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JURISDICTIONAL LINE-DRAWING IN A TIME WHEN SO MUCH LITIGATION IS “RELATED TO” BANKRUPTCY: A PRACTICAL AND CONSTITUTIONAL SOLUTION

*Duane Loft**

[T]he whole purpose of [bankruptcy law]—conservation and equitable distribution of the bankrupt’s estate in carrying out the constitutional power over bankruptcy—require[s] the availability of federal jurisdiction to avoid expense and delay.¹

INTRODUCTION

The past five years have seen some of the largest corporate bankruptcies in history—WorldCom,² Enron,³ Federal-Mogul,⁴ just to name a few.⁵ Collapsing into bankruptcy amid allegations of fraud or mass tort, these companies precipitated waves of litigation in state courts across America.⁶ Bankruptcy served as protection against thousands of angry state court plaintiffs, staying their litigation⁷ and forcing them to line up with other creditors to receive cents on the

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1. *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 484 (1957) (Frankfurter, J., dissenting).

2. *In re WorldCom, Inc.*, No. 02-13533, 2002 WL 1732647, at *1 (Bankr. S.D.N.Y. July 22, 2002).

3. *In re Enron Corp.*, 274 B.R. 327 (Bankr. S.D.N.Y. 2002).

4. *In re Federal-Mogul Global, Inc.*, 282 B.R. 301 (Bankr. D. Del. 2002).

5. For a complete list of the largest corporate bankruptcies since 1980, see *The Largest Bankruptcies 1980-Present*, BankruptcyData.com, at http://www.bankruptcydata.com/Research/15_Largest.htm (last visited Jan. 27, 2004).

6. See *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 372 (3d Cir. 2002) (deciding whether to transfer “tens of thousands of asbestos-related tort claims” to federal court or to remand them “to the state courts where they were originally filed”); *In re Enron Corp.*, 296 B.R. 505, 507 (Bankr. C.D. Cal. 2003) (involving “two of the more than 100 actions that have been filed across the country following the collapse of the Enron Corporation”); *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 312-13 (Bankr. S.D.N.Y. 2003) (describing how multiple securities actions, first filed in state courts, were consolidated and centralized in the Southern District of New York).

7. See *infra* note 14 and accompanying text for an explanation of bankruptcy’s automatic stay.

dollar for their damages.⁸ Yet, when a bankruptcy court stayed suits against the debtor, plaintiffs often turned to affiliated non-debtor third parties to exact more complete monetary rewards.⁹ In the securities fraud context, illustrated by trials surrounding the Enron and WorldCom bankruptcies, plaintiffs sued the debtor's accountants and directors when unable to proceed directly against the debtor.¹⁰ In cases representing the mass tort scenario, such as those produced by the Federal-Mogul and Dow Corning bankruptcies, tort victims sued third-party distributors of a debtor's injurious products when the debtor itself became bankrupt.¹¹ This Note addresses the question of when such bankruptcy-related litigation belongs in federal court. The Note concludes that federal jurisdiction is appropriate only where the third-party defendant has filed a proof of claim, a procedural measure necessary to ensure the defendant's right to distribution from the estate.¹²

As an example of the procedural timeline for these types of cases, consider the following hypothetical from the mass tort context. A third-party plaintiff sues Corporation *X* in state court, claiming injury by some product the corporation manufactured—for example, a brake pad containing asbestos. The plaintiff also names as co-defendants various distributors of the brake pad, alleging they too are liable on the same tort claims as Corporation *X*. Then, subsequent to the filing of the plaintiff's lawsuit, Corporation *X* files a petition for reorganization under chapter 11 of the United States Bankruptcy Code.¹³ As a result of the filing, all tort claims against the corporation, now a debtor in bankruptcy are stayed automatically pursuant to § 362(a) of the Bankruptcy Code.¹⁴ The plaintiff is left suing only the non-debtor distributors in state court. These distributors then seek removal to federal court on the grounds that their state court lawsuit is "related to" the debtor's bankruptcy.¹⁵ They argue that the outcome of the lawsuit will give rise to rights of contribution and

8. See, e.g., *In re Federal-Mogul*, 300 F.3d at 373 (noting that the "filing of the Debtors' chapter 11 petitions stayed the state court proceedings as to them").

9. *Id.*

10. See *In re WorldCom*, 293 B.R. at 313.

11. See *In re Federal-Mogul*, 300 F.3d at 373; *In re Dow Corning Corp.*, 86 F.3d 482, 485 (6th Cir. 1996).

12. See *infra* notes 183-95 and accompanying text.

13. See 11 U.S.C. § 301 (2000).

14. *Id.* § 362(a). Section 362 provides for an automatic injunction, triggered by the filing of a bankruptcy petition, which broadly stays any litigation, lien enforcement, or other actions to collect on a pre-petition claim. See *id.* In this example, the automatic stay clearly would extend to the tort lawsuits as they arise pre-petition and are attempts to collect on a claim.

15. Authority to remove is predicated on 28 U.S.C. § 1452(a) (2000). See, e.g., *In re Federal-Mogul*, 300 F.3d at 373.

indemnity against the debtor, rights which will in turn affect the debtor's estate and alter distribution among creditors.¹⁶

The question grappled with by courts,¹⁷ and the focus of this Note, is exactly when such "related to" jurisdiction should provide a federal forum for suits such as these, both constitutionally and as a policy matter. Title 28, § 1334 confers federal subject matter jurisdiction over proceedings "related to" a bankruptcy case.¹⁸ Accordingly, even in the absence of diversity,¹⁹ a federal court can adjudicate state-law litigation because of its relation to a federal bankruptcy case. The statute, however, fails to define the phrase "related to," and the legislative history merely suggests that Congress intended the jurisdictional grant to be broad and "comprehensive."²⁰

Expansive "related to" jurisdiction exists to serve the goals of speed and efficiency so integral to the bankruptcy system. Yet, beyond certain points, "related to" bankruptcy jurisdiction threatens to exceed Article III's grant of federal judicial power.²¹

For example, in the above hypothetical, the potential effect of the distributors' future indemnity claims may or may not provide adequate relatedness. This question will turn on difficult assessments of the merit of plaintiff's claim and the likelihood of a future indemnity claim by the distributors. Even more difficult is the situation where the distributors need a second lawsuit to conclude their rights to indemnification. Perhaps a federal court has no place answering these questions—i.e., speculating on the merits of state law claims—when analyzing the jurisdictional "related to" issue.

This Note argues that courts, in conducting the "related to" analysis, should look to whether the third-party defendant has filed a proof of claim against the bankruptcy estate pursuant to § 501 of the Bankruptcy Code.²² The existence of a proof of claim ensures that the related action constitutes a justiciable supplement to a federal question "Case."²³ Further, the proof of claim requirement guarantees that exercises of "related to" bankruptcy jurisdiction²⁴

16. See *infra* note 87 and accompanying text.

17. See *infra* Part I.C.

18. See 28 U.S.C. § 1334 (2000).

19. *Id.* § 1332.

20. H.R. Rep. No. 95-595, at 47 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6009 [hereinafter *House Report*].

21. See U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . .").

22. See 11 U.S.C. § 501 (2000). A proof of claim is a procedural device to ensure that creditors receive proportionate distribution from the bankruptcy estate. See *infra* notes 183-95 and accompanying text.

23. See U.S. Const. art. III, § 2, cl. 1 (extending federal judicial power to "all Cases, in Law and Equity, arising under . . . the Laws of the United States").

24. Throughout this Note, "bankruptcy jurisdiction" refers to the statutory grant of federal subject matter jurisdiction extending to bankruptcy cases and all their

neither under-serve nor over-serve the policy goals of a quick and efficient bankruptcy regime.

Part I of this Note begins by outlining bankruptcy jurisdiction's current statutory scheme. Part I.B. continues with a general discussion of its historical development, focusing in particular on prior statutory grants of jurisdiction over what would now be "related to" matters. Part I.C. then summarizes the breadth of case law in the "related to" area, separating out patterns of approaches and standards.

Part II sets forth various ways commentators have explained the constitutionality of expansive "related to" bankruptcy jurisdiction. It concludes that analogies to supplemental jurisdiction, in both its common-law and codified forms, best justify the power to bring state law disputes into federal court based only on their relation to a bankruptcy. Part II.B. suggests that, because analogies to supplemental jurisdiction offer the best, albeit problematic, explanations, principles of supplemental jurisdiction should define the proper scope of "related to" jurisdiction.

Part III.A. presents the problems that arise with a protective theory of bankruptcy jurisdiction. Part III.B. concludes that analogies to supplemental jurisdiction best explain the constitutionality of § 1334's "related to" provision. Parts III.C. and III.D. offer the proof of claim device as a way to make the supplemental jurisdiction analogy, discussed earlier, work properly. This part argues further that the existence of a proof of claim serves as the best mechanism for testing the proper relatedness of third-party litigation. Finally, Part III.E. asserts that a proof of claim requirement accommodates policies in tension, balancing efficiency on one side with fairness to litigants on the other.

I. TRACING THE DEVELOPMENT OF "RELATED TO" BANKRUPTCY JURISDICTION: CODE AND CASE LAW

This part offers a comprehensive look at how "related to" bankruptcy jurisdiction became what it is today. Part I.A. begins by setting forth the current statutory scheme. Part I.B. then goes back two hundred years to discuss the historical antecedents of the "related to" provision. Part I.C. finishes by describing the ways courts have synthesized this legislative history and arrived at varying interpretations of the general, open-ended "related to" language.

A. *The Current Statutory Structure of Bankruptcy Jurisdiction*

Section 1334 currently establishes federal subject matter jurisdiction over three types of bankruptcy proceedings: (1) those “arising under” the Bankruptcy Code; (2) those “arising in” a bankruptcy case; and (3) those “related to” a bankruptcy case.²⁵ The first class of proceedings, those “arising under” the Bankruptcy Code, are causes of action that the Bankruptcy Code explicitly authorizes, or that invoke a right created by a provision of the Bankruptcy Code.²⁶ The arising under clause of § 1334 is similar to the general arising under grant of 28 U.S.C. § 1331. Methods used to test for general § 1331 jurisdiction similarly apply in the bankruptcy context.²⁷ Examples of “arising under” cases might include a suit to recover a fraudulent transfer,²⁸ an action to avoid a preference,²⁹ or a suit to recover a postpetition transfer.³⁰

The “arising in” grant covers suits that only exist due to the filing of a bankruptcy case, and that do not, like “arising under” cases, derive from rights created by title 11.³¹ These types of proceedings are usually administrative matters such as hearings to determine the allowance of a claim, to appoint a trustee, or to resolve the dischargeability of a debt.³²

The “related to” grant of subsection 1334(b) provides for federal subject matter jurisdiction over disputes that neither “arise in” nor “arise under” title 11, but which nevertheless bear some relation to

25. *Id.* § 1334(b) (“[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.”). Subsection 1334(a) establishes federal jurisdiction over the bankruptcy “case,” which differs from the civil proceedings to which subsection 1334(b) refers. A bankruptcy “case” begins with the filing of a petition for relief, and encompasses all of the proceedings that occur during the course of the bankruptcy case until it is closed.

26. See 1 *Collier on Bankruptcy* ¶ 3.01[4][c][i], at 3-21 to 3-22 (Lawrence P. King ed., 15th ed. rev. 2003) [hereinafter *Collier*].

27. The Supreme Court has wavered on the proper test for 1331 arising under jurisdiction. The classic formulation is that a suit arises under the law that creates the cause of action. See *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). Since *American Well Works*, other tests have gained favor. See, e.g., *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 814 (1986) (applying a balancing standard that weighs the state and federal interests in assuming jurisdiction, with a particular emphasis on congressional intent to provide for a federal cause of action). See generally 15 James Wm. Moore et al., *Moore’s Federal Practice*, § 103.31[1], at 103-33 (3d ed. 1997) (“If state law creates the cause of action, the second test asks whether that cause of action poses a substantial federal question.”)

28. See 11 U.S.C. § 548 (2000).

29. *Id.* § 547.

30. *Id.* § 549. For more examples, see *Collier, supra* note 26, ¶ 3.01[4][c][i], at 3-22.

31. See *Collier, supra* note 26, ¶ 3.01[4][c][i], at 3-30.

32. *Id.* at 3-29 to 3-30.

the bankruptcy case.³³ Litigants generally seek “related to” bankruptcy jurisdiction in one of two possible situations. The first involves a debtor suing on a state-law cause of action that accrued before filing for bankruptcy.³⁴ These suits neither invoke a substantive right provided by title 11, nor constitute a proceeding which could arise only in the context of a bankruptcy case. Despite preceding the filing of a petition, however, the suits become property of the estate pursuant to § 541.³⁵ Because any proceeds of a judgment in the debtor’s favor will become property subject to distribution among creditors, the proceeding is deemed sufficiently “related to” the bankruptcy to sustain federal jurisdiction.³⁶

The second situation, and the focus of this Note, involves litigation between so called third-parties—parties who are neither a trustee nor a debtor in bankruptcy.³⁷ In this type of situation, one of the third-parties—either the plaintiff or the defendant—seeks “related to” bankruptcy jurisdiction as a way into federal court absent diversity or a § 1331 federal question.³⁸ According to most courts, this third-party litigant must establish as a threshold matter that the outcome of his proceeding “could conceivably have any effect on the estate being administered in bankruptcy.”³⁹ This “conceivable effect” standard is no bright-line rule, and there exists a breadth of case law giving the

33. 28 U.S.C. § 1334(b) (2000).

34. See *Collier*, *supra* note 26, ¶ 3.01[4][c][ii], at 3-24.

35. See 11 U.S.C. § 541(a)(1) (2000) (defining property of the debtor’s estate to include “all legal or equitable interests of the debtor in property”); see, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (related action by debtor for breach of contract); *In re Midgard Corp.*, 204 B.R. 764, 777 (B.A.P. 10th Cir. 1997) (related action by debtor for tortious interference); see generally *Collier*, *supra* note 26, ¶ 3.01[4][c][ii][A], at 3-24.

36. See, e.g., *In re Midgard*, 204 B.R. at 772.

37. See *Collier*, *supra* note 26, ¶ 3.01[4][c][ii][B], at 3-25 to 3-29. In chapter 7 cases, the bankruptcy court usually appoints a Trustee in Bankruptcy who oversees administration of the estate. *Id.* ¶ 1.03[2][c][ii], at 1-26. In chapter 11 cases, the debtor in possession takes over management of the debtor-company throughout the reorganization process. *Id.* ¶ 1.03[4][a], at 1-38 to 1-39.

38. These are generally the most difficult cases, and those that most effectively test the limits of “related to” jurisdiction. See *Collier*, *supra* note 26, ¶ 3.01[4][c][ii][B], at 3-26. The “related to” question arises when either the third-party plaintiff seeks original federal jurisdiction under § 1334, see *supra* note 25, or the third-party defendant seeks removal pursuant to 28 U.S.C. § 1452(a) (2000). The first type of cases, discussed *supra* notes 34-36 and accompanying text, satisfy the “related to” standard relatively easily. If the state suit that became property of the estate ends in the debtor’s favor, the estate immediately benefits, either financially or otherwise. In the third-party class of cases, however, the conclusion of the related proceeding may or may not immediately affect the debtor. This will depend on whether the losing third-party decides to pursue its newly acquired rights against the debtor. Only then will the third-party litigation affect the bankruptcy.

39. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (citation omitted). Some courts have adopted variations on this threshold standard, and a minority of circuit courts applies alternate tests. See *infra* Part I.C.

test its flexible, fact-specific substance.⁴⁰ The classic third-party scenario is tort litigation against non-debtor defendants who have potential rights to contribution or indemnity against a debtor in bankruptcy.⁴¹ These cases pose difficult questions of exactly how much effect the third-party litigation will have on the bankruptcy, and whether that effect forms a constitutionally sufficient connection to the bankruptcy.⁴²

Section 1334(c)'s mandatory and discretionary abstention provisions act to temper the statute's broad jurisdictional reach.⁴³ Subsection 1334(c)(2) requires a court to abstain from a "related to" proceeding based on state law causes of action if the proceeding could not have been commenced in federal court absent bankruptcy jurisdiction, and if the proceedings can be commenced and timely adjudicated in state court.⁴⁴ Subsection 1334(c)(1) provides that, as a matter of discretion, a court may, "in the interest of comity with State courts or respect for State law," abstain from hearing a related proceeding.⁴⁵

B. *The Historical Development of "Related to" Jurisdiction*

The current jurisdictional scheme under § 1334 is the end product of more than two hundred years of congressional, judicial, and popular debate over the proper scope of bankruptcy jurisdiction. This section lays out its legislative history in broad strokes, focusing in particular on the evolution of bankruptcy jurisdiction over third-party litigation.

40. See *infra* Part I.C.

41. For examples, see *infra* note 87.

42. See *infra* Parts I.C., II.

43. 28 U.S.C. § 1334(c) (2000).

44. *Id.* § 1334(c)(2).

45. *Id.* § 1334(c)(1). In determining whether to abstain voluntarily from hearing a proceeding, courts consider, among others, the following factors:

(1) [T]he effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

In re Tucson Estates, Inc., 912 F.2d 1162, 1167 (9th Cir. 1990) (citing *In re Republic Reader's Serv., Inc.*, 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987)).

1. The Bankruptcy Act of 1800

The first piece of bankruptcy legislation in the United States, the Bankruptcy Act of 1800, contained no jurisdictional provisions.⁴⁶ Courts treated the Bankruptcy Act like any other federal law for purposes of subject matter jurisdiction.⁴⁷ Accordingly, federal courts had traditional federal question jurisdiction over matters arising under the bankruptcy laws of the United States.⁴⁸

2. The Bankruptcy Act of 1841

With the Bankruptcy Act of 1841 came the first explicit grant of federal jurisdiction over bankruptcy matters.⁴⁹ Justice Story, in *Ex parte Christy*,⁵⁰ broadly interpreted this jurisdictional provision as reaching to “all cases where the rights, claims, and property of the bankrupt, or those of his assignee, are concerned.”⁵¹ According to Justice Story, bankruptcy jurisdiction did not stop at suits involving property held by the court as part of the estate.⁵² Rather, the jurisdictional reach of the Act extended to disputes over property outside the court’s possession, when the debtor sought to recover such property from an adverse claimant.⁵³

3. The Bankruptcy Act of 1867

The Bankruptcy Act of 1867 codified Justice Story’s broad conception of bankruptcy jurisdiction and adopted language very similar to that of the 1841 Act.⁵⁴ The jurisdictional provisions of the 1867 Act received similarly broad treatment by the Supreme Court.⁵⁵ Under the 1867 Act, a bankruptcy court’s jurisdiction was both in rem and in personam.⁵⁶ As such, the court could hear in rem actions

46. See Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (amended 1801 & 1802) (repealed 1803).

47. See *Lucas v. Morris*, 15 F. Cas. 1063 (C.C.S.D.N.Y. 1825) (No. 8,587).

48. The source of this jurisdiction was Article III, Section 2, Clause 1 of the U.S. Constitution and the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (current version at 28 U.S.C. § 41 (2000)).

49. See Act of Aug. 19, 1841, ch. 9, § 6, 5 Stat. 440, 445 (repealed 1843) (conferring bankruptcy jurisdiction in all matters and proceedings, including “all acts, matters, and things to be done under and in virtue of the bankruptcy”).

50. 44 U.S. 292 (1845).

51. *Id.* at 313.

52. *Id.* at 313-14.

53. *Id.*

54. See Act of Mar. 2, 1867, ch. 176, § 1, 14 Stat. 517 (repealed 1878) (“[Bankruptcy courts] shall have original jurisdiction . . . in all matters and proceedings in bankruptcy . . .”).

55. See *Lathrop v. Drake*, 91 U.S. 516, 517 (1875) (interpreting the jurisdictional language of the 1867 Act as “very broad and general”).

56. In personam jurisdiction, necessary to render a personal money judgment or

regarding disputed claims to property of the estate, in addition to in personam actions brought by the trustee to collect “assets of the bankrupt” not yet part of the estate.⁵⁷

Federal bankruptcy jurisdiction extended to in personam actions in order to ensure fast, fair, and efficient administration of the estate.⁵⁸ This extension, however, also “produced a persistent tension between the federal interest in estate administration and the localized interests of particular litigants, witnesses, and attorneys, who often found the federal forum inconvenient.”⁵⁹

4. The Bankruptcy Act of 1898

With these concerns in mind, Congress substantially retracted the reach of bankruptcy jurisdiction with the enactment of the Bankruptcy Act of 1898.⁶⁰ The 1898 Act provided for novel treatment of the in personam actions which the 1867 Act previously empowered federal courts to hear. The 1898 Act termed such in personam actions “controversies at law and in equity,”⁶¹ or “plenary suits,”⁶² and

injunction against a defendant, depends on the defendant’s physical presence in or connection to the state where the lawsuit is brought. *See generally* 16 Moore’s Federal Practice, *supra* note 27, § 108.02[1-2], at 108-15. In rem jurisdiction, on the other hand, allows a state, by virtue of its power over any property within its borders, to render a judgment determining the interests of persons in such property. *Id.* Unlike a judgment in personam, an in rem judgment does not impose any personal obligation on the defendant. *Id.*

57. *See* Act of Mar. 2, 1867, ch. 176, §§ 1-2, 14 Stat. 517, 518 (repealed 1878); *see generally* *Bardes v. Hawarden Bank*, 178 U.S. 524, 533 (1900) (describing how section 2 of the Act of 1867 conferred federal jurisdiction over “suits . . . between assignees in bankruptcy and adverse claimants of property of the bankrupt”).

58. *See Lathrop*, 91 U.S. at 518; *Bailey v. Glover*, 88 U.S. 342, 346-47 (1874).

59. Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In rem Model of Bankruptcy Jurisdiction*, 15 Bankr. Dev. J. 261, 266 (1999); *see also* *Williams v. Austrian*, 331 U.S. 642, 649 n.15 (1947) (describing the concerns of litigant inconvenience and expense that motivated the jurisdictional provisions of the Act of 1898).

60. *See* Act of July 1, 1898, ch. 541, § 2, 30 Stat. 544, 545 (repealed 1978). Section 2 of the 1898 Act mostly repeated the broad grant of jurisdiction contained in section 1 of the 1867 Act, but added the words “except as herein otherwise provided.” *Id.* at 546. This exception referenced section 23, which excluded from bankruptcy jurisdiction most in personam actions brought by the trustee. *Id.* § 23, at 552.

61. *Id.*

62. Under the 1867 and 1841 Acts, a suit “at law or in equity” required an independent “plenary” suit in circuit court launched by a formal complaint. *See Ex parte Christy*, 44 U.S. 292, 314-15, 316-17 (1845) (applying the 1841 Act). As this was the practice currently in place, the 1867 Act used the phrase “at law or in equity” likewise to indicate a plenary suit. *See* Act of July 1, 1898, ch. 541, § 2, 30 Stat. 544, 552. Plenary suits were procedurally different from summary proceedings. *See generally* Brubaker, *supra* note 59, at 267 n.26 (“‘Summary’ jurisdiction accurately connoted the more informal procedures used in summary matters, whereas a plenary suit was an ordinary civil action conducted according to the normal rules of civil procedure.”).

directed them to state courts, leaving federal courts primarily with in rem jurisdiction over “summary”⁶³ proceedings concerning estate property in possession of the court.⁶⁴

The summary/plenary bifurcation revived an exclusively in rem model of bankruptcy jurisdiction that originated in England.⁶⁵ The Act of 1898 limited summary jurisdiction, and hence federal bankruptcy jurisdiction, to disputes over property in the actual or constructive possession of the court.⁶⁶ Without possession of a jurisdictional res, federal courts lacked power to hear a trustee’s suit against an adverse claimant.⁶⁷ Hints of the in personam jurisdictional model still lingered, however. According to the Supreme Court in *Williams v. Austrian*,⁶⁸ if a trustee were administering a Chapter X business reorganization, he could bring a plenary suit in federal court.⁶⁹ Although confined to the business reorganization context, this interpretation of the Act revealed elements of a broader in personam rationale for federal bankruptcy jurisdiction.⁷⁰

Apart from creating the summary/plenary divide, the Act of 1898 provided for a limited grant of bankruptcy jurisdiction over third-party disputes—disputes that today would fall under the “related to”

63. Act of July 1, 1898, ch. 541, § 2, 30 Stat. 544, 545.

64. See generally *Bardes v. Hawarden Bank*, 178 U.S. 524, 537-38 (1900) (giving full effect to the language of section 23, and holding that suits to record fraudulent transfers, like other plenary suits, were to be tried in state courts). Summary jurisdiction, which the Act did not define, included the traditional administrative procedures of the bankruptcy process. See generally Daniel R. Cowans, *Bankruptcy Law and Practice* § 576, at 217 (2d ed. 1978). Examples of summary jurisdiction include, among others, the discharging of debts, the appointing of trustees, and the determining of how to liquidate assets. *Id.* at 217-18. For a more extensive list, see the Act of July 1, 1898, ch. 541, § 2, 30 Stat. 544, 545-46, which included nineteen categories of proceedings over which the bankruptcy courts had summary jurisdiction. Both bankruptcy courts and federal district courts had exclusive jurisdiction over these summary matters. *Id.* In 1903, Congress amended the Act of 1898 to provide for some specific instances where federal courts could hear a trustee’s plenary actions. See Act of Feb. 5, 1903, ch. 487, § 8, 32 Stat. 797, 798-99. One was when a defendant consented to jurisdiction. *Id.* The others were suits to avoid liens and suits to recover preferences or fraudulent conveyances. *Id.*

65. See Brubaker, *supra* note 59, at 263.

66. See Act of July 1, 1898, ch. 541, § 2, 30 Stat. 544, 546. Yet federal courts could hear, as summary matters, suits by the trustee against a third-party where that third-party, usually a creditor, had asserted a claim of its own and had thus “consented” to jurisdiction. *Id.* § 23; see also Elizabeth Warren & Jay Lawrence Westbrook, *The Law of Debtors and Creditors* 934 (4th ed. 2001) (noting how “[t]his ‘consent’ approach became so extended and artificial as to be called ‘jurisdiction by ambush’”).

67. See Brubaker, *supra* note 59, at 267.

68. 331 U.S. 642 (1947).

69. See *id.* at 646-47.

70. *Id.* at 657-58 (“Congress intended by the elimination of § 23 to establish the jurisdiction of federal courts to hear plenary suits brought by a reorganization trustee, even though diversity or other usual ground for federal jurisdiction is lacking.”)

provision of § 1334.⁷¹ Courts interpreting the jurisdictional provisions of the 1898 Act generally held that a federal court, absent diversity or federal question, may only decide third-party disputes if administering the bankruptcy would be impossible without such determination.⁷² Thus, the space for bankruptcy-related matters in federal courts remained limited under the 1898 Act, far more so than it is today.

5. Jurisdiction Under the Bankruptcy Reform Act of 1978

By 1978, federal courts had become considerably more accessible than they were in 1898.⁷³ As the concerns of litigant inconvenience diminished, considerations of delay and judicial efficiency took their place, compelling Congress to expand the jurisdictional grant for bankruptcy-related matters, and eliminate the bifurcated structure of the 1898 Act.⁷⁴

Congress saw two primary benefits to eliminating the summary/plenary jurisdictional regime. First was a reduction in the unnecessary delay inherent in a system where the constituent bankruptcy proceedings scatter among numerous state and federal fora. The bifurcated structure created lengthy, piecemeal adjudication whenever a bankruptcy court could not hear a plenary matter and had to wait out its resolution in a non-bankruptcy forum.⁷⁵ Second, Congress sought to reduce the expense of protracted litigation over questions involving whether a particular proceeding was fit for summary or plenary adjudication.⁷⁶ This expense depleted the estate and damaged the prospects for a reorganizing business to emerge from bankruptcy successfully.⁷⁷

71. Section 2, categories 6 and 7 of the 1898 Act, taken together, conferred federal jurisdiction over third-party disputes that were “necessary for the complete determination of a [bankruptcy] matter in controversy.” Act of July 1, 1898, § 2; see generally Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 Wm. & Mary L. Rev. 743, 781 (2000).

72. See, e.g., *First State Bank & Trust Co. of Guthrie, Okla. v. Sand Springs State Bank of Sand Springs, Okla.*, 528 F.2d 350, 353 (10th Cir. 1976); *In re Burton Coal Co.*, 126 F.2d 447, 448-49 (7th Cir. 1942).

73. *House Report*, *supra* note 20, at 48.

74. See David S. Kennedy & R. Spencer Clift, III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy Court and its Judicial Officers*, 9 J. Bankr. L. & Prac. 165, 188 (2000).

75. See Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt. 2, at 101 (1973) [hereinafter *Commission Report*].

76. See *id.*; see also *House Report*, *supra* note 20, at 43.

77. See *Commission Report*, *supra* note 75, at 101. The goals outlined in the congressional reports addressed the problems with plenary disputes that involve the trustee or debtor in possession as a party to the lawsuit. For third-party disputes, the policy considerations arguably differ. Delay in a suit on behalf of the estate causes legal fees to mount that needlessly deplete the estate property, limiting the chances of a successful reorganization or liquidation. The cost to litigate third-party disputes, on

To address these difficulties of delay and expense, the House and Senate separately offered two bills, each differing in its approach to jurisdiction. The House intended that bankruptcy jurisdiction under the new Code first incorporate all matters provided for in section 2a of the 1898 Act.⁷⁸ The House bill then provided for bankruptcy jurisdiction over: (1) administrative matters "arising in connection with petitions"; (2) "disputes affecting property in the custody of the court"; (3) administrative controversies "in which the adverse parties consent or waive objections to the court's jurisdiction"; and (4) proceedings based on a cause of action created by the Code.⁷⁹ Moreover, the House bill granted federal in personam jurisdiction over matters "related to cases under Title 11."⁸⁰ The House report was silent, however, on the substantive relatedness required under this provision.

The Senate, on the other hand, initially adopted an "estate-as-party" jurisdictional approach through a grant of jurisdiction over "all civil proceedings by or against a debtor in possession, a trustee, or other representative of the estate of a debtor."⁸¹ The Senate later amended this provision, and the committee report described the change in jurisdictional scope as "expanded to include all controversies arising out of"—the Senate's original estate-as-a-party grant—"or related to a [bankruptcy] case."⁸² Such an "expansion," shows that the Senate imagined federal jurisdiction over disputes between third parties with which a representative of the estate was not involved.⁸³

The resulting legislation enacted 28 U.S.C. § 1471, which contained jurisdictional language virtually identical to that of the current § 1334.⁸⁴ The Act provided for federal jurisdiction over proceedings

the other hand, does not directly fall on the estate, as third parties pay attorney fees out of pocket. Delay in third-party litigation might, however, impose costs indirectly to the estate by prolonging its administration. Thus, eliminating delay and expense is a valid policy consideration for third-party actions as well—actions that needlessly slow down a bankruptcy administration.

78. See *House Report*, *supra* note 20, at 46.

79. *Id.* at 43-44. Some representatives proposed that detriment to the estate be shown prior to removal to federal court. *Id.* at 51; see also Brubaker, *supra* note 71, at 797. The House defeated this proposal, finding it "inadequate to alleviate the problems that exist under the current jurisdictional framework," and likely to cause new problems of its own. *House Report*, *supra* note 20, at 51.

80. *House Report*, *supra* note 20, at 49. The Report also noted that the House bill would grant "the bankruptcy courts broad and complete jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases." *Id.* at 48.

81. See Brubaker, *supra* note 71, at 796 n.191 (citation omitted).

82. See S. Rep. 95-989, at 153 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5939 [hereinafter *Senate Report*].

83. See Brubaker, *supra* note 71, at 796 n.191.

84. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 92 Stat. 2549, 2668-69 (enacting 28 U.S.C. § 1471 (repealed 1984)); see generally Kennedy &

arising under title 11, and disputes arising in or related to a bankruptcy case.

C. *Articulating a Standard for “Related to” Bankruptcy Jurisdiction: Pacor and Its Progeny*

The above history of bankruptcy jurisdiction in the United States reveals a steady widening of the space available in federal courts for bankruptcy-related matters. However, the plain language of the current “related to” grant offers no real guidelines for defining its precise scope.⁸⁵ The federal circuit courts disagree on exactly how broadly to read the “related to” language, and how to articulate a common law standard to enforce the appropriate reading.⁸⁶ The case law has merely assembled an ad hoc patchwork to solve this difficult jurisdictional question. Many circuit courts, purportedly relying on identical tests, have reached divergent results in instances of almost identical factual and procedural circumstances.⁸⁷

Clift, *supra* note 74, at 188. Section 1471, however, granted this pervasive and original jurisdiction to bankruptcy courts, presided over by non-Article III judges. In 1984, the Supreme Court held that non-Article III bankruptcy judges could not constitutionally decide bankruptcy-related proceedings that were far removed from the “core” of traditional bankruptcy powers. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71, 87 (1982). In response, Congress modified the jurisdictional grant set forth in the 1978 Act by creating two distinct categories of bankruptcy proceedings: (1) “core” proceedings over which the bankruptcy courts had full jurisdiction; and (2) “non-core” proceedings, over which the bankruptcy courts had only limited power. See 28 U.S.C. § 157 (2000). Under the current, post-*Northern Pipeline* regime, federal district courts can refer non-core, related matters to the bankruptcy courts, who in turn can only submit findings and conclusions of law subject to review by the district courts. See generally, Kennedy & Clift, *supra* note 74, at 191-96.

85. See 28 U.S.C. § 1334(b).

86. The majority of circuit courts have at least nominally adopted the *Pacor* test for “related to” jurisdiction. See *In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991); *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir. 1990); *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 788 & n.19 (11th Cir. 1990); *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988); *In re Wood*, 825 F.2d 90, 93 (5th Cir. 1987); *In re Dogpatch, U.S.A., Inc.*, 810 F.2d 782, 786 (8th Cir. 1987); *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 1002 n.11 (4th Cir. 1986). The Second and Seventh Circuits appear to have adopted slightly different tests. Compare *In re Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987) (focusing the inquiry on the effect of third-party litigation on estate property or allocation of that property among creditors), with *In re Turner*, 724 F.2d 338, 341 (2d Cir. 1983) (finding bankruptcy jurisdiction where third-party litigation bears a “significant connection” to the bankruptcy).

87. For example, in *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 372 (3d Cir. 2002), the Third Circuit heard an appeal from distributors of Federal-Mogul’s asbestos-ridden brake pads. The distributors were defending mass tort claims and were seeking “related to” removal due to their potential indemnification and contribution rights against Federal-Mogul, then a debtor in chapter 11. *Id.* at 372-73. The lower court had denied removal, and the Third Circuit refused to issue a writ of mandamus to overturn the denial. The Third Circuit reasoned that, because a ruling against the distributor defendants will not bind Federal-Mogul, the dispute is not

1. The Dominant Standard for "Related to" Bankruptcy Jurisdiction

The starting point for any "related to" analysis is a determination of whether the outcome of the third-party dispute "could conceivably have any effect on the estate being administered in bankruptcy."⁸⁸ The U.S. Court of Appeals for the Third Circuit initiated this "conceivable effect" test in *Pacor, Inc. v. Higgins*.⁸⁹ It is slightly misleading, however, to label any "conceivable effect" formulation "the *Pacor* test." To do so, as the case itself illustrates, would extend *Pacor* more broadly than its holding dictates.

Pacor involved a suit in Pennsylvania state court brought by John Higgins and his wife against Pacor, Inc., a distributor of chemical supplies.⁹⁰ The plaintiffs sought damages for work-related exposure to asbestos supplied by Pacor.⁹¹ After being named in the complaint, Pacor filed a third-party impleader claim against the Johns-Manville Corporation, the original manufacturer of the asbestos.⁹² Johns-Manville then filed for bankruptcy in the U.S. District Court for the Southern District of New York.⁹³ The Pennsylvania state court proceeded to sever Pacor's impleader claim against Johns-Manville from the Higgins's tort action.⁹⁴ In response, Pacor filed two motions: (1) a motion to remove both actions to the Pennsylvania bankruptcy court; and (2) a motion to transfer the action to the Southern District of New York, where the case could join with the Johns-Manville

"related to" the bankruptcy for purposes of § 1334(b). *Id.* at 376. Contrast that ruling with *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996). There, the Sixth Circuit faced the issue of whether mass tort claims against suppliers of silicon breast implants were sufficiently related to the Dow Corning Corporation's bankruptcy to sustain federal jurisdiction. *Id.* at 485. The Sixth Circuit found that the claims were indeed so related. *Id.* at 495.

88. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (citation omitted) (emphasis omitted). *Pacor* has been almost universally recognized as the touchstone for "related to" questions. See, e.g., *In re Guild & Gallery Plus, Inc.*, 72 F.3d 1171, 1181 & n.5 (3d Cir. 1996).

Even for those circuits that have not formally adopted *Pacor*, [it] has provided an indispensable and frequently cited frame of reference, a veritable beacon on the uncharted and perilous waters of bankruptcy subject matter jurisdiction. The references to *Pacor* in Shepard's Citations are legion. When federal courts must consider whether an issue is a related proceeding, the starting point has universally been *Pacor*.

Id.

89. See *Pacor*, 743 F.2d at 994 (formulating the test as "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy") (citation omitted) (emphasis omitted).

90. *Id.* at 986.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

bankruptcy.⁹⁵ The Pennsylvania bankruptcy court denied removal on the ground that it was untimely.⁹⁶ On appeal, the district court disagreed, finding that the Johns-Manville court had extended the time limit for removal petitions.⁹⁷ The district court held, however, that it lacked jurisdiction over the original Higgins-Pacor suit because it was not “related to” the bankruptcy.⁹⁸ Pacor’s indemnity action against Johns-Manville, however, was held sufficiently “related to” the bankruptcy to allow for removal.⁹⁹

In analyzing the question of “related to” bankruptcy jurisdiction, the *Pacor* court began by noting that Congress intended this jurisdiction to be broad and far-reaching.¹⁰⁰ The court warned however, that bankruptcy jurisdiction had its limits, both statutory and constitutional.¹⁰¹ The court also made clear that the *Pacor*-Higgins action involved third parties, and thus needed some “nexus” to the title 11 case for subject matter jurisdiction to exist.¹⁰² To constitute this nexus, the outcome of the third-party action must “alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively)” and impact “upon the handling and administration of the bankrupt estate.”¹⁰³

Working off this formulation, the court concluded that the nexus between the Higgins-Pacor action and the Johns-Manville bankruptcy was not jurisdictionally sufficient.¹⁰⁴ The court conceded that the Higgins-Pacor action might give rise to an indemnification claim by Pacor against Johns-Manville.¹⁰⁵ Yet, the Higgins-Pacor action would produce no binding effect, no *res judicata* or collateral estoppel that might preclude Johns-Manville from asserting its rights in the *Pacor*-Johns-Manville action for indemnity.¹⁰⁶ The court distinguished the case at bar from cases where indemnification agreements between a third-party defendant and the debtor give rise to automatic liability.¹⁰⁷ Had such an agreement existed in *Pacor*, the third-party defendant’s rights against the Johns-Manville estate would have arisen immediately upon conclusion of the Higgins-Pacor suit. Without such agreement, though, Pacor had to “bring an entirely separate

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 987.

100. *Id.* at 994.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 995.

105. *Id.*

106. *Id.* (“Since Manville is not a party to the Higgins-Pacor action, it could not be bound by *res judicata* or collateral estoppel.” (citation omitted)).

107. *Id.*

proceeding to receive indemnification.”¹⁰⁸ Thus, in the eyes of the *Pacor* court, the possibility of indemnity confers “related to” jurisdiction only when the outcome of the third-party action will conclude the third-party’s indemnification rights vis-à-vis the debtor.

To summarize, *Pacor* appears to set forth three requirements for “related to” bankruptcy jurisdiction: (1) that the outcome of the related proceeding “conceivably affect” the bankruptcy; (2) that this effect alter the debtor’s rights or liabilities; and (3) that the effect be felt immediately, without the need for an additional proceeding.

Courts after *Pacor* almost invariably adopt the first requirement—that the outcome of the third-party dispute conceivably affect the bankruptcy.¹⁰⁹ Courts often disagree, however, on what precise effect to require. Most word their inquiry, like *Pacor*, in terms of legal effect, namely the alteration of the debtor’s rights or liabilities.¹¹⁰ Other courts look exclusively at the potential financial impact felt by the estate due to the outcome of third-party litigation.¹¹¹ Either formulation, however, whether in legal or monetary terms, will usually render an identical conclusion. In the bankruptcy context, legal

108. *Id.*

109. More than any other proposition enunciated by *Pacor*, the word “conceivable,” has gained the widest currency among circuit courts adjudicating “related to” issues. As discussed, *supra* notes 105-08 and accompanying text, *Pacor* qualified the term “conceivable” considerably by adding the automatic liability restriction. Yet, subsequent to *Pacor*, even the Third Circuit has emphasized the term “conceivable,” and in doing so broadened the scope of bankruptcy jurisdiction. *See In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261, 264 (3d Cir. 1991) (“Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on the ‘debtor’s . . . handling or administration of the bankrupt estate.’”). According to the Third Circuit and most other circuit courts, “conceivable” is an operative word in itself and thus neither certainty nor likelihood of effect on the bankruptcy is necessary to confer “related to” jurisdiction. *See, e.g., In re Guild & Gallery Plus, Inc.*, 72 F.3d 1171, 1181 (3d Cir. 1996) (“Certainty, or even likelihood, is not a requirement.”).

110. *See, e.g., In re Smith*, 866 F.2d 576, 580 (3d Cir. 1989).

111. *See, e.g., In re Zale Corp.*, 62 F.3d 746, 753 (5th Cir. 1995) (noting that courts have “related to” jurisdiction when the subject of the third-party dispute is property of the estate, or the “dispute over the asset would have an effect on the estate”); *In re Time Constr., Inc.*, 43 F.3d 1041, 1045 (6th Cir. 1995) (holding that third-party action was related to bankruptcy because outcome of action against sole shareholder directly impacted the value of debtor’s shares which were assets of the estate); *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989) (noting in dicta that the resolution of a state court proceeding involving the debtor’s sole shareholder “would have a substantial effect on the monetary value of [debtor’s] shares, and thus would have a substantial effect on the value of [the] bankruptcy estate”). The financial effect formulation ends up being overly broad. Imagine a shareholder derivative action in state court against a large public company. Supposing a portion of that company’s stock composed a large share of some debtor’s assets, somewhere undergoing bankruptcy, the company could remove to federal court. This is because the outcome of the shareholder derivative suit could severely devalue the company’s stock, and thus diminish the assets available to creditors in the otherwise unrelated bankruptcy.

alterations caused by third-party litigation—i.e., the debtor becoming liable to a third-party—almost invariably result in a financial effect on the estate, changing the distribution of assets among creditors.

A more meaningful dispute among courts arises in their approach to *Pacor*'s third prong—the requirement that the debtor's liability be concluded at the outcome of third-party litigation.¹¹² Many courts have abandoned this requirement of automatic liability.¹¹³ As discussed below, however, some courts, including perhaps the Supreme Court, retain the prerequisite.

2. The Supreme Court's Guidance on the "Related to" Question, or Lack Thereof

The Supreme Court, in *Celotex Corp. v. Edwards*,¹¹⁴ had occasion to resolve the varied approaches to bankruptcy jurisdiction among the circuits, but failed to do so.¹¹⁵ The Court noted the variance, and acknowledged *Pacor* as the dominant standard in the "related to" area.¹¹⁶ The *Celotex* Court refrained, however, from explicitly endorsing any circuit's approach, nor did it proffer one of its own. The Court merely affirmed that whatever the test, "bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor."¹¹⁷

It is unclear whether *Pacor*'s requirement of automatic liability informed the *Celotex* holding. In *Celotex*, judgment creditors in the related action sought to execute on a bond secured by debtor-Celotex's assets.¹¹⁸ These assets, however, rested in the possession of Northbrook, the third-party defendant and Celotex's guarantor on the bond.¹¹⁹ Because Northbrook already had possession of these assets,

112. See *supra* notes 105-08 and accompanying text.

113. See *infra* notes 121-25 and accompanying text.

114. 514 U.S. 300 (1995) (adjudicating an action by judgment creditors in asbestos litigation to immediately execute on a supersedeas bond against debtor's surety after debtor lost appeal for which bond was posted). For a more complete discussion of *Celotex*'s intricate factual and procedural posture, see Daniel McCloskey, *Celotex Corp. v. Edwards: The Supreme Court Expands the Jurisdiction of Bankruptcy Courts by Barring Collateral Attacks Against Their Injunctions, but Some Questions Remain Unanswered*, 24 Pepp. L. Rev. 1039, 1051-55 (1997).

115. The issue in *Celotex* was whether the action by the judgment creditors was "related to" the debtor's bankruptcy. See *supra* note 114. This issue squarely presented the "related to" question to the Supreme Court.

116. See *Celotex*, 514 U.S. at 308 n.6 ("The First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted the *Pacor* test with little or no variation, [while] [t]he Second and Seventh Circuits, on the other hand, seem to have adopted a slightly different test.").

117. *Id.*

118. *Id.* at 303.

119. *Id.* at 302 ("As collateral for the bond, Celotex allowed Northbrook to retain money owed to Celotex under a settlement agreement resolving insurance coverage

Northbrook would not have to bring a separate action to reach Celotex's collateral if the judgment creditors succeeded in executing on the bond. Rather, Northbrook could just hold onto what was already in its possession. This retention of collateral would immediately diminish Celotex's working assets, and in the Court's view, possibly destroy "any chance of a successful reorganization."¹²⁰

3. Courts Approaching "Related to" Issues after *Celotex*

If *Celotex*, like *Pacor*, did indeed place import on the existence of automatic liability, the Supreme Court may have been too subtle for subsequent courts to catch on. Many circuits have abandoned the prerequisite of automatic liability entirely.¹²¹ These courts are perfectly willing to find "related to" bankruptcy jurisdiction even over third-party litigation whose outcome will not conclude the debtor's liability for indemnity.¹²² In these types of cases, many courts are not concerned by the need for an extra suit to establish a third-party's right to claim indemnity against the debtor.¹²³ The mere fact that the suit is likely, or intended by the third-party, suffices to confer "related to" jurisdiction over the pending third-party action.¹²⁴ The question of likelihood often proves difficult, however, as courts speculate on the merits of related litigation and struggle to define the precise indemnity relationship between the debtor and the third-party defendant.¹²⁵

disputes between Northbrook and Celotex.")

120. *Id.* at 304 n.4 (citing the Bankruptcy Court's decision in *In re Celotex Corp.*, 140 B.R. 912, 914-15 (Bankr. M.D. Fla. 1992)).

121. *See, e.g., In re Dow Corning Corp.*, 86 F.3d 482, 491 (6th Cir. 1996) ("It has become clear following *Pacor* that 'automatic' liability is not necessarily a prerequisite for a finding of 'related to' jurisdiction."). A minority of courts still require the existence of automatic liability. *See, e.g., In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 382 (3d Cir. 2002) (holding third-party actions unrelated "because any indemnification claims that the [third-party defendants] might have against Debtors have not yet accrued and would require another lawsuit before they could have an impact on Federal-Mogul's bankruptcy proceeding").

122. *See, e.g., In re G.S.F. Corp.*, 938 F.2d 1467, 1475-76 (1st Cir. 1991) (conceding the lack of an indemnity agreement between the debtor and the third party defendant, but upholding "related to" jurisdiction nonetheless).

123. This was the situation in *Pacor*, where if the plaintiffs prevailed against *Pacor*, it would take an additional *Pacor*-Manville lawsuit to establish *Pacor*'s right to claim indemnity against Johns-Manville. *See supra* notes 105-08 and accompanying text.

124. *See, e.g., In re Titan Energy Inc.*, 837 F.2d 325, 330 (8th Cir. 1988) ("[E]ven a proceeding which portends a mere contingent or tangential effect on a debtor's estate meets the broad jurisdictional test [for 'related to' jurisdiction.]; *see generally Collier, supra* note 26, ¶ 3.01[4][c], at 3-27 ("'[A]utomatic' liability of the estate is not the *sine qua non* for related to jurisdiction; all that is necessary is that there could 'conceivably' be some effect upon the estate as a consequence of the litigation in question.")).

125. *See, e.g., In re Federal-Mogul Global*, 300 F.3d at 376 (reasoning that although an indemnification agreement existed that could "plausibly support a claim" against

Other courts partly adhere to *Pacor*'s requirement of automatic liability, distinguishing situations involving indemnity rights from those where the debtor is liable for contribution to a third-party defendant.¹²⁶ According to these courts, in the contribution scenario—where the debtor and the defendant are jointly and severally liable to a third-party plaintiff—“the statute does not require a finding of definite liability of the estate as a condition precedent to holding an action related to a bankruptcy proceeding.”¹²⁷ The rationale for this distinction is difficult to identify. Perhaps the situation where the debtor is co-liable to a third-party plaintiff is qualitatively different from the debtor being liable only to the third-party defendant. In the former case, courts might not worry about forcing the plaintiff into federal court. But for the automatic stay, that plaintiff presumably would have named the debtor as co-defendant anyway, thus conferring federal jurisdiction.¹²⁸ In the latter case, however, where the debtor is only liable to the third-party defendant (not the plaintiff), courts arguably have no place disrupting that plaintiff's choice of a state forum.

Fairness to litigants and the efficiency of the bankruptcy system are not the only concerns that lead courts to divergent results in “related to” cases. As Part II discusses, constitutional difficulties add another dimension to the “related to” problem, sparking debate among scholars and suggesting further limitations to the “related to” grant.

the debtor, the agreement's “boiler-plate” indemnification language was not likely to do so); *G.S.F. Corp.*, 938 F.2d at 1476 (speculating on whether or not the third party defendant would assert an indemnity claim against the debtor). In *G.S.F. Corp.*, there was no indemnity agreement between the debtor and the third party defendants. *Id.* Instead, Chase, the third-party defendant, had filed a proof of claim, preserving its rights to claim indemnity against the debtor, *G.S.F. Id.* Yet, Chase would only be entitled to proceed against *G.S.F.* for indemnity if the waiver of administrative expenses were construed so as not to bar a claim. *Id.* This was not an issue properly before the court. *Id.* Nevertheless, the court went through the statutory analysis to determine the extent of Chase's indemnity rights against *G.S.F.*, all to decide the jurisdictional question. *Id.*

126. Contribution is the right of one party, who has discharged a common liability, to recover from the party who shared the liability, the portion which it ought to pay. Indemnity on the other hand is where one person is compelled to pay, but another really should have paid, and thus a contract to reimburse or indemnify is implied by law. See Dan B. Dobbs, *Law of Remedies* § 4.3(4) (3d ed. 1993).

127. *In re Salem Mortgage Co.*, 783 F.2d 626, 635 (6th Cir. 1986) (“In distinguishing *Pacor*, we note that the parties in the mortgage transactions in this proceeding are more intertwined than the parties in *Pacor*.”).

128. The plaintiff would have a claim against the debtor's estate pursuant to 11 U.S.C. § 502 (2000), thus granting federal courts “arising under” bankruptcy jurisdiction.

II. CONSTITUTIONAL THEORIES TO EXPLAIN AND DEFINE THE SCOPE OF "RELATED TO" BANKRUPTCY JURISDICTION

The Supreme Court in *Celotex* resounded *Pacor's* warning¹²⁹ of an eventual "constitutional . . . limitation to the power of a bankruptcy court."¹³⁰ That limitation is not readily apparent, however, from either the code or the case law. Instead, it will depend on how we explain the constitutionality of "related to" jurisdiction. A correct and persuasive constitutional explanation will work to define the proper scope of "related to" jurisdiction, and in turn guide judicial analysis of "related to" questions.

Article III of the Constitution limits federal judicial power largely to the adjudication of federal questions.¹³¹ "Related to" actions, then, must either be federal questions in their own right or present logical supplements to a federal suit. At first blush, much "related to" litigation appears to satisfy neither of these Article III requirements. "Related to" actions, by definition, consist of state substantive law,¹³² and are often factually unrelated to the predicate bankruptcy. Yet, Congress intended a broad "related to" grant,¹³³ and courts have consistently construed it as such.¹³⁴

As this part analyzes, commentators have developed various constitutional theories to explain the expansive reach of bankruptcy jurisdiction. Part II.A. explores what is commonly known as protective jurisdiction, a theory used to justify the federal adjudication of cases not directly presenting issues of substantive federal law. Part II.B. describes analogies to forms of supplemental jurisdiction, drawn by commentators to show how "related to" actions work as logical supplements to federal question cases.

A. Protective Jurisdiction

Theories of protective jurisdiction can be traced as far back as Justice Marshall's famous *Osborn* opinion,¹³⁵ but have taken various shapes and forms in subsequent years.¹³⁶ Generally, the theory posits

129. *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995).

130. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984).

131. U.S. Const. art. III, § 2, cl. 1.

132. See *supra* notes 33-42 and accompanying text.

133. See *House Report, supra* note 20, at 43-48.

134. See, e.g., *Pacor*, 743 F.2d at 994 ("Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.").

135. *Osborn v. Bank of the United States*, 22 U.S. 738 (1824). The *Osborn* Court reasoned that federal jurisdiction should protect the rights of federally created institutions, such as a national bank, and thus should extend to litigation where such an institution is a party. *Id.* at 824-26.

136. *Compare Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 497 (1983) (holding that because Congress has, pursuant to its Article I powers, broadly enacted

that, where an active and articulated congressional legislative program is at stake, federal jurisdiction serves the purposes of the “arising under” clause in Article III,¹³⁷ even though the particular cases may involve only state substantive law.¹³⁸ The theory would allow Congress to jurisdictionally protect the general interests of a legislative program, even though Congress has failed to legislate on the particular issue before the court.¹³⁹ The Supreme Court has wavered on its amenability to general theories of protective jurisdiction, and has never explicitly adopted one to justify federal jurisdiction over state law claims where diversity or a § 1331 federal question is lacking.¹⁴⁰

rules of decision governing the sovereign immunity of foreign nations, any action against a foreign sovereign “accordingly ‘arises under’ federal law, within the meaning of Art. III”), *with* *Nat. Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 600-04 (1949) (holding that Congress may, pursuant to its Article I powers, authorize Article III courts to adjudicate cases not falling within the Article III enumeration).

137. U.S. Const. art. III, § 2, cl. 1.

138. A common example of this type of legislative program comes from the labor context, where the Taft-Hartley Act, 29 U.S.C. § 185(a) (2000), provides for federal jurisdiction over actions for violation of labor-management contracts. For general discussions of protective jurisdiction, see Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 90-91 (2d ed. 1990); Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 *UCLA L. Rev.* 542 (1983); Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 *N.Y.U. L. Rev.* 933 (1982).

139. Herbert Wechsler and Paul Mishkin each have advanced rationales for Congress’s right to confer protective federal jurisdiction. Wechsler offers a logical greater-includes-the-lesser argument, contending that, wherever Congress has the constitutional power to prescribe federal rules of decision, it may, without so doing, enact a naked jurisdictional statute which will provide a federal forum to govern substantive rules of decision, state and federal. See Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* 744-47 (1953) (“[I]f Congress could . . . pass substantive legislation on a particular matter, then this ‘greater’ power logically includes within it the ‘lesser’ power to provide the federal courts with jurisdiction over cases in the area.”). Mishkin offers a narrower view, arguing that “where there is an articulated and active federal policy regulating a field,” Congress may grant federal jurisdiction to protect it even though Congress has not addressed the particular issue before the court. Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 *Colum. L. Rev.* 157, 191-92 (1953).

140. The first case to explicitly address protective jurisdiction was *Textile Workers Union v. Lincoln Mills of Ala.* 353 U.S. 448, 456-57 (1957) (holding that section 301 of the Taft-Hartley Act, which confers federal jurisdiction over labor-management disputes in industries affecting commerce, reflected a congressional intent to create federal common law of labor and, therefore, supplied the requisite federal question). In a vigorous dissent, Justice Frankfurter contended that theories of protective jurisdiction “cannot be justified under any view of the allowable scope to be given to Article III.” *Id.* at 474 (Frankfurter, J., dissenting). Later Courts have not been quite as harsh as Frankfurter would have liked, but have nevertheless refrained from adopting any theory of protective jurisdiction. See *Mesa v. California*, 489 U.S. 121, 137 (1989) (“We have, in the past, not found the need to adopt a theory of ‘protective jurisdiction’ to support Art. III ‘arising under’ jurisdiction, and we do not see any need for doing so here because we do not recognize any federal interests that are not protected by limiting removal to situations in which a federal defense is alleged.”

If theories of protective jurisdiction are correct, they seem a perfect justification for an expansive model of bankruptcy jurisdiction. Article I of the Constitution enables Congress to establish “uniform Laws on the subject of Bankruptcies.”¹⁴¹ Moreover, Congress has in fact legislated extensively in the area of bankruptcy. Logically, it follows that Congress should have the power to confer broad federal jurisdiction to protect its established program. “Related to” jurisdiction appears to function as just such protection. When state law litigation threatens to delay an ongoing bankruptcy, and thereby disrupt the integrity and efficiency of a federal legislative system, Congress should be able to bring that litigation within the scope of federal judicial power.

This is essentially the argument advanced by Thomas Galligan, Jr., who proposes that “related to” bankruptcy jurisdiction works as a valid form of protective jurisdiction.¹⁴² Under his model, Congress, in enacting the Bankruptcy Code, evidently perceived independent value in a federal tribunal for all claims incident to bankruptcy. Galligan argues that Congress’s legislative prerogatives include extending federal judicial power to state law claims, and so any case falling under the bankruptcy jurisdictional provisions “arises under” federal law for purposes of Article III.¹⁴³

B. *Ancillary and Supplemental Jurisdiction*

Some commentators analogize “related to” jurisdiction to concepts of ancillary or supplemental jurisdiction—doctrines that allow federal courts to hear state grounds for recovery when they are joined to factually-related federal grounds.¹⁴⁴ John T. Cross argues that

(citation omitted)); *Verlinden*, 461 U.S. at 491 n.17 (“[W]e need not consider petitioner’s . . . argument that the Act is constitutional as an aspect of so-called ‘protective jurisdiction.’”). Justice Jackson, writing for the plurality in *Tidewater*, 337 U.S. at 588-601, argued that where an active and articulated federal program is at stake, Congress may, pursuant to its Article I “necessary and proper” powers, extend federal judicial power to state-law claims. Yet, Jackson’s rationale failed to receive majority support, and a majority of the Court advanced alternate reasoning that dismissed protective jurisdiction as a legitimate rationale. *See id.* at 607-16 (Rutledge, J., concurring); *id.* at 626-45 (Vinson, C.J., dissenting); *id.* at 646-52 (Frankfurter, J., dissenting).

141. U.S. Const. art. I, § 8, cl. 4.

142. *See* Thomas C. Galligan, Jr., *Article III and the “Related To” Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 U. Puget Sound L. Rev. 1, 41-43 (1987).

143. *Id.* at 2-3. There is some evidence that Congress had theories of protective jurisdiction in mind when drafting 28 U.S.C. § 1334 (2000). *See House Report, supra* note 20, at 47-48 (“There appears to be no reason why Congress cannot in the exercise of its power under the Bankruptcy Clause of the Constitution confer jurisdiction over all litigation having a significant connection with bankruptcy.” (citation omitted)).

144. *See generally* *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). *Gibbs*

“related to” jurisdiction is best understood as a species of ancillary jurisdiction.¹⁴⁵ In this model, the bankruptcy case constitutes a base federal question.¹⁴⁶ To the extent that a state law claim bears relation to that bankruptcy case, a federal court can hear the state claim as ancillary to the federal question.¹⁴⁷ Cross’s analogy opens itself to criticism, however, by requiring an expanded definition of ancillary jurisdiction, one in which the ancillary claim need only bear a “logical relationship” to the bankruptcy, rather than the usually-required factual nexus.¹⁴⁸ Ordinarily, for ancillary jurisdiction to exist, the state and federal claims must arise out of the same transaction.¹⁴⁹ Cross answers this criticism by explaining that his model does not treat ancillary jurisdiction as an independent basis for federal bankruptcy jurisdiction. Rather, Congress, in enacting § 1334, merely intended the “related to” grant to act in a way analogous to doctrines of ancillary jurisdiction.¹⁵⁰

In a similar attempt to explain the constitutionality of bankruptcy jurisdiction, Ralph Brubaker likens “related to” jurisdiction to statutory exercises of supplemental jurisdiction.¹⁵¹ Brubaker proposes

involved “pendent” jurisdiction, which concerns the resolution of a plaintiff’s federal and state-law claims against a single defendant in one action. *Id.* Ancillary jurisdiction, by contrast, involves state law claims asserted against a defendant different from the one against whom the federal claim is asserted. *See generally* 16 Moore et al., *supra* note 27, § 106.04[1], at 106-16.

145. *See* John T. Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis from the Perspective of Bankruptcy*, 87 Nw. U. L. Rev. 1188, 1251 (1993). The doctrine of ancillary jurisdiction evolved to allow defendants to assert related state law claims in a federal lawsuit, even though no independent basis of federal jurisdiction exists for those claims. *See Moore v. N.Y. Cotton Exch.*, 270 U.S. 593 (1926) (coining the doctrine of ancillary jurisdiction in its modern form).

146. *See* Cross, *supra* note 145, at 1235.

147. *Id.*

148. *Moore*, 270 U.S. at 609-10. This is based on factual relatedness akin to the *Gibbs* “common nucleus of operative fact” test. *Gibbs*, 383 U.S. at 725.

149. *See* Moore et al., *supra* note 27, § 106.04[1], at 106-16.

150. According to Cross, it is the statutory language, not the common law doctrines, which define the proper scope of bankruptcy jurisdiction. *See* Cross, *supra* note 145, at 1237, 1244.

151. *See* Brubaker, *supra* note 71, at 752-53. 28 U.S.C. § 1367(a) (2000) provides that “[federal] district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” Brubaker’s argument is similar to that of Cross, *supra* note 145, but relies on § 1367, rather than common law doctrines of ancillary and pendent jurisdiction. Brubaker also criticizes Cross’s depiction of related state-law claims as ancillary to a bankruptcy “case.” According to Brubaker, Cross’s model rests on an outdated in rem theory of bankruptcy jurisdiction. *See* Brubaker, *supra* note 71, at 832 (“The bankruptcy ‘case’ is not the primary jurisdictional unit in bankruptcy; individual bankruptcy proceedings present the justiciable controversies for exercise of the federal judicial power in bankruptcy.”).

that we view the bankruptcy estate as a federal entity as per *Osborn*,¹⁵² rather than a jurisdictional res.¹⁵³ In this model, all in personam claims by and against the estate constitute traditional federal questions. In a fashion similar to the way § 1367 empowers a federal court to hear claims “supplemental” to federal questions, so to does § 1334 enable that court to hear “related to” third-party disputes.¹⁵⁴

Analogies to supplemental and ancillary jurisdiction have considerable basis in the Bankruptcy Code’s legislative history. The 1978 Bankruptcy Reform Act’s jurisdictional scheme was justified as a policy matter on precisely the same grounds of “procedural convenience, fairness, and judicial economy” that drove the parallel creation of supplemental jurisdiction.¹⁵⁵ Moreover, as Susan Block-Lieb has noted, Congress, in other statutes, consistently uses the phrase “related to” to indicate grants of supplemental jurisdiction.¹⁵⁶

III. THE MISSING LINK: HOW FILING A PROOF OF CLAIM RESOLVES CONSTITUTIONAL DIFFICULTIES AND ACCOMMODATES POLICIES IN TENSION

The constitutional approaches discussed in Part II yield varying practical limitations on the scope of “related to” jurisdiction. Protective jurisdiction would seem to allow for an almost limitless “related to” grant. Analogies to supplemental jurisdiction, on the other hand, would limit the “related to” power by testing for factual relatedness between the bankruptcy and related proceedings. Part III.A. presents problems with a protective theory of bankruptcy jurisdiction. Part III.B. concludes that analogies to supplemental jurisdiction best explain the constitutionality of § 1334’s “related to” provision. Yet, as Part III.B. explains, the current “conceivable effect” test often upholds federal jurisdiction over “related to” actions that would fail the traditionally fact-based standards of supplemental jurisdiction. Thus, Parts III.C. and III.D. offer, as a substitute for the “conceivable effect” test, a procedural measure to ensure “related to” actions form valid supplements to federal question cases. Finally, Part III.E. asserts that a proof of claim requirement accommodates policies in tension.

152. See *supra* note 135. For purposes of federal jurisdiction, the bankruptcy estate would function as the National Bank did in *Osborn*.

153. See Brubaker, *supra* note 71, at 844.

154. Provided, according to Brubaker, they share a “conventional supplemental relationship” to a bankruptcy proceeding. *Id.* at 753.

155. *Id.* at 850-51.

156. See Susan Block-Lieb, *The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis*, 62 Fordham L. Rev. 721, 780-81 & nn.338-42 (1994) (listing examples from the copyright, trademark, and patent contexts).

A. Problems with a Protective Theory of Bankruptcy Jurisdiction

Theories of protective jurisdiction generally conflict with a traditional understanding of Article III “as both the source and limits of the federal judicial power.”¹⁵⁷ Article III enumerates but one specific category of protective jurisdiction—diversity of citizenship.¹⁵⁸ As a matter of constitutional interpretation, it does not appear that the Framers intended any more protective jurisdiction other than that over citizens of different states. Otherwise, the Constitution would provide for more such categories. Moreover, a theory of protective jurisdiction would impose no discernible limits on federal judicial power. As one commentator rightly put it, “[g]iven the nearly limitless field of Congress’s Article I concerns, [a protective jurisdiction] approach to federal jurisdiction could, indeed, undermine any intended checks against endless encroachments of the federal judicial power into a protected sphere of state autonomy over the development and administration of state law.”¹⁵⁹

As applied to the bankruptcy context, theories of protective jurisdiction would yield absurd practical results. Under Wechsler’s “greater includes the lesser” model of protective jurisdiction,¹⁶⁰ Congress could theoretically extend jurisdiction to the transactions of any person who at any point was bankrupt or was likely to become bankrupt.¹⁶¹ In redacting the provisions of Article III, the Framers likely did not intend for federal jurisdiction to reach this far. Moreover, the legislative history of § 1334 shows congressional intent for the expanse of “related to” jurisdiction to stop only at the limits imposed by the Constitution.¹⁶² As a constitutional guide, protective jurisdiction provides no workable boundaries to constrain the “related to” grant.¹⁶³

157. Brubaker, *supra* note 71, at 809; *see also* *Textile Workers Union of Ala. v. Lincoln Mills*, 353 U.S. 448, 474-75 (1957) (Frankfurter, J., dissenting); Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and The Federal System* 417 (5th ed. 2003) (terming “classical” the “proposition that the federal courts are courts of limited jurisdiction with no authority to adjudicate except in the instances specifically enumerated in Article III”).

158. U.S. Const. art. III, § 2, cl. 1. *See Lincoln Mills*, 353 U.S. at 476 (Frankfurter, J., dissenting) (finding theories of general protective jurisdiction “inconsistent with Article III’s recognition of ‘protective jurisdiction’ only in the specified situation of diverse citizenship”).

159. Brubaker, *supra* note 71, at 810 (citation omitted).

160. *See supra* note 139 and accompanying text.

161. *See Lincoln Mills*, 353 U.S. at 474 (Frankfurter, J., dissenting).

162. Congress, while intending the “related to” grant to be “broad” and “expanded,” spoke nothing of any limits, either in the statutory language or in the congressional report. *See House Report, supra* note 20, at 13. By this silence, Congress appears to have intended to allow bankruptcy jurisdiction to extend as far as courts, and ultimately Article III, would allow.

163. *See Brubaker, supra* note 71, at 812 (“‘Related to’ bankruptcy jurisdiction is

The Supreme Court has never explicitly endorsed protective jurisdiction as a valid constitutional explanation for bankruptcy jurisdiction.¹⁶⁴ In his *Lincoln Mills* dissent, Justice Frankfurter commented in dicta that bankruptcy jurisdiction “may be deemed to sweep within its scope interests analytically outside the ‘federal question’ category, but sufficiently related to the main purpose of bankruptcy to call for comprehensive treatment.”¹⁶⁵ Frankfurter was referring, however, to plenary cases brought by a trustee under state law to recover property.¹⁶⁶ Regarding “related to” third-party litigation, it is unlikely that Frankfurter would consider Congress’s bankruptcy power to justify exceeding the traditional limits of Article III.¹⁶⁷

B. *The Weaknesses of Analogies of Supplemental Jurisdiction*

Brubaker and Cross’s theories run up against one general difficulty, namely that certain “related to” actions fail conventional tests for supplemental and ancillary jurisdiction. Courts typically limit exercises of supplemental jurisdiction to state law claims arising out of the same “nucleus of operative fact” as their federal counterparts.¹⁶⁸ If the Constitution compels such a common-law standard to ensure supplemental claims form part of a justiciable Article III “case,”¹⁶⁹ analogies to supplemental jurisdiction fail to constitutionally justify a jurisdictional scheme where bankruptcy-related disputes often share little factual overlap with an “arising under” claim.¹⁷⁰

not self-defining, and protective jurisdiction theory as a referent provides no readily discernible limits, much like the prevailing test for ‘related to’ bankruptcy jurisdiction itself.” (citation omitted)).

164. See *supra* note 140 and accompanying text.

165. *Lincoln Mills*, 353 U.S. at 483 (Frankfurter, J., dissenting)

166. Recall the summary/plenary jurisdictional system under the 1898 Act, discussed *supra* notes 60-67 and accompanying text.

167. See *Lincoln Mills*, 353 U.S. at 483-84 (“If there is in the phrase ‘arising under the laws of the United States’ leeway for expansion of our concepts of jurisdiction, the history of Article III suggests that the area is not great”)

168. See *supra* note 148.

169. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim ‘arising under [the] Constitution, the Laws of the United States’ . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional ‘case’ The state and federal claims must derive from a common nucleus of operative fact.

Id.

170. Another difficulty is that ancillary jurisdiction generally works as a much narrower concept allowing only the court hearing the initial federal claim to hear related nonfederal claims. See Cross, *supra* note 145, at 1237. Typically, ancillary jurisdiction requires not only that the various claims logically form a single case, but also that the federal court hear the claims as one case. *Id.* Because bankruptcy jurisdiction allows “a ‘splitting’ of the federal case into its constituent federal and nonfederal components, they do not fit neatly within current theories of ancillary

For example, it is difficult to find a federal bankruptcy claim arising out of the same facts as, say, a related divorce proceeding between a bankruptcy debtor and her husband. It is unlikely that the bankruptcy petition itself so arises, unless the divorce forced the debtor to file. Perhaps the divorce shares facts common to other bankruptcy proceedings such as disputes regarding preference payments, fraudulent transfers, exempt property, etc. Similarly, however, none of these disputes is likely to arise from the personal circumstances between the debtor and her husband that gave rise to the divorce. Yet, courts will at times extend federal bankruptcy jurisdiction to the divorce proceeding on the basis that its outcome will affect the amount of property available for distribution to creditors.¹⁷¹ Traditional doctrines of supplemental jurisdiction fail to fully reconcile this outcome with Article III.

1. Conceptually Broadening the Constitutional Case

The dilemma can be resolved if we consider, as several commentators have, that pragmatic, not constitutional concerns, motivate the factual standards of relatedness currently in place outside of the bankruptcy context.¹⁷² Denis McLaughlin and Richard Matasar both understand Article III's "Case" requirement as broad enough to embrace supplemental claims sharing less factual overlap with federal claims than *Gibbs* requires.¹⁷³ If correct, these theories of Article III justify expansive "related to" bankruptcy jurisdiction. The potential effect of a third party action on a bankruptcy provides a "logical relationship" between state and federal claims. Such a

jurisdiction." *Id.* (citation omitted)

171. See, e.g., *Christie v. Chong*, No. C-02-0472, 2002 WL 598428, at *3 (N.D. Cal. 2002) (holding a divorce proceeding involving allocation of debtor's property at least "related to" the bankruptcy, but remanding on abstention grounds).

172. These pragmatic concerns, as the *Gibbs* Court noted, include "considerations of judicial economy, convenience and fairness to litigants." 383 U.S. at 726.

173. See Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 Cal. L. Rev. 1401 (1983) (contending that the only limit to supplemental jurisdiction is the existence of a case or controversy as defined under lawfully adopted procedural rules for the joinder of claims and parties, and that no common nucleus of operative fact is constitutionally required). Yet, acceptance of Matasar's view might give Congress too much power to extend subject matter jurisdiction, merely by expanding joinder rules. McLaughlin similarly understands the Article III "case or controversy" as consisting "of all claims that bear some 'logical relationship' to the original jurisdiction claim sufficient to justify joinder of the claims in a single action, irrespective of the precise nature of the nexus that establishes the logical relationship." Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 Ariz. St. L.J. 849, 910 (1992) (citation omitted).

relationship, according to McLaughlin, is all that Article III demands.¹⁷⁴

C. A Procedural Alternative to Resolve Constitutional Doubt

Perhaps expansive “related to” bankruptcy jurisdiction does not require such an enlarged view of the Article III “Case.” Is there really no bankruptcy proceeding with which typical third-party litigation shares a common factual basis? Take *In re WorldCom, Inc. Securities Litigation*,¹⁷⁵ for example. There, city pension funds sued WorldCom’s former executives, directors, underwriters, and accountants for securities fraud.¹⁷⁶ The defendants sought removal on the basis that their litigation was related to the WorldCom bankruptcy commenced several months earlier.¹⁷⁷ Defendants argued that their litigation was related to the WorldCom case because, *inter alia*, the defendants had entered into agreements with WorldCom that included promises to indemnify.¹⁷⁸ Moreover, because the defendants and WorldCom were potentially jointly and severally liable to the pension funds, the defendants had contribution rights against WorldCom should they be found liable.¹⁷⁹ According to the court, these indemnification and contribution rights, “conceivabl[y]” giving rise to claims against the estate, created “related to” jurisdiction over the third-party litigation.¹⁸⁰

In this scenario, it appears that the pension fund’s claim and the accountant’s indemnity rights indeed arose out of a “common nucleus of operative fact.” Were it not for WorldCom and its agents’ fraudulent bond offerings, the pension fund would not have sued. And without the fund’s lawsuit, the directors and other defendants would not have claimed indemnity or contribution rights against the estate. Thus, the factual basis—the securities fraud—in effect gave rise to the claims both of the third-party plaintiff against the defendant, and the third-party defendant against the estate.

The above analysis leaves one glaring question unresolved, namely whether or not the third-party defendant’s indemnification rights constitute a real federal question. Arguably, the third-party defendant possesses only a contingent right to indemnity at the time “related to” jurisdiction is at issue. If the third-party defendant has not yet judicially asserted that right, the supplemental jurisdiction analogy fails, as there is no base federal question, merely the potential

174. See McLaughlin, *supra* note 173, at 910.

175. 293 B.R. 308 (Bankr. S.D.N.Y. 2003).

176. *Id.* at 311.

177. *Id.*

178. *Id.* at 316.

179. *Id.*

180. *Id.* at 321.

for one. This section demonstrates that when the defendant files a proof of claim pursuant to § 501, the previously unasserted indemnification rights now “arise under” the Bankruptcy Code, becoming predicate federal questions to which “related to” claims can attach.

The Bankruptcy Code defines what constitutes a “claim” against the estate very broadly, so as to include even rights that are contingent on the occurrence of some future event.¹⁸¹ Courts typically treat indemnification rights as falling within this broad definition of “claim.” Sometimes indemnification rights arise from express agreement; other times the rights accrue through common-law principles of quasi-contract. For timing purposes, courts consider indemnity rights to become “claims” either at the moment the parties enter the indemnity agreement, or absent an express contract, at the moment the underlying suit is brought, the outcome of which would trigger indemnification.¹⁸²

Once a creditor has a valid claim against the bankruptcy estate, the creditor can preserve the claim by filing a “proof of claim” with the bankruptcy court pursuant to § 501.¹⁸³ Without an allowed proof of claim, the creditor cannot share in the distribution of the estate. In a chapter 11 business reorganization, a debt-holder without a proof of claim cannot be treated as a creditor for purposes of voting on a plan and distribution of dividends.¹⁸⁴ In effect, until filing a proof of claim, a creditor’s rights do not affect the bankruptcy.

Despite the broad definition of claim set forth by § 101(5), some claims may be disallowed under § 502.¹⁸⁵ Particularly relevant here is § 502(e) which instructs the bankruptcy court to disallow “any claim for reimbursement or contribution of an entity that is liable with the debtor”¹⁸⁶ to the extent that “such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance.”¹⁸⁷ The purpose of 502(e) is to “prevent . . . competition

181. See 11 U.S.C. § 101(5)(a) (2000) (defining a claim to include any right whether or not such right has been “reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured”); see generally 2 *Collier*, *supra* note 26, ¶ 101.05[1], at 101-25 to 101-28.

182. See, e.g., *In re Frenville Co., Inc.*, 744 F.2d 332, 336-37 (3d Cir. 1984) (stating in dicta that indemnification resulting from an indemnity contract arises upon the signing of an indemnification agreement, and ultimately holding that a non-contract based indemnification claim arises when the cause of action for the underlying negligence action is brought).

183. See 11 U.S.C. § 501(a) (“A creditor or an indenture trustee may file a proof of claim.”); *infra* note 205 and accompanying text (listing cases that look to the existence of proof of claim as a primary factor in testing for relatedness).

184. See 4 *Collier*, *supra* note 26, ¶ 501.01[2], at 501-4.

185. See 11 U.S.C. § 502; see generally 4 *Collier*, *supra* note 26, ¶ 502.02, at 502-9.

186. 11 U.S.C. § 502(e)(1).

187. *Id.* § 502(e)(1)(B).

between a creditor and [its] guarantor for limited proceeds of the estate.”¹⁸⁸ Further, courts have interpreted “reimbursement” to include indemnity claims.¹⁸⁹

Thus, in a scenario like *In re WorldCom*,¹⁹⁰ § 502(e) might preclude the directors from filing a proof of claim against the estate. The pension fund in *In re WorldCom* would have sued both WorldCom and its directors as co-defendants but for WorldCom’s bankruptcy petition, which stayed the plaintiff’s suit as to WorldCom. Filing the bankruptcy petition turned the pension fund into a creditor with a claim against the bankruptcy estate. If the directors are found liable to the pension fund, they too possess a fixed claim against the WorldCom estate. By disallowing the directors’ contingent claims for indemnity or contribution where the directors are co-liable with WorldCom, § 502(e) ensures that the WorldCom estate will not have to double pay on essentially the same claim.¹⁹¹ Thus, for any charge on which a court could find the directors jointly liable with WorldCom, the bankruptcy court would disallow a proof of claim.

However, § 502(e)(1) does not apply where WorldCom is liable to the directors purely for contractual indemnification, triggered by the directors becoming liable to the pension fund on the underlying securities fraud.¹⁹² Article X, section 2 of WorldCom’s by-laws provided that WorldCom would indemnify and advance expenses to its directors “to the fullest extent permitted under” Georgia corporations law.¹⁹³ This provision permitted the directors to immediately recoup costs incurred in the underlying litigation, regardless of whether or not a judgment had been rendered.¹⁹⁴ Thus, the directors had immediate, unobjectionable proofs of claim to file against the WorldCom estate. In fact, the directors in *In re WorldCom* did so file, including a proof of claim for over five million

188. *House Report*, *supra* note 20, at 354.

189. *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 146 B.R. 92, 95 (Bankr. S.D.N.Y. 1992 (citing *In re Wedtech Corp.*, 85 B.R. 285, 289 (Bankr. S.D.N.Y. 1988))).

190. For a discussion of the factual circumstances of the case, see *supra* notes 175-80 and accompanying text.

191. *See In re White Motor Corp.*, 731 F.2d 372, 374 (6th Cir. 1984).

192. *See In re Chateaugay Corp.*, 154 B.R. 416, 420 (Bankr. S.D.N.Y. 1993) (holding that, for § 502(e)(1) to apply, there must be a “sharing of a liability” and that “although the source of liability may differ, each debtor must be liable to the same party for essentially the same claim” (citation omitted)).

193. Restated By-Laws of WorldCom, Inc., at <http://contracts.corporate.findlaw.com/agreements/worldcom/bylaws.html> (last visited Jan. 21, 2004). This contractual indemnity supplied one of the directors’ arguments for “related to” bankruptcy jurisdiction. *See In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 320 (Bankr. S.D.N.Y. 2003).

194. *See Ga. Code Ann.* § 14-2-856(c) (2003) (providing, subject to several conditions, that “a corporation may advance or reimburse expenses incurred in advance of final disposition of the proceeding”).

dollars in legal fees.¹⁹⁵ These filings force immediate recognition of the director-defendants as a major creditor in the WorldCom bankruptcy and should per se confer “related to” jurisdiction over the underlying securities litigation.

This argument carries the natural corollary that had the director-defendants failed to file proofs of claims against the estate by the time they sought removal, bankruptcy jurisdiction would not extend to the securities lawsuit. This result may seem the product of form over function, but constitutionally it makes sense. As explained earlier, analogies to supplemental jurisdiction work somewhat well to explain Congress’s power to confer “related to” bankruptcy jurisdiction on federal courts.¹⁹⁶ This model requires, however, a base federal question for the state law claims to supplement. If there is no proof of claim against the bankruptcy estate—no “arising under” federal question in the cumulative Article III “case”—constitutional uncertainty taints the extension of federal judicial power to the state law litigation. Although somewhat formal, the proof of claim requirement is a procedural hurdle easily cleared by a third-party defendant seeking to remove. The defendant need only file a proof of claim sometime prior to his motion for removal.

D. *The Proof of Claim Condition and the Case Law*

The proof of claim requirement also provides an easy answer to the common-law methods for testing “related to” jurisdiction. Without a proof of claim, a third-party defendant is entitled to none of the privileges bankruptcy law affords creditors, and thus his third-party lawsuit cannot affect either distribution or reorganization. Logically then, state law litigation has no immediate effect, either financial or legal, on a bankruptcy until the third-party defendant has filed a proof of claim. Although the right to payment from the debtor is contingent on the outcome of the third-party litigation, a filed proof of claim forces the bankruptcy court to consider the claimant in deciding distribution or plans for reorganization. Conversely, if the bankruptcy court disallows a proof of claim pursuant to § 502,¹⁹⁷ then that claim cannot affect the bankruptcy, and thus neither can the state law action from which it derives.

195. See *In re WorldCom*, 293 B.R. at 320-21 & n.18 (noting that the director defendants filed proofs of claim “in the WorldCom bankruptcy proceeding seeking reimbursement for defense costs and asserting tort and contract claims against WorldCom in addition to the contractual and statutory indemnity and contribution claims”).

196. See *supra* notes 144-80 and accompanying text.

197. 11 U.S.C. § 502 (2000); see *supra* notes 185-87 and accompanying text.

E. Proofs of Claim and Bankruptcy Policy

Requiring a proof of claim also strikes the appropriate balance among competing policies. The requirement at once both eliminates the expense and delay attendant to piecemeal litigation and ensures that "related to" jurisdiction does not sweep too broadly. The "related to" provision causes bankruptcy courts to hear many more lawsuits than they normally would absent such expansive judicial reach. Bankruptcy courts must avoid wasting limited judicial resources on state law litigation having no immediate effect on a bankruptcy. Requiring a proof of claim ensures that they do not. Armed with this requirement, bankruptcy courts will not have to halt the bankruptcy process to wait out pending third-party litigation. Instead they can reason that the only outcomes worth waiting for are those where the third-party defendant has preserved his rights and filed a proof of claim. Only then can the third-party litigation potentially restructure distribution among creditors when it ends. If that third-party has not yet filed a proof of claim, and the bankruptcy judge faces an impending jurisdiction decision, the judge can merely set a quickly approaching bar date.¹⁹⁸ This forces the third-party defendant to either file a proof of claim and remove, or refrain from filing and pursue his future claim outside bankruptcy.

A common criticism of expansive bankruptcy jurisdiction is that it intrudes into the judicial provinces normally reserved to the states.¹⁹⁹ The broader the "related to" grant, the more state courts lose the right to adjudicate claims that arise in their territory, involve their law, and demand their expertise. Having a filed proof of claim as the only condition precedent to federal jurisdiction may at times offend states' rights. However, the abstention provisions of § 1334²⁰⁰ exist to protect state courts and states' rights.²⁰¹ Moreover, an overly narrow

198. Bankruptcy Rule 3002(c) sets forth a default ninety days, beginning after the first meeting of creditors, within which a creditor must file its proof of claim. Fed. R. Bankr. P. 3002(c); see generally 4 *Collier, supra* note 26, ¶ 501.02[5][a][i], at 501-14. Additionally, Rule 3003(c)(3) empowers bankruptcy courts to fix their own claims bar date, which the court may then strictly enforce. See 4 *Collier, supra* note 26, ¶ 501.02[5][b][i], at 501-15.

199. See *In re FedPak Sys., Inc.*, 80 F.3d 207, 214 (7th Cir. 1996) (favoring a narrow "related to" standard "to prevent the expansion of federal jurisdiction over disputes that are best resolved by the state courts"); *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 787-88 (11th Cir. 1990) (stating that overbroad construction of "related to" jurisdiction may bring into federal court matters that should be decided by state courts); Lori J. Forlano, Note, *Why Bankruptcy "Related To" Jurisdiction Should Not Reach Mass Tort Nondebtor Codefendants*, 73 N.Y.U. L. Rev. 1627, 1645-46 (1998) (arguing that the case for allowing state courts to adjudicate state-created rights is strongest in the mass tort context).

200. See *supra* notes 44-45 and accompanying text.

201. See *House Report, supra* note 20, at 51.

interpretation of the “related to” language would render these abstention provisions largely irrelevant.²⁰²

Critics of a broad reading of the “related to” grant also argue that a bankruptcy court should not interfere with a plaintiff’s right concerning forum selection.²⁰³ The proof of claim requirement might be vulnerable to this criticism as it allows the defendant of a third-party lawsuit to “hijack” state law litigation by filing a proof of claim and removing to federal court. Arguably, however, the broader “conceivable effect” test allows the defendant even more forum control. Under that test, the defendant can “hijack” the lawsuit as soon as there is even a distant possibility that he will pursue his indemnification rights against the debtor. Courts justify this disruption of plaintiff’s forum choice by citing the countervailing interest in an efficient bankruptcy system. More than any other standard, the proof of claim requirement ensures that courts only disrupt the plaintiff’s forum choice when these efficiency interests actually are achieved.

Forum selection problems may arise in the converse situation as well—where the plaintiff seeks original “related to” jurisdiction in a federal court, but the defendant has not yet filed a proof of claim. The proof of claim requirement may allow defendant to stay in state court as long as he wants. However, in the overwhelming number of “related to” questions, it is the plaintiff, not the defendant, who wishes to remain in state court. Moreover, the third-party defendant will likely have a substantial interest in filing a proof of claim sooner rather than later. Without doing so, the defendant will forgo his rights to both the proceeds of the debtor’s estate and to a vote on the plan for reorganization. Once the third-party defendant files a proof of claim, the plaintiff would be free to remove to federal court pursuant to § 1452(a).²⁰⁴

202. Critics argue, on federalism grounds, that abstention provisions alone cannot “cure a jurisdictional defect.” Forlano, *supra* note 199, at 1647 & n.148; *see also Lemco Gypsum*, 910 F.2d at 788 n.16 (noting that abstention provisions only partially address comity issues). Yet, conditioning removal on the filing of a proof of claim sufficiently restrains the “related to” provision to dispel any constitutional uncertainty. With the jurisdictional defect already cured, therefore, the abstention provisions serve their proper function—i.e., balancing federal and state interests; the interests of the bankruptcy system with the interests of local litigants and local courts.

203. *See, e.g.*, E. Scott Fruehwald, *The Related to Subject Matter Jurisdiction of Bankruptcy Courts*, 44 Drake L. Rev. 1, 31 (1995).

204. 28 U.S.C. § 1452(a) (2000). Unlike the general statutory removal provision for other federal questions, § 1452(a) does not condition removal on a district court having original jurisdiction, nor does it require the defendant to seek removal. *Compare* 28 U.S.C. § 1441(a) (“[A]ny civil action brought in a State court of which the district courts of the United States have *original* jurisdiction, may be removed by the *defendant* . . .”) (emphases added), *with* 28 U.S.C. § 1452(a) (“A party may remove any claim . . . to the district court for the district . . . if such district court has

CONCLUSION

The area of "related to" jurisdiction is one of erratic case law, competing policies, and constitutional difficulty. As this Note has demonstrated, the proof of claim requirement will bring needed consistency to the field, preserving judicial resources and building a concrete, predictable jurisprudence. The change will not require wholesale overhaul of the current "related to" analysis. In fact, some courts already look to the existence of a proof of claim as a primary factor in testing for relatedness.²⁰⁵ Given the current frequency with which jurisdictional issues are litigated, courts should strive to evolve this trend into a hard and fast rule that at once reduces jurisdictional litigation, preserves the speed and efficiency of the bankruptcy system, and complies with Article III. The proof of claim requirement, as a bright-line procedural rule, will greatly reduce litigation of jurisdictional issues. At the same time, the rule sweeps within its scope any action so affecting a bankruptcy as to demand its immediate adjudication by a federal court. Finally, the rule ensures that the nearly limitless "related to" grant respects the jurisdictional boundaries established by Article III of the Constitution.

jurisdiction of such claim or cause of action under section 1334 of this title.").

205. See, e.g., *In re Best Reception Sys., Inc.*, 220 B.R. 932, 944 (Bankr. E.D. Tenn. 1998) (deeming third-party proceedings to be related because third-party defendant filed a proof of claim, demonstrating intent to seek indemnification from debtor); *In re U.S. Brass Corp.*, 173 B.R. 1000, 1004 (Bankr. E.D. Tex. 1994) ("[I]f a proceeding is related to the underlying bankruptcy by virtue of an indemnification agreement against debtor, there must be something to evidence the impact, like a proof of claim; otherwise the Court has no interest in the non-debtor parties' squabble" (citation omitted)); *In re Salem Mills, Inc.*, 148 B.R. 505, 509 (Bankr. N.D. Ill. 1992); *In re Spaulding & Co.*, 131 B.R. 84 (Bankr. N.D. Ill. 1990) (holding that action among non-debtor parties involving indemnity agreement against debtor is not per se "related to" underlying bankruptcy case; "related to" proceeding must have a real or tangible or conceivable impact upon allocation of property among creditors evidenced by actual proof of claim, and not some probable or potential interference).