COLORADO RIVER ABSTENTION DOCTRINE IN THE FIFTH CIRCUIT: THE EXCEPTIONAL CIRCUMSTANCES OF A LIKELY REVERSAL

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I. INTRODUCTION

A decision to abstain under *Colorado River*[1] practically guarantees reversal in the Fifth Circuit.[2] Taking to heart the Supreme Court's pronunciation that there must be a heavy bias toward exercising jurisdiction,[3] the Fifth Circuit has narrowly interpreted the *Colorado River* doctrine.[4] For more than thirty-five years, the Fifth Circuit Court of Appeals has reversed virtually all appealed *Colorado River* abstentions.[5] In fact, for decades, *Colorado River* abstentions did not receive a single

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[1] 424 U.S. 800 (1976).

[2] *See infra* Tables A, B.

[3] *Colo. River*, 424 U.S. at 813, 820 ("The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it . . . . We emphasize . . . that we do not overlook the heavy obligation to exercise jurisdiction."); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 14 (1983); David A. Sonenshein, *Abstention: The Crooked Course of* Colorado River, 59 TUL. L. REV. 651, 658–61 (1985) (discussing the birth of the abstention and noting the Court's specification that this new category of abstention was even more limiting than the categories previously approved).

[4] *See, e.g.*, Black Sea Inv., Ltd. v. United Heritage Corp., 204 F.3d 647, 650 (5th Cir. 2000) (noting that in its decision to reverse the district court's abstention, it paid heed to the Supreme Court's admonition that that "the balance [should be] heavily weighted in favor of the exercise of jurisdiction" (quoting *Moses H. Cone*, 460 U.S. at 16)); Murphy v. Uncle Ben's, Inc., 168 F.3d 734, 739 (5th Cir. 1999) (finding that the district court abused its discretion in abstaining because "the balancing of these factors 'is heavily weighted in favor of the exercise of jurisdiction,'" and the abstention came "in the absence of 'only the clearest of justification'" (quoting *Moses H. Cone*, 460 U.S. at 16)); Evanston Ins. Co. v. Jimco, Inc., 844 F.2d 1185, 1190–91, 1193 (5th Cir. 1988) (noting the Supreme Court's emphasis on the heavy obligation to exercise jurisdiction and reversing the district court's abstention).

[5] *See infra* Table B.

affirmance in the Fifth Circuit.[6] Despite this dismal record, district courts considering this abstention ultimately abstained in more than one-third of their decisions.[7] The incongruence between the doctrine's high reversal rate and its continued use, then, warrants a closer examination of the ways courts have applied *Colorado River* abstention and an explanation of why they are applying it this way.

This article will briefly outline the doctrine's origin[8] before focusing on its application in the Fifth Circuit.[9] It will examine the doctrine's strict application at the appellate level,[10] the willingness of the district courts to abstain despite an astonishing reversal rate,[11] and the scant instances of affirmance.[12] Ultimately, while it is uncertain why district courts have continued to abstain under *Colorado River*,[13] what is certain is that such

[6] *See infra* Part V & Table B.

[7] *See infra* Part III; *see also* Comm. on Fed. Courts of the N.Y. State Bar Ass'n, *The Abstention Doctrine: The Consequences of Federal Court Deference to State Court Proceedings*, 122 F.R.D. 89, 97, 106 (West 1989) (attributing the doctrine's origin to the "busy lower federal courts" and suggesting that "[f]ederal courts should pay greater attention to the Supreme Court's command that abstention be invoked only under exceptional circumstances" (internal quotations omitted)).

[8] *See infra* Part II.

[9] *See infra* Parts III–V.

[10] *See infra* Part III.

[11] *See infra* Part IV.

[12] *See infra* Part V.

[13] Commentators suggest a range of motives for desiring an expansive interpretation of *Colorado River*. *See* Comm. on Fed. Courts of the N.Y. State Bar Ass'n, *supra* note 7, at 91–92 (framing the expansion of abstention doctrines as a judicial strategy to raise the requirements for getting into federal court); Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be with Us—Get Over It!!*, 36 CREIGHTON L. REV. 375, 419–21 (2003) (suggesting that conciliating a "genuine tension between the federal and state court systems" is more important than preserving a litigant's right to a federal forum or any delay abstention might cause in the federal litigation); James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 774–75 (1999) (asserting that duplicative litigation is arguably "inefficient and wasteful" and that the parallel system permits reactive litigation); Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 101 (1986) (suggesting that courts may wish to alleviate their crowded dockets); James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1065, 1101 (1994) (discussing benefits of expanded abstention such as mitigating friction in federal-state judicial relationships and denying the idea that federal courts must exercise jurisdiction); Sonenshein, *supra* note 3, at 664–65 (noting that courts may use the doctrine as "an easy means of clearing their dockets" or to avoid duplicative litigation).

abstentions have been, and remain, unlikely to stand on appeal.[14]

II. BIRTH OF *COLORADO RIVER* ABSTENTION IN THE SUPREME COURT

Litigants in the United States encounter two independent court systems: state courts and federal courts.[15] Federal courts, by design, are courts of limited jurisdiction.[16] State courts, in contrast, can hear both matters of state law and cases of purely federal law.[17] Generally, a cause of action that can be brought in federal court can also be brought in state court.[18] When a case falls under concurrent state-federal jurisdiction, the plaintiff can choose to file suit in either court.[19] Surprisingly, that decision has no effect on the availability of the two court systems;[20] either party can elect to file the same suit again, in whole or in part, in the other court.[21] The defendant in a state suit, for example, can file a counterclaim in federal court.[22] Another example is when, during litigation of a state suit, one party perceives a problem and files a second suit in federal court.[23] There is nothing barring the litigation of a suit in multiple proceedings spread across the two court systems.[24] In fact, since 1824 the Supreme Court's default position has been that a federal court is actually obligated to decide a case

[14] *See infra* Part V.

[15] Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823 (1990).

[16] *See id.*

[17] *See id.*

[18] Comm. on Fed. Courts of the N.Y. State Bar Ass'n, *supra* note 7, at 93; *see* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507–08 (1962) ("Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule.").

[19] *See* Sonenshein, *supra* note 3, at 651 ("For most legal disputes . . . federal jurisdiction is concurrent with that of the state courts, and state courts are thus permitted to decide cases that could, at the election of either party, be determined in a federal court."(footnote omitted)).

[20] *See* Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347, 1355–56 (2000) (discussing how concurrent jurisdiction permits "parallel overlapping state and federal litigation").

[21] *See id.*

[22] *See* Sonenshein, *supra* note 3, at 664.

[23] *See* George, *supra* note 13, at 775.

[24] *See, e.g.*, Redish, *supra* note 20, at 1355 (describing how *Colorado River* abstention prevents a federal court from enjoining a party to avoid duplicate litigation).

properly under its jurisdiction, without regard for other related proceedings.[25]

Within this general obligation to exercise jurisdiction,[26] however, the Supreme Court has recognized certain exceptions when a federal court should defer to the state courts.[27] When a federal court declines to exercise its validly conferred jurisdiction, this is known as abstention.[28] In approving abstention in a few specific circumstances,[29] the Supreme Court consistently pointed to the overarching goal of preserving a "balance between state and federal sovereignty," a concept known as comity.[30] Based on comity's regard for proper federal-state relations, the Court authorized the first abstention in 1941 by permitting a federal court to abstain when necessary to avoid inconsistent dispositions of state-law issues.[31] In *Railroad Commission v. Pullman Co.*, the Court reviewed state-law and constitutional challenges to an order by the Texas Railroad Commission.[32] The Court reversed the district court's judgment on grounds that the district court should have abstained from hearing the case until the state-law issues were resolved in the state proceeding.[33] With this decision, the Court authorized abstention by a federal court in deference to a state

[25] 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE § 4241 at 292 (3d ed. 1998).

[26] Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) (recognizing abstention is a narrow exception to the "duty of a District Court to adjudicate a controversy properly before it").

[27] *Id.* at 814–17 (enumerating three categories of circumstances in which abstention is appropriate); Comm. on Fed. Courts of the N.Y. State Bar Ass'n, *supra* note 7, at 93 ("State courts and federal courts have concurrent jurisdiction over most cases. This parallel system of courts has created the climate for the creation of the various abstention doctrines. The abstention doctrines will be invoked in cases in which the federal court has proper subject matter jurisdiction, but in which, for one or more reasons, the federal court will defer to state court consideration of the issues presented.").

[28] *Colo. River*, 424 U.S. at 813.

[29] *See* WRIGHT, ET AL., *supra* note 25, § 4241, 297–98 (describing *Pullman* and *Burford* abstention).

[30] Mathew D. Staver, *The Abstention Doctrines: Balancing Comity with Federal Court Intervention*, 28 SETON HALL L. REV. 1102, 1153 (1998); *see also* George, *supra* note 13, at 783 (Comity "is designed to promote friendly relations between sovereigns . . . .").

[31] R.R. Comm'n v. Pullman Co., 312 U.S. 496, 499–501 (1941).

[32] *Pullman Co.*, 312 U.S. 496.

[33] *Id.* at 501–02.

court's resolution of the state-law issues.[34] The resulting doctrine is known as *Pullman* abstention.[35]

Proceedings involving determinations by state administrative agencies present a similar conflict when both court systems are involved, so the Supreme Court soon approved a second abstention to "avoid needless conflict with the administration by a state of its own affairs."[36] This approval came in *Burford v. Sun Oil Co.* after Sun Oil brought a federal suit to attack a Texas Railroad Commission order regarding Burford's drilling permit.[37] The federal court abstained in deference to "the rightful independence of state governments in carrying out their domestic policy,"[38] and the Supreme Court affirmed that abstention.[39] This subsequently became known as *Burford* abstention.[40]

In time, the Court also recognized a need for abstention when the defendant in a state criminal case files a federal suit designed to challenge the constitutionality of the state laws implicated in the criminal case.[41] In *Younger v. Harris*, the Supreme Court sanctioned a third abstention, this time in deference to state criminal proceedings.[42] In that case, the appellee was being prosecuted in state court under a California law.[43] The appellee joined with other plaintiffs to challenge that law in federal court and seek an injunction against the state suit.[44] On review, the Supreme Court noted that since the beginning of this country's history, Congress has not deviated from its manifest "desire to permit state courts to try state cases free from

[34] WRIGHT, ET AL., *supra* note 25, § 4241; *see also* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1681 (2003).

[35] Vulcan Materials Co. v. City of Tehuacana, 238 F.3d 382, 390 (5th Cir. 2001) (stating that *Pullman* abstention's purpose is "to avoid decision of a federal constitutional question where the case may be disposed of on questions of state law"); Comm. on Fed. Courts of the N.Y. State Bar Ass'n, *supra* note 7, at 93–95.

[36] *Vulcan*, 238 F.3d at 390.

[37] 319 U.S. 315 (1943).

[38] *Id.* at 318.

[39] *Id.* at 334.

[40] *See* Sonenshein, *supra* note 3, at 656 n.20.

[41] Younger v. Harris, 401 U.S. 37 (1971); *see* Sonenshein, *supra* note 3, at 656.

[42] 401 U.S. at 53–54; *see* Vulcan Materials Co. v. City of Tehuacana, 238 F.3d 382, 390 (5th Cir. 2001).

[43] *Younger*, 401 U.S. at 41.

[44] *Id.* at 38–39.

interference by federal courts."[45] While recognizing that federal courts do have the power to enjoin state criminal actions, the Court underlined that this should not be done "except under extraordinary circumstances where the danger of irreparable loss is both great and immediate."[46] Accordingly, the Supreme Court reversed the district court's injunction and authorized what became known as *Younger* abstention, which allows federal courts to abstain in deference to state criminal proceedings.[47]

These abstentions all served the interests of comity in different ways, but they did not address all the problems caused by the dual system of courts.[48] Apart from the risk of inappropriate meddling by the federal courts in states' affairs, the dual system also tolerates litigation of parallel suits on the same issue in both systems.[49] Because the courts have limited authority to enjoin suits in other courts or to decline to hear suits that are properly under their jurisdiction, litigants can file the exact same suit twice, in identical federal and state actions.[50] Despite the evident inefficiency of duplicative proceedings, both cases must proceed until one of the courts reaches a decision.[51] Then, *res judicata* principles apply the first disposition to both cases, effectively wasting the judicial resources of whichever court loses the race to judgment.[52] Intuitively, one would expect to find a rule to avoid this waste by precluding litigation of the same issue in multiple actions involving the same parties.[53] Although abstention had only been used by the Supreme Court to address issues of comity, it seemed like an appropriate vehicle to deal with duplicative litigation.[54]

In 1976, the Supreme Court did, in fact, sanction a new abstention on grounds other than comity.[55] In *Colorado River Water Conservation*

[45] *Id.* at 43.

[46] *Id.* at 45 (citing Fenner v. Boykin, 271 U.S. 240 (1926)).

[47] *Id.* at 54.

[48] *See, e.g.*, Redish, *supra* note 20, at 1355–56 (describing how *Colorado River* abstention prevents a federal court from enjoining a party to avoid duplicate litigation).

[49] *See id.*

[50] *See id.*

[51] *See* Rehnquist, *supra* note 13, at 1064–65.

[52] *See id.*

[53] *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

[54] *See* Rehnquist, *supra* note 13, at 1092 (explaining that the *Colorado River* doctrine is not based on the federalism concern, but rather it is based on concern for the judicial economy).

[55] *Colo. River*, 424 U.S. at 817–819; *see* Sonenshein, *supra* note 3, at 658 (describing *Colorado River* as the first time the Court decided that "in some exceptional circumstances a

District v. United States, the Court authorized abstention by federal courts in deference to parallel state-court proceedings, this time on grounds of "wise judicial administration."[56] Seeking adjudication of water rights, the U.S. government brought suit in federal court on behalf of itself and certain Indian tribes against approximately 1,000 water users.[57] One of the defendants, in turn, moved to join the government in a related state court proceeding for comprehensive adjudication of all the government's federal and state claims in state court.[58] Then, several defendants moved for dismissal of the federal proceeding based on the McCarran Amendment, which allowed the United States to be joined as a defendant in any water-rights adjudication case in which it owns or is acquiring water rights.[59] Although the case fell under none of the existing abstention doctrines, the district court dismissed the federal suit on abstention grounds.[60]

The Supreme Court affirmed the district court's abstention.[61] In its opinion, the Court recognized the "virtually unflagging obligation" of federal courts to exercise the jurisdiction that they have been granted,[62] but determined that some exceptional circumstances warranted abstention outside the existing doctrines.[63] The Court then enunciated four factors to determine whether exceptional circumstances exist to warrant abstention: (1) whether the court has jurisdiction over a *res*;[64] (2) the inconvenience of the federal forum;[65] (3) the "desirability of avoiding piecemeal litigation";[66] and (4) "[t]he order in which jurisdiction was obtained by the concurrent forums."[67] The opinion underscored that the decision to abstain must rest on a careful balancing of multiple factors and that no one factor necessarily

federal court should dismiss or stay an action within its subject matter jurisdiction when the subject of the federal suit is simultaneously subject to litigation in state court").

[56] *See* 424 U.S. at 817–18.

[57] *Id.* at 805.

[58] *Id.* at 806.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 821.

[62] *Id.* at 817.

[63] *Id.* at 818.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

trumps the rest.[68] The Court found significant that although the federal case was filed first, no progress had been made when the defendants moved to dismiss it.[69] Also significant were the "extensive involvement of state water rights" in the suit, "the 300-mile distance between the District Court in Denver and the [state] court," and existing participation by the federal government in state proceedings.[70] Finally, the Court found that the most important consideration counseling for abstention was the McCarran Amendment, which had a "clear federal policy" of avoiding "piecemeal adjudication of water rights."[71] Taken together, the McCarran Amendment and the prescribed factors counseled against the exercise of jurisdiction and justified the district court's abstention.[72]

From the outset, the Court's approval of a new type of abstention garnered attention.[73] The decision provoked debates on the broader effects

[68] *Id.* at 818–19.

[69] *Id.* at 820 n.25.

[70] *Id.* at 820.

[71] *Id.* at 819. For slightly more recent discussions of the *Colorado River* doctrine's effect on water-rights adjudication in light of the McCarran Amendment, *see* Scott B. McElroy & Jeff J. Davis, *Revisiting* Colorado River Water Conservation District v. United States*—There Must Be a Better Way*, 27 ARIZ. ST. L.J. 597 (1995); John J. Harte, *Validity of a State Court's Exercise of Concurrent Jurisdiction over Civil Actions Arising in Indian Country: Application of the Indian Abstention Doctrine in State Court*, 21 AM. INDIAN L. REV. 63 (1997).

[72] *Colo. River*, 424 U.S. at 820.

[73] *See* Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 990 (2009) (calling abstention "a common-law doctrine that 'causes strange things to happen in federal courts'" (quoting Rehnquist, *supra note* 13, at 1050)); Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 590 (1989) (calling the *Colorado River* doctrine "perplexing"); Mullenix, *supra* note 13, at 101 (criticizing the newest form of abstention); Rehnquist, *supra* note 13, at 1054 (stating that "*Colorado River* rests on the hoary but unwise premise that the federal courts are somehow obligated to exercise every single ounce of the jurisdiction given them by Congress"); Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383, 425 n.228 (1991) (stating that cases following the *Colorado River* decision "leave unclear whether and to what extent *Colorado River* abstention applies"); Georgene M. Vairo, *Making* Younger *Civil: The Consequences of Federal Court Deference to State Court Proceedings*, 58 FORDHAM L. REV. 173, 184, 186–87 (1989) (referring to *Colorado River* doctrine as serving a "somewhat less lofty" purpose than the other abstention doctrines and suggesting that "an overcrowded docket alone might be enough to invoke" it). Later commentaries revisited the doctrine. *See* Jocelyn H. Bush, Comment, *To Abstain or Not to Abstain?: A New Framework for Application of the Abstention Doctrine in International Parallel Proceedings*, 58 AM. U. L. REV. 127, 145–46 (2008) (proposing application of *Colorado River* doctrine in cases of concurrent litigation in foreign courts); William A. Calhoun, II, Comment, *Arthur Miller's* Death of A Doctrine *or Will the Federal Courts Abstain from Abstaining? The Complex Litigation*

on litigants' rights, because abstention by the federal court could mean that the state court's decision would have conclusive effect in the federal court, effectively denying the litigants' right to a federal forum.[74] Critics found a profound problem in the new doctrine's "encroachment on the constitutional and statutory rights of federal litigants," to such an extent that they considered it beyond the power of the Supreme Court to sanction.[75] Some felt the doctrine was simply a way for federal courts to shirk their duty to exercise jurisdiction whenever the facts could "colorably be focused by the exceptional circumstances lens."[76]

On the other hand, some saw the doctrine as a solution to problems caused by the dual court system's tolerance of parallel litigation,[77] suggesting that this abstention could protect courts against forum gamesmanship by plaintiffs who take advantage of the system to harass defendants or to "obtain a discovery advantage unavailable in the substantive forum."[78] Further, supporters suggested that it could mitigate the waste caused by duplicative cases that pit one court against the other in a "race to judgment" that squanders the time and resources of the slower

Recommendations' Impact on the Abstention Doctrines, 1995 BYU L. REV. 961, 975–78 (1995) (concluding that the Supreme Court has upheld this and other abstention doctrines); Beth Shankle Anderson, *"Our Federalism" The* Younger *Abstention Doctrine and Its Companions*, FLA. B.J., November 2007, at 9, 18 (concluding that courts should continue invoking *Colorado River* doctrine and other abstention doctrines); Birdsong, *supra* note 13, at 405–11 (2003) (reviewing application of the doctrine and concluding that the "factual situation in that case was so unusual" that the *Colorado River* case itself argued against routine application of the doctrine).

[74] *See* Sonenshein, *supra* note 3, at 651–52.

[75] Mullenix, *supra* note 13, at 101; *see also* Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 B.Y.U. L. REV. 811, 855–56 (1991) ("*Colorado River* thus represents a bastard form of abstention. [I]t is plainly a refusal to exercise federal jurisdiction that is not dictated by the necessity of honoring the Constitution . . . .").

[76] Mullenix, *supra* note 13, at 104; *see also* Sonenshein, *supra* note 3, at 664 ("[I]n some situations, avoiding duplicative judicial and litigational effort is deemed more important than access to a federal forum to resolve a dispute within the jurisdictional power of a federal court.").

[77] *See* Redish, *supra* note 20, at 1355–56. At that time, as now, the most often-cited problem caused by the tolerance of parallel litigation is the courts' unwieldy caseload. *See, e.g.*, Martha Craig Daughtrey, *State Court Activism and Other Symptoms of the New Federalism*, 45 TENN. L. REV. 731, 731 (1977) ("[I]n 1977, there were some 20,000 new filings in the federal appellate courts and almost 175,000 new filings in the district courts—a staggering number of cases to be handled by a judiciary of approximately 500 in number.").

[78] Rehnquist, *supra* note 13, at 1064–65 (internal quotations omitted).

court.[79] Apparently, the Supreme Court had finally signed off on a solution to the oft-bemoaned wastefulness of duplicative litigation.[80]

Seemingly influenced by the doctrine's critics, however, the Supreme Court narrowed the availability of the doctrine the next time it addressed the issue.[81] *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* revolved around the arbitrability of a contractual dispute between a hospital and a contractor.[82] The state court had issued an injunction against arbitration by the contractor, who then filed suit in federal court to compel arbitration.[83] The district court granted the hospital's motion to stay the federal suit pending resolution of the state proceedings, based on the duplicative nature of the two suits, but the court of appeals reversed.[84]

The Supreme Court affirmed because the case did not satisfy the *Colorado River* exceptional-circumstances test.[85] In its reasoning, the Court found that the first two factors, jurisdiction over a *res* and inconvenience of the federal forum, were not present.[86] As for the avoidance of piecemeal litigation, the Court reasoned that the relevant federal law in this case actually required piecemeal resolution to give effect to the arbitration agreement.[87] This factor then, absent a statute such as the McCarran Amendment with a clear policy of avoiding piecemeal litigation, counseled against abstention.[88] Reviewing the fourth factor, the order in which jurisdiction was obtained by the concurrent forums, the Court noted that although the state suit was technically filed first, to count this factor for abstention solely on that basis was to give it "too mechanical a reading."[89] Instead, the Court determined that the federal case was nearing resolution

[79] *See id.*; *see also*, Redish, *supra* note 20, at 1351 ("[I]n virtually no other area of judicial federalism does our system accept jurisdictional rules that tolerate the burdens and waste of intersystemic redundancy.").

[80] *See* Rehnquist, *supra* note 13, at 1064–65; *see also* Redish, *supra* note 20, at 1351.

[81] *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

[82] *Id.* at 4; *see* Stanley T. Koenig, Comment, *Federal Court Stays and Dismissals in Deference to Duplicate State Court Litigation: The Impact of Moses H. Cone Memorial Hospital v. Mercury Construction*, 46 OHIO ST. L.J. 435, 447 (1985).

[83] *Moses H. Cone*, 460 U.S. at 7.

[84] *Id.* at 7–8.

[85] *Id.* at 19.

[86] *Id.*

[87] *Id.* at 19–20.

[88] *Id.* at 20 n.22.

[89] *Id.* at 21.

and "running well ahead of the state suit" and counted the fourth factor against abstention.[90] Thus, the Court found that the two absent factors were neutral and the other two factors counseled against abstention.[91]

In its review of the doctrine, the Supreme Court also augmented the test with two additional factors: (1) whether the case involved state or federal law;[92] and (2) whether the state-court proceeding would adequately protect the rights of the party that had invoked federal jurisdiction.[93] Applying the first factor to the case, the Court noted that the relevant statute, the Arbitration Act, presented an "anomaly in the field of federal-court jurisdiction," because it compelled arbitration in cases where the federal court would normally have jurisdiction.[94] Since the case involved issues of federal law, this factor weighed against abstention.[95]

As to the second factor, adequacy of the state-court proceedings, the Court reasoned that the state court was probably inadequate to protect the defendant's rights because it was uncertain whether arbitration could be compelled there.[96] This factor, then, also counseled against abstaining in favor of the state forum.[97] Because the balancing of all six factors counseled against abstention, the Court affirmed the reversal of the district court's abstention.[98]

Reiterating its *Colorado River* decision, the Court stressed the doctrine's limited scope and the heavy bias toward exercising jurisdiction,[99] explaining that the court's task is "not to find some substantial reason for the *exercise* of federal jurisdiction."[100] Instead, the test is to ascertain whether a case presents exceptional circumstances that "justify *surrender* of

[90] *Id.* at 22.

[91] *Id.* at 19.

[92] *Id.* at 23–26.

[93] Evanston Ins. Co. v. Jimco, Inc., 844 F.2d 1185, 1191 (5th Cir. 1988) (summarizing *Moses H. Cone*, 460 U.S. at 26).

[94] *Moses H. Cone*, 460 U.S. at 25, n.32.

[95] *Id.* at 26.

[96] *Id.* at 26–27.

[97] *Id.*

[98] *Id.* at 29.

[99] *See id.* at 15–16; s*ee also* Koenig, *supra* note 82, at 436 ("[T]he liberal use of [abstention] to conserve judicial resources is no longer permissible after Moses H. Cone Memorial Hospital v. Mercury Construction.").

[100] *Moses H. Cone*, 460 U.S. at 25.

that jurisdiction."[101] Simply put, *Colorado River* abstention applied only in rare circumstances that rose to the level of exceptionality required by the exceptional-circumstances test.[102] With *Moses H. Cone*, the Supreme Court slammed the door shut on any notion that *Colorado River* abstention would be a broadly applicable solution for duplicative litigation.[103]

III. INTERPRETATION IN THE FIFTH CIRCUIT COURT OF APPEALS

Taking seriously the Supreme Court's language and strict application in *Moses H. Cone*, the Fifth Circuit requires *Colorado River* abstentions to patently meet the exceptional-circumstances test.[104] In *Evanston Insurance Co. v. Jimco, Inc.*, the court of appeals determined that the trial court failed to "heavily weight the balance in favor of exercising jurisdiction."[105] Since *Evanston*, in the Fifth Circuit the command to heavily weight the balance in favor of exercising jurisdiction means an absent factor is not just a neutral item, but instead weighs against abstention.[106] Considering this strict interpretation of the doctrine by the court of appeals, it is not surprising to see that nearly nine in ten appealed *Colorado River* abstentions are reversed.[107] In contrast, a decision not to abstain under *Colorado River* has never been reversed.[108] The opinions in these cases repeatedly underscore that "*Colorado River* abstention is to be used only sparingly"[109] and that "[o]nly the clearest of justifications will warrant dismissal."[110] The court of appeals has indeed set a high bar for the facts to meet the exceptional-circumstances test and justify abstention.[111]

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[101] *Id.* at 19–26.

[102] *Id.* at 25–26.

[103] *See id.*

[104] *See infra* Table C for summaries of the few abstentions the Fifth Circuit has upheld*; infra* Table D for summaries of the many abstentions that the Fifth Circuit has found insufficient.

[105] 844 F.2d 1185, 1191 (5th. Cir. 1988) (internal quotations omitted).

[106] *See, e.g.*, Murphy v. Uncle Ben's, Inc., 168 F.3d 734, 738–39 (5th Cir. 1999) (counting all neutral or absent factors as weighing against abstention).

[107] *See infra* Table B.

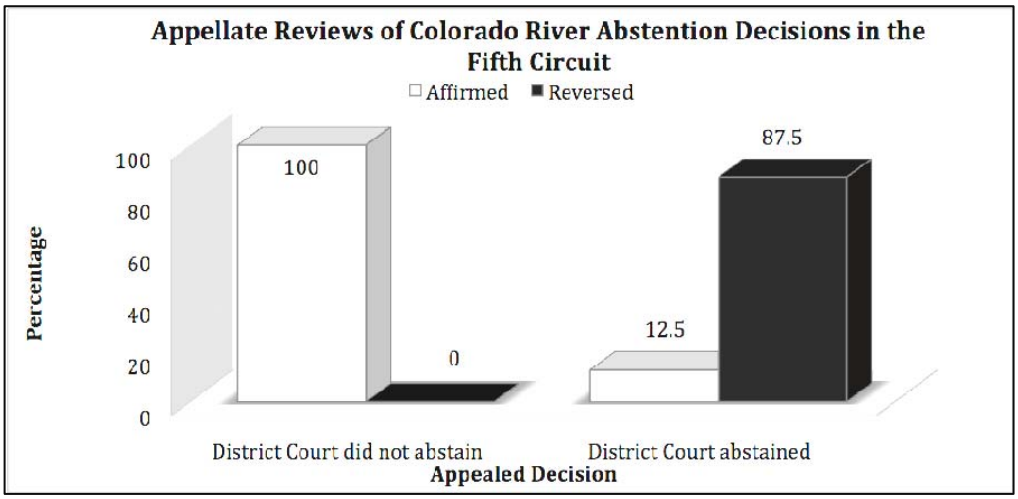
[108] *See infra* Table B.

[109] *In re* Abbott Labs., 51 F.3d 524, 529 (5th Cir. 1995).

[110] *Evanston Ins. Co.*, 844 F.2d at 1190.

[111] *See id.*

Figure 1[112]



The Fifth Circuit's strict application of the test is illustrated by *Murphy v. Uncle Ben's, Inc.*[113] The federal district court abstained from hearing the plaintiff's suit under the federal Age Discrimination in Employment Act in deference to the plaintiff's parallel state suit under state law.[114] In reversing the decision to abstain, the court of appeals found that only one factor was neutral, while the other five counseled against abstention.[115] The first two factors were not present, therefore under precedent they counseled against abstention.[116] In the third factor, although the parallel litigation was duplicative, the court found that there was no risk of piecemeal litigation because there was only one plaintiff, one defendant, and one issue.[117] Precedent clarified that "the prevention of duplicative litigation is not a factor to be considered in an abstention determination."[118] This factor,

[112] *Supra* Table B.

[113] 168 F.3d 734 (5th Cir. 1999).

[114] *Id.* at 736.

[115] *Id.* at 738–39.

[116] *Id.* at 738.

[117] *Id.* In 2000, the court of appeals twice held that because the courts did not have jurisdiction over a *res*, piecemeal litigation was not a danger. *See* Black Sea Inv., Ltd. v. United Heritage Corp., 204 F.3d 647, 651 (5th Cir. 2000); Am. Family Life Assurance Co. of Columbus v. Anderson, No. 00-60027, 2000 WL 1056303, at *2 (5th Cir. July 27, 2000) (per curiam).

[118] *Black Sea*, 204 F.3d at 650–51 (5th Cir. 2000) ("Duplicative litigation, wasteful though it

then, also counseled against abstention.[119] The order of jurisdiction, the fourth factor, also weighed against abstention since both cases had progressed at approximately the same pace.[120] Furthermore, the case involved both state and federal rules of decision.[121] Because the presence of a state-law issue does not counsel against abstention except in "rare circumstances"[122] and the case involved federal-law issues, the fifth factor also weighed against abstention.[123] Finally, the court noted that the sixth factor could, at most, be neutral if there was no reason to suspect that the state forum was inadequate, as in this case.[124] Given that five factors counseled against abstention and one factor was neutral, the case did not satisfy the exceptional-circumstances test, and the court held that abstention was improper.[125]

The appellate decisions also show that no single factor is significant enough to single-handedly overcome the balance heavily weighted toward the exercise of jurisdiction. Although the Supreme Court designated piecemeal litigation as a major concern in *Colorado River*, the Court also specified that abstention required a combination of factors counseling for abstention.[126] Likewise, Fifth Circuit precedent shows that the presence of this factor is insufficient to satisfy the test on its own.[127] Such was the case in *Stewart v. Western Heritage Insurance Co.*, a breach-of-contract and failure-to-pay action brought against an insurer.[128] The district court, after finding that some of the claims were only being heard in a parallel state

may be, is a necessary cost of our nation's maintenance of two separate and distinct judicial systems possessed of frequently overlapping jurisdiction. The real concern at the heart of the third Colorado River factor is the avoidance of piecemeal litigation . . . ."); *see also Murphy*, 168 F.3d at 738; Evanston Ins. Co. v. Jimco, Inc., 844 F.2d 1185, 1192 (5th Cir. 1988).

[119] *Murphy*, 168 F.3d at 738.

[120] *Id.* at 738–39.

[121] *Id.* at 739.

[122] *See Evanston Ins. Co.*, 844 F.2d at 1193.

[123] *Murphy*, 168 F.3d at 739.

[124] *Id.*

[125] *Id.*

[126] *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 818–19 (1976).

[127] *See* Kelly Inv., Inc. v. Cont'l Common Corp., 315 F.3d 494, 498 (5th Cir. 2002) ("[T]he district court incorrectly relied upon the possibility of inconsistent judgments as its main reason for abstaining."); *see also In re* Abbott Labs., 51 F.3d 524, 529 (5th Cir. 1995) (disregarding the district court's heavy emphasis on the risk of piecemeal litigation and finding abstention improper).

[128] 438 F.3d 488, 490 (5th Cir. 2006).

court action, abstained due to the potential for piecemeal litigation.[129] The court of appeals reversed, however, finding the district court's abstention to be inappropriate despite the pending state-court action.[130] Absent the other factors, the piecemeal litigation factor alone was insufficient to overcome the balance weighted in favor of exercising jurisdiction.[131]

Even in cases where several factors seemed to counsel for abstention, the appellate court has still reversed decisions to abstain.[132] In *Kelly Investments, Inc. v. Continental Common Corp.*, for example, the district court abstained after finding that three factors counseled for abstention: the state proceeding had progressed further, the federal forum was inconvenient, and piecemeal litigation would result if parallel proceedings were permitted.[133] The district court found the risk of piecemeal litigation especially important and determined that this importance tipped the balance toward abstention.[134]

The court of appeals, however, disagreed with the application of the test and reversed.[135] Although the state suit commenced two years before the federal suit, the court of appeals counted this factor against abstention because the federal court had nonetheless progressed more and was likely to reach a decision first.[136] Further, the district court had found that the state court was more convenient because it was in Texas, near many of the witnesses and exhibits, while the federal forum was in Louisiana.[137] Yet, the court of appeals disregarded the inconvenience of traveling to two separate proceedings, since that is possible whenever there are parallel proceedings.[138] Instead, the court underscored that the standard is not whether the federal forum is somehow less convenient, but whether the federal forum is so inconvenient that abstention is warranted.[139] As mentioned, the district court's decision relied heavily on the avoidance of piecemeal litigation, since the two courts could reach inconsistent rulings

[129] *Id.* at 491.
[130] *Id.* at 488.
[131] *Id.* at 490–93.
[132] *See Kelly Inv., Inc.*, 315 F.3d at 494.
[133] *Id.* at 498.
[134] *Id.*
[135] *Id.* at 499.
[136] *Id.*
[137] *Id.* at 498.
[138] *Id.*
[139] *Id.*

on the same issue.[140] But the court of appeals stated that while inconsistent judgments were possible, this possibility exists any time there is parallel litigation.[141] The problem is properly resolved through a plea of *res judicata*, however, not through abstention.[142] Although the district court cited three factors as counseling for abstention, the court of appeals applied the exceptional-circumstances test strictly, finding that the reasons cited were not enough to overcome the heavy bias toward exercising jurisdiction.[143] Thus, abstention was improper.[144]

In sum, a review of the appellate opinions indicates that the Fifth Circuit requires truly exceptional circumstances to overcome the heavy bias toward the exercise of jurisdiction.[145] The test requires a strict analysis of each factor, counting any factor that does not weigh for abstention as weighing against it.[146] Further, no one factor is so significant as to tip the balance toward abstention without the other factors.[147] When a district court abstains with anything less than truly exceptional circumstances then, the decision will most likely be reversed on appeal.[148]

IV. APPLICATION IN THE FIFTH CIRCUIT DISTRICT COURTS

Despite the high rate of reversal in the Fifth Circuit and the fact patterns that must be present to satisfy the exceptional-circumstances test, district courts show a disproportionate willingness to abstain.[149] In the nearly 200 cases in which courts considered *Colorado River* abstention, ultimately the courts decided to abstain in more than one third.[150] Their reasons for doing so run the gamut, but faced with an obviously wasteful trial amid a docket already bursting at the seams, it is no surprise that they find enticing an

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* at 499.

[144] *Id.*

[145] *See, e.g.*, *id.* at 498–99; *see also infra* Table D.

[146] *See* Murphy v. Uncle Ben's, Inc., 168 F.3d 734, 738–39 (5th Cir. 1999) (counting all neutral or absent factors as weighing against abstention); *see also* Evanston Ins. Co. v. Jimco, Inc., 844 F.2d 1185, 1191 (5th Cir. 1988).

[147] Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 818–19 (1976).

[148] *See infra* Table C (listing reversed abstention decisions in the 5th Circuit).

[149] *See infra* Table A.

[150] *See infra* Table A. From 1976 to 2011, 200 district courts considered abstaining under *Colorado River*; 69 of them ultimately abstained.

abstention doctrine favoring "wise judicial administration."[151] The very existence of a duplicative suit, in which the same parties are litigating the same issues, would seem to present the exceptional circumstance necessary to invoke an abstention doctrine dealing with parallel litigation. Yet, *Colorado River* abstention remains unavailable for all but a miniscule number of cases.[152] While in most cases the Fifth Circuit district courts have exercised jurisdiction rather than abstain with less than exceptional circumstances,[153] they have applied the *Colorado River* doctrine broadly in a surprising number of decisions, abstaining on grounds not recited in the doctrine or weighing the factors differently than precedent prescribed.[154]

At times, district courts have abstained based on considerations that do not form part of the exceptional-circumstances test.[155] For example, one court invoked *Colorado River* because it felt the state judge was "best positioned" to resolve the disputes.[156] Another abstained because it did not want to hold a trial.[157] One abstention came in the absence of any of the designated exceptional circumstances, the court instead pointing to its "heavy trial docket" as grounds for the decision.[158] A few courts have abstained under *Colorado River* even when none of the factors were present,[159] and others have abstained when there was, in fact, no parallel

[151] *Colo. River*, 424 U.S. at 817; *see also* Allen v. La. State Bd. of Dentistry, 835 F.2d. 101, 104 (5th Cir. 1988).

[152] *In re* Abbott Labs., 51 F.3d 524, 529 (5th Cir. 1995) ("*Colorado River* abstention is to be used only sparingly . . . .").

[153] *See, e.g.*, Velasquez-Campuzano v. Marfa Nat'l Bank, 896 F. Supp. 1415, 1425 n.9 (W.D. Tex. 1995), *aff'd per curiam*, 91 F.3d 139 (5th Cir. 1996) (finding that the district court could have abstained under *Colorado River* but affirming the decision to exercise jurisdiction regardless).

[154] *See* Sonenshein, *supra* note 3, at 664–65.

[155] *See, e.g.*, Safety Nat'l. Cas. Corp. v. Bristol-Meyers Squibb Co., 43 F. Supp. 2d 713, 721 (E.D. Tex. 1999), *rev'd*, 214 F.3d 562 (5th Cir. 2000).

[156] *See id.*

[157] Snap-On Tools Corp. v. Mason, 18 F.3d 1261, 1263 (5th Cir. 1994).

[158] *See, e.g.*, Diamond Offshore Co. v. A&B Builders, Inc., 75 F.Supp.2d 676 (S.D. Tex. 1999), *aff'd in part on other grounds, rev'd in part*, 302 F.3d 531, 539 (5th Cir. 2002) (examining a district court decision to abstain based on a busy docket).

[159] *See, e.g.*, Transocean Offshore USA, Inc., v. Catrette, 239 F. App'x 9, 13–14 (5th Cir. 2007) (applying the exceptional-circumstances test and reversing an abstention that the district court had based entirely on considerations irrelevant under *Colorado River*); Townson v. Crain Bros., Inc., No. 06-10545, 2007 WL 2402634, at *1–2 (E.D. La. Aug. 17, 2007) (finding no exceptional circumstances warranting abstention, but staying the case anyway); Am. Family Life Assurance Co. of Columbus v. Anderson, 77 F. Supp. 2d 759, 761–63 (S.D. Miss. 1999), *rev'd*

litigation.[160] These opinions, although not the norm, depict a liberal reading of the doctrine without regard for the strict test applied by the court of appeals.

More commonly, courts abstained based on misconstrued interpretations of the factors. For instance, in some opinions the risk-of-piecemeal-litigation factor was counted for abstention when piecemeal litigation was actually, according to the court of appeals, unavoidable[161] or required for proper resolution.[162] The inconvenience-of-the-federal-forum factor was once counted for abstention without any consideration of "the relative locations of the forums, the location of evidence or witnesses, or the availability of compulsory process—the very concerns that make up the 'inconvenience factor.'"[163] As it turned out, the federal forum actually presented no logistical difficulties.[164] In one case, the order-of-jurisdiction factor was counted for abstention even though the federal suit was nearing a decision and the state court had not even entered discovery phase on several major issues.[165] In another, the court counted this factor for abstention simply because both suits were "proceeding at approximately the same pace."[166]

Similarly, the presence-of-state-law factor has been counted for abstention simply because a case presented a state law issue[167] or because the applicable state law was unclear.[168] And in another example, the district

per curiam, 228 F.3d 410 (5th Cir. 2000) (reversing a district court abstention after finding all factors were either neutral or counseled against abstention); *Safety Nat'l Cas. Corp.*, 43 F. Supp. 2d at 721 (abstaining solely because the state judge was "well positioned" to resolve the disputes).

[160] Am. Guarantee & Liab. Ins. Co. v. Anco Insulations, Inc., 408 F.3d 248, 251–52 (5th Cir. 2005) (recognizing that while the state and federal suits shared some issues, the parties and claims differed and concluding that "the federal and state proceedings are not parallel"); Brown & Williamson Tobacco Corp. v. Williams, No. 95-60256, 1996 WL 101363, at *2 (5th Cir. Feb. 22, 1996) (noting the undisputed lack of parallel litigation in state court).

[161] Signad, Inc. v. City of Sugar Land, 753 F.2d 1338, 1340 (5th Cir. 1985).

[162] Bank One, N.A. v. Boyd, 288 F.3d 181, 185 (5th. Cir. 2002); *Snap-on Tools Corp.*, 18 F.3d at 1265–66 (5th Cir. 1994) (quoting Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp., 460 U.S. 1, 20 (1983)).

[163] Evanston Ins. Co. v. Jimco, Inc., 844 F.2d 1185, 1191 (5th Cir. 1988).

[164] *Id.* at 1192.

[165] *See Bank One*, 288 F.3d at 185–86.

[166] Murphy v. Uncle Ben's, Inc., 168 F.3d 734, 738–39 (5th Cir. 1999).

[167] *See* Evanston Ins. Co. v. Jimco, Inc., 664 F. Supp. 1004, 1007 (M.D. La. 1987), *rev'd*, 844 F.2d 1185 (5th Cir. 1988).

[168] *See* Black Sea Inv., Ltd. v. United Heritage Corp., 204 F.3d 647, 649, 651 (5th Cir. 2000).

court interpreted the adequacy-of-state-proceedings factor as counseling for abstention as long as the state forum was adequate.[169] Although the Supreme Court itself recognized that the *Colorado River* decision did not "prescribe a hard-and-fast rule" for applying the factors,[170] flexible interpretations have been rejected continually by the Fifth Circuit since they are not in keeping with a narrow application of the doctrine.[171]

Considering the court of appeals' stringent application of the exceptional-circumstances test, it is surprising that district courts have continued to abstain under broader circumstances.[172] While there are certainly valid considerations of conservation of judicial resources, concerns of systemic abuse by gamesman litigants,[173] and a desire to seek a palatable solution to duplicative litigation,[174] *Colorado River* abstention is not the avenue to address these concerns. While at first blush the existence of wasteful duplicative litigation would itself seem to be an exceptional circumstance worthy of invoking abstention, *Colorado River* abstention is reserved for truly exceptional circumstances,[175] to such an extent that *Colorado River* abstentions have yet to receive even one solid affirmance in the Fifth Circuit.[176]

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[169] *See* Safety Nat'l. Cas. Corp. v. Bristol-Meyers Squibb Co., 43 F. Supp. 2d 713, 721 (E.D. Tex. 1999), *rev'd*, 214 F.3d 562 (5th Cir. 2000) (finding the balance weighs for abstention in part because the state forum was adequate and concluding the state court was "well positioned" to resolve the disputes).

[170] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15 (1983).

[171] *See, e.g.*, *Black Sea Inv., Ltd.*, 204 F.3d at 650 (noting that in its decision to reverse the district court's abstention, it paid heed to the Supreme Court's admonition that that "the balance [should be] heavily weighted in favor of the exercise of jurisdiction" (quoting *Moses H. Cone*, 460 U.S. at 16)); *Murphy*, 168 F.3d at 737–39 (finding that the district court abused its discretion in abstaining because "the balancing of these factors 'is heavily weighted in favor of the exercise of jurisdiction,'" and the abstention came "in the absence of 'only the clearest of justification'" (quoting *Moses H. Cone*, 460 U.S. at 16)); *Evanston Ins. Co.*, 844 F.2d at 1190-93 (noting the Supreme Court's emphasis on the heavy obligation to exercise jurisdiction and reversing the district court's abstention).

[172] *See infra* Table A.

[173] *See* Rehnquist, *supra* note 13, at 1064–65.

[174] *See* Redish, *supra* note 20, at 1351.

[175] *See* Kelly Inv., Inc. v. Cont'l Common Corp., 315 F.3d 494, 499 (5th Cir. 2002).

[176] The Fifth Circuit has only affirmed three instances of abstention under *Colorado River*. *See* LAC Real Estate Holdings, LLC v. Biloxi Marsh Lands Corp., 320 F. App'x 267 (5th Cir. 2009); Nationstar Mortg. LLC v. Knox, 351 F. App'x 844 (5th Cir. 2009); Art 57 Props. v. 57 BB Prop., LLC, No. 99-10385, 2000 WL 423440 (5th Cir. Apr. 7, 2000).

V. POSSIBLE, BUT UNLIKELY, APPROVAL OF ABSTENTION

For more than two decades, every *Colorado River* abstention appealed in the Fifth Circuit was reversed.[177] Then, in 2000, the Fifth Circuit Court of Appeals granted its first tenuous affirmance.[178] Another nine years passed before two more affirmances were granted in 2009.[179] These decisions, however, are all unpublished and none were en banc.[180] Therefore, they are of limited precedential value and are unlikely to represent any meaningful shift in the Fifth Circuit's willingness to approve abstention under *Colorado River*.

The first affirmance came in *Art 57 Properties v. 57 BB Property, LLC*, a per curiam, unpublished opinion.[181] The Fifth Circuit's brief opinion pointed to several factors the court considered significant: the substantial progress of the state action compared to the federal action; the danger of inconsistent verdicts between the two actions; the lack of federal law needed to resolve the case; and concerns over forum shopping.[182]

Although the court of appeals made a reference to *Murphy*, it did not execute the careful balancing of the factors dictated by that case.[183] *Art 57* did provide the first affirmance of a *Colorado River* abstention, but nearly a

[177] *See infra* Tables B, D.

[178] Art 57 Props. v. 57 BB Prop., LLC, No. 99-10385, 2000 WL 423440 (5th Cir. Apr. 7, 2000). Another case, Allen v. La. State Bd. of Dentistry, 835 F.2d 100 (5th Cir. 1988), also appears in search results. While the court of appeals did mention *Colorado River*, most of the case was analyzed under *Younger* abstention parameters. *Id.* at 103. While the opinion claimed to examine the parts of the case that fell outside *Younger* under *Colorado River*, the reasons were that the state proceedings had progressed substantially further than federal proceedings, that the state was protecting the dentist's rights adequately, that his § 1983 complaint was inextricably intertwined with the issues being considered by the state court, and that the federal litigation was "vexatious and reactive." *Id.* at 104–05. This is a more liberal application of the test than the Supreme Court and the Fifth Circuit have prescribed, and the abstention was upheld mostly based on the *Younger* abstention analysis and Allen's evident hostility toward the state proceedings. *Id.* at 104.

[179] LAC Real Estate Holdings, LLC v. Biloxi Marsh Lands Corp., 320 F. App'x 267 (5th Cir. 2009); Nationstar Mortg. LLC v. Knox, 351 F. App'x 844 (5th Cir. 2009).

[180] *See* LAC Real Estate Holdings, LLC v. Biloxi Marsh Lands Corp., 320 F. App'x 267 (5th Cir. 2009); Nationstar Mortg. LLC v. Knox, 351 F. App'x 844 (5th Cir. 2009); Art 57 Props. v. 57 BB Prop., LLC, No. 99-10385, 2000 WL 423440 (5th Cir. Apr. 7, 2000).

[181] *Art 57 Props.*, 2000 WL 423440, at *1.

[182] *Id.*

[183] *See id.*

decade lapsed before the Fifth Circuit affirmed another.[184] Thus, *Art 57* did not mark a significant shift in the Fifth Circuit's interpretation of the doctrine.

The next affirmance came in 2009 in *Nationstar Mortgage LLC v. Knox*.[185] The Knoxes filed an action in state court and Nationstar removed the action to federal court based on diversity jurisdiction.[186] Nationstar then filed a separate action in federal court seeking to compel arbitration.[187] The first federal action was remanded for lack of diversity jurisdiction.[188] In the second federal action, the district court held that diversity jurisdiction existed, but decided to abstain anyway.[189] Although the district court did not rely on the *Colorado River* doctrine, on review the court of appeals applied the exceptional-circumstances test and found no abuse of discretion.[190] The Fifth Circuit found that two factors counseled for abstention, two counseled against, and two were neutral.[191] The court reasoned that the fourth factor counseled for abstention, since the state court obtained jurisdiction first, although the opinion noted that little progress had been made in either case.[192] The sixth factor, adequacy of the state forum, was also found to favor abstention since there was "no reason to doubt the adequacy of the state court" to resolve the issues.[193] The weighing of the factors again differed from established precedent, as according to precedent the two neutral factors should have counted against abstention,[194] yielding a balance of two factors for abstention and four against.[195] Nonetheless, based mostly on the "matter's very unusual procedural history," the court found no abuse of discretion.[196]

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[184] *See Nationstar Mortg. LLC*, 351 F. App'x at 852.

[185] *Id.*

[186] *Id.* at 846.

[187] *Id.*

[188] *Id.* at 846–47.

[189] *Id.* at 847.

[190] *Id.* at 851–52.

[191] *Id.* at 852.

[192] *Id.*

[193] *Id.*

[194] *See* Murphy v. Uncle Ben's, Inc., 168 F.3d 734, 738–39 (5th Cir. 1999) (counting all neutral or absent factors as weighing against abstention); *see also* Evanston Ins. Co. v. Jimco, Inc., 844 F.2d 1185, 1191 (5th Cir. 1988).

[195] *See Nationstar Mortg. LLC*, 351 F. App'x at 852.

[196] *See id.*

Later in 2009, the court of appeals again affirmed a decision to abstain in *LAC Real Estate Holdings, LLC v. Biloxi Marsh Lands Corp.*[197] After several cases had been filed and consolidated in state court to resolve a dispute concerning the entitlement to gas royalties from a property, LAC filed a suit in district court seeking to annul two tax sales in the chain of title.[198] The district court stayed the federal case in deference to the state court proceedings.[199] In its review of whether exceptional circumstances existed, the court of appeals found that while the "federal court had not assumed jurisdiction over any *res*," the state court had received a deposit of oil and gas royalties from the property, which it considered sufficient to fulfill the first factor.[200] Further, it found that both "the desire to avoid piecemeal litigation and the order" of jurisdiction weighed strongly in favor of abstention.[201] When the federal case was filed, the case had already been in state proceedings for around eight years, and had been the subject of several procedural appeals.[202] The state court would eventually try the chain-of-title issue that LAC wanted to raise, but it had "decided to try possession first [of the parcel] to establish the [appropriate] burdens of proof."[203] Therefore, the parallel proceedings presented a particular danger of piecemeal litigation.[204] The court thus found no abuse of discretion by the district court for abstaining.[205] In this case, the court's analysis more closely mirrored the narrow interpretation of the exceptional-circumstances test. The court of appeals issued its decision in an unpublished opinion, though, limiting its precedential value compared to the abundant published reversals of decisions to abstain.

Although these affirmances are all relatively recent, their designation as unpublished opinions signals that there has not been any meaningful shift in the Fifth Circuit's strict interpretation of the exceptional-circumstances test. Furthermore, they pale in comparison to the eleven reversals from the same time period.[206] Considering the data then, there is no suggestion that future

[197] 320 F. App'x 267, 268 (5th Cir. 2009).

[198] *Id.* at 268–69.

[199] *Id.* at 269.

[200] *Id.* at 271.

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *See infra* Table C.

decisions to abstain have less probability of reversal now than at any other time in the thirty-five-year life of the *Colorado River* abstention doctrine.

VI. CONCLUSION

While it might seem intuitive to employ *Colorado River* abstention against wasteful duplicative suits permitted by the dual system of courts, over time neither the Supreme Court nor the Fifth Circuit Court of Appeals has departed from the position that *Colorado River* offers an exceedingly narrow exception to the obligation to exercise jurisdiction.[207] Indeed, the appellate opinions continually reinforce a narrow interpretation of the doctrine and a strict application of the exceptional-circumstances test.[208] While duplicative litigation is a valid concern, *Colorado River* abstention is simply not the solution. Thus, in most cases, a decision to abstain under *Colorado River* is unlikely to stand on appeal.[209]

VII. APPENDIX

Table A: Overview of Colorado River *Abstention in the Fifth Circuit District Courts*

District Court Cases Considering *Colorado River* Abstention[210]		
District court did not abstain	131	65.5%
District court abstained	69	34.5%
Total	200	100%

[207] *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25-26 (1983) (stressing the doctrine's limited scope and the heavy bias toward exercising jurisdiction); *see In re* Abbott Labs., 51 F.3d 524, 529 (5th Cir. 1995) ("*Colorado River* abstention is to be used only sparingly . . . ."); *see also infra* Table C for summaries of the few abstentions the Fifth Circuit has upheld, and *infra* Table D for summaries of the many abstentions that the Fifth Circuit has found insufficient.

[208] *See supra* Part IV.

[209] *See infra* Table B.

[210] Methodology: The author compiled the data in all tables by searching WestLaw for Fifth Circuit cases that cited *Colorado River*. All results were reviewed; cases were excluded from this analysis if they referenced *Colorado River* but did not involve an abstention decision based on the *Colorado River* doctrine.

Table B: Overview of Colorado River *Abstention Decisions on Appeal*

Appellate Reviews of District Court Abstention Decisions	Total	Reversed	Affirmed
District court did not abstain	4	0 (0%)	4 (100%)
District court abstained	24	21 (87.5%)	3 (12.5%)

Table C: Fifth Circuit Affirmances of District Court's Decision Not to Abstain

1	*Am. Motorists Ins. Co. v. Cellstar Corp.*, No. 02-20612, 2003 WL 342257 (5th Cir. Jan. 28, 2003) (per curiam).
	The district court denied Cellstar's motion to dismiss in favor of parallel state claims. On appeal, Cellstar argued that the district court had erred in applying *Colorado River*. The appeals court, however, affirmed the district court's decision not to abstain.
2	*Brown v. Pac. Life Ins. Co.*, 462 F.3d 384 (5th Cir. 2006).
	Appellant argued that because the case revolved around arbitrability of a contract, the district court should have abstained under *Colorado River* in order to avoid piecemeal litigation. The court of appeals however, did not accept this argument and affirmed the district court's decision not to abstain.
3	*Conseco Fin. Servicing Corp. v. Shinall*, No. 01-60522, 2002 WL 31319368 (5th Cir. Oct. 1, 2002) (per curiam).
	Appellants argued that the district court should have abstained under *Colorado River*. In its review of the facts, the court of appeals found that the balance tipped slightly toward the exercise of jurisdiction. As the facts did not satisfy the exceptional-circumstances test, there was no abuse of discretion.
4	*RepublicBank Dall., Nat. Ass'n v. McIntosh*, 828 F.2d 1120 (5th Cir. 1987).
	The court of appeals found no abuse of discretion because contrary to appellants' assertion that the actions were parallel and stay was warranted to avoid piecemeal litigation, the actions were not, in fact, parallel.

Table D: Fifth Circuit Reversals of District Court's Decision to Abstain

1	*Am. Family Life Assurance Co. of Columbus v. Anderson*, No. 00-60027, 2000 WL 1056303 (5th Cir. July 27, 2000) (per curiam).
	In its review of the district court's analysis, the court of appeals found that all six factors were either neutral or counseled against abstention. Looking to *Moses H. Cone*, the court found that because neither the state nor federal courts had jurisdiction over a *res*, piecemeal litigation was not a danger. "[I]n this case the balance tips decisively against abstention."
2	*Am. Guarantee & Liab. Ins. Co. v. Anco Insulations, Inc.*, 408 F.3d 248 (5th Cir. 2005).
	The court of appeals held that the district court's grant of a stay was an abuse of discretion pending an outcome in a state court suit involving "some common issues." Although it was unclear which abstention doctrine the district court applied, the appeals court held that *Colorado River* was the appropriate standard and that the exceptional-circumstances test applied. Finding that the state suit was not actually parallel, the exceptional circumstances necessary for abstention were not present.
3	*Bank One, N.A. v. Boyd*, 288 F.3d 181 (5th Cir. 2002).
	The court of appeals found that it was abuse of discretion to abstain under *Colorado River*. The first factor was not relevant as there was no *res*. Neither party had raised the issue of inconvenience and both courts were in the same region, so the second factor also weighed against abstention. The court noted that piecemeal litigation was possibly required and therefore the third factor did not weigh against abstention. Comparing the progress made in both courts, the appeals court "question[ed] the weight attributed to this factor['s]" support of abstention. The fifth factor also weighed against abstention. The balance of the factors, then, weighed in favor of exercising jurisdiction.

4	*Black Sea Inv., Ltd. v. United Heritage Corp.*, 204 F.3d 647 (5th Cir. 2000).
	The court of appeals held that abstention under *Colorado River* was improper. The district court found there was duplicative litigation, but the court of appeals distinguished that from the piecemeal litigation addressed in *Colorado River*. Since no court had assumed jurisdiction over a disputed *res* in this case, there was no danger of inconsistent rulings with respect to a piece of property. The district court also "improvidently accorded great weight" to the fifth factor, because "a mere lack of clarity in applicable state law does not counsel in favor of abstention." After balancing the factors, they were all either neutral or weighed against abstention. Defendants contended *Brillhart* abstention actually applied, but the court of appeals confirmed that *Colorado River* was the appropriate doctrine.
5	*Brown & Williamson Tobacco Corp. v. Williams*, No. 95-60256, 1996 WL 101363 (5th Cir. Feb. 22, 1996).
	Appeals court found that the district court had misapplied *Colorado River* abstention, as no parallel litigation existed in state court.
6	*Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531 (5th Cir. 2002), *overruled on other grounds by Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009).
	District court abstained due to a "heavy trial docket, the preclusive effect of the district court's judgment, the potential for Diamond to incur further damages in [the parallel] suit, and the fact that the state court would provide an adequate alternative forum." The court of appeals held these were "not exceptional circumstances warranting abstention." The court of appeals therefore found that the district court had erred in abstaining.

7	*Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185 (5th Cir. 1988).
	The court of appeals re-examined the six factors after finding that the district court "misapplied several" and failed to heavily weight them in favor of exercising jurisdiction. There was no jurisdiction over a *res*, and the district court erred in counting the absence of this factor as neutral rather than against abstention. The district court also erred in its consideration of the second factor because it did not consider "the relative locations of the forums, the location of evidence or witnesses, or the availability of compulsory process—the very concerns that make up the 'inconvenience factor.'" The court clarified that this factor does not counsel for abstention whenever the state forum is somehow better, but rather that it only counsels for abstention when the federal forum is significantly more inconvenient than the state forum. Considering these points, the court of appeals found the federal forum did not present any "logistical difficulties" and found that the second factor also counseled against abstention. As to the third factor, there was no possibility of piecemeal litigation without jurisdiction over a *res*. This factor then counted against abstention, because "[t]he prevention of duplicative litigation is not a factor to be considered in an abstention determination." As to the fourth factor, the state suit had been filed first, but little progress had been made. For the fifth factor, the district court had held that the presence of state law issues weighed in favor abstention, but the court of appeals found that the presence of state law issues counsels for abstention "only in rare circumstances." This case presented no such rare circumstances, so this factor counseled against abstention. The sixth factor can only be neutral or counsel against abstention. On balance then, the case did not meet the exceptional-circumstances test, and the abstention was improper.

8	*In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995).
	The district court abstained under *Colorado River* based on two concerns, piecemeal litigation and complex questions of state law. The appeals court however disregarded the district court's view of the risk of piecemeal litigation. As to the second issue, the court of appeals found that "[s]tanding alone . . . the novelty or complexity of state law issues is not enough to compel abstention." The court also noted that "*Colorado River* abstention is to be used only sparingly . . . and this case is a poor candidate."
9	*Kelly Inv., Inc. v. Cont'l Common Corp.*, 315 F.3d 494 (5th Cir. 2002).
	The court of appeals found there was no jurisdiction over a *res*, and therefore, piecemeal litigation was not a risk. "[T]he district court [then,] incorrectly relied upon the possibility of inconsistent judgments as its main reason for abstaining." In review, the court of appeals found that none of the factors counseled for abstention, and therefore abstention was improper.
10	*Lawrence v. Davis*, 127 F. App'x 124 (5th Cir. 2005).
	The district court abstained in deference to pending Board of Inquiry proceedings in military court. The court of appeals held that abstention was improper but allowed the stay because the Board of Inquiry's proceedings were already advanced.
11	*Murphy v. Uncle Ben's, Inc.*, 168 F.3d 734 (5th Cir. 1999).
	The court of appeals found the district court abused its discretion in abstaining under *Colorado River*. The court of appeals found that factors one, two, and three weighed against abstention. It identified the fourth factor, the order in which jurisdiction was obtained, as "the priority element" of the exceptional-circumstances test and found that both cases were "proceeding at approximately the same pace." Thus, this factor weighed against abstention. The case presented both state and federal issues, so the fifth factor also weighed against abstention. The court noted that issues could arise regarding the adequacy of state proceedings, but that factor could not counsel for abstention according to *Evanston* and would nonetheless have been insufficient to pass the exceptional-circumstances test.

12	*New England Ins. Co. v. Barnett*, 561 F.3d 392 (5th Cir. 2009).
	The court of appeals held that the district court should have applied the *Colorado River* standard because the action "include[d] both declaratory and non-frivolous coercive claims for relief." The court therefore vacated and remanded for reconsideration under the appropriate standard.
13	*Providian Fin. Corp. v. Coleman*, 69 F. App'x 658 (5th Cir. 2003) (per curiam).
	The district court's decision to abstain was reversed in an unpublished opinion.
14	*Safety Nat'l. Cas. Corp. v. Bristol-Meyers Squibb Co.*, 214 F.3d 562 (5th Cir. 2000).
	The district court abstained under *Colorado River* reasoning that the state judge was "best positioned" to resolve the disputes. The court of appeals found that none of the factors constituting extraordinary circumstances was present to warrant abstention under *Colorado River*.
15	*Signad, Inc. v. City of Sugar Land*, 753 F.2d 1338 (5th Cir. 1985).
	The court of appeals reversed the district court's abstention in a Section 1983 claim, finding that none of the exceptional circumstances mentioned in *Colorado River* was present. In particular, the court held that piecemeal litigation was "unavoidable" to "preserv[e] access to the federal relief which [the relevant statute] assures."

16	*Snap-on Tools Corp. v. Mason*, 18 F.3d 1261 (5th Cir. 1994).
	This case involved an arbitration dispute similar to the one in *Moses H. Cone*. The district court abstained in deference to a state court proceeding, giving as its reasons that it did not want to hold a trial, it saw no reason the state court was inadequate, it suspected forum gamesmanship by the defendant, and that the plaintiff's choice of forum deserved preference. The court of appeals reviewed the case and applied the exceptional-circumstances test. It found the first factor was not present. The second factor did not counsel for abstention, as there was no demonstrable difference in convenience. The third factor, piecemeal litigation, counseled against abstention, first because the contract made it possible to arbitrate with all the plaintiffs even though the parallel suits named them separately, and second because "relevant federal law *requires* piecemeal litigation when necessary to give effect to an arbitration agreement." The fourth factor also counseled against abstention; as in *Moses H. Cone*, the state suit was filed first, but the federal suit had actually progressed more. The fifth factor counseled against abstention because federal law governs "'the arbitrability of the dispute' . . . whether it is raised in federal or state court." The court also addressed and disregarded additional arguments by the defendants, including the alleged waiver of arbitration rights by the plaintiff and alleged "fraudulent inducement" to enter the arbitration agreement. This argument did not constitute exceptional circumstances in the court's view.
17	*Southwind Aviation, Inc. v. Bergen Aviation, Inc.*, 23 F.3d 948 (5th Cir. 1994) (per curiam).
	The district court identified the case as a declaratory judgment action and abstained under *Brillhart* in deference to parallel state proceedings. The court of appeals clarified, however, that the claims sought coercive relief in addition to the declaratory judgment, so *Colorado River* was the correct doctrine to apply. The court of appeals then reversed the abstention and remanded for consideration under the appropriate standard.

18	*St. Paul Ins. Co. v. Trejo*, 39 F.3d 585 (5th Cir. 1994).
	The district court dismissed a workmen's compensation suit based on a statute barring removal of such a suit, reasoning that the underlying policy also permitted dismissal of a suit filed in federal court. In the alternative, the district court held that abstention was also supported by *Burford* and *Colorado River*, but did not apply the exceptional-circumstances test. The Fifth Circuit found that the first four factors counseled against abstention since the case did not involve "(1) a suit for property; (2) a less convenient federal forum; (3) piecemeal litigation, *i.e.* no more than one plaintiff, one defendant, and one issue; or (4) a federal court case being filed after the pending state case." Although the case did center on state law rather than federal law, this factor alone could not outweigh the balance of factors counseling against abstention. As to the sixth factor, the court held that the state forum appeared adequate but that this factor was insufficient, alone or even combined with the fifth, to outweigh the obligation to exercise jurisdiction.
19	*Stewart v. W. Heritage Ins. Co.*, 438 F.3d 488 (5th Cir. 2006).
	The district court stayed the federal case without applying *Colorado River*. The court of appeals assumed the cases were parallel and reviewed the abstention according to the *Colorado River* factors. The Fifth Circuit rejected the notion that the absence of a *res* was a neutral factor, instead counting the first factor against abstention. Since both federal and state courts were in the same region, the second factor also weighed against abstention. The third factor counseled for abstention, although the court recognized there was no *res* at issue, because some of the claims were only being heard in the state court case. The fourth factor counseled against abstention, as the federal case had indisputably progressed farther than the state case. The fifth factor was "at most neutral" because, though the subject matter of the claim only involved state law, the federal forum had diversity jurisdiction. Citing *Black Sea*, the appeals court held the sixth factor could only be neutral or counsel against abstention, and in this case, it was neutral because there was no argument questioning the adequacy of the state forum. Weighting the balance heavily in favor of exercising jurisdiction, the court of appeals found that abstention was inappropriate and refrained from addressing the claim that the two suits were not actually parallel.

20	*Superior Diving Co. Inc. v. Cortigene*, 372 F. App'x 496 (5th Cir. 2010).
	The district court abstained from addressing certain questions pending resolution of a parallel state suit and dismissed the case. The court of appeals took issue with the abstention, based on Colorado River's characterization as an "extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." Furthermore, since the state law proceedings were "no longer pending in state court," there was no rationale for the court to abstain.
21	*Transocean Offshore USA, Inc. v. Catrette*, 239 F. App'x 9 (5th Cir. 2007) (per curiam).
	The district court abstained from hearing a federal countersuit in favor of a pending state suit. In its decision, the district court relied on the fact that the Jones Act claim could only receive a jury trial in a state court, and the fact that proceeding with the federal case would be "constructive removal" of the Jones Act case. The appeals court however found that the lower court had abused its discretion in not applying the exceptional-circumstances test and disregarded both justifications. The court reasoned that such justifications do not fall under the factors prescribed in *Colorado River* and had never been recognized as factors to consider in a decision to abstain.