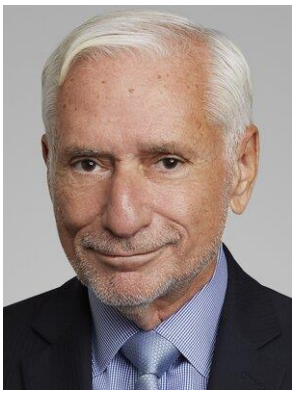
# Bankruptcy Rulings Highlight Split On Excusable Neglect

By **Michael Traison, Michelle McMahon and Amanda Tersigni** (April 19, 2022, 3:17 PM EDT)



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Your client, a creditor or equity security holder in a bankruptcy case, did not file proof of their claim or interest on time. Can you get relief to late file the claim?

Assuming your client was properly served with notice of the deadline, commonly called the bar date,[1] the question is whether the situation fits within the definition of "excusable neglect," which is the standard for relief under the Bankruptcy Code and applicable case law.

Rule 9006(b) of the Federal Rules of Bankruptcy Procedure permits courts to allow claims to be filed after the bar date where the failure to timely file was the result of excusable neglect.

The U.S. Supreme Court in its 1993 decision Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership established four factors for courts to consider in determining whether a creditor has demonstrated excusable neglect: (1) the danger of prejudice to the debtor; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith.[2]

As discussed in the U.S. Bankruptcy Court for the Southern District of New York's 2001 In re: Tronox decision, before Pioneer, "many courts had held that 'excusable neglect' could not be demonstrated where a party's delay was attributable to its own lack of diligence in investigating and pursuing the party's rights."[3]

According to Tronox, the Supreme Court "discarded such absolute rules" and "required courts to conduct a more general considering of the equities" in assessing excusable neglect.[4]

The Supreme Court also held the creditor accountable for the inaction of its counsel noting that the creditor's reliance on counsel was not excusable neglect.[5]

Notwithstanding an applicable governing bankruptcy rule and Supreme Court precedent, there are distinctions among the circuits as to how the Pioneer factors are applied that can alter the outcome of these cases. Recent cases illustrate this circuit split and the fact that a creditor's reliance on advice of counsel is not grounds for excusable neglect.

**Circuit Split on Application of the Pioneer Factors**

In its March 10 decision in In re: CJ Holding Co., the U.S. Court of Appeals for the Fifth Circuit noted that its application of all the Pioneer factors equally differed from decisions of

the U.S. Courts of Appeals for the First and Second Circuits and some lower court decisions within its own circuit.[6]

The Fifth Circuit held that all the Pioneer factors should be considered and given equal weight.[7]

In contrast, some lower courts in the Fifth Circuit, such as the U.S. Bankruptcy Court for the Southern District of Texas, have prioritized the fourth factor — good faith.[8]

Other circuit courts, such as the First, Second and Federal Circuit Courts, have held that the third factor — the reason for the delay, including whether it was within the reasonable control of the movant — should be given the most weight.[9]

In fact, a majority of the circuit courts, including the First and Second Circuits, place the greatest emphasis on the third factor: the reason for the delay and whether the delay was within the creditor's control.[10] These courts have gone so far as to hold that the other factors are relevant only in close cases.

In its 2003 decision in Silivanch v. Celebrity Cruises Inc., the U.S. Court of Appeals for the Second Circuit held that "despite the flexibility of 'excusable neglect' and the existence of the four-factor test in which three of the factors usually weigh in favor of the party seeking the extension, we and other circuits have focused on the third factor."[11]

Similarly, in the 2001 Graphic Communications International Union v. Quebecor Printing Providence Inc. decision, the U.S. Court of Appeals for the First Circuit found that "[w]hile prejudice, length of delay, and good faith might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry."[12]

Like the U.S. Courts of Appeal for the Third and Ninth Circuits, the Fifth Circuit in CJ Holding took a more holistic approach. The Fifth Circuit cited the Supreme Court's instruction in Pioneer that the inquiry is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission."[13]

The Fifth Circuit declined to give any of the Pioneer factors disproportionate weight and held that it would apply all factors equally.[14]

Similarly, the U.S. Court of Appeals for the Third Circuit in Ragguette v. Premier Wines & Spirits Ltd. took a rounded approach finding in 2012 that courts "must take into account all relevant circumstances surrounding a party's failure to file."[15] The Third Circuit held that control and reason for delay "[do] not necessarily trump all the other relevant factors" so courts cannot choose to ignore certain Pioneer factors.[16]

Thus, where the bankruptcy case is pending may significantly affect whether your client can demonstrate excusable neglect.[17]

**Reliance on Legal Counsel Is Not Excusable Neglect**

The Supreme Court also held in its Pioneer decision that clients are accountable for the acts and omissions of their attorneys.[18]

The Supreme Court held that a creditor who relied on his counsel's mistaken statement that no bar date had been set and that there was no urgency to file the proof of claim, did not demonstrate excusable neglect because the "[p]etitioner voluntarily chose this attorney as

his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."[19]

Recent decisions make clear that this standard encompasses not only the failure of counsel to meet a deadline, but also mistakes or miscalculations in legal analysis or strategy.[20]

In CJ Holding, the Fifth Circuit held that it was not excusable neglect for 67 claimants who were part of a putative class action to rely on a timely filed class proof of claim rather than timely file their own individual proofs of claim.[21] The putative class status was subsequently denied, and the class action proof of claim was disallowed.[22]

The Fifth Circuit noted that these 67 claimants were on notice that their putative class status and class proof of claim were in dispute but did not file individual proofs of claim, which 27 of the other putative class action creditors did.[23] This was a decision and action within the creditors' control, making them responsible for the late filing — the third Pioneer factor.[24]

The Fifth Circuit also held the creditors "failed to carry their burden of showing that they acted in good faith [the Pioneer fourth factor] — primarily due to the 'acts of their counsel,' which the bankruptcy court found verged on malpractice."[25]

The Fifth Circuit stated that the creditors could have sought to have the bankruptcy court apply Federal Rule of Civil Procedure 23 to their purported class proof of claim but did not:[26] "[E]ven if the Claimants' failure to move the bankruptcy court to apply Rule 23 was mere inadvertence or mistake, that does not constitute excusable neglect."[27]

Similarly, in In re: Westinghouse Electric Co. LLC, the U.S. Bankruptcy Court for the Southern District of New York also held on Feb. 15 that the creditor's legal mistakes were not excusable neglect.[28]

The court held that the creditor could have promptly filed a protective motion seeking permission to file a late claim in the event its primary legal strategy of seeking relief from the company that emerged from the bankruptcy did not succeed but did not despite knowing the consequences.[29] The court held that the creditor and his counsel made a legal choice that turned out to be a wrong one, but it was a choice that was knowingly made.[30]

Given that this decision was within the Second Circuit, the court found that because the creditor's tactical choices were the reason for the delay and were within his control, this weighed heavily against the motion for relief.[31]

**Takeaways**

Professionals should take away from these cases the importance of being cautious and having a Plan B. In both Westinghouse and CJ Holding the courts noted actions that should have been taken to protect clients in the event that the primary legal strategy was not successful. The courts held that the failure to take these actions supported their findings that the creditor did not prove excusable neglect.

As a professional, it may be challenging to persuade clients of the importance of taking precautionary actions when they increase legal expenditures, even incrementally. The Westinghouse and CJ Holding decisions make clear the danger of a penny-wise, pound-

foolish approach, particularly in courts that place the most weight on whether the reason for the delay was in the control of the creditor.

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[1] The requirements for service may depend on whether your client was a creditor known to the debtor or an "unknown" creditor and is a detailed analysis beyond the scope of this article. Proper service will be presumed for the rest of this discussion.

[2] Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993).

[3] In re Tronox Inc., 626 B.R. 688, 728 (Bankr. S.D.N.Y. 2021).

[4] Id.

[5] Pioneer, 507 U.S. at 396.

[6] W. Wilmington Oil Field Claimants v. Nabor Corp. Servs., Inc. (In re CJ Holding Co.), 27 F.4th 1105, 1113-14 (5th Cir. 2022).

[7] Id.

[8] Id. at 1113, 1118.

[9] Id.

[10] Alexander v. Saul, 5 F.4th 139, 149 (2d Cir. 2021) ("Affording dispositive weight to th[e third] factor accords with our precedents, which have described the reason for delays as the most important Pioneer factor."); U.S. v. Munox, 605 F.3d 359, 373 (6th Cir. 2010) (describing the reason for delay as the "foremost Pioneer consideration"); In re Enron Corp., 419 F.3d 115, 122 (2d Cir. 2005); U.S. v. Torres, 372 F.3d 1159, 1163 (10th Cir. 2004) ("[F]ault in the delay remains a very important factor—perhaps the most important single factor—in determining whether neglect was excusable."); Graphic Commc'ns Int'l Union, Loc. 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1, 5 (1st Cir. 2001); see also FirstHealth of Carolinas, Inc. v. CareFirst of Md., Inc., 479 F.3d 825, 829 (Fed. Cir. 2007).

[11] Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 365 (2d Cir. 2003).

[12] Quebecor Printing Providence, Inc., 270 F.3d at 5.

[13] CJ Holding Co., 27 F.4th at 1112.

[14] Id. at 1114.

[15] Ragguette v. Premier Wines & Spirits, 691 F.3d 315, 331 (3d Cir. 2012).

[16] Id.

[17] See Lemoge v. U.S., 587 F.3d 1188, 1192-93 (9th Cir. 2009) (focusing on the third Pioneer factor at the expense of the other three constitutes an abuse of discretion); In re Energy Future Holdings Corp., 619 B.R. 99, 110 (Bankr. D. Del. 2020) (relying on the Court in Pioneer finding that, "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control" and considering each Pioneer factor in turn when deciding whether movants' delay was excusable); see also In re Wooten, 620 B.R. 351, 356-57 (Bankr. D. N.M. 2020) (weighing the Pioneer factors on balance considering "all relevant circumstances surrounding the party's omission").

[18] Pioneer, 507 U.S. at 396-97.

[19] Id.

[20] Similarly, the Eleventh Circuit is also wary of granting relief for excusable neglect based on claims of attorney error. Curry v. Clayton Cnty. Police Dep't, No. 1:18-cv-1947-MLB, 2022 WL 1014476, at *3 (N.D. Ga. Apr. 5, 2022); see also Kocsis v. Florida State Univ. Bd. of Trs., No. 20-10474, 2021 WL 3671137, at *3 (11th Cir. Aug. 19, 2021) ("An attorney error based on a misunderstanding or misinterpretation of the law, on the other hand, generally cannot constitute excusable neglect."); In re Jacobs, No. 19-12591-j11, 2022 WL 696943, at *6 (Bankr. D. N.M. Mar. 8, 2022) ("[T]he court treats negligence of counsel the same as negligence by the party that counsel represents.").

[21] CJ Holdings Co., 27 F.4th at 1110-11.

[22] Id. at 1111.

[23] Id.

[24] Id. at 1116.

[25] Id. at 1118.

[26] Id.

[27] Id. at 1119.

[28] In re Westinghouse Elec. Co., LLC, 2022 WL 467797, at *11. In re Westinghouse Elec. Co., LLC, No. 17-10751 (MEW), 2022 Bankr. LEXIS 391 (Bankr. S.D.N.Y. Feb. 15, 2022).

[29] Id., at *7.

[30] Id.

[31] Id., at *10.