DESIGNING RELATED-TO BANKRUPTCY JURISDICTION

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This Note offers a framework for analyzing related-to bankruptcy jurisdiction under 28 U.S.C. § 1334 that courts can implement immediately within the bounds of the statute and case law. It argues that that the current requirements for related-to jurisdiction should be better deployed in accordance with the relative merits of jurisdictional rules and standards, and proposes a broad threshold inquiry back-stopped by a robust abstention doctrine, which will allow courts to both define bright-line boundaries where possible and fulfill the policy objectives of bankruptcy jurisdiction on a case-by-case basis.

INTRODUCTION

Bankruptcy is meant to provide a centralized forum for the comprehensive and efficient reorganization of a debtor's affairs.[1] The bankruptcy process entails consolidation of a wide variety of disputes concerning the debtor into a single bankruptcy case, which is "the

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[1] *See, e.g.*, Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447–48 (2004) (explaining that a court exercising bankruptcy jurisdiction is "able to provide the debtor a fresh start" once and for all by resolving any claim that any creditor has against the debtor's assets in one centralized case).

umbrella under which all of the proceedings that follow the filing of a bankruptcy petition take place."[2] Since bankruptcy seeks to resolve preexisting disputes and obligations involving the debtor within one case, most individual bankruptcy proceedings will involve nonbankruptcy claims, such as state law contract and tort claims.[3] As a result, bankruptcy subject matter jurisdiction must encompass not only claims involving substantive bankruptcy law, but also nonbankruptcy claims under state or federal law that are integral to resolution of a particular bankruptcy case. In order to hear these nonbankruptcy claims within bankruptcy, federal courts must rely on 28 U.S.C. § 1334(b), which vests original subject matter jurisdiction over "all civil proceedings" that are "related to" the bankruptcy case.[4] This Note focuses on the related-to bankruptcy jurisdiction of federal courts.

The difficulty with related-to bankruptcy jurisdiction is that its scope necessarily shrinks or expands across different bankruptcy cases. Related-to jurisdiction is "protean, and what is 'related to' . . . in one context may be unrelated in another."[5] This is because

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[2] 1 COLLIER ON BANKRUPTCY ¶ 3.01[2], at 3-6 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2013) [hereinafter COLLIER]. Federal district courts have exclusive jurisdiction over all bankruptcy cases. 28 U.S.C. § 1334(a) (2006). Bankruptcy cases cannot be administered in state court.

[3] *See* Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 1000 (2012) ("Although bankruptcy sometimes appears to be an arcane area of *substantive* law, it is best understood as a *procedural* device for the recognition, organization, and resolution of nonbankruptcy law entitlements relating to the debtor.").

[4] 28 U.S.C. § 1334(b) (2006). Under § 1334(b), only federal district courts are granted original jurisdiction over claims "related to" the bankruptcy case. *Id.* However, district courts have standing authority to refer bankruptcy proceedings to non-Article III bankruptcy courts. *See* 28 U.S.C. § 157(a) (2006) (authorizing district courts to refer "any or all proceedings arising under title 11 or arising in or related to a case under title 11" to bankruptcy courts). Various constitutional debates arise from the distinction between Article III district courts and non–Article III bankruptcy courts. *Compare* Susan Block-Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 529, 530 (1998) (presenting "the case for an Article III bankruptcy court system"), *with* Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 569 (1998) ("[T]he current system of bankruptcy adjudication is both constitutional and desirable for reasons of history and constitutional policy."). These debates are outside the scope of this Note, which deals exclusively with the statutory grant of bankruptcy jurisdiction that remains fixed regardless of what type of court is exercising it. *Cf.* Pfizer Inc. v. Law Offices of Peter G. Angelos (*In re* Quigley Co., Inc.), 676 F.3d 45, 52–53 (2d Cir. 2012) (distinguishing Article III division-of-labor issues from the statutory boundaries of bankruptcy jurisdiction).

[5] Bos. Reg'l Med. Ctr., Inc. v. Reynolds (*In re* Bos. Reg'l Med. Ctr., Inc.), 410 F.3d 100, 107 (1st Cir. 2005); *see also id.* ("The existence vel non of related to jurisdiction must be determined case-by-case."); *cf.* Celotex Corp. v. Edwards, 514 U.S. 300, 310 (1995) (suggesting that bankruptcy jurisdiction "may extend more broadly" in the Chapter 11 reorganization context than it does in the Chapter 7 liquidation context).

bankruptcy cases vary in their size and complexity, so the universe of disputes implicating a given debtor will change from case to case. Unfortunately, this protean nature makes it difficult for courts to test for related-to jurisdiction in a way that is both broadly applicable and helpful for decisionmaking. The Third Circuit's test for related-to jurisdiction from *Pacor, Inc. v. Higgins*, which asks whether a proceeding "*could conceivably have any effect*" on the debtor's bankruptcy estate,[6] is nearly universally accepted in its highly abstract form.[7] Nevertheless, related-to jurisdiction is frequently litigated, there is little consistency in the formal reasoning across cases, and there is no useful guiding doctrine that courts employ to bring uniformity to the jurisdictional analysis.[8]

This Note proposes a framework for analyzing related-to jurisdiction decisions that seeks to help courts best deploy the statute, case law, and doctrine already available to them. It argues that the *Pacor* "effect" requirement should serve as an overinclusive threshold inquiry, while the statutory provision providing for abstention from bankruptcy jurisdiction[9] should play a robust role in the case-by-case examination of whether jurisdiction over certain proceedings will help or hinder effective bankruptcy administration. This hybrid rule-standard test, well within the bounds of the jurisdictional statute and accepted case law, will allow courts to both define bright lines where possible and otherwise fulfill the policy objectives of bankruptcy jurisdiction through a case-by-case standard. Adoption of this proposal will not radically change the outcomes of many cases. Rather, the main upshot will be analytical uniformity among courts and decisions that are explicit about the functional factors guiding them.

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[6] 743 F.2d 984, 994 (3d Cir. 1984), *overruled in part by* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 129 (1995).

[7] *See infra* note 17 and accompanying text (listing circuit court decisions adopting the *Pacor* test).

[8] *See, e.g.*, COLLIER, *supra* note 2, ¶ 3.01[3][e][ii], at 3-16 ("By far the largest number of reported cases dealing with bankruptcy jurisdiction over civil proceedings are concerned with whether a particular proceeding is 'related to' a title 11 case."); Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 750 (2000) ("[T]he outermost bounds of federal bankruptcy jurisdiction [are] rife with litigation . . . . *Pacor* has produced a state of affairs in which jurisdictional determinations are essentially arbitrary—with countless instances of identical factual and procedural postures producing diametrically disparate results on nominal application of the same 'test.'"); Duane Loft, Note, *Jurisdictional Line-Drawing in a Time When So Much Litigation Is "Related to" Bankruptcy: A Practical and Constitutional Solution*, 72 FORDHAM L. REV. 1091, 1106 & nn.109–11 (2004) (discussing the difficulty courts have had construing and implementing a test for related-to jurisdiction in a consistent manner).

[9] *See infra* Part I.C (discussing the bankruptcy abstention statute).

Part I of this Note introduces the core requirements of related-to jurisdiction and statutory bankruptcy abstention. Next, in search of guidance on jurisdictional design, Part II reviews the operation of jurisdictional rules and standards. It then evaluates the requirements of related-to jurisdiction and argues that they should be better deployed in accordance with the relative merits of jurisdictional rules and standards. Part III proposes that courts should (1) use *Pacor*'s "effect on the estate" requirement as a threshold inquiry to serve as a vessel for bright-line categorical rules, and (2) undertake an aggressive, *sua sponte* abstention analysis examining the impact that inclusion or exclusion of related-to proceedings would have on effective bankruptcy administration.

I
The Scope of Related-to Bankruptcy Jurisdiction

A. Foundations and Function

Congress vests federal courts with bankruptcy subject matter jurisdiction in 28 U.S.C. § 1334. In addition to jurisdiction over the debtor's actual bankruptcy case, under this statute, federal courts have original and nonexclusive jurisdiction over three varieties of "civil proceedings": those "arising under" the Bankruptcy Code, those "arising in" a bankruptcy case, and those "related to" a bankruptcy case.[10] Whether a proceeding "arises under" the Bankruptcy Code "depends upon whether the Bankruptcy Code creates the cause of action or provides the substantive right invoked[,]" whereas claims "arising in" a bankruptcy case involve bankruptcy administration and thus "by their nature . . . could arise only in the context of a bankruptcy case."[11] Proceedings "related to" the bankruptcy case, however, "encompass tort, contract, and other legal claims . . . that, were it not for bankruptcy, would be ordinary stand-alone lawsuits . . . ."[12] These claims fall into one of two broad categories: causes of action held by the debtor prior to commencement of the bankruptcy case, which become property of the debtor's estate in bankruptcy, or lawsuits between third parties that affect the bankruptcy case.[13]

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[10] 28 U.S.C. § 1334(b) (2006). The statute vests district courts with "original and exclusive jurisdiction of all cases under title 11," § 1334(a), and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11," § 1334(b).

[11] Stoe v. Flaherty, 436 F.3d 209, 217–18 (3d Cir. 2006). *See generally id.* at 216–18 (describing the various types of bankruptcy matters).

[12] Zerand-Bernal Grp., Inc. v. Cox, 23 F.3d 159, 161 (7th Cir. 1994) (Posner, C.J.).

[13] Celotex Corp. v. Edwards, 514 U.S. 300, 307 n.5 (1995). Related-to proceedings commence within the bankruptcy case, for example, when a debtor sues to recover damages

Congress intended the grant of related-to jurisdiction to be broad in order to enable a comprehensive resolution of bankruptcy cases.[14] Thus, in practice, the prevailing test for related-to jurisdiction, introduced by the Third Circuit in *Pacor*, asks "whether *the outcome of* [a] *proceeding could conceivably have any effect on the estate being administered in bankruptcy*."[15] The *Pacor* court broadly defined "any effect on the estate" as any alteration of "the debtor's rights, liabilities, options, or freedom of action" that has any impact on "the handling and administration of the bankrupt estate."[16] Circuit courts have nearly unanimously adopted this formulation.[17] In *Celotex Corp. v. Edwards*,[18] the Supreme Court noted the appellate-level support for *Pacor* but stopped short of explicitly endorsing the test, choosing instead to simply affirm "that bankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor."[19] The *Celotex* Court agreed with the Third Circuit that Congress intended for bankruptcy jurisdiction to be comprehensive and capable of efficient resolution of the bankruptcy case, but it also warned that related-to jurisdiction "cannot be limitless."[20] Lower courts have thus been left to fend for themselves in carving out a bankruptcy jurisdiction that is both comprehensive and limited, with the *Pacor* test as the only guiding light.[21]

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based on a contract that was breached prior to bankruptcy or when a creditor seeks tort damages from a third party that the debtor has indemnified.

[14] *See infra* notes 26–27 and accompanying text.

[15] Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984), *overruled in part by* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 129 (1995).

[16] *Id.*

[17] *See* Bos. Reg'l Med. Ctr., Inc. v. Reynolds (*In re* Bos. Reg'l Med. Ctr., Inc.), 410 F.3d 100, 105 (1st Cir. 2005) (adopting the *Pacor* test for related-to jurisdiction); Pfizer Inc. v. Law Offices of Peter G. Angelos (*In re* Quigley Co.), 676 F.3d 45, 53–54 (2d Cir. 2012) (same); Nuveen Mun. Trust *ex rel.* Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C., 692 F.3d 283, 294 (3d Cir. 2012) (same); Valley Historic Ltd. P'ship v. Bank of N.Y., 486 F.3d 831, 836 (4th Cir. 2007) (same); Fire Eagle L.L.C. v. Bischoff (*In re* Spillman Dev. Grp., Ltd.), 710 F.3d 299, 304 (5th Cir. 2013) (same); Stewart v. Henry (*In re* Stewart), 62 F. App'x 610, 613 (6th Cir. 2003) (same); GAF Holdings, LLC v. Rinaldi (*In re* Farmland Indus., Inc.), 567 F.3d 1010, 1019 (8th Cir. 2009) (same); Montana v. Goldin (*In re* Pegasus Gold Corp.), 394 F.3d 1189, 1193 (9th Cir. 2005) (same); Gardner v. United States (*In re* Gardner), 913 F.2d 1515, 1518 (10th Cir. 1990) (same); Lawrence v. Goldberg, 573 F.3d 1265, 1270–71 (11th Cir. 2009) (same). *But see In re* FedPak Sys., Inc., 80 F.3d 207, 213–14 (7th Cir. 1996) (describing the Seventh Circuit's related-to test as "more limited" than *Pacor*).

[18] 514 U.S. 300 (1995).

[19] *Id.* at 308 n.6; *see also id.* (noting that this articulation holds "whatever test is used").

[20] *Id.* at 308.

[21] *See* Torkelsen v. Maggio (*In re* Guild & Gallery Plus, Inc.), 72 F.3d 1171, 1181 n.5 (3d Cir. 1996) ("*Pacor* . . . has provided an indispensable and frequently cited frame of reference, a veritable beacon on the uncharted and perilous waters of bankruptcy subject

Despite the lack of doctrinal guidance from the Court, there is a broad consensus that the outer bounds of bankruptcy jurisdiction are defined by both the functional goals of bankruptcy[22] and the Constitution. Since Congress intended that bankruptcy jurisdiction extend all the way to its constitutional limits[23] and the Supreme Court has not spoken directly on those limits,[24] most scholarly commentary debates the constitutional limits of related-to jurisdiction.[25] This Note leaves the constitutional debate to others and seeks to provide courts with an analytical framework that best fits the functional boundaries of bankruptcy jurisdiction.

Functionally, the breadth of bankruptcy jurisdiction is meant to facilitate effective bankruptcy resolution by protecting the estate's assets through centralization of any lawsuits that may affect those assets in a single forum, all for the sake of an orderly and equitable distribution to creditors.[26] As *Pacor* and *Celotex* both indicate, the

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matter jurisdiction. . . . When federal courts must consider whether an issue is a related proceeding, the starting point has universally been *Pacor.*").

[22] *See* Susan Block-Lieb, *Permissive Bankruptcy Abstention*, 76 WASH. U. L.Q. 781, 825 (1998) (arguing that the "breadth" of bankruptcy jurisdiction "is defined by reference to its functional purpose: the expeditious resolution of federal bankruptcy cases").

[23] *See* Brubaker, *supra* note 8, at 799 (finding that "the legislative history reveals virtually no regard for just how far 'related to' jurisdiction extends" aside from "limits the Constitution imposes").

[24] Radha A. Pathak, *Breaking the "Unbreakable Rule": Federal Courts, Article I, and the Problem of "Related to" Bankruptcy Jurisdiction*, 85 OR. L. REV. 59, 75 (2006); *see also id.* ("[T]he Court has dropped hints, some subtle and some not-so-subtle, that it believes 'related to' jurisdiction fits safely within constitutional bounds.").

[25] The two prominent explanations for related-to jurisdiction are based on theories of supplemental jurisdiction and protective jurisdiction. *See, e.g.*, Brubaker, *supra* note 8 (supplemental jurisdiction); John T. Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis from the Perspective of Bankruptcy*, 87 Nw. U. L. REV. 1188 (1993) (ancillary jurisdiction); Thomas C. Galligan, Jr., *Article III and the "Related to" Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 U. PUGET SOUND L. REV. 1 (1987) (protective jurisdiction). *See generally* Pathak, *supra* note 24, at 84–111 (reviewing various constitutional theories for related-to bankruptcy jurisdiction, including supplemental jurisdiction, protective jurisdiction, federal question jurisdiction, and Article I).

[26] *See, e.g.*, Pfizer Inc. v. Law Offices of Peter G. Angelos (*In re* Quigley Co.), 676 F.3d 45, 57 (2d Cir. 2012) ("One of the central purposes—perhaps *the* central purpose—of extending bankruptcy jurisdiction to actions against certain third parties . . . is to protect the assets of the estate so as to ensure a fair distribution of those assets at a later point in time." (internal quotation marks and alterations omitted)); Bos. Reg'l Med. Ctr., Inc. v. Reynolds (*In re* Bos. Reg'l Med. Ctr., Inc.), 410 F.3d 100, 107 (1st Cir. 2005) ("[T]he general rule governing related to jurisdiction [is] the strong federal policy in favor of the expeditious liquidation of debtor corporations and the prompt distribution of available assets to creditors. This policy is furthered by concentrating in a single forum any litigation that will impede or advance that goal." (internal citations omitted)); Wood v. Wood (*In re* Wood), 825 F.2d 90, 92 (5th Cir. 1987) ("Congress was concerned with the inefficiencies of piecemeal adjudication of matters affecting the administration of bankruptcies and intended to give federal courts the power to adjudicate all matters having an effect on the

legislative intent behind the bankruptcy jurisdiction statute was "'to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.'"[27] Other circuits have understood the *Pacor* formulation as giving effect to that intent.[28] But while this functional purpose determines most judicial decisions on related-to jurisdiction, courts have not yet developed the legal doctrine to implement bankruptcy goals in an express, consistent, and analytically rigorous way. The framework proposed in this Note seeks to provide a doctrine that meets those goals.

B. Related-to Requirements

Pacor essentially interprets the phrase "related to" in § 1334(b) to mean a likelihood that a proceeding will change something of significance to the bankruptcy case. Thus, there are two distinct analytical issues when implementing the test: what qualifies as an "effect on the estate," and how likely or "conceivable" those effects are to occur.[29] While courts tend not to dissect *Pacor*'s instructions so discretely, in practice the *Pacor* test imposes what this Note will label an "effect" requirement and a "conceivable" requirement.[30] Although uniformity in the implementation of *Pacor*'s "conceivable effect" test

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bankruptcy."); Elscint, Inc. v. First Wis. Fin. Corp. (*In re* Xonics, Inc.), 813 F.2d 127, 131 (7th Cir. 1987) ("The bankruptcy jurisdiction is designed to provide a single forum for dealing with all claims to the bankrupt's assets. It extends no farther than its purpose."); Susan Block-Lieb, *The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis*, 62 FORDHAM L. REV. 721, 811–14 (1994) (describing the consensus among Congress and courts that "the fundamental purpose of a broad grant of bankruptcy jurisdiction [is] the efficient resolution of claims against and distributions from a bankruptcy estate").

[27] Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984), *overruled in part by* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 129 (1995)).

[28] *E.g.*, Miller v. Kemira, Inc. (*In re* Lemco Gypsum, Inc.), 910 F.2d 784, 787–88 (11th Cir. 1990) (seeking a definition of "related to" that best represents Congress's intent and adopting the *Pacor* definition); Am. Hardwoods, Inc. v. Deutsche Credit Corp. (*In re* Am. Hardwoods, Inc.), 885 F.2d 621, 623 (9th Cir. 1989) (citing Fietz v. Great W. Sav. (*In re* Fietz), 852 F.2d 455, 457 (9th Cir. 1988)) (explaining how the *Pacor* definition effectively promotes Congress's objectives in enacting section 1334(a)).

[29] *See* Nuveen Mun. Trust *ex rel.* Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C., 692 F.3d 283, 294 (3d Cir. 2012) (describing "conceivable" as the "key inquiry" and the Supreme Court's emphasis on effect on the debtor's estate as a "critical component of the *Pacor* test"); Black v. U.S. Postal Serv. (*In re* Heath), 115 F.3d 521, 524 (7th Cir. 1997) (defining "related to" as "likely to affect").

[30] *Cf.* Loft, *supra* note 8, at 1106 (2004) (teasing out similar requirements from *Pacor* caselaw).

has not been forthcoming,[31] this Subpart provides a broad overview of how courts implement these two de facto requirements. As described below, the "effect" requirement tends to be implemented using a categorical rule approach, while courts disagree over whether to treat the "conceivable" requirement as a rigid rule or a flexible standard.

The conceptual distinction between the "effect" and "conceivable" requirements is best seen through an example. Suppose the debtor in bankruptcy is a corporation. Creditor *X* files a proof of claim in federal bankruptcy court, and simultaneously brings suit against one of the corporate-debtor's officers in state court. Should the officer want to defend the state tort suit within the bankruptcy case, perhaps in order to better take advantage of a coordinated legal defense with the the officer's employer, a basis for related-to jurisdiction under § 1334(b) must be shown. If the debtor's officer has a clear right to indemnification in the debtor's bylaws and if Creditor *X* prevails on the state tort claim, the officer will seek indemnification from the debtor and force it to cover damages out of assets in the bankruptcy estate. This successful indemnification claim by a corporate officer against the debtor's estate is a jurisdictionally sufficient "effect on the estate"; it would serve to directly change the allocation of estate property among creditors.[32] But say instead the debtor's bylaws have no indemnification provision, and the officer asserts a common law indemnification claim that may or may not require the debtor to indemnify. Under this scenario, the potential "effect on the estate" is still the debtor's obligation to indemnify the officer, but the *likelihood* of that effect actually accruing is far from certain. At the very least, the propriety of the common law indemnification claim would have to be litigated separate and apart from the resolution of the creditor-officer tort suit. Changing the source of the indemnification right—from crystal clear bylaw provision to murkier common law claim—changes the likelihood of the effect, not the effect itself.

Pacor's "effect" requirement allows courts to include or exclude from related-to jurisdiction third-party suits that cause certain "effects

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[31] *See, e.g.*, Brubaker, *supra* note 8, at 750 ("*Pacor* has produced a state of affairs in which jurisdictional determinations are essentially arbitrary—with countless instances of identical factual and procedural postures producing diametrically disparate results on nominal application of the same 'test.'"); Loft, *supra* note 8, at 1106 ("The case law has merely assembled an ad hoc patchwork to solve this difficult jurisdictional question. Many circuit courts, purportedly relying on identical tests, have reached divergent results in instances of almost identical factual and procedural circumstances.").

[32] For this reason, courts will find related-to jurisdiction over third-party suits that could directly trigger indemnification rights in the debtor's bylaws. *E.g.*, GAF Holdings, LLC v. Rinaldi (*In re* Farmland Indus., Inc.), 567 F.3d 1010, 1020 & n.5, 1021 (8th Cir. 2009); Belcufine v. Aloe, 112 F.3d 633, 636–37 (3d Cir. 1997).

on the estate"; the question is what *types* of "effects" suffice. In providing examples below, the primary purpose is to demonstrate that *Pacor*'s "effect" requirement can serve as a vehicle for *categorical* jurisdictional rules that can be articulated generally, beyond the particular facts of any one case. Describing the categorical rules over which courts agree and disagree will also provide the content for later discussion of how courts should implement *Pacor*'s "effect" requirement and this Note's proposed framework.

As the previous hypothetical suggests, the quintessential categorical rule of related-to jurisdiction is that a change to the amount of estate property owed to creditors or the distribution of that property among creditors is an "effect on the estate."[33] In other words, where a third-party suit will affect the distribution of the debtor's assets to the creditors, there is a clear rule in favor of bankruptcy jurisdiction,[34] and where there is no possible path for a third party to assert a claim against the debtor's estate following a dispute, there is no "effect on the estate."[35] For example, if they will not alter any recovery to creditors, third-party disputes over assets that are no longer or never were part of the debtor's estate categorically cannot result in an "effect on the estate."[36]

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[33] *See, e.g.*, N.Y.C. Emps.' Ret. Sys. v. Ebbers (*In re* WorldCom, Inc. Sec. Litig.), 293 B.R. 308, 323 (Bankr. S.D.N.Y. 2003) (rejecting an "argument regarding *the nature of the effect* on the bankruptcy estate" because the third party that might lead to contribution claims had "the potential to alter the distribution of assets among the estate's creditors" (emphasis added)).

[34] *See, e.g.*, Fire Eagle L.L.C. v. Bischoff (*In re* Spillman Dev. Grp., Ltd.), 710 F.3d 299, 305 (5th Cir. 2013) (finding related-to jurisdiction because a third-party dispute could diminish one creditor's claim against the bankruptcy estate and thus "allow[ ] a greater recovery for other unsecured creditors"); EOP-Colonnade of Dall. Ltd. P'ship v. Faulkner (*In re* Stonebridge Techs., Inc.), 430 F.3d 260, 266–67 (5th Cir. 2005) (finding related-to jurisdiction over third-party claims where collection on those claims could create "the need for [a third party] to seek reimbursement from [the] bankruptcy estate"); Brubaker, *supra* note 8, at 901 & n.559 (collecting cases where courts use the *Pacor* test to find related-to jurisdiction "[w]hen the validity, amount, or priority of a creditor's claim against the bankruptcy estate is dependent upon the outcome of a third-party dispute in which that creditor is embroiled"). Even the Seventh Circuit, which takes the narrowest view of § 1334(b) due to constitutional and federalism concerns, agrees that related-to jurisdiction can attach to third-party suits that affect the amount of property in the debtor's estate or the distribution of that property among creditors. *See In re* FedPak Sys., Inc., 80 F.3d 207, 213–14 (7th Cir. 1996) (describing the Seventh Circuit's narrower standard).

[35] *See, e.g.*, Nuveen Mun. Trust *ex rel.* Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C., 692 F.3d 283, 297 (3d Cir. 2012) ("If a creditor's recovery from a non-debtor *definitely* will not affect the amount of its payment from a bankruptcy estate, the third-party action is not 'related to' the bankruptcy proceeding." (emphasis added)).

[36] *See, e.g.*, Zuppardo v. BC Props. Ltd. (*In re* J.H. Inv. Servs., Inc.), 413 F. App'x 142, 149–50 (11th Cir. 2011) (finding no related-to jurisdiction because third-party dispute was over ownership of a condominium that was not part of the debtor's estate); Borrego Springs Bank v. Skuna River Lumber, LLC (*In re* Skuna River Lumber, LLC), 564 F.3d

A handful of categorical "effect" rules present difficulties, however. There is disagreement among courts over whether to enforce an "effect" rule that categorically excludes third-party suits that only change the identity of a creditor, without any change to the size of the claim.[37] Courts also struggle to create categorical rules when confronting third-party disputes that could enhance or reduce the value of the estate's assets—whereas jurisdiction seems natural over disputes that directly involve funds that the debtor seeks to include within the bankruptcy estate,[38] absurd outcomes may result where jurisdiction is sought over third-party claims that may change the value of the debtor's financial interest in another entity.[39] Finally, some courts have resisted the categorical assertion that voluntary third-party financial contributions to the bankruptcy estate can justify related-to jurisdiction over third-party suits against the contributors, when those contributions were made for the very purpose of taking advantage of the bankruptcy court's power to enjoin any lawsuits within the bankruptcy jurisdiction.[40] By refusing to hold that a pre-confirmation

353, 355–56 (5th Cir. 2009) (finding no related-to jurisdiction over property that was no longer part of the estate).

[37] *See, e.g.*, Joremi Enters., Inc. v. Hershkowitz (*In re* New 118th LLC), 396 B.R. 885, 891 (Bankr. S.D.N.Y. 2008) (noting rationales for related-to jurisdiction over third-party suits that would determine which parties would in fact become creditors); Brubaker, *supra* note 8, at 898–99, 898 & n.551 (listing cases where "courts have vacillated over their power to entertain" inter-creditor disputes that only serve to determine which party will claim a fixed amount from the debtor's estate).

[38] *See, e.g.*, Giuliano v. Legates (*In re* Legates), 381 B.R. 111, 115–17 (Bankr. D. Del. 2008) (finding related-to jurisdiction over third-party complaint brought by defendant of trustee's avoiding action, where there was doubt about defendant's ability to satisfy a judgment in favor of the debtor's estate); Brubaker, *supra* note 8, at 890 & n.526 (listing cases).

[39] *Compare* 8300 Newburgh Rd. P'ship v. Time Constr., Inc. (*In re* Time Constr., Inc.), 43 F.3d 1041, 1045 (6th Cir. 1995) (finding related-to jurisdiction over third-party dispute that could financially benefit a corporation, where the debtor was the sole shareholder and the dispute would significantly affect the value of the estate), *with* Tower Auto. Mex., S. De R.L. De C.V. v. Grupo Proeza, S.A. De C.V. (*In re* Tower Auto., Inc.), 356 B.R. 598, 602 (Bankr. S.D.N.Y. 2006) ("[A] debtor's distributable assets might consist exclusively of the stock of a multinational corporation, but that happenstance would not give the bankruptcy court jurisdiction of a patent or antitrust dispute involving that corporation, no matter how important to its financial well-being.").

[40] *See* Travelers Cas. & Sur. Co. v. Chubb Indem. Ins. Co. (*In re* Johns-Manville Corp.), 517 F.3d 52, 66 (2d Cir. 2008) ("It was inappropriate for the bankruptcy court to enjoin claims brought against a third-party non-debtor solely on the basis of that third-party's financial contribution to a debtor's estate."), *rev'd on other grounds sub nom.* Travelers Indem. Co. v. Bailey, 557 U.S. 137, 151–54 (2009); *In re* Combustion Eng'g, Inc., 391 F.3d 190, 228–30 (3d Cir. 2004) (holding that financial contributions by third parties "alone do not provide a sufficient basis for exercising subject matter jurisdiction"). *But see* Munford v. Munford, Inc. (*In re* Munford, Inc.), 97 F.3d 449, 453–54 (11th Cir. 1996) (upholding jurisdiction to enjoin suits against third parties who settled claims with the debtor's estate, where the settlement proceeds going to the estate were conditioned upon the injunction).

financial contribution to the estate is a sufficient categorical "effect," these courts object to the ability of third parties to buy protection from liability via contributions to the debtor's estate.[41]

Turning to *Pacor*'s "conceivable" requirement, the difference among courts is more dramatic. *Pacor* itself set a hard limitation on the "conceivable" requirement by introducing what will be referred to as the automatic-liability rule,[42] which is still good law in the Third Circuit and occasionally used by sister circuits.[43] The rule inquires whether, at the time the third-party dispute is brought,[44] resolution of that third-party dispute will have an automatic and binding effect on the bankruptcy case *without* the need for further adjudication.[45] This proposition must be uncontested; if there are insufficient findings of fact or contested factual or legal issues that put into question whether a third-party suit would automatically trigger a bankruptcy effect, there is no related-to jurisdiction under the automatic-liability rule.[46] In practice, the rule excludes from related-to jurisdiction those third-

[41] *See In re Johns-Manville Corp.*, 517 F.3d at 68 ("The bankruptcy court's desire to facilitate global finality for [the third-party contributor] may not be used as a jurisdictional bootstrap when no jurisdiction otherwise exists."); *In re Combustion Eng'g*, 391 F.3d at 228 (warning that such a holding would mean "a debtor could create subject matter jurisdiction over any non-debtor third-party by structuring a plan in such a way that it depended upon third-party contributions"); Cartalemi v. Karta Corp. (*In re* Karta Corp.), 342 B.R. 45, 55 (Bankr. S.D.N.Y. 2006) (noting the potential for abuse in the "conditioning of [releases on] financial participation by non-debtors" because "[a]nyone can devise a plan that involves contributions from non-debtors who (not surprisingly) would condition their participation on being shielded from *their* creditors").

[42] *Cf.* Brubaker, *supra* note 8, at 881 (coining the "wooden 'automatic liability' limitation"); Loft, *supra* note 8, at 1107 (coining the "requirement of automatic liability").

[43] *See* Nuveen Mun. Trust *ex rel.* Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C., 692 F.3d 283, 294 (3d Cir. 2012) ("'[R]elated to' jurisdiction does not exist if another action would need to be filed before the current action could affect a bankruptcy proceeding." (citing W.R. Grace & Co. v. Chakarian (*In re* W.R. Grace & Co.), 591 F.3d 164, 171–72 (3d Cir. 2009), and *In re* Fed.-Mogul Global, Inc., 300 F.3d 368, 382 (3d Cir. 2002))); Pfizer Inc. v. Law Offices of Peter G. Angelos (*In re* Quigley Co.), 676 F.3d 45, 54 (2d Cir. 2012) (describing how *Pacor*'s automatic-liability rule is satisfied on the facts of the case); Marotta Gund Budd & Dzera LLC v. Costa, 340 B.R. 661, 670–71 (Bankr. D.N.H. 2006) (applying the automatic-liability rule because of First Circuit precedent).

[44] *See Nuveen Mun. Trust*, 692 F.3d at 294 ("Conceivability is determined at the time a lawsuit is filed.").

[45] *See In re Fed.-Mogul*, 300 F.3d at 382 ("[*Pacor*] inquires whether the allegedly related lawsuit would affect the bankruptcy proceeding without the intervention of yet another lawsuit.").

[46] *Compare In re Quigley*, 676 F.3d at 54 & n.7 (2d Cir. 2012) (finding related-to jurisdiction because it was uncontested that the estate and the third-party defendant shared insurance plans, such that the third-party defendant could drain away insurance proceeds from the debtor's estate to pay for third-party litigation), *with In re Combustion Eng'g*, 391 F.3d at 232–33 & 232 nn. 42–43 (finding no related-to jurisdiction in part because there were insufficient findings of fact to conclude that third parties and the debtor shared insurance plans).

party disputes where the only possible effect on the estate is through a potential common law indemnification or contribution claim against the debtor's estate,[47] and includes third-party suits that could trigger clear and uncontested contractual indemnification agreements between debtors and third parties.[48] There remains some gray area in between these two poles, however.[49]

The majority of courts do not use the automatic-liability rule when encountering third-party disputes that may affect the debtor's estate.[50] These courts stress the congressional intent for a broad and comprehensive bankruptcy jurisdiction, which a requirement of automatic liability would potentially thwart.[51] In practice, the main division between these courts and those that follow the automatic-liability rule is that the former allow for related-to jurisdiction over third-party disputes that may lead to contingent, common law indemnification or contribution rights against the debtor's estate.[52] Because the outer

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[47] *See In re W.R. Grace*, 591 F.3d at 171–72 (*Pacor* and its progeny establish "that a potential indemnification claim under common law is not enough to establish a bankruptcy court's subject matter jurisdiction"). Such an effect would not accrue automatically at the end of the third-party suit because the party claiming indemnification against the estate "would still be obligated to bring an entirely separate proceeding to receive indemnification." Pacor, Inc. v. Higgins, 743 F.2d 984, 995 (3d Cir. 1984), *overruled in part by* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 129 (1995).

[48] *See, e.g.*, *In re Quigley*, 676 F.3d at 54 (joint insurance policies); Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC, 594 F.3d 383, 387 (5th Cir. 2010) (mortgage loan purchase agreement); Belcufine v. Aloe, 112 F.3d 633, 636–37 (3d Cir. 1997) (debtor's bylaws); *In re* G.S.F. Corp., 938 F.2d 1467, 1475 (1st Cir. 1991) (settlement agreement between debtor and lender), *abrogated on other grounds by* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 251–53 (1992).

[49] *See infra* notes 105–08 and accompanying text (describing the difficulties with implementing the automatic-liability rule).

[50] *See, e.g.*, Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (*In re* Dow Corning Corp.), 86 F.3d 482, 491 (6th Cir. 1996) ("It has become clear following *Pacor* that 'automatic' liability is not necessarily a prerequisite for a finding of 'related to' jurisdiction."); Nat'l Union Fire Ins. Co. v. Titan Energy, Inc. (*In re* Titan Energy, Inc.), 837 F.2d 325, 330 (8th Cir. 1988) (concluding related-to jurisdiction can exist over a third-party proceeding that "*portends* a mere contingent or tangential effect on a debtor's estate" (emphasis added)); Stichting Pensioenfonds ABP v. Countrywide Fin. Corp., 447 B.R. 302, 310 (Bankr. C.D. Cal. 2010) (listing Ninth Circuit decisions that apply a "conceivable effect" test and find related-to jurisdiction "even where claims of indemnification were contingent because it was *conceivable* that the defendants may be entitled to indemnification"); N.Y.C. Emps.' Ret. Sys. v. Ebbers (*In re* WorldCom, Inc. Sec. Litig.), 293 B.R. 308, 320 (Bankr. S.D.N.Y. 2003) (finding authority that rejects the automatic-liability rule "more persuasive").

[51] *See, e.g.*, Kelley v. Nodine (*In re* Salem Mortg. Co.), 783 F.2d 626, 633–34 (6th Cir. 1986) ("The 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.").

[52] *See, e.g.*, Refinery Holding Co. v. TRMI Holdings, Inc. (*In re* El Paso Refinery, LP), 302 F.3d 343, 349 (5th Cir. 2002) (finding related-to jurisdiction over third-party suit that

bounds of bankruptcy jurisdiction without the automatic-liability rule would expand to include any possible effect that could be described as "conceivable," these courts stress that each decision on jurisdiction must be case-by-case.[53] However, they remain vulnerable to the attack that they are adopting a test for jurisdiction that has no conceptual limits and risks universal bankruptcy jurisdiction.[54] As a compromise between pure conceivability and stringent automatic liability, some courts require that parties show a "reasonable legal basis" for a potential effect on the estate.[55]

Courts that use the automatic-liability rule are trying to enforce *Pacor*'s "conceivable" requirement with a bright-line, rule-based boundary for jurisdiction, while courts that ignore the rule and test for "conceivability" case-by-case prefer the requirement be enforced with a standard-based boundary for jurisdiction.[56] As argued in Part III, neither position is quite right: Instead, the jurisdictional threshold boundary should employ the "effect" requirement, and the "conceivable" inquiry should be folded into a more comprehensive version of statutory bankruptcy abstention, which is introduced immediately below.

C. Bankruptcy Abstention

Even where subject matter jurisdiction exists under 28 U.S.C. § 1334(b), Congress provides for two forms of abstention that respectively require or permit federal courts to abstain from exercising jurisdiction over certain related-to proceedings under certain circumstances.

Mandatory abstention dictates that the federal court *must* abstain from hearing a state law proceeding in federal court solely under the bankruptcy jurisdiction if it has already commenced and can be

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could eventually result in claim against the debtor's estate through a "chain of indemnification provisions"); *In re* FairPoint Commc'ns, Inc., 452 B.R. 21, 29 (Bankr. S.D.N.Y. 2011) (noting the circuit split over whether related-to jurisdiction permits courts "to enjoin claims for indemnification or contribution arising out of third party litigation that could ultimately affect the debtor's estate"); Loft, *supra* note 8, at 1108 ("[M]any courts are not concerned by the need for an extra suit to establish a third-party's right to claim indemnity against the debtor. The mere fact that the suit is likely, or intended by the third-party, suffices to confer 'related to' jurisdiction over the pending third-party action." (internal citation omitted)).

53 *Infra* Part II.B.2.

54 *See* Brubaker, *supra* note 8, at 874 n.470 (collecting sources questioning the lack of conceptual limits).

55 *See In re WorldCom*, 293 B.R. at 318 (discussing the "'reasonable' legal basis" standard).

56 *Infra* Part II.B.

"timely adjudicated" in state court.[57] In *Parmalat Capital Finance Ltd. v. Bank of America Corp.*,[58] the Second Circuit provided "[t]he most complete exegesis to date" on § 1334(c)(2) mandatory abstention,[59] laying out four factors that determine whether a proceeding can be "timely adjudicated" in state court such that abstention is required.[60] The factors focus on "the comparative speeds of adjudication in the federal and state forums" based on which courts can better deal with the complexity of the legal issues and are more familiar with the factual record,[61] whether the state court litigants "need the state law claims to be quickly resolved" to facilitate the bankruptcy case, and whether state court adjudication would "unduly prolong the administration of the estate."[62]

Permissive abstention allows a federal court to abstain from hearing any bankruptcy proceeding "in the interest of justice, or in the interest of comity with State courts or respect for State law."[63] Circuit courts have spun out sprawling multifactor tests for permissive abstention that usually involve examination of the possible effect on efficient bankruptcy administration, the interest of state courts in hearing proceedings with unsettled or predominating state law questions, the relative interest of the litigants in jury trials or forum shopping, and the feasibility of severing state law issues given the bankruptcy court's docket.[64] The extensive set of considerations affords courts much flexibility,[65] but the consensus is that abstention should be rare and used

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[57] 28 U.S.C. § 1334(c)(2) (2006).

[58] 639 F.3d 572 (2d Cir. 2011).

[59] COLLIER, *supra* note 2, ¶ 3.05[2], at 3-67.

[60] The four factors are:

> (1) the backlog of the state court's calendar relative to the federal court's calendar; (2) the complexity of the issues presented and the respective expertise of each forum; (3) the status of the title 11 bankruptcy proceeding to which the state law claims are related; and (4) whether the state court proceeding would prolong the administration or liquidation of the estate.

Parmalat, 639 F.3d at 580.

[61] *Id.* at 580–81.

[62] *Id.* at 581.

[63] 28 U.S.C. § 1334(c)(1) (2006). Permissive abstention decisions are not appealable to the court of appeals or the Supreme Court, nor is a decision to abstain under mandatory abstention. *Id.* § 1334(d). Only a decision *not* to abstain under mandatory abstention is appealable. *Id.*

[64] *See, e.g.*, Christensen v. Tucson Estates, Inc. (*In re* Tucson Estates, Inc.), 912 F.2d 1162, 1167 (9th Cir. 1990) (constructing a twelve-factor test); Block-Lieb, *supra* note 22, at 816 & n.170 (describing the twelve-factor *Tucson Estates* test as the "most influential" of permissive abstention tests).

[65] *See In re* Chi., Milwaukee, St. Paul & Pac. R.R. Co., 6 F.3d 1184, 1189 (7th Cir. 1993) ("Courts should apply these factors flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative.").

only in exceptional circumstances.[66] That said, courts still claim the power to raise permissive abstention *sua sponte*.[67] As Part II.B.3 further explains, permissive abstention can extend beyond federalism-based concerns, allowing courts to directly address bankruptcy policy. It therefore provides the best vehicle for a case-by-case inquiry based on functional goals of bankruptcy jurisdiction.

This introductory Part has laid out the operation of two threshold requirements for related-to jurisdiction, the "effect" requirement and the "conceivable" requirement, and described the two grounds on which courts may abstain from hearing related-to proceedings. The next question is how to go about evaluating these requirements in order to design the most effective framework for related-to jurisdiction.

II
Designing Related-to Bankruptcy Jurisdiction

In order to construct a functional framework for analyzing related-to jurisdiction, it is necessary to understand the relative benefits of jurisdictional rules and standards. Part II.A seeks to provide lessons on that front. Part II.B proceeds to apply those lessons to related-to bankruptcy jurisdiction. It first evaluates *Pacor*'s "effect" requirement, and demonstrates how courts have occasionally treated this requirement as a vehicle for categorical rules that include or exclude swaths of cases with certain generalized fact patterns. Examining *Pacor*'s "conceivable" requirement demonstrates how it is used as a rule requiring automatic liability by some courts and as a flexible and case-by-case standard by other courts. Finally, an evaluation of statutory bankruptcy abstention reveals the potential of that doctrine to shape the most functional contours of bankruptcy jurisdiction on a case-by-case basis.

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[66] *See* Collier, *supra* note 2, ¶ 3.05[1], at 3-65 & n.11. This consensus emerges from nonbankruptcy abstention doctrines that only provide for "'extraordinary and narrow exception[s]' to a federal court's duty to exercise its jurisdiction." Woodford v. Cmty. Action Agency of Greene Cnty., Inc., 239 F.3d 517, 522 (2d Cir. 2001) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976)).

[67] *See, e.g.*, Gober v. Terra + Corp. (*In re* Gober), 100 F.3d 1195, 1207 n.10 (5th Cir. 1996) ("Permissive abstention under § 1334(c)(1) may be raised by the court *sua sponte.*"); Bishop v. Applegate (*In re* Applegate), No. 11-40073, 2012 WL 423850, at *2 (Bankr. S.D. Ga. Jan. 31, 2012) ("It is well established that a court may decide *sua sponte* to address the issue of abstention."); *In re* Portrait Corp. of Am., Inc., 406 B.R. 637, 641 (Bankr. S.D.N.Y. 2009) (raising abstention *sua sponte*).

A. Jurisdictional Rules and Standards

As a general matter,[68] a jurisdictional rule tries to set up a clear inquiry that is easy to apply in future cases and mechanically produces a determinate yes-or-no answer on the existence of jurisdiction—specifically, by mandating outcomes based solely on the existence of certain facts.[69] A jurisdictional standard, on the other hand, allows for a case-specific decision based on how the given facts implicate various policy considerations, with flexibility and discretion in how competing factors cut in any given case.[70]

There are two core metrics by which to evaluate these jurisdictional design choices: efficiency and policy.[71] The efficiency metric justifies the usual mantra that "[j]urisdictional rules should be clear."[72] This is because clear jurisdictional rules result in easy application and valuable predictability, which can preserve resources of both litigants and courts by simplifying and deterring litigation on jurisdiction, channeling those resources to the merits.[73] The policy metric evaluates

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[68] There is of course much more to be said about the proper definitions of rules and standards than this brief overview can provide. *See, e.g.*, Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 15 n.56 (2011) (collecting sources). For the purposes of my argument, it is sufficient to stick with the general descriptive labels of "rules" and "standards," as defined in this Part.

[69] *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (describing how rules provide determinate answers solely by inquiring into the presence of certain "delimited triggering facts"); *see also* Larry Alexander, *Incomplete Theorizing: A Review Essay of Cass R. Sunstein's* Legal Reasoning and Political Conflict, 72 NOTRE DAME L. REV., 531, 541–42 (1997) (book review) ("[A]lthough value disputes might cause people to disagree about whether to have such rules, they will not cause people to disagree about what the rules require.").

[70] *See* Sullivan, *supra* note 69, at 58–60 (describing how standards allow for a holistic examination of the facts and policy considerations and thus "collapse decisionmaking back into the direct application of the background principle or policy to a fact situation").

[71] A third major metric is whether constitutional concerns are implicated by different jurisdictional tests. This Note leaves the constitutional debate to other scholars. *See supra* note 24 and accompanying text.

[72] Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 321 (2005) (Thomas, J., concurring); *see also* Elizabeth Y. McCuskey, *Clarity and Clarification:* Grable *Federal Questions in the Eyes of Their Beholders*, 91 NEB. L. REV. 387, 388 (2012) ("Jurists and commentators have repeated for centuries the refrain that *jurisdictional rules should be clear*.").

[73] *See, e.g.*, Hertz Corp. v. Friend, 130 S. Ct. 1181, 1193 (2010) (warning that complex jurisdictional tests can "eat[ ] up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims" as well as "produce appeals and reversals, encourage gamesmanship" and put "[j]udicial resources . . . at stake"); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 971–77 (1995) (surveying the benefits of rules as a design choice). For example, in the context of federal question jurisdiction under 28 U.S.C. § 1331, the well-pleaded complaint rule "errs on the side of making rather formal, noncontextual bright-line decisions at very early stages of litigation" in order to produce "a clear and dispositive resolution of jurisdiction so that the

design choices by direct reference to the specific justifications for jurisdiction in the first instance.[74]

Rules, as a design choice, rank higher from an efficiency standpoint because they are relatively clearer and easier to implement than flexible, multi-factor standards.[75] Standards, on the other hand, are better from a policy standpoint. Although policy goals can inform the initial articulation of a rule, they play no further role in its operation, and thus clear rules risk both under- and over-inclusion along policy dimensions.[76] Standards allow courts to make decisions with direct reference to functional policy goals, which means a higher likelihood of the "right" jurisdictional outcome in any given case, where "right" is defined by reference to those underlying policies.[77] In contrast to rules, both the articulation *and* the operation of a standard are informed by policy goals that raise the salience of certain facts and directly justify the ultimate decision in each case.[78]

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investment of resources in litigation will not be futile." SAMUEL ISSACHAROFF, CIVIL PROCEDURE 140 (3d ed. 2012).

74 For example, any legal test for federal question jurisdiction should be evaluated in part by how well it sorts between cases that deserve a federal forum and those that do not. *See Grable*, 545 U.S. at 313–14 (creating a standard for federal question jurisdiction that inquires whether there is a "serious federal interest in claiming the advantages thought to be inherent in a federal forum").

75 *See Hertz*, 130 S. Ct. at 1193 (noting the virtues of "administrative simplicity" and the drawbacks of "[c]omplex jurisdictional tests").

76 *See* Dodson, *supra* note 68, at 24–26 ("[A]n attempt to design a relatively clear jurisdictional line in one area for one policy value often leads to such inaccuracies and disconnects with competing policies that correction quickly follows in the form of express exceptions or fact-specific application."); Sullivan, *supra* note 69, at 58 ("A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness."); Sunstein, *supra* note 73, at 992–93 (identifying this design failure).

77 *See, e.g.*, Dodson, *supra* note 68, at 53 & n.252 (noting flexibility inevitably means more "opportunities for courts to better implement and accommodate the underlying policies in given circumstances"); Sullivan, *supra* note 69, at 58–59 ("Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules." (citation omitted)).

78 Here is a typical example. "Speed Limit 65" is a rule: It is a blunt test that ex ante balances the needs of drivers to get places with the needs of society to ensure safe driving, and thus provides a permanent boundary applicable to every case. A driver rushing his pregnant wife to the hospital at 75 miles per hour (MPH) violates the rule every time. One can argue that 65 MPH is too low a speed limit, but one cannot argue that this driver did not break the rule. "Drive at a safe speed" is a standard: This test asks whether a *particular* driver was driving "at a safe speed" in a *particular* context, without any more definition of "safe." Now the driver may bring evidence to show that, in this one case, 75 MPH in fact constituted a "safe speed." *See* Dodson, *supra* note 68, at 15–16 & nn.56–60 (examining the functional differences between rules and standards).

Since each jurisdictional instrument has one relative advantage over the other, switching between the two can require a tradeoff.[79] For example, when exceptions to a rule multiply to correct for errors of over- and underinclusiveness, the rule begins to "resemble[ ] a standard," which "offset[s]" the systemic "decisionmaking economies" of easy-to-apply rules.[80] The key is to recognize this tradeoff and deploy both clear rules and flexible standards strategically,[81] offsetting the pitfalls of one design with the addition of the other.[82] This will construct a jurisdictional "filter[ ]" that is not so broad as to lose all efficiency gains and not so narrow as to fail "to realize the purposes underlying" the grant of jurisdiction.[83]

B. Application to Related-to Bankruptcy Jurisdiction

This Subpart evaluates the requirements for related-to bankruptcy jurisdiction and bankruptcy abstention from the perspective of the jurisdictional design choice between rules and standards, along both efficiency and policy dimensions. Part III.B.1 argues that while *Pacor*'s "effect" requirement can occasionally be used to create some limited efficiency benefits, it nonetheless remains overinclusive from the standpoint of bankruptcy policy. Part III.B.2 argues that courts using the automatic-liability rule for *Pacor*'s "conceivable" requirement employ a jurisdictional rule that is not particularly efficient and functionally underinclusive, while those courts that treat the requirement as a case-by-case standard provide an inquiry that is functionally helpful but incomplete. As far as the functional failings of the "conceivable" requirement go, Part III.B.3 concludes that bankruptcy abstention offers the right corrective.

1. Evaluating the "Effect" Requirement

Broadly speaking, it is best to keep rules that likely have more efficiency benefits than policy costs, and to change rules into

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[79] *See* Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 538–39 (2012) (comparing a rule-based boundary regime with a standard-based boundary regime).

[80] *See* Sullivan, *supra* note 69, at 61, 63 (discussing the potential effect of a rule with numerous exceptions).

[81] *See* Nash, *supra* note 79, at 528 (arguing that a rule-standard structure of federal jurisdiction is "both normatively desirable and attainable"); *see also* Dodson, *supra* note 68, at 57–59 (arguing for narrow applications of both clear and complex jurisdictional rules).

[82] *See* Dodson, *supra* note 68, at 57 (advocating for "a hybrid doctrine [for jurisdiction] that uses a clear rule to address the easiest cases and an uncertain rule to address the harder cases").

[83] Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 IND. L.J. 309, 317 (2007).

standards where the policy costs outweigh the efficiency benefits. Rules are most effective when articulated in ways that produce categorical holdings,[84] because categorical rules may create enough efficiency through predictability to outweigh their policy failures.[85]

A barebones requirement to identify any potential effect that a third-party proceeding might have on the bankruptcy estate does not, on its face, offer much in the way of efficiency—it provides no guidance on what is or is not an "effect" for jurisdictional purposes. At the very least, though, the requirement is articulated so as to produce categorical rules: It asks the single yes/no question of whether the right type of effect has actually been identified. Over time, therefore, courts have been able to use the "effect" requirement as a vehicle to create a collection of narrow jurisdictional rules.[86] In the Seventh Circuit, for instance, disputes do not meet the "effect" requirement unless they would "affect[ ] the amount of property available for distribution [i.e., the debtor's estate] or the allocation of property among creditors"[87]—an attempt to put concrete borders around expansive bankruptcy jurisdiction.[88] Other "effect" rules similarly install clear categorical lines, for example between claims against estate property and those against non-estate property.[89]

These sub-rules can offer efficiency benefits, but they are discrete and usually narrow, extending only as far as the categorical generalizations themselves go beyond the facts of a given case. There may not be many third-party suits that risk changing *only* the identity of a creditor and no more,[90] to give one example, but an "effect" rule that

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[84] *See* Nash, *supra* note 79, at 521 ("Categorical-style decisionmaking provides a paradigmatic example of a rule.").

[85] For example, in the context of federal question jurisdiction, the well-pleaded complaint rule asks a binary question that can produce categorical answers. As a result, despite its functional underinclusiveness, the rule survives because its efficiency gains outweigh its failures from a policy standpoint. *See* ISSACHAROFF, *supra* note 73, at 140 (speculating "that the efficiency gain from a bright-line rule for jurisdictional gatekeeping has contributed to the stability of [the rule]" and that this gain has permitted the "rule, despite its apparent formalism, to survive"); Dodson, *supra* note 68, at 9 & n.26 ("The primary motivation for the [well-pleaded complaint] rule is that whether the plaintiff's complaint raises a federal question is (usually) clear, simple, and readily ascertainable.").

[86] *See supra* Part I.B (reviewing different categorical "effect on the estate" rules).

[87] *In re* Xonics, Inc., 813 F.2d 127, 131 (7th Cir. 1987).

[88] *See In re* FedPak Sys., Inc., 80 F.3d 207, 213–14 (7th Cir. 1996) (employing a narrower related-to inquiry than *Pacor* out of necessity "'in a universe where everything is related to everything else'" (quoting Gerald T. Dunne, *Editor's Headnotes: The Bottomless Pit of Bankruptcy Jurisdiction*, 112 BANKING L.J. 957, 957 (1995))).

[89] *See supra* note 36 and accompanying text (describing instances in which jurisdiction was denied for property no longer in an estate).

[90] *See supra* note 37 and accompanying text (identifying cases in which the court discussed a change in creditor identity and its effect on jurisdiction).

categorically includes or excludes such suits from related-to jurisdiction can provide clear predictability in that small subset of cases. Occasionally, the "effect" requirement can even be the vehicle for a significant categorical rule that affords future litigants important predictability about bankruptcy jurisdiction. The best example is when circuit courts hold that financial contributions by a third party to the estate or a compensation trust, which help completion of the reorganization, do not constitute an "effect on the estate" for jurisdictional purposes.[91] Such a categorical rule, embraced by the Second and Third Circuits, saves litigation resources by putting third parties who are negotiating bankruptcy settlements on clear notice that they cannot contribute to the debtor's estate in exchange for protection from lawsuits by *their* creditors (delivered through the bankruptcy court's power to enjoin proceedings over which it has related-to jurisdiction).[92]

With respect to the policy goals of jurisdiction, the "effect" requirement is not underinclusive because it is directly justified by bankruptcy policy.[93] *Pacor*'s original formulation of the requirement sought to achieve a comprehensive bankruptcy process that resolved all of the estate's affairs expeditiously.[94] When courts agree on categorical rules excluding third-party claims by way of the "effect" requirement, such as the rule that suits involving property no longer part of the estate are not included within the bankruptcy jurisdiction, the decisions tend to be justified by functional bankrupty policy

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[91] *See supra* note 40 and accompanying text (identifying courts that implemented this categorical assertion denying jurisdiction).

[92] *See supra* note 41 and accompanying text (describing the denial of jurisdiction in such instances). If the rule comes out the other way such that a preconfirmation financial contribution *is* an "effect on the estate" that would structurally alter future bankruptcy settlement negotiations as well. The Supreme Court had the opportunity to embrace either side of this rule in *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137 (2009), and while the possibility did come up frequently at oral argument, the Court resolved the case on different grounds. *See* Johns-Manville Corp. v. Chubb Indem. Ins. Co. (*In re* Johns-Manville Corp.), 600 F.3d 135, 152 (2d Cir. 2010) ("The *Bailey* Court did not contradict the conclusion of our jurisdictional inquiry. Instead, it held that the jurisdictional issue was not subject to collateral attack." (citation omitted)); Transcript of Oral Argument at 15, *Bailey*, 557 U.S. 137 (2009) (Roberts, C.J.) (posing hypothetical of third party asking for broad release from all traffic-accident liability as a condition to participating in a bankruptcy settlement); *id.* at 34 (Souter, J.) (offering one possible "view of jurisdiction" that bankruptcy jurisdiction could reach "any cases which, if contemplated, would have precluded the settlement that created the bankruptcy estate").

[93] *See* Brubaker, *supra* note 8, at 873 ("The *Pacor* test . . . requires a functional, case-specific inquiry into the utility of the bankruptcy forum with respect to any particular third-party dispute . . . .").

[94] *See supra* notes 26–28 and accompanying text (noting the policy motives of the *Pacor* test).

considerations.[95] Disagreements among courts are policy-driven too, arising where an "effect" rule appears to disrupt bankruptcy administration in one case but not the other. For example, courts that do not find related-to jurisdiction over third-party suits that determine only the ultimate identity of a creditor stress the absence of any change to core bankruptcy matters;[96] whereas courts holding the opposite point to case-specific consequences for bankruptcy administration, for example that the debtor may have different legal defenses against different parties or that the creditors' status vis-à-vis one another would change.[97]

From a policy standpoint, the major criticism of the "effect" requirement is that its bare formulation is dangerously overinclusive and risks a sprawling, unlimited bankruptcy jurisdiction.[98] This criticism is most potent when considering fact patterns that are not amenable to a categorical articulation of an "effect" rule. One example is the slippery slope that could result from an "effect" rule that categorically includes within bankruptcy jurisdiction those third-party suits that could change the value of assets in the debtor's estate.[99] The value of the debtor's assets is of course critical to the bankruptcy process, and while it may seem natural for bankruptcy courts to exercise jurisdiction over third-party suits that would affect that value, courts and commentators have warned that such a broad *categorical* inclusion could lead to the absurd result of bankruptcy jurisdiction over *any* lawsuit that could change the value of *any* stock that the debtor may just so happen to own.[100] This result would not facilitate the

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[95] *See, e.g.*, Borrego Springs Bank v. Skuna River Lumber, LLC (*In re* Skuna River Lumber, LLC), 564 F.3d 353, 355–56 (5th Cir. 2009) (justifying "the general rule that a bankruptcy court loses jurisdiction over assets once they are transferred from the bankruptcy estate" by pointing to the lack of any impact on bankruptcy administration or creditor distribution).

[96] *See* Spaulding & Co. v. Berman, Roberts & Kelly (*In re* Spaulding & Co.), 131 B.R. 84, 89 (N.D. Ill. 1990) (finding no related-to jurisdiction where third-party dispute would not change the net amount of claims asserted against the estate); Rouse v. Pinegar Chevrolet, Inc. (*In re* Chambers), 125 B.R. 788, 793 (Bankr. W.D. Mo. 1991) ("Most importantly, no matter which party prevails in the litigation between [third parties], the result will be the same for the estate and its other creditors.").

[97] *See* Joremi Enters., Inc. v. Hershkowitz (*In re* New 118th LLC), 396 B.R. 885, 890–91 (Bankr. S.D.N.Y. 2008) (noting these rationales and collecting cases). In *In re New 118th*, the court found related-to jurisdiction over a third-party suit that would determine only which of the two litigants was to bring a fixed claim against the debtor's estate, pointing to the fact that one of the third parties could be vulnerable to an equitable defense or equitable subordination if it brought the claim. *Id*. at 890–92.

[98] *Supra* note 54 and accompanying text.

[99] *See supra* notes 38–39 and accompanying text (noting this potential slippery slope).

[100] *See* Tower Auto. Mex., S. De R.L. De C.V. v. Grupo Proeza, S.A. De C.V. (*In re* Tower Auto., Inc.), 356 B.R. 598, 602 (Bankr. S.D.N.Y. 2006) ("[A] . . . debtor's distributable assets might consist exclusively of the stock of a multinational corporation, but that

expeditious resolution of the bankruptcy case, and demonstrates the need to correct for the "effect" requirement's overinclusiveness from the perspective of bankruptcy policy.[101] Similarly resistant to categorical "effect" rules, and thus vulnerable to criticism of expansive related-to jurisdiction, are cases with extraordinary facts that demand a particular jurisdictional outcome in the proceeding at bar due to some case-specific constraint on the bankruptcy process.[102]

There are three possible ways to correct for this overinclusive, sprawling "effect" requirement. The first, as evaluated above, is to narrow the requirement by more specifically defining what does and does not constitute "effects on the estate" for jurisdictional purposes.[103] The second is to impose a strict "conceivable" requirement that mandates a minimum level of likelihood of the "effect on the estate" occurring, through something like the automatic-liability rule. The third is to use bankruptcy abstention doctrine to narrow down jurisdiction on a case-by-case basis. The latter two solutions are evaluated below.

2. *Evaluating the "Conceivable" Requirement*

Recall from Part I that courts split on how to treat *Pacor*'s instruction that a third-party suit must result in a "conceivable effect" in order to be included within the related-to jurisdiction of federal courts. Some courts employ the literal meaning of "conceivable" and no more, some courts narrow the requirement through use of an automatic-liability rule, and some courts fashion a compromise by defining "conceivable" as a "reasonable legal basis."

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happenstance would not give the bankruptcy court jurisdiction of a patent or antitrust dispute involving that corporation, no matter how important to its financial well-being."); Brubaker, *supra* note 8, at 874 & n.471 (criticizing the proposition that a bankruptcy filing by a debtor with stock in a public corporation could "confer federal bankruptcy jurisdiction over any state-law dispute involving the public corporation"); Jeremy Casper, *Bankruptcy Jurisdiction's Constitutional Outer Limits*, ABI COMM. NEWS, Oct. 2010, *available at* http://www.abiworld.org/committees/newsletters/litigation/vol7num8/outer.html (worrying that such a principle "can produce results that are overbroad or downright absurd").

101 *See infra* note 159 and accompanying text (suggesting how to use a narrow "effect" rule or abstention doctrine to sort through this difficult category of cases).

102 *See, e.g.*, Am. Hardwoods, Inc. v. Deutsche Credit Corp. (*In re* Am. Hardwoods, Inc.), 885 F.2d 621, 624 (9th Cir. 1989) (finding related-to jurisdiction over third-party suit that could lead to elimination of officer's stock in the reorganizing firm, where officer was the central actor in the reorganization and would have no incentive to continue without equity in the firm).

103 *See In re* FedPak Sys., Inc., 80 F.3d 207, 214 (7th Cir. 1996) (justifying an "effect" requirement narrower than *Pacor* because "common sense cautions against an open-ended interpretation of the 'related to' statutory language 'in a universe where everything is related to everything else'" (quoting Dunne, *supra* note 88, at 957)).

Courts that employ the automatic-liability rule try to reap some rule-based efficiency benefits while including enough third-party suits so as to not get it *too* wrong with respect to bankruptcy policy. In theory, the automatic-liability rule should be a predictable and efficient way to cabin bankruptcy jurisdiction with clear boundaries. It clearly excludes third-party disputes that may result in a common law indemnification claim against the estate and clearly includes disputes that would trigger uncontested indemnification rights, such as those in a clear bylaw provision.[104] The problem is the rather large gray area in between.[105] Indemnification rights vary greatly in both source and clarity,[106] which complicates the consistent, easy determination of what is and is not "automatic."[107] Even proponents of the automatic-liability rule express skepticism of the rule's efficiency benefits. In a recent reaffirmation of the automatic-liability rule, the Third Circuit nonetheless urged courts to examine even contractual indemnity rights on a case-by-case basis to determine whether or not the potential for liability of the debtor's estate would arise automatically from adjudication of the third-party dispute.[108]

Courts that ignore the automatic-liability rule want to treat the "conceivability" requirement like a pure case-by-case standard, because the automatic-liability rule is underinclusive from a bankruptcy policy standpoint.[109] In the context of jurisdiction over third-party suits that may give rise to potential indemnification or contribution claims against the estate, courts that employ a standard point out

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104 *Supra* note 32.

105 *See* Loft, *supra* note 8, at 1108 ("The question of likelihood often proves difficult, however, as courts speculate on the merits of related litigation and struggle to define the precise indemnity relationship between the debtor and the third-party defendant.").

106 *See, e.g.*, N.Y.C. Emps.' Ret. Sys. v. Ebbers (*In re* WorldCom, Inc. Sec. Litig.), 293 B.R. 308, 320 & n.16 (Bankr. S.D.N.Y. 2003) (listing various alleged grounds for indemnification and contribution, including provisions in contractual underwriting agreements, provisions in the debtor's bylaws, directors and officers liability insurance coverage, statutory indemnification, and common law theories of joint and several liability).

107 For example, where a contractual agreement is not unconditional but instead subject to preconditions that render the indemnification claim uncertain, related-to jurisdiction may not exist under the automatic-liability rule despite the contractual nature of the debtor–third party relationship. *See* TD Bank, N.A. v. Sewall, 419 B.R. 103, 107 (D. Me. 2009) (describing the different types of possible indemnification agreements).

108 *See* W.R. Grace & Co. v. Chakarian (*In re* W.R. Grace & Co.), 591 F.3d 164, 174 n.9 (3d Cir. 2009) (warning that "contractual indemnity rights" are not necessarily "sufficient to bring a dispute over that indemnity within the ambit of related-to jurisdiction" and stating that what is or is not "sufficiently related to a bankruptcy to warrant the exercise of subject matter jurisdiction is a matter that must be developed on a fact-specific, case-by-case basis").

109 *See* Brubaker, *supra* note 8, at 881–82 & 882 n.501 (arguing that "*Pacor*'s search for 'automatic liability'" ignores the question of whether jurisdiction over third-party suits would facilitate efficient resolution of claims against the estate).

how the rule can disrupt or threaten effective bankruptcy administration.[110] Faced with "thousands of potential indemnification claims" against the debtor, for example, a court running the bankruptcy case understandably wants to dispose of the automatic-liability rule and exercise jurisdiction to ensure sound distributions to creditors.[111] Indeed, facing just such this situation in *In re Dow Corning*, the Sixth Circuit ultimately decided that uncertain effects on the estate still "depend[ed] on *contingencies sufficiently immediate* to support a finding of 'related to' jurisdiction," because enough third-party defendants had declared intent to seek contribution from the estate.[112] Aware that not all contingent indemnification claims suffice for jurisdiction and revealing that it was treating the "conceivable" requirement like a standard, the *Dow Corning* court also made sure to emphasize the case-specific nature of the decision.[113] Similarly, in *Coar v. National Union Fire Insurance Co*., the Fifth Circuit found related-to jurisdiction over a plaintiff's direct action against the debtor's insurer.[114] Even though the suit did not implicate any automatic effect against the debtor's estate, there was a hypothetical but "cognizable threat" that, pending adjudication of a host of other open issues particular to that case, the insurance proceeds would be unable to cover all claims against it and the debtor's estate would be left potentially vulnerable to additional claims.[115] District and Bankruptcy Courts within the Southern District of New York, a prominent bankruptcy forum, expressly acknowledge the use of a standard by requiring a "reasonable legal basis" for an effect on the estate,[116]

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[110] *See* Lori J. Forlano, Note, *Why Bankruptcy "Related to" Jurisdiction Should Not Reach Mass Tort Nondebtor Codefendants*, 73 N.Y.U. L. REV. 1627, 1644 (1998) ("[S]ome 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.").

[111] *See* Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (*In re* Dow Corning Corp.), 86 F.3d 482, 494 (6th Cir. 1996) ("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.").

[112] *Id.* at 495 (emphasis added).

[113] *Id.* at 494–95 ("Cognizant of the fact that 'related to' jurisdiction cannot be limitless and concerned about granting benefits of the automatic stay in bankruptcy to solvent codefendants, we nevertheless believe the possibility of contribution or indemnification liability *in this case* is far from attenuated." (emphasis added)).

[114] 19 F.3d 247, 249 (5th Cir. 1994).

[115] *Id.* at 249.

[116] *See* Back v. LTV Corp. (*In re* Chateaugay Corp.), 213 B.R. 633, 640 (S.D.N.Y. 1997) ("[*Pacor*'s] 'automatic liability' language . . . is inconsistent with this Circuit's 'any conceivable effects' test. . . . [But] an indemnity claim against a debtor, no matter how baseless, cannot trigger bankruptcy jurisdiction. Rather, in order to meet the 'any conceivable effects' test, [the claim] must have a reasonable legal basis.").

which in practice forces courts, on a case-by-case and fact-specific basis, to identify and weigh arguments over the likelihood that third-party suits could lead to effects on the debtor's estate.[117]

These courts demonstrate that the core inquiry of the "conceivable" requirement—how *likely* an effect on the estate is to occur—is better suited to a case-by-case standard than a bright-line rule. This is because the likelihood question is highly fact-sensitive and case-specific. It turns on factors like the merits of the third-party disputes and potential claims against the estate[118] and whether claims against the estate have been or are likely to be filed.[119]

But, crucially, courts that dispatch with the automatic-liability rule justify doing so for reasons beyond the strict likelihood of an effect on the estate. Where the facts also suggest that the magnitude or significance of potential claims against the estate are sufficiently high—regardless of whether liability is automatic and other lawsuits need to be brought—courts have recognized the need to exercise related-to jurisdiction and "marshal[ ]" third-party suits "in accord with the bankruptcy proceeding."[120] Significant claims against the estate, should they come to fruition, "would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as [the debtor's] ability to resolve its liabilities and proceed with reorganization,"[121] which is sometimes enough to war-

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117 *See, e.g.*, N.Y.C. Emps.' Ret. Sys. v. Ebbers (*In re* WorldCom, Inc. Sec. Litig.), 293 B.R. 308, 320–24 (Bankr. S.D.N.Y. 2003) (engaging in a "reasonable legal basis" inquiry by identifying various sources of indemnification and contribution claims against the debtor's estate, inquiring into whether they were contested, and inquiring into their factual and legal interconnectedness with the debtor's conduct).

118 *See, e.g.*, *In re* Fed.-Mogul Global, Inc., 300 F.3d 368, 376 (3d Cir. 2002) (doubting that a boilerplate indemnification agreement would result in liability against the debtor's estate); Arnold v. Garlock, Inc., 278 F.3d 426, 435 (5th Cir. 2001) (concluding that third-party contribution claims against the debtor were invalid under Texas law and "therefore no 'related to' jurisdiction could exist"); Loft, *supra* note 8, at 1108 (noting that courts will "speculate on the merits of related litigation" in order to answer "the question of likelihood").

119 *See* Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (*In re* Dow Corning Corp.), 86 F.3d 482, 493–94 (6th Cir. 1996) (considering whether third-party defendants had or intended to file indemnification or contributions claims against the debtor); Loft, *supra* note 8, at 1124 & n.205 (noting that some courts analyzing related-to jurisdiction will inquire whether third-party defendants have filed proofs of claim in bankruptcy).

120 Coar v. Nat'l Union Fire Ins. Co., 19 F.3d 247, 249 (5th Cir. 1994).

121 *In re Dow Corning*, 86 F.3d at 494; *see also, e.g.*, *Coar*, 19 F.3d at 249 (finding "related-to" jurisdiction claims against the debtor's insurance company which could leave the estate vulnerable); *In re* G.S.F. Corp., 938 F.2d 1467, 1475 (1st Cir. 1991) (pointing to "[d]elay in administration of the estate" that would occur if the court did not exercise related-to jurisdiction to enjoin third-party suit against a defendant that could possibly bring an indemnification claim against the estate); Am. Hardwoods, Inc. v. Deutsche Credit Corp. (*In re* Am. Hardwoods, Inc.), 885 F.2d 621, 624 (9th Cir. 1989) (basing

rant jurisdiction over third-party suits *regardless* of the likelihood of the effect on the estate accruing.[122] In other words, the inquiry of *Pacor*'s "conceivable" requirement is functionally incomplete: The significance and magnitude of the "effect on the estate," as well as economies of administration, also play an important role in fashioning a functional related-to jurisdiction.[123]

3. Evaluating Bankruptcy Abstention

Given *Pacor*'s functionally overinclusive "effect" requirement and functionally incomplete "conceivable" requirement, jurisdictional design principles point to the need for a case-by-case standard that can bring *all* the policy goals of bankruptcy jurisdiction directly to bear by screening out potential related-to proceedings that have little to no bankruptcy policy benefits. This Subpart demonstrates that mandatory and permissive abstention can serve this role.

In terms of pure bankruptcy function, the Second Circuit's test for mandatory abstention in *Parmalat*[124] does require courts to analyze whether the inclusion or exclusion of certain proceedings would help or hinder bankruptcy administration.[125] However, mandatory abstention cannot be invoked without a state law claim and a threat to comity with state courts; it is solely focused on federalism concerns and is limited to those cases in which a state law claim has in fact been filed.[126] If abstention doctrine is going to provide a comprehensive backstop to the overinclusive "effect" requirement and the relevant but incomplete question of likelihood in *every* case, it must address all

jurisdiction over third-party suit against the debtor's officer on the *prediction* that enforcement of the judgment would lead to execution of the officer's stock in the reorganizing firm, leaving the officer "little incentive to operate [the debtor] and maintain the reorganization plan"); *In re* FairPoint Commc'ns, Inc., 452 B.R. 21, 29 (S.D.N.Y. 2011) (finding related-to jurisdiction "to enjoin non-debtor litigation if the bankruptcy estate may be obligated to indemnify or contribute to the losing party . . . [because] such a contingent indemnification obligation . . . *threatens the finality* for the debtor that the bankruptcy system seeks to provide" (emphasis added)).

122 *Cf.* Nat'l Union Fire Ins. Co. of Pittsburgh v. Titan Energy, Inc. (*In re* Titan Energy Inc.), 837 F.2d 325, 330 (8th Cir. 1988) ("[E]ven a proceeding which portends a mere contingent or tangential effect on the debtor's estate meets the broad jurisdictional test articulated in *Pacor*.").

123 *See infra* notes 146–49 and accompanying text (discussing the three core factors of bankruptcy abstention—the magnitude of the potential effect on the estate, the potential of there being an effect on the estate, and the economy of administration).

124 Parmalat Cap. Fin. Ltd. v. Bank of Am. Corp., 639 F.3d 572 (2d Cir. 2011).

125 *See supra* note 62 and accompanying text (noting the interest in expeditious bankruptcy administration as one factor in mandatory abstention).

126 *See* 28 U.S.C. § 1334(c)(2) (2006) (requiring mandatory abstention for state law suits that have already commenced); N.Y.C. Emps.' Ret. Sys. v. Ebbers (*In re* WorldCom, Inc. Sec. Litig.), 293 B.R. 308, 331–32 (S.D.N.Y. 2003) (explaining that mandatory abstention cannot apply to an action that can be filed in federal court outside the bankruptcy case).

remaining claims that escape the confines of mandatory abstention, including other federal proceedings or yet-to-be filed state proceedings.

This can be done using permissive abstention. Some courts have acknowledged that permissive abstention stretches beyond federalism concerns[127] and consider abstaining in favor of another federal court or even a foreign court.[128] The more courts view permissive bankruptcy abstention as distinct from and broader than other nonbankruptcy abstention doctrines,[129] which focus only on federalism issues, the more useful abstention becomes as a comprehensive tool for exercising bankruptcy jurisdiction according to functional goals.[130]

Permissive abstention provides an effective vehicle for a jurisdictional inquiry that sounds in bankruptcy policy.[131] Indeed, "several courts of appeals have construed the permissive bankruptcy abstention provision broadly in order to foster expeditious resolution of litigation before bankruptcy courts."[132] The doctrine provides the right kind of fact-specific, flexible standard that can be used to determine whether including certain claims within the bankruptcy case would facilitate or hinder expeditious administration.[133] For example, courts

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[127] *See, e.g.*, Asbestos Claimants v. Apex Oil Co. (*In re* Apex Oil Co.), 980 F.2d 1150, 1152–53 & 1153 n.8 (8th Cir. 1992) (holding that § 1334(c)(1) abstention is not limited to state law cases); Mack v. Chambers (*In re* Mack), No. 6:06-CV-1782-Orl-19, 2007 WL 1222575, at *6 (M.D. Fla. Apr. 24, 2007) ("Abstention in the interests of justice is not limited to state law claims but may be invoked to avoid deciding federal claims.").

[128] *See, e.g.*, Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 833 (5th Cir. 1993) (extending permissive abstention to consider proceeding pending in foreign tribunal); *In re Apex Oil*, 980 F.2d at 1153 (federal Jones Act); Antioch Co. Litig. Trust v. Hardman, 438 B.R. 598, 610 (S.D. Ohio 2010) (federal ERISA action); Bickerton v. Bozel S.A. (*In re* Bozel S.A.), 434 B.R. 86, 102 (Bankr. S.D.N.Y. 2010) (foreign tribunal); *In re* Portrait Corp. of Am., 406 B.R. 637, 639 (Bankr. S.D.N.Y. 2009) (federal Lanham Act).

[129] *See* Block-Lieb, *supra* note 22, at 814–25 (analyzing the split among courts over whether § 1334(c)(1) does more than simply codify preexisting, nonbankruptcy abstention doctrines).

[130] *Cf.* Patrick M. Birney, *Reawakening Section 1334: Resolving the Conflict Between Bankruptcy and Arbitration Through an Abstention Analysis*, 16 AM. BANKR. INST. L. REV. 619, 674–76 (2008) (proposing the use of permissive abstention to balance the competing policy goals of bankruptcy and the Federal Arbitration Act).

[131] Standard permissive abstention factors include "the effect or lack thereof on the efficient administration of the estate," "the degree of relatedness or remoteness of the proceeding to the main bankruptcy case," "the burden of [the bankruptcy court's] docket," and "the presence in the proceeding of nondebtor parties." Christensen v. Tucson Estates, Inc. (*In re* Tucson Estates, Inc.), 912 F.2d 1162, 1167 (9th Cir. 1990).

[132] Block-Lieb, *supra* note 22, at 838. Block-Lieb notes that "[t]he language of the permissive abstention provision . . . [and] [t]he legislative history of the permissive bankruptcy abstention provision . . . lend[ ] some support to this position." *Id.* at 839 (citing H.R. REP. NO. 95-595, at 51 (1977), *reprinted in* U.S.C.C.A.N. 5962, 6012).

[133] *Compare In re Tucson Estates*, 912 F.2d at 1169 (concluding abstention would facilitate quick valuation of estate property), *with* Eastport Assocs. v. City of Los Angeles (*In re* Eastport Assocs.), 935 F.2d 1071, 1078 (9th Cir. 1991) (concluding abstention would delay

undertaking a permissive abstention analysis look closely at the significance of the proceeding to the bankruptcy case: Abstention is more valuable when the potential claims against the bankruptcy estate are very small[134] or when the proceeding in question has no financial impact on the debtor's estate,[135] and less valuable when adjudication within the bankruptcy case can shorten the length of the bankruptcy proceeding by helping debtors resolve liabilities[136] like "concomitant claims for contribution and indemnification [that] will assist the reorganization effort."[137] Notably, another consideration that emerges in these cases looks awfully similar to the "conceivable" requirement and the automatic-liability rule.[138] Recognizing that permissive abstention can apply in *all* cases regardless of federalism-specific concerns, courts can use the doctrine as the vehicle for a robust and flexible jurisdictional standard that fulfills the policy goal of effective bankruptcy administration in every case.

III
"Effect" Rules and Abstention Standards

This part puts forth an analytical framework for deciding related-to jurisdiction cases. It proposes that courts should use *Pacor*'s

administration because the proceeding in question involved the ultimate disposition of the estate's sole asset and thus would determine "the entire nature of the business undergoing reorganization").

134 *See* DHP Holdings II Corp. v. Peter Skop Indus., Inc. (*In re* DHP Holdings II Corp.), 435 B.R. 220, 225 (Bankr. D. Del. 2010) ("The Debtors admit that the amount at issue in this adversary proceeding is not significant and it certainly is not the linchpin for determining how the Debtors' bankruptcy cases will proceed.").

135 *See In re* Portrait Corp. of Am., Inc., 406 B.R. 637, 643 (Bankr. S.D.N.Y. 2009) (abstaining from "tangentially related . . . dispute between two non-debtors in which the Debtors' estates apparently have no financial interest"); *In re* Repurchase Corp., 329 B.R. 832, 836–37 (Bankr. N.D. Ill. 2005) (abstaining where dispute sought to enforce another court's order requiring the debtor to produce tax documents, such that the dispute would "not affect the bankruptcy estate" and had no "degree of relatedness" with the bankruptcy case).

136 *See, e.g.*, Lindsey v. Dow Chem. Corp. (*In re* Dow Corning Corp.), 113 F.3d 565, 571 (6th Cir. 1997) (finding abstention would negatively "affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as [the debtor's] ability to resolve its liabilities and proceed with reorganization").

137 N.Y.C. Emps.' Ret. Sys. v. Ebbers (*In re* WorldCom, Inc. Sec. Litig.), 293 B.R. 308, 334 (S.D.N.Y. 2003).

138 *See* Kelley v. Nodine (*In re* Salem Mortg. Co.), 783 F.2d 626, 634–35 (6th Cir. 1986) (disposing of *Pacor*'s automatic-liability rule because abstention limitations "are sufficient to keep federal jurisdiction from becoming overextended"); Antioch Co. Litig. Trust v. Hardman, 438 B.R. 598, 610 (S.D. Ohio 2010) (abstaining in part because the contended impact on bankruptcy administration was "entirely speculative" and "assumes the viability of all of the purported claims and the uncollectibility of potential judgment debtors"); *cf.* Brubaker, *supra* note 8, at 881–82 (arguing that the *Pacor* court used the automatic-liability rule when it should have relied on abstention instead).

"effect" requirement to craft categorical rules where possible, and then partake *sua sponte* in a clearly organized abstention analysis of every dispute in which a plausible "effect on the estate" is shown.[139]

As a threshold question, courts should continue to follow *Pacor*'s bare formulation and ask whether "*the outcome of* [a] *proceeding could conceivably have any effect*" on the debtor's bankruptcy estate.[140] A nondebtor third party that seeks related-to bankruptcy jurisdiction over a lawsuit must plead specifically what financial, legal, or practical effect the suit may have on the debtor's bankruptcy estate.[141] This "effect" requirement can serve as a vehicle for discrete categorical "effect" rules. Choosing when and when not to draw these rules depends on the facts and levels of generalization: "Effect" rules can build consensus among courts when they apply at a level of generalization that does not substantially impair bankruptcy administration, but can be more problematic when the application of general, non-fact-specific rules disrupts the bankruptcy process on the facts of a given case. For example, an "effect" rule that confers jurisdiction over third-party suits that could change the value of assets in the debtor's estate may be natural in one case and absurd in another.[142] Courts should only base a jurisdictional holding on the "effect" requirement, in other words, when its formulation is not likely to have perverse results when applied to different bankruptcy proceedings with different facts.

Because it is not possible to draw categorical "effect" rules in every case, this requirement is still going to be overinclusive from a bankruptcy perspective, and will risk delay for debtors and creditors

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139 *Cf.* Block-Lieb, *supra* note 22, at 851 (concluding that "[t]he bankruptcy goal of expeditiousness justifies abstention when a delegation of jurisdiction is the most efficient course of action," but will more often justify decisions against abstention that will foster efficiency by permitting "resolution of all bankruptcy related litigation in a single bankruptcy forum"); David L. Bryant, Note, *Selective Exercise of Jurisdiction in Bankruptcy-Related Civil Proceedings*, 59 TEX. L. REV. 325, 326 (1981) (arguing that the pre-§ 1334 abstention provision should be interpreted to confine related-to jurisdiction only to those proceedings that facilitate efficient bankruptcy administration).

140 Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984), *overruled in part by* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 129 (1995).

141 Of course, the requirement that litigants "plead specifically" any effects on the estate may not be enough to deter wholly fabricated or frivolous attempts at manufacturing bankruptcy jurisdiction. While the *sua sponte* bankruptcy abstention that this Note recommends can likely deal with this problem, one could also envision some sort of baseline plausibility requirement for pleading an "effect on the estate," akin to the "substantial" requirement in federal question jurisdiction, which is a minimal threshold that excludes only those claims that are clearly implausible, frivolous, or foreclosed by precedent. *See* Hagans v. Lavine, 415 U.S. 528, 536–38 (1974) (reviewing the substantiality requirement).

142 *Supra* notes 99–101 and accompanying text.

and unfairness to third-party litigants.[143] Therefore, whenever a party seeking bankruptcy jurisdiction pleads a sufficient "effect on the estate," the court should turn to mandatory abstention and raise permissive abstention *sua sponte*.[144] Despite their sprawling articulations, these two abstention provisions essentially serve two purposes: bankruptcy administration and federalism.[145] Putting federalism values aside, a comprehensive bankruptcy abstention test should incorporate three core factors: (1) the *significance or magnitude* of the potential "effect on the estate,"[146] (2) the *likelihood* of the potential "effect on the estate" accruing, which includes an examination of either the merits of third-party claims or the merits of claims directly against the estate[147] as well as an examination of the factual and legal overlap of

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[143] *See* Forlano, *supra* note 110, at 1644–48 (warning against expansive jurisdiction for the sake of bankruptcy administration without also considering "potential ill effects of allowing jurisdiction over [third-party] suits" such as delay for creditors, unfairness to third-party litigants, and usurpation of state law from state courts).

[144] *See supra* note 67 (noting the power of courts to raise permissive abstention *sua sponte*).

[145] For example, one can sort the influential *Tucson Estate* twelve-factor test for permissive abstention into these two umbrellas. Bankruptcy administration abstention includes "(1) the effect . . . on the efficient administration of the estate, . . . (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, . . . (9) the burden of [the bankruptcy court's] docket, [and] (10) the likelihood [of] . . . forum shopping," as well as the substance of the proceeding, whether a jury trial is required, and whether nondebtor parties are involved. Christensen v. Tucson Estates, Inc. (*In re* Tucson Estates, Inc.), 912 F.2d 1162, 1167 (9th Cir. 1990). Federalism abstention includes "(2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334," and "(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 . . . ." *Id.*

[146] *See, e.g.*, Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (*In re* Dow Corning Corp.), 86 F.3d 482, 493–94 (6th Cir. 1996) (recognizing the threat of "thousands" of potential claims against the debtor's estate, even when those claims were only based on a stated intention to bring suit); Am. Hardwoods, Inc. v. Deutsche Credit Corp. (*In re* Am. Hardwoods, Inc.), 885 F.2d 621, 624 (9th Cir. 1989) (considering the psychological effect that a corporate officer would not help run the reorganization if officer's stock in the firm was executed on); Brubaker, *supra* note 8, at 900 n.558 (suggesting the use of abstention when third-party suits that could trigger different distributions among creditors arise in bankruptcy cases where the debtor has no assets, such that the jurisdictionally sufficient "effect on the estate" is nonetheless insignificant to a particular bankruptcy case); *supra* notes 134–37 and accompanying text (citing abstention decisions involving the magnitude of the third-party claims).

[147] *See* Quinn v. Autem, No. 3:08-CV-02174-O ECF, 2009 WL 1953005, at *3 (N.D. Tex. July 6, 2009) (concluding that even though the debtor's articles of incorporation contained an indemnification provision, "[d]efendants have not provided evidence of entitlement to indemnification in the current action that would lead the Court to conclude that indemnification would be obtainable under the allegations made in [p]laintiff's pleadings"); *supra* notes 118–19 and accompanying text (noting cases that turn on the merits of the third-party claims); *see also* Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165,

third-party claims with claims against the estate,[148] and (3) *economy of administration*, which includes the potential delay or bias caused by inclusion or exclusion of the third-party suit.[149]

Courts that proactively raise bankruptcy abstention *sua sponte* can use the doctrine to resolve the jurisdictional issue functionally, in accordance with good bankruptcy policy. Given the flexible standard offered above, individual decisions will necessarily be limited to the particular facts of each bankruptcy proceeding. This is a valuable feature, not a bug: When no generalizable "effect" rule is desirable, *sua sponte* bankruptcy abstention can provide the best disposition for the proceeding at bar without the risk of setting precedent that will harm bankruptcy administration in future cases. Over time, some general patterns of holdings may materialize that can be turned into threshold "effect" rules.

Unfortunately, even courts that properly undertake a wide-ranging abstention analysis that sounds in bankruptcy policy still repeat the mantra that abstention is only a narrow exception to the general rule of broad bankruptcy jurisdiction.[150] Such a mantra, to the extent it automatically puts a strong thumb on the scale against

188 ("[T]he court may need to inquire into a variety of merits-related issues when deciding challenges to subject matter jurisdiction.").

148 *See, e.g.*, N.Y.C. Emps.' Ret. Sys. v. Ebbers (*In re* WorldCom, Inc. Sec. Litig.), 293 B.R. 308, 321 (S.D.N.Y. 2003) (holding that a reasonable legal basis, and thus related-to jurisdiction, existed for contribution claims because the conduct of the debtor and third-party defendant were "indisputably intertwined"); Brubaker, *supra* note 8, at 905–10 (discussing cases that rely on findings of "joint conduct" and "intertwined parties" to justify related-to jurisdiction over third-party suits (internal quotation marks omitted)); *cf.* Pfizer Inc. v. Law Offices of Peter G. Angelos (*In re* Quigley Co.), 676 F.3d 45, 57 (2d Cir. 2012) (describing the question of "whether a suit seeks to impose derivative liability" as one possible "helpful way to assess whether it has the potential to affect" the bankruptcy estate).

149 *See, e.g.*, Owens-Ill., Inc. v. Rapid Am. Corp. (*In re* Celotex Corp.), 124 F.3d 619, 626 (4th Cir. 1997) (noting that full resolution of third-party claims would "obviate" the statutory requirement that "a contingent or unliquidated claim be estimated if the bankruptcy court determines that the fixing or liquidation of a claim would unduly delay the administration of the bankruptcy case"); Masterwear Corp. v. Rubin Baum Levin Constant & Friedman (*In re* Masterwear Corp.), 241 B.R. 511, 519–21 (Bankr. S.D.N.Y. 1999) (abstaining from a third-party suit where potential claim against the debtor's estate had settled and third-party suit required a jury trial); Pathak, *supra* note 24, at 104, 113 (recognizing that while "the outcomes of lawsuits between third parties [that] are not directly binding on the estate[ ] are not necessary prerequisites for administration of the estate . . . [because] [t]he claim can be treated as contingent and estimated appropriately," it is still the case that "[f]ederal adjudication of 'related to' cases" within the bankruptcy case can avoid the "suboptimal" ability of "a slow-moving suit [between third parties] to thwart a potential creditor's recovery").

150 *See, e.g.*, Bickerton v. Bozel S.A. (*In re* Bozel S.A.), 434 B.R. 86, 102 (Bankr. S.D.N.Y. 2010) ("While bankruptcy courts have broad discretion to abstain under § 1334, following the guidance of the Supreme Court, this circuit has recognized that abstention should only be exercised in narrow circumstances.").

abstention in every case,[151] should stop. It is in the best interests of litigants, other courts, and the bankruptcy system to treat abstention doctrine as a crucial aspect of jurisdictional design: a vehicle for the case-by-case determination of whether a given proceeding properly belongs in the jurisdiction of a given bankruptcy case. Rather than start with a presumption against abstention, courts should undertake an even-handed bankruptcy abstention analysis *sua sponte* for every potential related-to proceeding. As one federal court of appeals put it, Congress combined a broad bankruptcy jurisdiction with a broad abstention doctrine so "the district court could determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy cases."[152]

This redesign of the related-to jurisdiction test can competently grapple with the tougher problems that have arisen throughout this Note. The paradigmatic *Pacor* case law split involves where to draw the jurisdictional line in third-party suits that could lead to potential indemnification or contribution claims against the debtor's estate.[153] The majority of courts that have rejected the automatic-liability rule already recognize the functional problems with trying to use bright lines to sort third-party disputes that risk this core "effect on the estate."[154] In particular, when faced with inchoate claims, courts that require a "reasonable legal basis" for related-to jurisdiction and employ a thorough abstention inquiry successfully account for all of the factors that constitute an adequate bankruptcy abstention,[155] and

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151 *Cf. In re* Portrait Corp. of Am., Inc., 406 B.R. 637, 642 (Bankr. S.D.N.Y. 2009) ("[T]he balance [of abstention factors] should be 'heavily weighted in favor of the exercise of jurisdiction.'" (quoting *In re* Ionosphere Clubs, Inc., 108 B.R. 951, 954 (Bankr. S.D.N.Y. 1989))).

152 Kelley v. Nodine (*In re* Salem Mortg. Co.), 783 F.2d 626, 635 (6th Cir. 1986); *see also* Wood v. Wood (*In re* Wood), 825 F.2d 90, 93 (5th Cir. 1987) ("The abstention provisions of the Act demonstrate the intent of Congress that concerns of comity and judicial convenience should be met, not by rigid limitations on the jurisdiction of federal courts, but by the discretionary exercise of abstention when appropriate in a particular case.").

153 *See supra* notes 47–48, 52 and accompanying text (noting this division); *see also* Loft, *supra* note 8, at 1097 ("The classic third-party scenario is tort litigation against non-debtor defendants who have potential rights to contribution or indemnity against a debtor in bankruptcy.").

154 *See supra* Part II.B.2 (discussing the automatic-liability rule, and the approach taken by such courts). The *Pacor* court itself, encountering the potential of bankruptcy jurisdiction over inchoate indemnification claims, could have handled the problem by relying on mandatory and permissive abstention. Brubaker, *supra* note 8, at 883–84 (describing *Pacor* as an appropriate case for mandatory or permissive abstention).

155 *See, e.g.*, N.Y.C. Emps.' Ret. Sys. v. Ebbers (*In re* WorldCom, Inc. Sec. Litig.), 293 B.R. 308, 320–21 (S.D.N.Y. 2003) (finding a reasonable basis because resolution of statutory and common law contribution claims are "necessarily interconnected" to the resolution of the third-party claims); *id.* at 322 n.21 (declining to consider what role significance or magnitude of the effect should play in the jurisdictional inquiry); *id.* at 333–34

attend to federalism interests as well.[156] This Note's framework would alter the doctrinal structure of these decisions so that discrete functional factors play a more transparent and organized role and are not hidden behind a blanket "reasonable legal basis" label.[157]

Or consider the slippery slope that arises from an "effect" rule that categorically includes any third-party disputes that could increase or decrease the assets of the estate.[158] Under the proposed reform, courts should consider crafting narrower "effect" rules, perhaps holding that changes to the value of *public* shares of stock in the estate cannot constitute an "effect on the estate."[159] In the meantime, courts can handle these third-party suits within bankruptcy abstention, which can easily control for the worst slippery slope cases and perhaps over time suggest some useful "effect" rules that can be put in place. Finally, for jurisdiction over third-party suits that may lead only to a change in the identity of the creditor,[160] courts should use the proposed bankruptcy abstention to examine on a case-by-case basis whether the potential "effects on the estate" are so small as to be insignificant,[161] or whether in fact the debtor would have individual defenses against different creditors.

One consequence of this proposed framework is that many jurisdictional decisions will be made at the case-by-case abstention stage,

(considering administrative efficiency); *id.* at 334 ("[T]he efficient and expeditious resolution of this litigation, and of its concomitant claims for contribution and indemnification, will assist the reorganization effort.").

156 *See id.* at 330–33 (engaging in mandatory abstention analysis and examining whether numerous or novel state law claims existed within the third-party dispute).

157 It would also prevent the unnecessary re-litigation of "effect" rules by making it clear that such categorical holdings operate as bright-line, threshold rules. *See id.* at 323 (rejecting an "argument regarding the nature of the effect on the bankruptcy estate" that distribution to creditors alone was not a sufficient "effect").

158 *See supra* note 38–39 and accompanying text (discussing the difficulty of creating categorical rules in this situation).

159 Notably, the decision that causes the most consternation about the slippery slope from such a categorical "effect" rule involved a sole shareholder of a closely held corporation. *See* 8300 Newburgh Rd. P'ship v. Time Constr., Inc. (*In re* Time Constr., Inc.), 43 F.3d 1041, 1042 (6th Cir. 1995). The *Time Construction* court understandably sought to exercise jurisdiction over litigation that could affect the only major asset in the debtor's estate. Had the court employed the framework proposed in this Note, it would not have couched its holding solely on the presence of a categorical "effect on the estate." Instead, it would have explained its decision not to abstain by stressing the relevancy of *this* debtor's status as sole shareholder and the critical impact on administration of *this* bankruptcy case in order to justify related-to jurisdiction over *this* particular third-party suit. Such a holding would not implicate the mischief identified in *supra* note 100 and accompanying text.

160 *See supra* note 37 and accompanying text (identifying such suits).

161 *See* Brubaker, *supra* note 8, at 900 n.558 (suggesting that the Seventh Circuit decision that established this categorical "effect" rule would be a good candidate for permissive abstention because the size of the claim was small and thus incidental to bankruptcy administration).

which would be less efficient and predictable than a broad and bright-line rule that applied to every case (like some blunter variation on the automatic-liability rule).[162] This concern is at least partially addressed by the abstentions statute's provision prohibiting appellate review of all permissive abstention decisions,[163] which will save litigant and judicial resources at the appellate level,[164] and allow for appellate review only of those categorical "effect" rules that are broadly applicable to other cases.[165] More important, however, is to recognize that the mantra of clear jurisdictional rules can only go so far until functional justifications exert their pull. For that reason, discretion in jurisdictional determinations is inevitable.[166] This is perhaps especially true in bankruptcy, which is less substantive law than procedural.[167] When designing bankruptcy procedure, the existence of functional considerations that are particular to the unique and fact-specific task of resolving a given bankruptcy case makes robust discretion unavoidable.[168] The "protean"[169] nature of bankruptcy jurisdiction means

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[162] *See* Daniel J. Meltzer, *Jurisdictional Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1904 (2004) ("Judicial rounding out of jurisdictional statutes plainly creates a possibility that the resulting doctrine may be sufficiently uncertain or indeterminate as to fail to provide adequate guidance to litigants about where disputes may and may not be filed."); *see also* Scott Dodson & Elizabeth McCuskey, Response, *Structuring Jurisdictional Laws and Standards*, 65 VAND. L. REV. EN BANC 31, 36–37 (2012) (arguing that a broad threshold rule paired with a broad abstention standard would concentrate litigation around the abstention standard and thus erode "efficiency and predictability gains").

[163] 28 U.S.C. § 1334(d) (2006) (prohibiting appeal of all abstention decisions, aside from decisions *not* to partake in mandatory abstention).

[164] *See* Meltzer, *supra* note 162, at 1908–09 (noting one way "to assure that unpredictable decisions cause little harm is substantially to insulate district court decisions from appellate review"); Nash, *supra* note 79, at 538 tbl.1 (claiming that appellate litigation costs are likely to be low when employing discretionary abstention standards that are not appealable).

[165] In practice, categorical "effect" rules will be reviewable by the court of appeals like any other bankruptcy matter, *see* 28 U.S.C. § 158(d) (2006) (providing for the bankruptcy appellate process), while most case-by-case decisions to abstain for bankruptcy policy reasons will likely not be appealable. This is another advantage of the setup proposed here: It will allow courts of appeal to play their usual jurisgenerative function by hearing only those related-to jurisdiction appeals in which the court below crafted a categorical rule that would apply to future proceedings.

[166] *See generally* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (describing judicial discretion on jurisdictional questions as pervasive and justified); *see also* Barry Friedman, *Seventy-Fifth Anniversary Retrospective: Most Influential Articles—David L. Shapiro*, Jurisdiction and Discretion, 75 N.Y.U. L. REV. 1553, 1554 (2000) ("Shapiro clearly was correct that . . . [t]he grants of jurisdiction by Congress are simply too broad, the factors suggesting that courts not exercise jurisdiction too particularistic, and the expertise at weighing those factors much too judicial in nature to deny this power to courts.").

[167] *See supra* note 3 (developing this characterization).

[168] *Cf.* Block-Lieb, *supra* note 26, at 826 (comparing the functional goals of supplemental jurisdiction with bankruptcy jurisdiction, and concluding that the unique

there is likely not a reliable way to make a bright-line rule that applies in every case *and* does not severely hamper the functional goals of bankruptcy jurisdiction. The best response (though frustrating) is a hybrid doctrine that makes discrete, clear rules where possible and sorts the rest case-by-case.[170] To the extent we must make do with discrete rules that are somewhat informed by bankruptcy goals, categorical holdings that identify sufficient and insufficient "effects on the estate" are the most fruitful option—they at least ask "what type" instead of "how much."[171] And to the extent that standard-based jurisdictional discretion can be exercised in a "principled" way,[172] courts should develop a rigorous and consistently articulated *sua sponte* bankruptcy abstention that can create a stable body of guiding precedent over time.[173]

Conclusion

This Note has provided an analytical framework for related-to jurisdiction that will allow courts to reap moderate efficiency gains through categorical rules where possible and still fulfill the policy objectives of bankruptcy subject matter jurisdiction. The goal is to nudge jurisdictional case law away from implicit functional reasoning and broad conclusory statements, and put in place a structured doctrinal setup that allows for both case-specific and broadly applicable holdings. Adoption of this proposal will result in analytical uniformity, clarity among courts about functional rationales, and more doctrinal guidance for litigants.

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goals of bankruptcy jurisdiction require "case by case consideration" of whether exercising supplemental jurisdiction in a bankruptcy case would facilitate bankruptcy administration).

169 *Supra* note 5 and accompanying text.

170 *See* Dodson, *supra* note 68, at 57 ("Narrowing the scope of the clear rule to the easy cases—in which underlying policies are less in conflict and the tasks of creating and implementing a clear rule are easier—is more feasible and justifiable than attempting to fit a single clear rule to all cases.").

171 *Cf.* Freer, *supra* note 83, at 320 (arguing that the *Grable* standard in federal question jurisdiction "asks how much" need there is for a federal forum, "an assessment ill-suited to a cut-and-dried rule").

172 *See* Shapiro, *supra* note 166, at 578–79 (articulating the possibility of a "principled discretion" that "draw[s] from the relevant statutory or constitutional grant of jurisdiction or from the tradition within which the grant arose" and employs criteria based on "equitable discretion, federalism and comity, separation of powers, and judicial administration" (internal quotation marks omitted)).

173 *See* Dodson, *supra* note 68, at 53 (arguing that "uncertainty can promote stability in doctrine . . . because the doctrine is crafted in small steps over a longer period of time"); Shapiro, *supra* note 166, at 589 (arguing that the authority granted by Congress leaves room "for judicial precedent to narrow the scope of discretion and even to generate predictable rules").