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Viability of Stays of Federal Actions Pending the Outcome of Parallel State Litigation

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THE VIABILITY OF STAYS OF FEDERAL ACTIONS PENDING THE OUTCOME OF PARALLEL STATE LITIGATION

Whether a federal court can stay an in personam[1] civil[2] action pending the outcome of state court litigation involving the same or substantially the same parties and issues remains an unsettled question.[3] When a decisive issue of state law is involved, or the possibility of avoiding a constitutional question exists, the federal court will generally defer to the state court through invocation of the abstention doctrine.[4] Under most other circumstances, the general rule, at first glance, would seem to be that a stay is within the discretion of the district court. Upon more intensive analysis, however, and in light of a 1976 United States Supreme Court decision, *Colorado River Water Conservation District v. United States*,[5] there appears to be no uniform solution among the circuits.

In August, 1977, the case of *Calvert Fire Insurance Co. v. Will*[6] changed the law in the Seventh Circuit on this issue. *Calvert* held that a federal district court could stay an action before it only if certain exceptional circumstances exist.[7] In so holding, the Court of Appeals for the Seventh Circuit overruled its earlier decision in *Aetna State Bank v. Altheimer*.[8] *Aetna* had left it to the discretion of a district court to stay an action before it pending the outcome of parallel state litigation.

The problem with the *Calvert* decision is that it implicitly equates a stay with a dismissal.[9] While there are some cases in which a stay can have the practical effect of a dismissal,[10] the terms "stay" and "dismissal" are

1. As to in rem actions, the traditional rule has been that the court which first acquires control of the res will adjudicate the action. *See* Kline v. Burke Constr. Co., 260 U.S. 226, 235 (1922).

2. The scope of this article will be limited to civil actions.

3. This issue is not a new question. *See generally* Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits*, 60 COLUM. L. REV. 684 (1960) [hereinafter cited as *Stays of Federal Proceedings*]; Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation*, 59 YALE L.J. 978 (1950).

4. The scope of this article is limited to the power of a federal court to stay proceedings when the abstention doctrine is not applicable. For an exhaustive treatment of the abstention doctrine, *see* Pell, *Abstention, A Primrose Path by Any Other Name*, 21 DEPAUL L. REV. 926 (1972). *See also* 20 AM. JUR. 2d, *Courts* § 14 (1965); 32 AM. JUR. 2d, *Federal Practice and Procedure* § 13 (1967).

5. 424 U.S. 800 (1976).

6. 560 F.2d 792 (7th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3426 (U.S. Jan. 10, 1978) (No. 77-693).

7. *Id.* at 796. *See* text accompanying note 44 *infra*.

8. 430 F.2d 750 (7th Cir. 1970).

9. The court found that the distinction between a stay and a dismissal was "not important." 560 F.2d at 796.

10. If another court renders a judgment that has a res judicata effect, the action may be

technically different. Although most federal courts adhere to the proper use of these terms, some courts are not so precise.[11] This imprecise use aggravates the confusion among the circuits as to what to do when there is concurrent jurisdiction over an action in state and federal courts.

After briefly considering the differences between a stay and a dismissal, this note will examine the United States Supreme Court opinions on which the lower federal courts rely when faced with this issue. It will then discuss the views espoused by the circuits and conclude with an analysis of the use of the stay by considering *Colorado River* and the factors that the courts should apply when confronted with this problem.

THE DISTINCTION BETWEEN DISMISSAL AND STAY

A dismissal is "an order for the termination of a case without a trial of any of its issues."[12] When a court dismisses an action, it abandons its jurisdiction over that action. If it is a dismissal without prejudice with leave to reinstate, the complaint can, under some circumstances, be reinstated upon a motion by one of the parties.[13] When the dismissal is with prejudice, the action cannot be brought again.[14]

In contrast to a dismissal, a stay is merely a temporary cessation of the proceedings.[15] When an action has been stayed, the court retains jurisdiction over it and can resume the proceedings at any time. When the proceedings are reactivated, res judicata[16] or collateral estoppel[17] can apply if another court has rendered a final judgment or has decided a particular issue. A stay can be granted: (1) when there is another action pending (it is not always

moot when the stay is vacated. *See* PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674, 682 (5th Cir. 1973).

11. This is especially true in the use of the terms *stay* and *abatement*, which at common law was a dismissal, but in equity was a suspension of the action. In equity, an abated action could be revived. First Nat'l Bank v. Board of Superiors, 221 Iowa 348, 264 N.W. 281 (1935); F.A. Mfg. Co. v. Hayden & Clemons, Inc., 273 F. 374 (1st Cir. 1921). *See also* Baer v. Fahnestock & Co., 565 F.2d 261, 263 (3d Cir. 1977); 1 AM. JUR. 2d *Abatement, Survival and Revival* §§ 3, 5 (1962).

12. 24 AM. JUR. 2d *Dismissal, Discontinuance, and Nonsuit* § 1 (1966). *See also* Brackenridge v. State, 27 Tex. Civ. Cas. 513, 11 S.W. 630 (1889); 27 C.J.S. *Dismissal and Nonsuit* § 1 (1959).

13. *See* Moore v. St. Louis Music Supply Co., 539 F.2d 1191, 1194 (8th Cir. 1976); *see also* Northrup v. Jay, 262 Mich. 463, 247 N.W. 717 (1933).

14. *See* Pulley v. Chicago R.I.&P. Ry., 122 Kan. 269, 251 P. 1100 (1927).

15. Solarana v. Industrial Elec., Inc., 50 Haw. 22, 428 P.2d 411 (1967).

16. Res judicata "gives conclusive finality to a final, valid judgment; and, if the judgment is on the merits, precludes further litigation of the same cause of action between the same parties or those in such legal relationship to them that they are said to be in privity and bound by the judgment." 1B MOORE'S FEDERAL PRACTICE ¶ 0.401 at 11 (2d ed. 1974). *See also* Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955).

17. Under the doctrine of collateral estoppel, a judgment on the merits in a prior suit "precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." Lawlor v. National

necessary that the other action involve the same parties and issues); (2) while awaiting the payment of costs in a prior action; (3) to preserve the status quo; (4) during a period of war when the plaintiff is an enemy and is deprived of his standing to sue; or (5) when one party is in the military.[18]

While both a dismissal and a stay have the effect of halting the proceedings, a stay is the less drastic device. Hence, many courts have held that it is preferable to stay an action[19] and retain jurisdiction, rather than to dismiss it and relinquish jurisdiction. With these basic differences in mind, one can more easily scrutinize the cases that favor or disapprove of stays.

UNITED STATES SUPREME COURT CASES

Early United States Supreme Court cases, through dicta, set forth the theory that a federal court could not refuse to exercise its properly invoked jurisdiction.[20] Based on this authority, the Court, in 1910, in *McClellan v. Carland*,[21] held that it would be error for a federal court to stay an action in order to allow the state court to commence proceedings which might preclude further action in the federal court.[22] In language which has since been frequently quoted, the Court stated that the pendency of a state court suit is no bar to an action in federal court.[23]

McClellan and the later case of *Kline v. Burke Construction Co.*[24] are often relied on today by those courts that refuse to grant stays based on the pendency of parallel state litigation. Yet, both cases are distinguishable on their facts. In *McClellan*, the record indicated that the stay had been granted to allow the state to institute an action in state court. Affidavits were filed in

Screen Serv. Corp., 349 U.S. 322, 326 (1955). *See generally* 1B MOORE'S FEDERAL PRACTICE ¶¶ 0.401-48 at 11-4201 (2d ed. 1974).

18. 1 AM. JUR. 2d *Actions* § 93 (1962).

19. *See, e.g.*, Langnes v. Green, 282 U.S. 531 (1931); Weiner v. Shearson, Hammill & Co., 521 F.2d 817, 821 (9th Cir. 1975); Solarana v. Industrial Elec., Inc., 50 Haw. 22, 428 P.2d 411 (1967).

20. "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). The courts of the United States "cannot abdicate their authority or duty in any case in favor of another jurisdiction." Chicot County v. Sherwood, 148 U.S. 529, 534 (1893).

21. 217 U.S. 268 (1910).

22. *Id.* at 281-82. If the state court proceedings resulted in a final judgment, the doctrine of res judicata might be invoked to bar a second suit on the same cause of action. *See* note 16 *supra*.

23. Specifically, the Court in *McClellan* stated:

> The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, for both the state and Federal courts have concurrent jurisdiction over such controversies, and when they arise between citizens of different states the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may have also taken jurisdiction of the same case.

Id. at 282.

24. 260 U.S. 226 (1922).

the Supreme Court, however, which indicated that the state court had actually commenced proceedings before the federal action and had ruled adversely to the plaintiffs in the federal suit. Thus, the lower federal court judge felt a stay was warranted in order to allow the state court to culminate its litigation. The Supreme Court stated that because the affidavits were not part of the record, it would not consider them and decided the case based on the facts as presented in the record, *i.e.*, that the federal action was stayed to allow the state to bring an action, rather than to culminate one that had already been brought.[25] Hence, it is questionable how the Court would have ruled had it been able to consider the fact that prior state court action was involved. *McClellan*, therefore, can only stand for the proposition that a stay cannot be granted prior to the commencement of a state court suit.[26]

Kline v. Burke Construction Co.[27] was a contract dispute in which the construction company asked the federal court to enjoin the state court proceedings. In holding that a federal court could not enjoin an in personam state court proceeding, the Court declared that "each court [state and federal] is free to proceed in its own way and in its own time, without reference to the proceedings in the other court."[28] Since the issue in *Kline* was whether a federal court could enjoin the state court proceedings, that case, like *McClellan*, does not answer the question as to whether a federal court can stay its own proceedings in deference to a previously commenced state court suit.

Landis v. North American Co.[29] is the strongest authority for proponents of a discretionary stay. The action in *Landis* arose out of the Public Utility Holding Company Act of 1935[30] under which the North American Company would have to register with the Securities and Exchange Commission. North American and American Water Works and Electric Company brought suit in the District Court for the District of Columbia challenging the constitutionality of the Act and asking the court to enjoin its enforcement. On the same day, the Securities and Exchange Commission instituted a test suit in the District Court for the Southern District of New York, seeking an order compelling various public utilities companies to register with them.

Despite North American's contention that the questions presented in the two suits were not identical and that the outcome of the New York suit

25. 217 U.S. at 282-83.
26. *See Stays of Federal Proceedings, supra* note 3, at 688.
27. 260 U.S. 226 (1922).
28. *Id.* at 230.
29. 299 U.S. 248 (1936).
30. Public Utility Act, ch. 681, tit. I, § 33, 49 Stat. 803 (1935) (current version at 15 U.S.C. § 79 (1976)).

would not necessarily be determinative of their rights,[31] the District Court for the District of Columbia stayed its proceedings. The stay was to extend until the United States Supreme Court rendered a decision in the other suit. Further, the stay was conditioned upon "diligent and active prosecution of the Government's suit."[32] The Court of Appeals for the District of Columbia reversed; the Supreme Court granted certiorari.[33]

The Supreme Court held that the stay as granted by the district court was improper in that it awaited the final decision of the other litigation by the Supreme Court.[34] However, the Court made it quite clear that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."[35] Emphasis was given to the "counsels of moderation"[36] that must be considered when a stay is granted. There must be a balancing of the competing interests. The party seeking the stay must show a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay will adversely affect one of the parties.[37] Further, when granted the stay should not extend beyond the time of the decision of the court in which the other action is pending.[38]

While *Landis* offers precise guidelines for the courts to follow in granting stays, both suits involved in that case were in federal courts. The problem of a federal court deferring to a state court was not present. Hence, *Landis* is merely persuasive authority for a federal court to consider when deciding the propriety of granting a stay in deference to a parallel state action.

In 1942, in *Brillhart v. Excess Insurance Co. of America*,[39] the Court, without even considering the possibility of a stay, held that a federal court could dismiss a declaratory judgment action pending the outcome of state court litigation. Brillhart's decedent was killed by a truck that was insured by Central Insurance Company. Central was, in turn, insured by Excess. In trying to recover a default judgment awarded by the state court, Brillhart instituted garnishment proceedings against Central in state court. Excess

31. 299 U.S. at 251.
32. *Id.* at 253.
33. *Id.* at 254.
34. *Id.* at 256. The Court pointed out that the other litigation was still pending in the trial court.
35. *Id.* at 254.
36. *Id.* at 255.
37. *Id.*
38. *Id.* at 256-57. The Court said that this would not preclude the petitioners from requesting a second stay after the first stay expired. However, the burden of proving the necessity of a second stay would again be on the petitioners.
39. 316 U.S. 491 (1942).

sought a declaratory judgment in federal court, contending that it was not liable on the grounds that Central had not notified it of the default judgment. Brillhart subsequently made Excess a respondent in the garnishment suit. While the district court dismissed, the court of appeals reversed and remanded, holding that dismissal was an abuse of discretion. The United States Supreme Court held that a dismissal would be proper when the state court could satisfactorily adjudicate the claims of all the parties.[40] Since the holding in *Brillhart* has been confined to declaratory judgment actions,[41] it is persuasive but not controlling authority in other instances.

In the 1976 case of *Colorado River Water Conservation District v. United States*,[42] the Court considered whether it was proper to dismiss a federal suit involving a dispute over water rights when there was concurrent jurisdiction with a state court. Reiterating the fundamental notion that a federal court must not refuse to exercise its properly invoked jurisdiction,[43] the Court acknowledged certain exceptional circumstances which would justify a dismissal of the federal action, in the interest of wise judicial administration. While no single factor is determinative, the Court found that the existence of exceptional circumstances might be indicated by: (1) the assumption of jurisdiction over a res by the state court; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which the state and federal courts obtained concurrent jurisdiction.[44]

In *Colorado River*, the Court found that a dismissal would further the policy of the McCarran Amendment[45] which allows joinder of the United States as a defendant in suits involving water rights. After studying the legislative history of the Amendment,[46] the Court decided that "[t]he clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system,"[47] and that this could best be accomplished by dismissing the federal suit.

Although the Supreme Court in *Colorado River* was concerned with the dismissal of a federal action, and repeatedly used the word *dismissal*,[48] the Court of Appeals for the Seventh Circuit, when addressing the issue of the propriety of a stay in *Calvert Fire Insurance Co. v. Will*,[49] relied on

40. *Id.* at 495.
41. *See* PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674, 679 (5th Cir. 1973).
42. 424 U.S. 800 (1976).
43. *Id.* at 817.
44. *Id.* at 818.
45. 43 U.S.C. § 666 (1970).
46. 424 U.S. at 807-09.
47. *Id.* at 819.
48. *Id.* at 813, 818-21.
49. 560 F.2d 792 (7th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3426 (U.S. Jan. 10, 1978) (No. 77-693).

Colorado River and applied the exceptional circumstances test. In doing so, the court abandoned its earlier rule that a stay was within the discretion of the district court.[50] However, because some of the lower federal courts adhere to the distinctions between a dismissal and a stay and are anxious to avoid duplicative litigation, there is a strong possibility that those courts will not find *Colorado River* to be controlling in regard to the issues of granting a stay pending the outcome of a parallel state action.

THE LOWER FEDERAL COURT DECISIONS

Courts in Favor of Stays

The Second Circuit quite clearly approves of stays pending the outcome of parallel state litigation.[51] In the leading case of *Mottolese v. Kaufman*,[52] the Court of Appeals for the Second Circuit borrowed from the doctrine of *forum non conveniens*,[53] and held that a defendant in a shareholders' derivative suit should not be subjected to oppressive multiple litigation on the same cause of action. While *Mottolese* involved a shareholders' derivative action where the likelihood of multiple litigation on the same cause of action is greater than in most situations, the Second Circuit has not confined the *Mottolese* rule to shareholders' derivative actions. Rather, the court of appeals and at least one of the district courts have focused on the overall desirability of avoiding what they feel is unnecessary duplicative litigation.

For example, in *Ungar v. Mandell*,[54] the Court of Appeals for the Second Circuit overturned the dismissal of a diversity suit brought by Ungar. In doing so, it declared that the suit appeared to be "a glaring example of the waste, duplication and vexatiousness that can be perpetrated through utilization of diversity jurisdiction."[55] Ungar filed the action after Mandell had instituted a state court suit alleging libel and slander. Ungar's federal court complaint asserted that Mandell had violated an agreement between them to settle their state court suits and sought specific performance, or in the alternative, damages, and an injunction of the state court litigation. The Second Circuit held that the district court's dismissal was

50. *Id.* at 796.

51. *See, e.g.*, Clarkson Co. v. Shaheen, 544 F.2d 624 (2d Cir. 1976).

52. 176 F.2d 301 (2d Cir. 1949).

53. Under the doctrine of *forum non conveniens* a court may dismiss an action if there exists another more appropriate forum in which to bring the action. Important considerations in the application of the doctrine are: (1) the relative ease of access to sources of proof; (2) the availability of witnesses; (3) the possibility of viewing the premises, when appropriate; (4) the interest in avoiding crowded dockets in certain forums; and, (5) the local interest in resolving localized controversies at home. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

54. 471 F.2d 1163 (2d Cir. 1972).

55. *Id.* at 1165.

inappropriate because the case presented none of the narrow circumstances[56] under which a federal court should refuse to exercise its jurisdiction. The court of appeals went on to infer that a stay would have been the proper course to follow in such a situation. Thus, the Second Circuit recognized the distinction between a dismissal and a stay.[57]

Similarly, the District Court for the Southern District of New York has granted stays when: (1) the state and federal suits were brought by the same plaintiff who appeared to be forum-shopping;[58] (2) the state and federal actions turned exclusively on issues of state law which a state court could more easily decide;[59] (3) the state court could give more complete relief;[60] and, (4) the state court proceeding had progressed further than the federal action.[61]

Because the Second Circuit has found that the distinction between a dismissal and a stay is an important one, and because it has recognized the use of a stay as a means of avoiding unnecessary multiple litigation, it may not find *Colorado River*[62] to be controlling. Thus, it is likely to continue to follow the rule that stays are discretionary.

The Court of Appeals for the Fifth Circuit permits a stay in equity suits only. The case of *PPG Industries, Inc. v. Continental Oil Co.*[63] was an action seeking a declaratory judgment of the parties' rights under a gas sale contract and an injunction restraining the defendant from breaching the contract. The Fifth Circuit, concluding that the underlying cause of action was equitable,[64] affirmed the district court's stay pending the final determination of the Texas state court action involving the same parties and issues.[65] The court of appeals noted that although a stay might have the practical effect of a dismissal, a stay was preferable because the district court might want to reactivate the proceedings should there be a delay in the state court action.[66] The court also stated its belief that the United States

56. The "narrow circumstances" in *Ungar* are not to be confused with the "exceptional circumstances" test of *Colorado River*. The *Ungar* court was referring to those circumstances justifying abstention. *Id.* at 1166. *See also* text accompanying note 4 *supra*. *See* text accompanying note 44 *supra* for the exceptional circumstances test of *Colorado River*.

57. 471 F.2d at 1166. Because the state action had been concluded by the time of the federal appeal, a stay was no longer viable.

58. Mars, Inc. v. Standard Brands, Inc., 386 F. Supp. 1201 (S.D.N.Y. 1974).

59. Universal Gypsum of Ga., Inc. v. American Cyanamid, Co., 390 F. Supp. 824 (S.D.N.Y. 1975).

60. Witmar Salvage Corp. v. C. W. Blakeslee and Sons, Inc., 308 F. Supp. 395, 397 (S.D.N.Y. 1969).

61. Mitter v. Massa, 237 F. Supp. 915 (S.D.N.Y. 1965).

62. 424 U.S. 800 (1976).

63. 478 F.2d 674 (5th Cir. 1973).

64. *Id.* at 679.

65. *Id.* at 684.

66. *Id.* at 682.

Supreme Court has shown a policy against dual litigation which applies equally to declaratory judgment actions and to ordinary equity suits, but not necessarily to actions at law.[67] Thus, the court would not go so far as to hold that a stay is discretionary in suits seeking to enforce legal remedies. In equitable actions, though, the Fifth Circuit felt that a stay is proper when the same parties and issues are involved in the state and federal actions, the state court is an adequate forum in which to litigate the claims, and the federal court serves no purpose other than mere duplication of effort. Other factors that the court felt should be considered in determining the propriety of a stay include the advantage of joinder, the priority of filing, the prospects of early completion of the state court suit, and fairness to the parties.[68]

Because the Fifth Circuit in *PPG Industries* recognized the distinction between a stay and a dismissal, it is possible that it would consider *Colorado River* to apply only to dismissals and not to stays. However, even if the Fifth Circuit were to find that *Colorado River* applies equally to dismissals and stays, the court might adhere to its view that stays in deference to parallel state proceedings are proper only in equity actions. The court's opinion in *PPG Industries* stressed the close relationship between suits for declaratory relief and those seeking injunctions or other equitable relief.[69] Because the action in *Colorado River* sought a declaration of the parties' rights to the use of federal water,[70] the Fifth Circuit might find that this was merely laying the ground for an injunction; hence, the underlying cause would be equitable.

The Ninth Circuit favored stays in *Weiner v. Shearson, Hammill & Co.*[71] and *McGreghar Land Co. v. Meguiar*.[72] In *Weiner*, the plaintiff had filed suit in state court in Arizona, alleging that the defendant had mishandled the sale and purchase of plaintiff's stock. The plaintiff subsequently transformed the action into one based on violations of the federal securities laws and filed a complaint in the District Court for the District of Arizona. The district court dismissed the action, but did not state on what grounds it based the dismissal.[73] The court of appeals reversed, holding that even if "abatement"[74] was proper, a stay was preferable.[75] On remand, the district court would have to determine whether under the facts of the case, the state court would be able to adjudicate all of the issues. The court of appeals indicated that because Weiner had raised the violations of the federal

67. *Id.* at 679.
68. *Id.* at 683.
69. *Id.* at 680.
70. 424 U.S. at 805.
71. 521 F.2d 817 (9th Cir. 1975).
72. 521 F.2d 822 (9th Cir. 1975). ***But see*** note 78 and accompanying text *infra*.
73. 521 F.2d at 818.
74. ***See*** note 11 and accompanying text *supra*.
75. 521 F.2d at 821.

securities laws in his answer to Shearson, Hammill's state court counterclaim, the state court might be able to adjudicate that issue.[76] If the state court was unable to determine whether there were violations of the federal securities laws, the federal court could always resume the proceedings, having retained jurisdiction by means of the stay.

McGreghar, the other Ninth Circuit case, was an action alleging fraud in the inducement to invest in a limited partnership. The defendants moved to dismiss for failure to join an indispensable party or, in the alternative, to abate pending the outcome of state court action to dissolve the partnership. In holding that the district court was in error when it dismissed the action, the court of appeals stated that the court should have stayed the proceedings, thus retaining jurisdiction over the cause.[77] As seen from *Weiner* and *McGreghar*, the Ninth Circuit today adheres to the precise use of the terms, "dismissal" and "stay."[78] Hence, it probably will not consider *Colorado River* to be controlling when deciding the propriety of stays.

A summary of the factors which should be considered before granting a stay was given by a district court in the Third Circuit in *Nigro v. Blumberg*.[79] The court there held that the following criteria should be considered: (1) the interest of comity;[80] (2) the promotion of judicial efficiency; (3) the adequacy and extent of relief available in the alternative forum; (4) the identity of parties and issues in both actions; (5) the likelihood of prompt disposition in the alternative forum; (6) the convenience of parties, counsel and witnesses; and (7) the possibility of prejudice to a party as a result of a stay.[81] In staying the federal action, the *Nigro* court was careful to stress that it was not relinquishing its jurisdiction and that the stay order could be modified if the plaintiff was to allege material facts and circumstances that would justify it.[82] Hence, the *Nigro* court, like the courts in the Second, Fourth,[83] Fifth, and Ninth Circuits, recognized the basic distinction between a stay and a dismissal, that of reserving jurisdiction as opposed to relinquishing it, and followed the more moderate approach of staying the action.

Courts That Have Denied Stays

The courts that have denied stays have generally done so because jurisdiction over one or more of the issues has been exclusively federal. In

76. *Id.* at 821-22.
77. *Id.* at 822.
78. *But see* Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 835-36 (9th Cir. 1963) (Duniway, J., dissenting) where the court apparently confused a stay with a dismissal.
79. 373 F. Supp. 1206 (E.D. Pa. 1974).
80. Comity refers to easy intercourse among sovereigns. It is used in the context of avoiding unnecessary friction with the state court. *See* Kline v. Burke Constr. Co., 260 U.S. 226, 229 (1922).
81. 373 F. Supp. at 1212-13.
82. *Id.* at 1214.
83. *See* Amdur v. Lizars, 372 F.2d 103 (4th Cir. 1967).

Cotler v. Inter-County Orthopaedic Association,[84] the Court of Appeals for the Third Circuit held that the district court should not have stayed an action in which the plaintiff alleged violations of the Securities Exchange Act of 1934[85] and of rule 10b-5 of the Securities and Exchange Commission.[86] The reasoning behind this decision was that the parties in both the state and federal actions were not identical, one of the causes of action in the federal court was not present in the state court litigation, and the state court lacked jurisdiction over the claim under the Securities Exchange Act of 1934.[87]

Similar reliance on preemption was employed by the Ninth Circuit in issuing a writ of mandamus directing the district court to vacate a stay order in *Lecor, Inc. v. United States District Court for the Central District of California*.[88] In 1972, Lecor had purchased two million shares of stock in the Luminall Corporation. In April, 1973, one Samson, the former president of Luminall, brought an action in state court alleging breach of employment and consulting contracts. The amended complaint sought damages and specific performance. Two months later, Lecor and Luminall filed suit in federal court, against Samson and an auditing firm, asserting misrepresentation and violations of the federal securities laws. The district court conditioned the stay on an agreement by Samson that he would not oppose the addition of parties or consolidation of claims in the state court, and that he would diligently prosecute his claim.[89]

The court of appeals distinguished *Lecor* from an earlier Ninth Circuit case[90] and focused on the fact that the federal court had exclusive jurisdiction over the claims alleging violation of the federal securities laws. Also, the Ninth Circuit noted that *Lecor* had two parties who were not named in the state court proceedings. Another factor that the court of appeals felt was significant was the availability of a jury trial in the federal suit.[91]

When the question of the discretionary use of stays was addressed by the Court of Appeals for the Seventh Circuit, in *Calvert Fire Insurance Co. v. Will*,[92] the court found that *Colorado River*[93] was controlling and applied

84. 526 F.2d 537 (3d Cir. 1975).

85. 15 U.S.C. § 78 (1976). This case was dealing specifically with an alleged violation of 15 U.S.C. § 78j (1976); *see* 526 F.2d at 540.

86. 17 C.F.R. § 240.10b-5 (1977).

87. 526 F.2d at 540.

88. 502 F.2d 104 (9th Cir. 1974). *Compare id. with* Weiner v. Shearson, Hammill & Co., 521 F.2d 817 (9th Cir. 1975). *See generally* text accompanying notes 68-74 *supra*.

89. *Id.* at 105.

90. Lear Siegler, Inc. v. Adkins, 330 F.2d 595 (9th Cir. 1964).

91. 502 F.2d at 106.

92. 560 F.2d 792 (7th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3426 (U.S. Jan. 10, 1978) (No. 77-693).

93. 424 U.S. 800 (1976).

the exceptional circumstances test.[94] The dispute in *Calvert* arose out of a contract under which the plaintiff joined a reinsurance pool operated by American Mutual Reinsurance Co. Concluding that it had been fraudulently induced to participate in the pool, Calvert notified American Mutual of its intention to rescind the contract. Subsequent litigation between the parties ensued in both state and federal courts. American Mutual filed a declaratory judgment action in state court, with Calvert counterclaiming, asserting violations of federal securities laws, and seeking damages. On the same day that it filed the state court answer, Calvert filed a complaint against American Mutual in federal court, raising all but one of the issues that it had set forth in its state court counterclaim. Upon motion by American Mutual to "abate,"[95] or in the alternative, to dismiss the federal action, Judge Will stayed all of Calvert's claims except that which was not before the state court.[96] In granting the stay, Judge Will relied on *Aetna State Bank v. Altheimer*[97] which had a similar fact pattern. Calvert then filed a petition for a writ of mandamus in the Court of Appeals for the Seventh Circuit asking for a reversal of the stay order and also seeking a directive to Judge Will to rule immediately on the one claim that he had not stayed.[98]

In issuing the writ, the Seventh Circuit noted that Judge Will had properly relied on *Aetna*.[99] Yet, the court, relying on *Colorado River*, found that there were no exceptional circumstances in the *Calvert* case which would justify a stay.[100] The Seventh Circuit felt that the effect of a stay in *Calvert* was equivalent to a dismissal;[101] thus the court applied *Colorado River*, and, at the same time, overruled *Aetna*.[102] Although the court in *Calvert* focused on the exceptional circumstances test, the court did point out the strong federal policy and interest in regulating securities. Because the federal court had exclusive jurisdiction over the rule 10b-5 claim, the court of appeals did not want to see the district court give up that jurisdiction.[103]

In a separate statement, Judge Pell,[104] joined by three judges, declared that the decision in *Calvert* to overrule *Aetna* had apparently taken the

94. 560 F.2d at 796. *See* text accompanying note 44 *supra*.
95. American Mutual may have wanted a stay. *See* note 11 *supra*.
96. 560 F.2d at 794-95.
97. 430 F.2d 750 (7th Cir. 1970).
98. 560 F.2d at 794.
99. *Id.* at 795.
100. *Id.* at 796.
101. *Id.*
102. *Id.*
103. *Id.* at 795-96.
104. The judges in regular active service on the Court of Appeals for the Seventh Circuit voted on the issue of holding an *en banc* rehearing before overruling *Aetna*. Four of the eight judges voted to hold the rehearing. Since this was not a majority, the rehearing *en banc* was not

power to stay proceedings from the district court.[105] Judge Pell indicated that he did not believe the Supreme Court intended *Colorado River* to apply to stays, because the language in *Colorado River* so clearly and frequently referred to dismissals.[106]

Summary of the Approaches Taken by the Federal Courts

The federal courts have solved the problem of stays in deference to state court proceedings on a case-by-case basis. Until *Calvert*, those courts that denied stays generally did so because of the exclusive nature of their jurisdiction over some of the claims involved.[107] Although the Seventh Circuit in *Calvert* found this to be an important factor, its decision placed principal reliance on the exceptional circumstances test of *Colorado River*.[108]

Those courts that have granted stays have considered several factors.[109] One such factor is the ability of the state court to successfully adjudicate the claims of all the parties,[110] which includes the question of whether the federal court has exclusive jurisdiction over any of the claims. Hence, the approach taken by those courts denying stays is actually in line with that course followed by the courts granting stays.

While the Fifth Circuit has developed the rule that stays are discretionary only in suits in equity,[111] the Second, Ninth and Fourth Circuits consider a stay of any action to be within the discretion of the district court.[112] Until *Calvert*, the Seventh Circuit shared this view. Since *Calvert*, the rule in the Seventh Circuit is that the court must justify a stay by showing exceptional circumstances.[113]

THE VALIDITY OF STAYS TODAY

While it has been argued that the exceptional circumstances test enunciated in *Colorado River* applies not only to dismissals but also to stays,[114] this position is questionable. The Supreme Court in *Colorado River* was

held. Judge Pell then filed a separate statement in which he disagreed with the panel's overruling of *Aetna*. Judges Bauer, Fairchild, and Tone joined in the statement. 560 F.2d at 796 n.5.

105. *Id.*
106. *Id.*
107. *See* text accompanying notes 84-91 *supra*.
108. *See* text accompanying notes 92-106 *supra*.
109. *See* text accompanying notes 51-83 *supra*.
110. *See* text accompanying note 81 *supra*.
111. *See* text accompanying notes 63-70 *supra*.
112. *See* text accompanying notes 51-62, 71-83 *supra*.
113. *See* text accompanying notes 92-106 *supra*.
114. *See, e.g.*, Comment, *Federal Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River*, 44 U. CHI. L. REV. 641 (1977) [hereinafter cited as *Federal Stays and Dismissals*].

addressing the issue of the propriety of a dismissal;[115] the opinion specifically and repeatedly used the term, "dismissal."[116] Given such terminology, it is doubtful that the Court intended the decision to be equally applicable to stays.[117] Moreover, the suggestion by one commentator that the Court implicitly disapproves of the abrogation of federal jurisdiction by means of stays[118] ignores the fact that the Court in *Colorado River* strained to find justification for the dismissal. For example, the Court placed great reliance on the desirability of avoiding piecemeal litigation.[119] Justice Stewart, however, joined by Justice Blackmun and Justice Stevens in dissent,[120] pointed out the fact that a dismissal in that case would not necessarily avoid piecemeal litigation since the state court would have to conduct separate proceedings to determine the federal claims. The state court's finding would then have to be incorporated into one all-inclusive water source tabulation. If the federal court were to determine the federal water claims, its decree could easily be incorporated into the water source tabulation.[121] Thus, it either made no difference as to which court decided the federal water claims, or, possibly, resolution of the controversy was delayed because the state court had the added burden of deciding the federal claims.

Justice Stewart also stated that there were issues of federal law involved in *Colorado River* which weighed heavily in favor of the retention of jurisdiction by the federal court.[122] Further, there were claims relating to water set aside for Indian reservations; by dismissing the action, the federal court would leave these claims to the state court. This procedure was contrary to the federal policy to resolve important disputes involving Indians in the federal forum.[123] Finally, Justice Stewart noted that the majority opinion placed undue significance on the distance between the federal court and the state court in justifying a dismissal of the federal action.[124] As Justice Stewart indicated, the Court's reliance on this factor was misplaced because the Federal District Court for the District of Colorado is authorized to sit at Durango, the headquarters of the water division involved in the suit and the locale of the state court.[125]

115. 424 U.S. at 809.
116. *Id.* at 813, 818-21.
117. Judge Pell maintained this position in *Calvert*. 560 F.2d at 796 n.5. *See* note 104 *supra*. *See also* Brief for Petitioner at 17-18, Will v. Calvert Fire Ins. Co., No. 77-693 (U.S., *cert. granted*, Jan. 9, 1978).
118. *See Federal Stays and Dismissals, supra* note 114, at 679-80.
119. 424 U.S. at 818-19.
120. *Id.* at 821 (Stewart, Blackmun, and Stevens, JJ., dissenting).
121. *Id.* at 825.
122. *Id.* at 825-26.
123. *Id.* at 826.
124. *Id.* at 823-24 n.6. *See also* Justice Stevens' dissenting opinion, *id.* at 827.
125. *Id.* at 823-24 n.6.

Justice Stevens, in his dissenting opinion,[126] felt that even if a weighing of the relevant factors was justified, the Supreme Court should have deferred to the judgment of the court of appeals which had ruled against a dismissal. Justice Stevens thought that the court of appeals was in a better position to evaluate the factors involved.[127]

As shown by both dissenting opinions, the majority in *Colorado River* seemed to be looking for a way to justify the dismissal. This hardly seems to be an indication that the Court disapproves of the use of stays, which are less drastic than dismissals, in order to promote wise judicial administration.[128]

If the Supreme Court does disapprove of the "abrogation of federal jurisdiction" by the use of stays, and did intend the exceptional circumstances test of *Colorado River* to control stays as well as dismissals, then evidently the Court has equated a stay with a dismissal. If this is true, the Court has overlooked one very important distinction between the two devices. When an action is dismissed with prejudice, it can be reinstated subject to the statute of limitations for that cause of action. If the statute has run, the motion to reinstate will be denied unless the opposing party fails to raise the statute as a defense. An action that has been stayed, however, tolls the running of the statute of limitations; thus, the proceedings can be recommenced at any time.[129] Perhaps the Supreme Court in *Colorado River* should have held that the lower federal courts should not dismiss the action even under certain exceptional circumstances but should stay it.[130] By using the stay, the court would not necessarily be abandoning its jurisdiction, and the statute of limitations would not pose a problem.

Finally, because the court does retain jurisdiction over the action when a stay is granted, it is a valuable tool for the courts to employ when faced with an action that is also pending in the state court. While a party is entitled to his day in court, there seems to be little justification for giving him two courts, particularly when the dockets are so overcrowded.

When it is obvious to the court that the federal action has been instituted in a vexatious or harassing spirit, or in an attempt to obtain a judgment that would be res judicata in the other suit, a stay offers a way in which the federal judiciary can avoid such abuse. (A dismissal would be improper because the federal court would be abandoning its properly in-

126. *Id.* at 826.

127. *Id.* at 827.

128. *See* Brief for Petitioner at 22-23, Will v. Calvert Fire Ins. Co., No. 77-693 (U.S. *cert. granted*, Jan. 9, 1978).

129. *See* Carr v. Grace, 516 F.2d 502, 503-04 (5th Cir. 1975). *See also* Moore v. St. Louis Music Supply Co., 539 F.2d 1191, 1194 (8th Cir. 1976).

130. *But see* Brief for Petitioner at 19-20, Will v. Calvert Fire Ins. Co., No. 77-693 (U.S. *cert. granted*, Jan. 9, 1978).

voked jurisdiction). Conversely, if it appears that the state suit was filed in an attempt to circumvent the raising of meritorious claims which are within the exclusive jurisdiction of the federal court, then a stay of the federal action would be inappropriate. The denial of a stay based on the exclusivity of the federal court's jurisdiction carries out the congressional policy behind the grants of exclusive federal jurisdiction. Those courts that have denied stays have, in fact, generally relied on the exclusive nature of their jurisdiction.

Other factors that the courts should, and usually do,[131] consider include: (1) the identity of the parties and issues in both actions; (2) the ability of the other court to fully and satisfactorily adjudicate all the claims; (3) the posture of the litigation in the other action; (4) the nature of the action and the relief sought; (5) the possible prejudice to the parties; (6) the convenience of the parties, counsel and witnesses; (7) the desire to avoid piecemeal litigation; and (8) the interest of comity.[132] A court granting a stay could do so on the condition that the moving party will compromise to help overcome a substantial objection to the stay.

Since a stay is a temporary suspension of the proceedings, the court should not grant the stay to extend beyond the outcome of the parallel action. If a delay arises in the other suit, the federal court should vacate its stay, unless it is clear that the delay would also involve the federal action.

CONCLUSION

The question of a federal court staying an action pending the outcome of a parallel state court suit has troubled the federal judiciary for many years. As the United States Supreme Court has not yet made a definitive determination, the power of a lower federal court to stay proceedings can only be determined by the circuits as they interpret the related Supreme Court decisions. Because some courts equate a stay with a dismissal, there is confusion among the circuits as to whether a stay is within the discretion of the district court, or can be granted only in certain instances. The Seventh Circuit has held that the exceptional circumstances test of *Colorado River*, which dealt with a dismissal, applies equally to stays and dismissals. If the other circuits rely on *Colorado River* for guidance, the semantic confusion will probably continue.

This article has suggested that the Supreme Court did not intend *Colorado River* to control stays and that the stay is an effective means by

131. *See, e.g.*, PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674 (5th Cir. 1973); Universal Gypsum v. American Cyanamid Co., 390 F. Supp. 824 (S.D.N.Y. 1975); Nigro v. Blumberg, 373 F. Supp. 1206 (E.D. Pa. 1974).

132. *See* text within note 80 *supra*.

which a federal court can avoid duplicative litigation, while retaining its jurisdiction. Fortunately, the Supreme Court is expected to decide this precise issue in *Will v. Calvert Fire Insurance Co.*[133]

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133. No. 77-693 (U.S. *cert. granted*, Jan. 9, 1978).