

MAY 31 2005

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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In re: )  
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HOOVER WSCR ASSOCIATES )  
LIMITED, )  
)  
Debtor. )  
\_\_\_\_\_)  
HOWARD M. EHRENBERG, Chapter )  
7 Trustee, )  
)  
Appellant, )  
)  
v. )  
)  
WSCR, INC., aka RELIASTAR )  
INVESTMENT RESEARCH, INC., )  
)  
Appellee. )  
\_\_\_\_\_)  
WSCR, INC., aka RELIASTAR )  
INVESTMENT RESEARCH, INC., )  
)  
Appellant, )  
)  
v. )  
)  
HOWARD M. EHRENBERG, Chapter )  
7 Trustee; UNITED STATES )  
TRUSTEE, )  
)  
Appellees. )  
\_\_\_\_\_)

BAP Nos. CC-04-1390-MaMoP  
CC-04-1391-MaMoP  
(related appeals)  
Bk. No. SA 98-24411-JB  
Adv. No. SA 99-01718-JB

MEMORANDUM<sup>1</sup>

Argued and Submitted on  
March 23, 2005 at Pasadena, California

Filed - May 31, 2005

<sup>1</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

1 Appeal from the United States Bankruptcy Court  
2 for the Central District of California

3 Honorable James N. Barr, Bankruptcy Judge, Presiding.

4  
5 Before: MARLAR, MONTALI and PERRIS, Bankruptcy Judges.

6  
7 **INTRODUCTION**

8  
9 The debtor is a limited partnership. In an adversary  
10 proceeding, the chapter 7<sup>2</sup> trustee ("Trustee") sought to recover  
11 from the debtor's general partner a deficiency in the bankruptcy  
12 estate, pursuant to § 723(a). The deficiency resulted from an  
13 unpaid civil judgment against the debtor. However, there was no  
14 separate judgment against the general partner and such an action  
15 on the claim was time-barred under California law.

16 Upon cross-motions for summary judgment, the bankruptcy court  
17 entered judgment in favor of the general partner and against  
18 Trustee. In a matter of first impression, the bankruptcy court  
19 concluded that the judgment claim was not the general partner's  
20 "personal liability," as that phrase is used in § 723(a). Its  
21 decision was published at Ehrenberg v. WSCR, Inc. (In re Hoover  
22 WSCR Assocs. Ltd.), 268 B.R. 227 (Bankr. C.D. Cal. 2001).

23 Trustee filed an untimely appeal of the order granting  
24 summary judgment, and after some proceedings, his motion for an  
25 extension of time to file a new notice of appeal was granted on

26  
27 <sup>2</sup> Unless otherwise indicated, chapter and section references  
28 are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and rule  
references are to the Federal Rules of Bankruptcy Procedure ("Fed.  
R. Bankr. P."), Rules 1001-9036.

1 the grounds of excusable neglect. The general partner then  
2 appealed the bankruptcy court's order granting the extension.  
3 Both appeals are before us.

4 We conclude that the bankruptcy court did not abuse its wide  
5 discretion to determine excusable neglect and grant Trustee's  
6 extension motion. On the merits of the summary judgment, we agree  
7 with and adopt the bankruptcy court's well-reasoned opinion and  
8 find Trustee's new arguments unavailing. Both orders are  
9 therefore AFFIRMED.

10

11

**FACTS**

12

13 Hoover-WSCR Associates Limited Partnership ("Debtor") is  
14 a California limited partnership whose general partner is WSCR,  
15 Inc., nka Reliastar Investment Research, Inc. ("WSCR").

16

17 Prepetition, Chris and Ann Koukladas (the "Koukladases") sued  
18 Debtor and other defendants, but not WSCR individually, for breach  
19 of contract and obtained a judgment for \$256,167.54. WSCR later  
20 assigned its interest in Debtor to third parties, but conceded  
21 that it was the general partner at the time the claim arose.

22

23 In 1998, Chris Koukladas filed an involuntary chapter 7  
24 petition against Debtor. He then filed a proof of claim for  
25 \$256,167.54 ("Koukladas Claim"). There were no assets in Debtor's  
26 estate to satisfy the Koukladas Claim. Therefore, Trustee filed a  
27 § 723(a) adversary proceeding to recover from WSCR the deficiency  
28 plus Trustee's administrative claim for attorney's fees and costs.

27

28

1 Cross-Motions for Summary Judgment

2  
3 Both parties filed motions for summary judgment in the  
4 adversary proceeding. WSCR asserted that California law required  
5 the Koukladases to obtain a separate judgment against WSCR in  
6 order to establish its liability to Trustee. Since it was  
7 undisputed that the statute of limitations had expired prepetition  
8 on any individual breach of contract action against WSCR, WSCR  
9 argued that it was entitled to summary judgment on the complaint.

10 Trustee countered that WSCR was jointly and severally liable  
11 for the limited partnership debts under California law and that a  
12 § 723 action is based on such liability. Therefore, he argued  
13 that, since he was asserting a federal cause of action, the  
14 statute of limitations defense was inapplicable, and the estate  
15 was entitled to sue WSCR for the deficiency.

16 On August 6, 2001, the court entered its order granting  
17 WSCR's motion for summary judgment and denying Trustee's motion.  
18 In its published opinion, the bankruptcy court noted there was no  
19 definition of the words: ". . . . a deficiency . . . with respect  
20 to which a general partner of the partnership is personally liable  
21 . . . ." in § 723(a). Consequently, it extensively analyzed the  
22 statute's legislative history, California statutory law, and  
23 federal case law. See Hoover WSCR Assocs. Ltd., supra.

24 The bankruptcy court interpreted the California statute  
25 making partners liable for partnership debts as merely providing a  
26 basis for liability that may be limited by other statutes. Id. at  
27 235 (citing California Corporations Code ("CAL. CORP. CODE")  
28 § 16306(a)). Such limiting statutes applicable to this case were:

1 CAL. CORP. CODE § 16307(c) (statute insulating a partner's assets  
2 from claims of partnership creditors unless there is a judgment  
3 against said partner); California Civil Procedure Code ("CAL. CIV.  
4 PROC. CODE") § 369.5 (procedure for initiating suit against a  
5 partner requiring individualized service of process); and the  
6 applicable statute of limitations which indisputably barred any  
7 action on the claim against WSCR. The bankruptcy court concluded  
8 that WSCR's assets were insulated from the Koukladas Claim, and  
9 therefore not recoverable under § 723 without a judgment against  
10 WSCR personally. Id. The bankruptcy court further held, in  
11 dictum, that Trustee's administrative expense claims were not part  
12 of the "deficiency" for which a partner is liable. Id. at 235-36.

13 Also on August 6th, a "Notice of Entry of Judgment or Order  
14 and Certificate of Mailing" was entered, which indicated that the  
15 memorandum decision and order were mailed on that date to  
16 Trustee's attorneys Joel Goldman ("Goldman") and Karen Rinehart  
17 ("Rinehart"). Nevertheless, Trustee failed to file a timely  
18 notice of appeal within ten days, pursuant to Rule 8002(a).

19

20 **Motion to Extend Time to Appeal**

21

22 On September 5, 2001, the 29th day after entry of the order  
23 on summary judgment, Trustee filed a motion for an extension of  
24 time to appeal the order.

25 Associate Attorney Franklin Kang ("Kang") and Trustee's lead  
26 attorney, Goldman, filed their declarations. Both attorneys  
27 averred that they did not receive written notice of entry of  
28 judgment nor did they learn of it until September 4, 2001,

1 following their firm's search of the docket.<sup>3</sup> Trustee then filed  
2 his extension motion only one day thereafter. Kang averred that  
3 he had notified the firm personnel to be alert for the notice of  
4 final order and to inform the proper attorney.<sup>4</sup> Goldman declared  
5 that he had been out of town for the latter part of August, 2001.<sup>5</sup>

6 On hearing the matter, the bankruptcy court found that  
7 Trustee had failed in his responsibility to monitor the docket,  
8 that such excuse was insufficient to establish excusable neglect,  
9 and denied his motion. Trustee appealed to the district court,  
10 which vacated the order and remanded with instructions that the  
11 bankruptcy court should articulate its reasons for finding a lack  
12 of excusable neglect on the part of Trustee or his counsel in  
13 light of all of the factors enunciated in Pioneer Inv. Servs. Co.  
14 v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993).

15 On remand, the bankruptcy court requested supplemental  
16 briefing and held two additional hearings on the extension motion.  
17 Trustee argued that an equally-weighted, four-factor analysis was  
18 "law of the case" pursuant to the district court's remand order.  
19 WSCR argued, to the contrary, that the bankruptcy court's prior  
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21  
22 <sup>3</sup> Although WSCR filed evidentiary objections to these  
23 declarations, it did not challenge the portions cited. Nor has  
24 WSCR renewed its objections on appeal, and therefore it has waived  
25 them.

26 <sup>4</sup> Appellate attorney Barbara Bacon ("Bacon") was assigned to  
27 the appeal in July, 2001. However her declaration was not  
28 presented. Nor was Attorney Rinehart's declaration filed, even  
though the court records indicated that she had also been served  
with the notice of entry of judgment.

<sup>5</sup> Counsel for WSCR sent Goldman two email messages, on  
August 22 and 24, 2001, respectively. Goldman stated that he did  
not receive them until he returned from a business trip.

1 ruling giving more weight to the reason for the delay was correct.  
2 WSCR also presented two subsequent Ninth Circuit opinions which  
3 underscored the appellant's responsibility to monitor the docket.

4 The bankruptcy court issued its order reversing itself, and  
5 granting the motion on July 28, 2004. In it, it articulated its  
6 approach and reasons for its ruling. First, the court explained  
7 its prior denial:

8 In my initial ruling, I was persuaded that when applying  
9 Rule 8002(c)(2), I should deny the motion if the movant  
10 did not prove "excuse" for failing to monitor the trial  
11 court docket, for that factor alone seemed the only one  
12 relevant to the question of whether the time to appeal  
should be extended in the case before me. Given the time  
frame within which all relevant activity occurred, other  
excusable neglect factors seemed far less significant --  
if significant at all.

13 Order Extending Time (July 28, 2004), p. 3:7-12.

14 The bankruptcy court stated that the district court mandate  
15 required it to "more closely consider each of the Pioneer  
16 factors." In doing so, it then determined that three of the four  
17 factors were either neutral or in Trustee's favor, whereas the  
18 "reason for delay" factor still weighed heavily against Trustee.  
19 Because it believed that each factor must be given some weight,  
20 the bankruptcy court determined that the neglect of Trustee's  
21 counsel in failing to file a timely notice of appeal was  
22 excusable.

23 The bankruptcy court gave Trustee 10 days in which to file  
24 his appeal of the summary judgment order, which he did. That  
25 appeal was designated BAP No. CC-04-1390. WSCR then timely  
26 appealed the extension order, which appeal was designated BAP No.  
27 CC-04-1391. Both appeals were set for joint oral argument, and  
28 they will be considered in reverse order.

1 **ISSUES**

2

3 1. Whether the bankruptcy court abused its discretion in  
4 granting Trustee's motion to extend time to appeal the  
5 summary judgment order.

6

7 2. Whether WSCR can be "personally liable" for a § 723(a)  
8 deficiency as to the Koukladas Claim against the Debtor  
9 if there can be no individual judgment rendered against  
10 it on the claim under California law.<sup>6</sup>

11

12 **STANDARDS OF REVIEW**

13

14 We review for an abuse of discretion the bankruptcy court's  
15 decision to grant a motion for an extension of time to file a  
16 notice of appeal on the grounds of excusable neglect. Pincay v.  
17 Andrews, 389 F.3d 853, 858 (9th Cir. 2004), cert. denied, 125  
18 S.Ct. 1726 (2005). Under this standard, we may reverse only if we  
19 are left with the definite and firm conviction that the bankruptcy  
20 court committed a clear error of judgment in the conclusion it  
21 reached after weighing the relevant factors. Id. Moreover, use  
22 of an incorrect legal standard is, per se, an abuse of discretion.  
23 Dawson v. Wash. Mut. Bank, F.A. (In re Dawson), 390 F.3d 1139,  
24 1151 (9th Cir. 2004).

25 We review the bankruptcy court's decision to grant a motion

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27 <sup>6</sup> Based on our ultimate disposition, in favor of WSCR, we do  
28 not reach the third issue raised, which was dictum in the  
bankruptcy court's opinion: whether a trustee's deficiency claim  
under § 723(a) includes Trustee's administrative expense claim.



1 for summary judgment, as well as the bankruptcy court's statutory  
2 interpretation, de novo. Beeler v. Jewell (In re Stanton), 303  
3 F.3d 939, 941 (9th Cir. 2002) (summary judgment); Saxman v. Educ.  
4 Credit Mgmt. Corp. (In re Saxman), 325 F.3d 1168, 1172 (9th Cir.  
5 2003) (statutory interpretation). Viewing the evidence in the  
6 light most favorable to the nonmoving party, we determine whether  
7 there are any genuine issues of material fact and whether the  
8 trial court correctly applied the relevant substantive law.  
9 Captain Blythers, Inc. v. Thompson (In re Captain Blythers, Inc.),  
10 311 B.R. 530, 534 (9th Cir. BAP 2004).

## 11 DISCUSSION

### 12 A. Rule 8002(c) - Motion to Extend Time to Appeal

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16 A notice of appeal must be filed within ten days of entry of  
17 the order appealed from. Fed. R. Bankr. P. 8002(a). A timely  
18 appeal is mandatory and jurisdictional. Browder v. Dir., Dept. of  
19 Corr., 434 U.S. 257, 264 (1978); Slimick v. Silva (In re Slimick),  
20 928 F.2d 304, 306 (9th Cir. 1990).

21 All is not lost for the appellant who fails to file a notice  
22 of appeal in the 10-day period. A bankruptcy court may extend the  
23 time for filing the notice of appeal, so long as the moving party  
24 files a written motion within the original 10-day period. Another  
25 exception allows for the filing of a late notice of appeal if a  
26 motion is filed not later than 20 days after the initial 10-day  
27 period. However, the court must be convinced that there has been  
28 a showing of "excusable neglect." Fed. R. Bankr. P. 8002(c).

1 Here, Trustee filed his motion on the 19th day of the 20-day  
2 extended period.

3 Rule 8002(c) is the only avenue of relief in bankruptcy court  
4 and is more circumspect than the federal appellate rules.<sup>7</sup>  
5 Nonetheless, the bankruptcy rules are generally construed in the  
6 same manner as the federal appellate rules. See Key Bar Inv.,  
7 Inc. v. Cahn (In re Cahn), 188 B.R. 627, 632 (9th Cir. BAP 1995).  
8 These differences, combined with a similar lenient construction  
9 policy, "warrants a generous construction of excusable neglect" in  
10 bankruptcy appeals based on an analysis that is "relative and  
11 contextual." Warrick v. Birdsell (In re Warrick), 278 B.R. 182,  
12 188 (9th Cir. BAP 2002) (Klein, J., dissenting).

#### 13 14 **(1) The "Excusable Neglect" Standard**

15  
16 In Pioneer, the Supreme Court proposed a "flexible" standard  
17 for determining "excusable neglect" to encompass "situations in  
18 which the failure to comply with a filing deadline is attributable  
19 to negligence." Id., 507 U.S. at 394. This definition permits  
20 courts, "where appropriate, to accept late filings caused by  
21

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22 <sup>7</sup> Rule 8002(c) is modeled after Federal Rule of Appellate  
23 Procedure ("Fed. R. App. P." or "FRAP") 4(a)(5), which provides  
24 that the initial 30-day appeal period in district court may be  
25 extended an additional 30 days by a motion made after expiration  
26 of the deadline upon a showing of either "excusable neglect" or  
27 "good cause." Fed. R. App. P. 4(a)(5)(A). In addition, the  
28 federal civil rules provide that if a moving party did not receive  
notice of entry of the judgment or order to which such party was  
entitled, and the other party would not be prejudiced, the moving  
party may file a motion to reopen the time to file an appeal  
within the earlier of 180 days after the judgment or order is  
entered or 7 days after receipt of notice of the entry. Fed. R.  
App. P. 4(a)(6).

1 inadvertence, mistake, or carelessness, as well as by intervening  
2 circumstances beyond the party's control." Id. at 388. Pioneer  
3 involved a late-filed proof of claim, not a notice of appeal, but  
4 the "excusable neglect" analysis applies with equal force. The  
5 burden of proving facts sufficient to establish excusable neglect  
6 is on the moving party. Cahn, 188 B.R. at 631.

7 The test for determining "excusable neglect" is well  
8 established: it is "at bottom, an equitable one, taking account of  
9 all relevant circumstances surrounding the party's omission."

10 Pioneer, 507 U.S. at 395. Such an analysis requires the weighing  
11 or balancing of relevant factors, including the following four:

- 12 (1) the danger of prejudice to the debtor,
- 13 (2) the length of the delay and its potential impact on  
14 judicial proceedings,
- 15 (3) the reason for the delay, including whether it was within  
16 the reasonable control of the movant, and
- 17 (4) whether the movant acted in good faith.

18 Id. at 395 (numbers inserted); Pincay, 389 F.3d at 855.

19 The Pioneer Court found that all four factors were favorable  
20 to a finding of excusable neglect for the movant, including the  
21 third factor--delay due to an ambiguous bar date notice. See  
22 Pioneer, 507 U.S. at 397-98. Usually, the Court opined,  
23 "ignorance of the rules, or mistakes construing the rules" do not  
24 constitute excusable neglect. Id. at 392.

25 Some courts in the Ninth Circuit, including the Circuit  
26 itself, in attempting to adhere to Pioneer, developed a guiding  
27 principle that a mistake of law or a failure to follow unambiguous  
28 rules is not the type of neglect that is excusable. See Speiser,  
Krause & Madole P.C. v. Ortiz, 271 F.3d 884, 889-90 (9th Cir.

1 2001) (attorney's failure to read and understand a procedural  
2 rule); Kyle v. Campbell Soup, 28 F.3d 928, 931 (9th Cir. 1994)  
3 (counsel's mistake in interpreting and applying unambiguous  
4 rules); Warrick, 278 B.R. at 187 (pro se litigant's failure to  
5 monitor the docket was solely a failure to follow unambiguous  
6 rules); Cahn, 188 B.R. at 632-33 (even though notice of entry of  
7 judgment was not given, counsel neglected his affirmative duty to  
8 monitor the docket).

9 This line of cases contrasted with those where such mistake  
10 or failure was not per se inexcusable unless it was coupled with  
11 something more. See Bateman v. United States Postal Serv., 231  
12 F.3d 1220 (9th Cir. 2000) (counsel missed deadline due to a family  
13 emergency that took him out of the country); Briones v. Riviera  
14 Hotel & Casino, 116 F.3d 379, 382 (9th Cir. 1997) (a pro se  
15 plaintiff, who was not proficient in the English language, missed  
16 a deadline because of communication problems with his translator  
17 and typist); TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691,  
18 699 (9th Cir. 2001) (defendant's failure to answer complaint was  
19 excusable neglect because she was unfamiliar with the legal system  
20 and was experiencing extreme personal difficulty).

21 Recently, the Ninth Circuit Court of Appeals put to rest the  
22 use of any per se rule in determining excusable neglect. In  
23 Pincay, 389 F.3d 853, the defendants' attorney delegated to a  
24 paralegal the calendaring of a filing deadline to appeal a  
25 district court decision in a civil matter. The paralegal then  
26 mistakenly advised the attorney that the appeal needed to be filed  
27 within 60 days instead of 30. When the deadline passed and after  
28 the mistake was discovered, the attorney filed a timely motion for

1 an extension under FRAP 4(a)(5)(A), which was granted by the  
2 district court on the grounds of excusable neglect.

3 On appeal to the Ninth Circuit, a majority of the three-judge  
4 panel concluded that ignorance of the rules that was compounded by  
5 the attorney's reliance on a paralegal was inexcusable as a matter  
6 of law and did not constitute excusable neglect, and it reversed  
7 the district court's ruling. Pincay v. Andrews, 351 F.3d 947, 952  
8 (9th Cir. 2003).

9 The Ninth Circuit then voted to hear the case en banc to  
10 consider whether a per se rule involving missed deadlines was  
11 inconsistent with Pioneer. It held that under Pioneer there can  
12 never be a per se legal rule "attributable to any particular type  
13 of negligence." Pincay, 389 F.3d at 860. The "real question" is  
14 "whether there [is] enough in the context of [the] case to bring a  
15 determination of excusable neglect within the district court's  
16 discretion." Id. at 859.

17 The Ninth Circuit acknowledged that "a lawyer's failure to  
18 read an applicable rule is one of the least compelling excuses  
19 that can be offered . . ." but deferred to the judgment of the  
20 district court which had found that the misreading of the  
21 unambiguous rule by the paralegal was excusable neglect. Id. It  
22 stated that it would have affirmed even if the district court had  
23 ruled the other way: "Had the district court declined to permit  
24 the filing of the notice, we would be hard pressed to find any  
25 rationale requiring us to reverse." Id. It concluded:

26 The decision whether to grant or deny an extension of  
27 time to file a notice of appeal should be entrusted to the  
28 discretion of the district court because the district  
court is in a better position than we are to evaluate  
factors such as whether the lawyer had otherwise been

1 diligent, the propensity of the other side to capitalize  
2 on petty mistakes, the quality of representation of the  
3 lawyers (in this litigation over its 15-year history), and  
4 the likelihood of injustice if the appeal was not allowed.

4 Id.

5 Thus, an appellate court must "leave the weighing of  
6 Pioneer's equitable factors to the discretion of the district [or  
7 bankruptcy] court in every case." Id. at 860.

8 From the following review, we hold that the bankruptcy court  
9 did not abuse its discretion in this case.

10  
11 **(2) Application of Law to Our Facts**

12  
13 The sole reason given for Trustee's neglect in filing a  
14 timely notice of appeal was his or his attorneys' failure to  
15 monitor the docket in order to learn about the entry of judgment.

16 The appellant has an affirmative legal duty to monitor the  
17 docket to determine when the order or judgment is entered. See  
18 Miyao v. Kuntz (In re Sweet Transfer & Storage, Inc.), 896 F.2d  
19 1189, 1193 (9th Cir. 1990). This duty may be relieved in the case  
20 of excusable neglect. See Fed. R. Bankr. P. 9022 (providing that  
21 while the court clerk is required to serve the notice of entry of  
22 a judgment or order upon the parties, lack of such notice "does  
23 not affect the time to appeal or relieve or authorize the court to  
24 relieve a party for failure to appeal within the time allowed,  
25 *except as permitted in Rule 8002.*") (Emphasis added.)

26 Based on an appellant's duty to monitor the docket, WSCR  
27 contends that the bankruptcy court applied the incorrect legal  
28 standard and should have given more weight to the third factor

1 (reasonable delay and reasonable control).<sup>8</sup> This argument has  
2 been foreclosed by Pincay. Under this standard, it is clear that  
3 a trial court need not give greater weight to the third factor in  
4 balancing the equities.<sup>9</sup>

5 In its decision, the bankruptcy court found that the third  
6 factor was unfavorable to Trustee, but that the other three  
7 factors were either favorable to Trustee or neutral. Thus, the  
8 bankruptcy court balanced all of the factors, determined that the  
9 equities weighed in favor of Trustee and granted the extension.  
10 The court therefore applied the correct legal standard, even  
11 without the benefit of Pincay.

12 WSCR also contends that the bankruptcy court erred in finding  
13 that it was not prejudiced by the late-filed appeal. The fact  
14 that WSCR must litigate the merits does not amount to legal  
15 prejudice. See Bateman, 231 F.3d at 1225 (loss of a quick victory

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16 <sup>8</sup> The bankruptcy court's first order denying Trustee's  
17 motion to extend because he failed in his affirmative duty to  
18 monitor the docket was not an abuse of discretion in light of  
19 Kyle, Warrick, and Cahn. Pincay was not decided until after the  
20 proceedings in bankruptcy court. However, the bankruptcy court's  
21 initial order was appealed to the district court, and on remand,  
22 the bankruptcy court changed its ruling.

23 Trustee argues on appeal that the district court's remand  
24 order was law of the case. WSCR contends that the bankruptcy  
25 court erred as a matter of law in its interpretation of the remand  
26 order. These issues are irrelevant because we are not reviewing  
27 the bankruptcy court's motivation for changing its mind or its  
28 interpretation of the district court's order for the purpose of  
resurrecting its initial order. That initial order has been  
superseded by the July 28, 2004 Order Extending Time, which is the  
only order before us.

<sup>9</sup> A three-judge dissent disagreed with the majority's  
decision because "[f]actors one, two and four will almost always  
cut one way: Delays are seldom long, so prejudice is typically  
minimal. Bad-faith delay is rare, given that we're only dealing  
with 'neglect,' not deliberate flouting of the rules . . . . Most  
of the work, then, is done by factor three, the most important one  
. . . ." Pincay, 389 F.3d at 861. (dissenting op.).

1 is not prejudice). Moreover, the delay itself is measured from  
2 the time of the missed 10-day deadline to the time the motion for  
3 an extension was filed, which is necessarily within 20 additional  
4 days. See Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 366  
5 (2d Cir. 2003); Fed. R. Bankr. P. 8002(a). Here, Trustee filed  
6 the motion for an extension on the 19th day of the 20-day extended  
7 period; therefore the delay was minimal. This factor weighed in  
8 favor of Trustee.

9 Finally, WSCR maintains that the bankruptcy court erred in  
10 finding that Trustee's counsel did not receive the notice of entry  
11 of judgment. It presented a copy of such notice along with a  
12 proof of service upon Trustee's counsel and argued that the  
13 "mailbox rule" governs. See Woody v. Bucknum (In re Bucknum), 951  
14 F.2d 204, 207 (9th Cir. 1991) ("Mail that is properly addressed,  
15 stamped and deposited into the mails is presumed to be received by  
16 the addressee.").

17 Under the "mailbox rule," the opposing party who contests  
18 notice must present something more than "self-serving allegations,  
19 especially when they are wholly insubstantial and contradicted by  
20 the record." Laurino v. Syringa Gen. Hosp., 279 F.3d 750, 753  
21 (9th Cir. 2002). WSCR maintains that its proof of service  
22 eviscerated Trustee's sole excuse for the untimely filing--that  
23 counsel did not know that a judgment had been entered.

24 We disagree with WSCR's assessment. Even if attorneys  
25 Goldman and Rinehart, to whom the Notice of Entry was addressed,  
26 were presumed to have received it, the information either was not  
27 communicated to attorney Kang or appellate counsel Bacon or was  
28 not acted upon due to inadvertence or negligence, as there was no



1 evidence in the record of bad faith. Therefore, the notice or  
2 lack thereof was just one more factor added to the mix in the  
3 court's equitable decision.<sup>10</sup>

4 Moreover, the court's finding of nonreceipt is supported by  
5 the law and the evidence. Trustee urges us to consider the  
6 mailbox rule as applied to Rule 8002(a) in light of Nunley v. City  
7 of Los Angeles, 52 F.3d 792 (9th Cir. 1995). In Nunley, the  
8 movant filed an affidavit which merely denied receipt and argued  
9 that it was sufficient evidence to rebut the presumption of  
10 receipt. On appeal to the Ninth Circuit, the court agreed with  
11 the movant, based on (1) the difficulty in demonstrating  
12 nonreceipt conclusively, and (2) the liberal policy behind the  
13 appellate rules to permit late appeals. Id.

14 \_\_\_\_\_When a court uses its discretion to determine the equities of  
15 the case under Rule 8002(c), it does not abuse its discretion by  
16 giving the specific factual denial a "generous construction." See  
17 Warrick, 278 B.R. at 188 (dissenting op.). In addition, there is  
18 legal support that a simple denial of receipt would be sufficient  
19 to rebut the presumption under the "bursting bubble" approach of  
20 Federal Rule of Evidence 301. See Nunley, 53 F.3d at 796 (citing  
21 10 Moore's Fed. Prac. § 301.04[2] (2d ed.)).

22 Therefore, in considering all of the equities of the case,  
23 \_\_\_\_\_

24 <sup>10</sup> "[T]he court may take into account, as one of the factors  
25 affecting its decision [to grant an extension of time to appeal  
26 under FRCP 73(a), now FRAP (4)(a)], whether the clerk failed to  
27 give notice as provided in Rule 77(d) or the party failed to  
28 receive the clerk's notice." Fed. R. Civ. P. 77(d), Advisory  
Committee Note to the 1948 amendment. Rule 77(d) is the  
counterpart to Bankruptcy Rule 9022 (Notice of Judgment or Order),  
which provides that lack of notice of the entry does not relieve a  
party for failure to appeal within the time allowed, except for  
excusable neglect as permitted in Rule 8002.

1 and, although reasonable persons could differ with the weighing of  
2 the factors including alleged nonreceipt of the notice of entry of  
3 judgment, we conclude that the bankruptcy court did not abuse its  
4 discretion in determining that the untimely notice of appeal was  
5 due to the excusable neglect of Trustee's counsel and in granting  
6 him an extension of time to appeal. We therefore AFFIRM the  
7 bankruptcy court's decision to allow the late filing of the notice  
8 of appeal.

9

10 **B. § 723(a) Deficiency Claim**

11

12 Trustee filed a complaint for a deficiency judgment against  
13 WSCR pursuant to § 723(a). This section provides:

14

15 (a) If there is a deficiency of property of the estate  
16 to pay in full all claims which are allowed in a case under  
17 this chapter concerning a partnership and with respect to  
18 which a general partner of the partnership is personally  
19 liable, the trustee shall have a claim against such general  
20 partner to the extent that under applicable nonbankruptcy  
21 law such general partner is personally liable for such  
22 deficiency.

18

19 11 U.S.C. § 723(a).

20

21 Both parties agree that California law is the "applicable  
22 nonbankruptcy law." Under this section, a chapter 7 trustee has a  
23 claim against the general partner similar to the partnership's  
24 entitlement to contribution under state law. See 6 Collier on  
25 Bankruptcy ¶ 723.02[1], p. 723-5 (Alan N. Resnick & Henry J.  
26 Sommer eds., 15th ed. rev. 2004); CAL. CORP. CODE § 16807. Such  
27 trustee's claim is dependent, however, upon the extent to which  
28 the general partner is "personally liable for the underlying  
claims of the partnership" under California law. 6 Collier on

1 Bankruptcy, supra, ¶ 723.02[2].

2 WSCR contends that California law required the Koukladases to  
3 obtain an individual judgment against WSCR in order to establish  
4 its personal liability for a deficiency on that claim under § 723.  
5 Since it was undisputed that the statute of limitations had run on  
6 any individual breach of contract cause of action against WSCR  
7 four years before the involuntary petition was filed, all agree  
8 that it would be impossible to obtain such judgment. Therefore,  
9 WSCR contends that summary judgment was properly entered in its  
10 favor.

11 Trustee counters that California law makes WSCR jointly and  
12 severally liable for the Partnership debts and it is that  
13 liability which is tapped in § 723(a). He contends that the  
14 statute of limitations defense is inapplicable because Trustee has  
15 an independent federal action against WSCR which is not time-  
16 barred.

17 The bankruptcy court's comprehensive published opinion was in  
18 favor of WSCR and against Trustee. The court concluded that a  
19 trustee's right to a deficiency under § 723(a) is tied to a  
20 creditor's rights under state law.<sup>11</sup> It held that

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22 <sup>11</sup> The bankruptcy court rejected case law suggesting that the  
23 source of trustee's authority under § 723(a) is the strong-arm  
24 power of § 544, under which a trustee steps into the shoes of a  
25 creditor and exercises the creditor's rights. See Hoover WSCR  
26 Assocs. Ltd., 268 B.R. at 233-34. We agree with the weight of  
27 authority that these provisions are parallel, but separate. See 6  
28 Collier on Bankruptcy, supra, ¶ 723.02[1], p. 723-6 and  
723.02[3][c], p. 723-10 (any impression that the trustee's rights  
under § 723(a) derive from the rights possessed by the trustee  
under § 544(a), rather than directly from § 723, is "mistaken").  
Therefore, Collier has corrected its former analysis, which we had  
relied upon in dictum in Andrew v. Coopersmith (In re Downtown

(continued...)

1 a trustee is entitled to judgment against partners under  
2 § 723(a) **only to the extent that partnership creditors have**  
3 **recovered or could recover judgment** against those partners  
4 under nonbankruptcy law.

5 It is clear from the legislative history of § 723(a), that  
6 in enacting that section Congress did not intend to thereby  
7 create new liabilities for partners of a partnership in  
8 bankruptcy, and it is also clear that the existence and  
9 extent of a partner's liability for partnership debts under  
10 § 723(a) is limited by applicable state law. In this case,  
11 both parties agree that WSCR is liable to the trustee only  
12 to the extent it is "personally liable" for the Koukladas  
13 claim against the bankruptcy estate under California law.

14 Hoover WSCR Assocs. Ltd., 268 B.R. at 234 (emphasis added).

15 Since the state statute of limitations had run, prepetition,  
16 on an action to hold WSCR liable on the Koukladas Claim, the court  
17 concluded that WSCR was not "personally liable" for the estate's  
18 deficiency on such claim.

19 Both state and federal law require that an inquiry begin with  
20 the language of the statute itself: where such language is plain  
21 and unambiguous, "the sole function of the courts is to enforce it  
22 according to its terms." United States v. Ron Pair Enters., Inc.,  
23 489 U.S. 235, 240 (1989); Viceroy Gold Corp. v. Aubry, 75 F.3d  
24 482, 490 (9th Cir. 1996) ("Under California law, statutory  
25 construction begins with the language of the statute.") Where, as  
26 here, the Code does not define or interpret the words "claims . .  
27 . with respect to which a general partner of the partnership is  
28 personally liable," we may look to legislative history to

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25 <sup>11</sup>(...continued)  
26 Inv. Club III), 89 B.R. 59, 65 (9th Cir. BAP 1988) (citing Collier  
27 for the proposition that a § 723(a) action is asserted under  
28 § 544(a)), but which is no longer good law. If the Koukladases  
could have pursued WSCR directly they would not have needed to  
file the involuntary petition against Debtor, as they are its only  
prepetition creditors.

1 determine congressional intent. 11 U.S.C. § 723(a); Dewsnup v.  
2 Timm, 502 U.S. 410, 418-19 (1992).

3       The history of § 723(a) shows an aggressive policy to limit  
4 liability in accordance with state law. In 1978, § 723(a) read:  
5 "If there is a deficiency of property of the estate to pay in full  
6 **all claims allowed in a case under this title concerning a**  
7 **partnership, then each general partner in such partnership is**  
8 **liable to the trustee** for the full amount of such deficiency."  
9 Pub. L. No. 95-598 (1978) (emphasis added).

10       The section was amended in 1984 to add the "personally  
11 liable" language: "If there is a deficiency of property of the  
12 estate to pay in full all claims **which are allowed in a case under**  
13 **this chapter concerning a partnership and with respect to which a**  
14 **general partner of the partnership is personally liable, the**  
15 **trustee shall have a claim against such general partner** for the  
16 full amount of the deficiency." Pub. L. No. 98-353, Sec. 476(a)  
17 (1984) (emphasis added).

18       It was then amended in 1994 to add, at the end: ". . . the  
19 trustee shall have a claim against such general partner **to the**  
20 **extent that under applicable nonbankruptcy law such general**  
21 **partner is personally liable for such deficiency."** Pub. L. No.  
22 103-394, sec. 212 (1994) (emphasis added).

23       The 1994 amendment clarified that "[i]f a general partner has  
24 no liability under state law for the obligations of the  
25 partnership, section 723(a) will not impose such liability." 6  
26 Collier on Bankruptcy, supra, ¶ 723.02[1][b], p. 723-6; 723.02[2],  
27 pp. 723-7 to 723-8. One concern of the drafters was to "preclude  
28 the trustee from seeking recourse against a partner with respect

1 to nonrecourse claims.'" Miller v. Spitz (In re CS Assocs.), 160  
2 B.R. 899 (Bankr. E.D. Pa. 1993) (citation omitted), aff'd, 167  
3 B.R. 368 (E.D. Pa. 1994).

4 Section 723(a) does not contain a statute of limitations for  
5 the trustee's action. We hold that its plain language as well as  
6 its legislative history supports the application of the state  
7 limitations period if the limitations period has expired prior to  
8 bankruptcy.<sup>12</sup>

9 California partnership law<sup>13</sup> provides that a general partner  
10 in a limited partnership has the same liabilities of a general  
11 partner in a general partnership. See CAL. CORP. CODE § 15643.

12 With some inapplicable exceptions, "all partners are liable  
13 jointly and severally for all obligations of the partnership  
14 unless otherwise agreed by the claimant or provided by law." CAL.  
15 CORP. CODE § 16306(a).

16 "[O]therwise . . . provided by law" refers, in this case, to  
17 CAL. CORP. CODE § 16307(c). This section provides, in relevant  
18 part:

19 **Actions against partnership; judgments**

20 (a) A partnership may sue and be sued in the name of  
21 the partnership.

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22 <sup>12</sup> Our decision is limited to these facts. Therefore, we do  
23 not decide what would happen in a case where the state statute of  
24 limitations has not run prior to bankruptcy, and whether the  
25 limitations period would be tolled.

26 We disagree with those courts which have rejected applicable  
27 nonbankruptcy law statutes of limitation. See CS Assocs., 160  
28 B.R. at 908; see generally J. Brighton & D. Sklar, "What is the  
Appropriate Statute of Limitations to be Applied to a Trustee's  
Cause of Action Under Section 723(A) of the Bankruptcy Code?" 104  
COM. L. J. 286 (Fall 1999).

<sup>13</sup> California's partnership law is contained in the  
California Uniform Partnership Act of 1994 ("UPA '94") under CAL.  
CORP. CODE §§ 16100-16962. UPA '94 governs the Debtor partnership  
and the Koukladases' action against Debtor, which was filed in  
1997. See CAL. CORP. CODE §§ 16111, 16112.

1 (b) [A]n action may be brought against the partnership and  
2 any or all of the partners in the same action or in  
separate actions.

3 (c) A judgment against a partnership is not by itself a  
4 judgment against a partner. A judgment against a  
5 partnership may not be satisfied from a partner's assets  
unless there is also a judgment against the partner.

6 CAL. CORP. CODE § 16307.

7 In accordance with § 16307(c), California gives due process  
8 to individual partners under CAL. CIV. PROC. CODE § 369.5(b). This  
9 statute provides:

10 **Partnerships, unincorporated associations; joinder of**  
11 **individual members**

12 (a) A partnership or other unincorporated association,  
13 whether organized for profit or not, may sue and be  
sued in the name it has assumed or by which it is  
known.

14 (b) A member of the partnership or other unincorporated  
15 association may be joined as a party in an action  
16 against the unincorporated association. If service  
17 of process is made on the member as an individual,  
18 whether or not the member is also served as a  
19 person upon whom service is made on behalf of the  
unincorporated association, a judgment against the  
member based on the member's personal liability may  
be obtained in the action, whether the liability is  
joint, joint and several, or several.

20 CAL. CIV. PROC. CODE § 369.5.

21 Section 369.5 is a procedural statute to effectuate  
22 enforcement of judgments in cases where, under existing  
23 substantive law, a partner is already liable. Orser v. Vierra,  
24 252 Cal. App. 2d 660, 670, 60 Cal. Rptr. 708, 715 (Ct. App. 1967).  
25 This provision facilitates "concurrent enforcement of claims  
26 against individual property of partners joined as defendants."  
27 Fazzi v. Peters, 68 Cal. 2d 590, 595, 68 Cal. Rptr. 170, 174, 440  
28 P.2d 242, 246 (1968) (construing former statute with same intent).

1 Accord, Barr v. United Methodist Church, 90 Cal. App. 3d 259, 272,  
2 153 Cal. Rptr. 322, 331 (Ct. App. 1979). Whereas, CAL. CORP. CODE  
3 § 16307 plainly provides the substantive law for the principle of  
4 individual liability apart from the entity's liability.

5       According to this scheme, therefore, although each partner is  
6 jointly and severally liable to the partnership creditors, there  
7 is a "collection procedure limitation": "[c]reditors may not  
8 automatically collect partnership debts from a general partner;  
9 the creditors must first obtain a judgment against the partner  
10 individually, holding the partner liable for the partnership's  
11 debt." A. Ahart, Calif. Prac. Guide: Enforcing Judgments and  
12 Debts, Ch. 3-A, ¶ 3:34 (The Rutter Group 2005).

13       Section 723, therefore, gives the trustee a right of action  
14 subject to state partnership law defenses.

15       We hereby adopt and incorporate the bankruptcy court's well-  
16 reasoned and exhaustive opinion, which comports with this  
17 enforcement limitation on Trustee's ability to pursue an action to  
18 recover the deficiency from WSCR because there was no separate  
19 judgment against WSCR, nor can there be.

20       Trustee maintains that a Supreme Court decision, which was  
21 published after the proceedings in bankruptcy court, supports his  
22 position that the bankruptcy court erred.

23       In United States v. Galletti, 541 U.S. 114, 124 S.Ct. 1548,  
24 158 L.Ed.2d 279 (2004), a partnership had been assessed for taxes.  
25 The partners filed bankruptcy, and the IRS filed proofs of claim  
26 seeking to establish the partners' personal liability for the  
27 partnership tax debt. Under the Internal Revenue Code ("IRC"),  
28 the time for an action against the partners, as individual



1 taxpayers, had expired because they had not been assessed, but it  
2 had not expired for an action under the partnership assessment.  
3 Id., 541 U.S. at 116.

4       The bankruptcy court disallowed the IRS claims and the  
5 district court affirmed. The Ninth Circuit also affirmed,  
6 reasoning that under California law "a creditor may not  
7 automatically collect from a general partner a debt that the  
8 partnership owes to the creditor. To the contrary, the creditor  
9 must first obtain a judgment against the partner holding the  
10 partner liable for the partnership's debt." United States v.  
11 Galletti, 314 F.3d 336, 344 (9th Cir. 2002) (citing CAL. CORP. CODE  
12 § 16307(c)).

13       The Supreme Court reversed, focusing, instead, on the meaning  
14 of "assessment." It held that the IRC requires only one  
15 assessment for any tax liability. The same assessment was  
16 applicable to the partnership and the partners who were  
17 secondarily liable. Galletti, 541 U.S. at 121-24. Therefore, the  
18 same statute of limitations applied to the partnership and the  
19 partners. Id. Consequently, the partners' tax liability could  
20 still be adjudicated in the claims allowance proceeding in  
21 bankruptcy court, and such judgment would satisfy CAL. CORP. CODE  
22 § 16307(c) for a "judgment against a partner." Id. at 124 n.5.

23       Galletti is consistent with California law which provides  
24 that a separate judgment is required against the general partner  
25 in order to determine that partner's personal liability on a claim  
26 against the partnership. See id. at 121 (discussing separate  
27 entity theory). The Supreme Court simply held that such separate  
28 judgment could be rendered in bankruptcy court and was not time-

1 barred under the IRC.<sup>14</sup> In contrast, in our case the state statute  
2 of limitations applied to bar the suit against WSCR. Therefore,  
3 Galletti actually supports WSCR's position that it was not  
4 personally liable for the partnership debt.

5 Trustee also cites case law that was rejected by the  
6 bankruptcy court. In CS Assocs., 160 B.R. 899, the bankruptcy  
7 court concluded that the partner was liable for partnership debts  
8 for which the creditor could not have obtained judgment directly  
9 against the partner. Id. at 908. While the facts of CS Assocs.  
10 are similar to our case, there is one significant difference: the  
11 applicable Pennsylvania statute<sup>15</sup> governing partners' joint and  
12 several liability does not contain the caveat "all partners are  
13 liable jointly and severally for all obligations of the  
14 partnership *unless otherwise . . . provided by law.*" CAL. CORP.  
15 CODE § 16306(a) (emphasis added). In California, the other  
16 statutes which address individual judgments against partners limit  
17 such joint and several liability.

18 CS Assocs. was followed in Liebmann v. Brown (In re Bonded  
19 Jewelry Center), 206 B.R. 381 (Bankr. D. Md. 1997), in which the

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20  
21 <sup>14</sup> In Galletti, the partners abandoned their state statute of  
22 limitations defense. See id. at 120 n.2.

23 <sup>15</sup> The Pennsylvania statute provides, in pertinent part:

24 All partners are liable:

25 . . . .

26 (2) Jointly for all other debts and  
27 obligations of the partnership but any  
28 partner may enter into a separate  
obligation to perform a partnership  
contract.

15 PA. CONS. STAT. ANN. § 8327 (West 1995).

1 Maryland and Pennsylvania statutes were identical.<sup>16</sup>

2 It was also cited in Mills v. Grotewohl (In re Super 8  
3 Florida III, Ltd.), 211 B.R. 764 (Bankr. M.D. Fla. 1996) for the  
4 proposition that “[a] partner’s liability in bankruptcy is the  
5 same as it would be under state law outside of bankruptcy.” Id.  
6 at 765. Since material legal and factual disputes existed  
7 concerning such liability under a Florida statute, which was  
8 identical to the California statute in its exception--“unless  
9 otherwise . . . provided by law,” summary judgment was denied in  
10 that case. Id. See FLA. STAT. ANN. § 620.8306(1) (West 2001).

11 The result in CS Assocs. is therefore inconsistent with  
12 California law. We hold that a trustee’s § 723(a) claim is  
13 dependent upon a general partner’s liability for partnership  
14 debts, which further requires that the creditor whose claim  
15 remains unpaid either hold or have the ability to obtain a  
16 personal judgment against the general partner. See CAL. CORP. CODE  
17 § 16307(c) and CAL. CIV. PROC. CODE § 369.5; see also Galletti,  
18 supra. In this case, the bankruptcy court correctly concluded  
19 that a § 723(a) action would improperly create a new liability for  
20 WSCR apart from state law, and therefore we affirm its decision to  
21 grant summary judgment in favor of WSCR.

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23 <sup>16</sup> See former MD. CODE ANN., CORPS. & ASS’NS § 9-307. This  
24 statute was repealed in 1998 and replaced by § 9A-306, which now  
resembles California law and provides, in pertinent part:

25 (a) Except as otherwise provided in subsections (b) and  
26 (c), all partners are liable jointly and severally for  
27 all obligations of the partnership unless otherwise  
agreed by the claimant or provided by law.

28 MD. CODE ANN., CORPS. & ASS’NS § 9A-306(a) (West WESTLAW through May  
10, 2005 legislation).

1 **CONCLUSION**

2  
3 The bankruptcy court applied the correct legal standard in  
4 determining excusable neglect under Rule 8002(c)(2), and its  
5 determination was not an abuse of discretion. Therefore, we  
6 **AFFIRM** the order granting Trustee's motion for an extension of  
7 time in which to file the notice of appeal.

8 On the merits, we adopt the bankruptcy court's opinion and  
9 conclude that Trustee's § 723(a) action against WSCR was limited  
10 by applicable state law, which required an individualized judgment  
11 determining WSCR's liability on the claim. Here, such judgment  
12 neither existed nor could it be attained by the Koukladases due to  
13 the expiration of the California statute of limitations prior to  
14 the bankruptcy. Consequently, Trustee could not establish WSCR's  
15 personal liability for the estate's deficiency on the claim in  
16 Debtor's bankruptcy case. Therefore, we **AFFIRM** the bankruptcy  
17 court's order granting summary judgment in favor of WSCR and  
18 against Trustee.

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