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The Appealability of Federal Court Orders Denying Stays in Deference to Concurrent State Court Proceedings

When Congress conferred non-exclusive subject matter jurisdiction upon the federal trial courts, it created the potential for simultaneous resort to state and federal courts by parties to a single dispute. The Supreme Court has consistently affirmed the principle that pendency of an action in state court is not a jurisdictional impediment to instituting a suit on the same cause of action in a federal court, provided that one or both of the actions are in personam. Yet it is equally well established that federal trial courts are no longer under an absolute obligation to exercise jurisdiction and may stay federal proceedings when the controversy may be settled more expeditiously in state court. Since the inception of the stay, the decision whether any particular action should be stayed has been committed to the district court's discretion.

In *Colorado River Water Conservation District v. United States*, the Supreme Court established parameters on a district court's power to stay federal proceedings pending state court actions, noting federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given to them." Yet in "exceptional circumstances," reasons of "wise judicial administration" do permit staying federal proceedings due to the presence of concurrent litigation in a state court. Although *Colorado River* can be viewed

1. The most apparent example of non-exclusive subject matter jurisdiction is diversity jurisdiction, enacted by Congress in 1789. See Microsoft Corp. v. Ontel Co., 686 F.2d 243, 250 (9th Cir. 1983) (Doyle, J., dissenting). The majority of the cases which come before federal courts are of a type over which the federal and state courts exercise concurrent jurisdiction. See generally Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits*, 60 COLUM. L. REV. 684 (1960).
3. When both actions are in rem or quasi in rem, the rule is well established that the court first perfecting jurisdiction over the property may exercise its jurisdiction to the exclusion of the other. See Princess Lima v. Thompson, 305 U.S. 456 (1939); United States v. Klein, 303 U.S. 276 (1938).
7. Calvert Fire, 437 U.S. at 664.
10. 424 U.S. at 818. Although the technical issue in *Colorado River* focused on dismissals
as significantly limiting the situation where a stay may be appropriate, the Court subsequently indicated in *Will v. Calvert Fire Ins. Co.* that *Colorado River* "in no way undermined the conclusion . . . that the decision whether to defer to the concurrent jurisdiction of a state court is, in the last analysis, a matter committed to the district court's discretion."12

*Microsoftware Computer Systems, Inc. v. Ontel Co.*,13 a recent Seventh Circuit case, substantially extended the inquiry into the discretionary power of a district court to grant or refuse stays. At issue was whether a federal district court is ever *required* to stay federal proceedings pending concurrent state court litigation. The Seventh Circuit, noting that the case was one of "first impression," held that the trial court's refusal to stay constituted an abuse of discretion.14 *Ontel* has been described as one of the most significant decisions of a United States court of appeals in the last decade.15 This decision, if followed in other circuits and maintained in the Seventh Circuit,16 creates a new limitation on the power of the national courts, indicating a substantial change in the distribution of power between the federal and state court systems.17

This Note examines the appealability of orders refusing to stay federal proceedings in deference to concurrent state court proceedings. Consideration is first given to the circumstances in which federal stays are proper. Included in this discussion is an evaluation of the *Ontel* holding. Attention is then directed to statutory mechanisms affording appellate jurisdiction. Specifically, analysis focuses on whether orders denying stays may be appealed of right, either as denials of injunctions under 28 U.S.C. § 1292(a)(1) or as final decisions within the meaning of 28 U.S.C. § 1291, or whether such orders may receive discretionary review, either by certification pursuant to 28 U.S.C. § 1292(b) or by a writ of mandamus under 28 U.S.C. § 1651(a). This Note concludes that these statutory provisions generally do not provide, and should not be expanded to provide, review of orders refusing to stay federal proceedings in deference to concurrent state court litigation.

rather than stays, the court subsequently indicated that the principles articulated in *Colorado River* are equally applicable to stays. See *Calvert Fire*, 437 U.S. at 672 (Brennan, J., dissenting).

11. 437 U.S. 655 (1978). The Court subsequently stressed that *Calvert Fire* did not undermine the importance of the exceptional circumstances test articulated in *Colorado River*. Justice Blackmun, although concurring in the judgment in *Calvert Fire* agreed with the four dissenting justices to form a majority opinion that requires application of the *Colorado River* test. *Mercury Const.*, 103 S. Ct. at 937-38.

12. 437 U.S. at 664.

13. 686 F.2d 531 (7th Cir. 1982).

14. *Id.* at 538.


16. The *Ontel* decision has been cited at least three times with apparent approval. See *Evans Transp. Co. v. Scullin Steel Co.*, 693 F.2d 715, 719 (7th Cir. 1982); *Voktas, Inc. v. Cent. Soya Int'l, Inc.*, 689 F.2d 103 (7th Cir. 1982); *Architectural Floor Prods. Co. v. Don Brann & Assocs., Inc.*, No. 81-5515, slip op. (N.D. Ill. October 26, 1982).

17. Jeffery Shaman, Professor of Law at DePaul University, views the *Ontel* ruling as "part of a trend to channel cases from the federal courts to state courts," *supra* note 15, at 457.
THE PROPRIETY OF FEDERAL STAYS

The "Exceptional Circumstances" Test

In Colorado River, the Supreme Court addressed the circumstances in which it is appropriate for a federal district court to stay a proceeding before it in deference to a parallel state court proceeding. The Court explained that in situations where jurisdiction is concurrent in two or more federal courts, the general principle is to avoid duplicative litigation.\(^{18}\) Where the action paralleling a federal suit is in a state court, however, the district court’s power to dismiss the federal suit is limited by the "virtually unflagging obligation" of the federal courts to exercise the jurisdiction given them.\(^{19}\) The circumstances that justify federal court inaction in deference to a state proceeding must be "exceptional."\(^{20}\)

The Court declined to prescribe a hard and fast rule for dismissal of the type in Colorado River, but instead described factors relevant to the decision. Specifically, the Court mentioned the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the priority of jurisdiction in the concurrent forums. The Court stressed that no one factor was necessarily determinative and that "only the clearest of justification will warrant dismissal."\(^{21}\) Justice Brennan’s opinion in Calvert Fire attempts to clarify the situations in which a stay of federal proceedings in deference to concurrent state action may be proper:

Just how "exceptional" such circumstances must be was made clear by our admonition that "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention." Since we had previously noted that "abdcation of the obligation to decide cases can be justified under [the abstention] doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." . .. the circumstances warranting dismissal "for reasons of wise judicial administration" must be rare indeed.\(^{22}\)

Evaluation of the Ontel Decision

The facts of Ontel do not distinguish it as a case so "exceptional" as to justify the Seventh Circuit’s holding that failing to stay the federal action

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20. Id. at 818.
21. Id. at 818-19.
constituted an abuse of discretion. Ontel, a New York corporation, delivered certain goods to MCS, an Illinois corporation, pursuant to contractual agreement. Ontel brought an action against MCS in New York state court, alleging MCS repudiated by failing to complete the prescribed payments. MCS refused to answer in state court, contesting the service of process. Instead, it instituted a separate proceeding against Ontel in federal district court in Illinois. Each of MCS's federal court claims arose out of the sale of goods which was the subject of the state court proceedings.

Approximately one month subsequent to the filing of the federal suit, Ontel filed a motion with the district court to stay the federal proceedings pending resolution of the state court litigation. At the time the motion was considered, MCS had still not answered in state court. The district judge denied the motion to stay. While noting that the two actions were "substantially identical," he found insufficient reason to shirk a district court's obligation to exercise jurisdiction.

In reversing the district court's decision to exercise jurisdiction over MCS's complaint, the Seventh Circuit recited three main considerations which purportedly required that the proceedings be stayed. These considerations included the lack of an identifiable federal interest in trying the case, the fact that the state court first perfected jurisdiction over the dispute, and the judicial diseconomy inherent in duplicative law suits.

The Seventh Circuit's conclusion that these considerations mandated that the federal suit be stayed is inconsistent with the "exceptional circumstances" test articulated by the Supreme Court in Colorado River. In Colorado River, the decisive factor in favor of staying the concurrent federal proceedings was "the clear federal policy" evinced by the McCarran Amendment of "avoid[ing] the piecemeal adjudication of water rights in a river system . . . a policy that recognizes the availability of comprehensive state systems for adjudication..." 

Pursuant to the contract between the parties, any dispute which arose was to be settled using New York state law. See Ontel, 686 F.2d at 533.

In its federal complaint, MCS alleged breach of warranty, breach of contract, fraudulent misrepresentations, and violation of the Illinois Fraud and Deceptive Consumer Practices Act (ILL. ANN. STAT. ch. 121 1/2, ¶ 261 (Smith-Hurd 1960)).

The basis of the Seventh Circuit's contention that there was no federal interest in trying the case was that MCS could have removed the state action had they been concerned with prejudice. This view ignores the facts of the case. In determining the propriety of a stay, the appellate court must view the facts as they were at the time the stay motion was made. Evans, 693 F.2d at 718. In Ontel, at the time the stay motion was made, MCS's ability to remove the state suit pursuant to 28 U.S.C. § 1441 had expired. There is no precedent for the contention that a litigant must attempt to remove a suit before he may institute a separate action in federal court. To the contrary, the Supreme Court has upheld the principle that a suit may proceed simultaneously in state and federal court. See supra note 2 and accompanying text.

The Seventh Circuit subsequently indicated that this factor has little substantive significance. See Evans, 693 F.2d at 718. In commenting on the priority issue, the Supreme Court in Mercury Const. stated that the focus should not center on which complaint was filed first, but rather on the relative progress in each action. 103 S. Ct. at 940.
of water rights as the means for achieving this goal."\textsuperscript{28} No comparable federal policy favoring unitary state adjudication existed in \textit{Ontel}. The lack of a particular federal interest in trying a case is clearly distinguishable from a strong federal policy favoring a stay.

If \textit{Ontel} is an example of circumstances sufficient to stay federal proceedings, it could be argued that a stay is proper whenever federal jurisdiction is based on diversity. Although diversity jurisdiction has been criticized as being outmoded and financially burdensome,\textsuperscript{29} until Congress decides to alter or eliminate this method of obtaining a federal forum, courts should not treat the diversity litigant as a second class citizen.\textsuperscript{30}

When a stay operates to deny a litigant a federal forum to which the jurisdictional statutes appear to entitle him, "it should not be granted unless there are substantial reasons going beyond the interest in judicial economy . . ."\textsuperscript{31} To require less would allow the federal suit to be stayed wherever there are parallel suits. The values served by the jurisdiction of the national courts have been thought so significant as "to render tolerable, not intolerable," occasional inefficiency. As Judge Doyle, dissenting in \textit{Ontel}, lamented, "this distinctly unexceptional case fails miserably as the occasion for the pronouncement of a new limitation upon the power of the national courts."\textsuperscript{32}

In addition to signaling a significant curtailment of federal jurisdiction, \textit{Ontel} also raises the threshold issue of whether appellate courts have jurisdiction to question the propriety of a district court's decision to exercise jurisdiction over a matter properly before it. The ensuing discussion suggests that generally they do not.

**DIRECT APPEAL OF RIGHT**

\textbf{Denial of Stay as a Refusal to Issue an Injunction: Section 1292(a)(1)}

By virtue of section 1292(a)(1) of the Judicial Code,\textsuperscript{33} appellate courts have jurisdiction over "interlocutory orders of the district courts . . . granting . . . or . . . refusing . . . injunction." Case law suggests that denials of stays

\begin{itemize}
  \item \textsuperscript{28} \textit{Colorado River}, 424 U.S. at 819.
  \item \textsuperscript{29} See generally Currie, \textit{The Federal Courts and the American Law Institute}, 36 U. CHI. L. Rev. 1, 268 (1968).
  \item \textsuperscript{30} \textit{See Evans}, 693 F.2d at 717.
  \item \textsuperscript{31} Id.
  \item \textsuperscript{32} \textit{Ontel}, 686 F.2d at 540 (Doyle, J., dissenting).
  \item \textsuperscript{33} Section 1292 provides:
    \begin{enumerate}
    \item The courts of appeals shall have jurisdiction of appeals from:
      \begin{enumerate}
      \item Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.
      \end{enumerate}
    \end{enumerate}
  \end{itemize}

are not independently reviewable under this provision. Such orders, however, potentially may be appealed as analogous to refusing an injunction under the judicially created doctrine known as the Enelow-Ettelson rule.

For an appellate court to invoke the Enelow-Ettelson rule to obtain jurisdiction over an order denying a stay, two requirements must be satisfied. First, the action in which the order was entered must be one which, prior to the merger of law and equity, would have been at law. Second, the stay must have been sought to allow the prior determination of an equitable defense or counterclaim. This latter prong of the Enelow-Ettelson rule is satisfied where, prior to the merger of law and equity, the party asserting the defense or counterclaim would have had to institute an independent action in a court of equity. The explanation of these requirements is embodied with seemingly archaic pre-merger customs, yet Enelow-Ettelson remains a viable doctrine of appellate jurisdiction. When both of the requirements are satisfied, the order denying a stay is appealable as analogous to a denial of an injunction by a court of equity to restrain proceedings in a separate action at law.

The historic analogy fails, however, if the principal suit is equitable in character. An equity court would have merely entered an order governing the sequence of trying the issues of a case. Similarly, the historic analogy fails if the matter sought for prior determination is legal in nature. A court of law need not have enjoined itself, and could not have enjoined an equity court, to secure the prior determination of legal issues.

The Ontel court acknowledged that Enelow-Ettelson was controlling on the issue of appealability. The first requirement of Enelow-Ettelson was easily

34. See, e.g., W.T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir. 1976); Glen Oaks Util., Inc. v. City of Houston, 280 F.2d 330 (5th Cir. 1960).
36. See, e.g., Whyte v. THinc Consulting Group Int'l, 659 F.2d 817, 818-19 (7th Cir. 1980).
37. Id.
38. Moore, supra note 22, at ¶ 110.20(3).
39. The distinction between law and equity embodied in the Enelow-Ettelson rule has been the topic of vast criticism among the circuit courts. See, e.g., Hussain v. Bache & Co., 562 F.2d 1287, 1289 nn.1-3 (D.C. Cir. 1977); Wallace v. Norman Indus., Inc., 467 F.2d 824, 827 (5th Cir. 1972). At least one commentator has suggested that if the distinction were to be eliminated, it would be best to deny appeals from all orders which directly govern the order of the trial, whether as a matter internal to a single lawsuit or as a matter of relations between separate tribunals. See, e.g., C. Wright, supra note 22, at ¶ 3923; see also J. Moore, supra note 22, at ¶ 110.20(3).
42. Jensenius, 639 F.2d at 1343-44 n.3; see, e.g., Great Am. Trading Corp. v. I.C.P. Cocoa, Inc., 629 F.2d 1282 (7th Cir. 1980); see generally Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955); City of Morgantown v. Royal Ins. Co., 337 U.S. 254 (1949).
43. Jensenius, 639 F.2d at 1343-44 n.3.
44. Ontel, 686 F.2d at 535.
satisfied. The principal dispute essentially involved a breach of contract, an action clearly legal in character. In finding the second requirement also satisfied, however, the Ontel court significantly expanded the scope of the review afforded by the rule.45

The court's expansion of Enelow-Ettelson stems from the reasoning it employed in concluding that Ontel sought the stay to allow prior determination of an equitable defense. Initially, the court correctly indicated that the substantive basis for a stay is to avoid unnecessary and financially wasteful duplication of lawsuits.46 The Supreme Court in Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.47 commented that control of duplicative litigation is a matter of equitable discretion. Relying on Kerotest, the Ontel court concluded that since the district court's decision to deny the stay was an exercise of equitable discretion, the second requirement of Enelow-Ettelson was satisfied. On that basis, it assumed jurisdiction over the appeal. This result is strikingly suspect in that Ontel did not even attempt to claim that it had sought the stay to allow the prior determination of an equitable defense, but merely to avoid additional expense.48 The effect of the Ontel decision is virtually to abrogate the second requirement of the Enelow-Ettelson rule, making any grant or denial of a stay appealable where the action in which it is entered is legal in nature.

In justifying its extension of appellate jurisdiction over the order denying the stay, the court construed section 1292(a)(1) as being flexible enough to allow review of orders which would be effectively unreviewable on appeal from a final judgment. Such an expansive construction of section 1292(a)(1) is unwarranted. Rather, the section was designed to have very narrow application,49 consistent with the congressional policy against piecemeal appeals.50 The Supreme Court has consistently held that for an interlocutory

45. The issue of § 1292(a)(1) review of an order denying a stay was also raised in Central Soya Co. v. Voktas, 661 F.2d 78, 80 n.6 (7th Cir. 1981), but could not be decided because defendants had not complied with the requisite notice of appeals provision.


47. 342 U.S. 180 (1951). "Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature." Id. at 183. In Kerotest the concurrent lawsuits were pending before two federal courts. The Court subsequently indicated that the circumstances justifying stays pending concurrent state litigation are substantially more limited. See supra notes 18-22 and accompanying text.

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

49. See Mellon Bank, 651 F.2d at 1249. See also U.S.M. Corp. v. G.K.N. Fasteners, Inc., 574 F.2d 17, 22 (1st Cir. 1978) ("The Enelow-Ettelson rule provides, in the form of a vestigial holdover, an errant exception to the general requirement of finality. As an exception . . . it is properly constricted to as narrow a compass as possible.").

50. Substantial concerns are embodied in the "final-judgment rule." Among these are the conservation of judicial resources, see Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945); promotion of better informed decisions, see Bodinger, 348 U.S. at 180-91; and preservation of the respect and integrity of federal trial courts, see Wright, The Doubtful Omniscience
order to be reviewable under section 1292(a)(1) a litigant must show not only that the order appealed has the practical effect of granting or refusing to grant an injunction, but also that it may have a "serious, perhaps irreparable consequence."  

Analysis of court decisions prior to Ontel suggests that section 1292(a)(1) should be applied with "an eye toward a finding of nonappealability." To minimize interlocutory appeals, appellate courts have scrutinized actions stringently in determining whether they are legal or equitable in nature, resolving all fair doubt about the character of an action against the claim that it is predominantly one at law. For example, in Schine v. Schine, plaintiff brought suit for $15,000,000 in damages due to alleged fraud and for an accounting arising out of defendant's alleged breach of fiduciary duty. Defendant sought interlocutory appeal under section 1292(a)(1) of the district court's refusal to stay the action to allow prior determination of an equitable counterclaim. The Second Circuit dismissed the appeal for lack of jurisdiction, holding that since the claim for an accounting would have been cognizable only in equity prior to the merger of law and equity, the entire suit was equitable for purposes of appealability. 

Similarly, appellate courts have strictly enforced the equitable defense requirement of the Enelow-Ettelson rule. In Jensenius v. Texaco, Inc. Marine Dept., a case very similar to Ontel, the district court stayed federal proceedings to permit resolution of a legal claim pending before a state court. The Fifth Circuit held Enelow-Ettelson did not allow review of the order because the stay was not sought to allow prior determination of an equitable claim or defense. The Jensenius court commented:

Absent an equitable defense or counterclaim "to support the fiction that the power of a court of equity has been invoked by a defendant to restrain the prosecution of a suit at law against him, there is no basis for holding

of Appellate Courts, 41 Miss. L. Rev. 751, 775 (1957). This last concern is particularly significant where the matter is committed to the broad discretion of the district courts.


52. Mellon Bank, 651 F.2d at 1249.

53. Id. at 1248.

54. 367 F.2d 685 (2d Cir. 1966).

55. Id. at 687-88. See also Lee, 593 F.2d at 1269 (mixed claims are to be treated as equitable unless the equitable relief sought is "incidental" or "clearly subordinate" to the legal claims); Danford v. Schwabacher, 488 F.2d 454, 457 (9th Cir. 1973) (mixed action deemed equitable if "it cannot fairly be said that either the legal or the equitable aspects predominate"). Strictly construing the legal character of a suit, however, is no longer permitted when the constitutional right to a jury trial is in question. See Dairy Queen v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc., v. Westover, 359 U.S. 500 (1959). There is a solid basis for this anomaly. The right to a jury trial is guaranteed by the seventh amendment and, as such, deserving of stringent safeguards. See G.K.N. Fasteners, 574 F.2d at 22.

56. 639 F.2d 1342 (5th Cir. 1981).

57. Id. at 1343; see also United States v. Georgia Pac. Corp., 562 F.2d 294, 296 (4th Cir. 1977); Hines v. D'Artois, 531 F.2d 726 (5th Cir. 1976); Wallace v. Norman Indus., Inc., 467 F.2d 824 (5th Cir. 1972).
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that the stay order . . . was equivalent to an injunction and, as such, appealable under § 1291(a)(1)."\(^58\)

Had the expansive reasoning articulated in the \textit{Ontel} decision been applied in \textit{Jensenius}, the order would have been appealable merely because the principal action was legal in character.

The Supreme Court, although it has never spoken directly on the applicability of section 1292(a)(1) to orders denying stays pending concurrent state court proceedings, has warned against \textit{Ontel}-type expansion of the \textit{Enelow-Ettelson} rule. Chief Justice Hughes' landmark opinion in \textit{Enelow v. New York Life Ins. Co.}\(^10\) specifically distinguished ordinary denials of stays, which are not reviewable, from those which are analogous to refusing an injunction.

This § 129 [predecessor to § 1292(a)(1)] contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice.\(^6\)

Subsequent to the \textit{Enelow} decision, the Court acknowledged the needless reliance on pre-merger procedural differentiations embodied in the \textit{Enelow-Ettelson} rule, yet indicated that the rule should not be modified by federal courts.

The reliance on the analogy of equity power to enjoin proceedings in other courts has elements of fiction in this day of one form of action. . . . The distinction has been applied for years, however, and we conclude that \textit{it is better judicial practice to follow the precedents which limit appealability of interlocutory orders}, leaving Congress to make such amendments as it may find proper.\(^61\)

In expanding the type of decision afforded review under the \textit{Enelow-Ettelson} rule, the \textit{Ontel} court compromised its authority to authorize appeals. The approach taken in \textit{Ontel} sets dangerous precedent for expanding interlocutory reviews, in direct conflict with the congressional policy against piecemeal appeals and specific Supreme Court mandate.\(^62\) Many interlocutory orders are equally important as orders denying stays and may determine the outcome of the litigation, but they are not for that reason converted into grants or denials of injunctions for purposes of appealability.\(^63\)

\(^{58}\) \textit{Jensenius}, 639 F.2d at 1343 (quoting Jackson Brewing Co. v. Clarke, 303 F.2d 844, 846 (5th Cir.), cert. denied, 371 U.S. 891, reh'g denied, 371 U.S. 936 (1962)).

\(^{59}\) 293 U.S. 379 (1935).

\(^{60}\) \textit{Id.} at 381-82. The point was made in \textit{Enelow} that the power to stay mere steps within the framework of the litigation before a court differs as to appealability from an injunction prohibiting proceedings in another court. This distinction was applied in Morgantown v. Royal Ins. Co., 337 U.S. 254 (1948).

\(^{61}\) \textit{Bodinger}, 348 U.S. at 184-85 (emphasis added).

\(^{62}\) \textit{See id.} (courts should not compromise their authority to exercise appellate jurisdiction merely to simplify litigation).

\(^{63}\) The Court employed this same analysis to refuse interlocutory appeal of an order striking a jury demand in Morgantown v. Royal Ins. Co., 337 U.S. at 258.
An alternative statutory mechanism for direct appeal of right is 28 U.S.C. § 1291, which provides for appeal of final decisions. Embodied in section 1291 is the strong congressional policy against "piecemeal appeals." Concern for conserving judicial resources and minimizing the significant delays caused by interlocutory appeals provoked the Supreme Court in Catlin v. United States to define final decisions, within the meaning of section 1291, as those which "end the litigation on the merits and leave nothing for the court to do but execute the judgment." At first blush, it appears obvious that trial court orders denying stays are not final decisions in the sense of "ending the litigation." To the contrary, the denial of a stay often signals parties to commence litigation in the federal courts. This has lured some courts into summarily dismissing section 1291 review of orders denying stays. Such a cursory disposition of the appealability issue, however, even if correct, is unjustifiable. Many apparent interlocutory decisions have been deemed to be "effectively final" under a doctrine known as the "collateral order" rule, first articulated by the Supreme Court in Cohen v. Beneficial Industrial Loan Corp.

Cohen, a diversity suit, involved an appeal from an order denying defendant's motion to require plaintiffs to post bond for payment of expenses incurred in defense of a stockholder's derivative suit, as required by a statute of the forum state. The Court's opinion began by emphasizing that there can be no appeal before final judgment "even from fully consummated decisions, where they are but steps towards final judgment in which they will merge." Yet the Court found the decision by the trial court not to require security immediately appealable, noting:

"This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

Four requisites of appealability can be distilled from the above passage and other language in the Cohen opinion. For an order to be within the "small class" of decisions excepted from the final judgment rule, it must resolve
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a question completely separate from the merits of the action, conclusively determine the disputed question, be effectively unreviewable on appeal from a final judgment, and involve a question of public importance.\footnote{72. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374-75 (1981).}

Analogizing from Cohen, courts have held a host of judgments appealable that are nominally interlocutory.\footnote{73. See generally C. Wright, supra note 22, at § 3911.} Whether denials of stays pending state court proceedings are appealable under Cohen is still an unsettled question. Justice Black, dissenting in Baltimore Contractors, Inc., v. Bodinger,\footnote{74. 348 U.S. 176 (1955).} concluded that an order denying a stay pending arbitration was within the exception to finality carved out by Cohen.\footnote{75. Id. at 185-86 (Black, J., dissenting).} Additionally, several circuits have held that stay orders are appealable as final decisions under section 1291.\footnote{76. See infra notes 104-07 and accompanying text. The Supreme Court recently held that a stay is appealable under § 1291 in Moses H. Memorial Hosp. v. Mercury Constr., 103 S. Ct. 927 (1983).} A strong argument can be made, however, that orders denying stays in deference to concurrent state court proceedings do not meet two of the Cohen criteria.\footnote{77. Two of the Cohen criteria are satisfied by orders denying stays pending state proceedings. First, such orders are collateral to the merits of the litigation. Second, such orders are not effectively reviewable on appeal from a final judgment. See Ontel, 686 F.2d at 534.}

It is unclear how a denial of a stay could satisfy the "importance" requisite of the collateral-order rule. The Cohen opinion indicated that to satisfy this requirement the order must involve a "serious and unsettled question,"\footnote{78. Cohen, 337 U.S. at 547; see also In re San Juan Star Co., 662 F.2d 108, 112 (1st Cir. 1981); United States v. Sorren, 605 F.2d 1211, 1213 (1st Cir. 1979).} not merely a question of the proper exercise of trial court discretion. An order denying a stay clearly falls into the latter category. The factual situations out of which stay motions arise tend to be individualized and complex, and the trial court has been granted broad discretion in determining the propriety of a stay in any particular situation.\footnote{79. See supra notes 7-12 and accompanying text.}

Although the public importance element has been criticized as not being an analytically proper component of the collateral order test,\footnote{80. See In re Continental Inv. Corp., 637 F.2d 1, 6 (1st Cir. 1980).} and although the Supreme Court has apparently never rejected an appeal for failure to satisfy it,\footnote{81. Id. at 7.} the Court has continued to include it in its statement of the Cohen doctrine.\footnote{82. See, e.g., Firestone, 449 U.S. at 374-75.} Strong policy considerations suggest that this criterion should be given substantive significance. Requiring that an order be of public significance to be appealable under Cohen accords a reasonable division of duties between trial and appellate courts. In making factual judgments or in applying general legal standards to particular fact situations, the trial court's judgment should rarely be disturbed. Only where a legal issue of general applicability is concerned is the appellate court arguably more competent.\footnote{83. See Wright, supra note 50, at 775.} By affording the
public importance element of *Cohen* practical significance, the division of duties reflected in the “clearly erroneous” and “incorrect” standards of review would also be reflected in the standards for direct appealability.

There is also serious doubt that a denial of a stay “conclusively determines the disputed question” within the meaning of *Cohen*. The critical inquiry in this regard concerns the trial court’s ability to reconsider the decision denying the stay as the trial progresses. Justice Jackson stressed in *Cohen* that the order before the Court was a “final disposition of a claimed right” and specifically distinguished cases in which the question was “subject to reconsideration from time to time.”\(^8^4\) Subsequent Supreme Court decisions, however, suggest that this distinction is not as dispositive as it may first appear.

In *Gillespie v. U.S. Steel Corp.*,\(^8^5\) the Court provided that in determining the question of finality the most important consideration is the “danger of denying justice” by delaying appellate review.\(^8^6\) A detailed reading of the *Cohen* opinion indicates that this same concern was an important factor in the Court’s decision to grant appellate review.\(^8^7\) Together, *Cohen* and *Gillespie* may be analyzed as creating a continuum: as the risk increases that an order may cause serious, perhaps irreparable harm, the Court is more willing to sanction a pragmatic approach to finality, dispensing with the “technical” impediments to appellate review. This construction would allow appellate courts to balance the effect of an order in a particular proceeding, freeing them from the constrictions imposed by the technical possibility that the order may subsequently be modified at the trial court level.

A trilogy of recent Supreme Court opinions supports this construction of the finality requirement. In *United States v. MacDonald*,\(^8^8\) a criminal defendant sought appellate review of a denial of a pre-trial motion to dismiss a murder indictment due to alleged violation of the sixth amendment right to a speedy trial. The court of appeals reversed the district court order and remanded the case with instructions to dismiss the indictment. Because of the importance of the jurisdictional question embodied in *MacDonald*, the Supreme Court granted certiorari.

The Court noted that it frequently had considered the appealability of pre-trial orders in criminal cases, twice departing from the general prohibition against piecemeal appellate reviews.\(^8^9\) In both cases in which the Court exercised appellate jurisdiction, it relied on the collateral-order exception articulated in *Cohen*.\(^9^0\)

In reversing the judgment of the Fourth Circuit, the Court intimated that

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86. *Id.* at 152-53 (the Court indicated that this factor should be balanced against the cost and inconvenience of piecemeal review).
89. *Id.* at 853.
90. *Id.*
denying immediate appellate review of the order did not create a substantial risk of denying justice. The resolution of the speedy trial claim necessitated a careful assessment of the particular facts of the case and therefore could best be considered after the relevant facts had been produced at trial. On that basis, the Court concluded that since the motion could be reconsidered by the trial court at a later point in the proceedings, the original order should be reinstated.

The same basic balancing approach was employed by the Court in Coopers & Lybrand v. Livesay. In Livesay, plaintiffs who had purchased securities in reliance on a prospectus instituted an action on behalf of themselves and other similarly situated purchasers, alleging defendants had violated federal securities laws. The district court first certified, and then after further proceedings, decertified the class.

Plaintiffs sought immediate review of the decertification order, filing a notice of appeals pursuant to section 1291. The Eighth Circuit exercised jurisdiction under the collateral order exception and reversed the adverse class determination on the grounds that plaintiffs may have found it economically imprudent to pursue the lawsuit to final judgment and then seek appellate review of the class decertification.

In reversing the court of appeals, the Court relied, in part, on the power of the district court to reconsider and modify the class decertification. The Livesay decision is significant in that it suggests the requisite risk of “denying justice” sufficient to outweigh the technical infinality of a nominally interlocutory order. The Court distinguished the irreparable harm present in Gillespie, finding it insignificant that the decertification order “may induce a party to abandon his claim before final judgment.” The Livesay opinion indicates that for an order to be appealable as conclusively determining a claimed right it must impose a substantial legal impediment rather than a mere economic disincentive. The Court intimated that to hold otherwise would infringe on “the appropriate relationship between the respective courts.”

The next Supreme Court comment defining the collateral-order exception is found in Justice Rhenquist’s concurring opinion in Firestone Tire & Rubber Co. v. Risjord. In Risjord, the court held that an order denying a mo-

91. Id. at 858-59.
92. Id. at 861.
94. Id. at 466-67.
95. Id. at 469. In subsequently discussing the Livesay decision, the Court cautioned that virtually all interlocutory orders may be altered or amended before final judgment; yet that does not render all such orders “inherently tentative.” The reasoning of the Livesay decision therefore only reaches orders where some revision might reasonably be expected in the ordinary course of litigation. Moses H. Memorial Hosp. v. Mercury Constr., 103 S. Ct. 927, 935 n.14 (1983).
96. Livesay, 437 U.S. at 477.
97. Id. at 476. (“[A]ny such ad hoc decisions [extending appellate jurisdiction] disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money”) (quoting Bodinger, 348 U.S. at 181-82).
tion to disqualify opposing party's counsel in a civil case was not immediately appealable under the collateral-order exception. The majority based its holding on the finding that the order was effectively reviewing on appeal from a final judgment.\textsuperscript{99} Justice Rehnquist, however, specifically focused on the issue of whether the order denying disqualification of counsel "conclusively determined the disputed question" within the meaning of \textit{Cohen}. Relying on the analysis employed in \textit{MacDonald} and \textit{Risjord}, Justice Rehnquist concluded that the question was not "conclusively determined" for purposes of appealability.\textsuperscript{100} The two considerations advanced to justify this conclusion demonstrated a balancing approach consistent with \textit{Cohen} and \textit{Gillispie}. First, the district court remained free to reconsider its decision at anytime during the trial process.\textsuperscript{101} Second, the denial of immediate review did not create a substantial risk of irreparable harm.\textsuperscript{102} As in \textit{MacDonald}, it could not be assumed that the same motion would be denied if made at a later point in the proceedings, when prejudice could better be assessed.

The pragmatic approach to finality, which emanates from the Supreme Court's cumulative interpretation of the collateral-order exception, developed concurrently in the circuit courts to extend appellate jurisdiction over order granting stays. In \textit{Amdur v. Lizars},\textsuperscript{103} a forerunner among the cases adopting this approach, the Fourth Circuit exercised jurisdiction over an appeal from an order staying federal proceedings pending resolution of similar proceedings in state court. Being careful not to encourage a multitude of appeals from stay orders, the \textit{Amdur} court indicated that only such orders that amount to a dismissal of the proceedings are appealable.\textsuperscript{104} The Fourth Circuit reiterated that in the usual case, stay orders are not appealable but are "merely interlocutory orders stating what the court proposes to do which may be revoked or superseded at any time."\textsuperscript{105} Subsequent circuit court decisions have mirrored the distinctions established in \textit{Amdur}.\textsuperscript{106}

Implicit in the distinction, for purposes of appealability, between ordinary stays and those which are tantamount to dismissals, is that the latter present

\begin{itemize}
\item \textsuperscript{99} \textit{Id.} at 377-78.
\item \textsuperscript{100} \textit{Id.} at 380-81 (Rehnquist, J., concurring).
\item \textsuperscript{101} \textit{Id.}
\item \textsuperscript{102} \textit{Id.} at 376.
\item \textsuperscript{103} 372 F.2d 103 (4th Cir. 1967).
\item \textsuperscript{104} \textit{Id.} at 106.
\item \textsuperscript{105} \textit{Id.} at 105-06 (quoting International Nickel Co. v. Martin J. Barry, Inc., 204 F.2d 583, 585 (4th Cir. 1962)).
\item \textsuperscript{106} See, e.g., Whyte v. THinc Consulting Group Int'l., 659 F.2d 817, 818 (7th Cir. 1981) ("An order staying judicial proceedings ... that ... does not result in a dismissal of the action is not a final order within the meaning of 28 U.S.C. § 1291."); Drexler v. Southwest Dubois School Corp., 504 F.2d 836, 838 (7th Cir. 1974) (en banc) ("Technically this case was ... merely stayed pending litigation in the state courts and it could be argued that the order is not appealable. However, we think it is only logical to consider this order a final judgment.") (emphasis added); see also Moses v. Kinnear, 490 F.2d 21, 24 (9th Cir. 1973); Druker v. Sullivan, 458 F.2d 1272, 1274 n.3 (1st Cir. 1972). But see State Farm Mut. Ins. Co. v. Scholes, 601 F.2d 1151 (10th Cir. 1979) (stay pending state court proceedings held not appealable within § 1291 or \textit{Cohen}).
\end{itemize}
a risk of serious, perhaps irreparable harm sufficient to warrant immediate review, notwithstanding that the order may be subsequently vacated by the district court. Substantial federal policy concerns may justify this conclusion. It is deeply embedded in American legal procedure that a party should have the opportunity to pursue claims in the forum of its choice. When that choice includes a federal forum, it should be strongly protected. Considerations warranting such protection include shielding out-of-state litigants from possible prejudice in state courts, securing the advantages of federal procedural rules, particularly the liberal discovery provisions, upholding the federal courts' "virtually unflagging obligation" to exercise jurisdiction over matters properly before them, and giving deference to the expertise of federal courts, especially when an issue of national significance is involved.

There is no comparable risk of "denying justice" where a trial court refuses to stay federal proceedings in deference to state court proceedings which would warrant immediate review under the collateral-order exception. In general, there is no substantive protection from unnecessary litigation. There are a wide variety of situations in which a ruling on a preliminary matter would determine whether or not the case is to continue; yet that does not make such rulings final for purposes of appealability. To rely on the hardship of being subjected to trial would abrogate the distinction between interlocutory and final orders. For this reason the Supreme Court has consistently held that the hazard of being subjected to trial does not vest a preliminary ruling with the finality requisite to appeal. Analyzed in the context of the balancing approach derived from Cohen and Gillespie, since no threat of serious harm is created by a denial of a stay, the power of the district court to reevaluate the order as the trial progresses precludes finding that the denial "conclusively determines the disputed question." This conclusion is not altered by


108. No court yet has indicated that the right to choose one's forum is any less substantial where an action is already pending before a separate tribunal. See supra note 2 and accompanying text.


110. Some courts have refused to stay federal actions to preserve the liberal federal discovery rules. See, e.g., Nevy v. Alexander, 170 F. Supp. 439 (E.D.N.Y. 1959). Other courts have conditioned stays on the assent of the state courts to use the federal discovery provisions. See, e.g., Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949).

111. See supra notes 18-22 and accompanying text.

112. See generally C. Wright, supra note 107, at §§ 17-20. The Supreme Court has upheld the discretionary power of district courts to stay actions based on exclusive federal jurisdiction. See Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978); see also Note, Jurisdiction-A Stay of Federal Court Proceedings Involving an Issue Within Exclusive Federal Jurisdiction, Pending Termination of a Parallel State Court Action, is Justified When the Federal Suit is Found to be Vexatious, 55 Notre Dame Law. 601 (1980).


115. See id.; see also Lamphere, 553 F.2d at 717.

the possibility that the denial of the stay may be erroneous. The Supreme Court in *Risjord* specifically warned against such expansion of finality.

Interlocutory orders are not appealable merely because they may be erroneous. To allow such wholesale appeals on that ground would not only constitute an unjustified waste of scarce judicial resources but would transform the limited exception carved out in *Cohen* into a broad disagreement of the finality rule imposed by congress in § 1291.¹¹⁷

**DISCRETIONARY REVIEW**

*Permissive Appellate Review: Section 1292(b)*

Some commentators have suggested¹¹⁸ that trial court orders denying stays of federal proceedings pending concurrent state court litigation should be certifiable under section 1292(b).¹¹⁹ In *Voktas, Inc. v. Central Soya International, Inc.*,¹²⁰ the Seventh Circuit accepted certification of such an order, yet did so apparently on the assumption that orders denying stays were certifiable.¹²¹ Analysis of the language and spirit of section 1292(b), however, suggests that such orders should not be permissively reviewed.

Congress enacted section 1292(b) in an effort to inject some flexibility into the technical rules of sections 1291 and 1292(a).¹²² Section 1292(b) provides interlocutory appeal of a carefully limited class of orders. The procedure for obtaining permissive review involves two steps. First, the trial court must certify the question for appeal.¹²³ Second, the court of appeals, in its unfettered discretion, must decide whether it will permit appeal to be taken from the order.¹²⁴ For a particular order to be certifiable three criteria must be satisfied:

1. The order must involve a controlling question of law;
2. There must exist a substantial ground for difference of opinion; and
3. The order must be such that immediate appeal may materially advance the ultimate termination of the litigation.

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¹¹⁸. See, e.g., J. Moore, supra note 22, at ¶ 110.20(4.2); C. Wright, supra note 22, at ¶ 3923.
¹¹⁹. Section 1292(b) provides:

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

²⁹. 689 F.2d 103 (7th Cir. 1982).
³⁰. Id. at 104 (the issue which the court discussed was whether a magistrate could certify an order under § 1292(b), not whether such a order was certifiable).
³¹. C. Wright, supra note 22, at ¶ 3929.
³². 28 U.S.C. § 1292(b).
³³. Id.
mediate appeal may materially advance the ultimate termination of the proceedings.125

Consistent with the congressional policy against interlocutory appeals, the House report on the bill126 and early court opinions indicated that permissive appeals should be reserved for "exceptional cases."127 As the court in Seven-Up Co. v. O-So Grape Co.128 noted:

There is nothing in the language of the statute or its legislative history to support the view that Congress intended to establish something akin to a "certiorari" policy for the court of appeals whereby important cases would not receive special treatment. . . . The statute was not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation.129

A strong argument can be made that trial court orders respecting a matter entrusted to the trial court's discretion do not involve a "controlling question of law" within the meaning of section 1292(b) and are therefore non-certifiable. The basis of this argument is that in affording immediate review to controlling questions of law, section 1292(b) was not designed to substitute wholesale appellate certainty for trial court uncertainty in situations where the trial court is given broad discretion.130 This position is consistent with the statutory language of the Act. When a trial judge has discretion to apply general legal standards to complicated fact situations, questions of fact, not law, generally predominate.131

Appellate courts have often accepted this construction of the statute in denying immediate review of discretionary orders. This is particularly well illustrated by opinions denying review of class certification orders. For example, in Link v. Mercedes-Benz of North America, Inc.,132 the Third Circuit refused to review a class certification of 300,000 claimants in an anti-injunction action because such certification "was grounded in the discretionary power of the district court."133 The court of appeals noted that the certification may have had a very significant practical effect on the litigation and that the aggrieved party had a very real interest in securing immediate appellate review, but it did not, for that reason, become a certifiable question.134 Similarly, in Wilcox v. Commerce Bank of Kansas City,135 the Tenth Circuit denied

125. See, e.g., Central Soya Co. v. Voktas, Inc., 661 F.2d 78 (7th Cir. 1981).
127. See, e.g., Krauss v. Board of Co. Road Comm'rs, 364 F.2d 919 (6th Cir. 1966); United States Rubber Co. v. Wright, 359 F.2d 784 (9th Cir. 1966).
129. Id. at 170-71.
133. Id. at 862.
134. Id. at 862-63.
135. 474 F.2d 336 (10th Cir. 1973).
section 1292(b) review of an order refusing to certify a class on the basis that
the order was within the sound discretion of the district court and therefore
should not be disturbed.\textsuperscript{136}

Applying the analysis of \textit{Link} and \textit{Wilcox} to trial court decisions regarding
stays indicates that both orders granting and denying stays should be non-
certifiable. It is well established that the decision to grant or deny a stay of
federal proceedings is committed to the broad discretion of the trial court.\textsuperscript{137}
Yet numerous cases have found orders granting stays certifiable under section
1292(b).\textsuperscript{138} Successful certification of such orders suggests three possible
conclusions. First, certification of the orders was erroneous; second, stay orders
are distinguishable from orders denying stays for purposes of permissive review;
or third, both orders are certifiable.

There is some authority for the argument that the decisions allowing section
1292(b) review of stay orders are erroneous. Some courts have limited
the definition of "controlling questions of law" to issues that may contribute
to the early determination of a \textit{wide spectrum} of cases.\textsuperscript{139} The Supreme Court
arguably exempted from that category questions concerning the propriety of
stays by intimating that it is not possible to develop a universal rule for deter-
mining when a stay of proceedings is proper.\textsuperscript{140}

The broad argument that stays are uncertifiable, however, is unnecessary
and, if possible, should be avoided due to the case support favoring certifiabil-
ity of stay orders. The requirement that the question contributes to the early
determination of a wide spectrum of cases is not supported by the language
of the section or its legislative history.\textsuperscript{141} This is not to concede the appealability
of orders denying stays under section 1292(b). Detailed analysis permits resolu-
tion of the apparent discrepancy in a manner consistent with both \textit{Link} and
\textit{Wilcox} and the decisions that have held stay orders certifiable. To resolve
this inconsistency, it is necessary to distinguish, for purposes of appealabil-
ity, orders that reflect a "conservative" exercise of discretion from those reflect-
ing "liberal" exercise of discretion. There is a general presumption that federal
courts should exercise jurisdiction over cases properly before them.\textsuperscript{142} The
circumstances where it is proper to stay federal proceedings pending concur-

\textsuperscript{136} See also Hellenstein v. Mr. Steak, Inc., 531 F.2d 470 (10th Cir. 1976); Blackie v. Bar-
rack, 524 F.2d 891 (9th Cir. 1975), \textit{But see} Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.),
cert. denied, 419 U.S. 885 (1974) (accepted appeal of class certification order under § 1292(b)).
\textsuperscript{137} Microsoft Computer Sys., Inc. v. Ontel Co., 686 F.2d 531, 534 (7th Cir. 1982).
\textsuperscript{138} See, e.g., P.P.G. Indus., Inc. v. Continental Oil Co., 478 F.2d 674 (5th Cir. 1973); Lear
Siegel, Inc. v. Adkins 330 F.2d 595 (9th Cir. 1964).
\textsuperscript{139} See, e.g., Kohn v. Royal, Koege & Well, 496 F.2d 1094 (2d Cir. 1973).
\textsuperscript{140} See Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665 (1978); see also Ontel, 686 F.2d
at 540 (Doyle, J., dissenting).

\textsuperscript{141} The Act makes no reference to the effect of the appeal on other cases. The certification
procedure was designed to facilitate the course of a particular litigation, rather than set prece-
dent. \textit{See supra} notes 119 & 126.

\textsuperscript{142} \textit{See supra} notes 18-22 and accompanying text.
rent state court proceedings are rare. Therefore, decisions denying stays of federal proceedings represent a conservative exercise of trial court discretion, consistent with the court's "obligation" to exercise jurisdiction. On the other hand, decisions staying federal proceedings represent a liberal exercise of discretion and, due to the substantial interests in providing a federal forum, require that some "exceptional circumstance" warrant the stay.

This distinction is extremely significant to the issue of appealability under section 1292(b). A prime factor in determining whether an order is reviewable under this provision as involving a controlling question of law is the probability that the order will be reversed on appeal. This reflects the intention of the framers of the statute to avoid wasteful litigation. Since the decision to grant or deny stays is committed to the discretion of the trial court, they are reviewable only for abuse. It is possible that a stay order, being a liberal exercise of discretion, would be reversed on appeal; thus the stay order may come with the provision of section 1292(b). It would be logically inconsistent, however, to find that a decision by the district court to exercise jurisdiction over a matter properly before it constitutes an abuse of discretion. On the contrary, such a decision is consistent with expressed Supreme Court mandate. Section 1292(b) is built on the presumption that a trial court will exercise discretion prudently. Allowing interlocutory appeal would certainly be more likely to lead to unproductive delay rather than the expeditious resolution of proceedings which the section was intended to promote. Therefore, an order denying a stay of federal proceedings pending concurrent state court action should not come within the scope of review extended by section 1292(b).

Empirically, discretionary orders which have been reviewed under this provision and subsequently were found to constitute an abuse of discretion support the distinction, for purposes of appealability, between conservative and liberal exercise of discretion. Appellate courts have found abuse of discretion in essentially two situations. The first is where the order violates expressed

143. Id.

144. This distinction was also articulated in Ontel. See Ontel, 686 F.2d at 542-43. (Doyle, J., dissenting) ("[t]he question is whether the district court was free to exercise its discretion in a conservative manner, to move in the mainstream, obedient . . . to its obligation to exercise jurisdiction").

145. See supra notes 18-22 and accompanying text.


147. See Katz, 496 F.2d at 755.

148. Seven-Up Co. v. O-SO Grape Co., 179 F. Supp. 167, 172 (S.D. Ill. 1959) ("[t]he principle that an exercise of discretion by the trial court is reviewable only for abuse is . . . well-founded in our jurisprudence").

149. See A. Olinick & Sons v. Dempster Bros. Inc., 365 F.2d 439, 442-43 (2d Cir. 1966) (where district court considered the correct factors but reached on erroneous conclusion, § 1292(b) did not provide a means of review); see also supra notes 23-32 and accompanying text. Even decisions to stay proceedings should not be reversed unless immoderate. In evaluating stay orders appellate courts should consider the scope of the stay and the reasons recited by the district court for the stay. See Hines v. D'Artois, 531 F.2d 726, 733 (5th Cir. 1976).

federal statutes. For example, in *In re Virginia Electric & Power Co.*,\(^{151}\) the Fourth Circuit accepted permissive appeal from an order by the district court judge recusing himself and other Virginia judges. The court noted that ordinarily the decision of whether to sit or not sit in a particular action is within the sound discretion of the trial court and as such not properly reviewable under section 1292(b).\(^{152}\) The appellate court granted review in *Virginia Electric*, however, because the order directly violated the statutory mandate of 28 U.S.C. § 455 and indicated a complete failure on the part of the district court to exercise the discretion given to it.\(^{153}\)

The second situation where discretionary orders have been reversed as constituting abuse of discretion is where they have violated significant policy concerns embodied in federal statute. For example, in *Mosely v. General Motors Corp.*,\(^{154}\) the district court order severing action alleging race discrimination in employment practices was held to constitute an abuse of discretion. Although the decision to order separate actions was within the trial court's discretion under Federal Rules of Civil Procedure 42(b), the appellate court justified reversing the order on the substantial policies embodied in, and statutory intent of, allowing permissive joinder under Federal Rules of Civil Procedure 20(a).\(^{155}\)

Denials of stays do not invoke either of the risks highlighted in *Virginia Electric* or *Mosely*. Rather, such orders are obedient to the district court's presumptive obligation to exercise jurisdiction and secure the federal interests in providing a forum for litigants. Section 1292(b) was enacted to reduce the unnecessary waste of judicial resources. Allowing discretionary review of orders denying stays would substantially undercut this goal.

*Writ of Mandamus: Section 1651(a)*

The final method of obtaining appellate review of interlocutory orders which merits discussion is the writ of mandamus.\(^{156}\) This is the only statutory mechanism that potentially could provide appellate review of orders denying stays without resorting to artifice or tortured language. Originally mandamus was thought only to issue where the duty to be performed was ministerial and the obligation to act peremptory and plainly defined.\(^{157}\) It was thought to be inappropriate to review decisions of district courts that were committed

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151. 539 F.2d 357 (4th Cir. 1976).
152. *Id.* at 363.
153. *Id.* at 363-64; see also *Johnson v. Georgia Hwy. Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969).
154. 497 F.2d 1330 (8th Cir. 1974).
155. *Id.* at 1332-34.
156. 28 U.S.C. § 1651(a) provides: "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1976).
to their discretion. The writ was gradually extended, however, to include cases in which the lower court had abused its discretion.

Some commentators and certain appellate court opinions suggest that mandamus will lie to review both grants and denials of stay motions. Such a conclusion, however, is unjustifiably overexpansive. The cases in which such statements were made and all the precedent upon which they are based, only concern situations where stays were granted. The assumption that mandamus should also lie where the stay was denied is obiter dictum and studied consideration of the statutory intent and judicial application of section 1651 suggest that it is erroneous.

The Supreme Court has repeatedly indicated that the traditional use of the writ in aid of appellate jurisdiction, both at common law and in the federal courts, has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.

To prevent excessive use of the provision, courts have established an extremely strict standard of review, limiting it to circumstances constituting a clear and indisputable judicial usurpation of power. Courts strictly prohibit use of the writ as a substitute for appeal regardless of the hardship which may result from delaying appellate review and a potentially unnecessary trial.

The decisive issue in determining whether mandamus will lie where a trial court refuses to stay federal proceedings pending state court litigation is whether such a decision could amount to a clear and indisputable usurpation of power. Because such a decision is committed to the trial courts discretion, it cannot be said that a litigant's right to a particular result is clear and indisputable.

This provoked the Supreme Court to state that such decisions ought not be overridden by a writ of mandamus. Such an issue is not merely technical since it raises grave questions of the continued strength of the salutary final judgment rule and the propriety of appellate interference with the trial process at an early stage of the proceedings.

158. Id. at 672.
159. See, e.g., Will v. United States, 389 U.S. 90, 95 (1967).
160. See, e.g., J. Moore, supra note 22, at ¶ 110.20[4.-2]; C. Wright, supra note 22, at § 3923.
162. See Lutes v. United States Dist. Ct., W. Dist. of Okla., 306 F.2d 948 (10th Cir.), cert. denied, 371 U.S. 941 (1962). The Lutes case served as the basis of the Pet Milk court's conclusion that writs of mandamus lie for both grants and denials of stays. Limiting Lutes to its facts, however, only serves as precedent for the availability of mandamus where stays are granted.
167. Id. at 665.
168. Parr v. United States, 351 U.S. 513, 520-21 (1956) (mandamus may not be used to thwart the congressional policy against piecemeal appeals).
When a federal court refuses to stay its proceedings it acts in a manner obedient to its virtually unflagging obligation to exercise jurisdiction over a matter properly before it. Even should the decision not to stay proceedings to await the determination of concurrent state action be erroneous, it would not amount to a usurpation of power sufficient to invoke mandamus.\(^9\) The notion that a district court is without power to issue an erroneous order would undermine the settled limitations upon the power of appellate courts to review interlocutory orders.\(^9\) "Certainly, Congress knew that some interlocutory orders might be erroneous when it made them non-reviewable."\(^9\) As the Supreme Court warned in *Will v. United States*,\(^7\) "[c]ourts faced with the preemptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' . . . into interlocutory review of non-appealable orders . . . ."\(^7\)

**CONCLUSION**

The present mechanisms which define appellate jurisdiction generally do not afford immediate review of orders denying federal stays in deference to concurrent state proceedings. This has preserved the respect and integrity of district courts' authority to make decisions in matters committed to their broad discretion. Appellate courts lack the intimate knowledge of docket pressures and the nuances of particular cases which are crucial to a reasoned decision of whether a federal suit should be stayed. Early review of such orders would increase the risk of shortsighted decisions.

Circuit courts should not feel that reasons of judicial economy compel immediate review of orders denying stays. Questions of efficiency cannot be viewed solely in the context of a single case.\(^7\) As the Supreme Court indicated in *Baltimore Contractors, Inc. v. Bodinger*:\(^7\)

> When the pressure rises to a point that influences Congress, legislative remedies are enacted. The Congress is in a position to weigh the competency interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction. This [Supreme] Court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all

\(^169\) See, e.g., *Parr*, 351 U.S. at 520; see also *United States v. Dior*, 671 F.2d 351, 357 (1982).
\(^170\) *Will*, 389 U.S. at 98 n.6.
\(^172\) 389 U.S. 90 (1967).
\(^173\) Id. at 98 n.6.
\(^174\) "Unless we assume that district courts will err and err clearly, more often than not when they deny stays, the aggregate effect of interlocutory appeals over the years will be to increase . . . the demands upon federal appellate resources . . . ." *Microsoft* Microsoftware Computer Sys., Inc. v. *Ontel Co.*, 686 F.2d 531, 541 (7th Cir. 1982) (Doyle, J., dissenting).
\(^175\) 348 U.S. 176 (1955).
courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system . . . the choices fall in the legislative domain.\footnote{176}

Properly used, a stay can be an efficient tool in curbing protracted, expensive litigation. The motion to stay, however, can also be used as a litigation weapon to preclude a litigant from trying a case before a federal court. A stay, although not a formal renunciation of jurisdiction, typically does set the stage for a later dismissal on a plea of res judicata.\footnote{177} Ironically, even an order denying a stay could be used as a weapon to defeat federal court jurisdiction if such orders were appealable immediately. The significant delays inherent in the federal appellate court system often would work just as effectively as a stay in assuring the prior completion of concurrent state suits, even where the appeal is taken on wholly spurious grounds.\footnote{178} Therefore, interlocutory review of orders denying stays is undesirable.

\textbf{Tracy Thomas Larsen}

\footnote{176} Id. at 181.  
\footnote{177} See, e.g., Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949).  
\footnote{178} The Third Circuit commented on the overcrowded appellate dockets in Link v. Mercedes-Benz of N. Am., noting that within the Third Circuit from 1969-1976 filings with the court of appeals doubled while the number of judgeships remained the same. The \textit{Link} court indicated similar statistics were reported from the other circuits. \textit{See} \textit{Link}, 550 F.2d at 863 n.2.