No. 20- 1117

IN THE

# Supreme Court of the United States

PHILIP JAY FETNER,
*Petitioner,*
v.
HOTEL STREET CAPITAL, LLC, *et al.*,
*Respondents.*

On Petition for Writ of Certiorari
to The United States Court of Appeals
for the Fourth Circuit

## PETITION FOR WRIT OF CERTIORARI

September 28, 2020

Philip Jay Fetner, *Pro Se*
8080 Enon Church Road
The Plains, Virginia 20198
(540) 222-9693
pjayfetner@aol.com

LEGAL PRINTERS LLC • Washington, DC • 202-747-2400 • legalprinters.com

## QUESTIONS PRESENTED

Petitioner asks this Court to review two questions arising from closely related orders issued by the Fourth Circuit Court of Appeals in two bankruptcy appeals taken in the same case. The orders are sufficiently related because the first question below arose in an appeal from the denial of an exclusivity extension but the Court of Appeals *sua sponte* invoked the equitable mootness doctrine to dismiss the appeal. The conversion of Petitioner's original Chapter 11 petition to Chapter 7 status was the event that triggered the invocation of the equitable mootness doctrine. The appeal of the conversion itself is the subject of the second question concerning the timing of the conversion order and so-called "jurisdictional" deadlines for appeal.

1. Should the Fourth Circuit Court of Appeals' invocation of equitable mootness foreclosing Petitioner's appeal of the Bankruptcy Court's denial of an exclusivity extension be set aside as unconstitutional or, alternatively, should the doctrine be refined to provide a more appropriate standard. In either event, the judgment would be reversed, and the case remanded to the Court of Appeals.

2. Should the Court of Appeals apply equitable considerations – not to jurisdictional matters but to confusion actually caused by the Bankruptcy Court in determining which of two

possible orders was the proper appealable order – to preserve Debtor's unquestionable and important constitutional right to appeal his conversion from Chapter 11 to Chapter 7 upon remand.

Both questions involve issues of constitutional mandates, this Court's ultimate supervisory role in bankruptcy matters, and possibly the importance of adhering to a consistent national legal standard to avoid (existing) conflicts among the different federal courts. The importance of these matters will be argued further by Petitioner in this brief.

## PARTIES TO THE PROCEEDING IN THIS COURT AND RULE 29.6 STATEMENT

HOTEL STREET CAPITAL, LLC.
c/o Robert M. Marino, Esq.
REDMON, PEYTON & BRASWELL
510 King Street, Suite 301
Alexandria, Virginia 22314

BANK OF AMERICA/WILMINGTON SAVINGS FUND SOCIETY
c/o Andrew Justin Narod, Esq.
BRADLEY ARANT BOULT CUMMINGS, LLP.
1615 L. Street, N.W., Suite 1350
Washington, D.C. 20036

IRS
c/o Robert K. Coulter, Esq.
UNITED STATES ATTORNEY'S OFFICE
2100 Jamieson Avenue
Alexandria, Virginia 22314

STEPHEN S. ROSZEL VII, PER BANG-JENSEN, EXECUTORS, SUSAN ROSZEL HARTZ
c/o William D. Ashwell, Esq.
MARK B. WILLIAMS & ASSOCIATES, PLC.
27 Culpeper Street
Warrenton, Virginia 20186

Creditors-Appellees

(Cont.)

UNITED STATES TRUSTEE
c/o Jack Ira Frankel, Esq.
OFFICE OF THE U.S. TRUSTEE
115 South Union Street
Alexandria, Virginia 22314

Trustee-Appellee

Petitioner is PHILIP JAY FETNER

Debtor-Appellant

Respondents are indicated above. Petitioner is not a corporation.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**United States Constitution**



**Statutory Provisions**
**United States Code**

**Federal Rules of Civil Procedure**



**Federal Rules of Bankruptcy Procedure**



**Other Authorities**

## JURISDICTION

The Fourth Circuit Court of Appeals issued its opinion in Appeal No. 19-2319 on April 20, 2020. Petitioner's timely petition for panel and *en banc* rehearing was denied on June 29, 2020. The Fourth Circuit Court of Appeals issued its opinion in Appeal No 19-2303 on April 20, 2020. Petitioner's timely petition for panel and *en banc* rehearing was denied on June 29, 2020.

The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. §1257.

## OPINIONS BELOW

The opinions of the Fourth Circuit Court of Appeals are reproduced in Appendices A & B. The opinions are unreported.

## CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III and the Fourteenth Amendment to the United States Constitution

## INTRODUCTION

The first question presented concerns the denial of an exclusivity extension, and appeal of that denial, and the subsequent dismissal of the appeal on grounds of equitable mootness. The denial of an

exclusivity extension, interlocutory in nature, is the only strictly interlocutory order that the Bankruptcy Code recognizes as appealable without leave of the appellate court. The notorious difficulty of determining "finality" is removed from the court by statute. The policy grounds for this choice are not difficult: the exclusionary period in Chapter 11 is equal to the automatic stay as a pillar of allowing a debtor a fresh start through a reorganization plan; and the importance of settling an appeal timely for such a critical bankruptcy building block.

The District Court here denied Debtor's emergency request for a stay pending appeal but sat on the appeal for one year. In the meantime, the Bankruptcy Court continued with the case and eventually converted Debtor's Chapter 11 petition to a Chapter 7 liquidation upon motion by the United States Trustee. That conversion was also appealed. Before briefing or hearing the merits of that appeal, the Trustee filed a preliminary motion to dismiss for lack of jurisdiction. The Trustee asserted that the Debtor had filed his appeal from the wrong order of the Bankruptcy Court and had missed filling his notice of appeal timely by some seven days. Debtor vigorously opposed the dismissal on factual grounds (the correct conversion order) and as a matter of equity. The District Court expressed sympathy with the equity argument but declared that the jurisdictional matter raised by the Trustee bared considerations of equity. The District Court dismissed the appeal. The Court of Appeals upheld the dismissal for the reasons given by the lower court.

Conversion of Debtor's Chapter 11 Petition was the trigger event for the Court of Appeals invoking equitable mootness, the subject of the first question presented.

The second question presented for this Court here is where the proper equitable-jurisdictional divide was recognized below in the conversion dispute. If the conversion appeal was wrongfully dismissed as a matter of lack of jurisdiction, then the question of exclusivity extension could never be denied as moot. Both Debtor's appeals should then be heard and decided on their merits.

## STATEMENT OF THE CASE

1. Petitioner filed a voluntary petition under Chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. §§101 et seq. in the U.S. Bankruptcy Code for the Eastern District of Virginia on September 7, 2017. Petitioner timely filed his Schedules, Statement of Financial Affairs, and other required documents.

2. Debtor was faced with four important (in relative size) creditors: the IRS (the smallest by far); two companies, a national bank and what Debtor has referred to as a sophisticated loan-sharking private operation run from the law firm representing him on many matters, both whom had lent him money; and a judgment creditor whose judgment was currently on appeal to the Virginia Supreme Court. The private creditors were all seriously contested – not overnight sensations to justify some bankruptcy purpose, but

long-standing disputes going back eight years or more.

3. Petitioner remained in possession and control of his assets as DIP pursuant to sections 1107 and 1108 of the Code. No creditors' committee was appointed. Debtor timely attended his obligatory §341 Creditors' Meeting.

4. On November 15, 2017, the largest contested creditor by far, Bank of America ("BoA"), filed a lift of stay motion to enforce a security interest in a property that Debtor did not own but controlled through a limited partnership which was the real owner. Debtor contested the motion and discovery schedules were established. No discovery was forthcoming by BoA despite many extensions of time and hearings and promises to the Bankruptcy Court, as well as Debtor. In June of 2018, BoA withdrew its motion for relief from stay.

5. The exclusivity period for Debtor to file a plan for reorganization initially set by statute (§1121(d)) was scheduled to expire on January 5, 2018. On January 2, 2018, pursuant to the provisions of §1121(d)(1) of the Code, Debtor filed a motion to extend exclusivity for a period to end June 5, 2018. The cause for the extension request was unresolved contingencies with respect to the Roszels and BoA. The motion was unopposed, and Debtor did not attend the hearing. The Bankruptcy Court approved the extension to June 5, 2018 by order entered February 2, 2008.

6. To ensure that exclusivity-related errors do not thwart a Chapter 11 filing, as well no doubt to signal clearly the recognition due exclusivity, the legislators of the Code did three important things: (i) the Code provides for extensions of the exclusivity period, multiple extensions, if warranted, (ii) a total of 18 months is allowed for all extensions in a given case – a relatively lengthy period for bankruptcy matters – when warranted, and (iii) bankruptcy court rulings on exclusivity, which rulings are interlocutory in nature, are made automatically appealable, without the necessity of seeking leave to appeal from the District Court, the only interlocutory order so treated in the Code. (See 28 U.S.C. 158 (a)(2).)

7. The Debtor filed a timely second motion on June 2, 2018 to extend exclusivity a second time, for four months, arguing that the same grounds which previously justified the first extension not only continued but had actually been exacerbated by the actions of the two creditors involved. Debtor set the first available return date of June 26, 2018 to hear the motion. Debtor had no inkling of any opposition.

8. This time, two disputed creditors opposed the motion – not the largest creditor, who represented nearly two-thirds of the total claims in this case – one filing an opposition the day prior to the opposition deadline, one filing an untimely opposition. On June 26, a hearing was held in Bankruptcy Court on Debtor's motion. Debtor was unable to attend because of a prior legal commitment implicating his

fiduciary duty to clients. Ruling from the bench, the Court denied Debtor's motion because Debtor had not established sufficient cause to extend further the exclusivity period. Moreover, the order finally entered on July 16 specified that the exclusivity period terminated on June 5, 2018, refusing to give effect to the long-established bankruptcy practice of tolling the deadline once an extension motion was timely filed. Debtor believed that such tolling was constitutionally required as part of normal due process.

9. Debtor immediately on July 3 filed a motion to reconsider the ruling from the bench. The motion asked that Debtor be allowed for the first time to testify at a new hearing, a true evidentiary hearing, and, equally important, that Debtor be allowed to file an exclusive plan of reorganization should the extension be denied, in accordance with established bankruptcy practice and constitutional due process. The motion was accompanied by a 13-page sworn Declaration by Debtor setting forth in summary form the elements of "cause" for the extension as a proffer of good faith. Debtor was present at the subsequent hearing held on July 17, 2018 to reconsider but was not permitted to testify. The Court denied the motion on procedural grounds, ruling that Rule 59(e) of the Federal Rules of Civil Procedure was not satisfied. Bankruptcy Rule 9023 incorporates Fed. R. Civ. P.59 and a motion to reconsider is usually treated as a motion to alter or amend under Rule 59(c). The Rule does not state an express standard for the consideration of such a motion, but the Fourth Circuit

has articulated three grounds for amending an earlier order: (i) an intervening change in controlling law; (ii) to account for new evidence not previously available; or (iii) to correct a clear error of law or to prevent a manifest injustice. The Court admitted from the bench that if Debtor's counsel had only requested a continuance on June 26 to permit Debtor to testify, she would have granted the request.[1]

10. The Debtor quickly appealed to the District Court on the grounds that:

i) Debtor was wrongfully denied the opportunity to present his version of the facts – genuine evidence – underlying a determination of cause. Facts as to intent, motivation, and progress particularly under Debtor's control. An abuse of discretion is automatic when the so-called discretion is not based upon probative evidence but rather hyperbole by counsel and attorneys "testifying." Evidentiary rulings in the absence of evidence are a sham and classic abuse of discretion.

ii) Debtor was denied fundamental due process by the refusal to recognize the tolling of the exclusivity deadline after timely exercising the right under the Code to ask for an extension of exclusivity. Due process is not discretionary.

iii) Equity demanded that the Bankruptcy Court prevent a manifest injustice.

---

[1] The United States Trustee did not take a position with respect to the second extension motion and did not substantively participate in the exclusivity hearings.

11. Debtor also filed an emergency motion to stay with the District Court. The Court curtly denied the motion and denied as well an unopposed motion by Debtor's counsel for a slight extension of time to file his appellate brief, which Debtor did manage to file timely. *Inter alia*, the stay pending appeal was refused on the grounds that no irreparable harm was shown, that the likely creation of equitable mootness was not irreparable under the circumstances, and that the public interest was best served by the efficiency and speed of the bankruptcy system.

12. *The District Court refused or failed to hold a hearing or rule on the appeal for one year.*

13. The appeal was finally denied on September 26, 2019 (rehearing was denied October 18, 2019), which order was timely appealed to the Court of Appeals for the Fourth Circuit. The Court of Appeals denied the appeal on the grounds of equitable mootness.

14. Debtor timely filed a motion to request an *en banc* hearing and for additional time to brief the equitable mootness issue, inserted for the first time in this matter *sua sponte* by the Appeals Court. The Court of Appeals granted the extra time but refused the motion for rehearing on June 29, 2020.

15. The United States Trustee ("UST") filed a motion to convert the Chapter 11 case to Chapter 7 on May 9, 2019. The movant has the burden of proving

that cause existed for conversion. The UST gave as ground for conversion several alleged failures by Debtor as a DIP: Debtor had caused loss to the estate; Debtor had engaged in "gross mismanagement of the estate;" and Debtor had "failed to confirm a plan of reorganization by statutory or Court-imposed deadlines." Both in his many papers and at the hearing held on the conversion in June 2019, the UST failed to allege or produce any evidence whatsoever for Debtor's alleged failure, which problem was recognized by the Bankruptcy Court itself at the June hearing but the lower Court determined itself to fill in the blanks. In essence, the Court ruled that Debtor had failed to provide a Disclosure Statement/ Reorganization Plan, that Debtor's proposed sources of income were too risky or speculative.

16. The order for conversion was executed on June 24, 2019, or so all the parties thought. An earlier version issued June 13 also facially purported to be the final order for conversion.

17. Debtor appealed the order of conversion using the executed version of June 24, 2019 to calculate the 14-day period mandated by statute for filing a notice of appeal. Before appellate briefs were filed (but well after Debtor's statement of issues and designation of the record was filed), the UST filed a preliminary motion for dismissal of the appeal, alleging that Debtor had missed the statutory deadline of 14 days for filing the notice of appeal because he had used the wrong order.

18. Debtor would later testify to the District Court that all the parties and the Bankruptcy Court itself understood that the order of June 24, 2019 was to be the operative order, replacing the initial order of June 13, which order was incomplete. Debtor gave several facial reasons why the changes were substantive and the new order a genuine replacement. The Debtor also made the essentially equitable argument that the intent of all the parties was clear and that due policy grounds of preferring that appeals be heard on their merits and that the small delay of 11 days between the two orders was meaningless, certainly nonprejudicial, as a practical matter.

19. The District Court held, however, that the earlier of the two orders was the operative order because facially the difference between the two orders was insignificant in substance. The District Court expressed sympathy for Debtor's equitable presentation but noted that jurisdictional mandates knew no equitable boundaries and concluded that the appeal must be dismissed.

20. Debtor appealed to the Court of Appeals. On April 20, 2020, the same day that the Court of Appeals ruled on the exclusivity appeal, the Court of Appels also ruled on this conversion appeal. The appeal was dismissed with little fanfare. Debtor asked for *en banc* participation, which request was denied on June 29, 2020.

## REASONS TO GRANT THE PETITION

## I. Equitable Mootness

In discussing the doctrine of equitable mootness, Petitioner must acknowledge his debt to the comprehensive concurring opinion of Circuit Judge Cheryl Ann Krause in *In re One2One Communications, LLC.*, 805 F.3d 428 (3d Cir. 2015). Judge Krause in turn no doubt owed a debt to then-Judge Alito's strong, lengthy dissent in *In re Cont'l Airlines*, 91 F.3d 553, 560 (3d Cir. 1996), followed by another dissent in *Nordhoff Invs. Inc., v. Zenith Elecs Corp,* 258 F.3d 180, 192 (3d Cir. 2001).[2]

The doctrine is not based on statute and is entirely judicially created in recognition by appellate courts that there is a point of "finality" in bankruptcy beyond which – overwhelmingly in the context of confirmed Chapter 11 reorganization plans – courts are loathe to alter fundamental changes. The doctrine was first applied soon after the enactment of the Bankruptcy Code in 1978. It is important to distinguish the doctrine from true mootness in the constitutional sense of lack of jurisdiction by an Article III court where there is no "case or controversy." Equitable mootness addresses a situation where redress is possible but would be inequitable to grant the appellant. Unwillingness to alter an outcome, not inability to do so. And so, from the beginning, the tension began with a party's due process right to challenge on appeal a judgment seen as wrong.

---

[2] *See also Ross E. Elgart, "Bankruptcy Appeals and Equitable Mootness,"* 19 Cardozo L. Rev. 2311 (1988).

While the doctrine is accepted by a majority of circuits, detractors abound, and today courts seem to be applying it not just inconsistently but more narrowly than in the past. Thus, when Petitioner refers to widespread disunity in the circuits, what is meant is a huge variety of invocations, on the one hand,[3] which cannot be easily rationalized. For a time, court applied the doctrine simply in the face of substantial inconvenience, a useful (and equitable) escape hatch in lieu of unraveling complexity. The doctrine was soon applied beyond the confines of reorganization plans – for example, to settlement agreements and orders authorizing the sale of debtor assets under Code §363 – although quite sparingly, it should be noted. Yet, although courts spoke of applying the doctrine "with a scalpel rather than an axe,"[4] many courts were dismissing appeals in the simplest of bankruptcies. The tipping point and perhaps the most deserving of equity was the presence of "innocent" third parties prominent in the transactions.

Nevertheless, the doctrine was originally designed to be limited in scope and creatively applied, specifically, in the most complex cases where limited relief was not feasible and upsetting a reorganization could cause substantial harm to many third parties. But the goals of finality cannot erase the matching

---

[3] Often enough, the doctrine is applied with judges clearly holding their nose, so to speak. One circuit judge has "banned" the term from the local lexicon insisting that the phrase "prudential consideration" be used. See *In re UNR Indus, Inc.,* 20 F.3d 766, 769 (7th Cir. 1974; Judge Easterbrook).

[4] *In re Pac Lumber Co.* 584 F.3d 229, 240 (5th Cir. 2009).

equivalent in a court's duty to protect the integrity of the legal process. It is time to review this equitable mootness "experiment," particularly in view of some relatively recent Supreme Court decisions that strongly suggest the doctrine cannot survive constitutional scrutiny today.

In the absence of a constitutional or statutory anchor declining to exercise jurisdiction over bankruptcy appeals, we have instead the bedrock principle that federal courts hear cases – and appeals – within their statutory jurisdiction. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Nor is equitable mootness among the handful of narrow and deeply rooted abstention doctrines recognized by the Supreme Court, doctrines *always* premised on alternative forms or mere postponement. Equitable mootness, on the other hand, is the end of the road. In *Stern v. Marshall*, 564 U.S. 462 (2011), this Court recognized the imperative in the Bankruptcy world of appellate courts exercising their jurisdiction and made the point that an unconstitutional law cannot be saved simply because it is convenient or efficient. In *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (2014), this Court emphasized its disapproval of doctrines that permit courts to decline to decide claims on "prudential" rather than statutory or constitutional grounds, admonishing that any such doctrines conflict with the Court's "recent affirmation" of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is "virtually unflagging." (*Id.* at 1386).

*See also New Orleans Pub Serv. Inc. v. Council of City of New Orleans,* 491 U.S. 350, 358 (1989).

Moreover, a comprehensive review of the Bankruptcy Code itself belies the doctrine. Such abstention possibilities that relate to *original* jurisdiction do not apply to appellate jurisdiction. Furthermore, preventing equitable mootness does not, in appropriate circumstances, prevent an appellate court, *after* hearing the merits of the appeal, from using its clear equitable authority to fashion a remedy while still protecting third parties. And the legislative history of 28 U.S.C. 1334(c) – establishing both permissible and mandatory abstention – discloses no mention of equitable mootness. Additionally, the argument that those statutory provisions that express a policy favoring the finality of bankruptcy decisions somehow support equitable mootness ignores the very rationale for the provisions in the first place – necessity. Narrowly tailored provisions for specific transactions cannot support a broad doctrine such as equitable mootness. The presumption is always against filling obvious gaps.

Finally, serious constitutional concerns require appellate review by an Article III judge in bankruptcy, and bankruptcy appellants whose appeals are dismissed as equitably moot cannot be said to have waived that right, even if waiver were available.

The Petitioner is informed by wise counsel that this Court has turned down writs of certiorari more than one occasion. In recent years, the Court has shown a willingness in Bankruptcy to elevate

constitutional principle over convenience and the siren calls of finality and practicality. Perhaps the extreme invocation in this case of the doctrine will provide a tipping point. Doctrines that are fundamentally unconstitutional but are permitted to hang out there to serve their practical masters have a way of producing the extremity – the failure of this case to meet the most basic requirements of equitable mootness as historically understood is argued immediately below – of this case. Left alone, it will happen again. The time has come for this Court to accept a challenge to equitable mootness.[5]

Were this Court somehow to save, de facto or de jure, equitable mootness, the judicial "experiment" would have to be repaired to its modest beginnings, limited in scope and availability. An appellate court would have to be quite specific and precise as to its applicability to the facts of the case before it. Nothing like the simple invocation in this instant matter, where the Court of Appeals *sua sponte*, without any suggestion by appellees and hence no adversarial education, ordered dismissal under the doctrine.[6]

The Petitioner is aware of the scholarly thinking that certiorari is most appropriate to cure the conflicts in federal courts that are stark, or most pronounced, that mere nuisance or uncertainties

---

[5] *See also Brief of Bankruptcy Law Professors in Support of Granting the Petition for Certiorari, Law Debentures Trust Co. of N.Y. v. Charter Commc'ns, Inc.* 133 S.Ct. 2021 (2013) (No. 12-847), 2013 WL 543337.

[6] It is true that the Court of Appeals permitted Petitioner a limited opportunity to argue against equitable mootness in his motion for rehearing *en banc* (denied).

should be given a chance to "percolate" through the network and self-correct. But equitable mootness at the very least is constitutionally suspect and what has been called the "confused, disparate, and rebellious" nature of equitable mootness precedent, with clearly no end in sight, calls for the supervisory hammer of this Court. No one should have any confidence in the bet that the differences among the Third, Seventh, and Ninth Circuits will resolve on their own anytime soon.

In this case, the importance of delineating the permissible contours of the doctrine is highlighted by the utter lack of traditional justifications for invocation:

(1) A reorganization plan was not involved. The "trigger" event was the later conversion order, itself appealed (see below).

(2) No serious unwinding of a complex situation was required. Little had been done under Chapter 7 that could not be easily rolled back. Debtor in fact provided a clear and simple roadmap in his appeal papers.

(3) There was no third-party injury whatsoever.

(4) Petitioner had duly sought a stay below at the District Court.[7]

(5) The particular merits of the Petitioner's original appeal were strong, if not overwhelming, on their own.

This last point leads to perhaps the most shocking element of this case, the fact that the

---

[7] Petitioner could not ask for a stay at the Court of Appeals because the District Court failed to announce its opinion.

District Court sat on the appeal for one year. As we have seen, the statutory basis for the interlocutory appeal was premised on the need to resolve this 'building block' quickly. Debtor pursued an emergency stay, which event speaks for itself. Ironically, one of the grounds given for stay was the possibility of equitable mootness rearing its head down the road. The District Court denied a consent motion for a brief extension of time to prepare the Debtor's appellate brief. The Court ignored numerous telephone calls seeking status. Under the circumstances, such a delay is unconscionable. The invocation of equitable mootness after a year's delay and because of a subsequent event occurring during that delay is an astounding unfairness to Petitioner. While certiorari may not exist simply for the correction of an injustice, a doctrine that permits such a result needs, at a minimum, reformation.

## II. Equity and Jurisdiction

The second question presented is shorter but as intense as the first. Also raised is the issue of whether the Petitioner in effect was denied a constitutional appeal on the false premise that the appellate court did not have jurisdiction.

The Petitioner need not before this Court argue the unassailable right to an appeal of a final order of the Bankruptcy Court. As we have seen, the appeal to what appeared to be the first order of the Bankruptcy Court on conversion was timely filed by Debtor. The question is, in the first instance, whether the order relied upon by the Debtor was, indeed, the

proper order for appeal. The United States Trustee on a preliminary motion to dismiss prior to hearing the merits of conversion argued that an earlier order on conversion dated eleven days prior to the motion relied upon by the Debtor was the operable motion. If so, the Trustee continued, the appellate court did not have jurisdiction as the statutory deadline for notice of appeal had expired prior to Debtor's actual notice.

Petitioner (Debtor) argued that the second order had superseded the first order and that on legal and equitable grounds the appeal should proceed. As previously noted, the District Court expressed sympathy for Debtor's equitable position but said that it was nevertheless bound by the jurisdictional provisions of the Code. Although Debtor cited in his opposition to the motion by the Trustee the highly clarifying opinion of Justice Ginsberg in *Kondrich v. Ryan,* 540 U.S. 443 (2004) for the proposition that appeal deadlines had to be carefully sorted into jurisdictional and claim-processing baskets, Debtor's equitable argument related primarily to the Trustee's preference for the first order over the second. Fleshing out the Statement of the Case provided above, the arguments for the second order were, briefly as follows:

a) All the parties and the Bankruptcy Court acted in word and in deed, as if the second order was to replace the first;
b) The second order had substantive changes to the first, including a revised timetable; and
c) This Bankruptcy Court's clear practice and intent here, as evidenced by the wording of the two orders, indicated replacement.

As a further equitable matter, Debtor pointed to only eleven days difference between the two orders, with no legal prejudice to any party caused by accepting the second order.

The District Court ruled that the case law was clear that the difference between the two orders, on their face, was legally insignificant and the second order was simply an iteration of the first order. The Court also said that it was sympathetic to the equities expressed by Debtor but its hands were tied by the jurisdictional deadlines. With respect to the Court, it was applying the equitable arguments to the wrong column of the ledger. The jurisdictional deadline concerned the days for filing the notice of appeal – days calculated from the date of the operative order. Debtor's argument concerned the proper order itself and made a compelling case (so agreed the Court) for the equitable treatment of allowing Debtor to use the 'second' order as the starting point for computing the jurisdictional deadline.

Petitioner is acutely aware, as stated earlier, that certiorari is not for redressing every error below and with respect to all mistakes of federal questions and procedures. What we have here is a federal system of bankruptcy, in fact a constitutional right, in which Chapter 11 is created to give a qualifying debtor the right to a fresh start pursuant to a Reorganization Plan (as opposed to a liquidation under Chapter 7). Chapter 11 is not a walk in the park, for debtors or their attorneys. Appeals are a critical part of the system to ensure compliance with the Code and fairness in the process. To emphasize the necessity for reasonable compliance and for

fairness, all Bankruptcy judges and appellate courts sitting in bankruptcy appeals sit in equity. Conversion is the end of Chapter 11. Therefore, an appeal on a conversion ruling is particularly important to the parties and the process, and appellate Courts should be particularly concerned to see that the merits on appeal are reached – and the constitutional mandate played out – whenever possible. The statutory basis for jurisdiction is not open to equitable supervision. The equitable supervision of this Court is available to ensure that all the lower appellate courts take equitable duties seriously and, in the rush to push out bankruptcy cases from crowded dockets, apply equity where possible to support the further constitutional mandate supporting appeals on the merits.

This case is sufficiently troubling to exercise this Court's supervisory function to see that Courts below are at least pointed in the right direction.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Philip Jay Fetner, *Pro Se*
Petitioner
8080 Enon Church Road
The Plains, Virginia 20198
(540) 222.9693
pjayfetner@aol.com