

FEDERAL CIRCUIT REJECTS COUNSEL'S ERROR IN MISREADING RULES

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In a recent case before the Federal Circuit, the Court found no excusable neglect in filing beyond the deadlines in the rules, and refused to reconsider an appeal of a breach of contract claim which had been rejected by the Court of Federal Claims as untimely. *United Communities LLC v. United States*, No. 2022-2074 (Fed Cir. Jan. 12, 2024).

United Communities submitted a claim to the contracting officer that alleged breaches of a contract for a rent cap on military member's basic allowance for housing. The contracting officer denied the claim in a final decision on June 29, 2020, which decision was subsequently confirmed on July 8, 2020. United Communities filed suit in the Court of Federal Claims ("COFC") on Sept. 17, 2020, alleging similar breaches of contract, and the COFC dismissed the claim with prejudice, and then denied a motion for reconsideration on Nov. 18, 2021.

United Communities failed to timely file its notice of appeals with the COFC and the Federal Circuit. The deadline for filing such a notice under Federal rules was on Jan. 17, 2022. United Communities failed to file its notice of appeal before this deadline. United Communities' counsel incorrectly relied on 41 USC § 7107, which governs timing of appeals from an Agency board of appeals. United Communities then filed for an extension of time to file a notice of appeal.

The Federal Circuit remanded to the COFC, which denied the notion, determining that the failure to file did not rise to the level of excusable neglect. United Communities argued that there was excusable neglect, based on the so-called "Pioneer Factors" which include:

- The danger of prejudice to the non-moving parties
- The length of the delay and its potential impact on judicial proceedings
- The moving party's reason for the delay, and whether it was within control of the moving party
- Whether the moving party acted in good faith

The Federal Circuit considered the Pioneer factors, and concluded that there was no reason for the late filing other than the counsel's erroneous understanding of the deadlines. The court considered good cause as well, but declined to find good cause since it was first brought up by United Communities on appeal.

The Federal Circuit expressed sympathy but refused to displace the COFC's discretion in denying the motion for an extension of time.

Takeaway. It is essential that counsel understand the deadlines in the court (or Board, or GAO rules). This situation could have been avoided.