

No.

IN THE
Supreme Court of the United States

MICHAEL T. KENNEDY, PETITIONER

v.

SKADDEN ARPS SLATE MEAGHER & FLOM LLP;
SKADDEN ARPS SK PRIVATE INVESTMENT FUND
1998 c/o SKADDEN ARPS; RICHARD T. PRINS;
GREGORY M. GALARDI; TENNENBAUM CAPITAL
PARTNERS, LLC; MICHAEL E. TENNENBAUM;
SUSAN S. TENNENBAUM; DAVID HOLLANDER;
ALVAREZ & MARSEL LLC; TENNENBAUM SVEF
LLC; TENNENBAUM SVOF LLC; MARK
HOLDSWORTH; HOWARD LEFKOWITZ; BABSON &
CO.; RICHARD E. SPENCER; JOSE E. FELICIANO;
STANLEY SPRINGEL; SK PRIVATE INVESTMENT
FUND 1998 LLC

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Whether an otherwise time-barred challenge on fairness grounds to the sale of a debtor's assets is subject to the doctrine of equitable tolling, where the undisputed facts of record show that a law firm appointed as debtor counsel withheld until after expiration of all applicable statutes of limitation that the senior secured lender with whom it solicited and negotiated the sale of substantially all of the debtor's assets was owned by debtor counsel's partners, thus effectively admitting it was on both sides of the transaction?
2. Whether a law firm may avoid the "disinterestedness" requirement of 11 U.S.C. § 327(a) by not disclosing under after expiration of all applicable statutes of limitation and confirmation of the debtor's plan of liquidation, that its partners at the time owned the debtor's senior secured lender that acquired substantially all of the debtor's assets in a transaction negotiated on debtor's behalf by that law firm and which was challenged at that time on grounds of insufficient consideration?
3. Whether this Court should exercise its supervisory power to remedy a departure from the accepted and usual course of judicial proceedings by remanding this case to the Third Circuit with instructions to apply the doctrine of equitable tolling to determine whether otherwise time-barred challenges to claims arising out of the fairness in Bankruptcy Court of a sale of substantially all of a debtor's assets, later ratified by a confirmation order upholding debtor's plan of liquidation, should be allowed to proceed?

4. Whether the Third Circuit's failure to apply equitable tolling to allow an otherwise time-barred challenge to a bankruptcy court decision affecting the integrity of the bankruptcy process should be upheld when such failure conflicts with the law in other circuit courts of appeal where principles of equitable tolling are always applicable in bankruptcy matters that affect the integrity of the bankruptcy process?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a)¹ is unreported. The district court's opinion (Pet. App. 10a) is unreported. The bankruptcy court's opinion (Pet. App. 50a) is unreported.

JURISDICTION

The court of appeals entered its judgment on November 30, 2017. On December 14, 2017, Petitioner filed his Petition for Rehearing and Rehearing *en banc*. On January 16, 2018, the court of appeals denied the Petition for Rehearing. Pet. App. 66a. A certified judgment, together with a copy of the opinion, in lieu of a formal mandate, was filed on January 24, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED**11 U.S.C. § 327(a)**

§ 327. Employment of professional persons

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or

¹ References to the Appendix to the Petition are hereinafter referred to as “_a”. References to the record below are referred (“A_____”).

assist the trustee in carrying out the trustee's duties under this title.

STATEMENT

This is an action by Michael T. Kennedy ("Kennedy"), who was the founder, chairman and together with his family were 70% shareholders of Radnor Holdings Corporation ("Radnor"), to challenge an otherwise time-barred sale in bankruptcy of Radnor's assets to its senior secured lender, based on information not disclosed until after expiration of all applicable statutes of limitation, that Radnor's bankruptcy counsel at the time of the sale actually owned the senior secured lender. Even though that information would have automatically violated bankruptcy rules requiring that counsel be "disinterested," the Third Circuit refused to follow the law in other Circuits and in this Court requiring in such circumstances that principles of equitable tolling be applied and, consequently, affirmed the dismissal of Kennedy's claims against Skadden in their entirety.

On August 21, 2006, Radnor, together with Radnor's affiliated Chapter 11 debtors ("Debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. *See In re Radnor Holdings Corp.*, 353 B.R. 820, 826 (Bankr. D. Del. 2006). On August 25, 2006, the Debtors filed an application to retain Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") as their bankruptcy counsel, effective as of the petition date, pursuant to an engagement agreement dated July 5, 2006. (A0009). At the time, Tennenbaum Capital Partners LLC ("Tennenbaum") was a secured lender to Radnor through two of its affiliates, Special Value Expansion Fund, LLC

(“SVEF”) and Special Value Opportunities Fund (“SVOF”), and controlled one of Radnor’s four board seats by virtue of its appointment of Jose Feliciano, who served on the board from February 9, 2006 until June 26, 2006. *Id.*

Counsel to debtor must be “disinterested” and not “hold or represent an interest in the estate.” 11 U.S.C. § 327(a). Likewise, Bankruptcy Rule 2014 requires debtors’ counsel to disclose connections with parties in interest in the bankruptcy case, and such obligation is continuing throughout the bankruptcy process. *See e.g., In re Granite Partners, L.P.*, 219 B.R. 22, 35 (Bankr. S.D.N.Y. 1998) (“[c]ontinuing disclosure is necessary to preserve the integrity of the bankruptcy system by ensuring that the trustee’s professionals remain conflict free”); *In re Olsen Industries*, 222 B.R. 49, 59 (Bankr. D. Del. 1997); *In re CF Holding Corp.*, 164 B.R. 799, 806 (Bankr. D. Conn. 1994). “[T]he need for professional self-scrutiny and avoidance of conflicts of interest does not end upon appointment.” *Rome v. Braunstein*, 19 F.3d 53, 57-58 (1st Cir. 1994); Fed. R. Bankr. P. 2014(a).

In support of its retention, Skadden filed several declarations disclosing its ties with Tennenbaum. The declaration annexed to the retention application disclosed Skadden’s representation of Tennenbaum in matters unrelated to Radnor; that Skadden had previously provided approximately five hours of tax advice to Tennenbaum in matters related to Radnor; that Skadden obtained a full waiver from Tennenbaum in connection with its proposed retention; and that during the previous 12-month period, the value of time Skadden billed to Tennenbaum accounted for 0.27% of the value of time billed to all Skadden client matters. (A0010).

What Skadden did not disclose, however, was that Skadden partners owned Special Value Expansion Fund LLC (“SVEF”). Had that information been disclosed, it would have resulted in Skadden’s immediate disqualification under 11 U.S.C. § 327(a) and would not have been waivable by the bankruptcy court. *See U.S. Trustee v. Price Waterhouse*, 19 F.3d 138, 141-142 (3d Cir. 1994) (rejecting the argument that bankruptcy courts may take a “flexible approach” in determining whether a professional who is not “disinterested” under the statutory definition may nevertheless be employed pursuant to § 327(a)).

Nevertheless, even without knowing that Skadden’s partners owned the Debtors’ senior secured lender, on September 13, 2006, the U.S. Trustee opposed Skadden’s retention, arguing that Skadden’s relationship with Tennenbaum in all other respects was a disqualifying conflict of interest. *In re Radnor Holdings Corp.*, 2013 WL 3228116 (Bankr. D. Del. June 20, 2013),*3. The trustee explained that the difficult is that “Skadden is stuck between two masters, okay? When that happens, one of Skadden’s two masters is going to get what it wants, one of them is going to be very unhappy.” (A0781). The trustee also warned of a “nightmare” if, because of its conflict, Skadden ultimately had to be disqualified, because “as much of a nightmare as it might be to disqualify Skadden and to put somebody else in, it’s a lot better to do it now, than a month from now, two months from now when the thing blows up in Skadden’s face and winds up blowing up in the face of the estate and the creditors of this estate wind up getting hurt by it.” (A0788).

The trustee’s objection became a contested matter. At issue was whether Skadden’s relationship with Tennenbaum would disqualify it from becoming

counsel to the Debtors. In connection with that dispute, on September 19, 2006, Skadden's then partner-in-charge of the Radnor engagement, Gregg M. Galardi ("Galardi") disclosed that it "currently represents" Tennenbaum "on matters unrelated to the Debtors," that Skadden's work on behalf of Tennenbaum "consists generally of representing Tennenbaum in its capacity as a registered investment advisor, and occasionally on corporate matters," and that "Tennenbaum & Co. acts as the managing member of Tennenbaum, which in turn, is the investment advisor for two affiliates of Tennenbaum, Special Value Expansion Fund, LLC ("SVEF") and Special Value Opportunities Fund ("SVOF")."

Galardi stated that while "SVOF and SVEF are the funds that make the actual investments in companies such as Radnor," (A0737-38), Tennenbaum & Co. had other funds for which Skadden also did work.² Thus, he stated that "any work" that Skadden does for the "investment funds of Tennenbaum & Co., such as SVOF and SVEF, consist primarily of three types of representations," *i.e.*, assisting such funds in their formation and in raising capital; appearance on behalf of such funds before the SEC in connection with the various regulatory and reporting requirements of such funds, and representing such funds on day to day corporate matters." *Id.* Galardi did not disclose that

² In fact, Tennenbaum had many funds which had nothing to do with Radnor. Thus, for example, in a filing with the SEC dated October 19, 2011, Tennenbaum disclosed having a total of 16 funds, 12 of which were registered with the SEC and four of which were non-registered private funds, and onl two of which had had anything to do with Radnor. See <https://www.sec.gov/Archives/edgar/data11695553/0001341004341004-11-001902-index.htm>.

Skadden's partners had an ownership interest in SVEF, that SVEF was Radnor's senior secured creditor, and that Galardi had already solicited SVEF to bid for the purchase of substantially all of the assets of Radnor under a purchase agreement negotiated on Radnor's behalf by Galardi.

The Bankruptcy Court held a contested evidentiary hearing on September 20, 2006, at which time Skadden's connection with Tennenbaum were explored and evaluated. At the hearing, Galardi disclosed that, in addition to helping raise capital for Tennenbaum's investment funds, Skadden's partners were among those who had also invested in such funds, stating, "There are funds, and Skadden Arps' partners invest in funds. The funds have been invested in, but they are blind trusts with no investment authority." (A0777). He added that Skadden had not yet "figured out the numbers." *Id.* In fact, as was later disclosed after expiration of the applicable statutes of limitation, the Tennenbaum fund that Skadden's partners had invested in was SVEF, SVEF was Radnor's senior secured lender, a preferred shareholder and, as a credit bidder, the proposed purchaser of Radnor's assets, and the Skadden partners who made that investment in SVEF knew at all times they held such ownership.

On September 21, 2006, the Bankruptcy Court, without knowledge of Skadden's ownership in SVEF overruled the U.S. Trustee's objection based on Skadden having demonstrated that its representation of Tennenbaum constituted only 0.27% of its ten annual \$1.6 billion billing revenue at that time. (A0820-823). Based only on the disclosures that were made, and the evidence presented at the hearing, which did not include any mention of Skadden partners having an ownership interest in Radnor's senior secured lender,

the Bankruptcy Court concluded that Tennenbaum was not a significant client and that Skadden's relationship with Tennenbaum was not a disabling conflict of interest. The order was not appealed. *Id.* This final order resolved the issue of whether Skadden was conflicted, which is a core allegation of Kennedy's later complaint.

SVEF was one of two senior secured Radnor lenders owned by Tennenbaum that Galardi had solicited to sell substantially all of Radnor's assets in an effort to pay off Radnor's secured indebtedness. At a pre-sale hearing on October 27, 2006, the Bankruptcy Court asked Galardi whether Skadden partners had "investments in Tennenbaum." (A0872). Rather than disclose that Skadden partners had invested in SVEF, Galardi instead reminded the court what he had said the month before, "[i]n fact, I said to you at that time on [the] record that those people invest in blind funds. They have no discretionary authority and Skadden Arps has a policy that if that was to disable us, they'd have to walk away from those investments." (*Id.*). In fact, as was later disclosed after the applicable statutes of limitation had expired, by "blind funds," Galardi meant only that the specific fund the Skadden partners were investing in was selected by Tennenbaum not Skadden, that such selection was made in 2004 – two years before Skadden solicited and negotiated the asset sale – and that once that selection was made in 2004, the Skadden partners would have known they had invested in SVEF, which was the senior secured lender who had been solicited by Skadden on Radnor's behalf to credit bid SVEF's debt as part of a transaction in which Radnor was selling to SVEF substantially all of its assets.

Tennenbaum's secured claims were heavily litigated during the chapter 11 cases. *In re Radnor Holdings Corp.*, 564 B.R. 467, 473 (D. Del. 2017). On the first day of the chapter 11 cases, Skadden recommended to Radnor's board that it form a special committee and hire separate counsel that had not represented Tennenbaum to investigate any potential claims and causes of action against Tennenbaum and the liens securing Tennenbaum's claims. *Id.* WilmerHale was retained by the special committee, and its retention was approved by the Bankruptcy Court. On October 25, 2006, the Debtors filed an objection to Tennenbaum's claims. *In re Radnor Holdings Corp.*, 2013 WL 3228116 (Bankr. D. Del. 2013). The objection was filed by WilmerHale as counsel for the special committee and by Skadden as counsel for the Debtors.

After attempts led by Skadden at restructuring proved unsuccessful, the Debtors, on Skadden's recommendation, initiated a sale process and ultimately requested, at Skadden's suggestion, that Tennenbaum make an offer to purchase Radnor's operating business. Skadden attorney Gregg M. Galardi, negotiated the sale agreement on behalf of the debtors. (A0913-923, A0950-0959). During the sale process, the Official Committee of Unsecured Creditors ("Committee") initiated an adversary proceeding against Tennenbaum and Feliciano, asserting causes of action based on recharacterization, equitable subordination, breaches of fiduciary duty, fraudulent conveyances, avoidance of liens, and objections to claims. 564 B.R. at 473. The Committee alleged that Tennenbaum because Radnor's secured lender so that it could engineer a bankruptcy fire sale and buy the company at a low price, leaving unsecured creditors with nothing:

[I]f Tennenbaum is permitted to consummate its scheme and to proceed with its acquisition plan the unsecured creditors stand to recover nothing. That outcome is by design, the result of a deliberate, coordinated plan by Tennenbaum to increase the debt load of the already over-leveraged Debtors, take them into default, and then acquire Debtors' valuable assets and business operations in a fire-sale at a discount so steep that it constitutes a constructively fraudulent transfer.

564 B.R. at 473.

On November 17, 2006, following an eight-day trial, the Bankruptcy Court entered a judgment against the Committee on each count of its complaint not previously withdrawn by the Committee. *See Official Comm. of Unsecured Creditors of Radnor Holdings Corp. v. Tennenbaum Capital Partners LLC*, 353 B.R. 820, 827 (Bankr. D. Del. 2006). Even though this was information known only to them, at no time during that trial was any disclosure made by either Tennenbaum or Debtors' counsel Skadden, or about Skadden's ownership of SVEF, the credit bidder and secured creditor that was making the acquisition that the Committee was challenging. Kennedy was a key witness against Tennenbaum during the trial, and the Bankruptcy Court determined that:

"TCP [Tennenbaum Capital Partners] did *not* engage in misconduct; TCP did *not* seek to benefit itself at the expense of others. TCP did *not* seek to mislead trade creditors, public noteholders, or other stakeholders. TCP at all

times acted in good faith with a view to maximize Radnor's value to all constituents."

564 B.R. at 473. The Committee appealed the Tennenbaum Judgment, but later voluntarily dismissed the appeal. The Committee never knew that Skadden was on both sides of the transaction. The non-disclosure notwithstanding, the Tennenbaum Judgment thus resolved the issue of whether Skadden and Tennenbaum conspired in the bankruptcy cases to ensure a sale to Tennenbaum, which is a core allegation of Kennedy's complaint.

On November 21, 2006, the Bankruptcy Court entered the Sale Order approving the sale of substantially all of the Debtors' assets to an affiliate of Tennenbaum which, unbeknownst to the Bankruptcy Court, was owned, at least in part, by Skadden's partners. The Sale Order contained specific findings, including that: (1) the sale to Tennenbaum represented the highest and best offer after a fair marketing process; (2) the asset purchase agreement and sale transaction were negotiated by the Debtors and Tennenbaum at arms' length, without collusion or fraud, and in good faith within the meaning of section 363(m)³ and (n)⁴ of the Bankruptcy Code; (3)

³ Section 363(m) of the Bankruptcy Code provides that a reversal or modification of an order approving a sale under section 363(b) "does not affect the validity of [the] sale . . . under such authorization to an entity that purchased . . . such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale . . . were stayed pending appeal." *See* 11 U.S.C. § 363(m).

⁴ Section 363(n) of the Bankruptcy Code provides that a debtor may (a) avoid a sale approved under section 363(b) if the sale price

Tennenbaum did not engage in any conduct that would permit the sale to be avoided, or costs or damages imposed, under section 363(n); (4) there was no evidence of insider influence, improper conduct, fraud or collusion by Tennenbaum or its affiliate in connection with the negotiation and the sale; and (5) the sale was undertaken by Tennenbaum in good faith and Tennenbaum was a purchaser in good faith within the meaning of section 363(m). The Bankruptcy Court further found that a restructuring or reorganization (as opposed to the sale and liquidation) was precluded by Radnor's circumstances, not by improper conduct on Skadden or Tennenbaum's part. 564 B.R. at 474.

The Sale Order was not appealed. However, none of the stakeholders whose interests were adversely affected by the sale knew that Skadden was on both sides of the transaction, which was information not disclosed until after expiration of the applicable statutes of limitation. The Sale Order nevertheless resolved the issue of whether Tennenbaum's purchase of the Debtors' assets was somehow wrongful, which is a core allegation of Kennedy's complaint.

On September 10, 2012, the Bankruptcy Court held a hearing to consider confirmation of the Debtors' plan of liquidation. 564 B.R. at 474. Kennedy's counsel had previously requested that the confirmation be delayed so that Kennedy could object to the plan on the basis of an unspecified "matter" that Kennedy had "uncovered." *Id.*, citing *Radnor*, 2013 WL 3228116, at

was controlled by an agreement among potential bidders, or (b) recover from a party to such an agreement any amount by which the value of the property sold exceeds the price at which the sale was consummated. *See* 11 U.S.C. § 363(n).

*11. The Bankruptcy Court had extended Kennedy's deadline to object for 30 days, and Radnor had later voluntarily extended that deadline by an additional 90 days. *Id.* Despite these extensions, Kennedy failed to file any objection to the proposed plan; rather he filed another motion to extend his objection deadline which, on July 12, 2012, was denied. *Id.*

At the conclusion of the hearing on September 10, 2012, the Bankruptcy Court entered a Confirmation Order, which was not appealed. *Id.* The Confirmation Order confirmed a plan of liquidation which had been predicated upon the sale six years before of substantially all of the Debtors' assets to an affiliate of Tennebaum. In authorizing that Confirmation Order, the Bankruptcy Court did not know that Skadden was on both sides of the transaction. The Confirmation Order nevertheless included a finding that Debtors' had acted in good faith in negotiating, formulating, and soliciting votes for acceptance of the plan, enjoined claimholders, such as Kennedy, from taking any action inconsistent with the provisions of the plan; and released the Debtors and their professionals, including Skadden, from any liability for any post-petition act or omission arising out of the chapter 11 cases, except for willful misconduct or gross negligence. *Id.* at 474-75. The plan also resulted in the elimination of all of Kennedy's equity in Radnor. *Id.*

As consideration in the asset sale that took place in 2006, the senior-secured Tennenbaum lender "credit bid" a portion of its secured claim. Because Tennenbaum did not credit bid its entire claim, the fund still held claims against Radnor after the sale. Because Kennedy had personally guaranteed up to \$10 million of those claims if not paid by Radnor, Tennenbaum sought to enforce the guaranty. When Kennedy refused to

pay, Tennenbaum sued him for breach of contract in New York and prevailed. *Id.* at 475.

On November 18, 2012, Skadden filed its final fee application seeking compensation for services rendered and reimbursement of expenses incurred as counsel to Debtors for the period from August 21, 2006 through September 28, 2012. *Id.* On December 26, 2012, Kennedy filed a combined motion and objection, in which he objected to Skadden's final fee application and moved to set aside the Sale Order under Rule 60(b)(“Objection”). *Id.* The Objection purported to seek various forms of relief in addition to “setting aside” the Sale Order, including “revesting” in the Debtors' estates the assets sold to the Tennenbaum affiliate that was later discovered to have been owned by Skadden's partners; invalidating certain plan releases approved in the Confirmation Order; and appointing an examiner, trustee, and special counsel to conduct an investigation and bring certain causes of action at Kennedy's behest. *Id.*

Contemporaneously therewith, Kennedy also filed the Complaint which sought \$300 million in damages and rescission of the sale. Kennedy's Objection expressly incorporated the allegations of the Complaint: (1) Tennenbaum was a major client of Skadden; (2) Skadden failed to disclose this to Kennedy; (3) Tennenbaum steered Radnor to retain Skadden; (4) Tennenbaum and Skadden colluded and conspired to advance Tennenbaum's objectives in the Debtors' chapter 11 cases to the exclusion of Kennedy's goal; (5) Skadden “effectively represented” Tennenbaum's interests in Radnor's chapter 11 cases; (6) Skadden prevented Kennedy from participating in the chapter 11 cases and orchestrated a sale of Debtors' assets to Tennenbaum; and (7) Skadden frustrated Kennedy's

and Radnor's attempts to reorganize Radnor. *Id.*; (A1033-1110).

The Bankruptcy Court denied the request to set aside the Sale Order as time-barred, as more than six years had passed since its entry on November 21, 2012. 564 B.R. at 475.

On March 15, 2013 – nearly five months after the applicable statute of limitations had run, and the confirmation order had been issued, Skadden disclosed for the first time that it held an ownership interest in the Tennenbaum affiliate that was Radnor's senior secured lender which purchased substantially all of the assets of the Debtors pursuant to a transaction negotiated by Skadden as Debtors' counsel. Thus, Skadden made the following disclosure:

In response to recent, baseless post-confirmation allegations and objections filed on and after December 26, 2012 by Michael T. Kennedy (Radnor's former Chairman, CEO and majority stockholder) against Skadden, Arps and in opposition to its final fee application in these cases, the Firm has made additional supplemental internal inquiries to identify all possible past Firm connections to Tennenbaum and its affiliates. In the past week, such recent supplemental internal inquiries revealed the following additional connections with Tennenbaum affiliates:

. . .

Special Value Expansion Fund, LLC shares: a total of thirty-nine (39) Series Z Preferred shares of Special Value Expansion Fund, LLC ("SVEF") were purchased by twenty-three (23)

Skadden, Arps affiliated investors (including Skadden, Arts partners and their spouses) at \$500.0 per share, for an aggregate of \$19,500. The Firm believes these shares were purchased sometime in 2004. These were individual, personal investments as to which the Firm itself was not a party. SVEF is a Tennenbaum affiliate and was as pre-petition lender to the Debtors.

(A1118).

According to financial statements filed with the SEC by SVEF, there were a total of 312 shares of Series Z Preferred shares issued and outstanding, which meant that Skadden's disclosure showed its partners held at least 12.5% of the class. In fact, the percentage could be much higher because, as Galardi testified two months later at a hearing on Kennedy's objection to Skadden's fees, the class of shares that Tennenbaum had offered to Skadden partners was for tax reasons *offered only to Skadden partners and to no one else*. (A1243) ("I believe certain of these funds were made available to Skadden partners that were not available to others, for tax reasons," and were "not available to the general public").

The Z Preferred shares were entitled to a paid dividend of 8% per year and special voting rights gave holders of Z Preferred the right to control a majority of the entire SVEF board if dividends were not paid for two years. (A0627-630). Skadden did not disclose the identity of the Skadden partners who purchased these Z Preferred shares. Thus, it was not known whether the investors were members of Skadden's executive committee or played some other management role with the firm. Nor was it ever disclosed what each Skadden investor received when the shares were later

redeemed; according to SEC filings, all such shares were redeemed as of November 30, 2013. And SVEF was not merely a “prepetition lender to the Debtors.” It was also a post-petition senior lender, credit bidder and purchaser of substantially all of the Debtor’s assets.

There has never been any discovery in respect of Kennedy’s claims. However, as indicated above, there was a two-day hearing in Bankruptcy Court on May 1-2, 2013 on Kennedys’ objection to the final payment of Skadden’s fees. During that hearing, Galardi, who had left Skadden in 2011, testified that each Skadden partner who invested with Tennenbaum would have known the name of the specific fund in which it had invested, and thus would have known in August 2006, when Skadden sought permission from the Bankruptcy Court to be retained as Radnor’s counsel, that his or her investment was in Radnor’s senior secured lender; and that Galardi’s use of the term “blind trust” in 2006 meant only that Tennenbaum itself selected the specific investment that was to be made, but that once that selection was made, the Skadden partner would have known for tax purposes in which specific fund the investment had been made. (A1231, 1233, 1238, 1243).

Finally, Galardi made clear in his testimony that the information that Skadden disclosed for the first time in March 2013 – after expiration of all applicable statutes of limitation – was information not disclosed by him in 2006. (A1248).

Following the evidentiary hearing and post-trial briefing, the Bankruptcy Court overruled Kennedy’s Objection in all respects and approved Skadden’s final fee application in its entirety. *See In re Radnor*, 2013 WL 3228116 (Bankr. D. Del. June 20, 2013). The Final Fee Order contained numerous and detailed findings of fact and conclusions of law upon which the Bankruptcy

Court determined that the claims and allegations of misconduct by Skadden asserted in the Complaint and Objection were without basis in fact and lacked legal foundation. The Bankruptcy Court further rejected Kennedy's allegations that Skadden made insufficient disclosures and concealed conflicts of interest:

Given the full record of Skadden disclosures, Skadden did not misrepresent its relationships with Tennenbaum to the Court or the UST. Skadden's numerous disclosures in these Chapter 11 cases (including the Galardi declaration and Skadden's statements at the September 20, 2006 hearing) were extensive, publicly filed, made on the record, and available to any member of the public, including Kennedy.

Id. at *4. The Court made no mention at all of the disclosures Skadden made on March 15, 2013, or the admissions Galardi made at the Skadden fee hearing on May 1-2, 2013. The Court thus nowhere explained why Skadden's failure to disclose until after expiration of the applicable statutes of limitation that it was on both sides of the transaction in which substantially all of Radnor's assets were sold was not a misrepresentation by Skadden of its relationships with Tennenbaum.

To the contrary, the Bankruptcy Court rejected Kennedy's allegations that he did not know of Skadden's relationships with Tennenbaum, finding that it was sufficient that he knew generally in 2006 that Skadden's partners had invested in Tennenbaum funds, even if he did not know, and could not have known until after expiration of the applicable statutes of limitation when Skadden disclosed it, that Skadden had an ownership interest in the specific Tennenbaum fund

which was Radnor's senior secured creditor and the entity that Skadden had solicited to purchase substantially all of Radnor's assets in exchange for a reduction in debt of all but \$10 million, which purchased . . . See *id.* at *4. Thus, the Court did not address Skadden's ownership interests in the Tennenbaum fund that was Radnor's senior secured lender which, had it been addressed, would have placed the Court in the position of having to address Skadden's failure to disclose a circumstance which would have resulted in its immediate disqualification as debtor's counsel under 11 U.S.C. § 327(a) because Skadden's ownership of a creditor would have created a conflict of interest under 11 U.S.C. § 327(a) that was not waivable. Instead, the Court found that "Skadden's pre-existing attorney client relationship with Tennenbaum was disclosed and known to Kennedy . . . when Skadden was retained prepetition . . . "; *id.* at *6 ("the Court finds that Kennedy lacks credibility" in claiming that he did not know about the relationship).

The findings and conclusions in the Final Fee Order were clearly contrary to the Complaint's core allegations that Skadden and Tennenbaum conspired to hire conflicts of interest, and to engineer an asset sale to Tennenbaum in the chapter 11 cases, to the detriment of Kennedy and other shareholders and creditors.

Kennedy appealed the Final Fee Order on July 3, 2013. On September 5, 2013, Skadden filed a motion for sanctions against Kennedy pursuant to Federal Rule of Bankruptcy Procedure 9011 and 28 U.S.C. § 1927,⁵ seeking, among other relief, dismissal of the

⁵ 28 U.S.C. § 1927 provides, "[a]ny attorney or other person admitted to conduct cases in any court of the United States or an

complaint. On August 14, 2014, the United States District Court for the District of Delaware affirmed the Final Fee Order, finding that the Bankruptcy Court's factual findings and conclusions were proper. In so doing, the District Court never addressed any of the information that Skadden did not disclose until March 15, 2013, and Kennedy appealed to the Third Circuit.

While the Third Circuit appeal was pending, the bankruptcy judge who had heard the Debtors' case retired, and the chapter 11 cases were reassigned on December 10, 2014, to another bankruptcy judge. Shortly thereafter, Kennedy filed a motion to vacate the Final Fee Order (the "Motion to Vacate"), on the grounds that the prior bankruptcy judge had relied on false statements and was not aware of the evidence that first came to light from Skadden on March 15, 2013, and thereafter. The Third Circuit appeal was stayed while the Motion to Vacate was pending.

On March 18, 2015, the Bankruptcy Court denied the Motion to Vacate, finding that Kennedy had not asserted a single new fact or argument which the Bankruptcy Court and the District Court had not already considered and rejected, and that Kennedy, dissatisfied with the ruling, was merely "taking a 'run' at a newly assigned judge." 5564 B.R. at 477. The Bankruptcy Court further determined, without any analysis of the new information that Skadden disclosed on March 15, 2013 regarding its ownership interest in Radnor's senior secured lender – information known only to Skadden and Tennenbaum -- that it was the law

Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

of the case that (1) the Skadden Retention Order resolved Skadden's purported conflict of interest and failure to disclose; (2) the Tennenbaum Judgment resolved Tennenbaum's purported improper scheme in the bankruptcy case to buy Debtors; (3) the Sale Order resolved Tennenbaum's purported conspiracy with Skadden to purchase Debtors; and (5) the Final Fee Order resolved and rejected all allegations of wrongdoing by and between Tennenbaum and Skadden. *Id.*

On December 10, 2015, the Third Circuit affirmed the Final Fee Order. *See In Re Radnor Holdings Corp.*, 629 F. App'x 277 (3d Cr. 2015),⁶ and on October 11, 2016, this Court denied Kennedy's petition for certiorari. *Kennedy v. Skadden, Arps, Slate, Meagher & Flom LLP*, 137 S. Ct. 294 (Oct. 11, 2016).

In the meantime, on April 22, 2016, while Kennedy's certiorari petition was pending, the Bankruptcy Court entered an order dismissing Kennedy's complaint with prejudice on grounds that the claims were (1) time-barred; (2) precluded by prior court orders and opinions, and (3) asserted by Kennedy without proper standing. In its order, the District Court nowhere addressed the disclosures that Skadden made on March 15, 2013, and Kennedy appealed the dismissal of the complaint to the Third Circuit.

On November 30, 2017, the Third Circuit affirmed the dismissal of Kennedy's complaint solely on the grounds that it was time-barred. *In Re Radnor Holdings Corporation*, 709 Fed. Appx. 94 (3d Cir. 2017). In its decision, the Third Circuit stated that "[s]ince Tennenbaum's relationship with Skadden, including

⁶ On January 19, 2016, the Third Circuit issued its mandate affirming the Final Fee Order.

that certain Skadden partners had invested in Tennenbaum-affiliated Funds, was revealed at the least by the sale hearing [on November 21, 2006] and thus more than six years before Kennedy filed his Complaint, his claims were time-barred.” The panel also stated that Kennedy was “unable to show that equitable tolling applies here.” Opinion at 7. The Third Circuit did not address Skadden’s ownership of SVEF, its cause for immediate disqualification as debtor’s counsel under 11 U.S.C. § 327(a), or holdings from the Third Circuit in *U.S. Trustee v. Price Waterhouse*, *supra*, that such requirement is not waivable. See also *In re Federated Dep’t Stores*, 44 F.3d 1310 (6th Cir. 1995), citing *In re Middleton Arms, LP*, 934 F.2d 723, 725 (6th Cir. 1991) (Section 327(a) clearly states that “the court cannot approve the employment of a person who is not disinterested, even if the person does not have an adverse interest”).

In its ruling, the Third Circuit recited that the Bankruptcy Court had determined there are multiple statutes of limitation which potentially apply to Kennedy’s claims and that his claims are time-barred no matter which of those statutes of limitations apply. See *Radnor Holdings Corp.*, 2016 WL 1644499, at *3 (identifying all potentially applicable statutes of limitation). The panel then stated that “[s]pecifically, none of the even potentially applicable statutes of limitations is more than six years, and because of all of the wrongful acts alleged in Kennedy’s complaint predate or relate to Radnor’s sale to Tennenbaum on November 21, 2006, and Kennedy did not file his original Complaint until December 26, 2012, more than six years later, each of the causes of action asserted in Kennedy’s complaint is time-barred.”

The Third Circuit then pointed out that Kennedy did not dispute that, absent tolling, all potentially applicable statutes of limitation had expired by the time he filed his Complaint, but argued that “any applicable limitations periods should be equitably tolled in this case because, according to Kennedy, appellees concealed until March 15, 2013, that certain Skadden attorneys had ownership interests in a Tennenbaum-affiliated Fund” and that Kennedy “acknowledged that ownership in the Tennenbaum affiliate by Skadden attorneys forms the basis for relief he is requesting under each of the counts set forth in his Complaint.” In fact, Kennedy’s claim was based not on mere ownership in the Tennenbaum affiliate by Skadden attorneys, as the Third Circuit stated, but rather on the Tennenbaum affiliate being the Radnor senior secured lender that acquired substantially all of Radnor’s assets in a sale that was solicited and negotiated on Radnor’s behalf by Skadden itself, as Debtors’ counsel, thus placing Skadden squarely on both sides of the transaction, which the Third Circuit did not mention.

The Third Circuit thus stated that that “[a]s the Bankruptcy Court and the District Court pointed out, the Bankruptcy Court conducted the hearing on the sale to Tennenbaum on November 21, 2006, more than six years before Kennedy filed this Complaint, and *Kennedy knew of Skadden’s relationship with Tennenbaum*, at the latest, by the time of the 2006 sale hearing.” *Id.* (emphasis added). However, Kennedy could have not known, because it was not disclosed until March 15, 2013, that Skadden’s partners owned the specific Tennenbaum affiliate that was Radnor’s senior secured lender and to whom Skadden, as debtors’ counsel, negotiated the sale of substantially all of Radnor’s assets.

The Third Circuit nevertheless stated that “[f]ollowing an evidentiary hearing, the Bankruptcy Court overruled Kennedy’s Objection to Skadden’s Final Fee Application and found that *prior to and at the September 20, 2006 hearing on Skadden’s retention as bankruptcy counsel, Skadden disclosed, among other things, that Skadden partners had invested in the Tennenbaum-affiliated Funds.*” *Radnor Holdings Corp.*, 2013 WL 3228116, at *3 (emphasis added). The Court added that “these disclosures were made openly and publicly prior to the Court’s approval and authorization of Skadden’s retention.” *Id.* at *3.

However, the disclosures that Skadden made in 2006 that its partners had invested in the Tennenbaum-affiliated Funds did not include the disclosure that the specific Fund that Skadden partners had invested in was the Tennenbaum affiliate that was Radnor’s senior secured lender to whom Skadden was negotiating the sale of substantially all of Radnor’s assets -- over the objection of stakeholders like Kennedy and other unsecured creditors, who believed Radnor could still be reorganized and the consideration for the sale was insufficient in any event.

The Third Circuit nevertheless held that Skadden’s disclosures in 2006 were sufficient to put Kennedy on notice of a conflict of interest that would have resulted in Skadden’s automatic disqualification as debtors’ counsel had it been known at the time. The Third Circuit thus concluded that, by virtue of the disclosures made in 2006, “Kennedy is unable to show that equitable tolling applies here.” *Id.*

On December 14, 2017, Kennedy filed a petition for rehearing and rehearing en banc, in which he argued that the Third Circuit panel which heard the case had overlooked the undisputed fact that Skadden

had waited until expiration of all applicable statutes of limitation before disclosing its ownership interest in Radnor's senior secured lender. Kennedy also argued that the panel had overlooked controlling Third Circuit authority on the application of equitable tolling, as well as Third Circuit authority governing the requirement that bankruptcy professionals be "disinterested," which requirement is unwaivable. On January 16, 2018, the Third Circuit issued an order without opinion denying the petition for rehearing and rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

The instant petition for certiorari should be granted because the Third Circuit's decision refusing to apply the doctrine of equitable tolling in a bankruptcy proceeding in which debtors' counsel waited until after expiration of the statute of limitations to disclose certain facts showing that it was on both sides of a transaction in which substantially all of the debtors' assets were sold, is in conflict with a recent decision of the Ninth Circuit in which the doctrine of equitable tolling was applied in a bankruptcy proceeding involving an otherwise time-barred fraudulent transfer claim as well as an older decision of this Court in which the doctrine of equitable tolling was held to apply in a pre-bankruptcy code proceeding in which facts giving rise to a claim by the debtor estate were not disclosed until after expiration of a ten-year statute of limitation. The petition should also be granted because the failure to apply equitable tolling here results in debtors' counsel succeeding in avoid liability for violating the bankruptcy rule against disinterestedness. Finally, the petition should be granted because the failure to apply equitable tolling here means that the bankruptcy

court's initial factual findings that transactions involving the sale of substantially all of the debtors' assets were at arms-length, and therefore fair to dissenting creditors, were based on an incomplete record in which the debtors' counsel was on both sides of that transaction, which is such a departure from the accepted and usual course of judicial proceedings that it warrants exercise of this Court's supervisory power.

A. The Third Circuit's Decision is in Conflict with a Recent Decision of the Ninth Circuit

The Third Circuit held in *In Re Radnor Holdings Corp.*, 706 Fed. Appx. 94 (3d Cir. 2017) that the doctrine of equitable tolling would not be applied even though defendant debtors' counsel waited until after the expiration of all applicable statutes of limitation before disclosing otherwise automatically disqualifying facts that its partners owned the debtor's senior secured lender to whom debtor's counsel solicited and negotiated the sale of substantially all of the debtors' assets. This failure to apply equitable tolling conflicts with the recent decision of the Ninth Circuit in *In Re Milby*, 875 F. 2d 1229 (9th Cir. 2017) which applied the doctrine to address an otherwise time-barred claim in Bankruptcy Court, citing as controlling the decision of this Court in *Holmberg v. Ambrecht*, 327 U.S. 392 (1946).

In Re Milby involved otherwise time-barred fraudulent transfer claims. The bankruptcy estate discovered allegedly fraudulent transfers days before the statute of limitations on avoidance claims was set to expire. However, the action was not filed until almost a year later. The bankruptcy court dismissed the action as time barred and held that the estate's delay in filing

after discovering the transfers precluded equitable tolling. The Bankruptcy Appellate Panel (“BAP”) reversed, holding that such post-discovery delay is irrelevant to whether equitable tolling applies.

The Ninth Circuit affirmed the judgment of the BAP not because post-discovery delay is irrelevant – the court said it was still a factor in assessing a party’s “overall diligence,” but because the estate’s overall diligence, combined with “the extraordinary circumstances preventing earlier discovery of the subject transfers, warrants equitable tolling.” 875 F.3d at 1230. By contrast, the Third Circuit in *Radnor* either overlooked or purpose chose to ignore the extraordinary circumstances preventing earlier discovery of otherwise automatically disqualifying facts showing that debtor’s counsel owned debtor’s senior secured lender to whom debtor’s counsel then solicited and negotiated the sale of substantially all of debtors’ assets, and on that basis, found no facts warranting equitable tolling. Because it is undisputed that the facts which showed debtors’ counsel owned debtor’s senior secured lender were not disclosed by Skadden until March 15, 2013 – after all applicable statutes of limitation had expired – the Third Circuit either found it too inconvenient to allow equitable tolling to reopen otherwise settled proceedings in Bankruptcy Court, which would be contrary to the law in other Circuits, or the Third Circuit simply chose to overlook the undisputed facts. Either way, this Court should grant certiorari to make clear that application of principles of equitable tolling is mandatory in bankruptcy proceedings where applicable statutes of limitation would otherwise have expired.

In requiring the application of equitable tolling, the Ninth Circuit stated that “[t]he doctrine of

equitable tolling is ‘read into every federal statute of limitation,” citing this Court’s opinion in *Holmberg*. *Holmberg* involved an otherwise time-barred attempt to recover losses from a bank shareholder who did not reveal the extent of his equity holdings in the bank until after expiration of the applicable statute of limitations which here was ten years. The Second Circuit held that the claim against the bank shareholder was controlled by the New York statute of limitations and that “the mere lapse of ten years barred the action.” 327 U.S. at 394.

In reversing and remanding with instructions to apply the doctrine of equitable tolling, Justice Frankfurter, in an opinion for the court, stated as follows:

Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principles that “laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced – an inequity founded upon some change in the condition or relations of the property or the parties.” [citation omitted]. And so, a suit in equity may lie though a comparable cause of action at law would be barred. If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.

Equity will not lend itself to such fraud and historically has relieved from it. It bars a

defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and remain in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.”

327 U.S. at 396-97. Thus, this Court held that the doctrine of equitable tolling is read into every federal statute of limitation. *Id.* at 397.

Here, the Third Circuit was presented with undisputed evidence that Skadden, as debtors’ counsel, withheld until after expiration of the applicable statutes of limitation information of its ownership interest in debtors’ senior secured creditor. The Skadden partner who was lead counsel for the debtors when the disclosure should have been made in the fall of 2006 testified in May 2013 that this was new information he had not previously disclosed.

In its opinion, the Third Circuit stated that Mr. Kennedy was “unable to show that equitable tolling applies here.” Opinion at 7. The panel did not cite any equitable tolling cases. In so doing, the panel overlooked the Third Circuit’s discussion of the applicable rules governing the doctrine of equitable tolling in *In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation*, 795 F.3d 380, 400-401 (3d Cir. 2015)(holding that equitable tolling may be applicable based on “fraudulent concealment”);

and the cases cited therein, *see e.g., Oshiver v. Levin Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994); *Miller v. N.J. State Dep't of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998) (equitable tolling is an appropriate remedy when principles of equity would make a rigid application of the statute of limitations unfair).

In the Third Circuit, “[t]he plaintiff has the burden of proving fraudulent concealment, which requires a three-part showing: (1) that the defendant actively misled the plaintiff; (2) which prevented the plaintiff from recognizing the validity of her claim within the limitations period; and (3) where the plaintiff’s ignorance is not attributable to her lack of reasonable due diligence in attempting to uncover the relevant facts.” *Cetel v. Kirwan Fin. Corp.*, 460 F.3d 494, 509 (3d Cir. 2006).

Here, there was ample evidence by which the Third Circuit could have found that Mr. Kennedy had made the required showing because (1) both Skadden and Tennenbaum knew the true facts about Skadden’s ownership in Radnor’s largest senior secured creditor; (2) which prevented Mr. Kennedy from recognizing the validity of his claim for challenging the asset sale which destroyed his company and extinguished his equity interest, within the limitations period; and (3) where Mr. Kennedy’s ignorance is not attributable to any lack of reasonable diligence on this part since Skadden was under a continuing obligation to disclose, and the information was known only to Skadden and Tennenbaum, neither of whom made the required disclosure – presumably because it was in their mutual financial self-interest not to do so.

B. The Third Circuit Decision Allows Skadden to Avoid Liability for Violating 11 U.S.C. §

327(a) Requiring Debtor's Counsel to Be Disinterested

The Third Circuit opinion is contrary to its own precedential opinion in *U.S. Trustee v. Pricewaterhouse, supra*, and that of the Sixth Circuit in *In Re Federated, supra*. The information that was not disclosed until after expiration of all applicable statutes of limitation was information that would have automatically disqualified Skadden from serving as debtors' counsel under the disinterestedness requirement of 11 U.S.C. § 327(a). Section 327(a) states in pertinent part that "[t]he Trustee, with the court's approval, may employ one or more . . . professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons . . . a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest." A bankruptcy court cannot appoint debtor counsel which is interested and that requirement cannot be waived by the court.

Here, Skadden, as the "professional person," actually held through its partners an ownership interest in debtors' senior secured creditor, which was information known only to Skadden and the debtors' senior secured creditor and its affiliates, and thus concealed by them. Thus, Skadden, as debtors' counsel, held "an interest adverse to the estate" in violation of the disinterestedness requirement which, had it been disclosed, would have automatically disqualified Skadden from serving as debtors' counsel. See Judge

Alito's seminal opinion in *United States Trustee v. Price Waterhouse*, 19 F.3d 138 (3d Cir. 1994) (disqualifying accounting firm from assisting debtor where accounting firm was a pre-petition debtor and thus not "disinterested" within meaning of bankruptcy rule). As this Court stated in *Price Waterhouse*, a bankruptcy court does not enjoy the discretion to bypass the requirements of the Bankruptcy Code. *See also In re Congoleum Corp.*, 426 F.3d 675, 693 (3d Cir. 2005) (rejecting debtor's retention of law firm as contrary to 11 U.S.C. § 327(a) based on law firm's pre-petition conduct); *In re Pillowtex, Inc.*, 304 F.3d 246 (3d Cir. 2002) (rejecting debtor's retention of Jones Day as contrary to 11 U.S.C. § 327(a) where law firm, which had represented debtor pre-petition, may have received voidable preference when it was paid in full prior to bankruptcy filing); *In re BH&P Inc.*, 949 F.2d 1300 (3d Cir. 1991) (upholding finding of an actual conflict of interest where there was "the possibility that the parties would favor one estate over the other in their attempt to serve all of them"); *see also In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 477 (3d Cir. 1998) ("[s]ection 327(a) presents a per se bar to the appointment of a law firm with an actual conflict").

C. The Third Circuit's Ruling Is Such a Departure from the Accepted and Usual Course of Judicial Proceedings as to Warrant Exercise of This Court's Supervisory Power

The Third Circuit's decision not to apply the doctrine of equitable tolling also foreclosed any meaningful look back at whether the transactions that Skadden, as debtors' counsel, negotiated with itself, as

the debtor's senior secured creditor, were fair to the debtor and its equity holders, including Mr. Kennedy, whose holdings, in this case, were extinguished by the Skadden-negotiated sale of substantially all of the debtors' assets to that Skadden-owned senior secured creditor in a transaction that Mr. Kennedy alleged was for less than fair consideration, thus exposing him to an otherwise unwarranted \$10 million claim on a personal guaranty.

In *U.S. Bank Nat. Ass'n ex rel. CW Capital Asset Management LLC v. Village at Lakeridge LLC*, 138 S.Ct. 960 (Mar. 5, 2018) ("*CW Capital*"), this Court very recently examined the process by which a non-consensual "cramdown" plan of reorganization in bankruptcy is deemed fair to the non-consenting creditors. Such plans are deemed fair only if another impaired creditor or class of creditors has consented, provided that the creditor or class is not an "insider" of the debtor, in which case the consent does not count. The critical issue in that case was whether the bankruptcy court's findings, which turned on whether the consenting creditor's transactions with the debtor were at arms length, were subject on appeal to *de novo* review or a clear error standard.

In holding for a unanimous Court that the standard of review in such cases should be clear error, Justice Kagan held that the decision is ultimately one involving a mixed question of law and fact for which deference should be given to the bankruptcy court because the bankruptcy court was in the best position to analyze and weigh all the relevant facts. Crucial to the bankruptcy court's decision in that case therefore was a weighing of all the facts and circumstances needed to determine whether a surgeon-investor's transaction with the otherwise conflicted creditor was

or was not at arms-length. The Court then ruled that the bankruptcy court's decision was so inherently fact-specific, it would only be reviewed on the basis of clear error. *Id.* at 968.

Here, however, the Radnor bankruptcy court applied an analogous arms length test to determine the fairness of the November 2006 sales of substantially all of Radnor's assets, to Radnor's senior secured lender, but did so while missing the most relevant of facts, i.e., that Skadden was on both sides of the transaction. Thus, the bankruptcy court never knew that Radnor's counsel Skadden was also the owner of Radnor's senior secured creditor to whom Skadden had solicited and negotiated the asset sale, and when the bankruptcy court, the district court, and the Third Circuit were each made aware that these facts were not disclosed until after expiration of the applicable statutes of limitation, none applied the doctrine of equitable tolling, which Justice Frankfurter held more than 70 years ago in *Holmberg*, must be read into every federal statute of limitation.

That was a clear error of law which impaired the Radnor bankruptcy court's case-specific factual findings, which only an appellate court can correct on a de novo review by remanding this case for application of the doctrine of equitable tolling and, in so doing, reinstating Mr. Kennedy's complaint so that he may take discovery in aid of his claims that the terms of the transaction were not fair.

CONCLUSION

For the foregoing reasons, petitioner Michael Kennedy respectfully request that his petition for certiorari be granted.

Respectfully submitted,

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