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Do You Know When Your Fee Petition is Due? The Rocky Road Untimely Attorney's Fee Petitions Travel

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Attorney's fees and costs often are available under the Longshore and Harbor Workers' Compensation Act (33 U.S.C.S. § 901 *et seq.)* to lawyers who successfully represent a "person seeking benefits"[2] (usually but not always a worker) after an employer or its carrier denies requested benefits.[3] Yet the Act doesn't set a date when an application for fees and costs is due. Nor do the regulations, in the sort of way Federal Rules of Civil Procedure, Rule 54(d)(2)(B)(i) does, which requires a fees motion to be filed in most situations no later than 14 days after the entry of judgment.[4] The regulations instead authorize the adjudicator at each level where legal services were done to specify when an application for fees and costs is to be served and filed.[5]

Bad things have happened in Article III courts to more than one lawyer who filed a fee application late. The venerable Wright & Miller treatise on federal litigation emphasizes that "timely filing is the safest course."[6] The lawyer who files late in district court must show "excusable neglect," as that concept has been developed by the Supreme Court of the United States and enforced in the federal courts of appeals in an array of contexts, including motions for fees, both statutory and contractual.[7]

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1 Views stated in this article are the authors', not those of the Secretary or any official or entity of the U.S. Department of Labor.

2 33 U.S.C.S. § 928(a); *Hunt v. Director, OWCP*, 999 F.2d 419, 423-424, 27 BRBS 84(CRT) (9th Cir. 1993); *Grierson v. Martine Terminals Corp.*, 49 BRBS 27 (2015).

3 See 33 U.S.C.S. § 928(a), for a successful prosecution of a claim denied outright, as well as 33 U.S.C.S. § 928(b) for success on a claim partially accepted by the employer or carrier.

4 "Unless a statute or court order provides otherwise, the [fees] motion must: (I) be filed no later than 14 days after the entry of judgment...."

5 20 C.F.R. § 702.132(a).

6 10 Charles Allen Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus & Adam N. Steinman, 10 Federal Practice & Procedure § 2680 (3d ed. 2015).

7 Fees due by contract usually are an element of damages a jury awards in its verdict. Yet a statute may reassign setting those fees from the jury to the court, treating them as an item of costs. *See* Cal. Civ. Code § 1717(a) (providing contractual fees "shall be fixed by the court, and shall be an element of the costs of suit."). When that sort of claim finds its way into federal court,

This article discusses just how bad things can get: denial of a fee in its entirety because a late fees claim can become a waived fee claim.[8] It does the lawyer no good if the trial judge accepts a late filing, yet fails to justify accepting it with a well-supported finding of excusable neglect. Courts of appeals are vigilant to ensure the requisite excusable neglect analysis has been made; they will reverse as an abuse of discretion a fee granted on a late petition that doesn't meet that unfriendly standard. Courts won't condone the invocation of excusable neglect as a way to finesse avoidable mistakes or to relieve professional incompetence.[9] The lesson is clear—a lawyer who can see a fee application may be late should get an extension of the time to file before the time runs out. This article shows why no claimant's lawyer should want to become the one who finds out whether a Longshore practitioner will fare any better than those in other practice areas.

The article first contrasts the rules on when a fee application is due under the Longshore Act and under the procedural rules of the U.S. District Courts. Next, it shows why an application to extend time made before the time expires may be made *ex parte*. The standard the U.S. Supreme Court established more than 20 years ago for a finding of excusable neglect is explained. How the courts of appeals have enforced the standard generally, and how they have treated late fee motions specifically are explored. Whether a Longshore lawyer should expect that Section 23(a) of the Longshore Act offers escape from excusable neglect analysis is considered last.

A. The Time to File: Timely Fee Petitions at the Department of Labor and at District and Other Courts

1. At OALJ: Set by Order

Under the Longshore Act and its extensions, a fee petition is due at the time the adjudicator at each level specifies. "The application shall be filed and served upon the other parties within the time limits specified by such district director, administrative law judge, Board, or court."[10] The ALJ frequently specifies the time to petition for attorney's fees in the Order portion of the Decision and Order. At OALJ, that requirement encompasses both service and filing. Service is how the document gets to the other party (*e.g.*, hand delivery, mailing to the last known address, or delivery by electronic means if the person has consented in writing to that form of delivery).[11] Filing is getting the document to OALJ: "A paper is filed when received by

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the successful party's fees due by contract are handled under Federal Rules of Civil Procedure, Rule 54(d)(2)(B). *See Port of Stockton v. Western Bulk Carrier KS*, 371 F.3d 1119, 1121-1122 (9th Cir. 2004) (finding a fee potentially available under a contract provision waived where the party failed to file a fees motion within 14 days after entry of a judgment).

8 *Logue v. Dore*, 103 F.3d 1040, 1047 (1st Cir. 1997) (finding defendants waived any fee that might be available under 42 U.S.C.S. § 1983 for its defense of a frivolous suit, when no fees motion was filed within the 14 days after entry of judgment available under Fed. R. Civ. P. 54(d)). *See also United Indus. v. Simon-Hartley, Ltd.*, 91 F.3d 762, 764 (5th Cir. 1996) (discussed later).

9 *Ragguette v. Premier Wines & Spirits*, 691 F.3d 315, 332-333 (3d Cir. 2012).

10 20 C.F.R. § 702.132(a) (implementing 33 U.S.C.S. § 928(c)).

11 29 C.F.R. § 18.30(a)(2)(ii) (A)-(F).

the docket clerk....”[12]

2. In District Court: Set by FRCP, Individual Order or Local Rule.

The Federal Rules of Civil Procedure set 14 days after the entry of a judgment as a default time to file a fees motion in U.S. District Court.[13] The statute that authorizes a fee might set a different time,[14] as can an order the judge enters in a specific case or a local rule of the district court. Class action fee motions are handled somewhat differently: The trial judge sets the time for a fees motion,[15] which then is handled under Rule 54(d)(2), so late motions also face the excusable neglect standard.[16]The 1993 Advisory Committee Notes to Federal Rules of Civil Procedure, Rule 54(d) explains why the default period to file a fees motion is 14 days. The short time affords the trial judge an opportunity to resolve fees “while the services performed are freshly in mind.”[17] The opposing party also knows whether fees are an issue before the notice of appeal from the substantive judgment is due, and a prompt disposition can allow a court of appeals to join the two issues in a single appeal.[18]

The text of the civil rule on making a fees motion reads:

(2) *Attorney’s Fees*.

> (A) *Claim to Be by Motion.* A claim for attorney’s fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.[[19]]
>
> (B) *Timing and Contents of the Motion.* Unless a statute[[20]] or a court order

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12 29 C.F.R. § 18.30(b)(2).

13 Fed. R. Civ. P. 54(d)(2)(B)(i). In the past the 14-day trigger was set to service of the motion too, but the current trigger, set to filing the motion, makes it parallel with the times for filing post-trial motions under Rules 50, 52 and 59. Service is still required by Rule 5(a), Fed. R. Civ. P. See the Advisory Committee Note to the 2002 amendment to Rule 54.

14 *See, e.g.*, the Equal Access to Justice Act, 28 U.S.C.S. § 2412(d)(1)(B) (requiring the application for fees to be filed within 30 days of the final judgment).

15 Fed. R. Civ. P. 23(h)(1).

16 *See Petrone v. Veritas Software Corp. (In re Veritas Software Corp. Sec. Litig.)*, 496 F.3d 962, 972 (9th Cir. 2007).

17 Advisory committee’s notes to the 1993 amendments to subdivision (d), paragraph (2), Fed. R. Civ. P. 54.

18 Advisory committee’s notes to the 1993 amendments to subdivision (d), paragraph (2), Fed. R. Civ. P. 54.

19 *Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102, 1116 (10th Cir. 2009) (holding that fees must be proven as contract damages at trial when the liability is based on an indemnification agreement); *Carolina Power & Light Co. v. Dynegy Mktg. & Trade*, 415 F.3d 354, 358-359 (4th Cir. 2005) (similar); *Kraft Foods N. Am., Inc. v. Banner Eng’g & Sales, Inc.*, 446 F. Supp. 2d 551, 577-578 (E.D. Va. 2006) (finding that a party had failed to offer proof at trial to support recovery of fees that were contract-based damages; they were not an item of costs).

20 *See* 28 U.S.C.S. § 2412(d)(1)(B); *Shalala v. Schaefer*, 509 U.S. 292, 295-296, 125 L. Ed. 2d 239, 246, 113 S. Ct. 2625, 2628-2629 (1993) (discussing the 30 days available after the entry of a judgment to apply for fees under the Equal Access to Justice Act, 28 U.S.C.S. § 2412(d)(1)(B)).

provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment....[21]

The phrase "unless... a court order sets another time" in Federal Rules of Civil Procedure Rule 54 encompasses two things: a judge's order in an individual case that sets the filing time, and a local rule that sets a time to file for fees without the entry of a case-specific order.[22] Local rules vary widely; some just repeat the14-day period to file Federal Rules of Civil Procedure Rule 54(b) gives.[23] Comments integral to a local rule may emphasize that a party who seeks an extension of the filing time do so promptly.[24] Other local rules prescribe the fees motion's format and time for responses,[25] or give notice that the judge may require contemporaneous time records to support the motion.[26] Occasionally local rules grant much more than 14 days to file,[27] or extend the time to file a fees motion in limited circumstances.[28]

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3. Fees Requests on Appellate Review

Beyond the OALJ, the excusable neglect rule of 29 C.F.R. § 18.32(b)(2) obviously does not apply. But the statute and regulation on where to apply for fees do. For services rendered at the Benefits Review Board, a fee petition is due no later than 60 days after the Board issues its decision.[29] The U.S. Courts of Appeals often set the time to petition for fees by local rule.[30]

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21 Fed. R. Civ. P. 54(d)(2)(A), (B).

22 *See Planned Parenthood v. AG*, 297 F.3d 253, 259-261 (3d Cir. 2002) (canvassing decisions from other circuits).

23 Central District of California's Local Civil Rule 54-10.

24 The Commentary to this Northern District of California Local Rule cautions against late motions:

> A short time period of only 14 days from the entry of judgment for filing a motion for attorney's fees is set by Fed. R. Civ. P. 54(d)(2)(B). Counsel who desire to seek an order extending the time to file such a motion, either by stipulation (See Civil L.R. 6-2) or by motion (See Civil L.R. 6-3), are advised to seek such an order as expeditiously as practicable.

N. Dist. Cal. Civil L.R. 54-5, Commentary.

25 District of Oregon's Local Rule 54-3 (setting no different time to file a fees motion—therefore requiring it in 14 days—but setting times for objections, replies, and limiting the length of motion papers.

26 Northern District of California's Local Civil Rule 54-5.

27 Eastern District of California's Local Civil Rule 293 (giving 28 days after entry of judgment to file a fees motion, setting requirements for its contents, and stating the criteria the court uses in making awards); Northern District of Illinois's Local Civil Rule 54.3(b) (specifying that, in the absence of any other order, a fee motion must be served and filed no later than 91 days after the judgment; this allows the parties to exchange information, negotiate the fee, and if unsuccessful, prepare a detailed joint statement described in the local rule that must be attached to the fees motion).

28 District of Columbia's Local Civil Rule 54.2(a) (creating alternatives, where the court may, when judgment is entered, order a status conference no more than 60 days after entry of judgment to allow time to negotiate fees, but without that order the usual 14 days to file applies).

29 20 C.F.R. § 802.203(c).

30 *See, e.g.*, U.S.C.S. Ct. App. 1st Cir., Loc. R. 39.1(a)(1) (requiring fee applications be filed

B. A Filing Date That Hasn't Passed May Be Extended Freely

If made before the due date, a motion at OALJ to extend the time to file for fees (and most other things) may be granted freely.[31] The text of the OALJ rules and federal civil rules authorize the judge to extend the time for an act "[w]ith or without motion or notice"[32] as long as the request comes "before the original time or its extension expires."[33] This is a specific exception to 29 C.F.R. § 18.33(a) that otherwise requires a request for an order be made by motion. But woe to any who file late. They face the "excusable neglect" standard of 29 C.F.R. § 18.32(b)(2), modeled on Federal Rules of Civil Procedure, Rule 6(b)(1)(B). Deadlines matter:

> We live in a world of deadlines. If we're late for the start of the game or the movie, or late for the departure of the plane or the train, things go forward without us. The practice of law is no exception. A good judge sets deadlines, and the judge has a right to assume that deadlines will be honored.[34]

C. Excusable Neglect for Late Filing

Excusable neglect "is not easily demonstrated, nor was it intended to be."[35]

The phrase "excusable neglect," nowhere defined by Congress or in the Federal Rules of Civil Procedure, was fleshed out by the U.S. Supreme Court more than 20 years ago in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*.[36] The case involved a proof of claim in a Chapter 11 bankruptcy filed 20 days late. While the phrase "excusable neglect" in

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within 30 days of the entry of the final circuit judgment); U.S.C.S. Ct. App. 3rd Cir., L.A.R. 108.1(a) (requiring applications be filed within 30 days after entry of appellate judgment); U.S.C.S. Ct. App. 8th Cir., R. 47C(a) (requiring motions for fees be filed within 14 days after the entry of appellate judgment); U.S.C.S. Ct. App. 9th Cir., Circuit R. 39-1.6(a) (requiring fee requests be submitted no later than 14 days after the deadline for filing a petition for rehearing, or its disposition); U.S.C.S. Ct. App. 11th Cir., Cir. R. 39-2(a) (requiring applications for fees be filed within 14 days after the time to file a petition for rehearing or rehearing *en banc*, or its disposition).

31 "[R]equests for extensions of time made before the applicable deadline has passed should 'normally... be granted in the absence of bad faith or prejudice to the adverse party.'" *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1259 (9th Cir. 2010). No judge may extend the time to file a few motions, *viz.*, ones seeking a new trial or to alter, delay, or give relief from the effectiveness of a judgment. *See* Fed. R. Civ. P. 6(b)(2).

32 29 C.F.R. § 18.32(b)(1). *See also* Fed. R. Civ. P. 6(b)(1)(A) (on which 29 C.F.R. § 18.32(b)(1) is pattered).

33 29 C.F.R. § 18.32(b)(1); Fed. R. Civ. P. 6(b)(1)(A).

34 *Spears v. City of Indianapolis*, 74 F.3d 153, 157 (7th Cir. 1996) (affirming the refusal to grant an after-the-fact extension of one day to file material to support a brief that already had been filed opposing summary judgment, when two extensions already had been granted).

35 *Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530, 534 (4th Cir. 1996) (interpreting "excusable neglect" as used in Fed. R. App. P. 4(a)).

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

the text of Federal Rules of Bankruptcy Procedure, Rule 9006(b)(1) was interpreted in *Pioneer*, the Supreme Court saw the disagreement in the circuits on the meaning of excusable neglect in Federal Rules of Appellate Procedure, Rule 4(a)(5) as a reason to grant certiorari.[37] *Pioneer*'s guidance on what constitutes excusable neglect effectively extends to all instances of that standard in federal rules of procedure.[38]

The Secretary of Labor stated in the Preface to the publication of the current Rules of Practice and Procedure that the Department intended to bring practice at the OALJ into closer alignment with the Federal Rules of Civil Procedure to take "advantage of the mature precedent the federal courts have developed and the broad experience they have in applying the FRCP."[39] The current iteration of the Rules of Practice Before the Office of Administrative Law Judges includes the same language about "excusable neglect" at 29 C.F.R. § 18.32(b)(2) as appears in Federal Rules of Civil Procedure, Rule 6(b)(1)(B). The Secretary of Labor expects the rules to be interpreted and applied similarly.

The Benefits Review Board has had no occasion to apply the text of the excusable neglect regulation at 29 C.F.R. § 18.32(b)(2) that the Secretary of Labor adopted in the early summer of 2015. Nor has it dealt with that concept in the context of a late attorney's fee petition in any published decision under the Longshore Act. The brace of published decisions decided under the generally similar fee regulation under the Black Lung Benefits Act[40] never analyzes excusable neglect, and offer inconclusive guidance. The Board first affirmed a deputy commissioner's denial of a fee when a lawyer filed his petition about 14 months after the time specified. Another order two months after the fee petition was due returned the amount withheld from the benefits that would have created the fund from which his attorney would be paid; the attorney did not object to that order. The Sixth Circuit upheld the fee denial.[41] Then, two years later, a divided panel of the Board found a deputy commissioner abused his discretion by denying a late fee application entirely. The application in the second case was filed one month late, and the time to file had been specified within the findings of fact, not the order. The lawyer had devoted time to the case over the course of three years, and the lawyer immediately sought

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37 *Pioneer*, 507 U.S. at 387 & n.3.

38 *Manus Corp. v. NRG Energy, Inc. (In re O'Brien Envtl. Energy, Inc.)*, 188 F.3d 116, 125 n.7 (3d Cir. 1999) (recognizing that the *Pioneer* factors guide excusable neglect analyses beyond the context of bankruptcy proceedings); *Pratt v. Philbrook*, 109 F.3d 18, 19 (1st Cir. 1997) ("*Pioneer* must be understood to provide guidance outside the bankruptcy context."). *See also Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 134 (7th Cir. 1996) ("[T]he tenor of [*Pioneer*] is that the term ['excusable neglect'] bears the same or similar meaning throughout the federal procedural domain."); *Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, 454 n.3 (1st Cir. 1995) ("We agree with the Tenth Circuit that Pioneer's exposition of excusable neglect, though made in the context of late bankruptcy filings, applies equally to Fed. R. App. P. 4(a)(5).").

39 Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 80 Fed. Reg. 28,768, 28,770 (May 19, 2015) (codified at 29 C.F.R. pt. 18). *See also* Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges, Notice of Proposed Rulemaking, 77 Fed. Reg. 72,142, 72,144 (Dec. 4, 2012) (to be codified at 29 C.F.R. pt. 18).

40 20 C.F.R. § 725.366(a).

41 *Bankes v. Director, OWCP*, 7 BLR 1-102 (1984), *aff'd*, 765 F.2d 81, 8 BLR 2-1 (6th Cir. 1985).

fees once he realized his error.[42] Both of these Board decisions predate the Supreme Court's definitive guidance in *Pioneer*. The facts in the second case bear some similarity to the odd placement of the date to file claims in the *Pioneer* case, which is discussed next.

Much like the Longshore fees regulation at 20 C.F.R. § 702.132, the Federal Rules of Bankruptcy Procedure at issue in *Pioneer* said the bankruptcy judge "shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed."[43] A different bankruptcy rule, which reads much like Federal Rules of Civil Procedure, Rule 6(b)(1)(B), empowered a bankruptcy judge to permit late filing when the failure "was the result of excusable neglect."[44]

The Supreme Court decision in *Pioneer* dealt with "inadvertence, miscalculation, or negligence."[45] The Court affirmed the Sixth Circuit's conclusion that the peculiar and inconspicuous placement of the final date to file a claim in a notice for a creditors' meeting,[46] without any indication of the date's significance, left a dramatic ambiguity in the notice that would have confused even an experienced bankruptcy lawyer, which led to an inadvertent failure to file a timely proof of claim. This justified the court of appeals' determination that the bankruptcy judge must consider the late filing, given the lawyer's excusable neglect.[47] The Supreme Court rejected, however, the Sixth Circuit's stated disinclination to penalize a client for the omission of the attorney. A client is accountable for those acts or omissions.[48] The Supreme Court gave "little weight" to the other reason the lawyer offered for filing late: upheaval he was experiencing from his withdrawal from a law firm, which gave him no access to his case file when the claim was due to be filed.[49]

1. Four Factors Determine Excusable Neglect

To determine whether neglect is excusable, the Supreme Court told lower federal courts to consider:

1. the danger of prejudice to the opposing party;
2. the length of the claimant's lawyer's delay and its potential impact on judicial proceedings;
3. the reason for the claimant's lawyer's delay, including whether it was in the reasonable control of the lawyer; and
4. whether the negligent lawyer acted in good faith.[50]

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42 *Paynter v Director, OWCP*, 9 BLR 1-190 (1986).

43 *Pioneer*, 507 U.S. at 382 & n.1 (quoting Fed. R. Bankr. P. 3003(c)(3)).

44 *Id.* at 382 & n.2 (quoting Fed. R. Bankr. P. 9006(b)(1)).

45 *Id.* at 388.

46 The Board's reliance on the placement of the fee petition's due date in the findings of fact might qualify as the sort of dramatic ambiguity the Sixth Circuit had highlighted in its decision that found excusable neglect that the Supreme Court approved in *Pioneer*.

47 *Pioneer*, 507 U.S. at 385-387, 398-399.

48 *Id.* at 396.

49 *Id.* at 384, 398.

50 *Id.* at 395, 397.

These four factors make "excusable neglect" an "elastic concept"[51] that is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission."[52] It "encompass[es] situations in which the failure to comply with a filing deadline is attributable to negligence"[53] and even reaches "omissions caused by carelessness."[54] Yet never mistake this for a friendly test.

When a district court or an administrative agency[55] analyzes the *Pioneer* factors, the courts of appeals review the excusable neglect determination for abuse of discretion. A litigant whose predicament arises from not observing clear or easily ascertainable rules and who cannot persuade the trial judge that, under the circumstances of the case, the neglect is excusable shouldn't expect a court of appeals to "meddle unless ... persuaded some exceptional justification exists."[56]

2. Excusable Neglect Determinations Unrelated to Fee Motions

An exhaustive analysis of excusable neglect is not the focus here. The four factors *Pioneer* set for analyzing excusable neglect yield to variations, as some circuits emphasize certain factors over others. The application of *Pioneer* is in some circuits more forgiving, in others less so. The courts of appeals have contrasting emphases: the Ninth takes a holistic approach; many circuits give special weight to the reason for the delay; and the Eleventh focuses on whether there is a showing of prejudice from the delay. These varying approaches are shown below.

a. Holistic

The Ninth Circuit takes a holistic approach.[57] In *Briones v. Riviera Hotel & Casino*, a case that involved a *pro se* plaintiff, the Ninth Circuit added a gloss to the Supreme Court's four factors: no single factor controls.[58] All must be weighed. The failure of a *pro se* litigant to

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51 *Id*. at 392.
52 *Id*. at 395.
53 *Id*. at 394.
54 *Id*. at 388.
55 *Hospital del Maestro v. NLRB*, 263 F.3d 173, 174-175 (1st Cir. 2001) (per curiam).
56 *Graphic Communs. Int'l Union, Local 12–N v. Quebecor Printing Providence, Inc*., 270 F.3d 1, 6-7 (1st Cir. 2001); *Mirpuri v. ACT Mfg.*, 212 F.3d 624, 631 (1st Cir. 2000).
57 *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 382 & n.2 (9th Cir. 1996); *Lemoge v. United States*, 587 F.3d 1188, 1193-1194 (9th Cir. 2009).
58 *Briones*, 116 F.3d at 382 & n.2. In *Briones*, the Ninth Circuit vacated and remanded the denial of a request a *pro se* plaintiff of limited English proficiency made to set aside a judgment under Fed. R. Civ. P. 60(b)(1) for "excusable neglect." Judgment already had been entered dismissing his Title VII employment claim by the time he filed a response to a motion to dismiss for improper service of the complaint. His response was more than 100 days late. The Ninth Circuit abrogated its earlier rule that failure to comply with a court rule precluded a finding of excusable neglect. The appellate panel returned the matter to the trial judge to apply all the factors *Pioneer* describes to the claim for relief under Rule 60(b), and to consider the prejudice to the plaintiff if the matter were dismissed.

comply with court rules was neglect (*i.e.*, negligence), but the district court must consider whether that neglect ought to be excused under *Pioneer*. The four factors the Supreme Court discussed set the framework for analysis, but are not an exclusive list.[59] The Ninth Circuit abrogated its pre-*Pioneer* precedent, which the district judge had followed.[60] That precedent held that, even for a *pro se* litigant, ignorance of court rules was inexcusable neglect.

Failing to explicitly list all the *Pioneer* factors when a judge determines excusable neglect is itself dicey, because one or more might be missed,[61] but to list the *Pioneer* factors without also analyzing how each applies to the specific situation is generally reversible error.[62] Sometimes prejudice to the negligent party must be part of the calculus too if, for example, rejecting a request to find excusable neglect would extinguish the merits of a substantive claim.[63] A district court in Hawaii therefore declined to dismiss an appeal from a bankruptcy court's decision when the appellant filed its brief in the district court late.[64] Considering prejudice to the negligent party might aid the inattentive lawyer in a trial judge's assessment of excusable neglect.

Briones was hardly the Ninth Circuit's last word on excusable neglect. In the 2004 *en banc* decision in *Pincay v. Andrews*,[65] the Ninth Circuit loosened the standards somewhat. The federal appellate rules authorize a district judge to retroactively extend the time to file a notice of appeal for excusable neglect, so long as the motion is filed in the district court "no later than 30 days after the time prescribed."[66] The district judge had permitted a defendant to file a notice of appeal 24 days late, after a paralegal miscounted the days available to file a notice of appeal.

The panel decision initially had reversed and dismissed the appeal, disparaging the lawyer's "ignorance of the rules, compounded by delegation of knowledge of the rules to a non-lawyer for whom responsibility was not accepted."[67] Reliance on a paralegal's misreading of an

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59 *Briones*, 116 F.3d at 381.

60 *See Swimmer v. IRS*, 811 F.2d 1343, 1345 (9th Cir. 1987).

61 *Bateman v. United States Postal Serv.*, 231 F.3d 1220, 1224 (9th Cir. 2000).

62 *Lemoge*, *supra*, 587 F.3d at 1194. *See also Farris v. Ranade*, 584 Fed. Appx. 887, 891 (9th Cir. 2014) (unpublished), *cert. denied*, __ U.S. __, 191 L. Ed. 2d 369, 135 S. Ct. 1456 (2015) (remanding a district judge's order declining to address a fees motion filed more than 14 days after entry of judgment for failure to analyze all four *Pioneer* factors, relying on language from *Lemoge* that: "it will always be a better practice for the district court to touch upon and analyze at least all four of the explicit *Pioneer* [ ] factors.").

63 *Lemoge*, 587 F.3d at 1195 (reversing a district court's decision not to set aside a dismissal for failure to serve the United States properly under Rule 60(b)(1), in part for failure to consider the fourth *Pioneer* factor [good faith], and in part because the negligent litigant would be statutorily time-barred from refiling the action).

64 *In re Hawaiian Airlines, Inc.*, 2011 U.S. Dist. LEXIS 41932, at **11-15 & n.7 (D. Haw. Apr. 18, 2011).

65 *Pincay v. Andrews*, 389 F.3d 853 (9th Cir. 2004), *cert. denied*, 544 U.S. 961, 161 L. Ed. 2d 602, 125 S. Ct. 1726 (2005) (*en banc*) [hereinafter *Pincay II*].

66 Fed. R. App. P. 4(a)(5)(A).

67 *Pincay v. Andrews*, 351 F.3d 947, 952 (9th Cir. 2003) [hereinafter *Pincay I*]. Granting *en banc* rehearing effectively vacated *Pincay I*. "The three-judge panel opinion shall not be cited as precedent by or to this Court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court." Circuit Advisory Committee Note (3) to U.S.C.S. Ct. App. 9th

unambiguous rule of procedure was, to the panel, inexcusable as a matter of law.[68]

The *en banc* court affirmed the discretionary extension and reinstated the appeal. It both rejected a *per se* rule[69] and emphasized the deferential standard for review of the district court's determination. The trial judge's finding of excusable neglect was adequately supported. All four *Pioneer* factors were considered: the opponent wasn't prejudiced by the delay, which itself was small, arose from carelessness, and involved no bad faith. Always treating a calendaring error as inexcusable would be inconsistent with the discretion the Supreme Court's analysis in *Pioneer* has reposed in a trial court to analyze the four factors in the context of the litigation as a whole.

The Ninth Circuit's *en banc Pincay II* decision was out of the mainstream. Other circuits regard errors that arise when a lawyer delegates a task to someone else (whether a lawyer or non-lawyer) as a serious shortcoming that, even under *Pioneer*, weighs so heavily under the third factor that the others can't tip the balance to merit a remedy under the rubric of excusable neglect.[70]

Yet the deferential standard of review doesn't guarantee appellate approval of a decision that rejects a late filing for inexcusable neglect, as the following two examples from the Ninth Circuit show.

The Ninth Circuit reversed a bankruptcy judge's finding (one the district court had affirmed) that female workers, who had no lawyer at the time, had failed to show excusable neglect for filing their proofs of claim out of time.[71] The female workers' claim alleged sex discrimination in retention bonuses the debtor corporation paid some workers. The Ninth Circuit emphasized that a notice the general counsel for the debtor corporation had sent employees affirmatively misled them about whether they had to file any wage claim against the bankruptcy estate. This equitable consideration led the appellate court to remand with an instruction to allow the workers to file their claims.

The court showed impatience in *Ahanchian v. Xenon Pictures, Inc.*,[72] with a trial judge's failure to recognize or apply the four *Pioneer* factors. The judge denied a motion to accept, after the fact, an opposition to a motion for summary judgment that was just three days late and was accompanied by a motion asking that it be considered excusable neglect.[73] The summary judgment motion had incorporated more than 1,000 pages of declarations and exhibits.[74] The eight days the district court's unusual local rules gave to prepare and file the opposition effectively became five business days, for three were the Labor Day holiday weekend.[75] The

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Cir., Circuit R. 35-3.

68 *Id.* at 951-952.

69 "We now hold that per se rules are not consistent with *Pioneer*." *Pincay II*, 389 F.3d at 855.

70 *See, e.g.*, *Ragguette v. Premier Wines & Spirits*, 691 F.3d 315, 328-333 (3d Cir. 2012) (finding the senior attorney's failure to exercise reasonable diligence in overseeing an assignment delegated to a more junior attorney to file a notice of appeal one important reason to reverse a district judge's finding of excusable neglect). For pre-*Pincay II* decisions, see Douglas R. Richmond, *Neglect, Excusable and Otherwise*, 2 Seton Hall Circuit Rev. 119, 120 n.9 (2005) (providing a collection of cases).

71 *ZiLOG, Inc. v. Corning (In Re ZiLOG, Inc.*), 450 F.3d 996, 1003-1007 (9th Cir. 2006).

72 *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253 (9th Cir. 2010).

73 *Id.* at 1257-1258.

74 *Id.* at 1256.

75 *Id.*

judge granted summary judgment in a three-paragraph order bereft of citation to any facts or any legal reasoning on the basis that no timely opposition was filed—and went on to grant attorney's fees of nearly a quarter million dollars.[76] Rather than remand for the *Pioneer* analysis, the appellate panel itself determined the extension should have been granted; it vacated the judgment and fee award.[77]

b. Emphasis on the Cause of Delay

Several circuits assign the greatest weight to the explanation offered for what caused the delay. Motions to find excusable neglect are often filed soon after the oversight. Three of the four *Pioneer* factors then usually lean in favor of granting relief from untimely actions. Because the delay is brief (a factor in itself), legal prejudice to the non-moving party is rarely an issue. This is particularly so when the motion seeks relief in the district court under Federal Rules of Appellate Procedure, Rule 4(a)(5) from the failure to file a timely notice of appeal, for no relief is possible unless the motion is filed within 30 days of when the notice ought to have been filed. Similarly, it's rare for a short delay in complying with a deadline to show the negligent litigant lacked good faith. Most cases come to turn on *Pioneer* factor three. The party who seeks relief must offer some convincing explanation for why the neglect was excusable. To the Second Circuit, "the equities will rarely if ever favor a party who 'fail[s] to follow the clear dictates of a court rule'" so that "where 'the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test.'"[78]

This is not a *per se* rule of the sort the Ninth Circuit abandoned in *Pincay II*, so the attitude of the Second Circuit is not in direct conflict with the rule in the Ninth. And the Second Circuit doesn't stand alone. The First, Eighth, and Tenth Circuits also assign the greatest weight to the reason for the delay in filing. To the Tenth Circuit, "fault in the delay remains a very important factor—perhaps the most important single factor—in determining whether neglect is excusable...."[79] The Eight Circuit has similarly held that "[t]he four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import. While 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."[80] The First Circuit, citing this language from the

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76 *Id.* at 1254, 1257-1258.

77 *Id.* at 1263.

78 *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366-367 (2d Cir. 2003), *cert. denied sub nom. Essef Corp. v. Silivanch*, 540 U.S. 1105, 157 L. Ed. 2d 890, 124 S. Ct. 1047 (2004) (quoting *Canfield v. Van Atta Buick/GMC Truck*, 127 F.3d 248, 250-251 (2d Cir. 1997), *cert. denied*, 522 U.S. 1117, 140 L. Ed. 2d 117, 118 S. Ct. 1055 (1998) (per curiam)).

79 *City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994), *cert. denied*, 513 U.S. 1191, 131 L. Ed. 2d 135, 115 S. Ct. 1254 (1995). *See also United States v. Torres*, 372 F.3d 1159, 1163-1164 (10th Cir. 2004) ("In our view, defense counsel's misinterpretation of a readily accessible, unambiguous rule cannot be grounds for relief unless 'the word "excusable" [is to be] read out of the rule.'" (quoting *Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 134 (7th Cir. 1996)).

80 *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir.), *cert. denied*, 531 U.S. 929, 148 L. Ed. 2d 248, 121 S. Ct. 309 (2000).

Eighth, takes the same view.[81]

In many circuits, the emphasis on the cause of delay grows stronger when the neglect at issue involves a lawyer's misinterpretation of an unambiguous rule. Relying on language from *Pioneer* that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect,"[82] courts of appeals are particularly harsh on those errors.[83]

c. Emphasis on Prejudice to the Other Party

The view that the Supreme Court gave primary importance to the absence of prejudice to the nonmoving party and to the interest of efficient judicial administration in determining whether the district court had abused its discretion prevails in the Eleventh Circuit.[84] One panel of the Third Circuit appeared to align itself with the lack-of-prejudice-to-the-opponent camp. But a later panel of the Third Circuit critiqued this as the dicta it was.[85] The Third Circuit has yet to align itself with a camp that treats one of the *Pioneer* factors (if any) as primary.

With these approaches in mind, the results in specific situations where late fee petitions were in issue follow.

D. Excusable Neglect Requests that Involve a Late Fee Petition

One federal court of appeals observed it is "no surprise that the Law Reporters bristle with decisions routinely applying the 'excusable neglect' standard to untimely motions for attorneys' fees."[86]

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81 *Hospital del Maestro v. NLRB*, 263 F.3d 173, 175 (1st Cir. 2001) (per curiam). *See also Dimmitt v. Ockenfels*, 407 F.3d 21 (1st Cir. 2005) (affirming the entry of summary judgment for the defendant because the plaintiff's lawyer failed to comply with a local rule that required him to accompany his opposition with a counterstatement admitting or denying the defense statement of facts; the reasons offered as the basis for the third and pivotal factor in assessing excusable neglect—the reason(s) for the noncompliance—were invalid).

82 *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 392, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993).

83 *See, e.g.*, *Advanced Estimating Sys. v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997) ("Soon after *Pioneer*, it was established in this circuit that attorney error based on a misunderstanding of the law was an insufficient basis for excusing a failure to comply with a deadline."); *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994) ("As this Court has explained numerous times: 'The excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules.'" (quoting *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 515 (2d Cir.), *cert. denied sub nom. Rothman v. New York State Dep't of Transp.* 474 U.S. 1032, 88 L. Ed. 2d 573, 106 S. Ct. 593 (1985)).

84 *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996).

85 Compare *In re Diet Drugs Prods. Liab. Litig.*, 401 F.3d 143, 154 (3d Cir. 2005) with *Ragguette v. Premier Wines & Spirits*, 691 F.3d 315, 333 & n.5 (3d Cir. 2012).

86 *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 226 (2d Cir. 2004) (finding the district court's order finding excusable neglect for having filed a fees motion seven days late so opaque as to be incapable of review, yet declining to remand because substantive law did not allow any

Lawyers who represent longshore workers may depend primarily on fee petitions for their livelihood, although they also may do other legal work. In other substantive legal areas, a fee petition won't represent a successful plaintiff's lawyer's sole source of income. Often the damages recovered by successfully prosecuting a civil cause of action create a fund from which the winning lawyer is paid according to the terms of a fee agreement. Awards under fee-shifting statutes satisfy part of the client's liability to the lawyer as a credit against the agreed fee. Most litigators therefore have a contractual source for a fee unavailable to practitioners under Section 28(e) of the Longshore Act.

Yet the damages recovered in a successful civil rights or employment discrimination case may not be large. For example, the jury verdict for compensatory damages against the employer in the 2006 case of *Burlington Northern & Santa Fe Railway v. White*,[87] a well-known U.S. Supreme Court case that deals with retaliation claims under Title VII (and similar whistleblower statutes), was $43,500, plus another $3,250 in medical expenses. A 33 percent contingency retainer agreement would yield a fee of about $15,500. That could be all a lawyer who drops the ball by failing to file a timely fee petition could get. The negligence in filing for fees late can also directly disadvantage the client, who loses the credit against the agreed fee that the statutorily available fee ought to have provided. One wonders if the lawyer just invites a bar grievance for incompetence (or a malpractice claim) by not walking away unpaid if an untimely fee petition is rejected for inexcusable neglect. So the predicament of the longshore lawyer who files a late fee petition may not be uniquely dire.

The following discussion shows that appellate courts often give deferential review to a trial judge's decision whether to accept a late motion for fees. While the trial judge must weigh all applicable factors, some factors get little weight.

1. Ninth Circuit

Since *Pincay II*, the Ninth Circuit's one published decision on late fee motions upholds a *Pincay II* analysis that rejected a fees motion filed 15 days late.[88] The petition came from an objector to a class settlement; the order the objector relied on as the basis for fees had approved a settlement and plan of allocation over a class member's objections. The objector filed for fees late, but not from an oversight. His lawyer intentionally delayed because of what he saw as the "strange procedural posture of the case,"[89] and because he somehow read the order that retained jurisdiction for several matters (among them, to hear and determine fee applications) as an extension of the time to file, even though that order never fixed a filing date that varied from the due date Rule 54(d) set. The intentional filing delay was not long and had not prejudiced the main plaintiffs. Rejecting as not compelling the reasons for lateness the objector offered was not an abuse of the trial judge's discretion.

Several older published decisions—ones decided after *Birones* but before *Pincay II*—

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fee to be awarded against a plaintiff whose action filed under 42 U.S.C.S. § 1983 proved to be unsuccessful, but had not been frivolous).

87 *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 165 L. Ed. 2d 345, 126 S. Ct. 2405 (2006).

88 *Petrone v. Veritas Software Corp. (In re Veritas Software Corp. Sec. Litig.)*, 496 F.3d 962, 972 (9th Cir. 2007).

89 *Petrone*, 496 F.3d at 972 (internal quotes omitted).

appear to retain vitality, when read with the *Pincay II* gloss that no one factor trumps others as a matter of law. Discussed below, all three confirm that a fee petition had better be timely filed.

The Ninth Circuit reversed the fees awarded to a lawyer who represented a successful Title VII plaintiff after the lawyer filed for his fees two days late in *Kyle v. Campbell Soup Co*.[90] A local rule of the district court required a motion to be filed within 30 days from entry of final judgment, a permissible variant from the 14-day period otherwise set in Rule 54(d). The lawyer received the judgment by mail. He mistakenly added three days for mailing to the filing time for the fee petition using Rule 6(e), not realizing the time actually ran from the day the judgment was entered. The district judge bailed the lawyer out by finding excusable neglect under Rule 6(b). The Ninth Circuit reversed for an abuse of discretion, because a mistake in construing clear rules of procedure was not excusable neglect. The Ninth Circuit acknowledged the Supreme Court's *Pioneer* decision, contrasting the Supreme Court's emphasis on the "dramatic ambiguity" in the way the bankruptcy court had set the time to file claims in the bankruptcy matter, with the absence of any ambiguity in the local rules or Federal Rules of Civil Procedure, Rule 6(e) on how to count the days for filing the fee motion.[91] Whatever deference the Ninth Circuit gives to factual determinations doesn't extend to characterizations a district judge gives to facts. Miscounting days wasn't regarded as excusable neglect. The Ninth Circuit not only reversed the enlargement of time to file for fees, it vacated the fee award.

Arguably the rule in *Kyle* is now too rigid, for the *en banc* court in *Pincay II* criticized *Kyle's* holding that misinterpreting an unambiguous rule of procedure just isn't excusable neglect.[92] All *Pioneer* factors should be evaluated.

Kyle wasn't a one-off decision, however. The Ninth Circuit followed *Kyle* when it upheld a district judge's denial of an enlargement of time to file a motion for fees out of time in *Committee for Idaho's High Desert v. Yost*.[93] The district judge recognized that under Federal Rules of Civil Procedure, Rule 6(b), the filing should have been titled a motion asking for a finding of excusable neglect, so that the judge could decide it before the merits of a fees motion filed four days late. The Ninth Circuit reiterated its holding that a lawyer's misunderstanding of the law—there a failure to realize that Rule 54(d) had become effective making the fee motion due 14 days after judgment was entered—could not constitute excusable neglect. To the panel "it clearly would have been abuse of discretion for the district court in this case to hold that ignorance of an amendment to a rule could constitute excusable neglect."[94] The holding in *Yost* can be harmonized with the *en banc* decision in *Pincay II* this way: a trial judge may decline to extend the time to file a fee application even when the delay arose from a good faith mistake that did not prejudice the opponent when the reasons offered to explain the late filing aren't ones the trial judges finds compelling.

Such an approach is consistent with a case decided well after *Briones*, but before *Pincay II*. The Ninth Circuit reversed a fee awarded against two individuals because the fee motion from

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90 *Kyle v. Campbell Soup Co.*, 28 F.3d 928, 929, 932 (9th Cir. 1994).

91 *Id.* at 931 (quoting *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 508 U.S. 380, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993)).

92 *Pincay v. Andrews*, 389 F.3d 853, 857, 860 (9th Cir. 2004), *cert. denied*, 544 U.S. 961, 161 L. Ed. 2d 602, 125 S. Ct. 1726 (2005) (*Pincay II)*.

93 *Comm. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 824-825 (9th Cir. 1996).

94 *Id.* at 825.

the corporate defendants was untimely under Federal Rules of Civil Procedure, Rule 54(d).[95] Fees were available under a Hawaii "loser pays" statute[96] in a complex shareholder derivative action that came to the district court under diversity jurisdiction. The defendants did not seek fees from two unsuccessful plaintiffs (Rogers and Gertino) within 14 days of the first judgment entered, which dismissed, with prejudice, their claims as individuals. On the substantive claim, the district judge found the individuals lacked standing to sue derivatively on behalf of shareholders of a company in which they owned no shares.[97] The corporate defendant filed its fee request against Rogers and Gertino two and a half years later. The Ninth Circuit found the lateness with respect to Rogers and Gertino "sufficient reason to deny the fee motion, absent some compelling showing of good cause,"[98] relying on 10 *Moore's Federal Practice* ¶ 54.151[1].[99] Fee claims the corporation made against other plaintiffs were found timely, but remanded for further proceedings. The Ninth Circuit did not discuss Rule 60(b) or Rule 6(b)(2) as potential means to save the late-filed claims for fees against Rogers and Gertino for excusable neglect.

2. Other Circuits Are No More Forgiving

The decisions from the Ninth Circuit are consonant with the brusque treatment the Courts of Appeals for the Second, Fifth, Sixth, Seventh, and Tenth Circuits give late fee motions. As long as the factors required to make an excusable neglect determination are considered, the trial judge's decision to reject or accept a late fee motion is usually upheld as falling within the range of available discretion. Should the judge fail to articulate or shortcut the necessary *Pioneer* analysis, those actions don't survive appellate review. A fee motion filed a single day late often gets by.

a. Affirming Findings About Excusable Neglect

Four cases illustrate the serious risk that a late fee motion will fail; the later the filing, the less likely is forgiveness.

The Sixth Circuit affirmed a denial of fees when a district judge found no excusable neglect when a fee motion was filed 13 days late.[100] A married couple's lawyer had successfully defended them against a housing discrimination claim. Two days after the jury returned its verdict, the couple (acting on their own) wrote to the judge, without copying the plaintiffs' lawyer, asking that the action be declared frivolous so they could recover some of what the case had cost them. In a letter they received five days later, the judge told them to have their lawyer make any requests.

Their lawyer left the country to go fishing without learning their wishes. Neither he nor the associate the clients contacted filed a fee motion nor requested an extension before the 14-

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95 *Kona Enters. v. Estate of Bishop*, 229 F.3d 877, 889-890 (9th Cir. 2000).

96 Haw. Rev. Stat. § 607-14.

97 *Kona*, 229 F.3d at 881.

98 *Id.* at 229 F.3d at 889-890 (quoting James William Moore et al., 10 Moore's Federal Practice ¶ 54.151[1] (3rd ed. 2000)).

99 James William Moore et al., 10 Moore's Federal Practice ¶ 54.151[1] (3rd ed. 2000).

100 *Allen v. Murph*, 194 F. 3d 722, 723- 724 (6th Cir. 1999).

day deadline ran. By the time the couple retained a replacement lawyer to pursue fees, their motion was late. Although the couple had acted promptly and diligently, the appellate court ascribed the trial lawyer's negligent handling of the matter to them and affirmed the finding of no excusable neglect. The Seventh Circuit affirmed a trial judge's decision to reject a fee motion filed 34 days late.[101] It rebuffed the argument that the opponent knew the successful party intended to seek fees as "an appeal to fairness based upon an asserted absence of prejudice, but without a corresponding claim that compliance with the deadline imposed by Rule 54(d)(2) was impossible or impracticable or that the plan's noncompliance was for some reason excusable."[102]

The Tenth Circuit affirmed a finding of no excusable neglect when a party erroneously believed that the district court's entry of an amended judgment to comply with the Tenth Circuit's mandate after an appeal did not trigger a new 14-day deadline to file a fees motion again.[103] A timely motion for fees had been filed after judgment for more than $10,000,000 was entered on a jury verdict. The district judge expressly denied that first fees motion, anticipating correctly that an appeal in the acrimonious litigation would follow. The district judge believed the effort required to set fees would be wasted were the underlying judgment not affirmed. That denial was without prejudice to the plaintiffs "renew[ing] their [fees] motion if future circumstances warrant."[104]

The plaintiffs' attorneys overlooked the Advisory Committee Notes to the 1993 amendment that created Rule 54(d)(2)(B). The notes clarified that a new 14-day period for filing for fees automatically begins if a new judgment is entered following an appellate court's remand. The plaintiffs filed a request for a hearing on their original fees motion 45 days after the amended judgment was entered; no new fees motion had been made. The district judge declined to find excusable neglect when the basis offered was the lawyer's mistaken view that the amended judgment was not a judgment for the purposes of Federal Rules of Civil Procedure, Rule 54(d)(2)(B). Holding that inadvertence, ignorance of the rules, and mistakes construing the rules do not constitute excusable neglect for purposes of Rule 6(b), the district judge's refusal to consider the untimely fee request was affirmed.[105] One has to wonder whether the acrimony that led the district judge to devote inordinate time and effort to referee squabbles throughout the litigation played some role in this outcome.

The Fifth Circuit upheld the rejection of a fee motion filed egregiously late—nearly one year after entry of judgment.[106] One of that appellate panel's alternative holdings determined that failure to file a motion for fees within the time Rule 54(d)(2)(B) set waived attorney's fees.[107]

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101 *Bender v. Freed*, 436 F.3d 747, 748-750 (7th Cir. 2006).

102 *Id.* at 750.

103 *Quigley v. Rosenthal*, 427 F.3d 1232, 1237-1238 (10th Cir. 2005).

104 *Id.* at 1234.

105 *Id.* at 1238.

106 *United Indus. v. Simon-Hartley, Ltd.*, 91 F.3d 762, 763-764 (5th Cir. 1996). See also the *Pioneer* analysis of a late fee application in *Murdock v. Borough of Edgewater*, 600 Fed. Appx. 67 (3d Cir. 2015) (analyzing a fee application submitted over one year late, in which the motion tried but failed to meet the extraordinary circumstances test of Rule 60(b)(6); the lawyer sought no finding of excusable neglect, but his motion would have failed every factor of the *Pioneer* test).

107 *Id.* at 766.

b. Reversing Findings About Excusable Neglect

Even a finding of excusable neglect will be reversed if not well supported, as these two decisions show.

A district judge in the Second Circuit had granted a defendant insurance company fees of $30,000 against an unsuccessful civil rights plaintiff, although the insurer filed its fees motion seven days late.[108] Granting the motion implied a finding of excusable neglect. The Second Circuit reversed; one of its alternative reasons was that the trial judge made no explicit excusable neglect finding. The appellate court emphasized that without "a sufficient reason for its delay, the fact that [both] the delay and prejudice were minimal would not excuse [the defendant's] mere inadvertence."[109]

The Fifth Circuit has found that, when actions by a trial judge affirmatively mislead a fee applicant, resulting in a late filing, the tardiness can be forgiven.[110] The trial judged referred to an oral fees request made "under 42 U.S.C.S. § 1988" in the order that accompanied the judgment; it deferred the fee request to "a separate hearing." A second reference to the oral fees request in later Findings and Conclusions on Remand (after the first judgment had been reversed and remanded) also said the fee request would be "addressed at a separate hearing." These gave the plaintiffs good reason to believe a hearing would be scheduled, without the need to file any written fees motion, so the appellate court determined fees had not been waived.

The Seventh Circuit reversed outright an award of $277,462 as supplemental fees granted under 42 U.S.C.S. § 1988 to the plaintiff's lawyer in a successful civil rights action.[111] Those fees represented time spent opposing the city's post-judgment motion directed to the underlying jury verdict, time spent to obtain the original fees award of $507,000 in the district court, and time defending the fees successfully on appeal. But the lawyer neither filed for supplemental fees within 90 days after the original judgment that included damages and fees, nor filed for fees 90 days after the court of appeals affirmed that judgment (the local rules of the Northern District of Illinois enlarged the time to file a fees motion from the usual 14 days to 90). The district judge did not explain why she allowed the lawyer 275 days to file after the original fee award was affirmed. Having offered no good reason for lateness, the court of appeals said of the time limit on fee motions found in Rule 54(d)(2)(B)(i): "These limits prevent what has occurred here: The revival of a case that the defendant supposed had long been closed."[112]

3. Sometimes a Special Case: Fee Motions Filed One Day Late

The courts of appeal can have mercy on fee motions filed one day late. In one such case, the Seventh Circuit found a miscalculation of the due date ought to be "embarrassing to the attorney but which surely cannot be said to have been in bad faith;"[113] it had no effect on the proceeding in view of the opponent's request for 60 to 100 days to respond to the petition, so it

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108 *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 223-224 (2d Cir. 2004).
109 *Id.* at 228.
110 *Romaguera v. Gegenheimer*, 162 F.3d 893 (5th Cir. 1998).
111 *Robinson v. City of Harvey*, 617 F.3d 915, 916, 918-919 (7th Cir. 2010).
112 *Id.* at 918-919.
113 *Crue v. Aiken*, 370 F.3d 668, 681 (7th Cir. 2004).

affirmed the district judge's finding of excusable neglect.[114]

Similarly, the Eighth Circuit saw no abuse of discretion when, after winning a summary judgment in an action filed against it by a physician who had lost his staff privileges, a hospital miscalculated the deadline to move for fees. The district judge denied the motion on the merits, which implicitly granted the motion to file it out of time for excusable neglect. The delay of one day did not prejudice the physician, the delay did not adversely affect any judicial proceedings, and the hospital acted in good faith.[115] On the merits, however, the order denying fees was affirmed.

E. A Bet that Section 23(a) Aids a Late-Filing Lawyer Is No Sure Thing

When the Longshore Act was initially adopted in 1927, Congress freed those who adjudicate claims for benefits under the Act from "common law or statutory rules of evidence" and from "technical or formal rules of procedure" in order to "make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties."[116] That 1927 Congress could not have intended to extend this procedural liberality to petitions that seek fees from employers and their insurance carriers, for fee-shifting first became available 55 years later, in amendments Congress made to the Act in 1972.[117] The requirement that a lawyer's fee be approved by the adjudicator at the level where the services were rendered,[118] on pain of criminal liability,[119] has been in place since the Act was first adopted. Approval was "designed to afford a full measure of protection to the claimant."[120] Obviously it doesn't protect the pecuniary interests of lawyers.

None of the decisions that consider excusable neglect for late fee motions have required the trial judge to discuss the prejudice a lawyer suffers when a fees motion is rejected as inexcusably late. The prejudice analysis the Ninth Circuit focuses on is the potential loss of a litigant's substantive claim, not on a lawyer's ancillary claim for fees.

A lawyer presumably acts to protect his or her own interest in fees, not an interest of the worker. There can be no fee contract with the claimant, so a fee award is never a set-off against any fee the claimant owes by contract. Will denying a fee to a lawyer who files a seriously late

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114 *Id.*

115 *Sugarbaker v. SSM Health Care*, 187 F.3d 853, 856 (8th Cir. 1999). For a similar case, see *Treasurer v. Goding*, 692 F.3d 888, 892-894 (8th Cir. 2012), *cert. denied*, __ U.S. __, 185 L. Ed. 2d 618, 133 S. Ct. 1644 (2013) (affirming a finding of excusable neglect for filing a notice of appeal one day late.).

116 Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 23, 44 Stat. 1424, 1437 (1927) (codified as amended at 33 U.S.C.S. § 923).

117 Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, sec. 13, 86 Stat. 1251, 1259-1260 (codified as amended at 33 U.S.C.S. § 928). *See also* S. Rep. No. 92-1125, at 8 (1972); H.R. Rep. No. 92-1441, at 4706 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4706.

118 Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 28(a), 44 Stat. 1424, 1437 (1927) (codified as amended at 33 U.S.C.S. § 928(e)).

119 Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 28(b), 44 Stat. 1424, 1437 (1927) (codified as amended t 33 U.S.C.S. § 928(e)).

120 *Attorney Grievance Comm'n v. Eisenstein*, 333 Md. 464, 635 A.2d 1327, 1333 (1994).

fee motion dissuade other members of the bar from accepting Longshore claims? No more than denying fees in other contexts dissuades lawyers from taking those cases. Neither Congress through the Act nor the Secretary through the regulations guarantee a fee to a dawdling lawyer who files a fee petition whenever he gets around to it, despite an order that has designated when to file.

The Seventh Circuit drew a distinction between the way the Longshore Act protects substantive interests of an injured longshore worker (who may be in desperate need of cash) and a lawyer's desire to deposit a fee awarded under Section 28 at a bank. Section 21(b) of the Act compels payment of all disability compensation while an employer and carrier seek any appellate review: an award "shall not be stayed pending [the Board's] final decision."[121] Any payment not made can be enforced using the equitable powers of the U.S. District Court.[122] The Seventh Circuit rejected a lawyer's claim that he was equally entitled to enforce a fee awarded to him under Section 28 in district court using Section 21(b)(3), while the employer and its carrier sought review of the fee at the Benefits Review Board.[123] The Seventh Circuit thought it:

> undignified for [the lawyer] to liken his cash needs to those of an injured longshoreman and it is unlikely that if Congress had thought about the issue it would have wanted the fees awarded by the deputy commissioner to be sitting in [the lawyer's] money market fund while review proceedings are going on, only to be paid back to the defendants (minus the interest) should he ultimately lose.[124]

It remains to be seen how concerned the courts will be of a negligent Longshore attorney's ability to obtain fees. Even if a court were to weigh any prejudice to the tardy lawyer when assessing excusable neglect, it may not tip the scales much, if at all.

Do you want to be the one to find out?

121 33 U.S.C.S. § 921(b)(3).
122 33 U.S.C.S. § 921(d).
123 33 U.S.C.S. § 921(a).
124 *Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 666 (7th Cir. 1982).