PIONEER'S PARADOX: APPELLATE RULE 4(a)(5) AND THE RULE AGAINST EXCUSING IGNORANCE OF LAW

*David N. May**

TABLE OF CONTENTS

I. INTRODUCTION

"The rule that a civil appeal must be filed within the time limit set by law . . . does not reside in an arcane or shadowy corner of the law."[1] Instead, "it is a basic, fundamental rule which every law student learns in the first year of law school."[2] Nor is the specific length of "the time limit set by law" obscure: Both the Federal Rules of Appellate Procedure (Rule(s))[3] and the United States Code[4]

---

* B.A., University of Missouri-Columbia, 1993; M.P.H., University of Oklahoma Health Sciences Center, 1995; J.D., Drake University, 1998. Many heartfelt thanks to Gregory C. Sisk, Richard M. and Anita Calkins Distinguished Professor of Law, Drake University Law School, for his generous review and critique of an earlier draft of this Article. Thanks also to Laura Kelly, LW '00, for her assistance in research.

1. George v. Camacho, 119 F.3d 1393, 1406 (9th Cir. 1997) (Nelson, J., dissenting).
2. *Id.*
3. FED. R. APP. P. 4(a)(1)(A). In general, the notice of appeal must be filed "within 30 days after the judgment or order appealed from is entered." *Id.* There are, however, some variations on the usual procedure. For example, if "the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." FED. R. APP. P. 4(a)(1)(B); *accord* 28 U.S.C. § 2107(b) (1994 & Supp. 1997). Judge Warriner opines that this "extraordinary time limit" is justified because "[i]t is axiomatic that governmental agencies are unable to take prompt, decisive action." United States v. Virginia, 508 F. Supp. 187, 188 (E.D. Va. 1981).

state with one clear voice that the notice of appeal must be filed within thirty days after the entry of the final judgment. And, the Supreme Court has said that "[t]his 30-day time limit is 'mandatory and jurisdictional.'"[5] Therefore, an appeal filed after this thirty day time limit is subject to dismissal.[6]

Since the late 1960s, however, both the Code and the Rules have allowed that an untimely appeal may survive if "excusable neglect" is shown.[7] For civil appeals, this "escape hatch"[8] is now found in Rule 4(a)(5),[9] which provides:

A second variation involves certain motions; specifically, if a party timely files one of several enumerated motions, then "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." FED. R. APP. P. 4(a)(4); *see, e.g.*, Havird Oil Co. v. Marathon Oil Co., 149 F.3d 283, 288 (4th Cir. 1998) (holding that the time for filing does not run until the district court explicitly disposes of all outstanding Rule 4(a)(4) motions).

A third variation provides: "If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing." FED. R. APP. P. 4(c).

4. 28 U.S.C. § 2107(a) ("Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.").

5. Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978) (quoting United States v. Robinson, 361 U.S. 220, 229 (1960)).

6. *See, e.g.*, Glinka v. Maytag Corp., 90 F.3d 72, 74 (2d Cir. 1996) (dismissing notice of appeal filed 51 days after denial of a motion for new trial) (citing Browder v. Director, Dep't of Corrections, 434 U.S. at 264; United States v. Robinson, 361 U.S. at 229).

7. *See* 28 U.S.C. § 2107(c); FED. R. APP. P. 4(a)(5); *see also* Parke-Chapley Constr. Co. v. Cherrington, 865 F.2d 907, 912 (7th Cir. 1989) (discussing the history of Rule 4(a)(5)). The *Cherrington* court explained:

> The history of [Rule] 4(a)(5) provides further support for a narrow interpretation of the "excusable neglect" standard. The predecessor to [Rule] 4(a)(5), [Rule of Civil Procedure] 73, was promulgated in 1937 to provide for the method of appeals from district court judgments. [Rule of Civil Procedure] 73 was amended in 1946 to allow the district court to extend the time period for appeals "upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment of the district court." In 1966, [Rule of Civil Procedure] 73 was further amended to allow the district court to grant an extension for grounds in addition to failure to learn of the judgment. This change, however, was to be interpreted strictly as indicated by the 1966 Committee Notes . . . .

Parke-Chapley Constr. Co. v. Cherrington, 865 F.2d at 912 (citations omitted).

8. Rodgers v. Watt, 722 F.2d 456, 458 (9th Cir. 1983) (describing the excusable neglect provision as an escape hatch).

9. FED. R. APP. P. 4(a)(5). The phrase "or good cause" appears after the phrase "excusable neglect." *Id.* However, courts have stated that only excusable neglect can allow an extension if the motion is made *after* the time for filing the notice of appeal has passed. *See, e.g.*, Midwest Employers Cas. Co. v. Williams, 161 F.3d 877, 881 (5th Cir. 1998) (Garza, J., dissenting) ("When a party moves for more time after the deadline for appealing has passed, it must show excusable neglect; good cause does not suffice."); Zack v. United States, 133 F.3d 451, 453 n.1 (6th Cir. 1998) (noting "an extension upon a showing of good cause is permissible *only* when the motion is filed *before* the expiration of the initial appeal period" (emphasis added)). *But see* Scarpa

"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 . . . expires; and (ii) that party shows *excusable neglect* . . . ."[10] But this escape hatch was not intended to open the flood gates for tardy appeals. Indeed, when the excusable neglect language was adopted, the advisory committee warned that:

> "In view of the ease with which an appeal may be perfected, no reason other than failure to learn of the entry of judgment should ordinarily excuse a party from the requirement that the notice be timely filed. But the District Court should have authority to permit the notice to be filed out of time in extraordinary cases where injustice would otherwise result."[11]

In line with this "legislative history,"[12] the courts have traditionally interpreted Rule 4(a)(5) quite strictly.[13] Indeed, more than one court has said that, in light of the advisory committee's admonitions, "excusable neglect should be limited to "unique" or "extraordinary circumstances."[14]

---

v. Murphy, 782 F.2d 300, 301 (1st Cir. 1986) (rejecting the view that good cause can apply only when the motion is filed before the time has expired).

10. FED. R. APP. P. 4(a)(5) (emphasis added).

11. Thompson v. E.I. DuPont de Nemours & Co., 76 F.3d 530, 534 n.4 (4th Cir. 1996) (quoting FED. R. CIV. P. 73(a) 1964 advisory committee's notes).

12. *See* United States v. Virginia, 508 F. Supp. 187, 189 (E.D. Va. 1981) (discussing the advisory committee's notes and referring to them as the rule's "legislative history").

13. *See, e.g.*, Thompson v. E.I. DuPont de Nemours & Co., 76 F.3d at 534 ("'Excusable neglect' is not easily demonstrated, nor was it intended to be."); Allied Steel v. City of Abilene, 909 F.2d 139, 142 (5th Cir. 1990) ("The 'excusable neglect' standard of [Rule 4(a)] is intended to be a 'strict one.'"); Pratt v. McCarthy, 850 F.2d 590, 593 (9th Cir. 1988) ("Our strict interpretation of excusable neglect promotes Rule 4(a)'s purpose of setting a definite point of time when litigation shall end, while recognizing certain extraordinary situations that prevent a late filing of a notice of appeal."); Redfield v. Continental Cas. Corp., 818 F.2d 596, 601 (7th Cir. 1987) (noting "the standard of excusable neglect is a strict one").

14. *See, e.g.*, Pontarelli v. Stone, 930 F.2d 104, 111 (1st Cir. 1991) ("Neglect is 'excusable' within the meaning of [Rule] 4(a)(5) only in 'unique or extraordinary' circumstances."); Bortugno v. Metro-North Commuter R.R., 905 F.2d 674, 676 (2d Cir. 1990) ("In general, 'a finding of "excusable neglect" must be based either on acts of someone other than appellant or his or her counsel, or some extraordinary event.'" (quoting 650 Park Ave. Corp. v. McRae, 836 F.2d 764, 767 (2d Cir. 1988))); Marsh v. Richardson, 873 F.2d 129, 130 (6th Cir. 1989) ("It is well settled that leave to file an untimely notice of appeal is to be granted only in unique or extraordinary circumstances."); Reinsurance Co. v. Administratia Asigurarilor de Stat, 808 F.2d 1249, 1251-52 (7th Cir. 1987) ("The history of the 'excusable neglect' standard thus clearly indicates that, with the exception of 'extraordinary cases where injustice would otherwise result,' few circumstances will ordinarily qualify under the excusable neglect rubric."); Ferguson v. Rice, No. 86-6682, 1986 WL 17908, at *2 (4th Cir. Oct. 20, 1986) (unpublished decision) ("Excusable neglect is to be found when a party receives no notice of an entry of judgment, or when extraordinary and/or unique circumstances occur."); Oregon v. Champion Int'l Corp., 680 F.2d 1300, 1301 (9th Cir. 1982) ("The standard for determining excusable neglect is 'a "strict" one.' It was intended to apply only to 'extraordinary cases where injustice would otherwise

Then, in 1993, the Supreme Court decided *Pioneer Investment Services v. Brunswick Associates.*[15] The *Pioneer* Court's view of excusable neglect[16] was far more liberal than that of the advisory committee.[17] Instead, the *Pioneer* majority advanced a new, "flexible understanding" of excusable neglect.[18] Determinations of whether neglect is excusable should involve a broad, equitable inquiry.[19] Indeed, that inquiry should "tak[e] account of *all* relevant circumstances."[20]

The *Pioneer* decision did not, however, involve Rule 4(a)(5). Rather, *Pioneer* interpreted excusable neglect in the context of Bankruptcy Rule 9006.[21] As a command from the Supreme Court, it was surely predictable that the *Pioneer* opinion—and its interpretation of Bankruptcy Rule 9006—would impact *bankruptcy* cases.[22] But, it was—and perhaps is—far less evident that *Pioneer* should change the meaning of excusable neglect *for purposes of Rule 4(a)(5).*[23]

---

result.'" (citations omitted)); Benoist v. Brotherhood of Locomotive Eng'rs, 555 F.2d 671, 672 n.1 (8th Cir. 1977) ("In general, excusable neglect may be found where a party has failed to learn of an entry of judgment, or in extraordinary cases where injustice would otherwise result.").

15. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380 (1993).

16. *See id.* at 389.

17. *See supra* text accompanying note 11; *see also, e.g.*, Canfield v. Van Atta Buick/GMC Truck, Inc., 127 F.3d 248, 250 (2d Cir. 1997) ("In *Pioneer*, however, the Supreme Court 'established a more liberal standard for determining whether there had been "excusable neglect."'" (quoting United States v. Hooper, 43 F.3d 26, 28 (2d Cir. 1994))).

18. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 389 (stating that a "flexible understanding of 'excusable neglect' accords with the policies underlying Chapter 11 and the bankruptcy rules").

19. *Id.* The *Pioneer* majority argued that this broad, equitable inquiry is consistent with the purposes underlying Chapter 11 of the Bankruptcy Code:

> Whereas the aim of a Chapter 7 liquidation is the prompt closure and distribution of the debtor's estate, Chapter 11 provides for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors. In overseeing this latter process, the bankruptcy courts are necessarily entrusted with *broad equitable powers* to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization. This context suggests that [Bankruptcy Rule] 9006's allowance for late filings due to "excusable neglect" entails a correspondingly *equitable inquiry.*

Id. (emphasis added) (citations omitted).

20. *Id.* at 395 ("Because Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of *all* relevant circumstances surrounding the party's omission." (emphasis added)).

21. *See id.* at 382-83 (stating that the question presented was whether "an attorney's inadvertent failure to file a proof of claim within the deadline set by the court can constitute 'excusable neglect' within the meaning of [Bankruptcy Rule 9006]").

22. *See, e.g.*, Robb v. Norfolk & Western Ry., 122 F.3d 354, 363 & n.5 (7th Cir. 1997) ("All Article III courts, including this one, are bound to follow the holdings of our Nation's highest court.").

23. *See infra* notes 121-48 and accompanying text.

Nonetheless, *Pioneer* has had a dramatic impact on Rule 4(a)(5) cases. In the last six years, almost every circuit court of appeals has acknowledged that the *Pioneer* opinion governs determinations of excusable neglect under Rule 4(a)(5).[24] For practical purposes, then, *Pioneer* has become a Rule 4(a)(5) decision.

During the same years in which the circuits anointed *Pioneer* as their guiding star, a second trend was also developing. Strangely, this second trend can be viewed as contrary to *Pioneer*. Specifically, in the years since *Pioneer*, seven different circuits have held that a mistake or ignorance of plain law *cannot* be excusable neglect under Rule 4(a)(5).[25] Notwithstanding judicial acceptance of *Pioneer*'s broad equitable inquiry, the circuit courts have continued to apply the ancient maxim that ignorance or mistakes of plain law cannot excuse.[26] The circuit courts have accepted *Pioneer*'s prescription that "all relevant circumstances"[27] must be taken into account; yet, the same courts continue to hold that "'[t]he 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.'"[28]

If we assume that (a) the circuit courts are correct that *Pioneer*'s broad, equitable approach does govern Rule 4(a)(5); and (b) the circuit courts are also correct in holding mistakes or ignorance of law *cannot* be excusable neglect under Rule 4(a)(5), we are then left in a difficult situation. At the risk of some melodrama, we are left like one who reads that (a) God told Abraham that he would be the "father of many nations";[29] but (b) God also told Abraham that he must murder Isaac, Abraham's *only son*.[30] Or, we are like one who reads that (a) Abraham was resigned to kill Isaac;[31] but (b) Abraham never doubted that Isaac

---

24. *See infra* notes 149-56 and accompanying text.

25. *See infra* notes 157-235 and accompanying text.

26. *See* Advanced Estimating Sys., Inc. v. Riney, 130 F.3d 996, 999 (11th Cir. 1997) ("The ancient legal maxim continues to apply: ignorance of fact may excuse; ignorance of law does not excuse.").

27. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 395 (1993). *See generally infra* notes 149-56 and accompanying text.

28. *See, e.g.*, Prizevoits v. Indiana Bell Tel. Co., 76 F.3d 132, 133 (7th Cir. 1996) (emphasis added) (identifying circuit court decisions supporting the stated principle) (quoting Cosmopolitan Aviation Corp. v. New York State Dep't of Transp. (*In re* Cosmopolitan Aviation Corp.), 763 F.2d 507, 515 (2d Cir. 1985)).

29. *Genesis* 17:5 (New International) ("No longer will you be Abram, your name will be Abraham; for I have made you a father of many nations.").

30. *Id.* 22:2 ("Then God said, 'Take your son, your only son, Isaac, whom you love, and go to the region of Moriah. Sacrifice him there as a burnt offering on one of the mountains I will tell you about.'").

31. The Bible states:

would indeed live.[32] In short, we are left in a state of tension, a state of paradox.[33] The purpose of this Article is to explore the paradox that allows *Pioneer* to coexist with a categorical prohibition against excusing mistakes or ignorance of plain law.

The exploration proceeds as follows: Part II canvasses the *Pioneer* decision itself. Part III discusses the applicability of *Pioneer* to Rule 4(a)(5). Part IV suggests that—even after *Pioneer*—mistake or ignorance of plain law cannot be excusable neglect under Rule 4(a)(5). Part V attempts to anticipate and resolve arguments that *Pioneer* is incongruous with the per se rule against excusing mistakes or ignorance of plain law.

II. *PIONEER INVESTMENT SERVICES V. BRUNSWICK ASSOCIATES*

A. *The Factual and Procedural Background*

There once was a debtor named Pioneer Investment Services Company.[34] On April 12, 1989, the debtor filed its petition for relief under Chapter 11.[35] In

---

> Early the next morning, Abraham got up and saddled his donkey. He took with him two of his servants and his son Isaac. When he had cut enough wood for the burnt offering, he set out for the place God had told him . . . . When they reached the place God had told him about, Abraham built an alter there and arranged the wood on it. He bound his son Isaac and laid him on the alter, on top of the wood. Then he reached out his hand and took the knife to slay his son.

Id. 22:3-10.

32. *See id.* 22:5, :7-8. "He said to his servants, 'Stay here with the donkey while I and the boy go over there. We will worship and then we will come back to you.'" *Id.* 22:5. "Isaac spoke up and said to his father, 'Father?' 'Yes, my son?' Abraham replied. 'The fire and wood are here,' Isaac said, 'but where is the lamb for the burnt offering?' Abraham answered, 'God himself will provide the lamb for a burnt offering, my son.'" *Id.* 22:7-8.

33. *See generally* SØREN KIERKEGAARD, FEAR & TREMBLING 76 (Alastair Hannay trans., Penguin Books 1985) (discussing the story of Abraham as told in *Genesis*, and describing the story in terms of a paradox).

34. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 383 (1993).

35. *Id.* A voluntary case under Chapter 11 commences with the filing of a petition in the bankruptcy court by an eligible entity. 11 U.S.C. § 301 (1999). Such voluntary commencement "constitutes an order for relief" under Chapter 11. *Id.*; *accord In re* Victoria Station, Inc., 840 F.2d 682, 684 (9th Cir. 1988).

Along with the petition, the debtor usually must pay a filing fee. 28 U.S.C. § 1930 (1994); FED. R. BANKR. P. 1006(a). Likewise, the debtor must provide certain information. *See generally* MARTIN J. BIENENSTOCK, BANKRUPTCY REORGANIZATION 261-83 (1987) (discussing the debtor's responsibility to disclose and the creditors' rights to investigate). Specifically, "a debtor in a voluntary Chapter 11 reorganization case [must] file *with the petition* a list containing the name, address and claim of the creditors that hold the 20 largest unsecured claims, excluding insiders." FED. R. BANKR. P. 1007(d) (emphasis added). In addition, at the time of filing the petition, the debtor also must file *either* "a list containing the name and address of *each* creditor" *or* a "schedule of liabilities." FED. R. BANKR. P. 1007(a) (emphasis added). Moreover, if the debtor chooses to

compliance with Bankruptcy Rule 1007(d),[36] a list of the debtor's twenty largest unsecured creditors accompanied the petition.[37] Three of the creditors listed were Brunswick Associates Limited Partnership (Brunswick), Clinton Associates Limited Partnership (Clinton), and West Knoxville Associates Limited Partnership (West Knoxville).[38] These three—Brunswick, Clinton, and West Knoxville—along with a company named Ft. Oglethorpe Associates Limited Partnership (Ft. Oglethorpe) were the four creditors who would later litigate the *Pioneer* case.[39]

On April 13, 1989, the bankruptcy court mailed a notice to all known parties in interest.[40] The April 13th notice informed its reader that a creditors' meeting would be held on May 5, 1989.[41] More importantly, the April 13th notice specifically stated: "You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree

---

file the "list containing the name and address of *each* creditor" rather than the "schedules of liabilities," the same schedule of liabilities—along with certain other "schedules and statements"—still have to be filed within 15 days after commencement. FED. R. BANKR. P. 1007(a), (c) (emphasis added); *see also* FED. R. BANKR. P. 1007(b)(1) ("Except in a Chapter 9 municipality case, the debtor, unless the court orders otherwise, shall file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs, prepared as prescribed by the appropriate Official Forms.").

The schedule of liabilities "constitute[s] prima facie evidence of the validity and amount of the claims of creditors, ***unless they are scheduled as disputed, contingent, or unliquidated.***" FED. R. BANKR. P. 3003(b)(1) (emphasis added); *see* 11 U.S.C. § 1111(a). In other words, if the creditor's claim is scheduled as *undisputed, uncontingent, and liquidated*, that claim is deemed filed and, therefore, need not actually be filed. *See* BIENENSTOCK, *supra*, at 630. By contrast, if a creditor's claim is *not* "scheduled or [is] scheduled [but] as disputed, contingent, or unliquidated," that creditor *must* timely file a proof of claim. FED. R. BANKR. P. 3003(c)(2); *see also* Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 382 ("Rule 3003(c) . . . sets out the requirements for filing proofs of claim in . . . Chapter 11 Reorganization cases."). Creditors who *must* file but fail to do so *on time* "shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution." FED. R. BANKR. P. 3003(c)(2).

The time for filing claims is not fixed by rule. *See* FED. R. BANKR. P. 3003(c)(3) ("The court shall fix . . . within which proofs of claim . . . may be filed."). Instead, the rules provide that "the court shall fix . . . the time within which proofs of claim . . . may be filed." *Id.* Accordingly, Rule 2002 provides that "the clerk, or some other person as the court may direct, shall give . . . all creditors . . . at least 20 days' notice by mail of . . . the time fixed for filing proofs of claims." FED. R. BANKR. P. 2002(a)(7).

36. *See* FED. R. BANKR. P. 1007(d) (requiring the debtor in a voluntary Chapter 11 case to submit a list of the 20 largest unsecured claims).

37. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 383.

38. Brunswick Assocs. v. Pioneer Inv. Servs. (*In re* Pioneer Inv. Servs.), 943 F.2d 673, 674 (6th Cir. 1991), *aff'd*, 507 U.S. 380 (1993).

39. *Id.* at 673.

40. *See* Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 383.

41. *Id.*

with the amount. See 11 U.S.C. Sec. 1111 & Bankruptcy rule 3003. Bar date is August 3, 1989."[42]

Among those who received and read the April 13th notice was Mr. Mark A. Berlin.[43] Mr. Berlin was a licensed attorney, a Certified Public Accountant, and an "experienced businessman."[44] Mr. Berlin was also *president* of two corporations that were the *general partners for* Clinton, West Knoxville, Brunswick, and Ft. Oglethorpe.[45] Thus, Mr. Berlin's receipt of the April 13th notice—which announced August 3rd as the bar date to file a proof of claim—was *actual notice* of the bar date to all four of the creditors who would later litigate the *Pioneer* case.[46] Moreover, it seems that Mr. Berlin *affirmatively acted* on the April 13th notice by personally attending the May 5th creditors' meeting.[47]

Although none of the four litigant-creditors was listed on the debtor's initial filing of schedules, an amended version was filed on May 25, 1989.[48] The amended schedules listed Clinton, West Knoxville, and Brunswick as "holding contingent unliquidated, and disputed claims"; Ft. Oglethorpe was not listed at all.[49] Thus, *even after the amended filing*, Bankruptcy Rule 3003(c)(2) required that all four creditors timely file proofs of claims.[50] If any of the four failed to do so, then that creditor would not "be treated as a creditor with respect to [its] claim for the purposes of voting and distribution."[51]

To summarize, as of May 25th, the facts were these: the four creditors were required to file timely proofs; and, Mr. Berlin—the sophisticated agent of all four creditors—had received and read the notice establishing the August 3rd bar date. Given these facts, it was perfectly reasonable to expect that each of the four creditors would file by August 3rd. And, given the additional fact that those

---

42. *Id.* at 384. *See generally supra* note 35 (providing a truncated primer on Chapter 11 procedure).

43. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 384.

44. Brunswick Assocs. v. Pioneer Inv. Servs. (*In re* Pioneer Inv. Servs.), 943 F.2d at 675.

45. *Id.*

46. *See* Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 405 (O'Connor, J., dissenting) (noting the bankruptcy court's finding that Berlin, "a sophisticated business person and an active participant in the bankruptcy proceedings, had received actual notice of, and was aware of, the deadline").

47. *See id.* at 384.

48. Brunswick Assocs. v. Pioneer Inv. Servs. (*In re* Pioneer Inv. Servs.), 943 F.2d at 675.

49. *Id.*

50. *See id.* at 676; FED. R. BANKR. P. 3003(c)(2). This requirement was set forth in the April 13th notice. *See supra* note 35 and text accompanying note 42.

51. *See* FED. R. BANKR. P. 3003(c)(2).

creditors' claims exceeded six million dollars,[52] few would have predicted that any of the four would not have filed their claims by August 3rd.

But August 3rd came and passed.[53] None of the four creditors filed timely notices.[54] So, under normal circumstances, none of those creditors would have "be[en] treated as a creditor with respect to [its] claim for the purposes of voting and distribution."[55] Under normal circumstances, all hope would have been lost.

There is a story, however, about how God once told an old man that he must sacrifice his beloved son.[56] But, even though the old man resigned himself to obey God's horrible command,[57] he never gave up hope.[58] In time, the old man's hope was fulfilled: as the old man raised the knife, an angel appeared and ordered him to halt.[59] Such an angel also appeared to the four *Pioneer* creditors; but *their* salvation took the form of Bankruptcy Rule 9006(b), which provides:

> when an act is required . . . to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, *the court for cause shown may at any time in its discretion . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.*[60]

So, on August 23, 1989, the four creditors filed their proofs, along with a motion for the relief described in Bankruptcy Rule 9006(b).[61] This motion also brought several additional facts into focus. Evidently, back in June, Mr. Berlin had hired a lawyer named Marc Richards.[62] Richards was an "experienced bankruptcy attorney" who had been hired to represent Berlin's companies.[63] Accordingly, Berlin had provided Richards with a complete copy of the case file, including a copy of the April 13th notice.[64] But it seems that Richards somehow

---

52. Transcript of Oral Argument, No. 91-1695, 1992 WL 687925, at *21, Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380 (1993).
53. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 384.
54. *Id.*
55. FED. R. BANKR. P. 3003(c)(2). *See supra* note 35.
56. *Genesis* 22:1-2 (New International) (recounting God's command that Abraham must kill Isaac, Abraham's only son). *See generally* KIERKEGAARD, *supra* note 33, at 52-56 (discussing *Genesis* 22).
57. *Genesis* 22:3-4, :9-10. *See* KIERKEGAARD, *supra* note 33, at 65 (observing that Abraham was willing to give up Isaac "if that was indeed what was demanded").
58. *Genesis* 22:5, :8. *See* KIERKEGAARD, *supra* note 33, at 65 (noting that Abraham believed that God would not demand Isaac of him).
59. *See Genesis* 22:11-19 (recounting Abraham's encounter with an angel of the Lord).
60. FED. R. BANKR. P. 9006(b) (emphasis added).
61. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 384 (1993).
62. *Id.*
63. *Id.*
64. *Id.*; *see supra* text accompanying notes 40-43.

overlooked the notice.[65] Even when Berlin asked Richards whether there was a deadline for filing claims, "Richards assured him that no bar date had been set and that there was no urgency in filing proofs of claim."[66] Richards was, of course, dead wrong: the bar date *had* been set. Because Richards was wrong, the creditors missed the bar date.

By failing to know about and to act on the bar date, Richards dropped the ball. To his credit, Richards frankly admitted that the mistake was his.[67] But the creditors' motion explained that the bar date had come "at a time when [Richards] was experiencing a major and significant disruption in his professional life caused by his withdrawal from his former law firm on July 31."[68] As the motion explained: "Because of this disruption, [Richards] did not have access to his copy of the case file in this matter until mid-August."[69]

On the basis of these events, the four creditors argued that their "failure to act was the result of excusable neglect" and that they should be permitted to file their proofs.[70] Thus began almost four years of litigation in four different courts.[71] The bankruptcy court initially refused the late filing.[72] That court held that, because the late filing was not caused by circumstances beyond the creditors' control, excusable neglect could not be shown.[73]

The creditors then appealed to the district court.[74] The district court followed a "more liberal approach, remand[ing] with instructions that the Bankruptcy Court evaluate [the creditors'] conduct against several factors, including:"[75]

> (1) whether granting the delay will prejudice the debtor; (2) the length of the delay and its impact on efficient court administration; (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform; (4) whether the creditor acted in good faith; and (5) whether clients should be penalized for their counsel's mistake or neglect.[76]

---

65. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 384.
66. *Id.*
67. *Id.* at 406 (O'Connor, J., dissenting).
68. *Id.* at 384 (quotations omitted).
69. *Id.* Why Richards had not simply asked Berlin for another copy is not clear.
70. Brunswick Assocs. v. Pioneer Inv. Servs. (*In re* Pioneer Inv. Servs.), 943 F.2d 673, 675 (6th Cir. 1991), *aff'd*, 507 U.S. 380 (1993).
71. *See* Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 384-87 (describing litigation that began in 1989, ended in 1993, and involved four different courts: the bankruptcy court, the district court, the court of appeals, and the Supreme Court).
72. *Id.* at 384-85.
73. *Id.*
74. *Id.* at 385.
75. *Id.*
76. *Id.* (citations and quotations omitted).

On remand, the bankruptcy court honored these instructions.[77] But, notwithstanding those instructions, the bankruptcy court again refused to find excusable neglect.[78] Apparently satisfied, the district court affirmed.[79] The creditors appealed again.[80]

The United States Court of Appeals for the Sixth Circuit agreed with the district court's multi-factor approach.[81] The court of appeals disagreed, however, with the bankruptcy court's application of the factors.[82] Specifically, the Sixth Circuit opined that the bankruptcy court had "inappropriately penalized the [creditors] for the errors of their counsel."[83] After all, Berlin had asked his trusted counsel about the deadline for filing the proofs.[84] Richards—the experienced bankruptcy attorney—had led Berlin astray by telling him that there was no urgency.[85] It was the lawyer—not the client—who was at fault.

Moreover, the circuit court found it significant that the notice of the bar date was given by a document titled "Notice for Meeting of Creditors."[86] The court found this placement to be "peculiar and inconspicuous."[87] Moreover, the use of the term "bar date" itself had created "dramatic ambiguity."[88] Thus, given Berlin's lack of bankruptcy experience,[89] the creditors could not have been expected to understand the cryptic notice.[90] Rather, it was Richards who should have understood and acted. Thus, the Sixth Circuit reversed, holding "the [bankruptcy] court erred in attributing the negligence of [the] attorney to the [creditors]."[91] The debtor then filed its petition for certiorari and the Supreme Court granted review.[92]

---

77. *Id.* at 386.
78. *Id.*
79. *Id.*
80. Brunswick Assocs. v. Pioneer Inv. Servs. (*In re* Pioneer Inv. Servs.), 943 F.2d 673, 675 (6th Cir. 1991), *aff'd*, 507 U.S. 380 (1993).
81. *Id.* at 677 (citing Dix v. Johnson (*In re* Dix), 95 B.R. 134, 138 (B.A.P. 9th Cir. 1988)).
82. *Id.* at 677-78.
83. *Id.* at 677.
84. *Id.*
85. *Id.*
86. *Id.* at 678.
87 *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 387 (1993). The *Pioneer* majority was made up of five Justices, two of whom are no longer on the Court. Justice White delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Blackmun, Stevens, and Kennedy joined. *See id.* at 381. Justice O'Connor filed a dissent joined by Justices Scalia, Souter, and Thomas. *See id.* at 399.

B. *The* Pioneer *Majority Opinion*

The Supreme Court's majority opinion in *Pioneer* was largely a reaction to the views of the courts below.[93] The Court began by rejecting the bankruptcy court's initial view of excusable neglect.[94] As was mentioned above, the bankruptcy court had first held that, because the reason for the late filing was not beyond the creditors' reasonable control, the creditors' late filing could not be excusable neglect.[95] According to the *Pioneer* majority, this view is consonant with neither the plain meaning of the word "neglect,"[96] nor the policies of Chapter 11 and the bankruptcy rules,[97] nor the established meaning of excusable neglect in other contexts.[98] Therefore, the majority specifically held "an attorney's inadvertent failure to file a proof of claim within the deadline set by the court *can* constitute 'excusable neglect'" within the meaning of Bankruptcy Rule 9006.[99]

Having held an inadvertent failure *can* constitute excusable neglect, the majority then inquired as to when such failure actually does constitute excusable neglect.[100] In this regard, the majority was "in substantial agreement with the factors identified by the Court of Appeals."[101]

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," *we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission.* These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.[102]

Despite these grounds of "substantial agreement," however, the *Pioneer* majority did differ with the Sixth Circuit on one point.[103] As noted above, the

---

93. *See generally id.* at 384-99 (rejecting the bankruptcy court's initial approach and then accepting, in modified form, the approach employed by the Sixth Circuit; affirming the Sixth Circuit's conclusion).
94. *Id.* at 388.
95. *Id.* at 384-85.
96. *Id.* at 388.
97. *Id.* at 389.
98. *See id.* at 392-95 (discussing the standards for excusable neglect found in Federal Rules of Civil Procedure 13(f) and 60(b)).
99. *Id.* at 383 (emphasis added).
100. *Id.* at 395.
101. *Id.*
102. *Id.* (emphasis added).
103. *Id.* at 396-97.

Sixth Circuit had suggested that it would be inappropriate to penalize creditors for the omissions of their attorney.[104] The Supreme Court found this argument untenable.[105] Justice White, writing for the majority, noted that where a party has

> "voluntarily chose[n] [an] attorney as his representative in [an] action, [that party] *cannot* [later] avoid the consequences of the acts or omissions of this freely selected agent."[106] ***Any other notion would be wholly inconsistent with our system of representative litigation,*** in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."[107]

The *Pioneer* majority concluded that "[t]his principle applies with equal force here and requires that [the creditors] be held accountable for the acts and omissions of their chosen counsel."[108] So, "in determining whether respondents' failure to file their proofs of claim prior to the bar date was excusable, the proper focus is upon whether the neglect of respondents *and their counsel* was excusable."[109]

Thus, the *Pioneer* majority clearly rejected the Sixth Circuit's view that it would be "unjustifiable" to punish the creditors "for the sins and neglect of their lawyer."[110] At the same time, the *Pioneer* majority did accept the Sixth Circuit's *result*.[111] In support of its conclusion, the *Pioneer* Court offered a two-paragraph

---

104. Brunswick Assocs. v. Pioneer Inv. Servs. (*In re* Pioneer Inv. Servs.), 943 F.2d 673, 677 (6th Cir. 1991), *aff'd*, 507 U.S. 380 (1993).

105. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 396-97.

106. *Id.* (emphasis added) (quoting Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962)).

> Surely if a criminal defendant may be convicted because he did not have the presence of mind to repudiate his attorney's conduct in the course of a trial, a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit. And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant. *Moreover, this Court's own practice is in keeping with this general principle. For example, if counsel files a petition for certiorari out of time, we attribute the delay to the petitioner and do not request an explanation from the petitioner before acting on the petition.*

Link v. Wabash R.R., 370 U.S. at 634 n.10 (emphasis added).

107. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 396-97 (emphasis added) (quoting Link v. Wabash R.R., 370 U.S. at 633-34).

108. *Id.* at 397.

109. *Id.*

110. Brunswick Assocs. v. Pioneer Inv. Servs. (*In re* Pioneer Inv. Servs.), 943 F.2d 673, 678 (6th Cir. 1991), *aff'd*, 507 U.S. 380 (1993).

111. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 397.

analysis.[112] In the first paragraph, the Court simply adopted the unchallenged findings below that the creditors had acted in good faith; the late filings caused no danger of prejudice to the debtor; and the late filings caused no danger of disruption to court proceedings.[113] These factors, said the Court, "weigh[ed] strongly in favor of permitting the tardy claim."[114]

In a separate paragraph, the Court assessed the "culpability" of the creditors' counsel.[115] The Court gave "little weight" to counsel's personal problems, that is, that he had been experiencing upheaval when the bar date passed.[116] But, the Court *did* find it significant that the April 13th notice—a document that the bankruptcy court itself had produced—failed to "prominently announce" the bar date.[117] Indeed, the Court agreed with the Sixth Circuit that the "peculiar and inconspicuous placement of the bar date in a notice regarding a creditors[']' meeting, without any indication of the significance of the bar date, left a 'dramatic ambiguity' in the notification."[118] This ambiguity did not, however, mean that the creditors' counsel was entirely absolved from his fault: "To be sure, were there any evidence of prejudice to petitioner or to judicial administration in this case, or any indication at all of bad faith, we could not say that the Bankruptcy Court abused its discretion in declining to find the neglect to be 'excusable.'"[119] But, there was no such evidence; therefore, the majority concluded "the unusual form of notice employed in this case *requires* a finding that the neglect of respondents' counsel was, under all the circumstances, 'excusable.'"[120]

III. *PIONEER*'S RELEVANCE TO RULE 4(A)(5)

As the preceding section explains, the *Pioneer* case dealt specifically with the Federal Rules of Bankruptcy Procedure. Because *Pioneer* dealt with the bankruptcy rules, it is fair to argue that *Pioneer* should have no relevance to Rule 4 of the Federal Rules of Appellate Procedure.[121] For purposes of such an argument, it may be conceded that (a) the language of statutes and rules should

---

112. *See id.* at 397-99.
113. *Id.* at 397-98.
114. *Id.*
115. *Id.* at 398-99.
116. *Id.* at 383, 398.
117. *Id.* at 398.
118. *Id.* (citation and quotations omitted).
119. *Id.*
120. *Id.* at 398-99 (emphasis added).
121. *Compare* FED. R. BANKR. P. 9006 (governing the time for acts to be done in bankruptcy cases and granting discretion for extensions), *with* FED. R. APP. P. 4 (governing time requirements of appeals in civil cases).

be given effect;[122] and (b) the phrase excusable neglect does appear in both the Federal Rules of Bankruptcy Procedure[123] and the Federal Rules of Appellate Procedure.[124] Yet, identical words in two different statutes can have two different meanings.[125] As even the *Pioneer* Court acknowledged, "the meaning of statutory language, plain or not, depends on context."[126] As Judge Hand explained: "Words are not pebbles in alien juxtaposition; they have only a

---

122. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."); Montclair v. Ramsdell, 107 U.S. 147, 152 (1882) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.").
The Eighth Circuit made this point quite eloquently:

> Before we can examine and give weight to Congressional debates in construing this statute we are met by certain established rules of construction. The first of these is that in seeking the meaning of a statute resort must first be made to the language of the statute, and this must be done whatever may have been in the minds of individual members of Congress. In examining that language we are to take words in their common meaning, and are to examine all of the language of the statute. If that language is plain and, as so construed, the law is within the power of Congress, the sole function of the courts is to enforce it according to its terms; it is the duty of the courts so to do, and they have no choice but to follow it, without regard to the consequences. In that situation, the duty of interpretation does not arise, and this is true, even though reliance is placed upon reports of committees of the Congress. *These rules of construction are not mere academic precepts. They go as deeply as the division of our form of government into three branches. It is the duty of the legislative branch to write the law. It is the duty of the judicial branch to take the law as so written. Whenever the judiciary changes that law—through construction or otherwise—it invades a domain prohibited to it and reserved solely for the legislative branch.*

Lansdown v. Faris, 66 F.2d 939, 942-43 (8th Cir. 1933) (emphasis added) (internal citations and quotations omitted).

123. *See* FED. R. BANKR. P. 9006(b)(1).

124. *See* FED. R. APP. P. 4(a)(5).

125. *See, e.g.*, Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 394. The *Pioneer* Court itself acknowledged that excusable neglect can mean different things in different rules or statutes. *See id.* To illustrate, the Court stated:

> Because of the language and structure of Rule 60(b), a party's failure to file on time for reasons beyond his or her control is not considered to constitute "neglect." *This latter result, however, would not obtain under Bankruptcy Rule 9006(b)(1).* Had respondents here been prevented from complying with the bar date by an act of God or some other circumstance beyond their control, the Bankruptcy Court plainly would have been permitted to find "excusable neglect."

Id. (emphasis added) (internal citations omitted). Thus, just as excusable neglect does mean something different for Federal Rule of Civil Procedure 60(b) than for Bankruptcy Rule 9006(b)(1), excusable neglect can also mean something different for Bankruptcy Rule 9006(b)(1) than for Rule 4(a)(5).

126. Holloway v. United States, 119 S. Ct. 966, 970 (1999) (citing Brown v. Gardner, 513 U.S. 115, 118 (1994)).

communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . ."[127]

Judge Hand's emphasis on context is readily applicable to the words excusable neglect.[128] For example, suppose a mechanic left an oily rag tucked beneath the hood of your car. In many cases, such neglect would be excusable. However, if a surgical team failed to remove a sterile sponge from any area within your abdominal cavity, such neglect would almost never be excusable. The disparate settings—the engine compartment as compared with the abdomen, the repair shop as compared with the hospital—make equivalent acts of negligence more or less excusable.

Thus it is reasonable to argue that if the *Pioneer* context is materially different from the Rule 4(a)(5) context, then excusable neglect could have a different meaning in each of the two respective contexts. And, upon inspection, it appears that these contexts do differ in important ways. It must be remembered that *Pioneer* dealt with Chapter 11, a statute aimed at successful reorganization.[129] Such reorganization requires a balancing of at least two interests:[130] the rehabilitation of the debtor[131] and the avoidance of forfeitures by

---

127. NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941); *see* National Bank v. Independent Ins. Agents of Am., 508 U.S. 439, 454-55 (1993) (quoting Judge Learned Hand's opinion in *NLRB v. Federbush Co.*); King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991) (same); Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19, 25 n.6 (1988) (same); United States v. Hamrick, 43 F.3d 877, 897 n.7 (4th Cir. 1995) (same); Sekula v. FDIC, 39 F.3d 448, 454 (3d Cir. 1994) (same); Moore v. District of Columbia, 907 F.2d 165, 167 n.4 (D.C. Cir. 1990) (same); Florsheim Shoe Co. v. United States, 744 F.2d 787, 795 (Fed. Cir. 1984) (same); Hulmes v. Honda Motor Co., 936 F. Supp. 195, 212 (D.N.J. 1996) (same); Joslyn Mfg. Co. v. Liberty Mut. Ins. Co., 836 F. Supp. 1273, 1278 (W.D. La. 1993) (same); Mangels v. City of Orange, 678 F. Supp. 1452, 1455-56 (C.D. Cal. 1988) (same); *see also* Rock of Ages Corp. v. Secretary of Labor, 170 F.3d 148, 155 (2d Cir. 1999) (quoting another source that, in turn, quotes Judge Learned Hand's opinion in *NLRB v. Federbush Co.*); New York Life Ins. Co. v. Deshotel, 142 F.3d 873, 886 (5th Cir. 1998) (same); Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507, 511 (5th Cir. 1997) (same); Tate & Lyle, Inc. v. Commissioner, 87 F.3d 99, 105 (3d Cir. 1996) (same); Mississippi Poultry Ass'n v. Madigan, 992 F.2d 1359, 1363 n.25 (5th Cir. 1993) (same); McCaslin v. Blue Cross & Blue Shield, 779 F. Supp. 1312, 1315-16 (N.D. Ala. 1991) (same).

128. At least one court has specifically acknowledged that context *does* matter to the interpretation of excusable neglect. *See* Fasson v. Magouirk (*In re* Magouirk), 693 F.2d 948, 950-51 (9th Cir. 1982) (observing that the words excusable neglect in "Bankruptcy Rule 802, which governs the time for filing a notice of appeal" are "very strictly construed." However, the same words are "liberally construed" in Rule 60(b), "especially in those instances where the order or judgment forecloses trial on the merits of a claim").

129. *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984) (noting that "the policy of Chapter 11 is to permit successful rehabilitation of debtors").

130. *See id.* A third interest will sometimes be the welfare of the debtor's employees. *Id.* Moreover, a fourth interest—"the congressional purpose of deriving as much value as possible from the debtor's estate"—clearly does shape Chapter 11. Toibb v. Radloff, 501 U.S. 157, 164

creditors.[132] Appropriately, "[t]he Bankruptcy Court is a court of equity";[133] and its job is—in "a very real sense"—a balancing of equities.[134] Thus, it is proper for a broad equitable approach—such as that described in *Pioneer*[135]—to apply in Chapter 11 cases. And in pursuing that broad equitable approach, the need for a prompt and final result will rarely be given weight.[136]

By contrast, the Federal Rules of Appellate Procedure often deal with circumstances far removed from those of a Chapter 11 reorganization. Instead, the Federal Rules of Appellate Procedure deal with lawsuits. In normal, everyday life—that is, life for everyone except insurance companies[137]—lawsuits are "rare and catastrophic experiences."[138] Accordingly, it is important that "someday" the catastrophe must cease, normalcy must return, and "there must be

---

(1991). This interest is largely inseparable from the other three: a valueless estate can yield little benefit for the debtor, its employees, or its creditors.

131. NLRB v. Bildisco & Bildisco, 465 U.S. at 527.

132. *Id.* Chief Justice Rehnquist made this point quite clear:

> Determining what would constitute a successful rehabilitation involves balancing the interests of the affected parties—the debtor, creditors, and employees. The Bankruptcy Court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees. In striking the balance, the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardship each may face.

Id.

133. SEC v. United States Realty & Improvement Co., 310 U.S. 434, 455 (1940) ("A bankruptcy court is a court of equity . . . and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act."); *see also* 11 U.S.C. § 105(a) (1999) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); Noonan v. Secretary, Health & Human Servs. (*In re* Ludlow Hosp. Soc'y, Inc.), 124 F.3d 22, 27 (1st Cir. 1997) ("Section 105(a) empowers the bankruptcy court to exercise its equitable powers—where 'necessary' or 'appropriate'—to facilitate the implementation of other Bankruptcy Code provisions.").

134. NLRB v. Bildisco & Bildisco, 465 U.S. at 527.

135. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 389 (1993).

136. This assertion is supported by *Pioneer*'s description of the differences between Chapter 11 and Chapter 7. *See supra* note 19.

137. Insurers are, after all, professional defenders of lawsuits. *See* David N. May, Note, *Inhouse Defenders of Insureds: Some Ethical Considerations*, 46 DRAKE L. REV. 881, 882 & n.1 (1998) (discussing the benefits, costs, and ethical implications of using in-house lawyers to defend insureds). While litigators are involved in lawsuits everyday, we certainly differ from the insurer in one key regard: while the insurer may not *technically* be a party, the insurer is a *part* of the litigation in that its money is often directly at stake. *Id.* at 882 n.2; *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(A) (1980) (commanding that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation [being] conduct[ed] for a client"). *But see id.* DR 5-103(A)(2) (allowing reasonable contingent fee contracts).

138. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 128 (1921).

an end to litigation."[139] Indeed, there exists a "*compelling* need for finality in litigation;"[140] and that "compelling need" is reflected in the Federal Rules of Appellate Procedure.[141] In fact, the very purpose of the Appellate Rules is to "'bring litigation to an end and to discourage dilatory tactics.'"[142] More specifically, the purpose of Rule 4(a) is

> "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."[143]

So, in order to accomplish this goal of allowing "the prevailing party to know, at a fixed time, how the litigation stands[,]. . . the courts must adopt [as they traditionally have] a strict interpretation of the words 'excusable neglect.'"[144]

---

139. Ackermann v. United States, 340 U.S. 193, 198 (1950); *see also* Norgaard v. DePuy Orthopaedics, Inc., 121 F.3d 1074, 1076 (7th Cir. 1997) (reciting *Ackermann*'s observation that "[t]here must be an end to litigation someday"); Ahmed v. Rosenblatt, 118 F.3d 886, 892 (1st Cir. 1997) (same); Cashner v. Freedom Stores, Inc., 98 F.3d 572, 580 (10th Cir. 1996) (same); Polec v. Northwest Airlines, Inc. (*In re* Air Crash Disaster), 86 F.3d 498, 552 (6th Cir. 1996) (same); Clifton v. Attorney Gen., 997 F.2d 660, 664 n.5 (9th Cir. 1993) (same); Dowell v. State Farm Fire & Cas. Auto. Ins., 993 F.2d 46, 48 (4th Cir. 1993) (same); Cotto v. United States, 993 F.2d 274, 278 (1st Cir. 1993) (same); Schwartz v. United States, 976 F.2d 213, 218 (4th Cir. 1992) (same); United States v. Wyle (*In re* Pacific Far East Lines, Inc.), 889 F.2d 242, 250 (9th Cir. 1989) (same); Randall v. Merrill Lynch, 820 F.2d 1317, 1322-23 (D.C. Cir. 1987) (same); Blinder, Robinson & Co. v. United States SEC, 748 F.2d 1415, 1421 (10th Cir. 1984) (same); Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 674 F.2d 976, 981 (3d Cir. 1982) (same); Capitol Life Ins. Co. v. Schnure, 665 F.2d 237, 239 (8th Cir. 1981) (same); Good Luck Nursing Home, Inc. v. Harris, 636 F.2d 572, 577 (D.C. Cir. 1980) (same).

140. Marcangelo v. Boardwalk Regency, 47 F.3d 88, 90 (3d Cir. 1995) (emphasis added) (citing Alaska Limestone Corp. v. Hodel, 799 F.2d 1409 (9th Cir. 1986); Pedereaux v. Doe, 767 F.2d 50 (3d Cir. 1985); Hensley v. Chesapeake & Ohio Ry., 651 F.2d 226 (4th Cir. 1981); Gooch v. Skelly Oil Co., 493 F.2d 366 (10th Cir. 1974)).

141. *See, e.g.*, *id.* (noting reluctance to accept court-fashioned exceptions to time limits on filing notice of appeal); Polylok Corp. v. Manning, 793 F.2d 1318, 1322 (D.C. Cir. 1986) ("The Federal Rules of Appellate Procedure impose strict requirements for the timely filing of appeals.").

142. Cosmopolitan Aviation Corp. v. New York State Dep't of Transp. (*In re* Cosmopolitan Aviation Corp.), 763 F.2d 507, 514 (2d Cir. 1985) (quoting McCormack v. Schindler (*In re* Orbitec Corp.), 520 F.2d 358, 362 (2d Cir. 1975)).

143. Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978) (quoting Matton Steamboat Co. v. Murphy, 319 U.S. 412, 415 (1943)); *accord* Needham v. White Labs., Inc., 454 U.S. 927, 930 (1981) (Rehnquist, J., dissenting) ("The clear purpose of Rule 4(a) is to set a definite point in time when litigation shall be at an end, so that the prospective appellee will know that he is freed of the appellant's demands.").

144. Hassett v. Far West Fed. Sav. & Loan Ass'n (*In re* O.P.M. Leasing Servs.), 769 F.2d 911, 916 (2d Cir. 1985).

Thus, the context and purposes of Rule 4(a)(5) suggest that—at least for purposes of *that* rule—excusable neglect must be strictly construed.

In sum, the Federal Rules of Appellate Procedure involve contexts and purposes that are foreign to Chapter 11 and its bankruptcy rules.[145] Accordingly, it is fair to suggest that, in a Rule 4(a)(5) setting, excusable neglect should have a meaning different from that suggested by *Pioneer*.[146] Instead, the traditional, strict interpretation of Rule 4(a)(5)—under which excusable neglect was found to exist only under "'extraordinary cases where injustice would otherwise result'"[147]—is most appropriate *for this rule* because *its* purpose is "to bring litigation to an end."[148] Therefore, it would be fair to conclude that *Pioneer*—and, more to the point, the majority's equitable, multi-factor approach—has absolutely no relevance at all for Rule 4(a)(5).

Notwithstanding such arguments, most courts of appeals have willingly revamped their discussions of Rule 4(a)(5) to reflect *Pioneer*'s influence.[149] The Second Circuit's *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*[150] decision in

---

145. *Compare supra* notes 129-36 and accompanying text (describing the policy bases for Chapter 11), *with supra* notes 137-44 and accompanying text (describing the Federal Rules of Appellate Procedure and their policy bases).

146. *See* Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 394 (1993). This is not to suggest, however, that the "different context, different meaning" argument is the *only* basis on which *Pioneer* could, or should, be rejected as the polestar for excusable neglect analysis. A complete cataloging of such possible bases is beyond the scope of this Article. However, one additional argument is worth mentioning here. To wit: one of the fundamental principles of Anglo-American jurisprudence is that each person shall have their day in court. *See* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295, 2315 (1999) (citing Martin v. Wilks, 490 U.S. 755, 762 (1989)). Our traditions are, however, far less generous toward those who have already had their day in court but seek a second bite of the apple. *See* Foucha v. Louisiana, 504 U.S. 71, 121 (1992) (Thomas, J., dissenting) (noting that insanity acquittees, "in sharp and obvious contrast to pretrial detainees, have had their day in court"). And, as Professor Gregory C. Sisk has rightly pointed out, civil appellants—unlike the claimants in *Pioneer*—have already had their day in court; specifically, appellants have already had a judicial hearing and a final decision by the district court. Letter from Professor Gregory C. Sisk, Richard M. & Anita Calkins Distinguished Professor, Drake Law School, to David N. May (Jan. 10, 2000) (on file with author). Thus, the law should be less reluctant to dismiss an initial claim—thereby denying the claimant of any day in court—than to dismiss an appeal, where the appellant has already had one judicial determination. Accordingly, the standard for excusable neglect applied in appeals should be more stringent than that applied in *Pioneer*.

147. *See* Alaska Limestone Corp. v. Hodel, 799 F.2d 1409, 1411 (9th Cir. 1986) (quoting Oregon v. Champion Int'l Corp., 680 F.2d 1300, 1301 (9th Cir. 1982)).

148. Cosmopolitan Aviation Corp. v. New York State Dep't of Transp. (*In re* Cosmopolitan Aviation Corp.), 763 F.2d 507, 514 (2d Cir. 1985) ("The purpose of the new rules [of appellate procedure] was to bring litigation to an end and to discourage dilatory tactics." (citing McCormack v. Schindler (*In re* Orbitec Corp.), 520 F.2d 358, 362 (2d Cir. 1975))).

149. *See infra* notes 150-56 and accompanying text.

150. Weinstock v. Cleary, Gottlieb, Steen & Hamilton, 16 F.3d 501 (2d Cir. 1994).

1994 was apparently the first circuit court opinion to apply *Pioneer* to Rule 4(a)(5).[151] Soon thereafter, the other circuits fell in line. In the latter half of 1994, the Tenth and Federal Circuits each acknowledged that *Pioneer* does have relevance to Rule 4(a)(5).[152] In 1995, the First, Ninth, and Eighth Circuits followed suit.[153] In 1996, the Seventh, Fourth, Eleventh and Sixth Circuits each issued opinions that either assumed or concluded that *Pioneer* does govern Rule 4(a)(5).[154] And, in September 1998, the Fifth Circuit joined its sister circuits.[155] Moreover, although it appears that neither the Third Circuit nor the D.C. Circuit have formally approved *Pioneer*'s expansion into Rule 4(a)(5) jurisprudence, it seems unlikely that either of those circuits would reject such expansion.[156] Therefore, at least as of this writing, the circuits appear to be in agreement that *Pioneer* does govern Rule 4(a)(5).

IV. THE ANCIENT MAXIM: MISTAKES OR IGNORANCE OF LAW DO NOT EXCUSE

Five years before he wrote *Pioneer*'s majority opinion, Justice White explained that:

> The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.[157]

---

151. *Id.* at 503.

152. City of Chanute v. Williams Natural Gas Co., 31 F.3d 1041, 1046 (10th Cir. 1994); Candela Laser Corp. v. Cynosure, Inc., Nos. 94-1514, 95-1018, 1994 WL 702194, at *1 (Fed. Cir. Dec. 6, 1994) (unpublished decision).

153. Virella-Nieves v. Briggs & Stratton Corp., 53 F.3d 451, 454 (1st Cir. 1995); Reynolds v. Wagner, 55 F.3d 1426, 1429 (9th Cir. 1995); Fink v. Union Cent. Life Ins. Co., 65 F.3d 722, 724 (8th Cir. 1995).

154. Prizevoits v. Indiana Bell Tel. Co., 76 F.3d 132, 134 (7th Cir. 1996); Thompson v. E.I. DuPont de Nemours & Co., 76 F.3d 530, 533 (4th Cir. 1996); Advanced Estimating Sys., Inc. v. Riney, 77 F.3d 1322, 1324 (11th Cir. 1996); United States v. Thompson, 82 F.3d 700, 702 (6th Cir. 1996).

155. Halicki v. Louisiana Casino Cruises, Inc., 151 F.3d 465, 469 (5th Cir. 1998).

156. As for the Third Circuit, no relevant post-*Pioneer* case has been found. However, the Third Circuit has traditionally employed "a more flexible approach" to excusable neglect. *See* Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 387 n.5 (1993) (citing Consolidated Freightways Corp. v. Larson, 827 F.2d 916 (3d Cir. 1987)). Thus, it seems unlikely that the Third Circuit would reject the applicability of *Pioneer* to Rule 4.

A similar analysis applies to the District of Columbia Circuit. *See In re* Buckingham Super Markets, Inc., 631 F.2d 763, 766 (D.C. Cir. 1980). As early as 1980, that circuit applied a "totality of the circumstances" analysis to excusable neglect. *Id.* at 766. In *Buckingham Super Markets*, the court asserted that "[t]he history of Rule 4(a) indicates that the excusable neglect standard has been applied with diminishing rigidity." *Id.* at 765. Thus, it seems quite plausible that the D.C. Circuit would accept *Pioneer* as a logical continuation of the (alleged) trend toward applying Rule 4 with "diminishing rigidity." *See id.*

157. Cheek v. United States, 498 U.S. 192, 199 (1991) (citing Liparota v. United States, 471 U.S. 419, 441 (1985) (White, J., dissenting); Lambert v. California, 355 U.S. 225, 228 (1957);

> Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common-law rule has been applied by the Court in numerous cases construing criminal statutes.[158]

Thus, because it is presumed that *every person*—not just lawyers—knows the law, a plea of "ignorance of the law" or "mistake of law" is generally[159] not a defense in a *criminal* prosecution. We may inquire, then, where this reasoning may lead if applied to the context of *civil* appeals, a context in which only money—not "human life and human freedom"—is usually at stake.[160] If ignorance of law or mistake of law is not a defense in a criminal proceeding, should the same idea not apply a fortiori to a civil appeal? Should there not be, then, a categorical rule that ignorance of law or mistake of law cannot constitute excusable neglect under Rule 4(a)(5)?

It appears that, at least prior to the advent of *Pioneer*, just such a rule did exist.[161] For example, in 1985, the Second Circuit explained that "[t]he 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."[162] But in saying "never," the Second Circuit surely meant "never, unless Congress or the Supreme Court tell us otherwise." Congress has remained reticent; so, the question is whether *Pioneer* abrogated the categorical rule against excusing ignorance or mistakes of law.

Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910); Reynolds v. United States, 98 U.S. 145, 167 (1879); Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833); United States v. Smith, 18 U.S. (5 Wheat.) 153, 182 (1820) (Livingston, J., dissenting); OLIVER HOLMES, THE COMMON LAW 47-48 (1881)).

158. *Id.* (citing Hamling v. United States, 418 U.S. 87, 119-124 (1974); United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952)).

159. The term "generally" is inserted here to recognize that "Congress has . . . softened the impact of the common-law presumption by making specific intent to violate the law an element of" some federal offenses. *Id.* at 200.

160. *See* TOM WOLFE, THE BONFIRE OF THE VANITIES 269 (1987) (observing that "[c]riminal law is a thing unto itself, because the stakes are not money but human life and human freedom"). The term "usually" is inserted above to acknowledge that habeas corpus proceedings are considered civil proceedings. Browder v. Director, Dep't of Corrections, 434 U.S. 257, 268-69 (1978).

161. *See* Paul A. Fischer, Annotation, *What Constitutes "Excusable Neglect" Which Will Permit Federal District Court to Extend Time for Filing Notice of Appeal from Civil Judgment Under Rule 4(a) of Federal Rules of Appellate Procedure and Under Former Rule 73(A) of Federal Rules of Civil Procedure*, 26 A.L.R. FED. 569, 575 (1976) (noting "courts have generally held that an attorney's ignorance or misinterpretation of the law concerning appeals is not the basis for finding 'excusable neglect'").

162. Cosmopolitan Aviation Corp. v. New York State Dep't of Transp. (*In re* Cosmopolitan Aviation Corp.), 763 F.2d 507, 515 (2d Cir. 1985) (emphasis added).

The *Pioneer* decision itself offers little help in answering this question. In *Pioneer*, the creditors' failure was not ignorance of *law*, such as a failure to know where to file proofs of claims.[163] Instead, the creditors' failure was ignorance of *the fact that* a bar date had been set. Thus, *Pioneer*'s most narrow holding—that the creditors' ignorance of *fact* was excusable—says little about whether ignorance of *law* can be excused.

Some language within *Pioneer* does, however, suggest that the rule against excusing mistakes or ignorance of law retains validity. As discussed above, the *Pioneer* majority rejected the bankruptcy court's view that any fault on the part of the late filer would preclude a finding of excusable neglect.[164] In support of that rejection, the *Pioneer* majority discussed excusable neglect as it appears in other federal rules.[165] Foremost in that discussion was Federal Rule of Civil Procedure 6(b),[166] the rule after which Bankruptcy Rule 9006(b)(1) was patterned.[167] Specifically, the *Pioneer* majority stated that under Federal Rule of Civil Procedure 6(b)—and, by implication, under Bankruptcy Rule 9006—"*ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect.*"[168] Accordingly, it can be fairly argued that under Rule 4(a)(5)—a rule more deserving of strict interpretation than either Federal Rule of Civil Procedure 6(b) or Bankruptcy Rule 9006—the same principle should apply with added force.

Many of the circuit courts have agreed.[169] A telling example is *Phillips v. Merchant Insurance Group*,[170] an unpublished Second Circuit case. Patrick J. Phillips, a pro se plaintiff, lost his age discrimination case against Merchants Insurance Group.[171] Plaintiff then became confused over the plain language of

---

163. *See supra* notes 64-66 and accompanying text. Incidentally, the bankruptcy rules provide that in general, proofs of claim "shall be filed with the clerk in the district where the case under the Code is pending." FED. R. BANKR. P. 5005(a)(1).

It is worth noting, however, that dicta in a recent Fifth Circuit case suggests a different view of *Pioneer*. *See* United States v. Clark, 193 F.3d 845, 847 (5th Cir. 1999) (stating that "*Pioneer* . . . involved [a] situation[ ] where a litigant's attorney . . . misinterpreted the federal rules"). With all due respect, the *Clark* opinion's description of the facts in *Pioneer* is simply incorrect.

164. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 388 (1993); *see supra* notes 94-99 and accompanying text.

165. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 391-95.

166. *Id.* at 391-92.

167. *Id.* at 391.

168. *Id.* at 392 (emphasis added).

169. *See infra* text accompanying notes 170-233 (discussing cases in which the rule against excusing mistakes or ignorance of law has been applied).

170. Phillips v. Merchant Ins. Group, Nos. 98-7908L, 98-7912, 1999 WL 278526, at *1 (2d Cir. May 4, 1999) (unpublished decision).

171. *Id.*

Rule 4(a); as a result, plaintiff failed to timely file his notice of appeal.[172] The district court found plaintiff's neglect to be excusable.[173]

On appeal, the Second Circuit conceded *Pioneer*'s announcement that "'excusable neglect' [may] 'encompass situations in which the failure to comply with a filing deadline is attributable to negligence.'"[174] Nonetheless, *Pioneer* had also said that "'inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect.'"[175] Accordingly, even though the mistake was that of a pro se plaintiff, the Second Circuit held that the district court had abused its discretion in finding excusable neglect.[176] Thus, the *Phillips* decision can only be read as an affirmation by the Second Circuit that—*as a matter of law*—mistakes or ignorance of law cannot be excusable neglect.[177]

The Federal Circuit has also signaled agreement with such a rule. In *Candela Laser Corp. v. Cynosure, Inc.*,[178] the cross-appellant failed to file on time because it had erroneously believed that a cross-appeal was unnecessary.[179] Cross-appellant argued that this error constituted excusable neglect.[180] Like the *Phillips* court, the *Candela* court acknowledged *Pioneer*'s relevance to Rule 4(a)(5).[181] However, the *Candela* court also found that "[t]he rule governing when a cross-appeal is necessary . . . is abundantly clear."[182] Moreover, the court said that, notwithstanding the width of the district court's discretion:

> when the question is simply failure to comply with clear legal requirements, something more than we have here must be provided us if we are to ascertain whether the trial court abused its discretion. Particularly is this so when the "error" is committed by experienced counsel. [Cross-appellant]'s belated realization that the more prudent course was to file a cross-appeal hardly qualifies, without more, for such extraordinary relief.[183]

---

172. *Id.* at *2.
173. *Id.* at *1.
174. *Id.* (quoting Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 394 (1993)).
175. *Id.* (quoting Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 392).
176. *Id.* at *2.
177. *See supra* notes 170-76 and accompanying text; *see also* Hanley v. Deluxe Caterers, Inc., Nos. 98-7586L, 98-7716, 1999 WL 130669, at *2 (2d Cir. Mar. 3, 1999) (unpublished decision) (holding district court did not abuse discretion in refusing to find excusable neglect where counsel pled that he was "not entirely familiar with federal practice").
178. Candela Laser Corp. v. Cynosure, Inc., Nos. 94-1514, 95-1018, 1994 WL 702194, at *1 (Fed. Cir. Dec. 6, 1994) (unpublished decision).
179. *Id.*
180. *Id.*
181. *Id.* at *2 (citing Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 388 (1993)).
182. *Id.*
183. *Id.*

Accordingly, the court overturned the district court's finding of excusable neglect and dismissed the cross-appeal.[184] *Candela*'s holding implies that, even after *Pioneer*, ignorance or mistakes of law are not excusable neglect in the Federal Circuit.

The Fifth Circuit's opinion in *Midwest Employers Casualty Co. v. Williams*[185] evinces a similar view.[186] In *Midwest Employers*, the notice of appeal was filed late because counsel misread Federal Rule of Civil Procedure 6(e).[187] The magistrate judge held that counsel's misreading constituted excusable neglect.[188] The Fifth Circuit disagreed, suggesting that—under the magistrate's view—"'almost every appellant's lawyer would plead his own inability to understand the law when he fails to comply with a deadline.'"[189] The *Midwest Employers* court did, however, remain mindful of the excusable neglect standard set forth by *Pioneer*.[190] Further, the court left "open the possibility that some misinterpretations of the federal rules could constitute excusable neglect."[191] But the court also suggested that such cases would require rare, if not extraordinary, circumstances.[192] However, because the facts at bar involved an ordinary mistake of law, the Fifth Circuit reversed the magistrate's finding of excusable neglect.[193] Restated, *Midwest Employers* demonstrates the Fifth Circuit's view that—barring highly unusual circumstances—ignorance or mistakes of law cannot be excusable neglect under Rule 4(a)(5).[194]

The Seventh Circuit has also held that mistakes of law are not excusable neglect.[195] In *Prizevoits v. Indiana Bell Telephone Co.*,[196] the deadline was missed because counsel had mistakenly assumed that the time to file a motion for

---

184. *Id.*

185. Midwest Employers Cas. Co. v. Williams, 161 F.3d 877 (5th Cir. 1998).

186. *Id.* at 879-80.

187. *Id.* at 878 ("The magistrate found that Midwest's counsel had misread Federal Rule of Civil Procedure 6(e) to apply to judgments served by mail and mistakenly believed he had three extra days to file the motion for a new trial.").

188. *Id.*

189. *Id.* at 879 (quoting Halicki v. Louisiana Casino Cruises, Inc., 151 F.3d 465, 467-70 (5th Cir. 1998)).

190. *Id.*

191. *Id.* at 880.

192. *Id.*

193. *Id.*

194. *See id.*

195. *See* Prizevoits v. Indiana Bell Tel. Co., 76 F.3d 132, 133 (7th Cir. 1996) ("'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 Cosmopolitan Aviation Corp. v. New York State Dep't of Transp. (*In re* Cosmopolitan Aviation Corp.) 763 F.2d 507, 515 (2d Cir. 1985))).

196. Prizevoits v. Indiana Bell Tel. Co., 76 F.3d 132 (7th Cir. 1996).

new trial could be extended.[197] The district court found counsel's neglect to be excusable and granted an extension of time to file the notice of appeal.[198] In reviewing the district court's decision, the Seventh Circuit acknowledged—or at least assumed—the relevance of *Pioneer* to Rule 4(a)(5).[199] Nonetheless, the *Prizevoits* court found that appellant's excuse was "transparently inadequate"[200] and did not constitute excusable neglect:

> Rule 6(b) makes plain both that the 10-day limit on filing a Rule 59(e) motion cannot be extended, no matter how new the party's lawyer is, and that there was nothing to wait for, since the district court had no power to grant the motion. The federal rules are complex—a minefield for lawyers not experienced in federal practice—but [appellant's] principal lawyer is a highly experienced federal litigator. He must know about Rule 6(b). An unaccountable lapse is not excusable neglect. *"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 rule."*[201]

Thus, *Prizevoits* suggests that—even after *Pioneer*—ignorance or mistakes of law are categorically inexcusable.

---

197. *Id.* at 133. Judge Posner explained the procedural history as follows:
> The judgment of the district court having been entered on February 7, 1995, [plaintiff] had until March 9 to file her notice of appeal. On February 17 her lawyer filed a motion to extend the time for filing a Rule 59(e) motion to alter or amend the judgment. The motion was improper, Rule 6(b) of the Federal Rules of Civil Procedure being explicit that the time for filing a motion under Rule 59(e) may not be extended. On March 13 the district judge denied the motion for an extension of time within which to file a Rule 59(e) motion. By then the time for filing the notice of appeal had expired; the improper motion had not, of course, extended the period for appealing.

Id.

198. *Id.*

199. *Id.* at 134 (citations omitted).
> We are mindful of the Supreme Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, . . . holding that "excusable neglect" is not limited to situations where the failure to timely file is due to circumstances beyond the control of the filer. The Court was not talking about Rule 4(a)(5), but the tenor of its opinion is that the term bears the same or similar meaning throughout the federal procedural domain. Six courts of appeals have so held with specific reference to Rule 4(a)(5). We may assume that they are right. It would make no difference to the outcome of the present case or in the standard applied by this court before the Supreme Court's decision.

Id. (citations and quotations omitted).

200. *Id.* at 133.

201. *Id.* (emphasis added) (quoting Cosmopolitan Aviation Corp. v. New York State Dep't of Transp. (*In re* Cosmopolitan Aviation Corp.), 763 F.2d 507, 515 (2d Cir. 1985)).

The Eleventh Circuit announced its adoption of a per se rule in *Advanced Estimating System, Inc. v. Riney*.[202] In that case, a lawyer had mistakenly believed post-trial motions were due ten days after *his receipt* of notice of the entry of judgment.[203] This belief was, of course, directly contrary to Federal Rule of Civil Procedure 59(b).[204] As a result of this mistaken belief, the lawyer failed to file his notice of appeal on time.

The trial court initially held that counsel's mistake of law could not be excusable neglect under the traditional "unique circumstances" test.[205] In its first review of *Advanced Estimating System*, the Eleventh Circuit remanded for reconsideration in light of *Pioneer*.[206] On remand, the district court found that excusable neglect *had* been shown.[207] Once again, review by the Eleventh Circuit was sought.[208]

In its second *Advanced Estimating System* opinion, the Eleventh Circuit held that the district court had erred in finding excusable neglect.[209] The court observed: "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."[210] Furthermore, "no circuit that has considered the issue after *Pioneer* has held that an attorney's failure to grasp the relevant procedural law is 'excusable neglect.'"[211] Accordingly, the Eleventh Circuit announced: "Today, we follow the other circuits and hold, *as a matter of law*, that an attorney's misunderstanding of the plain language of a rule *cannot*

---

202. Advanced Estimating Sys., Inc. v. Riney, 130 F.3d 996, 997 (11th Cir. 1997).

203. *Id.*

> Riney filed untimely motions for a new trial and for relief from judgment. Believing that these motions were timely—thereby tolling the period for filing a notice of appeal, . . . Riney failed to file a timely notice of appeal. (In their opposition to these post-trial motions, AES pointed out that the motions were untimely). [Riney's] notice of appeal, when filed, was about three weeks late.

Id.

204. FED. R. CIV. P. 59(b); Advanced Estimating Sys., Inc. v. Riney, 130 F.3d at 997 ("Rule 59 of the Federal Rules of Civil Procedure provides that a party has ten days after the 'entry' of judgment to file his motion for a new trial.").

205. Advanced Estimating Sys., Inc. v. Riney, 77 F.3d 1322, 1323 (11th Cir. 1996), *appeal dismissed*, 130 F.3d 996 (11th Cir. 1997).

206. *Id.* at 1325; Advanced Estimating Sys., Inc. v. Riney, 130 F.3d at 997.

207. Advanced Estimating Sys., Inc. v. Riney, 130 F.3d at 997.

208. *Id.*

209. *See id.* at 999 (dismissing appeal).

210. *Id.* at 998 (citing Cavaliere v. Allstate Ins. Co., 996 F.2d 1111, 1115 (11th Cir. 1993)).

211. *Id.* (citing Committee v. Yost, 92 F.3d 814, 825 (9th Cir. 1996); Prizevoits v. Indiana Bell Tel. Co., 76 F.3d 132, 133 (7th Cir. 1996); Kyle v. Campbell Soup Co., 28 F.3d 928, 931-32 (9th Cir. 1994); Weinstock v. Cleary, Gottlieb, Steen & Hamilton, 16 F.3d 501, 503 (2d Cir. 1994)).

constitute excusable neglect such that a party is relieved of the consequences of failing to comply with a statutory deadline."[212] Even after *Pioneer*, "[t]he ancient legal maxim continues to apply: ignorance of fact may excuse; ignorance of law does not excuse."[213] "Nothing in *Pioneer* indicates otherwise," said the court, "and we believe that the law in this area remains as it was before *Pioneer*."[214]

The Sixth Circuit agrees that—at least as to an "attorney's misunderstanding of the plain language of a rule"—the law "remains as it was before *Pioneer*."[215] Such agreement was clearly shown in *Deym v. Von Fragstein*.[216] In *Deym*, the notice of appeal was late because of an apparent failure to recognize that the time to appeal runs from the entry of the final judgment.[217] The district court found this error to constitute excusable neglect because "(1) the delay caused no harm to [the winner-below]; (2) the delay was minimal and had almost no impact on the judicial proceedings; and (3) the circumstances surrounding the failure to file a timely notice were 'extreme.'"[218]

The Sixth Circuit disagreed: "The plain language of Rule 4(a)(1) states, unambiguously, that the notice of appeal must be filed 'within 30 days after the date of entry of the judgment or order appealed from.'"[219] Moreover, even after *Pioneer*, the law of the Sixth Circuit and of other jurisdictions remains that "misreading a rule or statute does not constitute excusable neglect."[220] Thus, the late-filer "cannot rely on *Pioneer* to excuse the mistake made here, because even the *Pioneer* opinion noted that 'inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable neglect."'"[221] Accordingly, even though the district court had found excusable neglect under the *Pioneer* factors,[222] the *Deym* court dismissed the appeal "for lack of jurisdiction based on a failure to file a timely notice of appeal."[223] Without

---

212. *Id.* (emphasis added).
213. *Id.* at 999.
214. *Id.* at 998.
215. *Id.*; *see* Deym v. Von Fragstein, No. 97-3127, 1997 WL 650933, at *2 (6th Cir. Oct. 16, 1997) (unpublished decision). The *Deym* court cited *Prizevoits v. Indiana Bell Telephone Co.*, for the proposition that "'[t]he 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.'" Deym v. Von Fragstein, 1997 WL 650933, at *2 (quoting Prizevoits v. Indiana Bell Tel. Co., 76 F.3d 132, 133 (7th Cir. 1996)).
216. Deym v. Von Fragstein, No. 97-3127, 1997 WL 650933, at *1 (6th Cir. Oct. 16, 1997).
217. *Id.* at *2.
218. *Id.*
219. *Id.* (quoting FED. R. APP. P. 4(a)(1)).
220. *Id.*
221. *Id.* (quoting Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 392 (1993)).
222. *Id.*
223. *Id.* at *3.

question, *Deym* suggests the Sixth Circuit's agreement that—notwithstanding *Pioneer*—mistakes or ignorance of law cannot be excusable neglect.

The Ninth Circuit has also held that mistakes or ignorance of law remain inexcusable.[224] In *Reynolds v. Wagner*,[225] the appeal was late because counsel mistakenly believed that a showing of good cause would warrant an extension under Rule 4(a)(5).[226] The district court held that appellant's neglect was excusable under the *Pioneer* standard[227] because the Rule 4(a)(5) motion was filed "only one business day after the normal time expiration, there [was] no prejudice to the other side, there [was] no effect on the judicial proceedings, there [was] no indication of bad faith, and the reason for the delay [was] not unreasonable."[228] Despite these findings, the Ninth Circuit dismissed for lack of jurisdiction.[229] The *Reynolds* court observed that "the Advisory Committee Notes and decisions construing . . . [Rule 4(a)(5)] could hardly be clearer."[230] If the motion is filed after the time expires, only excusable neglect—not mere good cause—can justify an extension.[231] Therefore, because the rule over which counsel had tripped was so very clear, "there [was] no basis for deviating from the general rule that a mistake of law does not constitute excusable neglect."[232]

To summarize: The opinions in *Phillips*, *Candela*, *Midwest Employers*, *Prizevoitz*, *Advanced Estimating Systems, Inc.*, *Deym*, and *Reynolds* are particular instances that, when viewed as a whole, demonstrate a pattern in the law. To wit, these seven opinions show that *Pioneer* did not abrogate the traditional rule that a mistake or ignorance of plain law does not constitute excusable neglect under Rule 4(a)(5).[233] Moreover, it must be remembered that *none* of these seven opinions merely affirmed a district court's finding that excusable neglect did not exist. None of these courts merely found the district court had acted within its discretion. Rather, each of these seven courts reversed the district court's finding. Each of these courts concluded that a finding of excusable neglect had been *outside* the district court's range of discretion. Therefore, the majority of

---

224. *See* Reynolds v. Wagner, Nos. 93-56629, 96-55303, 96-55304, 1997 WL 423012, at *1 (9th Cir. July 28, 1997) (unpublished decision).

225. Reynolds v. Wagner, Nos. 93-56629, 96-55303, 96-55304, 1997 WL 423012 (9th Cir. July 28, 1997) (unpublished decision).

226. *Id.* at *2.

227. *Id.* at *1.

228. *Id.* at *2.

229. *Id.* at *1.

230. *Id.* at *3.

231. *Id.*

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

233. *See supra* notes 169-232 and accompanying text.

circuits[234] now hold that—at least barring extraordinary circumstances—mistakes or ignorance of plain law cannot be excusable neglect under Rule 4(a)(5). More importantly, those circuits so hold notwithstanding *Pioneer*.[235]

V. EXPLORING *PIONEER*'S PARADOX: DISCUSSION

The circuits have accepted *Pioneer*'s prescription that the determination of whether excusable neglect has been shown must take "account of all relevant circumstances surrounding the party's omission."[236] But the same circuits—or at least a majority of them—have continued to hold that "'[t]he excusable neglect standard can never (or almost never) be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules.'"[237] We have, therefore, two contradictory principles, both of which appear to be true. Not unlike Abraham, we are faced with a paradox.[238] The question is how to deal with that paradox.

Abraham met his paradox with "the strength of the absurd."[239] We, however, are apparently limited to "human calculations," such as logic and law.[240] Logic dictates that the rule against excusing mistakes or ignorance of law, hereinafter the per se rule, either (a) *is* consistent with *Pioneer*, or (b) *is not* consistent with *Pioneer*. Law dictates that, if the per se rule is not consistent with *Pioneer*, then that rule is either (1) *improper*, as an unjustified deviation from the Supreme Court's command,[241] or (2) *proper*, as a justified deviation

---

234. This assertion is based on simple arithmetic: If there are 13 circuits—the First through the Eleventh, plus the Federal and D.C. Circuits—and seven of those circuits hold the same view, then that view can fairly be called the "majority view."

235. *See supra* notes 169-232 and accompanying text.

236. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 395 (1993); *see supra* notes 149-56 and accompanying text.

237. *See, e.g.*, Prizevoits v. Indiana Bell Tel. Co., 76 F.3d 132, 133 (7th Cir. 1996) (quoting Cosmopolitan Aviation Corp. v. New York State Dep't of Transp. (*In re* Cosmopolitan Aviation Corp.), 763 F.2d 507, 515 (2d Cir. 1985) (quoting McCormack v. Schindler (*In re* Orbitec Corp.), 520 F.2d 358, 362 (2d Cir. 1975))). *But see* Canfield v. Van Atta Buick/GMC Truck, Inc., 127 F.3d 248, 250 (2d Cir. 1997) (stating that "per se rules like the one in *Cosmopolitan Aviation* do not perdure after *Pioneer*"); *cf.* Midwest Employers Cas. Co. v. Williams, 161 F.3d 877, 892 (5th Cir. 1998) (leaving open the possibility that—under some rare circumstances—such mistake or ignorance could constitute excusable neglect).

238. *See supra* notes 29-32 and accompanying text.

239. *See* KIERKEGAARD, *supra* note 33, at 65.

240. *See id.*

241. "Federal district courts and circuit courts are," after all, "bound to adhere to the controlling decisions of the Supreme Court." Motorcity of Jacksonville, Ltd. v. Southeast Bank N.A., 120 F.3d 1140, 1143 (11th Cir. 1997); Jaffree v. Wallace, 705 F.2d 1526, 1532 (11th Cir. 1983). Accordingly, "departures from prior Supreme Court precedent should not normally be pioneered by circuit or district judges." Day v. Massachusetts Air Nat'l Guard, 167 F.3d 678, 683 (1st Cir. 1999).

from *Pioneer*.[242] This Article passes on the latter issues, and focuses instead on whether the per se rule can be reconciled with *Pioneer*.

As noted before, the narrow holding of *Pioneer* offers little to support or detract from the per se rule.[243] The *Pioneer* opinion does, however, contain some language that suggests support for such a rule: the *Pioneer* majority did say that "*ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect.*"[244] And, in the views of at least some courts of appeals, this language—along with the principle that clients must be held responsible for errors of their attorneys[245]—has been enough to reconcile *Pioneer* with the per se rule.[246]

The question that remains, however, is whether the per se rule can be reconciled with *Pioneer*'s multi-factor approach.[247] This author believes that the answer is yes: even when all relevant facts are considered—as was *Pioneer*'s prescription—sometimes one or more particular circumstances are so important as to preclude a finding of excusable neglect no matter what the other circumstances may be.[248] For example, Lawyer *X* has a latent disability that

---

242. *See* Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987) ("We are bound to follow a decision of the Supreme Court *unless we are powerfully convinced that the Court would overrule it at the first opportunity.*" (emphasis added)); Indianapolis Airport Auth. v. American Airlines, Inc., 733 F.2d 1262, 1272 (7th Cir. 1984) (noting "an intermediate federal appellate court may properly decline to follow a U.S. Supreme Court decision when convinced that the Court would overrule the decision if it had the opportunity to do so").

243. *See supra* note 163 and accompanying text.

244. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 392 (1993) (emphasis added).

245. *Id.* at 396-97.

246. *See* Phillips v. Merchant Ins. Group, Nos. 98-7908L, 98-7912, 1999 WL 278526, at *1 (2d Cir. May 4, 1999) (unpublished decision) (quoting *Pioneer*'s observation that "ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect"); Halicki v. Louisiana Casino Cruises, Inc., 151 F.3d 465, 469 (5th Cir. 1998) (same); Advanced Estimating Sys., Inc. v. Riney, 130 F.3d 996, 998 (11th Cir. 1997) (same); Deym v. Von Fragstein, Nos. 97-3097, 97-3127, 1997 WL 650933, at *2 (6th Cir. Oct. 16, 1997) (unpublished opinion) (same); Reynolds v. Wagner, Nos. 93-56629, 96-55303, 96-55304, 1997 WL 423012, at *2 (9th Cir. July 28, 1997) (unpublished decision) (same); Kyle v. Campbell Soup Co., 28 F.3d 928, 931 (9th Cir. 1994) (same).

247. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

248. Judge Posner makes a similar point in his book on the Clinton scandals. *See* RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 162 (1999). Posner suggests that one way to evaluate a person's character is to add "all the qualities that we value in a person [that] are fairly to be considered aspects of 'character'. . . and then . . . the bad qualities [should be] netted out to provide a summary assessment." *Id.* This sort of calculus is analogous to the *Pioneer* analysis in that both calculations begin with the assumption of taking all relevant factors into account. *See* Pioneer Inv. Servs. v.

causes him to confuse dates. As a result of that disability, Lawyer *X* fails to timely file his notice of appeal. Lawyer *X* then files a motion to extend the time to file. Lawyer *X* knows why he missed the deadline; yet, in support of his motion, Lawyer *X* certifies that a computer failure caused the late filing. Somehow, his lie is exposed.

Under these circumstances, one particular factor—the movant's lack of good faith—would require a finding that excusable neglect had not been shown. This finding would still be required even if: (1) the danger of prejudice to the other side was nil; (2) the length of the delay was negligible; (3) the delay would have no (short-run) impact on judicial proceedings; and, (4) the actual reason for the delay—the disability—cries out for mercy.[249] The movant's bad faith draws the balance so far away from a finding of excusable neglect that nothing else can save him. Restated, the movant's bad faith not only clearly outweighs any mitigating factors, but also dissuades us from doing any further equitable arithmetic.[250] Therefore, we can posit a *categorical* rule against excusing late filings when the would-be appellant lies to the court about the reason for the delay. And, we can rightly conclude that such a rule is consistent with *Pioneer*.[251]

A similar analysis squares the per se rule against excusing mistakes or ignorance of law with the *Pioneer* multi-factor analysis. In this case, however, we focus on two interrelated parts of the *Pioneer* analysis: the reason for the delay, and whether the reason for the delay was within the reasonable control of the movant. As for the latter issue, once it is established the mistake was that of the movant's lawyer, it cannot be argued the mistake was not within the reasonable control of the movant. This is true because of *Pioneer*'s explicit

---

Brunswick Assocs., 507 U.S. at 395. But Posner also observes that, when such a calculus is applied to a person's character, "[t]here are some crimes and immoralities so outrageous that they *not only* clearly outweigh the person's good qualities but dissuade us from doing the necessary moral arithmetic." POSNER, *supra*, at 161. The same can apply under the *Pioneer* calculus: some reasons for missing a deadline "not only clearly outweigh" the mitigating factors—that is, should persuade a district court *not* to find excusable neglect—"but dissuade us from doing the necessary [equitable] arithmetic"—that is, place a finding of excusable neglect beyond the district court's discretion. *Id.*

249. *See* Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 395.

250. POSNER, *supra* note 248, at 162; *see also supra* note 248 (drawing an analogy between Posner's calculus of character and the *Pioneer* analysis).

251. The author has found no reported opinion that *directly* supports this suggestion. Nonetheless, it is difficult to imagine any court finding excusable neglect where the attorney lies to the court. *See, e.g., In re* Gabell, 858 P.2d 404, 404-06 (N.M. 1993) (disbarring attorney for making false statements under oath). This is especially true given *Pioneer*'s emphatically-held position that clients cannot escape from the sins of their freely-chosen attorneys. *See* Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 396.

command that "clients must be held accountable for the acts and omissions of their attorneys."[252]

But it is the former issue—the reason, or cause for the delay—that tips the scales irretrievably away from a finding of excusable neglect. The arguments in support of this view are many; only a few are presented here. For convenience sake, we can arbitrarily organize these arguments as consequential arguments, duty-based arguments, and systemic arguments. Upon close inspection, however, these three categories are shown to be less than discrete.

We can use the term "consequential arguments" to refer to those arguments that focus on presumed results. For example, a consequential argument for punishing those who speed while driving is the presumed result of speeding, that is, the alleged increase in the risk of accidents.[253] Similarly, there are several consequential arguments for refusing to excuse an attorney's mistake or

---

252. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 396.

253. This example was chosen to show the limitations of consequential arguments. The actual impact of speeding on accident rates is not always entirely clear. For example, it may be that the reduction in highway fatalities during the 1970s had more to do with rising gas prices—and therefore reduced travel—than with the 55 mile per hour speed limit. The same may be suggested regarding the consequential arguments made here. Even if it is intuitively clear that *X* will result from *Y*, such causation does not always actually occur.

Thus, one may attack the consequential arguments employed in this Article because they (apparently) lack scientific support. However, at least two good reasons exist for making and accepting such arguments nonetheless. First, despite whatever concerns we may have about the separation of powers, the fact remains that our *courts* frequently *make rules*. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 47 (1990). As Judge Posner has argued, "consequences are never irrelevant in law." *Id.* at 148. So, when courts make rules, they ought to and often do consider the consequences of those rules. *See id.* But, the courts make such inquiries without the resources—including, inter alia, time—to undertake wide-scale scientific tests. *Id.* at 62. Moreover, courts must often make their predictive inquiries under circumstances in which a valid scientific test would not necessarily be ethical. For example, a court should not *test* the hypothesis that the tort theory of wrongful death deters the sale of exploding automobiles. *See id.* As a result, the first part of the answer is that courts *do* make consequential analyses without the benefit of *scientific* evidence. *See id.*

The second part of the answer is that courts do have *empirical* bases for their assertions about the possible consequences of rules, and those empirical bases are not unlike those that support the arguments made here. We expect judges to have lived among humans, to have observed how humans generally react to incentives, and to be able to judge how humans will react to the incentives created by rules. *See generally id.* at 70 (noting "the parallel between, on the one hand, the scientist's deduction of consequences from a scientific theory and attempt to discover those consequences in nature and, on the other hand, the judges comparison of the implications of a legal doctrine with social reality"). Such empirical bases are, admittedly, not purely scientific. But reliance upon such judgment is, apparently, an accepted part of our judicial system today. Accordingly, reliance upon non-scientific empirical observation should not be considered fatal to an argument directed to our modern judiciary.

ignorance of plain law.[254] For example, if a late filing can be excused on the difficult-to-verify basis that the lawyer was ignorant of the law, some lawyers may be tempted to falsely claim such ignorance.[255] Obviously, that sort of fraud

---

254. The consequential arguments presented here rely upon one or more of three, interrelated assumptions about human behavior. To wit, it is assumed that:

1. All individuals—including, of course, attorneys—are "rational maximizers of their satisfactions." POSNER, *supra* note 248, at 353. And, both monetary and nonmonetary "satisfactions enter into the individual's calculus of maximizing." *Id.* at 354.
2. No individual action is "motivated by the public interest as such." *Id.* Rather, individuals—including lawyers—will pursue activities that benefit the public interest *only to the extent that* such activities maximize the individual's *own* satisfactions. *See id.*
3. Because persons rationally maximize their satisfactions, ***incentives matter***: human choice is influenced in a predictable way by changes in economic—and legal—incentives. *See* JAMES D. GWARTNEY ET AL., ESSENTIALS OF ECONOMICS 8 (1982). As Professor Gwartney and his colleagues explain:

> This guidepost to clear economic thinking might be called the basic postulate of all economics. As the personal benefits from choosing an option increase, other things constant, a human decision-maker will be more likely to choose the option. In contrast, as the costs associated with [an option] increase, a person will be less likely to choose the option. Applying this basic economic postulate to a group of individuals suggests that, as an option is made more attractive, more people will choose it. In contrast, as the cost of a selection to the members of the group increases, fewer of them will make this selection.

Id.

255. This disturbing argument has been made by more than one court. *See* Midwest Employers Cas. Co. v. Williams, 161 F.3d 877, 879-82 (5th Cir. 1998) (observing that, if mistakes or ignorance of law were excusable, "'almost every appellant's lawyer would plead his own inability to understand the law when he fails to comply with a deadline'" (quoting Halicki v. Louisiana Casino Cruises, Inc., 151 F.3d 465, 467-70 (5th Cir. 1998))); Advanced Estimating Sys., Inc. v. Riney, 130 F.3d 996, 998 (11th Cir. 1997).

However disturbing this argument may be, it does square with the idea of the lawyer as rational maximizer of personal satisfaction who reacts to incentives in the system. *See supra* note 254 (discussing economic assumptions of behavior). Consider, for example, a lawyer who misses the deadline simply because his schedule was horribly busy and he failed to pay attention to his calendar. If these circumstances are presented to the court, a finding of excusable neglect would be highly unlikely. Even the *Pioneer* Court gave "little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date." Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 398 (1993). Thus, if the lawyer confesses the true reason for the missed deadline, it is highly likely that the appeal will be dismissed. For the lawyer, this option carries a high likelihood of several negative consequences, for example, forfeiture of his client's appeal; the loss of the client as a client; a malpractice suit by the former client; and disapproval from his colleagues, among whom may be his employer. In economic terms, then, the option of revealing the truth carries extremely high costs and little hope for any benefit—save the peace of mind of having told the truth.

cannot be acceptable. Thus, any regime that creates both an incentive and an opportunity to defraud the court should be considered suspect.

Yet, even if we assume lawyers will not defraud the courts, negative consequences can still be expected to flow from any rule that allows district courts to excuse ignorance of law. To begin with, when compared with a per se rule, any other rule will decrease the likelihood of punishment—that is, dismissal of the appeal—for such mistake or ignorance.[256] Restated, when compared with the per se rule, any other rule reduces the incentive for lawyers to know the law;[257] and, we assume that when the incentive to know the law decreases, so too will actual knowledge.[258]

Any reduction in lawyers' knowledge of the law creates, in turn, the potential for a number of other negative consequences. For example, a decrease in lawyers' knowledge of law—and especially the *procedural* law—may reduce

---

The option of lying, however, may be perceived to carry both low costs and substantial benefits. First, the costs would be the sum of (a) the effort necessary to make up a plausible story as to how a mistake of law caused the missed deadline; (b) the very low probability of being caught in the lie times the high cost of being caught; and (c) whatever moral guilt may be felt, as mitigated by the justification of zealous advocacy for the client. Depending upon the individual lawyer, then, the costs of lying may be extremely low. Moreover, the potential benefits of lying would be large, that is, equal to the benefit of *avoiding* the prodigious costs of the truth. Thus, when compared with the truth, the lie carries both lower costs and superior benefits. Therefore, if telling the difficult-to-disprove lie that the lawyer had an "empty mind" will save the client's appeal, many lawyers will be willing to do so. *See* Midwest Employers Cas. Co. v. Williams, 161 F.3d at 879-82.

256. Although this point is presumed to be self-evident, it can be explained: the dismissal of the appeal is a punishment for the lawyer because it carries negative consequences. *See supra* note 255. If the lawyer misses the deadline because of a mistake or ignorance of law, the probability of receiving such punishment is 1.0 under the per se rule. Restated, if the lawyer misses the deadline because of a mistake or ignorance of law, the lawyer is always punished under the per se rule. Under any other rule—any non-per se rule—the probability of punishment is somewhat less than 1.0; this is because *sometimes* the lawyer will not be punished for missing the deadline because of a mistake or ignorance of law. Thus, because the probability of punishment under the per se rule is 1.0 and the probability of punishment under any non-per se rule is less than 1.0, the probability of punishment under the per se rule is always greater than the probability of punishment under any other rule.

257. *See supra* notes 254-56.

258. This flows simply from the assumption that lawyers react to incentives. As the benefits of any option—here, study of the law—decrease, it becomes less likely that lawyers will choose this option. *See supra* notes 254-56. This is particularly true given the utility-rich alternatives foregone by using one's time and energy to study the law, for example, reading a magazine, talking to a client, spending time with friends or family. And, because the law—and especially procedural law—is neither intuitive nor static, knowledge of the law will tend to decrease without ongoing study. This is apparently why many courts require lawyers to attend continuing legal education courses.

the efficiency of the court system.[259] Similarly, if knowledge of law declines among legal advocates, so too will the propensity of our adversarial system to produce results consistent with law.[260]

A decline in lawyers' knowledge can be expected to create negative consequences outside the courthouse as well. For one thing, as lawyers' knowledge of the law decreases, so too will the public's respect for the Bar: when a learned profession is no longer learned, the public rightly views that so-called profession as just another lucrative business.[261] And, as respect for lawyers declines, so too will respect for the law.

Moreover, much of the public's knowledge of our law is derivative of the Bar's knowledge: the laity depend on the Bar to instruct them about the law.[262] Thus, as knowledge among lawyers decreases, so too might knowledge among the laity. Furthermore, as knowledge of the law among the people decreases, so too might the peoples' propensity to follow the law.[263] Similarly, as the peoples'

---

259. This is, of course, evident to most practitioners: If the lawyers do not know the rules, it is less likely that the case will proceed smoothly. But consider also the Rule 4(a)(5) cases discussed in this Article. *See supra* text accompanying notes 169-233. In each of those cases—the courts' resources were diverted to what would otherwise have been a non-issue, that is, whether the court had jurisdiction—and that diversion was made necessary by the lawyers' mistake or ignorance of law. Of course, it can be argued that where a case is dismissed because of a late filing, the court is actually able to process the case more efficiently than if the merits had been reached. This observation merely shows that a strict construction of Rule 4(a)(5) enhances both *efficiency* and *justice*: by disposing of late-filed cases in an expedient fashion—that is, by dismissal—the courts of appeals are freed to devote more resources—including time—to other cases, cases in which the appellants did protect their rights by filing on time.

260. This point is perhaps best shown through a (not unlikely) hypothetical: Plaintiff has moved the court for *X* result. Statute *Y* prohibits *X* result. Neither Plaintiff nor his lawyer are aware of Statute *Y*. Defendant does not want *X* result, but neither the Defendant nor his lawyer are aware of Statute *Y*. So, Statute *Y* is not brought to the court's attention; moreover, the court feels no obligation to do legal research on behalf of Defendant. *See* Molasky v. Principal Mut. Life Ins. Co., 149 F.3d 881, 885 (8th Cir. 1998). In the end, the court orders *X* result, even though that result is inconsistent with Statute *Y*.

261. *In re* Horizon/CMS Healthcare Corp. Sec. Litig., 3 F. Supp. 2d 1208, 1210 (D.N.M. 1998).

262. For example, in a plea hearing, "the lawyer must provide the defendant with an understanding of the law in relation to the facts of his case." Stano v. Dugger, 921 F.2d 1125, 1183 (11th Cir. 1991) (Tjoflat, J., dissenting).

263. At least one court has expressed a similar concern:

> At perhaps the deepest level, it can be said that law itself is a teleological endeavor, and that its purpose is to guide people as they go about their daily activities. As such, *the law should be clear and understandable, for how can people follow its dictates if it is not?* If you take away that clarity to a sufficient extent, it is proper to question whether you are dealing with law at all, as opposed to raw power.

United States v. General Dynamics Corp., 644 F. Supp. 1497, 1500 (C.D. Cal. 1986) (emphasis added), *rev'd*, 828 F.2d 1356 (1987).

knowledge of law decreases, so too might their respect for the law as an institution recede.

To summarize, if lawyers are allowed to be excused for not knowing the law, then a number of negative consequences can be expected to result. At least some of these consequences—which range from frauds upon the court to a reduction in the peoples' respect for and propensity to obey the law—are fairly considered dangers to the rule of law. Moreover, it is self-evident that our governments must defend the rule of law, which is, after all, "*essential* to the freedom and wealth that distinguish the United States from most other nations."[264] Indeed, without the rule of law, our modern heterogeneous society would face the unacceptable choice of either abandoning our freedoms or surrendering to anarchy.[265] Thus, because any regime that excuses lawyers for their ignorance or mistakes of plain law creates unnecessary dangers to the rule of law, no such regime should be accepted.[266] Therefore, by definition, the per se rule is the only acceptable alternative.

---

264. POSNER, *supra* note 248, at 155 (emphasis added).

265. *Cf. id.* (explaining that the law is the glue that holds the heterogeneous subparts together).

266. We are, after all, "a Nation dedicated to the rule of law." Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992). One could argue, however, that because *Pioneer*'s inquiry is an *equitable* inquiry, that inquiry should consider only the particulars of the case at bar. According to this way of thinking, macro-scale considerations—for example, the rule of law in general—should have no bearing. The most obvious answer, of course, is that the "equitable" language of *Pioneer* has no bearing for Rule 4(a)(5) decisions. Such "equitable" language was, in this author's view, artifactual; such language derives solely from the accident that *Pioneer* itself was a Chapter 11 Bankruptcy case. *See supra* notes 121-48 and accompanying text.

However, this answer may not suffice. The courts of appeal that have adopted *Pioneer* as precedent for Rule 4(a)(5) decisions have also tended to at least mouth the word "equitable." *See, e.g.*, Horton v. West, No. 97-36061, 1999 WL 159682, at *1 (9th Cir. Mar. 18, 1999) (unpublished opinion) ("A determination of whether neglect is 'excusable' is an equitable determination to be made upon consideration of all relevant circumstances concerning the late filing."); Midwest Employers Cas. Co. v. Williams, 161 F.3d 877, 879 (5th Cir. 1998) (quoting *Pioneer*'s statement that the determination of excusable neglect is "at bottom an equitable one"). So, barring additional data from the Supreme Court, it seems that discussions of Rule 4(a)(5) should address *Pioneer*'s equitable language.

The question then becomes what the *Pioneer* court meant by the term "equitable." Did it mean that the inquiry must be limited to the circumstances of the litigants? The answer would seem to be "No." As the Supreme Court has noted, "equity" is an "instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944). More explicitly, "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." United States v. First Nat'l City Bank, 379 U.S. 378, 383 (1965). So, indeed, decisions involving equity—including decisions under *Pioneer*'s equitable analysis—do go beyond the private interests involved and do consider the public interest. Indeed, "when federal courts contemplate equitable relief," those courts "must also take account of the public interest." United

Of course, these consequential arguments seem to threaten that if we excuse mistakes or ignorance of law, then the rule of law will dissolve today and anarchy will officially take over tomorrow. In other words, these arguments may seem a bit extreme. After all, excusing a few mistakes will not set the Constitution on fire. But, when we are making or evaluating rules of law, we must consider the universal. As Justice Cardozo reminds us, "Our jurisprudence has held fast to Kant's categorical imperative, [a]ct on a maxim which thou canst will to be law universal."[267] Therefore, when we consider a rule that allows lawyers to miss deadlines and then be excused by claiming mistake or ignorance of law, it is fair to ask: "What if we excused—or might excuse—*every* instance of this behavior?" From this perspective, the results posited above become reasonable and, therefore, disturbing. Accordingly, our society should reject any regime under which a lawyer's mistakes or ignorance of plain law can be called excusable.

As mentioned above, however, the consequential arguments are not the only arguments for refusing to excuse such errors. There are also what may be called "duty-based arguments," arguments that focus on duties and breaches thereof. For example, we punish those who drive in excess of the speed limit regardless of whether their speeding actually harms or even increases the risk of harm. Why do we do so? We do so because speeding violates a duty, the duty to obey the law.

In comparison with consequential arguments for punishing mistakes or ignorance of law, the duty-based arguments require little explanation. In short, lawyers are obligated to know and understand the law that impacts their clients.[268] If a lawyer does not know about or understand the law in an area and yet he practices in that area nonetheless, he breaches his duty.[269] Thus, because a lawyer's failure to know and understand the relevant law constitutes a breach of duty owed to society, it follows that the law is justified in punishing such a breach. Indeed,—and this slips somewhat back toward the consequential—failure to punish such a breach would tend to undermine the rule of law. Therefore, because a lawyer's ignorance of relevant procedural law constitutes a breach of the lawyer's duty to society, our society should not endorse any regime

---

States Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 26 (1994). The rule of law is a matter of American public interest. *See* POSNER, *supra* note 248, at 155. Therefore, consequences that undermine the rule of law must be considered as part of *Pioneer*'s equitable analysis.

267. CARDOZO, *supra* note 138, at 139 (citation and quotations omitted).

268. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(1) (1980); *see also* Pyramid Controls Inc. v. Siemens Indus. Automation, Inc., 172 F.3d 516, 519-20 (7th Cir. 1999) ("All lawyers are presumed to know the law, and if they don't know a specific area of law well, they are obligated to consult with other lawyers who do.").

269. *See* MODEL CODE OF PROFESSIONAL REPSONSIBILITY DR 6-101(A)(1).

under which such ignorance can be excused. Accordingly, the only acceptable choice is a per se rule against excusing such ignorance.

In addition to consequential and duty-based arguments, a third sort of argument—not entirely separable from the first two—also suggests that ignorance of law should not constitute excusable neglect. This third sort might be called systemic arguments. Such arguments show a proposition to be unacceptable because it violates an assumption central to an entire *system*.[270]

For example, consider the sticky trilemma with which our system of law is faced: on one hand, the law values fairness in the sense of not punishing those who violate rules of which they do not or cannot know. For this reason, the law is often lenient toward those with significant mental handicaps.[271] On the other hand, however, "one can never observe another creature's mind,"[272] let alone catalog its contents. As such, we can never know with certainty whether any given violator knew even his own zip code, let alone the prohibitions of a federal statute.[273] Yet, as the third prong of the trilemma, our system of law would utterly fail if we could not punish an offender simply because we cannot verify that the offender knew of the relevant law.[274]

But anarchy has been avoided; our system of law does continue to work. Our system works because of a fiction—the assumption that persons have or always can have knowledge of the law—and the natural consequence of that fiction—the rule that persons cannot hide behind ignorance of the law.[275] But even if these principles are based in fiction, the rule of law as we understand it

---

270. An example: Mr. P suggests that a federal court cannot declare an executive officer's actions to be unlawful. Mr. P's suggestion is contrary to the established power of courts to review acts of the executive, a principle central to our system of law. Therefore, the systemic argument shows Mr. P's suggestion to be unacceptable.

271. One of many examples is the extension of statutes of limitations for persons with mental disabilities. *See* IOWA CODE § 614.8 (1) (1999).

272. POSNER, *supra* note 248, at 165.

273. *See* Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833) (noting that the "common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally" results in part from the "extreme difficulty of ascertaining what is, *bona fide*, the interpretation of the party").

274. *See id.* (noting that the rule that ignorance of the law will not excuse is in part based on "the extreme danger of allowing such excuses to be set up for illegal acts, to the detriment of the public").

275. Another way to formulate this idea is to assume not actual knowledge, but rather, constructive knowledge: the law is knowable, and so people are held to knowing, regardless of whether they actually know. Both formulations are, of course, somewhat fictional. It seems unlikely that all persons could ever know all the law, even if they did hire lawyers to help them. Therefore, which formulation is chosen—actual knowledge or constructive knowledge—does not really matter. The same result obtains: ignorance is not excusable.

could not exist without them.[276] Therefore, any legal standard that allows ignorance of law to constitute an excuse should not be accepted. Thus, again, the per se rule is the only acceptable choice.

To summarize, if the cause for missing a deadline is mistake or ignorance of plain law by an attorney, strong reasons—in the form of consequential arguments, a duty-based argument, and a systemic argument—support a rule against excusing such error. Indeed, all of these arguments suggest that the rule of law—that cherished cause and effect of our legal system—would be unnecessarily endangered by a standard under which such error can be excused. Accordingly, any such standard is unacceptable.

We return, then, to the *Pioneer* analysis. We recall the *Pioneer* majority set forth several circumstances to be considered when analyzing claims of excusable neglect.[277] Specifically, *Pioneer* mentioned the following as relevant circumstances:

(1) "[T]he danger of prejudice";[278]

(2) "[T]he length of the delay and its potential impact on judicial proceedings";[279]

(3) "[T]he reason for the delay, including whether it was within the reasonable control of the movant";[280] and

(4) "[W]hether the movant acted in good faith."[281]

As we saw in the case of the lawyer who lied to the court, however, sometimes one or more particular circumstance can be decisive.[282] In that example, we saw that the negative weight attached to a single circumstance—there, the movant's lack of good faith—can be of such magnitude so as to preclude a finding of excusable neglect.[283]

A similar situation arises when the reason for missing the deadline is an attorney's mistake or ignorance of law. In that case, we focus on one set of circumstances, that is, "the reason for the delay, including whether it was within

---

276. The phrase "as we understand it" is an important qualifier. There are *imaginable* regimes under which the rule of law can exist without the fiction that persons know the law. But such a regime would seem to require either the ability to read minds or a disregard for the unfairness of enforcing laws upon those not on notice of those laws. Our system, however, is happily committed to the idea of fairness. Therefore, in order to preserve the rule of law, our system must also be committed to the idea of constructive knowledge of the law.

277. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. 380, 395 (1993).

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *See supra* text accompanying notes 247-51.

283. *See supra* text accompanying notes 247-51.

the reasonable control of the movant."[284] As we have seen,[285] where the reason for the delay is an attorney's mistake or ignorance of law, any regime that excuses the delay will create substantial dangers to the rule of law.[286] Those dangers would *not* be mitigated or necessitated by *Pioneer*'s other factors, such as the absence of prejudice to the appellee, good faith on the part of the appellant, or a short delay in filing.[287] Nor should such "factors" be allowed to outweigh the rule of law. Therefore, even when all circumstances are considered—as was *Pioneer*'s dictate[288]—excusable neglect should never be found where the reason for the delay is an attorney's mistake or ignorance of law. Restated, even under the *Pioneer* analysis, there should exist a per se rule against excusing mistakes or ignorance of law.[289]

It could be suggested, however, that this argument offers more of a *compromise* than a *synthesis*.[290] In other words, it might be suggested any per se rule compromises the *Pioneer* analysis by taking away from the flexible, equitable nature of the multi-factor approach. And, indeed, flexibility *is* compromised by any per se rule: a rule cannot remain perfectly flexible if the district court will sometimes have only one choice. As a result, it may be suggested that, at the end of the day, the per se rule does stray from *Pioneer*'s analysis.

This suggestion relies on the false assumption that *Pioneer*'s flexibility is absolute. Indeed, the *Pioneer* Court refuted that assumption by affirming the Sixth Circuit's *reversal* of the district court's finding that excusable neglect had not been shown.[291] In other words, *Pioneer*'s holding establishes that some circumstances require as a matter of law that excusable neglect *must* be found.[292] Such a limitation on the district court's discretion cannot be reconciled with the "absolute flexibility" thesis. Moreover, once *that* limitation on the district court's discretion is admitted, should not the converse also be admitted? If the facts from which *Pioneer* arose required the district court to find excusable neglect, could another fact pattern require the district court not to find excusable neglect? The most persuasive answer is "Yes." The verity of that answer is particularly clear under Rule 4(a)(5), a rule which—by its nature—should stack

---

284. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 395.
285. *See supra* text accompanying notes 252-76.
286. *See supra* text accompanying notes 252-76.
287. *Compare with supra* text accompanying notes 247-51.
288. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 395.
289. *See supra* notes 169-232 and accompanying text.
290. Compromise is used here to mean a settlement of differences in which one or both sides makes concessions. Synthesis, however, is used to mean a combination of separate elements *in which the elements remain intact, making no new concessions.*
291. Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 398-99.
292. *Id.* at 399.

the odds against a finding of excusable neglect.[293] Therefore, at least with regard to Rule 4(a)(5), it is fair to conclude that—even in light of *Pioneer*—the district court exceeds its discretion by excusing a lawyer's mistake or ignorance of plain law.

VI. CONCLUSION

The *Pioneer* decision—and the circuits' treatment of the decision—have combined to revolutionize the law's view of excusable neglect. Most importantly, *Pioneer*'s revolution swept away the old regime under which excusable neglect could *only* be found under extraordinarily sympathetic circumstances. But the *Pioneer* revolution did not condemn the principle that some extraordinarily unsympathetic circumstances still preclude a finding of excusable neglect. Indeed, the *Pioneer* approach itself suggests that—*at least for purposes of Rule 4(a)(5)*—where an attorney misses a deadline because of his own mistake or ignorance of plain law, excusable neglect cannot be shown.[294] Thus, *Pioneer* can fairly be read as *approving*—not abrogating—the ancient maxim that ignorance of law does not excuse.[295]

---

293. *See supra* text accompanying notes 121-42.

294. *See supra* text accompanying notes 247-89. Importantly, this conclusion may be correct even if all the arguments offered in support of it are faulty. *See generally* Pioneer Inv. Servs. v. Brunswick Assocs., 507 U.S. at 380 (affirming the Sixth Circuit as to result, but disagreeing in part with the circuit court's reasoning). By comparison, we observe that in logic the conclusion to an argument can be true even if the premises of the argument are false or the method of reasoning is faulty. For example, consider the argument that:

a. If a man enjoys cigars, he must have always been faithful to his wife.

b. Bill Clinton has always been faithful to his wife.

Therefore, Bill Clinton enjoys cigars.

Here, neither premise rings true. The reasoning—if *X* then *Y*; given *Y*; therefore *X*—is faulty: it commits the fallacy of "affirming the consequent"; yet the conclusion is, apparently, true. *See* POSNER, *supra* note 248, at 80-81 (criticizing the Starr Report for its excessive sexual content; citing, as an example, the discussion of certain activities involving cigars).

We see, therefore, that correct conclusions can be defended by reasoning that is both faulty in form and dependent upon questionable premises. Similarly, it may also be true that the conclusion advanced by this Article—an attorney's ignorance or mistake of law cannot be excusable neglect—is correct even if the arguments advanced here are entirely wrong.

295. Advanced Estimating Sys., Inc. v. Riney, 130 F.3d 996, 999 (11th Cir. 1997) ("The ancient legal maxim continues to apply: ignorance of fact may excuse; ignorance of law does not excuse.").

A last-minute coda. On the very eve of this Article's publication, the United States Court of Appeals for the Eighth Circuit announced its decision in *Lowry v. McDonnell Douglas Corp.*, Nos. 99-1750, 99-1805, 2000 WL 489758 (8th Cir. Apr. 27, 2000). The *Lowry* appeal arose from the grant of summary judgment to Defendant McDonnell Douglas Corp. *Id.* at *1. The Eighth Circuit dismissed plaintiff's appeal. *Id.* at *7. As one of two alternative grounds for the dismissal, the *Lowry* court concluded that plaintiff had not shown excusable neglect under Rule 4(a)(5). *Id.* at *6.

Although the plaintiff was not entirely clear as to her reasons for filing late, the *Lowry* court appears to have read plaintiff's excuse as either (a) an inability to apply the thirty-day period to a calendar, or (b) a mistake regarding the rules governing how intervening weekends impact calculations of the thirty-day period. *Id.* Regardless, the court concluded that plaintiff's late-filing arose from "garden-variety attorney inattention." *Id.* Further, the court stated:

> Although neglect no longer needs to be beyond the party's control to be deemed excusable, "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer* [*Inv. Servs. v. Brunswick Assocs.*], 507 U.S. [380,] 392 [(1993)]. Notwithstanding the "flexible" *Pioneer* standard, experienced counsel's misapplication of clear and unambiguous procedural rules cannot excuse his failure to file a timely notice of appeal. "Here the rule is crystal clear, the error egregious, the excuses so thin as to leave the lapse not only unexcused but inexplicable." *Prizevoits* [*v. Indiana Bell Tel. Co.*], 76 F.3d [132,] 134 [7th Cir. 1996)]. If we were to apply the excusable neglect standard to require that we deem Lowry's neglect excusable in this case, it is hard to fathom the kind of neglect that we should *not* deem excusable. *See id.*; *see also Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997) ("That the four-part *Pioneer* standard for determining excusable neglect applies does not change existing law that a lawyer's misunderstanding of clear law cannot constitute excusable neglect. If it could, almost every appellant's lawyer would plead his own inability to understand the law when he fails to comply with a deadline. We do not believe that the [Supreme] Court intended a practice that would require courts to be that lenient about disobedience to plain law.").

Id. (emphasis in original).

Accordingly, the *Lowry* court held that the district court had abused its discretion in finding excusable neglect under Rule 4(a)(5). *Id.* Thus, the *Lowry* opinion demonstrates the Eighth Circuit's approval of a per se rule against excusing ignorance or mistakes of plain law. Therefore, when considered together with the other circuit opinions discussed in this Article, it now appears that eight of the thirteen circuits approve the per se rule. *See supra* notes 169-232 and accompanying text.