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When a District Court Has Stayed a Claim Involving Concurrent Jurisdiction, Issuance of a Writ of Mandamus Compelling Adjudication Is Improper.

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FEDERAL COURTS—Appellate Jurisdiction—When a District Court Has Stayed a Claim Involving Concurrent Jurisdiction, Issuance of a Writ of Mandamus Compelling Adjudication Is Improper

Will v. Calvert Fire Insurance Co.,
____U.S.____, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978).

American Mutual Reinsurance Company brought suit against Calvert Fire Insurance Company in a state court alleging that Calvert had illegally terminated its membership in American's reinsurance pool. Calvert filed a counterclaim alleging violations of the Securities Exchange Act of 1933, state securities law, and common law fraud. On the same day Calvert filed suit in federal district court, alleging a violation of rule 10b-5 of the Securities Exchange Act of 1934, over which federal courts have exclusive jurisdiction, as well as the same claims alleged in the state court counterclaim. American's motion to abate the federal suit was substantially granted when the district court judge stayed all aspects of the proceeding pending the outcome of the state claim, and refused to rule on Calvert's claim for damages under the 1934 Act. Calvert sought and obtained from the court of appeals a writ of mandamus compelling immediate adjudication of the exclusively federal claim.[2] Judge Will appealed the issuance of the writ to the United States Supreme Court. Held-*Reversed.* When a federal district judge has stayed a proceeding involving concurrent state and federal jurisdiction and an exclusively federal claim, issuance of a writ of mandamus compelling adjudication is improper.[3]

The history of the writ of mandamus is still unwritten.[4] Prior to the time of the Tudors in England the writ was little more than an administrative order from superiors to subordinates directing them to supply information.[5] In the seventeenth century the King's Bench adapted the writ for legal purposes.[6] The writ was issued in the King's name from the high court requiring a person, corporation, or inferior court of judicature to do a specific act.[7] The writ of mandamus was brought into American federal jurisprudence by the Judiciary Act of 1789.[8] Presently, courts are empow-

1. *See* 15 U.S.C. § 78 aa (1970)(violations of rule 10b-5 within exclusive jurisdiction of federal courts).

2. Calvert Fire Ins. Co. v. Will, 560 F.2d 792, 793 (7th Cir. 1977), *rev'd*, ____U.S.____, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978). Calvert sought both a reversal of the stay order and an order compelling immediate adjudication of claims not formally stayed. *Id.* at 794.

3. Will v. Calvert Fire Ins. Co., ____U.S.____,____, 98 S. Ct. 2552, 2559, 57 L. Ed. 2d 504, 513-14 (1978).

4. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 173 (5th ed. 1956).

5. *Id.* at 173.

6. *Id.* at 173.

7. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 229 (7th ed. 1966).

8. 1 Stat. 81 (1789)(no longer in force). *See generally* Kitch, *Section 1404(a) of the*

ered to issue the writ by the All Writs Act which provides that "all courts established by Congress may issue writs when it is necessary and appropriate to aid their respective jurisdictions."[9] Generally, mandamus is used as an aid to appellate jurisdiction either by ordering a court to abstain from exercising jurisdiction or by compelling it to accept it.[10] The most significant limitation on the power to issue the writ of mandamus is that the writ will not lie to control or direct acts that are within the judicial discretion of the lower courts, unless an abuse of the right of discretion is present.[11] The major problem facing the courts is the question what constitutes abuse of discretion.[12] One court has attempted to frame a test, but by its very nature the concept of abuse of discretion defies precise definition.[13]

The use of mandamus to compel a trial court to exercise its jurisdiction after it has granted a stay in the proceeding has been a source of frequent litigation.[14] The power to stay a pending case is regarded as incidental to the power inherent in every court to control its own docket with economy of time and effort for all parties to the litigation.[15] Generally, a stay in the proceeding will be granted to await development of the issues or to force

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Judicial Code: In the Interest of Justice or Injustice? 40 IND. L.J. 99, 114-15 (1965). Sections 13 and 14 of the Judiciary Act of 1789 conferred upon all courts of the United States power to issue all writs not specifically provided for elsewhere. *Id.* at 114-15.

9. 28 U.S.C. § 1651 (1970).

10. *See, e.g.*, Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943) (traditional use of writ to confine or compel court to exercise jurisdiction); Atchley v. Taylor, 169 F.2d 626, 637 (6th Cir. 1948)(mandamus is appropriate remedy to compel inferior court to exercise duty imposed); Federal Sav. & Loan Ins. Corp. v. Reeves, 148 F.2d 731, 732 (8th Cir. 1945)(traditional use of writ to compel exercise of jurisdiction).

11. *See* Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318 (1958)(writ limited to governing of ministerial acts). *But see In re* Evans, 524 F.2d 1004, 1007 (5th Cir. 1975)(mandamus will not lie to correct mere abuse of discretion). *See generally* 15 CYCLOPEDIA OF FEDERAL PROCEDURE § 84.44, at 349 (3d ed. 1976).

12. *See, e.g.*, Clemons v. Board of Educ., 228 F.2d 853, 857 (6th Cir. 1956) (abuse of discretion occurs when trial court refuses to apply law to conceded or undisputed facts), *cert. denied*, 350 U.S. 1006 (1956); *In re* Josephson, 218 F.2d 174, 182 (1st Cir. 1954) (abuse of discretion is clear error in judgment in conclusion reached upon weighing of relevant factors); Home Owners' Loan Corp. v. Huffman, 134 F.2d 314, 316 (8th Cir. 1943) (abuse of discretion is arbitrary action by reason of failure to apply appropriate equitable and legal principles to established or conceded facts).

13. *See* Delno v. Market St. Ry., 124 F.2d 965, 967 (9th Cir. 1942). In *Delno* the court reasoned that abuse of discretion occurs only when reasonable men could not differ on the outcome. In contrast, if the court exercised its discretion in such a way that minds would differ then no abuse was evident. *Id.* at 967.

14. *See, e.g.*, La Buy v. Howes Leather Co., 352 U.S. 249, 251 (1957) (mandamus properly granted to overturn court's deference to master in antitrust suit); Bankers Life & Cas. v. Holland, 346 U.S. 379, 382 (1956) (mandamus inappropriate to compel court to vacate severance and transfer order); McClellan v. Carland, 217 U.S. 268, 283 (1910) (mandamus proper to overturn stay).

15. *See, e.g.*, Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936); Kansas City S. Ry. v. United States, 282 U.S. 760, 763-64 (1931); Aetna State Bank v. Altheimer, 430 F. 2d 750, 755 (7th Cir. 1970).

the parties to bring a state court action to secure a definitive determination of a state law.[16] Since the mere existence of jurisdiction should not be construed as meaning that it must be exercised,[17] the power of a federal district court to stay, pending the outcome of a state proceeding has been upheld even when the issue involved is an exclusively federal claim.[18] In *Aetna State Bank v. Altheimer*[19] the Court of Appeals for the Seventh Circuit upheld a district court stay of an action brought under rule 10b-5 of the Securities Exchange Act of 1934.[20] The stay was justified as a means of controlling the disposition of cases on the district court's docket with economy of time and effort.[21] In a later decision involving the identical fact situation the Court of Appeals for the Third Circuit issued a writ of mandamus to overturn the stay and compelled the district court to adjudicate the federal suit immediately.[22] The court stated that no interest—state, federal, or that of the litigants—was served by staying the federal case.[23]

Both stays and dismissals may be granted pursuant to the doctrine of abstention. Under this doctrine a federal district court may decline or postpone the exercise of its jurisdiction.[24] Abstention has been described as an "extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it."[25] In *Colorado River Water*

16. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 10.20, at 249 (2d ed. 1975). *See generally* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976); Will v. United States, 389 U.S. 90, 95 (1967).

17. Kansas City S. Ry. v. United States, 282 U.S. 760, 763 (1931). The question whether to stay a proceeding pending outcome of an earlier suit for the same purpose is within the discretion of the district court. *Id.* at 763-64. *But cf.* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (unflagging obligation to exercise jurisdiction when conferred exclusively).

18. *See* Aetna State Bank v. Altheimer, 430 F.2d 750, 755 (7th Cir. 1970). *Contra*, Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537, 542 (3d Cir. 1975).

19. 430 F.2d 750 (7th Cir. 1970).

20. *Id.* at 758.

21. *Id.* at 755.

22. *See* Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537, 542 (3d Cir. 1975).

23. *Id.* at 542; *see* McClellan v. Carland, 217 U.S. 268, 280 (1910); Mottolese v. Kaufman, 176 F.2d 301, 302 (2d Cir. 1949); 9 MOORE'S FEDERAL PRACTICE ¶ 110.28, at 309 (2d ed. 1975). Mandamus is looked upon with favor as an effective exercise of federal appellate jurisdiction in the proper case particularly when an exclusively federal issue is involved. *Id.* at 309. *But see* W. BARRON, A HOLTZOFF & C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 64, at 352 (1960); Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815, 824-27 (1959). The writ of mandamus is seen as a nuisance to the growing doctrine of abstention, which is viewed as a step forward in the administration of the federal courts. *See* W. BARRON, A. HOLTZOFF & C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 64, at 352. Professor Wright believes that broad discretion should be given the trial courts in the exercise of abstention but warns against its use merely as a convenience for a federal court. *See* Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815, 824-27 (1959). He reasons that, unless a trial court can cite a valid legal reason for abstaining, abstention is both improper and an abuse of a potentially valuable jurisdictional tool. *See id.* at 826-27.

24. *See* County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959).

25. *Id.* at 188-89.

Conservation District v. United States[26] the Supreme Court set out three categories of situations in which abstention is proper,[27] but recognized that in exceptional circumstances "dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration" may be appropriate.[28] The court upheld a dismissal by the district court as such an "exceptional circumstance,"[29] but indicated that had this suit involved concurrent jurisdiction in which an exclusively federal claim was present, the district court would have had an "unflagging obligation" to assume jurisdiction.[30]

In *Will v. Calvert Fire Insurance Co.*[31] Calvert had sought a writ of mandamus to compel the district court to proceed to adjudicate a claim based upon the Securities Exchange Act of 1934.[32] The Court stated that for the writ to be issued in a case involving a review of an interlocutory order, the petitioner has "the burden of showing that its right to the issuance of the writ is clear and indisputable."[33] In considering whether that burden had been fulfilled by Calvert, the Court, following the holding in *Brillhart v. Excess Insurance Co.*,[34] placed great emphasis on the discretionary powers of a district court to defer to a state court when there is concurrent pending litigation.[35] It was observed that the normally excessive workload of a trial court makes it imperative that it be allowed to handle and clear the docket without appellate intervention as long as the time delay is not extraordinary.[36] The Court distinguished *Colorado River*, reasoning that unlike a dismissal, an order deferring a proceeding can be reconsidered on the basis of new information revealed during the progress of the state case.[37] The fact that there had been no formal stay of Calvert's

26. 424 U.S. 800 (1976).

27. *See id.* at 814-17. The categories in which abstention would be deemed proper were: cases in which federal constitutional issue is involved and a state court's determination of the issue would be mooted or seen in a different light because of some pertinent state law; cases which involve a question of state law bearing on policy problems of public import which transcend the result of the instant case; and cases in which federal jurisdiction has been invoked to restrain state criminal proceedings. *Id.* at 814-17.

28. *Id.* at 817.

29. *Id.* at 821.

30. *See id.* at 817.

31. ___U.S.___, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978).

32. Mandamus is generally viewed as an extraordinary remedy that should be reserved for extraordinary situations. *See, e.g.*, Will v. United States 389 U.S. 90, 95 (1967) (review of trial court's interlocutory order in criminal case not deemed as warranting extraordinary remedy of mandamus); La Buy v. Howes Leather Co., 352 U.S. 249, 255 (1957)(writ issued to compel district court to adjudicate antitrust suits); *Ex parte* Fahey, 332 U.S. 258, 259-60 (1947)(use of writ to enjoin payment of attorneys fees deemed misuse of mandamus).

33. Will v. Calvert Fire Ins. Co., ___ U.S. ___, ___, 98 S. Ct. 2552, 2557, 57 L. Ed. 2d 504, 511 (1978); *see* Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953).

34. 316 U.S. 491 (1942).

35. Will v. Calvert Fire Ins. Co., ___ U.S. ___, ___, 98 S. Ct. 2552, 2558, 57 L. Ed. 2d 504, 513 (1978).

36. *Id.* at ___, 98 S. Ct. at 2559, 57 L. Ed. 2d at 513.

37. *Id.* at ___, 98 S. Ct. at 2559, 57 L. Ed. 2d at 513 (deferral not equivalent to dis-

claim for rule 10b-5 damages was emphasized;[38] thus, the Court avoided addressing the question whether the grant of exclusive jurisdiction should obligate the district court to proceed.[39]

The four dissenting justices argued that the language in *Colorado River* limited the doctrine of abstention to three narrow categories.[40] Concern was expressed with the majority's disregard for the explicit language set out in *Colorado River* concerning a federal court's "unflagging obligation" to assume jurisdiction and adjudicate.[41] It was further expressed that since the instant case involved an exclusively federal question the obligation to adjudicate became more imperative.[42] *Brillhart* on which the majority had relied, was distinguished on two grounds. First, it was noted that the question in *Brillhart* was not one of exclusive federal jurisdiction.[43] Second, *Brillhart* involved a suit for a declaratory judgment.[44] The dissenting justices concluded that Judge Will had abused his power of discretion and that therefore the writ was the proper remedy for rectifying this judicial wrong.[45] Countering the majority's reliance on the fact that there had been no technical stay, the dissenting justices asserted that the lengthy delay involved in adjudicating the federal claim was equivalent to a formal stay.[46]

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missal). In contrast, the Seventh Circuit had equated the language in *Colorado River* concerning a dismissal to apply to any deference to a state court. Circumstances which would justify such a deference were deemed to be: "1) assumption of jurisdiction over a res by the state court; 2) the desirability of avoiding piecemeal litigation; 3) the inconvenience of the federal forum; and 4) the order in which concurrent jurisdiction was obtained." Calvert Fire Ins. Co. v. Will, 560 F.2d 792, 795 (7th Cir. 1977), *rev'd*, ___U.S.___, 98 S. Ct. 2552, 57 L. Ed.2d 504 (1978).

38. Will v. Calvert Fire Ins. Co., ___ U.S. ___, ___, 98 S. Ct. 2552, 2559-60, 57 L. Ed. 2d 504, 514 (1978).

39. *Id.* at ___, 98 S. Ct. at 2559-60, 57 L. Ed. 2d at 514.

40. *Id.* at ___, 98 S. Ct. at 2563, 57 L. Ed. 2d at 518-19 (Brennan, J., dissenting).

41. *Id.* at ___, 98 S. Ct. at 2563, 57 L. Ed. 2d at 518 (Brennan, J., dissenting).

42. *Id.* at ___, 98 S. Ct. at 2563, 57 L. Ed. 2d at 519 (Brennan, J., dissenting) (Congress expressed legislative intent for uniformity by expressly conferring federal jurisdiction).

43. *Id.* at ___, 98 S. Ct. at 2562, 57 L. Ed. 2d at 517 (Brennan, J., dissenting). *Brillhart* was a diversity action in which state, rather than federal law, governed. Brillhart v. Excess Ins. Co., 316 U.S. 491, 494 (1942).

44. Will v. Calvert Fire Ins. Co., ___ U.S. ___, ___, 98 S. Ct. 2552, 2562, 57 L. Ed. 2d 504, 517 (1978). (Brennan, J., dissenting). In declaratory judgment suits the court declares the rights and legal relations of the parties involved. *Id.* at ___, 98 S. Ct. at 2662, 57 L. Ed. 2d at 517 (Brennan, J., dissenting).

45. *Id.* at ___, 98 S. Ct. at 2564-65, 57 L. Ed. 2d at 520 (Brennan, J., dissenting); *see* La Buy v. Howes Leather Co., 352 U.S. 249, 257 (1957).

Justice Blackmun concurred in the result stating that the issuance of the writ was premature. Will v. Calvert Fire Ins. Co., ___ U.S.___,___, 98 S. Ct. 2552, 2560, 57 L. Ed. 2d 504, 515 (1978) (Blackmun, J., concurring). Chief Justice Burger filed a brief dissent agreeing with Justice Brennan, but also stating that he found it unnecessary to raise the issue of res judicata. *Id.* at ___, 98 S. Ct. at 2560-61, 57 L. Ed. 2d at 515 (Burger, C.J., dissenting).

46. *See id.* at ___, 98 S. Ct. at 2565, 57 L. Ed. 2d at 520-21 (Brennan, J., dissenting). The dissenting justices offered a second reason to justify their position that the lack of a

Congress by specifically placing the words "exclusive jurisdiction" into the Securities Exchange Act of 1934, demonstrated a legislative intent to achieve greater uniformity of construction and litigation.[47] Allowing a trial court to stay a proceeding involving an exclusively federal claim could operate to frustrate this intent, in light of the possible res judicata effect of the state court's finding.[48] Res judicata effect could apply to bar relitigation of any factual issues pertinent to the rule 10b-5 claim that had already been adjudicated in the state court.[49] Thus, the fact that the state court could not directly pass on the question of the rule 10b-5 claim because of exclusive federal jurisdiction[50] does not provide an adequate safeguard to protect Congress' legislative intent of uniformity of construction. In addition to this frustration, the res judicata dilemma would also in essence deny the right to a federal forum.[51] The right of a party to have his federal claims decided in a federal forum cannot be denied.[52] The United States Supreme Court has never resolved the question whether res judicata principles should apply in a suit involving both concurrent jurisdiction and an exclusively federal claim.[53] Although the Second Circuit has indicated that

technical stay was immaterial. It was pointed out that the district court had "indicated that it would give the state court's determination that the disputed transaction did not involve a 'security' within the meaning of the 1934 Act res judicata effect . . . thereby depriving Calvert of a federal court determination of a legal issue within the exclusive jurisdiction of the federal courts." *Id.* at ____, 98 S. Ct. at 2565, 57 L. Ed. 2d at 521 (Brennan, J., dissenting).

47. *See* 2 L. LOSS, SECURITIES REGULATIONS 997 (2d ed. 1961). Professor Loss draws this conclusion because the 1934 Act is much more complicated, thus much easier to misinterpret than the 1933 Act. Therefore he argues Congress must have expressly made it exclusively a federal question. On the floor of the House, Rep. Rayburn of Texas stated, "We thought the bill as drawn meant exclusive, but in order that it be entirely clear we offer this amendment." *See id.* at 997 (citing 78 CONG. REC. 8099 (1934)).

48. *See* Will v. Calvert Fire Ins. Co., ____ U.S. ____, ____, 98 S. Ct. 2552, 2561, 57 L. Ed. 2d 504, 516 (1978)(Brennan, J., dissenting) (exclusive jurisdiction evinces a legislative desire for uniform federal interpretation).

49. *See* Osadchy v. Gans, 436 F. Supp. 677, 683 (D.N.J. 1977)(fact issues in rule 10b-5 case at state level can be given res judicata effect in subsequent federal suit); Connelly v. Balkwill, 174 F. Supp. 49, 63. (N.D. Ohio 1959) (state determination of rule 10b-5 claim given res judicata effect). *See generally* Comment, *Res Judicata: Exclusive Federal Jurisdiction and the Effects of Prior State-Court Determinations*, 53 VA. L. REV. 1360, 1370-82 (1967); Comment, *The Res Judicata and Collateral Estoppel Effect of Prior State Suits on Actions Under SEC Rule 10b-5*, 69 YALE L.J. 606, 606-14 (1960). In *Will*, the dissenting justices observed that the district court had indicated that it would give res judicata effect to the state court's finding whether a 'security' was involved in the transaction. Calvert would thereby have been deprived of a federal court determination of his federal claim. *See* Will v. Calvert Fire Ins. Co., ____ U.S. ____, ____, 98 S. Ct. 2552, 2565, 57 L. Ed. 2d 504, 521 (1978) (Brennan, J., dissenting).

50. *See* 15 U.S.C. § 78aa (1970).

51. *See* Connelly v. Balkwill, 174 F. Supp. 49, 60 (N.D. Ohio 1959).

52. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964); Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909).

53. Will v. Calvert Fire Ins. Co., ____ U.S. ____, ____, 98 S. Ct. 2552, 2564, 57 L. Ed. 2d 504, 519 (1978) (Brennan, J., dissenting).

exclusive federal issues should be immune from prejudgment elsewhere,[54] other courts have held otherwise.[55]

Because of the possible res judicata problems, the majority's distinction between the dismissal in *Colorado River* and the stay in *Will* with regard to possible reconsideration based on new information seems rather artificial.[56] If the issues cannot be relitigated then a stay is equivalent to a dismissal, and when the stay results in an extended delay as in *Will,* the similarity is even more striking.[57] The strong possibility that res judicata could operate to bar further adjudication of Calvert's federal suit should be sufficient to evidence the impropriety of the stay.[58]

In *Will,* the issues had more than a sufficient opportunity to await new developments[59] and being an exclusively federal claim with regard to rule 10b-5, no determination of state law was forthcoming.[60] Thus, the usual reasons to justify a stay, namely, awaiting new developments and forcing a state court action to obtain a definitive state ruling,[61] are not available to lend credence in the instant case.

The writ of mandamus is not limited to aiding jurisdiction already acquired but extends to cases such as *Will* in which the petitioner's chance for appeal is obstructed by a stay in the litigation.[62] It is well established that mandamus will lie to correct abuse of discretion,[63] including improper deference to pending state proceedings.[64] The Court in *Will* stated that one

54. *See* Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 189 (2d Cir. 1955) (prejudgment to have no effect on exclusive federal question), *cert. denied,* 345 U.S. 923 (1953).

55. *See* Osadchy v. Gans, 436 F. Supp. 677, 683 (D.N.J. 1977) (fact issues in rule 10b-5 cases at state level can be given res judicata effect in subsequent federal suit); Connelly v. Balkwill, 174 F. Supp. 49, 63 (N.D. Ohio 1959)(state determination of rule 10b-5 claim given res judicata effect).

56. *See* Will v. Calvert Fire Ins. Co., ___U.S.___,___, 98 S. Ct. 2552, 2558-59, 57 L. Ed. 2d 504, 513 (1978).

57. *See id.* at ___, 98 S. Ct. at 2565, 57 L. Ed. 2d at 521 (1978) (Brennan, J., dissenting).

58. *See* Osadchy v. Gans, 346 F. Supp. 677, 683 (D.N.J. 1977); Connelly v. Balkwill, 174 F. Supp. 49, 63 (N.D. Ohio 1959).

59. *See* Will v. Calvert Fire Ins. Co., ___ U.S. ___,___, 98 S. Ct. 2552, 2565, 57 L. Ed. 2d 504, 521 (1978) (Brennan, J., dissenting) (case before district court for two and one-half years without any action).

60. *See* 15 U.S.C. § 78aa (1970) (confers exclusive jurisdiction on federal courts for rule 10b-5 claims).

61. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 110.20, at 249 (2d ed. 1975). *See generally,* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976); Will v. United States, 389 U.S. 90,95 (1967).

62. *See* Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943)(writ of mandamus can be used before court of issuance has jurisdiction).

63. *See, e.g.,* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511 (1959)(mandamus used to compel judge to conduct jury trial); Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537, 542 (3d Cir. 1975) (mandamus granted to overturn discretionary stay); Duffy v. Dier, 465 F.2d 416, 418 (8th Cir. 1972) (mandamus properly issued to compel disclosure of informants).

64. McClellan v. Carland, 217 U.S. 268, 281-82 (1910). In *McClellan* a federal court that had concurrent jurisdiction with a state court ordered a stay deferring to the state forum. The