ALERTS

Fifth and Sixth Circuits Reject Inexcusable Late Filings

March 15, 2022

"Sixty-seven creditors [who] failed to file timely [claims] [a]fter an approximately two-year-and-nine-month delay...[thus] failed to meet their burden of providing excusable neglect" on their motion to file late claims, held the U.S. Court of Appeals for the Fifth Circuit on March 10, 2022. *In re CJ Holding Co.,* 2022 WL 714890, *1 (5th Cir. Mar. 10, 2022). After reversing the district court, the Fifth Circuit "reinstated the judgment of the bankruptcy court," stressing that it had not "abused its discretion by denying the Claimants' motion for relief from the bar date." *Id.,* at *11. The Sixth Circuit also affirmed the lower courts' denial of the debtor's motion in another case for an extension of time to appeal, agreeing that counsel's "miscalculation of the deadline was insufficient to establish excusable neglect." *In re Smith*, 2022 WL 591702 (6th Cir. Feb. 28, 2022).

"The sole issue in *CJ Holding*, "said the Fifth Circuit, was "whether the bankruptcy court abused its discretion by denying the Claimants' motion for leave to file late" claims. Id., at 4. Resolution turned on "whether the Claimants' failure to file timely proofs of claim was the result of excusable neglect." *Id.*

The Applicable Legal Standard

Both Circuits in *CJ Holding* and *Smith* closely followed the Supreme Court's four criteria for "excusable neglect" in *Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd. Partnership*, 501 U.S. 380 (1993): (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." *Pioneer*, 401 U.S. at 395. Courts make an "equitable" inquiry, with the burden of showing "excusable neglect" on the movant. 2022 WL 714890, at 4.

Prejudice to the Debtor. The Fifth Circuit rejected the bankruptcy court's finding of "prejudice" in *CJ Holding*." *Id.*, at *4-*6. In its view, "the prejudice factor favors the Claimants because the debtors had notice of the Claimants' claims" when they "negotiated and formulated" their reorganization plan and "had at least some expectation of those claims." *Id.*, at *5. They also "participated in a global mediation with" those "claims in mind." *Id.* Nor would "additional litigation costs and other legal fees" incurred by the debtors "constitute prejudice." *Id.* And "a disputed claims reserve [here] mitigate[d] against the risk of "unexpected losses." *Id.* Still, said the court, the prejudice criterion "is *not* entitled to any kind of disproportionate weight." *Id.* (emphasis in text).

Length of Delay. The Fifth Circuit accepted the bankruptcy court's holding in *CJ Holding* that "the length of delay" – "*two years and nine months* after the *bar date* passed" – would delay "resolution of the case." *Id.*, at * 6 (emphasis in text). The reorganization plan had "explicitly" provided for the disallowance of late claims. *Id.* And many courts in other cases have denied motions to file late claims "after far shorter delays than the one here." *Id.* Further, the Claimants had failed to present to the bankruptcy court any "evidence regarding the delay's impact on" the case. *Id.*, at *7.

Reason for the Delay. The Fifth Circuit also agreed with the bankruptcy court in *CJ Holding* that the reason for delay "was within the movant's reasonable control." *Id.*, at *8. It rejected the "Claimants' counsel's argument that he did not have contact information" for each Claimant. *Id.* Counsel gave no explanation for this assertion or why the Claimants "could not themselves file individual" claims "once they received the bar-date notice." "Twenty-seven" other similarly situated claimants, in fact, "took it upon themselves to file individual proofs of claim." *Id.*, at *9. The delay here, said the court, "was not beyond the reasonable control of the Claimants, whose duty it was to file timely" claims. Id.

Good Faith. Finally, the Fifth Circuit agreed with the bankruptcy court in *CJ Holding* that the Claimants' counsel's actions "verged on malpractice" or "both a lack of diligence or misunderstanding of bankruptcy procedure." *Id.*, at *9-10. If not "bad faith," said the court, the Claimants' failure here did them no "favors for purposes of meeting their burden to show good faith."

Id., at *10. And "mere inadvertence or mistake… does not constitute excusable neglect under *Pioneer*." *Id.*

The Sixth Circuit's *Smith* Decision

The bankruptcy court in *Smith* had entered a nondischargeability judgment in favor of a creditor. The debtor "missed the fourteen-day deadline to appeal the judgment" and waited three weeks before seeking permission to file a late notice of appeal." 2022 WL 591702, at *1. He argued that his counsel had "miscalculated the deadline to appeal by one day and had communicated that erroneous deadline to [the debtor] and the new attorney he had obtained for appeal." *Id.*

Although the bankruptcy court had "discretion to extend that deadline by 21 days 'if the party shows excusable neglect'" under Bankruptcy Rule 8002(d)(1), the bankruptcy court reasoned that counsel's "miscalculation of the deadline was insufficient to establish excusable neglect." *Id.* at *2. It also found "no allegations or evidence of bad faith," but that the 3-week delay was "within the movant's reasonable control." *Id.* The bankruptcy court had not abused its discretion, said the Sixth Circuit, because "excusable neglect is a 'flexible' and 'elastic' concept."· *Id.*, citing *Pioneer*, 507 U.S. at 392, 395 n. 14. In particular, the debtor "waited until the very last day to file his motion despite learning immediately that he had missed the deadline to file his appeal." *Id.*

Comments

(1) The Fifth Circuit applied an "exceptionally deferential standard of review" in *CJ Holding* when considering the bankruptcy court's exercise of discretion. *Id.*, at *11, citing *In re Enron Corp.,* 419 F.3d 115, 129 (2d Cir. 2005) ("[W]e are particularly reluctant—absent evident arbitrariness—to substitute our judgment for that of the bankruptcy judge who has presided over the proceedings… [and] who is most familiar with the parties and the potential impact of any late-filed claim[.]")

(2) The Fifth Circuit also noted in *CJ Holding* that the Claimants' counsel, "[o]n multiple occasions before the district court… attributed the untimeliness of the Claimants' proofs of claim to inadvertence and mistake." 2022 WL 714890, at *10 n.4.

(3) Obvious lesson for creditors and their counsel: Pay attention to claim-filing and appeal-filing bar dates. *CJ Holding* and *Smith* are hardly outliers. Courts now have ample precedent to bar late claims and appeals.

(4) Deadlines to watch:

- *Unsecured Claims*: court-ordered under Fed. R. Bankr. P. 3002-3005;
- *Administrative Priority Claims*: by court order; often within thirty (30) days after any Chapter 11 reorganization plan becomes effective.
- *Notice Of Appeal From Bankruptcy Court*: generally "within 14 days after entry of the judgment, order or decree being appealed." Fed. R. Bankr. P. 8002(a)(1); *In re Tennial*, (6th 2020) (rule-based "appeal deadline is mandatory").

Authored by Michael L. Cook.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or the author.

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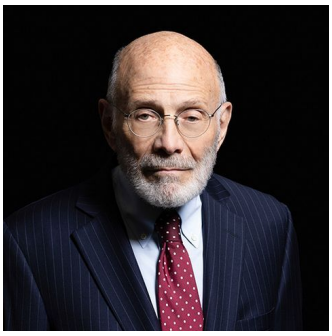

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