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Staying Diversity Proceedings Pending the Outcome of Parallel Suits in State Court

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STAYING DIVERSITY PROCEEDINGS PENDING THE OUTCOME OF PARALLEL SUITS IN STATE COURT

Microsoftware Computer Systems v. Ontel Corp. [1]

A federal court confronted with an action involving the same issues and parties as a pending state court suit has four options: enjoin the state proceeding,[2] stay the federal action,[3] dismiss the federal action,[4] or let both suits proceed.[5] A federal court's refusal to stay a diversity action before it raises two questions: is the order denying a stay appealable? If so, should the court of appeals ever require the district court to grant a stay? In

1. 686 F.2d 531 (7th Cir. 1982)

2. 28 U.S.C. § 2283 (1976) provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." While this section allows a federal court to enjoin state actions involving property over which it has custody, it does not authorize injunctions to restrain state proceedings in personam merely because a parallel proceeding is pending in federal court. Jett v. Zink, 474 F.2d 149 (5th Cir.), *cert. denied*, 414 U.S. 854 (1973). A state court may, however, voluntarily stay its proceedings following the assumption of federal jurisdiction if it appears that the federal court may better resolve the dispute. *See, e.g.,* Voktas, Inc. v. Central Soya Co., 689 F.2d 103, 104-05 (7th Cir. 1982).

3. *See, e.g.,* Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) (plurality opinion); *see generally* Annot., 5 A.L.R. Fed. 10 (1970).

4. *See, e.g.,* Colorado River Water Dist. v. United States, 424 U.S. 800 (1976).

5. *See, e.g.,* Adolph Coors Co. v. Davenport Mach. & Foundry Co., 89 F.R.D. 148 (D. Colo. 1981).

Microsoftware Computer Systems v. Ontel Corp.,[6] the United States Court of Appeals for the Seventh Circuit answered yes to both questions,[7] straining its jurisdiction to impose unprecedented substantive limits on district courts exercising jurisdiction in the face of parallel proceedings. The decision sharply contrasts with the strong federal policies that restrict appellate review to final judgments and require courts to exercise jurisdiction absent exceptional circumstances.

On December 15, 1980, Ontel, a New York corporation, filed a contract damages action against Microsoftware Computers Systems (MCS), an Illinois corporation,[8] in New York state court.[9] MCS filed an answer and a counterclaim.[10] On February 25, 1981, MCS brought a diversity action against Ontel in the United States District Court for the Northern District of Illinois.[11] Its complaint was virtually identical to the answer and counterclaim filed in New York.[12] The only difference between the federal and state actions was that MCS was the plaintiff in Illinois while Ontel was the plaintiff in New York.[13] To avoid the inconvenience of trying concurrent proceedings in distant forums, Ontel sought a stay of the federal action pending judgment in the state court.[14] The motion was denied,[15] Ontel

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

7. *Id.* at 536, 538. The Seventh Circuit has been at the forefront in concurrent proceedings litigation. In addition to the main case, see generally Evans Transp. v. Scullin Steel Co., 693 F.2d 715 (7th Cir. 1982); Voktas, Inc. v. Central Soya Co., 689 F.2d 103 (7th Cir. 1982); Whyte v. THinc Consulting Group Int'l, 659 F.2d 817 (7th Cir. 1981); Will v. Calvert Fire Ins. Co., 500 F.2d 792 (7th Cir. 1977), *rev'd*, 437 U.S. 655 (1978) (plurality opinion), *remanded,* 586 F.2d 12 (7th Cir. 1978), *remanded sub nom.*, Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859 (N.D. Ill. 1978), *aff'd*, 600 F.2d 1228 (7th Cir. 1979); Aetna State Bank v. Altheimer, 430 F.2d 750 (7th Cir. 1970). *See also* Burrows v. Sebastian, 448 F. Supp. 51 (N.D. Ill. 1978).

8. 686 F.2d at 533. Ontel alleged that MCS owed for goods delivered under contract. The contract provided that New York law would govern disputes.

9. Supreme Court of Nassau County, New York.

10. 686 F.2d at 533. Initially, MCS claimed that service of process was defective. On May 26, 1981, the Supreme Court of Nassau County held that service was good, and MCS appealed. When *Microsoftware* was argued before the Seventh Circuit, the state appeal was pending.

11. Eastern Division; Judge Julius Hoffman.

12. MCS claimed breaches of warranty and contract, misrepresentation, and violation of the Illinois Consumer Fraud and Deceptive Practices Act, ILL. ANN. STAT. ch. 1218, ¶¶ 261-272 (Smith-Hurd Supp. 1981-1982). All the claims arose from the sale of goods underlying the New York action. 686 F.2d at 533.

13. 686 F.2d at 533. The district court had found that the federal and state actions were virtually identical. Microsoftware Computer Sys. v. Ontel Corp., No. 81 C 1014, excerpt of proceedings at 4 (N.D. Ill. July 20, 1981).

14. 686 F.2d at 533.

15. *Id.* Ontel filed motions in the district court seeking reconsideration of the order denying the stay, as well as a stay pending reconsideration. Both were denied.

appealed to the United States Court of Appeals for the Seventh Circuit, and a divided panel reversed.[16]

I. APPELLATE JURISDICTION

The threshold issue before the court of appeals was whether the order denying the stay was appealable.[17] Generally, only final judgments may be appealed,[18] and a denial of a stay request is not final because it signals the parties to begin litigating the merits.[19] Nevertheless, 28 U.S.C. § 1292(a)(1),[20] a statutory exception to the final judgment rule, allows appeal from interlocutory orders granting or refusing injunctions.[21] An order staying or refusing to stay proceedings is equivalent to an injunction if two conditions are satisfied: first, the action stayed (or the action in which the stay request is denied) must be legal, rather than equitable; second, the stay must permit prior determination of an equitable defense or counterclaim.[22] This historical interpretation of the interlocutory appeal statute is called the *Enelow-Ettleson* rule.[23]

In *Microsoftware,* the Seventh Circuit held that Ontel's stay request met

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Microsoftware Computer Sys. v. Ontel Corp., No. 81 C 1014, excerpt of proceedings at 2, 3 (N.D. Ill. July 20, 1981).

16. 686 F.2d at 538. Judge Doyle, dissenting, was a district judge sitting by designation. His opinion reflects greater deference to the district court's discretion. *See id.* at 540 (Doyle, J., dissenting).

17. 686 F.2d at 533. The district court, ruling on Ontel's motion for certification for permissive interlocutory appeal and a stay pending appeal, found that the order was not appealable and refused to certify it under 28 U.S.C. § 1292(b) (1976) (allows permissive interlocutory appeal where district court and court of appeals consent). Microsoftware Computer Sys. v. Ontel Corp., No. 81 C 1014, excerpt of proceedings at 4, 5 (N.D. Ill. July 30, 1981).

18. *See* Cobbledick v. United States, 309 U.S. 323, 324 (1940); 28 U.S.C. § 1291 (1976). A final judgment ends litigation on the merits and leaves nothing to do but execute the judgment. Catlin v. United States, 324 U.S. 229, 233 (1945).

19. 686 F.2d at 533-34. *See* Lee v. Ply*Gem Indus., 593 F.2d 1266, 1268 (D.C. Cir.), *cert. denied,* 441 U.S. 967 (1979); Kappelman v. Delta Airlines, 539 F.2d 165, 167-68 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1061 (1977); Ephraim Freightways v. Red Ball Motor Freight, 376 F.2d 40, 41 (10th Cir.), *cert. denied,* 389 U.S. 829 (1967). Orders granting stays, however, may be appealable final judgments. *See* note 91 *infra*.

20. (1976).

21. This was the first statutory exception to the final judgment rule. *See* Act of Mar. 3, 1891, ch. 517, § 7, 26 Stat. 828, 829. For the history of § 1292(a)(1), see Stewart-Warner Corp. v. Westinghouse Elec., 325 F.2d 822, 829-31 (2d Cir. 1963) (Friendly, J., dissenting), *cert. denied,* 376 U.S. 944 (1964); Note, *Appellate Review of Stay Orders in the Federal Courts,* 72 COLUM. L. REV. 518, 518-22 (1972); Note, *Appealability in the Federal Courts,* 75 HARV. L. REV. 351, 367-75 (1961).

22. This is the most repeated form of the rule, taken from Jackson Brewing Co. v. Clarke, 303 F.2d 844, 845 (5th Cir.), *cert. denied,* 371 U.S. 891 (1962).

23. It is named for two Supreme Court decisions: Ettleson v. Metropolitan Life

both requirements and assumed jurisdiction.[24] The court found that the federal action was legal because MCS sought damages for breach of contract.[25] The court also reasoned that Ontel's stay request raised an equitable defense of duplicative lawsuits, similar to a bill of peace, thus invoking the federal court's equitable discretion.[26] This analysis raises two issues: whether the *Enelow-Ettleson* rule should apply where law and equity are merged, and if so, was the rule properly applied in *Microsoftware?*

A. *Historic Analogy*

The concept equating stays with injunctions has roots in the English Court of Chancery. After King James I affirmed equity's power to enjoin proceedings at law,[27] plaintiffs often initiated identical actions in the separate law and equity courts.[28] Defendants in turn petitioned Chancery to require the plaintiffs to elect a single forum. While equity would enjoin the simultaneous action at law, the law courts had no power to restrain proceedings in equity and could prevent duplicative litigation only by staying their own actions.[29]

Federal courts initially maintained separate law and equity courts, and equity practice was governed by the chancery rules as modified by the Supreme Court.[30] The Law and Equity Act of 1915[31] eroded some of the distinction between law and equity by permitting a defendant to plead eq-

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Ins. Co., 317 U.S. 188 (1942); Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935).

24. 686 F.2d at 534-36.

25. MCS's federal complaint primarily alleged breach of contract. The court of appeals found that the alleged violation of Illinois law and the request for a declaration that the contract damage limits were void were incidental and did not affect the complaint's legal nature. *Id.* at 536 n.4. Determining the nature of the action stayed can be complex when legal and equitable claims are mixed. Generally an action is legal if its claims are predominantly legal, Ephraim Freightways v. Red Ball Motor Freight, 376 F.2d 40, 41 (10th Cir.), *cert. denied,* 389 U.S. 829 (1967), or the equitable relief sought is merely incidental. Diematic Mfg. Corp. v. Packaging Indus., 516 F.2d 975, 978-79 (2d Cir.), *cert. denied,* 423 U.S. 913 (1975).

26. 686 F.2d at 536.

27. *See* G. RADCLIFFE & G. CROSS, THE ENGLISH LEGAL SYSTEM 120-21 (2d ed. 1946).

28. Chancery jurisdiction was often abused by plaintiffs, who invoked it merely to delay just proceedings at law. *Id.* at 123.

29. *See generally* 1 E. DANIELL, CHANCERY PLEADING AND PRACTICE 797-98, 1618 (W. Cooper 5th ed. 1879); W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 460-65 (1931). Although a bill was introduced in the House of Lords to give the common law courts the power to restrain equity judges with writs of prohibition, the measure did not pass. *Id.* at 464.

30. *See* Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

31. Ch. 90, §§ 274a-b, 38 Stat. 956, 957 (1915), *repealed,* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 997.

uitable defenses in actions at law, but the two systems were still governed by separate substantive rules. As in chancery, equity could restrain proceedings at law pending determination of equitable defenses, but law courts could not enjoin equity. Nevertheless, if a law court stayed its proceedings to allow a prior equitable determination, the result was as if equity had enjoined the action at law.[32] Thus, the law court's stay was equivalent to an injunction.

This reasoning was adopted by the Supreme Court in *Enelow v. New York Life Insurance Co.*[33] The plaintiff brought an action at law to recover on an insurance policy. The defendant pleaded fraud, an equitable defense, and the trial court stayed legal proceedings.[34] Based on the historic analogy to equity, the Supreme Court held that the stay was an appealable interlocutory order.[35] While recognizing that the Law and Equity Act had simplified pleading by allowing equitable defenses in actions at law, the Court found that the Act was not intended to disturb the substance of equity's power. Thus, when a court of law required, or refused to require the prior determination of an equitable defense, it exercised equitable jurisdiction, granting or refusing an injunction.[36]

Following the merger of law and equity,[37] the Court reconsidered the issue in *Ettleson v. Metropolitan Life Insurance Co.*[38] The Court held that

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32. Griesa v. Mutual Life Ins. Co. of N.Y., 165 F. 48, 50 (8th Cir. 1908); Purdy v. Baker, 92 A.D. 242, 86 N.Y.S. 1065 (1904).

33. 293 U.S. 379 (1935).

34. *Id.* at 381.

35. *Id.* at 381-83. The case was decided under § 129 of the Judicial Code, 28 U.S.C. § 227 (1940), the predecessor to § 1292 (a)(1).

36. 293 U.S. at 381-83.

> The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of § 129. And, in this respect, it makes no difference that the two cases, the suit in equity for an injunction and the action at law in which the proceedings are stayed, are both pending in the same court, in view of the established distinction between "proceedings at law and proceedings in equity in the national courts and between the powers of those courts when sitting as courts of law and when sitting as courts of equity."

Id. (quoting Griesa v. Mutual Life Ins. Co. of N.Y., 165 F. 48, 50-51 (8th Cir. 1908)).

37. *See* FED. R. CIV. P. 2 ("There shall be one form of action to be known as civil action."), adopted by the Supreme Court order of Dec. 20, 1937, 302 U.S. 783, under authority conferred by the Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (1976)) (power to unify rules of law and equity). The new provisions were intended to "unite the general rules prescribed for cases in equity with those in actions at law to secure one form of civil action and procedure for both." FED. R. CIV. P. 1 advisory committee note.

38. 317 U.S. 188 (1942).

Enelow was good law even under a system ostensibly lacking substantial distinctions between law and equity.[39] Then, after apparently repudiating *Enelow* and *Ettleson* in *City of Morgantown v. Royal Insurance Co.*,[40] the Court retreated in *Baltimore Contractors v. Bodinger*.[41] In *Baltimore Contractors,* the plaintiffs brought an action for an accounting, and the defendant moved for a stay pending arbitration. The Supreme Court held that the denial of the stay was not an appealable interlocutory order.[42] The historic analogy to law and equity did not apply because the action in which the stay was sought and the arbitration defense were equitable. By denying the stay, equity was merely controlling its docket, not refusing an injunction.[43] Although the Court criticized *Enelow-Ettleson* as outdated,[44] it concluded the rule should be applied to limit interlocutory appeals.[45]

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39. *Id.* at 192. The defendants argued that because merger had abolished the distinctions between law and equity, the stay was simply a trial court controlling its own docket, and not equivalent to an injunction issued by a court of equity. *Id.* at 190. The Court spurned this distinction. "The plaintiffs are . . . in no different position than if a state equity court had restrained them from proceeding in the law action. Nor are they differently circumstanced than was the plaintiff in the *Enelow* case." *Id.* at 192. The Court's reasoning avoided the issue of whether merger had sufficiently eroded the "established distinction" between law and equity that *Enelow* had relied on. One authority, however, does not think *Ettleson* could have been distinguished from *Enelow*. *See* 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3923 (1977).

40. 337 U.S. 254 (1955). The Court observed:

> The fiction of a court with two sides, one of which can stay proceedings in the other, is not applicable where there is no other proceeding in existence to be stayed. . . . [D]istinctions from common law practice which supported our conclusions in the *Enelow* and *Ettleson* cases supply no analogy competent to make an injunction of what in any ordinary understanding of the word is not one.

Id. at 257-58.

41. 348 U.S. 176 (1955).

42. *Id.* at 177-78.

43. *Id.* at 182.

44. *Id.* The Court found that *Enelow-Ettleson* was outmoded in the new system, where law and equity were merged. *Id.* at 184.

45. The Court concluded that "it is better judicial practice to follow the precedents which limit appealability of interlocutory orders." *Id.* at 185. Courts and commentators usually view *Baltimore Contractors* as firmly establishing the *Enelow-Ettleson* rule. *See, e.g.,* Whyte v. THinc Consulting Group Int'l, 659 F.2d 817, 820 (7th Cir. 1981); 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *supra* note 39, § 3923. This view is only partially correct. In *Baltimore Contractors,* the Court committed itself only to the cases limiting appeal, like *Morgantown*, and not those expanding it, like *Enelow* and *Ettleson*. 348 U.S. at 185. The decision strongly discouraged piecemeal interlocutory review, and therefore, it is anomalous to interpret it as sanctioning the use of *Enelow-Ettleson* to appeal orders otherwise not subject to review. Nevertheless, the case has been read as keeping alive both lines of cases. *See*

Commentators and lower courts have uniformly assailed the *Enelow-Ettleson* rule.[46] Their primary contention has been that the distinction between law and equity makes little sense in a system based on merger.[47] Results depend on characterizing a case as legal or equitable rather than on the efficiency of allowing interlocutory appeal.[48] Because the rule is phrased in terms of a prior determination, review depends on the "pure fortuity of the race to the courthouse."[49]

The courts have grudgingly continued to apply the *Enelow-Ettleson* rule because the Supreme Court has not reconsidered *Baltimore Contractors.*[50] Some courts reason that Congress has implicitly approved the rule by failing to abrogate the older decisions.[51] Arguably, the *Enelow-Ettleson* rule

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9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 110.20[3] (2d ed. 1982).

46. *See, e.g.,* 9 J. MOORE, B. WARD, & J. LUCAS, *supra* note 45, ¶ 110.20[3]; 16 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, *supra* note 39, § 3923. One court has suggested that the rule has been criticized by nearly every court and commentator that has considered it. *See* Mellon Bank, N.A. v. Pritchard-Keang Nam Corp., 651 F.2d 1244, 1247 (8th Cir. 1981).

47. The *Microsoftware* court observed that the *Enelow-Ettleson* rule has "outlived the fine distinctions between law and equity." 686 F.2d at 535. *See also* Baltimore Contractors v. Bodinger, 348 U.S. 176, 181-83 (1955); City of Morgantown v. Royal Ins. Co., 337 U.S. 254, 257 (1955); Lee v. Ply*Gem Indus., 593 F.2d 1266, 1269 (D.C. Cir.), *cert. denied,* 441 U.S. 967 (1979); Hussain v. Bache & Co., 562 F.2d 1287, 1289 & nn.1-3 (D.C. Cir. 1977); Wallace v. Norman Indus., 467 F.2d 824, 827 (5th Cir. 1972); Penoro v. Reders A/B Disa, 376 F.2d 125, 129 (2d Cir.), *cert. denied,* 389 U.S. 852 (1967); Travel Consultants v. Travel Management Corp., 367 F.2d 334, 336 (D.C. Cir. 1966), *cert. denied,* 386 U.S. 912 (1967); Glen Oaks Utils. v. City of Houston, 280 F.2d 330, 333 (5th Cir. 1960).

48. In cases with mixed legal and equitable claims, appeal depends on whether the request for equitable relief is "merely incidental." *See* 16 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, *supra* note 39, § 3923.

49. Chapman v. International Ladies Garment Workers Union, 401 F.2d 626, 628 (4th Cir. 1968).

50. *See* Jackson Brewing Co. v. Clarke, 303 F.2d 844, 845 (5th Cir.), *cert. denied,* 371 U.S. 891 (1962). Three cases are sometimes read as not following the rule in allowing appeal: Glen Oaks Utils. v. City of Houston, 280 F.2d 330 (5th Cir. 1960); City of Thibodaux v. Louisiana Power & Light Co., 255 F.2d 774 (5th Cir. 1958), *rev'd on other grounds,* 360 U.S. 25 (1959); Jewell v. Davies, 102 F.2d 670 (6th Cir. 1951), *cert. denied,* 343 U.S. 904 (1952). *But see* Jackson Brewing Co. v. Clarke, 303 F.2d 844, 845 (5th Cir.) (appeals in *Glen Oaks* and *Thibodaux* were justified on other grounds), *cert. denied,* 371 U.S. 891 (1962). *Jewell* did not follow the *Enelow-Ettleson* rule and appeal should not have been allowed under any theory. For the flaw in the court's reasoning, see note 101 *infra*.

51. *See, e.g.,* J.M. Huber & Co. v. M/V Plym, 468 F.2d 166, 167 (4th Cir. 1972) ("Were the decisional slate clean we would have no hesitancy in discarding this fictional distinction and upholding appealability, but it would appear that the solution must come from the Congress or upon reconsideration by the Supreme Court."); *see also* Hartford Fin. Sys. v. Florida Software Servs., 712 F.2d 724, 726-27

once was necessary to evade the rigid finality requirements. Following *Baltimore Contractors*, though, Congress passed the Interlocutory Appeals Act,[52] relaxing the final judgment rule. Because it may allow interlocutory appeal in deserving cases, the Act may obviate the need for *Enelow-Ettleson*.[53]

Perhaps the *Enelow-Ettleson* rule should be rejected,[54] but *Microsoftware* theoretically followed long-standing Supreme Court precedent by applying the rule. Nevertheless, the court of appeals has given the rule unprecedented breadth by using it to allow interlocutory appeal from orders denying stays. Courts have uniformly found that stay orders in actions pending judgment in concurrent state legal proceedings are not appealable interlocutory orders.[55] If the state court action is legal, the federal stay does not

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(1st Cir. 1983); Wallace v. Norman Indus., 467 F.2d 824, 827 (5th Cir. 1972); Chapman v. International Ladies Garment Workers Union, 401 F.2d 626, 628 (4th Cir. 1968); Travel Consultants v. Travel Management Corp., 367 F.2d 334, 338 (D.C. Cir. 1966), *cert. denied,* 386 U.S. 912 (1967). The theory of legislation by inaction is not persuasive. It not only assumes that Congress is aware of the problem, but that there are no other reasons why it has failed to act. *See* Grouvard v. United States, 328 U.S. 61, 67, 70 (1946) (inaction may indicate congressional desire to leave the problem fluid rather than adoption by silence); R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 181-82, 254-55 (1975).

52. Pub. L. No. 85-919, 72 Stat. 1770 (1958) (codified as amended at 28 U.S.C. § 1292(b) (1976)) (allows permissive appeal of interlocutory orders, subject to district and appellate court approval). For the text of the statute and its application to stays in concurrent proceedings, see note 90 *infra*.

53. *See* Chappel & Co. v. Frankel, 367 F.2d 197, 201 (2d Cir. 1966). Congress did not have the *Enelow-Ettleson* rule particularly in mind when it passed § 1292(b). *See* S. REP. NO. 2434, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 5255.

54. *See* 9 J. MOORE, B. WARD, & J. LUCAS, *supra* note 45, ¶ 110.20[3] ("It is hoped that the Supreme Court will accept the first opportunity offered to decide that the reason for the Enelow-Ettleson rule is no more."); 16 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, *supra* note 39, § 3923 ("If the question can again be brought before the Supreme Court, it should reject the historic analogy out of hand.").

55. *See* Andrews v. Southern Discount of Ga., 662 F.2d 722, 724 (11th Cir. 1981); D.K. Jensenius v. Texaco, 639 F.2d 1342, 1343 (5th Cir. 1981); Arny v. Philadelphia Transp. Co., 266 F.2d 869, 879 (3d Cir. 1959). In Jackson Brewing Co. v. Clarke, 303 F.2d 844 (5th Cir.), *cert. denied,* 371 U.S. 891 (1962), the defendant sought a stay to await judgment in the parties' state court breach of contract action. In holding that the stay was not an appealable interlocutory order, the court observed:

> The stay in this case was not granted to permit the prior determination of an equitable defense or counterclaim asserted by the appellee; rather, the District Court stayed proceedings until the pending law action between the parties could be finally determined. The state action involved simply a legal claim for breach of contract, and it presented essentially the same legal issues as were raised in the pleadings in the federal action.

Id. at 846. *Microsoftware* is virtually identical to *Jackson Brewing,* except that the

permit prior determination of an equitable defense or counterclaim.[56] If there is no equitable defense[57] to support the fiction that equity has enjoined a proceeding at law, the stay order or denial is not equivalent to an injunction under section 1292(a)(1).[58]

Microsoftware should have been no exception. Ontel sought a stay of the federal proceedings not to allow prior determination of an equitable defense, but to await judgment in a state action at law.[59] The court of appeals found that the federal action was legal, and concluded that the state and federal actions were virtually identical.[60] Thus, logic would indicate that the state action must have been legal as well. Since the stay order would not have permitted prior determination of an equitable defense, the district court's order was not a denial of an injunction under section 1292(a)(1).[61]

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latter involved granting, rather than denying the stay. Since *Enelow-Ettleson* and § 1292(a)(1) are phrased in terms of granting *or* denying stays or injunctions, the distinction is not determinative. *See* Whyte v. THinc Consulting Group Int'l, 659 F.2d 817, 820 (7th Cir. 1981) (Cummings, C.J.). The difference may be significant under § 1291. *See* note 91 *supra. Microsoftware* cited no case allowing appeal from a denial of a stay in a federal action pending completion of state legal proceedings. Cases involving orders denying stays pending other types of legal proceedings generally deny appeal. *See, e.g.,* Castahno v. Jackson Marine, 650 F.2d 546, 549 (5th Cir. 1981) (legal action pending in England); United States v. Georgia-Pacific Corp., 562 F.2d 294, 296 (4th Cir. 1977) (court of claims action pending); Anderson v. United States, 520 F.2d 1027, 1028-29 (5th Cir. 1975) (bankruptcy action pending); Wallace v. Norman Indus., 467 F.2d 824, 827 (5th Cir. 1972) (other federal action pending); Ephraim Freightways v. Red Ball Motor Freight, 376 F.2d 40, 41 (10th Cir.) (administrative action pending), *cert. denied,* 389 U.S. 829 (1967).

56. Jackson Brewing Co. v. Clarke, 303 F.2d 844, 846 (5th Cir.), *cert. denied,* 371 U.S. 891 (1962).

> Where a court stays proceedings at law to permit the progress of another action at law, the law/equity distinction does not come into play, for the action is viewed simply as a court's control of its own docket. Since the stay in such a case is not equitable in origin, the order is not regarded as an injunction.

Limbach Co. v. Gevyn Constr. Corp., 544 F.2d 1104, 1107 n.6 (5th Cir. 1976), *cert. denied,* 430 U.S. 916 (1977).

57. A defense is equitable under the *Enelow-Ettleson* rule if the defendant is entitled to have it determined in equity while the law action is enjoined, or could maintain a bill in equity on the averments. Enelow v. New York Life Ins. Co., 293 U.S. 379, 383 (1934). Ontel raised no such defense.

58. *See* Highfield Water Co. v. Washington County Sanitary Dist., 295 Md. 410, —, 456 A.2d 371, 374-75 (1983) (collecting federal and state cases).

59. 686 F.2d at 533.

60. *Id.* at 533-34.

61. Compare the majority's holding with Judge Doyle's dissent, *id.* at 540 (no equitable defense asserted), and Judge Hoffman's refusal to stay pending appeal, Microsoftware Computer Sys. v. Ontel Corp, No. 81 C 1014, excerpt of proceedings at 5 (N.D. Ill. July 30, 1981) (clear that New York action solely one for damages

The analogy to a bill of peace[62] does not buttress the holding. Equity may issue a bill of peace to enjoin actions at law, but neither the state or federal court in *Microsoftware* exercised equitable jurisdiction. Even if equitable jurisdiction were involved, a bill of peace would not have been appropriate. A bill of peace should issue only if the complainant has previously established a right at law, or the persons controverting his rights are so numerous that the injunction is necessary to prevent a multiplicity of suits.[63] *Microsoftware* falls into neither class. Since the state action was pending, Ontel had established no right at law. There were only two parties to both actions, so there was no risk of multiple suits.[64] Absent vexation, equity does not enjoin legal actions merely because other suits are pending.[65]

The court also noted that the need to control duplicative litigation invoked the equitable discretion of the trial court.[66] Preventing wasteful lawsuits does raise equitable considerations, such as conservation of judicial resources and comprehensive litigation disposition.[67] Nevertheless, a court exercising equitable discretion does not necessarily determine an equitable defense.[68] All concurrent proceedings raise equitable considerations, yet few concern equitable defenses.

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and thus legal). *See also* Texaco v. Cottage Hill Operating Co., 709 F.2d 452, 454 (7th Cir. 1983) (declining to extend *Microsoftware* reasoning where state action did not include identical parties and issues); Highfield Water Co. v. Washington County Sanitary Dist., 295 Md. 410, —, 456 A.2d 371, 374 (1983) (recognizing that *Microsoftware* is against the weight of authority). The Seventh Circuit's expansion of the rule is contrary to the principle that *Enelow-Ettleson* and § 1292(a)(1) should be narrowly construed. *See* Whyte v. THinc Consulting Group Int'l, 659 F.2d 817, 819 (7th Cir. 1981); Mellon Bank, N.A. v. Pritchard-Keang Nam Corp., 651 F.2d 1244, 1245 (8th Cir. 1981).

62. "Equity will interfere to restrain proceedings at law upon a bill in the nature of a bill of peace, whose object is to restrain useless and vexatious litigation and to prevent a multiplicity of suits." 686 F.2d at 536 (quoting 1 J. HIGH, HIGH ON INJUNCTIONS § 61 (4th ed. 1905)).

63. 686 F.2d at 536. *See* J. POMEROY, EQUITY JURISPRUDENCE § 253 (5th ed. 1941).

64. The theory justifying equitable intervention is that the remedy at law is inadequate because of the multiplicity of suits. There was no risk of multiple suits in *Microsoftware,* either in terms of parties or issues. There are only two potential parties to both actions, and the conclusion of the state or federal action would merge or bar the parties' claims. *See* note 182 *infra*.

65. *See* Murphy v. Cadell, 2 B. & P. 137, 106 Eng. Rep. 1200 (K.B. 1800). There was no evidence in *Microsoftware* that the federal action was vexatious. It appears that MCS chose the Illinois federal forum for its convenience and counsel's familiarity with local judges. *See* Nat'l L. J., Sept. 6, 1982, at 32, col. 4 (statement of J. Scotellaro, MCS counsel). *Compare* Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1234 (7th Cir. 1979) (federal action dilatory and vexatious).

66. 686 F.2d at 536.

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

68. 686 F.2d at 540 (Doyle, J., dissenting).

B. *Practical Reasons for Allowing Appeal*

The Seventh Circuit augmented its analysis of equity's history with three practical reasons for allowing appeal: (1) a denial of a stay is effectively unreviewable on appeal from final judgment; (2) a stay saves judicial resources by preventing multiple proceedings; and (3) appeal was necessary to settle intra-circuit conflicts over the scope of the district courts' discretion to stay parallel proceedings.[69]

All orders unreviewable on appeal from final judgment do not necessarily require interlocutory review.[70] The need for appellate review must be balanced against the policy favoring appeal only from final judgments.[71] Since the Judiciary Act of 1789,[72] the congressional mandate has been to have entire cases decided in single appeals following judgment on the merits.[73] Section 1292(a)(1) is only a limited exception to this rule, allowing appeal of orders with "serious, perhaps irreparable consequences" that can be challenged effectively only by immediate appeal.[74] Only an order that affects the merits of a claim or passes on the legal sufficiency of a request for an injunction has serious, perhaps irreparable consequences.[75] The order in *Microsoftware* met neither requirement because it only moved the litigation toward final judgment.[76] Therefore, the policy discouraging piecemeal review should have precluded appeal.[77]

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69. *Id.* at 534-35.

70. *Cf.* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (inability to take effective appeal after final judgment is only one factor in allowing collateral order interlocutory appeal).

71. *See* Baltimore Contractors v. Bodinger, 348 U.S. 176, 181 (1955).

72. Ch. 20, §§ 21, 22, 25, 1 Stat. 73, 83-85 (codified at 28 U.S.C. § 1291 (1976)).

73. *See* Carson v. American Brands, 450 U.S. 79, 83-84 (1981); Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480 (1978); Switzerland Cheese Ass'n v. E. Horne's Mkt., 385 U.S. 23, 25 (1966); Andrews v. United States, 373 U.S. 334, 340 (1963); Baltimore Contractors v. Bodinger, 348 U.S. 176, 178-82 (1955); Cobbledick v. United States, 309 U.S. 323, 324 (1940).

74. Baltimore Contractors v. Bodinger, 348 U.S. 176, 180-81 (1955). *See also* Carson v. American Brands, 450 U.S. 79, 84, 85 (1981); Switzerland Cheese Ass'n v. E. Horne's Mkt., 385 U.S. 23, 24-25 (1966).

75. *See* Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480 (1978).

76. The court found that the stay issue was completely separate from the merits. 686 F.2d at 534.

77. It has been suggested that if the *Enelow-Ettleson* rule is satisfied, serious, perhaps irreparable consequences are not required before appeal is allowed. *See* White v. THinc Consulting Group Int'l, 659 F.2d 817, 820 (7th Cir. 1981); Comment, *Arbitration or Litigation?, United States District Court Orders Resolving the Issue Should Be Appealable Under 28 U.S.C. § 1292,* 2 U. ILL. L.F. 338, 345 (1973). The Court has held, however, that § 1292(a)(1) does not reach orders that "in no way touch on the merits of the claim but only relate to pretrial procedures." Switzerland Cheese Ass'n v. E. Horne's Mkt., 385 U.S. 23, 24 (1966). While an order granting a stay arguably reaches the merits because it may effectively put the plaintiff

The court of appeals also urged that the " 'unjustified wast[ing] of scarce judicial resources' has often been a factor in deciding whether to allow interlocutory appeal,"[78] and concluded that appeal was necessary to prevent duplication between the state and federal court.[79] The interlocutory appeal issue cannot be viewed solely in terms of allocating cases between state and federal courts; it also involves division of labor between federal district and appellate courts. In general, the cost associated with an interlocutory appeal is that the appeal may be unnecessary if the trial court was correct. The cost of not allowing appeal is that the trial may be unnecessary if the trial court was in error. If the cost of an unnecessary appeal is equivalent to an unnecessary trial, interlocutory appeals should be allowed only if trial courts err more than they are correct. Since trial courts are sustained far more often than they are reversed, the finality rule promotes efficiency.[80]

The court of appeals could only speculate that the waste of duplicative state and federal trials more than offset the inconvenience of interlocutory appeal. The federal action was unnecessary only if the state court lawsuit would result in a judgment on the merits, barring the federal claim.[81] When the court of appeals granted the stay, it had no idea whether the New York action would reach a judgment on the merits. On the contrary, since the state court's jurisdiction was being appealed when *Microsoftware* was decided,[82] there was reason to believe the New York action would not be res

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out of court, an order advancing the case to trial does not. Since an order denying a stay request is equivalent to the latter, it would not have serious, perhaps irreparable consequences. *Cf.* Mellon Bank, N.A. v. Pritchard-Keang Corp., 651 F.2d 1244, 1248-49 (8th Cir. 1981) (consequences test justified applying the *Enelow-Ettleson* rule narrowly).

78. 686 F.2d at 534 (quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 378 (1981)). In context, the *Firestone* quote reads:

> But interlocutory orders are not appealable "on the mere grounds that they may be erroneous." Permitting wholesale appeals on that ground not only would constitute an unjustified waste of scarce judicial resources, but would transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291.

449 U.S. at 378 (citation omitted). The *Cohen* (collateral order) exception to the finality rule is discussed in note 91 *infra*. In *Firestone,* the Court was concerned with narrowing exceptions to the finality rule to avoid wasteful interlocutory review. *Microsoftware* moves in the opposite direction, disregarding the finality rule, imposing additional burdens on appellate courts.

79. 686 F.2d at 534. The federal trial can hardly be viewed as unjustified if it guarantees MCS the right to a federal forum. *See* text accompanying notes 135-36 *infra.*

80. J. LANDERS & J. MARTIN, CIVIL PROCEDURE 863 (1981). *See also Microsoftware,* 686 F.2d at 540-41 (Doyle, J., dissenting).

81. 686 F.2d at 540 (Doyle, J., dissenting).

82. *See* note 10 *supra.*

judicata. If so, the federal trial would not be unnecessary.[83]

Even if permitting appeal in *Microsoftware* saved resources, this gain does not justify a general rule allowing appeal from interlocutory orders denying stays. The issue transcends the confines of a single case in which the court of appeals decides that a district court erred in denying a stay.[84] It is doubtful that district courts generally err more often then not in denying stay orders.[85] In the unlikely event this is true, it is for Congress and not the Seventh Circuit to expand interlocutory review.[86]

Finally, the *Microsoftware* court reasoned that interlocutory review was necessary to harmonize conflicts among lower court orders concerning stays in concurrent proceedings.[87] The court traced this conflict to its previous failure to provide guidance.[88] Interlocutory review is necessary to direct the lower courts only if the court of appeals cannot otherwise review stay orders. Orders granting or denying stays can be appealed through means other than section 1292(a)(1), including mandamus,[89] permissive interlocu-

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83. 686 F.2d at 541 (Doyle, J., dissenting).

84. *Id. Accord* Baltimore Contractors v. Bodinger, 348 U.S. 176, 181-82 (1955).

85. 686 F.2d at 541 (Doyle, J., dissenting). Lower courts are afforded great discretion to deny stays, but only exceptional circumstances justify granting a stay. *See* text accompanying note 136 *infra.*

86. *See* Baltimore Contractors v. Bodinger, 348 U.S. 176, 181-82 (1955). Ad hoc changes in appellate jurisdiction encourage interlocutory appeals, wasting time and money. Thus Congress, not the courts, should "weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on the litigants." *Id.* at 181. *See also* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 103 S. Ct. 927, 945 (1983) (Rehnquist, J., dissenting) (decisions that create uncertainty about appealability result in colorable appeals which delay and disrupt proceedings).

87. 686 F.2d at 535. The court compared the district court's order below; Browning v. United States Movilyn Corp., 83 F.R.D. 211 (E.D. Wis. 1979); and Gentron Corp. v. H.C. Johnson Agencies, 79 F.R.D. 415 (E.D. Wis. 1978) with Evans Transp. Co. v. Scullin Steel Co., 530 F. Supp. 787 (N.D. Ill. 1982); and Burrows v. Sebastian, 448 F. Supp. 51 (N.D. Ill. 1978). The conflict was only temporary. *See* note 92 *infra*.

88. 686 F.2d at 535.

89. *See* 28 U.S.C. § 1651 (1976) (appellate courts may issue writs of mandamus in aid of their jurisdiction). Mandamus was once an effective means to appeal stay orders. *See, e.g,* Aaacon Auto Transp. v. Ninfo, 490 F.2d 83, 84 (2d Cir. 1974); Lummus Oil Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80, 86-87 (2d Cir. 1961), *cert. denied,* 368 U.S. 986 (1962). The utility of mandamus to challenge stay orders in diversity cases was severely undercut by Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) (plurality opinion). In *Will,* the Seventh Circuit issued a writ of mandamus to compel a district court to proceed in a case despite parallel proceedings in state court. The Supreme Court reversed, holding that mandamus is reserved for clear and indisputable cases. *Id.* at 667. Since the Court also held that stay orders in concurrent proceedings issue within the district court's discretion, the plaintiff

tory appeal,[90] and appeal from stays as final judgments.[91] Moreover elimi-

whose action was stayed had no clear right to the writ. *Id.* at 665-66. Following *Will,* fewer diversity litigants are able to appeal stay orders through writs of mandamus. *See also* Moses H. Cone Memorial Hosp. v. Mercury Const. Corp, 103 S. Ct. 927, 933 n.6 (1983) (court of appeals has no occasion to review through mandamus when it can review by ordinary contemporary appeal).

90. 28 U.S.C. § 1292(b) provides in part:

> When a district judge, in making in a civil action an order otherwise not appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . . .

Several courts have allowed appeal under this section of stay orders issued pending resolution of concurrent proceedings. *See, e.g.,* Voktas v. Central Soya Co., 689 F.2d 103 (7th Cir. 1982); Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228 (7th Cir. 1979); Lear Siegler v. Adkins, 330 F.2d 595 (9th Cir. 1964). *But see* Microsoftware Computer Sys. v. Ontel Corp., No. 81 C 1014, excerpt of proceedings at 5 (N.D. Ill. July 30, 1981) (denying certification). Since § 1292(b) permits certification only if appeal is not otherwise allowed under § 1292(a), *Microsoftware* implicitly contradicts Voktas v. Central Soya Co., 689 F.2d 103 (7th Cir. 1981). Permissive interlocutory appeal is rare because it requires the consent of both the trial and appellate courts. In fiscal year 1974, only 100 of 16,436 appeals were certified by district courts, and the court of appeals took only half that number. C. WRIGHT, LAW OF FEDERAL COURTS § 102 (3d ed. 1976). This practice conforms with the congresssional intent to limit permissive appeal to exceptional cases. *See* H. REP. NO. 1667, 85th Cong., 2d Sess. 2 (1958); *see generally* Note, *Section 1292(b); Eight Years of Undefined Discretion,* 54 GEO. L.J. 940 (1966); Note, *Appealability in the Federal Courts,* 75 HARV. L. REV. 351, 360 (1961).

91. There is conflict over whether stays granted in concurrent proceedings are equivalent to dismissals and thus appealable under § 1291. Initially, stays were not equated with dismissals. *See, e.g.,* Jackson Brewing Co. v. Clarke, 303 F.2d 844, 845 (5th Cir.), *cert. denied,* 371 U.S. 891 (1962); Arny v. Philadelphia Transp. Co., 266 F.2d 869, 870 (3d Cir. 1959). Then the Supreme Court recognized that orders could be final if they put "a party effectively out of court." Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 n.2 (1962). In parallel proceedings where the state defendant is the federal plaintiff, judgment on the merits in state court may later be asserted as res judicata in the federal action. Thus, the stay of the federal proceedings may put the plaintiff out of court. Based on this reasoning and *Idlewild*, the Seventh Circuit has held that a stay may be equivalent to a dismissal. *See* Drexler v. Southwest Dubois School Corp., 504 F.2d 836, 838 (7th Cir. 1981) (en banc). Other circuits disagree. *See, e.g.,* Andrews v. Southern Discount Co. of Ga., 662 F.2d 722, 723 (11th Cir. 1981) (per curiam); D.K. Jensenius v. Texaco, 639 F.2d 1342, 1343 (5th Cir. 1981). The Supreme Court recently decided the issue. *See* notes 107-16 and accompanying text *infra*.

Another avenue for review under § 1291 is the collateral order exception, which allows appeal of district court orders that (1) resolve issues completely separate from the merits, (2) would be effectively unreviewable on appeal from final

nating apparent conflicts in the lower court decisions may even be unnecessary, since they spring from legitimate exercises of discretion. Disagreement within a certain range may be unavoidable.[92] Because district courts are closer to the facts that determine whether a stay should issue, they may be best suited to judge the propriety of stays.[93]

C. *Recent Supreme Court Decisions*

While neither history nor practicality compel review of orders denying stays under section 1292(a)(1), Supreme Court dictum has suggested that stay orders may be subject to interlocutory appeal. In *Will v. Calvert Fire Insurance Co.,*[94] the Court vacated a writ of mandamus ordering a district court to hear a diversity action despite pending concurrent state proceedings.[95] The plurality observed that the "District Court's exercise of its discretion may be subject to review and modification in a proper interlocutory

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judgment, and (3) conclusively determine the disputed question. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545 (1949). In *Microsoftware,* the Seventh Circuit found the order failed the third condition because the district court was free to reconsider the order denying the stay throughout the litigation. 686 F.2d at 534. *Cf.* Hastings v. Maine-Endwell Cent. School Dist., 676 F.2d 893, 896 (2d Cir. 1982) (interim award of attorneys' fees not appealable because court could modify the award as the action progressed). *But see* Baltimore Contractors v. Bodinger, 348 U.S. 176, 185-86 (1955) (Black, J., dissenting) (denial of stay pending arbitration should be appealable collateral order). The Supreme Court recently decided a similar issue. *See* notes 110-15 and accompanying text *infra.*

A district court might insulate its decision to delay litigation from review by simply postponing the trial date without formally issuing a stay order. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 103 S. Ct. 927, 944 (1983) (Rehnquist, J., dissenting); Will v. Calvert Fire Ins. Co., 437 U.S. 665, 665 (1978); Evans Transp. Co. v. Scullin Steel Co., 693 F.2d 715, 718 (7th Cir. 1982).

92. The conflicting cases cited in *Microsoftware* have been reconciled without resort to appeal under § 1292(a)(1). Evans Transp. Co. v. Scullin Steel Co., 530 F. Supp. 787 (N.D. Ill. 1982), was vacated and remanded by the court of appeals, 693 F.2d 715 (7th Cir. 1982) (dismissal appealed as final judgment). Burrows v. Sebastian, 448 F. Supp. 51 (N.D. Ill. 1978), was substantially overruled in Voktas v. Central Soya Co., 689 F.2d 103 (7th Cir. 1982) (permissive interlocutory appeal). The only remaining conflict is between *Microsoftware* and the other Seventh Circuit cases, and that conflict was created by the court of appeals, not the district court. *But cf.* Evans Transp. Co. v. Scullin Steel Co., 693 F.2d 715, 719 (7th Cir. 1982) (attempts to reconcile *Microsoftware* with other circuit decisions). The *Microsoftware* court's "guidance" is likely to confuse the district courts.

93. 686 F.2d at 541 (Doyle, J., dissenting) ("It is inherent in the enjoyment of choice by district courts that in a batch of virtually identical cases" some courts will grant stays while others will deny them).

94. 437 U.S. 655 (1978) (plurality opinion).

95. *Id.* at 663.

appeal, cf. *Landis*, 229 U.S. 256-259."[96] In *Landis v. North American Co.*,[97] the district court stayed proceedings pending a decision in another federal action between the parties.[98] Neither the court of appeals[99] nor the Supreme Court discussed the jurisdiction issue.[100]

Landis does not authorize interlocutory appeal from stay orders under section 1292(a)(1) or *Enelow-Ettleson*, because it was decided under a special District of Columbia statute that potentially allowed permissive appeal from all interlocutory orders.[101] Neither *Landis* nor *Will* should be read as generally allowing interlocutory appeal from orders granting or denying stays.

Following *Microsoftware,* the Supreme Court eliminated some of the uncertainty regarding appeal of stay orders in concurrent proceedings. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[102] the plaintiff, Hospital, filed an action in state court seeking a declaration that its contract dispute with the defendant, Mercury, was not subject to arbitration.[103] Three weeks later, Mercury filed a diversity action seeking an order compelling arbitration. Finding the state and federal suits identical, the district court stayed the federal proceedings pending judgment in the state court.[104] The Fourth Circuit assumed jurisdiction and reversed the order,[105] and the Supreme Court affirmed.[106]

Although the Court did not discuss whether the order was appealable under section 1292(a)(1), the majority found two grounds for appeal under 28 U.S.C. § 1291.[107] First, the Court held the stay order was a final decision because it put Mercury effectively out of federal court.[108] Since both

96. *Id.*

97. 229 U.S. 248 (1936).

98. North Am. Co. v. Landis, 85 F.2d 398, 399 (D.C. Cir.), *rev'd*, 299 U.S. 248 (1936).

99. *Id.*

100. Landis v. North Am. Co., 229 U.S. 248, 249-50 (1936).

101. *See* Act of Mar. 3, 1901, ch. 854, § 226, 31 Stat. 1225, *repealed,* Act of May 24, 1949, ch. 143, § 142, 63 Stat. 110. The Act was similar to 28 U.S.C. § 1292(b) except that the former did not require district court certification. One court relied on *Landis* to allow appeal otherwise not permitted. *See* Jewell v. Davies, 192 F.2d 670 (6th Cir. 1951), *cert. denied,* 343 U.S. 904 (1952). Since *Jewell* did not arise under the District of Columbia statute or its equivalent, it was incorrectly decided. *See* 9 J. MOORE, B. WARD, & J. LUCAS, *supra* note 45, ¶ 110.20[4.-3] n.13.

102. 103 S. Ct. 927 (1983).

103. *Id.* at 934.

104. Mercury Const. Corp. v. Moses H. Cone Memoral Hosp., 656 F.2d 933, 937 (4th Cir. 1981) (en banc), *aff'd*, 103 S. Ct. 927 (1983).

105. *Id.* at 946.

106. 103 S. Ct. at 927.

107. (1976).

108. *Cf.* Idlewild Liquor Corp. v. Epstein, 370 U.S. 713, 715 n.2 (1962) (a decision is final if it puts the plaintiff "effectively out of court"). *See* note 91 *supra.*

actions involved the same issue, the stay of the federal action eliminated any chance of federal jurisdiction being exercised because the state court judgment would be res judicata in the dispute.[109] Alternatively, the stay order was held appealable under the *Cohen v. Beneficial Industrial Loan Corp.*[110] collateral order exception to the finality rule. The *Cohen* exception, later refined in *Coopers & Lybrand v. Livesay*,[111] allows appeal of orders (1) conclusively determining a disputed question, (2) resolving an important issue completely separate from the merits of the action, and which are (3) effectively unreviewable on appeal from a final judgment.[112] The majority had little doubt that the order in *Mercury Construction* met the second and third elements; the district court's refusal to adjudicate the matter was an important issue completely separate from the merits, and the order would be effectively unreviewable on appeal from a final judgment because of the res judicata effect of the state court decision.[113]

Thus, the issue was whether the order conclusively determined the disputed question. Although the Court conceded that the stay order was subject to reconsideration by the district judge, this was true "only in the technical sense that every order short of a final decree is subject to reopening at the discretion of the district judge."[114] Finding no basis to suppose the lower court contemplated reconsideration, the Court reasoned that the district judge would not have granted the stay unless it expected the state court to adequately resolve the issues.[115] Therefore, the order was conclu-

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109. 103 S. Ct. at 934 & n.11.

> *Idlewild*'s reasoning is limited to cases where (under *Colorado River,* abstention, or closely similar doctrine) the object of the stay is to require all or an essential part of the federal suit to be litigated in a state forum. . . . We do not hold that an order becomes final merely because it may have the practical effect of allowing a state court to be the first to rule on a common issue. We hold only that a stay order is final when the sole purpose and effect of the stay is precisely to surrender jurisdiction of a federal court to a state court.

Id. at 934-35 n.11.

110. 337 U.S. 541 (1949).

111. 437 U.S. 463 (1978).

112. *Id.* at 468.

113. 103 S. Ct. at 935. *But see id.* at 547 (Rehnquist, J., dissenting) (arbitration issue was not "important" because the state court could have adequately resolved it).

114. *Id.* at 935 & n.14. This reasoning was based on FED. R. CIV. P. 54(b) which provides:

> [A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

115. 103 S. Ct. at 935 & nn.13-14. *But see id.* at 946 (Rehnquist, J., dissenting)

sive, and all the *Cohen* elements were satisfied.[116]

The majority viewed a stay of federal proceedings in deference to a concurrent state court action as practically indistinguishable from a dismissal.[117] The question that *Mercury Construction* leaves open is whether orders *denying* stays in concurrent proceedings are appealable under the collateral order exception. The majority in *Microsoftware* would have applied the collateral order exception but for its conclusion that the order denying the stay did not conclusively determine the disputed question.[118] Following *Mercury Construction,* the Seventh Circuit would, therefore, probably apply the collateral order exception to orders denying stays.[119]

Notwithstanding the *Microsoftware* court's conclusion, orders denying stays may not resolve important issues completely separate from the merits. In *Mercury Construction,* the Court observed that the second element in the *Cohen* exception is a distillation of the principle discouraging piecemeal review of steps which will merge in a final judgment.[120] Unlike the stay order in *Mercury Construction,* which ended consideration of the merits, the denial of the stay in *Microsoftware* moved the parties toward final judgment.

Nevertheless, an order denying a stay will occasionally be unreviewable on appeal from final judgment. Two results are possible when the stay is refused: the state court may reach judgment on the merits first, res judicata will end the federal proceeding, and there can be no effective appeal.

(order was not conclusive because it was subject to modification if progress in state court was inadequate).

116. *Id.* at 935.

117. *Id.* at 934 n.8 ("substanceless distinction").

118. 686 F.2d at 534. *See* note 91 *supra.*

119. The Seventh Circuit reasoned that by the time a final judgment was reached, "the extra resources needed to prosecute and decide two identical lawsuits will already have been spent." 686 F.2d at 534. This conclusion was rejected in Highfield Water Co. v. Washington County Sanitary Dist., 295 Md. 410, 456 A.2d 371 (1983). The parties were involved in concurrent state and federal litigation. The state court defendant moved for a stay of proceedings on the grounds that a federal court was exercising in rem jurisdiction over the dispute. The trial court denied the motion, and the defendant appealed. The court of appeals, citing and rejecting *Microsoftware,* held the order was not appealable as an interlocutory or final order. The court refused to apply the collateral order exception, finding that the order was not effectively unreviewable on appeal from final judgment:

> [We do not] accept . . . the argument that review upon a final judgment will be ineffective because [a party] must bear the cost and inconvenience of a trial, harms that a reversal on appeal will not recompense. That [a party] will have to bear such a burden does not present a better case for the effective unreviewability of an order denying a disqualification than could be made for all interlocutory orders.

Id. at —, 456 A.2d at 374 (quoting Peat, Marwick, Mitchell & Co. v. Los Angeles Rams Football Co., 284 Md. 86, 94, 394 A.2d 801, 806 (1978)).

120. 103 S. Ct. at 933 n.13 (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

Alternatively the federal action may proceed to judgment on the merits, and theoretically the court of appeals could decide the action should have been stayed, and reverse. Thus some orders denying stays could be reviewable after final judgment. The court issuing the order, however, cannot predict whether the state court will beat the federal court to judgment, so *Cohen*'s applicability will be uncertain.

The issue can be analogized to appeal of orders denying motions to dismiss.[121] Orders denying motions to dismiss are not final under section 1291.[122] *Mercury Construction* held that stay orders in concurrent proceedings are equivalent to dismissals. Conversely, a refusal to stay could be equivalent to a denial of a motion to dismiss, and it should not be appealable under section 1291.

The appellate review analysis in *Mercury Construction* was a product of the majority's strong feeling that federal courts must not abdicate jurisdiction to state courts.[123] Allowing review of orders granting stays was necessary to keep open the doors of the federal courthouse.[124] When a request for a stay is denied, however, there is no such compulsion because the plaintiff is not deprived of a federal forum. Therefore, stay refusals are best analyzed as interlocutory, and should not be appealable under sections 1291 or 1292(a)(1).

II. DISCRETION TO STAY

In the second part of its decision, the *Microsoftware* court held that a district court may be required to stay proceedings pending resolution of a similar action between the parties in state courts.[125] While the court conceded that the decision to deny the stay was largely committed to the district court's discretion,[126] it concluded that Ontel's request should have been granted.[127]

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121. *See* FED. R. CIV. P. 12(b)(6).

122. Spruill v. Gage, 262 F.2d 355, 356 (6th Cir. 1958). *See also* Catlin v. United States, 324 U.S. 229, 236 (1945).

123. *See* 103 S. Ct. at 936-37.

124. The majority opinion conspicuously lacks the admonitions against expansion of the limited exceptions to the finality rule that have characterized recent decisions. *See, e.g.,* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 378 (1981) (orders denying motions to disqualify counsel are not appealable collateral orders); Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (rejecting "death knell" exception to finality rule for orders denying class certification); *see also* 103 S. Ct. at 945 (Rehnquist, J., dissenting) (raising concern that *Mercury Construction* will lead to unreasonable interference with district courts' docket control and more appeals).

125. 686 F.2d at 533, 538.

126. *Id.* at 537 (citing Will v. Calvert Fire Ins. Co., 437 U.S. 655, 664 (1978) (plurality opinion)).

127. 686 F.2d at 538.

A. *The Exceptional Circumstances Test*

The court of appeals began its analysis with *Colorado River Water District v. United States.*[128] In *Colorado River,* the government brought a federal action seeking a declaration of water rights for itself and some Indian tribes. A defendant in a Colorado state water court moved to join the United States in the state proceedings so all claims could be adjudicated in a single action.[129] The request was granted, and the federal action was dismissed.[130] The Supreme Court upheld the dismissal.[131]

Initially, the Court held that none of the traditional abstention doctrines applied.[132] Therefore, the issue was whether the dismissal of the federal action could be upheld solely to avoid duplication between the state

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128. 424 U.S. 800 (1976).

129. Colorado's seven water divisions hear claims under the Colorado Water Rights Determination and Administration Act of 1969, COLO. REV. STAT. §§ 37-92-101 to -602 (1973 & Supp. 1982). The Act established a single continuous proceeding in each division. *Id.* § 37-92-201. Thus, the state court action was pending when the federal suit commenced. 424 U.S. at 820.

130. 424 U.S. at 805-07.

131. *Id.* at 821.

132. *Id.* at 813. The Court recognized three abstention classes in which federal courts could stay or dismiss proceedings pending state court action: (1) where state law may dispose of a federal constitutional issue, *see* Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941); (2) where difficult state law questions determine public policy that transcends results in the case at bar, *see* Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959); and (3) where federal jurisdiction is invoked to restrain state criminal proceedings, *see* Younger v. Harris, 401 U.S. 37 (1971). Other categories have been discussed, including a "fourth abstention doctrine," which recognizes a need to ease federal docket congestion, particularly when pending parallel state proceedings involve the same parties and issues as the federal action. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 52 (3d ed. 1976); Ashman, Alfini, & Shapiro, *Federal Abstention: New Perspectives On Its Current Vitality,* 46 MISS. L.J. 629 (1975); Currie, *Federal Jurisdiction and the American Law Institute,* 36 U. CHI. L. REV. 268 (1969); Kurland, *Toward A Co-Operative Judicial Federalism*; *The Federal Court Abstention Doctrines,* 24 F.R.D. 481 (1959); Wright, *The Abstention Doctrine Reconsidered,* 37 TEX. L. REV. 815 (1959). The American Law Institute did not recognize this fourth abstention doctrine in its jurisdiction work. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969). The Senate has passed a bill establishing a Federal Jurisdiction Review and Revision Commission to study concurrent jurisdiction problems. *See* S. 3123, 96th Cong., 2d Sess., 126 CONG. REC. S1267-68 (daily ed. Sept. 17, 1980) (remarks of Senator Thurmond).

Prior to *Colorado River,* the trend was to recognize that district courts had broad discretionary power to stay proceedings pending concurrent state action. *See, e.g.* Weiner v. Shearson, Hammill & Co., 521 F.2d 817 (9th Cir. 1975); Aetna State Bank v. Altheimer, 430 F.2d 750 (7th Cir. 1970); Amdur v. Lizars, 372 F.2d 103 (4th Cir. 1967); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949).

and federal courts.[133] Prior Supreme Court cases dealing with dismissals in the context of multiple federal proceedings had held that only one of the actions between the parties should go forward.[134] The Court, however, distinguished dismissals of federal actions in deference to state proceedings because of the rule that a pending state action is no bar to a federal court's exercising diversity jurisdiction over a suit involving the same parties and issues.[135] Given the "virtually unflagging obligation" of the federal courts to exercise their jurisdiction, the Court held that only "exceptional circumstances" justified dismissing a federal action in deference to a pending state

133. 424 U.S. at 817.

> Although this case falls within none of the abstention categories, there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern . . . the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."

Id. (quoting Kerotest Mfg. Co. v. C-O Two Fire Equip. Co., 342 U.S. 180, 183 (1952)). Some lower courts, however, view concurrent proceedings as a comity problem. *See, e.g.,* Centronics Data Computer Corp. v. Merkle-Korff Indus., 503 F. Supp. 168, 170 (D.N.H. 1980).

134. 424 U.S. at 817. In concurrent proceedings between federal courts, dismissal of one action does not deprive the plaintiff of a federal forum. Thus, the general rule has been to avoid duplication and let only one action proceed. *See* Kero-Test Mfg. Co. v. C-O Two Fire Equip. Co., 342 U.S. 180, 183 (1952) ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"); Landis v. North Am. Co., 299 U.S. 248, 254 (1936). Seven years after *Landis*, in Meredith v. Winter Haven, 320 U.S. 228 (1943), the Court reversed a decision dismissing a diversity action so that state law issues could first be decided in state court. The Court observed:

> The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity . . . to assert their rights in federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.

Id. at 234 (citation omitted). The Court also noted, however, that when the case was dismissed there was no litigation pending in state court which could have resolved the issues presented. *Id.* at 237. *Cf.* PPG Indus. v. Continental Oil Co., 478 F.2d 674, 678 (5th Cir. 1973) (*Meredith* may have reached different result had state court action been pending).

135. 424 U.S. at 817. *See* McClellan v. Carland, 217 U.S. 268 (1910); note 147 *infra*.

suit.[136] Factors relevant to this determination include (1) whether either court exercised in rem jurisdiction;[137] (2) the inconvenience of the federal forum;[138] (3) the need to avoid piecemeal litigation;[139] and (4) the order in which the actions were filed.[140] Dismissals must be based on the "clearest of justifications."[141]

After positing the unflagging obligation, the Court concluded that the facts in *Colorado River* were exceptional because federal law encouraged resolution of water disputes in comprehensive actions.[142] Dismissal was necessary to avoid piecemeal litigation.[143]

The key to *Colorado River* is the virtually unflagging obligation, a duty gleaned primarily from three cases. In the first, *England v. Louisiana State Board of Medical Examiners,*[144] the Court noted that federal courts have a duty to exercise their jurisdiction to guarantee the right to a federal forum.[145] In the second case, *McClellan v. Carland*,[146] the Court stated that pending state proceedings were no bar to federal courts exercising diversity

136. 424 U.S. at 817. This virtually unflagging obligation phrase could be dictum because it appeared "in an opinion which *upheld* the correctness of a district court's *final* decision to dismiss because of concurrent jurisdiction." Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665 (1978) (plurality opinion).

137. 424 U.S. at 817. *See* Donovan v. City of Dallas, 377 U.S. 408, 412 (1964); Princess Lida v. Thompson, 305 U.S. 456, 466 (1939).

138. 424 U.S. at 818. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

139. 424 U.S. at 818. *Cf.* Brillhart v. Excess Ins. Co., 316 U.S. 491, 495 (1942) (federal court may dismiss declaratory judgment action in deference to concurrent state proceeding).

140. 424 U.S. at 818. *See* Pacific Livestock Co. v. Oregon Water Bd., 241 U.S. 440, 447 (1916).

141. 424 U.S. at 819.

142. *Id.* at 819. *See* McCarran Amendment, ch. 651, § 208a-c, 66 Stat. 560, 562 (1952) (codified as amended at 43 U.S.C. § 666 (1976)).

143. 424 U.S. at 819. Justices Stewart, Blackmun, and Stevens argued that not even that McCarran Amendment justified dismissal. They were concerned with the peculiarly federal aspects of the case: (1) federal water law was involved; (2) the federal government was a party; and (3) the rights of Indian tribes, traditionally federal subjects, were implicated. *Id.* at 825-26 (Stewart, J., dissenting), 826-27 (Stevens, J., dissenting). Query whether these three Justices would oppose stays in a federal case based solely on diversity jurisdiction. *Cf.* Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) (Justices Stewart and Stevens join plurality opinion upholding stay where jurisdiction was concurrent).

144. 375 U.S. 411 (1964). The plaintiffs brought a federal action challenging a state law on due process grounds. The district court remitted the action to state court for statutory interpretation, where the plaintiffs lost both the construction and constitutional challenges. The federal court dismissed its action and the plaintiffs appealed to the Supreme Court, which reversed, holding that the plaintiffs had a right to a federal determination of their constitutional claim. *Id.* at 415.

145. *Id.* The right is qualified: "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a federal court to

jurisdiction.[147] Finally, the *Colorado River* Court cited *Cohens v. Virginia,*[148] in which Chief Justice Marhsall suggested that federal courts may not decline to exercise their jurisdiction.[149]

The virtually unflagging obligation was later questioned by a plurality of the Court in *Will v. Calvert Fire Insurance Co.*[150] Four justices found that a diversity litigant did not have a clear and indisputable right to federal adjudication of a matter subject to pending state court proceedings.[151] The district court had stayed proceedings because a similar action between the parties had been commenced in state court before the federal action was filed.[152] Relying on *Colorado River*, the Seventh Circuit issued a writ of mandamus ordering the district court to rescind the stay.[153] The Supreme Court reversed, stating that the decision to defer to the concurrent state proceedings was committed to the district court's discretion.[154] Because mandamus is reserved for clear and indisputable causes,[155] it was not an appropriate tool for overriding the district court's discretion.[156]

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consider federal constitutional claims can be compelled, through no fault of his own, to accept a state court determination of those claims." *Id.* (footnote omitted).

146. 217 U.S. 268 (1910).

147. *Id.* at 282. The *Colorado River* Court stated this as the general rule. 424 U.S. at 818. This "rule," however, is not supported by the facts in *McClellan*, where the court stayed proceedings and directed the parties to commence an action in state court; no action was pending when the federal suit was initiated. McClellan v. Carland, 217 U.S. at 281. (Actually, the *McClellan* Court had affidavits from the lower court indicating that a state action was pending, if not completed. Nevertheless, the Court found that the statements were not properly part of the record, and decided that case as if no other action was pending. *Id.* at 283.) The distinction is important, given *Colorado River*'s recognition that the order of proceedings is a factor in determining exceptional circumstances. 424 U.S. at 818.

148. 19 U.S. (6 Wheat.) 264 (1812).

149. *Id.* at 404. "It may be true that there was never such a rule uniformly applied in the federal courts. It is clear that there is no such rule today." C. WRIGHT, LAW OF FEDERAL COURTS § 52 (3d ed. 1976). The abstention doctrines are plainly inconsistent with Chief Justice Marshall's suggestion that the federal courts must always exercise their jurisdiction. *See* note 132 *supra; see also* Meredith v. Winter Haven, 320 U.S. 228, 235-36 (1943) (lengthy list of areas in which the federal courts defer to state courts).

150. 437 U.S. 655 (1978) (plurality opinion).

151. *Id.* at 664, 667-70.

152. Will v. Calvert Fire Ins. Co., 560 F.2d 792, 793 (7th Cir. 1977), *rev'd,* 437 U.S. 655 (1978).

153. 560 F.2d at 795.

154. Will v. Calvert Fire Ins. Co., 437 U.S. at 662-63. The district court was not compelled to exercise its jurisdiction because the matter may have been settled more expeditiously in state court.

155. Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976).

156. 437 U.S. at 667. After the Supreme Court reversed, the Seventh Circuit remanded the case to the district court for reconsideration in light of *Colorado River.*

Although *McClellan v. Carland* seemed to compel issuance of the writ, the plurality distinguished the case as outdated,[157] given the intervening increase in federal-state concurrent proceedings,[158] citing *Brillhart v. Excess Insurance.*[159] In *Brillhart*, the Court upheld the stay of a federal declaratory judgment action concerning a matter pending in state court. After noting that declaratory judgment jurisdiction is discretionary,[160] the *Brillhart* Court observed:

> Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in state court presenting the same issues not governed by federal law. Gratuitous interference with the orderly and comprehensive disposition of state court litigation should be avoided.[161]

Calvert Fire Ins. Co. v. Will, 586 F.2d 12, 14 (7th Cir. 1978). The district court found four reasons why *Colorado River* did not prohibit the stay: (1) the suit was vexatious; (2) *Colorado River* applied only to dismissals, not to stays; (3) the stay was within the bounds of discretion; and (4) the federal plaintiff had waived the right to a federal forum by failing to remove the state court action. Calvert Fire Ins. Co. v. American Mut. Rein. Co., 459 F. Supp. 859, 863-64 (N.D. Ill. 1978), *aff'd*, 600 F.2d 1228 (7th Cir. 1979).

157. Will v. Calvert Fire Ins. Co., 437 U.S. at 663. Justice Rehnquist also distinguished *McClellan* on a narrow procedural ground. *Id.* at n.6 (issuing a writ of mandamus is not the same as issuing an order to show cause why the writ should not issue). The dissent, without elaborating, termed this treatment a "flouting" and "disregard" of *McClellan. Id.* at 670 (Brennan, J., dissenting).

158. Diversity cases are a substantial part of the burgeoning federal caseload. *See* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 366 (1981); Cooke, *Waste Not, Wait Not—A Consideration of Federal and State Jurisdiction,* 49 FORDHAM L. REV. 895 (1981); Sheran & Utter, *State Cases Belong In State Courts,* 12 CREIGHTON L. REV. 1 (1978). Congress has considered but failed to pass several bills restricting diversity jurisdiction. *See, e.g.,* H.R. 6816, 98th Cong., 2d Sess. (1982); H.R. 1046, 96th Cong., 1st Sess. (1979).

159. 316 U.S. 491 (1942).

160. *Id.* at 494 ("Although the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act, 28 U.S.C. § 400, it was under no compulsion to exercise that jurisdiction."). The Declaratory Judgments Act, now codified at 28 U.S.C. § 2201 (1976), provides that "any court of the United States . . . *may* declare the rights and legal relations of any interested party." (emphasis added). *Compare* 28 U.S.C. § 1332 (1976) (diversity jurisdiction) ("district courts *shall* have original jurisdiction") (emphasis added).

161. Brillhart v. Excess Ins. Co., 316 U.S. at 495. *Will*'s dissenters took umbrage at the plurality's application of *Brillhart* outside declaratory judgment jurisdiction. 437 U.S. at 670-72 (Brennan, J., dissenting). Chief Justice Burger and Justices Brennan, Powell, and Marshall found that the stay was inappropriate because, inter alia, the securities claims in *Will* involved exclusive federal jurisdiction under 15 U.S.C. § 78aa (1976) (Securities Exchange Act of 1934). Perhaps some of the dissenters would not oppose stays in diversity cases, where jurisdiction is concurrent rather than exclusive.

The *Will* plurality also distinguished *Colorado River* as applying only to dismissals, not to stays. Since the stay could be rescinded if the district court found that the state court could not completely resolve the issues, the Court reasoned the stay was not equivalent to final dismissal.[162]

The four justice dissent in *Will* contended that the circumstances were not exceptional.[163] Justice Blackmun cast the swing vote, concurring on a narrow procedural ground.[164] In dictum, however, he aligned himself with the dissenters.[165] *Will* is criticized for adding confusion to an amorphous area of the law.[166]

B. *The Test Applied in Microsoftware*

Microsoftware must be analyzed in this maze of dicta and distinctions. The court of appeals noted that several factors in *Microsoftware* comported with *Colorado River*'s exceptional circumstances test.[167] The court found that the federal forum in Illinois was inconvenient because it forced parties, attorneys, and witnesses to commute from the state court action in New York.[168] There was also good reason to avoid piecemeal litigation because both lawsuits involved the same contract, parties, and issues.[169] Finally, the court found that the federal action should be stayed because the state action was filed first. Since the New York and federal courts were equally compe-

162. Will v. Calvert Fire Ins. Co., 437 U.S. at 665.

163. *Id.* at 672-74 (Brennan, J., dissenting).

164. *Id.* at 663 (Blackmun, J., concurring in the judgment). The district court had issued the stay before *Colorado River* was decided, and Justice Blackmun felt that the Seventh Circuit should have remanded the case to the district court for reconsideration instead of issuing the writ.

165. Justice Blackmun quoted the passage from *Brillhart* set forth in text accompanying note 161 *supra*. *Id.* at 663 n.*.

166. *See* Calvert Fire Ins. Co., v. American Mut. Reins. Co., 459 F. Supp. 859, 864 (N.D. Ill. 1978), *aff'd* 600 F.2d 1228 (7th Cir. 1979); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 313 (Supp. 1981); 17 C. WRIGHT, A. MILLER, E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4247 (Supp. 1982). The division of the Court in *Will* has caused some lower courts to treat *Colorado River* as continuing in full force. *See, e.g.,* Evans Transp. Co. v. Scullin Steel Co., 693 F.2d 715, 717 (7th Cir. 982); Voktas v. Central Soya Co., 689 F.2d 103, 105 (7th Cir. 1981); Microsoftware Computer Sys. v. Ontel Corp., 686 F.2d 531, 539 (7th Cir. 1982) (Doyle, J., dissenting). *But see* Microsoftware Computer Sys. v. Ontel Corp., 686 F.2d 531, 537 (7th Cir. 1982); Zellen v. Second New Haven Bank, 454 F. Supp. 1359, 1363-64 (D. Conn. 1978) (rely on *Will* plurality opinion).

167. 686 F.2d at 538.

168. *Id.* The dissent found no clear balance of convenience to the New York forum. *Id.* at 540 (Doyle, J., dissenting).

169. *Id.* at 538. The district court had found that sharing discovery between the two actions could relieve some of the burden of trying the suits simultaneously. Microsoftware Computer Sys. v. Ontel Corp., No. 81 C 1014, excerpt of proceedings at 6 (N.D. Ill. July 20, 1981). The court of appeals found this savings was minimal. 686 F.2d at 534.

tent to resolve the dispute, allowing the federal action to proceed would have been "a grand waste of efforts."[170]

The Seventh Circuit also considered a factor not expressly listed in the *Colorado River* exceptional circumstances test: whether there was any "federal interest" in the case.[171] The case presented neither a federal question nor justification for diversity jurisdiction. The court observed that diversity jurisdiction was based on the need for out-of-state plaintiffs to sue state residents in neutral forums.[172] MCS, an Illinois corporation, escaped no bias by filing an action in Chicago. Consequently, the majority found that the exercise of federal jurisdiction was unwarranted.[173]

Although *Microsoftware* did not present the clear justification *Colorado River* requires for dismissals of concurrent proceedings,[174] two factors may

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170. 686 F.2d at 538.

171. *Id.*

172. *Id. See* C. WRIGHT, LAW OF FEDERAL COURTS § 23 (3d ed. 1976).

173. 686 F.2d at 537. The court also noted that MCS could have removed the New York action if it were concerned with prejudice in the state courts. *Id.*

174. The discussion of whether diversity jurisdiction was warranted is the most novel aspect of the opinion. It is normally not suggested that a diversity plaintiff must show bias as a condition to filing in federal court. Comment, *Federal Stays and Dismissals In Deference To Parallel State Proceedings; The Impact of Colorado River,* 44 U. CHI. L. REV. 641, 665 (1977). The closest precedent is the Prejudice or Local Influence Act of 1867, ch. 196, 14 Stat. 558. This law required state court defendants seeking removal to file affidavits stating that they believed that prejudice or local influence would deny them justice in the state courts. This requirement was repealed by the Act of Jan. 20, 1914, ch. 11, 38 Stat. 278. *See* 28 U.S.C. §§ 1441-1450 (1976) (no showing of prejudice required for removal). The mere absence of local prejudice does not justify denying the plaintiff a federal forum:

> It is true that [in] *Colorado River* . . . federal jurisdiction was based on the presence of a federal question, rather than diversity of citizenship . . . and that the diversity jurisdiction is increasingly embattled. It is based on a concern that many think outmoded (the danger of prejudice in state court toward out-of-state litigants), and it is a drain on federal judicial resources at a time when the federal courts are groaning under an unprecedented case load. But until Congress decides to alter or eliminate diversity jurisdiction, we are not free to treat the diversity litigant as . . . second class.

Evans Transp. Co. v. Scullin Steel Co., 693 F.2d 715, 717 (7th Cir. 1982). *Microsoftware* presented no exceptional circumstances. The result was based solely on judicial economy, which alone is insufficient to justify the stay. *See id.* at 716-18; Microsoftware Computer Sys. v. Ontel Corp., 686 F.2d at 538-40 (Doyle, J., dissenting). Had the circumstances in *Microsoftware* truly been exceptional, they would have only allowed the district court to grant the stay, not the court of appeals. Since the district court denied the stay, it exercised its discretion in a conservative manner, taking jurisdiction obedient to its unflagging obligation. Nor is the court of appeals' holding supported by the more liberal discretion standard advocated by the *Will* plurality. *Will* held that the decision to defer to parallel state proceedings was committed to the district court's discretion. 437 U.S. at 665. The Seventh

distinguish these cases. *Colorado River* applied to dismissals, not to stays, and, unlike the federal plaintiffs in *Colorado River*, MCS waived an opportunity to remove the state proceedings to federal court.

Where the concern is for the plaintiff's right to a federal forum, there is an arguable difference between stays and dismissals. A dismissal puts the parties out of court, and unless the plaintiff refiles the action, the federal court will not exercise jurisdiction. A stay, in contrast, merely delays the exercise of federal jurisdiction because the court retains control over the litigation, ready to decide the case if the state court does not fully resolve the dispute. The distinction seems well suited to *Microsoftware* because the Seventh Circuit ordered the stay on the condition that it terminate, for example, if the New York action was dismissed for defective service of process.[175] Thus, although the district court would not immediately try the merits, it retained jurisdiction over the lawsuit.

This distinction, recognized in traditional abstention cases,[176] was adopted by the plurality in *Will*.[177] Because the stay in *Will* left the district court free to reactivate the federal action if state court progress was inadequate, the Court found that "deferral was *not* equivalent to dismissal."[178] On remand, the district court agreed: *Colorado River* concerned a dismissal of federal litigation, "clos[ing] the door of the federal courthouse . . . whereas this federal forum remains available to the litigants upon a showing that the state court is unable to adjudicate all relevant issues properly."[179] Other lower courts have followed the same reasoning.[180] If the

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Circuit did not find the district court abused its discretion. Rather, the court noted that it did not "mean to criticize the care with which the district court reached its decision." 686 F.2d at 537. This statement implies that the court has taken the unprecedented step of narrowing the discretion of the district court's to *deny* stays, virtually opposite from the *Colorado River* holding that district courts have only limited discretion to *grant* stays.

175. 686 F.2d at 538 n.7.

176. *See* Harrison v. NAACP, 360 U.S. 167, 177 (1959) (*Pullman* stay postpones, but does not abdicate, the exercise of federal jurisdiction).

177. 437 U.S. at 665.

178. *Id.*

179. Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859, 863 (N.D. Ill. 1978), *aff'd*, 600 F.2d 1288 (7th Cir. 1979). Although *Colorado River* consistently referred to dismissal rather than "stay," the Court relied on one case involving a stay, McClellan v. Carland, 217 U.S. 268 (1910). *See* note 147 *supra.* Although the distinction between stays and dismissals was not expressly recognized in *Microsoftware,* it had been adopted by both members of the majority in prior cases: Judge Bauer, in Calvert Fire Ins. Co. v. Will, 560 F.2d 792, 796 n.5 (7th Cir. 1978), and Chief Judge Cummings, in Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1234-35 & n.15 (7th Cir. 1979).

180. *See, e.g.,* Giulini v. Blessing, 654 F.2d 189, 193-94 (2d Cir. 1981); Augustin v. Mughal, 521 F.2d 1215, 1216-17 (8th Cir. 1975); McGregor Land Co. v. Meguiar, 521 F.2d 822, 824 & n.1 (9th Cir. 1975); Weiner v. Shearson, Hammill & Co., 521 F.2d 817, 821-22 (9th Cir. 1975); Carr v. Grace, 516 F.2d 502, 504 (5th Cir.

virtually unflagging obligation is imposed to assure plaintiffs a federal forum, a stay does not necessarily deny this choice.

This reasoning has been criticized.[181] In most cases where federal proceedings are stayed, the parties and issues in the state and federal actions are similar. The federal courts defer anticipating state court judgments that will later be asserted as res judicata in the federal action, obviating the exercise of federal jurisdiction.[182] Thus, the plaintiff is effectively out of federal court when the stay is granted.[183] Moreover, the analogy to stays in traditional abstention cases is imperfect because those stays are granted anticipating the parties will return to federal court.[184]

In *Microsoftware,* the New York action might have been dismissed for defective service of process, and since there would be no judgment on the merits, the federal court would face a full trial. Therefore, the stay may not have been equivalent to a dismissal. When the Seventh Circuit ordered the stay, it could not predict whether the state result would eventually be asserted as res judicata in the federal action.[185] Thus, the stay could be equated with a dismissal only when judgment on the merits is reached in state court.[186] Nevertheless, since the concern in *Colorado River* was guaran-

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1975); Shareholders Management Co. v. Gregory, 449 F.2d 326, 328 (9th Cir. 1971); Aetna State Bank v. Altheimer, 430 F.2d 750, 756-58 (7th Cir. 1970); *see generally* Note, *The Vitality of Stays of Federal Actions Pending the Outcome of Parallel State Litigation,* 54 CHI. KENT L. REV. 614 (1977) (*Colorado River* applies only to dismissals).

181. *See, e.g.,* 17 C. WRIGHT, A. MILLER, & E. COOPER, *supra* note 166, § 4247.

182. *See, e.g.,* Evans Transp. Co. v. Scullin Steel Co., 693 F.2d 715, 718 (7th Cir. 1982); Microsoftware Computer Sys. v. Ontel Corp., 686 F.2d at 534; Ungar v. Issais, 59 F.R.D. 1396 (S.D.N.Y.), *aff'd without opinion,* 486 F.2d 1396 (2d Cir. 1973); *see also* RESTATEMENT (SECOND) OF JUDGMENTS §§ 15, 86 (1976).

183. Evans Transp. Co. v. Scullin Steel Co., 693 F.2d 715, 718 (7th Cir. 1982); 17 C. WRIGHT, A. MILLER, & E. COOPER, *supra* note 166, § 4247; Ashman, Alfini, & Shapiro, *Federal Abstention; New Perspectives on Its Current Vitality,* 46 MISS. L.J. 629, 639 (1975); Currie, *Federal Jurisdiction and the American Law Institute,* 36 U. CHI. L. REV. 268, 317 (1969).

184. *See, e.g.,* Chicago v. Fieldcrest Dairies, 316 U.S. 168, 173 (1942); Railroad Comm'n of Tex. v. Pullman, 312 U.S. 496, 501 (1941); *see also* England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964).

185. 686 F.2d at 536. That jurisdiction was doubtful may have justified denying, rather than granting the stay. In Adolph Coors Co. v. Davenport Mach. & Foundry Co., 89 F.R.D. 148 (D. Colo. 1981), the district court denied a request for a stay in concurrent proceedings because the federal plaintiff/state defendant was challenging jurisdiction in a state court appeal. Since it was unclear whether the state courts would completely resolve the dispute because of the doubtful jurisdiction, the court felt that the federal action should go forward. *Id.* at 153.

186. *See* Arny v. Philadelphia Transp. Co., 226 U.S. 869 (2d Cir. 1959). In *Arny,* the plaintiff appealed a stay order on the theory that it was equivalent to a dismissal. The court dismissed the appeal:

> The plaintiff-appellant argues that the order appealed from is more than a mere postponement of a trial for good cause but is in substance a perma-

teeing a federal forum, perhaps any doubt should be resolved in the plaintiff's favor, and the stay equated with a dismissal.[187]

Even if stays are equated with the abdication of federal jurisdiction, they may be justified where a state defendant/federal plaintiff has waived an opportunity to remove the state court proceedings to federal court.[188] Because MCS could have removed the New York action,[189] the Seventh Circuit observed that "any interest MCS had in a federal forum could have been satisfied by removing the [state court] action instead of creating a second one."[190] Removal would have been ideal because it would have assured MCS a federal forum without creating wasteful concurrent

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nent stay since the conclusion of the State court litigations will in all probability render the suit at bar *res judicata* and that therefore the stay order is tantamount to a dismissal . . . . We cannot say that the order appealed from will surely result in the case becoming *res judicata* by reason of an adjudication of the case or cases now pending in the Court of Common Pleas. The cause . . . might be dismissed by the court for reasons not related to the merits of the action.

Id. at 871.

187. One problem is reconciling the treatment of stays in concurrent proceedings under *Colorado River* with allowing appeal under § 1291. *Compare* 16 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, FEDERAL PRACTICE & PROCEDURE § 3923 (1977) (a court's stay of its own proceedings should generally not be appealable) *with* 17 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4247 (1978) (a federal court's stay because of a pending state proceeding is equivalent to a dismissal). It is contradictory to equate a stay in concurrent proceedings as equivalent to a dismissal, yet deny appeal under § 1291. The Seventh Circuit seems to be consistent on this point because stays are equated with dismissals under *Colorado River* and for appeal under Section 1291. *See* Evans Transp. Co. v. Scullin Steel Co, 693 F.2d 715, 718 (7th Cir. 1982); Drexler v. Southwest Dubois School Corp., 504 F.2d 836, 838 (7th Cir. 1974) (en banc).

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

189. 686 F.2d at 536; Microsoftware Computer Sys. v. Ontel Corp. No. 81 C 1014, excerpt of proceedings at 4-5 (N.D. Ill. July 20, 1981). *See generally* 28 U.S.C. § 1441(a) (1976) (allows removal of diversity cases). *But cf.* Colonial Bank & Trust Co. v. Cahill, 424 F. Supp. 1200, 1202 (N.D. Ill. 1976); (removal privilege may be waived); Le Manquais v. Glick, 17 F. Supp. 347, 349-50 (W.D. Tex. 1936) (same).

190. 686 F.2d at 537. The court did not discuss why MCS failed to remove, but it seems MCS was motivated by choice of forum. In a removal case, venue in the federal case is the district in which the state action was pending. 28 U.S.C. § 1441(a) (1976). Therefore, if MCS had removed, it would have tried the case in federal court in New York. By filing as plaintiff, though, MCS expected a trial in Chicago. It appears that MCS did not want to litigate in federal court as much as it wanted to litigate in Chicago. *See* note 65 *supra.*

Removal would not have prevented MCS from challenging service of process, for only subject matter jurisdiction is derivative in removal cases. *See* Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160, 162 (3d Cir. 1976); Maloney v. Iowa-Ill. Gas & Elec. Co., 88 F. Supp. 686, 687 (S.D. Iowa 1950).

proceedings.[191]

There are two ways that the failure to remove may justify the stay order in *Microsoftware*. First, *Colorado River* emphasized the plaintiff's right to a federal forum. The unflagging obligation and exceptional circumstances tests were designed to protect this right. But if the federal plaintiff has foregone an opportunity to secure a federal forum, these concerns are not as compelling. Given the removal option, the question in *Microsoftware* was not whether MCS shall have access to federal court, but which federal court: Chicago or New York. When the choice is between two federal forums, judicial economy is decisive, for there is no question of depriving the plaintiff of his federal forum. By waiving the removal opportunity, MCS chose not to litigate in federal court.[192]

The removal issue can also be analyzed within *Colorado River*'s exceptional circumstances framework. The right to remove is burdened by statutory restrictions.[193] If state court defendants have unrestrained access to federal court as plaintiffs, the restrictions are only a trap for the unwary; any procedural default preventing removal could be cured by simply filing a second action in federal court.[194] Staying the state defendant/federal

191. 686 F.2d at 537 (citing Burrows v. Sebastian, 448 F. Supp. 51, 53 (N.D. Ill. 1978)). In *Burrows*, the plaintiff filed an action in state court and subsequently filed a second action in federal court. The federal proceedings were stayed, the district court holding that the exceptional circumstances test did not apply where the federal proceedings were repetitive (plaintiff files both federal and state actions) rather than reactive (state court defendant files federal action). The stay simply placed the plaintiff in the position of having to decide in which of the two forums to pursue his claim. *Id.* at 53. *Burrows* was followed in Yseuta v. Parris, 486 F. Supp. 127, 128-29 (N.D. Ga. 1980) (court made no mention of *Colorado River*); distinguished in Evans Transp. Co. v. Scullin Steel Co., 693 F.2d 715, 718 (7th Cir. 1982); and substantially overruled in Voktas, Inc. v. Central Soya Co., 689 F.2d 103, 107-09 (7th Cir. 1982). Since state court plaintiffs have no removal rights, the stay in *Burrows* deprived the plaintiff of his only chance at a federal forum. *See* Evans Transp. Co. v. Scullin Steel Co., 693 F.2d 715, 718 (7th Cir. 1982).

192. Evans Transp. Co. v. Scullin Steel Co., 693 F.2d 715, 719 (7th Cir. 1982).

193. *See* 28 U.S.C. §§ 1441-1450 (1976) (especially § 1441(a)-(b) (subject matter, filing time, and bond)).

194. The state court defendant who is free to file a second action has little incentive to remove because filing as plaintiff assures the plaintiff's choice of forum. *See* note 190 *supra.* Although true only for state court defendants who are able to bring independent federal actions, this would seem to include many of them, given the Declaratory Judgments Act, 28 U.S.C. §§ 2201-2202 (1976). *See* Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits,* 60 COLUM. L. REV. 684, 704 (1960); Note, *Federal Stays and Dismissals in Deference to Parallel State Court Proceedings; The Impact of Colorado River,* 44 U. CHI. L. REV. 620, 627 (1977); Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation,* 59 YALE L.J. 978, 988-89 n.43 (1950). In Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859 (N.D. Ill. 1978), the court justified a stay based partially on the federal plaintiff's failure to remove the state action. The court held

plaintiff's federal action prevents this circumvention and avoids piecemeal litigation.[195]

Either theory supports the stay in *Microsoftware*. There is no justification, however, for the court's procedural holding. Allowing appeal from an order denying a stay cannot be reconciled with prior law. Were the situation reversed, and the lower court had stayed the federal action, the need to vindicate MCS's right to a federal forum could have outweighed the policy against piecemeal appellate review. The district court, however, denied the stay and acted according to the general rule by exercising jurisdiction. Thus the issue entails weighing the convenience of the parties and courts against the finality rule. By allowing appeal from the district court's order, the Seventh Circuit simply traded duplication between the state and federal forums for waste between the federal district and appellate courts.[196]

C. *Colorado River Revived*

Following the Seventh Circuit's decision in *Microsoftware*, the Supreme Court dispelled the doubts following *Will* in *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*[197] The Court rejected the argument that *Will*

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that the plaintiff should not have been permitted to "circumvent the statutory removal procedures so as to entitle it to two forums in which to secure an adjudication of its identical claims." *Id.* at 864. End runs around the removal statute are disfavored. *See* Merrill, Lynch, Pierce, Fenner & Smith v. Haydu, 675 F.2d 1169, 1173-74 (11th Cir. 1982) (dismissal justified in part because federal plaintiff had allowed deadline for removal of prior state court action to pass); Southern Cal. Petroleum Corp. v. Harper, 273 F.2d 715, 720 (5th Cir. 1960) (declaratory judgment action dismissed even though federal plaintiff never had a right to remove); Kaufman & Ruderman, Inc. v. Cohn & Rosenberger, 177 F.2d 849, 850 (2d Cir. 1949) (declaratory judgment statute may not be used to circumvent removal provisions).

195. The *Colorado River* Court did not indicate whether the list of exceptional circumstances factors is exhaustive. Prior decisions suggest an open ended test: "some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred." Meredith v. Winter Haven, 320 U.S. 228, 234 (1943). *See also* PPG Indus. v. Continental Oil Co., 478 F.2d 674, 678-79 (5th Cir. 1973) (*Meredith* list not exhaustive). Protection of the removal restrictions would fit either class. If the *Colorado River* list is exhaustive, a stay to prevent circumvention of the removal provisions could fall under "the desirability of avoiding piecemeal litigation." 424 U.S. at 818. In either case, the stay would be justified by something more than mere administrative convenience.

Courts interpreting *Microsoftware* have declined to extend it beyond situations where a federal plaintiff has waived an opportunity to remove a concurrent state court action. *See* Evans Transp. Co. v. Scullin Steel Co., 693 F.2d 715 (7th Cir. 1982); Green v. Indal, Inc., 565 F. Supp. 805 (S.D. Ill. 1983); Architectural Floor Prods. Co. v. Don Brann & Assocs., 551 F. Supp. 802 (N.D. Ill. 1982).

196. 686 F.2d at 541 (Doyle, J., dissenting).

197. 103 S. Ct. 927 (1983). The facts are discussed in text accompanying notes 102-104 *supra*.

undermined *Colorado River,* because only four justices had joined the plurality opinion in *Will;* the four dissenting justices, plus Justice Blackmun, concurring only in the judgment, produced a majority in favor of applying *Colorado River*.[198] Moreover, the *Mercury Construction* Court distinguished *Will* as applying only to review by mandamus, and not to ordinary appeal.[199]

Perhaps more importantly, the Court held that the exceptional circumstances test applies to stays as well as dismissals:

> We have no occasion in this case to decide whether a dismissal or a stay should ordinarily be the preferred course of action when a district court properly finds that *Colorado River* counsels in favor of deferring to a parallel state court suit. We can say, however, that a stay is as much a refusal to exercise jurisdiction as a dismissal.[200]

Applying the *Colorado River* test, the Court concluded that there were no exceptional circumstances justifying the stay: (1) jurisdiction over property and inconvenience of the federal forum were not at issue;[201] (2) there was no danger of piecemeal litigation resulting from deciding the arbitration issue in federal, rather than state court;[202] and (3) although the state court action was filed first, this priority did not justify the stay.[203] The Court rejected the "mechanical" concept of staying the federal action merely because the state court suit was filed first, for "priority should not be measured exclusively by which complaint was filed first, but . . . in terms of how much progress had been made in the two actions."[204] Because at the time the stay was granted, the federal proceedings were running well ahead of the state court action, the Court concluded the filing order

198. *Id.* at 937. *See* notes 163-65 and accompanying text *supra.*

199. *Id.* at 938.

200. *Id.* at 943.

201. *Id.* at 939.

202. *Id.* Two different disputes were involved, Hospital against Mercury, and Hospital against Architect, but only the first was covered by the arbitration agreement. Under the Arbitration Act, agreements must be enforced even though they do not reach all parties to the underlying dispute. *Id.* at 939 nn.22-23. *See* 9 U.S.C. § 2 (1976). Thus, piecemeal litigation was inevitable if arbitration proceeded, but this result followed whether the arbitration question was decided in state or federal court. 103 S. Ct. at 939.

203. 103 S. Ct. at 939.

204. *Id.* Two factors made it unreasonable for Mercury to have filed first. The state court had granted an *ex parte* injunction forbidding Mercury from taking any steps toward arbitration. Mercury did not file the federal action until the injunction was dissolved. *Id.* at 940. *See also id.* at n.34 (questioning but not deciding whether the injunction could prevent Mercury from filing the federal suit). Not only did Mercury feel restrained by the injunction, but it had to await Hospital's refusal to arbitrate before commencing a suit to compel arbitration. *Id.* & n.27. *See* 9 U.S.C. § 3 (1976).

weighed against issuing the stay.[205]

The Court also analyzed factors not expressly discussed in *Colorado River.* Since the case arose under the Federal Arbitration Act,[206] federal law provided the rule of decision on the merits.[207] Moreover, the state proceedings were unlikely to adequately protect Mercury's rights.[208] Finally, the Court observed:

> [O]ur task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist "exceptional" circumstances, the "clearest of justifications," that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction.[209]

Mercury Construction is important because it settles the confusion engendered by *Will* and provides clearer guidance for lower courts. The decision leaves open however, the propriety of stays in cases like *Microsoftware,* which involve only diversity jurisdiction. A number of factors distinguish *Microsoftware* from *Mercury Construction:* (1) inconvenience of the federal forum, (2) the possibility that identical actions would proceed side-by-side, (3) the inadequacy of relief in state court, (4) federal law controlling the merits, and (5) the state court defendant's failure to remove. The last factor is perhaps the best reason for distinguishing the cases, but the Court did not address it in *Mercury Construction*.[210] Aside from this distinction, however, it seems unlikely that the Supreme Court would countenance the stay in *Microsoftware*. It is fair to say that following *Mercury Construction,* district courts enjoy virtually unlimited discretion to deny stays in concurrent proceedings, while orders granting stays will have to overcome the rigorous presumption against the surrender of federal jurisdiction.

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205. 103 S. Ct. at 940.

206. 9 U.S.C. §§ 1-14 (1976).

207. 103 S. Ct. at 941. The Court noted that federal law issues must "always be a major consideration weighing against surrender." This conclusion was implicit in *Colorado River* and *Will. See* notes 143 & 163 *supra.*

208. 103 S. Ct. at 942-43.

209. *Id.* at 942.

210. Mercury filed a petition to remove the Hospital's state court action, but the district court remanded the case for lack of complete diversity. The state court suit was commenced by Hospital (a North Carolina corporation) against Architect (a North Carolina corporation) and Mercury (an Alabama corporation). The Supreme Court did not review the propriety of the removal or the remand. 103 S. Ct. at 932-33 n.4.