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"Excusable Neglect": When Missing a Deadline May Not Be Fatal

February 9, 2021

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The imperative "justice, justice shall you pursue" is nowhere better illustrated than in the application of deadlines to perform an act, including filing dates, limitations dates, due dates for filing appeals, and deadlines for filing claims. Courts sometimes exercise their equitable jurisdiction rather than follow the literal language of rules of procedure. In several prior legal alerts, we have highlighted the importance of equity and flexibility in administering justice in the bankruptcy court setting.[1]

While adherence to deadlines should be scrupulously respected, there are situations where courts accept late filings based on a showing of "excusable neglect." *See* Fed. R. Bankr. P. 9006(b)(1). Many courts turn to the non-exclusive factors set forth in *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388, 395 (1993) to determine whether "excusable neglect" has been established. Considerations include: (1) the danger of prejudice to the non-moving party; (2) the length of the delay and potential impact on judicial proceedings; (3) the reason for the delay; and (4) whether movant acted in good faith. *See Pioneer Inv. Servs.*, 507 U.S. at 400.

An example is found in a decision from the Bankruptcy Appellate Panel of the Sixth Circuit, *Ballinger v. Smith (In re Smith)*, No. 20-8015, 2021 WL 212361 (B.A.P. 6th Cir. Jan. 21, 2021), which involved lateness in filing a notice of appeal. The bankruptcy court declared the debtor's debts nondischargeable. *See* 615 B.R. 214 (Bankr. W.D. Ky. 2020). The debtor failed to appeal the bankruptcy court's decision within the 14-day time period permitted under Federal Rules of Bankruptcy Procedure Rule 8002, apparently because of a failure on the part of his lawyers, who advised the debtor 13-days after the bankruptcy court issued the order denying the discharge, that they would not file an appeal on his behalf. Moreover, they provided the debtor the wrong deadline by which to file the appeal. The debtor was then forced to retain new counsel. *See In re Smith*, Motion to Extend Time to Appeal, Adv. No. 19-03033-thf, ECF No. 17 at 12-13 (Bankr. W.D. Ky. Mar. 18, 2020).

The debtor's new counsel attempted to move for an extension of time to file the appeal based upon "excusable neglect" due to the misinformation the debtor received from prior counsel. *See In re Smith*, Order, Adv. No. 19-

03033-thf, ECF No. 26 at 2 (Bankr. W.D. Ky. Apr. 16, 2020).

The bankruptcy court discussed the factors necessary to determine "excusable neglect" as set forth in *Pioneer* and focused on the amount of time the debtor was late to file the notice of appeal, as opposed to the reason for such delay. *See id.* The bankruptcy court denied the debtor's motion and concluded that "missing the 14-day appeals deadline by one day may have constituted 'excusable neglect,' but waiting an additional three weeks before notifying the [C]ourt of his request was not." *See id.* There was no discussion about why the debtor missed the deadline. *See id.* The debtor then appealed.

The Bankruptcy Appellate Panel criticized the bankruptcy court's findings and noted that "[w]hile the length of the delay is included as a potential factor in determining excusable neglect, this fact is but one relevant circumstance in the fact-dependent inquiry and cannot be examined to the exclusion of other factors." 2021 WL 2123631, at *2.

The Bankruptcy Appellate Panel focused primarily on the bankruptcy court's failure to factor the debtor's reason for missing the original deadline to appeal and directed the bankruptcy court to render a new decision based on the factual inquiry under the *Pioneer* factors. *See id.* at *2-3. Though unstated, part of its consideration may have been that the failure was the product of the prior legal counsel who had exited the case rather than the debtor himself.

The bankruptcy court's order was vacated and the Bankruptcy Appellate Panel sent the case back to the Kentucky bankruptcy court for further findings of fact and conclusions of law, stating that the factors to determine "excusable neglect" set forth in *Pioneer* "are not mechanically applied nor do they carry equal weight." *See In re Smith*, 2021 WL 2123631, at *2 (citing *Cmty. Fin. Servs. Bank v. Edwards (In re Edwards)*, 748 Fed. App'x 695, 698 (6th Cir. 2019)).

While our clients are advised to be wary of applicable due dates and to file in advance of any deadline, failure to do so alone will not be the end of the inquiry necessarily. Failing to file timely must be avoided, but it is important to know that courts may consider late filings under certain circumstances and, most importantly, when a party has set forth a good reason for any delays.

However, demonstrating "excusable neglect" is often deemed a "demanding standard" and some circuits believe such relief should be granted only under "exceptional circumstances." *See In re Puerto Rico Hosp. Supply Inc.*, Case No. 19-01022, 2020 WL 7133165, at *2-3 (Bankr. D.P.R. Dec. 4, 2020) (rejecting the argument that the "Covid-19 global pandemic and associated disruption and disablement of law offices from normal procedures … [were] 'unique or extraordinary circumstances'" because attorneys have "an ongoing responsibility to inquire into the status of a case" and should have been monitoring the electronic filings); *see also Ott v. Somogye (In re Somogye)*, Case No. 18-30927, 2020 WL 4810805, at *12 (Bankr. N.D. Ohio July 28, 2020) (finding the concept of excusable neglect to be "a strict standard that is met only in extraordinary cases"); *Chatha v. Westates Holdings, LLC (In re Chatha)*, BAP No. EC-19-1147-LBG, 2020 WL 2991775, at *5 (B.A.P. 9th Cir. June 1, 2020) (reiterating that "circumstances where a deadline is missed due to inattentiveness or general office disruption … [do not] constitute excusable neglect").

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have questions regarding these provisions, or any other aspect of bankruptcy law, please contact Michael Traison at 312.860.4230 or Amanda Tersigni at 516.357.3738.

Footnote

[1] For further discussion of the importance of deadlines and other timely filing dates, please see the following prior alerts:

The Impact of Workouts on Deadlines to Act: Be Attentive to Statutes of Limitations - Cullen and Dykman LLP (cullenllp.com)

Bankruptcy Court Finds Note and Mortgage Unenforceable Based on Expired Statute of Limitations - Cullen and Dykman LLP (cullenllp.com)

Recent Bankruptcy Court Decisions of Statutory Interpretation Reiterate the Importance of Equitable Consideration in Bankruptcy Cases - Cullen and Dykman LLP (cullenllp.com)

Don’t Miss the Bar Date! The Importance of Timely Filing Bankruptcy Proofs of Claim - Cullen and Dykman LLP (cullenllp.com).

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