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Permissive Abstention in Bankruptcy

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I. Introduction

As courts of limited jurisdiction, federal courts generally are obligated to exercise the full authority of their jurisdiction to the extent sanctioned by the Constitution and Congress.[1] In light of this duty, the doctrine of permissive abstention, as codified in 28 U.S.C.A. § 1334(c)(1),[2] constitutes an anomaly within the paradigm of federal jurisdiction.[3] Permissive abstention allows a bankruptcy court, to abstain from adjudicating a particular matter in order to allow it to be heard in an alternative forum based on "the interest of justice, or in the interest of comity with State courts or respect for State law."[4] Permissive abstention is grounded in the "traditional notions of abstention which allow courts to decline to assert otherwise valid subject matter jurisdiction in instances in which they find matters are better resolved in state court or where the interests of justice so demand."[5]

Permissive abstention is unique in that allows for the fractionalization of jurisdiction between bankruptcy courts and state courts with respect to matters over which either court could properly exercise jurisdiction.[6] Courts employ the doctrine of permissive abstention under section 1334(c)(1) with greater frequency in the bankruptcy context than with nonbankruptcy grants of federal jurisdiction, most notably with respect to mass tort litigation.[7] The prevalence of permissive abstention in bankruptcy cases is attributable to the additional considerations concerning the Chapter 11 process, such as the efficiency of the administration of the estate, which are not relevant in other areas of federal jurisdiction. Despite the fact that permissive abstention is implicated in many Chapter 11 cases, bankruptcy courts have neglected to develop a uniform standard for applying section 1334(c)(1). Most courts have adopted a multifactor test, referred to herein as the *Tucson Estates* test,[8] without examining whether this test comports with the underpinnings of the permissive abstention doctrine codified in section 1334(c)(1).

This article addresses the contours of permissive abstention under section 1334(c)(1) as it has developed in the bankruptcy context. In addition, examining the functional application of the *Tucson Estates* test suggests that bankruptcy courts may be better served by forgoing this analysis in favor of a streamlined approach which focuses on the underlying principles of abstention while taking into account particularized considerations unique to bankruptcy.

II. Jurisdiction of the Bankruptcy Court

Subject matter jurisdiction of the bankruptcy court is rooted in section 1334 of the Judicial Code, which grants four types of jurisdiction to federal district courts.[9] Under 28 U.S.C.A. § 1334, the district court has original and exclusive jurisdiction over all "cases under title 11," and original but not exclusive subject matter jurisdiction over all civil proceedings "arising under" Title 11, or "arising in" or "related to" cases under Title 11.[10] 28 U.S.C.A. § 1334(e) also grants exclusive jurisdiction to the district courts of all property of the estate and

certain claims involving section 327 of the Bankruptcy Code. Section 157(a) of the Judicial Code permits district courts to refer to bankruptcy courts all cases and proceedings of which jurisdiction is granted by section 1334.[11] Subsections (b) and (c) to section 157 prescribe the means through which bankruptcy courts can discharge their delegated jurisdiction by identifying (1) those "core" proceedings in which the bankruptcy court may issue a final order adjudicating a matter and (2) those "non-core" proceedings in which the bankruptcy court, absent consent of the parties, is empowered only with the authority to submit findings of fact and conclusions of law to the district court for entry of a final judgment.[12] This broad jurisdictional framework facilitates the capability of bankruptcy courts to "deal efficiently and expeditiously with all matters connected with the bankruptcy estate."[13]

Based on this jurisdictional structure, bankruptcy court jurisdiction encompasses four types of matters: (1) cases under Title 11, (2) proceedings arising under Title 11, (3) proceedings arising in a case under Title 11, and (4) proceedings related to a case under Title 11 and certain other matters under section 327 of the Bankruptcy Code.[14] A case "under title 11" refers to the main bankruptcy case commenced by the filing of a voluntary or involuntary petition.[15] A proceeding "arises under title 11" when the Bankruptcy Code creates the cause of action or when the right to relief is dependent on resolution of a significant question of bankruptcy law.[16] A proceeding "arises in" a Title 11 case when it relates to the administration of the bankruptcy case and would nevertheless not exist outside the context of a bankruptcy case.[17] A "related to" proceeding is a matter which could conceivably have some impact on the handling and administration of the estate.[18]

III. Permissive Abstention

A. Section 1334(c)(1)

Permissive abstention is codified in section 1334(c)(1), which provides:

> Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under Title 11 or arising in or related to a case under Title 11.[19]

The language of the statute is phrased broadly to include proceedings which fall under "arising under," "arising in" and "related to" jurisdiction. As such, section 1334(c)(1) may be employed with respect to both core and non-core proceedings.[20] The statutory language clearly dictates that section 1334(c)(1) is inapplicable with respect to abstention from a "case under title 11," as distinguished from proceedings therein. Instead, the authority of a bankruptcy court to abstain from an entire case is governed by section 305 of the Bankruptcy Code, which allows for dismissal or suspension of all proceedings when in the best interests of the debtor and its creditors.[21]

B. History of Permissive Abstention

Since the enactment of the Bankruptcy Act of 1898, which granted bankruptcy judges (then-called bankruptcy referees) limited in rem jurisdiction over bankruptcy litigation, courts have exercised their discretion to abstain.[22] The application of permissive abstention pursuant to the 1898 Bankruptcy Act was influenced primarily by the Supreme Court's decision in *Thompson v. Magnolia Petroleum Co.*[23] In *Thompson*, which is the one a limited number of Supreme Court decisions which explicitly address permissive abstention in the context of bankruptcy jurisdiction,[24] the Supreme Court was confronted with the issue of whether the bankruptcy court could appropriately abstain from hearing a property dispute involving an oil field in Illinois.[25] The underlying dispute in *Thompson* concerned an unsettled real property question of whether the grant of a right of way to a railroad included an accompanying property right to the subsurface minerals.[26] The Supreme Court's

opinion reaffirmed that bankruptcy courts maintain "exclusive and nondelegable control over the administration of an estate in its possession."[27] *Thompson*'s holding in this regard is codified in 28 U.S.C.A. § 1334(e). The Court went on to find, however, that the lower court abused its discretion in failing to abstain and explained that:

> the proper exercise of [the bankruptcy court's] control may, where the interests of the estate and the parties will best be served, lead the bankruptcy court to consent to submission to state courts of particular controversies involving unsettled questions of state property law and arising in the course of bankruptcy.[28]

Thompson encapsulated the principle that abstention is appropriate with respect to unsettled questions of state law where resolution of the state law issue would obviate the necessity of federal jurisdiction, i.e., if the bankruptcy trustee in *Thompson* had no property interest in the oil then it would fall outside the jurisdiction of the bankruptcy court.[29] Following *Thompson*, courts applied the judicially-created permissive abstention doctrine to bankruptcy cases where the state law issue being presented was not sufficiently settled.[30]

As part of the enactment of the Bankruptcy Code in 1978, Congress passed 28 U.S.C.A. § 1471(d), which codified the doctrine of permissive abstention. Section 1471(d) provided:

> Subsection (b) or (c) of this section [conferring bankruptcy jurisdiction] does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.[31]

The legislative history to section 1471(d) provides that the section was intended to "insure that the jurisdiction of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases"; and "to codif[y] … case law relating to the power of abstention," citing specifically to *Thompson*.[32]

Four years after the enactment of section 1471(d), the Supreme Court issued its decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[33] which found the jurisdictional structure created by the 1978 Bankruptcy Code to be unconstitutional and forced a reconfiguring of the permissive abstention statute. As a result of *Marathon*, in 1984 Congress repealed section 1471(d) and enacted 28 U.S.C.A. § 1334(c). Although there is a dearth of legislative history documenting the passage of section 1334(c)(1), courts have generally relied on the legislative history to section 1471(d) in interpreting section 1334(c)(1) on the ground that the two provisions are substantially similar.[34]

Section 1334 was amended as part of the Bankruptcy Reform Act of 1994. These amendments addressed the scope of an appeal of a bankruptcy court's decision to permissively abstain, and are discussed in further detail in section G. herein.[35] In addition, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 further amended section 1334(c)(1) to prevent a court from abstaining from a matter arising under a cross-border insolvency proceeding which meets the requirements under Chapter 15.[36]

C. The *Tucson Estates* Test

Section 1334(c)(1) sets forth three basic circumstances which justify permissive abstention: (1) the interests of justice; (2) comity with state courts; and (3) respect for state law.[37] These statutory guidelines are malleable in nature and provide little in terms of guidance for bankruptcy courts to determine whether permissive abstention is appropriate and should be ordered.[38] The structure of section 1334(c)(1) calls for bankruptcy courts to engage in a case-by-case determination as to whether permissive abstention is warranted based on the circum-

stances. As such, section 1334(c)(1) incorporates an inescapable element of discretion to be exercised by the bankruptcy judge in determining whether to abstain from a particular matter.[39] The burden of establishing that permissive abstention is warranted in a particular proceeding rests with the proponent.[40]

The inherent flexibility of section 1334(c)(1) precludes any definitive criteria from being gleaned from the statutory language itself. As such, bankruptcy courts have resorted to applying a judge-made 12-factor test, articulated in the seminal Ninth Circuit decision *In re Tucson Estates, Inc.*,[41] in determining whether to permissively abstain under section 1334(c)(1). These factors are:

1. the effect or lack thereof on the efficient administration of the estate;
2. the extent to which state law issues predominate over bankruptcy issues;
3. the difficulty or unsettled nature of the applicable state law;
4. the presence of a related proceeding commenced in state court or other non-bankruptcy court;
5. the jurisdictional basis, if any, other than 28 U.S.C.A. § 1334;
6. the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
7. the substance rather than the form of an asserted "core" proceeding;
8. the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;
9. the burden of the court's docket;
10. the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;
11. the existence of a right to a jury trial; and
12. the presence in the proceeding of non-debtor parties.[42]

Although the *Tucson Estates* test is not controlling authority in many jurisdictions, it is the predominant approach utilized by bankruptcy courts in applying section 1334(c)(1).[43] Certain bankruptcy courts apply an adjusted-factor test. However, the variations often are minor in nature, and application of either test would lead to the same result.[44] There is no "specific formula" which exists with respect to how these factors are to be applied and this can lead to bankruptcy courts assigning varying degrees of importance to particular factors depending upon the individualized circumstances of each case.[45] These courts seem to disregard that a so-called factor test fails to provide meaningful guidance to the bankruptcy courts in applying section 1334(c)(1).[46]

D. Nonbankruptcy Abstention[47]

Courts generally are split as to whether section 1334(c)(1) is intended to incorporate pre-existing nonbankruptcy abstention doctrines or override these judge-made doctrines by statute.[48] As such, an understanding of pre-1978 nonbankruptcy abstention doctrines can inform the proper analysis under section 1334(c)(1). Non-bankruptcy abstention can be categorized into three groups: (1) abstention under the *Pullman* doctrine,[49] which deals with abstaining to avoid reaching a federal constitutional question when the question may be decided through unsettled issues of state law; (2) abstention under the *Burford* doctrine,[50] which, as noted earlier, deals with abstaining to avoid unnecessary conflict with the administration by a state of its local affairs; and (3) abstention under the *Colorado River* doctrine,[51] which deals with abstaining to avoid duplicative litigation in federal and state courts. Abstention in nonbankruptcy cases is most often governed by the *Colorado River* doctrine, which differs from the standards employed by courts in ascertaining whether abstention is appropriate under section 1334(c)(1).

Colorado River stands for the nonstatutory principles that "abstention is the narrow exception to the congressional grant of subject matter jurisdiction bestowed upon the federal courts," and deviation from the exercise of such jurisdiction is warranted only under "exceptional circumstances" involving issues of state law.[52] The

"exceptional circumstances" standard arising from the *Colorado River* decision is more rigid in its application than in determining whether abstention is necessary.[53] Courts adopting a more narrow construction of section 1334(c)(1) maintain that section 1334(c)(1) was intended to codify the judicially-created abstention doctrines,[54] such as the *Colorado River* doctrine. However, most courts have eschewed this stringent interpretation in favor of the flexible *Tucson Estates* test.[55] Instead, these courts rule that the bankruptcy courts are not strictly bound by decisions involving nonbankruptcy abstention.[56]

The most significant difference between the nonbankruptcy abstention doctrines and section 1334(c)(1), is that the statute provides bankruptcy courts with significantly broader discretion in determining whether to abstain from a particular proceeding.[57] The 12-factor balancing approach provides for a more fluid test in determining whether abstention is appropriate in comparison with the more rigid standards applied under nonbankruptcy abstention doctrines. Importantly, the only factor which is relevant under the tests governing section 1334(c)(1) and the *Colorado River* doctrine is the "difficulty or unsettled nature of the applicable state law."[58] Further, the balancing approach established by the multi-factor test first adopted in *Tucson Estates* provides that the unsettled nature of a state law issue is only a single consideration among many, thereby making abstention under section 1334(c)(1) possible even where a state law issue is straightforward.[59] This represents a stark contrast from the approaches taken under nonbankruptcy abstention doctrines, where the unsettled nature of the underlying state law is a principal consideration.

E. Mandatory Abstention

The counterpart to permissive abstention, the doctrine of mandatory abstention, is codified in 28 U.S.C.A. § 1334(c)(2), which provides:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.[60]

Under this provision, mandatory abstention is warranted where the following five requirements are met: (1) the motion to abstain is timely; (2) the proceeding is based upon a state law claim or cause of action; (3) the plaintiff has commenced the action in a State forum or other appropriate jurisdiction; (4) the state court is capable of timely adjudicating the action; (5) there is no independent basis for federal jurisdiction which would have permitted the proceeding to have been commenced in federal court absent the bankruptcy; and (6) the proceeding is non-core.[61]

Several critical distinctions exist between mandatory abstention and permissive abstention in the bankruptcy context. Unlike the *Tucson Estates* test for permissive abstention, which calls for an exercise of discretion by the bankruptcy court in balancing of, or according priority to, the relative criteria, mandatory abstention under section 1334(c)(2) prescribes a mechanical checklist of factors.[62] Elimination of any discretionary element under section 1334(c)(2) makes its application by bankruptcy courts more predictable.

Furthermore, section 1334(c)(2) contains an explicit requirement that a motion be filed seeking the bankruptcy court to abstain, which requirement is conspicuously absent from section 1334(c)(1). Reading the statutory provisions together, the implication is that a bankruptcy court has the authority to permissively abstain sua sponte whereas mandatory abstention must be raised by an interested party.[63]

Finally, by its terms, mandatory abstention under section 1334(c)(2) applies to "a proceeding based upon a State law claim or State law cause of action" is "related to a case under title 11" but does not arise under or arise in a case under title 11.[64] Thus, unlike permissive abstention, which applies to any proceeding over which the bankruptcy court has jurisdiction, mandatory abstention under section 1334(c)(2) is limited in scope to non-core proceedings. In this sense, the authority to permissively abstain under section 1334(c)(1) is broader than mandatory abstention because it is applicable to a broader range of civil proceedings.[65]

F. Foreign Proceedings

Based on the 2005 amendments, section 1334(c)(1) on its face does not apply "with respect to a case under chapter 15" of the Bankruptcy Code.[66] The end result of this amendment is the facilitation of Chapter 15 recognition proceedings instituted by foreign bankruptcy representatives in cases previously commenced in a foreign jurisdiction. Therefore, under the plain language of the statute, parties are foreclosed from seeking a bankruptcy court's order permissively abstaining pursuant to section 1334(c)(1) from hearing a Chapter 15 case. However, it may not preclude abstention from proceedings brought within the Chapter 15 case.

Although application of section 1334(c)(1) is barred by the terms of the statute with respect to Chapter 15 cases, courts have extended the statute to foreign proceedings under the related doctrines of international comity and forum non conveniens with respect to pending foreign proceedings intersecting with a Chapter 11 case.[67] International comity is the principle that a federal court may, in its discretion, decline to exercise jurisdiction under certain circumstances based on deference to the laws and interest of a foreign nation.[68] The forum non conveniens doctrine permits a court to decline jurisdiction where the case could be more conveniently tried in another forum and the exercise of jurisdiction in the U.S. would be problematic for the parties and the administration of the courts.[69] Therefore, although section 1334(c)(1) is unavailable with respect to a case under Chapter 15, it may be employed by bankruptcy courts to abstain from hearing an adversary proceeding in a Chapter 11 case where a parallel proceeding is pending in a foreign jurisdiction.

G. Appeals of Abstention Decisions

The appealability of decisions rendered pursuant to section 1334(c)(1) is governed by 28 U.S.C.A. § 1334(d), which provides in pertinent part:

> Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.[70]

Under this section, parties are entitled to appeal a bankruptcy court's decision to abstain to the district court pursuant to 28 U.S.C.A. § 158. A review of the legal principles of abstention applied by the bankruptcy court is plenary, while the decision of whether to exercise permissive abstention is reviewed under an abuse of discretion standard.[71] Unlike decisions not to grant mandatory abstention under section 1334(c)(2), which are not covered by section 1334(d), decisions on permissive abstention are not subject to review by the courts of appeal or the Supreme Court under the statute.[72] The Second Circuit Court of Appeals recently issued a decision in *In re Baker*, which reaffirmed that the plain language of the statute bars courts of appeal from exercising jurisdiction with respect to appeals of permissive abstention decisions.[73] As such, under the current version of section 1334, only district courts may exercise appellate jurisdiction of appeals over bankruptcy court decisions concerning permissive abstention.[74]

Although the current version of the statute is clear in terms of the appealability of abstention decisions, a

procedural wrinkle persists with respect to the ability of courts of appeal to review decisions involving cases commenced prior to The Bankruptcy Reform Act of 1994 (the 1994 Amendments). Prior to the 1994 Amendments, decisions involving permissive abstention were reviewable by the courts of appeal. Therefore, a circuit split has emerged as to whether the date of the filing of the relevant state action or the petition date of the underlying bankruptcy proceeding is the proper point to measure whether the 1994 Amendments bar an appeal. The Third Circuit Court of Appeals has held that in determining whether the 1994 Amendments bar review, the appropriate measuring date is the date of the filing of the state court action from which abstention is sought.[75] In contrast, the Fifth Circuit and First Circuit have held that the petition date of the underlying bankruptcy is dispositive as to the applicability of the 1994 Amendments.[76] This distinction could be critical in terms of seeking a second-level appeal of a decision under section 1334, however, this issue largely is moot as most matters now eligible for appeal will be within the purview of the 1994 Amendments regardless of which test applies.

III. Revisiting the Viability of the *Tucson Estates* Test

The open-ended language of section 1334(c)(1), in conjunction with the paucity of legislative history, has left bankruptcy courts to their own devices in attempting to apply section 1334(c)(1).[77] The *Tucson Estates* test unquestionably is a useful shorthand tool in treading the uncertain waters of permissive abstention under section 1334(c)(1). In applying the *Tucson Estates* test, bankruptcy courts should strive to guard against a rote application of the enumerated factors in order to avoid a "false sense that a head count will yield the answer with mathematical certainty."[78] As with other multifactor doctrinal tests, however, a mechanical resort to a list of factors unweighted for relevant circumstances can unwittingly lead bankruptcy courts to disregard consideration of the purposes underlying the statute itself.

The decision of the Third Circuit Court of Appeals in *In re Owens Corning*[79] is instructive with respect to the dangers involved with multifactor tests. *Owens Corning* addressed the proper standard in determining whether substantive consolidation of affiliated debtor entities is warranted.[80] In critiquing the viability of existing factor tests for substantive consolidation,[81] the Third Circuit explained:

> In assessing whether to order substantive consolidation, courts consider many factors … They vary (with degrees of overlap) from court to court. Rather than endorsing any prefixed factors, in *Nesbit* we "adopt[ed] an intentionally open-ended, equitable inquiry … to determine when substantively to consolidate two entities." *Id.* at 87 … We reiterate that belief here. Too often the factors in a checklist fail to separate the unimportant from the important, or even to set out a standard to make the attempt. This often results in rote following of a form containing factors where courts tally up and spit out a score without an eye on the principles that give the rationale for substantive consolidation (and why, as a result, it should so seldom be in play).[82]

The court went on to summarize the key underlying principles through which the substantive consolidation inquiry should be guided as follows: (i) respecting entity separateness to prevent unnecessary cross-creep of liability; (ii) substantive consolidation is to remedy harm caused by debtors who disregard separateness; (iii) mere benefit to the administration of the case does not justify substantive consolidation; (iv) substantive consolidation is "extreme" and imprecise, and should be used rarely and as a remedy of last resort; and (v) substantive consolidation may not be used offensively to disadvantage creditors.[83] With these fundamental principles in mind, the Third Circuit established that the test for substantive consolidation requires a showing either that: (i) prepetition, the entities disregarded separateness so significantly that their creditors treated them as one; or (ii) postpetition, their assets and liabilities are so scrambled that separating them is a prohibitive cost and hurts all creditors.[84]

Similar to substantive consolidation in *Owens Corning*, permissive abstention represents a type of equitable tool that inexorably requires an element of discretion on the part of the bankruptcy judge. The critique of factor tests set forth in *Owens Corning* is equally applicable to the *Tucson Estates* test. The issue with such tests is that they often create an analytical line that is "more nice than bright" since bankruptcy courts may simply run down the *Tucson Estates* factors as a check list and lost sight of the purpose of permissive abstention.[85] The *Tucson Estates* test leaves bankruptcy courts without sufficient guidance as to determining the relative importance among the 12 factors in terms of the overarching goal of section 1334(c)(1), which often leaves bankruptcy courts in the unenviable position of attempting to accomplish an ad hoc balancing of the factors in a particular case.

Bankruptcy courts may be better served by following the teachings of the Third Circuit in *Owens Corning* and eschewing the *Tucson Estates* test in favor of a streamlined approach that distills the relevant factors to those critical to the principles underlying section 1334(c)(1). In that vein, the Supreme Court has explained that the doctrine of abstention is born of a desire to "soften the tensions inherent in a system that contemplates parallel judicial processes" by embodying federal respect for State law and policy.[86] At its core, section 1334(c)(1) functions to promote federalism by ensuring that bankruptcy jurisdiction is exercised when critical to the expeditious administration of bankruptcy cases while keeping an eye toward the availability of non-bankruptcy fora to litigate nonessential disputes.[87]

Keeping these principles in kind, the *Tucson Estates* test may be revised to limit the permissive abstention calculus to only three factors: (i) the effect of abstention on the administration of the bankruptcy estate; (ii) whether the subject matter of the proceeding in question involves unsettled controlling issues of state law; and (iii) whether the proceeding is core or non-core.[88] These three factors dovetail with the primary concerns of section 1334(c)(1), namely ensuring that federal bankruptcy jurisdiction does not overstep its boundaries into the province of state law while preserving the interest in achieving an efficient resolution of bankruptcy cases. Admittedly, this streamlined approach will not resolve all close questions under section 1334(c)(1). However, it does allow bankruptcy courts to determine such questions based on the baseline principles of abstention and avoids a convoluted and mechanical analysis which applies all the *Tucson Estates* factors unnecessarily.

IV. Conclusion

Based on the inherently discretionary nature of permissive abstention under section 1334(c)(1), it is difficult to predict with any regularity the types of proceedings over which bankruptcy courts will elect to abstain. Due to the elasticity of this doctrine, and in light of the critical impact it can have on the progression of a bankruptcy case, it is critical to approach questions of permissive abstention with a proper understanding of the underlying goals of efficiency and respect for the sovereignty of courts within the intra-judicial federal system. Although the *Tucson Estates* test is intended to provide a guidepost for bankruptcy courts under section 1334(c)(1), the myriad of factors to be analyzed can often cause bankruptcy courts to lose sight of the forest for the trees and may prevent courts from properly applying section 1334(c)(1) in keeping with the bedrock principles of permissive abstention.

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[FN1] See generally Colorado River Water Conservation Dist. v. U. S., 424 U.S. 800, 817–18, 96 S. Ct.

1236, 47 L. Ed. 2d 483, 9 Envt. Rep. Cas. (BNA) 1016 (1976) (explaining that federal courts have a "virtually unflagged obligation" to exercise the grant of jurisdiction bestowed upon them).

[FN2] Unless otherwise indicated herein, any reference to section 1334(c)(1) shall refer to 28 U.S.C.A. § 1334(c)(1).

[FN3] See Allegheny County v. Frank Mashuda Co., 360 U.S. 185, 188–89, 79 S. Ct. 1060, 3 L. Ed. 2d 1163 (1959) (explaining that abstention constitutes the exception to a federal court's obligation to exercise the full grant of its jurisdiction and abdication of this obligation is an "extraordinary and narrow exception"); see also In re Ionosphere Clubs, Inc., 108 B.R. 951, 954, 114 Lab. Cas. (CCH) P 12056 (Bankr. S.D. N.Y. 1989).

[FN4] See 28 U.S.C.A. § 1334(c)(1).

[FN5] WRT Creditors Liquidation Trust v. C.I.B.C. Oppenheimer Corp., 75 F. Supp. 2d 596, 603 n.1 (S.D. Tex. 1999) (quoting In re Simmons, 205 B.R. 834, 847 (Bankr. W.D. Tex. 1997)).

[FN6] As discussed in further detail herein, the use of permissive abstention need not be limited to state court proceedings, but rather it is equally applicable to parallel federal proceedings. In most instances, however, he issue of permissive abstention is addressed the alternative forum is state court.

[FN7] Block-Lieb, Permissive Bankruptcy Abstention, 76 Wash. U. L.Q. 781, 781–82 (1998) (noting that federal courts elect not to exercise bankruptcy jurisdiction more commonly such that "[a]bstention is more frequently permitted in the bankruptcy context").

[FN8] This name is derived from the seminal Ninth Circuit case, In re Tucson Estates, Inc., 912 F.2d 1162, 1167, Bankr. L. Rep. (CCH) P 73613 (9th Cir. 1990), which adopted the 12-factor test relied upon by most bankruptcy courts. The specific factors comprising the *Tucson Estates* test are discussed in further detail herein.

[FN9] See 28 U.S.C.A. § 1334(a), (b) and (e) (bestowing district courts with (1) "original and exclusive jurisdiction of all cases under title 11," (2) "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11," (3) "exclusive jurisdiction … of all property, wherever located, of the debtor as of the commencement of [a bankruptcy] case, and of property of the estate," and (4) "exclusive jurisdiction … over all claims or causes of action that involve construction of section 327 of title 11"); see generally Celotex Corp. v. Edwards, 514 U.S. 300, 307, 115 S. Ct. 1493, 131 L. Ed. 2d 403, 27 Bankr. Ct. Dec. (CRR) 93, 32 Collier Bankr. Cas. 2d (MB) 685, Bankr. L. Rep. (CCH) P 76456, 31 Fed. R. Serv. 3d 355 (1995) ("The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute.").

[FN10] 28 U.S.C.A. § 1334(b). These three types of proceedings encompass all litigation that could conceivably impact a debtor's bankruptcy case.

[FN11] 28 U.S.C.A. § 157(a) (providing that "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district").

[FN12] 28 U.S.C.A. § 157(b) to (c). The text of section 157(b)(1) provides that "[b]ankruptcy judges

may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title." 28 U.S.C.A. § 157(b)(1). The determination of whether a proceeding qualifies as a core proceeding is governed by section 157(b)(2). See 28 U.S.C.A. § 157(b)(2) (providing a nonexhaustive list of examples of matters which constitute core proceedings). In contrast, section 157(c) provides that a bankruptcy judge to "hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11 [and to] submit proposed findings of fact and conclusions of law to the district court [and that] any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected."). 28 U.S.C.A. § 157(c)(1).

[FN13] Celotex, 514 U.S. at 308 (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994, 12 Bankr. Ct. Dec. (CRR) 285, Bankr. L. Rep. (CCH) P 70002 (3d Cir. 1984)).

[FN14] See 28 U.S.C.A. § 1334; see also In re Resorts Intern., Inc., 372 F.3d 154, 162, 43 Bankr. Ct. Dec. (CRR) 46 (3d Cir. 2004) (internal citation omitted).

[FN15] See In re Seven Fields Development Corp., 505 F.3d 237, 250, 48 Bankr. Ct. Dec. (CRR) 276, Bankr. L. Rep. (CCH) P 81040 (3d Cir. 2007) (explaining that "cases under title 11" refers to the main bankruptcy petition as opposed to proceedings within the main case) (citation omitted).

[FN16] See In re Sharif, 411 B.R. 276, 280 (Bankr. E.D. Va. 2008) (citation omitted).

[FN17] In re A.H. Robins Co., Inc., 86 F.3d 364, 372, 29 Bankr. Ct. Dec. (CRR) 329 (4th Cir. 1996).

[FN18] See Pacor, Inc. v. Higgins, 743 F.2d 984, 994, 12 Bankr. Ct. Dec. (CRR) 285, Bankr. L. Rep. (CCH) P 70002 (3d Cir. 1984) (the test for relatedness is "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy"); In re TXNB Internal Case, 483 F.3d 292, 62 U.C.C. Rep. Serv. 2d 805 (5th Cir. 2007) (explaining that an action is "related to" a bankruptcy case if the outcome could have a positive or negative impact on the debtor's rights or liabilities or influence the administration of the estate) (citing Matter of Zale Corp., 62 F.3d 746, 752, Bankr. L. Rep. (CCH) P 76617 (5th Cir. 1995)).

[FN19] 11 U.S.C.A. § 1334(c)(1).

[FN20] See 1 Collier on Bankruptcy ¶3.05, p. 3-52 (rev. 16th ed.2009) ("Section 1334(c)(1) thus applies to core matters as well as to related matters."); In re Szostek, 429 B.R. 552, 569 (Bankr. W.D. Tex. 2010), adhered to on reconsideration, 433 B.R. 611 (Bankr. W.D. Tex. 2010) ("Permissive abstention is available as to both core and non-core claims.") (citation omitted).

[FN21] 11 U.S.C.A. § 305(a). Section 305 provides, in relevant part, that a court may dismiss or suspend a case at any time upon a showing that "the interests of creditors and the debtor would be better served by such dismissal or suspension." 11 U.S.C.A. § 305(a)(1). Unlike section 1334(c)(1), section 305 does not authorize a bankruptcy court to abstain from hearing a particular adversary proceeding or claim before it, rather, the decision to abstain must be made as to the proceedings in toto. Section 305 also applies to ancillary cases involving petitions for recognition which are filed pursuant to Chapter

15. See 11 U.S.C.A. § 305(a)(2)(A), (b). The intersection of Chapter 15 foreign proceedings and the doctrine of permissive abstention is discussed further herein.

[FN22] Collier, ¶3.05[2], p. 3-52 ("Under [the 1898 Bankruptcy Act], a bankruptcy judge could abstain from hearing a matter even if the court had jurisdiction over the controversy.").

[FN23]
Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 60 S. Ct. 628, 84 L. Ed. 876 (1940).

[FN24] See Block-Lieb, Permissive Bankruptcy Abstention, 76 Wash. U. L.Q. 781, 797 (1998) (noting that only a handful of Supreme Court decisions address permissive abstention with respect to bankruptcy jurisdiction).

[FN25] Thompson, 309 U.S. at 479.

[FN26] Thompson, 309 U.S. at 479–84.

[FN27] Thompson, 309 U.S. at 483.

[FN28] Thompson, 309 U.S. at 483.

[FN29] See Block-Lieb, Permissive Bankruptcy Abstention, 76 Wash. U. L.Q. 781, 799–801 (1998) (explaining that courts of appeal interpreting Thompson construed it narrowly to stand for the proposition that courts should permissively abstain "from resolving unsettled issues of state property law in bankruptcy where resolution of the state law issue would have obviated the need to exercise summary bankruptcy jurisdiction over the disputed property) (citing First Nat. Bank of White River Jct., Vt. v. Reed, 306 F.2d 481 (2d Cir. 1962).

[FN30] See, e.g., Wikle v. Country Life Ins. Co., 423 F.2d 151, 154 (9th Cir. 1970) (affirming decision to abstain regarding conflict of state-appointed receiver's ability to collect rents); In re Maidman, 466 F. Supp. 278, 284, 5 Bankr. Ct. Dec. (CRR) 210, Bankr. L. Rep. (CCH) P 67135 (S.D. N.Y. 1979) (affirming decision of bankruptcy court to abstain from adjudicating dispute with respect to state court construction of real property lease terms).

[FN31] 28 U.S.C.A. § 1471(d) (repealed 1984).

[FN32] Block-Lieb, Permissive Bankruptcy Abstention, 76 Wash. U. L.Q. 781, 806 (1998) (quoting H.R. Rep. No. 95-595, at 446 (1977), reprinted in 1978 U.S.C.A.A.N. 5963, 4901).

[FN33] Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598, 6 Collier Bankr. Cas. 2d (MB) 785, Bankr. L. Rep. (CCH) P 68698 (1982).

[FN34] See, e.g., In re New York City Off-Track Betting Corp., 434 B.R. 131, 148 (Bankr. S.D. N.Y. 2010) (noting that the absence of legislative history for section 1334(c)(1) warrants looking to the legislative history for section 1471(d) as the statutes are substantially similar) (citing In re Pan American Corp., 950 F.2d 839, 845, 26 Collier Bankr. Cas. 2d (MB) 20, Bankr. L. Rep. (CCH) P 74377 (2d Cir. 1991). There is some legislative history to indicate that section 1334(c)(1) was intended to be broader in scope than its predecessor section 1471(d) since section 1334(c)(1) provides for abstention on the

grounds of comity or respect for state law in addition to simply the interests of justice. See Block-Lieb, Permissive Bankruptcy Abstention, 76 Wash. U. L.Q. 781, 809–10 (1998).

[FN35] Pub. L. No. 103-394 (1994). Section 1334 was also amended by the Judicial Improvements Act of 1990, Pub. L. No. 101-650 (1990), although these changes are not material to the scope of permissive abstention under section 1334(c)(1).

[FN36] Pub. L. No. 109-8 (2005). The 2005 Amendments made some technical and non-substantive changes to section 1334(c). See Pub. L. No. 109-8, § 1219 (Striking out "made under this subsection" and inserted "made under subsection (c)" and substituting "Subsection (c) and this subsection" for "This subsection" in the last sentence of section 1334(d) dealing with stays.").

[FN37] Pan Am., 950 F. 2d at 845 (explaining that section 1334(c)(1) provides three criteria for determining whether permissive abstention is appropriate).

[FN38] Pan Am., 950 F.2d at 845 ("The statute thus furnishes three admittedly nebulous criteria to determine whether abstention is appropriate.").

[FN39] See In re Ahearn, 318 B.R. 638, 644 (Bankr. E.D. Va. 2003) (observing that the statute vests bankruptcy courts with discretion as to whether permissive abstention is appropriate); see also In re Bay Vista of Virginia, Inc., 394 B.R. 820, 845 (Bankr. E.D. Va. 2008); In re RNI Wind Down Corp., 348 B.R. 286, 295, 46 Bankr. Ct. Dec. (CRR) 275 (Bankr. D. Del. 2006), subsequently aff'd, 359 Fed. Appx. 352 (3d Cir. 2010) (noting that the decision to abstain is within the "broad discretion of the bankruptcy court") (citation omitted).

[FN40] See In re Bozel S.A., 434 B.R. 86, 102 (Bankr. S.D. N.Y. 2010) (citing In re Altchek, 119 B.R. 31, 35 (Bankr. S.D. N.Y. 1990).

[FN41] In re Tucson Estates, Inc., 912 F.2d 1162, 1167, Bankr. L. Rep. (CCH) P 73613 (9th Cir. 1990) (citing and incorporating the factors set forth by the bankruptcy court in In re Republic Reader's Service, Inc., 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987)); see also Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co., 6 F.3d 1184, 1189, Bankr. L. Rep. (CCH) P 75481 (7th Cir. 1993) (adopting 12-factor test to ascertain whether permissive abstention is appropriate). The Ninth Circuit's *Tucson Estates* decision was not the first court to examine such factors, but it is widely credited as being the most influential case since it was the first court of appeal to formally adopt such a test. See Block-Lieb, Permissive Bankruptcy Abstention, 76 Wash. U. L.Q. 781, 816 (1998) (noting that the Ninth Circuit's decision in *Tucson Estates* is the most influential in terms of developing the 12-factor test which courts apply in determining whether to abstain in the bankruptcy context).

[FN42] Tucson Estates, 912 F.2d at 1167.

[FN43] See, e.g., In re DHP Holdings II Corp., 435 B.R. 220, 223–24 (Bankr. D. Del. 2010); see also In re Taub, 417 B.R. 186, 192, 52 Bankr. Ct. Dec. (CRR) 48 (Bankr. E.D. N.Y. 2009) (listing the following factors under section 1134(c)(1) analysis: "(1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable state law, (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court, (5) the jurisdictional

basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than the form of an asserted 'core' proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the court's] docket, (10) the likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of non-debtor parties.") (internal quotation marks and citations omitted); In re Bay Vista of Virginia, Inc., 394 B.R. 820, 845 (Bankr. E.D. Va. 2008) (listing the following factors: (1) the court's duty to resolve matters properly before it; (2) the predominance of state law issues and non-debtor parties; (3) the economical use of judicial resources; (4) the effect of remand on the administration of the bankruptcy estate; (5) the relatedness or remoteness of the action to the bankruptcy case; (6) whether the case involves questions of state law better addressed by the state court; (7) comity considerations; (8) any prejudice to the involuntarily removed parties; (9) forum non conveniens; (10) the possibility of inconsistent results; (11) any expertise of the court where the action originated; and (12) the existence of a right to a jury trial.) (internal citations omitted). The factors which courts apply in determining whether to abstain under section 1334(c)(1) are similar in nature to those factors considered in the context of equitable remand. See Lennar Corp. v. Briarwood Capital LLC, 430 B.R. 253, 267 (Bankr. S.D. Fla. 2010); see also Drexel Burnham Lambert Group, Inc. v. Vigilant Ins. Co., 130 B.R. 405, 407 (S.D. N.Y. 1991).

[FN44] See In re SJI, Inc., 442 B.R. 690, 692 (Bankr. D. Minn. 2010) (applying the following truncated factor test under section 1334(c)(1): (1) the effect or lack thereof on the efficient administration of the estate if the court abstains, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficult or unsettled nature of the applicable law, (4) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (5) the substance rather than the form of an asserted "core" proceeding, (6) 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, and (7) the existence of a right to a jury trial) (citing In re Williams, 256 B.R. 885, 894, 37 Bankr. Ct. Dec. (CRR) 46 (B.A.P. 8th Cir. 2001)).

[FN45] See In re Valley Media, Inc., 289 B.R. 27, 30, 40 Bankr. Ct. Dec. (CRR) 204 (Bankr. D. Del. 2003) ("Courts utilizing these factors have not developed a specific formula to address how many or which factors are required for discretionary abstention to be appropriate"); see also Trans World Airlines, Inc. v. Karabu Corp., 196 B.R. 711, 715, 29 Bankr. Ct. Dec. (CRR) 236 (Bankr. D. Del. 1996) (explaining that the assessment of these factors is not "merely a mathematical exercise").

[FN46] See In re Owens Corning, 419 F.3d 195, 210–11, 45 Bankr. Ct. Dec. (CRR) 36, Bankr. L. Rep. (CCH) P 80343 (3d Cir. 2005), as amended, (Oct. 12, 2005) (discussing the intrinsic weakness of "factors" tests), discussed in section III infra.

[FN47] For a thorough discussion of the intersection between permissive abstention under section 1334(c)(1) and nonbankruptcy doctrines of federal abstention, see Block-Lieb, Permissive Bankruptcy Abstention, 76 Wash. U. L.Q. 781, 787–826 (1998).

[FN48] Compare Pan American Corp., 950 F.2d at 846 (finding that Congress intended for section 1334(c)(1) to be "informed by principles developed under the judicial abstention doctrines"), with In re

Apex Oil Co., 980 F.2d 1150, 1153 n.7, 23 Bankr. Ct. Dec. (CRR) 1161, Bankr. L. Rep. (CCH) P 74988 (8th Cir. 1992) (explicating declining to follow the conclusion of the *Pan American* court and concluding that section 1334(c)(1) was intended to be broader in scope than merely incorporating existing judicial abstention doctrines).

[FN49] See Railroad Commission of Tex. v. Pullman Co., 312 U.S. 496, 500, 61 S. Ct. 643, 85 L. Ed. 971 (1941). The *Pullman* decision established that abstention is warranted where a claim pending in federal court that a state action is violative of the U.S. Constitution can be resolved through addressing the unsettled state law issues while avoiding the federal constitutional law altogether. Pullman, 312 U.S. at 500. Abstention under the *Pullman* doctrine is appropriate only in situations where resolution of the state law issue may require consideration of whether the state action violates federal constitutional law. See Block-Lieb, Permissive Bankruptcy Abstention, 76 Wash. U. L.Q. 781, 787 (1998).

[FN50] See Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943) (holding that abstention is appropriate to allow state courts to resolve issues which are particularly localized in effect in order to avoid undue interference with the administration of state affairs).

[FN51] Colorado River Water Conservation Dist. v. U. S., 424 U.S. 800, 813, 819, 96 S. Ct. 1236, 47 L. Ed. 2d 483, 9 Env't. Rep. Cas. (BNA) 1016 (1976) (establishing that abstention is appropriate in favor of state court where duplicative litigation is pending under certain "exceptional circumstances," such as the piecemeal adjudication of water rights); see also Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 14, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) (applying the *Colorado River* standard but finding that exceptional circumstances did not exist to justify abstention).

[FN52] Colorado River, 424 U.S. at 813.

[FN53] The Supreme Court has prescribed the following six factors that may be considered and weighed in determining whether "exceptional circumstances" exist that would permit a district court to decline exercising jurisdiction: (1) assumption by either court of jurisdiction over a res; (2) the relative inconvenience of the forums; (3) the avoidance of piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) whether and to what extent federal law provides the rules of decision on the merits; and (6) the adequacy of the state proceedings in protecting the rights of the party invoking federal jurisdiction. Wilton v. Seven Falls Co., 515 U.S. 277, 285–86, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995) (internal citations omitted).

[FN54] See Pan Am., 950 F.2d at 845 ("An examination of the statute's history, however, convinces us that this provision was intended to codify judicial abstention doctrines").

[FN55] See Block-Lieb, Permissive Bankruptcy Abstention, 76 Wash. U. L.Q. 781, 815 (1998) (positing that the adoption of the multifactor test under section 1334(c)(1) operates as an implicit rejection of the notion that the statute codifies pre-existing abstention doctrines since it incorporates factors not previously addressed in those doctrines).

[FN56] See, e.g., In re Southwinds Associates Ltd., 115 B.R. 857, 861 n.5, 20 Bankr. Ct. Dec. (CRR) 1174, 23 Collier Bankr. Cas. 2d (MB) 991 (Bankr. W.D. Pa. 1990) ("The grounds for abstention in bankruptcy cases have been codified and we are not strictly bound by these precedents.").

[FN57] Matter of Wood, 825 F.2d 90, 93, 17 Collier Bankr. Cas. 2d (MB) 743, Bankr. L. Rep. (CCH) P 71955 (5th Cir. 1987) (explaining that "[t]he abstention provisions of the [section 1334] 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").

[FN58] See Block-Lieb, Permissive Bankruptcy Abstention, 76 Wash. U. L.Q. 781, 816 (1998).

[FN59] See Block-Lieb, Permissive Bankruptcy Abstention, 76 Wash. U. L.Q. 781, 816 (1998).

[FN60] 28 U.S.C.A. § 1334(c)(2).

[FN61] See In re Finova Capital Corp., 358 B.R. 113, 118, 47 Bankr. Ct. Dec. (CRR) 130 (Bankr. D. Del. 2006); In re Bennett, 376 B.R. 918 (Bankr. W.D. Wis. 2007).

[FN62] Cf. In re Earned Capital Corp., 331 B.R. 208, 220, 45 Bankr. Ct. Dec. (CRR) 73 (Bankr. W.D. Pa. 2005), aff'd, 346 B.R. 123 (W.D. Pa. 2006), order aff'd, 505 F.3d 237, 48 Bankr. Ct. Dec. (CRR) 276, Bankr. L. Rep. (CCH) P 81040 (3d Cir. 2007) (noting "considerable latitude" exists in determining whether permissive abstention is warranted).

[FN63] See, e.g., Matter of Gober, 100 F.3d 1195, 1207 n.10, Bankr. L. Rep. (CCH) P 77193 (5th Cir. 1996) ("Permissive abstention may be raised by the court sua sponte").

[FN64] 28 U.S.C.A. § 1334(c)(2).

[FN65] Collier, ¶3.05[2], p. 3-54 (explaining that permissive abstention under section 1334(c)(1) applies to a broader range of proceedings than its counterpart under section 1334(c)(2)).

[FN66] See 28 U.S.C.A. § 1334(c)(1) ("*Except with respect to a case under Chapter 15 of Title 11*, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under Title 11 or arising in or related to a case under Title 11.") (emphasis added).

[FN67] See, e.g., In re Bozel S.A., 434 B.R. 86, 102 (Bankr. S.D. N.Y. 2010) (extending section 1334(c)(1) under the doctrine international comity or forum non conviens to adversary proceeding brought by liquidator of the debtor's sole shareholder where parallel proceedings involving the authority of the liquidator to take corporate actions was pending in Luexemborg) (citations omitted); In re Viking Offshore (USA) Inc., 405 B.R. 434, 440, 62 Collier Bankr. Cas. 2d (MB) 409 (Bankr. S.D. Tex. 2008), reconsideration denied, motion to certify appeal granted, (Feb. 5, 2009) (citing Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 23 Bankr. Ct. Dec. (CRR) 1483, Bankr. L. Rep. (CCH) P 75125 (5th Cir. 1993)) (applying the doctrines of comity and foreign non conveniens under section 1334(c)(1) while acknowledging that the plain language of the statute did not apply to a foreign proceeding commenced under the laws of the Netherlands); In re Regus Business Centre Corp., 301 B.R. 122, 128–29 (Bankr. S.D. N.Y. 2003).

[FN68] See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 543 n.27, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

[FN69] See Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV, 569 F.3d 189, 200, 2009 A.M.C. 1626 (4th Cir. 2009), cert. denied, 130 S. Ct. 1066, 175 L. Ed. 2d 885, 2010 A.M.C. 2998 (2010).

[FN70] 28 U.S.C.A. § 1334(d).

[FN71] See generally In re Seven Fields Development Corp., 505 F.3d 237, 253, 48 Bankr. Ct. Dec. (CRR) 276, Bankr. L. Rep. (CCH) P 81040 (3d Cir. 2007).

[FN72] See 28 U.S.C.A. § 1334(d).

[FN73] Baker v. Simpson, 613 F.3d 346, 352, Bankr. L. Rep. (CCH) P 81816 (2d Cir. 2010), cert. denied, 131 S. Ct. 928, 178 L. Ed. 2d 772 (2011) ("Unlike decisions concerning mandatory abstention, decisions on permissive abstention, which lie within the discretion of the bankruptcy court, are not subject to review by the court of appeals. We therefore lack jurisdiction to decide whether the district court's decision on permissive abstention was correct.").

[FN74] See Seven Field Development, 505 F.3d at 253.

[FN75] Seven Field Development, 505 F.3d at 250–52.

[FN76] In re Southmark Corp., 163 F.3d 925, 927–29, 33 Bankr. Ct. Dec. (CRR) 948, Bankr. L. Rep. (CCH) P 77874 (5th Cir. 1999); In re Middlesex Power Equipment & Marine, Inc., 292 F.3d 61, 67 n.4, 39 Bankr. Ct. Dec. (CRR) 196, 48 Collier Bankr. Cas. 2d (MB) 508, Bankr. L. Rep. (CCH) P 78684 (1st Cir. 2002).

[FN77] See generally In re Best, 417 B.R. 259, 273–74 (Bankr. E.D. Pa. 2009) ("The non-specific language of the statute, its evolution, and the paucity of legislative history has resulted in somewhat differing approaches toward permissive abstention of bankruptcy proceedings.") (citation omitted).

[FN78] In re Franklin, 179 B.R. 913, 928, 27 Bankr. Ct. Dec. (CRR) 20, 33 Collier Bankr. Cas. 2d (MB) 687 (Bankr. E.D. Cal. 1995).

[FN79] In re Owens Corning, 419 F.3d 195, 45 Bankr. Ct. Dec. (CRR) 36, Bankr. L. Rep. (CCH) P 80343 (3d Cir. 2005), as amended, (Oct. 12, 2005).

[FN80] Owens Corning, 419 F.3d at 205–12.

[FN81] At the time of the *Owens Corning* decision, several different factor tests existed among the circuits whether to substantively consolidate two entities in the bankruptcy context. See, e.g., In re Vecco Const. Industries, Inc., 4 B.R. 407, 6 Bankr. Ct. Dec. (CRR) 461, 22 C.B.C. 954, 2 Collier Bankr. Cas. 2d (MB) 216, Bankr. L. Rep. (CCH) P 67608 (Bankr. E.D. Va. 1980) ("(1) The presence or absence of consolidated financial statements; (2) The unity of interests and ownership between various corporate entities; (3) The existence of parent and intercorporate guarantees on loans; (4) The degree of difficulty in segregating and ascertaining individual assets and liabilities; (5) The existence of transfers of assets without formal observance of corporate formalities; (6) The commingling of assets and business functions; [and] (7) The profitability of consolidation at a single physical location."); Pension Ben. Guar. Corp. v. Ouimet Corp., 711 F.2d 1085, 1093, 4 Employee Benefits Cas. (BNA) 1582 (1st Cir. 1983)

(listing five nonexclusive factors: (1) the parent owns a majority of the subsidiary's stock; (2) the entities have common officers or directors; (3) the subsidiary is grossly undercapitalized; (4) the subsidiary transacts business solely with the parent; and (5) both entities disregard the legal requirements of the subsidiary as a separate corporation; In re Augie/Restivo Baking Co., Ltd., 860 F.2d 515, 518, 18 Bankr. Ct. Dec. (CRR) 852, Bankr. L. Rep. (CCH) P 72482 (2d Cir. 1988) ("(1) 'whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit' and (2) 'whether the affairs [of the two companies] are so entangled' that consolidation will be beneficial."); In re Bonham, 229 F.3d 750, 766 (9th Cir. 2000) (same); Eastgroup Properties v. Southern Motel Ass'n, Ltd., 935 F.2d 245, 249, 21 Bankr. Ct. Dec. (CRR) 1423, 25 Collier Bankr. Cas. 2d (MB) 158, Bankr. L. Rep. (CCH) P 74055 (11th Cir. 1991) ("(1) that 'there is substantial identity between the entities to be consolidated; and (2) [that] consolidation is necessary to avoid some harm or to realize some benefit."); see also In re Auto-Train Corp., Inc., 810 F.2d 270, 276, Bankr. L. Rep. (CCH) P 71618 (D.C. Cir. 1987) (same).

[FN82] Owens Corning, 419 F.3d at 210 (internal citations omitted).

[FN83] See Owens Corning, 419 F.3d at 211.

[FN84] See Owens Corning, 419 F.3d at 211.

[FN85] See generally Dastgheib v. Genentech, Inc., 457 F. Supp. 2d 536, 542 (E.D. Pa. 2006) (explaining that the line separating legal from equitable claims is "more nice than bright," and still forces courts to engage in a nuanced analysis).

[FN86] See Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 n.9, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987).

[FN87] See In re Weldon F. Stump & Co., 373 B.R. 823, 827 (Bankr. N.D. Ohio 2007) (observing that the underlying purpose of section 1334(c)(1) is to promote respect for federalism).

[FN88] Bankruptcy courts in the District of Delaware have already recognized that it is appropriate to weight these three factors more heavily when engaged in the Tucson Estates analysis. See DHP Holdings, 435 B.R. at 221 (noting that these three factors are "particularly important" under section 1334(c)(1)); In re Fruit of the Loom, Inc., 407 B.R. 593, 600 (Bankr. D. Del. 2009) (citing In re LaRoche Industries, Inc., 312 B.R. 249, 255, 43 Bankr. Ct. Dec. (CRR) 96, 52 Collier Bankr. Cas. 2d (MB) 799 (Bankr. D. Del. 2004)).

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