Federal Court Stays and Dismissals in Deference to Duplicate State Court Litigation: The Impact of *Moses H. Cone Memorial Hospital v. Mercury Construction*

I. INTRODUCTION

The court system in the United States in many instances provides concurrent jurisdiction to prospective litigants who have the opportunity to file their cases in either state or federal court. For a number of reasons, parties often bring a case in both state and federal court.[1] In *Moses H. Cone Memorial Hospital v. Mercury Construction*[2] the United States Supreme Court severely limited the federal courts' ability to abstain or stay actions to avoid these parallel proceedings.

This Comment will discuss the rationale and impact of the *Moses* decision by first describing the abstention doctrine and identifying the circumstances that cause litigants to bring suit in both state and federal court. The federal law prior to *Moses* will be analyzed, first by examining the Supreme Court decisions and second by considering how the lower courts interpreted those decisions. This Comment then will address the reasons behind the Supreme Court's decision in *Moses* and its practical effect. Finally, this Comment will examine lower courts' interpretations of past Supreme Court decisions to help forecast their interpretation of the *Moses* decision.

II. THE EVOLUTION OF THE ABSTENTION DOCTRINE

The abstention doctrine defines the circumstances under which a federal court properly can decline to exercise or can postpone its jurisdiction.[3] Chief Justice Marshall in *Cohens v. Virginia*[4] established the general rule of abstention when he observed:

> It is most true, that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. . . . 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.[5]

Despite this pronouncement, the federal courts have found at least three distinct circumstances in which abstention may be proper.[6] The first circumstance in which the courts have found abstention to be appropriate is called *Pullman* abstention,

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1. This situation often is called "parallel proceedings" or duplicate litigation. It includes any situation in which two or more suits are prosecuted simultaneously and "at least some of the issues and parties are so closely related that the judgment of one will have res judicata effect on the other." Comment, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of* Colorado River, 44 U. CHI. L. REV. 641, 641 n.1 (1977).

2. 460 U.S. 1 (1983) [hereinafter referred to as *Moses*].

3. Allegheny County v. Frank Mashuda Co., 360 U.S. 185, 188 (1959).

4. 19 U.S. (6 Wheat.) 264 (1821).

5. *Id.* at 404.

6. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976); *see also* C. WRIGHT, THE LAW OF FEDERAL COURTS § 52 (4th ed. 1983).

named after the leading case of *Railroad Commission of Texas v. Pullman Co.*[7] The aim of this line of cases is to avoid deciding a federal constitutional question when the case may be decided on the basis of state law.[8] The second situation in which federal courts have found abstention to be proper is when the federal suit would conflict needlessly with a state's administration of its affairs.[9] This situation is called *Burford* abstention after *Burford v. Sun Oil Co.*[10] The third circumstance found to be appropriate for abstention is called *Younger* abstention[11] after the case of *Younger v. Harris.*[12] *Younger* held that a federal court should refrain from hearing a constitutional challenge to a pending state criminal action.[13] A court will abstain unless the case involves "bad faith, harassment, or a patently invalid state statute."[14] This use of abstention is justified on the grounds that such a case is an "improper intrusion on the right of a state to enforce its laws in its own courts."[15]

Courts also have used abstention to avoid duplicate litigation on the grounds of judicial economy. The Supreme Court has rejected this use of abstention[16] but it has been adamantly retained by some circuits.[17] This Comment will demonstrate that the liberal use of stays or dismissals to conserve judicial resources is no longer permissible after *Moses H. Cone Memorial Hospital v. Mercury Construction.*[18]

III. SITUATIONS IN WHICH ABSTENTION IS CLEAR

Abstention sometimes is proper in federal court to avoid duplicate litigation.[19] If a state court already has taken over a *res*, then the federal court must decline jurisdiction.[20] Abstention also is clear when the federal court is asked to decide a declaratory judgment action and a state action that will effectively determine all of the issues already is pending.[21] In addition, a federal court clearly can refuse to hear a case when the same action is pending in another federal court.[22] The unclear situation, at least prior to *Moses*, is when both the state and federal courts have concurrent jurisdiction over an in personam action other than a declaratory judgment.

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7. 312 U.S. 496 (1941).

8. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976).

9. C. WRIGHT, *supra* note 6, § 52, at 308.

10. 319 U.S. 315 (1943).

11. The Court first formally called this practice abstention in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976). *See* C. WRIGHT, *supra* note 6, § 52A, at 320.

12. 401 U.S. 37 (1971).

13. *Id.* at 53.

14. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 (1976).

15. C. WRIGHT, *supra* note 6, § 52A, at 320.

16. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); *see also infra* note 64.

17. Microsoftware Computer Sys., Inc. v. Ontel Corp., 686 F.2d 531, 538 (7th Cir. 1982); Giulini v. Blessing, 654 F.2d 189, 193–94 (2d Cir. 1981); Union Light, Heat & Power Co. v. United States Dist. Court, 588 F.2d 543, 544 (6th Cir. 1978); *see infra* notes 118–19 and accompanying text.

18. 460 U.S. 1 (1983).

19. C. WRIGHT, *supra* note 6, § 52, at 315–16.

20. Princess Lida v. Thompson, 305 U.S. 456, 466 (1939).

21. Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 495 (1942).

22. Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183–84 (1952).

IV. FEDERAL ABSTENTION WHEN THE PARTIES HAVE BROUGHT SUIT IN STATE COURT

A. *The Scope of the Problem*

Why would parties become involved in two cases, one in state court and one in federal court, on the same cause of action? The motivation for the duplicate litigation in a particular case will have a great effect on how favorable the federal court will be towards abstention in that case, no matter what legal standard is applied. For example, a federal court will be much less sympathetic to a plaintiff who filed the case in federal court to harass the defendant than to a plaintiff who filed the case merely because the state court suit was proceeding too slowly.[23]

Three basic types of duplicate litigation exist.[24] The first type, called a repetitive suit,[25] occurs when a plaintiff brings multiple suits on the same claim against the same defendant in two or more forums. Multiple suits may be brought to harass the defendant or to insure that at least one of the courts will obtain personal jurisdiction over the defendant.[26] Multiple suits also are brought as a means of forum shopping and for other tactical reasons.[27] For example, a plaintiff in a quasi in rem action may not know if the defendant will appear generally and submit to personal jurisdiction or appear specially to defend the property. In this situation it may be to the plaintiff's advantage to file suit in another jurisdiction where additional property may be found.[28] Not only may this tactic allow additional recovery, but it also might induce the defendant to appear generally in one jurisdiction to avoid duplicate litigation.[29]

The second type of duplicate litigation is a reactive suit.[30] A reactive suit is filed by the defendant in the first action against the plaintiff of that action "either seeking a declaration that he is not liable to the plaintiff or asserting an affirmative claim that arises out of or is intimately related to the same transaction or occurrence that is the subject of the first action."[31] Reactive suits may be brought to obtain the tactical advantages of being the plaintiff in the proceeding,[32] to take advantage of or to avoid the prejudices of a particular forum,[33] or to take advantage of a particular forum's choice of law rule that provides more favorable substantive law to the original

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23. *E.g.*, Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 17 n.20 (1983) (majority in dicta agreed that a suit brought to harass the defendant may be stayed in deference to the state court proceedings).

24. Comment, *supra* note 1, at 642.

25. Vestal, *Repetitive Litigation*, 45 IOWA L. REV. 525 (1960).

26. Comment, *supra* note 1, at 643.

27. *Id.*

28. Vestal, *supra* note 25, at 527.

29. The Supreme Court's holding in Shaffer v. Heitner, 433 U.S. 186 (1977) made this tactic less practicable. In *Shaffer* the Court extended the minimum contacts test of International Shoe Co. v. Washington, 326 U.S. 310 (1945) to quasi in rem actions. Thus, the requirement for quasi in rem jurisdiction is minimum contacts between the defendant, the forum, and the litigation. Shaffer v. Heitner, 433 U.S. 186, 209 (1977). Mere ownership of property within a state is not sufficient. *Id.* at 209.

30. Vestal, *Reactive Litigation*, 47 IOWA L. REV. 11 (1961).

31. Comment, *supra* note 1, at 643.

32. Vestal, *supra* note 30, at 13. "Juries normally react in a more favorable manner to requests for relief from plaintiffs than from defendants; there are some procedural advantages in the conduct of a lawsuit; and the plaintiff has more control over the suit than does the defendant." *Id.*

33. Comment, *supra* note 1, at 643–44.

defendant.[34] A defendant also might bring a reactive suit because the original suit is proceeding too slowly.[35] A defendant might bring a reactive suit to gain advantages provided by federal procedure[36] or because there exists a defense or counterclaim based on federal law.[37] The defendant may be unable to remove the state court action to federal court because the requirements for removal are not met.[38]

The third type of duplicate litigation occurs when different named plaintiffs bring separate class actions or shareholder derivative suits representing the same or similar classes on the same cause of action.[39] Individual plaintiffs also may be in the process of litigating the same cause of action.[40] Multiple class actions often are brought by individual class members who desire to control the litigation[41] or "to collect the substantial attorneys' fees awarded the plaintiff in a successful class suit."[42]

To the author's knowledge, no one has conducted a study of the prevalence of repetitive, reactive, or multiple class suits. The lack of such a study is understandable, since it would be difficult to trace the filings of the litigants in the multitude of jurisdictions available. It is also unfortunate, since this kind of information could indicate the extent to which judicial resources are wasted by duplicate litigation. If courts knew that duplicate litigation occurred in a large number of federal cases, they might be more sympathetic to abstention to avoid the "grand waste of efforts by both the courts and parties."[43] However, if a study found that multiple suits were filed only rarely, the federal courts probably would ignore the state court case and proceed to judgment to protect the well-defined jurisdiction of the federal court.[44] Thus, a study

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34. *Id.*

35. *Id.* at 644.

36. *Id.*

37. *Id.*

38. *E.g.*, a defendant in a diversity case cannot remove to federal court if he or she is a citizen of the state in which the action was brought. 28 U.S.C. § 1441(b) (1982). A defendant also may have failed to file a petition for removal within a thirty day period. *Id.* § 1446(b).

39. Comment, *supra* note 1, at 644. Multiple class action proceedings do not occur often because in order to certify a common question class action under Federal Rule 23(b)(3), a court must find that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV P. 23(b)(3). One of the factors listed as important to this decision is "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." FED. R. CIV. P. 23(b)(3)(B). Some courts have relied on this language in refusing to certify a class action when other related suits are pending. Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90, 107 (10th Cir. 1971); Barkel v. Charles Pfizer & Co., 51 F.R.D. 504, 505 (S.D.N.Y. 1970); *see* Comment, *supra* note 1, at 672.

40. Comment, *supra* note 1, at 672.

41. *Developments in the Law-Class Actions*, 89 HARV L. REV. 1318, 1414 (1976).

42. Comment, *supra* note 1, at 644.

43. Microsoftware Computer Sys., Inc. v. Ontel Corp., 686 F.2d 531, 538 (7th Cir. 1982).

44. *See, e.g.*, AMERICAN LAW INSTITUTE. STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, pt. I at 72 (Official Draft Sept. 25, 1965). "It is of first importance to have a definition [of jurisdiction] so clear cut that it will not invite extensive threshold litigation over jurisdiction." *Id.*

> [L]itigants should have the opportunity to determine which judicial system—state and federal—is both equipped and inclined to hear their case and render a verdict without unnecessary delay. Also, greater certainty in this area would result in a conservation of legal and judicial energies; energies unnecessarily expended when a case is shuttled back and forth between the federal court and a state forum. Finally, the unconscionable delays and increased costs which result from such uncertainty can only result in a diminished respect for our judicial systems.

Ashman, Alfini, & Shapiro, *Federal Abstention: New Perspectives on its Current Vitality*, 46 MISS. L.J. 629, 629 (1975).

indicating how often such duplicate litigation occurs could have a profound impact on the balance struck in *Moses* between these two countervailing concerns.[45]

B. *The Supreme Court Decisions Prior to* Moses

The federal courts prior to 1949 universally held that

> the mere pendency of an action in personam in state court would not require, nor even permit, a federal court to refuse to hear an action or to stay an action, and that instead both state and federal actions should go forward until one of them resulted in a judgment that might be asserted as res judicata in the other.[46]

Then two Second Circuit cases authorized stays when the parties had similar proceedings pending in state court.[47] At first, other courts did not follow these decisions. However, between 1967 and 1976 many federal courts under an increasing caseload began to abstain or to grant a stay[48] when a similar state proceeding had been filed. The Ninth Circuit indicated that it had discretion to take such action.[49]

In 1976 the Supreme Court finally addressed the issue in *Colorado River Water Conservation District v. United States*.[50] The United States had brought suit in the United States District Court for the District of Colorado asserting certain water rights in the State of Colorado.[51] Jurisdiction was based on 28 U.S.C. section 1345, which gives the district courts original jurisdiction of all suits brought by the United States.[52] Two months after the federal suit commenced, one of the defendants filed a motion in state court "seeking an order directing service of process on the United States in order to make it a party to proceedings [in state court] for the purpose of adjudicating all of the Government's claims, both state and federal."[53] The United States was served with process and was joined as a defendant pursuant to the McCarran Amendment.[54] The federal district court granted defendants' motion to dismiss,

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45. Some indications imply that relatively few duplicate litigation cases occur between state and federal court. For one thing, relatively few duplicate class actions occur. *See supra* note 39. Moreover, the state court may dismiss the action, leaving the federal court to pursue the litigation alone. *See, e.g.*, McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281 (Del. 1970); Power Train Inc. v. Stuver, 550 P.2d 1293 (Utah 1976). Some states even codified the practice of stays or dismissals in subsequently filed suits. *See, e.g.*, GA CODE ANN. § 9–2–44(a) (1982); ILL. ANN. REV. STAT. ch. 110, § 2–619(a)(3) (Smith-Hurd 1983); N.Y. CIV. PRAC. R. 3211(a)(4) (McKinney 1970).

46. C. WRIGHT, *supra* note 6, at 316; *see* McClellan v. Carland, 217 U.S. 268 (1910).

47. P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949).

48. Simmons v. Wetherell, 472 F.2d 509 (2d Cir.), *cert. denied*, 412 U.S. 940 (1973); Reichman v. Pittsburg Nat'l. Bank, 465 F.2d 16 (3rd Cir. 1972); Thompson v. Boyle, 417 F.2d 1041 (5th Cir. 1969), *cert. denied*, 397 U.S. 972 (1970); Amdur v. Lizars, 372 F.2d 103 (4th Cir. 1967).

49. Weiner v. Shearson, Hammill & Co., 521 F.2d 817 (9th Cir. 1975).

50. 424 U.S. 800 (1976).

51. *Id.* at 805.

52. 28 U.S.C. § 1345 (1982). This statute specifies that "[e]xcept as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States. . . ." *Id.*

53. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 806 (1976).

54. 43 U.S.C. § 666 (1982). This statute provides as follows:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to such suit, shall (1) be deemed to have waived any right to plead that the State laws are

holding that the abstention doctrine required deference to the state court proceedings.[55] On appeal, the Court of Appeals for the Tenth Circuit reversed, holding that abstention was inappropriate.[56] The Supreme Court's majority opinion, written by Justice Brennan and joined by Justices White, Marshall, Powell, and Rehnquist, began its discussion of the abstention issue by declaring that

> [a]bstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. [Abstention] can be justified . . . only in the exceptional circumstances, where the order to the parties to repair to the State court would clearly serve an important countervailing interest."[57]

The Court then said that abstention is appropriate in only three specific circumstances[58] and was not appropriate merely to avoid duplicate litigation.[59] Although judicial economy was not an adequate justification for abstention, the Court did state that "there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by the federal courts or by state and federal courts."[60] The Court noted that these principles rest on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."[61] When the duplicate litigation is between the state and federal courts the Court indicated that as a general rule, the pendency of an action in state court is no bar to similar proceedings in federal court.[62] Due to the federal courts' "virtually unflagging obligation . . . to exercise the jurisdiction given them,"[63] the circumstances permitting dismissal for reasons of wise judicial administration are considerably more limited than the circumstances in which abstention is appropriate.[64] The Court said that "[t]he former circumstances, though exceptional, do nevertheless exist."[65] The factors to be considered in determining exceptional circumstances are: the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was

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> inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. . . .

Id.

55. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 806 (1976).

56. *See* United States v. Akin, 504 F.2d 115, 122 (10th Cir. 1974).

57. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188–89 (1959)).

58. *Id.* at 814–17; *see supra* notes 6–15 and accompanying text.

59. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

60. *Id.*

61. *Id.* (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952)).

62. *Id.*

63. *Id.*

64. *Id.* The Court said that judicial economy is not an appropriate reason for abstention. Yet in this case, the Court essentially abstained, as it did exactly what it defined abstention to mean—declining to exercise or postponing jurisdiction. *See* Allegheny County v. Frank Mashuda Co., 360 U.S. 185, 188 (1959). The Court tried to distinguish between the abstention doctrine (which is based on important state interests) and the situation in the case at hand (in which no state interest existed). With this distinction, the Court stressed that a much higher standard of review would need to be met to justify dismissal in deference to state court proceedings.

65. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976).

obtained by the concurrent forums.[66] The Court added that "[n]o one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. Only the clearest of justifications will warrant dismissal."[67]

Although the Court allowed a dismissal in *Colorado River*, it stressed the unusual nature of the suit and the presence of factors warranting dismissal. The most important factor in this case was the McCarran Amendment,[68] which the majority found to evince a clear federal policy of avoiding piecemeal adjudication of water rights in a river system.[69] The Court pointed to other factors justifying dismissal:

> (a) the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss, (b) the extensive involvement of state water rights occasioned by this suit naming 1000 defendants, (c) the 300-mile distance between the District Court in Denver and the [other state water right] proceedings.[70]

The Court was careful to limit the justifications for dismissal to the facts of the case. The Court did not decide whether

> despite the McCarran Amendment, dismissal would be warranted if more extensive proceedings had occurred in the District Court prior to dismissal, if the involvement of state water rights were less extensive than it is here, or if the state proceedings were in some respect inadequate to resolve the federal claims.[71]

The dissent agreed with the majority's formulation of the applicable test in duplicate litigation cases, but believed that application of this test required that the Court proceed with the litigation in this case.[72]

The Supreme Court in *Colorado River* limited to exceptional circumstances the federal courts' ability to dismiss an action to prevent duplicate litigation. In determining exceptional circumstances, the factors in favor of dismissal are balanced against the federal court's virtually unflagging obligation to hear the case.[73] A federal court should not dismiss a case unless the factors in favor of dismissal clearly outweigh the court's jurisdictional obligation.[74] Since the dissent approved of the majority's test, *Colorado River* made clear that at least exceptional circumstances must be found before a federal court can dismiss a case in deference to state

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66. *Id.*

67. *Id.* at 818–19.

68. 43 U.S.C. § 666 (1982).

69. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976); *see also* Arizona v. San Carlos Apache Tribe of Ariz., 103 S. Ct. 3201 (1983), *reh'g denied*, 104 S. Ct. 209 (1984). *But see* United States v. Adair, 723 F.2d 1394, 1400–07 (9th Cir. 1983) (court stated that abstention in the *Colorado River* situation (duplicate water rights litigation under the McCarran Amendment) can be avoided by limiting the federal court's jurisdiction to one state).

70. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 820 (1976).

71. *Id.*

72. *Id.* at 821–26 (Stewart, J., dissenting).

73. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 818–19 (1983).

74. *Id.* at 819.

proceedings. *Colorado River* was a considerable limitation on the liberal dismissals some circuits previously had allowed in duplicate litigation cases.[75]

However two years later the Supreme Court's decision in *Will v. Calvert Fire Insurance Co.*[76] raised new questions and uncertainties concerning the dismissal issue. In *Will*, American Mutual Reinsurance Company sued Calvert Fire Insurance Company in state court seeking a declaration that Calvert remained subject to a reinsurance pool agreement that it had attempted to rescind.[77] Six months later, Calvert's answer raised a defense based on the Securities Exchange Act of 1934.[78] However, the federal courts have exclusive jurisdiction of cases arising under the Securities Exchange Act of 1934.[79] Thus, on the same day Calvert filed its answer in state court, Calvert filed a complaint seeking enforcement of the Act and damages in federal court.[80] American Mutual moved to stay proceedings in federal court because the state court suit commenced six months earlier than the federal court suit and included identical claims and defenses except Calvert's claim for damages.[81]

Three months later the federal district court granted a stay of all aspects of Calvert's federal action subject to the concurrent jurisdiction of both courts, noting that only Calvert's claim for damages was subject to the exclusive jurisdiction of the federal court.[82] A stay differs from a dismissal in that the federal court retains jurisdiction over the case. If the state court action does not proceed satisfactorily, the federal court can proceed with the case at the request of one of the parties.[83] The other important aspect of a stay order is that it ordinarily is not considered final for the purposes of appeal under 28 U.S.C. section 1292(a).[84]

When Federal District Judge Will rejected two motions to reconsider his stay order and refused to certify an interlocutory appeal pursuant to 28 U.S.C. section 1292(b), Calvert petitioned the Court of Appeals for the Seventh Circuit for a writ of mandamus directing Judge Will to proceed to adjudicate its federal claims.[85] The court of appeals granted the writ of mandamus and the Supreme Court granted certiorari.[86]

Justice Rehnquist's plurality opinion began by determining the appropriate standard of review for the case. The Court distinguished the standard of review on

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75. *See supra* notes 47–48.

76. 437 U.S. 655 (1978), *on remand*, 506 F.2d 12 (7th Cir. 1978).

77. *Id.* at 658.

78. *Id.*

79. 15 U.S.C. § 78aa (1982).

80. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 658 (1978).

81. *Id.* at 659.

82. *Id.*

83. *Id.* at 665.

84. *See, e.g.*, Arny v. Philadelphia Transp. Co., 266 F.2d 869 (3rd Cir. 1959); Mottolese v. Preston, 172 F.2d 308 (2d Cir. 1949). *But see* Amdur v. Lizars, 372 F.2d 103 (4th Cir. 1967); Hickey v. Johnson, 9 F.2d 498 (8th Cir. 1925).

85. Will v. United States, 389 U.S. 90, 95 (1967). A writ of mandamus is an extraordinary remedy and traditionally has been used in the federal courts "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Id.* (quoting Roche v. Evaporated Milk Assn., 319 U.S. 21, 26 (1943)). As an equitable remedy, a writ of mandamus can be invoked only when a direct appeal is not possible, Hines v. D'Artois, 531 F.2d 726 (5th Cir. 1976); American Fidelity Fire Ins. Co. v. United States Dist. Ct. for N. Cal., 538 F.2d 1371 (9th Cir. 1976), and an abuse of judicial power would result if the lower court were not subject to review. Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953).

86. Calvert Fire Ins. Co. v. Will, 560 F.2d 792 (7th Cir. 1977), *rev'd*, 437 U.S. 655 (1978).

direct appeal[87] from that of a writ of mandamus.[88] Although a "simple showing of error may suffice to obtain a reversal on direct appeal, to issue a writ of mandamus under such circumstances 'would undermine the settled limitations upon the power of an appellate court to review interlocutory orders.'"[89] In order for a writ of mandamus to issue, the petitioner must show that the issuance of the writ is "clear and indisputable."[90]

The Court then turned to the abstention issue, declaring that

> [i]t is well established 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." It is equally well settled that a district court is "under no compulsion to exercise that jurisdiction," where the controversy may be settled more expeditiously in the state court.[91]

The plurality relied on *Brillhart v. Excess Insurance Co.*[92] as support for its assertion that a district court is not compelled to exercise its jurisdiction. The other Justices attacked this reliance. Justice Blackmun, who concurred in the judgment, said that *Brillhart*, a diversity case, had no application to a case concerning federal issues.[93] He also noted that even if *Brillhart* were applicable, the holding in that decision was limited by the Court's decision in *Colorado River*.[94] Justice Brennan in his dissent said that:

> [C]rucial to this Court's approval of the District Court's dismissal of the suit in *Brillhart* were two factors absent here. First, because the federal suit was founded on diversity, state rather than federal law would govern the outcome of the federal suit. Second, and more significantly, the federal suit was for a declaratory judgment. Under the terms of the provision empowering federal courts to entertain declaratory judgment suits, 28 U.S.C. § 2201. the assumption of jurisdiction over such suits is discretionary.[95]

The plurality also considered *McClellan v. Carland*,[96] in which the Supreme Court granted a writ of mandamus under facts similar to *Will*.[97] Justice Rehnquist said that

> [s]uch an automatic exercise of authority may well have been appropriate in a day when Congress had authorized fewer claims for relief in the federal courts, so that duplicative

87. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661 (1978) (quoting 28 U.S.C. § 2106 (1982)) (On direct appeal "a court of appeals has broad authority to 'modify, vacate, set aside or reverse' an order of a district court, and it may direct such further action on remand 'as may be just under the circumstances'").

88. All Writs Act, 28 U.S.C. § 1651(a) (1982) (a writ of mandamus may issue only when "necessary or appropriate in aid of their respective jurisdictions").

89. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661 (1978) (quoting Will v. United States, 389 U.S. 90, 98 n.6 (1967)).

90. Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953).

91. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 662–63 (1978) (quoting McClellan v. Carland, 217 U.S. 268, 282 (1910) and Brillhart v. Excess Ins. Co., 316 U.S. 491, 494 (1942)).

92. 316 U.S. 491 (1942).

93. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 667 (1978) (Blackmun, J., concurring).

94. *Id.*

95. *Id.* at 671 (Brennan, J., dissenting). The declaratory judgment statute, 28 U.S.C. § 2201 (1982) provides, "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration. . . ." *Id.*

96. 217 U.S. 268 (1910).

97. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 663 (1978).

> litigation and the concomitant tension between state and federal courts could rarely result. However, as the overlap between state claims and federal claims increased, this Court soon recognized that situations would often arise when it would be appropriate to defer to the state courts.[98]

Far more important to the Court was the fact that *Colorado River* concerned an appeal from a dismissal, while *Will* dealt with a writ of mandamus after a stay.[99] Although the Seventh Circuit categorized the stay as "equivalent to a dismissal,"[100] the plurality felt that since "Calvert remained free to urge reconsideration of [the Judge's] decision to defer based on new information as to the progress of the state case; to this extent, at least, deferral was *not* 'equivalent to a dismissal.'"[101]

The Court defended the rule that leaves to the discretion of the district court the decision to stay proceedings because of concurrent state litigation.[102] The Court said that if the judge had scheduled the case for a later date on his calendar, it would have had the same effect as granting a stay; yet a writ of mandamus would not be appropriate in such a situation.[103] The district court achieved this result by granting a stay; yet this does not change the underlying legal controversy.[104] The Court concluded that since the matter was committed to the district court's discretion, it could "not be said that the litigant's right to a particular result was clear and indisputable."[105]

Justice Blackmun, the fifth vote for reversal, concurred in the judgment only because the district judge did not have the guidance of the *Colorado River* decision when he granted the stay order.[106] Justice Brennan dissented and Chief Justice Burger, Justice Marshall, and Justice Powell joined in this dissent. Justice Brennan said that the plurality's opinion had "an ominous potential for the abdication of federal court jurisdiction in the opinion's disturbing indifference to 'the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.'"[107] He believed that obedience to that obligation becomes even more important when the case is within the exclusive jurisdiction of the federal court.[108] He also said that the plurality ignored the analytical framework of *Colorado River*, a case "whose vitality [was] not questioned,"[109] and that no exceptional circumstances that could be weighed against the district court's unflagging obligation to exercise its exclusive jurisdiction existed in this case.[110]

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98. *Id.*
99. *Id.* at 664.
100. Calvert Fire Ins. Co. v. Will, 560 F.2d 792, 796 (7th Cir. 1977), *rev'd*, 437 U.S. 655 (1978).
101. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665 (1978) (emphasis in original).
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 666.
106. *Id.* at 668 (Blackmun, J., concurring).
107. *Id.* at 669 (Brennan, J., dissenting) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).
108. *Id.*
109. *Id.* at 674.
110. *Id.* at 676.

Will v. Calvert is difficult to interpret because of the circumstances of the case and the split of the court. Had Justice Rehnquist's opinion commanded a majority, lower courts would have been able to use a standard of discretion in staying actions in deference to parallel proceedings. Moreover, as long as the lower court used the language of stay rather than a dismissal, they would be able to insulate themselves from appellate review.[111]

However, the plurality opinion did not speak for the Court since Justice Blackmun voted for reversal only because the district judge had not had the guidance of the Court's opinion in *Colorado River* when he granted the stay.[112] Therefore, a majority of the Court, Justice Blackmun and the four dissenters, agreed that (1) the *Brillhart* decision is not authority when the case is not a diversity case concerning a declaratory judgment; (2) the *Colorado River* test is still applicable when a federal court is considering a stay in deference to state court proceedings; and (3) a writ of mandamus can issue to vacate a stay that is not consistent with the holding of *Colorado River*.[113] Indeed, on remand the Seventh Circuit interpreted the case in this manner.[114] However, the lower courts have not always uniformly interpreted plurality decisions, and no clear cut standard for interpreting these decisions has ever been delineated.[115]

A lower court eager to lessen its docket easily could rely on the plurality's opinion in *Will* as authority for a standard of discretion in cases concerning duplicate litigation.[116] Moreover, *Will* is further complicated by the fact that it concerned the exclusive jurisdiction of the federal court. It is impossible to tell how many of the dissenters might have agreed with the plurality if the case had concerned only concurrent litigation.

C. *The Lower Courts' Decisions: The Disparity in Interpretation of the Supreme Court*

The Supreme Court's decisions prior to *Moses* left much room for interpretative variation by the lower courts. Some circuits held that because of the lack of a clear majority in *Will*, *Colorado River*'s strict test requiring "exceptional circumstances" to warrant dismissal was in no way limited by *Will v. Calvert*.[117] The Second Circuit held that even absent a majority in *Will*, *Colorado River* addressed only the propriety of dismissals and that at the very least the question of stays was left open.[118] Other circuits held that *Will* fixed the appropriate standard (a standard of discretion) for

111. C. WRIGHT, *supra* note 6, at 319.

112. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 668 (1978) (Blackmun, J., concurring).

113. *See* C. WRIGHT, *supra* note 6, at 319.

114. Will v. Calvert Fire Ins. Co., 586 F.2d 12 (7th Cir. 1977), *rev'd* 437 U.S. 655 (1978).

115. *See* Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 756 (1980).

116. *See infra* note 123.

117. Strode Publishers, Inc. v. Holtz, 665 F.2d 333, 336 (11th Cir. 1982) (court denied dismissal despite the state court defendant's having filed in federal court when he could have removed instead); Tover v. Billmeyer, 609 F.2d 1291, 1293 (9th Cir. 1980); Western Auto Supply Co. v. Anderson, 610 F.2d 1126, 1127 (3rd Cir. 1979).

118. Giulini v. Blessing, 654 F.2d 189, 193–94 (2d Cir. 1981).

federal court stays, while *Colorado River* is binding only on outright dismissals.[119]

Two lower court opinions, both in the Seventh Circuit, were particularly distressing to those who felt that the lower courts should hold to the exceptional circumstances test of *Colorado River*.[120] The first case dealt with the continuing saga of *Will*. In *Calvert Fire Insurance Co. v. American Mutual Reinsurance Co.*,[121] Judge Will reconsidered his stay of the proceedings in light of *Colorado River* as the Circuit Court had directed.[122] Judge Will found that Calvert's damage claim was without merit and dismissed that claim for relief, leaving only those claims between the parties subject to the state court's concurrent jurisdiction. The district court then granted a stay, holding that this case was different from *Colorado River* because it dealt with a stay rather than an outright dismissal and because Calvert failed to use the 28 U.S.C. section 1441 removal procedure, even though it was available on the basis of diversity of citizenship.[123] On appeal, the Seventh Circuit upheld the stay, reiterating Judge Will's assertion of the differences between this case and *Colorado River*.[124] The court said that Calvert's filing of the federal suit was "a reactive defense maneuver . . . to delay the state proceeding and postpone final resolution of its dispute. . . ."[125] The court held that the federal district court could stay its proceedings pending the outcome of state proceedings "at least where the district judge has found the federal suit to be vexatious."[126]

Therefore, in a case that had been remanded to the district court so that it could apply *Colorado River*'s exceptional circumstances test, the Circuit Court upheld a stay solely because the suit was vexatious. *Colorado River* did not list harassment of the defendant as an exceptional circumstance that warranted dismissal, and the Circuit Court's holding seems in conflict with its own earlier opinion.[127]

Three years later, in *Microsoftware Computer Systems v. Ontel Corp.*,[128] the Seventh Circuit was even more lenient in granting a stay than it was in *American Mutual*. Ontel originally brought suit in state court alleging a breach of contract by Microsoftware Computer Systems (MCS).[129] MCS counterclaimed in state court and filed suit in federal court based on diversity. The district court denied Ontel's motion to stay proceedings and Ontel appealed.[130]

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119. Microsoftware Computer Sys. v. Ontel Corp., 686 F.2d 531, 538 (7th Cir. 1982) (court held that it was an abuse of discretion for the district court to deny a stay in the case); Union Light, Heat & Power Co. v. United States Dist. Ct., 588 F.2d 543, 544 (6th Cir. 1978).

120. *See, e.g.*, Note, *Jurisdiction—A Stay of Federal Court Proceedings Involving an Issue Within Exclusive Federal Jurisdiction, Pending Termination of a Parallel State Court Action, Is Justified When the Federal Suit Is Found to Be Vexatious*, 55 NOTRE DAME LAW. 601 (1980).

121. 459 F. Supp. 859 (N.D. Ill. 1978).

122. Will v. Calvert Fire Ins. Co., 586 F.2d 12 (7th Cir. 1978). The Court did not issue a writ of mandamus because Judge Will agreed to reconsider the stay on his own motion.

123. Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859, 863–64 (N.D. Ill. 1978), *aff'd*, 600 F.2d 1228 (7th Cir. 1979).

124. Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1234 (7th Cir. 1979).

125. *Id.*

126. *Id.* at 1235.

127. *Compare* Will v. Calvert Fire Ins. Co., 586 F.2d 12 (7th Cir. 1978) *with* Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228 (7th Cir. 1979).

128. 686 F.2d 531 (7th Cir. 1982).

129. *Id.* at 533.

130. *Id.*

The Seventh Circuit first addressed whether it had jurisdiction to hear an appeal from the denial of a stay and concluded that the denial of a stay was equivalent to an order refusing to grant an injunction and therefore was immediately appealable under 28 U.S.C. section 1292(a)(1).[131] The court then addressed the denial of a stay and held that the denial was an abuse of discretion.[132] The court restated the *Colorado River* rule that the federal courts have an "unflagging obligation . . . to exercise the jurisdiction given them. . . ."[133] Citing *Will*, the court also said that the decision to postpone exercising jurisdiction is a matter committed to the district court's discretion.[134]

The court said that a number of factors in *Microsoftware* favored dismissal. First, the court found no federal interest since *Microsoftware* was a diversity case.[135] Second, the court said that since the state action was filed first and since nothing indicated that the state court could not fully and fairly resolve the parties' dispute, proceeding with the case would be "gratuitous interference" with the state court litigation.[136] Finally, the court said that "there would be a grand waste of efforts by both the courts and parties in litigating the same issues regarding the same contract in two forums at once."[137] This holding does not appear to conform to a test requiring that a court abstain only under "exceptional circumstances" in which only the "clearest of justifications" warrant dismissal.[138]

D. *The* Moses *Decision*

In 1983 in *Moses H. Cone Memorial Hospital v. Mercury Construction*[139] the Supreme Court addressed the uncertainty of the lower court opinions. Cone Memorial and Mercury Construction had entered into a construction contract that contained a binding arbitration clause.[140] A dispute arose under the contract, and when it was not resolved, Cone Memorial refused to pay Mercury Construction the contract price.[141] Cone Memorial then filed an action in state court seeking a declaration that Mercury Construction had no right to arbitrate.[142] In response, Mercury Construction filed an action in federal court seeking an order compelling arbitration under section 4 of the

131. *Id.* at 534.

132. *Id.* at 538.

133. *Id.* at 537 (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

134. *Id.* at 537.

135. *Id.*

136. *Id.* at 538 (quoting Brillhart v. Excess Ins. Co., 316 U.S. 491, 495 (1942)). However, note that *Brillhart* concerned a declaratory judgment action. *See supra* notes 108–09 and accompanying text.

137. 686 F.2d 531, 538 (7th Cir. 1982).

138. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976). The court could have held that since the defendant could have removed to federal court in the original action under 28 U.S.C. § 1441 (1976), but did not, a federal interest in favor of dismissal was present in the case. The federal interest was that of upholding the procedural requirements of removal. This might have been an "exceptional circumstance" to warrant dismissal. However, the court did not list this as a significant factor and probably would have found that dismissal was warranted without it.

Colorado River seemed to imply that a federal interest had to be present to warrant dismissal. *Microsoftware* held that a stay was required when no federal interest existed. In this way, the court strayed from the *Colorado River* holding, at least if one believes that *Colorado River* applies to stays as well as dismissals. *See infra* text accompanying note 181.

139. 460 U.S. 1 (1983).

140. *Id.* at 4–5.

141. *Id.* at 6.

142. *Id.* at 7.

Arbitration Act.[143] Jurisdiction was based on diversity of citizenship. The district court granted a motion to stay the federal suit since the state action contained the identical issue of the arbitrability of Mercury Construction's claim.[144] Mercury Construction sought review of the stay by both a direct appeal and a petition for mandamus.[145]

The Supreme Court first had to determine whether the district court's stay order was appealable under 28 U.S.C. section 1291.[146] The issue was of critical importance because, as was pointed out in *Will*, if an order can be reviewed only by a writ of mandamus, then the moving party has the burden of showing that its right to the issuance of the writ is "clear and indisputable."[147] In a direct appeal, "a simple showing of error may suffice."[148]

The stay order would have been appealable in *Moses* only if it had been a "final decision" within section 1291.[149] In making this determination, Justice Brennan first looked to the Supreme Court's decision in *Idlewild Bon Voyage Liquor Corp. v. Epstein*,[150] a *Pullman* abstention case,[151] in which the Court held that the district judge's stay was a final order since the "[a]ppellant was effectively out of court."[152]

Justice Brennan said that finality was even clearer in *Moses*. "A district court stay pursuant to Pullman abstention is entered with the expectation that the federal litigation will resume in the event that the plaintiff does not obtain relief in state court on state-law grounds."[153] By contrast, since *Moses* concerned the identical substantive issue in both state and federal courts, a stay in federal court pending resolution in state court would preclude further litigation in the federal forum. The state court's judgment on the issue would be res judicata.[154] Thus, even more clearly than in *Idlewild*, Mercury Construction was effectively out of court. Therefore, the stay order amounted to a dismissal of the suit and was appealable as final under 28 U.S.C. section 1291.[155]

Moreover, even if the stay order were not final for the purposes of appeal, Justice Brennan said that it nevertheless would be appealable within the *Cohen v. Beneficial Loan Corp.*[156] exception to the finality rule. To fall within this exception, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits, and be effectively unreviewable on appeal from

143. 9 U.S.C. § 4 (1982).

144. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 7 (1983).

145. *Id.*

146. *Id.* at 8. 28 U.S.C. § 1291 (1982) provides: "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

147. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 662 (1978) (quoting United States v. Duell, 172 U.S. 576 (1889)).

148. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661 (1978).

149. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 8 (1983).

150. 370 U.S. 713, 715 n.2 (1962).

151. *I.e.*, a case in which the federal court abstained to avoid a decision of a federal constitutional question when the case could be decided on the basis of state law. *See supra* notes 7–8 and accompanying text.

152. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 n.2 (1962).

153. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 10 (1983).

154. *Id.*

155. *Id.*

156. 337 U.S. 541 (1949).

a final judgment."[157] Justice Brennan said that the order in *Moses* clearly met the second and third of these criteria.[158]

> An order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits. For the same reason, this order would be entirely unreviewable if not appealed now. Once the state court decided the issue of arbitrability, the federal court would be bound to honor that determination as res judicata.[159]

The case additionally met the first criterion, that of conclusively determining the disputed question, because presumably the judge would not have granted the stay unless he expected the state court to resolve the issues adequately.[160]

The Court turned to the propriety of the district court's order of a stay in deference to the litigation in state court.[161] The Court first reviewed its decision in *Colorado River*[162] and then addressed Cone Memorial's assertion that the Supreme Court's decision in *Will*[163] undermined *Colorado River*'s exceptional circumstances test. Cone Memorial contended that the plurality opinion in *Will* had either overruled or substantially modified the Court's holding in *Colorado River*.[164]

The Court pointed out that Justice Rehnquist's opinion in *Will* did not command a majority of Justices. Five of the Justices in *Will*, Justice Blackmun and the four dissenters, agreed on the vitality of the *Colorado River* test.[165]

Even assuming the vitality of Justice Rehnquist's opinion in *Will*, the majority in *Moses* drew a distinction between *Will* and *Moses*.[166] *Will* concerned a petition for a writ of mandamus, in which a petitioner must show a clear and indisputable right to the writ.[167] Even Justice Rehnquist admitted in *Will* that the petitioner in that case might have succeeded on a proper appeal.[168]

The Court then addressed Cone Memorial's contention that the opinions of Justice Rehnquist and Justice Blackmun in *Will* require greater deference to the discretion of the district court than was given to the court of appeals in this case.[169] Justice Brennan agreed that

> the decision whether to defer to the state courts is necessarily left to the discretion of the district court in the first instance. Yet to say that the district court has discretion is not to say that its decision is unreviewable; such discretion must be exercised under the relevant standard prescribed by this Court. In this case, the relevant standard is *Colorado River*'s exceptional-circumstances test, as elucidated by the factors discussed in that case.[170]

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157. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 11–12 (1983) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).
158. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 12 (1983).
159. *Id.*
160. *Id.* at 13.
161. *Id.*
162. *Id.* at 13–16.
163. *Id.* at 16.
164. *Id.* at 17.
165. *Id.*
166. *Id.* at 18.
167. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661–62 (1978).
168. *Id.* at 665.
169. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 18–19 (1983).
170. *Id.* at 19.

The Court then applied the *Colorado River* factors to the circumstances of the case but did not find the exceptional circumstances required to uphold the district court's stay.[171] Cone Memorial conceded that the court had not assumed jurisdiction over any *res* and that the federal court was not a less convenient forum than the state court.[172]

In *Moses* the Court found that the remaining factors, avoidance of piecemeal litigation and the order in which jurisdiction was obtained, actually counseled against a stay.[173] Cone Memorial was involved in two disputes here, one with Mercury Construction concerning Mercury's claim for delay and impact costs, which was subject to an arbitration agreement, and one with the architect for indemnity, which was not subject to an arbitration agreement.[174] Therefore, in this case federal law required piecemeal litigation since "[u]nder the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement."[175] If the dispute with Mercury Construction were arbitrable, then Cone Memorial's disputes would be resolved separately, one by arbitration and the other, if necessary, in state court. If the dispute were not arbitrable, then both disputes would be resolved in state court. Thus, the federal court's decision to proceed with the case would not cause piecemeal resolution of the parties' underlying dispute.[176]

The Court then turned to the order in which the two courts obtained jurisdiction. Although the state court obtained jurisdiction nineteen days before the federal court, Justice Brennan felt that "priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions."[177] In this case, the state court suit had had no substantial proceedings, while when the stay was granted, the federal court had taken most of the steps necessary to resolve the arbitrability issue.[178]

In addition, the Court noted that federal law, the Arbitration Act, was to be applied. Although the Court admitted that this source-of-law factor was not as significant as in *Will*, since concurrent jurisdiction was at issue here, the Court stressed that:

> our task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather the task is to ascertain whether there exist "exceptional" circumstances, the "clearest of justifications," that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction. . . . [T]he presence of federal-law issues must always be a major consideration against surrender.[179]

171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 20.
176. *Id.*
177. *Id.* at 21.
178. *Id.* at 22.
179. *Id.* at 25–26 (emphasis in original).

Another factor weighing against the stay was the possible inadequacy of the state court proceeding, since substantial room for doubt existed that Mercury Construction would be able to obtain an order in state court compelling Cone Memorial to arbitrate.[180]

Finally, the Court dealt with Cone Memorial's contention that a stay was less onerous than a dismissal, since Mercury Construction was free to urge the reopening of the federal case if the state suit failed to adequately adjudicate its rights. Therefore, Cone Memorial contended, *Colorado River*'s test should not apply. Justice Brennan declared that "a stay is as much a refusal to exercise federal jurisdiction as a dismissal."[181] A district court would not grant a stay or a dismissal if it did not think the state court would provide an adequate resolution of the dispute.[182] Indeed, a court would seriously abuse its discretion if it granted a stay or dismissal without such a belief.[183]

Justice Rehnquist dissented in *Moses* and Chief Justice Burger and Justice O'Connor joined his dissent. The dissent stated that the district judge's stay order was not sufficiently final to be appealable under section 1291. Justice Rehnquist first said that if the district court merely had set the trial date two months away rather than staying the action, the order would have been subject to review only by a writ of mandamus or by a permissive interlocutory appeal under 28 U.S.C. section 1292(b).[184] The dissent remarked that this stay was no more final than setting the trial date and that the stay order was tentative.[185] The stay order was subject to change "on a showing that the state proceedings were being delayed, either by the Hospital or by the court, or that the state courts were not applying the federal Act, or that some other reason for a change had arisen."[186]

Justice Rehnquist said that the majority had created uncertainty regarding when a district court order in a pending case can be appealed.[187] He said that "[t]his uncertainty gives litigants opportunities to disrupt or delay proceedings by taking colorable appeals from interlocutory orders, not only in cases nearly identical to this but also in cases which the ingenuity of counsel disappointed by a district court's ruling can analogize to this one."[188] Since the dissenters differed in their view of the

180. *Id.* at 26–27.
181. *Id.* at 28.
182. *Id.*
183. *Id.*
184. *Id.* at 30 (Rehnquist, J., dissenting).
185. *Id.*
186. *Id.*
187. *Id.* at 31.
188. *Id.* at 31–32. Justice Rehnquist's concern has not been proved to be entirely meritorious. True, the federal courts have followed the *Moses* decision holding that a stay in deference to duplicate state court litigation is directly appealable under 28 U.S.C. § 1291. *See* Koke v. Phillips Petroleum Co., 730 F.2d 211 (5th Cir. 1984); Herrington v. County of Sonoma, 706 F.2d 938 (9th Cir. 1983). However, they have been reluctant to extend the *Moses* finality rule beyond abstention or abstention-like cases. *See* EEOC v. Neches Butane Prods. Co., 704 F.2d 144, 150 (5th Cir. 1983). This result necessarily follows from footnote 11 of the *Moses* decision, in which the Court stated that there must be legal impossibility to the suit in federal court (in these cases it would be the res judicata effect of the state court judgment that would render the suit in federal court legally impossible) as opposed to practical or economic impossibility. 460 U.S. 1, 10 n.11 (1983).

stay order's appealability, they did not address whether the district court's order was proper in this case.[189]

E. *The Impact of the* Moses *Decision*

The Supreme Court's decision in *Moses* had a powerful effect on the standard to be applied when a federal court decides whether to stay or dismiss an action in deference to parallel state court proceedings. *Moses* was strengthened further by the dissenters' failure to express displeasure at the majority's extending the *Colorado River* test to stays as well as dismissals. Although the dissenting Justices were in no way required to reach the issue, since they disagreed on the appealability of the stay order under 28 U.S.C. section 1291,[190] they do seem to have retreated from their formerly vigorous stand on the subject.[191] Thus, the Court probably will not change its position on the subject in the near future.

The Court's opinion in *Moses* has created a number of practical repercussions. The Court clearly extended *Colorado River* to include stays as well as dismissals. The Court did this in two ways. First, by allowing a direct appeal from a stay whenever a party is "effectively out of court" or falls within the *Cohen v. Beneficial Loan Corp.*[192] exception to the finality rule, the Court removed the district court's ability to insulate itself from review. *Cohen*'s two conditions will apply to the vast majority of cases.[193] A district judge would consider a stay or dismissal only if the issues in both courts were so similar that a decision in state court would effectively preclude the parties' federal court claims. Moreover, *Cohen*'s exception to the finality rule will apply to almost all stays in deference to state court proceedings. A refusal to adjudicate the merits of a case always will present an important issue separate from the merits.[194] The order always will be entirely unreviewable if not appealed immediately, since the federal court will be bound to honor the state court judgment.[195] A case concerning a stay almost always will meet the last criterion, that of conclusively determining the disputed question, because a district court presumably would grant a stay only if it expected the state court to adequately determine the issues.[196] Second, the Court held that no real difference exists between a stay and a dismissal. Thus, the *Colorado River* standard for review applies to both.[197] Therefore, the lower court cases that held that *Colorado River* applies only to dismissals are no longer good law.[198]

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189. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 35 (1983).

190. *Id.*

191. *See* Justice Rehnquist's plurality opinion in Will v. Calvert Fire Ins. Co., 437 U.S. 655, 657–67 (1978).

192. 337 U.S. 541 (1949); *see supra* notes 156–60 and accompanying text.

193. *See, e.g.*, Koke v. Phillips Petroleum Co., 730 F.2d 211 (5th Cir. 1984); Herrington v. County of Sonoma, 706 F.2d 938 (9th Cir. 1983).

194. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 12 (1983).

195. *Id.*

196. *Id.* at 13.

197. *Id.*; *see supra* notes 181–83 and accompanying text.

198. *See supra* note 118 and accompanying text. The Second Circuit confirmed this proposition in Giardina v. Fontana, 733 F.2d 1047 (2d Cir. 1984).

The *Moses* decision also destroyed the precedential value of *Will*. The Court achieved this end with three different rationales. First, the Court explained that the plurality in *Will* did not command a majority and, therefore, was of no precedential value.[199] Second, the Court distinguished *Will* because it came to the Court through a petition for writ of mandamus rather than a direct appeal. The Court then greatly expanded the availability of a direct appeal from a stay.[200] Third, the Court emphasized that the plurality's statement in *Will* that the decision to stay or dismiss proceedings is within the discretion of the district court did not establish a standard of review.[201] The standard of review to be applied is *Colorado River*'s exceptional circumstances test.[202] Therefore, the lower court cases that accepted *Will* as authority for granting the district court discretion in such actions no longer can be considered good law.[203]

Moses also strengthened the *Colorado River* test by clarifying that the party seeking the stay or dismissal has the burden of proof; there must "exist 'exceptional' circumstances the 'clearest of justifications' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction."[204] Therefore, the mere absence of factors that weigh against dismissal is insufficient.

Finally, in *Moses* the Court made clear that two factors besides those enumerated in *Colorado River* were to be considered. One factor is whether federal law is to be applied.[205] The absence of federal issues will weigh in favor of dismissal in "rare circumstances."[206] The second factor brought forth in *Moses* is the inadequacy of the state forum.[207] This factor, however, was framed in terms of the inadequacy rather than the adequacy of the state forum. Therefore, since the Court has held that the absence of factors weighing in favor of dismissal is insufficient,[208] the adequacy of the state forum to resolve the dispute probably will not weigh in favor of dismissal. The way the Court framed the second factor seems dispositive of the way the federal courts should handle its absence. Indeed, several courts have agreed with this interpretation.[209] Thus, *Moses* seems to have overruled the lower court decisions that failed to apply the *Colorado River* test when determining whether to stay proceedings in deference to parallel state litigation.[210]

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199. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 17 (1983); *see supra* notes 164–65 and accompanying text.

200. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 18 (1983); *see supra* notes 166–68 and accompanying text.

201. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 19 (1983); *see supra* notes 169–70 and accompanying text.

202. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 19 (1983).

203. *See supra* note 119 and accompanying text. The Seventh Circuit confirmed this proposition in Illinois Bell Telephone v. Illinois Commerce Commission, 740 F.2d 566 (7th Cir. 1984).

204. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 25–26 (1983) (emphasis in original).

205. *Id.* at 23. Justice Brennan indicated that this factor was brought forth in *Will*, in which the four dissenters and Justice Blackmun had agreed that the fact that federal law was to be applied was a significant factor weighing against the stay.

206. *Id.* at 26.

207. *Id.*

208. *Id.*

209. *E.g.*, Forehand v. First Ala. Bank of Dothan, 727 F.2d 1033, 1035 (11th Cir. 1984); Kruse v. Snowshoe Co., 715 F.2d 120, 123 (4th Cir. 1983).

210. *See supra* notes 118–19 and accompanying text.

Considering the lower courts' past attempts to limit the strong language of *Colorado River*,[211] a possibility exists that some lower courts will do so in the future. However, the lower courts will find this task much more difficult after *Moses*. A lower court now has to work within the factors outlined in *Colorado River* and *Moses*, regardless of whether the case concerns a stay or a dismissal.[212] Also, in *Moses* the Court emphasized that the burden of proof is on the party seeking dismissal.[213] Thus, a lower court will have difficulty granting a stay or dismissal without a powerful justification. Therefore, the lower courts that made frequent use of stays in such cases probably will not be able to do so as easily in the future.

Yet, as the dissent in *Moses* pointed out, nothing in the majority's opinion prevents a district court from setting long calendar dates in cases subject to parallel state litigation.[214] Such decisions would not be considered final so as to be reviewable on direct appeal, but only would be subject to a writ of mandamus, in which the petitioner would have to show a clear and indisputable right to the issuance of the writ.[215] However, these silent stays probably will never become a common practice since most district judges probably will follow the spirit as well as the letter of *Moses*.

F. *The Application of* Moses

Calvert Fire Insurance Co. v. American Mutual Reinsurance Co.[216] and *Microsoftware Computer Systems v. Ontel Corp.*,[217] will be analyzed to determine if their holdings would be different under *Moses* and to give insight into the impact of *Moses* on subsequent lower court decisions. Recent decisions applying *Moses* also will be discussed.

In *American Mutual* the Seventh Circuit upheld a stay because the plaintiff's suit was vexatious.[218] This case is easy to analyze because the majority's opinion in *Moses* addressed it in a footnote.[219] Justice Brennan indicated that deference to state litigation because the federal suit was reactive or vexatious "has considerable merit."[220] The *Moses* majority made clear that the harassment of the defendant may be an "exceptional circumstance" that favors dismissal.[221] Therefore, the Seventh Circuit's decision in *American Mutual* probably would have been no different had the case arisen subsequent to *Moses*.

Microsoftware Computer Systems v. Ontel is quite different, however. In that case, the Seventh Circuit held it was an abuse of discretion not to stay an action in deference to parallel state proceedings.[222] The case was a diversity case, so the court

211. *Id.*
212. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 13 (1983).
213. *Id.* at 25–26.
214. *Id.* at 30 (Rehnquist, J., dissenting).
215. *Id.* at 18.
216. 600 F.2d 1228 (7th Cir. 1979).
217. 686 F.2d 531 (7th Cir. 1982).
218. Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1235 (7th Cir. 1979).
219. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 17–18 n.20 (1983).
220. *Id.*
221. *Id.*
222. Microsoftware Computer Sys. v. Ontel Corp., 686 F.2d 531, 538 (7th Cir. 1982).

said that no federal interest in the litigation existed.[223] The court also said that since the state court could adequately resolve the dispute, to proceed with the federal litigation would be "gratuitous interference" with the state court.[224] *Moses* clearly has overruled this case. In *Moses* the Court said that the lack of federal issues would weigh in favor of dismissal only in "rare circumstances."[225] Moreover, the adequacy of the state forum is not a factor that favors dismissal.[226] The court could have said that since the defendant in the state action could have removed to federal court under 28 U.S.C. section 1441 but did not, the federal interest in upholding the procedural requirements for removal supported dismissing the case.[227] However, any single factor favoring dismissal probably would not be sufficient here. In *Moses* the Court emphasized that only the "clearest of justifications" would warrant dismissal. Under this strict standard, a court would have difficulty holding that a district court's denial of a stay was an abuse of discretion. Finding an abuse of discretion would be nearly impossible in *Microsoftware*, in which only one factor favored dismissal. As the Supreme Court indicated in *Colorado River*, "[n]o one factor is necessarily determinative. . . ."[228]

In *Illinois Bell Telephone v. Illinois Commerce Commission*,[229] the Seventh Circuit seems to have acceded to the stricter test. Indeed, even the Second Circuit, the first court to favor abstention in duplicate litigation cases[230] and the court most reluctant to give up this abstention power[231] has applied the stricter standard. In *Giardina v. Fontana*,[232] after reversing a district court stay in a diversity case, the Second Circuit stated that:

> [w]e reach this conclusion with some reluctance in view of the increasing caseload in the federal courts. . . . Moreover, we are loath to overturn an exercise of discretion of an able district judge. But in view of the record before us and what we regard as the most relevant precedents, we do not think we have any choice.[233]

In fact, all the circuits seem to be following the *Colorado River* and *Moses* tests strictly,[234] allowing a stay in only the most exceptional of circumstances.[235]

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223. *Id.* at 537.

224. *Id.* at 538 (quoting Brillhart v. Excess Ins. Co., 316 U.S. 491, 495 (1942)).

225. Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 26 (1983).

226. *See supra* notes 207–09 and accompanying text.

227. *See supra* note 138.

228. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976).

229. 740 F.2d 566 (7th Cir. 1984).

230. P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949).

231. Giulini v. Blessing, 654 F.2d 189, 193–94 (2d Cir. 1981).

232. 733 F.2d 1047, 1053 (2d Cir. 1984).

233. *Id.*

234. Forehand v. First Ala. Bank of Dothan, 727 F.2d 1033, 1035–36 (11th Cir. 1984); Kruse v. Snowshoe Co., 715 F.2d 120, 123–24 (4th Cir. 1983); Herrington v. County of Sonoma, 706 F.2d 938 (9th Cir. 1983).

235. Fox v. Consolidated Rail Corp., 739 F.2d 929 (3rd Cir. 1984) (state court lawsuit had already been settled by the parties); Board of Educ. of Valley View v. Bosworth, 713 F.2d 1316, 1321–22 (7th Cir. 1983) (the state court had already rendered judgment on some of the issues and was expected to proceed to judgment on the rest of the issues shortly).

V. CONCLUSION

As evidenced by these lower courts' decisions, *Moses* limits a district court's ability to abstain or stay an action in deference to parallel state litigation. No longer will the federal courts be able to avoid the requirements of *Colorado River* by characterizing an abstention as a stay rather than a dismissal. Moreover, with the burden of proof placed on the party moving for dismissal of the federal action, a court will have difficulty abstaining except in the most exceptional of circumstances. Furthermore, considering the strength of the six to three decision, the requirements for dismissal of a federal action in deference to state court litigation probably will not change in the near future.

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