CAN A FEDERAL COURT EVER LOSE "RELATED TO" JURISDICTION AFTER IT ATTACHES UNDER 28 U.S.C. § 1334(b)?[1]

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This article addresses the question whether a federal court can lose "related to" jurisdiction after it attaches under 28 U.S.C. §1334(b) due to changed circumstances? I recently addressed this issue in a bankruptcy appeal pending before the United States District Court for the Eastern District of Kentucky. For all the reasons set forth below, a federal court cannot possibly lose related to jurisdiction after it attaches no matter what subsequent events come to pass, with the exception of the filing of an amended pleading (i.e., a complaint, counterclaim, cross-claim, third-party complaint, etc.).

The statutory framework relative to bankruptcy court jurisdiction

Bankruptcy courts, like all federal courts, are courts of limited jurisdiction. The district courts have original and exclusive jurisdiction of all cases filed under title 11. 28 U.S.C. § 1334(a). The United States Bankruptcy Code is codified as 11 U.S.C. § 101, *et seq.* (the "Code"). The reference to "title 11" in 28 U.S.C. § 1334(a) is a reference to a bankruptcy petition itself filed under section 301, 302, or 303 of the Code. *Michigan Employment Security Commission v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1141 (6th Cir. 1991).

Under 28 U.S.C. § 157(a), each district court may provide that any and all cases filed under the Code be referred to bankruptcy judges for the district. This is done by local rules of the district court. In Kentucky, cases are automatically referred to bankruptcy judges in the Eastern and Western District of Kentucky under Local Rule

[1] This article is a service for friends and clients of DelCotto Law Group PLLC. The opinions expressed in this article are intended for general guidance only and not as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance.

83.12 of the United States District Court for the Eastern and Western Districts of Kentucky.

The district courts, and bankruptcy courts when cases filed under the Code are referred to bankruptcy judges, have "original jurisdiction but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). Sections 1334(a)-(b) list four types of matters over which the district courts have jurisdiction:

> (1) "cases under title 11," (2) "proceedings arising under title 11," (3) proceedings "arising in" a case under title 11, and (4) proceedings "related to" a case under title 11.

Wolverine, 930 F.2d at 1141. 28 U.S.C. §§ 1334(b) and 157(b)(1) equate "core proceedings" with the categories of "arising under" and "arising in" proceedings. *Stern v. Marshall,* 564 U.S. ___, 131 S. Ct. 2594, 2605 (2011); *Wolverine Radio* at 1144. The phrase "arising under title 11" describes "those proceedings that involve a cause of action created or determined by a statutory provision of title 11 [the Code]," and "arising in" proceedings are "those that, by their very nature, could arise only in bankruptcy cases." *Wolverine Radio* at 1144. A proceeding that is noncore may be "related to" a case under the Code under certain circumstances. The most widely accepted test for determining whether a proceeding is noncore, and thus "related to" a case under the Code, was espoused in *In re Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), and is known as the "*Pacor* test." It provides:

> The usual articulation of the test for determining whether a civil proceeding is related to a bankruptcy is whether *the outcome of that*

> *proceeding could conceivably have any effect on the estate being administered in bankruptcy.* [citations omitted]. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to a bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.

Id. at 994 (emphasis in original). The Sixth Circuit has "accepted the *Pacor* articulation" (*Robinson v. Michigan Consolidated Gas Co., Inc.*, 918 F.2d 579, 584 (6th Cir. 1990)), albeit with the caveat that "situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement." *Kelley v. Salem Mortgage Co. (In re Salem Mortgage Co.)*, 783 F.2d 626, 634 (6th Cir. 1986).[2]

Virtually all federal courts hold that once "related to" jurisdiction attaches under 28 U.S.C. § 1334(b), subsequent events cannot divest a court of such jurisdiction

In the adversary proceeding on appeal referred to above, the bankruptcy court cited and relied upon two obscure cases in support of its conclusion that a bankruptcy court can "lose" related to jurisdiction as a result of changed circumstances after the commencement of an adversary proceeding. These cases are *Dierkes v. Crawford Orthodontic Care, P.C. (In re Dierkes)*, Adv. Proc. Nos. 05-06022-MGD and 05-06122-MGD, 2007 WL 5734794 (Bankr. N.D. Ga. 2007) and *Boyer v. Conte (In re Import &*

[2] The First, Fourth, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits have adopted the *Pacor* test for "related to" jurisdiction "with little or no variation." *In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991); *A.H. Robbins Co. v. Piccinin*, 788 F.2d 994, 1002 n.11 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986); *Wood v. Wood (In the Matter of Wood)*, 825 F.2d 90, 93 (5th Cir. 1987); *Dogpatch Properties, Inc. v. Dogpatch U.S.A., Inc. (In re Dogpatch U.S.A., Inc.)*, 810 F.2d 782, 786 (8th Cir. 1987); *Fietz v. Great Western Sav. (In re Fietz)*, 852 F.2d 455, 457 (9th Cir. 1988); *Gardner v. United States (In re Gardner)*, 913 F.2d 1515, 1518 (10th Cir. 1990); *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 788 n.19 (11th Cir. 1990).

Mini Car Parts, Ltd., Inc.), 200 B.R. 857 (Bankr. N.D. 1996). Neither of these cases is an appellate decision and *Dierkes* is an unreported decision.

Dierkes and *Boyer* are all alone in holding that a bankruptcy court can lose related to jurisdiction absent the filing of an amended pleading. All decisions at the circuit court level have held that a federal court cannot be divested of related to jurisdiction after it attaches under 28 U.S.C. § 1334(b). *See, e.g., Superior Bank, FSB v. Boyd (In re Lewis)*, 398 F.3d 735, 743 (6th Cir. 2005) (bankruptcy court's subject matter jurisdiction is "tested as of the time the action is filed and subsequent changes will not operate to divest a court of its jurisdiction once it has been properly invoked" unless Congress "clearly and affirmatively" expresses an intent to do so by statute); *Newby v. Enron Corp. (In re Enron Corp. Securities)*, 535 F.3d 325, 333, 336 (5th Cir. 2008) (as long as "related to" jurisdiction under 28 U.S.C. § 1334(b) exists when an action is removed, no subsequent event, including confirmation of a Chapter 11 plan or reorganization, can divest a bankruptcy court or district court of such jurisdiction); *Continental Nat'l. Bank of Miami v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1346 n.8 (11th Cir. 1999) ("The presence or absence of jurisdiction [under 28 U.S.C. § 1334(b)] must be evaluated based *on the state of affairs existing at the time the adversary complaint was filed* [citation omitted], not at some later time when, for example, it was ultimately determined here that the Estate had no interest in the sale proceeds.") (emphasis added); *Owens-Illinois, Inc. v. Rapid American Corp. (In re Celotex Corp.)*, 124 F.3d 619, 626 (4th Cir. 1997) ("Before we apply the *Pacor* test, we note that if 'related to' jurisdiction actually existed at the time of Rapid's removal of the Contribution Action to the district court, Rapid's global settlement with the Celotex bankruptcy estate and the treatment of Owens' claim under

the Confirmed Plan could not divest the district court of that subject matter jurisdiction."); *see also Banks v. Morton (In re Banks)*, Adv. Proc. No. 07-03157-DOT, 2010 WL 842352 (Bankr. E.D. Va. Mar. 4, 2010) (where bankruptcy court has core jurisdiction over trustee's claims and related to jurisdiction over cross-claims by one non-debtor defendant against another non-debtor defendant, the bankruptcy court is not divested of subject matter jurisdiction over cross-claim even where trustee settles with both non-debtor defendants); *King's Grant Gold Acquisition, LLC v. Abercrombie (In re T 2 Green, LLC)*, 364 B.R. 592, 601-02 n.6 (Bankr. D.S.C. 2007) (where bankruptcy court had jurisdiction under 28 U.S.C. § 1334(b) when Chapter 11 debtor filed adversary proceeding, the substitution of a non-debtor plaintiff and confirmation of a plan or reorganization did not divest the bankruptcy court of said jurisdiction).

Nonbankruptcy cases hold that once subject matter jurisdiction attaches under a federal statute, a federal court cannot be divested of such jurisdiction

The holding of federal courts that the attachment of related to jurisdiction is unaffected by subsequent events is entirely consistent with subject matter jurisdiction disputes under federal statutes outside of the bankruptcy context. Three of these statutes and cases construing the same are as follows:

1. 28 U.S.C. § 1345, which grants the federal district courts original jurisdiction over all civil actions commenced by the United States. Jurisdiction under § 1345 is not lost if a third party is substituted for the United States as the plaintiff. *Munoz Bermudez v. Ind. Siderurgica, Inc.*, 673 F. Supp 57 (D.P.R. 1987); *Hardenbergh v. Ray*, 151 U.S. 112 (1894) (finding that the substitution of parties cannot defeat jurisdiction of a pending action in federal court);

2. 28 U.S.C. § 1332, governing diversity of citizenship and amount in controversy. Events such as a change of citizenship after the filing of a complaint or a reduction of the amount demanded to below the required jurisdictional amount cannot divest a federal court of subject matter jurisdiction under § 1332. *See, e.g., Freeport-McMoRan, Inc.*, 498 U.S. 426, 428 (1991) (jurisdiction once acquired is not divested by a subsequent change in the citizenship of the parties); and

3. 28 U.S.C. § 1331, governing jurisdiction of federal questions. Jurisdiction is not lost under § 1331 if the federal claim upon which jurisdiction is based becomes moot or is dismissed. *Rosado v. Wyman*, 397 U.S. 397 (1970) (holding that when an issue regarding the constitutionality of a state law became moot, the federal court did not lose jurisdiction over the pendent claim).

No cogent argument can be made how a federal court can lose related to subject matter jurisdiction under 28 U.S.C. § 1334(b) after it attaches, when a federal court cannot be divested of subject matter jurisdiction due to subsequent events after it attaches under 28 U.S.C. §§ 1331, 1332 and 1345. *Dierkes* and *Boyer* are all alone in holding that a bankruptcy court can lose related to jurisdiction after it attaches under 28 U.S.C. § 1334(b). They are infirm in this regard and "too wobbly to withstand even the mild breezes of cursory examination." *In re Martin*, 817 F.2d 175, 178 (1st Cir. 1987).

Conclusion

Absent the filing of an amended "pleading" as such term is used in Fed. R. Civ. P. 7(a), a federal court cannot lose related to subject matter jurisdiction after it attaches under 28 U.S.C. § 1334(b). Any argument to the contrary cannot withstand judicial scrutiny.

For more information about this topic or any other litigation matter, please contact Mike Gartland at 859-231-5800, or visit our website, www.dlgfirm.com.