

No. 17-1456

In the Supreme Court of the United States

MICHAEL T. KENNEDY,
Petitioner,
v.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, *et al.*,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit*

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Petitioner Michael Kennedy asserts that the bankruptcy court, district court, and court of appeals erred in applying the doctrine of “equitable tolling” to his time-barred claims. Should the Court deny the Petition because it identifies no circuit conflict or exceptional circumstance justifying review, but instead is premised on the courts below having misapplied settled law?

2. In a different but related proceeding in 2013, the bankruptcy court evaluated Skadden’s 2013 disclosures about individual partners owning \$19,500 of investments in Tennenbaum, and reaffirmed that Skadden’s 2006 disclosures on the issue were proper. The district court and court of appeals affirmed that ruling, and this Court denied certiorari. In this proceeding, Kennedy premises his equitable tolling theory on Skadden having made insufficient disclosures in 2006 on that same issue. Do the bankruptcy court’s 2013 findings preclude Kennedy’s equitable tolling theory?

CORPORATE DISCLOSURE STATEMENT

Respondents Tennenbaum Capital Partners, LLC, Tennenbaum & Co. LLC, Special Value Expansion Fund, LLC, Special Value Opportunities Fund, LLC, Michael E. Tennenbaum, Suzanne S. Tennenbaum, David A. Hollander, Mark K. Holdsworth, Howard M. Lefkowitz, Babson & Co., LLC, Richard E. Spencer, and José E. Feliciano make the following disclosures under Rule 29.6:

1. CNO Financial Group (NYSE: CNO) holds a greater than 10% interest in respondent Tennenbaum Capital Partners, LLC.

2. Massachusetts Mutual Life Insurance Company is the parent corporation of respondent “Babson & Co., LLC” (whose correct legal name is Babson Capital Management LLC and who is now known as Barings LLC).

With respect to the other respondents listed above, they do not have parent corporations, and there is no public corporation that holds 10% or more of their stock.

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INTRODUCTION

Petitioner Michael Kennedy was the founder, chairman, and majority shareholder of a company called Radnor that filed for bankruptcy in 2006. Dissatisfied with the outcome of the bankruptcy case, Kennedy has become a serial litigant. In the bankruptcy court and elsewhere, he has repeatedly alleged that Radnor's bankruptcy counsel (Skadden) and purchaser (Tennenbaum) conspired to conceal conflicts of interest so that Skadden could be retained as counsel and then engineer a bankruptcy "fire sale" to Tennenbaum. But in a separate proceeding in 2013—one that has been fully appealed and is now law of the case—the bankruptcy court considered these allegations and reaffirmed that Skadden and Tennenbaum's actions were proper. That did not stop Kennedy from continuing to assert the same rejected theories in the current proceeding, causing the bankruptcy court to sanction him for litigating "beyond reason."

This proceeding arises from the dismissal of Kennedy's complaint against the respondents raising the same conspiracy-theory allegations that were rejected in 2013. The bankruptcy court dismissed the claims as time-barred, precluded by prior judicial findings, and because Kennedy lacked standing to assert the claims. The district court affirmed on all grounds, and the Third Circuit affirmed that the claims were time-barred and that the statute of limitations was not "equitably tolled." Having affirmed on one of the three grounds, the Third Circuit did not reach the other two.

Kennedy's Petition to have this Court review the dismissal of his complaint should be denied for two reasons. First, Kennedy identifies no circuit split or exceptional circumstance justifying review. Instead, the Petition boils down to the argument that the three courts that already have reviewed his equitable tolling theory misapplied settled law.

Second, even if review by this Court were justified, the courts below did not misapply the law. The Petition is based on the premise that Skadden and Tennenbaum concealed their relationship from the bankruptcy court, thus "equitably tolling" the statute of limitations for Kennedy's claims. But in the 2013 proceeding at which Kennedy alleged the same "concealment" as he does here, the bankruptcy court found that Skadden's disclosures have always been appropriate. That final, non-appealable order, which is not part of this appeal and is law of the case, conclusively establishes that Skadden did not conceal information. The courts below therefore did not misapply the law in rejecting Kennedy's equitable tolling theory.

STATEMENT OF THE CASE

Rather than belabor the record, Tennenbaum relies on the statement of the case presented by Skadden in its opposition brief. Tennenbaum writes separately to identify two important misstatements of fact contained in the Petition.

The Petition is based on two fundamental premises:

1. Skadden allegedly concealed information in 2006 when it disclosed its ties to Tennenbaum as part of its

motion to be employed as Radnor's bankruptcy counsel;
and

2. In reality, Skadden supposedly "owned" or "controlled" the Tennenbaum funds involved in the bankruptcy case and which ultimately bought Radnor, such that Skadden was hopelessly conflicted.

Both of these key premises are refuted by judicial findings in Radnor's bankruptcy case. These findings were made in separate proceedings that are not part of this appeal and that are final and binding on Kennedy.

1. The bankruptcy court already has held that Skadden did not conceal information. In 2006, Skadden disclosed its connections to Tennenbaum as part of its motion to be retained as bankruptcy counsel. The United States Trustee objected, which prompted the bankruptcy court to hold a contested hearing on the issue. The bankruptcy court evaluated Skadden's relationship with Tennenbaum and concluded that "the Skadden-Tennenbaum relationships presented no improprieties." *See In re Radnor Holdings Corp.*, 2013 WL 3228116, at *4 (Bankr. D. Del. June 20, 2013) (summarizing findings made at the 2006 hearing), *aff'd* 528 B.R. 245 (D. Del. 2014), *aff'd* 629 F. App'x 277 (3d Cir. 2015), *cert. denied* 137 S. Ct. 294.

Critically, in 2013, the bankruptcy court reaffirmed that Skadden's 2006 disclosures were full and appropriate even in light of the information that Kennedy claims was concealed. Earlier that year, Kennedy had objected to Skadden's fees on the grounds that Skadden was conflicted, which prompted the bankruptcy court to hold a two-day evidentiary hearing. In advance of that hearing, Skadden made a

supplemental disclosure that certain of its partners or their spouses, in their individual capacities, held an interest in the Tennenbaum funds that participated in Radnor's bankruptcy case valued at a total of \$19,500.¹ Kennedy seized on this supplemental disclosure and argued that it was "new" and "concealed" information that was disqualifying. Kennedy then appeared at the evidentiary hearing with counsel, testified personally, cross-examined the Skadden witness, and submitted post-trial briefing addressing the "concealed" information. After evaluating the evidence, the bankruptcy court found that Skadden's original disclosures in 2006 were proper and that Skadden's employment remained appropriate. *See In re Radnor Holdings Corp.*, 2013 WL 3228116, at *4 ("Given the full record of Skadden disclosures, Skadden did not misrepresent its relationships with Tennenbaum to the Court or the UST."); *id.* at *12 ("Skadden's Pre-Retention Disclosures and other disclosures made in connection with Skadden's retention as bankruptcy counsel, including Skadden's disclosures with respect to Tennenbaum, were adequate and sufficient."). The district court and court of appeals affirmed, and this Court denied Kennedy's petition for a writ of certiorari. 528 B.R. 245 (D. Del. 2014); 629 F. App'x 277 (3d Cir. 2015); *cert. denied* 137 S. Ct. 294. As a result, it is law of the case that Skadden did not conceal information in its disclosures to the bankruptcy court.

¹ Those funds are respondents Special Value Expansion Fund, LLC and Special Value Opportunities Fund, LLC. In 2006, Skadden had disclosed that certain of its partners invested in a Tennenbaum affiliate over which they had no investment authority. *See Radnor*, 2013 WL 3228116, at *3.

2. The bankruptcy court also has determined that Skadden did not “own” or “control” the Tennenbaum funds that participated in the bankruptcy case. Under Bankruptcy Code § 327, debtor’s counsel may not “hold or represent an interest adverse to the estate.” 11 U.S.C. § 327(a). Skadden’s involvement here consisted of \$19,500 of investments by individual partners or their spouses in their personal capacities—hardly ownership or control, as the bankruptcy court implicitly found after evaluating this fact and concluding that Skadden’s employment was proper. *Radnor*, 2013 WL 3228116, at *12 (“At all times during these Chapter 11 cases ... Skadden ... did not hold or represent an interest adverse to Debtors’ estates and was disinterested within the meaning of 11 U.S.C. § 327(a).”).

REASONS FOR DENYING THE PETITION

Tennenbaum adopts the grounds for denying the Petition raised by Skadden in its opposition brief. In particular, (1) the Petition identifies no circuit split or exceptional circumstance justifying review, but instead raises an alleged misapplication of settled “equitable tolling” law; and (2) in any event, the courts below correctly applied that law, as the facts demonstrating a lack of concealment by Skadden (and therefore a lack of grounds for equitable tolling) have been judicially established in final orders.

I. The Petition identifies no circuit split or exceptional circumstances justifying review, and instead raises the question of whether the courts below misapplied “equitable tolling” law.

At issue in this appeal is whether the Third Circuit correctly rejected Kennedy’s equitable tolling theory. That is not an appropriate question over which to grant *certiorari*.

First, there is no inter-circuit split over the elements of equitable tolling law or how to apply that law. The case identified by Kennedy reached a different result than here not because of a conflict in the law, but because the defendant there had fraudulently concealed information. *Milby v. Templeton (In re Milby)*, 875 F.3d 1229, 1233 (9th Cir. 2017). By contrast, here it already has been judicially established that Skadden did not conceal information. *Radnor*, 2013 WL 3228116 at *4, 12. The difference between this case and *Milby* therefore is factual, and

the courts in both cases correctly applied settled law to their particular facts.

Second, no intra-circuit split exists. Kennedy asserts that the Third Circuit overlooked its decision in *Community Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 400–01 (3d Cir. 2015). But that case merely held that fraudulent concealment of facts could support equitable tolling. *Id.* This unremarkable proposition creates no conflict because no concealment occurred in this case, as has been judicially established. This case therefore raises no inconsistency with *Community Bank*.

Kennedy also argues that the Third Circuit’s opinion contradicts its decision in *U.S. Trustee v. Price Waterhouse*, 19 F.3d 138 (3d Cir. 1994). But again, the different context of that case explains its holding. *Price Waterhouse* disqualified an estate professional because it was a creditor of the estate and therefore was not “disinterested” as required by 11 U.S.C. § 327(a). By contrast, here the bankruptcy court assessed Skadden’s relationship with Radnor and Tennenbaum and found that Skadden was “disinterested” within the meaning of 11 U.S.C. § 327(a). 2013 WL 3228116 at *12. Because that finding is law of the case, there is no conceivable inconsistency between the facts here and *Price Waterhouse*.

Finally, no exceptional circumstances exist that would otherwise warrant review. Kennedy alleges that his claims are the only vehicle through which he can challenge a sale on which Skadden stood on both sides of the deal. That is wrong for two reasons. First, it is based on the false premise that Skadden stood on both sides of the deal, and the bankruptcy court held

otherwise. Second, it ignores that Kennedy could have appealed the sale order, particularly because Kennedy knew of Skadden's relationship with Tennenbaum before then. *See In re Radnor Holdings Corp.*, 706 F. App'x 94, 98 (3d Cir. Nov. 30, 2017) ("Tennenbaum's relationship with Skadden, including that certain Skadden partners had invested in Tennenbaum-affiliated Funds, was revealed at the latest by the sale hearing..."). In sum, Kennedy was never foreclosed from challenging the sale.

II. In any event, the courts below correctly applied the law, as the facts demonstrating a lack of concealment by Skadden have been judicially established in final orders.

Kennedy predicates his equitable tolling argument on the assertion that Skadden concealed information that would have disqualified it from acting as Radnor's bankruptcy counsel. He focuses on Skadden's 2013 disclosure that certain of its partners or their spouses held a total of \$19,500 in the Tennenbaum funds that purchased Radnor, and he argues that this "ownership" over Tennenbaum was a disqualifying conflict that Skadden concealed until after the statute of limitations expired.

But a final, fully-appealed judicial finding dooms Kennedy's tolling argument: the bankruptcy court's 2013 re-affirmance—made after examining the precise information that Kennedy claims was concealed—that Skadden's 2006 disclosure were appropriate. *See In re Radnor Holdings Corp.*, 2013 WL 3228116, at *4, 12. There was no concealment.

This lack of concealment negates the premise of Kennedy's tolling argument. Kennedy therefore cannot demonstrate that the bankruptcy court, district court, and court of appeals misapplied the law of equitable tolling.

CONCLUSION

Because Kennedy has identified no circuit conflict or exceptional circumstances justifying review, and in any event the courts below correctly applied the doctrine of equitable tolling, the Petition should be denied.

Respectfully submitted,

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