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2 UNITED STATES COURT OF APPEALS

3  
4 FOR THE SECOND CIRCUIT

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6  
7 August Term, 2011

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9 Argued: December 7, 2011 Decided: February 21, 2012

10  
11 Docket Nos. 09-4302-cv (L); 09-4306-cv (con);  
12 09-4373-cv (con)

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15 PARMALAT CAPITAL FINANCE LIMITED,

16  
17 *Plaintiff-Appellant,*

18  
19 DR. ENRICO BONDI, EXTRAORDINARY COMMISSIONER OF PARMALAT FINANZIARIA  
20 S.P.A., PARMALAT S.P.A., AND OTHER AFFILIATED ENTITIES, IN  
21 EXTRAORDINARY ADMINISTRATION UNDER THE LAWS OF ITALY,

22  
23 *Plaintiff-Counter-Defendant-Third-Party-Defendant-Appellant,*

24  
25 CAPITAL & FINANCE ASSET MANAGEMENT S.A., CATTOLICA PARTECIPAZIONI  
26 S.P.A., HERMES FOCUS ASSET MANAGEMENT EUROPE LIMITED, ERSTE  
27 SPARINVEST KAPITALANLAGEGESELLSCHAFT M.B.H., SOLOTRAT, SOCIETE  
28 MODERNE DES TERRASSEMENTS PARISIENS, RENATO ESPOSITO, FONDAZIONE  
29 ITALO MONZINO, SOUTHERN ALASKA CARPENTERS PENSION FUND, ON BEHALF OF  
30 ITSELF AND ALL OTHERS SIMILARLY SITUATED, CRISTINA PONCIBO, MARGERY  
31 LOUISE KRONENGOLD, ROBERT MCQUEEN, CUSTODIAN, INDIVIDUALLY AND ON  
32 BEHALF OF ALL OTHERS SIMILARLY SITUATED, FERRI GIAMPOLO, FOOD  
33 HOLDINGS LIMITED, DAIRY HOLDINGS LIMITED, G. JAMES CLEAVER, GORDON  
34 I. MACRAE, GERALD K. SMITH, LAURA J. STURAITIS, MONUMENTAL LIFE  
35 INSURANCE COMPANY, TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,  
36 TRANSAMERICA LIFE INSURANCE COMPANY, AVIVA LIFE INSURANCE COMPANY,  
37 PRINCIPAL GLOBAL INVESTORS, LLC, PRINCIPAL LIFE INSURANCE COMPANY,  
38 SCOTTISH RE (US) INC., HARTFORD LIFE INSURANCE COMPANY, PLAN  
39 ADMINISTRATOR G. PETER PAPPAS,

40  
41 *Plaintiffs,*  
42

BANK OF AMERICA CORPORATION, BANC OF AMERICA SECURITIES LIMITED,  
BANK OF AMERICA, N.A., BANK OF AMERICA NATIONAL TRUST & SAVINGS  
ASSOCIATION, BANC OF AMERICA SECURITIES LLC, BANK OF AMERICA  
INTERNATIONAL, LTD., GRANT THORNTON INTERNATIONAL, LTD.,

*Defendants-Appellees,*

GRANT THORNTON INTERNATIONAL, GRANT THORNTON LLP,

*Defendants-Third-Party-Plaintiffs-Counter-Claimants-Appellees,*

DEUTSCHE BANK AG, MORGAN STANLEY & Co., INCORPORATED, BONLAT  
FINANCING CORPORATION, CALISTO TANZI, FAUSTO TONNA, COLONIALE  
S.P.A., CITIGROUP INC., BUCONERO, LLC, ZINNI & ASSOCIATES, P.C.,  
DELOITTE TOUCHE TOHMATSU, DELOITTE & TOUCHE S.P.A., A SOCIETA PER  
AZIONI UNDER THE LAWS OF ITALY, JAMES E. COPELAND JR., PARMALAT  
FINANZIARIA S.P.A., STEFANO TANZI, LUCIANO DEL SOLDATO, DOMENICO  
BARILI, FRANCESCO GIUFFREDI, GIOVANNI TANZI, DELOITTE & TOUCHE  
USA, LLP, DELOITTE & TOUCHE L.L.P., CREDIT SUISSE FIRST BOSTON,  
CITIBANK, EUREKA SECURITISATION PLC, VIALATTEA LLC, PAVIA E  
ANSALDO, BANCA NAZIONALE DEL LAVORO S.P.A., CITIBANK, N.A.,  
PROFESSOR MARIA MARTELLINI, BANCA INTESA S.P.A., DELOITTE & TOUCHE  
TOHMATSU AUDITORES INDEPENDENTES, CREDIT SUISSE INTERNATIONAL,  
CREDIT SUISSE SECURITIES (EUROPE) LIMITED, CREDIT SUISSE, CREDIT  
SUISSE GROUP, GRANT THORNTON S.P.A., A SOCIETA PER AZIONI UNDER THE  
LAWS OF ITALY, NOW KNOWN AS ITALAUDIT, S.P.A.,

*Defendants,*

PARMATOUR S.P.A.,

*Defendant-Third-Party-Defendant.*

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1  
2 Before: CABRANES and WESLEY, Circuit Judges, and KOELTL, District  
3 Judge.\*  
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6 This is an appeal from the judgments of the United States  
7 District Court for the Southern District of New York (Kaplan,  
8 J.) dismissing the claims of plaintiffs-appellants Parmalat  
9 Capital Finance Limited and Dr. Enrico Bondi against the Grant  
10 Thornton defendants after determining, pursuant to the mandate  
11 of this Court, that mandatory abstention under 28 U.S.C.  
12 § 1334(c)(2) was not required in these bankruptcy-related cases.  
13 Because we find that mandatory abstention was required in these  
14 cases under the test we laid out in our prior Opinion, we vacate  
15 the judgments of the District Court, and remand these cases to  
16 the District Court with instructions to transfer them to the  
17 United States District Court for the Northern District of  
18 Illinois so that they can be remanded to Illinois state court.  
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\* The Honorable John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

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J. GREGORY TAYLOR, Allan B. Diamond, J.  
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JAMES L. BERNARD, David M. Cheifetz,  
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Thornton International, Inc. and  
Grant Thornton International Ltd.

LINDA T. COBERLY, Bruce R. Braun, William  
P. Ferranti, Winston & Strawn LLP,  
Chicago, IL, for Appellee Grant  
Thornton LLP.

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1 PER CURIAM:

2 Plaintiffs-appellants Parmalat Capital Finance Limited  
3 ("PCFL") and Dr. Enrico Bondi ("Bondi," and collectively,  
4 "Appellants") appeal from the judgments of the United States  
5 District Court for the Southern District of New York (Kaplan,  
6 J.) dismissing their claims against Grant Thornton  
7 International, Inc., Grant Thornton International Ltd, and Grant  
8 Thornton LLP (collectively, "Grant Thornton" or "Appellees").  
9 In our prior Opinion in this case, Parmalat Capital Fin. Ltd. v.  
10 Bank of America Corp. ("Parmalat"), 639 F.3d 572, 582-83 (2d  
11 Cir. 2011), we vacated the decisions not to abstain from  
12 deciding these cases pursuant to the mandatory abstention  
13 provision in 28 U.S.C. § 1334(c)(2) that applied to these  
14 bankruptcy-related proceedings.

15 We remanded the cases to the District Court for a  
16 determination of whether the cases could be "timely adjudicated"  
17 in Illinois state court in accordance with the factors we set  
18 forth in that Opinion. On remand, the District Court again  
19 concluded that mandatory abstention did not apply, In re  
20 Parmalat Sec. Litig., Nos. 04 Civ. 9771, 06 Civ. 2991, 2011 WL  
21 3874824, at \*1 (S.D.N.Y. Aug. 31, 2011), and the Appellants  
22 renewed their appeals to this Court arguing for mandatory  
23 abstention. Because we find that these cases can be "timely  
24 adjudicated" within the meaning of the statute and pursuant to

1 the test we laid out in our prior Opinion, we conclude that  
2 abstention was mandatory in these cases. Accordingly, we vacate  
3 the judgments of the District Court and remand these cases with  
4 instructions that the cases be transferred to the Northern  
5 District of Illinois and remanded to Illinois state court.

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#### BACKGROUND

8 The facts in these long-running cases were fully set forth  
9 in our prior Opinion, Parmalat, 639 F.3d at 576-78, and we  
10 provide only a summary here.

11 These cases arise out of the collapse of Parmalat  
12 Finanziaria, S.p.A. ("Old Parmalat") in 2003. Plaintiff-  
13 appellant Bondi represents Old Parmalat's Italian bankruptcy  
14 estate as its Extraordinary Commissioner under Italian law.  
15 Parmalat's plan of reorganization, the Concordato, was approved  
16 after the commencement of these lawsuits, and is proceeding in  
17 Italy. Plaintiff-appellant PCFL is a Grand Caymans-based  
18 corporate subsidiary of Parmalat. PCFL is in liquidation in the  
19 Cayman Islands.

20 In 2004, PCFL and Bondi commenced separate proceedings  
21 pursuant to former 11 U.S.C. § 304 in the Bankruptcy Court for  
22 the Southern District of New York. These proceedings permitted  
23 PCFL and Bondi, as representatives of the foreign bankruptcy  
24 estates, to commence bankruptcy cases in the United States in

1 order to enjoin litigation against PCFL and Parmalat in the  
2 United States courts. The bankruptcy court entered a  
3 preliminary injunction shielding Old Parmalat from American  
4 lawsuits. Purchasers of Old Parmalat's debt and equity  
5 securities had filed securities fraud class action lawsuits in  
6 the United States against Old Parmalat and against various banks  
7 and auditing firms that had allegedly participated in the fraud,  
8 including Appellees Grant Thornton, who had been auditors for  
9 Old Parmalat and PCFL. After the issuance of the preliminary  
10 injunction, the securities fraud plaintiffs dropped Old Parmalat  
11 as a defendant.

12 In August 2004, Bondi filed suit in Illinois state court  
13 against Grant Thornton, alleging claims arising under Illinois  
14 law including professional malpractice, fraud, negligent  
15 misrepresentation, and unlawful civil conspiracy. Bondi filed a  
16 similar suit in New Jersey state court against Citigroup. In  
17 September 2004, Grant Thornton removed the Illinois case to the  
18 United States District Court for the Northern District of  
19 Illinois on the basis of 28 U.S.C. §§ 1334(b) and 1452, arguing  
20 that removal was proper because the case was "related to"  
21 Bondi's § 304 proceeding in the Southern District of New York.  
22 Bondi filed a motion to remand, arguing that the court was  
23 required to abstain from hearing the case pursuant to 28 U.S.C.  
24 § 1334(c)(2). The Judicial Panel on Multidistrict Litigation

1 transferred Bondi's action against Grant Thornton to Judge  
2 Kaplan in the Southern District of New York. On February 25,  
3 2005, Judge Kaplan denied Bondi's motion to remand to state  
4 court. The District Court found that it had jurisdiction  
5 pursuant to § 1334(b) and that abstention was not mandatory.  
6 The District Court denied Bondi's motion for an interlocutory  
7 appeal pursuant to 28 U.S.C. § 1252(b).

8 In December 2005, PCFL filed suit against Grant Thornton in  
9 the same Illinois state court, alleging similar claims to those  
10 asserted by Bondi. PCFL also filed a complaint in North  
11 Carolina state court against Bank of America alleging some  
12 similar claims. Grant Thornton removed the Illinois case to the  
13 United States District Court for the Northern District of  
14 Illinois, again arguing that removal was proper because the  
15 state law claims were related to PCFL's § 304 proceeding. PCFL,  
16 like Bondi, filed a motion to abstain and remand, arguing that  
17 abstention was mandatory pursuant to 28 U.S.C. § 1334(c)(2).  
18 The Northern District of Illinois denied PCFL's motion. That  
19 court then transferred the case to Judge Kaplan in the Southern  
20 District of New York for consolidation with Bondi's case. In a  
21 separate proceeding, the North Carolina case against Bank of



1 America was also transferred to the Southern District of New  
2 York.<sup>1</sup>

3 In October, 2005, the Italian bankruptcy court approved the  
4 Concordato. Under the Concordato, a newly formed entity,  
5 Parmalat, S.p.A. ("New Parmalat"), assumed all of the legal  
6 liabilities, as well as the assets, of its predecessor  
7 companies. New Parmalat acts as a claims administrator for  
8 creditors of Old Parmalat under the Concordato. See Bondi v.  
9 Capital & Fin. Asset Mgmt. S.A., 535 F.3d 87, 89 (2d Cir. 2008).  
10 In June 2007, the District Court denied Bondi's motion to bar  
11 the securities fraud plaintiffs from bringing direct claims  
12 against New Parmalat. See In re Parmalat Sec. Litig., 493 F.  
13 Supp. 2d 723 (S.D.N.Y. 2007), aff'd, Bondi, 535 F.3d at 94. The  
14 District Court also granted a motion to permit Grant Thornton to  
15 file third party contribution claims against Parmalat in the  
16 securities class action. See In re Parmalat Sec. Litig., 472 F.  
17 Supp. 2d 582 (S.D.N.Y.), aff'd, 240 F. App'x 916 (2d Cir. 2007).  
18 The securities class actions eventually settled.

19 Meanwhile, the Illinois and North Carolina actions  
20 continued in the Southern District of New York. Following  
21 discovery, the District Court issued a detailed and thoughtful

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<sup>1</sup> Bondi's New Jersey case against Citigroup remained in New Jersey state court. See, e.g., Bondi v. Citigroup, Inc., 32 A.3d 1158 (N.J. Super. Ct. App. Div. 2011).

1 opinion granting summary judgment to the defendants. See In re  
2 Parmalat Sec. Litig., 659 F. Supp. 2d 504 (S.D.N.Y. 2009). With  
3 regard to the North Carolina action, we affirmed the District  
4 Court's grant of summary judgment to Bank of America. See  
5 Parmalat Capital Fin. Ltd. v. Bank of Am. Corp., 412 F. App'x  
6 325 (2d Cir. 2011) (summary order).

7 In a separate Opinion regarding the Illinois actions  
8 against Grant Thornton, we vacated the decisions not to abstain  
9 from deciding these cases pursuant to the mandatory abstention  
10 provision in 28 U.S.C. § 1334(c)(2). Parmalat Capital Fin. Ltd.  
11 v. Bank of Am. Corp., 639 F.3d 572, 582-83 (2d Cir. 2011). We  
12 remanded the Illinois cases to the District Court for a  
13 determination of whether the cases could be "timely adjudicated"  
14 in Illinois state court within the meaning of § 1334(c)(2), in  
15 accordance with the factors we set forth in that Opinion. On  
16 remand, the District Court again concluded that mandatory  
17 abstention did not apply. In re Parmalat Sec. Litig., Nos. 04  
18 Civ. 9771, 06 Civ. 2991, 2011 WL 3874824, at \*1 (S.D.N.Y. Aug.  
19 31, 2011). The Appellants renewed their appeals to this Court  
20 arguing for mandatory abstention.

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1 adjudication in the federal and state forums." Id. The  
2 District Court found that this factor ultimately weighs in favor  
3 of denying abstention. In re Parmalat, 2011 WL 3874824, at \*1-  
4 \*3. We agree that this factor weighs in favor of denying  
5 abstention, but this factor is not dispositive. It is plainly  
6 the case that, were this claim to remain in federal court, we  
7 would reach the merits of the already-decided motions for  
8 summary judgment. There would be a decision on the merits  
9 sooner if abstention were denied. But that difference in timing  
10 appears to be a matter of months, rather than years.

11 The Appellants have conceded that, if this case were  
12 remanded to the Illinois state courts, the Appellants will not  
13 seek to relitigate the discovery issues already decided by the  
14 District Court. If they received an adverse judgment, it could  
15 then be appealed directly through the Illinois appellate courts.  
16 There is no allegation in the record that the Illinois courts  
17 are "backlogged," and no dispute over the assertion that the  
18 difference in the time it takes to resolve a case between  
19 federal and Illinois state courts, when both start at the same  
20 time, is no more than a few months. The conclusion that there  
21 would be years of delay from a remand overestimates, based  
22 solely on the complexity of the record, the amount of time an  
23 Illinois court might take to decide or review a summary judgment  
24 motion.

1           On balance, this factor does tip in favor of denying  
2           abstention. At the very least, there will be delay added for  
3           the review of the summary judgment motion by an Illinois trial  
4           court. But the entire inquiry cannot “turn exclusively on  
5           whether an action could be adjudicated most quickly in state  
6           court.” Parmalat, 639 F.3d at 580; see also In re Exide Techs.,  
7           544 F.3d 196, 218 n.14 (3d Cir. 2008) (“The question is not  
8           whether the action would be more quickly adjudicated in [the  
9           bankruptcy court] than in state court, but rather, whether the  
10          action can be timely adjudicated in the state court.”

11          (alterations in original) (internal quotation marks omitted)).

12          The District Court did not specifically address each of the  
13          other three factors.<sup>2</sup> We now address them in turn.

14          The second factor, “the complexity of the issues presented  
15          and the respective expertise of each forum” cuts in favor of  
16          remand. We explained in our prior Opinion that “[t]he district  
17          court may find that this factor particularly favors abstention  
18          here because one of the key issues in this case—the defense of  
19          in pari delicto—is a matter of Illinois state law and there is  
20          some doubt as to the nature and reach of the defense.”

21          Parmalat, 639 F.3d at 580 n.8. The District Court did not  
22          address these legal issues, despite the fact that, as the

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<sup>2</sup> The remaining factors solely involve issues of law that are not premised on findings of fact.

1 Appellees conceded at oral argument, basic questions regarding  
2 in pari delicto under Illinois law are unsettled. See, e.g.,  
3 Peterson v. McGladrey & Pullen, LLP, --- F. Supp. 2d ----, 2010  
4 WL 4435543, at \*2-\*3 (N.D. Ill. 2010) (“[T]here is no  
5 controlling authority in the Seventh Circuit or Illinois on  
6 whether the defense of in pari delicto is available against a  
7 bankruptcy trustee.”), on appeal, No. 10-3770 (7th Cir.) (argued  
8 Sept. 8, 2011).<sup>3</sup>

9         Instead, the District Court appeared to find that this  
10 factor supported denying abstention, because the facts in the  
11 case are complex, and the District Court is already familiar  
12 with them. In re Parmalat, 2011 WL 3874824, at \*2-\*3. But the  
13 District Court did not address the complexity of the legal  
14 issues, even though we specifically highlighted that the  
15 complexity of state law issues here “particularly favors  
16 abstention,” and despite the fact that the District Court’s  
17 disposition of these cases rested on its prediction and  
18 interpretation of Illinois law. See In re Parmalat Sec. Litig.,

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<sup>3</sup> Although Amici Curiae have argued that in pari delicto should not apply to Bondi because he is an appointed public official charged with overseeing Parmalat’s bankruptcy affairs, Bondi has analogized his position to that of a bankruptcy trustee throughout this litigation. Indeed, Bondi conceded to the District Court that he “stands in the shoes” of Parmalat, and on appeal, he likewise did not assert that in pari delicto did not apply to him on the basis of his position as Extraordinary Commissioner of Old Parmalat.

1 659 F. Supp. 2d 504, 519-20 & nn. 101, 103 (S.D.N.Y. 2009); id.  
2 at 530-32 & nn. 162, 166-168, 170. This Court, in another  
3 case, found that the application of in pari delicto to auditor  
4 malpractice under New York law was sufficiently important and  
5 unsettled to warrant certifying questions to the New York Court  
6 of Appeals. See Kirschner v. KPMG LLP, 590 F.3d 186 (2d Cir.  
7 2009); 938 N.E.2d 941 (N.Y. 2010) (responding to certified  
8 questions). The high courts of Pennsylvania and New Jersey have  
9 each issued recent decisions limiting the in pari delicto  
10 doctrine in auditor malpractice cases. See Official Comm. of  
11 Unsecured Creditors of Allegheny Health Educ. & Research Found.  
12 v. PricewaterhouseCoopers, LLP, 989 A.2d 313 (Pa. 2010); NCP  
13 Litig. Trust v. KPMG LLP, 901 A.2d 871 (N.J. 2006). In our  
14 prior Opinion we specifically noted that, "Illinois does not  
15 permit our Court to certify questions of Illinois state law to  
16 the Illinois Supreme Court." Parmalat, 639 F.3d at 580 n.8.  
17 Remand will allow the state courts of Illinois to speak directly  
18 on these issues of state law. Moreover, the complexity of the  
19 factual issues in these cases is tempered by the fact that there  
20 is a thorough summary judgment record that will accompany this  
21 case back to the Illinois state court.

22 The third factor, "the status of the title 11 bankruptcy  
23 proceeding to which the state law claims are related," also  
24 favors remand. We specifically explained in our prior Opinion

1 that "[b]ecause a [bankruptcy] court overseeing a § 304 case is  
2 not tasked with overseeing reorganization or liquidation of the  
3 estate, we see no reason why, as a result of the § 304  
4 proceeding, the litigants in a state law proceeding would  
5 require swift resolution of the state law claims." Parmalat,  
6 639 F.3d at 581 n.9. The District Court did not explain why  
7 such swift resolution of the § 304 proceeding was required here,  
8 or even whether a quicker resolution of the Illinois claims  
9 would have any effect on the § 304 proceeding. It is difficult  
10 to see how these actions will affect the § 304 proceeding, and  
11 the Appellees do not claim that they would. They argue that the  
12 factor is "neutral," but it is not, in our view, neutral. It  
13 supports the proposition that these cases can be timely  
14 adjudicated in state court without affecting the federal  
15 interest in "related-to" jurisdiction.

16 The fourth factor, "whether the state court proceeding  
17 would prolong the administration or liquidation of the estate,"  
18 also favors remand. The Appellees do not challenge the  
19 assertion that the ability of New Parmalat to pay creditors  
20 according to the Concordato does not depend on the resolution of  
21 the Illinois claims. It appears undisputed that the Italian  
22 reorganization of Parmalat will be completed when the current  
23 appeal in Italy is concluded, so that the pendency of the  
24 Illinois cases will not affect the reorganization of Parmalat.



1 Nor is there any dispute that PCFL is in liquidation in the  
2 Cayman Islands. See In re Leco Enters., Inc., 144 B.R. 244,  
3 251 (S.D.N.Y. 1992) ("In deciding whether a matter may be timely  
4 adjudicated, perhaps the single most important factor is the  
5 nature of the underlying chapter proceeding. In a Chapter 7  
6 proceeding there is no administrative urgency or plan of  
7 reorganization to facilitate and timely adjudication can be  
8 weighed relatively lightly." (alterations and internal quotation  
9 marks omitted)); accord Bates & Rogers Constr. Corp. v. Cont'l  
10 Bank, N.A., 97 B.R. 905, 908 (N.D. Ill. 1989) ("Bates & Rogers  
11 is involved in a liquidating Chapter 11 which involves no  
12 reorganization. Consequently, no administrative urgency or plan  
13 of reorganization exists to facilitate. In light of this fact,  
14 we do not believe that a potential delay in state court will  
15 significantly affect the administration or liquidation of the  
16 estate." (citation omitted)); see also Parmalat, 639 F.3d at  
17 581-82 ("Unlike WorldCom, the district court here is not charged  
18 with administration of a bankruptcy estate. As a result, the  
19 possibility that remand of the state court claims will slow down  
20 the § 304 proceeding is insufficient to show that state court  
21 adjudication would be untimely. The inquiry's proper focus is on  
22 the timely administration of the estate, not the § 304  
23 proceeding.").

1           The District Court did not address this factor with  
2 specific reference to the types of proceedings at issue, but the  
3 Appellees argue that remand would harm the creditors by  
4 increasing the cost of litigation. The issue, though, is  
5 plainly not whether abstention increases the ultimate payout to  
6 the creditors, but whether it "unduly prolong[s] the  
7 administration of the estate" at issue. Parmalat, 639 F.3d at  
8 581. As we noted, the Appellants are the administrators of the  
9 estates at issue, and were presumably "well versed in the  
10 timeliness concerns of their respective foreign bankruptcy  
11 proceedings when they selected the state forum." Id. at 581  
12 n.10. That presumption is only buttressed by the nature of the  
13 foreign bankruptcy proceedings and the extent to which they do  
14 not depend on the Illinois claims for resolution.

15           These are unusual cases. They have existed in parallel  
16 with a securities fraud class action that was also before the  
17 District Court, in which Grant Thornton had asserted third-party  
18 contribution claims against Parmalat. At least Bondi likely  
19 could have asserted Parmalat's state law claims against Grant  
20 Thornton in that securities fraud action, but he chose not to do  
21 so. Instead, Bondi chose to assert these claims as a separate  
22 action in a state forum, and the unusual procedural posture of  
23 these cases reflects that decision. However, mandatory  
24 abstention affords that choice. By contrast, when PCFL

1 attempted to sue Bank of America in North Carolina state court,  
2 there was an independent basis for federal jurisdiction,  
3 unrelated to bankruptcy jurisdiction. Mandatory abstention did  
4 not apply in that case, and we summarily affirmed the District  
5 Court's grant of summary judgment to Bank of America.

6 In sum, the four factors weigh in favor of abstention.  
7 While some additional time will be expended by remanding these  
8 cases, that delay does not outweigh the substantial factors that  
9 militate in favor of abstention, namely the complexity of the  
10 state law issues, the deference owed to state courts in deciding  
11 state law issues where possible, and the minimal effect of the  
12 state cases on the federal bankruptcy action and on the  
13 administration of the underlying estates.

14 The four factors are meant to guide courts' analyses with  
15 respect to the ultimate balance, struck by Congress, between, on  
16 the one hand, creating a federal forum for purely state law  
17 cases which, due to delay, might impinge upon the federal  
18 interest in the administration of a bankruptcy estate, and, on  
19 the other, ensuring that purely state law cases remain in state  
20 courts when they would not significantly affect that federal  
21 interest. See Leco, 144 B.R. at 252 (§ 1334 mandatory abstention  
22 "comports with principles of federalism"); cf. Stern v.  
23 Marshall, 131 S. Ct. 2594, 2619-20 (2011) ("The dissent asserts  
24 . . . that, 'to be effective, a single tribunal must have broad

1 authority to restructure debtor-creditor relations.’ But the  
2 framework Congress adopted in the 1984 Act already contemplates  
3 that certain state law matters in bankruptcy cases will be  
4 resolved by judges other than those of the bankruptcy courts.  
5 Section 1334(c)(2), for example, requires that bankruptcy courts  
6 abstain from hearing specified non-core, state law claims that  
7 ‘can be timely adjudicated in a State forum of appropriate  
8 jurisdiction’” (citation and alterations omitted). The factors  
9 are ultimately interrelated: an action might be “timely  
10 adjudicated” in state court, despite some substantial delay,  
11 where the delay has little or no effect on the bankruptcy estate  
12 which creates the federal interest. See Stoe v. Flaherty, 436  
13 F.3d 209, 219 (3d Cir. 2006) (“[T]imeliness in this context must  
14 be determined with respect to needs of the title 11 case and not  
15 solely by reference to the relative alacrity with which the  
16 state and federal court can be expected to proceed.”).  
17 Conversely, even a relatively brief delay might make state court  
18 adjudication untimely where the state action substantially  
19 affects the bankruptcy estate, or where the estate’s resolution  
20 is contingent upon the state action. Based on the particular  
21 facts of these cases, the four-factor test indicates that these

1 cases can be "timely adjudicated" in Illinois state court.<sup>4</sup>  
2 Abstention is therefore mandatory.

3

4

## II.

5 The District Court also concluded that, even if this case  
6 could be "timely adjudicated" in the Illinois state courts,  
7 mandatory abstention did not apply because these cases "could .  
8 . . have been commenced" in federal court. See In re Parmalat,  
9 2011 WL 3874824, at \*3 (citing 28 U.S.C. §  
10 1334(c)(2)). It was error to consider this argument, because it  
11 had been waived, and because it was outside the scope of the  
12 mandate set forth in our previous Opinion.

13 It is plain that this argument was waived in the initial  
14 appeal, because it had not been raised with the District Court  
15 as a basis to avoid mandatory abstention. See, e.g., Singleton  
16 v. Wulff, 428 U.S. 106, 120 (1976) ("It is the general rule, of  
17 course, that a federal appellate court does not consider an  
18 issue not passed upon below."); see also Stoe, 436 F.3d at 219.

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<sup>4</sup> The District Court did not resolve the issue of which party bears the burden of showing timely adjudication. Our previous Opinion, while noting that other courts have held to the contrary, explained that there were reasons for imposing the burden on the party opposing abstention. Parmalat, 639 F.3d at 582 (citing Younger v. Harris, 401 U.S. 37, 44 (1971)). However, because the balance of the four factors weighs in favor of abstention, we do not need to resolve this issue.

1           The argument was not raised on the initial appeal, and we  
2 issued a mandate that focused specifically and exclusively on  
3 the question of "timely adjudication." Parmalat, 639 F.3d at  
4 582. The Appellees argue that the mandate reasonably can be  
5 read as allowing consideration of an alternative basis for  
6 denying mandatory abstention. We have explained that, "[t]o  
7 determine whether an issue remains open for reconsideration on  
8 remand, the trial court should look to both the specific  
9 dictates of the remand order as well as the broader 'spirit of  
10 the mandate.'" United States v. Ben Zvi, 242 F.3d 89, 95 (2d  
11 Cir. 2001). Here, both the "specific dictates of the mandate"  
12 and the "spirit of the mandate" focus entirely on the question  
13 of timely adjudication, with no mention of an alternative basis  
14 for denying mandatory abstention. It is not reasonable to  
15 construe the mandate as allowing alternative, dispositive bases  
16 for denying abstention to be raised for the first time on  
17 remand, particularly when the cases had been pending for years  
18 and had already been the subject of an appeal. The more  
19 reasonable reading of the mandate is that it directed the  
20 District Court to examine the issue of timely adjudication as a  
21 bar to abstention, and that alternative grounds for denying  
22 abstention that had not been raised either before the District  
23 Court or on the initial appeal were "impliedly decided" to have

1 been waived in the first instance. Id. The District Court  
2 therefore should not have entertained this argument.

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**CONCLUSION**

5 We have considered all of the arguments of the parties. To  
6 the extent not specifically addressed above, they are either  
7 moot or without merit. For the reasons explained above, we  
8 **VACATE** the judgments of the District Court and **REMAND** these  
9 cases to the District Court with instructions to transfer them  
10 to the Northern District of Illinois so that they can be  
11 remanded to Illinois state court.<sup>5</sup> The mandate shall issue  
12 forthwith.

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<sup>5</sup> The proper procedure to remand a case subject to mandatory abstention under 28 U.S.C. § 1334(c)(2) is found in 28 U.S.C. § 1452(b). See Covanta Onondaga Ltd. v. Onondaga Cnty. Res. Recovery Agency, 318 F.3d 392, 398-99 (2d Cir. 2003). However, under § 1452(b), the appropriate court to remand a case to state court is the "court to which [the] claim or cause of action [was] removed." 28 U.S.C. § 1452(b). Because the Illinois state court actions were originally removed to the United States District Court for the Northern District of Illinois, from which they were transferred to the District Court for the Southern District of New York, only the District Court for the Northern District of Illinois has the authority to remand the actions back to the Illinois state court. Thus, on remand, the District Court for the Southern District of New York should transfer the actions to the District Court for the Northern District of Illinois, which can then remand the actions to Illinois state court.