NOTES

WHY BANKRUPTCY "RELATED TO" JURISDICTION SHOULD NOT REACH MASS TORT NONDEBTOR CODEFENDANTS

LORI J. FORLANO*

Consider the following scenario: Companies X, Y, and Z all manufacture and distribute the same defective product. The product causes injuries; a mass tort litigation ensues. Company X files a petition for relief[1] under chapter 11 of the United States Bankruptcy Code,[2] which freezes all suits against it.[3] Suits against Companies Y and Z are not stayed,[4] and these companies are eager to find a way to delay suits against them, even if they cannot halt them altogether. If Companies Y and Z can argue successfully that the suits against them are "related to" the debtor's bankruptcy,[5] they may be able to transfer

* I would like to thank Professor Barry Adler for his helpful comments. Thanks also to Arthur Chung, Rick Gonzalez, Sara Mogulescu, Paul Schmidt, Jane Small, and the staff of the *New York University Law Review*. Special thanks to my editor Lewis Bossing, to C. L. Lindsay III, and to my family.

[1] The filing of a petition for relief commences a bankruptcy case. See 11 U.S.C. § 101(42) (1994).

[2] Title 11 of the United States Code is known unofficially as the Bankruptcy Code. See, e.g., Lawrence P. King & Michael L. Cook, Creditors' Rights, Debtors' Protection and Bankruptcy 641 (3d ed. 1997) (discussing Bankruptcy Code generally). Chapters 7, 9, 11, 12, and 13 provide different forms of relief for debtors. See id. at 644. Title 11 refers to the Bankruptcy Code generally, while chapter 11 refers to a specific chapter of the Bankruptcy Code. See id.

[3] Under the Code, an automatic stay halts any action against the debtor which may deplete the debtor's estate, such as the commencement or continuation of suits or the enforcement of judgments against the debtor. See 11 U.S.C. § 362(a)(1) (1994).

[4] See id. § 362(a)(1) (stating that automatic stay applies to actions "against the debtor"). Although some courts have allowed the stay to apply to nondebtors, see, e.g., A. H. Robins Co. v. Piccinin, 788 F.2d 994, 1011 (4th Cir. 1986) (holding that bankruptcy court could stay suit against debtor's insurer), the statutory language refers only to protection of the debtor. Most courts will not extend protection, absent extraordinary circumstances, to protect solvent nondebtors from ordinary litigation risks. See, e.g., In re Kelton Motors Inc., 121 B.R. 166, 192-93 (Bankr. D. Vt. 1990) ("[T]he filing of a bankruptcy petition . . . does not, as a general rule, stop litigation against nondebtors although they are in some way connected with the bankrupt, such as joint tortfeasors . . . and related companies.").

[5] Determining the proper scope of "related to" jurisdiction in bankruptcy cases is the subject of this Note. Some definitions are necessary at the outset. Federal district courts have original and exclusive jurisdiction over all title 11 "cases." See 28 U.S.C. § 1334(a) (1994). A case is "the umbrella under which all of the proceedings which follow the filing

these suits to the district court where the bankruptcy case of debtor Company X is pending,[6] unless that court abstains from hearing the case.[7]

This Note argues that the district court hearing the Company X bankruptcy petition should not assert "related to" jurisdiction over

---

of a bankruptcy petition take place." 1 Collier on Bankruptcy, ¶ 3.01[3] (Lawrence P. King et al. eds., 15th ed. 1998). Disputes over the handling of various aspects of a case often arise during its pendency; these disputes are formally called "proceedings." See, e.g., Lawrence P. King, Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984, 38 Vand. L. Rev. 675, 677 (1985) (distinguishing cases from proceedings). District courts have original but not exclusive jurisdiction over all "proceedings" that "arise under," "arise in," or are "related to" cases under title 11. See 28 U.S.C. § 1334(b) (1994) (granting district court bankruptcy jurisdiction). If a district court has jurisdiction over a proceeding, that court then may refer its jurisdictional power to a bankruptcy court. See 28 U.S.C. § 157(a) (1994); see also infra note 30 and accompanying text.

[6] 28 U.S.C. § 157(b)(5) (1994) states:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

The purposes of § 157(b)(5) include the centralization of the administration of the estate, the elimination of multiple forums for adjudicating bankruptcy cases, and the assurance of fair payment of claims. See, e.g., Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (In re Dow Corning Corp.), 86 F.3d 482, 496 (6th Cir. 1996) [hereinafter *Dow Corning I*].

Section 157(b)(5) raises an interesting question in a case under title 11 involving claims against nondebtor codefendants because the language of the statute does not distinguish between personal injury tort and wrongful death claims (PITWD claims) pending against the debtor's estate and other PITWD claims. Cf. 28 U.S.C. § 157(b)(2)(B) (referring twice to PITWD claims "against the estate"). Section 157(b)(5) arguably could apply only to PITWD claims against the estate. The courts have not followed this rule, however, allowing transfer of PITWD claims pending against nondebtor codefendants. See, e.g., *Dow Corning I*, 86 F.3d at 497 (holding that § 157(b)(5) allows transfer of PITWD claims pending against nondebtor codefendants); *A. H. Robins*, 788 F.2d at 1011-14 (same).

[7] 28 U.S.C. § 1334 provides for two types of abstention in title 11 cases: mandatory abstention, see 28 U.S.C. § 1334(c)(2) (1994), and discretionary abstention, see 28 U.S.C. § 1334(c)(1) (1994).

In broad terms, § 1334(c)(2) requires a district court, in a proceeding based upon a state law claim or cause of action which is "related to" a case under title 11, to abstain from hearing the case if the proceeding can be adjudicated in an appropriate state forum. See 28 U.S.C. § 1334(c)(2) (1994). The language of § 157(b)(2)(B), however, refers only to PITWD claims "against the estate." The statute is silent as to whether abstention is mandatory when the PITWD claims are not against the estate. Cf. Lindsay v. Dow Chem. Co. (In re Dow Corning Corp.), 113 F.3d 565, 570 (6th Cir.) [hereinafter *Dow Corning II*] (holding that under § 157(b)(2)(B) court may not globally abstain from hearing nondebtor PITWD claims without examining each claim individually), cert. denied, 118 S. Ct. 435 (1997).

28 U.S.C. § 1334(c)(1) provides for discretionary abstention. A district court may exercise discretion to abstain from hearing PITWD claims against nondebtor codefendants. See, e.g., In re Dow Corning Corp., No. 95-CV-72397-DT, 1996 U.S. Dist. LEXIS 16754, at *21 (E.D. Mich. July 30, 1996) (exercising discretion to abstain from PITWD cases pending against nondebtor codefendants in interest of "justice, comity and judicial economy"), rev'd, 113 F.3d 565 (6th Cir. 1997).

proceedings by tort plaintiffs against Companies Y and Z, the nondebtor codefendants. Exploring this jurisdictional question is not simply an intellectual exercise. Such issues have figured prominently in at least two mass tort litigations, the A. H. Robins "Dalkon Shield" bankruptcy[8] and, more recently, the Dow Corning breast implant litigation.[9] Both the Fourth Circuit in the Robins bankruptcy and the Sixth Circuit in the Dow Corning bankruptcy found that tort claims against nondebtor codefendants were "related to" the bankruptcy case of the debtor corporation.[10] Part I of this Note will examine the history and present statutory bases of bankruptcy court jurisdiction, including "related to" jurisdiction. Part II will discuss the ambiguities of the various judicial standards for "related to" jurisdiction, including the Sixth Circuit's assertion of "related to" jurisdiction in the Dow Corning mass tort litigation. Part III will illustrate why an expansive reading of "related to" as applied to nondebtor codefendants creates problems for mass tort plaintiffs and for our state and federal judiciaries. Such a reading of the relevant statutory language allows nondebtor codefendants to delay the trial of mass tort cases, making it harder for plaintiffs to continue litigating. Expanded "related to" jurisdiction also infringes on states' rights and exemplifies why bankruptcy jurisdiction should be interpreted narrowly out of respect for Article III of the Constitution.

I

THE HISTORY OF BANKRUPTCY COURT JURISDICTION

The Bankruptcy Act of 1898 ("the Act") contained the original federal bankruptcy laws.[11] Under the Act, bankruptcy proceedings were generally conducted before referees whose final orders were appealable to the district court.[12] The Act's grant of jurisdiction to the bankruptcy courts was limited.[13] Much time and money were spent

[8] Robins filed a chapter 11 petition for relief in 1985 in reaction to suits stemming from plaintiffs' use of an intrauterine contraceptive device known as the Dalkon Shield. See, e.g., *A. H. Robins*, 788 F.2d at 996 ("Confronted, if not overwhelmed, with an avalanche of actions filed . . . seeking damages for injuries allegedly sustained by the use of . . . [the] Dalkon Shield, the manufacturer of the device, A. H. Robins Company, Incorporated (Robins) filed its petition under Chapter 11 . . . .").

[9] Dow Corning filed a chapter 11 petition in 1995 as a result of breast implant litigation. See, e.g., *Dow Corning I*, 86 F.3d at 486 (noting that chapter 11 petition was motivated by mass tort litigation).

[10] See *Dow Corning I*, 86 F.3d at 490; *A. H. Robins*, 788 F.2d at 1002 n.11 & 1014.

[11] See Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

[12] See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53 (1982) (discussing referee system).

[13] The bankruptcy courts were vested with summary jurisdiction only over controversies involving property in the actual or constructive possession of the court. See id. at 53;

contesting the jurisdiction of the court, instead of litigating the merits of the cases.[14] The Bankruptcy Reform Act of 1978 amended 28 U.S.C. § 1471 in an attempt to solve this jurisdictional crisis.[15] The legislative history accompanying the enactment of § 1471 records Congress's intention to grant the bankruptcy courts broad power.[16] In this way, "Congress mandated that all of the jurisdiction given to the Article III district court was to be exercised by the non-Article III bankruptcy court."[17] This broad grant of authority to a non-Article III court[18] raised serious constitutional questions about the validity of the jurisdictional scheme.

---

see also Howard C. Buschman III & Sean P. Madden, The Power and Propriety of Bankruptcy Court Intervention in Actions Between Nondebtors, 47 Bus. Law. 913, 916 (1992) (arguing that jurisdiction under Act was too limited).

14 See, e.g., King & Cook, supra note 2, at 691 (noting that jurisdictional issues were often litigated under Act).

15 See Bankruptcy Reform Act of 1978, ch. 90, 92 Stat. 2549, 2668-69 (repealed 1984) [hereinafter Reform Act]. The Reform Act eliminated the referee system and established in each judicial district a bankruptcy court as an adjunct to the district court. See, e.g., *Northern Pipeline*, 458 U.S. at 53 (explaining system introduced by Reform Act). The jurisdiction of the bankruptcy courts created by the Reform Act was much broader than that exercised under the former referee system. See id. at 54. 28 U.S.C. § 1471 (repealed 1984) stated:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the 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.
>
> (c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

16 See, e.g., H.R. Rep. No. 95-595, at 48 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6010 (stating that Reform Act granted bankruptcy courts "broad and complete jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases").

17 1 Collier on Bankruptcy, supra note 5, ¶ 3.01[2][b].

18 Article III of the Constitution provides that "[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. Article III judges hold their offices only during "good Behaviour" and receive compensation "which shall not be diminished during their Continuance in Office." Id. In order to ensure the independence of the judiciary, the judicial power of the United States must be exercised by courts having the attributes prescribed by Article III. See, e.g., *Northern Pipeline*, 458 U.S. at 58 ("Art. III both defines the power and protects the independence of the Judicial Branch."). The *Northern Pipeline* Court stated:

> It is undisputed that the bankruptcy judges whose offices were created by the [Reform Act] do not enjoy the protections constitutionally afforded to Art. III judges. The bankruptcy judges do not serve for life subject to their continued "good Behaviour." Rather, they are appointed for 14-year terms, and can be removed by the judicial council of the circuit in which they serve on grounds of "incompetency, misconduct, neglect of duty, or physical or mental disability." Second, the salaries of the bankruptcy judges are not immune from diminution

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[19] the Supreme Court held that Congress, in enacting § 1471, had impermissibly removed the essential attributes of an Article III court and had vested them in a non-Article III adjunct.[20] Thus, the Supreme Court declared the broad grant of jurisdiction in § 1471 unconstitutional.[21] Shortly after the *Northern Pipeline* decision, Congress amended the jurisdictional statute to comply with the Supreme Court's edict.[22] The jurisdictional grant under the 1984 Amendments is codified in 28 U.S.C. § 1334(a) and (b). The language used in these subsections is nearly identical to the language employed in 28 U.S.C. § 1471(a) and (b):[23]

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the 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.[24]

Under the 1984 Amendments, there are four statutory bases of jurisdiction under which a district court may refer proceedings to a

---

> by Congress. In short, there is no doubt that the bankruptcy judges created by the [Reform Act] are not Art. III judges.

Id. at 60-61 (citations omitted).

19 458 U.S. 50 (1982).

20 See id. at 87. At issue in *Northern Pipeline* was whether the bankruptcy court could adjudicate a suit raised by the debtor (Northern Pipeline) against a third party (Marathon) based on state law claims for breach of contract, breach of warranty, misrepresentation, coercion, and duress. See id. at 56. Under § 1471, the bankruptcy court would automatically have had jurisdiction over such a dispute. See, e.g., 1 Collier on Bankruptcy, supra note 5, ¶ 3.01[2][b] (stating that § 1471 allowed all jurisdiction given to district court to be exercised by bankruptcy court).

21 See *Northern Pipeline*, 458 U.S. at 87. In a plurality opinion, the Court held all of § 1471 unconstitutional. See id. at 52, 87. Justice Rehnquist's concurring opinion expressed concern over the broad sweep of the plurality's invalidation of the entire section but could see no logical basis for severing 28 U.S.C. § 1471(c) from § 1471(a) & (b) and thus joined in the result that the entire section was unconstitutional. See id. at 91-92 (Rehnquist, J., concurring).

22 See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 99 Stat. 333 (codified at 28 U.S.C. § 1334(a), (b) (1994)).

23 See, e.g., King & Cook, supra note 2, at 742 (stating that language of § 1334(a) & (b) is "exactly the same" as that in former § 1471). The 1984 Amendments did not, of course, include a section analogous to 28 U.S.C. § 1471(c), which authorized the blanket referral of district court jurisdiction to the bankruptcy courts.

24 28 U.S.C. § 1334(a), (b) (1994).

bankruptcy court: (1) cases "under" title 11;[25] (2) proceedings "arising under" a title 11 case;[26] (3) proceedings "arising in" a title 11 case;[27] and (4) proceedings "related to" a title 11 case.[28] "Related to" jurisdiction provides the "broadest and most nebulous standard for the bankruptcy court's exercise of subject matter jurisdiction."[29]

The jurisdiction granted to the district courts under § 1334(a) and (b) may be referred to the bankruptcy judges in the district.[30] The bankruptcy courts, however, can hear and issue final orders and judgments only regarding cases under title 11 and in "core"[31] proceedings arising under title 11 or arising in a case under title 11. As for non-core matters which are "otherwise related to" a case under title 11, bankruptcy courts may make proposed findings of fact and conclusions of law to be submitted to the district court for final disposition.[32]

---

25 Categorizing a case as "under" title 11 "refers merely to the bankruptcy petition itself, over which district courts (and their bankruptcy units) have original and exclusive jurisdiction." Wood v. Wood (In re Wood), 825 F.2d 90, 92 (5th Cir. 1987).

26 According to the legislative history for the Reform Act, "arising under" jurisdiction applies to "any matter under which a claim is made under a provision of title 11." S. Rep. No. 95-989 at 154 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5940.

27 The "arising in" category acts as the "residual category of civil proceedings" of which "administrative matters" are a principal component. 1 Collier on Bankruptcy, supra note 5, ¶ 3.01[4][c][iv]. Such administrative matters include allowance or disallowance of claims against the estate, estimation of claims, and motions to terminate, annul, or modify the automatic stay. See id. ¶ 3.02[3][a] (listing administrative matters).

28 One court has stated:

> For the purpose of determining whether a particular matter falls within bankruptcy jurisdiction, it is not necessary to distinguish between proceedings "arising under," "arising in a case under," or "related to a case under," title 11. These references operate conjunctively to define the scope of jurisdiction. Therefore, it is necessary only to determine whether a matter is at least "related to" the bankruptcy.

Wood, 825 F.2d at 93.

29 Buschman & Madden, supra note 13, at 914.

30 28 U.S.C. § 157(a) (1994) ("Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.").

31 Roughly speaking, "core" proceedings are those that do not exist outside of the bankruptcy. See, e.g., *Wood*, 825 F.2d at 97 (stating that core proceeding is one that "by its nature . . . could arise only in the context of a bankruptcy case"). Core matters include, but are not limited to, proceedings affecting the administration of the debtor's estate, counterclaims by the estate against claimants, preferences, dischargeability of debts, and issues surrounding the automatic stay. See 28 U.S.C. § 157(b)(2) (1994) (listing core matters). Parties may appeal these final orders and judgments from the bankruptcy court to the appropriate district court. See 28 U.S.C. § 157(c)(1) (1994) (governing method of review of bankruptcy court decision by district court).

32 28 U.S.C. § 157(c)(1) (1994). Consent by the involved parties, however, allows the bankruptcy courts to make final orders in non-core proceedings. See 28 U.S.C. § 157(c)(2) (1994).

II
CONFUSION OVER THE STANDARD FOR "RELATED TO" JURISDICTION

The current judicial standard for "related to" jurisdiction is ambiguous at best. This Part will discuss the Supreme Court's decision in *Celotex Corp. v. Edwards*,[33] which failed to clarify the federal circuit court conflicts over the scope of "related to" jurisdiction. The lower federal courts have construed the statute either narrowly or broadly, and the ensuing jurisdictional dilemma has had a controversial effect on courts deciding mass tort litigations.

A. The Ambiguity of the Pacor *Standard for "Related to" Jurisdiction*

Pacor, Inc. v. Higgins,[34] which arose from the Johns-Manville Corporation (Manville) asbestos bankruptcy, is considered the "seminal" case dealing with "related to" jurisdiction.[35] Pacor was a distributor of chemical supplies.[36] John Higgins, an employee of Pacor, brought a products liability action against Pacor in Pennsylvania state court, alleging work-related exposure to asbestos.[37] In turn, Pacor filed a third-party complaint against Manville, claiming that Manville was the original manufacturer of the asbestos.[38] On August 26, 1982, Manville filed a petition for relief under title 11 in the United States Bankruptcy Court for the Southern District of New York.[39] Pacor then moved to have the Higgins-Pacor controversy joined with the Manville bankruptcy case and heard in the bankruptcy court.[40] On Higgins's "appeal," the United States District Court for the Eastern District of Pennsylvania held that the Higgins-Pacor suit was not "related to" the Manville bankruptcy and that the United States Bankruptcy Court for the Southern District of New York lacked jurisdiction to hear the matter.[41]

The Third Circuit affirmed.[42] Before setting forth the standard for determining whether a proceeding is "related to" a case under title 11, the court noted that the jurisdiction of the bankruptcy courts was

---

33 514 U.S. 300 (1995).

34 743 F.2d 984 (3d Cir. 1984).

35 See, e.g., Buschman & Madden, supra note 13, at 925 (stating that *Pacor* is "the seminal case setting forth a test for related jurisdiction").

36 See *Pacor*, 743 F.2d at 986.

37 See id.

38 See id.

39 See id.

40 See id.

41 See id.

42 See id. at 996.

not without limit and that there was a "statutory, and eventually constitutional" limitation to the power of the bankruptcy court.[43] The *Pacor* court then articulated its standard:

> The . . . test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.[44]

Despite the court's observation that "related to" jurisdiction is "not without limit,"[45] the language defining this standard is virtually limitless. Some courts consider the "conceivably have any effect" test to be the *Pacor* standard.[46] Other courts have made the phrase "in any way impacts" the *Pacor* standard.[47] Some commentators have suggested that the "in any way impacts" test narrows the "conceivable effects" test.[48]

In spite of the apparent breadth of either the "conceivable effects" test or the "in any way impacts" test, the court concluded that the Higgins-Pacor action was not "related to" the Manville bankruptcy case because the outcome of the action could "in no way bind Manville, in that it could not determine any rights, liabilities, or course of action of the debtor."[49] The court stressed two reasons for this conclusion. First, the court stated that because Manville was not a party to the Higgins-Pacor action, Manville could not be bound by res judicata or collateral estoppel; were Higgins to win his products liability case, Manville would still be able to relitigate any issue in response to a later claim by Pacor.[50] Second, the court noted that were Higgins to

---

[43] Id. at 994.

[44] Id. (citations omitted).

[45] Id.

[46] See, e.g., Wood v. Wood (In re Wood), 825 F.2d 90, 93 (5th Cir. 1987) (stating *Pacor* test asks "whether the outcome of that proceeding could *conceivably* have any effect on the estate being administered in bankruptcy").

[47] See, e.g., A. H. Robins Co. v. Piccinin, 788 F.2d 994, 1002 n.11 (4th Cir. 1986) (stating that *Pacor* test states "action is related to bankruptcy if the outcome . . . in any way impacts upon the handling and administration of the bankrupt estate" (quoting *Pacor*, 743 F.2d at 994)).

[48] See, e.g., Buschman & Madden, supra note 13, at 927 (stating that third sentence of *Pacor* standard explains, modifies, and limits otherwise extremely broad implications of first sentence). It is unclear, however, how a standard which triggers "related to" jurisdiction if an action "in any way impacts" a bankruptcy could be seen as a cabining device.

[49] *Pacor*, 743 F.2d at 995.

[50] See id.

prevail, Pacor would still be obligated to bring an entirely separate proceeding for indemnification.[51] No legal relationship existed between Pacor and Manville or between Higgins and Manville—Pacor was not a contractual guarantor of Manville; Manville had not agreed to indemnify Pacor; and Higgins was not a creditor of Manville.[52]

Pacor's vague language has led to confusion in the United States Courts of Appeals over the scope of "related to" jurisdiction. In its 1995 decision in *Celotex,* the Supreme Court addressed the issue.[53] While the Court stated that Congress's grant of "related to" jurisdiction to the bankruptcy courts was a grant with limits (albeit one of "some breadth"),[54] the Court did not state what those limits should be. At the conclusion of its "related to" discussion, however, the Court included a footnote, setting forth, verbatim, the *Pacor* standard.[55] In the footnote, the Court noted that the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits had adopted *Pacor*

---

51 See id.

52 See id.

53 See Celotex Corp. v. Edwards, 514 U.S. 300, 307-10 (1995). In 1989, Bennie and Joann Edwards won a suit in Texas against Celotex, an asbestos manufacturer. See id. at 302. To stay execution of the judgment pending appeal, Celotex posted a $300,000 bond. See id. Northbrook Property and Casualty Insurance Company (Northbrook) served as surety for the bond. See id. As collateral for the bond, Celotex allowed Northbrook to retain money owed to Celotex under a settlement agreement resolving insurance coverage disputes between Northbrook and Celotex. See id. The Fifth Circuit affirmed the district court's judgment for Edwards. See id. On the same day, Celotex filed a petition for relief under chapter 11 of the Code in the United States Bankruptcy Court for the Middle District of Florida. See id. The bankruptcy court exercised its equitable powers and issued an injunction staying "all proceedings involving Celotex." Id. at 303. Despite the injunction, the district court in Texas allowed the Edwards to execute the bond against Northbrook. See id. at 304. The Fifth Circuit affirmed. See id. at 305. Reversing the Fifth Circuit, the Supreme Court held that allowing the Edwards to recover from Northbrook on the bond would have an adverse impact on Celotex's reorganization since Northbrook would then be able to retain the insurance proceeds that Celotex pledged as collateral when the bond was issued. See id. at 309-10. The Court further held that the Edwards should have challenged the injunction in bankruptcy court rather than collaterally attacking the bankruptcy court's injunction in the federal courts in Texas. See id. at 313.

54 The Court stated:

> Congress did not delineate the scope of "related to" jurisdiction, but its choice of words suggests a grant of some breadth. . . . We agree with the views expressed by . . . the Third Circuit in *Pacor, Inc. v. Higgins* that "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," and that the "related to" language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simply proceedings involving the property of the debtor or the estate. We also agree . . . that a bankruptcy court's "related to" jurisdiction cannot be limitless.

Id. at 307-08 (footnotes and citations omitted) (quoting *Pacor*, 743 F.2d at 994).

55 See id. at 308 n.6.

with little or no variation,[56] while the Second and Seventh Circuits "seem[ed] to have adopted a slightly different test."[57] The Court stated that bankruptcy courts have "jurisdiction over more than simply [the] proceedings involving the property of the debtor or the estate,"[58] perhaps implying that the Seventh and the Second Circuit standards are too narrow.[59] The Court nowhere explicitly resolved, however, whether *Pacor* articulated the proper test for determining the scope of "related to" jurisdiction.[60]

B. Varying Standards for Determining the Scope of "Related To" Jurisdiction

As the Supreme Court noted in *Celotex*, the Second and the Seventh Circuit Courts of Appeals have opted for a narrow reading of "related to" jurisdiction.[61] In *In re Turner*,[62] Judge Friendly, writing for the Second Circuit, argued for a narrow interpretation of the "related to" language.[63] Burneice Turner was the lessee of a bar owned by Kenneth Ermiger.[64] On December 7, 1981, Turner filed a petition for relief in the United States Bankruptcy Court for the Northern District of New York.[65] Turner filed a schedule of property claimed as exempt under the Code, including a contingent cause of action against Ermiger for conversion, and then filed a complaint against Ermiger in

---

56 See id. The Court cited In re G.S.F. Corp., 938 F.2d 1467, 1475 (1st Cir. 1991) (citing *Pacor* with approval); A. H. Robins Co. v. Piccinin, 788 F.2d 994, 1002 n.11 (4th Cir. 1986) (same); Wood v. Wood (In re Wood), 825 F.2d 90, 93 (5th Cir. 1987) (same); Robinson v. Michigan Consol. Gas Co., 918 F.2d 579, 583 (6th Cir. 1990) (same); Dogpatch Properties, Inc. v. Dogpatch U.S.A., Inc. (In re Dogpatch U.S.A., Inc.), 810 F.2d 782, 786 (8th Cir. 1987) (same); Fietz v. Great W. Sav. (In re Fietz), 852 F.2d 455, 457 (9th Cir. 1988) (same); Gardner v. United States (In re Gardner), 913 F.2d 1515, 1518 (10th Cir. 1990) (same); Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.), 910 F.2d 784, 788 & n.19 (11th Cir. 1990) (same).

57 *Celotex*, 300 U.S. at 309 n.6. The court here cited Turner v. Ermiger (In re Turner), 724 F.2d 338, 341 (2d Cir. 1983) (holding that proceeding must have "significant connection" to bankruptcy case in order to fall within "related to" jurisdiction); Elscint, Inc. v. First Wisc. Fin. Corp. (In re Xonics), 813 F.2d 127, 131 (7th Cir. 1987) (holding that proceeding must affect property available for distribution in order to fall within "related to" jurisdiction); and Home Ins. Co. v. Cooper & Cooper, Ltd., 889 F.2d 746, 749 (7th Cir. 1989) (same). For a discussion of the Second and Seventh Circuit standards, see infra notes 62-80 and accompanying text.

58 *Celotex*, 514 U.S. at 308.

59 See infra notes 62-80 and accompanying text.

60 See *Celotex*, 514 U.S. at 309 n.6 ("But whatever test is used, the . . . cases make clear that bankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor.").

61 See supra note 57.

62 724 F.2d 338 (2d Cir. 1983).

63 See id. at 341.

64 See id. at 339.

65 See id.

the bankruptcy court for conversion of property that was on the premises of the bar.[66] The bankruptcy judge rendered a memorandum decision granting judgment to Turner without stating how the Turner-Ermiger suit was "related to" the Turner bankruptcy.[67] Ermiger appealed the jurisdictional question to the district court, which affirmed.[68] Ermiger then appealed to the Second Circuit.[69]

Judge Friendly first reviewed the legislative history surrounding the passage of 28 U.S.C. § 1471(b).[70] He then fashioned a new standard for determining whether a proceeding is "related to" a case under title 11, extracting an isolated sentence from the legislative history: "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."[71] Judge Friendly held that because there was "no showing that Turner's action against Ermiger had any 'significant connection' with her bankruptcy case," the case fell outside the scope of § 1471(b).[72]

In 1987, in *In re Xonics*,[73] the Seventh Circuit also articulated a narrow standard for "related to" jurisdiction, holding that a matter is "related to" a bankruptcy when "it affects the amount of property available for distribution or the allocation of property among creditors."[74] The Seventh Circuit later reaffirmed this standard in *Home Insurance Co. v. Cooper & Cooper, Ltd.*,[75] adding that the court viewed "related to" jurisdiction narrowly "not only out of respect for Article III but also to preserve the jurisdiction of state courts over questions of state law involving persons not party to the bankruptcy."[76]

---

66 See id.

67 See id.

68 See id. at 339-40.

69 See id.

70 See id. at 340-41.

71 H.R. Rep. No. 95-595, at 47 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6009 (emphasis added).

72 See *Turner*, 724 F.2d at 341. In showing that there was no "significant connection" between the Turner-Ermiger conversion suit and the Turner bankruptcy, the Second Circuit noted that Turner had brought the present action in her own name, that the judgment ordered Ermiger to pay damages directly to Turner, and that there was no suggestion that the proceeds from the suit would be turned over to the trustee who had been appointed to Turner's bankruptcy case. See id.

73 813 F.2d 127 (7th Cir. 1987).

74 Id. at 131.

75 889 F.2d 746 (7th Cir. 1989).

76 Id. at 749.

In re FedPak Systems, Inc.[77] illustrates the Seventh Circuit's continuing adherence to a standard narrower than that announced in *Pacor*. The *FedPak* court stated that its approach was more limited and that a proceeding was "related to" a bankruptcy case only when the dispute affects the amount of property available for distribution or the allocation of property among creditors.[78] The court cited *Home Insurance* for the proposition that "related to" jurisdiction should be interpreted narrowly out of respect for Article III and in order to prevent the expansion of federal jurisdiction over disputes that are best resolved by state courts.[79] Finally, the court noted: "[W]e believe that common sense cautions against an open-ended interpretation of the 'related to' statutory language 'in a universe where everything is related to everything else.'"[80]

Unlike the Second and Seventh Circuits, the Sixth Circuit has elected to expand the *Pacor* standard for "related to" jurisdiction. *In re Salem Mortgage Co.*[81] involved five related corporations, each of which filed petitions for relief under title 11, as well as other nondebtor codefendants.[82] In determining whether the bankruptcy court hearing the title 11 petitions had jurisdiction to hear claims against the nondebtor codefendants, the Sixth Circuit reviewed the legislative history of the "related to" statute, stating that "[t]he emphatic terms in which the jurisdictional grant is described in the legislative history, and the extraordinarily broad wording of the grant itself, leave us with no doubt that Congress intended to grant to the district courts broad jurisdiction in bankruptcy cases."[83] The court continued: "Although situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement, we believe that a broader interpretation of the statute more closely reflects the congressional intent in adopting the new bankruptcy laws."[84]

The court then distinguished *Pacor* in three ways. First, the court noted that the parties in *Salem Mortgage* were more intertwined than

---

77 80 F.3d 207 (7th Cir. 1996).

78 See id. at 213-14.

79 See id. at 214.

80 Id. at 214 (quoting Gerald T. Dunne, The Bottomless Pit of Bankruptcy Jurisdiction, 112 Banking L.J. 957, 957 (1995)). The *FedPak* holding is notable in light of the fact that *FedPak* was decided after *Celotex*. See supra notes 53-60 and accompanying text. The *FedPak* court stated: "While the United States Supreme Court appears to favor a broad interpretation [of "related to" jurisdiction], it has not mandated such an approach." *FedPak*, 80 F.3d at 213 n.8.

81 Kelly v. Nodine (In re Salem Mortgage Co.), 783 F.2d 626 (6th Cir. 1986).

82 See id. at 629-30.

83 Id. at 633-34.

84 Id. at 634.

the parties in *Pacor*.[85] Second, the court noted the opinion of the bankruptcy court that § 1334(b) did not require the debtor to be potentially bound by res judicata or collateral estoppel in order for a proceeding to be considered "related to" a case under title 11.[86] Finally, the court held that § 1334(b) did not require a finding of definite liability against the estate as a condition necessary to holding an action related to a bankruptcy proceeding.[87] Despite the Supreme Court's assertion in *Celotex* that the Sixth Circuit has adopted the *Pacor* formulation "with little or no variation,"[88] the Sixth Circuit seems to have adopted a standard that expands upon *Pacor*.[89]

C. *"Related to" Jurisdiction and Mass Tort Litigation*

The Sixth Circuit's expansive reading of the *Pacor* standard is exemplified by its reasoning and holding in *In re Dow Corning Corp.*,[90] the mass tort litigation arising from injuries allegedly caused by silicone breast implants. Dow Corning was formed in 1943 as a joint venture of Dow Chemical Co. and Corning Inc. to develop and produce silicone and silicone products during World War II.[91] By 1995, more than 36,000 implant recipients had sued Dow Corning, claiming that the breast implants caused them infirmities, including autoimmune diseases, scleroderma, systemic disorders, joint swelling, and chronic fatigue.[92] The plaintiffs alleged that Dow Chemical and Corning negligently conspired with and aided and abetted Dow Corning's

---

[85] *Salem Mortgage* involved a class action against various debtor and nondebtor corporations, all but one of which shared a principal place of business. See id. at 629 & n.6. *Pacor* involved one suit which was not linked closely, if at all, to the Manville bankruptcy. See Pacor, Inc. v. Higgins, 743 F.2d 984, 995 (3d Cir. 1984) (finding no "related to" jurisdiction).

[86] See *Salem Mortgage*, 783 F.2d at 634-35. Contra *Pacor*, 743 F.2d at 995 (finding no "related to" jurisdiction because "[s]ince Manville is not a party to the Higgins-Pacor action, it could not be bound by res judicata or collateral estoppel").

[87] See *Salem Mortgage*, 783 F.2d at 635. Contra *Pacor*, 743 F.2d at 995 (finding no "related to" jurisdiction because "there would be no automatic creation of liability against Manville on account of a judgment against Pacor").

[88] Celotex Corp. v. Edwards, 514 U.S. 300, 308 n.6 (1995) (citing Robinson v. Mich. Consol. Gas Co., 918 F.2d 579, 583-84 (6th Cir. 1990)).

[89] Four years after *Salem Mortgage*, the Sixth Circuit stated: "We too have accepted the *Pacor* articulation, albeit with the caveat that 'situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement.'" Robinson v. Mich. Consol. Gas Co., 918 F.2d 579, 584 (6th Cir. 1990) (quoting *Salem Mortgage*, 783 F.2d at 634). Both the *Salem Mortgage* court and the *Robinson* court failed, however, to describe the nature of such an "extremely tenuous connection."

[90] *Dow Corning I*, 86 F.3d 482 (6th Cir. 1996).

[91] See In re Dow Corning Corp., 187 B.R. 919, 921 (E.D. Mich. 1995) (discussing Dow Corning corporate history), rev'd, 86 F.3d 482 (6th Cir. 1996). Dow Chemical and Corning each have a 50% ownership interest in Dow Corning. See id.

[92] See id. at 922.

manufacture and sale of unsafe products.[93] Minnesota Mining and Manufacturing Co. (3M), Baxter Healthcare Corp. and Baxter International Inc. (Baxter), and Bristol-Myers Squibb Co. and Medical Engineering Corp. (Squibb) were other leading manufacturers and suppliers of silicone gel-filled implants and were listed as codefendants with Dow Corning, Dow Chemical, and Corning in a large number of the personal injury actions.[94]

On June 25, 1992, the Federal Judicial Panel on Multidistrict Litigation ordered the consolidation of all breast implant actions pending in federal courts for coordinated pretrial proceedings and transferred the consolidated action to Chief Judge Pointer of the Northern District of Alabama.[95] On September 1, 1994, Chief Judge Pointer certified a class for settlement purposes only and approved a complex agreement that would create a $4.25 billion settlement fund.[96] Approximately 440,000 women elected to register for inclusion in the settlement.[97] Several thousand plaintiffs, however, opted out of the settlement class, choosing instead to pursue individual suits.[98]

Due to the large number of opt-outs and the imminent crush of litigation costs, Dow Corning filed a petition for reorganization under chapter 11 of the Bankruptcy Code.[99] Dow Corning then filed a motion, pursuant to 28 U.S.C. § 157(b)(5), to transfer all opt-out claims pending against it, Dow Chemical, and Corning to the Eastern District of Michigan, where the reorganization petition had been filed.[100] 3M, Baxter, and Squibb also filed motions to transfer.[101] The district court held that none of the claims against *any* of the nondebtors were "related to" the bankruptcy of Dow Corning.[102]

The nondebtor codefendants argued that the suits against them were "related to" Dow Corning's bankruptcy because any judgment in the mass tort litigation might generate claims for contribution or in-

---

93 See *Dow Corning I*, 86 F.3d at 486 n.6.

94 See id at 485. According to 3M, when Dow Corning filed a petition for relief under title 11, Dow Corning was a codefendant in approximately 75% of the cases filed against 3M. See id. at 486 n.7. Baxter never designed, manufactured, or marketed breast implants but is a codefendant with Dow Corning as a result of corporate acquisitions and mergers. See id. at 485 n.2. Baxter stated that it and Dow Corning were codefendants in more than 5,000 cases. See id. at 487 n.7. The Bristol-Myers Squibb implants were manufactured by a subsidiary, the Medical Engineering Corporation. See id. at 485 n.3.

95 See id. at 485.

96 See id.

97 See id. at 485-86.

98 See id. at 485.

99 See id. at 486.

100 See id.

101 See id.

102 See id. at 487.

demnification which would impact Dow Corning's assets.[103] The district court noted, however, that there would be no ripe claim for indemnification until such time as a judgment was rendered and concluded that the nondebtor codefendants would have to proceed with separate indemnification proceedings after any such judgment.[104] The district court also stated that 3M, Baxter, and Squibb had not alleged that there was a contractual or automatic basis for indemnification between them and Dow Corning and noted that the nondebtor codefendants had not asserted cross-claims against the debtor.[105] The district court also rejected the codefendants' arguments that judicial economy would be best served if the cases against them were joined with the cases against Dow Corning, citing *Pacor* for the proposition that "'judicial economy itself does not justify federal jurisdiction.'"[106]

The Sixth Circuit reversed, holding that the district court should have asserted "related to" jurisdiction over the claims against all of the nondebtor codefendants.[107] The court found that "related to" jurisdiction existed over the suits against the codefendants due to the fact that the codefendants had *potential* claims for contribution and indemnification against Dow Corning.[108] The court admitted that 3M, Baxter, and Squibb had not yet filed contribution claims, indemnification claims, or even proofs of such claims against the debtor.[109] Still, the court held that these potential claims for contribution and indemnification could conceivably have an effect on the bankruptcy proceedings.[110] The court asserted that the definite bases for indemnification required by *Pacor* were not necessary under Sixth Circuit precedent.[111] The court further argued that the nondebtor co-

---

103 See id. at 490.

104 See In re Dow Corning Corp., 187 B.R. 919, 937 (E.D. Mich. 1995), rev'd, 86 F.3d 482 (6th Cir. 1996).

105 See id. The court apparently adopted *Pacor*'s reasoning here. See Pacor, Inc. v. Higgins, 743 F.2d 984, 995 (3d Cir. 1984) (stating that, even if Higgins won, Pacor would be obligated to bring entirely separate proceeding against Manville to receive indemnification and that there was no automatic creation of liability against Manville in event of judgment against Pacor).

106 In re Dow Corning Corp., 187 B.R. at 937 (quoting *Pacor*, 743 F.2d at 994), rev'd 86 F.3d 482 (6th Cir. 1996).

107 See *Dow Corning I*, 86 F.3d 482, 494 (6th Cir. 1996) (finding "related to" jurisdiction over actions pending against codefendants). With regard to Dow Chemical and Corning, the court also held that joint insurance policies held by the companies with Dow Corning provided additional support for finding "related to" jurisdiction, but the court did not rely on this argument. See id.

108 See id.

109 See id. at 490.

110 See id.

111 See id. at 491 (discussing Kelly v. Nodine (In re Salem Mortgage Co.), 783 F.2d 626 (6th Cir. 1986)).

defendants had "asserted repeatedly . . . that they intend[ed] to file claims for contribution and indemnification against Dow Corning,"[112] and that Dow Corning might have claims against them for contribution and indemnification under theories of joint and several liability.[113] The court concluded: "Claims for indemnification and contribution, whether asserted against or by Dow Corning, obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization."[114] According to the *Dow Corning* decision, a Sixth Circuit codefendant in a mass tort case need only state an intention to assert a potential contribution or indemnification claim against a debtor to come within the "related to" jurisdiction of the bankruptcy court.[115] The nondebtor codefendant will then be eligible to transfer the cases against it to the district court where the bankruptcy case is proceeding via 28 U.S.C. § 157(b)(5).[116]

In *A. H. Robins*,[117] the Fourth Circuit adopted a similarly expansive reading of the "related to" language of 28 U.S.C. § 1334(b).[118] Robins, who had engaged in the manufacture and marketing of an intrauterine contraceptive device known as a Dalkon Shield, filed a petition for relief under chapter 11 of the Bankruptcy Code.[119] The filing was precipitated by the "avalanche of actions" filed against Robins, its insurer, Aetna Casualty & Surety, and officers and directors of Robins due to injury claims arising from the use of the Dalkon Shield.[120] The district court, in determining whether the bankruptcy court had the power to halt suits against the nondebtor codefendants

---

112 Id. at 494.

113 See id.

114 Id.

115 See id. at 490.

116 See 28 U.S.C. § 157(b)(5) (1994) (allowing transfer). On July 9, 1998, Dow Corning, under the watchful eye of Bankruptcy Judge Arthur Spector, agreed to a $3.2 billion settlement of the breast implant suits against it as part of its restructuring plan. See, e.g., David J. Morrow, Implant Maker Reaches Accord on Damage Suits, N.Y. Times, July 9, 1998, at A1.

117 A. H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986).

118 See id. at 1002 n.11 (stating that "related to" jurisdiction may be found if proceeding "'in any way impacts'" debtor's bankruptcy (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984))).

119 See *A. H. Robins*, 788 F.2d at 996.

120 Id. at 996 & n.4. Robins discontinued manufacture of the Dalkon Shield in 1974 because of the tort suits filed against it, but Robins did not actually recall the device until 1984. See id. at 996. By 1985, when Robins filed a bankruptcy petition, the number of pending suits had grown to 5,000. See id.

adopted the "in any way impacts" test from *Pacor*.[121] The court then stated that all actions against Robins and the nondebtor codefendants, wherever pending, could be transferred to the United States District Court for the Eastern District of Virginia, where the bankruptcy petition had been filed.[122] The decision in *A. H. Robins*, coupled with the Sixth Circuit's decision in *Dow Corning*, sets a powerful precedent: A district court may assert "related to" jurisdiction over nondebtor codefendants in mass tort litigations without fear of reversal.

III
WHY "RELATED TO" JURISDICTION SHOULD NOT REACH MASS TORT NONDEBTOR CODEFENDANTS

The United States Courts of Appeals have yet to arrive at a uniform standard for bankruptcy courts' "related to" jurisdiction. In mass tort litigation, the courts have articulated an almost meaningless standard for determining whether "related to" jurisdiction exists over nondebtor codefendants. All that is required for a finding of "related to" jurisdiction in the Sixth Circuit is an assertion that the nondebtor codefendants might file contribution or indemnification claims against the debtor which might then ripen into fixed claims.[123] This statutory interpretation is doubly contingent and simply too remote. Such an interpretation also ignores the fact that many courts—including the Supreme Court—have explicitly noted the need for limits on "related to" bankruptcy jurisdiction.[124]

Allowing "related to" jurisdiction to encompass claims against nondebtor codefendants in mass tort cases may seem, at first blush, an efficient means of managing the various claims. Yet the court in *Pacor* stated emphatically that "[j]udicial economy itself does not justify federal jurisdiction."[125]

---

121 See id. at 1002 n.11 ("'An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.'" (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984))).

122 See *A. H. Robins*, 788 F.2d at 998, 1016. The transfers occurred pursuant to 28 U.S.C. § 157(b)(5). See id. at 1010-11.

123 See, e.g., *Dow Corning I*, 86 F.3d 482, 494 (6th Cir. 1996) (stating that "claims currently pending against the nondebtors give rise to contingent claims against Dow Corning which unquestionably could ripen into fixed claims").

124 See, e.g., Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (stating that "a bankruptcy court's 'related to' jurisdiction cannot be limitless"); Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984) (stating that jurisdiction of bankruptcy courts to hear cases related to bankruptcy is "not without limit").

125 *Pacor*, 743 F.2d at 994 (3d Cir. 1984); see also Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.), 910 F.2d 784, 789 (11th Cir. 1990) ("Judicial economy itself does not satisfy federal jurisdiction."); Wisc. Dep't of Indus., Labor & Human Rel. v. Marine Bank

In addition, some courts have advanced the argument that extending "related to" jurisdiction to encompass claims against nondebtor codefendants is necessary to provide the debtor with the best possible chance for an effective reorganization. The Sixth Circuit in *Dow Corning* emphasized the importance of effective reorganizations by distinguishing the case from *Pacor*: "A single possible claim for indemnification or contribution simply does not represent the same kind of threat to a debtor's reorganization plan as that posed by the thousands of potential indemnification claims at issue here."[126] The court in *A. H. Robins* also argued for the centralization allowed by an expansion of "related to" jurisdiction, stating that if the bankruptcy court could arrive at a fair estimation of the value of the claims and submit a plan of reorganization based on such an estimation, the reorganization of the debtor could be accomplished more efficiently.[127]

The successful reorganization of the debtor cannot be a bankruptcy court's only concern, however. In his dissenting opinion in *Celotex*, Justice Stevens discussed the bankruptcy court's "emergency" rationale for issuing an injunction.[128] The court had justified the injunction by arguing that emergency relief was required "lest the reorganization of Celotex become impossible and liquidation follow."[129] Justice Stevens criticized "the misguided notion that a good end is a sufficient justification for the existence and exercise of power."[130] The "specter of liquidation," according to Justice Stevens, could not justify the finding of "related to" jurisdiction in every case.[131] Furthermore, piecemeal litigation, where some proceedings take place in federal court while others take place in state court, is not uncommon in bankruptcy cases and would not necessarily sound the death knell for a reorganization.[132] Finally, assuming nondebtor codefendants can show that suits against them would affect a debtor's estate, the benefits of a successful reorganization must still be weighed against the potential ill effects of allowing jurisdiction over the suits.

Monroe (In re Kubly), 818 F.2d 643, 645 (7th Cir. 1987) (stating that "limited jurisdiction" of bankruptcy court "may not be enlarged by the judiciary because the judge believes it wise to resolve the dispute").

126 *Dow Corning I*, 86 F.3d at 494.

127 See A. H. Robins Co. v. Piccinin, 788 F.2d 994, 1013 (4th Cir. 1986) (emphasizing need for efficient reorganizations).

128 See *Celotex*, 514 U.S. at 331 (Stevens, J., dissenting).

129 Id.

130 Id.

131 Id. at 319 n.5.

132 See, e.g., E. Scott Fruehwald, The Related to Subject Matter Jurisdiction of Bankruptcy Courts, 44 Drake L. Rev. 1, 30 (1995) (discussing judicial overemphasis on having all bankruptcy issues decided in single forum).

No matter the strength of the judicial efficiency and consolidation arguments, these arguments must be balanced against competing concerns, including, first and foremost, fairness to the plaintiffs as creditors of the estate.[133] Allowing a transfer of cases pending against nondebtor codefendants to the district court where the debtor's bankruptcy is proceeding can be a powerful delaying tactic.[134] Such a transfer effectively blocks trial dates in federal and state courts around the country and potentially places thousands of cases on the docket of the district court where the bankruptcy case is proceeding. The transfer also relieves the pressure on the nondebtor codefendants to negotiate settlements with tort claimants by buying them months or years of delay.[135] "The result [is] a defendant's dream and a plaintiff's nightmare on a nationwide scale—long, indefinite postponements for impecunious plaintiffs and comfortable defendants, the ideal posture for negotiation of cheap settlements."[136] Furthermore, as the *A. H. Robins* court noted, some tort claimants may be receiving "critical medical, physical or psychological care" in a particular locality, and their cases may require deposing "substantial numbers of local witnesses."[137] By transferring the cases, the nondebtor codefendants can force a plaintiff to litigate in a forum far away from where he or she resides.[138]

State judiciaries also suffer when nondebtor tort defendants move to transfer cases to federal bankruptcy courts. The expansion of "related to" jurisdiction to reach nondebtor codefendants allows, in any given litigation, all claims pending against nondebtor codefendants which are based on state law to be heard in federal court, thus depriv-

---

133 The goals of bankruptcy are two-fold: to relieve the debtor of debts and to allow the creditors their fair share of the assets of the debtor. See, e.g., id. at 2 (discussing goals of bankruptcy law).

134 See, e.g., Hassan Fattah, Dow Loses Consolidation Attempt, Chemical Wk., Aug. 7, 1996, at 10 (noting concern that consolidation in Dow Corning mass tort litigation of more than 12,500 cases in federal court through finding of "related to" jurisdiction would delay litigation).

135 See, e.g., Brief for Appellee Official Committee of Tort Claimants at 3, *Dow Corning I*, 86 F.3d 482 (6th Cir. 1996) (noting deleterious effect of transfer on plaintiffs). This delay can postpone a nondebtor codefendant's payments of large judgments. In *Dow Corning*, for example, jury awards against the nondebtor codefendants have been $30,000 or more. See, e.g., U.S. Survey Clears Silicone Implants of Role in Breast Cancer, N.Y. Times, Sept. 17, 1997, at A19 (reporting results of breast implant litigations).

136 Petition for a Writ of Certiorari at 11, Official Comm. of Tort Claimants v. Dow Corning Corp., cert. denied, 117 S. Ct. 718 (1997).

137 A. H. Robins Co. v. Piccinin, 788 F.2d 994, 1016 (4th Cir. 1986).

138 See, e.g., Petition for a Writ of Certiorari at 12, Official Comm. of Tort Claimants v. Dow Corning Corp., cert. denied, 117 S. Ct. 718 (1997) ("Any alleged joint tortfeasor of a defendant in Chapter 11 would have . . . an easy route to long delay in an often distant bankruptcy court.").

ing the state courts of their right to hear and decide causes of action based on state law. Of course, in general, bankruptcy courts may adjudicate claims over which other federal courts lack jurisdiction under federal question or diversity of citizenship jurisdiction.[139] States consequently lose the right to litigate some cases to the bankruptcy court in exchange for allowing a specialized forum to administer efficiently the federal bankruptcy laws. Yet the more federal courts expand "related to" jurisdiction, the more state courts will lose the right to adjudicate claims that arise in their territory, involve their law, and demand their expertise. Many courts have noted their concern that an overbroad construction of § 1334(b) may bring into federal court matters that should be left for state courts to decide.[140] While there is a potential for overreaching any time a federal court asserts jurisdiction over a state law claim, the case for protecting the right of state courts to adjudicate state-created causes of action could not be stronger than in mass tort cases involving thousands of plaintiffs[141] and numerous nondebtor codefendants.[142] According to the Sixth Circuit in *Dow Corning*, a nondebtor codefendant need only state an intention to assert a possible contribution or indemnification claim against the debtor to ensure that any state-law-based claim comes within the "related to" jurisdiction of the bankruptcy court.[143] Once jurisdiction is found, 28 U.S.C. § 157(b)(5) allows the district court to pull cases

---

139 See, e.g., Fruehwald, supra note 132, at 2 (citing example illustrating how bankruptcy court could hear state law contract claim between Virginia debtor and Virginia creditor and noting that federal court would lack jurisdiction because no diversity of citizenship or federal question).

140 The *FedPak* court stated that it favored a narrow "related to" standard in order "to prevent the expansion of federal jurisdiction over disputes that are best resolved by state courts." In re FedPak Sys., Inc., 80 F.3d 207, 214 (7th Cir. 1995); see also Miller v. Kemira, Inc. (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).

141 Mass tort cases can easily involve thousands of people, as exemplified by the Robins and Dow Corning bankruptcies. For example, by 1985, Robins and its insurer had paid roughly $517 million for 25 trial judgments and 9,300 settlements. See *A. H. Robins*, 788 F.2d at 996 n.4.

142 The addition of codefendants increases the number of claims, and the sheer number of cases involved raises the federalism stakes. For example, in the *Dow Corning* litigation, "tens of thousands" of suits were filed against the nondebtor codefendants. See *Dow Corning I*, 86 F.3d 482, 485 (6th Cir. 1996). Any time a federal court holds that a suit against a nondebtor codefendant is "related to" a bankruptcy case, a state court may be deprived of hearing that case.

143 See id. at 494 (finding "related to" jurisdiction over tort proceedings against nondebtor codefendants where codefendants expressed intention to file claims for contribution and indemnification against debtor).

from state courts into a federal forum.[144] Furthermore, the statute governing transfer refers only to "personal injury tort and wrongful death cases," without specifying whether this includes cases pending against nondebtor codefendants.[145] Despite case law allowing the transfer,[146] the statute itself nowhere resolves whether the federal district courts have the power to appropriate state-law claims which are not directed against the estate and bring them into a federal forum. Of course, even if a court asserts jurisdiction, it may always abstain from hearing the case. Yet it appears that only one court, which was reversed on appeal, has held that a court must abstain from hearing cases involving personal injury tort and wrongful death cases pending against nondebtor codefendants because the exemption from mandatory abstention does not apply to these claims against defendants other than the estate.[147] Even allowing for discretionary abstention, which takes into consideration comity between federal and state courts, no grant of abstention can, by itself, cure a jurisdictional defect.[148] Barring bankruptcy jurisdiction over state-law claims against nondebtor codefendants in mass tort cases would be a simple, though perhaps simplistic, way to guard the interests of state courts. Finally, allowing "related to" jurisdiction over claims against nondebtor codefendants raises constitutional concerns. In *Northern Pipeline*, the Court found the blanket referral of jurisdiction from the district courts to the bankruptcy courts unconstitutional.[149] It has been argued that the *Northern Pipeline* Court found the blanket *referral* of jurisdiction to a non-Article III court unconstitutional, but that the Court was not concerned about the constitutionality of the *scope* of bankruptcy juris-

144 See 28 U.S.C. § 157(b)(5) (1994) (stating that district court where bankruptcy case is pending may order that "personal injury tort and wrongful death" claims be tried in that court).

145 See id.

146 See, e.g., *A. H. Robins*, 788 F.2d at 1011-14 (supporting transfer of tort claims pending against nondebtor codefendants); see also supra note 6.

147 See In re Dow Corning Corp., No. 95-CV-72397-DT, 1996 U.S. Dist. LEXIS 16754, at *16 (E.D. Mich. July 30, 1996) (holding that exemption from mandatory abstention does not apply to PITWD claims which are not against estate), rev'd, 113 F.3d 565 (6th Cir. 1997). The Sixth Circuit reversed the decision of the district court, arguing that the district court should have addressed each claim individually. The court failed to address the district court's statutory argument, however. See *Dow Corning II*, 113 F.3d 565, 570 (6th Cir. 1996); see also supra note 7.

148 See, e.g., Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.), 910 F.2d 784, 788 n.16 (11th Cir. 1990) (noting that abstention provisions only partially address comity issues).

149 See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (holding that statute governing jurisdiction removed "essential attributes" of Article III court and impermissibly placed them in non-Article III adjunct); see also supra text accompanying notes 19-21.

diction.[150] However, federal courts have acknowledged the limits on "related to" jurisdiction—the limits imposed by the Constitution and its grant of jurisdiction to Article III courts.[151] Even when these limits are not technically exceeded, the federal courts may, by virtue of the fact that *Celotex* failed to define the meaning of "related to" jurisdiction, interpret "related to" narrowly. Prime candidates for an application of a narrow interpretation of "related to" jurisdiction are those mass tort cases involving claims against nondebtor codefendants where the nondebtor codefendants argue that the claims against them are "related to" the bankruptcy of the debtor based solely on hypothetical claims the nondebtor codefendants might raise against the debtor.

CONCLUSION

There is no indication that Congress, in enacting the bankruptcy laws, intended that bankruptcy courts would handle mass tort litigations.[152] Whether district courts should assert "related to" jurisdiction over cases against nondebtor codefendants is debatable. Of course, one way to resolve the problems raised by this Note would be for the Supreme Court to decide exactly what the standard for "related to" jurisdiction is and how it should be applied in the context of mass tort cases. The Court passed up a prime opportunity to do the former in *Celotex* and to do the latter in *Dow Corning*.[153] Failing this, federal courts should refuse to extend "related to" jurisdiction to claims against nondebtor codefendants in mass tort cases where the codefendants have only stated an intention to make a claim against the

---

150 See, e.g., Wood v. Wood (In re Wood), 825 F.2d 90, 93 (5th Cir. 1987) ("The holding in Marathon suggests no concern over the constitutionality of the scope of bankruptcy jurisdiction defined by Congress; its concern is with the *placement* of the jurisdiction in non-Article III courts.").

151 See, e.g., Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984) ("[T]here is a statutory, and eventually constitutional, limitation to the power of a bankruptcy court.").

152 According to one commentator:

> [M]ass torts . . . never really were contemplated to be a factor in bankruptcy cases. Matters such as asbestos claims and Dalkon Shield claims, for example, never entered into Congress' collective legislative mind. . . . [H]ad Congress considered the subject, it then might have identified and provided rules for resolving some of the thorny issues which have arisen in the cases in which mass torts have played a significant role.

William L. Norton, Jr., 1 Norton Bankruptcy Law and Practice 2d § 3:19 (William L. Norton, Jr. et al. eds., 1994); see also The Effect of Bankruptcy Cases of Several Asbestos Companies on the Compensation of Asbestos Victims: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 98th Cong. 30 (1983) (statement of Professor Lawrence P. King) (stating that unified bankruptcy jurisdiction was never intended to include "11,000 or more cases pending around the country").

153 See supra notes 53-60, 90-116 and accompanying text.

estate. Such an approach would not be inconsistent with *Pacor*, which suggested the importance of a binding legal relationship between the debtor and the nondebtor codefendants in finding "related to" jurisdiction.[154] Nor would such an approach disregard the broader Sixth Circuit "related to" standard.

Whatever the solution, it must be accomplished soon. Given that present and future mass tort defendants will look to past mass tort cases to formulate strategies, developments regarding "related to" jurisdiction as applied to nondebtor codefendants will have an undeniable impact on future mass tort litigation. Given concerns about effects on federalism, constitutional norms, and, most importantly, on future tort plaintiffs facing unexpected, lengthy litigation delays, courts should avoid an overbroad interpretation of the "related to" jurisdiction of the bankruptcy court in mass tort litigation.

[154] See *Pacor*, 743 F.2d at 995 (holding proceeding not "related to" bankruptcy where proceeding could not legally bind debtor).