

Norton Annual Survey of Bankruptcy Law
August 2008
Part I . Article 11

Abstention: Recent Developments

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I. INTRODUCTION

There are two statutory provisions for abstention in the context of a bankruptcy matter--[11 U.S.C.A. § 305](#) and [28 U.S.C.A. § 1334\(c\)](#). [Bankruptcy Code § 305](#) contemplates that there are certain instances where the bankruptcy court may have proper jurisdiction in a case, but the court's intervention may not serve the best interests of the debtor and the creditors. [\[FN1\]](#) It provides that, after notice and a hearing, [\[FN2\]](#) the court "may dismiss a case under this title or may suspend all proceedings in a case under this title." [\[FN3\]](#) [Section 305](#) is limited to the extent that it does not authorize a bankruptcy court to abstain from hearing a portion of the bankruptcy proceedings before it, such as a particular adversary proceeding or a particular creditor's claim. [\[FN4\]](#) Instead, [section 305](#) provides the court with the ability to abstain from hearing an entire bankruptcy case that falls within its jurisdiction. [\[FN5\]](#)

The Code provides two scenarios where it is appropriate for the court to abstain from hearing a case. The first is where the interests of the creditors and the debtor are best served by the court's abstention. [\[FN6\]](#) The second is when there is pending a foreign proceeding that meets the "fairness" criteria set forth in Code § 304(c). [\[FN7\]](#) Courts have consistently held that abstention under [section 305](#) is an extraordinary power that should only be exercised by the court in extraordinary circumstances. [\[FN8\]](#) This is especially true in light of section 304(c), which expressly precludes review of a district court's decision to abstain by the courts of appeals or by the Supreme Court. [\[FN9\]](#)

Unlike [section 305](#), which authorizes abstention from an entire case, [28 U.S.C.A. § 1334\(c\)](#) allows a court to abstain from hearing a particular proceeding. If a party seeks to have a bankruptcy court abstain from a proceeding, [§ 1334\(c\)](#) is the appropriate vehicle; if it desires suspension of all proceedings within a case, [§ 305\(a\)](#) should be invoked. [\[FN10\]](#) Under certain circumstances, abstention from a particular proceeding or matter is mandatory: those proceedings related to a bankruptcy case, but not arising under [Title 11](#) (noncore). [\[FN11\]](#) Where the requirements for mandatory abstention are not met, the court has the discretion to abstain from hearing a proceeding in the interests of justice or comity with state courts or out of respect for state law. [\[FN12\]](#)

II. [11 U.S.C.A. § 305](#)--ABSTENTION

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A. 11 U.S.C.A. § 305(a)(1)--Best Interests of the Creditors and the Debtor

The determination of whether abstention is in the best interests of the creditors and the debtor is a fact-intensive inquiry based on the "totality of the circumstances." [FN13] This, however, does not mean that the bankruptcy court must conduct an independent evidentiary hearing to determine whether abstention is in the best interests of the creditors before abstaining from a case. In fact, one court has indicated that a bankruptcy court faced with a motion under section 305(a)(1) should not conduct an evidentiary hearing because to do so "would 'uselessly place form over substance.'" [FN14]

Courts, however, should inquire into the circumstances of a case in determining whether, under the totality of the circumstances, the best interests of the creditors will be served by abstention. In making this inquiry, many courts have relied on a three-part test to determine if abstention is appropriate in an involuntary case. [FN15] Under this test, the court will abstain if: (1) the petition was filed by a few recalcitrant creditors while most creditors oppose the bankruptcy; (2) there is an out-of-court arrangement in progress; and (3) the dismissal of the petition serves the best interests of the debtor and the creditors. [FN16]

Other courts have chosen to examine a number of factors to determine whether to abstain from exercising jurisdiction. These factors include: (1) the time and efficiency of administration; (2) whether there is already another forum available to protect the parties' interests; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of distributing the assets in an equitable manner; (5) whether the parties are able to reach an out-of-court arrangement which is less expensive and better serves the interests of all the parties; (6) whether a non-federal insolvency has progressed to the point where it would be more costly and time consuming to begin a bankruptcy proceeding; and (7) the purpose for which the bankruptcy jurisdiction is being invoked. [FN17]

Case law has provided examples of when abstention may serve the best interests of creditors, which include: involuntary cases that are essentially two-party disputes; [FN18] cases where the only significant assets are lawsuits, and pursuing such litigation in bankruptcy serves little purpose other than to drive up the administrative costs to the estate; [FN19] cases where there is another forum better suited to address the issues raised in a particular case; [FN20] and, of course, when an involuntary case is commenced by a few recalcitrant creditors to gain negotiating or other leverage in a state court litigation.

Other cases describe circumstances where abstention is not in the best interests of the creditors. For instance, abstention is not necessarily warranted because a debtor has the ability to pay creditors outside the bankruptcy. In *Achey*, the debtor filed a motion to dismiss her bankruptcy, claiming that because of an inheritance that she received after filing her voluntary petition under Chapter 7, she would be able to pay creditors outside of the bankruptcy. [FN21] Emphasizing that the debtor's inheritance would not provide her with sufficient funds to pay off her unsecured creditors in full, thereby prejudicing those creditors, the court held that "[t]he ability to pay creditors outside a bankruptcy case cannot constitute the sole ground as cause to grant a dismissal." [FN22] A more recent decision held that abstention was not in the best interests of the estate where receiver filed bankruptcy petitions on behalf of judicially dissolved limited partnerships, seeking to liquidate them under the provision of Chapter 11. [FN23] In *State Park*, the receiver's authority to file a petition on behalf of the limited partnerships was challenged. The court held that, not only did the receiver have authority to file petition on behalf of the partnerships under Texas law, but the utilization of the Bankruptcy Code to expeditiously effectuate the sale of assets was in the best interests of the debtors and their creditors. Another bankruptcy court dismissed an involuntary Chapter 7 petition as the case involved issues of unsettled nonbankruptcy law, preferring the pending state court forum to try and decide the issues presented. [FN24]

Because abstention decisions are not reviewable by a court of appeals or by the Supreme Court, the case law relating to section 305(a) is relatively scarce. [FN25] However, certain recent cases stand out on the issue of abstention.

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In *JR Food Mart of Arkansas, Inc.*, [\[FN26\]](#) the bankruptcy court granted the debtor's motion to abstain from hearing the involuntary case, even though the involuntary was the debtor's "third foray into bankruptcy." [\[FN27\]](#) The court found that the involuntary proceeding represented a long-standing two-party dispute emanating from state court litigation, and therefore, it held that there was no remedy for the debtor or creditors in bankruptcy that the state court could not provide. [\[FN28\]](#)

The bankruptcy court further cautioned that:

[D]issatisfaction with another court's rulings, or the perceived untimeliness of rulings, is not a reason to file a bankruptcy case. Indeed, such a filing may constitute an abuse of the bankruptcy process. It is not the province of the bankruptcy court to either oversee or manage a case more properly within the purview of the state courts simply because a party to litigation is dissatisfied for procedural or other reasons. [\[FN29\]](#)

In contrast, the bankruptcy court in *R&A Business Associates*, whose decision was affirmed by the district court, [\[FN30\]](#) declined to abstain from the bankruptcy proceeding. In that case, the court recognized that while the involuntary proceeding was initiated by two creditors who were, at the time, embroiled in a state court action with the debtor, nine other creditors later joined in the involuntary petition. Therefore, the court held that abstention would not be in the best interests of creditors as the bankruptcy proceedings were no longer a two-party dispute.

Likewise, in *Paper I Partners, L.P.*, an involuntary Chapter 7 case, the court refused to abstain from hearing a case under [section 305](#), in part because of the large number of creditors. [\[FN31\]](#) The debtors claimed that the obligations of the petitioning creditors, all former limited partners of the debtors, had been paid by issuance of "Promissory Security" or, in the alternative, that the maturity date of the partners' debts had been postponed by issuance of "Promissory Security," and thus the obligations were not yet payable. [\[FN32\]](#) The court found that, indeed, the "Promissory Security" was not payment and did not extend the maturity dates of the obligations but, instead, was "a forced extension of credit by the limited partners to the Partnership." [\[FN33\]](#) Thus the court denied the requested relief. It found that such extraordinary relief was not warranted, specifically because (1) the number of petitioning creditors was unusually large at 30, (2) no creditors had appeared in opposition, and (3) the only opposition was from the debtors' general partner, whose only interests were subordinate to those of the petitioning creditors. [\[FN34\]](#)

Another scenario under which the issue of abstention often arises is in the premature filing of a bankruptcy case in anticipation of exposure to significant liabilities. The recent case of *Schur Management*, [\[FN35\]](#) the court dismissed bankruptcy cases filed by codefendants in a state court litigation as having been filed prematurely and therefore not in good faith. Debtors had been defending a state court litigation, during which time their insurance company was liquidated. Fearing that without a general liability policy, they would suffer significant exposure, the debtors each filed voluntary petitions, citing the need to protect their assets. The court held that the debtors had no "present need to file... only the 'mere possibility of a future need to file.'" [\[FN36\]](#) The state court litigation had no effect on the debtors' financial position or viability, and there was no reasonable to believe that these debtors could not obtain all needed bankruptcy relief if and when an adverse jury verdict is entered against them.

Abstention also arises frequently in the context of an assignment for the benefit of creditors or other out-of-court arrangement. Certain recent cases illustrate this growing scenario. [\[FN37\]](#) In *Cincinnati Gear*, [\[FN38\]](#) the court dismissed an involuntary petition on the grounds that the interests of creditors were no better, and perhaps worse, served in bankruptcy in light of the fact that the debtor assigned all of its assets to an assignee prior to the involuntary petition. In *Fortran Printing*, [\[FN39\]](#) the court dismissed an involuntary petition in favor of a state receivership proceeding. In *NRG Energy*, [\[FN40\]](#) the court dismissed an involuntary Chapter 11 because the company was in the process of negotiating restructuring agreements with its various creditor constituencies. The court in that case noted that, even though the debtor may pursue a prepackaged reorganization in another judicial district, the interests of creditors and judicial economy was better served by allowing the debtor to finalized its preliminary restructuring work outside of court and without the expense of being in bankruptcy. [\[FN41\]](#)

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In a rare circumstance, a bankruptcy court has declined to abstain from a Chapter 7 bankruptcy proceeding where the Chapter 7 debtors died during the pendency of the case. [FN42] The court determined that both the probate and bankruptcy cases could proceed simultaneously with little or no difficulty. [FN43]

B. 11 U.S.C.A. § 305(a)(2)--Pending Foreign Proceedings

As little case law there is on [section 305\(a\)\(1\)](#), there is even less law on [section 305\(a\)\(2\)](#), which provides that when there is a pending foreign proceeding, and certain other factors exist which are set forth in section 304, abstention is warranted. [FN44] To qualify as a "foreign proceeding," three requirements must be met: (1) the proceeding must entail an administrative or judicial process involving insolvency or reorganization; (2) it must be conducted for the purpose of liquidating an estate, adjusting its debts or effecting its reorganization; and (3) it must be pending in a foreign country, where the debtor maintains its residence, domicile or principal place of business. [FN45]

A recent case, *In re Xacur*, [FN46] demonstrates how difficult it is to dismiss a case under [section 305\(a\)\(2\)](#). In the *Xacur* case, the bankruptcy court in Houston declined to abstain from the involuntary bankruptcy proceedings initiated by seven Mexican banks and one American bank against three Mexican citizens: Jacobo Xacur, Jose Maria Xacur, and Felipe Xacur.

The court found that since the Xacurs transferred their residences from Mexico to the U.S., they in effect "stymied any further activity in the individual civil proceedings" pending against them in Mexico, and therefore, it was in the best interests of creditors to allow the bankruptcy proceedings to continue. The court also found that because there was no foreign proceeding pending against the debtors collectively and that certain proceedings pending against the Xacur companies did not qualify as a "foreign proceeding" against the debtors, the debtors could not satisfy the required elements under [section 305\(a\)\(2\)](#) for abstention.

Similarly, in the more recent case of *In re Aerovias Nacionales De Columbia S.A. Avianca*, [FN47] the court denied a motion to dismiss and retained jurisdiction over the Chapter 11 case of a Columbian airline company. The court determined that because there was no pending foreign proceeding, the debtor had substantial U.S. contacts and business, and the debtor's leases with U.S. airport facilities constituted its primary assets, retention of jurisdiction in the U.S. was appropriate. [FN48] The court found that the foregoing factors overrode the facts that (i) the debtor had more than 4000 employees in Columbia; the debtor had only 28 employees in the U.S.; and (iii) the debtor was organized under the laws of Columbia. [FN49] The court reasoned:

This is not a case where the foreign debtor has manipulated its place of filing or has attempted to evade its creditors, either to take advantage of the fact that the United States leaves management in possession of the estate, to benefit from a different system of priorities or to gain some other perceived legal advantage. [FN50]

In another recent case, *In re Globo Comunicacoes E Participacoes*, [FN51] the court vacated and remanded, directing the bankruptcy court to determine on remand whether the court should abstain from involuntary bankruptcy petition against Brazilian holding company. The court went on to conclude that the factors the bankruptcy court must consider upon remand include: (a) whether bankruptcy court could exercise jurisdiction over substantial creditors; (b) whether Brazilian courts would render decisions inconsistent with the bankruptcy court's judgments; (c) whether debtor purposefully availed itself of the U.S. forum; and (d) whether most creditors support the bankruptcy, as opposed to only a few disgruntled creditors. [FN52]

Despite the difficulty in obtaining a dismissal under [section 305\(a\)\(2\)](#) as shown by the foregoing cases, some creditors have been successful. In *Ionica PLC*, the Joint Administrators of debtor's administration proceeding pending in the United Kingdom filed debtor's Chapter 11 proceeding for the purpose of asserting claims of equitable subordination and substantive consolidation, which apparently were unavailable under British law. [FN53] Debtor's parent corporation and one of the creditors moved to dismiss the debtor's bankruptcy, primarily arguing that the

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debtor, a British company, lacked a nexus to the U.S. and therefore, its assets and liabilities should be dealt with in the English proceeding. The court agreed. It considered the factors outlined in 304(c):

- (1) just treatment of all holders of claims against or interests in such estate;
- (2) protection of claim holders in the U.S. against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of such estate;
- (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
- (5) comity; and
- (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

Finding that "[a]ll of [these] factors tip in favor of dismissal with the possible exception of [section] 304(c)(4)," the court granted the motion to dismiss. [FN54] The court wrote "the absence of the equitable subordination and substantive consolidation remedies does not make English insolvency law repugnant. In truth, no two distribution schemes are identical. If the lack of identity was a determining factor, the other factors would become meaning less, and no ancillary petition could ever survive." [FN55]

Similarly, in the recent case of *In re Cenargo Int'l PLC*, [FN56] an English shipping company filed under Chapter 11 in the U.S. in part to counter a likely involuntary filing by U.S. noteholders. The company was later placed into administration proceedings in England by a principal creditor who had earlier participated in the U.S. case. Although the reported decision principally involved the question whether the creditor had thereby violated the American stay, the court noted that the proper venue for the case was the United Kingdom, the place of its main business and the only jurisdiction with effective control over its assets and most of its creditors, and the jurisdiction that, most parties agreed, would most efficiently and effectively be able to reorganize its affairs. The court accordingly held against the U.S. creditors' committee, which filed the one remaining objection to abstention, and suspended proceedings under [Bankruptcy Code § 305\(a\)\(2\)](#).

It is worth noting, however, that even if dismissal cannot be obtained pursuant to [§ 305\(a\)\(2\)](#), dismissal pursuant to [§ 305\(a\)\(1\)](#) may still be a possibility, notwithstanding a pending foreign proceeding. In the recent case of *In re Monitor Single Lift I, Ltd.*, [FN57] the court noted that the principles of comity when dealing with a foreign bankruptcy proceeding were not applicable where an indirect, nondebtor subsidiary of the debtor was involved in an administration proceeding in Scotland. The court reasoned that the rationale behind the principles of comity were to provide for "an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." [FN58] Since the assets belonging to the debtor were not the same as the assets held by the subsidiary, there was no need to "give further consideration to the ongoing administration proceeding [in Scotland]." [FN59] The court then applied the factors normally applied in a [§ 305\(a\)\(1\)](#) motion. Although the court in this case ultimately denied the motion, the denial was based on the [§ 305\(a\)\(1\)](#) factors only. [FN60]

C. Authority to Impose Sanctions and Award Costs

While a court cannot abstain from hearing only a portion of a case under [section 305\(a\)](#), there is authority for a court abstaining from a case to retain limited jurisdiction to award costs, attorney's fees, actual and punitive damages, and sanctions. [FN61] In *Kujawa*, the district court affirmed the bankruptcy court's award of costs, attorney's fees, actual and punitive damages, and sanctions after it abstained from the case. In the bankruptcy court, the debtor "alleged that the bankruptcy filing was in bad faith and that his former attorney [and another] had organized the creditors to file." [FN62] The court disqualified the attorney for the creditors because he had once represented the debtor and had previously been disqualified in at least two other cases in the bankruptcy court. [FN63] The court subsequently entered a final order, with conclusions of law, abstaining and dismissing the involuntary petition pursuant to [section 305](#) and retaining limited jurisdiction to award sanctions, costs, fees, and damages. [FN64] The district court affirmed, holding that "the bankruptcy court always has the inherent power to impose civil sanctions on the parties

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who appear before it. The bankruptcy court, therefore, is free to impose monetary sanctions in the form of costs, attorneys' fees or actual or punitive damages for abuse of its procedures." [FN65] While the amount of sanctions imposed against the creditor's attorney was reduced on appeal, the court affirmed the authority of the bankruptcy court to enter an award of attorney's fees even after abstaining from a case. [FN66] Similarly, in *In re Macke Intern. Trade, Inc.*, [FN67] the court awarded attorney's fees against "those who inappropriately invoke the involuntary bankruptcy process." [FN68] The fact that the court failed to exercise its jurisdiction over the case did not prevent it from awarding attorney's fees.

III. [28 U.S.C.A. § 1334](#)--ABSTENTION

As opposed to abstaining from an entire case, courts have authority to abstain from hearing a particular proceeding in the interests of justice. [FN69] In certain instances, courts are required to abstain from hearing a proceeding which does not arise under [Title 11](#). In core proceedings and related proceedings, however, the court has discretion in determining whether to abstain from hearing a proceeding.

"Arising under" proceedings are those where the cause of action is created by [Title 11](#). [FN70] "Arising in" proceedings are proceedings not based on a particular right created by [Title 11](#) and would have no existence outside of a bankruptcy case. "Related to" proceedings are those which potentially have some effect on the bankruptcy estate, such as altering debtor's rights, liabilities, options, or freedom of action, or otherwise have an impact on the administration of the bankruptcy estate. [FN71] Proceedings that "arise in" and "arise under" [Title 11](#) together constitute the bankruptcy court's "core" jurisdiction. [FN72] A nonexhaustive list of core proceedings is set forth in [28 U.S.C.A. § 157\(b\)\(2\)](#). A proceeding is noncore if it "does not invoke a substantive right created by federal bankruptcy law and is one that could exist outside of bankruptcy." [FN73]

A. Mandatory Abstention--[28 U.S.C.A. § 1334\(c\)\(2\)](#)

Pursuant to [28 U.S.C.A. § 1334\(c\)\(2\)](#), a court must abstain from hearing a proceeding:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under [title 11](#) but not arising under [title 11](#) or arising in a case under [title 11](#), with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

The mandatory abstention provision contained in [§ 1334\(c\)\(2\)](#) applies to cases which "relate to" proceedings under [Title 11](#); it never applies to core proceedings. [FN74] Courts may be required to abstain from hearing a case related to a bankruptcy proceeding that was originally filed in state court and subsequently removed to federal court. [FN75] There are six requirements, each of which must be present, in order for a court to be required to abstain from hearing a proceeding: (1) timeliness of the motion to abstain; (2) action based upon a state law claim or cause of action; (3) state court action has been commenced; (4) action can be timely adjudicated in state court; (5) no independent basis for federal jurisdiction absent bankruptcy; and (6) the matter is noncore. [FN76]

Under certain circumstances, the request for abstention is not timely. [FN77] The statute itself does not define what constitutes a "timely" motion, however, courts have found that "a party acts in a timely fashion when he or she moves as soon as possible after he or she should have learned the grounds for such a motion." [FN78] In *Doctors Hospital*, after the suit was removed by another party, movants waited eight months to request the court to abstain. The movants went on to request and participate in a hearing on their motion for a preliminary injunction and motions for summary judgment. The court found that these circumstances underscore the untimeliness of the motion to abstain. [FN79] The court also analyzed the timeliness from the date of confirmation of plan, still finding the motion, filed one month later, untimely. [FN80] Generally, such a motion should be made early in a case so as to prevent a waste of judicial resources. [FN81]

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In the recent case of *4 Front Petroleum, Inc.*, the trustee initiated a state court action against officers, directors, and a prepetition consultant of the debtor-corporations. [FN82] One of the defendants removed the action to bankruptcy court, which the trustee opposed and moved for remand and/or abstention within 10 days after the notice of removal was filed. All of the claims asserted by the trustee were for various breaches of fiduciary duties and negligence, and the action was based wholly upon state law and did not depend on bankruptcy laws for their existence. [FN83] The court examined each of the elements for mandatory abstention at length, easily establishing the first three elements. The court determined that the proceeding could be timely adjudicated in state court, as the proceeding was in its earliest stages, no substantive issues had been resolved in either court, and no scheduling order has been entered in the bankruptcy court. [FN84] The court further held that no federal questions were raised by the trustee in his action, nor was there any diversity of the parties. [FN85] As such, no independent basis existed for federal jurisdiction. Lastly, the defendant-consultant argued that the trustee's action was core because:

- (1) the action would adjust the debtor/creditor relationship;
- (2) the outcome of the proceeding could enhance distribution to creditors, therefore affecting administration of the estate;
- (3) assertion of the claims against officers and directors of the debtors will result in competition for D&O insurance policy proceedings which may affect the amount available for distribution to the estates;
- (4) the consultant was a court-appointed professional;
- (5) the trustee's claims against the consultant constituted a direct and collateral attack on the court's administration;
- (6) the conduct of one of the debtor's creditor may affect the consultant's defense of claims;
- (7) the officer-defendants have indemnification rights arising out of the trustee's claims;
- (8) the resolution of the trustee's claims will have a lasting impact on the "reorganization industry" nationwide; and
- (9) the bankruptcy court is familiar with the pre and post-bankruptcy history of the debtors. [FN86]

The court conceded that each of these factors supporting the conclusion that the outcome of the proceedings could conceivably affect the estate; nevertheless, the defendant could not establish that the proceeding could arise only in the context of a bankruptcy case. As such, the court determined that the proceeding was noncore and that mandatory abstention was appropriate, remanding the case to state court. [FN87] Another court found that mandatory abstention was justified in a case involving allegations of fraud, breach of fiduciary duty, and successor liability as not having an independent basis for federal jurisdiction. [FN88]

In reviewing the requirements for mandatory abstention, in the recent case of *Stoe v. Flaherty*, [FN89] the court dismissed defendants' argument that § 1334(c)(2) requires the existence of parallel proceedings by the requirement that "an action is commenced, and can be timely adjudicated, in a State forum. Defendants argue that where no parallel proceedings exist, remand, rather than abstention, is the appropriate remedy." [FN90] The Third Circuit disagreed, articulating that the existence of an ongoing state proceeding is not inherent in the nature of abstention. Further, the statutory text mandates abstention in removed cases as well as those initiated in federal court. [FN91] The court concluded that § 1334(c)(2) is based on comity, reflecting a congressional judgment that a party wishing to litigate a state claim in state court, finding himself federal court solely because the controversy is related to a bankruptcy, should be able to insist on a state adjudication, so long as it does not adversely affect the bankruptcy proceedings. [FN92]

In *Midgard Corp.*, the court held that, notwithstanding the absence of a parallel pending proceeding in state court, a removed proceeding may be subject to mandatory abstention. [FN93] The court noted that § 1334(c)(2) does not require that the state court proceeding be pending at the time of abstention, just that the proceeding had been "commenced" in a state forum of appropriate jurisdiction. An action that has been removed from state court to federal court was "commenced in a state forum." [FN94]

The element of mandatory abstention, determining whether an action can be timely adjudicated in state court, entails a consideration of whether awaiting the outcome of the action in state court will interfere with the

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administration of the bankruptcy estate. [FN95] For courts to determine whether an action can be timely adjudicated in a state forum, an examination is made of (1) the backlog of the state court's calendar; (2) the status of the bankruptcy proceeding; (3) the complexity of the issues; and (4) whether the state court proceeding would prolong the administration or liquidation of the estate. [FN96] Some courts have added additional elements to this list, including (i) status of the proceeding in state court prior to being removed (i.e., whether discovery had been commenced); (ii) whether the parties consent to the bankruptcy court entering judgment in the non-core case; and (iii) whether the underlying bankruptcy case is a reorganization or liquidation case. [FN97]

In the case of *In re Gregory Rock House Ranch*, the court abstained under [§ 1334\(c\)\(2\)](#) from hearing a noncore proceeding that had been pending for over five years in state court. [FN98] The court examined whether the action could be timely adjudicated in state court and found that, despite the state court case having progressed slowly, the limited scope of the state court action would not have a major impact of the administration of the bankruptcy estate. [FN99] Because "the standard for what constitutes timeliness is generally uncertain," this element is one of judicial discretion. [FN100]

In another case, *Massey Energy Co. v. West Virginia Consumers for Justice*, only two of the elements for mandatory abstention were at issue--whether an action is commenced that could be timely adjudicated in state court. [FN101] In *Massey*, the state court action had been removed. The defendants argued that mandatory abstention did not apply to removed cases, as [§ 1334\(c\)\(2\)](#) requires a separate, parallel proceeding currently in state court. The court found the defendants' reading inconsistent with the plain meaning of the statute [FN102] and went on to determine that in the removed matter, discovery had been commenced, motions have been heard, depositions had been noticed, final trial date had been set, and further continuances would be denied. Based on these circumstances, the court found that not only would the claim be timely adjudicated but would probably reach adjudication with more celerity than any other forum. [FN103]

A party is permitted to appeal a bankruptcy court's decision to exercise mandatory abstention under [§ 1334\(c\)\(2\)](#). [FN104] However, as discussed in more detail below, a decision to exercise permissive abstention pursuant to [§ 1334\(c\)\(1\)](#) is not appealable. Thus it is important that the party seeking abstention be clear as to which subsection of the Code the court is utilizing, as it will effect whether that decision can be appealed.

B. Permissive Abstention--[28 U.S.C.A. § 1334\(c\)\(1\)](#)

Under [28 U.S.C.A. § 1334 \(c\)\(1\)](#), a bankruptcy judge is permitted to abstain from hearing a proceeding arising under [Title 11](#) or related to a case arising under [Title 11](#) "in the interest of justice, or comity with state courts or respect for state law." The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) amended [section 1334\(c\)\(1\)](#), which now prevents a court from abstaining from a proceeding lawfully commenced under Title 11, Chapter 15 to recognize a foreign proceeding. [FN105] This amendment assists foreign bankruptcy representatives in cases already commenced in the debtor's home country.

Courts have enunciated 12 factors that a bankruptcy judge should consider when deciding whether to abstain, including:

- (1) the 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.A. § 1334](#);
- (6) the degree of relatedness or remoteness of the proceeding in 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

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- court with enforcement left to 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. [\[FN106\]](#)

Courts are to apply these factors flexibly depending on the facts and circumstances of a particular case, and no one factor is necessarily determinative. [\[FN107\]](#) Often times, permissive abstention arises where an arbitration clause is at issue. Arbitration is widely regarded as an efficient and favored means of resolving disputed matters. [\[FN108\]](#)

In the case of *Brook Mays Music Company*, the bankruptcy court examined each of the foregoing factors in a case involving an action by one of the debtor's insurers against its prepetition lender. [\[FN109\]](#) The court noted the following, in denying a motion to abstain:

(1) *The effect or lack thereof on the efficient administration of the estate if the court recommends remand or abstention.* This court would be able to adjudicate the State Court Action fairly quickly (within a couple of months, if the parties request it). This court doubts that the State Court can move that quickly. It would be in furtherance of the efficient administration of the estate for this matter to be resolved quickly.

(2) *Extent to which state law issues predominate over bankruptcy issues.* Admittedly there are more state law issues involved in this litigation than anything else. However, it appears there is a major defense that this court could address more easily than the State Court (namely, the preclusive effect of the DIP Order).

(3) *Difficult or unsettled nature of applicable law.* Although the issues presented are mostly state law issues, these are not at all difficult state law issues. Bankruptcy courts deal with state law issues frequently.

(4) *Presence of related proceeding commenced in state court or other non-bankruptcy proceeding.* Not applicable. The State Court Action was commenced postpetition. Moreover, all related proceedings are in the bankruptcy court.

(5) *Jurisdictional basis, if any, other than § 1334.* It is unanimously agreed there is federal diversity jurisdiction in the matter. The action is going to be in federal court one way or another.

(6) *Degree of relatedness or remoteness of proceeding to main bankruptcy case.* This court considers these claims to be quite related to the underlying bankruptcy case and considers the Debtor likely to be a necessary party.

(7) *The substance rather than the form of an asserted core proceeding.* Not applicable-the matters are not "core."

(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.* Not applicable.

(9) *The burden of the bankruptcy court's docket.* This court is not overburdened. Moreover, unlike the State Court, this court has familiarity with the parties and the disputes.

(10) *The likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties.* This court believes that forum shopping is a likely possibility on the part of the Plaintiffs.

(11) *The existence of a right to a jury trial.* The court determines that Plaintiffs do indeed have the right to a jury trial. This court cannot preside over the jury trial without the consent of all parties....

(12) *The presence in the proceeding of nondebtor parties.* There are nondebtor parties, but all have participated extensively in the bankruptcy case and would appear not to be inconvenienced by this or the district court forum.

(13) *Comity.* As discussed, there are clearly mostly state law issues involved in the State Court Action, but there is one rather substantial federal law issue (possible estoppel or preclusion with regard to the DIP Order). Therefore, comity perhaps weighs slightly in favor of a state law forum, but not overwhelmingly.

(14) *The possibility of prejudice to other parties in the action.* The court is presented with no evidence of prejudice to the Plaintiffs of having their claims heard in a federal forum. [\[FN110\]](#)

This type of examination is the typical balancing act that a court will undertake to determine whether to exercise its discretion in abstaining from hearing a particular proceeding.

In *Astropower Liquidating Trust*, [\[FN111\]](#) the bankruptcy court refused to exercise its discretion to abstain from a

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proceeding, even though the action was brought postconfirmation where the estate no longer existed. The defendants argued in favor of abstention, relying on the first and sixth factor, in that the postconfirmation proceeding would not affect the estate and that a Canadian forum would provide for a more prompt resolution of the matter. [FN112] In making its determination, the court found that the second, third, fourth, and fifth factors disfavored abstention. The court found that since no related proceeding was pending in any other court and diversity of citizenship provided an alternative basis for jurisdiction, abstention was not appropriate. While the absence of a related proceeding is a dispositive factor in mandatory abstention, it is but one of many factors in determining discretionary abstention. [FN113]

Unlike mandatory abstention, a bankruptcy court's decision to exercise permissive abstention is not appealable. [FN114] The 1994 amendments to the section--still in effect notwithstanding nonsubstantive changes [FN115] made in 2005--allow only mandatory abstention to be appealed. There is a split in the circuits regarding the applicability of the 1994 amendments to cases filed before the amendments took effect. Although all courts agree that the amendments apply only to cases filed after the effective date of the amendments, there is a question as to whether the filing date of the bankruptcy case or the state court case that should count. In *In re Seven Fields Dev. Corp.*, the Third Circuit Court of Appeals determined that the date of the state court action was dispositive. In *Seven Fields*, the bankruptcy case was filed in 1986, but the state court action was not filed until 2004. The court held that the date of the bankruptcy was not dispositive because the effective date applied equally to state court actions and bankruptcy cases. In other words, the date of the particular case determined the applicability of the amendments.

The holding in *Seven Fields* was in direct conflict with the holding of the Fifth Circuit in *In re Southmark Corp.* [FN116] There, the court held that the date of the underlying bankruptcy was dispositive. Thus the court applied the previous version of § 1334 to a state court action filed after the amendments effective date. In short, it is possible that even if the filing date of the bankruptcy is prior to 1994, the exercise of permissive abstention by the bankruptcy court may not be appealable. What is certain is that for all matters relating to bankruptcy cases filed after 1994, the exercise of permissive abstention is not appealable.

IV. CONCLUSION

Due to the increasing popularity of the assignment for the benefit of creditors, particularly in light of the sweeping changes of BAPCPA, abstention requests will likely increase in the future. As indicated by the published foregoing cases, a party arguing for abstention bears a heavy burden of proof. [FN117] When properly utilized, abstention can be a powerful weapon in the fight to protect the creditors and the debtor from the self-interests of a "few recalcitrant creditors" who attempt to undermine a fair and expeditious out-of-court arrangement to distribute the assets of the debtor, from the duplication of efforts with state and other courts, and from the unnecessary expense of administrative costs of the bankruptcy. Abstention can also reserve disputes involving novel state law issues to the state courts, relieving the burden of the bankruptcy court dockets.

[FN1]. [11 U.S.C.A. § 305.](#)

[FN2]. See [Matter of Sullivan Cent. Plaza I, Ltd., 935 F.2d 723, 727 \(5th Cir. 1991\)](#); [Buffington v. First Service Corp., 672 F.2d 687, 690 \(8th Cir. 1982\)](#).

[FN3]. [11 U.S.C.A. § 305](#); see [In re Mazzocone, 183 B.R. 402, 421-422 \(Bankr. E.D. Pa. 1995\)](#), order aff'd, [200 B.R. 568 \(E.D. Pa. 1996\)](#) (finding that suspending the proceedings for six months was in the best interest of the debtor and the creditors); see also [In re Rookery Bay, Ltd., 190 B.R. 949 \(Bankr. M.D. Fla. 1995\)](#).

[FN4]. See [In re Ice Cream Liquidation, Inc., 281 B.R. 154, 167 n. 20, 39 Bankr. Ct. Dec. \(CRR\) 248 \(Bankr. D. Conn. 2002\)](#).

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[FN5]. See [In re Andrus](#), 338 B.R. 746, 750, 55 Collier Bankr. Cas. 2d (MB) 1266 (Bankr. E.D. Mich. 2006).

[FN6]. [11 U.S.C.A. § 305\(a\)\(1\)](#).

[FN7]. [11 U.S.C.A. § 305\(a\)\(2\)](#). Certain decisions relating to [section 305\(a\)\(2\)](#) were discussed in the 1997-1998 edition of this publication. See Evan D. Flaschen and Oscar H. Urizar, Section 304 and Related Provisions--United States Treatment of Foreign Insolvencies, Annual Survey of Bankruptcy Law 235 (1997-1998 ed.).

[FN8]. E.g. [In re StatePark Building Group, Ltd.](#), 316 B.R. 466, 476 (Bankr. N.D. Tex. 2004); [In re Pallet Reefer Co.](#), 233 B.R. 687, 694, 34 Bankr. Ct. Dec. (CRR) 164, 41 Collier Bankr. Cas. 2d (MB) 1299 (Bankr. E.D. La. 1999); [In re RCM Global Long Term Capital Appreciation Fund, Ltd.](#), 200 B.R. 514 (Bankr. S.D. N.Y. 1996), corrected, (Sept. 18, 1996); [In re Manchester Heights Associates](#), 140 B.R. 521, 523 (Bankr. W.D. Mo. 1992).

[FN9]. [11 U.S.C.A. § 305\(c\)](#); [In re Grigoli](#), 151 B.R. 314, 24 Bankr. Ct. Dec. (CRR) 27, 28 Collier Bankr. Cas. 2d (MB) 1089 (Bankr. E.D. N.Y. 1993) (holding that a decision of whether to abstain pursuant to [section 305](#) is reviewable by the district court but is not reviewable by the court of appeals or the Supreme Court). Further, in light of the fact that district courts' decisions to abstain are not reviewable, the courts must make specific and substantiated findings to support dismissal or abstention, especially as to the benefits to the estate and creditors. See [In re Spade](#), 258 B.R. 221 (Bankr. D. Colo. 2001), decision aff'd, 269 B.R. 225, 47 Collier Bankr. Cas. 2d (MB) 582 (D. Colo. 2001).

[FN10]. [Andrus](#), 338 B.R. at 750 (citations omitted).

[FN11]. [28 U.S.C.A. § 1334\(c\)\(2\)](#); [In re Wells Properties, Inc.](#), 102 B.R. 68, 692-35 (Bankr. N.D. Ill. 1989).

[FN12]. [28 U.S.C.A. § 1334\(c\)\(1\)](#); [In re Colarusso](#), 382 F.3d 51, 57, Bankr. L. Rep. (CCH) P 80154 (1st Cir. 2004).

[FN13]. [In re McTague](#), 198 B.R. 428, 432, 29 Bankr. Ct. Dec. (CRR) 560 (Bankr. W.D. N.Y. 1996).

[FN14]. [In re ELRS Loss Mitigation, LLC](#), 325 B.R. 604, 634, 44 Bankr. Ct. Dec. (CRR) 242 (Bankr. N.D. Okla. 2005); [In re Kujawa](#), 224 B.R. 104, 108 (E.D. Mo. 1998) (citation omitted) (affirming bankruptcy court's abstention even though it did not conduct an independent evidentiary hearing).

[FN15]. E.g., [In re Grigoli](#), 151 B.R. 314, 24 Bankr. Ct. Dec. (CRR) 27, 28 Collier Bankr. Cas. 2d (MB) 1089 (Bankr. E.D. N.Y. 1993).

[FN16]. [Grigoli](#), 151 B.R. at 319-320; [In re 801 South Wells Street Ltd. Partnership](#), 192 B.R. 718, 723, 28 Bankr. Ct. Dec. (CRR) 851, 35 Collier Bankr. Cas. 2d (MB) 483, Bankr. L. Rep. (CCH) P 76976 (Bankr. N.D. Ill. 1996); [In re Eastman](#), 188 B.R. 621, 624-625, Bankr. L. Rep. (CCH) P 76770 (B.A.P. 9th Cir. 1995).

[FN17]. [In re Euro-American Lodging Corp.](#), 357 B.R. 700, 729, 47 Bankr. Ct. Dec. (CRR) 171 (Bankr. S.D. N.Y. 2007); [Spade](#), 258 B.R. 221 (bankruptcy court held that a broader approach in considering more factors is favorable); [In re ABQ-MCB Joint Venture](#), 153 B.R. 338, 341 (Bankr. D. N.M. 1993); [In re Fax Station, Inc.](#), 118 B.R. 176, 177 (Bankr. D. R.I. 1990).

[FN18]. [ELRS Loss Mitigation](#), 325 B.R. at 634 ("use of an involuntary bankruptcy filing is an improper method of resolving a two-party dispute"); [In re Jr. Food Mart of Arkansas, Inc.](#), 241 B.R. 423, 35 Bankr. Ct. Dec. (CRR) 65 (Bankr. E.D. Ark. 1999); and [In re Axl Industries, Inc.](#), 127 B.R. 482 (S.D. Fla. 1991), judgment aff'd in part, appeal dismissed in part, 977 F.2d 598 (11th Cir. 1992). Accord, [In re Westerleigh Development Corp.](#), 141 B.R. 38

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(Bankr. S.D. N.Y. 1992). See also [In re Uno Broadcasting Corp.](#), 167 B.R. 189, 25 Bankr. Ct. Dec. (CRR) 1009 (Bankr. D. Ariz. 1994) (for proposition that when other creditors are affected, abstention is not appropriate, even if the case is seemingly a 'two-party' dispute); and [In re RCM Global Long Term Capital Appreciation Fund, Ltd.](#), 200 B.R. 514 (Bankr. S.D. N.Y. 1996), corrected, (Sept. 18, 1996).

[FN19]. See generally [Axl Industries](#), 127 BR 482.

[FN20]. [In re Forest Hill Funeral Home & Memorial Park](#), 364 B.R. 808, 48 Bankr. Ct. Dec. (CRR) 11 (Bankr. E.D. Okla. 2007).

[FN21]. [In re Achey](#), 2002 WL 539036 (Bankr. N.D. Iowa 2002).

[FN22]. [Achey](#), 2002 WL 539036 at * 1; see also [In re Williams](#), 305 B.R. 618, 621-22 (Bankr. D. Conn. 2004) (court denied debtor's motion to dismiss, filed upon becoming entitled to an inheritance, holding that the potential prejudice to the Debtor was substantially outweighed by the potential prejudice to creditors upon dismissal).

[FN23]. [In re StatePark Building Group, Ltd.](#), 316 B.R. 466 (Bankr. N.D. Tex. 2004).

[FN24]. [In re St. Marie Development Corp. of Montana, Inc.](#), 334 B.R. 663, 672 (Bankr. D. Mont. 2005).

[FN25]. The predominant case law on the subject of abstention relates to [28 U.S.C.A. § 1334](#). See § III infra.

[FN26]. [Jr. Food Mart](#), 241 BR 423.

[FN27]. [Jr. Food Mart](#), 241 BR at 424.

[FN28]. [Jr. Food Mart](#), 241 BR at 424; accord [ELRS Loss Mitigation](#), 325 B.R. at 634-5 (abstaining from a two-party dispute where the state court stood ready as a viable forum).

[FN29]. [Jr. Food Mart](#), 241 B.R. at 427.

[FN30]. [In re R & A Business Associates, Inc. v. R & A Business Associates, Inc.](#), 1999 WL 820859 (E.D. Pa. 1999).

[FN31]. [In re Paper I Partners, L.P.](#), 283 B.R. 661 (Bankr. S.D. N.Y. 2002).

[FN32]. [Paper I Partners](#), 283 B.R. at 674-75.

[FN33]. [Paper I Partners](#), 283 B.R. at 669.

[FN34]. [Paper I Partners](#), 283 B.R. at 679-80.

[FN35]. [In re Schur Management Co., Ltd.](#), 323 B.R. 123, 44 Bankr. Ct. Dec. (CRR) 151 (Bankr. S.D. N.Y. 2005).

[FN36]. [Schur Management](#), 323 B.R. at 127 (citing [In re SGL Carbon Corp.](#), 200 F.3d 154, 35 Bankr. Ct. Dec. (CRR) 116, 43 Collier Bankr. Cas. 2d (MB) 668, Bankr. L. Rep. (CCH) P 78084, 1999-2 Trade Cas. (CCH) ¶ 72739 (3d Cir. 1999)).

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[FN37]. See [In re Cincinnati Gear Co.](#), 304 B.R. 784, 41 Bankr. Ct. Dec. (CRR) 197 (Bankr. S.D. Ohio 2003); [In re Fortran Printing, Inc.](#), 297 B.R. 89 (Bankr. N.D. Ohio 2003); and [In re NRG Energy, Inc.](#), 294 B.R. 71 (Bankr. D. Minn. 2003).

[FN38]. [Cincinnati Gear](#), 304 B.R. 784.

[FN39]. [Fortran Printing](#), 297 B.R. at 96.

[FN40]. [NRG Energy](#), 294 B.R. 71.

[FN41]. [NRG Energy](#), 294 B.R. at 81.

[FN42]. [In re Bauer](#), 343 B.R. 234 (Bankr. W.D. Mo. 2006).

[FN43]. [Bauer](#), 343 B.R. at 238.

[FN44]. Even when discussion under [§ 305\(a\)\(2\)](#) may have been appropriate given the facts of a case, the courts have either ignored [§ 305\(a\)\(2\)](#) in favor of [§ 305\(a\)\(1\)](#) or have briefly addressed the foreign proceeding issue. See [In re Gurley](#), 222 B.R. 124 (Bankr. W.D. Tenn. 1998), as amended on reh'g, (June 15, 1998) (bankruptcy court declined to abstain from the adversary proceeding brought by the debtor against the Chapter 7 trustee of her husband's bankruptcy case in Florida, relating to the turnover of property over which the Florida court imposed a constructive trust). See also [In re Travelstead](#), 227 B.R. 638 (D. Md. 1998) (containing extensive discussion of comity relating to [§ 305\(a\)\(2\)](#) and [28 U.S.C.A. § 1334](#)).

[FN45]. [In re Netia Holdings S.A.](#), 277 B.R. 571 (Bankr. S.D. N.Y. 2002); [In re MMG LLC](#), 256 B.R. 544, 45 Collier Bankr. Cas. 2d (MB) 491 (Bankr. S.D. N.Y. 2000).

[FN46]. [In re Xacur](#), 216 B.R. 187 (Bankr. S.D. Tex. 1997).

[FN47]. [In re Aerovias Nacionales de Colombia S.A.](#), 303 B.R. 1 (Bankr. S.D. N.Y. 2003).

[FN48]. [Aerovias Nacionales de Colombia](#), 303 B.R. at 11-13.

[FN49]. [Aerovias Nacionales de Colombia](#), 303 B.R. at 11-13.

[FN50]. [Aerovias Nacionales de Colombia](#), 303 B.R. at 13 (citing LoPucki, [Cooperation in International Bankruptcies: A Post-Universalist Approach](#), 84 Cornell L.Rev. 696, 713-20 (1999)).

[FN51]. [In re Globo Comunicacoes e Participacoes S.A.](#), 317 B.R. 235 (S.D. N.Y. 2004).

[FN52]. [Globo Comunicacoes e Participacoes](#), 317 B.R. 235.

[FN53]. [In re Ionica PLC](#), 241 B.R. 829, 831 (Bankr. S.D. N.Y. 1999).

[FN54]. [Ionica](#), 241 B.R. at 838.

[FN55]. [Ionica](#), 241 B.R. at 838.

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[FN56]. [In re Cenargo Intern., PLC, 294 B.R. 571 \(Bankr. S.D. N.Y. 2003\).](#)

[FN57]. [In re Monitor Single Lift I, Ltd., 381 B.R. 455, 49 Bankr. Ct. Dec. \(CRR\) 124, 59 Collier Bankr. Cas. 2d \(MB\) 435 \(Bankr. S.D. N.Y. 2008\).](#)

[FN58]. [Monitor Single Lift I, 381 B.R. at 466 \(citing *Cunard S.S. Co. Ltd. v. Salen Reefer Services AB*, 773 F.2d 452, 457-58, Bankr. L. Rep. \(CCH\) P 70762, 1986 A.M.C. 163, 2 Fed. R. Serv. 3d 1288 \(2d Cir. 1985\)\).](#)

[FN59]. [Monitor Single Lift I, 381 B.R. at 466-67.](#)

[FN60]. [Monitor Single Lift I, 381 B.R. at 470.](#)

[FN61]. [In re Kujawa, 224 B.R. 104 \(E.D. Mo. 1998\).](#)

[FN62]. [In re Kujawa, 270 F.3d 578, 580, 38 Bankr. Ct. Dec. \(CRR\) 170, Bankr. L. Rep. \(CCH\) P 78531, 50 Fed. R. Serv. 3d 1571 \(8th Cir. 2001\).](#)

[FN63]. [In re Kujawa, 112 B.R. 968, 972-73, 20 Bankr. Ct. Dec. \(CRR\) 607 \(Bankr. E.D. Mo. 1990\).](#)

[FN64]. [Kujawa, 224 B.R. at 107.](#)

[FN65]. [Kujawa, 224 B.R. at 108.](#)

[FN66]. [Kujawa, 270 F.3d at 583-84.](#)

[FN67]. [In re Macke Intern. Trade, Inc., 370 B.R. 236, 48 Bankr. Ct. Dec. \(CRR\) 115 \(B.A.P. 9th Cir. 2007\).](#)

[FN68]. [Macke Intern. Trade, 370 B.R. at 248.](#)

[FN69]. [28 U.S.C.A. § 1334.](#)

[FN70]. [In re Middlesex Power Equipment & Marine, Inc., 292 F.3d 61, 68, 39 Bankr. Ct. Dec. \(CRR\) 196, 48 Collier Bankr. Cas. 2d \(MB\) 508, Bankr. L. Rep. \(CCH\) P 78684 \(1st Cir. 2002\).](#)

[FN71]. [Middlesex Power Equipment, 292 F.3d at 68.](#)

[FN72]. [28 U.S.C.A. § 157\(b\)\(1\); *Concerto Software, Inc. v. Vitaquest Intern., Inc.*, 290 B.R. 448, 452 \(D. Me. 2003\); *Matter of U.S. Brass Corp.*, 110 F.3d 1261, 1268, 30 Bankr. Ct. Dec. \(CRR\) 778 \(7th Cir. 1997\) \("\[c\]ore proceedings are actions by or against the debtor that arise under the Bankruptcy Code in the strong sense that the Code itself is the source of the claimant's right or remedy, rather than just the procedural vehicle for the assertion of a right covered by some other body of law, normally state law"\).](#)

[FN73]. [Barnett v. Stern, 909 F.2d 973, 981, Bankr. L. Rep. \(CCH\) P 73584, R.I.C.O. Bus. Disp. Guide \(CCH\) P 7595 \(7th Cir. 1990\).](#)

[FN74]. See [Patterson v. Morris, 337 B.R. 82, 92-93 \(E.D. La. 2006\)](#), aff'd in part, appeal dismissed in part, [448 F.3d 736 \(5th Cir. 2006\)](#); [Andrus, 338 B.R. at 750](#); [In re Premier Hotel Development Group, 270 B.R. 243, 250, 47 Collier Bankr. Cas. 2d \(MB\) 788 \(Bankr. E.D. Tenn. 2001\)](#) ("[m]andatory abstention does not apply to core

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proceedings").

[FN75]. [Stoe v. Flaherty](#), 436 F.3d 209, 213, 45 Bankr. Ct. Dec. (CRR) 265, 55 Collier Bankr. Cas. 2d (MB) 724, 11 Wage & Hour Cas. 2d (BNA) 229 (3d Cir. 2006), as amended, (Mar. 17, 2006); [Mt. McKinley Ins. Co. v. Corning Inc.](#), 399 F.3d 436, 446-7, 44 Bankr. Ct. Dec. (CRR) 67 (2d Cir. 2005); [In re WorldCom, Inc. Securities Litigation](#), 293 B.R. 308, 331, 30 Employee Benefits Cas. (BNA) 2076, Fed. Sec. L. Rep. (CCH) P 92285 (S.D. N.Y. 2003), for additional opinion, see, 2003 WL 685099 (Mar. 3, 2003); [Christo v. Padgett](#), 223 F.3d 1324, 1331 (11th Cir. 2000); [In re Southmark Corp.](#), 163 F.3d 925, 929, 33 Bankr. Ct. Dec. (CRR) 948, Bankr. L. Rep. (CCH) P 77874 (5th Cir. 1999); [Robinson v. Michigan Consol. Gas Co. Inc.](#), 918 F.2d 579, 584 n.3, 20 Bankr. Ct. Dec. (CRR) 1971, 24 Collier Bankr. Cas. 2d (MB) 49, Bankr. L. Rep. (CCH) P 73720, 17 Fed. R. Serv. 3d 1145 (6th Cir. 1990); but see [Louisiana Land and Exploration Co. v. Offshore Tugs Inc.](#), 23 F.3d 967, 981- 2, 1995 A.M.C. 1514 (5th Cir. 1994).

[FN76]. [Stoe v. Flaherty](#), 436 F.3d at 213; [In re Mobile Tool Intern.](#), 320 B.R. 552, 556 (Bankr. D. Del. 2005) (citing [In re LaRoche Industries, Inc.](#), 312 B.R. 249, 253, 43 Bankr. Ct. Dec. (CRR) 96, 52 Collier Bankr. Cas. 2d (MB) 799 (Bankr. D. Del. 2004)).

[FN77]. [In re Balco Equities Ltd., Inc.](#), 323 B.R. 85, 93 (Bankr. S.D. N.Y. 2005) (finding a motion to abstain untimely when filed 6 months after creditor was made party to state court action); [In re AHT Corp.](#), 265 B.R. 379, 384 (Bankr. S.D. N.Y. 2001) (defendants' motion to abstain not timely when filed 2 1/2 months after complaint and one day before defendants' long-extended deadline to answer, and where defendants had not already "utilized the substantive process" of court "on a matter going to the merits"); [In re Waugh](#), 165 B.R. 450, 452 (Bankr. E.D. Ark. 1994) (denying motion to abstain as untimely when filed nearly four months after complaint).

[FN78]. [In re Midgard Corp.](#), 204 B.R. 764, 776 (B.A.P. 10th Cir. 1997) (quoting [In re Novak](#), 116 B.R. 626, 628 (N.D. Ill. 1990)).

[FN79]. See [In re Doctors Hosp. 1997, L.P.](#), 351 B.R. 813, 843 (Bankr. S.D. Tex. 2006).

[FN80]. [Doctors Hosp.](#), 351 B.R. at 843.

[FN81]. [Doctors Hosp.](#), 351 B.R. at 834; [In re Marshland Development, Inc.](#), 129 B.R. 626, 632 n.15, 21 Bankr. Ct. Dec. (CRR) 1482, 25 Collier Bankr. Cas. 2d (MB) 360, Bankr. L. Rep. (CCH) P 74110 (Bankr. N.D. Cal. 1991) (finding a motion untimely when made eight months after the commencement of adversary proceedings).

[FN82]. [In re 4 Front Petroleum, Inc.](#), 345 B.R. 744 (Bankr. N.D. Okla. 2006).

[FN83]. [4 Front Petroleum](#), 345 B.R. at 750.

[FN84]. [4 Front Petroleum](#), 345 B.R. at 754.

[FN85]. [4 Front Petroleum](#), 345 B.R. at 753.

[FN86]. [4 Front Petroleum](#), 345 B.R. at 751-752.

[FN87]. [4 Front Petroleum](#), 345 B.R. at 752, 754.

[FN88]. [In re Holiday RV Superstores, Inc.](#), 362 B.R. 126, 130 (D. Del. 2007) ("[t]he Adversary Complaint involves state law issues that do not arise under [Title 11](#) and do not involve administrative matter that arise only in bankruptcy cases").

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[FN89]. [Stoe v. Flaherty, 436 F.3d 209.](#)

[FN90]. [Stoe v. Flaherty, 436 F.3d at 213.](#)

[FN91]. [Stoe v. Flaherty, 436 F.3d at 214](#); accord [Christo v. Padgett, 223 F.3d 1324, 1331 \(11th Cir. 2000\)](#) (§ 1334(c)(2) applies to state law claims that have been removed to federal court under § 1452(a)); [In re Southmark Corp., 163 F.3d 925, 929, 33 Bankr. Ct. Dec. \(CRR\) 948, Bankr. L. Rep. \(CCH\) P 77874 \(5th Cir. 1999\)](#) ("we note, only to reject out of hand, [Defendant's] assertion that statutory abstention does not apply to cases removed to federal court on the basis of bankruptcy jurisdiction. [28 U.S.C.A. § 1452](#). There is no textual support in the statute for this position, only a handful of bankruptcy court opinions support it, and the vast majority hold otherwise").

[FN92]. [Stoe v. Flaherty, 436 F.3d at 215.](#)

[FN93]. [Midgard Corp., 204 B.R. at 744.](#)

[FN94]. [Midgard Corp., 204 B.R. at 744.](#)

[FN95]. [Midgard Corp., 204 B.R. at 779](#) (noting that timeliness is "only one of several factors to be considered, and does not, taken alone, focus on the larger concern of whether the administration of the bankruptcy case will be impaired by adjudication in State Court").

[FN96]. [In re DeMert & Dougherty, Inc., 271 B.R. 821, 843 \(Bankr. N.D. Ill. 2001\)](#); [In re Georgou, 157 B.R. 847, 850-851 \(N.D. Ill. 1993\)](#).

[FN97]. [Midgard Corp., 204 B.R. at 778-79.](#)

[FN98]. [In re Gregory Rock House Ranch, LLC., 339 B.R. 249 \(Bankr. D. N.M. 2006\)](#).

[FN99]. [Gregory Rock House Ranch, 339 B.R. at 249](#); see also [In re Mugica, 362 B.R. 782, 793 \(Bankr. S.D. Tex. 2007\)](#) (the movant need not show that the matter can be more timely adjudicated in state court, only that the matter can be timely adjudicated in state court).

[FN100]. [Georgou, 157 B.R. at 851.](#)

[FN101]. [Massey Energy Co. v. West Virginia Consumers for Justice, 351 B.R. 348, 352, 56 Collier Bankr. Cas. 2d \(MB\) 1585 \(E.D. Va. 2006\)](#).

[FN102]. [Massey Energy, 351 B.R. at 352.](#)

[FN103]. [Massey Energy, 351 B.R. at 352.](#)

[FN104]. See [Stoe v. Flaherty, 436 F.3d at 212](#); [In re Seven Fields Development Corp., 505 F.3d 237, 249, 48 Bankr. Ct. Dec. \(CRR\) 276, Bankr. L. Rep. \(CCH\) P 81040 \(3d Cir. 2007\)](#) (recognizing that [§ 1334\(d\)](#) explicitly allows review of mandatory abstention pursuant to [§ 1334\(c\)\(2\)](#)).

[FN105]. [11 U.S.C.A. §§ 1504 and 1515.](#)

(Publication page references are not available for this document.)

[FN106]. See [Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co.](#), 6 F.3d 1184, 1189-90, [Bankr. L. Rep. \(CCH\) P 75481](#) (7th Cir. 1993); [Andrus](#), 338 B.R. at 751 (citing [In re Kmart Corp.](#), 307 B.R. 586, 596-7 (Bankr. E.D. Mich. 2004)); [In re AstroPower Liquidating Trust](#), 335 B.R. 309, 330, 45 [Bankr. Ct. Dec. \(CRR\) 228](#) (Bankr. D. Del. 2005).

[FN107]. [Chicago, Milwaukee R.R.](#), 6 F.3d at 1189.

[FN108]. See [In re Griffin Trading Co.](#), 250 B.R. 667, 673, 36 [Bankr. Ct. Dec. \(CRR\) 121](#) (Bankr. N.D. Ill. 2000); [Porter-Hayden](#), 304 BR at 736 (citing [Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.](#), 885 F.2d 1149, 1156-57, 19 [Bankr. Ct. Dec. \(CRR\) 1344](#), [Bankr. L. Rep. \(CCH\) P 73091](#), [Fed. Sec. L. Rep. \(CCH\) P 94568](#) (3d Cir. 1989)).

[FN109]. [In re Brooks Mays Music Co.](#), 363 B.R. 801, 47 [Bankr. Ct. Dec. \(CRR\) 283](#) (Bankr. N.D. Tex. 2007).

[FN110]. [Brooks Mays Music](#), 363 B.R. at 817-819

[FN111]. [Astropower Liquidating Trust](#), 335 B.R. 309.

[FN112]. [Astropower Liquidating Trust](#), 335 B.R. at 330 (citing [In re LaRoche Industries, Inc.](#), 312 B.R. 249, 254, 43 [Bankr. Ct. Dec. \(CRR\) 96](#), 52 [Collier Bankr. Cas. 2d \(MB\) 799](#) (Bankr. D. Del. 2004)).

[FN113]. [Astropower Liquidating Trust](#), 335 B.R. at 331.

[FN114]. [Stoe v. Flaherty](#), 436 F.3d at 212; [Seven Fields](#), 505 F.3d at 249.

[FN115]. The 2005 amendments changed [§ 1334](#) in minor ways. "made under this subsection" was replaced with "made under subsection (c)." Also "This subsection" was replaced with "Subsection (c) and this subsection" in [§ 1334\(d\)](#). The changes had no effect on the substance of the section. See [Seven Fields](#), 505 F.3d at 249.

[FN116]. [In re Southmark Corp.](#), 163 F.3d 925, 33 [Bankr. Ct. Dec. \(CRR\) 948](#), [Bankr. L. Rep. \(CCH\) P 77874](#) (5th Cir. 1999).

[FN117]. See, e.g. [In re Sherwood Enterprises, Inc.](#), 112 B.R. 165, 167 (Bankr. S.D. Tex. 1989), judgment entered, 4 [Tex. Bankr. Ct. Rep. 116](#) (Bankr. S.D. Tex. Jan. 27, 1989).

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