

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
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6
7 August Term, 2010
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9 Argued: November 2, 2010 Decided: January 18, 2011
10 Amended: April 8, 2011
11

12 Docket Nos. 09-4302-cv (L); 09-4306-cv (con);
13 09-4373-cv (con)
14

15
16 Parmalat Capital Finance Limited,
17

18 *Plaintiff-Appellant,*
19

20 Dr. Enrico Bondi, Extraordinary Commissioner of Parmalat
21 Finanziaria S.p.A., Parmalat S.p.A., and other affiliated
22 entities, in Extraordinary Administration under the laws of
23 Italy,
24

25 *Plaintiff-Counter-Defendant-Third-Party-Defendant-Appellant,*
26

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

1 Administrator G. Peter Pappas,
2

3 *Plaintiffs,*
4

5 -v.-
6

7 Bank of America Corporation, Banc of America Securities
8 Limited, Bank of America, N.A., Bank of America National
9 Trust & Savings Association, Banc of America Securities LLC,
10 Bank of America International, Ltd., Grant Thornton
11 International, Ltd,
12

13 *Defendants-Appellees,*
14

15 Grant Thornton International, Grant Thornton LLP,
16

17 *Defendants-Third-Party-Plaintiffs-Counter-Claimants-*
18 *Appellees,*
19

20 Deutsche Bank AG, Morgan Stanley & Co., Incorporated, Bonlat
21 Financing Corporation, Calisto Tanzi, Fausto Tonna,
22 Coloniale S.p.A., Citigroup Inc., Buconero, LLC, Zinni &
23 Associates, P.C., Deloitte Touche Tohmatsu, Deloitte &
24 Touche S.p.A., a Societa per Azioni under the laws of Italy,
25 James E. Copeland Jr., Parmalat Finanziaria S.p.A., Stefano
26 Tanzi, Luciano Del Soldato, Domenico Barili, Francesco
27 Giuffredi, Giovanni Tanzi, Deloitte & Touche USA, LLP,
28 Deloitte & Touche L.L.P., Credit Suisse First Boston,
29 Citibank, Eureka Securitisation plc, Vialattea LLC, Pavia e
30 Ansaldo, Banca Nazionale Del Lavoro S.p.A., Citibank, N.A.,
31 Professor Maria Martellini, Banca Intesa S.p.A., Deloitte &
32 Touche Tohmatsu Auditores Independentes, Credit Suisse
33 International, Credit Suisse Securities (Europe) Limited,
34 Credit Suisse, Credit Suisse Group, Grant Thornton S.p.A., a
35 Societa per Azioni under the laws of Italy, now known as
36 Italaudit, S.p.A.,
37

38 *Defendants,*
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40 Parmatour S.p.A.,
41

42 *Defendant-Third-Party-Defendant.*
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3 Before:

4 CABRANES, WESLEY, *Circuit Judges*, and KOELTL,* *District Judge*.
5

6 Plaintiff-Appellant Parmalat Capital Finance Limited
7 and Plaintiff-Counter-Defendant-Third-Party-Defendant-
8 Appellant Dr. Enrico Bondi (collectively, "Appellants")
9 commenced these actions to recover damages that they contend
10 are owed to them pursuant to Illinois state law. In this
11 appeal, Appellants challenge orders of the United States
12 District Court for the Southern District of New York
13 (Kaplan, J.) and the Northern District of Illinois
14 (Castillo, J.) denying Appellants' motions for remand and
15 abstention, and granting summary judgment to
16 Defendants-Third-Party-Plaintiffs-Counter-Claimants-
17 Appellees Grant Thornton International and Grant Thornton
18 LLP. We hold that the district courts had proper removal
19 jurisdiction over these actions. As a matter of first
20 impression in our Circuit, we set forth the standard for
21 determining "timely adjudication" for the purposes of 28
22 U.S.C. § 1334(c)(2) abstention. We then VACATE and REMAND
23 to allow the district court to consider, in light of this
24 Opinion, whether abstention is mandatory in the
25 circumstances presented here.
26

27 AFFIRMED in part and VACATED and REMANDED in part.
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29

30
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36 Bondi.
37

38 J. GREGORY TAYLOR, Diamond McCarthy LLP, New York, NY
39 (Allan B. Diamond, Richard I. Janvey, J.

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

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2 Appellant Parmalat Capital Finance Limited.
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20 Claimant-Appellees Grant Thornton
21 International, Inc. and Grant Thornton
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26

27 GEORGE M. PAVIA, Pavia & Harcourt LLP, New York, NY
28 for Amicus Curiae the Government of the
29 Republic of Italy.
30

31
32
33 _____
WESLEY, Circuit Judge:

34 The questions presented are (1) whether the district
35 court erred in exercising jurisdiction over plaintiffs'
36 claims, pursuant to 28 U.S.C. § 1334(b); and (2) whether the
37 district court properly declined to abstain from exercising
38 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
23 U.S.C. § 1334(c)(2), which provides that a district court

1 "shall abstain" from hearing an applicable claim "if an
2 action is commenced, and can be timely adjudicated, in a
3 State forum of appropriate jurisdiction."

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

14 **A. Removal Jurisdiction**

15 28 U.S.C. § 1334(b) provides that "the district courts
16 shall have original but not exclusive jurisdiction of all
17 civil proceedings arising under title 11, or arising in or
18 *related to* cases under title 11." 28 U.S.C. § 1334(b)
19 (emphasis added). Grant Thornton removed the present
20 actions from Illinois state court as actions "related to"
21 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,
23 involves a bankruptcy estate located abroad does not short

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

15 The district court properly exercised removal
16 jurisdiction pursuant to 28 U.S.C. § 1334(b).

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

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

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

17 28 U.S.C. § 1334(c)(2) (emphasis added). The district
18 courts determined that abstention pursuant to § 1334(c)(2)
19 was not mandatory here because PCFL and Bondi failed to move
20 for abstention and, in the alternative, PCFL and Bondi
21 failed to show that their actions could be "timely
22 adjudicated" in state court as required by statute. We
23 review these holdings in turn.

24 1. *Motion for Abstention*

25 Bondi filed a motion titled "Plaintiff's Motion for
26 Remand to State Court" and explicitly argued that the court
27 should abstain pursuant to § 1334(c)(2). PCFL filed a
28 motion titled "Parmalat Capital Finance Limited's Motion to
29 Abstain and Remand." In that motion, PCFL likewise
30 explicitly argued that the court should abstain pursuant to

1 § 1334(c)(2). Based on these filings, the district courts
2 clearly erred in their determinations that PCFL and Bondi
3 failed to file motions for abstention.

4 2. *Timely Adjudication*

5 i. Standard of Review

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

16 ii. What Constitutes ‘Timely’

17 Four factors come into play in evaluating § 1334(c)(2)
18 timeliness: (1) the backlog of the state court’s calendar
19 relative to the federal court’s calendar; (2) the complexity
20 of the issues presented and the respective expertise of each
21 forum; (3) the status of the title 11 bankruptcy proceeding
22 to which the state law claims are related; and (4) whether
23 the state court proceeding would prolong the administration

1 or liquidation of the estate. See *In re Georgou*, 157 B.R.
2 847, 851 (N.D. Ill. 1993).

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

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

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

7 As to the third factor – the status of the “related to”
8 title 11 bankruptcy proceeding – a court must consider
9 whether the litigants in a state proceeding need the state
10 law claims to be quickly resolved as a result of the status
11 of the ongoing title 11 bankruptcy proceeding. For
12 instance, a trustee in a chapter 11 reorganization may
13 require expeditious resolution of the state law claims in
14 order to determine what resources are available to fund the
15 chapter 11 reorganization. For this reason, courts have
16 found that what might be timely in the Chapter 7 context is
17 not necessarily timely in Chapter 11 cases where time is of
18 the essence. See *In re Leco Enters.*, 144 B.R. 244, 251
19 (S.D.N.Y. 1992). In the Chapter 7 context, some courts have

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 even suggested that "in deciding whether a matter may be
2 timely adjudicated, perhaps the single most important factor
3 is the nature of the underlying chapter proceeding." *Id.*
4 (citation omitted).⁹

5 Finally, the fourth factor asks whether the state court
6 proceeding would prolong the administration or liquidation
7 of the estate. A matter cannot be timely adjudicated in
8 state court if abstention and remand of the state law claims
9 will unduly prolong the administration of the estate. Thus,
10 in a case like the WorldCom bankruptcy, "the close
11 connections between the defendants in [the] action and the
12 debtor, and the complexity of [the] litigation" may suggest
13 that "remanding to the state court could slow the pace of
14 litigation dramatically" by leading to duplicative motions
15 practice, repetitious discovery, and parallel adjudication
16 of common issues. *In re Worldcom, Inc. Sec. Litig.*, 293
17 B.R. 308, 331 (S.D.N.Y. 2003).

18 In the present case, the district courts emphasized

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

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 c. *Remand to Assess Timely Adjudication*

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

10 On remand, the district court should determine whether
11 these cases can be timely adjudicated in Illinois state
12 court at the present time. Although Bondi preserved for
13 appeal the question of whether this case could have been
14 timely adjudicated in Illinois state court at the time the
15 district court declined to abstain in February 2005 (and
16 indeed sought to appeal the issue at that time), much may
17 have changed in the intervening years. It would be futile
18 for the district court on remand to consider only the facts
19 known to it at the time of its initial order. Accordingly,
20 the district court should allow the parties to supplement
21 the record with current information to allow it to assess
22 timely adjudication in the present tense. *See generally*
23 *Stoe v. Flaherty*, 2006 WL 2927272 (W.D. Pa. Oct. 11, 2006)

1 (considering "timely adjudication" following a remand order
2 from the Third Circuit and noting that prior resolution of
3 the case on the merits in federal court was not dispositive
4 in the timely adjudication analysis).

5 On remand, the district court should also consider
6 which party should bear the burden to show that these
7 matters cannot be timely adjudicated in state court.
8 Although many courts have required the movant to
9 affirmatively show that a matter can be timely adjudicated
10 in state court, few cases have analyzed the question in
11 detail. *See, e.g., Stoe v. Flaherty*, 436 F.3d 209, 219 n.5
12 (3d Cir. 2006); *but see XL Sports, Ltd. v. Lawler*, 49 Fed.
13 App'x 13, 20 (6th Cir. 2002) ("Nothing in the record
14 indicates that the Tennessee courts would not adjudicate the
15 claim in a timely fashion"). Typically, a party
16 seeking relief bears the burden to show he is entitled to
17 that relief. *See, e.g., In re the City of New York*, 607
18 F.3d 923, 944 (2d Cir. 2010). Placing the burden on the
19 party opposing remand may nevertheless be inconsistent with
20 the mandatory nature of abstention under § 1334(c)(2) as
21 well as the principles of comity, which presume that a state
22 court will operate efficiently and effectively. *See Younger*
23 *v. Harris*, 401 U.S. 37, 44 (1971). Accordingly, when

1 examining this issue, the district court should consider
2 these significant competing concerns.

3 A mandate shall issue forthwith remanding these cases
4 to the district court to hold such proceedings as are
5 necessary to assess whether § 1334(c)(2) abstention is
6 mandatory. If the district court elects to abstain pursuant
7 to § 1334(c)(2) and remands these cases to the appropriate
8 Illinois state court, we will have no jurisdiction over an
9 appeal. See 28 U.S.C. § 1334(d); *In re Cathedral of the*
10 *Incarnation*, 90 F.3d 28, 32-34 (2d Cir. 1996) (holding that
11 a decision to remand based on mandatory abstention is not
12 reviewable on appeal). If, however, the district court
13 determines that abstention is not mandatory, any party to
14 this appeal may restore jurisdiction to this court within 30
15 days by letter to the Clerk's Office seeking review, without
16 need for a new notice of appeal. See *United States v.*
17 *Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994). The Clerk's Office
18 will then set a briefing schedule and refer the appeal to
19 this panel for disposition.

20 **III. CONCLUSION**

21 The Southern District of New York's February 25, 2005
22 order denying Bondi's motion for remand and the Northern
23 District of Illinois's February 16, 2006 order denying

1 PCFL's motion to abstain and remand are hereby AFFIRMED in
2 part and VACATED and REMANDED in part. We affirm the
3 district courts's determinations that these cases were
4 properly removed under 28 U.S.C. § 1334(b). We VACATE the
5 district courts's abstention holdings and REMAND to the
6 Southern District of New York for proceedings consistent
7 with this Opinion. The mandate shall issue forthwith.