

PINCAY v. ANDREWS

Ninth Circuit Court of Appeals, 2004.
389 F.3d 853, cert. den'd, 544 U.S. 961 (2005).

Professor's Note: The petition for certiorari unsuccessfully sought to have the Supreme Court resolve the conflict between circuits regarding whether federal trial judges abuse their discretion by granting an extension when a practitioner negligently misunderstands a clear procedural rule. The petition is from an en banc decision of the circuit, involving a much larger bench than the usual three-judge panel for routine appeals.

Court's Opinion. SCHROEDER, CHIEF JUDGE.

This appeal represents a lawyer's nightmare. A sophisticated law firm, with what it thought was a sophisticated system to determine and calendar filing deadlines, missed a critical one: the 30-day time period in which to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A). The rule, however, provides for a grace period of 30 days within which a lawyer in such a fix may ask the district court for an extension of time, and the court, in the exercise of its discretion, may grant the extension if it determines that the neglect of the attorney was "excusable."¹ Here an experienced trial judge found excusable neglect, and the appellee asks us to overturn that ruling.

The underlying dispute began in 1989 when Laffit Pincay, Jr. and Christopher McCarron (Pincay) sued Vincent S. Andrews, Robert L. Andrews, and Vincent Andrews Management Corp. (Andrews) for financial injuries stemming from alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and California law. * * * On remand, Pincay elected to pursue the remedy on his California law claim. Judgment was entered in his favor on July 3, 2002.

Andrews's notice of appeal was due 30 days later, but a paralegal charged with calendaring filing deadlines misread the rule and advised Andrews's attorney that the notice was not due for 60 days, the time allowed when the government is a party to the case. *See* Fed. R.App. P. 4(a)(1)(B). Andrews's counsel learned about the error when Pincay relied upon the judgment as being final in related bankruptcy proceedings, and Andrews promptly tendered a notice of appeal together with a request for an extension within the 30-day grace period. By that time the matter had been in litigation for more than 15 years. Everyone involved should have been well aware that the government was not a party to the case, and any lawyer or paralegal should have been able to read the rule correctly. The misreading of the rule was a critical error that, had the district court viewed the situation differently, would have ended the litigation then and there with an irreparably adverse result for Andrews. The district court, however, found the neglect excusable and granted the motion for an extension of time to file the notice of appeal.

¹ The rule provides in relevant part: "The district court may extend the time to file a notice of appeal if: (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) ... that party shows excusable neglect or good cause." Fed. R.App. P. 4(a)(5)(A).

Pincay appealed to this court, and a majority of the three-judge panel concluded that Andrews's attorney had improperly delegated the function of calendaring to a paralegal, and held that the attorney's reliance on a paralegal was inexcusable as a matter of law. It ordered the appeal dismissed. The dissent would have applied a more flexible and deferential standard and affirmed the district court.

A majority of the active non-recused judges of the court voted to rehear the case en banc to consider whether the creation of a per se rule against delegation to paralegals, or indeed any per se rule involving missed filing deadlines, is consistent with the United States Supreme Court's leading authority on the modern concept of excusable neglect, *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). We now hold that per se rules are not consistent with *Pioneer*, and we uphold the exercise of the district court's discretion to permit the filing of the notice of appeal in this case.

The * * * Court in *Pioneer* established a four-part balancing test for determining whether there had been "excusable neglect" within the meaning of Federal Rule of Bankruptcy Procedure 9006(b)(1). The Court also reviewed various contexts in which the phrase appeared in the federal rules of procedure and made it clear the same test applies in all those contexts. The *Pioneer* factors include: (1) the danger of prejudice to the non-moving party, (2) the length of 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 moving party's conduct was in good faith.

In this case, the district court analyzed each of the *Pioneer* factors and correctly found: (1) there was no prejudice, (2) the length of delay was small, (3) the reason for the delay was carelessness, and (4) there was no evidence of bad faith. It then concluded that even though the reason for the delay was the carelessness of Andrews's counsel, that fact did not render the neglect inexcusable. * * *

Because the [three-judge] panel majority decided the case in part on the issue of delegation of calendaring to a paralegal, we consider that issue first. * * *

In the modern world of legal practice, the delegation of repetitive legal tasks to paralegals has become a necessary fixture. Such delegation has become an integral part of the struggle to keep down the costs of legal representation. Moreover, the delegation of such tasks to specialized, well-educated non-lawyers may well ensure greater accuracy in meeting deadlines than a practice of having each lawyer in a large firm calculate each filing deadline anew. The task of keeping track of necessary deadlines will involve some delegation. The responsibility for the error falls on the attorney regardless of whether the error was made by an attorney or a paralegal. *See* Model Rules of Prof'l Conduct R. 5.5 cmt. 2 (2002) ("This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work."). We hold that delegation of the task of ascertaining the deadline was not per se inexcusable neglect.

The larger question in this case is whether the misreading of the clear rule could appropriately have been considered excusable. Resolution of that question requires some effort to try to distill any principles that have evolved in the 10 years since *Pioneer*. In *Pioneer* itself, the Court adopted a broader and more flexible test for excusable neglect. A narrower test existed in many circuits before *Pioneer* that limited excusable neglect to situations that were beyond the control of the movant for an extension as, for example, the messenger being hit by a truck on the way to the court clerk's filing desk.

* * *

Our circuit's confusion is not isolated. The authorities interpreting *Pioneer* in a number of circuits are in some disarray. In fact, the confusion begins with *Pioneer* itself, and various subsequent circuit opinions have cited similar portions of *Pioneer* to support their respective but differing conclusions. The key passage in *Pioneer*, having a little something for everyone, is as follows:

Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect, it is clear that "excusable neglect" under [Bankruptcy] Rule 6(b) is a some-what "elastic concept" and is not limited strictly to omissions caused by circumstances beyond the control of the movant.

[The Court here discusses the varied results in the various circuits.]

Despite this confusion, there appears to be general agreement on at least one principle: the standard of review. We review for abuse of discretion a district court's decision to grant or deny a motion for an extension of time to file a notice of appeal. We must therefore affirm unless we are left with the definite and firm conviction that the lower court committed a clear error of judgment in the conclusion it reached after weighing the relevant factors.

In this case the mistake itself, the misreading of the Rule, was egregious, and the lawyer undoubtedly should have checked the Rule itself before relying on the paralegal's reading. Both the paralegal and the lawyer were negligent. That, however, represents the beginning of our inquiry as to whether the negligence is excusable, not the end of it. The real question is whether there was enough in the context of this case to bring a determination of excusable neglect within the district court's discretion.

We therefore turn to examining the *Pioneer* factors as they apply here. The parties seem to agree that three of the factors militate in favor of excusability, and they focus their arguments on the remaining factor: the reason for the delay. Appellee Andrews characterizes the reason for the delay as the failure of a "carefully designed" calendaring system operated by experienced paralegals that heretofore had worked flawlessly. Appellant Pincay, on the other hand, stresses the degree of carelessness in the failure to read the applicable Rule.

We recognize that a lawyer's failure to read an applicable rule is one of the least compelling excuses that can be offered; yet the nature of the contextual analysis and the

balancing of the factors adopted in *Pioneer* counsel against the creation of any rigid rule. Rather, the decision whether to grant or deny an extension of time to file a notice of appeal should be entrusted to the discretion of the district court because the district court is in a better position than we are to evaluate factors such as whether the lawyer had otherwise been diligent, the propensity of the other side to capitalize on petty mistakes, the quality of representation of the lawyers (in this litigation over its 15-year history), and the likelihood of injustice if the appeal was not allowed. Had the district court declined to permit the filing of the notice, we would be hard pressed to find any rationale requiring us to reverse.

Pioneer itself instructs courts to determine the issue of excusable neglect within the context of the particular case, a context with which the trial court is most familiar. Any rationale suggesting that misinterpretation of an unambiguous rule can never be excusable neglect is, in our view, contrary to that instruction. "[T]he right way, under *Pioneer*, to decide cases involving ignorance of federal rules is with an 'elastic concept' equitable in nature, not with a per se rule."

We are also mindful that Rule 4 itself provides for leniency in limited circumstances. It could have been written more rigidly, allowing for no window of opportunity once the deadline was missed. Many states' rules provide for an extension of the time for filing a notice of appeal under few [*many = few—got that?*], if any, circumstances. The federal rule is a more flexible one that permits a narrow 30-day window for requesting an extension, and the trial court has wide discretion as to whether to excuse the lapse.

We understand several of our sister circuits have tried to fashion a rule making a mistake of law per se inexcusable under Rule 4. We agree that a lawyer's mistake of law in reading a rule of procedure is not a compelling excuse. At the same time, however, a lawyer's mistake of fact, for example, in thinking the government was a party to a case and that the 60-day rule applied for that reason, would be no more compelling (especially in *this* case, which is in its fifteenth year).

We are persuaded that, under *Pioneer*, the correct approach is to avoid any per se rule. *Pioneer* cautioned against "erecting a rigid barrier against late filings attributable in any degree to the movant's negligence." There should similarly be no rigid legal rule against late filings attributable to any particular type of negligence. Instead, we leave the weighing of *Pioneer's* equitable factors to the discretion of the district court in every case.

We hold that the district court did not abuse its discretion in this case. Therefore, the district court's order granting the defendant's motion for an extension of time to file the notice of appeal is AFFIRMED. The merits of the appeal are [therefore now] before the three judge panel in appeal number 02-56491. The panel should proceed to decide that appeal.

[Concurring opinion omitted.]

KOZINSKI, CIRCUIT JUDGE, with whom JUDGES RYMER and MCKEOWN join, dissenting:

We must never forget that it is "excusable neglect" we are expounding. * * * *Pioneer* * * * gave us a four-part test for recognizing when admitted neglect—inadvertence, miscalculation, negligence, carelessness—can nonetheless be excused.

But if excusable neglect must be neglect, it must also be excusable. *Pioneer's* four-part test isn't just a black box into which we throw (1) prejudice to the adverse party, (2) the length of the delay, (3) the reason for the delay, and (4) the good faith of the movant, and accept whatever comes out. When all the weighing and balancing is done, we must have something we can say with a straight face is excusable.

Factors one, two and four will almost always cut one way: Delays are seldom long, so prejudice is typically minimal. Bad-faith delay is rare, given that we're only dealing with "neglect," not deliberate flouting of the rules—though flouting does happen on occasion. Most of the work, then, is done by factor three, the most important one which may balance out any findings under the other factors: The greater the delay, the prejudice to the adverse party and the movant's bad faith, the better a reason the movant must show for having missed the deadline. In this case, the district court found there was no prejudice to Pincay, the delay was short and there was no bad faith. Thus, defendants need not have offered a terribly good countervailing reason to make their neglect excusable.

But they needed to show *something*. * * * The action was not complicated; the lawyer worked at a large, sophisticated law firm; and the rule is as clear as legal rules get:

In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered. Fed. R.App. P. 4(a)(1)(A).

Thus, the number of days to file a notice of appeal was 30--no ifs, ands or buts about it. There surely are complicated rules in the law, but this isn't one of them. The majority agrees: "[A]ny lawyer or paralegal should have been able to read the rule correctly."

Rather than present a reason for the neglect, defendants call the error " 'inexplicable,' " and "aberrational." But "inexplicable" and "aberrational" are not synonyms for excusable.

* * *

In any event, the calendaring system here did not fail. The wrong date was calendared with meticulous efficiency and accuracy. But the lawyer did fail by abdicating his basic duty—to determine the applicable appeal deadline based on a clear-as-day rule.

At bottom, what the sophisticated-calendar-system excuse comes down to is that the lawyer didn't bother to read the rule; instead, he relied on what a calendaring clerk told him. While delegation may be a necessity in modern law practice, it can't be a lever for ratcheting down the standard for professional competence. If it's inexcusable for a competent lawyer to misread the rule, it can't become excusable because the lawyer turned the task over to a non-lawyer. Errors made by clerks performing lawyerly functions are probably less excusable than those made by the lawyer himself; they certainly can't be more so.

The majority may be right that any competent lawyer or clerk should have been able to read the rule correctly, but that is quite different from saying that a lawyer and a non-lawyer would be equally likely to *misread* the rule. Studying and practicing law develops certain skills and habits of mind that, one hopes, make lawyers more careful than non-lawyers about reading rules. When a lawyer turns this function over to a non-lawyer, it increases the likelihood an error will be made. Had the lawyer in this case read the rule himself, rather than relying on what a clerk told him, he doubtless would have gotten it right. Indeed, the 30-day rule for appeals in federal court is so well known among federal practitioners that, had the lawyer but *thought* about the rule, rather than relying entirely on the calendaring clerk's representation, he would surely have realized that the 60-day period is wrong. Instead, the lawyer delegated the calendaring issue to the calendaring "system," which is made up entirely of non-lawyers. If turning large chunks of law practice over to para-professionals can itself be an excuse for misreading rules, then we'll probably see more such delegation and misreading. It is the cold logic of the marketplace that conduct that is rewarded will be repeated.

The Supreme Court told us in *Pioneer* that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer* forecloses any per se rule against "mistakes construing the rules." Still, the word "usually" suggests that we should not apply the balancing test so that virtually *no* type of mistake is off limits for excusable negligence. Yet this is precisely what the majority has done here, because if this mistake is excusable, I can't imagine a mistake that isn't. No circuit has taken a position as charitable to lawyer errors as we do today; the majority is at odds with decisions in at least six other circuits.

I would hold that the error here—whether made by the lawyer, the calendaring clerk or the candlestick-maker—is inexcusable and dismiss the appeal as untimely.

Notes & Questions:

1. What is the federal rules standard applicable to this case?
2. What is the test for applying that standard?
3. Did the majority apply that standard correctly—as opposed to the other circuits which have decided this recurring issue?
4. How *should* this case have been resolved?