

AUG 25 2016

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

5	In re:)	BAP No.	CC-15-1424-KuFKi
)		
6	GACN, INC.,)	Bk. No.	14-13695
)		
7	Debtor.)	Adv. No.	15-01135
)		
8	_____)		
)		
9	CERTAIN UNDERWRITERS AT LLOYDS,)		
	SYNDICATES 2623/623,)		
)		
10	Appellant,)		
)		
11	v.)	OPINION	
)		
12	GACN, INC.,)		
)		
13	Appellee.)		
)		
14	_____)		

Argued and Submitted on June 23, 2016
at Pasadena, California

Filed - August 25, 2016

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Victoria S. Kaufman, Bankruptcy Judge, Presiding

Appearances: Ross Smith of Troutman Sanders LLP argued for
appellant Certain Underwriters at Lloyds,
Syndicates 2623/623; Simon Aron of Wolf, Rifkin,
Shapiro, Schulman & Rabkin, LLP argued for
appellee GACN, Inc.

Before: KURTZ, FARIS and KIRSCHER, Bankruptcy Judges.

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1 KURTZ, Bankruptcy Judge:
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3 **INTRODUCTION**

4 This appeal originates from an adversary proceeding filed by
5 chapter 11¹ debtor GACN, Inc. against its insurer. The adversary
6 proceeding seeks declaratory relief determining the parties'
7 rights and liabilities under state law arising from an insurance
8 contract the insurer and GACN entered into prepetition. The
9 insurer appeals from the bankruptcy court's order denying the
10 insurer's motion for mandatory or permissive abstention.

11 Our decision in this appeal largely turns on the answer to
12 the following question: for purposes of determining whether
13 GACN's declaratory relief action is a "core" bankruptcy
14 proceeding, is the action so "inextricably connected" to the
15 debtor-in-possession's efforts to administer its bankruptcy
16 estate that the action can be said to "arise in" a case under
17 title 11 and also can be said to fall within the scope of one or
18 both "catchall" provisions identifying core bankruptcy
19 proceedings set forth in 28 U.S.C. § 157(b)(2)(A) and (O)?

20 Pursuant to controlling Ninth Circuit authority, the answer
21 to this question is no. The declaratory relief action is not a
22 core bankruptcy proceeding. The bankruptcy court's decision to
23 the contrary is erroneous. The bankruptcy court also erred when
24 it determined - for mandatory abstention purposes - that the
25

26 ¹ Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 declaratory relief action presented questions of both state law
2 and federal law. For purposes of mandatory abstention, the
3 action only presented questions of state law. Therefore, we
4 REVERSE the bankruptcy court's determinations that the
5 declaratory relief action was a core proceeding and that it
6 raised both questions of state law and federal law. As a result,
7 we must VACATE the bankruptcy court's denial of the insurer's
8 request for mandatory abstention, and we REMAND the matter for
9 further proceedings.

10 The bankruptcy court's discretionary abstention ruling also
11 was based on the same error regarding the core versus noncore
12 nature of the declaratory relief action. Additionally, the
13 bankruptcy court erroneously concluded that bankruptcy law issues
14 predominated over state law issues. Consequently, we also must
15 VACATE and REMAND the bankruptcy court's discretionary abstention
16 ruling.

17 **FACTS**

18 The insurer has conceded that most of the relevant facts are
19 undisputed, so we rely heavily on the facts as stated by the
20 bankruptcy court in its thorough and carefully-reasoned decision.

21 GACN owns and operates a family restaurant in the San
22 Fernando Valley. Before GACN filed bankruptcy, certain of its
23 former employees successfully sued GACN in the Los Angeles County
24 Superior Court for wrongful termination, resulting in a judgment
25 in favor of its former employees. The judgment included a \$1.6
26 million compensatory damages award and \$4 million punitive
27 damages award.

28 The wrongful termination judgment spurred further court

1 activity. In August 2014, GACN commenced its chapter 11
2 bankruptcy case, and in February 2015, GACN filed a complaint
3 (postpetition) in the Los Angeles County Superior Court against
4 the insurer and against the legal counsel the insurer had hired
5 and paid to defend GACN in the wrongful termination lawsuit. In
6 the complaint, GACN alleged that the insurer and the defense
7 counsel had wrongfully and unreasonably failed to settle with the
8 wrongful termination plaintiffs even though the insurer and
9 defense counsel knew that the wrongful termination plaintiffs had
10 offered to settle for the \$1 million policy limit and also knew
11 that there was a likelihood that the wrongful termination lawsuit
12 ultimately would cost far more than the policy limit.

13 Meanwhile, in GACN's bankruptcy case, the wrongful
14 termination plaintiffs filed proofs of claim in an aggregate
15 amount exceeding \$11 million. GACN (acting as debtor in
16 possession) negotiated a settlement with the wrongful termination
17 plaintiffs, subject to bankruptcy court approval and also subject
18 to the insurer's approval. The portion of the settlement
19 agreement dealing with insurer approval provided:

20 3. This Agreement is further conditioned upon its
21 approval by Lloyd's, or upon a court order which
22 provides that Lloyd's approval is not required (the
23 "Lloyds Determination"). Alternatively, the Lloyds
Determination may, upon consent of the Parties to this
Agreement, be satisfied by entry of the Confirmation
Order.

24 Settlement Agreement (April 17, 2015) at p. 4.

25 As for its substantive terms, the settlement agreement
26 provided in relevant part for three installment payments of
27 \$150,000 each to be paid by GACN principal George Metsos. The
28 settlement agreement further provided for the assignment of a

1 portion of any litigation proceeds recovered on account of GACN's
2 state court complaint against the insurer and defense counsel.

3 GACN then asked the insurer for its consent to the
4 settlement, but the insurer rejected that request. In essence,
5 the insurer asserted that the insurance contract required the
6 insurer's **prior** consent before GACN could negotiate or enter into
7 any settlement and that GACN's postpetition conduct in
8 negotiating and settling with the wrongful termination plaintiffs
9 violated the insurance contract.

10 The insurer thereafter filed an answer to GACN's state court
11 complaint. The answer included an affirmative defense in which
12 the insurer asserted that GACN's postpetition interactions with
13 the wrongful termination plaintiffs barred GACN from any recovery
14 on its state court complaint. The sixth affirmative defense
15 specifically provided as follows:

16 Plaintiff's Complaint and each purported cause of
17 action alleged therein against [insurer] is limited or
18 barred by operation of Policy Section X.B., which
19 provides that "No Insured will, except at their own
20 cost, voluntarily make a payment, assume any
21 obligation, or incur any expenses without our consent.
22 Subsequent payments which are deemed by us as having
23 been prejudiced by any such voluntary payment will also
24 be the sole responsibility of the Insured." Plaintiff
25 has revealed that, despite Policy Section X.B., it
26 unilaterally negotiated a fully executed settlement
27 agreement with the underlying claimants, and Plaintiff
28 did not seek or obtain [insurer's] prior consent.

23 Answer (July 22, 2015) at pp. 3-4.

24 In turn, GACN filed the underlying adversary proceeding in
25 the bankruptcy court naming the insurer as the defendant and
26 seeking declaratory relief. In summary, GACN sought a judicial
27 determination of the parties' rights and liabilities arising
28 from: (1) its postpetition negotiation of the conditional

1 settlement; (2) the insurer's rejection of GACN's request for its
2 approval of the settlement; and (3) Section X.B. of the insurance
3 contract. GACN's adversary complaint described the dispute in
4 the following manner:

5 22. There now exists an actual controversy with respect
6 to the rights and obligations of the parties under the
7 Policy. Specifically, the Policy provides Underwriters
8 with certain rights and obligations concerning its
9 prior consent to any proposed settlement, the nature
10 and extent of which are in controversy. GACN has
11 requested Underwriters' consent to proceed with the
12 proposed settlement with GACN's Judgment Creditors, as
13 doing so is in GACN's best interests and will prevent
14 further avoidable damages to GACN. But Underwriters
15 have unreasonably and in bad faith failed and refused
16 to provide such consent. By its actions and inactions,
17 Underwriters contends that proceeding with the
18 settlement will adversely affect GACN's rights under
19 the Policy. GACN contends that proceeding with the
20 settlement should not result in any adverse effect on
21 the Policy or GACN's rights under the Policy, and that
22 Underwriters in good faith should consent to the
23 proposed settlement.

24 Complaint for Declaratory Relief (Aug. 20, 2015) at p. 6.

25 The insurer moved the bankruptcy court to abstain from
26 hearing GACN's declaratory relief action based on either
27 mandatory abstention or discretionary abstention. After full
28 briefing and a hearing, the bankruptcy court issued its ruling.
The bankruptcy court held that four of the seven requirements for
mandatory abstention were met. The bankruptcy court recognized
that, by way of the insurer's sixth affirmative defense in GACN's
pending state court action, that action included the same subject
matter as GACN's declaratory relief adversary proceeding. Also,
there was no non-bankruptcy basis for federal court jurisdiction,
the state court presiding over the action had jurisdiction, and
the insurer's abstention motion was timely.

On the other hand, the bankruptcy court held that mandatory

1 abstention did not apply because three of the prerequisites were
2 not met. According to the bankruptcy court, the state court
3 could not timely adjudicate the issues raised by the declaratory
4 relief action, those issues were not purely state law issues, and
5 the declaratory relief action was a core proceeding.

6 The bankruptcy court also denied the insurer's request for
7 discretionary abstention. After reciting all twelve of the
8 factors bankruptcy courts typically consider in deciding a
9 discretionary abstention request, the bankruptcy court
10 specifically discussed many of these factors, and its position on
11 the remaining factors is not in doubt. The entirety of the
12 decision makes clear what the court thought about all of the
13 discretionary abstention factors. On the whole, the bankruptcy
14 court explained, the adversary proceeding would require the court
15 to determine whether GACN's postpetition efforts to administer
16 its own bankruptcy case (by attempting to fix, compose and extend
17 the prepetition debt it owed to the wrongful termination
18 plaintiffs) somehow ran afoul of its prepetition contract with
19 the insurer. Because the critical and essential reorganization
20 task of formulating a viable plan of reorganization was being
21 impeded by the unresolved adversary proceeding issues and because
22 GACN's ability to successfully reorganize was threatened by this
23 impediment, the bankruptcy court concluded that exercising its
24 discretion to abstain in this instance "would conflict with
25 fundamental bankruptcy policy."

26 On December 1, 2015, the bankruptcy entered its order denying
27 the insurer's abstention motion, and the insurer timely appealed.

1 **JURISDICTION**

2 The bankruptcy court's jurisdiction is discussed below.
3 With respect to our jurisdiction, a motions panel of this court
4 previously determined that an order denying abstention is a final
5 order for appeal purposes, citing Krasnoff v. Marshack (In re
6 General Carriers Corp.), 258 B.R. 181, 186-87 (9th Cir. BAP
7 2001).² However, on further reflection, we disagree with this
8 conclusion of the motions panel. We are not bound by its
9 decision. See Couch v. Telescope Inc., 611 F.3d 629, 632 (9th
10 Cir. 2010); Stagecoach Utils., Inc. v. Cty. of Lyon (In re
11 Stagecoach Utils., Inc.), 86 B.R. 229, 230 (9th Cir. BAP 1988).

12 We have taken a closer look at In re General Carriers Corp..
13 We held there that the order denying abstention at issue therein
14 should be treated as final and immediately appealable under the
15 collateral order doctrine. Id. at 187. Under that doctrine,
16 certain orders that do not end the litigation are nonetheless
17 treated as immediately appealable if they: "(1) determine
18 conclusively the disputed issue that is completely separable from
19 the merits of the action; (2) effectively would be unreviewable
20 on appeal from a final judgment; and (3) are too important to be
21 denied review." Id. at 186-87. The General Carriers court held
22 that the abstention order on appeal satisfied all three criteria.

23
24 ² The motions panel also relied on In re Bankruptcy
25 Petition Preparers Who Are Not Certified Pursuant to Requirements
26 of Arizona Supreme Court, 307 B.R. 134, 140 (9th Cir. BAP 2004).
27 But that decision is inapposite. It did not involve an appeal
28 from an order denying abstention. Rather, the Panel there
construed the order on appeal as an order **granting** abstention,
the finality of which is not at issue in the appeal currently
before us. See id.

1 In relevant part, General Carriers explained that the abstention
2 motion had been filed as a stand-alone motion. Id. at 185. In
3 other words, no adversary proceeding had been commenced or was
4 pending. Id. As a result, the order on appeal satisfied the
5 second collateral order doctrine requirement of being effectively
6 unreviewable on appeal from a final judgment or order, because
7 there was no pending adversary proceeding to finally resolve.
8 Id. at 187.

9 The matter currently before this Panel is distinguishable.
10 Here, there is a pending adversary proceeding, and the insurer
11 could seek review of the abstention order upon the final
12 resolution of that adversary proceeding. Thus, the collateral
13 order doctrine does not apply in this instance.

14 The General Carriers court alternately held that the order
15 on appeal satisfied the flexible finality standard generally
16 applicable in bankruptcy cases. The flexible finality standard
17 treats a covered bankruptcy court order as final if the order:
18 “1) resolves and seriously affects substantive rights and 2)
19 finally determines the discrete issue to which it is addressed.”
20 Id. at 186 (quoting Elliott v. Four Seasons Props. (In re
21 Frontier Props.), 979 F.2d 1358, 1363 (9th Cir. 1992)).

22 This aspect of General Carriers also is distinguishable from
23 this case. In General Carriers, the Panel considered an order
24 entered in the main bankruptcy case; here, however, we are
25 dealing with an order entered in an adversary proceeding, and the
26 flexible finality standard does not apply in adversary
27 proceedings. Belli v. Temkin (In re Belli), 268 B.R. 851 (9th
28 Cir. BAP 2001). Instead, for purposes of determining the

1 finality of an adversary proceeding judgment or order, bankruptcy
2 courts rely upon the same finality standard that applies in all
3 other federal civil cases. That standard treats a judgment or
4 order as final for appeal purposes only if it "ends the
5 litigation on the merits and leaves nothing for the court to do
6 but execute the judgment." Catlin v. United States, 324 U.S.
7 229, 233 (1945); see also Eastport Assocs. v. City of Los Angeles
8 (In re Eastport Assocs.), 935 F.2d 1071, 1075 (9th Cir. 1991)
9 (holding that finality defect of order denying motion to abstain
10 was "cured" by subsequent entry of final order disposing of the
11 merits of the entire adversary proceeding). The order denying
12 abstention at issue herein did not meet the general federal civil
13 finality standard, so it was interlocutory and not final.

14 Unless we grant leave to appeal, this interlocutory appeal
15 from the bankruptcy court's order denying abstention is subject
16 to dismissal for lack of jurisdiction. Giesbrecht v. Fitzgerald
17 (In re Giesbrecht), 429 B.R. 682, 687 (9th Cir. BAP 2010). We
18 typically grant leave to appeal when "refusal would result in
19 wasted litigation and expense, the appeal involves a controlling
20 question of law as to which there is a substantial ground for
21 difference of opinion, and an immediate appeal would materially
22 advance the ultimate termination of the litigation." Official
23 Comm. of Unsecured Creditors v. Credit Lyonnais Bank Nederland,
24 N.V. (In re NSB Film Corp.), 167 B.R. 176, 180 (9th Cir. BAP
25 1994).

26 We hold that this standard is met here. The appeal involves
27 a controlling question of law regarding what constitutes a core
28 proceeding, which still is a somewhat unsettled area of law. And

1 our resolution of this question now very well might prevent
2 wasted litigation and expense and also might materially expedite
3 the ultimate termination of this litigation. Accordingly, we
4 grant the insurer leave to pursue this interlocutory appeal, and
5 we will turn our attention to the merits.

6 **ISSUES**

- 7 1. Did the bankruptcy court err when it denied the insurer's
8 mandatory abstention request?
- 9 2. Did the bankruptcy court err when it denied the insurer's
10 discretionary abstention request?

11 **STANDARDS OF REVIEW**

12 We review de novo orders regarding mandatory abstention, and
13 we review for an abuse of discretion orders regarding permissive
14 abstention. Bethlahmy v. Kuhlman (In re ACI-HDT Supply Co.), 205
15 B.R. 231, 234 (9th Cir. BAP 1997).

16 The bankruptcy court abuses its discretion if it applies an
17 incorrect legal rule or its findings of fact are illogical,
18 implausible or without support in the record. United States v.
19 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

20 **DISCUSSION**

21 **1. Overview of Bankruptcy Court Jurisdiction**

22 In large part, our resolution of this appeal hinges on our
23 review of the bankruptcy court's determination that the
24 declaratory relief action was a "core" bankruptcy proceeding
25 rather than a "noncore" proceeding. To facilitate our discussion
26 of this issue, we first strive to place the core versus noncore
27 distinction in context.

28 Bankruptcy court jurisdiction is statutorily based. Under

1 28 U.S.C. § 1334(a), federal district courts have “original and
2 exclusive jurisdiction” over all title 11 cases (i.e., the
3 bankruptcy case itself). Under 28 U.S.C. § 1334(b), district
4 courts have “original but not exclusive jurisdiction” over “all
5 civil proceedings **arising under** title 11, or **arising in** or
6 **related to** cases under title 11.” (Emphasis added.)

7 In turn, 28 U.S.C. § 157 specifies how district courts can
8 share their bankruptcy jurisdiction with the bankruptcy courts.
9 In accordance with the referral process authorized in 28 U.S.C.
10 § 157(a), virtually all federal district courts have “referred”
11 to the bankruptcy courts all of those matters over which the
12 district courts hold bankruptcy jurisdiction pursuant to 28
13 U.S.C. § 1334.

14 The terms “arising under title 11” and “arising in a case
15 under title 11” are terms of art which the courts have defined.
16 Wilshire Courtyard v. Cal. Franchise Tax Bd. (In re Wilshire
17 Courtyard), 729 F.3d 1279, 1285 (9th Cir. 2013). A proceeding
18 “arises under” title 11 if it presents claims for relief created
19 or controlled by title 11. Id. In contrast, the claims for
20 relief in a proceeding “arising in” a title 11 case are not
21 explicitly created or controlled by title 11, but such claims
22 nonetheless would have no existence outside of a bankruptcy case.
23 Id.

24 The remaining category of bankruptcy jurisdiction, “related
25 to” jurisdiction, is an exceptionally broad category encompassing
26 virtually any matter either directly or indirectly related to the
27 bankruptcy case. Id. at 1287.

1 **2. Core Versus Noncore Distinction - Generally**

2 The above-referenced jurisdictional scheme is the product of
3 Congress' 1984 amendments to the Bankruptcy Code. Congress
4 enacted this new jurisdictional scheme to address and resolve the
5 constitutional issues identified by the Supreme Court in Northern
6 Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50
7 (1982). The 1984 revisions, in relevant part, created two broad
8 categories of proceedings potentially subject to bankruptcy court
9 jurisdiction: "core" bankruptcy proceedings and "noncore"
10 proceedings. Marshall v. Stern (In re Marshall), 600 F.3d 1037,
11 1052-54 (9th Cir. 2010), aff'd, 564 U.S. 462 (2011).

12 Core proceedings consist of all actions "arising under"
13 title 11 and also those "arising in" a case under title 11. Id.
14 at 1053. 28 U.S.C. § 157(b) (2) contains a non-exhaustive list of
15 core bankruptcy proceedings. Id. at 1053-54. Included in that
16 list are a number of provisions identifying specific types of
17 bankruptcy court proceedings that qualify as core and two
18 catchall provisions that bookend the more-specific provisions.
19 The first catchall provision, 28 U.S.C. § 157(b) (2) (A),
20 designates as core "matters concerning the administration of the
21 estate" and the second catchall provision, 28 U.S.C.
22 § 157(b) (2) (O), designates as core "other proceedings affecting
23 the liquidation of the assets of the estate or the adjustment of
24 the debtor-creditor or the equity security holder relationship,
25 except personal injury tort or wrongful death claims."

26 Congress specified that bankruptcy judges could render
27 final, appealable rulings in core bankruptcy proceedings. 28
28 U.S.C. § 157(b) (1); In re Marshall, 600 F.3d at 1053-54.

1 Congress further specified that bankruptcy judges could render
2 final, appealable rulings in noncore proceedings, but only with
3 the parties' consent (in order to avoid Marathon-like
4 constitutional problems). Id. (citing 28 U.S.C. § 157(c)).

5 **3. Core Versus Noncore Distinction & Abstention Factors**

6 The core versus noncore distinction affects other aspects of
7 bankruptcy court jurisprudence besides whether the bankruptcy
8 court can enter final, appealable rulings. In relevant part, the
9 distinction plays a significant role in the bankruptcy court's
10 decision whether to grant or deny an abstention motion. Whether
11 an action is a core or a noncore proceeding is a factor to be
12 considered in making both mandatory and permissive abstention
13 rulings. See 28 U.S.C. § 1334(c)(1), (2); see also In re
14 Eastport Assocs., 935 F.2d at 1075-76 (identifying permissive
15 abstention factors).

16 The bankruptcy court correctly recited the applicable legal
17 standards for determining both mandatory and permissive
18 abstention requests. Neither party on appeal has challenged
19 those standards. Rather, the parties' arguments on appeal focus
20 on whether the undisputed facts presented herein satisfy these
21 factors. As the bankruptcy court noted, mandatory abstention
22 requires:

- 23 (1) A timely motion; (2) a purely state law question;
24 (3) a non-core proceeding § 157(c)(1); (4) a lack of
25 independent federal jurisdiction absent the petition
26 under title 11; (5) that an action is commenced in a
state court; (6) the state court action may be timely
adjudicated; (7) a state forum of appropriate
jurisdiction exists.

27 Order Denying Abstention (Dec. 1, 2015) at p. 9 (citing In re
28 General Carriers Corp., 258 B.R. at 189).

1 With respect to permissive abstention, the bankruptcy court
2 pointed out that courts consider the following twelve factors:

3 (1) the effect or lack thereof on the efficient
4 administration of the estate if a Court recommends
5 abstention, (2) the extent to which state law issues
6 predominate over bankruptcy issues, (3) the difficulty
7 or unsettled nature of the applicable law, (4) the
8 presence of a related proceeding commenced in state
9 court or other nonbankruptcy court, (5) the
10 jurisdictional basis, if any, other than 28 U.S.C.
11 § 1334, (6) the degree of relatedness or remoteness of
12 the proceeding to the main bankruptcy case, (7) the
13 substance rather than form of an asserted "core"
14 proceeding, (8) the feasibility of severing state law
15 claims from core bankruptcy matters to allow judgments
16 to be entered in state court with enforcement left to
17 the bankruptcy court, (9) the burden of [the bankruptcy
18 court's] docket, (10) the likelihood that the
19 commencement of the proceeding in bankruptcy court
20 involves forum shopping by one of the parties, (11) the
21 existence of a right to a jury trial, and (12) the
22 presence in the proceeding of nondebtor parties.

23 Id. at 9-10 (citing Christensen v. Tucson Estates, Inc. (In re
24 Tucson Estates, Inc.), 912 F.2d 1162, 1167 (9th Cir. 1990)).

25 **4. Review of Bankruptcy Court's Determination of Core Status**

26 While the parties and the bankruptcy court canvassed the law
27 from both the Ninth Circuit and other circuits, there is ample
28 Ninth Circuit law on point sufficient to answer the question of
whether GACN's declaratory relief adversary proceeding qualifies
as a core proceeding.

Four Court of Appeals cases inform our analysis. Battle
Ground Plaza, LLC v. Ray (In re Ray), 624 F.3d 1124 (9th Cir.
2010); Harris v. Wittman (In re Harris), 590 F.3d 730 (9th Cir.
2009); Maitland v. Mitchell (In re Harris Pine Mills), 44 F.3d
1431 (9th Cir. 1995); Piombo Corp. v. Castlerock Props. (In re
Castlerock Props.), 781 F.2d 159 (9th Cir. 1986).

In re Castlerock Props. (the earliest of these four

1 decisions) articulated the Ninth Circuit's general rule
2 regarding whether state law contract claims qualify as core or
3 noncore proceedings: "state law contract claims that do not
4 specifically fall within the categories of core proceedings
5 enumerated in 28 U.S.C. § 157(b) (2) (B)-(N) are [noncore]
6 proceedings . . . even if they arguably fit within the literal
7 wording of the two catch-all provisions, sections § 157(b) (2) (A)
8 and (O)." In re Castlerock Props., 781 F.2d at 162. The Ninth
9 Circuit adopted this narrow interpretation of the catchall
10 provisions in deference to Marathon and in order to avoid a
11 reprise of the constitutional problems Marathon grappled with.
12 See In re Harris, 590 F.3d at 740 (identifying the impetus for In
13 re Castlerock Prop.'s holding).

14 Whereas In re Castlerock Props. involved a prepetition
15 contract claim, In re Harris Pine Mills (the second oldest of the
16 four decisions) involved postpetition tort claims allegedly
17 arising from the bankruptcy trustee's exercise of his statutory
18 duty to administer bankruptcy estate assets: specifically, the
19 bankruptcy-court-approved sale of those assets. In re Harris
20 Pine Mills, 44 F.3d at 1434. In re Harris Pine Mills held that
21 the postpetition state law tort claims asserted against the
22 bankruptcy trustee and his agents were based on conduct
23 "inextricably intertwined" with the trustee's sale of estate
24 property and, therefore, that those claims constituted core
25 proceedings that fell within the scope of 28 U.S.C. § 157(b) (2)'s
26 catchall provisions. Id. at 1438.

27 In re Harris (the third oldest of these four decisions)
28 effectively extended In re Harris Pine Mills' holding to

1 postpetition contract claims. In re Harris analyzed at length
2 both In re Castlerock Props. and In re Harris Pine Mills. In the
3 process, In re Harris made some important statements about
4 “arising in” jurisdiction and about when 28 U.S.C. § 157(b) (2)’s
5 catchall provisions apply to contract actions. For instance, In
6 re Harris stated that, “[b]ecause the plaintiff sued the
7 bankruptcy trustee for the trustee’s conduct in administering the
8 bankruptcy estate, the state law claims **arose in** the bankruptcy
9 case and were subject to federal jurisdiction.” In re Harris,
10 590 F.3d at 738 (emphasis added). In so stating, In re Harris
11 further explained that “an action against a bankruptcy trustee
12 for the trustee’s administration of the bankruptcy estate could
13 not” exist independent of a bankruptcy case. Id. at 737.

14 Moreover, in deciding that In re Harris Pine Mills was
15 controlling, In re Harris noted that the causes of action in both
16 cases arose “from the trustee’s post-petition conduct pursuant to
17 the trustee’s duty to administer the bankruptcy estate.” Id. at
18 739. Therefore, In re Harris reasoned, the breach of contract
19 action before it, just like the tort action before In re Harris
20 Pine Mills, qualified as a core proceeding under 28 U.S.C.
21 § 157(b) (2) (A), because the action “was inextricably intertwined
22 with the sale of estate assets - the literal administration of
23 the bankruptcy estate.” Id.

24 In re Harris made some similarly expansive statements
25 regarding the basis for core jurisdiction in the process of
26 determining that In re Castlerock Props. did not control the
27 outcome of Harris’ appeal. First, as a preliminary matter, In re
28 Harris noted that In re Castlerock Props. did not entirely

1 eliminate the catchall provisions of 28 U.S.C. § 157(b)(2)(A) and
2 (O), but rather merely limited their application “under
3 principles of constitutional avoidance.” Id. at 740. And
4 second, In re Harris held that Harris’ action against the
5 bankruptcy trustee fell within the scope of In re Castlerock
6 Props.’s narrow construction of the catchall provisions. In so
7 holding, In re Harris explained as follows:

8 Harris’s claim does not just “relate” to the
9 administration of the estate, **his suit necessarily**
10 **involves how the bankruptcy estate was administered.**
11 This is not like the pre-petition contract suits in
12 Castlerock and Marathon that only arguably related to
13 the administration of the estate because one of the
14 parties to the contract was in bankruptcy. **Harris’s**
15 **breach of contract claim arose from the administration**
16 **of his bankruptcy estate. Castlerock, like Marathon,**
17 **involved breach of contract claims that arose before**
18 **and independent of the administration of bankruptcy**
19 **assets.**

20 Id. at 740 (citations omitted and emphasis added).

21 If our analysis of the above-referenced Ninth Circuit
22 decisions ended there, we likely could and would conclude under
23 In re Harris that GACN’s declaratory relief action “arose in”
24 GACN’s bankruptcy case and was a “core” proceeding under both 28
25 U.S.C. § 157(b)(2)(A) and (O). By way of its declaratory relief
26 action, GACN sought to determine whether, as contended by the
27 insurer, GACN had breached its obligations under the insurance
28 contract as a result of its postpetition efforts to administer
its bankruptcy estate and move toward a viable plan of
reorganization (by negotiating a settlement fixing, composing and
extending its indebtedness to the wrongful termination
plaintiffs).

Thus, GACN’s declaratory relief action, similar to the

1 lawsuit in In re Harris, arose from the debtor-in-possession's
2 "post-petition conduct pursuant to [its] duty to administer the
3 bankruptcy estate," was "inextricably intertwined with the . . .
4 the literal administration of the bankruptcy estate" and
5 "necessarily involve[d] how the bankruptcy estate was
6 administered." Id. In addition, GACN's declaratory relief
7 action was unlike the state law claims at issue in Castlerock and
8 Marathon, which "involved breach of contract claims that arose
9 before and independent of the administration of bankruptcy
10 assets." Id.

11 But our analysis of the Ninth Circuit decisions does not end
12 there. In re Harris also expressed a concern indicating that
13 bankruptcy courts must take care not to include within the
14 definition of core proceedings "traditional" prepetition contract
15 actions like the one at issue in Marathon. Id. at 741.
16 According to In re Harris, the Marathon concern was not
17 implicated by Harris' lawsuit because the underlying contract was
18 entered into postpetition, was approved by the bankruptcy court,
19 directly related only to estate administration and involved as
20 parties the trustee and the estate's Special Representative. Id.

21 None of the types of facts that satisfied In re Harris's
22 Marathon concern are present here. The insurance contract was
23 entered into prepetition between the insurer and GACN - before
24 GACN became a debtor in possession - and the insurance contract
25 never was the subject of bankruptcy court approval. It also is
26 relevant that, here, the debtor in possession - GACN - commenced
27 the adversary proceeding against the insurer, rather than the
28 other way around. This further distinguishes the matter

1 currently before us from In re Harris, in which Harris filed the
2 subject action against the bankruptcy trustee. Some of the
3 above-quoted language from In re Harris suggests that this
4 distinction is significant. See, e.g., id. at 737 (holding that
5 “an action **against** a bankruptcy trustee for the trustee’s
6 administration of the bankruptcy estate” is a core proceeding
7 arising in a title 11 case); see also Schultze v. Chandler, 765
8 F.3d 945, 948-50 (9th Cir. 2014) (explaining why actions against
9 estate professionals routinely are considered core proceedings
10 and further stating that “courts have been less concerned with
11 the identity of the party bringing the claim and more concerned
12 with the identity and function of the party against whom the
13 claim is brought”).

14 In short, In re Harris suggested that an adversary
15 proceeding **by** the trustee or debtor in possession on a
16 **prepetition** contract might not escape Marathon’s constitutional
17 concerns (and hence should not be determined to be within the
18 scope of 28 U.S.C. § 157(b)(2)(A) or (O)), even if that adversary
19 proceeding involved claims for relief based on the trustee’s - or
20 the debtor in possession’s - postpetition conduct undertaken to
21 administer the bankruptcy estate.

22 What In re Harris suggested, In re Ray largely confirms. In
23 In re Ray (the newest of the four Ninth Circuit decisions
24 referenced above), the reorganized debtor (Ray), in furtherance
25 of his confirmed chapter 11 plan, sought and obtained bankruptcy
26 court approval to sell an undeveloped half-acre parcel of real
27 property adjacent to the shopping mall the debtor co-owned with a
28 third party. In re Ray, 624 F.3d at 1128-29. The prospective

1 buyer of the shopping mall (Battle Ground Plaza, LLC) objected to
2 the sale of the half-acre parcel because, under the terms of the
3 parties' prepetition contract for the sale of the shopping mall,
4 Battle Ground Plaza held a right of first refusal to purchase the
5 half-acre parcel. Id. The bankruptcy court approved the sale of
6 the half-acre parcel over Battle Ground Plaza's objection. Id.

7 Later on, Battle Ground Plaza filed a state court lawsuit
8 against Ray and others alleging, among other things, that Ray had
9 breached his contractual duty to honor the right of first refusal
10 by selling the half-acre parcel to someone other than Battle
11 Ground Plaza. Id. The state court "remanded" the lawsuit to the
12 bankruptcy court, and the bankruptcy court ultimately entered a
13 final decision on the merits denying any relief on Battle Ground
14 Plaza's prepetition contract claim. Id.

15 On appeal, the Ninth Circuit held that the bankruptcy court
16 lacked jurisdiction to hear and decide the merits of Battle
17 Ground Plaza's lawsuit. Id. at 1131-35. According to In re Ray,
18 the lawsuit did not arise under title 11, did not arise in a case
19 under title 11, and was not even related to a case under title
20 11. Id. at 33. Nor did the bankruptcy court have ancillary
21 jurisdiction over the lawsuit. Id. at 1135-36.

22 The only aspects of In re Ray relevant here concern its
23 determination that the bankruptcy court lacked "arising in"
24 jurisdiction and its analysis of In re Harris. According to In
25 re Ray, following the reasoning of In re Harris, Battle Ground
26 Plaza's lawsuit did not "arise in" a case under title 11 because
27 the lawsuit could exist independently of Ray's bankruptcy case,
28 so the lawsuit was not a core proceeding. Id. at 1133.

1 Undeniably, there were some potentially significant
2 similarities between In re Harris and In re Ray. Id. In both
3 cases, the breach of contract lawsuits directly arose from
4 postpetition conduct specifically undertaken to further either
5 estate administration or the consummation of a confirmed
6 reorganization plan. Id. Based on this similarity, In re Ray
7 arguably could have concluded (as In re Harris did) that the
8 subject lawsuit could not have existed outside of a title 11
9 case. But, importantly, In re Ray did not rely on this
10 similarity.

11 Instead, In re Ray focused on what it perceived to be the
12 key distinctions in the controlling facts of both cases:

- 13 • In re Harris involved a lawsuit against the bankruptcy
14 trustee and other estate representatives, who at all
15 relevant times were engaged in the performance of their
16 statutory duties as prescribed by the Bankruptcy Code,
17 whereas In re Ray involved a lawsuit against the reorganized
18 debtor and several non-debtor parties; and
- 19 • In re Harris involved a lawsuit for breach of a postpetition
20 settlement agreement the trustee entered into as part of his
21 administration of the bankruptcy estate's assets, whereas In
22 re Ray involved a lawsuit for breach of a prepetition right
23 of first refusal created under state law rather than as part
24 of a bankruptcy case. Id.

25 Based on these distinctive facts, In re Ray concluded
26 that Battle Ground Plaza's lawsuit did not arise in a title 11
27 case and was not a core proceeding. Id.

28 When we look at the four above-referenced Ninth Circuit

1 cases as a whole, we are persuaded that GACN's declaratory relief
2 action against the insurer is not a core proceeding. The
3 underlying dispute solely concerns the parties' rights and
4 liabilities under a prepetition insurance contract, which was
5 entered into pursuant to state law rather than as a part of a
6 bankruptcy case. Additionally, the insurer has not attempted to
7 assert against GACN any sort of affirmative claim for relief
8 challenging any aspect of GACN's performance of its statutory
9 duties as a debtor in possession or otherwise implicating core
10 bankruptcy claims procedures.

11 We recognize and appreciate the major impact the
12 declaratory relief action is having and will continue to have on
13 GACN's bankruptcy case. It is not an exaggeration to say that
14 GACN's prospects of a successful consensual reorganization depend
15 upon it prevailing in that action. Nor are we disregarding the
16 fact that the insurer's litigation position (that GACN forfeited
17 its rights under the insurance contract by negotiating a
18 postpetition settlement with the wrongful termination plaintiffs)
19 challenges GACN's conduct as debtor in possession in
20 administering the bankruptcy estate and impedes GACN from making
21 further progress towards confirming a consensual chapter 11 plan.

22 The catch is that none of these facts translate into core
23 bankruptcy jurisdiction. The criteria for core jurisdiction, set
24 forth above, as established by Congress in response to Marathon,
25 have been strictly construed by the Ninth Circuit in order to
26 avoid a future Marathon-like constitutional problem. The facts
27 of this case simply do not satisfy the Ninth Circuit's strict
28 standards for core jurisdiction.

1 Thus, the bankruptcy court erred when it held that GACN's
2 declaratory relief action qualified as a core bankruptcy
3 proceeding.

4 **5. Review of Bankruptcy Court's Determination That Other**
5 **Mandatory Abstention Elements Were Not Satisfied**

6 Even though we have decided that GACN's declaratory relief
7 action was a noncore proceeding, this does not by itself
8 establish that the bankruptcy court incorrectly denied mandatory
9 abstention. To support its mandatory abstention denial, the
10 bankruptcy court also determined that two other mandatory
11 abstention prerequisites were not met. According to the
12 bankruptcy court, GACN's adversary proceeding did not present
13 purely state law questions. Additionally, the bankruptcy court
14 found that the state court could not timely adjudicate the
15 dispute. We will address each of these determinations in order.

16 With respect to the questions raised by the declaratory
17 relief action, we disagree with the bankruptcy court's
18 determination that the action raised both state law questions and
19 bankruptcy law questions. This abstention element requires
20 bankruptcy courts to look at the parties' claims for relief in
21 order to ascertain whether state law or federal law governs those
22 claims. See, e.g., Bowen Corp. v. Sec. Pac. Bank Idaho, F.S.B.,
23 150 B.R. 777, 782 (Bankr. D. Idaho 1993); World Solar Corp. v.
24 Steinbaum (In re World Solar Corp.), 81 B.R. 603, 607 (Bankr.
25 S.D. Cal. 1988). Bowen Corp.'s and In re World Solar Corp.'s
26 analyses of this mandatory abstention element are consistent with
27 the language of the statute, which focuses on whether the subject
28 proceeding involves "State law claim[s] or State law cause[s] of

1 action." 28 U.S.C. § 1334(c) (2).

2 On its face, GACN's complaint only asks for a determination
3 of the parties' rights and liabilities under the insurance
4 contract, which is wholly governed by state law. The bankruptcy
5 court posited that bankruptcy law questions might arise because
6 the action will affect GACN's rights and duties as a debtor in
7 possession and also might impair GACN's ability to obtain
8 bankruptcy court approval under Rule 9019 of its settlement with
9 the wrongful termination plaintiffs. The bankruptcy court's
10 reasoning conflates the potential impact of the action with the
11 law governing the action. We recognize that General Carriers
12 Corps.'s articulation of this element referenced state law
13 "questions" rather than state law "claims for relief." 258 B.R.
14 at 189. But we do not read General Carriers Corp. as attempting
15 to depart from the statutory language or as attempting to change
16 the plain meaning of that language. For mandatory abstention
17 purposes, we hold that GACN's adversary proceeding only presented
18 questions of state law.

19 As for the issue of whether the state court could timely
20 adjudicate the dispute, the bankruptcy court here answered a
21 slightly different question: who could resolve the dispute faster
22 - the bankruptcy court or the state court. While the bankruptcy
23 court's question frequently is relevant to the timeliness
24 determination, it is not always controlling. The most important
25 considerations in making the timeliness determination are the
26 circumstances surrounding the bankruptcy case and the urgency of
27 resolving the dispute presented by those circumstances. In re
28 World Solar Corp., 81 B.R. at 612. As In re World Solar Corp.

1 indicated, the greater the urgency in resolving the dispute for
2 bankruptcy purposes, the less of a delay in the state court the
3 bankruptcy court should allow for before determining that the
4 state court cannot timely adjudicate the dispute.

5 Here, the record indicated that GACN's need to resolve the
6 dispute underlying the declaratory relief action was relatively
7 urgent because the pendency of the dispute was impeding GACN's
8 reorganization efforts. The record also suggested that a number
9 of months would elapse before the state court could address the
10 dispute either by trial or summary judgment. These factors tend
11 to support the bankruptcy court's timeliness determination.

12 On the other hand, because the bankruptcy court erroneously
13 concluded that the dispute was a core proceeding, the bankruptcy
14 court's timeliness calculation necessarily was off. When, as
15 here, the dispute is a noncore proceeding, and one of the parties
16 has not consented to the bankruptcy court entering a final
17 decision pursuant to 28 U.S.C. § 157(c)(2), the bankruptcy court
18 cannot itself enter a final decision, but rather must submit
19 proposed findings of fact and conclusions of law to the district
20 court, which only can enter a final decision after considering
21 the bankruptcy court's proposed findings and conclusions and
22 after reviewing de novo any matter a party has timely and
23 specifically objected to. 28 U.S.C. § 157(c)(1).

24 When the 28 U.S.C. § 157(c)(1) district court review process
25 is factored into the timeliness equation, the bankruptcy court
26 might conclude that GACN could obtain a more timely resolution of
27 the issues underlying the declaratory relief action by seeking
28 from the state court summary adjudication of the insurer's sixth

1 affirmative defense in the state court action. See generally
2 See's Candy Shops, Inc. v. Sup. Ct., 210 Cal. App. 4th 889, 899-
3 900 (2012) (indicating that summary adjudication procedures are
4 available to dispose of individual affirmative defenses).

5 Our collective experience as bankruptcy judges indicates
6 that the length of time it takes district courts to complete the
7 review process under 28 U.S.C. § 157(c) (1) varies widely from
8 court to court and district to district. We have no personal
9 knowledge of how long this process might take in the Central
10 District of California on a matter requiring the interpretation
11 of an insurance contract provision.

12 Therefore, remand is necessary so that the bankruptcy court
13 can revisit the timeliness issue.

14 **6. Decision re Bankruptcy Court's Denial of Mandatory Abstention**

15 In sum, we will VACATE and REMAND the bankruptcy court's
16 denial of the insurer's request for mandatory abstention, so that
17 the bankruptcy court can factor into its timeliness consideration
18 28 U.S.C. § 157(c) (1)'s district court review process for noncore
19 matters. On remand, the bankruptcy court also can consider the
20 other aspects of the timeliness issue we have alluded to, above,
21 and it may reopen the record on this issue if it deems it
22 necessary or desirable.

23 However, based on our analysis set forth above, we must
24 overturn the bankruptcy court's ruling that GACN's declaratory
25 relief action is a core proceeding and its ruling that the action
26 raises both questions of state law and questions of bankruptcy
27 law for mandatory abstention purposes. We REVERSE these rulings.
28 Consequently, the resolution on remand of the insurer's mandatory

1 abstention request depends solely on the bankruptcy court's
2 resolution of the timeliness issue. If the bankruptcy court, on
3 remand, decides the timeliness issue in favor of the insurer, it
4 should grant the mandatory abstention request, but if it decides
5 the timeliness issue in favor of GACN, it should deny the
6 mandatory abstention request.

7 **7. Discretionary Abstention**

8 Generally speaking, the bankruptcy court's discretionary
9 abstention analysis is persuasive. The bankruptcy court cogently
10 reasoned that the huge impact the resolution of the declaratory
11 relief action would have on the administration of GACN's
12 bankruptcy estate and on GACN's prospects of proposing a viable
13 consensual plan of reorganization militated strongly against
14 discretionary abstention, citing Cont'l Ins. Co. v. Thorpe
15 Insulation Co. (In re Thorpe Insulation Co.), 671 F.3d 1011, 1021
16 (9th Cir. 2012). In essence, the bankruptcy court held that this
17 factor outweighed any factors that arguably might weigh in favor
18 of discretionary abstention.

19 That being said, the bankruptcy court's errors regarding the
20 presence of a core proceeding and regarding the predominance of
21 bankruptcy law issues over state law issues infected the
22 bankruptcy court's discretionary abstention analysis. Both the
23 noncore status of the declaratory relief action and the
24 predominance of state law issues therein are relevant to several
25 of the discretionary abstention factors. Because these factors
26 might be weighed differently if the noncore status of the action
27 and the predominance of state law issues are accounted for, we
28 conclude that the errors were not harmless to the bankruptcy

1 court's denial of discretionary abstention and that the denial
2 under these circumstances constituted an abuse of discretion.

3 Accordingly, we will VACATE and REMAND the bankruptcy
4 court's denial of the insurer's request for discretionary
5 abstention so that the bankruptcy court can account for the
6 noncore status of the declaratory relief action and for the
7 predominance of state law issues therein.

8 CONCLUSION

9 In closing, we acknowledge that our decision, following
10 Ninth Circuit law, adheres to a formulaic standard for
11 determining core jurisdiction - a standard that can lead to
12 seemingly arbitrary results offering little or no relief from the
13 real-life litigation obstacles debtors encounter, and which can
14 seriously threaten the foundational Bankruptcy Code objectives to
15 provide debtors with a fresh start and creditors with a ratable
16 distribution from available assets. Then again, this formulaic
17 standard necessarily flows from the Supreme Court's Marathon
18 decision and Congress' post-Marathon amendments to the Bankruptcy
19 Code's jurisdictional scheme. Neither the Ninth Circuit nor this
20 Panel are writing on a clean slate. We are bound by both
21 Marathon's pronouncements and Congress' jurisdictional scheme.

22 For the reasons set forth above, we REVERSE in part, and we
23 VACATE and REMAND in part.