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Bankruptcy—Excusable Neglect—Late Filings of Bankruptcy Proofs of Claims Are Not Limited to Those Beyond the Filer's Ability to Control. Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership, 113 S. Ct. 1489 (1993).

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BANKRUPTCY—EXCUSABLE NEGLECT—LATE FILINGS OF BANKRUPTCY PROOFS OF CLAIMS ARE NOT LIMITED TO THOSE BEYOND THE FILER'S ABILITY TO CONTROL. *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership*, 113 S. Ct. 1489 (1993).

I. INTRODUCTION

Debtors and creditors must meet many deadlines in bankruptcy proceedings. One of the most important deadlines is the bar date[1] for filing proofs of claims.[2] The penalty for failure to meet this deadline is harsh; the creditor is not recognized as a creditor for purposes of voting and distribution.[3] Bankruptcy Rule 9006(b) provides the method by which a court may extend the period of time within which a party must act in certain circumstances.[4] If a deadline is missed, Rule 9006(b) provides that the bankruptcy court may, at its discretion, extend the deadline upon a showing of excusable neglect.[5]

Assume that an attorney represents a group of clients with a combined claim against a debtor totaling $7,000,000. The bankruptcy court establishes a bar date for filing proofs of claims and the attorney fails to advise the clients that the claims must be filed by a certain date. The attorney, in the process of leaving his law firm and without access to the clients' files, discovers after the deadline that he has missed the bar date. He files the proofs of claims twenty days after the bar date along with a motion requesting the court to permit the late filing. The court refuses to allow the late filing. The result is a group of upset clients and a probable malpractice action. Such a scenario occurred in a recent case decided by the United States Supreme Court.[6]

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1. Bar date is a term used frequently in bankruptcy to describe the date by which an act must be completed.

2. The bankruptcy court has the authority to establish the bar date for filing proofs of claims. FED. R. BANKR. P. 3003(c)(3). Any creditor whose claim is not scheduled by the debtor or is scheduled as disputed, contingent, or unliquidated must file a proof of claim prior to the effective bar date. FED. R. BANKR. P. 3003(c)(2). The claim is scheduled if it is included in the list of creditors filed by the debtor.

3. FED. R. BANKR. P. 3003(c)(2). The failure to file a claim does not extinguish it but makes it unenforceable against the estate of the debtor. 8 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY, ¶ 3003.05[3] n.8 (15th ed. 1993).

4. FED. R. BANKR. P. 9006(b).

5. FED. R. BANKR. P. 9006(b)(2).

6. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 113 S. Ct. 1489 (1993).

II. Facts and Case History

Pioneer Investment Services Company, hereinafter "Pioneer," filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on April 12, 1989, in the United States Bankruptcy Court for the Eastern District of Tennessee.[7] The petition included a list of the twenty largest unsecured creditors, including all but one of the respondents.[8] On April 13, 1989, the bankruptcy court mailed a notice to Pioneer's creditors which announced a meeting on May 5, 1989.[9] The notice contained a passage which stated that a proof of claim had to be filed for all unlisted claims or those listed as disputed, contingent, or unliquidated on or before August 3, 1989.[10] The placement of the notice of the bar date for filing proofs of claims in a document entitled "Notice for Meeting of Creditors" was unusual.[11] The notice of the bar date is normally placed in a separate document. The notice was received and read by Mark A. Berlin, president of the corporate general partners of each of the four respondents.[12] Berlin attended the creditors' meeting and retained Marc Richards, an experienced bankruptcy attorney, to represent the four respondents.[13] Berlin provided Richards with a complete copy of the case file, including the notice of the May 5 creditors' meeting.[14] In an affidavit, Berlin also indicated that when he asked Richards if there was a deadline for filing proofs of claims, Richards assured him that the bar date had not been established.[15] The respondents filed their proofs of claims, which

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7. *Id.* at 1492.

8. *Id.* The three respondents included in the list of the 20 largest creditors were Clinton Associates Limited Partnership ("Clinton"), West Knoxville Associates Limited Partnership ("West Knoxville"), and Brunswick Associates Limited Partnership ("Brunswick"). *In re* Pioneer Inv. Servs. Co., 106 B.R. 510, 511-12 (Bankr. E.D. Tenn. 1989). The fourth respondent, Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe") was not included in the list. *Id.*

9. 113 S. Ct. at 1492.

10. *Id.* The passage stated: "You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. *See* 11 U.S.C. Sec. 1111 & Bankruptcy [R]ule 3003. Bar date is August 3, 1989." *Id.*

11. *Id.* at 1499. "Ordinarily the bar date in a bankruptcy case should be prominently announced and accompanied by an explanation of its significance." *Id.* at 1499-1500 (citing *In re* Pioneer Inv. Servs. Co., 943 F.2d 673, 678 (6th Cir. 1991)).

12. *Pioneer*, 113 S. Ct. at 1492. Berlin is the president of Robriste Enterprises, Inc., general partner of Clinton, West Knoxville, and Brunswick. *Pioneer*, 106 B.R. at 512. He is also the president of Pudding Enterprises, Inc., general partner of Ft. Oglethorpe. *Id.*

13. *Pioneer*, 113 S. Ct. at 1492.

14. *Id.*

15. *Id.*

totaled $6,943,139,[16] on August 23, 1989, twenty days after the bar date of August 3, 1989, along with a motion asking the court to permit the late filing.[17] In his motion, Richards claimed that he was unaware of the bar date and that, at the time, he was withdrawing from his former law firm and did not have access to his files during the first half of August, 1989.[18]

Pioneer's schedules listed three of the respondents as general unsecured creditors and listed the claims as contingent, unliquidated, and disputed.[19] Accordingly, the respondents were required by Section 1111(a) to file proofs of claims with the bankruptcy court.[20] Rule 3003 requires that the bankruptcy court establish a bar date for filing the proofs of claims.[21] The failure to file a required proof of claim by the bar date has drastic results. Under Rule 3003, a creditor who fails to file a proof of claim when required is not treated as a creditor for purposes of voting and distribution.[22] The bar date may be extended by the court for "cause shown" under Rule 3003(c).[23] The bankruptcy court concluded that Rule 3003(c)(3) must be read in conjunction with Rule 9006(b).[24] Rule 9006(b)(1) permits

16. *Pioneer*, 106 B.R. at 513. Claims were filed in the following amounts: Clinton—$1,567,650; Brunswick—$2,364,336; West Knoxville—$2,280,831; and Ft. Oglethorpe—$730,322. *Id.*

17. *Pioneer*, 113 S. Ct. at 1492.

18. *Id.* at 1492-93.

19. *Pioneer*, 106 B.R. at 513. The respondents were not included in debtor's statement of financial affairs as originally filed on May 18, 1989. *Id.* at 512. However, the schedules were amended on May 25, 1989, to "include Clinton, West Knoxville, and Brunswick as creditors holding contingent, unliquidated, and disputed claims." *Id.* at 512-13. Ft. Oglethorpe was not listed as a creditor. *See supra* note 8.

20. Section 1111(a) of the Bankruptcy Code provides that "[a] proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(*l*) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated." 11 U.S.C. § 1111(a) (1988). Section 521(*l*) refers to the list of creditors filed by the debtor. 11 U.S.C. § 521(*l*) (1988). Section 1106(a)(2) refers to the list of creditors filed by the trustee if the debtor did not file a list. 11 U.S.C. § 1106(a)(2) (1988).

21. FED. R. BANKR. P. 3003(c)(3).

22. FED. R. BANKR. P. 3003(c)(2) states that "any creditor who fails to [file a proof of claim within the prescribed time] shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution." *See supra* note 3.

23. FED. R. BANKR. P. 3003(c)(3) provides that "[t]he court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed."

24. *Pioneer*, 106 B.R. at 514 (quoting *In re* Vertientes, Ltd., 845 F.2d 57, 60 (3d Cir. 1988); *In re* South Atl. Fin. Corp., 767 F.2d 814, 817 (11th Cir. 1985); *In re* Dix, 95 B.R. 134, 137 (Bankr. 9th Cir. 1988)). A few courts have concluded that the "for cause" language in Rule 3003(c)(3) creates a different standard than "excusable neglect". 8 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY, ¶ 3003.05[4][a] (15th ed. 1993) (citations omitted).

the court in certain circumstances to extend the time period upon a motion filed after the expiration of the specified period where the failure to act was the result of excusable neglect.[25]

The bankruptcy court denied the motion to allow the late filing.[26] Following precedent established by the Eleventh Circuit, the court held that a party cannot claim excusable neglect unless the late filing is due to circumstances beyond its ability to control.[27] On appeal, the district court remanded, adopting a more liberal reading of the meaning of excusable neglect.[28] After weighing the equitable factors applied by the district court, the bankruptcy court, in an unpublished opinion, again denied the respondents' motion.[29] The bankruptcy court attached considerable importance to its findings that the delay was not outside the control of the respondents and that it was not improper to penalize the respondents for the neglect of their counsel.[30] The district court affirmed the bankruptcy court holding but was

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25. FED. R. BANKR. P. 9006(b)(1) provides:

> Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

26. *Pioneer*, 106 B.R. at 517. Following the bankruptcy court decision, the respondents sued Richards for malpractice. *Excusable Neglect*, THE NAT'L L.J., Apr. 5, 1993, at 11. That case was pending in New York at the time of the Supreme Court *Pioneer* decision. *Id.*

27. 106 B.R. at 516 (quoting *In re* South Atl. Fin. Corp., 767 F.2d 814, 817 (11th Cir. 1985)).

28. *Pioneer*, 113 S. Ct. at 1493. The district court instructed the bankruptcy court to consider the following factors:

> (1) whether granting the delay will prejudice the debtor; (2) the length of the delay and its impact on efficient court administration; (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform; (4) whether the creditor acted in good faith; and (5) whether clients should be penalized for their counsel's mistake or neglect.

Id. (quoting *In re* Dix, 95 B.R. 134, 138 (Bankr. 9th Cir. 1988) (in turn quoting *In re* Magourik, 693 F.2d 948, 951 (9th Cir. 1982)).

29. 113 S. Ct. at 1493.

30. *Id.* The bankruptcy court found the following on each factor:

> (1) that petitioner would not be prejudiced by the late filings; (2) that the 20-day delay in filing the proofs of claim would have no adverse impact on efficient court administration; (3) that the reason for the delay was not outside respondents' control; (4) that respondents and their counsel acted in good faith; and (5) that, in light of Berlin's business sophistication and his actual knowledge of the bar date, it would not be improper to penalize respondents for the neglect of their counsel.

Id.

reversed by the Court of Appeals for the Sixth Circuit.[31] The court of appeals confirmed the district court's conclusion that existing precedent followed a more liberal approach to defining excusable neglect.[32] However, the court of appeals disagreed with the bankruptcy court's conclusion on remand that the respondents should be penalized for the errors of their counsel.[33]

III. HISTORICAL DEVELOPMENT

Rule 9006 provides for enlargement of the time allowed for certain acts in bankruptcy proceedings.[34] The rule was patterned after Rule 6(b) of the Federal Rules of Civil Procedure and Rule 26(b) of the Federal Rules of Appellate Procedure.[35] Rule 9006 applies to all deadlines except those specifically excluded or limited.[36] Enlargement under certain rules is permitted only as provided in the rule itself.[37] Because Rule 3003 is not an exception specifically identified

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31. *Id.*

32. *Pioneer*, 943 F.2d at 676-77.

33. *Id.* The court of appeals also found the peculiar and inconspicuous placement of the bar date in the notice of the creditors' meeting significant. *Id.* at 678.

34. FED. R. BANKR. P. 9006. *See supra* note 25 for the text of Rule 9006.

35. FED. R. BANKR. P. 9006(b), Advisory Committee Notes. Federal Rule of Civil Procedure 6 provides:

> (b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . ."

FED. R. CIV. P. 6(b).

36. FED. R. BANKR. P. 9006(b)(2)-(3). Under subsection (b)(2), the court does not have the power to enlarge the time period for the time specified by certain rules, including the following: (1) the time for filing a list of the 20 largest creditors under Rule 1007(d); (2) the time for sending notice of dismissal for failure to pay the filing fee as provided in Rule 1017(b)(3); (3) the 20 to 40 day period for the meeting of the creditors as provided by Rule 2003(a); (4) the 10 day period for filing a motion to resolve an election dispute provided by Rule 2003(d); (5) the 10 day period allowed by Rule 7052 to move to amend findings of fact; (6) the time to move for a new trial under Rule 9023; and (7) the time provided by Rule 9024 to move for relief from a judgment. 9 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY, ¶ 9006.05[2] (15th ed. 1993).

37. Under FED. R. BANKR. P. 9006(b)(3) enlargement is permitted only to the extent and under the conditions stated in the following rules: (1) Rule 1006(b)(2), the time for paying the filing fee in installments cannot be more than 180 days after the petition is filed, even after enlargement; (2) Rule 1017(e), the time period for filing motions to dismiss a debtor's Chapter 7 case for substantial abuse; (3) Rule 3002(c), the time for filing a proof of claim in a Chapter 7 or 13 case; (4) Rule 4003(b), the time period for filing objections to a claim of exemption; (5)

in Rule 9006, most courts have held that the deadline for late filings of claims may be extended after the bar date upon a showing of excusable neglect.[38]

Prior to the *Pioneer* decision, the courts of appeals were split over the proper interpretation of excusable neglect.[39] The Eleventh Circuit adopted a strict construction of excusable neglect when it determined that failure to file a proof of claim must result from circumstances beyond the party's reasonable control.[40] The creditor in the Eleventh Circuit decision of *In re South Atl. Fin. Corp.* failed to file a timely claim because its counsel mistakenly believed her predecessor had filed the proof of claim.[41] The court concluded that the focus of the inquiry under Rule 9006 should be on the movant's actions, not on the prejudicial effect or lack thereof on the other parties.[42] As the creditor's counsel could have easily ascertained whether the proof of claim had been filed, the late filing was within the company's reasonable control and did not constitute excusable neglect.[43]

The Fourth and Seventh Circuits followed the lead of the Eleventh Circuit in adopting a strict interpretation of excusable neglect under Rule 9006.[44] However, these decisions did not involve late filings of proofs of claims in a Chapter 11 proceeding but involved Chapter 7 proceedings.[45]

Rule 4004(a), the time period in which to object to a discharge; (6) Rule 4007(c), the time period within which to file a dischargeability complaint; (7) Rule 8002, the time period for filing a notice of appeal; and (8) Rule 9033, the time period for filing objections to a bankruptcy judge's proposed finding of fact and conclusions of law. 9 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY, ¶ 9006.05[3] (15th ed. 1993).

38. 8 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY, ¶ 3003.05 (15th ed. 1993) (citations omitted). While the Supreme Court did not address this issue in *Pioneer*, the Court did adopt an excusable neglect standard in a Rule 3003 question, thus implicitly settling this issue. *See supra* note 24 and accompanying text.

39. 9 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY, ¶ 9006.06 (15th ed. 1993).

40. *In re* South Atl. Fin. Corp., 767 F.2d 814, 817 (11th Cir. 1985) (quoting *In re* Gem Rail Corp., 12 B.R. 929, 931 (Bankr. E.D. Pa. 1981)). In its initial decision, the *Pioneer* bankruptcy court adopted this philosophy. *See supra* note 27.

41. *South Atlantic*, 767 F.2d at 816.

42. *Id.* at 818-19.

43. *Id.*

44. *In re* Davis, 936 F.2d 771, 772 (4th Cir. 1991); *In re* Danielson, 981 F.2d 296, 297 (7th Cir. 1992).

45. *Davis*, 936 F.2d at 772; *Danielson*, 981 F.2d at 297.

The Eighth Circuit also indicated it followed a strict construction of excusable neglect in *Hanson v. First Bank of South Dakota, N.A.*[46] The *Hanson* court did not find excusable neglect when a creditor filed a late ballot accepting the debtor's plan because it had experienced employee turnover.[47] In so holding, the Eighth Circuit appeared to have adopted the strict standard adopted by the Eleventh Circuit in *In re South. Atl. Fin. Corp.*[48] However, the Eighth Circuit decision is not clear on whether the only consideration is the determination of whether the event is beyond the creditor's reasonable control.[49] The court concluded only that prejudice in and of itself is not sufficient to warrant an extension.[50]

In *In re Magouirk*, the Ninth Circuit took a more liberal view of excusable neglect and isolated five equitable factors which had been considered by other courts in an evaluation of whether excusable neglect exists.[51] The creditor in *Magouirk* failed to file a timely complaint to determine dischargeability of a debt.[52] The *Magouirk* court concluded that a liberal definition of excusable neglect should be applied and then noted a broad range of factors considered by other bankruptcy courts.[53] The *Magouirk* Court listed these factors as:

> (1) whether granting the delay will prejudice the debtor, (2) the length of the delay and its impact on efficient court administration, (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform, (4) whether the creditor acted in good faith, and (5) whether clients should be penalized for their counsel's mistake or neglect.[54]

Although the *Magourik* holding applied only to an untimely objection to the discharge of an individual debt,[55] the Ninth Circuit, in *In re*

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46. 828 F.2d 1310 (8th Cir. 1987).

47. *Id.* at 1315 (noting that employee turnover is considered to be within the employer's reasonable control).

48. *See supra* note 27 and the accompanying text.

49. *Hanson*, 828 F.2d at 1315.

50. *Id.* The court stated: "While the prejudicial effect on other interests may be a factor in the exercise of the court's discretion under the rule, the excusable neglect must result at least in part from the act of the party failing to perform." *Id.* This leaves open the possibility that the court may consider equitable factors when appropriate.

51. 693 F.2d 948 (9th Cir. 1982).

52. *Id.* at 949.

53. *Id.* at 951.

54. *Id.* (citing *In re* Heyward, 15 B.R. 629 (Bankr. E.D.N.Y. 1981); *In re* Hinote, 13 B.R. 874 (Bankr. E.D. Pa. 1981); *In re* Klayer, 13 B.R. 542 (Bankr. W.D. Ky. 1981); *In re* Wallace, 12 B.R. 938 (Bankr. E.D. Pa. 1981); *In re* Gerber, 7 B.R. 910 (Bankr. D. Minn. 1981)).

55. *Magourik*, 693 F.2d at 951.

Dix, adopted both the liberal construction for the late filing of proofs of claims and the five equitable factors noted in *Magouirk*.[56] After applying these five factors, the *Dix* court allowed the late filing of a claim in a case where the creditor was not aware of his claim before the bar date passed.[57]

The five equitable factors noted in *Magouirk* and applied in *Dix* were adopted by the Tenth Circuit in *In re Centric Corp.*[58] After determining that the first three factors weighed against the creditor, the Tenth Circuit refused to allow the creditor's untimely opposition to a debtor's objection to its proof of claim without considering the fourth and fifth factor.[59]

In its decision in *Pioneer*, the Sixth Circuit adopted a liberal interpretation of excusable neglect and affirmed with qualification the district court's adoption of these five equitable factors.[60]

IV. ANALYSIS

The United States Supreme Court granted certiorari in *Pioneer* because of the conflict among the circuits over the meaning of "excusable neglect".[61] In a close decision,[62] Justice White delivered the opinion of the court affirming a more liberal view of excusable neglect.[63]

The *Pioneer* majority's analysis of the meaning of excusable neglect began with the dictionary meaning of neglect which includes faultless omissions as well as those resulting from carelessness.[64] The plain meaning of excusable neglect, therefore, encompasses late filings which result from inadvertence, mistake, or carelessness and late

56. 95 B.R. 134 (Bankr. 9th Cir. 1988).

57. *Id.* at 139.

58. 901 F.2d 1514, 1517 (10th Cir. 1990).

59. *Id.* at 1517-18 (but noting an additional consideration that, if the opposition was allowed, the creditor would have collected little, if anything).

60. *Pioneer*, 943 F.2d at 677 (qualifying these factors as aids for case-by-case adjudication, rather than a necessary or complete list of the factors to be considered).

61. *Pioneer*, 113 S. Ct. at 1494.

62. The decision was 5-4 with Justices J. White, C. J. Rehnquist, Blackmun, Stevens, and Kennedy in the majority. *Id.* at 1491. Justices O'Connor, Scalia, Souter, and Thomas dissented. *Id.*

63. *Id.* at 1491. The Court did not address the "for cause" exception in Rule 3003. *See supra* note 23. Instead, by adopting an excusable neglect standard in a Rule 3003 question, the Court implicitly concluded that Rule 3003 must be read in conjunction with Rule 9006. *See supra* note 38.

64. 113 S. Ct. at 1494-95. The Court noted that Webster's defines neglect as "'to give little attention or respect' to or 'to leave undone or unattended to esp[ecially] through carelessness.'" *Id.* (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 791 (1983)).

filings caused by circumstances beyond the party's ability to control.[65]

The *Pioneer* majority also looked to the policies underlying the purpose of Chapter 11 to support the balancing approach it ultimately adopted.[66] Chapter 11 entrusts bankruptcy courts with broad equitable powers to balance the interests of the parties in order to ensure the success of the reorganization.[67] The Court concluded this equitable inquiry should be extended to the interpretation of excusable neglect.[68]

The *Pioneer* majority also concluded that the history of the bankruptcy rules supported its conclusion that enlargement is not limited to those circumstances where the failure to file was beyond the filing party's ability to control.[69] The Advisory Committee notes to former Rule 10-401(b), forerunner to Rule 3003(c), noted that the bankruptcy rules insure that those who fail to file their claims through inadvertence or otherwise are allowed to participate.[70]

The Court concluded that the determination of excusable neglect is an equitable one which should take into account all relevant circumstances, including possible prejudice to the debtor, "length of the delay and its impact on judicial proceedings, reason for the delay," and the good faith of the creditor.[71] The Court refused, however, to adopt the fifth factor considered by the Sixth Circuit: whether it is appropriate under the circumstances to penalize the client for the negligence of its attorney.[72] To the contrary, the Court affirmed its position that clients are accountable for the acts of their attorneys as stated in *Smith v. Ayer*.[73]

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65. 113 S. Ct. at 1495.

66. *Id.* While Rule 9006 applies to late filings of proofs of claims in Chapter 11 filings, it does not apply to the equivalent rule in Chapter 7 filings, Rule 3002(c). *Id. See supra* note 37.

67. 113 S. Ct. at 1495.

68. *Id.*

69. *Id.* at 1496.

70. *Id.* "'This attitude is carried forward in the rules, first by dispensing with the need to file proofs of claims and stock interests in most instances and, secondly, by permitting enlargement of the fixed bar date in a particular case with leave of court and for cause shown in accordance with the equities of the situation.'" *Id.* (quoting Advisory Committee Note accompanying Rule 10-401(b), reprinted in COLLIER ON BANKRUPTCY, ¶ 10-401.01 (14th ed. 1977)).

71. 113 S. Ct. at 1498. The factors outlined by the Court include those first mentioned in the context of late claims filings under Rule 3003 in *In re* Dix. 95 B.R. at 138. *See supra* notes 54-56 and accompanying text.

72. 113 S. Ct. at 1499. The attorney's neglect was a key consideration in the finding of excusable neglect by the Sixth Circuit: "While we find that the bankruptcy court did apply the *Dix* factors as directed by the district court on remand, it inappropriately penalized the plaintiffs for the errors of their counsel." *Pioneer*, 943 F.2d at 677.

73. *Pioneer*, 113 S. Ct. at 1499.

Petitioner voluntarily chose this attorney as his representative in the action,

After concluding that the decision of whether there was excusable neglect should be an equitable one, taking into account all relevant factors, including those applied in *Dix*, the Court turned to the facts in *Pioneer*.[74] The *Pioneer* majority agreed with the Sixth Circuit that the lack of prejudice to the debtor, lack of impact on the efficiency of the administration of the court, and the good faith of the creditors and their counsel weighed heavily in favor of granting permission for the late filing.[75] The Court gave little weight to the upheaval in the attorney's practice.[76] Instead, the Court considered the inadequacy of the notice of the bar date of great significance.[77] Ordinarily, the notice of the bar date is in a separate document rather than included in a notice of a creditor's meeting, as was the case with the *Pioneer* notice.[78] In fact, the Court concluded that the form of notice required a finding of excusable neglect.[79]

The dissent in *Pioneer* concluded that the balancing approach is inconsistent with the plain meaning of neglect and it unduly complicates the task of the courts applying the rule.[80] The dissent concluded that Rule 9006 requires a two-part test.[81] First, the court must conclude that the failure to file resulted from excusable neglect.[82]

> and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

Id. (quoting Smith v. Ayer, 101 U.S. 320, 326 (1980)).

74. 113 S. Ct. at 1499.

75. *Id.*

76. *Id.*

77. *Id. See supra* note 10 for the text of the notice.

78. 113 S. Ct. at 1499.

79. *Id.* at 1499-1500. "We agree with the [Court of Appeals] that the 'peculiar and inconspicuous placement of the bar date in a notice regarding a creditors['] meeting,' without any indication of the significance of the bar date, left a 'dramatic ambiguity' in the notification." *Id.* at 1500 (quoting *Pioneer*, 943 F.2d at 678).

> This is not to say, of course, that respondents' counsel was not remiss in failing to apprehend the notice. To be sure, were there any evidence of prejudice to petitioner or to judicial administration in this case, or any indication at all of bad faith, we could not say that the Bankruptcy Court abused its discretion in declining to find the neglect to be "excusable." In the absence of such a showing, however, we conclude that the unusual form of notice employed in this case requires a finding that the neglect of respondents' counsel was, under all the circumstances, "excusable."

Id.

80. 113 S. Ct. at 1500 (O'Connor, J., dissenting). Justice O'Connor was joined by Justices Scalia, Souter, and Thomas. *Id.*

81. *Id.* (O'Connor, J., dissenting).

82. *Id.* (O'Connor, J., dissenting).

Second, if excusable neglect is established, the court must consider the equities and grant relief in its discretion.[83] The focus of the first inquiry should be on the movant's actions and the reasons for those actions, not on the effect of the extension.[84] The dissent argued that the majority, in eliminating the "bright-line" rule, introduced uncertainty into a routine matter and encouraged litigants to appeal.[85]

Perhaps the most persuasive argument of the dissent is that the record did not support the majority's conclusion that respondents or their counsel did not have actual notice.[86] The dissent suggested that in such circumstances, the case should be remanded to the bankruptcy court for a factual finding.[87]

The *Pioneer* majority directed bankruptcy courts to balance the equities rather than adopt a "bright-line" rule in their interpretations of excusable neglect.[88] Bankruptcy courts can no longer base their analyses of excusable neglect solely on the question of the fault of the filing party.[89] Instead, the courts must consider all relevant circumstances, including the impact of the late filing on other parties.[90]

V. SIGNIFICANCE

There is no question that the Supreme Court eliminated the "bright-line" rule. However, the question of how often the equities will weigh in favor of a late filing of proofs of claims remains.

In *Pioneer*, one of the factors which weighed in favor of the creditors was the lack of prejudice to other parties if the late filing were allowed.[91] Although the Supreme Court did not mention it, Pioneer's plan called for payment of 100 cents on the dollar to unsecured creditors.[92] It is hard to imagine a situation which results in less prejudice to other creditors.

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83. *Id.* (O'Connor, J., dissenting).

84. *Id.* at 1501-02 (O'Connor, J., dissenting).

85. *Id.* at 1503 (O'Connor, J., dissenting). In applying a balancing test to the facts in *Pioneer*, two courts concluded that the respondents' neglect was inexcusable. Conversely, two courts, the court of appeals and the United States Supreme Court, concluded it was excusable. *Id.*

86. *Id.* at 1503-04 (O'Connor, J., dissenting). The dissent agreed that if the inadequate notice of the bar date caused the respondents to miss the deadline, the failure may be excusable neglect. *Id.*

87. *Id.* at 1504 (O'Connor, J., dissenting).

88. *Id.* at 1498 (O'Connor, J., dissenting).

89. *Id.* at 1498-99 (O'Connor, J., dissenting).

90. *Id.* (O'Connor, J., dissenting).

91. *See supra* note 76 and accompanying text.

92. Brief for Respondents, Sept. 1, 1992, Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 113 S. Ct. 1389 (1993) (No. 91-1695); available in LEXIS, Genfed Library, Briefs File.

The *Pioneer* decision extends beyond the finding of excusable neglect when the bar date for proofs of claim is not adequately displayed. Rule 9006(b) permits a party to move for an extension in all circumstances except those specifically excepted.[93] The excusable neglect standard established in *Pioneer* has been applied to situations in which there was a failure to file a timely brief[94] and a failure to file a timely answer to a complaint.[95]

Soon after its decision in *Pioneer*, the Supreme Court remanded *In re Harlow Fay, Inc.*[96] to the Eighth Circuit to reconsider its decision in light of the holding in *Pioneer*.[97] In its original decision, the Eighth Circuit affirmed a district court decision denying a finding of excusable neglect in the failure to file a timely brief.[98] After receiving several extensions of time to file a brief, Harlow requested an additional extension after the filing date.[99] Upon considering the decision on remand, the Eighth Circuit again found that the district court did not abuse its discretion in dismissing Harlow's appeal on the basis that the debtor did not establish excusable neglect.[100]

On April 23, 1993, a bankruptcy court in northern Idaho granted a motion to extend the time for filing a proof of claim where the creditor's attorney advised it not to file a proof of claim because the attorney thought the debtor would be able to claim an offset.[101] Although there was a lengthy delay between the motion and the bar date, and the delay was solely the result of the attorney's decision, the court concluded the deadline should be extended as there was no showing of prejudice to the debtor or that granting the motion would delay administration of the case.[102] The court also noted that the debtor's disclosure statement filed after the bar date continued to list the creditor as the holder of a disputed claim.[103]

A New York bankruptcy court interpreted the *Pioneer* decision narrowly and concluded that the *Pioneer* holding stood for a finding of excusable neglect when the bar date notice is inadequate.[104]

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93. *See supra* notes 36-37.
94. *In re* Harlow Fay, Inc., 993 F.2d 1351 (8th Cir. 1993).
95. *In re* Maps Int'l, Inc., 152 B.R. 989, 990 (Bankr. N.D. Okla. 1993).
96. 951 F.2d 175 (8th Cir. 1991).
97. Harlow Fay, Inc. v. Federal Land Bank, 113 S. Ct. 1809 (1993).
98. *Harlow*, 951 F.2d at 176.
99. *Id.*
100. *In re* Harlow Fay, Inc., 993 F.2d 1351 (8th Cir. 1993).
101. *In re* Earth Rock, 153 B.R. 61 (Bankr. N.D. Idaho 1993).
102. *Id.* at 63. The delay was eight months, indicating a "severe lack of diligence on the part of both Creditor and its counsel . . . ." *Id.*
103. *Id.*
104. *In re* New York Seven-Up Bottling Co., 153 B.R. 21, 23 (Bankr. S.D.N.Y. 1993).

VI. CONCLUSION

The full impact of *Pioneer* has not been determined. Certainly, bankruptcy courts will have to consider each of the equitable factors established by the *Pioneer* court in each evaluation of a motion for an enlargement of time under Rule 9006. The courts can no longer base their decision solely on whether the late filing was due to circumstances beyond the reasonable control of the filer. The convenience of a "bright-line" rule has been eliminated. However, it is evident from the post-*Pioneer* decisions that the *Pioneer* holding is subject to varied interpretation.

Sue Patton Mosley