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Federal Court Abstention In The International Context

By Mark A. Schwartz

The United States Supreme Court has consistently asserted that federal courts have a “virtually unflagging obligation” to exercise the jurisdiction conferred to them by Congress. Indeed, as a general matter, a federal court *must* adjudicate all cases properly brought before it unless the court determines that it lacks jurisdiction in a particular case. That said, the courts have recognized several scenarios in which a federal court has discretion to abstain from exercising its jurisdiction in the name of “wise judicial administration, giving regard to the conservation of judicial resources and comprehensive disposition of litigation.” *Finova Cap. Corp. v. Ryan Helicopters U.S.A. Inc.*, 180 F.3d 896, 898 (7th Cir. 1999).

The Supreme Court has acknowledged three forms of “abstention” with which most litigators are intimately familiar. First, *Colorado River* abstention allows a federal district court to stay or dismiss a lawsuit out of deference to parallel litigation brought in a state court. Second, so-called *Burford* abstention allows federal courts to avoid judicial

interference where there exists a complex state regulatory scheme concerning important matters of state policy. Third, *Pullman* abstention applies where a federal constitutional question might be mooted by securing an authoritative state court determination of an unresolved question of state law.

While the Supreme Court has yet to address it, there is a fourth category of abstention – referred to by some lower federal courts as “international abstention” – that will likely gain importance as the U.S. economy continues on the path of globalization. Consider, for example, a contract dispute between a foreign supplier and domestic purchaser of goods over the proper interpretation of a clause in the contract. Assume also that the contract is silent as to the forum to resolve the dispute. In the typical situation, the foreign party will want to litigate in its home jurisdiction, and the domestic party will prefer a court in the U.S. Very often the result will be the proverbial “race to the courthouse,” where each party attempts to be the first to file suit in its chosen forum. Yet, where each party sues the other in its chosen forum and the two cases will resolve the identical dispute, it may not make sense for both cases to proceed on a parallel track. The developing doctrine of international abstention gives courts discretion in such circumstances to stay or dismiss cases properly brought before them where a prior-filed action is pending in a foreign country, so long as certain criteria are present.

The Court of Appeals for the Eleventh Circuit, one of the few Circuit Courts to address the issue, has provided a useful discussion of the policy reasons that support the international abstention doctrine. See *Turner Entm’t Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994). In that case, the court noted that courts have sought to fashion principles that will promote three readily identifiable goals in the area of concurrent international jurisdiction:

- (1) a proper level of respect for the acts of our fellow sovereign nations – a rather vague concept referred to in American jurisprudence as international comity;

(2) fairness to litigants; and (3) efficient use of scarce judicial resources.

Id. The *Turner* court then enumerated specific factors to consider when addressing each of these policy concerns:

General comity concerns include: (1) whether the judgment was rendered via fraud; (2) whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence; and (3) whether the foreign judgment is prejudicial, in the sense of violating American public policy because it is repugnant to fundamental principles of what is decent and just. . . . Also relevant to considerations of international comity are the relative strengths of the American and [foreign] interests.

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With respect to the goal of fairness, relevant considerations include: (1) the order in which the suits were filed; (2) the more convenient forum; and (3) the possibility of prejudice to parties resulting from abstention.

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Criteria relevant to [judicial] efficiency include (1) the inconvenience of the federal forum; (2) the desirability of avoiding piecemeal litigation; (3) whether the actions have parties and issues in common; and (4) whether the alternative forum is likely to render a prompt disposition.

Id. at 1519-22 (citations omitted).

The Court of Appeals for the Seventh Circuit has adopted a slightly different, though not inconsistent, approach to international abstention. Under Seventh Circuit precedent, a federal court faced with a motion to abstain in favor of a foreign proceeding should apply the “same general principles” as the Supreme Court set forth in *Colorado River Water Conservation Dist. v. United*

States, 424 U.S. 800 (1976), though in the international context interests of “international comity” are also relevant. *Finova*, 180 F.3d at 896. Under the Seventh Circuit’s approach, a court must first determine whether “the federal and foreign proceedings are in fact parallel,” that is, whether “substantially the same parties are litigating substantially the same issues simultaneously in two fora.” *Id.* (quotation marks omitted). If the proceedings are parallel, the court must then “balance the considerations that weigh in favor of, and against, abstention, bearing in mind the exceptional nature of the measure.” *Id.* These considerations, which the court adopted from the Supreme Court’s *Colorado River* decision, are:

- (1) the identity of the court that first assumed jurisdiction over the property;
- (2) the relative inconvenience of the federal forum;
- (3) the need to avoid piecemeal litigation;
- (4) the order in which the respective proceedings were filed;
- (5) whether federal or foreign law provides the rule of decision;
- (6) whether the foreign action protects the federal plaintiff’s rights;
- (7) the relative progress of the federal and foreign proceedings; and
- (8) the vexatious or contrived nature of the federal claim.

Id. (citing *Colorado River*, 424 U.S. at 818). The *Finova* court held that a single factor weighing against abstention would not necessarily preclude abstention; rather, the court concluded that the “decision to abstain is based on an assessment of the totality of the circumstances, and the Supreme Court has cautioned against placing too much weight on any specific factor.” 80 F.3d at 900.

From a nuts-and-bolts perspective, a litigator faced with an international abstention issue should also review the District Court for the District of Massachusetts decision in *Goldhammer v. Dunkin’ Donuts, Inc.*, 59 F. Supp. 2d 248 (D. Mass. 1999). The court in that case developed a comprehensive list of factors to consider when undertaking an international abstention analysis. *Id.* at 252-53. After discussing the limited power of federal courts to abstain from exercising their jurisdiction, the court set forth a “roster of factors” to consider in

determining whether to abstain in favor of parallel litigation in a foreign forum. Those factors include: (1) the similarity of parties and issues involved in the foreign litigation; (2) the promotion of judicial efficiency; (3) the adequacy of relief available in the alternative forum; (4) issues of fairness to and convenience of the parties, counsel, and witnesses; (5) the possibility of prejudice to any of the parties; and (6) the temporal sequence of the filing of the actions. *Id.* The court then undertook a careful analysis of the factors as they applied to facts before it. Finally, the court noted that the “overarching concerns for a federal court facing concurrent international jurisdiction are demonstrating a proper level of respect for the acts of other sovereign nations, ensuring fairness to litigants, and efficiency using scarce judicial resources.” *Id.* at 253 (citations omitted).

As with other forms of abstention, a party moving a court to abstain on international grounds will always bear a heavy burden. Given their “unflagging” obligation, federal courts will grant such motions only in “exceptional circumstances.” But such circumstances do exist. Indeed, there are rare instances when it simply makes no sense for a court to allow domestic litigation to proceed where a competent tribunal is already adjudicating the same case in a different country. In such cases, lawyers should consider moving to dismiss or stay a pending action on international abstention grounds where such relief would promote international comity and judicial efficiency, and prevent the potential for inconsistent judgments.

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