

NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-1346

RUSSELL W. MCMURRAY, JR., on behalf of himself and all others
similarly situated

v.

LODWEIJK J.R. DE VINK; ROBERT N. BURT; DONALD C. CLARK; JOHN A.
GEORGES; WILLIAM H. GRAY, III; WILLIAM R. HOWELL; LASALLE D.
LEFFALL, JR.; GEORGE A. LORCH; ALEX J. MANDL; MICHAEL I. SOVERN;
WARNER-LAMBERT CO.; AMERICAN HOME PRODUCTS CORP.

(D. C. N. J. No. 99-cv-05253)

ELLIOT WALSEY, derivatively on behalf of himself and all others
similarly situated

v.

LODEWEIJK J.R. DE VINK; ROBERT N. BURT; DONALD C. CLARK; JOHN A.
GEORGES; WILLIAM H. GRAY, III; WILLIAM R. HOWELL; LASALLE D.
LEFFALL, JR.; GEORGE A. LORCH; ALEX J. MANDL; MICHAEL I. SOVERN;
AMERICAN HOME PRODUCTS CORP.; WARNER LAMBERT CO.

(D. C. N. J. No. 99-cv-5499)

Elliot Walsey and Russell W. McMurray, Jr.,
Appellants

Appeal from the Judgment of the District Court
of the District of New Jersey
District Judge: Hon. Katharine Sweeney Hayden

Argued: November 7, 2001

Before: BECKER, Chief Judge, McKEE and RENDELL, Circuit Judges

(Opinion filed: January 3, 2002)

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OPINION OF THE COURT

McKEE, Circuit Judge.

Appellants Russell McMurray, Jr. and Elliot Walsey appeal an order by the District Court for the District of New Jersey staying this diversity action in favor of concurrent

litigation that is proceeding in state court in Delaware. Appellants rely upon *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976) and its progeny in arguing that the district court abused its discretion by entering the stay. For the reasons that follow, we will reverse.

I. Facts

These consolidated actions arise from an aborted takeover battle between Appellees Warner-Lambert Company (“Warner”), and American Home Products Corporation (“AHP”). Warner is a Delaware corporation, with its principal place of business in New Jersey. It manufactures and sells pharmaceuticals world-wide. AHP also manufactures pharmaceutical products, and is also a Delaware corporation with its principal place of business in New Jersey.

On November 4, 1999, Warner announced an agreement to merge with AHP. The merger was valued at approximately \$70 billion. The merger agreement valued each share of Warner stock at \$83.55. The combined company was to have 20 directors, with ten coming from Warner and ten from AHP. Warner’s CEO was to be CEO of the combined company. AHP’s CEO was to be Chairman for 18 months, and was then to step aside in favor of Warner’s CEO. The merger agreement also contained a liquidated damage clause or “break-up fee” that required Warner to pay AHP \$2 billion if Warner terminated the agreement.

The same day the Warner/AHP merger was announced, Pfizer, Inc. another major manufacturer of pharmaceutical products, disclosed a bid for an “unfriendly” takeover of

Warner. Pfizer's offer to Warner was for \$82.4 billion, and valued Warner stock at \$96.40 per share, or \$17.85 more per share than AHP's offer. Pfizer's offer was therefore more favorable to Warner shareholders. Unlike the AHP agreement, however, the Pfizer offer did not contain a provision for the Warner CEO or Warner directors to have a position in the company that would have been formed by the merger.

The Warner/AHP merger agreement lead to a flurry of lawsuits, including the one before us. Russell McMurray and Elliot Walsey (collectively, "the shareholders") are shareholders of Warner. On November 10, 1999, McMurray filed a shareholder class action on behalf of Warner shareholders in the District Court for the District of New Jersey against Warner and AHP. Shortly thereafter, on November 23, 1999, Walsey filed a corporate derivative suit against Warner and AHP in the same court. The two complaints both arise from the merger agreement between Warner and AHP, contain the same facts and allegations, and rely exclusively upon Delaware law.

The shareholders' complaint alleges that Warner directors initially refused to pursue serious merger discussions with Pfizer in violation of their fiduciary obligation to Warner's shareholders. The alleged breach is based upon their reluctance to pursue Pfizer's substantially higher offer. According to the averments, Pfizer attempted merger discussions with Warner on three previous occasions, but the Warner directors simply refused to entertain the possibility. The complaints also claim that Warner breached its fiduciary duty by agreeing to pay AHP the \$2 billion break-up fee.

In addition to the federal suits, other Warner shareholders also began filing suits against Warner in state court in Delaware. To date, over 30 shareholder class action suits are pending in the Delaware courts as well as one derivative action. The Delaware suits were consolidated into *Rosman v. De Vink*, C.A. No. 17519-NC. The Delaware litigation is based upon the same allegations and requests the same relief as the Walsey and McMurray actions.¹

Warner and AHP filed motions asking the district court to abstain in favor of the litigation in Delaware state court, or in the alternative, to stay the proceedings while the Delaware litigation was pending. The district court refused to abstain, but issued an order “granting a stay and administratively terminating these cases.”² McMurray and Walsey filed a motion for reconsideration, which the district court denied. This appeal followed.³

II. Discussion

A. Jurisdiction

¹ A New Jersey state case, *Bass v. De Vink*, Docket No. MRS-C-206-99, was also filed against Warner and AHP by Warner shareholders in New Jersey Superior Court. *Bass* is also based on the same facts and allegations as the McMurray and Walsey actions. On January 7, 2000, the New Jersey court stayed the *Bass* action pending final judgment in the Delaware state litigation. The New Jersey Superior Court, Appellate Division, affirmed the stay. *See Bass v. DeVink*, 765 A.2d 247 (N.J. Super. Ct. App. Div. 2001).

² “Administrative termination” appears to be an informal mechanism for clearing dockets in the district courts of New Jersey. However, that method of disposing of cases is not sanctioned by, or even mentioned in, the Federal Rules of Civil Procedure.

³ In February 2000, Warner and AHP announced that they had abandoned their merger agreement, and shortly thereafter, Warner entered into a merger agreement with Pfizer. That merger was finalized on June 19, 2000. However, for reasons that we discuss below, the Pfizer merger does not moot this appeal.

Preliminarily, Warner and AHP argue that the district court's stay was not a final order under 28 U.S.C. § 1291,⁴ and that we therefore have no jurisdiction. However, that issue has already been resolved by the Supreme Court. In *Moses H. Cone Memorial Hosp. v Mercury Construction, Corp.* 460 U.S. 1 (1983), the district court stayed federal litigation in favor of parallel proceedings in state court, and the propriety of that stay was challenged on appeal. In analyzing the jurisdictional issue, the Supreme Court concluded that "a stay of the federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum; the state court's judgment on the issue would be res judicata." 460 U.S. at 10. The Court held that the stay was therefore equivalent to a dismissal because the defendant was "effectively out of [federal] court." *Id.* at 10, 13.

We have previously held that the pertinent jurisdictional inquiry under *Moses H. Cone* is whether the district court has surrendered its jurisdiction to the state court such that the stay will have *res judicata* effect in subsequent litigation in state court. *See Spring City Corp. v. Am. Buildings Co.*, 193 F.3d 165, 171 (3d Cir. 1999). If it has that effect, the order staying the federal litigation is final and appealable. *Id.*

Here, the issues raised in the Delaware litigation will be *res judicata* for purposes of the federal adjudication. The defendants in the state and federal suits are the same, and plaintiffs Walsey and McMurray are represented in the Delaware shareholder action.

Warner Br. at 6. Thus, a decision on the merits in state court will have a preclusive effect

⁴ 28 U.S.C. § 1291 reads in relevant part: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

on the stayed federal case, putting the shareholders “effectively out of [federal] court.”

See Moses H. Cone, 460 U.S. at 10. The stay is therefore a final order that is reviewable under § 1291.⁵

B. The Stay

The shareholders contend that the district court applied the wrong legal standard in granting the stay. They insist that the abstention that resulted from the district court’s order is inconsistent with *Colorado River* and its progeny, and that the stay was, therefore, an abuse of discretion.⁶

Colorado River involved the application of the McCarran Amendment, 43 U.S.C. § 666, which waives the federal government’s sovereign immunity in water rights cases and permits the United States to be joined in state suits involving those rights. The United States had filed suit in federal district court seeking a declaration of certain water rights. Shortly thereafter, one of the defendants in that declaratory action brought an action against the United States in state court in an effort to adjudicate both state and

⁵ Warner also argues that the shareholders’ claims are moot because AHP did eventually merge with Pfizer, and the Warner/AHP merger was never consummated. Although Warner did not raise this challenge at the district court level, we will briefly respond because mootness has jurisdictional implications. *See Jersey Central Power & Light v. Township of Lacey*, 772 F.2d 1103, 1108 n.8 (3d Cir. 1985).

We conclude that while the shareholders’ injunctive claims are moot, the damages’ claims are not, as the complaints also seek damages for the \$2 billion break-up fee in the WarnerAHP agreement. It is therefore irrelevant for purposes of our jurisdiction that the plaintiffs also sought to enjoin the aborted merger with AHP in their complaints.

⁶ We review the district court’s decision to enter that stay for an abuse of discretion. *See Ryan v. Johnson*, 115 F.3d 193, 196 (3d Cir. 1997). However, to the extent that the district court based the stay on an erroneous view of the law, our review is plenary. *Id.* at 196.

federal claims pursuant to the provisions of the McCarran Amendment. Several of the defendants in the federal action then attempted to dismiss the federal suit arguing that the federal court lacked jurisdiction under the McCarran Amendment. The district court never decided the jurisdictional issue, but did abstain in favor of the ongoing state actions. The Supreme Court granted certiorari in an appeal from that abstention “to consider whether the McCarran Amendment terminated jurisdiction of federal courts to adjudicate federal water rights and whether, if that jurisdiction was not terminated, the District Court’s dismissal was nevertheless appropriate.” *Colorado River*, 424 U.S. at 806.

The Supreme Court affirmed largely because of the federal policy reflected in the McCarran Amendment. “The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property.” *Id.* at 819. The Court reasoned that the policy against piecemeal litigation reflected Congress’ assessment that state courts and state administrators had more expertise in adjudicating water rights than federal courts. *See Moses H. Cone*, 460 U.S. at 16.

The Court considered four factors in determining if abstention was warranted: 1) which forum first assumed jurisdiction over the property at issue, 2) the inconvenience of the federal forum, 3) the desirability of avoiding piecemeal litigation, and 4) the order in which jurisdiction was obtained in the concurrent forums. *Colorado River*, 424 U.S. at

818. In doing so, however, the Court stressed that “no one factor is necessarily determinative.” Rather, the combination of these factors must be balanced against “the obligation to exercise jurisdiction . . .”. *Id.* Once the balancing is completed, “[o]nly the clearest of justifications will warrant dismissal [in favor of the concurrent state litigation].” *Id.* at 818-19.

In *Moses H. Cone, supra*, the Court identified two additional factors that must be considered. These additional considerations require the trial court to weigh: which forum’s law provides the rule of decision, and the adequacy of the state proceeding in protecting the parties’ rights. *Moses H. Cone*, 460 U.S. at 23, 26.

Here, the district court correctly noted that *Colorado River* states that a court may abstain only in extremely limited circumstances. However, the court then proceeded to make a distinction between abstaining and granting a stay. *See* A-1, Letter Opinion dated October 26, 2000 at 2. The court concluded that our discussion of *Colorado River* in *Ryan v. Johnson*, 115 F.3d 193 (3d Cir. 1997) furnished the most recent pronouncement on the law of abstention. However, the court then relied upon several factors enunciated in *Tabas v. Mullane*, 608 F. Supp. 759, 763 (D.N.J. 1985) in holding that a stay was appropriate here even though it also held that abstention was not.⁷ *See* Letter Op. at 2.

⁷*Tabas* requires the balancing of the following seven factors: 1) ease of access to sources of proof; 2) availability of compulsory process for attendance of hostile witnesses; 3) the possibility of viewing premises, if appropriate; 4) the enforceability of any judgment rendered; 5) the efficiency of the litigation; 6) the progress of the litigation already commenced in state court, and 7) the applicability of state and/or federal law. *See Tabas*, 608 F. Supp. at 763. The shareholders refer to the resulting law as the “*Tabas* Doctrine.”

Compared with other forms of abstention, like *Pullman*,⁸ where a court is required to dismiss the case, the Supreme Court expressly left open the question whether a federal court should dismiss or stay its proceedings when ordering abstention because of duplicative state court litigation. In *Moses H. Cone*, the Court stated:

[w]e have no occasion . . . to decide whether a dismissal or 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 federal jurisdiction as a dismissal. When a district court decides to dismiss or stay under *Colorado River*, it presumably concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties.

Moses H. Cone, 460 U.S. at 28. Thus, the District Court erred in concluding that, by staying the case, it was not abstaining. The stay that was entered is nothing more than the procedural mechanism for abstaining in favor of the concurrent state litigation.

We reject any notion that *Tabas* could properly establish a separate test for abstention. The relevant inquiry must be guided by *Colorado River* and its progeny, not *Tabas*, or principles extrapolated from it. We therefore reject any suggestion that *Tabas* furnishes an analytical framework for a stay distinct from *Colorado River*.⁹

⁸*Railroad Comm’n v. Pullman Co.*, 312 U.S. 496 (1941).

⁹The shareholders also argue that *Tabas* is not good law as it was based on “the subsequently discredited plurality opinion in *Will v. Calvert Fire Ins. Co.*, 437 U.S. 644 (1978).” Appellants Br. at 15. We need not discuss that issue because *Tabas* is a district court decision, and not controlling. We do note, however, that the precise question in *Calvert Fire* was whether a circuit court of appeals could properly issue a *writ of mandamus* to compel a district court to exercise jurisdiction. See *Will v. Calvert Fire Ins. Co.*, 437 U.S. 644, 661 (1978). In *Moses H. Cone* the Supreme Court interpreted *Calvert Fire* as reaffirming the *Colorado River* test. *Moses H. Cone* noted that although the

It is well established in this Circuit that *Colorado River* governs motions to dismiss on grounds of abstention. *See, e.g., Ryan*, 115 F.3d at 196 (applying *Colorado River* to the motion to dismiss); *Ingersoll-Rand, Corp. v. Callison*, 844 F.2d 133, 137 (3d Cir. 1988) (same); *Western Auto Supply Co. v. Anderson*, 610 F.2d 1126, 1127 (3d Cir. 1979) (same). We have consistently emphasized the narrowness of *Colorado River*, and stressed that a federal court is usually statutorily obligated to exercise the jurisdiction that Congress has bestowed. *See Western Auto*, 610 F.2d at 1127 (citing *Colorado River* and *Calvert Fire* as emphasizing a court’s “unflagging obligation” to exercise jurisdiction); *see Kentucky W. Virginia Gas Co. v. Penn. Public Utility Comm’n*, 791 F.2d 1111, 1118 (3d Cir. 1986) (noting in *dicta* that the movant did not meet the *Colorado River* standards as there had been no showing of any congressional legislation evincing an intent to circumscribe the plaintiff’s right to choose the federal forum).

In *Ryan*, we reversed a district court’s decision to abstain and dismiss an action in favor of state litigation largely because there was no clear congressional policy against piecemeal litigation that would have counseled in favor of abstention. *See Ryan*, 115 F.3d at 199. *Ryan* was a negligence suit involving state tort law. We stated that “[t]he presence of garden-variety state law issues has not, in this circuit, been considered sufficient evidence of a congressional policy to consolidate multiple lawsuits for unified resolution in the state courts.” *Id.* at 198. We also cautioned that if the presence of

decision to exercise jurisdiction was reversed in *Calvert Fire*, the reversal was because the proof needed for a *writ of mandamus* was inadequate, not because *Colorado River* is no longer good law. *See Moses H. Cone*, 460 U.S. at 18.

concurrent litigation itself becomes the threshold test for meeting *Colorado River's* piecemeal litigation factor, then “the test becomes so broad that it swallows up the century-old principle . . . that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction” *Id.* (quoting *Colorado River*, 424 U.S. at 817) (internal quotations omitted). That is precisely the situation here.

We reaffirmed *Ryan, supra*, in *Spring City Corp.* In *Spring City*, we concluded that no “exceptional circumstances” warranted a stay. Our decision focused in large part upon the narrowness of the *Colorado River* doctrine as exemplified by its requirement of a clear federal policy against piecemeal litigation. We again noted that such a policy is a prime consideration in any attempt to overcome a federal court’s obligation to exercise jurisdiction. *See Spring City*, 193 F.3d at 172. We also explicitly stated that “*Ryan* represents the applicable law under Third Circuit and Supreme Court precedent” regarding abstention. *Id.*

We perceive no distinction between the circumstances here, and the circumstances that were insufficient to justify abstention in *Ryan*. In fact, only the fourth *Colorado River* factor--the order in which jurisdiction was obtained--weighs in favor of abstention here. That factor does not turn upon “which complaint is filed first, but rather [on]. . . how much progress has been made in the two actions.” *Moses H. Cone*, 460 U.S. at 21. We are advised without contradiction that

the Delaware Litigation proceeded on an expedited schedule. .
. . [T]he plaintiffs in the Delaware Litigation moved with

expedition. Court conferences were held; voluminous documents were requested and produced; interrogatories propounded, objected to and answered; and some twenty depositions were taken. The Court of Chancery ruled upon multiple discovery and scheduling issues. Indeed, discovery in the Delaware Litigation is largely, if not altogether, complete.

Warner Br. at 7. This does not weigh heavily in the balance however, given our consideration of all of the other *Colorado River/Moses H. Cone* factors and the absence of a federal policy against piecemeal litigation that was so important to our inquiry in *Ryan*.¹⁰

There has been no assumption of jurisdiction over property here so that is not relevant to our analysis. The federal district court is situated in Newark, New Jersey. That forum is not inconvenient as both Warner and AHP have their principle place of business in New Jersey. Moreover, New Jersey and Delaware are neighboring states. Even if we were to assume that the participants must travel to New Jersey from the most distant part of Delaware, we would be hard put to define the resultant travel as imposing such a hardship that a federal court in New Jersey would be inconvenient for purposes of *Colorado River*. In addition, there is no credible allegation that this litigation involves anything more than garden-variety state corporate law issues.

¹⁰ In support of its argument that this case evinces a congressional policy against piecemeal litigation, Warner mentions in its brief that the Securities Litigation Uniform Standards Act (“SLUSA”) requires remand to state court of any action removed from federal court. Warner Br. At 28. However, this is not a remanded action and the shareholders here do not allege a SLUSA violation in their Complaints or in their briefs. Thus, whatever congressional policy may be evidenced in SLUSA is not implicated here.

Appellees seize upon the fact that the issues here are controlled by Delaware law, and they remind us of the expertise of Delaware courts in resolving issues of corporate law and shareholders' rights. We share the appellees' high regard for the courts and jurists of Delaware, and we are well aware of the unique stature of corporate law in Delaware. However, that is not a sufficient reason for a federal court to refrain from exercising its jurisdiction.

Moreover, "while the presence of federal issues militates against abstention, the converse cannot be said; abstention cannot be justified merely because a case arises entirely under state law." *Ryan*, 115 F.3d at 199; *see also Spring City*, 193 F.3d at 172. Furthermore, application of state law is not as important where, as here, the federal forum is adequate to protect the parties' rights. It is a far more important consideration when the state court is an *inadequate* forum to protect the rights of the litigants. *See Ryan*, 115 F.3d at 200; *Spring City*, 193 F.3d at 172.

Given the parameters of *Colorado River* and *Ryan*, it is clear that the district court abused its discretion in staying this litigation. It is ironic that the district court explained the "alternative" relief here by stating: "[a]bstention would be an extreme and inappropriate response. But a stay meets the proper concerns raised by the defendants, and the motion for that relief is granted." A-3. However, as we stated above, here there is no distinction between abstaining from adjudicating the federal litigation on the one hand, and staying it on the other. We therefore hold that the district court abused its discretion by entering the stay.

III. CONCLUSION

For the reasons set forth above, we will vacate the district court's order and remand for further proceedings on the merits.¹¹

TO THE COURT:

Please file the foregoing opinion.

By the Court,

/s/ Theodore A. McKee
CIRCUIT JUDGE

¹¹Since we hold that the district court erroneously applied *Tabas* rather than *Colorado River* and *Ryan*, it necessarily also follows that the district court erred in denying the shareholders' Motion for Reconsideration. *See* Local Civil Rule 7.1(g) (a motion for reconsideration may be granted where the court has overlooked controlling decisions).

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JUDGMENT

This cause came to be considered on appeal from the United States District Court for the District of New Jersey, and was argued on November 7, 2001.

On consideration whereon, it is now ORDERED AND ADJUDGED by this Court that the order of the stay entered by the District Court is hereby vacated, and the matter is remanded to that court for further proceedings consistent with the attached opinion.

ATTEST:

CLERK

DATED