By Scott A. Wolfson

Pier 1: Do Claims Agents Make Neglect Less Excusable?

The convenience of claims agent websites seems to extend to all but the smallest of reorganization cases. The ability to obtain nearly real-time information on all court filings — and even be notified of them as they are filed through a free docket subscription — has forever changed the practice. This convenience, like all others, comes at a cost.

For attorneys and case participants grappling with the cost-benefit analysis of whether they should review the onslaught of daily megacase filings for potential impact on their tangentially involved, unsecured clients, *Pier 1*[1] suggests that your angst is well-placed. Expectations put on bankruptcy participants are increasing, along with the availability of information, meaning that the next deadline you miss might not be as excusable as you had hoped.

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The "Excusable Neglect" Standard

The excusable-neglect standard applies in several situations. First, it can arise in connection with a request for reconsideration of a claim that has been allowed or disallowed under § 502(j), as it did in *Pier 1*. This section provides for the reconsideration of allowance or disallowance "for cause." Rule 3008 of the Federal Rules of Bankruptcy Procedure provides that reconsideration shall be by motion, with the court entering an appropriate order after a hearing on notice.[2]

Cause is not defined by § 502(j). When determining whether cause exits, courts look to Bankruptcy Rules 9023 (New Trials; Amendment of Judgments) and 9024 (Relief from Judgment or Order), which incorporate Rules 59 and 60 of the Federal Rules of Civil Procedure, respectively.[3] When reconsideration is sought under Bankruptcy Rule 3008 after the appeal period has expired, the motion is subject to Bankruptcy Rule 9024, which incorporates Civil Rule 60 and its excusable-neglect standard.[4]

The excusable-neglect standard can also arise in connection with Bankruptcy Rule 9006, as it did with the U.S. Supreme Court in *In re Pioneer Investment Services Co*.[5] Rule 9006 is a general rule governing the computation, enlargement and reduction of periods of time prescribed in other Bankruptcy Rules. Rule 9006(b)(1) empowers a bankruptcy court to permit a late filing if the movant's failure to comply "was the result of excusable neglect."

SCOTUS on "Excusable Neglect"

The excusable-neglect standard is one of the few bankruptcy topics on which the Supreme Court has directly opined. In *Pioneer*, the Court held that an attorney's inadvertent failure to file a proof of claim within the deadline set by the court constituted excusable neglect under Bankruptcy Rule 9006(b)(1).[6] In reaching its decision, the Court held that the lack of congressional guideposts for determining what sorts of neglect will be considered "excusable" meant that the determination is an equitable one taking into account all relevant circumstances surrounding the party's omission.[7] These circumstances include: (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.[8]

However, the Supreme Court made it clear in *Pioneer* that the lower court erred when it held that it would be inappropriate to penalize a party for the omissions of its attorney. The Court stated, "[C]lients must be held accountable for the acts and omissions of their attorneys."[9]

Pier 1 Bankruptcy

The setup for Pier 1 is familiar given the recent spate of retail bankruptcy filings. Pier 1 filed for chapter 11 protection and rejected leases as part of its restructuring efforts. A landlord whose lease was rejected and whose claim was disallowed belatedly filed a motion for relief from the order granting omnibus objection (the "motion"). The parties stipulated to the facts presented in the contested matter.[10]

Upon Pier 1's chapter 11 filing in February 2020 the bankruptcy court entered an order authorizing and directing claims agent Epiq Corporate Restructuring LLC to perform noticing services,

1 *In re Pier 1 Imps. Inc.*, 2024 Bankr. LEXIS 591; 2024 WL 1059317 (Bankr. E.D. Va. March 11, 2024).
2 "A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order."
3 *See Pier 1*, *supra* at *9.
4 *See* Fed. R. Civ. P. 60(b) ("On motion and just terms, the court may relieve a party or its legal representative from final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or *excusable neglect*.") (emphasis added)).
5 507 U.S. 380 (1993).
6 *Id.* at 383.
7 *Id.* at 395.
8 *Id.*
9 *Id.* at 396.
10 *Pier 1*, 2024 Bankr. LEXIS 591, at *2.

and to receive, maintain, record and otherwise administer the proofs of claim in the cases.[11]

One of the debtors had entered into a lease with the landlord pre-petition for a location in Florida. The debtors confirmed a plan and, post-confirmation in September 2020, filed a notice that they sought to reject the landlord's lease. The landlord did not respond, and the lease was rejected.[12]

The landlord timely filed a general unsecured proof of claim for rejection damages, and included therein a service address for notices to the landlord. In January 2021, the landlord's agent was told by the reorganized debtors' plan administrator that they did not expect to distribute anything to unsecured creditors like the landlord.[13]

More than two years later, in April 2023, the reorganized debtors objected to the landlord's claim, seeking to reduce it from approximately $462,000 to $0. The claims agent mailed the claim objection to the landlord at the service address listed in the landlord's proof of claim. Neither the landlord nor its agent filed a response to claim objection, both later claiming that they had not received the claim objection, resulting in an order being entered sustaining the objection and reducing the claim to zero.

The order granting the claim objection was mailed to the landlord, as were a September 2023 notice of allowed general unsecured claims and a resolved claims notice, both of which indicated that the landlord's claim was "allowed" in the amount of $0. The landlord claimed that it also did not receive these documents.[14]

The landlord received an email inquiry from a third party in November 2023 concerning the potential purchase of the landlord's claim. Following the inquiry, the landlord contacted counsel for the reorganized debtors — 34 months after the landlord's last communication with them — for an update on any proposed distribution to unsecured creditors. The landlord learned that an interim distribution of 8-9 percent would be paid to general unsecured creditors with a valid claim, but was told that it would not receive a distribution because its claim had been reduced to zero.[15]

The reorganized debtors began the process of making the interim distributions to holders of allowed general unsecured claims on Dec. 14, 2023. The landlord did not file its motion until Jan. 31, 2024, two-and-a-half months after being informed of the reduction of its claim. The court noted that "[a]t no point prior to the filing of the Motion did [the Landlord, its agent] or any party on their behalf subscribe for free electronic docket alerts provided by the Claims Agent."[16]

No Neglect, No Excuse

The landlord's motion sought to vacate the order granting the claim objection reducing its claim to zero and to obtain leave to file a late response to the claim objection. The *Pier 1* court noted that reconsideration under § 502(j) is a two-step process: The court must decide (1) whether there is "cause" for reconsideration; and (2) whether the equities of the case dictate allowance or disallowance of the claims.[17] Since cause is not defined by § 502(j), and the appeal period for the claim-objection order had expired, the court analyzed the motion under Civil Rule 60(b) (incorporated by Bankruptcy Rule 9024), under which a party may seek relief from a final judgment or order due to "mistake, inadvertence, surprise, or excusable neglect."[18]

Under the facts before it, the court first held that the landlord did not act neglectfully under *Pioneer*. There were no omissions through carelessness; rather, the landlord intentionally withdrew its participation in the bankruptcy cases once it learned that no distribution to unsecured creditors was anticipated.[19] The landlord's "intentional choice to sit back and ignore the bankruptcy does not constitute neglect and, as such, cannot constitute cause for reconsideration of the [claim-objection order]."[20]

Even assuming that there was neglect, the landlord failed to show excusable neglect. The court analyzed the landlord's conduct under *Pioneer*'s four-part inquiry, which is designed to take into account all relevant circumstances surrounding the party's failure to act timely.[21]

First, the court held that granting the motion would prejudice the reorganized debtors and their creditors because an interim distribution had already been paid, and granting the motion would likely lead to hundreds of other creditors seeking the same relief. Second, the court found that the length of the delay by the landlord weighed against granting the motion, as did the delay and expense that would result from granting the motion and the necessary recalculation of the interim distribution.[22]

The third *Pioneer* factor — whether the delay was beyond the reasonable control of the person whose duty is was to perform — was not met because "the delay was well within [the landlord's] control."[23] Not only was the landlord at fault for failing to present evidence of its standardized practice for receiving and processing mail, the court held that the claims agent's website and free services essentially left the landlord without an excuse:

> [The landlord] had other options for it to receive notices. It could have elected to receive free electronic notifications in these bankruptcy cases. The Claims Agent hosts a website with free access to the complete docket and claims register, an extensive overview of the case, and a cache of important documents organized by topic. In white lettering with a conspicuous orange border, the website provides the ability to subscribe to docket alerts. During the Hearing, [the landlord] argued that, with [more than 1,800] documents filed in this case, receiving an email notification for each new document would be cumbersome. Again, as was its prerogative, [the landlord] made the determination that reviewing free email alerts on

11 *Id.* at *2-*3.
12 *Id.* at *3.
13 *Id.* at *4.
14 *Id.* at *5-*7.
15 *Id.* at *7-*8.
16 *Id.* at *8.
17 *Id.* at *9.
18 *Id.*
19 *Id.*
20 *Id.* at *12 (internal citations and quotations omitted).
21 507 U.S. at 395.
22 *Pier 1*, *supra* at *13-*14.
23 *Id.* at *14.

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> docket filings was too great a burden to protect recovery on its Claim.
> Alternatively, [the landlord] could have hired counsel to monitor the docket for activity concerning its Claim. *See* LBR 9010-1 (a party may appear on the record only through counsel). Although this would have required [the landlord] to incur legal expense to engage counsel, [the landlord] made the decision that pursuing this avenue was not worthwhile. In light of the foregoing, the Court finds that the delay was entirely within [the landlord's] control and, as such, the third factor is not satisfied.[24]

24 *Id.* at *16-17 (certain internal citations omitted). The court also held that no evidence was offered on the issue of good faith.

Therefore, the *Pier 1* court denied the motion because, assuming neglect, the landlord failed to prove that the neglect was excusable as necessary for reconsideration under § 502(j).

Conclusion

The proliferation of claims agents and the extensive free services they provide for case participants means that it will continue to become increasingly difficult to show that neglecting to timely act was excusable. Every key fact and deadline in a reorganization of substance is available on a claims agent's website. Using these sites and their related services to actively monitor cases for your client must be standard practice. There is no excuse for not doing so. abi

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