UIC Law Review

Volume 17 | Issue 1 Article 2

Winter 1984

Diverting the Course of Colorado River: A Reconciliation of Seventh Circuit Adaptations, 17 J. Marshall L. Rev. 49 (1984)

Michael W. Pinsof

Richard A. Wolfe

Follow this and additional works at: https://repository.law.uic.edu/lawreview

Part of the Civil Procedure Commons, Constitutional Law Commons, Fourteenth Amendment Commons, Jurisdiction Commons, and the Supreme Court of the United States Commons

Recommended Citation
Michael W. Pinsof, Diverting the Course of Colorado River: A Reconciliation of Seventh Circuit Adaptations, 17 J. Marshall L. Rev. 49 (1984)

https://repository.law.uic.edu/lawreview/vol17/iss1/2

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

DIVERTING THE COURSE OF *COLORADO RIVER*: A RECONCILIATION OF SEVENTH CIRCUIT ADAPTATIONS

MICHAEL W. PINSOF* &
RICHARD A. WOLFE**

Inherent in the conferral by Congress of diversity jurisdiction upon federal district courts in 1789 was the potential for the pendency of simultaneous proceedings in state and federal courts by parties to a single dispute. Early in our federal jurisprudence, the United States Supreme Court observed that, "the pendency of an action in state court is no bar to proceedings concerning the same subject matter in the federal court having jurisdiction."[1] In its most recent pronouncement on the subject,[2]

* J.D. DePaul University College of Law 1979; B.A. University of Iowa 1976; Member Chicago Bar Association; Associate with Wolfe & Polovin, Chicago, Illinois.

** J.D. DePaul University College of Law 1972; B.A. University of Illinois 1969; Member Illinois State Bar Association and American Bar Association; Partner of Wolfe & Polovin, Chicago, Illinois.

The law firm of Wolfe and Polovin represented Ontel Corporation before the United States District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals. The authors wish to express their gratitude to the law firm of Blau, Kramer, Wactler & Lieberman, P.C., Jericho, New York, for its cooperation and assistance.

1. McClellan v. Carland, 217 U.S. 268, 282 (1910).

2. On February 23, 1983, the United States Supreme Court decided the case entitled Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 103 S. Ct. 927 (1983). In *Cone*, the petitioner (a hospital located in North Carolina) filed an action against the respondent (a construction company with its principal place of business in Alabama) in North Carolina state court, seeking, *inter alia*, a declaratory judgment that there was no right to arbitration under the construction contract between the parties, and that the petitioner was not liable to the respondent. The state court issued an *ex parte* injunction forbidding the respondent to take any steps towards arbitration, which was dissolved after the respondent presented its objections. The respondent then instituted an action in North Carolina district court, jurisdictionally founded upon diversity of citizenship, wherein it sought an order compelling arbitration under section 4 of the United States Arbitration Act of 1925 (9 U.S.C. § 4 (1976)). The district court stayed the action pending resolution of the state court's suit because the two suits involved the identical issue of the arbitrability of the respondent's claims. The Court of Appeals for the Fourth Circuit, finding that it derived appellate jurisdiction under 28 U.S.C. § 1291 (1976), reversed the district court's stay order and remanded the case with instructions to enter an order to arbitrate. *In re* Mecury Const. Corp., 656 F.2d 933 (4th Cir. 1981). Before addressing the substantive issue, the Supreme Court (in an opinion delivered by Justice

the Supreme Court underscored the "virtually unflagging obligation" of the federal courts to exercise the jurisdiction given them,[3] notwithstanding the pendency of a parallel proceeding in state court. In *Colorado River Water Conservation District v. United States*[4], the Court formulated certain factors to be balanced by district courts in determining those rare occasions when sufficient "exceptional circumstances" are present to justify the renunciation of their "duty" to exercise jurisdiction.[5]

Since *Colorado River* was decided, the district courts have adopted divergent applications of the "balancing test" articulated by the Supreme Court when confronted with a motion to dismiss or, in the alternative, to stay federal proceedings in deference to a parallel suit pending in state court. This division of authority has culminated in a trilogy of seemingly conflicting decisions by the Seventh Circuit Court of Appeals rendered over a period of three months. The first and most controversial of the three, *Microsoftware Computer Systems, Inc. v. Ontel Corp.*,[6] appears, at first, to cast serious doubt upon the continued vitality of *Colorado River* in the Seventh Circuit by virtue of its plurality decision that under certain circumstances a district court is *required* to stay its proceedings in deference to a parallel state action. In *Voktas, Inc. v. Central Soya Corp.*,[7] and *Evans Transportation Co. v. Scullin Steel Co.*,[8] two unanimous and separate Seventh Circuit Court of Appeals panels reached seemingly contradictory holdings, founded upon a strict adherence to the mandate of *Colorado River*. This article will trace the district

Brennan, in which Justices White, Marshall, Blackmun, Powell, and Stevens joined) held that the district court's stay order was appealable as a "final decision" under 28 U.S.C. § 1291. Turning to the principal issue, the Court held that the district court abused its discretion in granting the stay. After reaffirming the continued validity of the "exceptional circumstances" standard promulgated in *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976), the Court undertook to apply the factors set forth in that case. The Court concluded that the applicable factors of the exceptional circumstances test, *i.e.*, avoidance of piecemeal litigation and the order in which jurisdiction was obtained by the concurrent forums, failed to demonstrate sufficiently exceptional circumstances to justify the district court's stay. Moreover, the fact that federal law would govern the issue of the arbitrability of the dispute in either forum militated against the district court's stay order. Finally, an important reason dictating against allowing a stay was the probable inadequacy of the state suit to protect the respondent's rights, since it was doubtful that the respondent could obtain from the state court an order compelling the petitioner to arbitrate.

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

4. 424 U.S. 800 (1976).

5. *Id.* at 818. *See infra* note 43-46.

6. 686 F.2d 531 (7th Cir. 1982).

7. 689 F.2d 103 (7th Cir. 1982).

8. 693 F.2d 715 (7th Cir. 1982).

court cases which followed in the wake of *Colorado River*, analyze and attempt to reconcile the *Ontel, Voktas* and *Evans* decisions and propose an analytical framework for evaluating future cases.

PARALLEL PROCEEDINGS IN FEDERAL AND STATE COURTS: AN OVERVIEW

Definition and Historical Perspective

The terms "parallel proceedings," "duplicative litigation," and "the exercise of concurrent jurisdiction" are used interchangeably throughout this article to refer to the simultaneous prosecution of two or more suits in which at least some of the issues and parties are so closely related that the judgment of one will necessarily have a *res judicata* effect on the other.[9] In the first type of *res judicata* effect, "claim preclusion," a final and valid judgment disposing of a particular claim of a party is deemed conclusive.[10] Second, "issue preclusion" or collateral estoppel, makes a judgment conclusive as to any issue actually litigated and determined when that issue was essential to the judgment.[11]

In the context of parallel actions pending concurrently in state and federal forums, the underlying tenet which has pervaded judicial thought since 1821 is that federal courts must hear all cases which satisfy the jurisdictional requirements. In *Cohens v. Virginia*,[12] Chief Justice Marshall stated in dictum:

> 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. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution . . . . 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.[13]

The rationale advanced in support of the foregoing rule was that the jurisdictional statutes bestow upon a federal court plaintiff whose action satisfies the jurisdictional prerequisites an "absolute right" to a federal forum, and imposes upon the court a correlative obligation to proceed to judgment on the plaintiff's

9. Wilson, *Federal Court Stays and Dismissals in Deference to Parallel State Proceedings: The Impact of Colorado River*, 44 U. CHI. L. REV. 641 (1977).

10. *See* RESTATEMENT (SECOND) OF JUDGMENTS, § 45(a), (b) (Tent. Draft No. 1, 1973).

11. *Id.* at Section 45(c).

12. 19 U.S. (6 Wheat.) 264 (1821).

13. *Id.* at 404.

claim.[14]

Although the Supreme Court has consistently adhered to the notion that a federal court has an obligation to exercise its jurisdiction once it is properly invoked,[15] this doctrine has been substantially undercut by the gradual expansion of the three "conventional prototypes" of the abstention doctrine.[16] The traditional abstention doctrines emerged from general principles of federalism, reflecting the concern that in certain instances federal/state comity outweighs any interests favoring adjudication of disputes in the plaintiff's chosen forum.[17] Although a discussion of judicial abstention is beyond the scope of this article, its significance from an historical perspective lies in the gradual erosion of the "absolute right" doctrine whereby a federal court is required to provide a forum to a litigant who properly invokes its jurisdiction.

Types of Parallel Proceedings

Parallel proceedings can be categorized into two types: "re-

14. *See* Checker Cab Mfg. Co. v. Checker Taxi Co., 26 F.2d 752 (N.D. Ill. 1928).

15. *See, e.g.*, Colorado River Water Cons. Dist. v. United States, 424 U.S. 800 (1976); McClellan v. Carland, 217 U.S. 268 (1910); Wilcox v. Consolidated Gas Co., 212 U.S. 19 (1940).

16. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 218 § 52 (3d Ed. 1976); Note, *Judicial Abstention and Exclusive Federal Jurisdiction: A Reconciliation*, 67 CORNELL L. REV. 219 (1981) [hereinafter cited as *Exclusive Jurisdiction*]; *Note, Abstention and Mandamus after Will v. Calvert Fire Insurance Co.*, 64 CORNELL L. REV. 566 (1979) [hereinafter cited as *Abstention*]; Wilson, *supra* note 9. According to Professor Wright, the three "conventional prototypes" of judicial abstention have been invoked to (1) avoid federal constitutional decisions where potentially dispositive state law question is presented; (2) avoid needless conflict with state administration of state affairs; (3) allow state courts to resolve unsettled questions of state law. WRIGHT, *supra*, at § 52.

The seminal case for the first branch of the abstention doctrine directed the federal court to abstain from deciding federal constitutional claims until a state court has resolved unclear, potentially dispositive state law issues. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). *See* C. WRIGHT, *supra* § 52 at 218-21; Field, *"Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine,"* 122 U. PA. L. REV. 1071, 1077-79 (1974). The second branch is illustrated by Louisiana Power and Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). In that case, the Supreme Court approved deferral to a state tribunal for a determinative ruling on state policy of first impression. The third traditional branch is derived from the Supreme Court's more recent holdings in Younger v. Harris, 401 U.S. 37 (1971) and Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). This branch prohibits federal courts from interfering with pending state actions involving the enforcement of important state laws, and turns on principles of comity. *See* C. WRIGHT, *supra*, § 52 at 229-36; Redish, *"The Doctrine of Younger v. Harris: Deference in Search of a Rationale"*, 63 CORNELL L. REV. 463 (1978).

17. *Exclusive Jurisdiction, supra* note 16, at 221.

active" and "repetitive".[18] This classification provides a significant normative factor in the analytical framework which is proposed later in this article and serves to highlight some of the practical problems which are inherent in concurrent litigation.

Repetitive actions are successive suits based upon the same claim filed by a plaintiff against the same defendant in two different forums. A plaintiff may desire to file repetitive suits for harassment purposes, to insure against the risk that the first court will not obtain personal jurisdiction over the defendant,[19] to obtain certain benefits of forum shopping,[20] or to gain a tactical advantage.[21] Additionally, a second duplicative action may be used by a plaintiff who has received an adverse ruling in a prior suit which is not *res judicata*.[22]

Conversely, reactive suits are instituted by the defendant in the initial action against the original plaintiff for the purpose of asserting an affirmative claim that arises out of, or is closely related to, the same transaction or occurrence from which the initial plaintiff's action arose. Among the reasons advanced for filing reactive suits are the supposed tactical advantages inherent in proceeding as a plaintiff,[23] the advantage or disadvantage of proceeding in a particular forum based upon perceived prejudices,[24] and the choice of law rules in the second forum

18. This terminology is taken from Vestal, *Repetitive Litigation*, 45 IOWA L. REV. 525 (1960); Vestal, *Reactive Litigation*, 47 IOWA L. REV. 11 (1961). *See also* Wilson, *supra* note 9, at 642-44.

19. *See, e.g.*, O'Hare Int'l Bank v. Lambert, 459 F.2d 328, 330 (10th Cir. 1972); Bethlehem Steel Corp. v. Tishman Realty & Constr. Co., 72 F.R.D. 33, 36 (S.D.N.Y. 1976).

20. *See, e.g.*, Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1203 (2d Cir. 1970); Mars, Inc. v. Standard Brands, Inc., 386 F. Supp. 1201, 1204 (S.D.N.Y. 1974).

21. *See, e.g.*, Beard v. New York Cent. R.R. Co., 20 F.R.D. 607, 610 (N.D. Ohio 1957). *See also* Ystueta v. Parris, 486 F. Supp. 127 (N.D. Ga. 1980), where the court held that the "plaintiffs' [expressed] desire to obtain the earliest trial date possible . . . [was] not sufficient reason to justify" the pendency of virtually identical repetitive actions in state and federal courts, when viewed in light of "the duplication of effort and expense which would be involved for counsel, the litigants and the courts if both suits were actively pursued."

22. *See, e.g.*, Beaver v. Borough of Johnsonburg, 375 F. Supp. 326, 328 (W.D. Pa. 1974) (dismissal on ground of laches).

23. *See* Vestal, *Reactive Litigation*, *supra* note 18, at 13-14.

24. *See, e.g.*, Caribbean Sales Assocs., Inc. v. Hayes Indus., Inc., 273 F. Supp. 598 (D.P.R. 1967), *vacated* 387 F.2d 498 (1st Cir. 1968). Perceived prejudice in the state forum is aptly illustrated in Miles v. Grove Mfg. Co., 537 F. Supp. 885 (E.D. Va. 1982), in the context of repetitive suits, where, during the course of discovery in the state case, it became desirable for the plaintiff to depose two witnesses who resided in Pennsylvania. In his brief filed in district court in response to defendant's motion to stay the federal action, the plaintiff alleged that he feared the Pennsylvania judge, when confronted with a motion to compel the witnesses (allegedly prominent lo-

that might result in the application of more favorable substantive law.[25]

The Development of Policies Underlying Federal Court Abeyance to Concurrent State Proceedings

The traditional abstention doctrines do not directly confront the jurisprudential concerns inherent in concurrent litigation in state and federal courts.[26] The traditional abstention doctrines were justified by deep-rooted notions of comity and federalism. The emergence of federal court abeyance to concurrent state proceedings, however, is based on pragmatic considerations, such as the additional "expense and misappropriation of judicial resources inherent in duplicative litigation."[27] In other words, the federal judge stays the action pending the resolution of the parallel state action because it is wise and sensible to do so.

In *Landis v. North American Co.*,[28] the Supreme Court first recognized the power inherent in federal courts to stay their proceedings in deference to actions pending in other federal courts.[29] The Court based its decision on considerations of judicial economy and convenience. A number of lower courts extended *Landis* to include stays granted in deference to parallel state proceedings.[30] An examination of these cases, which recognized at least some discretionary power in the federal courts to stay federal actions in deference to parallel state proceedings, reveals certain recurring policies.

In the absence of federal court abeyance, duplication and waste of judicial resources is inevitable. Because of the *res judicata* effect of the first action to be concluded on the unresolved parallel action, a race to the courthouse may result.[31] Duplicative proceedings may also provoke undesirable procedural tac-

---

cal citizens) to appear for their depositions, would be "overly deferential to their sentiments" and refuse to order their depositions be taken. *Id.* at 886. The court summarily rejected this allegation. *Id.* at 890.

25. *See, e.g.*, PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674, 676 (5th Cir. 1973).

26. *See* Wilson, *supra* note 9, at 651.

27. *See Exclusive Jurisdiction*, *supra* note 16.

28. 299 U.S. 248 (1936).

29. *Id.* at 254-255.

30. *See, e.g.*, PPG Indus., Inc. v. Continental Oil Co., 478 F.2d 674 (5th Cir. 1973) (equity suit stayed pending outcome of parallel state proceeding); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949) (stayed on plea of *forum non conveniens*).

31. *See, e.g.*, Weiner v. Shearson, Hammill & Co., Inc., 521 F.2d 817, 820 (9th Cir. 1975).

tics[32] and increase the caseload of already overburdened federal dockets.[33]

Of course, there may be competing policy arguments which dictate against a federal court's abeyance in deference to concurrent state proceedings. For example, one of the litigants may be hampered by the state court's more restrictive discovery rules. Therefore, the federal forum, with its far-reaching discovery capabilities, would be the preferable forum for litigation.[34] Additionally, the defendant in the state court action may have a bona fide affirmative claim based on a statute vesting exclusive jurisdiction in the federal courts.[35]

The Colorado River *Standard*

In *Colorado River*, the Supreme Court articulated a standard to govern the circumstances in which a federal court may relinquish its jurisdiction in deference to a pending state proceeding to avoid duplication of judicial effort and ensure that the controversy is adjudicated in the forum best able to make a comprehensive and dispositive decision.[36]

The litigation in *Colorado River* was commenced when the United States filed suit in federal court to obtain an adjudication of its rights to certain bodies of water situated in the State of Colorado.[37] At the time the government instituted the federal action, it was concurrently involved in water rights litigation in several Colorado state courts.[38] After the federal suit was filed, a party to a related state proceeding joined the United States in the state litigation pursuant to the McCarran Amendment.[39]

32. *See, e.g.*, Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 194 (2d Cir. 1955) (Medina, J., dissenting) *cert. denied*, 350 U.S. 825 (responsible people may make wholly unfavorable offensive and defensive claims with impunity).

33. *See, e.g.*, Weiner v. Shearson, Hammill & Co., 521 F.2d at 820.

34. *See* Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Suits*, 60 COLUM. L. REV. 684, 705-06 (1960); *see also* Voktas, Inc. v. Central Soya Co., 689 F.2d 103 (7th Cir. 1982).

35. *See generally, Exclusive Jurisdiction, supra* note 16.

36. Colorado River Water Cons. Dist. v. United States, 424 U.S. at 817-18.

37. *Id.* at 805.

38. *Id.* at 806.

39. 43 U.S.C. § 666 (1970). The McCarran Amendment provides for joinder of the United States as defendant in suits for the adjudication of water rights, and provides in pertinent part:

> 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 any such suit, shall (1) be

The district court then dismissed the federal action in deference to the pending state proceeding to which the United States had been made a party. The Tenth Circuit Court of Appeals reversed, holding that the district court should not have abstained.[40]

On appeal, the Supreme Court reversed the court of appeals decision, holding that the district court's dismissal of the action was proper.[41] The Court underscored the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" when confronted with a motion to dismiss in deference to a parallel state action.[42] To justify the dismissal of a federal action, the Court stated that exceptional circumstances must be present.[43] The Court articulated the following factors which are relevant to the determination of whether exceptional circumstances exist: (1) the desirability of avoiding piecemeal litigation;[44] (2) the order in which jurisdiction was obtained by the concurrent forums;[45] (3) the inconvenience of the federal forum;[46] and (4) a preference for the first court assuming jurisdiction over any property which may be involved in the suit.[47]

---

deemed to have waived any right to plead that the State laws are 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: *Provided*, that no judgment for costs shall be entered against the United States in any such suit. 43 U.S.C. § 666(a).

40. United States v. Akin, 504 F.2d 115 (10th Cir. 1974) *rev'd sub nom.*, Colorado River Water Cons. Dist. v. United States, 424 U.S. 800 (1976). The court of appeals held that the McCarran Amendment simply allowed the government to be joined as a defendant in a state water rights action in which it was a necessary party and did not by implication prohibit the United States from litigating its water rights as a plaintiff in federal court. *Id.* at 118-19. The court also concluded that the district court should not have abstained, emphasizing that the federal action had been filed first and that jurisdiction was based on the presence of the United States as plaintiff. *Id.* at 120-22.

41. Colorado Water Cons. Dist. v. United States, 424 U.S. at 820-81.

42. *Id.* at 817-18, *citing*, England v. Medical Examiners, 375 U.S. 411, 415 (1964); McClellan v. Carland, 217 U.S. 268, 281 (1910); Cohens v. Virginia, 219 U.S. (6 Wheat.) 264, 404 (1821).

43. Colorado Water Cons. Dist. v. United States, 424 U.S. at 818.

44. *Id., citing*, Brillhart v. Excess Ins. Co., 316 U.S. 491, 495 (1942).

45. Colorado River Water Cons. Dist. v. United States, 424 U.S. at 818, *citing*, Pacific Livestock Co. v. Oregon Water Bd., 241 U.S. 440, 447 (1916).

46. Colorado River Water Cons. Dist. v. United States, 424 U.S. at 818, *citing*, Gulf Oil Corp., v. Gilbert, 330 U.S. 501 (1947).

47. Colorado River Water Cons. Dist. v. United States, 424 U.S. at 818, *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, 296 U.S. 463, 477 (1936).

In *Colorado River*, the decisive factor in the Court's decision to uphold the dismissal of the federal suit was "the clear federal policy" demonstrated by the McCarran Amendment: "the avoidance of piecemeal adjudication of water rights in a river system".[48] The Court ruled that the consent to suit provision in the McCarran Amendment evinced a congressional policy judgment that the state courts are adequate to adjudicate federal interests in water rights cases.[49]

Although the factual scenario of the case is unique, the Court's discussion of the "principles governing the contemporaneous exercise of concurrent jurisdiction" has far-reaching implications. The Supreme Court sanctioned, for the first time, the primary consideration of "wise judicial administration" in the context of federal court abeyance in deference to pending state court proceedings.[50] The Court also made it clear that a stricter standard should be applied by federal courts to federal court abeyance to parallel state court suits, as contrasted with concurrent proceedings in two federal courts.[51]

Colorado River sets forth the factors which are to be balanced against the obligation to exercise federal jurisdiction in determining whether "exceptional circumstances" are present so as to justify a stay in deference to a parallel state proceeding. However, the Supreme Court provided minimal guidance in the application of the balancing test, thereby necessitating the application of a substantial degree of latitude and discretion by federal district courts.

THE WAKE OF *COLORADO RIVER*

The cases preceding the Seventh Circuit trilogy of decisions, and following *Colorado River*, reveal a patchwork of conflicting district court applications and interpretations of *Colorado River*. While one line of cases strictly construed the limitations imposed upon a district court's discretion to defer to a state court where parallel proceedings were pending,[52] other

48. Colorado River Water Cons. Dist. v. United States, 424 U.S. at 819.

49. *Id.* at 819-20.

50. *Id.* at 817-18.

51. *Id.* at 818.

52. *See* Browning v. United States Movidyn Corp., 83 F.R.D. 211 (E.D. Wis. 1979) (in an action demanding payment of notes and for declaratory relief based upon diversity of citizenship, the court denied defendant's motion to dismiss due to the pendency of a concurrent state court action commenced by the defendant, based in part, upon its finding that there was some doubt as to whether the issues raised in the concurrent actions were completely similar. The court held that the defendant failed to demonstrate the "clearest of justifications" to entitle it to dismissal, and that the potential for duplication and piecemeal litigation cannot in and of itself be consid-

district courts strained to yield jurisdiction to the state court by broadly interpreting the discretion conferred upon them by *Colorado River*.[53]

The first approach, wherein the district court demonstrates an extreme reluctance to find the "exceptional circumstances" necessary to warrant a stay, is well illustrated by the case of *Gentron Corp. v. H.C. Johnson Agencies, Inc.*[54] In *Gentron*, an action was commenced in New York state court to recover commissions allegedly due and owing pursuant to a contract between the parties.[55] Subsequently, the defendant in the first suit filed a separate action against the New York plaintiff in Wisconsin state court.[56] The Wisconsin proceeding was then removed to federal district court where the defendant moved to stay the Wisconsin federal proceeding pending the resolution of the New York state action.[57]

In *Gentron*, the court felt constrained by *Colorado River* from abdicating its jurisdiction notwithstanding the explicit recognition by the court that, "the New York state action was commenced first, that continued adjudication of this action may result in piecemeal litigation, and that it will certainly result in a duplication of effort."[58] In apparent contradiction to its ultimate holding, the court also observed that the case before it "involves no federal claim at all," and for that reason it is also a less appealing case for the exercise of federal jurisdiction, and that "[t]here is no apparent reason why the New York state court cannot adjudicate in the action before it all issues raised in this action."[59]

---

ered exceptional circumstances necessary to override the court's obligation to exercise its jurisdiction); Gentron Corp. v. H.C. Johnson Agencies, Inc., 79 F.R.D. 415 (E.D. Wis. 1978). *See infra* note 54-60.

53. *See* Ystueta v. Parris, 486 F. Supp. 127 (N.D. Ga. 1980) (in wrongful death action based upon diversity of citizenship, defendants moved to compel an election between the district court action and a substantially identical state court action filed on the same date, or, in the alternative, to stay the federal proceedings pending the completion of the state action. The court held that inasmuch as the party opposing the stay had the power to exercise his preference for a federal forum without the aid of the court, the issuance of a stay should, within the sound discretion of the court, be granted, to promote the court's interest in controlling and managing its docket); Burrows v. Sebastian, 448 F. Supp. 51 (N.D. Ill. 1978). *See also*, Holmes v. Chicago Transit Auth., 505 F. Supp. 877 (N.D. Ill. 1981); Centronics Data Computer Corp. v. Merkle-Korff Indus., 503 F. Supp. 168 (D.N.H. 1980).

54. 79 F.R.D. 415 (E.D. Wisc. 1978).

55. *Id.* at 416.

56. *Id.*

57. *Id.*

58. *Id.* at 418.

59. *Id.* at 417.

Nevertheless, the *Gentron* court denied the motion to stay, and held, "the clear import of the *Colorado* decision . . . is that exceptional circumstances must be present to justify the non-exercise of federal jurisdiction, once it is properly invoked. A duplication of effort, while wasteful, is not exceptional."[60]

In contrast to *Gentron*, the decision of Judge Nicholas Bua of the Northern District of Illinois in *Burrows v. Sebastian*[61] signaled a departure from the *Colorado River* mandate requiring the presence of exceptional circumstances before a federal court can defer to a pending state action. In *Burrows*, the plaintiffs filed an action in Indiana state court to recover damages for personal injuries allegedly sustained.[62] Subsequently, the same plaintiffs filed suit in the Northern District of Illinois seeking recovery for injuries suffered in the same occurrence naming two additional parties defendant and adding a prayer for punitive damages.[63] In the subsequent federal action jurisdiction was based upon diversity of citizenship.[64] The defendants in the state court action then filed a motion to dismiss in the federal court in light of the prior pending similar state court action.[65]

In *Burrows*, the court noted that the case involved a repetitive, rather than a reactive suit, in that both the state and federal actions had been brought by the same plaintiffs.[66] In such a situation, Judge Bua reasoned, a stay of the federal suit simply placed the plaintiff in the position of having to elect the forum in which he desired to proceed, and in no way infringed upon his right to have his claims adjudicated in federal court.[67] In such instances, the court stated, "it cannot be said that there has been any abrogation, justified or otherwise, of the court's 'duty' to exercise its jurisdiction. Hence, such an order does not require 'exceptional circumstances' to be warranted."[68]

The district court in *Burrows* granted the stay requested, and held that the absence of a duty to exercise jurisdiction calls for a "much more liberal granting of stays . . . in order to 'avoid duplicative litigation.' "[69] Thus, the *Burrows* decision marked the first significant departure from the *Colorado River* constraints in the district court's formulation of a new, more liberal

60. *Id.* at 418.
61. 448 F. Supp. 51 (N.D. Ill. 1978).
62. *Id.* at 52.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 53.
67. *Id.*
68. *Id.*
69. *Id.* at 53-54.

test to be applied to cases where the grant of a stay would not result in the denial of a federal forum to the federal court plaintiff.

Given this divergent line of cases, it is not surprising that the Seventh Circuit reached seemingly conflicting holdings in three cases involving only subtle factual distinctions. Whereas, in *Voktas* and *Evans*, the court strictly adhered to the "exceptional circumstances" test in holding that the district court should not entirely abrogate its jurisdiction, in *Ontel*, the court put forth the unprecedented proposition that a district court is required, under certain circumstances, to stay its proceedings in deference to a parallel state court suit. Whatever "common law" can be synthesized from these three decisions, it cannot be disputed that the unprecedented *Ontel* holding altered the course of the already turbulent waters of *Colorado River* in the Seventh Circuit. The remainder of this article will address itself to the question of whether the three cases can be reconciled and used collectively to provide a foundation for precedent and a policy to evaluate future cases.

THE *ONTEL* DECISION

Ontel, a New York Corporation, filed an action in the Supreme Court of Nassau County, New York, alleging that Microsoftware Computer Systems, Inc. (MCS), an Illinois corporation, owed it money for goods delivered pursuant to a written contract which provided, *inter alia*, that New York law was to govern.[70] Some two months later, MCS filed an action against Ontel in the Northern District of Illinois founded upon diversity of citizenship, alleging various common law theories, and a violation of the Illinois Consumer Fraud and Deceptive Practices Act.[71] Each count of the district court complaint related to the same transaction that was the subject of the New York state action.[72] The record on appeal indicated that the claims averred by MCS in the district court were raised in substantially similar form, by way of an answer and counterclaim in the state court action.[73]

Ontel then moved the district court for the entry of an order staying the proceedings, pending a final disposition of the New York state action.[74] The district court denied the motion,

70. Microsoftware Computer Sys., Inc. v. Ontel Corp., 686 F.2d 531, 533 (7th Cir. 1982).

71. ILL. REV. STAT. ch. 121½, §§ 261-369 (1981).

72. Microsoftware Computer Sys., Inc. v. Ontel Corp., 686 F.2d at 533.

73. *Id.*

74. *Id.*

Ontel's subsequent motion to reconsider, and Ontel's motion to certify the question on appeal. Ontel appealed the denials to the Seventh Circuit Court of Appeals.[75]

Chief Judge Walter Cummings, writing for the majority in *Ontel*, was confronted with the preliminary issue of whether the order denying the stay was appealable. Ontel contended that the order denying the stay should be deemed equivalent to an order refusing to grant an injunction and, therefore, immediately appealable under 28 U.S.C. § 1292(a)(1).[76] Citing various practical[77] and historical[78] reasons, the court treated the order

---

75. *Id.*

76. 28 U.S.C. 1292(a)(1) provides:

(a) The courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where direct review may be had in the Supreme Court . . . .

With few exceptions, since the adoption of the Judiciary Act of 1789, only final decisions have been appealable. Absent outright dismissal of the federal action, or alternatively, unless the stay effectively terminates the litigation, a district court's grant or denial of a stay does not ordinarily result in a final order, and hence is not appealable. Appellate courts usually refuse to treat a district court's ruling on a motion to stay the federal proceeding as a final order, because after the state court has rendered a judgment, the litigant can return to the forum that issued the stay and litigate his unsettled claim. For a general discussion of appealability stay orders under § 1292(a)(1), see Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330 (1978).

77. Microsoftware Computer Sys., Inc. v. Ontel Corp., 686 F.2d 531, 534-35 (7th Cir. 1982). The primary practical reason noted by the court is that the decision not to stay is effectively unreviewable on appeal from a final judgment. A secondary practical reason is that there has been considerable disagreement among the district courts of the Seventh Circuit regarding when proceedings should be stayed in deference to parallel state proceedings which, the court presumes, stems from its failure to provide any guidance on the subject. *Id.*

78. *Id.* at 535. Historically, the court observes, whether an order granting or denying a stay could be appealed as an order granting or denying an injunction depended on the character of the underlying dispute and the putative basis for the stay. Under the "Enelow-Ettelson" rule the crucial issue is whether the underlying cause of action is one which before the merger of law and equity was by its nature at law or in equity. In addition, the court observes, some courts have engrafted a second prong to the test of appealability of an order granting or denying a stay. Not only must the underlying action be legal rather than equitable, but "the stay must have been sought to enable the prior determination of an equitable defense." Lee v. Ply*Gem Indus., Inc., 593 F.2d 1266, 1268 (D.C. Cir. 1979), *cert. denied*, 441 U.S. 967.

The court in *Ontel* finds that the underlying action is clearly legal in nature and that the stay was requested to interpose an equitable defense, the equitable basis for such a defense being the avoidance of unnecessary and wasteful duplication of litigation. Microsoftware Computer Sys., Inc. v. Ontel Corp., 686 F.2d at 535-36. *Cf.*, Texaco, Inc. v. Cottage Hill Operating Co., 709 F.2d 452 (7th Cir. 1983), where the Court of Appeals distinguished

denying the stay as an injunction for purposes of § 1292(a)(1) and assumed jurisdiction over the appeal.[79]

Turning to the substantive issue, the court noted the enormous discretion and latitude possessed by district courts in these matters and emphasized that its holding was in no way meant to "criticize the care with which the district court here reached its decision."[80]

Citing *Burrows* as authority, the court posited as the first factor warranting the stay pending the outcome of the New York action, the absence of a "federal" interest that would justify litigating a duplicate case in federal court as opposed to a single case in state court.[81] In support of its thesis that there was no "federal interest" present, the court pointed to the fact that federal jurisdiction in the case was founded solely on *diversity of citizenship*, and thus the applicable law was *exclusively* state law.[82] Additionally, the historical justification for federal diversity jurisdiction (the avoidance of possible prejudice against out of state defendants on the part of foreign state courts), was not present, the court observed.[83] Had MCS desired to avoid prejudice of the New York state court, or preferred to litigate the dispute in federal court for any other reason, it could have removed the state action instead of creating a second, duplicative one.[84]

The second and third factors enunciated by the court in *Ontel* to support its decision to grant the stay were the priority in time of the state court filing and the absence of evidence that the state court could not adequately resolve the dispute.[85] The court went on to express its concern that one or both of the parties in either forum may "attempt to accelerate or stall the proceedings in order to influence which court finishes first," the result of which would be "quite similar to forum shopping, and

---

Ontel, finding that the parties to the two suits are different and resolution of the state court's suit would not render the federal proceedings unnecessary. Accordingly, the court declined to extend the *Ontel* analysis pertaining to the second prong of the *Enelow-Ettelson* rule to the facts in *Cottage Hill* and concluded that the district court's order denying the motion to stay was not appealable under § 1292(a)(1). *Id.*

79. Ontel Corp., 686 F.2d at 536.

80. *Id.* at 537.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* Because MCS was an out-of-state defendant whose citizenship was diverse with that of the state court plaintiff (accordingly, the District Court of New York possessed original jurisdiction), MCS could have removed the state action pursuant to 28 U.S.C. § 1441 (1976).

85. *Id.* at 538.

is just as unseemly."[86] Further, the court voiced its preference for preventing the "potential abrasive[ness] of the spirit of federal/state comity" which might be caused by the district court's proceeding at full tilt while an identical action was pending between the same parties in state court.[87]

The final factor which weighed in favor of the court's decision to reverse the district court's denial of the stay was the "grand waste of efforts by both the courts and parties in litigating the same issues regarding the same contract in two forums at once."[88] The efforts required to proceed with the federal action, the court stated, must be viewed as additional because it is not likely that the state court would stay its proceedings in deference to the later-filed federal action.[89]

District Judge James Doyle (from the Western District of Wisconsin sitting by designation) filed a strongly-worded dissenting opinion in *Ontel* wherein he chastized the manner in which the majority "turns on its head" controlling precedent and 375 years of historical development.[90] The heart of Doyle's dissent was that an occasional waste of judicial resources arising from duplication of effort was outweighed by the value served by having a separate system of federal jurisdiction.[91] Judge Doyle, in choosing to strictly apply the dictates of *Colorado River*, framed the issue in terms of "whether the district court was free to exercise its discretion in a conservative manner, to move in the mainstream, obedient to its virtually unflagging obligation to exercise its jurisdiction."[92] Doyle argues that the effect of the majority's holding "is to effect a substantive change in the distribution of power between the national court system and the court systems of the states."[93] "[T]his distinctively unexceptional case," argued Doyle, "fails miserably as the occasion for the pronouncement of a new limitation upon the power of the national courts."[94]

THE *VOKTAS* DECISION: A RETURN TO *COLORADO RIVER?*

The opinion of the Seventh Circuit in *Voktas*, authored by a

86. *Id.*
87. *Id., citing*, Ystueta v. Parris, 486 F. Supp. 127, 129 (W.D. Ga. 1980).
88. Ontel Corp., 686 F.2d at 538.
89. *Id.*
90. *Id.* at 539.
91. *Id.* at 538-39.
92. *Id.* at 539.
93. *Id.*
94. *Id.* at 540.

visiting district court judge,[95] is somewhat perplexing because it initially failed to cite the previously-decided *Ontel* case, even though Judge William Bauer joined the majority in both decisions. Although the court subsequently issued a footnote to *Voktas* evidencing its consideration of *Ontel*, a glaringly feeble attempt was made to reconcile the two cases and to enunciate guidelines governing the discretion of federal courts to stay their proceedings in abeyance to pending state court actions.[96]

The litigation in *Voktas* commenced when a Greek corporation filed a products liability action in Indiana state court against an Indiana corporation and a Panamanian corporation.[97] Three months later, the same plaintiff instituted a virtually identical suit in federal district court in Indiana, alleging diversity of citizenship as the sole basis for federal jurisdiction.[98] The defendants filed a motion to stay the federal action pending the outcome of the state court suit, which was denied by the federal magistrate[99] and certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).[100]

While the appeal was pending, the state court stayed all proceedings before it "pending disposition of the parallel proceeding . . . in the U.S. District Court."[101] The court of appeals noted that the apparent reason for the stay of the state court proceedings was the concern of the state court judge about the adequacy of resources of the state court to handle such a complex suit which involved voluminous discovery in distant locations.[102] Due to the foregoing developments, the court of appeals observed, the appeal involving the denial of the motion to stay the federal proceedings in deference to the state court action was "close to being moot."[103] Moreover, the court noted, a reversal of the federal magistrate on appeal would practically result in "judicial paralysis," where neither court would be in a position to proceed to a resolution of the dispute.[104]

---

95. Voktas, Inc. v. Central Soya Co., 689 F.2d 103 (7th Cir. 1982). The Honorable Earl R. Larson, Senior Judge of the United States District Court for the District of Minnesota, was sitting by designation.

96. *Id.* at 105, n.6. Footnote number 6 of *Voktas* was issued by the Court some two weeks after it rendered its slip opinion. *Id.*

97. *Id.* at 104.

98. *Id.*

99. *Id.*

100. *Id. See also* 28 U.S.C. § 1292(b) (1976).

101. Voktas, Inc. v. Central Soya Co., No. C-80-26 (Cir. Ct. DeKalb County, Ind., Dec. 23, 1981).

102. Voktas, Inc., 689 F.2d at 104-05.

103. *Id.* at 105.

104. *Id.*

Nonetheless, the court in *Voktas* proceeded to address the merits of the appeal and considered whether the federal magistrate abused his discretion in denying the motion for a stay.[105] In light of the foregoing facts, which by the court's own admission rendered its decision moot for all practical purposes, the court's legal analysis on the dispositive issue must be read cautiously. However, the court left no doubt that the special obligation of the federal courts to exercise their jurisdiction must be strictly observed to conform with *Colorado River*. The court of appeals affirmed the denial of the stay and held that the magistrate properly applied the *Colorado River* balancing test and did not err by failing to consider the best use of judicial resources and the additional burden of the federal discovery sought by the plaintiff.[106] In confirming the vitality of the *Colorado River* standards, the court in *Voktas* flatly rejected the approach of the court in *Burrows*, which "equated the stay of a repetitive federal action in deference to state proceedings with the stay of a federal action in the presence of a concurrently pending federal action."[107] In the former situation, the *Voktas* court held that federal courts have a "heightened duty" to exercise jurisdiction which cannot be abrogated unless "exceptional circumstances" are demonstrated.[108]

In its footnote (issued shortly after the decision in *Voktas* was rendered) the court of appeals relied entirely on the fact that the state court had stayed its proceedings to reconcile the *Voktas* decision with *Ontel*. Whether this application of *Voktas* is a subtle cue from the Seventh Circuit that *Voktas* should be limited to its facts, remains to be seen.

THE *EVANS* REMAND: A RETREAT FROM *ONTEL*

Factually, the *Evans* case was, at the time arguments were heard by the Seventh Circuit, virtually identical to *Ontel*. However, the court of appeals, in a unanimous opinion written by Judge Richard Posner, astutely chose to consider the merits of the appeal in the scenario as it existed at the time the district court dismissed the underlying district court action.[109] This enabled the court to address the substantive issues of a justiciable

105. *Id.*

106. *Id.* at 107-108.

107. *Id.* at 108; Burrows v. Sebastian, 448 F. Supp. 51, 53 (D.N.H. 1980).

108. Voktas, Inc., 686 F.2d at 108-109. *See* Colorado River Water Cons. Dist., 424 U.S. at 817.

109. Evans Transp. Co. v. Scullin Steel Co., 693 F.2d 715, 718-19 (7th Cir. 1982).

controversy, and yet avoid overruling the district court by rendering an outright reversal.

The initial action was brought in Missouri state court by Scullin Steel Company (Scullin) seeking damages for fraud and breach of contract against Evans Products Company.[110] One month later, Evans Transportation Company, a wholly owned subsidiary of Evans Products, commenced suit in Illinois federal district court against Scullin for breach of the same contract.[111] Jurisdiction in the federal action was based solely upon diversity of citizenship, the federal plaintiff being an Illinois corporation with its principal place of business in Illinois, and Scullin being a Delaware corporation with its principal place of business in Missouri.[112]

Scullin moved to dismiss, or in the alternative, to stay the federal suit, contending that the federal suit would be inconvenient to have to defend the federal suit while prosecuting the concurrent proceeding in Missouri state court.[113] The district court granted Scullin's motion and dismissed the suit "with leave to reinstate should it become apparent that the Missouri action cannot resolve the controversy between the parties."[114] Evans Transportation appealed.[115]

The record on appeal revealed that subsequent to the issuance of the order of dismissal by the Illinois district court, Scullin amended its complaint in the Missouri state action to add Evans Transportation (the federal court plaintiff) as a party defendant.[116] Having been duly joined in the state court suit, Evans Transportation successfully removed that action to federal district court in Missouri pursuant to 28 U.S.C. § 1441(a).[117] Scullin then moved to remand the case to Missouri state court, arguing that the presence of Evans Products (like Scullin, a Delaware corporation) in the state suit, precluded removal to federal district court. This motion was still pending before the

110. *Id.* at 716.

111. *Id.*

112. *Id.*

113. *Id.*

114. Evans Transp. Co. v. Scullin Steel Co., 530 F. Supp:, 787, 789 (N.D. Ill. 1982).

115. Evans Transp. Co. v. Scullin Steel Co., 693 F.2d at 716.

116. *Id.*

117. 28 U.S.C. § 1441(a) (1976) provides in pertinent part, as follows:

(a) Except as otherwise expressly provided by Act of Congress any civil action brought in a State court of which the district courts of the United State have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Missouri district court when the Seventh Circuit rendered its decision.

Addressing the propriety of the order on review, the court of appeals chastized the lower court's decision to dismiss, rather than stay, the underlying federal action. The court noted that if the state suit "wash[ed] out," the party who properly invoked the jurisdiction of the federal court "ought to be allowed to get back in."[118] Moreover, the statute of limitations might preclude the federal court plaintiff from reinstating the suit after a dismissal. Such would not be the case if the suit was stayed.[119]

The court of appeals viewed the facts of the case as they appeared to the district court when it ordered the dismissal and determined that all the lower court knew or could have known was that the defendant had, one month prior to the commencement of the federal suit, instituted an action arising out of the same contract which was at issue in Missouri state court against an affiliate of the plaintiff.[120] Finding the record devoid of any evidence of forum shopping on the part of the federal court plaintiff, the court concluded that, "the principal basis on which the district court decided to give priority to the Missouri state court action was simply that it had been filed a month earlier than the federal suit."[121]

Moreover, the federal court plaintiff could not, at the time the order of dismissal was entered, have removed the state suit to federal court because it was not a party to the suit. Its parent company, who was the original party defendant in the state proceeding, also could not have removed because it was a citizen of the same state as Scullin.[122] Accordingly, the court of appeals stated, since the record failed to indicate any evidence of bad faith on the part of the federal court plaintiff in commencing the subsequent federal suit, the Illinois federal court was not only a jurisdictionally proper forum, but was the *only* federal forum open to Evans Transportation.[123]

The foregoing consideration, that of providing access to a federal court, played an important role in the *Evans* decision and formed one of the primary bases for the court's distinction between *Evans* and *Ontel*. Judge Posner observed that the procedural posture of *Evans* at the time of the lower court dismissal

---

118. Evans Transp. Co. v. Scullin Steel Co., 693 F.2d at 717-18.

119. *Id.* at 718.

120. *Id.*

121. *Id.*

122. Both Evans Products Company and Scullin Steel Company are Delaware corporations with their principal place of business in Missouri. *Id.*

123. *Id.* at 718.

was different from *Ontel* in that the issue before the court in *Ontel* was not whether the federal court plaintiff would have access to a federal forum, but which federal forum it would have access to.[124] In such instances, the court stated, "considerations of judicial economy become decisive, for there is no question of depriving a litigant of his right to litigate in federal court."[125]

However, in basing his distinction between *Ontel* and *Evans* on the premise that Illinois was the *only* federal forum available to Evans Transportation, Judge Posner appears to have made a critical misstatement. Pursuant to the federal venue statute,[126] the federal court plaintiff in *Evans* could have originally filed its suit in Illinois, Missouri, or Delaware federal district court.[127] Thus, the federal court plaintiff in *Evans*, like the federal court plaintiff in *Ontel*, had a choice of federal forums which it could have gained access to. The key distinction to note is that using access to one *particular* federal forum in *Ontel* would have fostered the interests of judicial economy by having the controversy heard by one court, while at the same time preserving the right of the federal court plaintiff to a federal forum. The dispute existing at the time the district court in *Evans* ordered the dismissal could not possibly have been resolved by one court due to the lack of identity of parties.

It is significant to note that the reactive federal suits in both *Ontel* and *Evans* were filed in a different forum than the state court proceeding. Not coincidentally, in each case the subsequent action was commenced in the district court sitting in the state of citizenship of the federal court plaintiff. In *Ontel*, the court based its reversal of the denial of the stay, in part, upon its

---

124. *Id.* at 719.

125. *Id.*

126. 28 U.S.C. § 1391 (1976) provides in pertinent part as follows:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

127. The plaintiff "resided" in Illinois, and the defendant "resided" in Missouri and Delaware, for purposes of 28 U.S.C. § 1391. For diversity purposes, the federal court defendant, a Delaware corporation with its principal place of business in Missouri, is deemed a citizen of both states. *See* 28 U.S.C. § 1391(c). Accordingly, the federal defendant can be sued in the federal district courts of either state. Additionally, as the court noted, the cause of action arose in Missouri, by virtue of the fact that the contract was signed and performed there. Venue was proper in Illinois, because the federal court plaintiff was an Illinois corporation with its principal place of business in Illinois.

finding that access to another federal forum by way of removal eliminated any interest which the federal court plaintiff may have had in commencing its action in a federal forum.[128] In *Evans*, notwithstanding the availability of two alternate federal forums to the plaintiff, the court held that the dismissal of the federal action, even if treated as a stay, was improper.[129]

Rather than reversing the district court dismissal outright, the court of appeals remanded the case for reconsideration of whether a stay should be entered in light of the events which had transpired in the Missouri state court litigation subsequent to the dismissal.[130] In dicta, the court speculated on certain factors which, on remand, might be weighed by the district court. One of the facts mentioned by the court was that, because the contract was signed and performed in Missouri, the substantive law which would most likely be applied by a federal court was that of Missouri.[131] Another factor which, if found to be present, would weigh in favor of a stay, was the greater convenience of the Missouri forum for witnesses.[132] An additional factor which would have warranted abeyance to the Missouri action, but apparently was not present, was if the Missouri state court action was closer to trial than the Illinois district court proceeding.[133]

Although the court of appeals criticized the district court judge's election to dismiss rather than stay the federal suit, the court in *Evans* may be attempting to convey a message to the district court judge on remand that factors warranting a stay may well have been present, and that a stay may well have been within the court's discretion. The presence of such factors, however, was not expressly set forth. The presence of a previously filed state proceeding, and the judicial inconvenience and lack of economy inherent in a subsequently filed parallel federal action, were insufficient, without more explicit findings of fact, to warrant a stay of the federal suit.

128. Ontel Corp., 686 F.2d at 537.

129. Evans Transp. Co., 693 F.2d at 718.

130. *Id.* at 719.

131. *Id.* at 720. The court applied the rule of the forum state (Illinois) pertaining to conflicts of laws as it is required to do under the doctrine of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Applying the holding in Cook Assoc's., Inc. v. Colonial Broach & Machine Co., 14 Ill. App. 3d 965, 304 N.E.2d 27 (1973), the court in *Evans* found that the law of Missouri, the state where the contract was performed, would govern, and would prevail over the law of the forum state. Evans Transp. Co., 693 F.2d at 720.

132. Evans Transp. Co. v. Scullin Steel Co., 693 F.2d at 720.

133. *Id.*

AN ATTEMPT TO RECONCILE THE FOREGOING DECISIONS

As a prerequisite to the formulation of an analytical framework in which to depict the current state of the law in the Seventh Circuit, an attempt must be made to reconcile the *Ontel, Voktas*, and *Evans* decisions. More specifically, this section will seek to analyze the extent to which the breadth and scope of the *Ontel* opinion is limited by the decisions which followed it. This analysis is impeded by the unique transpiration of events in the state court proceedings in both *Voktas* and *Evans*, while the appeal was pending, which in each case played a vital role in the ultimate decision of the Seventh Circuit.

In a procedural context, an important distinguishing factor between *Ontel* and *Evans* on the one hand, and *Voktas* on the other, is that in the latter case the state court plaintiff also initiated the subsequently filed federal action. Employing the vernacular explained previously, the federal suit in *Voktas* was "repetitive" rather than "reactive." In and of itself, this may well be a distinction without a difference since, as noted above, there is the potential for abuse and the possibility of undesirable consequences in either context.

When a repetitive suit is commenced in federal court by a party who has already initiated litigation against the same defendant in state court, there exists an expressed policy determination that it is not unfair to make the plaintiff abide by its initial choice of forum.[134] In *Voktas*, the court expressed its determination that, at least where the state court has stayed its proceedings, and the federal forum is better able to handle complex discovery in foreign countries, the obligation of a federal court to exercise jurisdiction outweighs this policy and overrides any duplication of effort which may occur when a plaintiff is allowed to invoke the jurisdiction of both a state and federal court to resolve the same controversy.[135]

In *Voktas*, it must be reemphasized that the repetitive federal suit commenced by the plaintiff was brought in a federal district situated in the same state as the previously filed state court suit.[136] This fact serves to obfuscate the "forum shopping" concern which played such a prevalent role in the court's reversal of the denial of a stay in *Ontel*. In both *Ontel* and *Evans*, the court notes that the substantive law which would have to be applied by the district court is that of the forum in which the paral-

---

134. Shamrock Oil Corp. v. Sheets, 313 U.S. at 107-108, n.2 *quoting* H.R. REP. No. 1078, 49th Cong., 1st Sess. p. 1 (1886). *See also* Wilson, *supra* note 9, at 666-667.

135. Voktas, Inc., 689 F.2d at 105-108.

136. *Id*. at 104-105.

lel state suit was previously filed.[137] Conversely, in *Voktas* the district court in the repetitive action was able to apply the law of the state in which it was situated.[138]

As noted earlier, the court of appeals, in its footnote to *Voktas* acknowledging *Ontel*, did not enunciate the rather obvious distinctions suggested herein. The court relied instead upon the fact that the state court had already stayed its proceedings because of the state judge's perception that the federal forum was better suited to complex international litigation.[139] Notwithstanding the court's dependence upon the facts which transpired in the state court suit in *Voktas*, the decision provides a point of reference on one end of a hypothetical spectrum which serves to illustrate a situation in which a district court judge has virtually no discretion to defer to a parallel state court suit and must exercise its jurisdiction. In such situations, the court in *Voktas* left little doubt as to the necessity of "exceptional circumstances" to warrant abeyance to a parallel state suit.

Because only a defendant can invoke the removal procedure,[140] the ability to remove a concurrent state action is not germane to the situation where a state court plaintiff chooses to commence a repetitive suit in federal district court. In this context, the district court is merely called upon to decide whether one party should be entitled to simultaneously litigate its claim against another party on two judicial tiers.

Where it is the defendant in the state court proceeding who institutes the federal (reactive) suit, the ability of that party to remove the state court suit to federal district court in the first instance becomes a crucial consideration. If a federal forum is available to the state court defendant by way of removal jurisdiction, the stay of a reactive federal suit would not have the effect of denying that party access to a federal forum. This concept, when considered in conjunction with the developments in the Missouri state proceeding in *Evans*, can be used to reconcile the *Ontel* and *Evans* decisions.

---

137. Ontel Corp., 686 F.2d at 533; Evans Transp. Co., 693 F.2d at 719-720.

138. Voktas, Inc., 689 F.2d at 103.

139. *Id.* at 105.

140. *See* 28 U.S.C. § 1441 (1976). The plaintiff may not remove even if the defendant in the state court asserts a federal defense or counterclaim. Tennessee v. Union & Planters' Bank, 152 U.S. 454, 461-62 (1894) (defense); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 106-107 (1941) (counterclaim). The plaintiff cannot remove by asserting that the counterclaim is a separate and independent cause of action under § 1441(c). Lee Foods Div. v. Bucy, 105 F. Supp. 402, 404 (W.D. Mo. 1952).

It will be recalled that in *Evans* certain procedural developments in the Missouri state action, subsequent to the dismissal of the Illinois federal suit, caused the court of appeals to remand, rather than reverse outright, the order of dismissal entered by the district court.[141] Evans Transportation, the federal court plaintiff, joined as a party defendant in the state court suit, proceeded to remove the action to Missouri federal district court pursuant to 28 U.S.C. § 1441.[142] By exercising the removal procedure, the state court defendant in *Evans* did precisely what the state court defendant was able, but failed to do, in *Ontel*. Because the federal court plaintiff succeeded in gaining access to a federal forum by removing the Missouri state court action, the court of appeals in *Evans* no longer felt duty-bound to allow the federal court plaintiff the unconditional right to have its claim resolved in an Illinois district court, and remanded the case for further consideration.[143]

If it is conceded that the federal court plaintiff in *Evans* did, in fact, have other forums available at the time it instituted the reactive federal suit, then it is possible to discern a policy from the reconciliation of *Ontel* with *Evans*. This policy is that, for a federal court to defer to a state court, the federal forum must be available to a federal court plaintiff in a reactive suit by way of removal of a parallel state court action, and not merely by the availability of alternative forums for commencement of a reactive suit. Accordingly, it is the ability of the federal court plaintiff to remove the state action which may ultimately be pointed to as the distinguishing factor between *Ontel* and *Evans*. Where removal is available, as in *Ontel*, considerations of judicial economy dictate that the dispute be resolved by one court. Where such is the case, the obligation of a federal court to exercise jurisdiction in a parallel federal suit may be outweighed by considerations of judicial economy. Where removal is not available to the federal court plaintiff, *Evans* would seem to mandate the exercise of federal jurisdiction in a parallel suit, notwithstanding the availability of alternate federal forums with proper original jurisdiction, and the resultant duplication of judicial resources.

In *Evans*, the court refused to consider the existence of factors which could very easily have been inferred from the facts and circumstances in the record. This reluctance presents a stark contrast to the *Ontel* opinion in which the court seems at times to almost reach for facts and infer motivations to justify its

141. Evans Transp. Co., 693 F.2d at 719-720.
142. *Id.*
143. *Id.*

holding. Although the district court's supporting rationale for its decision in *Evans*[144] is noticeably sparse, the court of appeals on review understated the evidence before the district court when it observed that the "principal basis" for the district court's decision to defer to the state court action was that it had been filed first.[145]

In *Ontel*, the court was far more willing to infer bad faith and a forum shopping motive from the federal court plaintiff's actions. This judicial activism may be explained and justified by the failure of the federal court plaintiff to invoke the removal procedure to gain access to a federal court, although clearly available. When access to a federal court can be gained in this manner, thereby rendering unnecessary the filing of a duplicative federal action, the *Ontel* decision would seem to stand for the uncontradicted proposition that a federal court *must* stay its proceedings in abeyance to the parallel action pending in state court. If removal is, for whatever reason, unavailable to the federal court plaintiff in a reactive suit, the policies underlying *Ontel* must give way to the duty of a federal forum to exercise jurisdiction, unless "exceptional circumstances" are present. This duty would appear to preclude a federal court from deferring to a parallel proceeding pending in state court, even where other federal forums are available to the federal court plaintiff for the commencement of its reactive suit.

Thus, where a federal district court abrogates its jurisdiction by staying its proceeding in deference to a parallel state proceeding, the "exceptional circumstances" warranting such a stay must be specifically and thoroughly set forth by the district court judge. Clearly, priority of filing the state court suit and judicial inefficiency are, absent additional factors, insufficient to trigger abrogation. Where the case falls within the precise scope of *Ontel*, the "exceptional circumstances" test is inapplicable, and a much less stringent test encompassing considerations of judicial economy and efficiency is employed. By its very nature, removal of the state action, when available, will foster these interests. In such circumstances, the obligation of the district court is directly contrary to its normal "unflagging" obligation to exercise jurisdiction, and it must, under *Ontel*, stay its proceedings in abeyance to a parallel state action.[146]

---

144. Evans Transp. Co. v. Scullin Steel Co., 530 F. Supp. 787 (N.D. Ill.), *rev'd*, 693 F.2d 715 (7th Cir. 1982).

145. Evans Trans. Co., 693 F.2d at 718.

146. This analysis is supported by the recently-decided case of Mechanical Sys., Inc. v. Cadre Corp., 567 F. Supp. 948 (N.D. Ill., 1983), wherein Judge Milton Shadur stated in dictum: ". . . as *Evans* makes clear, *Microsoftware*'s abstention formulation is applicable in situations involving

AN ANALYTICAL FRAMEWORK

The *Ontel* decision has carved out a noteworthy exception to the "unflagging obligation" of federal courts to exercise jurisdiction while a parallel action is pending in state court. Although the breadth of that exception seems to have been somewhat limited by the subsequent Seventh Circuit decisions in *Voktas* and *Evans*, it cannot be questioned that, at least in the Seventh Circuit, a new framework must be formulated in which to analyze future cases. The framework suggested herein marks a substantial departure from the "balancing test" enunciated in *Colorado River*. If other circuits elect to follow the *Ontel* holding, the approach suggested in this article should provide a greater degree of certainty and consistency to the law in this area and provide much needed guidance to federal district court judges.

The approach, which may be most practical in the aftermath of *Ontel, Voktas* and *Evans*, is a "sliding scale" of discretion. It consists, at each opposite end, of situations where the district court has little or no discretion. The middle of the scale, in which most cases undoubtedly will fall, would be comprised of those factors the Seventh Circuit has expressly considered in applying and interpreting *Colorado River*. An attempt will be made to "weigh" those factors, in order of perceived importance, by placing them closer to one opposite end of the scale or the other, depending on how they affect the district court's discretion.

The *Ontel* case signifies the end of the scale on which the district court has virtually no discretion to exercise jurisdiction; in such instances the court *must* stay its proceedings in deference to a concurrent state court action. The *sine qua non* of a case falling within the *Ontel* end of the scale is the ability of the plaintiff in a reactive federal suit to remove the concurrent state court suit to federal district court. If, at the time the state court action was commended, the defendant is able to gain access to a federal forum by way of removal, then the stay of a subsequently filed reactive federal suit would not effectively deny that party access to a federal forum. Hence, a subsequent attempt by the state court defendant to gain access to a federal forum by insti-

---

concurrent federal and state proceedings only if the defendant in the state suit (who is also the plaintiff in the federal action) eschewed an opportunity to remove the state suit to a federal forum." *Id.* at 950 n.3. In *Mechanical Systems*, the state court defendant, being a citizen of the state in which it was sued, could not, under 28 U.S.C. § 1441(b), remove a diversity action to federal district court. *Id.* at 950. Accordingly, the court declined to apply *Microsoftware*'s "less stringent standards" of deferral to a parallel state action. *Id.*

tuting a separate action must be stayed by the district court pending the resolution of the concurrent state suit.[147]

At the *Ontel* end of the scale, it can be argued without contradicting the *Voktas* decision, that the applicable standard is equivalent to that standard applied where there are parallel actions pending in two or more federal courts. This equation, first suggested by Judge Bua in *Burrows*, was rejected by the Seventh Circuit in *Voktas* because it failed to consider the "special obligation of the federal courts to exercise their jurisdiction."[148] However, this rejection was expressly limited to *repetitive* proceedings.[149] In *Evans*, a reactive case where the federal court plaintiff had temporarily successfully removed the state court action, resulting in two pending federal actions in different states regarding the same claims, the court notes, "[T]hat makes no sense, and of course a stay of one [federal action] would not deprive anyone of access to the federal courts."[150] Accordingly, a stay of a reactive federal action can be granted where the plaintiff could have removed the parallel state court suit without minimizing or ignoring the "special obligation" of the federal court to exercise jurisdiction.

Thus, in order to obtain a stay of a reactive suit, the federal court defendant (state court plaintiff) need not demonstrate "exceptional circumstances," but must at least show that the federal court plaintiff could have obtained a federal forum by means other than the commencement of the reactive federal proceeding. These interests will *always* be served by a stay of the reactive federal suit where the exercise of the removal procedure will result in the resolution of the dispute in *one* federal forum.

At the opposite end of the scale are situations where the district court has virtually no discretion to stay its proceedings in abeyance to a concurrent state court action and is thus required to exercise jurisdiction. This extreme is clearly illustrated by the *Voktas* case where the state court stayed its proceedings in

147. This end of the analytical framework proposed in this article was applied quite narrowly by District Judge Susan Getzendanner in her recent opinion in the case of Architectural Floor Prod. Co. v. Don Brann & Assoc's., Inc., 551 F. Supp. 802 (N.D. Ill. 1982). In *Architectural Floor*, the court rejected the applicability of *Ontel*, noting that "*Ontel* is not a case of wide application". *Id.* at 805. The court in *Architectural Floor* held that, due to the inability of the state court defendant to remove ("complete" diversity did not exist, as certain co-defendants were citizens of the same state as the plaintiff), the federal interest underlying the grant of diversity jurisdiction could be served only by allowing the federal action to proceed. *Id.*

148. Voktas, Inc., 689 F.2d at 108.

149. *Id.*

150. Evans Transp. Co., 693 F.2d at 719.

deference to the repetitive federal action because of the advantages the federal discovery rules provided to complex litigation involving parties of international citizenship.[151] In this procedural context, the obligation to provide the litigants with a federal forum for the resolution of their disputes is nearly absolute.

A federal court is still constrained by the "unflagging obligation" to exercise its jurisdiction, unless the case falls within the *Ontel* context. This remains the underlying policy consideration in the application of those factors in the middle of the "sliding scale." With the benefit of the three recent Seventh Circuit decisions, it is now possible to define with a greater degree of specificity those circumstances which are truly "exceptional" enough to justify the exercise of a district court judge's discretion to issue a stay. Unlike the simple "laundry list" of factors enumerated by the Supreme Court in the course of propounding its balancing test, an attempt will be made to place at a particular locus on the "sliding scale" certain factors expressly considered by the Seventh Circuit in its trilogy of decisions.

In the broad range between the opposite ends of the scale discussed earlier, the district court judge possesses a wide latitude of discretion, subject at all times of course, to its "unflagging obligation." Although a case may not fall within the exact *Ontel* scenario because of the inability of the federal court plaintiff to remove the concurrent state court action, there exists a range of discretion in which the district court judge *may* exercise his discretion in favor of a stay.

The factor aligned closest to the *Ontel* end of the scale is the ability of the state court to fully and fairly resolve the dispute between the litigants. When this factor is present, in conjunction with the priority of filing of the state action, and the presence of at least one of the "middle range" factors set forth below, the district court should be free to exercise its discretion in favor of a stay.

If the district court record lacks evidence pertaining to the relative ability of the state court to dispose of the controversy, then the district court should consider certain factors which may necessitate "reading" beyond the record. For example, the court in both *Ontel* and *Evans* found that the substantive law to be applied in each case was the law of the forum in which the *state* court is situated. The state court will normally be more familiar with its own substantive law than will a federal district court situated in another state. Consequently, the law to be ap-

151. Voktas, Inc., 689 F.2d at 105-107.

plied in a given case may militate in favor of a stay of the federal action.

Another factor which the courts should consider in determining the ability of the state court suit to adequately resolve the litigation, is whether the matters at issue are governed exclusively by state law or whether any of the claims involve federal statutes. The determinative factor in this analysis is whether the federal jurisdiction for the action is based upon diversity of citizenship, or the presence of a bona fide federal question. In *Ontel*, the absence of a federal interest played a significant role in the Seventh Circuit's reversal of the district court's denial of the stay. Moreover, such a consideration is supported by the weight of authority.[152] In *Evans*, however, the court implicitly rejected the notion that federal courts should grant stays more readily where federal jurisdiction is founded solely upon diversity of citizenship:

> . . .[U]ntil Congress decides to alter or eliminate the diversity jurisdiction we are not free to treat the diversity litigant as a second-class litigant, and we would be doing just that if we allowed a weaker showing of judicial economy to justify abstention in a diversity case than in a federal question case.[153]

Notwithstanding this dicta from *Evans*, the absence of a federal interest in a reactive federal suit is a proper factor for the district court judge to consider in his determination of whether to grant a stay in deference to a parallel state suit.

Moving away from the *Ontel* extreme toward the middle range of the imaginary scale of discretion, the district court judge, faced with a motion to stay in abeyance to parallel state proceedings, should consider the motivations of the federal court plaintiff in bringing the federal action. In *Voktas*, the court cited with approval its previous decision in *Calvert Fire Insurance Co. v. Will*,[154] for the proposition that the perceived vexatious and dilatory nature of the federal suit is a significant contributing factor supporting a district judge's decision to grant a stay.[155] In *Evans*, the court went so far as to scrutinize the substantive allegations of the complaint in the state court action, which acknowledged that the federal court plaintiff had complained about the quality of the goods before the other party instituted suit in state court.[156] Thus, the court concluded that

---

152. *See* Gentron Corp. v. H.C. Johnson Agencies, Inc., 79 F.R.D. 415 (E.D. Wis. 1978). *See also* Miles v. Grove Mfg. Co., 537 F. Supp. 885 (D. Va. 1982).

153. Evans Transp. Co., 693 F.2d at 717.

154. 560 F.2d 792 (7th Cir. 1977), *rev'd on other grounds*, 437 U.S. 655 (1978).

155. Voktas, Inc., 689 F.2d at 109.

156. Evans Transp. Co., 693 F.2d at 719.

there was no evidence of bad faith in the commencement of the federal action by the state court defendant.[157]

At the fulcrum of the imaginary scale are factors which, although not to be weighted heavily in the district court judge's exercise of discretion, may, if all other factors are relatively equal, tip the balance one way or the other. The first consideraion to be placed in the middle range of the scale is whether, as in *Ontel*, a "grand waste of efforts by both the courts and parties"[158] would result by concurrently litigating the same issues in two forums. Although duplication of efforts is singularly dispositive in the *Ontel* context, where removal is available to the federal court plaintiff, this factor is substantially less important in other applications. The court in *Evans* shrugged off the loss of judicial economy inherent in duplicative litigation and observed that it may be the "unavoidable price" of providing diversity litigants with their right to a federal forum under 28 U.S.C. § 1332.[159] In *Voktas*, the court affirmed the denial of the stay notwithstanding its express recognition of the finding of the magistrate that, "a grant of the motion for stay would result in a better use of judicial resources."[160]

Another factor in the middle range of the scale to be accorded weight similar to that accorded considerations of judicial economy, is the relative convenience of the state and federal forums to the parties and witnesses. Where, as the court observed in *Ontel*, the geographical distance between the two forums would necessitate either hiring two sets of attorneys or commuting long distances, this factor may be very important.[161] Conversely, relative convenience is virtually inconsequential in a situation such as in *Voktas*, where the repetitive federal action was instituted in the federal district in which the state court was situated.[162] It is instructive to note that the court of appeals in *Evans* expressly criticized the "brief reference" by the district court to the convenience of the parties.[163] Accordingly, if the district court weighs this factor in reaching its decision to grant or deny a stay, it must consider it thoroughly.

Located slightly off center of the range of the scale balancing in favor of exercising federal jurisdiction, is the proximity of the state court suit to trial at the time the federal action is com-

157. *Id.*
158. Ontel Corp., 686 F.2d at 538.
159. Evans Transp. Co., 693 F.2d at 720.
160. Voktas, Inc., 689 F.2d at 107.
161. Ontel Corp., 686 F.2d at 538.
162. *Id. See also* Miles v. Grove Mfg. Co., 537 F. Supp. 885 (D. Va. 198).
163. Evans Transp. Co., 693 F.2d at 720.

menced. In *Evans*, the court noted that the proceedings were "neck and neck" in that the state action was no closer to trial than the federal action which had been filed only one month thereafter.[164] Even prior to *Colorado River*, the court in *Evans* noted that stays of federal actions were limited to cases where parallel state proceedings were well underway at the time the federal suit was filed.[165] Thus, a finding that the previously filed state action is no closer to final disposition than the parallel federal suit will weigh in favor of the concurrent exercise of federal jurisdiction.

Within the discretionary range approaching the end of the scale mandating the exercise of federal jurisdiction, are the concerns brought to light in *Voktas*. In *Voktas*, the advantages of the federal rules of discovery in resolving complex international litigation ultimately caused the state court to stay its proceedings.[166] Similarly, these considerations would weigh heavily in favor of the exercise of federal jurisdiction in the face of a motion to stay pending the resolution of a state action involving claims better suited in federal litigation.

When federal jurisdiction is founded upon an exclusive grant, such as those contained in the Securities Act of 1934,[167] or the Clayton Act,[168] the desire for uniform and effective administration of the federal statutes should strongly suggest the exercise of federal jurisdiction notwithstanding the presence of other factors which would warrant a stay.[169] Hence, this factor may be placed at a locus on the scale very close to the *Voktas* extreme where the district court has virtually no discretion to order a stay.

CONCLUSION

The course of *Colorado River* has been altered by the recent trilogy of cases decided by the Seventh Circuit Court of Appeals. Rather than diverting the course in any one direction, the Seventh Circuit has created two branches of *Colorado River* which flow in opposite directions from the source. At the source is the underlying policy that a district court must fulfill its unflagging

---

164. *Id.*

165. *See, e.g.*, Amdur v. Lizars, 372 F.2d 103 (4th Cir. 1967); Milk Drivers & Dairy Employees Union Local No. 338 v. Dairymen's League Coop. Ass'n, Inc., 304 F.2d 913 (2d Cir. 1962).

166. Voktas, Inc., 689 F.2d at 105.

167. 15 U.S.C. § 78aa (1976).

168. 15 U.S.C. § 15 (1976).

169. *See* Cotler v. Inter-County Orthopaedic Ass'n, P.A., 526 F.2d 537 (3d Cir. 1975); McGough v. First Arlington Nat'l Bank, 519 F.2d 552 (7th Cir. 1975). *See also Exclusive Jurisdiction, supra* note 16 at 219.

obligation to exercise jurisdiction, unless exceptional circumstances are present. Branching out from the source in one direction is the newly formulated requirement that the district court stay its proceedings where facts similar to those existing in *Ontel* are present. In the opposite direction flows the branch represented by *Voktas*, wherein the district court must provide a federal forum where jurisdiction is properly founded. The middle branch, and most widely travelled, represents the broad latitude of discretion possessed by a district court judge when faced with the choice of whether to stay its proceedings in abeyance to a parallel state court action. This branch is limited at each bank by *Ontel* and *Voktas*, which impose limits on the district court judge's exercise of discretion.

The branches of *Colorado River* represented by the divergent opinions which have evolved from the Seventh Circuit are as yet uncharted. The analytical framework suggested herein should serve to establish more cogent guidelines to be applied by district courts in choosing whether to exercise jurisdiction or grant a stay. It is anticipated that the course of *Colorado River* and its various branches will rapidly become apparent as interpretive case law develops.