

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
4

5
6
7 August Term, 2010
8

9 (Argued: November 2, 2010 Decided: January 18, 2011)
10

11 Docket Nos. 09-4302-cv (L); 09-4306-cv (con);
12 09-4373-cv (con)
13

14
15 Parmalat Capital Finance Limited,
16

17 *Plaintiff-Appellant,*
18

19 Dr. Enrico Bondi, Extraordinary Commissioner of Parmalat
20 Finanziaria S.p.A., Parmalat S.p.A., and other affiliated
21 entities, in Extraordinary Administration under the laws of
22 Italy,
23

24 *Plaintiff-Counter-Defendant-Third-Party-Defendant-Appellant,*
25

26 Capital & Finance Asset Management S.A., Cattolica
27 Partecipazioni S.p.A., Hermes Focus Asset Management Europe
28 Limited, Erste Sparinvest Kapitalanlagegesellschaft m.b.H.,
29 Solotrat, Societe Moderne des Terrassements Parisiens,
30 Renato Esposito, Fondazione Italo Monzino, Southern Alaska
31 Carpenters Pension Fund, on behalf of itself and all others
32 similarly situated, Cristina Poncibo, Margery Louise
33 Kronengold, Robert McQueen, Custodian, individually and on
34 behalf of all others similarly situated, Ferri Giampolo,
35 Food Holdings Limited, Dairy Holdings Limited, G. James
36 Cleaver, Gordon I. MacRae, Gerald K. Smith, Laura J.
37 Sturaitis, Monumental Life Insurance Company, TransAmerica
38 Occidental Life Insurance Company, TransAmerica Life
39 Insurance Company, Aviva Life Insurance Company, Principal
40 Global Investors, LLC, Principal Life Insurance Company,
41 Scottish Re (US) Inc., Hartford Life Insurance Company, Plan
42 Administrator G. Peter Pappas,

1
2 *Plaintiffs,*

3
4 -v.-

5
6 Bank of America Corporation, Banc of America Securities
7 Limited, Bank of America, N.A., Bank of America National
8 Trust & Savings Association, Banc of America Securities LLC,
9 Bank of America International, Ltd., Grant Thornton
10 International, Ltd,

11
12 *Defendants-Appellees,*

13
14 Grant Thornton International, Grant Thornton LLP,

15
16 *Defendants-Third-Party-Plaintiffs-Counter-Claimants-*
17 *Appellees,*

18
19 Deutsche Bank AG, Morgan Stanley & Co., Incorporated, Bonlat
20 Financing Corporation, Calisto Tanzi, Fausto Tonna,
21 Coloniale S.p.A., Citigroup Inc., Buconero, LLC, Zinni &
22 Associates, P.C., Deloitte Touche Tohmatsu, Deloitte &
23 Touche S.p.A., a Societa per Azioni under the laws of Italy,
24 James E. Copeland Jr., Parmalat Finanziaria S.p.A., Stefano
25 Tanzi, Luciano Del Soldato, Domenico Barili, Francesco
26 Giuffredi, Giovanni Tanzi, Deloitte & Touche USA, LLP,
27 Deloitte & Touche L.L.P., Credit Suisse First Boston,
28 Citibank, Eureka Securitisation plc, Vialattea LLC, Pavia e
29 Ansaldo, Banca Nazionale Del Lavoro S.p.A., Citibank, N.A.,
30 Professor Maria Martellini, Banca Intesa S.p.A., Deloitte &
31 Touche Tohmatsu Auditores Independentes, Credit Suisse
32 International, Credit Suisse Securities (Europe) Limited,
33 Credit Suisse, Credit Suisse Group, Grant Thorton S.p.A., a
34 Societa per Azioni under the laws of Italy, now known as
35 Italaudit, S.p.A.,

36
37 *Defendants,*

38
39 Parmatour S.p.A.,

40
41 *Defendant-Third-Party-Defendant.*

1 Before:

2 CABRANES, WESLEY, *Circuit Judges*, and KOELTL,* *District Judge*.

3
4 Plaintiff-Appellant Parmalat Capital Finance Limited
5 and Plaintiff-Counter-Defendant-Third-Party-Defendant-
6 Appellant Dr. Enrico Bondi (collectively, "Appellants")
7 commenced these actions to recover damages that they contend
8 are owed to them pursuant to Illinois state law. In this
9 appeal, Appellants challenge orders of the United States
10 District Court for the Southern District of New York
11 (Kaplan, J.) and the Northern District of Illinois
12 (Castillo, J.) denying Appellants' motions for remand and
13 abstention, and granting summary judgment to
14 Defendants-Third-Party-Plaintiffs-Counter-Claimants-
15 Appellees Grant Thornton International and Grant Thornton
16 LLP. We hold that the district courts had proper removal
17 jurisdiction over these actions. As a matter of first
18 impression in our Circuit, we set forth the standard for
19 determining "timely adjudication" for the purposes of 28
20 U.S.C. § 1334(c)(2) abstention. We then VACATE and REMAND
21 to allow the district court to consider, in light of this
22 Opinion, whether abstention is mandatory in the
23 circumstances presented here.

24
25 AFFIRMED in part and VACATED and REMANDED in part.

26
27
28
29 _____
30 KATHLEEN M. SULLIVAN, Quinn Emanuel Urquhart &
31 Sullivan, LLP, New York, NY (Peter E.
32 Calamari, Terry L. Wit, Sanford I. Weisburst,
33 *on the brief*), for Plaintiff-Counter-
34 Defendant-Third-Party Defendant-Appellant
35 Bondi.

36 J. GREGORY TAYLOR, Diamond McCarthy LLP, New York, NY
37 (Allan B. Diamond, Richard I. Janvey, J.
38 Benjamin King, *on the brief*), for Plaintiff-

* The Honorable John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

1 *Appellant Parmalat Capital Finance Limited.*

2
3 LINDA T. COBERLY, Winston & Strawn LLP, Chicago, IL
4 (Bruce R. Braun, William P. Ferranti, *on the*
5 *brief*), *for Defendant-Third-Party-Plaintiff-*
6 *Counter-Claimant-Appellee Grant Thornton LLP.*

7
8 JOSEPH B. TOMPKINS JR., Sidley Austin LLP,
9 Washington, DC (Alan C. Geolot, Mark P.
10 Guerrero, Robert D. Keeling, A. Robert
11 Peitrzak, Daniel A. McLaughlin, *on the brief*),
12 *for Defendants-Appellees Bank of America et*
13 *al.*

14
15 JAMES L. BERNARD, Stook & Stook & Lavan LLP, New
16 York, NY (Quinlan D. Murphy, Katherine I.
17 Puzone, David M. Cheifetz, *on the brief*), *for*
18 *Defendant-Third-Party-Plaintiff-Counter-*
19 *Claimant-Appellees Grant Thornton*
20 *International, Inc. and Grant Thornton*
21 *International Ltd.*

22
23 PARTHA P. CHATTORAJ, Markowitz & Chatteraj LLP, New
24 York, NY *for Amicus Curiae Guido Alpa.*

25
26 GEORGE M. PAVIA, Pavia & Harcourt LLP, New York, NY
27 *for Amicus Curiae the Government of the*
28 *Republic of Italy.*

29
30
31
32 _____
WESLEY, *Circuit Judge:*

33 The questions presented are (1) whether the district
34 court erred in exercising jurisdiction over plaintiffs'
35 claims, pursuant to 28 U.S.C. § 1334(b); and (2) whether the
36 district court properly declined to abstain from exercising
37 that jurisdiction, pursuant to 28 U.S.C. § 1334(c)(2). This

1 appeal is taken from judgments of the United States District
2 Court for the Southern District of New York (Kaplan, *J.*) and
3 challenges rulings made by that court and by the United
4 States District Court for the Northern District of Illinois
5 (Castillo, *J.*). The contested rulings include two orders
6 dated February 25, 2005 and February 16, 2006 finding
7 federal jurisdiction in the present cases and declining to
8 abstain from exercising that jurisdiction. We conclude that
9 jurisdiction was proper, but remand to allow the district
10 court¹ to consider, in light of this Opinion, whether
11 abstention is mandatory.

12 I. BACKGROUND

13 These cases arise from the financial collapse of
14 Parmalat Finanziaria, S.p.A. and many of its subsidiaries.
15 Twenty-three Parmalat-related corporations are now in the
16 midst of bankruptcy and reorganization proceedings in Italy.
17 Italy's Minister of Finance appointed Dr. Enrico Bondi, here
18 the Plaintiff-Counter-Defendant-Third-Party-Defendant-

¹ Although multiple courts were initially involved in these cases, the multidistrict litigation proceedings are now before the United States District Court for the Southern District of New York (Kaplan, *J.*). We thus remand to that court. References herein to "the district court" refer to the United States District Court for the Southern District of New York unless otherwise noted.

1 Appellant, to serve as Extraordinary Commissioner of these
2 bankruptcy proceedings in a role analogous to a Chapter 11
3 Trustee. Parmalat Capital Finance Limited ("PCFL"), a
4 Parmalat subsidiary headquartered in the Grand Caymans, is
5 likewise insolvent and currently in liquidation proceedings.
6 These liquidation proceedings are ongoing in the Grand
7 Caymans and are overseen by Joint Official Liquidators
8 appointed by the Grand Court of the Cayman Islands.

9 In January and June 2004 respectively, PCFL and Bondi
10 commenced separate proceedings pursuant to former 11 U.S.C.
11 § 304 in the Bankruptcy Court for the Southern District of
12 New York. Section 304 permitted PCFL and Bondi, as
13 representatives of the foreign bankruptcy estates, to
14 commence bankruptcy cases in the United States in order to
15 enjoin litigation against PCFL and Parmalat in United States
16 courts.² Section 304 also empowered PCFL and Bondi to seek
17 orders from the bankruptcy court regarding turnover of
18 property in the United States belonging to the respective
19 bankruptcy estates.

20 Meanwhile, purchasers of Parmalat's debt and equity

² Although § 304 was repealed, it remains applicable to this case. See Pub. L. 109-8 (enacting Chapter 15 of the Bankruptcy Code and repealing 11 U.S.C. § 304 for all ancillary petitions filed after October 17, 2005).

1 securities filed class action lawsuits against Parmalat and
2 others for securities fraud. Those cases were consolidated
3 before Judge Kaplan in the United States District Court.

4 In August 2004, Bondi filed suit in Illinois state
5 court against Defendants-Third-Party-Plaintiffs-Counter-
6 Claimants-Appellees Grant Thornton International and Grant
7 Thornton LLP (collectively, "Grant Thornton"). Bondi
8 alleges claims against Grant Thornton arising under Illinois
9 state law for professional malpractice, fraud, aiding and
10 abetting fraud and constructive fraud, negligent
11 misrepresentation, aiding and abetting breach of fiduciary
12 duty, theft and diversion of corporate assets, conversion,
13 unjust enrichment, aiding and abetting fraudulent transfer,
14 deepening insolvency, and unlawful civil conspiracy. On
15 September 16, 2004, Grant Thornton removed the case to the
16 United States District Court for the Northern District of
17 Illinois on the basis of 28 U.S.C. §§ 1334(b) and 1452. In
18 its Notice of Removal, Grant Thornton argued, among other
19 things, that removal was proper because the Illinois state
20 law case was "related to" Bondi's § 304 proceedings in the
21 Southern District of New York. The next day, Bondi filed a
22 "Motion to Remand to State Court." Bondi argued therein
23 that there was no federal jurisdiction over the case and, in

1 any event, the court should abstain pursuant to 28 U.S.C. §
2 1334(c)(2).

3 On December 9, 2004, the Judicial Panel on
4 Multidistrict Litigation transferred Bondi's action against
5 Grant Thornton to Judge Kaplan in the Southern District of
6 New York. On February 25, 2005, Judge Kaplan denied Bondi's
7 Motion to Remand to State Court. The district court found
8 that it had jurisdiction pursuant to § 1334(b) and that
9 abstention was not mandatory.³ The district court reasoned
10 that Bondi failed to file a motion for abstention and, in
11 the alternative, Bondi failed to demonstrate that his claims
12 could be "timely adjudicated" in Illinois state court.⁴ 28
13 U.S.C. § 1334(c)(2).

14 In December 2005, PCFL likewise filed suit against
15 Grant Thornton in Illinois state court alleging similar

³ The district court likewise declined Bondi's motion to abstain pursuant to 28 U.S.C. § 1334(c)(1). It concluded that permissive abstention was not appropriate because of "the importance of coordinating this proceeding with the international bankruptcy and the Securities Fraud Action outweighs any interest in comity with Illinois courts or Illinois law." Bondi does not challenge this ruling on appeal.

⁴ Shortly after the district court issued its order, Bondi filed a motion under 28 U.S.C. §1292(b) to certify questions of law related to remand and abstention. The district court denied Bondi's motion, precluding him from pursuing an interlocutory appeal. Accordingly, Bondi's first opportunity to challenge Judge Kaplan's ruling on remand and abstention arose in the present appeal following the entry of judgment below.

1 claims to those asserted by Bondi. On January 5, 2006,
2 Grant Thornton removed the case to the United States
3 District Court for the Northern District of Illinois on the
4 basis of 28 U.S.C. §§ 1334(b) and 1452. In its Notice of
5 Removal, Grant Thornton argued, as in the Bondi case, that
6 removal was appropriate because the state law claims were
7 related to PCFL's § 304 proceeding. On January 20, 2006,
8 PCFL filed a motion titled "Parmalat Capital Finance
9 Limited's Motion to Abstain and Remand." Like Bondi, PCFL
10 argued that there was no federal jurisdiction over its case
11 and that abstention was mandatory pursuant to 28 U.S.C. §
12 1334(c)(2).⁵ By short order on February 16, 2006, the
13 Northern District of Illinois denied PCFL's motion, noting
14 that it "fully adopt[ed]" the reasoning of the Southern
15 District of New York's February 25, 2005 order denying
16 Bondi's remand motion. The case was then transferred to the
17 United States District Court for the Southern District of
18 New York for consolidation with Bondi's case.

19 Following discovery, the district court entertained a
20 series of motions to dismiss the complaints or to grant

⁵ In addition, PCFL moved for permissive abstention pursuant to 28 U.S.C. § 1334(c)(1). Like Bondi, PCFL does not challenge the denial of its motion for permissive abstention on appeal.

1 judgment in favor of defendants. Ultimately, the court
2 resolved the cases in final judgments for defendants,
3 dismissing the matters on grounds not relevant here. See *In*
4 *re Parmalat Sec. Litig.*, 659 F. Supp. 2d 504 (S.D.N.Y.
5 2009).

6 Appellants filed this timely appeal. This opinion
7 focuses on the February 25, 2005 and February 16, 2006
8 orders to determine whether the district courts correctly
9 determined that those courts had jurisdiction and were not
10 required to abstain pursuant to § 1334(c)(2). Although
11 Appellants also raise other challenges relating to the
12 summary judgment proceedings in the district court, we need
13 not reach those claims.

14 **II. DISCUSSION**

15 Bondi and PCFL challenge the lower federal courts'
16 exercise of jurisdiction on two grounds. First, Bondi and
17 PCFL contend that removal from Illinois state court was
18 improper because the Illinois actions are based solely on
19 state law claims and are not "related to" any bankruptcy
20 cases in federal court. See 28 U.S.C. § 1334(b). Second,
21 Bondi and PCFL contend that, even if removal was proper, the
22 district courts were required to abstain pursuant to 28

1 U.S.C. § 1334(c)(2), which provides that a district court
2 “shall abstain” from hearing an applicable claim “if an
3 action is commenced, and can be timely adjudicated, in a
4 State forum of appropriate jurisdiction.”

5 We conclude that the cases were properly removed. As
6 to the abstention question, the meaning of “timely
7 adjudicated” is a matter of first impression in this
8 Circuit. Our task here then is to set forth a standard for
9 determining “timely adjudication” for the purposes of 28
10 U.S.C. § 1334(c)(2). We hold that the district court
11 employed the wrong standard. We therefore vacate the
12 judgment on the abstention issue and remand to allow the
13 district court to consider, in light of this decision,
14 whether abstention is mandatory.

15 **A. Removal Jurisdiction**

16 28 U.S.C. § 1334(b) provides that “the district courts
17 shall have original but not exclusive jurisdiction of all
18 civil proceedings arising under title 11, or arising in *or*
19 *related to* cases under title 11.” 28 U.S.C. § 1334(b)
20 (emphasis added). Grant Thornton removed the present
21 actions from Illinois state court as actions “related to”
22 the 11 U.S.C. § 304 proceedings in the Southern District of

1 New York.⁶ PCFL and Bondi press a novel argument: they
2 contend that removal was improper because § 304 proceedings
3 are not “cases” within the meaning of the removal statute.
4 In the alternative, they argue that the state law claims are
5 not “related to” the § 304 proceedings. We disagree on both
6 counts.

7 *1. A Section 304 Proceeding is a “Case”*

8 One need not look far to find substantial support for
9 Grant Thornton’s contention that a § 304 proceeding is a
10 “case” within the context of the bankruptcy statute. The
11 Bankruptcy Code repeatedly refers to § 304 proceedings as
12 “cases” and Section 304 itself is titled “Cases ancillary to
13 foreign proceedings.” 11 U.S.C. § 304 (emphasis added).
14 The Bankruptcy Code also defines “petition” as a “petition
15 filed under section 301, 302, 303, or 304 of this title, as
16 the case may be, *commencing a case under this title.*” 11
17 U.S.C. § 101(42) (emphasis added). The statutory language
18 is clear: a § 304 proceeding is a case for the purposes of
19 subject matter jurisdiction under § 1334(b).

20 *2. State Law Claims may be “Related to” a Section 304*

⁶ Grant Thornton also removed on the ground of relation to the United States bankruptcy of a subsidiary of Parmalat. Because of our resolution of the appellees’ principal claim, it is unnecessary to reach this argument.

1 *Proceeding*

2 For the purposes of removal jurisdiction, a civil
3 proceeding is "related to" a title 11 case if the action's
4 "outcome might have any 'conceivable effect' on the bankrupt
5 estate." *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d
6 Cir. 1992). In the Illinois state law actions at issue
7 here, Bondi and PCFL are attempting to recover damages that
8 they contend are due the respective bankruptcy estates in
9 Italy and the Grand Caymans. If either Bondi or PCFL is
10 successful in their claims against Grant Thornton, the funds
11 they recover will benefit the respective bankruptcy estates.
12 See *In re Boston Reg'l Med. Ctr., Inc.*, 410 F.3d 100, 107
13 (1st Cir. 2005) ("[The liquidating entity's] success or lack
14 of success in securing a share of the trust corpus will
15 directly impact the amount of the liquidating dividend
16 eventually paid to [the debtor's] creditors. That is a
17 matter intimately connected with the efficacy of the
18 bankruptcy proceeding.") It is not difficult to conclude
19 that the "conceivable effect" test is satisfied. The
20 present actions are therefore "related to" the § 304
21 proceeding.

22 The fact that a § 304 proceeding, by definition,

1 involves a bankruptcy estate located abroad does not short
2 circuit the "related to" analysis. In the context of §
3 1334(b), there is no need to distinguish between estates
4 administered principally in foreign forums and those
5 administered principally in domestic forums. As the
6 district court explained below, "[t]here is no reason why a
7 state law action designed to recover some of those assets
8 [of the foreign debtor] . . . and thus increase the size of
9 the estate involved in the Section 304 case is not 'related
10 to' the Section 304 Proceeding within the meaning of Section
11 1334." *Bondi v. Grant Thornton Int'l*, 322 B.R. 44, 48
12 (S.D.N.Y. 2005). So long as the estate at issue in a § 304
13 proceeding, wherever located, may conceivably be affected by
14 the state law actions, those state law actions are "related
15 to" the § 304 case.⁷

16 The district court properly exercised removal

⁷ We disagree with another court's approach in a similar case involving state law claims related to the Parmalat bankruptcy. In *Bondi v. Citigroup, Inc.*, No. 04 CV 4373 (D.N.J. Nov. 18, 2004), the United States District Court for the District of New Jersey concluded that although the state law claims were related to the Parmalat estate, "related to" jurisdiction was nevertheless lacking because the Parmalat estate is located abroad. As explained above, we disagree with this conclusion. State law claims are "related to" § 304 proceedings so long as they satisfy our Court's "related to" test set forth in *Cuyahoga*, 980 F.2d at 114. Nothing more is required.

1 jurisdiction pursuant to 28 U.S.C. § 1334(b).

2 **B. Section 1334(c)(2) Abstention**

3 The jurisdiction-conferring statute covering bankruptcy
4 cases and proceedings provides:

5 Upon timely motion of a party in a
6 proceeding based upon a State law claim
7 or State law cause of action, related to
8 a case under title 11 but not arising
9 under title 11 or arising in a case under
10 title 11, with respect to which an action
11 could not have been commenced in a court
12 of the United States absent jurisdiction
13 under this section, the district court
14 *shall abstain* from hearing such
15 proceeding if an action is commenced, and
16 can be timely adjudicated, in a State
17 forum of appropriate jurisdiction.
18

19 28 U.S.C. § 1334(c)(2) (emphasis added). The district
20 courts determined that abstention pursuant to § 1334(c)(2)
21 was not mandatory here because PCFL and Bondi failed to move
22 for abstention and, in the alternative, PCFL and Bondi
23 failed to show that their actions could be “timely
24 adjudicated” in state court as required by statute. We
25 review these holdings in turn.

26 *1. Motion for Abstention*

27 Bondi filed a motion titled “Plaintiff’s Motion for
28 Remand to State Court” and explicitly argued that the court
29 should abstain pursuant to § 1334(c)(2). PCFL filed a

1 motion titled "Parmalat Capital Finance Limited's Motion to
2 Abstain and Remand." In that motion, PCFL likewise
3 explicitly argued that the court should abstain pursuant to
4 § 1334(c)(2). Based on these filings, the district courts
5 clearly erred in their determinations that PCFL and Bondi
6 failed to file motions for abstention.

7 2. *Timely Adjudication*

8 i. Standard of Review

9 As explained above, § 1334(c)(2) abstention is
10 mandatory when, among other things, the matter can be
11 "timely adjudicated" in state court. Whether an action can
12 be timely adjudicated in state court is a mixed question of
13 law and fact. The factual inquiry focuses on how quickly a
14 case can be adjudicated in state court; the legal inquiry
15 asks if this pace is sufficiently swift. Given this mixed
16 question of law and fact, we review the court's
17 determination *de novo*. See *McCarthy v. Dun & Bradstreet*
18 *Corp.*, 482 F.3d 184, 204 (2d Cir. 2007).

19 ii. What Constitutes 'Timely'

20 Four factors come into play in evaluating § 1334(c)(2)
21 timeliness: (1) the backlog of the state court's calendar
22 relative to the federal court's calendar; (2) the complexity

1 of the issues presented and the respective expertise of each
2 forum; (3) the status of the title 11 bankruptcy proceeding
3 to which the state law claims are related; and (4) whether
4 the state court proceeding would prolong the administration
5 or liquidation of the estate. See *In re Georgou*, 157 B.R.
6 847, 851 (N.D. Ill. 1993).

7 The first two factors require a court to consider
8 timely adjudication in light of the particular factual and
9 procedural circumstances presented in the two courts being
10 compared. Timeliness cannot reasonably be defined as a
11 fixed period of time. Instead, timeliness is a case- and
12 situation-specific inquiry that requires a comparison of the
13 time in which the respective state and federal forums can
14 reasonably be expected to adjudicate the matter. The
15 inquiry does not turn exclusively on whether an action could
16 be adjudicated most quickly in state court. It is, however,
17 informed by the comparative speeds of adjudication in the
18 federal and state forums. A court should therefore consider
19 the backlog of the state court's calendar (if any) relative
20 to the federal court's calendar. Where the legal issues in
21 a case are especially complex, the forum with the most
22 expertise in the relevant areas of law may well be expected

1 to adjudicate the matter in a more timely fashion relative
2 to the other forum.⁸ On the other hand, when the facts in a
3 case are especially complex, the forum with greater
4 familiarity with the record may likewise be expected to
5 adjudicate the matter more quickly. Ultimately, the
6 relative adjudication times are not solely determinative,
7 but do shed light on whether the state court can timely
8 adjudicate the matter.

9 As to the third factor – the status of the “related to”
10 title 11 bankruptcy proceeding – a court must consider
11 whether the litigants in a state proceeding need the state
12 law claims to be quickly resolved as a result of the status
13 of the ongoing title 11 bankruptcy proceeding. For
14 instance, a trustee in a chapter 11 reorganization may
15 require expeditious resolution of the state law claims in
16 order to determine what resources are available to fund the
17 chapter 11 reorganization. For this reason, courts have

⁸ The district court may find that this factor particularly favors abstention here because one of the key issues in this case – the defense of *in pari delicto* – is a matter of Illinois state law and there is some doubt as to the nature and reach of the defense. Notably, Illinois does not permit our Court to certify questions of Illinois state law to the Illinois Supreme Court. Ill. Sup. Ct. R. 20 (permitting certification only from the Supreme Court of the United States and the United States Court of Appeals for the Seventh Circuit).

1 found that what might be timely in the Chapter 7 context is
2 not necessarily timely in Chapter 11 cases where time is of
3 the essence. See *In re Leco Enters.*, 144 B.R. 244, 251
4 (S.D.N.Y. 1992). In the Chapter 7 context, some courts have
5 even suggested that “in deciding whether a matter may be
6 timely adjudicated, perhaps the single most important factor
7 is the nature of the underlying chapter proceeding.” *Id.*
8 (citation omitted).⁹

9 Finally, the fourth factor asks whether the state court
10 proceeding would prolong the administration or liquidation
11 of the estate. A matter cannot be timely adjudicated in
12 state court if abstention and remand of the state law claims
13 will unduly prolong the administration of the estate. Thus,
14 in a case like the WorldCom bankruptcy, “the close
15 connections between the defendants in [the] action and the
16 debtor, and the complexity of [the] litigation” may suggest
17 that “remanding to the state court could slow the pace of
18 litigation dramatically” by leading to duplicative motions

⁹ Because a court overseeing a § 304 case is not tasked with overseeing reorganization or liquidation of the estate, we see no reason why, as a result of the § 304 proceeding, the litigants in a state law proceeding would require swift resolution of the state law claims. A court may, however, find that a particular § 304 proceeding does create a need for urgency among the litigants in the state law proceeding.

1 practice, repetitious discovery, and parallel adjudication
2 of common issues. *In re Worldcom, Inc. Sec. Litig.*, 293
3 B.R. 308, 331 (S.D.N.Y. 2003).

4 In the present case, the district courts emphasized
5 that remand would not promote timely adjudication because
6 this case is a "complex bankruptcy-cum-securities fraud
7 multidistrict litigation[]" such that "the importance of
8 coordinating this proceeding with the international
9 bankruptcy and the Securities Fraud Action outweighs any
10 interest in comity with Illinois courts or Illinois law."
11 We disagree with this approach. The impact of the state
12 court proceedings on the securities class action itself,
13 absent evidence of prolonging the administration or
14 liquidation of the foreign estates, is immaterial to the
15 question of timely adjudication.¹⁰ Unlike *Worldcom*, the
16 district court here is not charged with administration of a
17 bankruptcy estate. As a result, the possibility that remand
18 of the state court claims will slow down the § 304

¹⁰ It bears noting that Bondi and the Joint Official Liquidators, appointed by the Grand Court of the Cayman Islands and charged with overseeing PCFL, selected Illinois state court as the forum in which to prosecute their claims against Grant Thornton. Presumably, Bondi and the Joint Official Liquidators were well versed in the timeliness concerns of their respective foreign bankruptcy proceedings when they selected the state forum.

1 proceeding is insufficient to show that state court
2 adjudication would be untimely. The inquiry's proper focus
3 is on the timely administration of the estate, not the § 304
4 proceeding.

5 Contrary to the district courts' approach, we further
6 conclude that Grant Thornton, as the party opposing remand,
7 bears the burden to show that these matters cannot be timely
8 adjudicated in state court. *Contra In re Worldcom*, 293 B.R.
9 at 331 (placing the burden on the party moving for
10 abstention). "Although several bankruptcy courts have
11 required the movant affirmatively to show that the matter
12 can be timely adjudicated in the state court, this would
13 seem to reverse the usual burden implicit in the general
14 rule that the party seeking to litigate in the federal forum
15 must first establish that right." *Acolyte Elec. Corp. v.*
16 *City of New York*, 69 B.R. 155, 180 (Bankr. E.D.N.Y. 1986)
17 (citations omitted). Placing the burden on the party
18 opposing remand is consistent with the mandatory nature of
19 abstention under § 1334(c)(2) as well as principles of
20 comity, which presume that a state court will operate
21 efficiently and effectively. This presumption is borne out
22 of "a proper respect for state functions, a recognition of

1 the fact that the entire country is made up of a Union of
2 separate state governments, and a continuance of the belief
3 that the National Government will fare best if the States
4 and their institutions are left free to perform their
5 separate functions in their separate ways." *Younger v.*
6 *Harris*, 401 U.S. 37, 44 (1971).

7 *c. Remand to Assess Timely Adjudication*

8 Nearly six years has passed since Appellants sought
9 federal abstention in this matter. The record tells us
10 nothing of the current status of the domestic and foreign
11 bankruptcy proceedings. Similarly, the record is silent as
12 to whether remanding these cases to Illinois state court
13 would prolong the administration of the foreign estates.
14 Accordingly, we cannot resolve the issue of "timely
15 adjudication" based on the record before us.

16 On remand, the district court should determine whether
17 these cases can be timely adjudicated in Illinois state
18 court at the present time. Although Bondi preserved for
19 appeal the question of whether this case could have been
20 timely adjudicated in Illinois state court at the time the
21 district court declined to abstain in February 2005 (and
22 indeed sought to appeal the issue at that time), much may

1 have changed in the intervening years. It would be futile
2 for the district court on remand to consider only the facts
3 known to it at the time of its initial order. Accordingly,
4 the district court should allow the parties to supplement
5 the record with current information to allow it to assess
6 timely adjudication in the present tense. *See generally*
7 *Stoe v. Flaherty*, 2006 WL 2927272 (W.D. Pa. Oct. 11, 2006)
8 (considering "timely adjudication" following a remand order
9 from the Third Circuit and noting that prior resolution of
10 the case on the merits in federal court was not dispositive
11 in the timely adjudication analysis).

12 A mandate shall issue remanding these cases to the
13 district court to hold such proceedings as are necessary to
14 assess whether § 1334(c)(2) abstention is mandatory. If the
15 district court elects to abstain pursuant to § 1334(c)(2)
16 and remands these cases to the appropriate Illinois state
17 court, we will have no jurisdiction over an appeal. *See* 28
18 U.S.C. § 1334(d); *In re Cathedral of the Incarnation*, 90
19 F.3d 28, 32-34 (2d Cir. 1996) (holding that a decision to
20 remand based on mandatory abstention is not reviewable on
21 appeal). If, however, the district court determines that
22 abstention is not mandatory, any party to this appeal may

1 restore jurisdiction to this court within 30 days by letter
2 to the Clerk's Office seeking review, without need for a new
3 notice of appeal. See *United States v. Jacobson*, 15 F.3d
4 19, 22 (2d Cir. 1994). The Clerk's Office will then set a
5 briefing schedule and refer the appeal to this panel for
6 disposition.

7 **III. CONCLUSION**

8 The Southern District of New York's February 25, 2005
9 order denying Bondi's motion for remand and the Northern
10 District of Illinois's February 16, 2006 order denying
11 PCFL's motion to abstain and remand are hereby AFFIRMED in
12 part and VACATED and REMANDED in part. We affirm the
13 district courts's determinations that these cases were
14 properly removed under 28 U.S.C. § 1334(b). We VACATE the
15 district courts's abstention holdings and REMAND to the
16 Southern District of New York for proceedings consistent
17 with this Opinion.