

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

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**SUPREME COURT, U.S.**  
**WASHINGTON, D.C. 20543**

CAPTION: PIONEER INVESTMENT SERVICES COMPANY,  
Petitioner v. BRUNSWICK ASSOCIATES LIMITED  
PARTNERSHIP, ET AL.

CASE NO: 91-1695

PLACE: Washington, D.C.

DATE: Monday, November 30, 1992

PAGES: 1- 45

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   PIONEER INVESTMENT SERVICES           :

4   COMPANY,                               :

5                   Petitioner               :

6                   v.                       :   No. 91-1695

7   BRUNSWICK ASSOCIATES LIMITED       :

8   PARTNERSHIP, ET AL.               :

9   - - - - - X

10                                       Washington, D.C.

11                                       Monday, November 30, 1992

12                   The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 1:38 p.m.

15 APPEARANCES:

16 CRAIG J. DONALDSON, ESQ., Morristown, New Jersey; on  
17 behalf of the Petitioner.

18 JOHN A. LUCAS, ESQ., Knoxville, Tennessee; on behalf of  
19 the Respondents.

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1 PROCEEDINGS

2 (1:38 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in number 91-1695, Pioneer Investment Services  
5 Company v. Brunswick Associates Limited Partnership.

6 Mr. Donaldson, you may proceed when you're  
7 ready.

8 ORAL ARGUMENT OF CRAIG J. DONALDSON

9 ON BEHALF OF THE PETITIONER

10 MR. DONALDSON: Mr. Chief Justice, and may it  
11 please the Court:

12 This case comes to the Court from a decision of  
13 the United States Court of Appeals for the Sixth Circuit,  
14 which allowed the respondents who were claimants in  
15 Pioneer's chapter 11 case to file their proofs of claim  
16 out of time based upon a finding by the Sixth Circuit that  
17 their failure to file within the originally prescribed  
18 deadline was the result of excusable neglect.

19 To reach that result, the Sixth Circuit adopted  
20 a test that was first enunciated in the Ninth Circuit in  
21 the case of *In re Dix* and has been referred to frequently  
22 as the liberal interpretation of excusable neglect  
23 focusing on five factors set forth in that opinion.

24 The Sixth Circuit also, to reach the result that  
25 it did, had to consider an equitable factor which was, in

1 its opinion, there was no prejudice to the debtor to allow  
2 these proofs of claim to be filed under the excusable  
3 neglect standard.

4 And finally, what it had to do, contrary to the  
5 decision of this Court in Link v. the Wabash Railroad  
6 decided some 30 years ago, said that it was inappropriate  
7 for the courts below to punish the respondents for the  
8 neglect of their counsel.

9 We suggest to the Court that this opinion  
10 clearly is wrong on all three counts and must be reversed.

11 The first error is in the adoption of the test  
12 itself. Petitioner submits to the Court that the test  
13 adopted by the Sixth Circuit and followed by the Ninth  
14 does violence to and runs plainly contrary to the plain  
15 language of rule 9006(b)(1) itself, which states that  
16 where, as here, a motion for an extension of time was  
17 filed after the deadline has expired, the court has to  
18 find that the failure to act was the result of excusable  
19 neglect.

20 As the Eleventh Circuit stated, and we contend  
21 properly so, in the South Atlantic case, the words failure  
22 to act in the plain language of the rule limit the focus  
23 of the inquiry to the actions or inactions of the movant  
24 and to the reasons for their failure to act within the  
25 time provided, and that they do not permit, as the Ninth

1 Circuit has done and the Sixth Circuit has done in this  
2 case, consideration of factors other than why didn't they  
3 do what they were supposed to do within the time they were  
4 supposed to do it, and what were the reasons for that.

5 The concept that there is no prejudice to the  
6 debtor we submit under the authorities, not only the  
7 Eleventh Circuit, but in the decisions of the Second,  
8 Third, Fourth, Fifth, and Eleventh Circuits that we have  
9 cited in our briefs, all hold uniformly that there is no  
10 room for consideration of so-called equitable factors in  
11 determining whether the failure to act under rule 9006 is  
12 a result of excusable neglect.

13 The bankruptcy code quite clearly in section  
14 1111(a) dictates who must in a chapter 11 case file a  
15 proof of claim, and it says that if your claim is listed  
16 as disputed, contingent, or unliquidated, you must file a  
17 proof of claim. Bankruptcy rule 3003 supplementing the  
18 code section goes on to say also that if your claim is not  
19 listed or you do not agree with the amount listed on the  
20 debtor's schedule, you must file a proof of claim. And  
21 the facts here clearly show that three of the respondents  
22 were listed as disputed and unliquidated, and one was not  
23 listed at all.

24 We submit to the Court that the congressional  
25 intent that underlies section 1111 in the bankruptcy rules

1 is to clearly place an affirmative duty on creditors who  
2 fall within the definition of the code and rules to file  
3 their proofs of claim if they want to be able to  
4 participate in the debtor's chapter 11 reorganization in  
5 three very important respects: one, to have their claim  
6 allowed; two, to have a right to vote on the plan of  
7 reorganization; and three, and probably most importantly,  
8 to receive a distribution from the debtor's estate.

9 And as the decisions of the other courts of  
10 appeals that we have cited in our brief recognize, there  
11 was a congressional intent underlying this section  
12 requiring these creditors to file these claims to promote  
13 certainty and finality in chapter 11 proceedings. And  
14 these courts, contrary to the Sixth Circuit in this case  
15 and the Ninth Circuit in the Dix case, say that this  
16 congressional intent precludes courts from finding  
17 exceptions based on equitable considerations or equitable  
18 factors.

19 QUESTION: Well, Mr. Donaldson, I guess this  
20 case may turn on what we mean by excusable neglect under  
21 the statute. Would you agree?

22 MR. DONALDSON: I would agree wholeheartedly,  
23 Justice O'Connor.

24 QUESTION: And what's our test for excusable  
25 neglect? What does that mean, do you suppose?



1           MR. DONALDSON: Excusable neglect, as I'm sure  
2     the Court knows, is nowhere defined in the bankruptcy code  
3     or the rules and, for that matter, is nowhere defined in  
4     the similar rule 6 of the Federal Rules. The Eleventh  
5     Circuit in the South Atlantic case defined excusable  
6     neglect as follows: the failure to timely perform a duty  
7     that was due to circumstances which were beyond the  
8     reasonable control of the person whose duty it was to  
9     perform.

10           QUESTION: Well, why is that definition any  
11    improvement on the statutory language? It doesn't seem to  
12    say anything more than excusable neglect.

13           MR. DONALDSON: I think it is an improvement,  
14    Mr. Chief Justice, for this reason. When the statute  
15    talks about excusable neglect in this definition which  
16    says -- the essential part being beyond the reasonable  
17    control, granted it is somewhat nebulous, but I think it  
18    clearly implies that when you come into court saying  
19    excusable neglect, you have to come in and present  
20    circumstances that are unique or extraordinary, that are  
21    beyond --

22           QUESTION: Doesn't the provision of the -- what  
23    does the Federal -- provision in the Federal Rules that  
24    talks about default judgments say? Doesn't it use the  
25    term excusable neglect?

1           MR. DONALDSON: If Your Honor please, rule 55(c)  
2 that talks about the entry of default only is for cause  
3 shown. Rule 60(b), where you would come in to ask to set  
4 aside a default judgment entered by the court, talks about  
5 excusable neglect.

6           QUESTION: Why do we need a definition of  
7 excusable neglect? Why not leave it largely to -- don't  
8 you think Congress may have intended to leave it largely  
9 to the discretion of the initial court, the bankruptcy  
10 court?

11          MR. DONALDSON: I think the answer is yes, Mr.  
12 Chief Justice. If I may expound, though.

13          I think Congress, by using the term excusable  
14 neglect, certainly left it to the courts to exercise their  
15 discretion. However, as this Court said not too many  
16 years ago in United States v. Boyle, what elements  
17 constitute excusable neglect is a question of law that  
18 clearly is unsettled, and we are asking the Court here  
19 today in this case to settle it.

20          QUESTION: Well, don't you think it's rather  
21 strange to talk about events beyond somebody's control  
22 when you're trying to define excusable neglect? I mean,  
23 neglect is always -- is never beyond your control, is it?  
24 That's just sort of -- negligence. Is that ever beyond  
25 your control?

1 MR. DONALDSON: Justice White, the answer to  
2 your question --

3 QUESTION: I would think --

4 MR. DONALDSON: -- is no, as phrased, because  
5 neglect, obviously, means that something has to be within  
6 your control and you failed to do it. But the test, as  
7 enunciated by the Eleventh Circuit and followed by the  
8 substantial --

9 QUESTION: I would think the Eleventh Circuit  
10 definition would just -- how could you ever prove that  
11 neglect was beyond your control?

12 MR. DONALDSON: Well, if Your Honor please,  
13 they're not saying it's beyond your control. They qualify  
14 it by saying it's beyond your reasonable control. They  
15 don't say it's -- they don't say you have to come in and  
16 prove something was totally beyond your control before you  
17 show excusable neglect.

18 QUESTION: That still doesn't sound like a  
19 disregard or carelessness of any kind, and that's the  
20 meaning of neglect, is it not? It seems to me that the  
21 Eleventh Circuit reads the neglect word out of the  
22 statutory phrase, out of the rule.

23 MR. DONALDSON: I don't believe so. They --

24 QUESTION: Because if you say reasonable, well,  
25 then it's not carelessness.

1 MR. DONALDSON: Well, they say beyond the  
2 reasonable control, and I think what they mean by that is  
3 -- and I think the case authority supports it -- is that  
4 mere ordinary, garden variety neglect of counsel, simple  
5 inadvertence if you will, is not going to suffice to let  
6 someone be relieved from a deadline that is imposed by  
7 other rules of the court, that that discretion that's  
8 vested in the court has to be circumscribed by something  
9 that shows that the reason you failed to act is due to  
10 something unique or extraordinary.

11 QUESTION: Well, but you just say it isn't  
12 excusable. You just -- what's wrong with that? And let  
13 the courts decide whether it's excusable or not.

14 MR. DONALDSON: I think that -- I think  
15 that's --

16 QUESTION: That's not enough? Isn't that  
17 enough?

18 MR. DONALDSON: I think that's proper, Justice  
19 White, but I think someone -- and I respectfully suggest  
20 it falls to the duty of this Court -- is to tell the  
21 courts below how they determine whether it's going to be  
22 excusable.

23 QUESTION: Well, did the -- the court below  
24 didn't even ever get around to determining whether the  
25 attorney's error was excusable or not, did it? I mean,



1       they just -- it seemed to me they said that the client,  
2       the creditor, wasn't neglectful, it was his lawyer.

3               MR. DONALDSON: That's correct.

4               QUESTION: And yet, the question should have  
5       been whether the neglect of the lawyer was excusable.

6               MR. DONALDSON: That's correct.

7               QUESTION: Is that one of the three errors they  
8       made?

9               MR. DONALDSON: Yes, Justice White. I suggest  
10      it --

11              QUESTION: You've only talked about one so far.

12              MR. DONALDSON: That is the other error, and  
13      you're absolutely correct. They said, well, the client  
14      didn't do anything wrong, and we're not going to punish  
15      the client because the lawyer was neglectful. And that is  
16      the other part of our argument.

17              Going back to 1962 and the decision of this case  
18      in Link v. the Wabash Railroad, this Court clearly laid  
19      down the proposition that a party cannot escape the  
20      consequences of the acts and omissions of his attorney,  
21      and that is precisely what the Sixth Circuit allowed these  
22      respondents --

23              QUESTION: Well, it would be hard -- I suppose  
24      it would be -- have been hard for the court of appeals to  
25      get to the issue of whether this is excusable neglect when

1 the attorney just up -- right out says there's no hurry.

2 MR. DONALDSON: I think --

3 QUESTION: That was just wrong.

4 MR. DONALDSON: I think what they said was --

5 QUESTION: Maybe he ought to -- he should know  
6 the law.

7 MR. DONALDSON: Well, I would think any attorney  
8 is certainly charged with knowledge of the rules and the  
9 statute and --

10 QUESTION: It certainly hadn't been changed  
11 lately, had it?

12 MR. DONALDSON: No, not since -- in substance as  
13 far as who was supposed to file their claims and within  
14 what time, it had been the same since the enactment in  
15 1978. Although the rules of procedure had changed by  
16 number, by substance, they really hadn't. So, really --

17 QUESTION: Mr. Donaldson, I don't know why you  
18 concede. It seems -- maybe I misunderstood, but you  
19 appear to concede that neglect always has an element of  
20 negligence or blameworthiness about it. Why do you  
21 concede that? I don't think that it does invariably.

22 MR. DONALDSON: I think by --

23 QUESTION: You can talk about a neglected house.  
24 Maybe the person doesn't care about or doesn't -- the  
25 person doesn't want to spend any more money on it. It

1 doesn't mean that there's any blame involved. It's just a  
2 failure to do something that could be done is neglect. He  
3 neglected to do it.

4 MR. DONALDSON: I agree.

5 QUESTION: He failed to do it. It's the same as  
6 failed. That's one meaning of it. It can have the other  
7 meaning, but it doesn't invariably have that meaning of  
8 negligence or blameworthiness, does it?

9 MR. DONALDSON: No. I think --

10 QUESTION: Well, but you didn't say that in  
11 response to the questions. If that's your position, I  
12 wish you would say it.

13 MR. DONALDSON: No. I agree, Justice Scalia.  
14 An accepted definition of neglect certainly is very simply  
15 the failure to do an act.

16 QUESTION: He just neglected his legal training.  
17 That's all.

18 QUESTION: You just neglected to say that.

19 (Laughter.)

20 MR. DONALDSON: I failed to do it. That is  
21 correct.

22 QUESTION: Mr. Donaldson --

23 QUESTION: I was using it there in the second  
24 sense, Mr. Donaldson.

25 QUESTION: May I ask this question, Mr.

1 Donaldson? Having had the benefit of that suggestion, can  
2 you give us an example of excusable neglect as either you  
3 or Justice Scalia would interpret it?

4 MR. DONALDSON: What would be acceptable --

5 QUESTION: What would -- when should a judge  
6 ever excuse neglect either the way you define it or the  
7 way Justice Scalia does it?

8 MR. DONALDSON: If -- one that comes right away  
9 to mind, Justice Stevens, is if the attorney or the  
10 counsel never received notice of the bar date.

11 QUESTION: And you'd say that was neglect in  
12 that -- and you think that's the way in which they meant  
13 the neglect.

14 MR. DONALDSON: I think that's a unique or  
15 extraordinary -- I don't go by so much the word neglect as  
16 I do the word excusable.

17 QUESTION: What if you had a tickler system set  
18 up in your office that worked regularly where you were  
19 given a note the day before something was due that it's  
20 due tomorrow, and it just failed on this one occasion?  
21 Would that be an example of, A, neglect and, B, of  
22 excusable neglect?

23 MR. DONALDSON: No, Your Honor, it would not.

24 QUESTION: Which -- it would be -- it would not  
25 be neglect or it would not be excusable?



1 MR. DONALDSON: It would be neglect, but it  
2 would not be excusable because --

3 QUESTION: That's what happened in this case.

4 MR. DONALDSON: Well, Justice Stevens, I would  
5 say based on the record here, Mr. Richards went far beyond  
6 the grounds of neglect or concurrent findings by the  
7 bankruptcy court and the district court that not only was  
8 he negligent, he was totally indifferent to the bar date.

9 QUESTION: But why in the case, the hypothetical  
10 I put to you is that neglect not excusable?

11 MR. DONALDSON: The failure in your office of  
12 the tickler system?

13 QUESTION: Yes.

14 MR. DONALDSON: I think because the cases hold  
15 and the way the statute is construed, that mere neglect of  
16 counsel or counsel's staff will not rise to the dignity of  
17 being excusable.

18 QUESTION: Well, but by -- mere -- but by  
19 hypothesis the statute says some neglect is excusable, and  
20 to say that mere neglect is never excusable simply defies  
21 the statutory language.

22 MR. DONALDSON: Well, I think where that gets  
23 perilously close to, Mr. Chief Justice, is this. Maybe  
24 something like if you did have a tickler system and you've  
25 taken all the steps you could conceivably take to make

1 sure you don't fall through the trap of missing a deadline  
2 and that system malfunctions, but that leads to these  
3 problems. Then the next question might be, well,  
4 shouldn't you have had a backup system, and I think you  
5 get into a series of what if's that engulf the rule.

6 QUESTION: Well, isn't that an argument for  
7 confiding a great deal of discretion as Congress may have  
8 intended to the district courts or the bankruptcy courts  
9 here? We don't want thousands of little annotations in  
10 law books saying this is or is not excusable neglect.

11 MR. DONALDSON: Right. I think the Congress  
12 clearly has conferred that discretion on the lower courts,  
13 but it also attempted to, and I think does, circumscribe  
14 it. It's not an unbridled discretion that any time  
15 someone runs into court and says -- well, particularly  
16 like this case, runs into court and says, well, it's my  
17 lawyer's fault, or I forgot to read something, or a lawyer  
18 comes in and said I forgot to read something. If that  
19 were permitted to be the standard of excusable neglect, I  
20 dare say it would do away with the efficacy of any  
21 deadline set under any rules of procedure.

22 QUESTION: Well, would you be satisfied to win  
23 this case on the ground that the court of appeals didn't  
24 blame the client, they didn't stick the client with his  
25 lawyer's neglect, and therefore did not decide whether the

1 lawyer was excusably neglectful or not?

2 MR. DONALDSON: To answer your question, Justice  
3 White, I certainly would be happy to win the case on  
4 that --

5 QUESTION: But you would rather win it on some  
6 other ground.

7 MR. DONALDSON: Well, I don't know that I'd  
8 rather win it on some other ground, but for the sake of  
9 the system and the efficient administration of justice  
10 throughout the Federal system at least, I would like to  
11 win it on a ground where --

12 QUESTION: You want to confine -- you want to  
13 put some definition into excusable neglect.

14 MR. DONALDSON: I would like this Court to adopt  
15 as bright a line as possible as to what factors are to be  
16 considered or what the appropriate definition is of  
17 excusable neglect because --

18 QUESTION: Do I understand that your position is  
19 that the factors to be included can only be factors that  
20 have to do with the action or the state of mind of the  
21 person who is allegedly excusably neglectful?

22 MR. DONALDSON: Yes, sir.

23 QUESTION: So that you cannot take into account,  
24 for example, how much harm has been caused by the action.

25 MR. DONALDSON: Correct.

1           QUESTION: He's either excusably neglectful or  
2 not, and if he is, it doesn't matter if it has caused a  
3 whole lot of harm. It's still excusable neglect.

4           MR. DONALDSON: That's correct. I think it has  
5 to be determined solely by the actions of the moving party  
6 and the reasons for those actions without consideration of  
7 any other, what you might call equitable factors, such as  
8 prejudice or lack thereof.

9           QUESTION: May I go a step or so? Whether it's  
10 a \$100 million windfall or a 10 cent windfall is totally  
11 irrelevant. That's one.

12           Also, I take it it's totally irrelevant whether  
13 it's a 10-minute delay or a 3-year delay.

14           MR. DONALDSON: Yes, sir. I think it has to be.

15           QUESTION: How do you get around the fact that  
16 the statute reads that the court may allow the late filing  
17 in a case of excusable neglect, which seems to suggest  
18 that there may be cases of excusable neglect in which it  
19 will and other cases of excusable neglect in which it will  
20 not allow the late filing? And isn't it at that point  
21 that it's appropriate for the court to look at the  
22 consequences to third parties, whether they're getting  
23 hurt or whether they're not getting hurt?

24           MR. DONALDSON: I think, to answer your  
25 question, no, and if I may expound.



1           The statute -- the last sentence begins with the  
2 failure to act. I think the plain language of the words  
3 failure to act directs the focus solely and exclusively to  
4 what the movant did or didn't do and the reasons for that.

5           QUESTION: Well, it may -- that may direct the  
6 court's attention to the reasons for the failure to act in  
7 determining what is excusable, but it certainly does not  
8 exclude from the court's consideration the consequences to  
9 third parties in determining whether a -- an excusable  
10 neglect should, in fact, be a basis for precluding him and  
11 making -- precluding the party from making a late filing.

12           MR. DONALDSON: But I think it does for this  
13 reason. If a party could come in and, in fact, establish  
14 that there was excusable neglect, however determined, even  
15 if that would result in the most extreme prejudice to the  
16 debtor, I think the court has to exercise its discretion  
17 and let that creditor file its claim regardless of the  
18 consequences if --

19           QUESTION: Yes, but that's no discretion at all.  
20 I mean, if that were going to be -- if that were the  
21 intent of Congress, why didn't Congress simply make it  
22 mandatory that if the neglect was found to be excusable, a  
23 late filing would be permitted?

24           MR. DONALDSON: They could have done that, but  
25 they did not.

1                   QUESTION: Well, I know, and it seems to me  
2                   there's some significance in the fact that they did not.  
3                   They left it a discretionary judgment or they left some  
4                   further act of discretion even when the neglect was found  
5                   to be excusable. And yet, in the hypothesis that you  
6                   give, it seems to me that the court has no discretion left  
7                   at all.

8                   MR. DONALDSON: I would think if the party comes  
9                   in and proves that the neglect -- that their failure to  
10                  act was excusable neglect, that they have brought  
11                  themselves within rule 9006(b)(1), and that the court  
12                  would have to exercise its discretion to let them in.

13                  QUESTION: But, no, they have brought themselves  
14                  within the rule, but what the rule says, as Justice Souter  
15                  points out, is that the court may permit the act to be  
16                  done. That's the rule. The court may.

17                  I don't know why you fight this. It's a  
18                  discretion that's all in your favor. It's not a  
19                  discretion that could possibly hurt the interests of your  
20                  client. It's a discretion not to allow the excusable  
21                  neglect even though you have authority to do so, where in  
22                  Justice Stevens' example, for instance, the consequences  
23                  are enormous of allowing it to be filed late.

24                  QUESTION: Don't you think there's room in the  
25                  words excusable neglect to mean that, well, there has been

1 neglect in this case, but because of other considerations,  
2 we're going to excuse it? This is saying that excusable  
3 doesn't necessarily define neglect. It's just a -- it  
4 defines -- it tells the court, no matter what the neglect  
5 is, you can excuse it based on other considerations.

6 MR. DONALDSON: But I don't think that's what  
7 the rule intends. I think what the rule --

8 QUESTION: But there's room just in reading the  
9 language to -- for that, isn't there?

10 MR. DONALDSON: Well, perhaps there is after you  
11 first determine whether the failure to act was the result  
12 of excusable neglect.

13 QUESTION: No. You just say there's neglect.  
14 Sure, it's neglect, but that isn't the whole story.

15 MR. DONALDSON: I think it may be.

16 QUESTION: May I ask you? How much is the  
17 windfall in this case?

18 MR. DONALDSON: To answer your question  
19 directly, Your Honor, none.

20 QUESTION: How much is -- how much do the  
21 creditors claim the windfall was?

22 MR. DONALDSON: In excess of \$6 million.

23 QUESTION: \$6 million.

24 MR. DONALDSON: Yes, sir.

25 QUESTION: And there's no prejudice whatsoever

1 to the State in allowing the claim other than the fact you  
2 have to defend the claim, which you otherwise wouldn't  
3 have to defend.

4 MR. DONALDSON: Well, I think there is. What  
5 has been overlooked is the prejudice the other creditors  
6 who timely did file whose payout period would be extended  
7 by -- from 5 years to 10. So there's definitely prejudice  
8 to the other creditors.

9 QUESTION: Why would it be extended for 5 years?

10 MR. DONALDSON: That's what the plan provides,  
11 Justice Stevens, is if these claims were ever ultimately  
12 allowed to pay out, the unsecured creditors --

13 QUESTION: Oh, I see, because there's much more  
14 money to pay.

15 MR. DONALDSON: Yes, sir.

16 Mr. Chief Justice, I would like to reserve the  
17 remaining time for rebuttal.

18 QUESTION: Very well, Mr. Donaldson.

19 Mr. Lucas, we'll hear from you.

20 ORAL ARGUMENT OF JOHN A. LUCAS

21 ON BEHALF OF THE RESPONDENTS

22 MR. LUCAS: Mr. Chief Justice, and may it please  
23 the Court:

24 I would like to focus at the outset on what I  
25 believe is the key issue and -- which the Court -- many



1 members of the Court have been addressing in their  
2 questions to my adversary, and that is the fundamental  
3 difference between the petitioners and the respondents in  
4 this case is that the petitioners advocate, in essence, a  
5 nondiscretionary, strict, in their words, inflexible rule  
6 to be applied only in extraordinary circumstances. That  
7 is not an exercise of discretion.

8 The respondents, on the other hand, submit that  
9 this is and should be a discretionary standard in which  
10 the lower courts are permitted flexibility in the exercise  
11 of their discretion as guided perhaps by certain  
12 guideposts set by this Court.

13 QUESTION: Well, in this case, Mr. Lucas, the  
14 bankruptcy court ruled against your client, and then the  
15 district court in the exercise of its discretion ruled  
16 against it, didn't it?

17 MR. LUCAS: The bankruptcy court did, Your  
18 Honor, and we believe that the bankruptcy court, in  
19 effect, abused its discretion because of the way that it  
20 weighed the factors.

21 QUESTION: Well, do you think that is something  
22 that should be reviewed on a legal basis every time a  
23 bankruptcy court reaches a conclusion?

24 MR. LUCAS: Your Honor, I think that the review  
25 on an abuse of discretion standard will be a very rare

1 review. When litigants and attorneys know that the  
2 bankruptcy court is exercising its discretion and is  
3 operating within a fairly broad framework, then the  
4 chances of cases being appealed for abuse of discretion  
5 are very rare. And, in fact, we believe that it will cut  
6 down on this collateral litigation rather than promote it.

7 But if the Court attempts to draw a bright line  
8 rule, a rule -- a bright line that I submit does not exist  
9 and cannot exist, but if the Court were to attempt that,  
10 that would increase the collateral litigation.

11 QUESTION: But the line, I take it, is bright  
12 enough so that there would be an abuse of discretion in  
13 this case if the bankruptcy court ruled against your  
14 client.

15 MR. LUCAS: I believe there was an abuse of  
16 discretion in this case, Your Honor, and that's one of the  
17 points of our appeal is that the bankruptcy court erred in  
18 the way it weighed these factors because the way it  
19 weighed them -- and I'll come to this in a moment, but it  
20 weighed them in a way that inevitably would find against  
21 clients like mine who moved expeditiously to correct their  
22 error, to correct their neglect and, in effect, weighed  
23 these factors in a way that put undue emphasis and put  
24 sole emphasis on this beyond reasonable control test that  
25 the bankruptcy court had accepted in the first instance

1 and which was continually urged by petitioners.

2 Your Honor, let me add --

3 QUESTION: I understand one of your arguments to  
4 be that excusable neglect cannot consist of circumstance  
5 -- exclusively of circumstances reasonably beyond the  
6 control of the party for the reason that that would not be  
7 neglect because there would not be any negligence or blame  
8 attachable, if it were circumstances beyond the control of  
9 the party. Isn't that one of the arguments you make?

10 MR. LUCAS: That is correct, Justice Scalia.

11 QUESTION: Am I to understand then that where  
12 you are negligent or blameworthy, but you have some  
13 excuse, you are in better shape for purposes of this rule  
14 than if you're not blameworthy at all?

15 MR. LUCAS: No, Your Honor, because --

16 QUESTION: What do you do with a person where  
17 the circumstances are beyond his control? If it doesn't  
18 come within the meaning of 906(b)(1), what do you do in  
19 that situation?

20 MR. LUCAS: Your Honor, I think that that is  
21 covered in other rules. For example, one of the examples  
22 frequently given, not one that my opponent gave, but it's  
23 when the courthouse for some reason is just physically  
24 inaccessible. A practitioner in San Francisco and there's  
25 an earthquake and he cannot get to the courthouse. It's

1 beyond his reasonable control. That's the type of example  
2 that some lower courts have given. That's covered in the  
3 same rule. In rule 9006(a), it provides that if the  
4 courthouse is inaccessible, then it will be extended under  
5 subsection (a).

6 QUESTION: That's the only thing? That's the  
7 only thing? His car is engulfed by a flood on the way to  
8 the court?

9 MR. LUCAS: No, Your Honor --

10 QUESTION: That isn't covered by 906(a), is it?

11 MR. LUCAS: 9006(a) covers where the courthouse  
12 is physically -- is inaccessible.

13 QUESTION: That's just one small example of  
14 absolute -- circumstances that absolutely prevent it.  
15 There are so many others I can think of, and you say  
16 that's not covered by (b).

17 MR. LUCAS: No, Your Honor. I believe that  
18 there are other ways of covering. I believe that under,  
19 for example, section 105 of the bankruptcy code, which is  
20 a broad grant of equitable powers, that the court would  
21 have the power to grant extensions such as Your Honor just  
22 suggested in your question.

23 There's also constitutional ramifications here.  
24 For example, one of the contexts that this situation  
25 arises in is creditors who never received notice of the



1 bankruptcy, consequently never filed a proof of claim,  
2 never moved for an extension of time because they weren't  
3 aware of it. And there's a well-developed body of case  
4 law that says you cannot deprive those creditors of their  
5 property right without due process, meaning that they have  
6 to get notice.

7 QUESTION: That's another single instance, but  
8 why don't you just cover my one instance of the car being  
9 swept away on the way to the courthouse. What do you say  
10 covers that?

11 MR. LUCAS: Your Honor, I would say that either  
12 the -- either section 105 of the bankruptcy code --

13 QUESTION: What does that say?

14 MR. LUCAS: Your Honor, that's a section that  
15 essentially grants the court inherent equitable powers,  
16 makes the bankruptcy court a court of equity. And it has  
17 been the subject of some case law in this Court and in the  
18 lower courts which says, well, that can't be used in  
19 derogation of specific provisions.

20 But I think the section 105 could be used in  
21 this instance to fill in a gap if that were a gap. It  
22 also might come under the doctrine of equitable tolling.

23 QUESTION: Are you defending entirely the court  
24 of appeals opinion?

25 MR. LUCAS: Your Honor, we would articulate the

1 rule slightly differently.

2 QUESTION: Well, let me ask you specifically.  
3 Do you think the court of appeals said the client  
4 shouldn't be blamed for the negligence of his or its  
5 lawyer?

6 MR. LUCAS: Your Honor, in this situation I  
7 believe the court of appeals did say that under the  
8 circumstances, it would be unfair to penalize the client.

9 QUESTION: So, they didn't really inquire  
10 whether the attorney's negligence was excusable.

11 MR. LUCAS: Well, I believe that they did  
12 ultimately because they were addressing the question at  
13 the outset of excusable neglect.

14 We're not trying to overturn Link v. Wabash. We  
15 accept that for purposes of this argument as good law.

16 QUESTION: Do you think the court of appeals  
17 accepted it as good law?

18 MR. LUCAS: I believe it did, Your Honor,  
19 because the question is not whether or not we're going to  
20 -- whether or not the client is chargeable with the acts  
21 or omissions of attorney, it's what are the consequences  
22 of that. And Link says that the client, having chosen  
23 attorney -- having chosen an attorney, is bound by the  
24 acts of his attorney and, in the words of the court, that  
25 he cannot avoid the consequences of having chosen his own

1 attorney. And the question here is what should those  
2 consequences be.

3 QUESTION: Well, you can't imagine more severe  
4 consequences than in Link when the plaintiff's complaint  
5 was dismissed.

6 MR. LUCAS: That's correct, Your Honor, but  
7 here's an important point about Link. Link supports our  
8 position, Mr. Chief Justice, and that is because you will  
9 recall that in Link this Court affirmed the exercise of  
10 discretion by the trial court. The trial court had  
11 dismissed a case for the plaintiff's attorney's failure to  
12 appear at a pretrial conference, and this Court gave the  
13 trial court discretion and said it could do that based  
14 upon all the facts and circumstances in the record which  
15 were known to the trial court, and that this Court would  
16 grant the district courts that discretion.

17 QUESTION: And here the bankruptcy court denied  
18 your motion. The district court denied it, but the court  
19 of appeals didn't say that those courts had any  
20 discretion.

21 MR. LUCAS: Well, they did both deny, but let me  
22 jump, if I may, to the last point of my argument, which is  
23 to why the bankruptcy court abused its discretion. In the  
24 respondent's favor, the bankruptcy court found that there  
25 was no prejudice to the debtor or to other creditors.

1                   And Mr. Donaldson was asked a moment ago by  
2 Justice Scalia, well, why does he fight this discretionary  
3 rule. The reason that the petitioner fights the  
4 discretionary rule is they know that if the discretion is  
5 weighed properly, that the respondents' claims should be  
6 filed because there was no prejudice to anyone. The  
7 bankruptcy court so found, and it has been affirmed by the  
8 district court, not the subject of appeal. No adverse  
9 impact on judicial administration, no bad faith.

10                   And the bankruptcy court said -- curiously they  
11 said but early in the case, like here, and where there's a  
12 short delay, like here, those factors will seldom, if  
13 ever, be present.

14                   QUESTION: So, it wouldn't make any difference  
15 whether the attorney's error would subject him to a  
16 malpractice suit or not?

17                   MR. LUCAS: I don't think that makes a  
18 difference, Justice White. But --

19                   QUESTION: So, you're not really talking about  
20 whether it was just a human error in the sense that almost  
21 anybody would make it.

22                   MR. LUCAS: It was a human error. We concede it  
23 was neglect, but the way the bankruptcy court weighed  
24 these factors, it said that early in the case they will  
25 hardly ever be present where the delay like here is short.



1 And so, they said -- the bankruptcy court said, therefore,  
2 I'm going to look at whether or not it was within their  
3 reasonable control and focus on that.

4 So, early in the case where creditors, such as  
5 my client, is diligent, realizes their mistake, takes  
6 actions promptly to cure it, they're penalized the way the  
7 bankruptcy court weighed the factors because he says,  
8 well, I won't consider those because it's too early in the  
9 case. They won't be present.

10 But he created a catch-22 because late in the  
11 case those factors will almost always be present. There's  
12 a much greater risk of prejudice, impact on judicial  
13 administration, bad faith, and the like late in the case.

14 QUESTION: That's an argument certainly why the  
15 bankruptcy court was wrong in exercising its discretion in  
16 this case, but it -- do you support the view taken by the  
17 Sixth Circuit, as Justice White reads its opinion, as I  
18 do, that whatever the consequences -- whatever the neglect  
19 of the attorney, it should not be visited on the client?

20 MR. LUCAS: Your Honor, I don't think --

21 QUESTION: Can you answer it yes or no?

22 MR. LUCAS: I don't support it the way Your  
23 Honor just articulated it. If Your Honor meant to say  
24 must the sins of the attorney always be visited upon the  
25 client, then I believe that the answer is no. I believe

1 that the courts in some circumstances have some  
2 discretion. There's attorney sins and there's client  
3 sins. An example is rule 11. There's -- there are some  
4 instances in rule 11 where the courts say we're going to  
5 visit this sin upon the attorney because it's an  
6 attorney-type error. Other times it's appropriate to  
7 penalize the client. So, Link doesn't purport to overrule  
8 that sort of distinction.

9 But in this case, I say that we are not  
10 attempting to overrule Link, and to the extent that the  
11 Sixth Circuit decision relied upon Link, we think it can  
12 be affirmed on other grounds because we say in this case  
13 we acknowledge that there was neglect, and we acknowledge  
14 that that neglect is imputable to the respondents.

15 QUESTION: So, then if the Sixth Circuit said  
16 otherwise, you don't find it necessary to uphold that part  
17 of the Sixth Circuit --

18 MR. LUCAS: That is correct, Your Honor. That  
19 is correct, but I still --

20 QUESTION: So, you can look to other factors.

21 MR. LUCAS: That is correct because I still say  
22 that begs the question. Now that the respondents are  
23 charged with their client's neglect, the rule then  
24 inquires should we excuse that neglect.

25 I think it's appropriate at this point to -- I'd

1     like to refer to a case -- an opinion that Justice Scalia  
2     wrote for the majority in 1988, *Pierce v. Underwood*, and  
3     in that case, Your Honor may recall that the question  
4     before the Court was whether or not the position of the  
5     United States was substantially justified for purposes of  
6     an award of attorney's fees.

7             And Justice Scalia, writing for the majority,  
8     said that the Court was going to eschew what Justice  
9     Scalia and the Court termed a rigorously scientific  
10    approach and said because of the large number of possible  
11    situations in which the phrase might arise, that it was  
12    inappropriate to draw a set of narrow guidelines, that  
13    this was simply an area in which the court -- the lower  
14    courts had to have a substantial amount of discretion.  
15    And the Court also said that it would not choose to  
16    substitute a different formula for the formula  
17    substantially justified which had been chosen by Congress.

18            We think that that holding is applicable to this  
19    case also because what the petitioner is seeking to do,  
20    Your Honors, is to substitute new words for the words that  
21    exist in the rule. They want the rule to read that an  
22    extension of time may be granted where the failure to act  
23    was due to circumstances beyond the reasonable control of  
24    the moving party, and that's simply not what the rule  
25    says.

1           The rule grants on its face the trial court's  
2   discretion. It says that the trial court, in its  
3   discretion, may extend the time.

4           QUESTION: Suppose you say it goes beyond  
5   circumstances entirely beyond the reasonable control and  
6   includes some other factors, all of which, however, have  
7   to do with the subjective actions of the individual and  
8   does not include such extrinsic elements as how much  
9   hardship is produced to the other party. You'd have a  
10   whole lot of discretion still within the meaning of  
11   excusable so long as it's limited to factors affecting the  
12   subjective actions of the individual.

13           And then you would have additional discretion at  
14   the back end because even when the court finds excusable  
15   neglect, it need not -- it may, as the rule says, but it  
16   need not use that. And once again, that would be up to  
17   its discretion.

18           MR. LUCAS: That is correct, Justice Scalia, but  
19   there's nothing in the rule that dictates that approach.  
20   There is simply nothing in the rule that says that the  
21   only focus shall be on the actions of the moving party or  
22   the party who has failed to act.

23           And, in fact, I think it comports not only with  
24   the face of the rule, but just with our everyday  
25   experience when we inquire if a person has transgressed,



1 whether it's neglect, an act, or omission, but if a person  
2 has failed to act or if they've transgressed in some way  
3 and we then visit the question of should we excuse their  
4 transgression, should we excuse their failure to act, what  
5 is a perfectly logical inquiry? What harm have they  
6 caused?

7 QUESTION: But that isn't quite what the statute  
8 says. The last clause says where the failure to act was  
9 the result of excusable neglect. It seems to me that does  
10 tie it down rather closely to the acts of the person who  
11 should have acted.

12 MR. LUCAS: But it's where the failure to act is  
13 simply a descriptive trigger, if you will, for describing  
14 what has happened. Remember -- and this is extremely  
15 important -- that rule 9006 is a rule of general  
16 application. We're describing all sorts of omissions  
17 here. This is not a rule that deals just with bankruptcy  
18 proofs of claim. Like its counterpart in the Federal  
19 civil rules, Federal rule 6, this deals with obtaining an  
20 extension of time under -- for virtually any filing  
21 required to be made in the context of a civil suit or any  
22 filing in a bankruptcy case. So the phrase, where the  
23 failure to act, is simply a description that triggers the  
24 rule.

25 QUESTION: Does the word excusable have some

1 notion of looking into the motives and the subjective  
2 inclinations of the actor? I mean, I wouldn't consider it  
3 excusable neglect if you violate the rule but you didn't  
4 cause any harm. I mean, could the court say, well, it's  
5 excusable neglect because even though he's out of time,  
6 what's the harm. It's no big deal. He's a week late.  
7 Nobody is going to be harmed. I'll just extend it. It's  
8 excusable neglect because it's harmless. Is that  
9 excusable neglect?

10 MR. LUCAS: Yes, I believe it is. I believe it  
11 may be a proper factor to weigh, Justice Scalia, not the  
12 only factor, but I think whether or not there is harm is a  
13 factor that the court should weigh.

14 QUESTION: It's not an intentional failure to  
15 file it on time. He just said I'm going to be a week  
16 late, and the court said no harm done.

17 MR. LUCAS: I misunderstood the question then,  
18 Your Honor. If it's intentional, then the element of good  
19 faith comes in and good faith might well be decisive if  
20 it's intentional.

21 But the point is that the petitioner's test  
22 fails to allow any of these things to be weighed. We say  
23 that they should weigh the prejudice to other parties,  
24 other creditors, prejudice to the court essentially in the  
25 impact on judicial administration, good faith.

1           There's a fourth element that I would suggest  
2   that would go into the calculus properly which is not  
3   covered in our brief, and that is what is the nature of  
4   the deadline missed and what is the impact on the moving  
5   party. Keeping in mind that this rule applies, as I said,  
6   to virtually any filing, under the Federal rules, it  
7   applies to answers, it applies to discovery responses, it  
8   applies to briefs, it applies to proofs of claim, it  
9   applies to notices of appeal.

10           And the way you weigh these factors, and  
11   particularly the good faith factor, might vary from case  
12   to case, but that's what discretion is all about. And  
13   that's the type of discretion that the Court allowed the  
14   trial courts in *Pierce v. Underwood*, and we submit that  
15   that discretion is appropriate here because on the face of  
16   the rule it says that the court may in its discretion.

17           Your Honor, there's another point that I would  
18   like to make about the source of this beyond reasonable  
19   control test because that test, obviously, is not one that  
20   appears on the face of the rules or the bankruptcy code.  
21   It's not in the plain language of the rule. Where do we  
22   find it?

23           The petitioner finds that -- and this is the  
24   linchpin of their argument because it appears in the very  
25   first section of the argument portion of their brief, and

1 the rest of their argument flows from the need for  
2 finality. And they say, well, there's a need for finality  
3 that was articulated by the lower courts, and they cite to  
4 a Second Circuit opinion in a case called Hoos v. Dynamics  
5 Corporation. And they cite this need for finality there.

6 And the reason that's so important to the  
7 petitioner is that without this need for finality that  
8 they find in the bankruptcy code, an overriding need in  
9 their view, you really can't get to the beyond reasonable  
10 control language because it's just not in the rules. But  
11 in the Hoos v. Dynamics Corporation, the court did discuss  
12 the need for finality, but -- and perhaps it was an  
13 overriding or the most important need there, but the  
14 circumstances were entirely different than they are today.

15 In that case, it was decided under the old  
16 Bankruptcy Act, and in that case creditors in a chapter 11  
17 case had until virtually the end of the bankruptcy process  
18 in which to file their proofs of claim. Proofs of claim  
19 had to be filed by confirmation of the plan, not before.  
20 That, as the Court knows, is virtually the last step in  
21 the process.

22 In Hoos, the creditors were actually attempting  
23 to file their claims after the plan had already been  
24 confirmed. So, of course, there was a need for finality.  
25 There's always a need -- a greater need for finality at



1 the end of the case, but the petitioners seek to  
2 extrapolate from that and say, well, in Hoos there was a  
3 need for finality at the end of the case. Therefore,  
4 there's a need for finality here at the beginning of the  
5 case.

6 Obviously, it just doesn't follow, and without  
7 that supposed need for finality, the overriding need for  
8 finality, they simply can't get to this beyond reasonable  
9 control test because that's the need that has driven every  
10 court of appeal that has decided and articulated this  
11 beyond reasonable control test.

12 QUESTION: Mr. Lucas, straighten me out on some  
13 facts. Has this plan been confirmed?

14 MR. LUCAS: Yes, Your Honor, it has.

15 QUESTION: And do I understand that the  
16 unsecured creditors will be paid off 100 cents on the  
17 dollar?

18 MR. LUCAS: That is correct, Justice Blackmun.

19 QUESTION: Do you have any comments about that  
20 as far as your clients are concerned?

21 MR. LUCAS: Your Honor, it illustrates the  
22 windfall to the debtor, to the petitioner, if this type of  
23 procedural defect is allowed to essentially deprive my  
24 clients of their right to file the claim. And, of course,  
25 once the claim is filed, it is prima facie evidence of the

1 validity of the claim. So, we do believe that for  
2 purposes of this discussion, the claim has to be accepted  
3 as a valid one, and therefore, there is a \$6.9 million  
4 windfall to the debtor because that's the amount of  
5 money --

6 QUESTION: There are that many assets.

7 MR. LUCAS: It was I believe a \$55 million asset  
8 case, Your Honor, and it's a 100 percent payment plan.  
9 So, that is the amount that my clients have been deprived  
10 of because their attorney was negligently 20 days late.

11 QUESTION: Well, if these claims are filed, is  
12 the 100 percent payoff affected?

13 MR. LUCAS: It is affected to this extent that  
14 without my clients' claims, it's a 5-year payoff. Once  
15 our claims are factored into the plan -- if our claims are  
16 allowed, it's a 10-year payoff.

17 That plan, incidentally, was formulated  
18 after -- the plan had not begun being drafted at the time  
19 this time extension was sought. So, the plan anticipated  
20 -- because the litigation over the filing of these claims  
21 was going on while the debtor was drafting its plan, the  
22 plan anticipated and planned for the eventuality that  
23 these claims would be permitted or would be allowed.

24 QUESTION: Is interest payable on the claims?

25 MR. LUCAS: Yes, Justice Kennedy, there is

1 interest payable, and interest is being paid to other  
2 creditors and has been since the plan was confirmed.

3 QUESTION: Would there be any virtue in tying  
4 the phrase excusable neglect in this bankruptcy rule into  
5 the provisions of rule 60(b) of the Rules of Civil  
6 Procedure where I'm sure there must be some decisions  
7 construing the same phrase?

8 MR. LUCAS: Your Honor, I think that whatever  
9 decision this Court makes necessarily -- even if the Court  
10 attempts to limit it to proofs of claim and bankruptcy  
11 rule 9006, that whatever decision this Court makes will be  
12 construed as also governing rule 6 and all the filings in  
13 Federal civil litigation simply because the rule, for all  
14 intents and purposes, are identical.

15 And the phrase excusable neglect, if the Court  
16 is going to avoid the one-subsection-at-a-time approach to  
17 the statutory construction, if we're going to avoid that,  
18 it seems to me that it has to be construed uniformly. If  
19 it's going to be an absolute, strict standard allowing no  
20 exceptions except for matters beyond the moving party's  
21 reasonable control here, then the same must be true for a  
22 party who files an answer 1 day late in a lawsuit.

23 And let me use that example, if I may, to sort  
24 of highlight the everyday litigation problems that would  
25 flow from the rule proposed by petitioners if it were

1 accepted by this Court. Let's take a hypothetical example  
2 of a defendant in a lawsuit who is served with a summons  
3 and, of course, required to answer in 20 days. But  
4 through an administrative error, clerical breakdown,  
5 whatever, through neglect, for reasons within his control,  
6 the defendant doesn't answer the lawsuit, say, a \$7  
7 million lawsuit, until the 21st day. 9:00 the next  
8 morning, his answer is 9 hours late.

9 Today, I submit and I believe that in most  
10 jurisdictions around the country, most district judges  
11 will think that it's in the exercise of their discretion  
12 to allow an answer to be filed 9 hours late rather than to  
13 deprive a party of his or her day in court and essentially  
14 impose a windfall to the plaintiff, who at that point  
15 would have a \$6.9 million default judgment.

16 But it is precisely that sort of exercise of  
17 discretion that the petitioners would deprive the trial  
18 courts of exercising if their hard and fast, inflexible  
19 rule is accepted in this case.

20 If there are no other questions, that completes  
21 my comments.

22 QUESTION: Thank you, Mr. Lucas.

23 Mr. Donaldson, you have 4 minutes remaining.

24 REBUTTAL ARGUMENT OF CRAIG J. DONALDSON

25 ON BEHALF OF THE PETITIONER



1 MR. DONALDSON: Mr. Chief Justice, and may it  
2 please the Court:

3 The respondents say that the test that we  
4 advance here is inflexible. What I would say to the Court  
5 on behalf of the petitioner is the test advanced here by  
6 the respondent is no test at all. It leads to an  
7 unbridled, unchecked discretion vested in lower courts  
8 that, in effect, any time someone comes in with any  
9 excuse, whatever it may be, that a deadline is going to be  
10 extended. And as I said earlier in our argument, in  
11 construing this term, it cannot be construed such that it  
12 just sweeps away deadlines imposed by other rules of the  
13 court which are necessary to the efficient administration  
14 of justice.

15 In particular reference to the Sixth Circuit  
16 opinion below, the only way that the Sixth Circuit found  
17 the bankruptcy court and district court abused this  
18 discretion was predicated on the finding that it was  
19 inappropriate to penalize the party for the negligence of  
20 counsel. Had it not found that, and had it found that it  
21 should have penalized, as the bankruptcy court and  
22 district court did, the respondents for the neglect of  
23 their counsel, the Sixth Circuit could not have found that  
24 the bankruptcy court and district court abused their  
25 discretion.

1 QUESTION: Well, if you want to -- I suppose the  
2 real party in interest is the client, and if you want to  
3 impose a rule that this is excusable if it's due to  
4 something -- some act beyond your control, surely in this  
5 case the negligence of his lawyer was beyond his control.

6 MR. DONALDSON: But I think the rule looks,  
7 Justice White, at the negligence of the party and the  
8 party's counsel, and if one of them is at fault -- well,  
9 at least in the context of the client, if the lawyer is at  
10 fault, the client I think under Link has to suffer the  
11 consequences. But ultimately the system allocates the  
12 burden properly because the client still has, which is  
13 exactly what has been done in this case, its action  
14 against -- over against the attorney for whatever damages  
15 it sustained as a result of his negligence.

16 QUESTION: Or whatever damages he could recover.

17 MR. DONALDSON: Or what he could prove --

18 QUESTION: I mean, or whatever damages the  
19 lawyer could pay for.

20 MR. DONALDSON: Yes, sir.

21 Finally, to answer one point -- two points of  
22 Mr. Lucas very briefly. He says that from the Hoos case  
23 and the need for finality came out of the Bankruptcy Act  
24 because at that point you filed plans of confirmation, and  
25 he seems to imply that the need for finality and certainty

1 is less now under the bankruptcy code and rules than it  
2 was under the act. And I submit it's exactly in reverse.

3 The bankruptcy code and rules now say that the  
4 court shall fix the time within which claims are to be  
5 filed.

6 QUESTION: Can that be amended?

7 MR. DONALDSON: Pardon, Justice White?

8 QUESTION: Can the court set a file date and  
9 then change it?

10 MR. DONALDSON: If it does so before the  
11 expiration of the date set, the plain language of rule  
12 3003 says for cause shown, that the court may extend it  
13 provided that it's done before the expiration of the  
14 original period.

15 But I think that the -- I'm sorry. Thank you.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
17 Donaldson.

18 The case is submitted.

19 (Whereupon, at 2:35 p.m., the case in the above-  
20 entitled matter was submitted.)

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# CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

Pioneer Investment Services Company, Petitioner v. Brunswick

Associates Limited Partnership, et al.

Case No: 91-1695

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Loone May*

(REPORTER)