

Do the doctrines of abstention and removal apply to Hague Convention cases?

The International Child Abduction Remedies Act (ICARA), 22 U.S.C. §§ 9001 et seq., provides for original concurrent jurisdiction in both federal and state courts.¹ Dual jurisdiction allows issues to be raised about the interface between federal and state courts, including abstention and removal.

Three types of abstention have been addressed in the cases:

1. *Younger* abstention²
2. *Colorado River* abstention³
3. *Rooker-Feldman* doctrine⁴

***Younger* Abstention.** Ordinarily, the fact that there is an ongoing state case does not provide a reason for a federal court to decline to exercise jurisdiction that has been established by statute. An exception to this rule is the *Younger* abstention, which applies when the district court's acceptance of a case would disrupt an ongoing state criminal, civil, or administrative proceeding.⁵

There are prerequisites to invoking *Younger* abstention:

1. there must be an ongoing state judicial proceeding to which the federal plaintiff is a party and with which the federal proceeding will interfere;
2. the state proceedings must implicate important state interests; and
3. the state proceedings must afford an adequate opportunity to raise the claims.

The Third Circuit's decision in *Yang v. Tsui*,⁶ noted a pattern in abstention cases: Where there is a state court custody proceeding pending, but the Hague issues have not been raised, or have been raised and not litigated, and a Hague petition is filed in federal court, courts have concluded that abstention is not appropriate.⁷ Where, however, the state court has litigated the Hague claim, then abstention is appropriate.⁸

1. "The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention." 22 U.S.C. § 9003(a).

2. *Younger v. Harris*, 401 U.S. 37 (1971).

3. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

4. *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983)

5. *Moore v. Sims*, 442 U.S. 415 (1979); *Williams v. Red Bank Board of Education*, 662 F.2d 1017 (3d Cir. 1981 (overruled on other grounds by *Schall v. Joyce*, 885 F.2d 101 (3d Cir. 1989)).

6. See *Yang v. Tsui*, 416 F.3d 199, 202–03 (3d Cir. 2005), for an excellent review of the cases dealing with *Younger* abstention, and some differences between federal circuits as to the criteria on which *Younger* abstention is based.

7. *Karpenko v. Leendertz*, 619 F.3d 259 (3d Cir. 2010) (abstention not appropriate where parties had the ability to raise Hague claims in a state court proceeding but failed to do so. *Id.* at 262 n.1. *Accord Barzilay v. Barzilay*, 536 F.3d 844, 852 (8th Cir. 2008); *Silverman v. Silverman*, 267 F.3d 788 (8th Cir. 2001) (state court informed of pending Hague Convention petition in federal court, but state court refused to stay its

Note that the Eighth Circuit does not favor abstention in Hague Convention cases:

As *Silverman I* and *Silverman II* made clear, the law in this circuit does not favor abstention in Hague Convention cases. See [Silverman v. Silverman,] 267 F.3d [788,] 792 [(8th Cir. 2001)] (“[A]bstention principles do not permit an outright dismissal of a Hague petition.”); *Silverman II*, 338 F.3d at 891 (“[A]bstention does not apply *853 in Hague Convention cases.”); 42 U.S.C. § 11603(d) [now transferred to 22 U.S.C. § 9003(d)] (“*The court in which an action is brought under [§ 11603(b)] shall decide the case in accordance with the Convention.*”) (emphasis added).⁹

Colorado River Abstention. Abstention is appropriate where there are parallel cases pending in state and federal courts. The *Colorado River* abstention requires that the same parties be involved, are litigating substantially identical claims, and are raising nearly identical allegations and issues.¹⁰

The Supreme Court¹¹ has set forth six factors to be considered in determining if federal courts should abstain:

1. whether one of the courts has assumed jurisdiction over any property in issue;
2. the inconvenience of the federal forum;
3. the potential for piecemeal litigation;
4. the order in which the forums obtained jurisdiction;
5. whether federal or state law will be applied; and
6. the adequacy of each forum to protect the parties’ rights.

In *Holder v. Holder*¹² the district court’s abstention from hearing a Hague case under *Colorado River* was reversed, because the pending state claim involved only custody issues, and no Hague claim was asserted in the state court.¹³

In *Lops v. Lops*,¹⁴ the Eleventh Circuit affirmed the district court’s refusal to abstain under *Colorado River* on the basis, *inter alia*, that the district court was better positioned to determine the case on an expedited basis, because the state court postponed hearing of the merits of the case for approximately fifty days.

action and proceeded to a custody determination—*held*: abstention inappropriate where state failed to stay proceedings and entered custody decree).

8. *Id.* at 202.

9. *Barzilay v. Barzilay*, 536 F.3d 844, 852–53 (8th Cir. 2008).

10. *Timoney v. Upper Merior Twp.* 66 Fed. Appx. 403, 405 (3d Cir. 2003); *New Beckley Mining Corp v. Int’l Union*, 946 F.2d 1072, 1073 (4th Cir. 1991).

11. *Moses H. Cone Mem. Hosp. v. Mercury Construction Co.*, 460 U.S. 1, 15–16, 23–27 (1983).

12. 305 F.3d 854 (9th Cir. 2002).

13. *Accord Biel v. Bekmukhamedova*, 964 F. Supp. 2d 631 (E.D. La. 2013) (denying abstention on *Younger* and *Colorado River* grounds, based on the fact that a pending state custody action was not being used to adjudicate the Hague Convention claim).

14. 140 F.3d 927 (11th Cir. 1998).

Rooker-Feldman Doctrine. The *Rooker-Feldman* doctrine stands for the proposition that the loser in a state court action may not invoke the jurisdiction of the United States courts to enforce what is perceived to be a federally protected right. Complaints that the state court has erroneously ruled on federal rights are tantamount to a request that the district court sit as court of appeal to state court decisions. Similarly, federal courts must abstain from relitigating issues that are “inextricably intertwined” with a state court decision.

The narrow scope of the doctrine was reaffirmed by the Supreme Court in *Exxon Mobil Corp. v. Saudi Basic Industries*.¹⁵ The Court observed that the *Rooker-Feldman* doctrine is confined to “cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting the district court review and rejection of those judgments.”

Typically, *Rooker-Feldman* applies when a party files a Hague petition for return in state court. Upon being denied relief in state court, the aggrieved parent then files a new application for return in federal court, alleging that the state court decided the case erroneously.¹⁶

In *Altamiranda v. Vale*,¹⁷ father filed a Hague Convention petition for the return of the children to Venezuela. The parties negotiated a settlement of the return case, a settlement reduced to a judgment in state court. The settlement provided that in the event mother failed in her obligations under the settlement agreement, father could revive his Hague Convention case in federal court. When mother defaulted on her obligations regarding the children, father reinstated his Hague Convention case. The court rejected mother’s argument that *Rooker-Feldman* barred the federal court from proceeding with the case. Father showed that his consent to allow the children to remain in the U.S. was procured by fraud, and the state court judgment provided that the federal court could resume Hague Convention proceedings in the event of mother’s default on her obligations.

Removal 28 U.S.C. § 1441. Removal has only been mentioned in a handful of cases. In *In re Mahmoud*,¹⁸ the district court accepted removal of an ongoing Hague case from state court. Ultimately the matter became moot, and the district court dismissed the case, but it noted that removal was appropriate in Hague cases. In *Lops v. Lops*,¹⁹ the Eleventh Circuit found that the district court properly refused to abstain under the *Colorado River* cri-

15. 544 U.S. 280 (2005).

16. See *Holder v. Holder*, 305 F.3d 854 (9th Cir. 2002) (district court should proceed with hearing of Hague case even though pending state court case would resolve issues of custody; “federal courts must have the power to vacate state custody determinations and other state court orders that contravene the treaty” (citing *Mozes v. Mozes* 239 F.3d 1067 (9th Cir. 2001))); see also *Rigby v. Damant* 486 F. Supp. 2d 222 (D. Mass. 2007) (district court could not enjoin state court from proceeding with custody determination during pendency of Hague case in the federal court—if the state court is required to stay its proceedings because of the pendency of the Hague petition in federal court, it must do so on its own). But see *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005) (holding *Rooker-Feldman* inapplicable to district court that invalidated a state action that dealt with termination of mother’s parental rights under the Indian Child Welfare Act).

17. 538 F.3d 581 (7th Cir. 2008).

18. No. CV 96 4165 (RJD), 1997 WL 43524 (E.D.N.Y. 1997).

19. 140 F.3d 927 (11th Cir. 1998).

teria. The dissent in *Lops* argued that this was in direct contravention of the removal statutes, as there was a pending state proceeding ongoing.

The issue of removal can lead to time-consuming litigation. As noted by a leading academic on the 1980 Convention,

Within the United States, the choice in the U.S. implementing legislation to provide for concurrent jurisdiction in both state and federal courts over Hague applications has given rise to its own set of unforeseen complexities. To the extent that ICARA provides a Hague applicant with the choice of pursuing an application for return in either state or federal court, its concomitant failure to limit a defendant-abductor's right to remove the case from state to federal court may have been an oversight. Thus, under existing law, an application for return brought in state court may be removed to federal court by the defendant, potentially creating delay in the purported "expeditious" Hague process.²⁰

Editor's comment: Removal should ordinarily not be used in a Hague case. ICARA assigns choice of forum to the petitioner. Absent compelling or extraordinary reasons, the parent responding to a petition should not be able to defeat the petitioner's choice of forum.

20. Linda Silberman, *Patching up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 Tex. Int'l L.J. 41 (2003) (footnotes omitted).