Volume 24 | Issue 4 Article 8

1979

Federal Courts - Use of Mandamus to Compel Adjudication of a Claim within Exclusive Federal Jurisdiction

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FEDERAL COURTS—USE OF MANDAMUS TO COMPEL ADJUDICATION OF A CLAIM WITHIN EXCLUSIVE FEDERAL JURISDICTION.

Will v. Calvert Fire Insurance Co. (U.S. 1978)

In July 1974, American Mutual Reinsurance Company (Amreco) brought suit for declaratory judgment against Calvert Fire Insurance Company (Calvert) in an Illinois state court,[1] seeking to establish that a contract of reinsurance between itself and Calvert was in full force and effect.[2] Calvert's answer, filed in January 1975, alleged that the agreement was unenforceable because Amreco had violated the Securities Act of 1933 (1933 Act),[3] the Securities Exchange Act of 1934 (1934 Act),[4] the Illinois Securities Act,[5] and the Maryland Securities Law,[6] and because Amreco was guilty of common law fraud.[7] Calvert also counterclaimed for two million dollars in damages, asserting all the grounds it had asserted in its defense except the alleged violation of rule 10b-5.[8] Calvert excluded the rule 10b-5 claim for damages from the state court counterclaim because actions under the 1934 Act are subject to exclusive federal jurisdiction.[9]

On the same day, Calvert filed suit in federal court,[10] seeking rescission of its agreement with Amreco and claiming two million dollars in damages.[11] Calvert's suit was grounded upon the same violations of the se-

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1. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 658 (1978). Suit was brought in the Circuit Court of Cook County, Illinois. *Id.* The circuit court opinion is unreported.

2. *Id.* A reinsurance policy is a device by which primary insurers seek to lessen the risk of financial losses from claims exceeding their premium intake. *See id.* In early 1974, Calvert joined Amreco's "multiple line pool." Calvert Fire Ins. Co. v. Will, 560 F.2d 792, 793 (7th Cir. 1977), *rev'd*, 437 U.S. 655 (1978). By the terms of the reinsurance agreement, Calvert was to pay premiums to Amreco, earning a pro rata share of Amreco's balance remaining after the deduction of losses paid to primary insurers and Amreco's management fee. 560 F.2d at 793. On the other hand, if Amreco's losses exceeded the pool premiums, it was to be indemnified by the pool members. *Id.*

3. 15 U.S.C. §§ 77a-77aa (1976).

4. Calvert contended in its answer that the agreement was unenforceable because under rule 10b-5, 17 C.F.R. § 240.10b-5 (1978), enacted pursuant to § 10(b) of the 1934 Act, 15 U.S.C. § 78j(b) (1976), the agreement could be rescinded. 437 U.S. at 659 n.1.

5. ILL. REV. STAT. ch. 121½, § 137.1-.19 (1978).

6. 1937 Md. Laws ch. 348, *as amended by* 1961 Md. Laws ch. 1 (repealed 1975 Md. Laws ch. 311, § 1) current version at MD. CORP. & ASS'NS CODE ANN. §§ 11-101 to 11-908 (1978).

7. 437 U.S. at 658. Calvert gave notice of rescission to Amreco in April 1974, after receiving Amreco's financial statement and 1973 annual report. 560 F.2d at 793. Finding itself pro rata accountable for the pool's substantial losses, Calvert concluded that it had been fraudulently induced to join the pool in that Amreco had withheld material financial data sought by Calvert during their negotiations. *Id.*

8. 437 U.S. at 658.

9. *Id.* The 1934 Act specifically provides for federal jurisdiction:

> The district courts of the United States . . . shall have exclusive jurisdiction of violations of . . . [the 1934 Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by . . . [the 1934 Act] or the rules and regulations thereunder. . . .

15 U.S.C. § 78aa (1976).

10. Calvert filed suit in the United States District Court for the Northern District of Illinois. 437 U.S. at 658.

11. *Id.*

curities laws alleged in its state court counterclaim and the alleged violation of rule 10b-5.[12]

In February 1975, Amreco moved to abate, or, in the alternative, to dismiss the federal court action.[13] Judge Will, United States District Judge for the Northern District of Illinois, ruled on the motions on May 6, 1975, staying all of Calvert's claims, except its claim for damages under rule 10b-5, pending the completion of the state proceedings.[14] On May 9, 1975, Judge Will heard oral argument on the rule 10b-5 claim, but has yet to render a decision on that issue.[15] In an unreported decision in June 1975, the state trial court ruled that the reinsurance agreement was not a "security" within the meaning of the federal securities laws, thereby barring Calvert's rule 10b-5 defense.[16]

Judge Will had twice refused requests by Calvert to reconsider his order staying its claims, and had declined to certify an interlocutory appeal.[17] Calvert therefore sought a writ of mandamus,[18] which was granted by the United States Court of Appeals for the Seventh Circuit and which directed Judge Will to adjudicate the claims for equitable and monetary relief under the 1934 Act.[19] On certiorari, the United States Supreme Court reversed,[20] *holding* that a writ of mandamus may not issue to direct federal adjudication of a claim for damages within the exclusive jurisdiction of the

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12. *Id.* at 658-59.

13. *Id.* at 659. The motion to dismiss was based on the contention that the reinsurance agreement was not a "security" within the meaning of either the 1933 Act or the 1934 Act. *Id.* The motion to abate was based on the fact that the state court proceeding had been initiated some six months prior to the federal proceeding and included all the contested claims except that alleged under rule 10b-5. *Id.*

14. *Id.* In a memorandum opinion, Judge Will noted that a tentative trial date had already been set in the state court and that federal litigation of the same issues would be duplicative and wasteful. *Id.*

15. *Id.* at 660.

16. *Id.* n.2. The Illinois Appellate Court subsequently affirmed the decision of the trial court, and the Supreme Court of Illinois denied leave to appeal. American Mut. Reinsurance Co. v. Calvert Fire Ins. Co., 52 Ill. App. 3d 922, 367 N.E.2d 104 (1977), *petition for leave to appeal denied*, No. 50,085 (Ill. Jan. 26, 1978), *cert. denied*, 436 U.S. 906 (1978).

17. 437 U.S. at 660. As Judge Will's stay order was not a final order, it was not directly appealable. 560 F.2d at 794, *citing* Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537, 540 (3d Cir. 1975). Calvert therefore sought judicial review of the order by petitioning for a writ of mandamus. 437 U.S. at 660.

Recently, Judge Will reconfirmed and expanded his stay. *See* note 97 and accompanying text *infra*.

18. 560 F.2d at 794. The Seventh Circuit stated that "Calvert . . . therefore partially [sought] reversal of the district court's decision to stay Calvert's claim for equitable relief and partially [sought] an order compelling Judge Will to immediately decide the claim for damages over which he . . . retained jurisdiction." *Id.*

19. *Id.* at 797. The Seventh Circuit noted that although Judge Will had acted properly under that court's prior ruling in Aetna State Bank v. Altheimer, 430 F.2d 750 (7th Cir. 1970), the *Aetna* decision was no longer dispositive in light of the decision of the United States Supreme Court in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). 560 F.2d at 796. For a discussion of *Colorado River*, *see* notes 35-46 and accompanying text *infra*.

20. 437 U.S. at 667. *Calvert* was a 5-4 decision. Justice Blackmun concurred in the judgment on separate grounds. *See* notes 64 & 65 and accompanying text *infra*.

federal courts where the issue is concurrently being heard by way of defense in a state court proceeding. *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978).

The United States Supreme Court's decision in *Railroad Commission v. Pullman Co.*[21] marked the advent of abstention as an accepted federal court procedure,[22] and federal district courts have utilized various forms of the doctrine to resolve some of the difficulties inherent in a system of concurrent state and federal jurisdiction.[23] In essence, abstention is a doctrine under which a federal court may decline to exercise or may postpone the exercise of its jurisdiction in favor of another court with concurrent jurisdiction.[24]

The lower federal courts, in response to drastically increased dockets, have employed the abstention doctrine to conserve judicial resources by avoiding duplicative litigation.[25] The federal courts of appeals, in the absence of a specific Supreme Court decision to the contrary, have upheld the power of the district courts to stay actions under such circumstances.[26]

A major Supreme Court statement on abstention was made in *Brillhart v. Excess Insurance Co. of America.*[27] Brillhart, the administrator of a decedent's estate, had obtained a default judgment against Central Mutual Insurance Company (Central), the insurer of the carrier responsible for the decedent's death.[28] Brillhart subsequently instituted garnishment proceedings against Central in state court.[29] The Excess Insurance Company of America (Excess), upon learning of its possible liability to Brillhart as a reinsurer of Central, instituted an action in federal court seeking to determine its rights under the reinsurance agreement with Central.[30] Brillhart made Excess a party to the garnishment proceeding,[31] however, and sought dismissal of the federal suit on the ground that the issues involved could be fully decided in the state proceeding.[32] The United States Supreme Court agreed that a dismissal was within the discretion of the district court,[33] stating that

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21. 312 U.S. 496 (1941).

22. *See* Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 590 (1977).

23. For a discussion of the various forms of abstention, *see* note 40 and accompanying text *infra*.

24. *See* County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959). Concurrent jurisdiction may arise between two federal courts or between a state and a federal court.

25. *See* Ashman, Alfini & Shapiro, *Federal Abstention: New Perspectives on its Current Vitality*, 46 MISS. L.J. 629, 631-32 (1975) [hereinafter cited as *Federal Abstention*].

26. *See* 1A MOORE'S FEDERAL PRACTICE ¶ 0.203[4], at 2136 & n.6 (2d ed. 1978) [hereinafter cited as MOORE].

27. 316 U.S. 491 (1942).

28. *Id.* at 492.

29. *Id.*

30. *Id.* at 492-93. *See* Excess Ins. Co. of America v. Brillhart, 121 F.2d 776, 777-78 (10th Cir. 1941), *rev'd*, 316 U.S. 491 (1942).

31. 316 U.S. at 493.

32. *Id.* The district court dismissed the action, but the United States Court of Appeals for the Tenth Circuit reversed, directing the district court to hear the case. Excess Ins. Co. of America v. Brillhart, 121 F.2d 776, 778 (10th Cir. 1941), *rev'd*, 316 U.S. 491 (1942).

33. 316 U.S. at 498.

> [o]rdinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.[34]

Recently, in *Colorado River Water Conservation District v. United States*,[35] the Supreme Court enunciated what seems to be a restatement of the abstention doctrine. In *Colorado River*, the United States instituted an action in the United States District Court for the District of Colorado, seeking to assert certain reserved water rights.[36] Shortly thereafter, one of the defendants filed suit in state court to adjudicate all of the Government's claims.[37] The district court granted a motion by the defendants to dismiss the federal action, reasoning that the abstention doctrine required deference to the state court proceedings.[38] On appeal, the United States Court of Appeals for the Tenth Circuit reversed, holding that abstention was inappropriate.[39]

In reversing the decision of the Tenth Circuit, the Supreme Court noted three categories to which abstention traditionally has been confined.[40] The Court recognized that the situation presented in *Colorado*

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34. *Id.* at 495.

35. 424 U.S. 800 (1976).

36. *Id.* at 805. The state of Colorado is divided into seven water conservation districts for the purpose of allocating water and adjudicating conflicting claims to that resource. The regulatory scheme is codified in Colorado's Water Right Determination and Administration Act, COLO. REV. STAT. §§ 37-92-101 to -602 (1973). The United States claimed reserved water rights under state and federal law. 424 U.S. at 805-06. Federal court jurisdiction was invoked under a statute which provides: "Except 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, or by any agency or officer thereof expressly authorized to sue by Act of Congress." 28 U.S.C. § 1345 (1976).

37. 424 U.S. at 806. Jurisdiction over the United States by the state court was obtained under the McCarran Water Rights Suit Act, 43 U.S.C. § 666 (1976). 424 U.S. at 806.

38. 424 U.S. at 806. The district court opinion was unreported. *Id.*

39. United States v. Akin, 504 F.2d 115, 122 (10th Cir. 1974), *rev'd sub nom.* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

40. 424 U.S. at 814-17. The categories noted by the Court included "cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Id.* at 814, *quoting* County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959). This category, known as "Pullman abstention," was first enunciated by the Supreme Court in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). The *Colorado River* Court was careful to note, however, that "the opportunity to avoid decision of a constitutional question does not alone justify abstention by a federal court." 424 U.S. at 815 n.21, *citing* Harman v. Forssenius, 380 U.S. 528 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964). Moreover, the Court stated that "the presence of a federal basis for jurisdiction may raise the level of justification needed for abstention." 424 U.S. at 815 n.21, *citing* Burford v. Sun Oil Co., 319 U.S. 315, 318 n.5 (1943); Hawks v. Hamill, 288 U.S. 52, 61 (1933). For a discussion of the *Pullman* doctrine, *see* MOORE, *supra* note 26, ¶ 0.203[1], at 2101-18; Field, *supra* note 22.

The second class of cases recognized by the *Colorado River* Court were those presenting "difficult questions of state law bearing on policy problems of substantial public import . . . transcend[ing] the result in the case then at bar." 424 U.S. at 814, *citing* Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968); Louisiana Power & Light Co. v. City of Thibodaux, 360

River did not fall within any of the enumerated categories,[41] but nevertheless held that dismissal in favor of the pending state litigation was proper under considerations of "wise judicial administration."[42] After noting the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them,"[43] and that the "circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention,"[44] the Court determined that

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U.S. 25 (1959); Hawks v. Hamill, 288 U.S. 52 (1933). The Court noted that in order for a case to fall within this category, "[i]t is enough that exercise of federal review . . . would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." 424 U.S. at 814, *citing* Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943). *See generally* MOORE, *supra* note 26, ¶ 0.203[2], at 2118-30.1.

The third category noted by the Court included cases where "absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings . . ., state nuisance proceedings antecedent to a criminal prosecution, . . . or collection of state taxes." 424 U.S. at 816 (footnote omitted), *citing* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Younger v. Harris, 401 U.S. 37 (1971); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943). *See generally* MOORE, *supra* note 26, ¶ 0.203[3], at 2131-35.

41. 424 U.S. at 817. The Court also noted that

> [a]bstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest."

Id. at 813, *quoting* County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959).

42. 424 U.S. at 817-21. The Court noted that these principles of "wise judicial administration" were "unrelated to considerations of proper constitutional adjudication and regard for federal-state relations," and that they "govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts." *Id.* at 817. Continuing, the Court stated that "considerations of '[w]ise judicial administration giv[e] regard to conservation of judicial resources and comprehensive disposition of litigation.' " *Id.*, *quoting* Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952). *See generally* MOORE, *supra* note 26, ¶ 0.203[4], at 2135-42; *Federal Abstention*, *supra* note 25, at 631-48.

43. 424 U.S. at 817. The Court stated that "[g]enerally, as between state and federal courts, the rule is 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.' " *Id.*, *quoting* McClellan v. Carland, 217 U.S. 268, 282 (1910). However, it noted that "[a]s between federal district courts, . . . the general principle is to avoid duplicative litigation." 424 U.S. at 817, *citing* Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180 (1952); Steelman v. All Continent Corp., 301 U.S. 278 (1937); Landis v. North Am. Co., 299 U.S. 248 (1936). The reason for this difference, the Court noted, "stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." 424 U.S. at 817, *citing* England v. Medical Examiners, 375 U.S. 411, 415 (1964); McClellan v. Carland, 217 U.S. 268, 281 (1910); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (dictum).

44. 424 U.S. at 818. The Court added that "[t]he former circumstances, though exceptional, do nevertheless exist." *Id.* The Court noted some of the factors to be considered in determining whether dismissal for reasons of "wise judicial administration" would be appropriate. One such circumstance involved the exercise of *in rem* or *quasi in rem* jurisdiction, where exclusive jurisdiction would be recognized in the first court that assumed control over the contested property. *Id.*, *citing* Donovan v. City of Dallas, 377 U.S. 408, 412 (1964); Princess Lida v. Thompson, 305 U.S. 456, 466 (1939); United States v. Bank of New York Co., 296 U.S. 463, 477 (1936).

dismissal was proper since "a number of factors clearly counsel against concurrent federal proceedings."[45] Although the Court recognized "wise judicial administration" as a ground for dismissal,[46] the scope of this ground has yet to be defined.

Writing for the Court in *Calvert*, Justice Rehnquist[47] first recognized that a writ of mandamus is the appropriate remedy to compel a lower federal court to exercise its authority when it is under a duty to do so.[48] He noted, however, that such a duty would only arise when the right to an adjudication of a claim in the district court is "clear and indisputable."[49]

In deciding whether Calvert's right to a district court adjudication of its claim was "clear and indisputable," Justice Rehnquist, relying primarily on *Brillhart*,[50] reasoned that although

> "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having juris-

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Another consideration concerned the "inconvenience of the federal forum." 424 U.S. at 818, *citing* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). Moreover, the Court noted that the "desirability of avoiding piecemeal litigation" was a factor to consider in dismissing the federal suit. 424 U.S. at 818, *citing* Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 495 (1942). Finally, it was urged that the order in which the concurrent forums obtained jurisdiction might influence the district court's decision to dismiss the action. 424 U.S. at 818, *citing* Pacific Live Stock Co. v. Oregon Water Bd., 241 U.S. 440, 447 (1916). The Court advised 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." 424 U.S. at 818-19, *citing* Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936). In conclusion, the Court indicated that "[o]nly the clearest of justifications will warrant dismissal." 424 U.S. at 819.

45. 424 U.S. at 819. The Court accorded great weight to the federal policy embodied in the McCarran amendment, 43 U.S.C. § 666 (1976), characterizing it as "a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these [federal] goals." 424 U.S. at 819. *See* note 37 *supra*. The Court also found significant the absence of proceedings in the district court other than the filing of the complaint, the extensive involvement of state water rights, the distance between the water conservation district and the federal courthouse, and the contemporaneous participation of the United States in other state water rights proceedings. 424 U.S. at 820.

In light of the Court's reliance on the McCarran amendment in its determination of the appropriateness of the dismissal, one commentator has stated that *Colorado River* provides little, if any, authorization for district court stays or dismissals on the ground of pendent state proceedings. *See* MOORE, *supra* note 26, ¶ 0.203[4], at 2140. Indeed, after *Colorado River*, the Seventh Circuit expressly overruled its prior decisions allowing district courts to exercise their discretionary power to stay federal proceedings. *See* note 19 *supra*.

46. *See* note 42 and accompanying text *supra*. *Colorado River* was a 6-3 decision. The dissenters endorsed the majority's pronouncement of the use of the abstention doctrine, but disagreed with the recognition of a previously unauthorized ground for dismissal. 424 U.S. at 821 (Stewart, J., dissenting).

47. Justice Rehnquist was joined in his opinion by Justices Stewart, White, and Stevens.

48. 437 U.S. at 661, *citing* Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). Justice Rehnquist stated: "There can be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the Court of Appeals may issue the writ 'in order that [it] may exercise the jurisdiction of review given by law.' " 437 U.S. at 661-62, *quoting* Insurance Co. v. Comstock, 83 U.S. (16 Wall.) 258, 270 (1873).

49. 437 U.S. at 662, *quoting* Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953), *quoting* United States v. Duell, 172 U.S. 576, 582 (1899).

50. 437 U.S. at 662. For a discussion of *Brillhart*, *see* notes 27-34 and accompanying text *supra*. Justice Rehnquist's reliance on *Brillhart* was criticized both by Justice Brennan in a dis-

> diction," [i]t 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.[51]

Justice Rehnquist concluded that the decision to exercise jurisdiction rests largely on the "carefully considered judgment" of the district court.[52] Although he recognized the "virtually unflagging obligation"[53] of the federal courts to exercise their jurisdiction, Justice Rehnquist maintained that this obligation in no way undermined the power of the district courts to exercise the discretion recognized in *Brillhart*.[54]

Applying the two premises he had adopted, Justice Rehnquist reasoned that one cannot logically have a "clear and indisputable" right, which is necessary for the issuance of a writ of mandamus,[55] to the adjudication of a matter that has been committed to the district court's discretion.[56] He therefore concluded that even an abuse of discretion by the district court should not be overridden by a writ of mandamus.[57] Consequently, with

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senting opinion and by Justice Blackmun in his concurring opinion. *See* notes 65 & 67 and accompanying text *infra*.

51. 437 U.S. at 662-63, *quoting* Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 494 (1942); McClellan v. Carland, 217 U.S. 268, 282 (1910). The Court in *McClellan* held that a federal court may not withhold resolution of a claim over which it has cognizance and allow the question to be brought and decided in a state court. 217 U.S. at 281. Justice Rehnquist noted that the remedy allowed in *McClellan* was not a writ of mandamus, but rather an order to show cause why such a writ should not issue. 437 U.S. at 663 n.6. This comment is somewhat misleading as the Court in *McClellan* authorized the issuance of either a writ or an order to show cause. *See* 217 U.S. at 283.

52. 437 U.S. at 663, *quoting* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976). *See* note 44 and accompanying text *supra*. Justice Rehnquist recognized that this discretionary power of district court judges has recently been acknowledged. 437 U.S. at 663. He distinguished *McClellan* by noting that the exercise of jurisdiction mandated by that decision was appropriate in a day when there was little overlap between federal and state court jurisdiction. *Id.* For a discussion of *McClellan*, *see* note 51 *supra*. In contrast, under the modern system of expanded federal jurisdiction and concomitant jurisdictional conflicts, Justice Rehnquist reasoned that the *McClellan* rationale was no longer applicable, and that situations often arise where deferral to a state court would be appropriate. 437 U.S. at 663. Justice Rehnquist again relied on *Brillhart* as illustrative of this view, reiterating that "[t]he decision in such circumstances is largely committed to the discretion of the District Court." 437 U.S. at 664, *citing* Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 494 (1942).

53. 437 U.S. at 664, *quoting* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). *See* note 43 and accompanying text *supra*.

54. 437 U.S. at 664. Justice Rehnquist noted that the "unflagging obligation" should be a factor considered by the court in the exercise of its discretion. *Id.* He reasoned that it was good policy to commit a stay decision to the discretion of the district court, stating that "a busy federal trial judge . . . is . . . entrusted with a wide latitude in setting his own calendar." *Id.* at 665. *See also* Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936).

55. *See* notes 48 & 49 and accompanying text *supra*.

56. 437 U.S. at 665-66.

57. *Id.* at 665. Justice Rehnquist concluded that the proper method of reviewing a district court's exercise of its discretion in staying a proceeding was by interlocutory appeal. *Id.*, *citing* Landis v. North Am. Co., 299 U.S. 248, 256-59 (1936). Justice Rehnquist distinguished La Buy v. Howes Leather Co., 352 U.S. 249 (1957), where the Supreme Court allowed a writ of mandamus to issue to correct a district judge's abuse of discretion in improperly allowing a case to be heard by a master. According to Justice Rehnquist, soon after *La Buy*, the Court warned against the dangers of the issuance of writs of mandamus upon a mere showing of abuse of discretion. 437 U.S. at 665 n.7, *citing* Will v. United States, 389 U.S. 90, 98 n.6 (1967). *But see* note 76 *infra*.

respect to Calvert's claim for equitable relief under rule 10b-5,[58] the plurality held that in view of the concurrent state jurisdiction and the discretionary nature of stay orders in such situations, a writ of mandamus could not issue.[59] Justice Rehnquist dispensed with the contention that the equitable claim remained an "exclusive" federal claim by reasoning that the fact that the issue may be resolved by the state court[60] made the situation indistinguishable from those in which there exists concurrent state and federal jurisdiction.[61] Justice Rehnquist also concluded that the continuing pendency of the rule 10b-5 claim for damages[62] in the district court was a mere delay in its adjudication, which was inadequate grounds for the issuance of a writ of mandamus.[63]

Justice Blackmun, in a brief concurring opinion, believed the issuance of the writ to be improper on the ground that Judge Will had ordered the stay prior to the Supreme Court's decision in *Colorado River*, and therefore without its guidance.[64] In dictum, Justice Blackmun indicated his disapproval of Justice Rehnquist's reliance on *Brillhart*, stating that *Colorado River* had "cut back on . . . [the] sweeping language" of *Brillhart*.[65]

In a strongly worded dissent,[66] Justice Brennan criticized the plurality's "misreliance on *Brillhart*,"[67] its "misapplication of *Colorado River*,"[68] its

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58. *See* text accompanying notes 10 & 11 *supra*.

59. 437 U.S. at 665-66.

60. *Id.* at 666 n.9. *See* note 4 and accompanying text *supra*. The equitable claim could be ruled on by the state court because Calvert brought it up by way of defense in the state action. 437 U.S. at 666 n.9. *See also* Aetna v. Altheimer, 430 F.2d 750, 754 (7th Cir. 1970).

61. 437 U.S. at 666 n.9.

62. As the claim for damages was not heard in the state court, *see* text accompanying note 9 *supra*, Justice Rehnquist maintained that only Calvert's rule 10b-5 claim for damages was subject to exclusive federal jurisdiction. 437 U.S. at 659.

63. Justice Rehnquist acknowledged that a writ could properly issue "[w]here a district court obstinately refuses to adjudicate a matter properly before it," for such conduct would be tantamount to an obstruction of the appellate procedure. 437 U.S. at 666-67. Nothwithstanding Calvert's contentions that Judge Will "in effect" stayed the claim for damages under rule 10b-5, Justice Rehnquist implied that it is necessary to allege "a heedless refusal to proceed" in order for a writ to issue. *Id.* at 667. Furthermore, Justice Rehnquist characterized the delay as "simply a product of the normal excessive load of business in the District Court" compounded by Judge Will's participation in the mandamus proceedings, thereby foreclosing any possibility of inferring the necessary "heedless refusal." *Id. See* notes 14 & 15 and accompanying text *supra*.

64. 437 U.S. at 668 (Blackmun, J., concurring). Apparently acknowledging the extraordinary nature of the writ of mandamus, Justice Blackmun stated that the issuance of the writ was premature because the court of appeals should have required reconsideration of the case by Judge Will in light of *Colorado River*. *Id.*

65. *Id.* at 667 (Blackmun, J., concurring). Justice Blackmun stated that he was not sure that *Brillhart*, a diversity case, was fully compatible with *Colorado River*, a "federal-issue" case. *Id. See* text accompanying notes 92 & 93 *infra*.

66. Justice Brennan was joined in his dissenting opinion by Chief Justice Burger and Justices Marshall and Powell. Chief Justice Burger also wrote a separate dissenting opinion to emphasize his nonparticipation in that portion of Justice Brennan's opinion dealing with res judicata. *See* note 70 *infra*. The Chief Justice found it unnecessary in the context of *Calvert* to discuss whether a federal court should give res judicata effect to state court judgments which implicate federal claims over which the federal courts have been granted exclusive jurisdiction. 437 U.S. at 668 (Burger, C.J., dissenting).

67. 437 U.S. at 674 (Brennan, J., dissenting). Justice Brennan stated that neither the logic nor the holding of *Brillhart* was controlling in *Calvert*. First, he noted that *Brillhart* was

failure to accord sufficient respect to "exclusive" federal jurisdiction,[69] and its avoidance of the res judicata problems that would follow from its decision.[70] Justice Brennan concluded that the writ of mandamus was proper

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grounded on diversity jurisdiction and therefore state, rather than federal, law applied. *Id.* at 671 (Brennan, J., dissenting). Second, and more significant, Justice Brennan noted that *Brillhart* involved a suit for a declaratory judgment. *Id.* Justice Brennan observed that under the Declaratory Judgment Act, 28 U.S.C. § 2201 (1976), the assumption of jurisdiction over such actions is expressly discretionary. 437 U.S. at 671 (Brennan, J., dissenting). That act provides: "In a case . . . within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such declaration . . . ." 28 U.S.C. § 2201 (1976) (emphasis added). In contrast, in *Calvert*, the dissent noted that "federal jurisdiction is not only non-discretionary, but [it is] *exclusive*." 437 U.S. at 672 (Brennan, J., dissenting) (emphasis supplied by the dissent). *See* note 9 *supra*.

68. 437 U.S. at 674 (Brennan, J., dissenting). Justice Brennan maintained that the clear holding of *Colorado River* was that a "federal court's power to dismiss the suit before it in deference to the parallel [state] proceeding is limited by the 'virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.' " *Id.* at 673 (Brennan, J., dissenting), *quoting* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). *See* note 43 and accompanying text *supra*. Noting that the facts of *Calvert* did not fall into any of the three categories where abstention would be appropriate, Justice Brennan stated that the "exceptional" circumstances necessary for dismissal on the ground of "wise judicial administration" did not exist. 437 U.S. at 673 (Brennan, J., dissenting). *See* notes 40-44 and accompanying text *supra*.

Justice Brennan also observed that the decisive factor permitting dismissal in *Colorado River* was the "clear federal policy . . . recogniz[ing] the availability of comprehensive state systems for adjudication of water rights as the means for achieving . . . [the federal] goals." 437 U.S. at 673 (Brennan, J., dissenting), *quoting* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976). Justice Brennan distinguished *Calvert* as follows: "[A]s evinced by the exclusive jurisdiction of the federal courts to determine 1934 Act claims, the relevant federal policy here is the precise opposite of that found to require deference to the concurrent state proceeding in *Colorado River*." 437 U.S. at 673 (Brennan, J., dissenting).

69. 437 U.S. at 670-72 (Brennan, J., dissenting). Justice Brennan stated: "When Congress thus mandates that only federal courts shall exercise jurisdiction to adjudicate specified claims, the 'well established' principle . . . 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,' governs *a multo fortiori*." *Id.* at 670 (Brennan, J., dissenting), *quoting* McClellan v. Carland, 217 U.S. 268, 282 (1910). Justice Brennan criticized Justice Rehnquist for his "flouting" of *McClellan*, "a decision that has stood unquestioned for nearly 70 years." 437 U.S. at 669 (Brennan, J., dissenting).

70. 437 U.S. at 676 (Brennan, J., dissenting). In disputing Justice Rehnquist's conclusion that the delay in the adjudication of Calvert's damages claim was not equivalent to a stay, Justice Brennan noted:

> First, at the time the Court of Appeals granted the writ, Calvert's 10b-5 damages action had been before Judge Will for more than two and a half years without a ruling on the basic legal issue underlying the claim. Second, and for me dispositive, the District Court indicated that it would give the state court's determination that the disputed transaction did not involve a "security" within the meaning of the 1934 Act res judicata effect, thereby depriving Calvert of a federal court determination of a legal issue within the exclusive jurisdiction of the federal courts.

Id. at 677 (Brennan, J., dissenting) (citations omitted). For a discussion of the treatment of this issue by the Court, *see* note 63 and accompanying text *supra*. For a discussion of whether a federal court may give res judicata effect to a state court determination of a question within exclusive federal jurisdiction, *see generally* Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 VA. L. REV. 1360 (1967).

either because of Judge Will's "clear abuse of discretion"[71] or because of his failure to exercise his authority when it was his duty to do so.[72]

An independent analysis of the facts of *Calvert* under the *Colorado River* criteria for abstention clearly indicates that abstention in the instant case was unwarranted.[73] Furthermore, it is doubtful that support for dismissal under a "wise judicial administration" argument could be found in light of the federal policy evidenced by the grant of exclusive federal jurisdiction over rule 10b-5 claims.[74] Contrary to Justice Brennan's dissent, however, the plurality never attempted to bring *Calvert* within the ambit of the *Colorado River* decision.[75] Justice Rehnquist never reached the issue of whether Judge Will's stay was appropriate, but rather addressed the issue of whether mandamus was the proper remedy to be used to compel adjudication of the rule 10b-5 claims.[76] Justice Rehnquist's conclusion, however, that mandamus cannot be an appropriate remedy because one cannot have a "clear and indisputable" right to a matter that has been committed to a court's discretion,[77] although seemingly logical, can only be meaningful if his premises were correct as applied to the proceedings in *Calvert*. In particular, the premise that a district court has discretionary power to withhold the exercise of exclusive federal jurisdiction in a case properly brought before it[78] must withstand scrutiny.

71. 437 U.S. at 676 (Brennan, J., dissenting), *quoting* La Buy v. Howes Leather Co., 352 U.S. 249, 257 (1957). For a discussion of Justice Rehnquist's treatment of *La Buy*, *see* note 57 *supra*.

72. 437 U.S. at 676 (Brennan, J., dissenting), *citing* Will v. United States, 389 U.S. 90, 95 (1967); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). *See* note 48 and accompanying text *supra*. Justice Brennan further stated that "there is simply a complete dearth of 'exceptional' circumstances countervailing the District Court's 'unflagging obligation' to exercise its exclusive jurisdiction." 437 U.S. at 676 (Brennan, J., dissenting).

73. The stayed claim in *Calvert* did not fall within any of the traditional abstention categories. *See* note 40 *supra*.

74. *See* Calvert Fire Ins. Co. v. Will, 560 F.2d 792, 796 (7th Cir. 1977). *See also* text accompanying notes 9 & 69 *supra*; note 68 *supra*. Perhaps the argument could be made that because *Colorado River* authorizes a *dismissal* for reasons of "wise judicial administration" under "exceptional circumstances," this implies the validation of a *stay* for reasons of "wise judicial administration" under less than "exceptional" circumstances, a stay being a less severe order than a dismissal. *See generally* note 44 *supra*. It is arguable, however, that there is no real difference between a stay and a dismissal where the court intends to give res judicata effect to the state court determination.

75. Justice Brennan stated that since *Calvert* "falls within none of the three general abstentation categories, . . . the opinion of . . . [Justice] Rehnquist . . . strains to bring . . . [*Calvert*] within the principles that govern in a very narrow class of 'exceptional' situations." 437 U.S. at 668-69 (Brennan, J., dissenting). An examination of Justice Rehnquist's opinion, however, reveals no claim of "exceptional circumstances" or application of the "wise judicial administration" test.

76. *See* notes 56-63 and accompanying text *supra*. Although Justice Rehnquist indicated that even an abuse of discretion by the district court should not be overridden by a writ of mandamus, *see* note 57 and accompanying text *supra*, the Supreme Court has held to the contrary on prior occasions. *See, e.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511 (1959) (abuse of discretion in disallowing jury trial corrected by mandamus); La Buy v. Howes Leather Co., 352 U.S. 249 (1957) (abuse of discretion in allowing case to be heard by master corrected by mandamus); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953) (mandamus may be used where there is clear abuse of discretion). *See* note 71 and accompanying text *supra*.

77. *See* text accompanying notes 55 & 56 *supra*.

78. *See generally* notes 52-63 and accompanying text *supra*.

Justice Rehnquist's reliance on *Brillhart* for support of this position is difficult to justify.[79] *Brillhart* involved a declaratory judgment action, in which the assumption of jurisdiction is expressly discretionary.[80] In contrast, Calvert's rule 10b-5 claim not only was not for a declaratory judgment,[81] but was also within exclusive federal jurisdiction, and federal courts remain obligated to expeditiously consider and resolve those claims which Congress explicitly reserved to the federal courts.[82] It is submitted that Justice Rehnquist's position that the hearing of an "exclusive" federal claim as a defense in state court causes it to lose its power to command a federal adjudication[83] is inconsistent with legislative mandate.[84] Furthermore, although it is not contested that the state court may rule on Calvert's exclusive federal claim when it is asserted as a defense,[85] it is also clear that there is nothing to prevent the federal district court from hearing the claim concurrently.[86]

Justice Rehnquist's reliance on *Colorado River* for the proposition that the decision to stay "is largely committed to the 'carefully considered judgment' . . . of the District Court"[87] is similarly misplaced. The *Colorado*

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79. Since Justice Blackmun and the dissenters criticized Justice Rehnquist's reliance on *Brillhart*, it is submitted that *Brillhart* is believed to be inapposite by a majority of the Court. *See* notes 65 & 67 and accompanying text *supra*. Moreover, the Court's holding in *Brillhart* was expressly limited to those issues "not governed by federal law." Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 495 (1942). *See* text accompanying note 34 *supra*.

80. *See* note 67 *supra*.

81. Calvert's two claims under rule 10b-5 were for rescission and damages. *See* text accompanying notes 11 & 12 *supra*.

Although it could be argued that the delay in the adjudication of the rule 10b-5 claim for damages was in effect a stay and should be treated as such, for purposes of the remainder of this note Justice Rehnquist's reasoning on this issue will be followed, and it will be assumed that Calvert's rule 10b-5 claim for damages—which was not brought before the state court—was not effectively stayed by the continuing delay in its adjudication. *See* note 63 and accompanying text *supra*.

82. 437 U.S. at 668 (Burger, C.J., dissenting). The courts of appeals have generally held that district courts should not stay claims over which the federal courts have exclusive jurisdiction. *See, e.g.*, Calvert Fire Ins. Co. v. Will, 560 F.2d 792, 796 (7th Cir. 1977), *rev'd on other grounds*, 437 U.S. 655 (1978); Cotler v. Inter-County Orthopedic Ass'n, 526 F.2d 537, 542 (3d Cir. 1975); Lecor, Inc. v. United States District Court, 502 F.2d 104, 106 (9th Cir. 1974).

Although Justice Rehnquist reasoned that Judge Will ordered a stay of the claim for equitable relief and not a dismissal, and that federal jurisdiction was therefore not extinguished, a more realistic view is that Judge Will's stay was tantamount to a dismissal in light of his intention to give res judicata effect to the state court determination. *See* note 70 *supra*.

83. *See* notes 59-61 and accompanying text *supra*.

84. *See* notes 9 & 69 and accompanying text *supra*. Justice Rehnquist's suggestion that because the equitable claim may be ruled on by the state court, albeit by way of defense, the statutory grant of exclusive federal jurisdiction becomes meaningless, was without explanation and seemingly without basis. As Justice Brennan noted, there are valid reasons for recognizing federal jurisdiction notwithstanding the ability of the state court to decide the issue—for instance, the use of liberal federal discovery procedures, and federal court "expertise." 437 U.S. at 675 (Brennan, J., dissenting).

85. *See* note 60 *supra*.

86. *See* note 51 and accompanying text *supra*. It is submitted that the fact that a state court may decide an issue by way of defense does not relieve the federal courts from exercising their "exclusive" jurisdiction. *See* notes 83 & 84 and accompanying text *supra*.

87. *See* note 52 and accompanying text *supra*.

River Court did not purport to deal with cases of exclusive federal jurisdiction,[88] but rather had before it a situation where congressional policy dictated a state court resolution of such conflicts.[89]

Since Justice Rehnquist's conclusion in *Calvert* that mandamus should not have issued was dependent upon a showing that the district courts have discretion to hear cases within exclusive federal jurisdiction,[90] his failure to adequately support the premise undermines that line of reasoning.[91] On the other hand, in the absence of a valid argument to the contrary, the dissent's position that Judge Will's stay was not proper under *Colorado River* and that Calvert had a "clear and indisputable" right to a federal adjudication of its federal claim leads to the conclusion that the issuance of the writ was proper.

The potential impact of *Calvert* as to the impropriety of mandamus to direct the adjudication of a claim within "exclusive" federal jurisdiction where a state proceeding may concurrently resolve the issue is severely limited by Justice Blackmun's concurring opinion. Since Justice Blackmun agreed with the dissenters that *Brillhart* was inapposite,[92] a majority of the Court would not have applied the reasoning of *Brillhart* to the facts of *Calvert*.[93] It is therefore submitted that the district courts would be remiss in deciding any subsequent cases presenting similar issues without conducting an analysis similar to that employed in *Colorado River*.[94] Although Justice Blackmun hinted of possible future alignment with the *Colorado River* analysis suggested by the dissenters in *Calvert*, it must be remembered that his cursory objection to the plurality's reasoning was dictum.[95] Furthermore, should Justice Blackmun become aligned with the dissenters in similar cases in the future, his brief opinion does not indicate whether he would do

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88. The Court in *Colorado River* stated: "[A] carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." 424 U.S. at 818-19. This language certainly permits some degree of discretion in the district court, but must be read in the context of the facts of *Colorado River*, in which the Court was not faced with the issue of abstention in cases involving a claim subject to exclusive federal jurisdiction.

89. *See* note 68 *supra*.

90. *See* notes 52-54 and accompanying text *supra*.

91. It should be noted, however, that in areas other than exclusive federal jurisdiction, Justice Rehnquist's reasoning may well apply. *See* note 98 and accompanying text *infra*.

92. *See* notes 65, 67 & 79 and accompanying text *supra*.

93. *See* note 79 *supra*. *See also* notes 65 & 67 and accompanying text *supra*.

94. *See* notes 64-65 & 68 and accompanying text *supra*. Since the *Calvert* decision, Judge Will has reconfirmed his stay by using a *Colorado River* analysis. *See* note 97 and accompanying text *infra*.

95. *See* note 65 and accompanying text *supra*. Justice Blackmun's statement that Judge Will did not have the guidance of *Colorado River* was perhaps an indication of Justice Blackmun's belief that *Colorado River* may mandate a different result. *See* note 64 and accompanying text *supra*. His conclusion that the issuance of the writ was *premature* instead of *wrong* may indicate that mandamus would have been proper had Judge Will stayed the action in light of *Colorado River*. *See* note 64 *supra*. It is therefore submitted that Justice Blackmun could possibly side with the *Calvert* dissenters in subsequent cases presenting similar issues, thereby creating a new majority position.

so by joining in their *Calvert* reasoning or on separate grounds. This area of the law is apparently still open to controversy.

There are important questions left unanswered by the *Calvert* decision, the most far reaching of which stems from the Court's failure to address the question of whether Judge Will's stay was appropriate under *Colorado River*.[96] In an apparent attempt to clarify the scope of the district courts' discretionary powers, Judge Will, subsequent to the *Calvert* decision, reconfirmed his stay on Calvert's equitable claim and entered a stay on the damages claim.[97]

An important application of *Calvert* may arise in the situation where a district court judge wrongfully stays a "nonexclusive" federal action. It is in these situations that Justice Rehnquist's analysis becomes significant, for it might be argued that although the grant of the stay was wrong, the fact that *Colorado River* appears to give minimal discretion to the district courts should bar the issuance of a writ.[98]

Although the abstention doctrine touches a relatively small percentage of the caseload of a district court judge,[99] it has been said that the uncertainty in this area "could prove to be disastrous for the federal judicial system."[100] *Calvert*, with its limited holding,[101] does little to clear up the lingering uncertainties, perhaps even obfuscating them further.[102] *Calvert* however, has brought into focus the issues which need to be resolved,[103] and has set the stage for the next confrontation.[104]

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96. It is submitted that the majority would have provided additional support for its holding had they concluded that the stay was appropriate under *Colorado River*.

97. *See* Calvert Fire Ins. Co. v. American Mut. Reinsurance Co., 459 F. Supp. 859 (N.D. Ill. 1978). Judge Will relied on *Colorado River* for the discretionary power to stay the action. *Id.* at 863-64. The district judge apparently then authorized an interlocutory appeal. *Id.* at 866. This action will require the resolution of the very important questions left unanswered by the *Calvert* Court. *See* note 103 and accompanying text *infra*.

98. On the other hand, it could be argued that *Colorado River* only recognizes discretion in cases where there is an express federal policy favoring state adjudication. *See* note 68 *supra*. Additionally, it may be argued that under La Buy v. Howes Leather Co., 352 U.S. 249 (1957), an abuse of discretion may be grounds for the issuance of the writ. *See* note 76 and accompanying text *supra*. *But see* note 57 and accompanying text *supra*.

99. One survey has indicated that 68.1% of the responding judges were faced with only one to five possible abstention cases in a two-year period. Over 10% had no such cases. *Federal Abstention*, *supra* note 25, at 648-49.

100. *Id.* at 652.

101. The *Calvert* Court's holding went only to the issue of mandamus. *See* notes 59, 64 & 76 and accompanying text *supra*.

102. *See* Calvert Fire Ins. Co. v. American Mut. Reinsurance Co., 459 F. Supp. 859, 864 & n.4 (N.D. Ill. 1978).

103. The broad issues which should be resolved are: 1) whether a district court has discretion to abstain where there is exclusive federal jurisdiction but a state court is concurrently hearing the issue by way of defense; and 2) whether a district court has discretion to abstain where there is exclusive federal jurisdiction and no concurrent state proceedings. *See* note 97 and accompanying text *supra*.

104. *See* note 97 and accompanying text *supra*.