

JURISDICTION

THE COLORADO RIVER DOCTRINE, ABSTENTION AND PROCEDURAL REMEDIES TO PARALLEL LITIGATION

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In 1976, the United States Supreme Court issued an opinion that established a new basis for abstention that is now referred to as the Colorado River Doctrine. See *Colorado River Water Conservation District, et al. v. United States*, 424 U.S. 800 (1976).

In November 1972, the United States brought a federal action against 1,000 water users to obtain a determination of water rights in Colorado Water Division No. 7. In January 1973, pursuant to the statutory consent granted by the McCarran Amendment, the United States was joined in a state action adjudicating the Government's water rights in Water Division No. 7. Defendants in the federal action filed a motion to dismiss and, without deciding the jurisdictional question, the District Court granted the motion to dismiss on the grounds that the doctrine of abstention required deference to the state court proceedings. The Court of Appeals for the Tenth Circuit reversed, holding that abstention was inappropriate and, pursuant to 28 U.S.C. § 1345, that the District Court had jurisdiction over all civil actions commenced by the United States unless otherwise provided by Congress.

On *certiorari*, the Supreme Court held that the District Court had jurisdiction to hear the action because the McCarran Amendment did not diminish federal district court jurisdiction. In addition, the Supreme Court held that dismissal on abstention grounds was improper under the then existing forms of the abstention doctrine. However, the Supreme Court reversed the decision of the Tenth Circuit, holding that "principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations govern in situations involving contem-



poraneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."

The factors considered by the Supreme Court in affirming the dismissal were: (1) the federal policy against piecemeal litigation revealed by the McCarran Amendment's consent to state court jurisdiction; (2) the absence of federal court proceedings beyond the filing of a complaint; (3) the presence of extensive rights governed by state law; (4) the relative convenience of the state and federal forums; and (5) the participation by the government in similar state actions in Colorado Water Divisions Nos. 4, 5 and 6.

In applying the Colorado River Doctrine and determining whether to abstain from exercising jurisdiction, the courts have generalized the Colorado River factors as follows: (1) the desirability of avoiding piecemeal litigation; (2) the relative progress in the two actions; (3) the relative convenience of the federal and state forums; and (4) other factors supporting

abstention. In *Colorado River*, the government's willing participation in state litigation in other water divisions was the "other factor" supporting abstention. In addition, the Supreme Court has expanded these factors to take into consideration whether the state forum adequately can protect a parties' rights and whether state or federal law provides the rule of decision on the merits. See *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

In addition to the *Moses Cone* factors, the Courts of Appeals and District Courts have added additional factors to be considered when determining whether the federal court should abstain from exercising jurisdiction. These factors include the availability of removal and the contrived or vexatious nature of the federal claim. See *LaDuke v. Burlington Northern Railroad Company*, 879 F.2d 1556 (7th Cir. 1989).

Prior to a determination of whether sufficient factors exist to abstain from exercising jurisdiction, there must be a determination that there are two parallel

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actions. See *Woodford v. Community Action Agency of Greene County, Inc.*, 239 F.3d 517 (2nd Cir. 2001). Parallel litigation occurs when substantially the same parties are contemporaneously litigating substantially the same issues. See *AAR International, Inc. v. Nimelias Enterprises S.A.*, 2001 U.S. App. LEXIS 7880 (7th Cir. April 27, 2001). Absent a determination that the two actions are parallel, there is not a substantial likelihood that the state litigation will dispose of all the claims presented in the federal litigation and, therefore, abstention would be improper. See *Intel Corporation v. Advanced Micro Devices, Inc.*, 12 F.3d 908 (9th Cir. 1993); see also *American Home Assurance Company v. Roxco, Ltd.*, 81 F. Supp. 2d 674 (S.D. Miss. 1999).

Other Forms of the Abstention Doctrine

In addition to the Colorado River Doctrine, there are three other forms of the abstention doctrine, the Pullman, Burford and Younger Doctrines. In *Railroad Commission of Texas v. Pullman*, the Supreme Court held that a federal court should abstain from exercising jurisdiction in a federal question action when the determination by a state court of an unresolved state law issue may alleviate the federal question. 312 U.S. 496 (1941). *Burford v. Sun Oil Co.* supports abstention in actions reviewing state agency decisions if the state has a system to review agency decisions and federal court intervention would disrupt efforts to “establish a coherent policy with respect to a matter of substantial public concern.” 319 U.S. 315 (1943). Finally, in *Younger v. Harris*, the Supreme Court held that the possible unconstitutionality of a statute does not, in and of itself, justify an injunction against good-faith attempts to enforce the statute. 401 U.S. 37 (1971). Absent evidence of bad faith, harassment or other unusual circumstances, the decision supports abstaining from exercising jurisdiction.

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Procedural Remedies to Parallel Litigation

In addition to abstention, litigants may use or seek the following procedural remedies to avoid parallel litigation.

Dismissal

Both voluntary and involuntary dismissals are provided for by the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 41(a) allows a plaintiff to voluntarily dismiss its action if the dismissal is filed before defendant has answered or filed a motion for summary judgment. If an answer or dispositive motion has been filed, the plaintiff may still file voluntarily dismiss the action if it can get the other parties to stipulate to the dismissal.

Transfer & Consolidation

The transfer of federal actions is governed by 28 U.S.C. § 1404, *et seq.* 28 U.S.C. § 1404(a) provides for the transfer of an action to any other district or division in which the action might have been brought. This statute also governs motions to transfer for the convenience of the parties and witnesses.

While 28 U.S.C. § 1406(a) authorizes dismissal of an action filed in the wrong venue, it also authorizes a transfer of the case if the transfer would be in the interests of justice.

Similarly, if the court determines that it lacks subject matter jurisdiction and that a transfer would be in the interests of justice, the court may transfer the action to any court in which the action could have been brought. 28 U.S.C. § 1631.

A transfer could also be based upon a contractual forum selection clause. These types of clauses have been enforced in federal courts since the decision in *Bremen v. Zapata Off-Shore Corporation*. 407 U.S. 1 (1972).

Once a case has been transferred, Federal Rule of Civil Procedure 42(a) provides for the consolidation of actions having a common question of law or fact. This same section allows for the joint trial of any and all matters at issue in the once separate actions. However, Federal Rule of Civil Procedure 42(b) adds that for convenience, to avoid prejudice, or when separate trials will be more economical and expeditious, the court may order a separate trial of any claim.

Antisuit Injunctions

Finally, a party involved in parallel litigation may seek an injunction prohibiting the opposing party from prosecuting the parallel action. It should be noted that an antisuit injunction enjoins the opposing party, not the judge or court involved in the parallel action.

The Colorado River Doctrine provides the most likely basis for a court to abstain from exercising its jurisdiction over an action. Clearly, application of the doctrine is fact sensitive. Fortunately, if the facts do not support abstention, there are additional procedural remedies to attempt to avoid the pitfalls and expenses of parallel litigation.■

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