

# Product Liability Claims in the Bankruptcy Courts After the 1984 Amendments: Four Standards to Limit “Related to” Jurisdiction

*District courts are granted jurisdiction over claims related to a product liability action when a manufacturer files for chapter 11 relief under the 1984 amendments to the Bankruptcy Reform Act of 1978. The asbestos litigation illustrates the potential encroachment on state power when nonbankrupt codefendants initiate removal of claims pending against them. This Comment proposes four standards to limit “related to” jurisdiction in order to balance concerns of timely resolution of the debtor’s estate with the respect for state power implicit in article III.*

## INTRODUCTION

The widespread use of asbestos during the 1940’s and 1950’s<sup>1</sup> exposed thousands of individuals to this potential carcinogen.<sup>2</sup> Contact with this deadly fiber often results in serious and even fatal health problems.<sup>3</sup> Manufacturers of asbestos products face thousands of per-

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<sup>1</sup> Asbestos insulates from weather, corrosion, fire, heat, cold, acid, alkalies, electricity, noise, energy losses, vibration, bacteria, dust, and vermin. Asbestos is used in construction, floor tile, friction materials, paper, felt, packing and gaskets, insulation, and textiles. I. SELIKOFF & D. LEE, *ASBESTOS AND DISEASE* 17-20 (1978). Asbestos has also been incorporated into a variety of consumer products, including hot pads, ironing board covers, and oven insulation. *Id.* at 130-31.

<sup>2</sup> Asbestos minerals are naturally occurring fibrous minerals of the serpentine or amphibole series which demonstrate relative indestructibility and resistance to heat. *Id.* at 33. Inhalation of asbestos fibers leads to four principal diseases: parenchymal asbestosis, pleural asbestosis, mesothelioma, and asbestos-associated carcinoma. For a detailed description of these diseases, see generally I. SELIKOFF & D. LEE, *supra* note 1.

<sup>3</sup> One estimate indicates that 27.5 million individuals were exposed to asbestos while working in the United States from 1940 to 1979. Asbestos Litig. Rep. (Andrews) 5176 (July 9, 1982) (report for U.S. Dep’t of Labor by I. Selikoff) (copy on file at U.C. Davis Law Review office). Family exposure to dust brought home on a worker’s clothing and neighborhood exposure from factories add to the number of individuals at risk. I. SELIKOFF & D. LEE, *supra* note 1, at 115-18. Annual deaths from asbestos related disease have averaged 8200 and are expected to increase to 9700 before the year 2000.

sonal injury and wrongful death claims nationwide.<sup>4</sup> The number of suits is bound to increase, as the health problems associated with asbestos only manifest themselves after a long latency period.<sup>5</sup> The personal tragedies suffered from the use of asbestos will be devastating.

Faced with staggering litigation costs,<sup>6</sup> several asbestos manufacturers have turned to the voluntary petition for reorganization under chapter 11 of the Bankruptcy Act of 1978.<sup>7</sup> Attention has focused on the propriety of a financially stable company utilizing a chapter 11 petition

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Asbestos Litig. Rep., *supra*, at 5176. Cf. Comment, *Adjudicating Asbestos Insurance Liability: Alternatives to Contract Analysis*, 97 HARV. L. REV. 739, 739 & n.1 (1984) (estimates of projected deaths from asbestos disease to end of century) [hereafter Comment, *Asbestos Insurance Liability*].

<sup>4</sup> Over 11,000 lawsuits are pending in 46 states against Johns-Manville Corporation. *GAF v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 26 Bankr. 405, 407 (Bankr. S.D.N.Y. 1983). An average of 425 asbestos related law suits were brought against Johns-Manville Corp. each month in the first half of 1982 alone. Affidavit under Local Rule XI-2 of James F. Beasley, *In re Johns-Manville Corp.*, Nos. 82 B 11,656 to 82 B 11,676 (Bankr. S.D.N.Y. filed Aug. 26, 1982), *reprinted in* Asbestos Litig. Rep. (Andrews) 5421 (Aug. 27, 1982) (copy on file at U.C. Davis Law Review office) [hereafter Affidavit of Beasley]. A separate mass of litigation has arisen between the manufacturers and the insurance industry concerning the liability for coverage of asbestos victims. Dispute centers around the occurrence of "bodily injury" for purposes of determining which of successive insurers must pay on the claims. *See generally* Comment, *Asbestos Insurance Liability*, *supra* note 3 (discusses theories of insurer liability and proposes a theory of communitarian pluralism to allocate liability). Threats of bankruptcy appear less likely for the insurance industry because of the larger pool of assets and extensive state regulation designed to protect solvency. *Id.* at 754.

<sup>5</sup> The diseases of mesothelioma and asbestosis, which are associated with asbestos exposure, usually appear after a latency period of at least ten years. *See generally* I. SELIKOFF & D. LEE, *supra* note 1, at 176-78. For a discussion of the effect of the passage of time on product liability, see Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734 (1983) (discussing latent injuries from asbestos exposure as example of knowledge of defect at time of trial rather than time of manufacture).

<sup>6</sup> One manufacturer estimated that the average individual cost of approximately 3470 asbestos claims was \$16,600.00 through June, 1982. Consultants for the company estimated that financial resources of over two billion dollars could be devoted to the asbestos litigation. Affidavit of Beasley, *supra* note 4, at 5423.

<sup>7</sup> As of this writing, all bankruptcy petitions were filed by asbestos manufacturers prior to the modifications to the Bankruptcy Reform Act of 1978 passed on June 29, 1984. *See infra* note 9. While the Johns-Manville petition, *In re Johns-Manville Corp.*, Nos. 82 B 11,656 to 82 B 11,676 (Bankr. S.D.N.Y. filed Aug. 26, 1982), *supra* note 4, has received the most media attention, UNR Industries, Inc. and Amatex Corporation have also filed for voluntary reorganization under Chapter 11. *In re UNR Indus.*, Nos. 83 B 9841 to 82 B 9851 (Bankr. N.D. Ill. filed July 29, 1982); *In re Amatex Corp.*, No. 82 05,220K (Bankr. E.D. Pa. filed Nov. 1, 1982).

to avoid mounting litigation costs.<sup>8</sup> However, these petitions raise a more perplexing issue concerning the appropriate use of federal resources and the balance of power between state and federal courts.

The propriety of federal adjudication of state claims related to a bankruptcy petition will inevitably become the focus of controversy under the Bankruptcy Amendments of 1984, passed by the House and Senate on June 29, 1984.<sup>9</sup> Jurisdiction over claims related to a bankruptcy petition is vested in the district courts.<sup>10</sup> Contrary to its predecessor, the new bankruptcy jurisdiction statute directs judges that "in the interest of comity with state courts or respect for state law" they may abstain from cases arising under, arising in, or related to a bankruptcy petition.<sup>11</sup>

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<sup>8</sup> See generally Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121 (1983) (discusses use of bankruptcy system by company facing mass tort liability) [hereafter Note, *The Manville Bankruptcy*]; Comment, *Will Financially Sound Corporate Debtors Succeed in Using Chapter 11 of The Bankruptcy Act as a Shield Against Massive Tort Liability?*, 56 TEMP. L.Q. 539 (1983) (same).

<sup>9</sup> These amendments were required by the conclusion of the Supreme Court in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) that the system implemented by the Bankruptcy Reform Act of 1978 was unconstitutional. See *infra* text accompanying notes 17-19. After two years of political maneuvering, both the House and Senate passed compromise recommendations reached in the CONFERENCE REPORT ON BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984, H. REP. NO. 882, 98th Cong., 2d Sess. [hereafter CONFERENCE REPORT]. For discussion of the competing interests that prolonged agreement on the necessary amendments, see Middleton, *Havoc Reigns in Bankruptcy Fight*, Nat'l L.J., July 9, 1984, at 3, col. 1; *Bankruptcy Bill Sails Through House, Senate*, L.A. Times, June 30, 1984, Part I, at 1, col. 4. Bankruptcy judges will be appointed for 14-year terms. CONFERENCE REPORT, *supra* at 5 (ch. 6, § 152(a)(2)(b)). Jurisdiction over related claims remains in the district courts. See *infra* notes 10-11. President Reagan signed the Bankruptcy Amendments of 1984 into law on July 10, 1984. For a preliminary evaluation of anticipated congressional proposals prompted by *Northern Pipeline* standards, see VanDercreek, *Article III Versus Bankruptcy Judges and Magistrates — A Partial Triumph of Principles of Separation of Powers over the Pragmatism of Docket Congestion*, 10 FLA. ST. U.L. REV. 569 (1983).

<sup>10</sup> 28 U.S.C. § 1334 will provide that:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

CONFERENCE REPORT, *supra* note 9, at 1-2.

<sup>11</sup> CONFERENCE REPORT, *supra* note 9, at 2 (28 U.S.C. § 1334(c)(1)). A party may direct the court's attention to this concern:

The products liability claims that pushed the manufacturers into bankruptcy court are based entirely on state law. Federal power to adjudicate such state law claims is limited by article III of the United States Constitution. While congressional power to regulate bankruptcy under article I is suggested as an alternative source of federal power, the rationale is not convincing when claims that do not concern the debtor are involved.

The scope of federal subject matter jurisdiction is defined in article III, section 2, which circumscribes federal judicial power.<sup>12</sup> A case must arise under federal law, involve citizens of different states, or fall within a category of special areas of federal interest.<sup>13</sup> Congress implements this jurisdictional grant through statutes<sup>14</sup> and may grant courts less than the entire range of federal jurisdiction permitted by article

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(2) 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. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

*Id.* (28 U.S.C. § 1334(c)(2)).

<sup>12</sup> U.S. CONST. art. III, § 2.

<sup>13</sup> Aside from diversity and federal question jurisdiction, article III extends jurisdiction to:

[A]ll cases affecting Ambassadors, other public Ministers and Consuls; — to all cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between a State and Citizens of another State; . . . — between Citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

*Id.* This enumeration marks the outer boundaries of federal jurisdiction. See *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). See generally 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3521, at 36-38 (1975) (discussion of *Hodgson* and *Marbury*) [hereafter 13 WRIGHT, MILLER & COOPER]. Potential expansion of article III jurisdiction via the bankruptcy power granted to Congress in U.S. CONST. art. I, § 8, cl. 4, is discussed *infra* text accompanying notes 78-90.

<sup>14</sup> See, e.g., 28 U.S.C. § 1331 (1982) (federal question jurisdiction); 28 U.S.C. § 1332 (1982) (diversity jurisdiction).

III.<sup>15</sup> Concerns of state and federal comity, as well as the more pragmatic goal of controlling the flow of cases to federal court, have traditionally been the motivating factors for such limiting statutes.<sup>16</sup>

The paramount importance of article III was recently reiterated in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>17</sup> Basing its decision on failure to provide bankruptcy judges with protected salary and life tenure as required by article III,<sup>18</sup> the Supreme Court concluded that exercise of jurisdiction over all claims related to a bankruptcy action was unconstitutional.<sup>19</sup> Although subject matter limita-

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<sup>15</sup> *Palmore v. United States*, 411 U.S. 389, 401 (1973); *City of Greenwood v. Peacock*, 384 U.S. 808, 833 (1966). *But see* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328-29, 330 (1816) (Congress must vest all judicial power granted by article III in federal courts); *Eisentrager v. Forrestal*, 174 F.2d 961, 966 (D.C. Cir. 1949), *rev'd on other grounds sub nom.* *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (Constitution compels conferral of jurisdiction over cases arising under federal law on some district court). This later position has not prevailed. 13 WRIGHT, MILLER & COOPER, *supra* note 13, § 3526, at 113.

<sup>16</sup> Amendments to the civil removal statute, 28 U.S.C. § 1441 (1982), provide a clear example of this point. The original removal statute allowed removal if "controversies were separable." 28 U.S.C. § 71 (1946). The modification to "separate" in 28 U.S.C. § 1441(c) was intended to emphasize the complete disassociation between federal and state causes of action. The number of cases removable to federal court was consequently narrowed. *American Fire & Casualty Co. v. Finn*, 431 U.S. 6, 9-10 (1951). *See generally* 28 U.S.C. § 1441 Reviser's Notes (1976); 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3724, at 623-25 (1976) [hereafter 14 WRIGHT, MILLER & COOPER]. Several statutes provide concurrent jurisdiction for state and federal courts, presumably to alleviate burdens on state judicial resources. *E.g.*, 45 U.S.C. § 56 (1982) (Federal Employer's Liability Act); 46 U.S.C. § 688 (1982) (Merchant Marine Act); *see also* 13 WRIGHT, MILLER & COOPER, *supra* note 13, § 3526, at 115.

<sup>17</sup> 458 U.S. 50 (1982).

<sup>18</sup> *Id.* at 76.

<sup>19</sup> *Id.* at 87 n.40. The Court's plurality opinion, authored by Justice Brennan, broadly defined the issue presented to the court: "[W]hether the assignment by Congress to bankruptcy judges of the jurisdiction granted in 28 U.S.C. § 1471 . . . by § 241(a) of the Bankruptcy Act of 1978 violates Art. III of the Constitution." *Id.* at 52. In a subsequent paragraph, the issue was expanded to "whether the Bankruptcy Act of 1978 violates the command of Art. III." *Id.* at 62. The concurring opinion drafted by Justice Rehnquist stressed that the issue before the court was limited to whether removal of state law claims violated article III. *Id.* at 89. (Rehnquist, J., concurring). This narrower holding was reiterated by Chief Justice Burger's dissenting opinion. *Id.* at 92 (Burger, C.J., dissenting). All jurisdiction conferred by the section upon district courts is delegated to the bankruptcy courts in 28 U.S.C. § 1471(c). The grant of authority over related claims in 28 U.S.C. § 1471(b) was held nonseverable from the arising under and arising in bases of jurisdiction. The Court concluded that all of 28 U.S.C. § 1471 must be unconstitutional. *Id.* at 87 n.40, 91-92 (Rehnquist, J., joined by

tions imposed by article III were not discussed,<sup>20</sup> the decision implicitly

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O'Connor, J., concurring). The Court rejected arguments that the bankruptcy courts fit into previously recognized exceptions to the requirements of article III. *Id.* at 71-72; *cf.* *Palmore v. United States*, 411 U.S. 389 (1973) (courts of District of Columbia within territorial exception); *Crowell v. Benson*, 285 U.S. 22 (1932) (public rights exception); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857) (courts-martial exception). For general discussions concerning the scope of the Court's holding, see Fullerton, *No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts*, 49 BROOKLYN L. REV. 207 (1983); Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197 (1983). The decision, originally stayed until October 4, 1982, *Northern Pipeline*, 458 U.S. at 88, was extended to December 24, 1982, to allow additional time for congressional action. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 459 U.S. 813 (1982). The Court denied further extensions of the stay. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 459 U.S. 1094 (1982). With minor modifications in some circuits, interim rules to govern bankruptcy courts were adopted by all circuits. For an unmodified version of the interim rules, see *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 265-67 (6th Cir. 1983). Because the transition period for implementation of the 1978 Act expired on March 31, 1984, these rules also expired on that date. Congressional action to resolve the *Northern Pipeline* dilemma prior to that deadline did not occur and the courts operated under an extension of the interim rules. *Bankruptcy Courts Get Extension*, L.A. Times, May 25, 1984, Part IV, at 1, col. 1. Although there was significant debate over the constitutionality of those rules, they were generally considered valid under the *Northern Pipeline* standards. *White Motor Corp.*, 704 F.2d at 260; *Braniff-Airways, Inc. v. Civil Aeronautics Bd. (In re Braniff-Airways, Inc.)*, 700 F.2d 214, 215 (5th Cir. 1983), *cert. denied*, 103 S. Ct. 2112 (1983). *But see In re Conley*, 26 Bankr. 885, 891 (Bankr. M.D. Tenn. 1983); *In re Motion to Dismiss: the Constitutionality of Jurisdiction of the Bankruptcy Court*, 23 Bankr. 334, 345-46 (Bankr. N.D. Ga. 1982).

<sup>20</sup> Federal subject matter limitations were neither briefed by the parties nor addressed by the courts. Brief for Appellant at ii, *Northern Pipeline*, reprinted in 128 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 490 (1983) (question presented "whether Congress . . . has the power to delegate the jurisdiction provided in 28 U.S.C. § 1471 to bankruptcy judges lacking Article III requisites as to tenure and compensation"); Brief for Appellee at i, *Northern Pipeline*, reprinted in 128 LANDMARK BRIEFS, *supra*, at 575 (question presented whether bankruptcy judges "whose tenure and compensation do not meet the requirements of Article III . . . [may adjudicate] . . . disputes between private parties based upon common law and state or federal statutory claims"); *see also Northern Pipeline*, 458 U.S. at 52. The contract actions asserted by Northern against Marathon were originally filed in the bankruptcy court after the petition for reorganization. *Id.* at 57. Assuming Northern's liability to Marathon as a debtor would be reduced or eliminated by the resolution of these actions, the claims would clearly fall within the ancillary jurisdiction of the bankruptcy courts. Ancillary jurisdiction extends federal jurisdiction to state law claims that derive from litigation properly in the federal courts. *See generally* 14 WRIGHT, MILLER & COOPER, *supra* note 16, at § 2523. The claim against the bankrupt defendant and the debtor's petition for reorganization share the common facts of alleged liability for a defective product. Distribution of the debtor's estate depends upon liquidation of the pending tort claims. Thus, the state and federal

rejects the notion that bankruptcy courts are immune from article III.<sup>21</sup> The Senate has echoed this concern in its recent attempt to restructure the bankruptcy courts.<sup>22</sup>

Although Congress has power to extend bankruptcy jurisdiction to the limits of article III,<sup>23</sup> potential infringement on state sovereignty becomes more serious as these limits are approached. Under the Bankruptcy Act of 1978, any claim related to a bankruptcy action could be removed to bankruptcy court.<sup>24</sup> The statute authorizing removal of related claims contains no language limiting this procedure. If the bankruptcy court has jurisdiction over a related claim, it can be removed by any party.<sup>25</sup> Removal under the Bankruptcy Amendments of 1984 par-

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claims derive from a "common nucleus of operative fact." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978). Bankruptcy procedure will be involved in the determination and prioritization of these claims. The plaintiff's right to adequate relief can only be preserved if the contract claims are adjudicated within the purview of the bankruptcy court. Thus, the plaintiff would "ordinarily expect to try them together." *Id.* A recognition of this conclusion may have been implicit in the suggestion by the Chief Justice that "rerouting" the ancillary claims to district court would solve the article III dilemma. *Northern Pipeline*, 458 U.S. at 92.

<sup>21</sup> See *infra* text accompanying notes 86-89.

<sup>22</sup> See *infra* text accompanying notes 106-11. The Senate enacted a preliminary version of the Bankruptcy Court and Federal Judgeship Act of 1983, S. 1013, 98th Cong., 1st Sess. (1983), on April 27, 1983. The Act vested jurisdiction over all bankruptcy cases in the district courts. District judges possessed the option to designate a bankruptcy judge as a special master with fact-finding functions, or to refer the entire case to a United States magistrate or bankruptcy judge with full jurisdictional powers.

<sup>23</sup> See *supra* note 15.

<sup>24</sup> Bankruptcy jurisdiction was defined in 28 U.S.C. § 1471(b) (1982): "Notwithstanding any Act of Congress [conferring exclusive jurisdiction on a court other than the district court], the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11." This jurisdiction was delegated to the bankruptcy courts in 28 U.S.C. § 1471(c) (1982).

<sup>25</sup> 28 U.S.C. § 1478(a) (1982): "A party may remove any claim or cause of action in a civil action . . . if the bankruptcy courts have jurisdiction over such claim or cause of action." The grant of jurisdiction in 28 U.S.C. § 1471(b) (1982) is potentially broader than the scope of removal in 28 U.S.C. § 1478(a) (1982). Jurisdiction extends to "any civil proceeding" under 28 U.S.C. § 1471(b) (1982). Although an argument can be made that bankruptcy removal should be more limited than original bankruptcy jurisdiction, the distinction has more technical than pragmatic effect. If there is no original jurisdiction, a claim cannot be removed. See 28 U.S.C. § 1478(a) (1982); Kennedy, *The Bankruptcy Court Under the New Bankruptcy Law: Its Structure, Jurisdiction, Venue, and Procedure*, 11 ST. MARY'S L.J. 251, 287 (1979). But see 1 COLLIER ON BANKRUPTCY ¶ 3.01, at 3-70.1 to 3-71 (L. King 15th ed. 1983) ("civil action" in § 1478(a) should be less inclusive than "civil proceeding" in § 1471(b)) [hereafter COLLIER ON BANKRUPTCY]. Courts do not rely on this distinction as a reason to refuse jurisdiction

allels this procedure, although the specific consideration of state comity is presumably incorporated into the equation.<sup>26</sup> Thus, removal of a state law claim is possible if it falls within the scope of "related to" jurisdiction.<sup>27</sup> Under this procedure, some codefendants of the bankrupt

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over a removed claim. The distinction is either blurred by treating the two statutes simultaneously, or avoided altogether by resting the decision concerning jurisdiction on some other ground. *See, e.g.,* *Scientific Computers, Inc. v. Neuromedics, Inc.*, 20 Bankr. 410, 411 (Bankr. D. Minn. 1982) (avoid jurisdictional issue by abstaining); *In re Palazzo*, 19 Bankr. 229, 230 (Bankr. M.D. Fla. 1982) (same); *Person v. Rapco Foam, Inc. (In re Rapco Foam)*, 16 Bankr. 765, 766 (Bankr. W.D. Mo. 1982) (§ 1478(a) permits removal of proceedings within jurisdictional boundaries of §§ 1471(b),(c)); *Griffith v. Realty Executives, Inc.*, 6 Bankr. 753, 755-56 (Bankr. D.N.M. 1980) (legislative history does not indicate that § 1478(a) should be interpreted more narrowly than § 1471(b); however, ancillary jurisdiction sufficient to support jurisdiction under § 1478(a)). This Comment suggests standards to limit the exercise of jurisdiction over related claims under 28 § 1471(b). *See infra* Part III. Although some distinctions will be made when jurisdiction is refused on discretionary as opposed to jurisdictional grounds, *see infra* text accompanying notes 98-103, the discretionary considerations are similar in both contexts. *See infra* note 102. Thus, the standards suggested to limit "related to" jurisdiction synthesize the case law on remand or refusal of jurisdiction under § 1478(a) and § 1471(b). By implementing these limitations in § 1471(b), removal jurisdiction will be narrowed as well.

<sup>26</sup> 28 U.S.C. § 1452(a) will permit removal under the following circumstances:

- (a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

CONFERENCE REPORT, *supra* note 9, at 4. Although there is no specific reference to the consideration of state comity issues, the general reference to 28 U.S.C. § 1334 should incorporate the specific reference to this matter in 28 U.S.C. § 1334(c)(1). *See supra* text accompanying note 11.

<sup>27</sup> *See supra* note 24. "Arising under" and "arising in" are terms of art in the bankruptcy court with a settled meaning. Cases that arise under bankruptcy law involve administrative matters that do not concern any third parties. Actions to recover assets of the debtor that are held by third parties arise in bankruptcy litigation. Note, *Bankruptcy and the Limits of Federal Jurisdiction*, 95 HARV. L. REV. 703, 707 (1982) [hereafter Note, *Limits of Federal Jurisdiction*]. Since neither of these situations is present in product liability claims against nonbankrupt defendants, the statutory language is inapplicable. Removal of such claims can be predicated only upon the remaining statutory language authorizing "related to" jurisdiction. *Cf. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 54 (1982) (cases related to bankruptcy litigation will include matters governed by state law); *In re Trina-Dee, Inc.*, 14 Bankr. 482, 483 (Bankr. E.D. Pa. 1981) (parties stipulated debtor's suit against attorney for malpractice within "related to" jurisdiction); COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 3.01, at 3-48 (action of debtor for negligent injuries caused by another within

asbestos manufacturers have removed the pending products liability claims to federal bankruptcy court.<sup>28</sup> Thus, bankruptcy jurisdiction permits the assumption of jurisdiction over cases involving nondebtor third parties that are based entirely on state product liability law.<sup>29</sup>

Bankruptcy courts presently rely upon a variety of discretionary factors<sup>30</sup> to balance the competing concern over distribution of the debtor's estate with the fundamental principle of state power. The inadequacy of this technique is exemplified by the multiple defendant asbestos actions. Resolution of the product liability claim against the debtor defendant is obviously essential to complete distribution of the debtor's estate. A plaintiff's claims against nondebtor defendants are only indirectly related via claims for contribution or indemnity among codefendants. While some relation to a bankruptcy petition exists, litigating liability against numerous defendants may delay rather than facilitate resolution of the debtor's estate. In addition, this posture encroaches upon a state's legitimate interest in protecting its injured citizens and ensuring uniform application of its product liability laws. Thus, although it is argu-

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"related to" jurisdiction).

<sup>28</sup> See, e.g., Application for Removal and Preliminary Memorandum of law of John Crane-Houdaille, Inc. in Support of its Application for Removal and Transfer of Venue of the Proceedings, Aaron v. Johns-Manville Corp., No. 3-82-1119JR (Bankr. N.D. Cal. filed Sept. 24, 1982) (requesting removal of 163 pending cases) [hereafter Application for Removal and Preliminary Memorandum]. Other defendants have attempted to take advantage of the automatic stay provisions of the Bankruptcy Act to suspend all litigation pending in the state courts. Under 11 U.S.C. § 362(a) (1982) the "commencement or continuation" of any proceedings against the debtor is stayed when the bankruptcy petition is filed. Under the 1984 Amendments, certain damages are recoverable for wilful violations of the stay, CONFERENCE REPORT, *supra* note 9, at 22 (11 U.S.C. § 362(h)), but the practice under § 362(a) is not altered in any way relevant to this Comment. Nonbankrupt defendants argue that this stay must be extended to the claims pending against them as well, or lifted with respect to Johns-Manville's product liability claims. Defendants also argue that the broad power of bankruptcy courts to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title" under 11 U.S.C. § 105(a) (1982) authorizes extension of the stay. See, e.g., Neubauer v. Owens-Corning Fiberglas Corp., 26 Bankr. 644 (E.D. Wisc. 1983); GAF Corp. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 26 Bankr. 405 (Bankr. S.D.N.Y. 1983). For a summary of the judicial response to these arguments, see Note, *The Manville Bankruptcy*, *supra* note 8, at 1139 n.90. The increased hardship on seriously ill plaintiffs is often cited by courts as the overriding concern in refusing to extend the stay. See, e.g., Neubauer, 26 Bankr. at 647; GAF, 26 Bankr. at 417.

<sup>29</sup> See, e.g., Application for Removal and Preliminary Memorandum, *supra* note 28. The Bankruptcy Amendments of 1984 recognize this explicitly. See *supra* text accompanying note 11.

<sup>30</sup> See *infra* text accompanying notes 112-21.

able that these claims fall within the scope of "related to" jurisdiction, neither of the goals underlying this jurisdictional grant are served by such action.

This Comment argues that the "related to" standard should incorporate four criteria to measure the nature of the relation of state claims to the bankruptcy petition. These criteria would enable district courts to balance concerns of timely resolution of the debtor's estate with the respect for state power implicit in article III. Using this analytical framework, this Comment examines the authority of district courts to assume jurisdiction over state law claims in the context of multiparty product liability actions. The asbestos litigation will be used to illustrate the inadequacies of the current application of the "related to" standard, and as a paradigm for application of the four criteria.<sup>31</sup> Routine application of the following criteria will enable district courts to properly determine when it is appropriate to abstain in the interests of state comity as directed by the Bankruptcy Amendments of 1984.

Part I summarizes the constitutional limitations on federal jurisdiction imposed by article III and their relevance in the bankruptcy context. By applying recognized tests for the constitutional limits of federal courts to adjudicate state claims, it illustrates the tenuous constitutionality of bankruptcy jurisdiction. Part II outlines the congressional policy underlying bankruptcy jurisdiction and the application of statutory and constitutional standards under the Bankruptcy Reform Act of 1978 by the bankruptcy court. Finally, Part III proposes an analysis that limits "related to" jurisdiction within the boundaries of article III while maintaining the flexibility intended by Congress, and applies this anal-

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<sup>31</sup> Although other manufacturers have taken advantage of chapter 11 petitions when faced with mass product liability claims, the asbestos litigation is unusual in its multiple defendants. For another multiple defendant action, see *Person v. Rapco Foam, Inc.* (*In re Rapco Foam, Inc.*), 16 Bankr. 765 (Bankr. W.D. Mo. 1982) (personal injury suit against seller, installer, and manufacturer of insulation with one defendant filing for bankruptcy); *cf.* *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254 (6th Cir. 1983) (truck manufacturer with 160 unliquidated product liability claims); *Universal Safety Equip. Co. v. Safeguard Mfg. Co.* (*In re Safeguard Mfg. Co.*), 25 Bankr. 415 (Bankr. D. Conn. 1982) (manufacturer of component part of industrial machines). While these cases raise issues similar to the plaintiff vs. bankrupt asbestos defendant litigation, the concerns implicated by joinder of third party nonbankrupt defendants are distinct. It is these latter issues that are the focus of analysis in this Comment. Throughout this Comment, claims implicated in asbestos litigation are characterized in three groups for purposes of analysis. A plaintiff's claim against the debtor defendant will be analyzed separately from a plaintiff's claim against nondebtor codefendants. Finally, claims between defendants for contribution and indemnity are given distinct analysis.

ysis in the context of asbestos litigation.

## I. CONSTITUTIONAL LIMITATIONS TO FEDERAL JURISDICTION LIMIT THE SCOPE OF "RELATED TO" JURISDICTION

Federal courts are courts of "limited jurisdiction."<sup>32</sup> The Constitution establishes the jurisdictional boundaries in article III.<sup>33</sup> Each claim brought to federal court requires an independent basis of jurisdictional support.<sup>34</sup> Although Congress may restrict the scope of jurisdiction statutorily, the constitutional limits of federal power depend on an interpretation of article III. Jurisdiction over related claims is within the statutory powers granted to the bankruptcy court under article III. To examine the constitutional authority of bankruptcy courts to adjudicate related state law claims, the analysis necessarily focuses on the scope of "arising under" jurisdiction granted in article III.

### A. *The Constitutional "Ingredient" of Federal Law Test*

Chief Justice Marshall liberally defined the constitutional scope of federal question jurisdiction in *Osborn v. Bank of the United States*.<sup>35</sup> If federal law forms some "original ingredient" in a cause of action, the suit "arises under" federal law for purposes of the Constitution.<sup>36</sup> Whether any party actually relies upon this federal element as part of a

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<sup>32</sup> 13 WRIGHT, MILLER & COOPER, *supra* note 13, § 3522, at 44; *see also* P. BATOR, P. MICHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 2 (2d ed. 1973) (federal judicial power extended to nine specified classes of cases) [hereafter HART & WECHSLER].

<sup>33</sup> This requirement follows from the conclusion that the Constitution sets the outer limits of jurisdictional power. *See* *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (statute cannot confer jurisdiction over all suits to which alien is a party without regard to opponent's citizenship when Constitution limits such jurisdiction to suits involving a state or its citizens); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (Supreme Court cannot be given original jurisdiction over issues that are not enumerated in article III); *see also* 13 WRIGHT, MILLER & COOPER, *supra* note 13, § 3521, at 37 (federal courts cannot be given authority broader than that allowed in Constitution); Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103, 106 (1984) (article III, § 2 sets outer limits of constitutional power).

<sup>34</sup> Facts supporting the claims of jurisdiction must be affirmatively alleged for any original claim, counterclaim, cross-claim, or third party claim. FED. R. CIV. P. 8(a)(1).

<sup>35</sup> 22 U.S. (9 Wheat.) 738 (1824). In *Osborn*, standing of the Bank of the United States to sue or be sued depended upon specific authorization by Congress. Because standing is a threshold issue in every case, the court concluded that a "federal ingredient" existed sufficient that the case arose under federal law. *Id.* at 823-25.

<sup>36</sup> *Id.* at 823.

claim or defense is immaterial; the fact that the federal ingredient hovers in the background is sufficient. Thus, federal jurisdiction is constitutional even if no substantive point of federal law is raised.<sup>37</sup>

Applying the constitutional definition of arising under jurisdiction in the bankruptcy context, related claims against bankrupt asbestos defendants arise under federal law. Distribution of the debtor's estate depends upon liquidation of the pending tort claims by reducing them to settlement or judgment.<sup>38</sup> The amount of recovery available to each

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<sup>37</sup> *Id.* at 824. The constitutional definition of arising under jurisdiction must be carefully distinguished from the statutory implementation of this source of jurisdictional power in 28 U.S.C. § 1331 (1982). The statute is consistently interpreted more restrictively than the Constitution. Several standards have evolved to assess whether a cause of action arises under 28 U.S.C. § 1331 (1982). Three interpretations have emerged from the Supreme Court. *See American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) ("a suit arises under the law that creates the action") (Holmes, J.); *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912) (to arise under federal law suit must "really and substantially [involve] a dispute or controversy respecting the validity, construction, or effect of such a law upon the determination of which the result depends"); *Gully v. First Nat'l Bank*, 299 U.S. 109, 118 (1936) (federal issue must be actual and important element in the claim) (Cardozo, J.). For a discussion of the application of these standards and a summary of additional methods of analysis, see 13 WRIGHT, MILLER & COOPER, *supra* note 13, § 3562.

<sup>38</sup> Claims that are pending against the debtor's estate at the time a bankruptcy petition is filed are precisely characterized by their degree of finality. A liquidated claim is one in which the dollar amount of liability is either agreed upon or known. An unliquidated claim is either contingent or disputed. In a disputed claim, liability has not been admitted by the debtor. A contingent claim is one that requires additional facts which have not yet occurred to establish liability. *See, e.g., Dunbar v. Dunbar*, 190 U.S. 340 (1903) (contingent claim); *Colman Co. v. Withoft*, 195 F. 250 (9th Cir. 1912) (contingent claim); *United States v. Sullivan*, 19 F. Supp. 695 (W.D.N.Y. 1937) (unliquidated claim), *aff'd*, 95 F.2d 1021 (2d Cir. 1938); *Ellis v. Burnham*, 160 N.E. 437, 263 Mass. 57 (1928) (unliquidated claim); *see also* 4 COLLIER ON BANKRUPTCY ¶ 925.02, at 925-3 (L. King 15th ed. 1983) (definition of claims in context of Chapter 9 bankruptcy proceedings). Claims against a bankrupt asbestos defendant may fall into any of these categories. A plaintiff with an award from a final judgment or a settlement agreement has a liquidated claim. Unliquidated claims include those where liability is disputed and the large class of future claims whose recovery is contingent upon manifestation of asbestos related disease. The ability of bankruptcy judges to resolve the problem of future claims is beyond the scope of this Comment. Future reference to unliquidated claims includes only those actually filed by an exposed individual, or among defendants for contribution or indemnity. For analysis of the contingent claim problem, see Note, *Mass Tort Claims and The Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common Law Tort System*, 61 TEX. L. REV. 1297, 1328-36 (1983) [hereafter Note, *Mass Tort Claims*]; Note, *Tort Claims Against the Business Debtor Filing for Reorganization and a Fresh Start*, 52 U. CIN. L. REV. 791, 815-17 (1983) [hereafter Note, *Business Debtor*]. The significance of the distinction between liquidated and unliquidated claims arises with the power of bankruptcy

plaintiff must be determined within the limits of the debtor's assets. Bankruptcy procedure will be substantially involved in the determination of these claims.<sup>39</sup> Thus, state product liability claims against the bankrupt defendant have sufficient federal ingredients to constitutionally arise under federal law.<sup>40</sup>

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judges to estimate unliquidated claims. *See infra* note 39. All tort claims fall within the definition of a "claim" given in 11 U.S.C. § 101 (4)(A) (1982). 2 COLLIER ON BANKRUPTCY ¶ 101.04, at 1-1-16.2 (L. King 15th ed. 1983).

<sup>39</sup> Under 11 U.S.C. § 502(c)(1) (1982) a bankruptcy judge is directed to estimate "any contingent or unliquidated claim, fixing or liquidation of which . . . would unduly delay the closing of the case." For purposes of the following general discussion, this procedure is continued without significant changes under the 1984 Amendments. *See* CONFERENCE REPORT, *supra* note 9, at 44-45. This duty to estimate unliquidated claims has been held mandatory in appropriate circumstances, although it has been suggested that the bankruptcy judge may lift the automatic stay under 11 U.S.C. § 362 (1982) and allow state courts to resolve the problem. *Compare In re Nova Real Estate Inv. Trust*, 23 Bankr. 62, 65 (Bankr. E.D. Va. 1982) (estimation of contingent claim mandatory even if claimant objects) *with* Note, *The Manville Bankruptcy*, *supra* note 8, at 1128 n.43 (court has power to lift stay for cause). Although bankruptcy judges are not bound by any particular method in the estimation of claims, they should follow accepted legal principles. *See, e.g.*, *Bittner v. Borne Chem. Co.*, 691 F.2d 134, 135 (3d Cir. 1982). While substantive state products liability law should control the estimation of these claims, bankruptcy law completely dominates the process of distribution of funds to satisfy the claims after their liquidation. *See, e.g.*, 11 U.S.C. §§ 1121-1129 (1982) (procedure for filing reorganization plan and requirements concerning approval by creditors and the court); 11 U.S.C. §§ 1102-1103 (1982) (creation, powers, and duties of creditor's committees). These procedural rules have significant implications on the rights of the parties to relief from the debtor's estate. For example, although creditors are empowered to object to a reorganization plan under 11 U.S.C. § 1129(a)(8) (1982), the court may require confirmation under what are known as the "cram down" provisions of 11 U.S.C. § 1129(b) (1982). If the court determines that a plan is "fair and equitable" to the class of creditors refusing to confirm the plan it will be approved despite their disapproval. 11 U.S.C. § 1129(b)(1) (1982). Thus, while the right to relief may be governed by a bankruptcy law, the amount of relief is ultimately determined by the bankruptcy court. The 1984 Amendments do not make any significant substantive changes to these sections for purposes of this general discussion. *See* CONFERENCE REPORT, *supra* note 9, at 55-58. For a detailed discussion of the cram down procedure, see 5 COLLIER ON BANKRUPTCY ¶ 1129.03 (L. King 15th ed. 1983).

<sup>40</sup> *Cf. Verlinden B.V. v. Central Bank*, 103 S. Ct. 1962, 1973 (1983) (case can arise under statute granting jurisdiction over civil actions by foreign plaintiffs against foreign defendants when statute enacted pursuant to article I powers); *Toledo Fence & Post Co. v. Lyons*, 290 F. 637, 642 (6th Cir. 1923) (federal law grants trustee in bankruptcy power to institute or defend claims; thus bankruptcy suits arise under federal law); *see also* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS app. C, at 482-83 (1969) ("ingredient theory" may be necessary to justify bankruptcy jurisdiction). *Contra* Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933, 980 (1982) (statute granting trustee right

Related claims against nonbankrupt defendants require further analysis. There is no federal ingredient in a state law product liability action.<sup>41</sup> Thus, when analyzed apart from the claims against the debtor defendant, they do not arise under federal law. Federal law will be implicated in claims of nonbankrupt defendants against the bankrupt defendant for contribution or indemnity. These claims are subject to inclusion in the reorganization plan and will be dependent upon bankruptcy law to the same extent as the plaintiff's claims.<sup>42</sup> However, the requirement of an independent basis of jurisdiction for *each* claim instituted in federal court must be kept in mind.<sup>43</sup> Jurisdiction over contribution or indemnity claims does not automatically confer jurisdiction over the liability action on which they are premised.<sup>44</sup>

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to sue confers right to "play the game" and not "right to win") [hereafter Note, *Protective Jurisdiction*]. Under the theory espoused in *Verlinden*, only jurisdictional statutes that are part of a comprehensive body of substantive law enacted pursuant to Congress' article I powers can provide the basis for arising under jurisdiction. *Verlinden*, 103 S. Ct. at 1973. Congressional power over bankruptcy is specifically derived from article I, § 8 of the Constitution and is intended to be a comprehensive body of law.

<sup>41</sup> Products liability cases are generally based upon tort, contract, and strict liability principles. See 1 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 3 (1983); W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* 677-94 (5th ed. 1984) [hereafter *PROSSER & KEETON*]. Although some federal products liability statutes have been enacted, none are currently applicable in the asbestos context. 1 L. FRUMER & M. FRIEDMAN, *supra* § 4.

<sup>42</sup> See *supra* notes 38-39.

<sup>43</sup> See FED. R. CIV. P. 8(a)(1).

<sup>44</sup> If this approach were followed, jurisdiction could be premised on the collusive joinder of claims. A plaintiff would simply name a nominally liable defendant who would in turn implead the party with primary liability. Assuming some federal ingredient in that third party claim, the plaintiff could then transfer the initial case to federal court. Circumvention of the requirement of an independent basis of jurisdiction by such tactical maneuvering should not be permissible because it directly flouts the limits imposed by article III. *Cf. Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978) (allowing plaintiff to add claims against impleaded nondiverse defendants would "flout the congressional command" of complete diversity). In 28 U.S.C. § 1359 (1982) federal jurisdiction is prohibited if "any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction" of a federal court. Although collusive joinder generally involves devices designed to create or defeat diversity of citizenship, the policy behind its prohibition is to protect the power of state courts to adjudicate state claims. See *O'Brien v. AVCO Corp.*, 425 F.2d 1030, 1036 (2d Cir. 1969) (appointment of administrator of estate to obtain federal jurisdiction impermissible when sole purpose was to create diversity in state law action between citizens) (citing AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 118 (1969)); *Lester v. McFaddon*, 415 F.2d 1101, 1104 (4th Cir. 1969) (same); 14 WRIGHT, MILLER & COOPER, *supra* note 16, § 3637, at 83. Claims concerning nonbankrupt defendants are based solely upon

*B. State and Federal Claims That Comprise "One Constitutional Case" are Within the Scope of Article III*

The express language of article III has traditionally been interpreted to permit federal courts to adjudicate some state law claims between nondiverse citizens.<sup>45</sup> The constitutional limit of this power is articulated as a requirement that state and federal claims comprise "one constitutional case."<sup>46</sup> The substance of this standard has been defined in the judicially created doctrines of pendent and ancillary jurisdiction.<sup>47</sup> These theories may be conveniently characterized as doctrines of supplemental jurisdiction.<sup>48</sup> The outer limits of supplemental jurisdiction

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state law. *See supra* note 41. Therefore, the federal policy against collusive joinder should be applicable in this context as well.

<sup>45</sup> *Siler v. Louisville & N.R.R.*, 213 U.S. 175, 191 (1909) (once federal court obtains jurisdiction it has right to decide all questions in case); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824) (if there is sufficient ground for federal jurisdiction other incidental questions can be decided). *See generally* Matasar, *supra* note 33, at 106 n.14.

<sup>46</sup> *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 (1978) (constitutional limits of federal judicial power determined by relation of federal and state claims); *Aldinger v. Howard*, 427 U.S. 1, 9 (1976) (state claims with a sufficient factual relation to federal claim within pendent jurisdiction); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (pendent jurisdiction arises when state claim sufficiently related to claim arising under federal law) (citing U.S. CONST. art. III, § 2).

<sup>47</sup> Pendent jurisdiction encompasses federal and nonfederal claims brought by the plaintiff that share some factual relationship. Ancillary jurisdiction is occasioned by joinder of claims by a defendant or third party intervenor. Nonfederal claims in the ancillary context concern property that is implicated in a claim properly before the federal court, or which are "transactionally related" to the federal claims. *See generally* 13 WRIGHT, MILLER & COOPER, *supra* note 13, §§ 3523, 3567; Matasar, *supra* note 33, at 117.

<sup>48</sup> Matasar, *supra* note 33, at 104 n.3. State law claims in the asbestos litigation fall into both categories. A plaintiff's claims against bankrupt defendants are pendent to the claim against the bankrupt defendant. The addition of new parties to the pendent claim place these claims in the category of pendent party jurisdiction. *See Aldinger v. Howard*, 427 U.S. 1, 14 (1976); 13 WRIGHT, MILLER & COOPER, *supra* note 13, § 3567 (Supp. 1980). A plaintiff's claims against the debtor, as well as claims for indemnity or contribution between the nonbankrupt defendants and the bankrupt defendant, should be premised upon ancillary jurisdiction. These claims require distribution from the debtor's property, which is in exclusive control of the bankruptcy courts after the petition for reorganization. *See Freeman v. Howe*, 65 U.S. (24 How.) 450, 457 (1860) (state court could not interfere with property seized by federal court but federal court empowered to exercise ancillary jurisdiction over state replevin action to protect rights of parties). Although ancillary jurisdiction developed separately from the doctrine of pendent jurisdiction, *see* Matasar, *supra* note 33, at 141, a strong argument can be made that the constitutional limitations for these doctrines are identical. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978) (pendent and ancillary

were defined by the Court in *United Mine Workers v. Gibbs*.<sup>49</sup> The focus of analysis is the relation of state and federal claims. *Gibbs* outlines a three part test to measure the extent of this relationship.<sup>50</sup> The federal claim must constitute a substantial part of the case, sufficient to federalize the entire claim. This relationship turns on whether both federal and state claims derive from a "common nucleus of operative fact."<sup>51</sup> Finally, the claims must be logically connected, such that the plaintiff would "ordinarily expect to try them together."<sup>52</sup>

Dismissals for lack of jurisdiction on the grounds of insubstantiality are rare.<sup>53</sup> Insubstantiality dismissals are upheld only if the federal claim is "obviously frivolous" or barred by precedent.<sup>54</sup> If reliance is placed on the *Osborn* ingredient theory, the implication of bankruptcy law in the claims between defendants may be sufficient to federalize the entire asbestos case. Claims for indemnity or contribution are not

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jurisdiction "two species of the same generic problem" with "constitutional limits" enunciated by *Gibbs*); Matasar, *supra* note 33, at 155-56. Thus, although ancillary jurisdiction is generally assessed by reference to whether state and federal claims derive from the "same transaction or occurrence," *Moore v. New York Cotton Exch.*, 270 U.S. 593, 609 (1926), this Comment analyzes the relationship of all claims implicated in asbestos litigation under the constitutional standard enunciated in *Gibbs*. See *infra* text accompanying notes 50-75. For analysis of the same transaction or occurrence test, see generally 13 WRIGHT, MILLER & COOPER, *supra* note 13, § 3523; Matasar, *supra* note 33, at 145-49.

<sup>49</sup> 383 U.S. 715, 726 (1966).

<sup>50</sup> Although *Gibbs* sets out a three part test, only the common nucleus of operative fact requirement has any force. The other two requirements are generally ignored, treated without analysis, or subsumed in the more manageable common nucleus requirement. Matasar, *supra* note 33, at 128, 138 & nn.175-77.

<sup>51</sup> *Gibbs*, 383 U.S. at 725.

<sup>52</sup> *Id.*

<sup>53</sup> Dismissals are confined to claims that are frivolous or barred by earlier precedent. See *infra* note 54. However, these limitations are liberally construed by the courts. See, e.g., *Bell v. Hood*, 327 U.S. 678, 680-81 (1946) (complaint alleging violation of constitutional rights substantial although right to damages premised on common law tort and trespass claims). But see Matasar, *supra* note 33, at 127 n.109, and cases cited therein (dismissals on grounds of insubstantial federal claims). For a general discussion of the substantial federal question requirement, see Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1401, 1417-46 (1983).

<sup>54</sup> *Duke Power Co. v. Caroline Envtl. Study Group*, 438 U.S. 59, 70 (1978) (claims must be "patently without merit"); see also *Hagans v. Lavine*, 415 U.S. 528, 539 (1974) (equal protection claims not frivolous or insubstantial); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-67 (1974) (right to possess Indian lands not foreclosed by prior Supreme Court decisions or devoid of merit such that there was no federal controversy).

clearly without merit, nor is there any rule barring adjudication of such claims in bankruptcy court. However, the core of the bankruptcy action is distribution of the debtor's estate to facilitate financial recovery.<sup>55</sup> Claims against nonbankrupt defendants are unrelated to this core action, but rather are linked to the state product liability actions asserted against the bankrupt defendant. In effect, they are claims related to a claim that is related to the bankruptcy petition.<sup>56</sup> Thus, the relation to the federal ingredient has become quite attenuated. Dismissal on the grounds of an attenuated federal ingredient does not fit neatly into the typical insubstantiality dismissals noted above.<sup>57</sup> Resolution of the dilemma is probably best resolved by focusing on the common nucleus of operative fact requirement.<sup>58</sup>

Prior to the *Gibbs* decision, analysis of the common nucleus of operative fact test required identity of the factual issues necessary to prove federal and nonfederal claims.<sup>59</sup> Under *Gibbs*, this restrictive approach was rejected to conform to the more liberal allowance for joinder of claims under the federal rules.<sup>60</sup> Although there is disagreement on the

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<sup>55</sup> The broad grant of "related to" jurisdiction was specifically intended to facilitate distribution of the debtor's estate. See *infra* note 95. Only cases affecting distribution should be considered core bankruptcy actions. See *infra* text accompanying notes 149-60; Note, *Limits of Federal Jurisdiction*, *supra* note 27, at 711.

<sup>56</sup> This statement can be best understood by reference to an example. Assume *P* sues *A*, *B*, and *C* for injuries from exposure to asbestos. *A* and *B* cross-claim against *C* for contribution and indemnity. *C* ultimately files for bankruptcy. *P*'s claims against *A* and *B* do not require the presence of *C* to afford full recovery under the theory of joint and several liability. See *infra* text accompanying notes 155-56. Thus, they can be considered unrelated to the bankruptcy action. The nonbankrupt defendants' claims for contribution and indemnity require distribution from the debtor's estate and thus are related to the bankruptcy action. However, *P*'s claim against the nonbankrupt defendants must be resolved before *A* and *B* will have any right to indemnity or contribution. Thus, *P*'s claim is related to the contribution and indemnity claims that are related to the bankruptcy petition.

<sup>57</sup> See *supra* note 54.

<sup>58</sup> Because of the generous attitude toward substantiality, it is possible that these claims would be retained. See *supra* note 53. However, courts generally avoid "hair-splitting analysis" concerning substantiality and rely upon *Gibbs*' other requirements to resolve the jurisdictional issue. Matasar, *supra* note 33, at 128.

<sup>59</sup> *Hurn v. Oursler*, 289 U.S. 238, 246 (1933) (federal court may assert jurisdiction over federal and state claims that are distinct grounds for single cause of action but not over state cause of action separate and distinct from federal cause of action). In *Hurn*, a federal claim of copyright infringement and a state claim of unfair competition were merely different grounds on a single cause of action, and thus within the scope of federal jurisdiction. *Id.*

<sup>60</sup> *United Mine Workers v. Gibbs*, 383 U.S. 715, 724-25 (1966) (*Hurn* approach "unnecessarily grudging" after adoption of Federal Rules). See generally Matasar,

requisite degree of factual similarity, some factual overlap is clearly required by *Gibbs*.<sup>61</sup> A "sufficient evidentiary nexus" or some "common elements of proof" should satisfy the common nucleus requirement.<sup>62</sup>

Satisfying the common nucleus of operative fact test is problematic in asbestos litigation. Evidence of the plaintiff's injuries and possible negligence in handling asbestos will be common to claims against both debtor and nondebtor defendants.<sup>63</sup> However, factual proof concerning the use of a particular product, manufacturers, and efforts to warn the consumer will vary.<sup>64</sup> Thus, while evidence of damages may be common

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*supra* note 33, at 128-30 (outlines history of application of *Hurn* test and difficulties encountered with modern joinder provisions); 13 WRIGHT, MILLER & COOPER, *supra* note 13, § 3567, at 442 (problems created by *Hurn* test).

<sup>61</sup> Some courts focus on factual identity. See *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1033 (2d Cir. 1979) (facts relating to state claim for breach of employment contract occurred prior to October 1, 1971, while facts relating to federal Securities Act violation occurred after this date); *PAAC v. Rizzo*, 502 F.2d 306, 313 (3d Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975) (defamation claim against mayor for statements allegedly made about director of antipoverty agency factually distinct from federal claims against mayor for interference with operation of agency); *Wilder v. Irvin*, 423 F. Supp. 639, 642-43 (N.D. Ga. 1976) (state claims for malicious prosecution and false imprisonment presented different elements of proof and recovery from federal claim for failure to provide proper evidentiary hearing prior to ejection, although both claims arose from single event); *Matasar*, *supra* note 33, at 130-31. Other courts interpret *Gibbs* as requiring some evidentiary overlap, but much less than factual identity. *Jenn-Air Prods. Co. v. Penn Ventilator, Inc.*, 283 F. Supp. 591, 595 (E.D. Pa. 1968) (state law unfair competition claim pendent to federal patent claim although unfair competition claim involved some unpatented products); *Pennsylvania v. Brown*, 260 F. Supp. 323, 335 (E.D. Pa. 1966) (different elements of proof to establish alternative grounds in suit to enjoin denial of admission of black male orphans would not preclude pendent jurisdiction over state claims), *vacated on other grounds*, 373 F.2d 771 (3d Cir. 1967), *aff'd*, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968).

<sup>62</sup> This conclusion follows from the rejection of the factual identity approach. See *supra* note 60; *Matasar*, *supra* note 33, at 133-34.

<sup>63</sup> While the manner of use may vary by product, use of safety appliances to reduce exposure is probably similar for each plaintiff. An additional common element to all claims is the potential "tobacco defense" if the plaintiff is a cigarette smoker. See Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 631-33 (1983) [hereafter Special Project].

<sup>64</sup> *In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 909-10 (J.P.M.D.L. 1977); *Yandle v. PPG Indus.*, 65 F.R.D. 566, 571 (E.D. Tex. 1974); see also *Management Investors v. UMW*, 459 F. Supp. 90, 91 (E.D. Tenn. 1978) (joinder of state law claims to federal action under Labor Management Relations Act improper when state claims present different questions of motivation and calculation of damages), *aff'd*, 610 F.2d 384 (6th Cir. 1979); *Souder v. McGuire*, 423 F. Supp. 830, 833 (M.D. Pa. 1976) (malpractice claim not based upon same theory of liability as civil rights and assault and battery claims and would require extensive ex-

to all claims, the crucial proof of causation will be distinct. The extent of this divergence in asbestos litigation is not minimal. Product identification is a major stumbling block in many cases and requires extensive testimony and proof.<sup>65</sup> Often ten or more products manufactured by different defendants must be identified.

The nonbankrupt defendants' claims for indemnity introduce a third set of facts, clearly separate from those necessary to establish the defendant's underlying liability.<sup>66</sup> Some defendants may have had knowledge of asbestos hazards, warranting a greater share of liability. A product of one defendant may only have incorporated materials supplied by another. The evidentiary and legal showings necessary to establish a right to indemnity are so divergent that they fall outside the contemplation of the *Gibbs* common nucleus of operative fact requirement.

The requirement that the plaintiff would "ordinarily expect to try them together" should be considered equivalent to a decision to join claims.<sup>67</sup> If a plaintiff would expect to bring all claims in one proceed-

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pert testimony); *cf.* *Abed v. A.H. Robins Co.*, 693 F.2d 847, 853 (9th Cir.), *cert. denied*, 103 S. Ct. 817 (1982) (common issues in mass product liability action are outnumbered by variations in proximate cause, affirmative defenses, and absence of single set of operative facts giving rise to liability).

<sup>65</sup> *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (asbestos related disease results from many years of exposure making it "impossible as a practical matter, to determine which exposure or exposures . . . caused the disease"); *Migues v. Nicolet Indus.*, 493 F. Supp. 61, 64 (E.D. Tex. 1980), *rev'd in part sub nom. Migues v. Fibreboard Corp.*, 662 F.2d 1182 (5th Cir. 1981) (same); *see also In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 910 (J.P.M.D.L. 1977) (products exposed to will vary by employment); Special Project, *supra* note 63, at 608-10 (difficulties in establishing causation have led to alternative theories to avoid causation issue); Comment, *Issues in Asbestos Litigation*, 34 HASTINGS L.J. 871, 889-91 (1983) (reliance on market share liability may reduce proof problems) [hereafter Comment, *Asbestos Litigation*].

<sup>66</sup> An indemnity claim shifts the burden of liability from one defendant, or defendants, to another party who should bear responsibility for the harm. PROSSER & KEETON, *supra* note 41, at 344. The duty to indemnify requires some showing that there is a disparity in the kind of conduct involved, or some special relationship among the defendants to warrant the shifting of responsibility. *Id.* The evidence necessary to establish these facts is not part of the plaintiff's product liability claim. A claim for contribution, which merely requires a pro rata division of damages by the number of tortfeasors, will not require any analysis of the individual fault of defendants, unless contribution is assessed on a comparative basis. *Id.* at 340-41.

<sup>67</sup> *Matasar*, *supra* note 33, at 136, 139. *But see Eidschun v. Pierce*, 335 F. Supp. 603, 608 (S.D. Iowa 1971) (focus on expectation to adjudicate in one judicial proceeding). The later approach is inconsistent with the reasoning in *Gibbs*. The practical considerations of litigating claims before one trier of fact were discussed in *Gibbs* under the discretionary elements of pendent jurisdiction; thus the expectation of trial test must

ing and could do so under the federal rules, the requirement is satisfied.<sup>68</sup> The plaintiff's initial decision to join all defendants in one complaint lends weight to the expectation that all product liability claims against the various defendants could be tried in a single proceeding.<sup>69</sup> Joinder of joint tortfeasors is clearly within the scope of permissible joinder under the federal rules.<sup>70</sup>

However, once again the asbestos cases miss fitting into the neat cubbyholes provided by *Gibbs*. An asbestos plaintiff certainly did not expect to try claims against a nonbankrupt defendant in the federal court simply because one defendant filed for bankruptcy. While some commentators argue that the expectation of bringing claims before the same trier of fact should not be the focus of analysis,<sup>71</sup> removal to district court after a petition for bankruptcy is filed is problematic. The plaintiff's concern is with full recovery. This need is adequately protected by removal of the claim against the bankrupt defendant.<sup>72</sup> There is certainly no expectation that third party defense actions would be resolved

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refer to the joinder issue. Matasar, *supra* note 33, at 135-36 (citing *Gibbs*, 383 U.S. at 721-25).

<sup>68</sup> Matasar, *supra* note 33, at 139. Further ambiguity arises with the definition of the ordinarily expected portion of the *Gibbs* test. While some commentators would require joinder of any claims that would be barred by res judicata in a subsequent proceeding, others suggest the phrase is intended to have an open ended and flexible meaning. Compare 13 WRIGHT, MILLER & COOPER, *supra* note 13, § 3567, at 445 (res judicata approach) with Matasar, *supra* note 33, at 136-38 (open ended interpretation). Interpreting the entire phrase as equivalent to federal joinder rules sufficiently resolves the ambiguity for purposes of this Comment.

<sup>69</sup> See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1086, cert. denied, 419 U.S. 869 (1974) (eleven asbestos manufacturers named as defendants).

<sup>70</sup> Under Federal Rule of Civil Procedure 20 a plaintiff may join any parties against which "any right to relief jointly, severally, or in the alternative" is asserted if the claims arise out of the "same . . . or series of transactions or occurrences and if any question of law or fact common to all those persons will arise in the action." An asbestos plaintiff asserts joint and several liability against the asbestos manufacturers. See, e.g., *Borel v. Fiberboard Paper Prods. Corp.*, 493 F.2d 1076, 1096, cert. denied, 419 U.S. 869 (1974). While the facts concerning the manufacture of products by each defendant will vary, the common element of injury from exposure to asbestos products should be sufficient to satisfy the rest of rule 20. Joint tortfeasors are not indispensable parties under Federal Rule of Civil Procedure 19, thus joinder of any or all asbestos manufacturers is at plaintiff's option. See, e.g., *Dunlop v. Beloit College*, 411 F. Supp. 398, 402 (W.D. Wisc. 1976); *In re Related Asbestos Cases*, 23 Bankr. 523, 530 (N.D. Cal. 1982).

<sup>71</sup> See *supra* note 67.

<sup>72</sup> This protection is derived from the right to participate in a creditor's committee and to approve a reorganization plan granted under Bankruptcy Act. See *supra* notes 38-39.

in the same forum.

The preceding discussion indicates that jurisdiction over claims against nonbankrupt asbestos defendants under "related to" jurisdiction is of questionable constitutionality. Even if the three part *Gibbs* test is satisfied, supplemental jurisdiction is highly discretionary and must promote judicial economy, convenience, and fairness to the litigants.<sup>73</sup> Courts often resort to these discretionary considerations if satisfaction of the *Gibbs* requirements is problematic.<sup>74</sup> Thus, it is likely that the nonbankrupt asbestos claims would remain in state court on the basis of these discretionary factors.<sup>75</sup> While this conforms to the current practice of bankruptcy courts,<sup>76</sup> absolute reliance on discretionary factors without the possibility of review is dangerous.<sup>77</sup> To ensure systematic protection of article III, fixed standards should be implemented to ensure that "related to" jurisdiction falls only within the constitutional scope of *Gibbs*.

C. *Article III Limitations Should Not Be Enlarged Via Article I Congressional Powers Over Bankruptcy*

Article I can be an additional source of congressional power to define federal subject matter jurisdiction.<sup>78</sup> Under the theory of protective jurisdiction, if federal interests enumerated in article I are at stake, federal courts may assert jurisdiction over state claims that are not otherwise within the scope of article III.<sup>79</sup> Under its authority to legislate

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<sup>73</sup> *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

<sup>74</sup> *See, e.g., Moor v. County of Alameda*, 411 U.S. 693, 715-17 (1973) (pendent jurisdiction should be denied if difficult questions of state law are involved or state issues will complicate trial by jury); *Winterhalter v. Three Rivers Motors Co.*, 312 F. Supp. 962, 963-64 (W.D. Pa. 1970) (state claims predominated warranting dismissal). *See generally* Matasar, *supra* note 33, at 181-82 nn.379-81 and cases cited therein.

<sup>75</sup> Numerous state law product liability issues are unsettled. *See infra* text accompanying notes 188-91. Potential denial of the choice of a jury trial in the bankruptcy context is also significant. *See infra* text accompanying notes 197-98.

<sup>76</sup> *See infra* text accompanying notes 112-21.

<sup>77</sup> Bankruptcy judges were confronted with the decision to take jurisdiction over state claims in two contexts. Original jurisdiction over related claims was asserted via 28 U.S.C. § 1471(b) (1982), while jurisdiction over a related claim removed to bankruptcy court was premised on 28 U.S.C. § 1478(a) (1982). The decision to refuse jurisdiction or remand a related claim was nonreviewable on appeal. 28 U.S.C. §§ 1471(d), 1478(b) (1982).

<sup>78</sup> *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 600 (1949). *See also* *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 473 (1957); *Williams v. Austrian*, 331 U.S. 642, 657 (1947); *Schumacher v. Beeler*, 293 U.S. 367, 371 (1934).

<sup>79</sup> *See* HART & WECHSLER, *supra* note 32, at 416; 13 WRIGHT, MILLER & COOPER, *supra* note 13, § 3565, at 431-33; Note, *Limits of Federal Jurisdiction*, *supra*

matters of bankruptcy,<sup>80</sup> Congress created courts necessary for the adjudication of claims concerning the bankruptcy action.<sup>81</sup> Traditional cases that followed the article I analysis involved plenary suits concerning the trustee of the debtor,<sup>82</sup> an approach that may be justified when the related claim involves the debtor defendant.<sup>83</sup> Effective reorganization depends upon liquidation of all contingent claims and state judicial machinery may be slower than its bankruptcy counterpart. Thus, under the protective jurisdiction theory, to effectively implement the article I bankruptcy power, it may be necessary to enlarge the scope of jurisdiction beyond article III.

Many courts and commentators agree that the better view is to deny expansion of article III jurisdiction via article I powers.<sup>84</sup> Although the validity of the theory of protective jurisdiction has not been squarely decided by the Supreme Court,<sup>85</sup> *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* emphatically rejected an argument that bankruptcy courts are immune from article III separation of powers re-

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note 27, at 711; Note, *Protective Jurisdiction*, *supra* note 40, at 983. A narrower view of the protective jurisdiction theory would permit article I to serve as a source of jurisdiction only if the primary federal interest will be affected by the state law claim. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 484 (1957) (Frankfurter, J., dissenting); Note, *Limits of Federal Jurisdiction*, *supra* note 27, at 711.

<sup>80</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>81</sup> *Williams v. Austrian*, 331 U.S. 642, 658 (1947); *Schumacher v. Beeler*, 293 U.S. 367, 371 (1934).

<sup>82</sup> See *supra* note 81; Note, *Limits of Federal Jurisdiction*, *supra* note 27, at 712-13 & n.49. Subsequent analysis of these cases has focused on the fact that the suits were between the trustee and others, and the trustee's right to sue was subject to challenge on federal grounds. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 472 (1957) (Frankfurter, J., dissenting); *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 599 (1949).

<sup>83</sup> See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 483 (1957) (Frankfurter, J., dissenting) (claims outside federal question category can be swept into bankruptcy power if "sufficiently related to . . . main purpose of bankruptcy to call for comprehensive treatment"); *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 652 n.3 (1949) (Frankfurter, J., joined by Reed, J., dissenting) (Congress can determine that all claims related to bankruptcy estate be adjudicated in federal court under bankruptcy powers).

<sup>84</sup> *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982); *Matasar*, *supra* note 33, at 107 n.16; see also *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (six Justices rejecting view that article I powers can enlarge article III jurisdiction). *Contra* Note, *Protective Jurisdiction*, *supra* note 40 (article I powers can expand federal jurisdiction under protective jurisdiction theory).

<sup>85</sup> *Verlinden B.V. v. Central Bank*, 103 S. Ct. 1962, 1970 n.17 (1983); Note, *Protective Jurisdiction*, *supra* note 40, at 937-38.

quirements. In *Northern Pipeline*, the Court was concerned with the absence of any limitations on congressional power to grant jurisdiction over related issues to a nonarticle III court if the article I arguments were accepted.<sup>86</sup> Congress would be able to expand the scope of federal jurisdiction by granting "related to" jurisdiction to any court created to resolve federal claims.<sup>87</sup> The only limitation on this power would be imposed by the necessary and proper clause in article I.<sup>88</sup> Thus, a cause of action related to a claim implicating interstate commerce would automatically be within the jurisdiction of federal courts. For example, Congress would be able to create a non-article III court to adjudicate cases involving crimes or issues concerning interstate commerce under their article I powers. *Northern Pipeline* recognized the potential of encroachment on state power through such actions in the broad grant of "related to" jurisdiction.<sup>89</sup>

While protective jurisdiction may have been warranted in the earlier days of bankruptcy litigation, the emergence of mass tort actions cautions against a reaffirmation of the theory.<sup>90</sup> If the constitutional limitations on article III are to be taken seriously, *Gibbs* must be regarded as the outer limit of federal power to adjudicate state claims. The concerns for efficient resolution of the debtor's estate which underlie protective jurisdiction can be adequately served by the application of fixed standards to test the relation of claims.

## II. CURRENT INTERPRETATION OF "RELATED TO" JURISDICTION RESPECTS STATUTORY LIMITATIONS BUT DOES NOT REFLECT CONSISTENT CONSIDERATION OF ARTICLE III LIMITATIONS

Although the Constitution establishes the outer limits of federal judicial power, Congress may enact jurisdictional statutes restricting the permissible scope of jurisdiction. When jurisdictional statutes do not reach the limits of article III, jurisdictional decisions can often avoid

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<sup>86</sup> *Northern Pipeline*, 458 U.S. at 73.

<sup>87</sup> See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 473-74 (1957) (Frankfurter, J., dissenting).

<sup>88</sup> U.S. CONST. art. I, § 8, cl. 18. This power has historically been given broad construction and is not a significant limitation on congressional power in this context. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324-25 (1819); see also *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966) (quoting *McCulloch v. Maryland*).

<sup>89</sup> *Northern Pipeline*, 458 U.S. at 73-74.

<sup>90</sup> See Note, *Limits of Federal Jurisdiction*, *supra* note 27, at 711, 721 (bankruptcy jurisdiction should be limited to core matters involving the debtor-creditor relationship). *Contra* Note, *Protective Jurisdiction*, *supra* note 40, app. at 1026-30.

constitutional issues.<sup>91</sup> For example, if a court concludes on statutory grounds that there is no jurisdiction over a controversy, the issue of constitutional power will never be reached.<sup>92</sup> Similarly, if a district court refuses jurisdiction over a state claim because it is insufficiently related to a bankruptcy petition, the issue of constitutional limitations will remain unaddressed.

Retention of jurisdiction on purely statutory grounds should not be accepted so easily. *Gibbs* stands for the proposition that constitutional power is a prerequisite to every assertion of federal jurisdiction.<sup>93</sup> Thus, statutory authority alone is an insufficient basis for federal jurisdiction. An underlying source of constitutional power must be identified.<sup>94</sup> If a district judge retains jurisdiction over a claim related to the bankruptcy petition, the jurisdiction exerted must rest upon constitutional authority. This section examines the current efforts of bankruptcy judges to reconcile these requirements under the 1978 Act.

#### A. *Statutory Grounds for Refusing Jurisdiction Over Related Claims*

The Bankruptcy Reform Act of 1978 expanded bankruptcy jurisdiction to promote both convenience and judicial economy in resolution of claims involving the debtor.<sup>95</sup> Congress sought to facilitate the resolution of as many related controversies as possible with minimal duplication of judicial effort.<sup>96</sup> Thus, "related to" jurisdiction should be con-

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<sup>91</sup> See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978) (absence of complete diversity as required by 28 U.S.C. § 1332 precluded exercise of ancillary jurisdiction); *Aldinger v. Howard*, 427 U.S. 1, 16 (1976) (counties excluded from definition of "persons" for civil rights suit under 42 U.S.C. § 1983 (1982) precluding pendent party jurisdiction). The Court has not yet applied these principles to a pure pendent jurisdiction case such as *Gibbs*. One commentator suggests that it is appropriate to extend the requirement of congressional intent to pendent analysis as well. See Matasar, *supra* note 33, at 167.

<sup>92</sup> See cases cited *supra* note 91.

<sup>93</sup> *Gibbs*, 383 U.S. at 725; see also *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 (1978) (*Gibbs* defined constitutional limits of federal power).

<sup>94</sup> *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978).

<sup>95</sup> *In re Trina-Dee, Inc.*, 14 Bankr. 482, 484 (Bankr. E.D. Pa. 1981); *Hurt v. Cypress Bank*, 9 Bankr. 749, 754 (Bankr. N.D. Ga. 1981); *Westinghouse Credit Corp. v. Yeary (In re Brothers Coal Co.)*, 6 Bankr. 567, 571 (Bankr. W.D. Va. 1980); S. REP. NO. 989, 95th Cong., 1st Sess. 17, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5803; accord H.R. REP. NO. 598, 95th Cong., 1st Sess. 45, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6006; see generally COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 3.01, at 3-30 to 3-36.

<sup>96</sup> The usual federal policy of protecting the litigants from potential prejudice of

fined to cases in which convenience and economy will be served. However, the explicit language of 28 U.S.C. § 1471(b) lacked guidelines for implementing these congressional policies of convenience and judicial economy.<sup>97</sup> Some bankruptcy judges refused jurisdiction when related claims did not share a sufficiently close factual nexus with the bankruptcy proceeding.<sup>98</sup> Other courts rejected related claims because of insufficient effect on the resolution of the debtor's estate.<sup>99</sup> Although these potential limitations had been identified, there was no consistent method to their application. Some courts required direct connection to the debtor's property,<sup>100</sup> while others adopted a liberal approach and exercised jurisdiction over any claim that could conceivably affect the bankruptcy proceeding.<sup>101</sup>

Although the grant of "related to" jurisdiction was found in 28

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state courts has not been considered a motivation for this inclusive "related to" jurisdiction. *Hurt v. Cypress Bank*, 9 Bankr. 749, 754 (Bankr. N.D. Ga 1981).

<sup>97</sup> See *supra* notes 24-25.

<sup>98</sup> *Heagle v. Haug (In re Haug)*, 19 Bankr. 223, 224 (Bankr. D. Or. 1982) (fraud from sale and contract by debtor and three nondebtors); *Ng v. Pacheco (In re Chong)*, 12 Bankr. 255, 257 (Bankr. D. Hawaii 1981) (common law fraud claim); COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 3.01, at 3-46.

<sup>99</sup> *Benchic v. Century Entertainment Corp. (In re Century Entertainment Corp.)*, 25 Bankr. 502, 505 (Bankr. S.D. Ohio 1982) (class action against debtor and other defendants dismissed because of minimal effect of outcome on debtor's property); *Jensen Elec. v. American Computer & Telecommunications Corp. (In re American Computer & Telecommunications Corp.)*, 24 Bankr. 150, 151 (Bankr. E.D. Va. 1982) (fraud and negligence claims against nondebtor dismissed because no assets of debtor would be involved in suit); *Crown Cent. Petroleum Corp. v. Wechter (In re General Oil Distrib.)*, 21 Bankr. 888, 891-92 (Bankr. E.D.N.Y. 1982) (suit against debtors and nondebtors will have potential impact on creditors and conduct of parties which must be resolved before reorganization). The factual nexus requirement and effect on the debtor's estate are not considered mutually exclusive by the courts. See, e.g., *Heagle v. Haug (In re Haug)*, 19 Bankr. 223, 224 (Bankr. D. Or. 1982).

<sup>100</sup> *Murdock v. Allina (In re Curtina Int'l)*, 15 Bankr. 993, 996 (Bankr. S.D.N.Y. 1981); *Nelson White Constr. Management Corp. v. McConaghy (In re McConaghy)*, 15 Bankr. 480, 481 (Bankr. E.D. Va. 1981).

<sup>101</sup> *Crown Cent. Petroleum Corp. v. Wechter (In re General Oil Distrib.)*, 21 Bankr. 888, 892 n.13 (Bankr. E.D.N.Y. 1982) (state law action to recover gasoline or proceeds from nondebtor within bankruptcy jurisdiction); *In re Trina-Dee, Inc.*, 14 Bankr. 482, 484 (Bankr. E.D. Pa. 1981) (debtor's claim for legal malpractice should be resolved in bankruptcy court to expedite resolution of debtor's estate); *Westinghouse Credit Corp. v. Yeary (In re Brothers Coal Co.)*, 6 Bankr. 567, 571 (Bankr. W.D. Va. 1980) (state claim against guarantor of indebtedness of bankrupt defendant); see also *Hurt v. Cypress Bank*, 9 Bankr. 749, 753-54 (Bankr. N.D. Ga. 1981) (if ownership of debtor's property in controversy claim within "related to" jurisdiction even if debtor dismissed from action).

U.S.C. § 1471(b), decisions to refuse jurisdiction frequently relied upon the power to abstain “in the interests of justice” from related proceedings in 28 U.S.C. § 1471(d).<sup>102</sup> These decisions were explicitly made nonreviewable on appeal.<sup>103</sup> Many of the abstention decisions balanced the congressional goal of expediting all litigation concerning the debtor with the policy of efficient resolution of the debtor’s estate.<sup>104</sup> This approach satisfied the goals underlying the 1978 Act and presumably confined “related to” jurisdiction within ambits that have congressional approval. However, the ad hoc reliance upon discretionary factors<sup>105</sup> may not achieve these goals either as consistently or as constitutionally as Congress might hope.

Increased concern over the constitutionality of “related to” jurisdiction was reflected in one of the Senate’s proposals for modifying the jurisdiction of the bankruptcy courts.<sup>106</sup> Motivated by a concern that bankruptcy courts have been granted jurisdiction over cases that are outside of the judicial power provided for in the Constitution,<sup>107</sup> a provision was included requiring abstention on a state action upon the motion of any party.<sup>108</sup> Balancing concerns of efficient resolution of all

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<sup>102</sup> 28 U.S.C. § 1471(d) (1982) provided that “a district court or a bankruptcy court, in the interest of justice, [may abstain] from hearing a particular proceeding arising under . . . arising in or related to a case under title 11.” This decision cannot be reviewed on appeal. A decision to remand a removed case was guided by the same principles under 28 U.S.C. § 1478(b) (1982): “The court . . . may remand such claim or cause of action on any equitable ground.” Abstention under the Bankruptcy Amendments of 1984 is possible on the motion of any party when it is in the “interests of justice,” in the “interest of comity with state courts” or in a related action where there would not otherwise be jurisdiction absent the bankruptcy provision. CONFERENCE REPORT, *supra* note 9, at 2 (28 U.S.C. §§ 1334(c)(1), 1334(c)(2)). Remand of a removed claim is permissible on “any equitable ground.” *Id.* at 4 (28 U.S.C. § 1452(b)). Presumably the equitable grounds would include comity issues specifically mentioned in the jurisdictional statute. Thus, the decision to abstain or remand is used interchangeably throughout the text.

<sup>103</sup> 28 U.S.C. §§ 1478(b), 1471(d) (1982). The new removal statute, 28 U.S.C. § 1452, contains a similar provision, while the jurisdictional statute, 28 U.S.C. § 1334 may limit the nonreviewability to abstention decisions under 28 U.S.C. § 1334(c)(2). *Conference Report, supra* note 9, at 1-2, 4.

<sup>104</sup> See cases cited *infra* note 119.

<sup>105</sup> See *infra* text accompanying notes 112-21.

<sup>106</sup> The Senate explicitly recognized the “serious constitutional question” concerning the ability of bankruptcy courts to confer jurisdiction over related state law claims that lack an independent basis of federal subject matter jurisdiction. S. REP. NO. 55, 98th Cong., 1st Sess. 19 (1983), reprinted in 94 BANKR. L. REP. (CCH) pt. II (Apr. 22, 1983) [hereafter SENATE REPORT].

<sup>107</sup> *Id.* at 18.

<sup>108</sup> The Senate’s proposed 28 U.S.C. § 1471(h)(2) provided that “the Court shall,

claims related to the bankruptcy petition<sup>109</sup> with an awareness of state and federal comity issues,<sup>110</sup> the Senate concluded that increased deference to state courts would ensure the constitutionality of the bankruptcy system.<sup>111</sup>

Bankruptcy judges relied upon a series of discretionary factors in determining whether to assert jurisdiction over related claims.<sup>112</sup> Related state claims were refused if issues of law were intimately involved with state policies and only tangentially related to the bankruptcy proceeding.<sup>113</sup> Interference with the state judicial process,<sup>114</sup> prejudice to invol-

upon proper motion, abstain from adjudicating" any claim involving the debtor that arises under state law. SENATE REPORT, *supra* note 106, at 107. Although the section does not refer to the power of any party to make such a motion, the Senate Report evidences this intent. *Id.* at 41.

<sup>109</sup> SENATE REPORT, *supra* note 106, at 18. The Senate noted that judicial economy is not always served by retention of state law claims by bankruptcy judges. Unfamiliarity with state law prolongs resolution of the dispute and title 11 cases may not be accorded priority. *Id.* at 19.

<sup>110</sup> Judicial federalism requires respect for a state's interest in determining state law issues. *Id.* at 18-19. Federal decisions on state issues may create competing bodies of law. A party should not be denied the opportunity to pursue a state law claim in state court. *Id.* at 19.

<sup>111</sup> *Id.* at 41.

<sup>112</sup> See *Benchic v. Century Entertainment Corp.* (*In re Century Entertainment Corp.*), 25 Bankr. 502, 505 (Bankr. S.D. Ohio 1982) ("concerns regarding abstention . . . separable from jurisdictional questions"); *Scientific Computers, Inc. v. Neuromedics, Inc.* (*In re Scientific Computers, Inc.*), 20 Bankr. 410, 412 (Bankr. D. Minn. 1982) (unnecessary to "speculate" on extent of federal jurisdiction because of "obligation" to abstain when debtor not a party and no property of debtor involved). Several discretionary factors are commonly cited by the courts. See, e.g., *Fulton v. Mandalay Shores Coop. Hous. Ass'n* (*In re Mandalay Shores Coop. Hous. Ass'n*), 25 Bankr. 533, 536 (Bankr. M.D. Fla. 1982) (completion of discovery and preparation of cases for trial justified remand); *In re Trina-Dee, Inc.*, 14 Bankr. 482, 484 (Bankr. E.D. Pa. 1981) (prejudice to involuntarily removed parties factor to consider in deciding to remand state action); *Hurt v. Cypress Bank*, 9 Bankr. 749, 755 (Bankr. N.D. Ga. 1981) (state actions remanded to avoid interference with state judicial process); *Kishi v. Greco* (*In re Greco*), 3 Bankr. 18, 19-20 (Bankr. D. Hawaii 1979) (inequitable to allow removal of state court summary possession claim against nonbankrupt defendant when cause of action ready for trial).

<sup>113</sup> *Universal Profile, Inc. v. Atlanta Fed. Sav. & Loan Ass'n*, (*In re Universal Profile, Inc.*), 6 Bankr. 194, 196 (Bankr. N.D. Ga. 1980) (counterclaim requesting modification of alimony and child support payments in divorce decree outside jurisdiction of bankruptcy court). See generally COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 3.01, at 3-46.

<sup>114</sup> *Hurt v. Cypress Bank*, 9 Bankr. 749, 755 (Bankr. N.D. Ga. 1981); *Tidwell v. Thomas* (*In re Tidwell*), 4 Bankr. 100, 102 (Bankr. N.D. Tex. 1980).

untarily removed parties,<sup>115</sup> and complete resolution of the state claim prior to removal<sup>116</sup> were also considered in remanding state law claims.

The predominance of state law issues, existence of multiple actions, and the goal of conservation of judicial resources<sup>117</sup> were relevant factors in assessing the practicality of retaining jurisdiction over state law claims. They do not, however, assist in the determination of whether the bankruptcy action and related claims against nondebtor defendants comprise a single constitutional case as required by article III.<sup>118</sup>

Although bankruptcy courts cited the presence of nondebtor defendants as sufficient reason to refuse jurisdiction over related claims,<sup>119</sup> this conclusion was not premised on any standard that indicated concern with the limitations imposed by article III. Decisions centered on the fact that nondebtor defendants are only tangentially related to the

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<sup>115</sup> *Emerald City Records, Inc. v. First Media Corp. (In re Emerald City Records, Inc.)*, 9 Bankr. 319, 320-21 (Bankr. N.D. Ga. 1981) (state claim for malicious prosecution stemming from involuntary bankruptcy proceedings involved four parties that were not involved in bankruptcy litigation); *Kishi v. Greco (In re Greco)*, 3 Bankr. 18, 19-20 (Bankr. D. Hawaii 1979) (inequitable to allow removal of state court summary possession claim against codefendant of bankrupt when cause of action ready for trial).

<sup>116</sup> *Tidwell v. Thomas (In re Tidwell)*, 4 Bankr. 100, 102 (Bankr. N.D. Tex. 1980).

<sup>117</sup> *Midatlantic Nat'l Bank/Citizens v. Comtek Elec., Inc. (In re Comtek Elec., Inc.)*, 23 Bankr. 449, 451 (S.D.N.Y. 1982) (contract action against debtor and nondebtor guarantor remanded on principles of comity, conservation of resources, and presence of multiple actions); *Emerald City Records, Inc. v. First Media Corp. (In re Emerald City Records, Inc.)*, 9 Bankr. 319, 320-21 (Bankr. N.D. Ga. 1981) (remand of state claim for malicious prosecution stemming from involuntary bankruptcy proceedings involving four parties that were not involved in bankruptcy litigation); *Universal Profile, Inc. v. Atlanta Fed. Sav. & Loan Ass'n (In re Universal Profile, Inc.)*, 6 Bankr. 194, 196 (Bankr. N.D. Ga. 1980) (counterclaim requesting modification of alimony and child support payments in divorce decree outside jurisdiction of bankruptcy court).

<sup>118</sup> See *supra* text accompanying notes 46-52.

<sup>119</sup> *Fulton v. Mandalay Shores Coop. Hous. Ass'n (In re Mandalay Shores Coop. Hous. Ass'n)*, 25 Bankr. 533, 536 (Bankr. M.D. Fla. 1982) (suit involving numerous nondebtor defendants should be remanded to state court); *Jensen Elec., Inc. v. American Computer & Telecommunications Corp. (In re American Computer & Telecommunications Corp.)*, 24 Bankr. 150, 151 (Bankr. E.D. Va. 1982) (bankruptcy court lacks subject matter jurisdiction over claim against nondebtor that will not concern assets of debtor); *Heagle v. Haug (In re Haug)*, 19 Bankr. 223, 224 (Bankr. D. Or. 1982) ("tenuous connection" between debtor and controversy against nondebtors insufficient to support jurisdiction under 28 U.S.C. § 1471(b)); *COLLIER ON BANKRUPTCY*, *supra* note 25, ¶ 3.01, at 3-46 (certain civil proceedings have no logical connection to bankruptcy action although debtor is a party); Note, *Limits of Federal Jurisdiction*, *supra* note 27, at 711 (bankruptcy jurisdiction should be limited to actions concerning debtor-creditor relationships).

bankruptcy proceeding<sup>120</sup> or implicate issues outside the expertise of bankruptcy judges.<sup>121</sup>

While this practice is consistent with the general federal procedure of abstention,<sup>122</sup> bankruptcy abstention does more than simply adjust notions of convenience, judicial economy, and fairness to litigants. As the preceding analysis of the application of "related to" jurisdiction in asbestos litigation indicates, bankruptcy jurisdiction hovers on the edge of constitutionality. A decision not to abstain from such a case necessarily implicates decisions of constitutional power.

*Gibbs* identifies the importance of discretionary considerations in determining whether supplemental jurisdiction is appropriate.<sup>123</sup> However, like these discretionary considerations abstention decisions do not address the issue of constitutional power.<sup>124</sup> District judges making an abstention decision under the 1984 amendments should undertake the constitutional analysis as a complement to any statutory decision to ensure that the mandate of *Gibbs* is satisfied.

### B. Constitutional Limitations Are Rarely Considered by Bankruptcy Courts

Although potential limitations on the scope of "related to" jurisdiction have been identified, article III was rarely identified as a relevant consideration. Many bankruptcy judges relied upon the presence of the

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<sup>120</sup> *Fulton v. Mandalay Shores Coop. Hous. Ass'n (In re Mandalay Shores Coop. Hous. Ass'n)*, 25 Bankr. 533, 536 (Bankr. M.D. Fla. 1982); *Jensen Elec., Inc. v. American Computer & Telecommunications Corp. (In re American Computer & Telecommunications Corp.)*, 24 Bankr. 150, 151 (Bankr. E.D. Va. 1982); *Heagle v. Haug (In re Haug)*, 19 Bankr. 223, 224 (Bankr. D. Or. 1982).

<sup>121</sup> *Universal Profile, Inc. v. Atlanta Fed. Sav. & Loan Ass'n (In re Universal Profile, Inc.)*, 6 Bankr. 194, 196 (Bankr. N.D. Ga. 1980) (alimony and child support); COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 3.01, at 3-46.

<sup>122</sup> See generally 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE §§ 4241-4248 (1978) [hereafter 17 WRIGHT, MILLER & COOPER]. Decisions to abstain can be grouped in four categories: to avoid challenges to state action under the federal constitution if issues of state law may be dispositive of the case, *id.* § 4242; to avoid interference with a state's administration of its own affairs, *id.* § 4244; to avoid difficult questions of state law, *id.* § 4246; and when a similar action is pending in state court in which the dispute between parties can be resolved, *id.* § 4247. See *infra* note 183 (limited application of abstention in area of unsettled issues of state law).

<sup>123</sup> *Gibbs*, 383 U.S. at 726; see *supra* text accompanying note 73.

<sup>124</sup> *Gibbs*, 383 U.S. at 725-26; 13 WRIGHT, MILLER & COOPER, *supra* note 13, § 3567, at 448; Matasar, *supra* note 33, at 178.

debtor in the state action to make a "traditional" bankruptcy case<sup>125</sup> and federalize the entire claim. While this approach may be defensible against a debtor defendant,<sup>126</sup> joinder of multiple defendants complicates the issue.<sup>127</sup> Claims against nondebtors would be excluded automatically from the ambit of "related to" jurisdiction, which is stricter than is constitutionally required. Article III requires some scrutiny of the relationship between state and federal claims to answer the requirement that they comprise one constitutional case.<sup>128</sup>

Bankruptcy courts occasionally referred to the labels relied upon to assess the constitutionality of supplemental jurisdiction.<sup>129</sup> These references were generally limited to the discretionary features of these doctrines or simply to the labels of pendent and ancillary jurisdiction.<sup>130</sup>

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<sup>125</sup> *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 264-65 (6th Cir. 1983) (adjudication of products liability actions against debtor defendant within traditional jurisdiction of bankruptcy courts); *Tidwell v. Thomas (In re Tidwell)*, 4 Bankr. 100, 102 (Bankr. N.D. Tex. 1980) (presence of debtor in related state claim is element of relationship test). *But cf.* *Ford Motor Co. v. Transport Indem. Co.*, 508 F. Supp. 1092, 1095 (E.D. Mich. 1981) (absence of one defendant from a claim against second defendant justifies remand); *Fulton v. Mandalay Shores Coop. Hous. Ass'n (In re Mandalay Shores Coop. Hous. Ass'n)*, 25 Bankr. 533, 536 (Bankr. M.D. Fla. 1982) (suit involving nondebtor defendants should not be adjudicated by bankruptcy courts even if debtor indispensable party to some counts of complaint).

<sup>126</sup> *See Williams v. Austrian*, 331 U.S. 642, 658 (1947) (bankruptcy courts have authority to hear suit by trustees in reorganization proceeding against directors of debtor corporation for misappropriation of assets even if no separate ground of federal jurisdiction); *Schumacher v. Beeler*, 293 U.S. 367, 371 (1934) (suit by trustee in bankruptcy against adverse claimant permitted regardless of diversity of citizenship); Note, *Limits of Federal Jurisdiction*, *supra* note 27, at 712 n.49 and cases cited therein.

<sup>127</sup> *See* cases cited *supra* note 119.

<sup>128</sup> *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

<sup>129</sup> *See, e.g., Alioto v. Official Creditor Comm.*, 654 F.2d 664, 670 (9th Cir. 1981) (bankruptcy courts may exercise ancillary jurisdiction over state claims "necessary to the resolution of the bankruptcy proceeding."); *In re Palazzo*, 19 Bankr. 229, 230 (Bankr. M.D. Fla. 1982) (bankruptcy court does not have jurisdiction over claims of nondebtors unless jurisdiction can be sustained on pendent jurisdiction principle); *Heagle v. Haug (In re Haug)*, 19 Bankr. 223, 224 (Bankr. D. Or. 1982) (tradition of *Aldinger v. Howard*, 427 U.S. 1 (1976) a pendent party jurisdiction case, must be considered in bankruptcy context); *Griffith v. Realty Executives, Inc.*, 6 Bankr. 753, 755-56 (Bankr. D.N.M. 1980) (ancillary jurisdiction). *Contra Smith v. American Fin. Sys. (In re Smith)*, 14 Bankr. 712, 719 (Bankr. N.D. Ga. 1981) (pendent jurisdiction doctrine inapplicable in bankruptcy courts).

<sup>130</sup> *See supra* note 129. For example, in *Griffith v. Realty Executives, Inc.* 6 Bankr. 753, 755-56 (Bankr. D.N.M. 1980), ancillary jurisdiction was relied upon to justify the retention of cross-claims and counterclaims for indemnity and contribution. The court concluded that considerations of judicial economy, consistency in results, and prompt resolution of disputes were shared by both ancillary principles and the bankruptcy re-

Determination of jurisdictional issues through conclusory labels or on the basis of the status of the parties fails to recognize the flexibility available in article III.<sup>131</sup> Some claims against nonbankrupt defendants may be proper subjects for adjudication by federal courts. Implicit in the creation of the three part *Gibbs* analysis<sup>132</sup> is the assumption that a fixed standard is useful in achieving the appropriate balance between respect for article III and the desire to resolve all related litigation most efficiently. By incorporating a similar set of standards into the analysis of whether claims are related to a bankruptcy petition, consistent protection of article III values will be ensured. When accompanied by such an analysis, reliance on discretionary factors via the abstention doctrine would no longer be objectionable.

### III. A PROPOSED ANALYSIS TO LIMIT THE SCOPE OF "RELATED TO" JURISDICTION

#### A. *The Appropriate Limitations on "Related To" Jurisdiction*

*Gibbs* implemented a three part test that defines the constitutional limits of federal power to adjudicate state law claims. Although Congress is constitutionally empowered to extend "related to" jurisdiction to these limits, the explicit priority of efficient administration of the debtor's estate is not served by such an interpretation. As the degree of factual identity between claims involving the debtor and those involving third parties decreases, efficiency in administering the debtor's estate is inevitably reduced. Liquidation may be delayed while third party claims are litigated. Judicial energy must be diverted to supervision of these claims as well. "Related to" jurisdiction should be defined more narrowly than *Gibbs*, limiting jurisdiction to claims with greater factual identity than required under the common nucleus test.<sup>133</sup>

*Gibbs* also identifies the importance of discretionary considerations in deciding whether to retain jurisdiction over state law claims.<sup>134</sup> Discre-

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moval statute. However, one court explicitly rejected the constitutional limitations imposed by these doctrines. *Smith v. American Fin. Sys. (In re Smith)*, 14 Bankr. 712, 719 (Bankr. N.D. Ga. 1981).

<sup>131</sup> This flexibility is inherent in the power of federal courts to adjudicate some state law claims between nondiverse parties. *See supra* note 45.

<sup>132</sup> *Gibbs*, 383 U.S. at 725 (common nucleus of operative fact, ordinarily expect to try claims together, substantial federal claim).

<sup>133</sup> Minimal factual identity is generally considered sufficient under *Gibbs*. *See supra* text accompanying notes 61-62.

<sup>134</sup> *Gibbs*, 383 U.S. at 726; *see supra* text accompanying note 73.

tionary factors do not affect the constitutional limits of federal power.<sup>135</sup> They are, however, of primary significance in jurisdictional decisions.<sup>136</sup> Courts will refuse to exercise jurisdiction on discretionary grounds even if constitutional requirements could have been satisfied.<sup>137</sup> Difficulties arise when discretionary factors are given varying degrees of respect by different courts.<sup>138</sup> Litigants are unable to predict with any certainty whether they will be required or even allowed to resolve disputes in a federal forum.<sup>139</sup> Forum shopping by both plaintiffs and defendants is likely, and courts will be confused concerning the appropriate tests to apply.

Bankruptcy jurisdiction is one of the more disruptive exercises of supplemental jurisdiction by federal courts. Litigation proceeding in other courts is suspended under the automatic stay,<sup>140</sup> or taken out of the state forum altogether.<sup>141</sup> To alleviate this disruption and ensure respect for the independence of state courts, certain discretionary concerns should be incorporated into the analysis of "related to" jurisdic-

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<sup>135</sup> See *supra* note 46.

<sup>136</sup> See Matasar, *supra* note 33, at 178-81.

<sup>137</sup> See, e.g., Moor v. County of Alameda, 411 U.S. 693, 716 (1973) (refusal of pendent jurisdiction because of potential for jury confusion); *In re Palazzo*, 19 Bankr. 229, 230 (Bankr. M.D. Fla. 1982) (related claims scheduled for immediate trial in district court therefore abstention appropriate); see also cases cited *supra* note 74.

<sup>138</sup> Compare *Fulton v. Mandalay Shores Coop. Hous. Ass'n* (*In re Mandalay Shores Coop. Hous. Ass'n*), 25 Bankr. 533, 536 (Bankr. M.D. Fla. 1982) (suit involving nondebtors should be remanded), *Jensen Elec., Inc. v. American Computer & Telecommunications Corp.* (*In re American Computer & Telecommunications Corp.*), 24 Bankr. 150, 151 (Bankr. E.D. Va. 1982) (same) *Scientific Computers, Inc. v. Neuromedics, Inc.* (*In re Scientific Computers, Inc.*), 20 Bankr. 410, 412 (Bankr. D. Minn. 1982) (same) and *Heagle v. Haug* (*In re Haug*), 19 Bankr. 223, 225 (Bankr. D. Or. 1982) (same) with *Crown Cent. Petroleum Corp. v. Wechter* (*In re General Oil Distrib., Inc.*), 21 Bankr. 888, 891-92 (Bankr. E.D. N.Y. 1982) (jurisdiction over claims against nondebtors retained); compare *Midatlantic Nat'l Bank/Citizens v. Comtek Elec., Inc.* (*In re Comtek Elec., Inc.*), 23 Bankr. 449, 451 (Bankr. S.D.N.Y. 1982) (state law issue should be resolved by state court), *Emerald City Records, Inc. v. First Media Corp.* (*In re Emerald City Records, Inc.*), 9 Bankr. 319, 320-21 (Bankr. N.D. Ga. 1981) (same), *Universal Profile, Inc. v. Atlanta Fed. Sav. & Loan Ass'n* (*In re Universal Profile, Inc.*), 6 Bankr. 194, 196 (Bankr. N.D. Ga. 1980) (same), and *Family Sav. & Loan Ass'n v. Calabria* (*In re Calabria*), 5 Bankr. 73, 75 (Bankr. D. Conn. 1980) (same) with *In re Trina-Dec, Inc.*, 14 Bankr. 482, 484 (Bankr. E.D. Pa. 1981) (debtor's claim against attorney for negligence and malpractice retained) and *Westinghouse Credit Corp. v. Yearly* (*In re Brothers Coal Co.*), 6 Bankr. 567, 571 (Bankr. W.D. Va. 1980) (state action for payment on guarantee of indebtedness retained).

<sup>139</sup> For an example of this problem, see *infra* text accompanying notes 186-87.

<sup>140</sup> 11 U.S.C. § 362(b) (1982); see *supra* note 28.

<sup>141</sup> 28 U.S.C. § 1478(a) (1982); see *supra* note 28.

tion.<sup>142</sup> Although this approach is not constitutionally required,<sup>143</sup> greater consistency in the application of "related to" jurisdiction will be achieved than is possible through reliance upon selective abstention.<sup>144</sup>

The standards proposed in the following part of this Comment parallel the analysis implemented in *Gibbs*.<sup>145</sup> However, requiring greater identity of factual issues and mandatory reliance on particular discretionary factors diverges from the *Gibbs* technique. These standards are intended to balance congressional concerns over efficient resolution of the debtor's estate with concerns for state and federal comity. Because the standards are somewhat narrower than *Gibbs*, they will pass constitutional scrutiny. This limitation resolves the growing concern over the constitutionality of "related to" jurisdiction.<sup>146</sup>

### B. Four Proposed Standards to Determine Whether Claims are Related To a Bankruptcy Petition

#### 1. Sufficient Effect on Distribution of the Debtor's Estate

"Related to" jurisdiction rests on a belief that efficient resolution of a debtor's estate requires adjudication of all claims involving the debtor in one forum.<sup>147</sup> Congress intentionally rejected rigid jurisdictional classifications in favor of a flexible standard that would permit jurisdiction over such claims.<sup>148</sup> This flexibility is undermined if state claims that

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<sup>142</sup> See *infra* text accompanying notes 179-211.

<sup>143</sup> Discretionary concerns are not part of the three part test outlined in *Gibbs*. See *supra* note 73.

<sup>144</sup> *Contra* SENATE REPORT, *supra* note 106, at 41; Note, *Selective Exercise of Jurisdiction in Bankruptcy Related Civil Proceedings*, 59 TEX. L. REV. 325, 326, 335 (1981) (abstention "in the interest of justice" will promote efficient operation of bankruptcy system while jurisdictional standards are too rigid) [hereafter Note, *Bankruptcy Jurisdiction*].

<sup>145</sup> *Gibbs* requires that the federal claim be substantial, that state and federal claims share a common nucleus of operative fact, and that the plaintiff would ordinarily expect to try the claims together. *Gibbs*, 383 U.S. at 725.

<sup>146</sup> See *supra* notes 106-11.

<sup>147</sup> See *supra* note 95.

<sup>148</sup> 28 U.S.C. § 1471 (1982) abolished the earlier distinction between summary and plenary jurisdiction as a basis for determining subject matter jurisdiction over related state claims. Previously, summary jurisdiction could be asserted over any controversy that involved property in actual or constructive possession of the court. Plenary jurisdiction was invoked for issues not immediately related to the bankruptcy proceeding, or involving property in the possession of a third party. Consent of the parties was a prerequisite to the exercise of jurisdiction over plenary disputes. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 54 (1982). See generally

have little or no effect on the distribution of the debtor's estate are transferred to district court under bankruptcy jurisdiction.

To fall within the range of "related to" jurisdiction, the outcome of the state claims must have a direct impact on the debtor's estate.<sup>149</sup> Rather than extend jurisdiction to any claims that could conceivably affect a debtor's estate,<sup>150</sup> direct and foreseeable impact on the reorganization proceedings should be required.<sup>151</sup> This limitation would further the congressional goal of facilitating distribution of the debtor's estate by limiting "related to" jurisdiction to claims that are actually implicated in the reorganization proceedings.

The easiest case for finding sufficient effect on the debtor's estate exists when property of the debtor is involved in the related claims. If the debtor's estate is either augmented or decreased by the outcome of the state litigation, "related to" jurisdiction is appropriate.<sup>152</sup> A more

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COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 3.01, at 3-24. These amendments were to take effect on April 1, 1984. Pub. L. No. 95-598, tit. IV, § 402(b), 92 Stat. 2682 (1978). During the transitional period, bankruptcy judges were granted full jurisdictional powers under 28 U.S.C. § 1471. Pub. L. No. 95-598, tit. IV, § 405, 92 Stat. 2685 (1978). Jurisdictional provisions are found in title II, § 241(a), codified at 28 U.S.C. §§ 1471-1482 (1982). *See generally* COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 3.01, at 3-8 to 3-10.

<sup>149</sup> *See* Jensen Elec., Inc. v. American Computer & Telecommunications Corp. (*In re* American Computer & Telecommunications Corp.), 24 Bankr. 150, 151 (Bankr. E.D. Va. 1982); Heagle v. Haug (*In re* Haug), 19 Bankr. 223, 224 (Bankr. D. Or. 1982); Murdock v. Allina (*In re* Curtina Int'l), 15 Bankr. 993, 995 (Bankr. S.D.N.Y. 1981); Nelson White Constr. Management Corp. v. McConaghy (*In re* McConaghy), 15 Bankr. 480, 481 (Bankr. E.D. Va. 1981).

<sup>150</sup> *See supra* note 101.

<sup>151</sup> *See* Albany Bank & Trust Co. v. Jenner & Block, (*In re* Systems Mktg. Consol.), 19 Bankr. 519, 521 (Bankr. N.D. Ill. 1982) (disposition of related claim would have no effect on reorganization proceedings); Heagle v. Haug (*In re* Haug), 19 Bankr. 223, 225 (Bankr. D. Or. 1982) (tenuous connection of controversy to bankruptcy proceedings insufficient); Maddox v. United States (*In re* Lunsford), 12 Bankr. 762, 764 (Bankr. M.D. Ala. 1981) (same); Universal Profile, Inc. v. Atlanta Fed. Sav. & Loan Ass'n (*In re* Universal Profile, Inc.), 6 Bankr. 190, 193 (Bankr. N.D. Ga. 1980) (tenuous connection of controversy to debtor and administration of estate).

<sup>152</sup> 28 U.S.C. § 1471(e) (1982) grants exclusive jurisdiction over all property of the debtor as soon as the bankruptcy suit is commenced, a procedure continued under the Bankruptcy Amendments of 1984. CONFERENCE REPORT, *supra* note 9, at 2 (28 U.S.C. § 1334(d)). *See also* Williams v. Austrian, 331 U.S. 642, 658 (1947) (misappropriation of debtor's assets); Schumacher v. Beeler, 293 U.S. 367, 368 (1934) (suit to enjoin sale of property of debtor). *But see* Desmarais v. Northern Nat'l Bank (*In re* Desmarais), 33 Bankr. 27, 29 (Bankr. D. Me. 1983) (jurisdiction over declaratory judgment action concerning debtor's property refused because of state expertise in real property area).

difficult situation arises when the debtor's liability depends upon resolution of third party claims against nondebtors. Any third party claim hinges on an initial determination of liability between both debtor and nondebtor defendants. Liability is not governed by bankruptcy law, and rights of the parties to damages will not be affected by bankruptcy rulings.<sup>153</sup> Only the amount of relief available from the debtor will be determined under bankruptcy procedures.

For example, assume the plaintiff is a welder using asbestos gloves and an asbestos suit for protection from heat. Plaintiff welds in ship compartments with exposed asbestos insulation in the ceiling. The gloves were manufactured by *A*, the suit by *B*, and the insulation by *C*. Plaintiff develops cancer and joins all three manufacturers in a single suit for personal injuries.

Although the plaintiff was exposed to more than one toxic substance, the resulting disease constitutes a single, indivisible injury.<sup>154</sup> A plaintiff's exposure to cancer causing substances is therefore a single harm for which all the defendants are potentially liable. Under the theory of joint and several liability, any defendant can be held responsible for the entire amount of damages necessary to compensate the plaintiff for harm sustained.<sup>155</sup> Thus, even if *C* is partly culpable, *A* and *B* can be held liable for the entire harm. *A* and *B* will have a cause of action for

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<sup>153</sup> See *supra* note 66.

<sup>154</sup> *Mabray v. Velsicol Chem. Corp.*, 480 F. Supp. 1240, 1244 (W.D. Tenn. 1979) (corporation and city created single harm of injury to plaintiff and fetus from toxic chemicals although negligence derived from independent acts); *Montrey v. Peter J. Schweitzer, Inc.*, 105 F. Supp. 708, 712 (D.N.J. 1952) (personal and property damage from river pollution single wrong created by four defendants); *Silverman v. Swift & Co.*, 100 F. Supp. 961, 963 (D. Conn. 1951) (injury from trichinosis single injury although defendants sued on distinct causes of action). *But cf.* *Forbes v. American Tobacco Co.*, 37 F.R.D. 530, 532 (E.D. Wis. 1965) (inhalation of cigarettes and toxic fumes that caused pulmonary emphysema and heart condition create separate and independent claims). See generally RESTATEMENT (SECOND) OF TORTS § 433A (1965). Punitive damages claims against certain defendants should not change this result. Differences in intent between joint tortfeasors are immaterial in assessing liability for the entire harm. *Id.* at 879 comment a; see also *Union Planters Nat'l Bank v. CBS*, 557 F.2d 84, 90 (6th Cir. 1977); *Simon v. Gulf Coast Rental Tool Serv.*, 408 F. Supp. 911, 916 (N.D. Tex. 1976). *But cf.* *Jacks v. Torrington Co.*, 256 F. Supp. 282, 285 (D.S.C. 1966) (claim against party for punitive damages arising from reckless or wilful conduct entirely separate from claim for actual damages arising from mere negligence).

<sup>155</sup> *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1096 (5th Cir. 1973) (asbestos defendants joint tortfeasors), *cert. denied*, 419 U.S. 869 (1974); *Migues v. Nicolet Indus.*, 493 F. Supp. 61, 64 (E.D. Tex. 1980) (same), *rev'd in part sub nom.* *Migues v. Fibreboard Corp.*, 662 F.2d 1182 (5th Cir. 1981). See generally PROSSER & KEETON, *supra* note 41, at 327-28.

contribution against *C* for its measure of fault.<sup>156</sup>

If *C* files for bankruptcy and is no longer a party to the state action, *A* and *B* will argue that their third party claims for contribution will have a sufficient effect on the debtor's estate to warrant exercise of "related to" jurisdiction.<sup>157</sup> Successful resolution of a contribution claim requires some reimbursement from the debtor's estate and directly implicates the debtor's property. When a contribution claim is satisfied, the size of the debtor's estate is reduced. The codefendants will have to stand in line with other creditors to receive their pro rata share of the debtor's property. Thus, it appears that a claim for contribution has a sufficient effect on the debtor's estate to warrant the exercise of "related to" jurisdiction.<sup>158</sup>

Satisfaction of the sufficient effect requirement should not pose unreasonable restrictions on the exercise of "related to" jurisdiction.<sup>159</sup> Many third party claims will involve contribution or indemnity actions against the debtor and will have a direct impact on the property of the debtor. When third party claims are essentially private disputes be-

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<sup>156</sup> PROSSER & KEETON, *supra* note 41, at 341.

<sup>157</sup> See *Griffith v. Realty Executives, Inc.*, 6 Bankr. 753, 756 (Bankr. D.N.M. 1980) (jurisdiction over cross-claims and counterclaims for indemnity and contribution against nondebtors retained to prompt speedy resolution and avoid inconsistent results); *cf. GAF Corp. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 26 Bankr. 405, 408 (Bankr. S.D.N.Y. 1983) (basis for argument of nondebtors for extension of automatic stay).

<sup>158</sup> See, e.g., *Griffith v. Realty Executives, Inc.*, 6 Bankr. 753, 756 (Bankr. D.N.M. 1980). A possible impediment to this conclusion is the traditional hesitancy of courts to premise federal jurisdiction on anything but the allegations made in the plaintiff's complaint. The issue often arises with attempts to remove by third party defendants. See, e.g., *Luebbe v. Presbyterian Hosp.*, 526 F. Supp. 1162, 1164-65 (S.D.N.Y. 1981) (third party product liability claim not removable); *Chase v. North Am. Sys.*, 523 F. Supp. 378, 382 (W.D. Pa. 1981) (product manufacturer brought in on third party complaint by original defendant not allowed to remove); 14 WRIGHT, MILLER & COOPER, *supra* note 16, § 3724, at 645. This approach is not constitutionally mandated, but rather evolved from the judicial interpretation given to the statutory grant of arising under jurisdiction. *Verlinden B.V. v. Central Bank*, 103 S. Ct. 1962, 1972 (1983). Similarly, "related to" jurisdiction over a contribution or indemnity claim should not be constitutionally prohibited.

<sup>159</sup> *Contra Crown Cent. Petroleum Corp. v. Wechter (In re General Oil Distrib.)*, 21 Bankr. 888, 892 n.13 (Bankr. E.D.N.Y. 1982) (bankruptcy jurisdiction should extend to any dispute "which might affect the bankruptcy proceeding"); COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 3.01, at 3-49 (appropriate criterion should evolve from conceivable effect standard); Kennedy, *supra* note 25, at 288 (1979) (boundaries of bankruptcy jurisdiction not "amenable to elaboration by rules"); Note, *Bankruptcy Jurisdiction*, *supra* note 144, at 335 ("rigid jurisdictional categories . . . [will] impair the efficiency of the bankruptcy system").

tween private parties, the sufficient effect test narrows the scope of "related to" jurisdiction appropriately.<sup>160</sup>

Although claims for indemnity and contribution will decrease the size of the debtor's estate,<sup>161</sup> bankruptcy law is only implicated after the right to the debtor's property has been established.<sup>162</sup> If this determination requires extensive factual findings and complex legal theories, distribution of the debtor's assets could be seriously delayed. Thus, the sufficient effect test is not of itself an adequate protection for "related to" jurisdiction.

## 2. Fact Relatedness<sup>163</sup> to the Bankruptcy Petition

By virtue of liberal joinder rules, parties joined in the same action do not always base their claims on an identical set of operative facts. If the right to relief arises out of the "same . . . or series of transactions or occurrences" and some common question of law or fact unites the parties, joinder will be permissible.<sup>164</sup> Thus, multiple defendants can be joined on claims for exposure to asbestos products on the theory that a single disease was caused by use of a variety of products during the plaintiff's employment. When a single plaintiff brings suit, the type of work, time, and manner of exposure will be common to each case.

There are, however, significant issues that vary from case to case. Product identification may require extensive testimony by experts and coworkers for one manufacturer, while the plaintiff easily recognizes

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<sup>160</sup> See *Fulton v. Mandalay Shores Coop. Hous. Ass'n (In re Mandalay Shores Coop. Hous. Ass'n)*, 25 Bankr. 533, 536 (Bankr. M.D. Fla. 1982) (suit between nondebtor plaintiffs and nondebtor defendants); *Jensen v. American Computer & Telecommunications Corp. (In re American Computer & Telecommunications Corp.)*, 24 Bankr. 150, 151 (Bankr. E.D. Va. 1982) (suit against nondebtor as joint tortfeasor with debtor did not allege any financial entanglement or concert of action).

<sup>161</sup> See *supra* note 66.

<sup>162</sup> The right to the debtor's property depends upon success on a contribution or indemnity claim. For a discussion of such claims, see PROSSER & KEETON *supra* note 41, at 341. For a discussion concerning the involvement of bankruptcy law in the satisfaction of claims for contribution or indemnity, see *supra* notes 38-39.

<sup>163</sup> Fact relatedness has been equated with the common nucleus of operative fact requirement of *Gibbs*. Matasar, *supra* note 33, at 128. Fact relatedness has been adopted in this context to distinguish from the analysis employed in *Gibbs*. See *supra* text accompanying notes 59-62.

<sup>164</sup> See, e.g., CAL. CIV. PROC. CODE § 378(a)(1) (West 1973); N.Y. CIV. PRAC. LAW § 1002(a) (McKinney 1976); see also FED. R. CIV. P. 20(A). See generally 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1653, at 271-72, 276 (1975) [hereafter 7 WRIGHT & MILLER]; *supra* note 70.

the identity of another.<sup>165</sup> When claims for indemnity are introduced, an additional set of factual circumstances concerning knowledge and communication among manufacturers must be introduced.<sup>166</sup>

Diversion of attention away from the administration of the debtor's estate to resolve these state products liability issues will undermine the goal of efficiency. Thus, a state law claim should only be considered related to the bankruptcy action if the claims are logically related or share a reasonable nexus to the bankruptcy action.<sup>167</sup> While this potential standard has been identified, no efforts have been made to define its parameters.

The fact relatedness test should focus on the evidence necessary to establish liability on all claims joined in a single action.<sup>168</sup> If state claims share a factual nexus with the bankruptcy proceeding, they would fall within the scope of "related to" jurisdiction. In order to limit "related to" jurisdiction, the common factual core must predominate over questions unique to individual defendants.

This standard should not be construed as a requirement of complete factual identity. Joinder of multiple defendants always implicates at least some factual discrepancy. A per se exclusion of multiple party suits goes further than is required by article III and is more restrictive than necessary to protect congressional intent.<sup>169</sup>

Preservation of scarce judicial resources was an explicit concern of the 1978 Bankruptcy Reform Act.<sup>170</sup> Thus, the amount of judicial energy that would be diverted to resolve state claims is a relevant element in the fact relatedness test. If litigation is technical, or involves numerous issues that do not concern the debtor, jurisdiction should be denied.

The factual issues in asbestos litigation demonstrate the importance

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<sup>165</sup> See *supra* note 65.

<sup>166</sup> See *supra* note 66.

<sup>167</sup> *Heagle v. Haug (In re Haug)*, 19 Bankr. 223, 224 (Bankr. D. Or. 1982); *Ng v. Pacheco (In re Chong)*, 12 Bankr. 255, 257 (Bankr. D. Hawaii 1981); COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 3.01, at 3-46.

<sup>168</sup> Cf. *supra* note 61 (analysis for the common nucleus of operative fact test and comparison of cases interpreting *Gibbs* to require factual identity or some evidentiary overlap).

<sup>169</sup> Requiring complete factual identity would actually fly in the face of congressional intent. Rigid jurisdictional classifications were intentionally rejected by Congress. See *supra* notes 95, 148.

<sup>170</sup> *In re Trina-Dee, Inc.*, 14 Bankr. 482, 484 (Bankr. E.D. Pa. 1981); *Hurt v. Cypress Bankr.*, 9 Bankr. 749, 754 (Bankr. N.D. Ga. 1981); *Westinghouse Credit Corp. v. Yeary (In re Brothers Coal Co.)*, 6 Bankr. 567, 571 (Bankr. W.D. Va. 1980); H.R. REP. NO. 598, 95th Cong., 1st Sess. 45, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6006 (1978).

of the fact relatedness limitation. Although each third party claim has a sufficient effect on the debtor's estate, factual issues multiply with the joinder of each manufacturer.<sup>171</sup> Evidence necessary to establish product identification, knowledge of the manufacturer, and product warnings must be established through ten to twenty independent sets of facts for each case. Legal theories may vary by defendant as well. Liability of some manufacturers depends upon a finding of successor corporation liability, while other companies can be held directly liable.<sup>172</sup> When the balance tips away from fact relatedness, the plaintiff's claims against nondebtor defendants are not within the appropriate scope of "related to" jurisdiction.

Claims of nonbankrupt defendants against the debtor for contribution or indemnity may impose less of an evidentiary burden than the underlying liability claims. If all defendants have been found liable on a single judgment, the pro rata share of the debtor defendant can be easily established.<sup>173</sup> Evidence necessary to prevail on an indemnity theory may be premised upon some of the same evidence the plaintiff uses to establish liability against the bankrupt manufacturer. For example, assume that *C* in the preceding hypothetical also manufactured the insulation used by *A* to produce its asbestos gloves. Both the plaintiff and *A* will introduce evidence tending to establish *C*'s knowledge of asbestos hazards. Supplier identification should not pose the proof difficulties inherent in the plaintiff's cause of action, assuming accurate business records are available. Thus, the indemnity claims share a sufficient factual nexus to fall within "related to" jurisdiction.

Although the third party claims are factually related to the bankruptcy petition, this should not permit the nonbankrupt defendants to carry the primary liability claims in on the coattails of these actions. As illustrated above, the delay in resolution of the Chapter 11 petition would be extreme if such action were allowed. Although fairness to the defendant should be considered, rights to indemnity or contribution can be protected without removal of the underlying liability claims under bankruptcy jurisdiction.<sup>174</sup>

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<sup>171</sup> See *supra* note 65.

<sup>172</sup> See, e.g., Special Project, *supra* note 63, at 832-34 and cases cited therein.

<sup>173</sup> PROSSER & KEETON, *supra* note 41, at 341.

<sup>174</sup> A detailed discussion of procedural methods to resolve the contribution or indemnity claims is beyond the scope of this Comment. For one proposal, see Note, *The Manville Bankruptcy*, *supra* note 8, at 1129-31, 1138-41 (suggests that individual claims against debtor be estimated by state court with ceiling of debtor's liability set by bankruptcy court). Under the broad equitable powers granted to bankruptcy judges in 11 U.S.C. § 105(a) (1982) and the right granted to creditors to approve the debtor's

An alternative approach to the fact relatedness analysis is to limit "related to" jurisdiction to claims for relief which arise from a single wrong or an interlocked series of transactions.<sup>175</sup> If claims meet this standard, the entire suit should be removed.<sup>176</sup> Damage arising from a single incident does not preclude satisfaction of this test merely because more than one party is potentially at fault.<sup>177</sup> Thus, claims against multiple defendants in the asbestos litigation would be within the scope of "related to" jurisdiction under this theory.<sup>178</sup>

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plan for reorganization by 11 U.S.C. § 1126 (1982), it is probable that the creditors' interests will be adequately protected.

<sup>175</sup> See *Ford Motor Co. v. Transport Indem. Co.*, 508 F. Supp. 1092, 1095 (E.D. Mich. 1981); COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 3.01, at 3-69. This approach derives from the interpretation of the separate and independent claims standard for civil removal, 28 U.S.C. § 1441(c) (1982), in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 14 (1951).

<sup>176</sup> COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 3.01, at 3-69.

<sup>177</sup> *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 16 (1951) (claims against three defendants for failure to compensate for property damage not separate and independent when damage caused by one fire); *Union Planters Nat'l Bank v. CBS*, 557 F.2d 84, 89 (6th Cir. 1977) (joinder of contract and tort claims against different defendants does not render claim separate and independent when there is single injury from interrelated events); *Willoughby v. Sinclair Oil & Gas*, 188 F.2d 902, 903 (10th Cir. 1951) (independent negligence of three defendants with regard to propane pump not separate and independent when single harm resulted); *Edwards v. E.I. DuPont De Nemours & Co.*, 183 F.2d 165, 169 (5th Cir. 1950) (action against two sellers of dynamite not separate and independent when single explosion caused single injury). *But cf.* *Climax Chem. Co. v. C.F. Braun & Co.*, 370 F.2d 616, 619 (10th Cir.) (negligence of several contractors in performance of construction contracts separate and independent where only connection object constructed), *cert. denied*, 386 U.S. 981 (1966); *Lemke v. St. Margaret Hosp.*, 552 F. Supp. 833, 841 (N.D. Ill. 1982) (negligence of school in allowing injury to plaintiff and subsequent negligence of hospital personnel required vindication of distinct right); *Twentieth Century Fox Film Corp. v. Taylor*, 239 F. Supp. 913, 917 (S.D.N.Y. 1965) (liability on contract required distinct factual allegations rendering claims against two defendants separate and independent).

<sup>178</sup> While the tendency to borrow from the civil removal standard appears logical, the application of the separate and independent claims standard in bankruptcy litigation actually turns the *Finn* analysis on its head. In civil removal, only claims that are separate and independent can be removed. See 28 U.S.C. § 1441(c) (1982); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 11-12 (1951). For bankruptcy removal, only claims that are not separate and independent could be removed in their entirety. COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 3.01, at 3-69. In addition, the congressional motivation underlying the two statutes is diametrically opposed. 28 U.S.C. § 1441(c) (1982) was enacted to limit the flow of cases to federal court. See *supra* note 16. 28 U.S.C. § 1478 (1982) was enacted to facilitate the removal of cases to federal court. See *supra* note 95. Thus, attempting to bend the separate and independent claims analysis to fit bankruptcy jurisdiction is illogical.

The primary problem with this approach is its lack of flexibility. Systematic consideration of the impact of jurisdiction on the reorganization proceedings is avoided as long as claims are against joint tortfeasors. The factual relation of the claims and the time necessary to resolve them is similarly ignored. Thus, while the procedure provides some standard to limit the flow of cases to district court under bankruptcy jurisdiction, it is inadequate to protect the policies underlying "related to" jurisdiction.

### 3. Areas of Particular State Interest

Bankruptcy judges traditionally abstained from "related" claims when complex issues of state law were raised in the proceedings.<sup>179</sup> The Supreme Court ratified this procedure in *Thompson v. Magnolia Petroleum Co.*<sup>180</sup> Abstention from an issue concerning property ownership of right of way lands was appropriate because state law on the subject was unsettled.<sup>181</sup> This principle has been construed to justify abstention when state courts have a particular interest in the substantive law underlying the related claims.<sup>182</sup>

Although judicial attitudes are changing, outside the bankruptcy context abstention on the grounds of an unsettled issue of state law is generally rejected by federal courts in favor of the alternative procedure of certification.<sup>183</sup> While certification may be adequate protection for state

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<sup>179</sup> See generally 17 WRIGHT, MILLER & COOPER, *supra* note 122, § 4246, at 493; Note, *Bankruptcy Jurisdiction*, *supra* note 144, at 336-37; cf. *Terrace Lawn Memorial Gardens v. A.H. Doty & Assoc.*, 256 F.2d 398, 401 (9th Cir. 1958) (abstention appropriate if legal issues of "distinctively local cast"); *Desmarais v. Northern Nat'l Bank (In re Desmarais)*, 33 Bankr. 27, 29 (Bankr. D. Me. 1983) (real property is area of state expertise); *Universal Profile, Inc. v. Atlanta Fed. Sav. & Loan Ass'n (In re Universal Profile, Inc.)*, 6 Bankr. 194, 196 (Bankr. N.D. Ga. 1980) (alimony and child support issues outside expertise of bankruptcy judges).

<sup>180</sup> 309 U.S. 478, 483 (1940).

<sup>181</sup> *Id.* at 484.

<sup>182</sup> See, e.g., *Terrace Lawn Memorial Gardens v. A.H. Doty & Assoc.*, 256 F.2d 398, 401-02 (9th Cir. 1958) (state issues concerning usurious interest, stock holdings, stock holder status, and foreclosure proceedings); *Desmarais v. Northern Nat'l Bank (In re Desmarais)*, 33 Bankr. 27, 29 (Bankr. D. Me. 1983) (real property law); *Universal Profile, Inc. v. Atlanta Fed. Sav. & Loan Ass'n (In re Universal Profile, Inc.)*, 6 Bankr. 194, 196 (Bankr. N.D. Ga. 1980) (alimony and child support).

<sup>183</sup> See, e.g., *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 816 (1976); *Meredith v. City of Winter Haven*, 320 U.S. 228, 236-37 (1943); *Martin v. State Farm Mut. Auto. Ins. Co.*, 375 F.2d 720, 722 (4th Cir. 1967). See generally 17 WRIGHT, MILLER & COOPER, *supra* note 122, § 4246, at 493-502. *But see Fortin v. Commissioner of the Mass. Dep't of Public Welfare*, 692 F.2d 790, 798 (1st Cir. 1982) (federal court has discretionary power to abstain from deciding unsettled issue of state law). However, other courts continue to narrowly construe abstention on the grounds of

independence in the context of general civil litigation, the peculiar nature of bankruptcy jurisdiction warrants a more direct measure of protection. Removal of claims initiated in state court directly interferes with the state judicial process by abrogating the state's authority to adjudicate the dispute. The disruption to state judicial machinery is heightened by the possibility of removal at any stage of the state proceeding.<sup>184</sup> A state's concern for uniform application of law is not the only interest trammelled upon by this procedure. State judges may have spent a significant amount of time resolving motions, supervising pre-trial proceedings and settlements, and preparing for trial. In the area of toxic tort litigation, cases may be assigned to particular judges who will develop a special expertise in the technical aspects of the factual issues surrounding liability.<sup>185</sup>

Reliance on the selective abstention practice to protect these state interests is inadequate. District judges may disagree about the primacy of a state's interest in a particular case. Because abstention decisions are insulated from appellate review,<sup>186</sup> serious problems of inconsistency may result. For example, a judge in the Northern District of California may conclude that state law concerning market share liability<sup>187</sup> in the

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unsettled state law. *See, e.g.*, *Thomas v. Barry*, 729 F.2d 1469, 1471 (D.C. Cir. 1984). Certification is clearly the procedure to follow in such circumstances. *Lehman Bros. v. Schein*, 416 U.S. 386 (1974). Concerning the procedure of certification, see generally 17 WRIGHT, MILLER & COOPER, *supra* note 122, § 4248.

<sup>184</sup> 28 U.S.C. § 1478(a) (1982) permits removal as long as bankruptcy courts have jurisdiction over the cause of action. 28 U.S.C. § 1471 (1982) only requires the presence of a case under title 11, which can arise at any time. *Compare* 28 U.S.C. § 1446(b) (1982) (petition for removal in civil case must be filed within 30 days of receipt of pleading indicating basis for removal) *with* Bankr. Rule 9027(a)(2) (Aug. 1, 1983), *reprinted in* 94 BANKR. L. REP. (CCH) 87 (Extra Ed. April 29, 1983) (application for removal must be filed no later than 90 days after order for relief, or 30 days after order terminating stay, or 30 days after qualification of trustee in reorganization case); *see also* *Hurt v. Cypress Bank*, 9 Bankr. 749, 755 (Bankr. N.D. Ga. 1981); *Tidwell v. Thomas (In re Tidwell)*, 4 Bankr. 100, 102 (Bankr. N.D. Tex. 1980).

<sup>185</sup> *See, e.g.*, *Asbestos Litig. Rep. (Andrews)* 6384, 6385 (March 25, 1983) (Judicial Administration Working Group on Asbestos Litigation proposes assigning asbestos cases within one court to single judge or particular group of judges) (copy on file at U.C. Davis Law Review office); *accord* Joint Order Appointing Special Masters, *In re Ohio Asbestos Litig. (N.D. Ohio & Ct. C. P. Cuyahoga County, Ohio 1983)* (Lambros, District Judge and McMonagle, Common Pleas Judge), *reprinted in* *Asbestos Litig. Rep. (Andrews)* 6741 (June 10, 1983) (special masters appointed to coordinate management of litigation in both courts and expedite pre-trial and trial procedure) (copy on file at U.C. Davis Law Review office).

<sup>186</sup> *See supra* note 103.

<sup>187</sup> Market share liability allows recovery if the plaintiff joins a "substantial share"

asbestos context is unsettled and abstain from related claims. Her counterpart in the Southern District of California may decide that market share liability is clearly applicable under California precedent and retain jurisdiction over related claims. Neither decision is subject to review. To avoid these inconsistencies, consideration of the state's interest in the substantive law underlying the related claims should be incorporated in the jurisdictional test for "related to" jurisdiction. This approach ensures protection of the state and federal comity policies implicit in article III. The federal interest in efficient administration of the debtor's estate will not be impeded by this procedure.

Several unresolved legal issues in asbestos litigation illustrate the importance of analyzing the state interest in resolving pending product liability claims. First, jurisdictions differ on the appropriate date to start accrual of the statute of limitations. While some states have adopted a discovery rule, the definition of this rule is not consistent.<sup>188</sup> Other jurisdictions have rejected the discovery rule completely and begin accrual on the date of exposure.<sup>189</sup> If all actions against the debtor are consolidated in one federal court, a plaintiff may be held to a different statute of limitations than in his own jurisdiction.

A second potential area of divergence is on the issue of market share

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of the manufacturers of a particular product. If the plaintiff establishes that the defendant produced the type of product that caused the injury, that the product was defective, and that the manufacturers knew or should have known of this defect, recovery is permissible in spite of the inability to identify a particular product by manufacturer. A defendant can escape liability by proving it did not in fact manufacture the product in question. Finally, damages are apportioned according to a defendant's respective share of the market. *See Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 611-13, 607 P.2d 924, 936-38, 163 Cal. Rptr. 132, 144-46, *cert. denied*, 449 U.S. 912 (1980); Special Project, *supra* note 63, at 620-22. For a discussion of market share liability in the context of asbestos litigation, see *infra* text accompanying notes 190-91.

<sup>188</sup> *Compare* Pauley v. Combustion Eng'g, Inc., 528 F. Supp. 759, 765 (S.D.W. Va. 1981) (statute runs when plaintiff discovers, or should have discovered disease), *Velasquez v. Fibreboard Paper Prods. Corp.*, 97 Cal. App. 3d 881, 888, 159 Cal. Rptr. 113, 117 (1979) (same) *and* *Louisville Trust Co. v. Johns-Manville Prods. Corp.*, 580 S.W.2d 487, 501 (Ky. 1979) (same) *with* *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151, 1154 (6th Cir. 1982) (statute of limitations begins running if plaintiff could have discovered disease) *and* *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155, 160 (8th Cir. 1975) (same); *see also* Comment, *Asbestos Litigation*, *supra* note 65, at 881-82.

<sup>189</sup> *See, e.g.*, *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008, 1010-11, 430 N.E.2d 1297, 1299, 446 N.Y.S.2d 244, 246 (1981), *cert. denied*, 456 U.S. 967 (1982); *see also* Comment, *Asbestos Litigation*, *supra* note 65, at 882 & nn.72-73 (variations on date of exposure rule).

liability. Although this theory is largely rejected in asbestos cases,<sup>190</sup> the problems with product identification suggest that some variation of the concept may be adopted as an appropriate remedy.<sup>191</sup> Each state has a strong interest in controlling the development of this area of product liability law. If all claims against nondebtors are transferred to district court under bankruptcy jurisdiction, any arguments concerning this theory will necessarily be resolved by federal judges.

#### 4. Fairness to the Litigants

A second facet of the disruption to pending litigation caused by a bankruptcy filing is found in the impact on the litigants. When product manufacturers invoke the Chapter 11 petition to limit their liability in mass tort actions, victims must gamble on the possibility of both adequate and speedy recovery for their injuries. Bankruptcy judges have often considered the effect the bankruptcy petition has on involuntarily removed parties as a reason to refuse jurisdiction.<sup>192</sup> Although this is traditionally regarded as a purely discretionary decision, incorporation of fairness considerations would provide some measure of protection to litigants who become victims of a tactical bankruptcy petition.<sup>193</sup>

While the bankrupt defendant may benefit from concluding all litigation in the bankruptcy court, the plaintiff is effectively denied a choice of a forum as soon as the Chapter 11 petition is filed.<sup>194</sup> Al-

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<sup>190</sup> See *In re Related Asbestos Cases*, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982); *Starling v. Seaboard Coast Line R.R. Co.*, 533 F. Supp. 183, 186 (S.D. Ga. 1982); *Prelick v. Johns-Manville Corp.*, 531 F. Supp. 96 (W.D. Pa. 1982). *But see Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd on other grounds*, 681 F.2d 334 (5th Cir. 1982).

<sup>191</sup> For arguments against the application of market share liability in the asbestos context, see Special Project, *supra* note 63, at 623-25; Comment, *Asbestos Litigation*, *supra* note 65, at 890-95.

<sup>192</sup> See, e.g., *Midatlantic Nat'l Bank/Citizens v. Comtek Elec., Inc. (In re Comtek Elec., Inc.)*, 23 Bankr. 449, 451 (Bankr. S.D.N.Y. 1982) (removal of action that stays judgment against nondebtor codefendant who guaranteed debtor's promissory note inequitable); *Kishi v. Greco (In re Greco)*, 3 Bankr. 18, 19-20 (Bankr. D. Hawaii 1979) (debtor's removal action an attempt to extend stay of state court action from summary dispossession to nondebtor defendant).

<sup>193</sup> Although the bankruptcy petition of Johns-Manville was not necessarily in bad faith, there are still tactical advantages that affect the decision whether to file for chapter 11 relief. See generally Special Project, *supra* note 63, at 814-18.

<sup>194</sup> The power of the defendant to remove the pending product liability action to bankruptcy court under 28 U.S.C. § 1478(a) was unquestionable. See *supra* note 25. The nonbankrupt defendants are also granted power to remove as parties to the action. This power also exists under the 1984 Amendments. See *supra* note 26 (28 U.S.C. §

though this is logical to the extent necessary to facilitate claims against the debtor's property,<sup>195</sup> property of a nondebtor codefendant has nothing to do with the administration of the bankruptcy estate.<sup>196</sup> More significantly, a plaintiff may be denied a preference for a trial by jury if state law claims are removed to bankruptcy court. Although 28 U.S.C. § 1480 preserved the choice for jury trial in bankruptcy courts and the 1984 amendment continues this protection,<sup>197</sup> judges are empowered to determine the amount of disputed claims if complete trial would unduly delay resolution of the debtor's estate.<sup>198</sup> Thus, denial of the choice of forum implicates more than a procedural decision to institute litigation in state courts. A preference for a jury trial may be directly denied. The possibility of this occurrence increases as the number of defendants

1452(a)). Denial of choice of forum has been considered relevant in civil removal cases. *See, e.g.,* Chase v. North Am. Sys., 523 F. Supp. 378, 382 (W.D. Pa. 1981).

<sup>195</sup> Williams v. Austrian, 331 U.S. 642, 658 (1947); Schumacher v. Beeler, 293 U.S. 367, 371 (1934); White Motor Corp. v. Citibank, N.A., 704 F.2d 254, 255 (6th Cir. 1983); Note, *The Manville Bankruptcy*, *supra* note 8, at 1137-40.

<sup>196</sup> Fulton v. Mandalay Shores Coop. Hous. Ass'n (*In re Mandalay Shores Coop. Hous. Ass'n*), 25 Bankr. 533, 536 (Bankr. M.D. Fla. 1982); Anvil Partnership v. Clifford/Sooner Drilling Program (*In re Clifford Resources, Inc.*), 24 Bankr. 778, 780 (Bankr. S.D.N.Y. 1982); Jensen Elec. v. American Computer & Telecommunications Corp. (*In re American Computer & Telecommunications Corp.*), 24 Bankr. 150, 151 (Bankr. E.D. Va. 1982).

<sup>197</sup> 28 U.S.C. § 1480(b) (1982) provides that "this chapter and title 11 do not affect any right to trial by jury in a case related to a case under title 11." Under the 1984 Bankruptcy Amendments,

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.

(b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

CONFERENCE REPORT, *supra* note 9, at 3-4 (28 U.S.C. § 1411). Prior to the enactment of the Bankruptcy Reform Act of 1978, a right to trial by jury depended upon whether a suit was within the summary or plenary jurisdiction of the court. If a suit was within the court's summary jurisdiction, there was no right to jury trial. *Katchen v. Landy*, 382 U.S. 323, 336-37 (1966); *see also* COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 3.01, at 3-84.3; Note, *The Manville Bankruptcy*, *supra* note 8, at 1140. It is generally considered that 28 U.S.C. § 1480(a) was intended to modify this approach by preserving the right to jury trial where the right would have existed had suit been brought in state or federal court. *See* COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 3.01, at 3-96. *But see* Belfance v. Sizzler Family Steak Houses (*In re Portage Assocs.*), 16 Bankr. 445 (Bankr. N.D. Ohio 1982); Note, *Manville Bankruptcy*, *supra* note 8, at 1141.

<sup>198</sup> 11 U.S.C. § 502(c) (1982) allows the bankruptcy court to estimate "any contingent or unliquidated claim, the fixing or liquidation of which . . . would unduly delay the closing of the case." *See also supra* note 39.

multiplies. The factual issues in asbestos litigation differ significantly between defendants and could conceivably warrant denial of a jury trial.

The interests of the plaintiff are usually considered when removal of the state claim will result in some unfairness. Thus, when removal of the state court actions extends the automatic stay provisions to nondebtor defendants, the court will remand the related claims to state court.<sup>199</sup> The resolution or dismissal of a federal claim usually precipitates dismissal of any remaining state claims from federal court.<sup>200</sup> The resolution of a Chapter 11 petition may cause the subsequent remand of any unresolved products liability claims against nonbankrupt defendants.

Lengthy delays caused by these procedural machinations do not benefit a plaintiff suffering from a progressive asbestos-related disease. Estimates indicate that the plaintiff receives only twenty cents of every dollar awarded in an asbestos case.<sup>201</sup> As the amount of actual recovery decreases, the likelihood that the plaintiff will survive to benefit from the judgment diminishes as well. The additional problem of preserving the testimony of a dying plaintiff becomes serious as litigation becomes protracted.<sup>202</sup>

A plaintiff's interests are best protected by the court's refusal to assert "related to" jurisdiction over claims against nonbankrupt defendants. However, the debtor's codefendants assert a competing argument concerning their claims for contribution or indemnity. The prevalent opinion among defense attorneys appears to be that contribution from bankrupt codefendants is possible only if the bankruptcy court retains jurisdiction over the entire action. Defendants argue that the award granted by a state court may differ significantly from the assets availa-

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<sup>199</sup> *Midatlantic Nat'l Bank/Citizens v. Comtek Elec., Inc. (In re Comtek Elec., Inc.)*, 23 Bankr. 449, 451 (Bankr. S.D.N.Y. 1982); *Kishi v. Greco (In re Greco)*, 3 Bankr. 18, 19-20 (Bankr. D. Hawaii 1979).

<sup>200</sup> *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Safeco Ins. Co. v. Guyton*, 692 F.2d 551, 556 (9th Cir. 1982). *But cf. Stamford Bd. of Educ. v. Stamford Educ. Assoc.*, 697 F.2d 70, 72 (2d Cir. 1982) (ancillary jurisdiction over cross-claim retained when substantial time already devoted to state issue); *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 479 (3d Cir. 1979) (dismissal of federal claim on morning of trial did not require dismissal of state claim).

<sup>201</sup> *Asbestos Litig. Rep. (Andrews)* 5716 (Oct. 22, 1982) (National Meeting Discussing Coordination Efforts) (copy on file at U.C. Davis Law Review office).

<sup>202</sup> *Cf. Neubauer v. Owens Corning Fibreglas Corp.*, 26 Bankr. 644, 647 (E.D. Wisc. 1983) (extending stay to nondebtor defendants may prolong litigation and deprive court of plaintiff's testimony).

ble to satisfy a contribution claim.<sup>203</sup>

The pro rata share of the debtor will be confined to the debtor's assets, and codefendants will have to stand in line with other creditors to obtain recovery. However, the policy underlying joint and several liability favors the interests of the plaintiff over those of the joint tortfeasors.<sup>204</sup> If joinder of the debtor would defeat jurisdiction, the plaintiff may proceed only against nondebtors and still recover the entire award.<sup>205</sup>

Finally, there is no strong federal policy to overshadow these arguments of fairness to the litigants.<sup>206</sup> While federal courts have a strong interest in the effective reorganization of a debtor's estate, there is no corresponding concern over the resolution of claims that do not involve the debtor.<sup>207</sup> When as many as twenty nondebtor defendants are implicated in the state law issues, diversion of time away from the reorganization proceeding can be serious.<sup>208</sup>

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<sup>203</sup> Lewin, *Burdensome Asbestos Cases*, N.Y. Times, Jan. 10, 1984, at 30, col. 1.

<sup>204</sup> J. FLEMING, *THE LAW OF TORTS* 176 (6th ed. 1983). This notion evolves from the general tort principle that an innocent plaintiff should not be precluded from recovery merely because of inability to pinpoint the exact cause of her harm. *See, e.g.*, *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 610-11, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (policy relied upon as justification for market share liability), *cert. denied*, 449 U.S. 912 (1980); *Summers v. Tice*, 33 Cal. 2d 80, 88, 199 P.2d 1, 5 (1948) (policy relied upon to shift burden to independent tortfeasors to apportion damages when incapable of proof).

<sup>205</sup> *Lumberman's Mut. Casualty Co. v. Elbert*, 348 U.S. 48, 51-52 (1954) (joint tortfeasor not indispensable party and failure to join one tortfeasor will not deprive court of jurisdiction); *Tatham v. Hoke*, 469 F. Supp 914, 917 (W.D.N.C. 1979) (physician who negligently treated plaintiff after an abortion not an indispensable party in suit against doctor who performed abortion), *aff'd*, 622 F.2d 587 (4th Cir. 1980); 7 WRIGHT & MILLER, *supra* note 164, § 1623, at 242-44; *accord* *Johns-Manville Corp. v. GAF Corp.*, 26 Bankr. 405, 412 (Bankr. S.D.N.Y. 1983) (bankrupt asbestos defendant not indispensable party, thus litigation against codefendants can proceed in debtor's absence). Codefendants would then institute suit in another state to recover the appropriate share of damages. J. FLEMING, *supra* note 204, at 176; *see also* PROSSER & KEETON, *supra* note 41, at 338-40. Requiring nondebtor defendants to pursue their claims for contribution in bankruptcy court would not cause any more procedural unfairness than this practice. Nondebtor defendants can obtain representation on a creditor's committee to preserve their interest in recovery from the debtor's estate. *See supra* note 39.

<sup>206</sup> *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

<sup>207</sup> *See supra* note 55. Although some commentators recommend an extension of federal jurisdiction on a protective jurisdiction theory, the product liability actions will not affect the debtor and any special concerns could be adequately addressed by state courts. *See generally* Note, *Limits of Federal Jurisdiction*, *supra* note 27, at 711.

<sup>208</sup> *See supra* text accompanying note 65-66. Although the plaintiff's claim against

The predominance of state law products liability issues also argues against the assertion of jurisdiction by the bankruptcy courts.<sup>209</sup> State judges are presumably more familiar with the intricacies of state product liability law. This consideration is important in the field of toxic tort liability where many legal rules are unsettled.<sup>210</sup> The intermingling of bankruptcy rules concerning the right to a debtor's assets and tort concepts of liability may create jury confusion by requiring limitation of damages against the debtor to a prearranged amount in a distribution fund.<sup>211</sup>

### CONCLUSION

Congress has approached the limits of constitutional authority by permitting the exercise of jurisdiction over claims related to a bankruptcy action by district courts. The restructuring of the present bankruptcy system by Congress and the heightened awareness of article III limitations should provide the impetus for a reexamination of the scope of "related to" jurisdiction.

Application of the four proposed standards to test the nature of the relation between state claims and the bankruptcy petition will balance the concerns for state sovereignty implicit in article III with the congressional goal of efficient administration of the bankruptcy system.

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the nondebtor merely adds an additional claim, new parties are joined with the inclusion of the nondebtor defendants. Federal courts are traditionally more reluctant to extend jurisdiction to additional parties than to add additional claims against parties already before the court. *See, e.g.*, *United States ex rel Hoover v. Franzen*, 669 F.2d 433 (7th Cir. 1982); *Blake v. Pallan*, 554 F.2d 947 (9th Cir. 1977); *Ayala v. United States*, 550 F.2d 1196 (9th Cir.), *cert. granted*, 434 U.S. 814 (1977), *cert. dismissed*, 435 U.S. 982 (1978).

<sup>209</sup> *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Universal Profile, Inc. v. Atlanta Fed. Sav. & Loan Ass'n (In re Universal Profile, Inc.)*, 6 Bankr. 194, 196 (Bankr. N.D. Ga. 1980) (counterclaim requesting modification of alimony and child support payments in divorce decree predominantly state law issues).

<sup>210</sup> *See supra* text accompanying notes 188-91.

<sup>211</sup> Jury trials were authorized by 28 U.S.C. § 1480 (1982), a procedure continued under the 1984 Amendments. *See supra* note 197. Johns-Manville's current reorganization plan proposes evaluation of each claim by medical experts with awards dependent upon the type of asbestos-related disease contracted. For example, all plaintiffs with asbestosis receive \$40,000 regardless of their condition. Lewin, *supra* note 203. Approval of this evaluation formula will fix liability at that amount and could not be modified by jury award. *See Note, The Manville Bankruptcy, supra* note 8, at 1129-31. While separate trials under Rule 42(b) provide a partial solution, jurisdiction over state claims is generally refused when such trials are appropriate. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Claims will be related to the bankruptcy petition only if they have a sufficient effect on the debtor's estate and indicate a dominant measure of fact relatedness in terms of evidentiary proof. The state interest in the substantive law underlying the related claims and fairness to the litigants must also be examined to minimize disruption to the state judicial process.

The resort to voluntary reorganization by asbestos manufacturers highlights the need for immediate implementation of these criteria. While a plaintiff's claim against a debtor defendant may satisfy the four requirements, claims against nondebtors do not. The additional claims of nondebtors against the debtor for contribution and indemnity complicate this procedural morass. Resolution of indemnity and contribution claims by the district courts under bankruptcy jurisdiction is both logical and necessary to achieve complete administration of the debtor's estate.

The inevitable result of the limitation of "related to" jurisdiction would be the separation of claims initially joined in one suit into state and federal forums. While this result would not be an optimal choice for any litigant, absence of an alternative forum to adjudicate state and federal issues together should not prohibit implementation of the four standards suggested above. Notions of judicial economy and convenience to litigants must be subordinated to article III considerations. District courts should not be treated as a repository for state law product liability claims related to a bankruptcy petition. By limiting the scope of "related to" jurisdiction, the value of a separate bankruptcy system in facilitating rehabilitation of companies will be preserved.

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