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The Divestiture Rule Explained: A Judge-Made Doctrine Doesn't Necessarily Deprive a Lower Court of Ongoing Subject Matter Jurisdiction

The filing of an appeal in federal court generally divests the lower court of jurisdiction. This rule of appellate jurisdiction applies both to appeals from a district court to a court of appeals and from a bankruptcy court to a district court.

'A notice of appeal is an event of jurisdictional significance - it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.' *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

Significantly, however, divestiture of jurisdiction is a judge-made rule, not one created by statute. As a result, the court overseeing [Acute Inc. v. ECI Pharmaceuticals LLC](#) ('ECI Pharmaceuticals') observed recently that the 'divestiture rule is not truly jurisdictional.' Adv. Pro. No. 25-01048-SMG, 2025 Bankr. LEXIS 1232, *3 (Bankr. S.D.Fla. May 21, 2025).

The First Circuit has held similarly. '[B]ecause the judge-made divestiture rule isn't based on a statute, it's not a hard-and-fast jurisdictional rule. . . . The rule, rather is rooted in concerns of judicial economy, crafted by courts to avoid confusion and inefficiency that would inevitably result if two courts at the same time handled the same issues in the same case. Hence its application turns on concerns of efficiency and isn't mandatory.' *U.S. v. Rodriguez-Rosado*, 909 F.3d 472, 477-78 (1st Cir. 2018) (internal citations omitted).

ECI Pharmaceuticals shows how one court analyzed when or when not to apply the divestiture rule.

The debtors filed for chapter 11, planned to sell substantially all of their assets, and confirmed a plan of liquidation. Parties in interest appealed both the sale order and the confirmation order. The latter appeal challenged the confirmation order on the ground that it approved nonconsensual third-party releases.

While those two appeals were pending, one of the appellants (and other plaintiffs) filed an adversary proceeding in the bankruptcy court alleging that the debtor procured the confirmation order by fraud. The plaintiffs sought revocation of the confirmation under 11 U.S.C. 1144 ('On request of a party in interest at any time before 180 days after the date of the entry of order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud.').

The debtors, the liquidating trust, and the liquidating trustee filed motions to dismiss the adversary proceeding, citing Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), each made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7012.

The movants asserted that (i) the bankruptcy court lacked subject matter jurisdiction both because of the appeals that were pending at the district court and the divestiture rule, and (ii) the complaint failed to state a claim upon which relief could be granted. In response, the plaintiffs argued that the divestiture rule should not apply in this instance because the adversary proceeding addressed different issues from those pending in the appeals.

As an initial matter, the bankruptcy court noted that it had subject matter jurisdiction over the adversary proceeding. The case invoked the court's 'arising under' jurisdiction because it was based on a provision of the Bankruptcy Code, section 1144. The bankruptcy court also had jurisdiction over the adversary proceeding in light of the standing order of reference from the district court to the bankruptcy court under 28 U.S.C. 157(a).

The bankruptcy court then noted that bankruptcy court orders are appealable to the district court under 28 U.S.C. 158(a). But while the statute grants a district court jurisdiction over an appeal, the statute does not necessarily divest the bankruptcy court of ongoing jurisdiction.

'Congress granted subject matter jurisdiction to district courts to hear appeals from bankruptcy courts. But nothing in the statute actually provides for the divestiture of the bankruptcy court's jurisdiction.' 2025 Bankr. LEXIS 1232, *10.

The court said it might be more appropriate to refer to the divestiture rule as 'one of comity or deference, rather than jurisdiction. As such, the divestiture rule is still an important doctrine of judicial economy that courts must carefully consider and apply; it just doesn't speak to the power of a court to hear a matter.' Id. at 10-11.

The court concluded that the adversary proceeding addressed a different issue from the appeal of the confirmation order under section 1144. The lawsuit focused on whether the confirmation order was procured by fraud while the appeal concerned whether the third-party releases in the confirmation order were valid. 'Although both disputes emanate from the same order, they are discrete issues,' the court said. Id. at *12.

The court noted that it had the discretion to allow the adversary proceeding to continue while the appeal of the confirmation order was being heard by the district court. But 'as a matter of comity or deference,' the court decided to stay the adversary proceeding until the district court resolved the appeal.

The court reasoned that, should the plaintiffs prevail in the adversary proceeding and the confirmation order is revoked, the appeal would be mooted. This would 'impermissibly interfere with the appellant's right in its appeal.' Id. at *13. In its discretion, therefore, the court thought the better option was to allow the appeal of the confirmation order to proceed first.

In doing so, the court aimed to 'ensur[e] that plaintiffs' rights are preserved, while at the same time affording comity and deference to the District Court in not taking any action that might interfere with the pending appeal of the confirmation order.' Id. at 15.

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