YALE LAW & POLICY REVIEW

Deadlines in Civil Litigation: Toward a More Equitable Framework for Granting Extensions

*By James Mooney**

This Note proposes reforms to federal rules of procedure governing deadline extensions in civil litigation. Civil Rule 6(b)(1)(B), a representative example, allows deadline enlargements after a party files a document late, provided that the litigant "failed to act because of excusable neglect." Unfortunately, courts interpret "excusable neglect" inconsistently and some circuits construe it narrowly. This allows judges to dismiss meritorious cases and bar appeals even when extending deadlines would not prejudice other parties or harm the proceedings. A more equitable framework would channel judicial discretion and encourage courts to resolve cases on the merits rather than on missed due dates.

* Yale Law School, J.D. Class of 2019. I am deeply grateful to Noah Messing for supervising this project and encouraging me to pursue publication. Thanks to Yena Lee and Jamie Durling for invaluable feedback on my early drafts. Thanks also to Laurel Raymond, Simon Zhen, Jake van Leer, and other members of the *Yale Law & Policy Review* for careful editing and thoughtful suggestions.

INTRODUCTION

On January 27, 2015, a missing Supreme Court litigant called a top attorney about a deadline problem. The litigant, Bobby Chen, had disappeared in late 2014 after the Court granted his petition for certiorari, which he wrote in broken English without the assistance of counsel. The Justices grant approximately eighty out of more than 7,000 petitions each year,[1] making Chen's achievement remarkable for someone proceeding pro se. But the Court could not reach Chen to deliver the news.[2] After

1. *Frequently Asked Questions (FAQ)*, U.S. S. CT., https://www.supremecourt.gov/about/faq_general.aspx [https://perma.cc/2THY-SANJ].

2. A bizarre series of events accounted for Chen's disappearance. In November 2014, two days after the Supreme Court agreed to take his case, Chen went to California on business. During the trip, he suffered a "slip-and-fall injury" that prevented him from returning home until January 2015. Chen did not have his mail forwarded to California because he did not expect to be gone long. Chen was unaware that he could monitor the progress of his case online. Instead, he created an e-mail account for communications with the Court, and upon receiving no messages he assumed that the petition was still pending. Chen learned about the dismissal after returning home. Petition for

several weeks, *The Wall Street Journal* inquired about the "Supreme Court's Missing Man" and *The Baltimore Sun* published a headline that read, "Bobby Chen, the Supreme Court is Looking for You."[3] On January 9, 2015, the Justices dismissed the case after Chen failed to file an opening brief.

Ironically, Chen's case concerned another blown deadline. In November 2011, Chen sued Baltimore city officials for accidentally demolishing his house, but after filing the complaint he failed to serve summonses on the defendants. Lacking an attorney, Chen had not received summonses or service instructions, and he assumed that U.S. marshals would serve the documents for him because he was pro se. The U.S. District Court for the District of Maryland accepted this explanation and extended the service due date by sixty days. Although Chen complied, during the sixty-day period the case was transferred to a new judge. The defendants responded to the summonses by moving to dismiss the case because Chen did not show good cause for missing the original deadline. Applying Fourth Circuit precedent interpreting Federal Rule of Civil Procedure 4(m),[4] the district court granted the motion and held that it lacked discretion to extend the deadline without a showing of good cause. The judge acknowledged that the Fourth Circuit "contradicted every other circuit that had interpreted Rule 4(m)," along with the Advisory Committee's notes to the rule, but he considered himself bound by the higher court.[5] The Fourth Circuit affirmed the district court decision and Chen filed his certiorari petition.

After Chen learned that the Justices dismissed his case, the Supreme Court clerk's office told him that he could file a petition for rehearing. Chen knew he needed professional help with convincing the Court to reopen the

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Rehearing at 4, Chen v. Mayor and City Council of Baltimore, 135 S. Ct. 939 (2015) (No. 13-10400).

3. Chris Kaltenbach, *Bobby Chen, the Supreme Court is Looking For You*, BALT. SUN (Dec. 12, 2014), https://www.baltimoresun.com/features/baltimore-insider-blog/bal-bobby-chen-the-supreme-court-is-looking-for-you-20141212-story.html [https://perma.cc/WY5F-2RE2]; Brent Kendall & Colleen Wilson, *Supreme Court's Missing Man*, WALL ST. J. (Dec. 9, 2014), https://www.wsj.com/articles/supreme-courts-missing-man-1418172350?mod=WSJ_hp_EditorsPicks [https://perma.cc/F86N-NC3S].

4. Mendez v. Eliot, 45 F.3d 75 (4th Cir. 1995).

5. Petition for Rehearing at 3, Chen v. Mayor and City Council of Baltimore, 135 S. Ct. 939 (2015) (No. 13-10400).

case. Thus, he called former U.S. Solicitor General Paul D. Clement, who was then a partner at the litigation boutique Bancroft PLLC.[6] Clement agreed to take the case pro bono and filed a rehearing petition three and a half weeks after the case was dismissed. Assuring the Justices that Chen would miss no more deadlines after retaining experienced Supreme Court counsel, Clement urged the Court to reconsider the case and resolve the circuit split regarding Rule 4(m).[7] Without explanation, on February 23, 2015, the Justices declined to do so.[8]

Bobby Chen is one of many litigants who struggle to navigate complex court procedures without the assistance of counsel. Whereas Chen defied the odds by reaching the U.S. Supreme Court, however fleetingly, thousands struggle to comply with procedural rules in the lower federal courts.[9] In Fiscal Year 2018, fifty percent of new cases in federal appeals courts[10] and more than twenty-five percent of civil cases initiated in federal district courts were filed pro se.[11] The federal courts do not track the number of suits that judges dismiss due to missed deadlines, but the challenges those time limits create for self-represented parties are evident. Civil procedure is one of the most feared classes in law school because the rules are dense and difficult to master. The rules are even more daunting

6. I worked at Bancroft at the time and interviewed Chen about his case.

7. Petition for Rehearing at 5, Chen v. Mayor and City Council of Baltimore, 135 S. Ct. 939 (2015) (No. 13-10400).

8. John Fritze, *Supreme Court Denies Missing Litigant Bobby Chen a Second Chance*, BALT. SUN (Feb. 23, 2015), http://www.baltimoresun.com/news/maryland/politics/blog/bal-supreme-court-denies-missing-litigant-bobby-chen-a-second-chance-20150223-story.html [https://perma.cc/R2DC-3PCY].

9. Nina Ingwer VanWormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 993 (2007) (discussing problems that arise in pro se litigation); Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 114 (2002) (same).

10. *Judicial Business 2018*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/judicial-business-2018 [https://perma.cc/6BY4-3K9H].

11. *U.S. District Courts–Civil Pro Se and Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2018*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2018.pdf [https://perma.cc/TAD7-NHND].

to pro se litigants, who often lack significant education and almost always have no legal training.

Parties in federal court must obey time limits in federal and local rules of procedure as well as court orders. In the Federal Rules of Civil Procedure alone, there are at least eleven deadlines regarding pleadings and service of process that commonly arise in litigation.[12] Some jurisdictions have local rules that empower courts to rule summarily on motions that do not receive a timely response.[13] Missing a deadline, particularly one concerning a dispositive motion, can cause a dismissal[14] in the D.C. Circuit and the Seventh Circuit.[15] Other circuits forbid dismissals

12. Practical Law Litigation, *Common Deadlines in Federal Litigation Chart, Practical Law Checklist* 7-517-4421 (2019). When tallying common deadlines, I counted the time limit to answer a pleading only once, though there are six potential deadlines depending on the case. For example, federal-officer defendants have more time to file an answer than private-citizen defendants. FED. R. CIV. P. 12(a)(2)-(3). There is also a particular rule that applies if the defendant did not answer before the matter was removed to federal court. FED. R. CIV. P. 81(c)(2).

13. *See, e.g.*, N.D. IND. R. 7-1(d)(4) (providing that "[t]he court may rule on a motion summarily if an opposing party does not file a response before the deadline."); N.D. GA. R. 7.1(B) (stating that "[f]ailure to file a response shall indicate that there is no opposition to the motion.").

14. A dismissal on the basis of a missed deadline is usually without prejudice. But forcing a plaintiff to restart litigation results in wasted legal fees, additional delay, and potentially the ordeal of a malpractice suit if a lawyer blew the due date. Dismissals without prejudice can also operate as de facto adjudications on the merits if the statute of limitations elapsed during the litigation. Ciralsky v. CIA, 355 F.3d 661, 672 (D.C. Cir. 2004) (explaining that "when a suit is dismissed without prejudice, the statute of limitations is deemed unaffected by the filing of the suit, so that if the statute of limitations has run the dismissal is effectively with prejudice") (quoting Elmore v. Henderson, 227 F.3d 1009, 1011 (7th Cir. 2000)).

15. *See, e.g.*, Cohen v. Bd. of Trustees of the Univ. of the D.C., 819 F.3d 476, 481 (D.C. Cir. 2016) (stating that, although the panel had concerns about the case law's policy implications, "the district court did not commit reversible error in granting the defendants' unopposed motion to dismiss the complaint under Federal Rule 12(b)(6), at least insofar as dismissal was without prejudice."); Tobel v. City of Hammond, 94 F.3d 360, 362 (7th Cir. 1996) (holding that "the district court clearly has authority to enforce strictly its Local Rules, even if a default results."); Reinbold v. Advanced Auto Parts, Inc., No. 18-CV-605-SMY-DGW, 2018 WL 4051830, at *1 (S.D. Ill. Aug. 24, 2018)

based solely on a failure to respond to a motion to dismiss[16] and restrict the use of default judgments.[17] A judge's refusal to extend the time limit to appeal renders a district court decision final.

District judges have significant discretion to decide what sanction is appropriate for a missed deadline. Lesser penalties include warnings, excluding evidence, ordering a litigant to pay an opposing party's attorneys' fees for bringing a motion to compel discovery, and "prohibiting the disobedient party from supporting or opposing designated claims or defenses."[18] Though judges tend to show some lenience to self-represented litigants, people proceeding pro se are still often held to the same standard of compliance as attorneys.[19] Moreover, when a lawyer misses a deadline, the client frequently pays the price. In 2014, AT&T lost its right to appeal a forty-million-dollar patent verdict because its attorneys failed to read the

(citing *Tobel* and "construe[ing] a party's failure to file a timely response as an admission of the merits of the motion[s] [to dismiss].").

16. *See, e.g.*, Stevenson v. City of Seat Pleasant, Md., 743 F.3d 411, 416 n.3 (4th Cir. 2014) (stating that "[e]ven though Appellants did not challenge the motions to dismiss, we note that the district court nevertheless has an obligation to review the motions to ensure that dismissal is proper."); Servicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc., 702 F.3d 794, 806 (5th Cir. 2012) (observing that "Rule 12 does not by its terms require an opposition; failure to oppose a 12(b)(6) motion is not in itself grounds for granting the motion."); Issa v. Comp USA, 354 F.3d 1174 , 1177 (10th Cir. 2003) (declaring that "a district court may not grant a motion to dismiss for failure to state a claim 'merely because [a party] failed to file a response.'") (quoting Reed v. Bennett, 312 F.3d 1190, 1194 (10th Cir. 2002)); *see also* Cohen, 819 F.3d at 481-82 (compiling and analyzing cases across circuits).

17. *See, e.g.*, Newgen, LLC. v. Safe Cig, LLC, 840 F.3d 606, 616 (9th Cir. 2016) (stating that it is "the general rule that default judgments are ordinarily disfavored."); Meehan v. Snow, 652 F.2d 274, 277 (2d Cir. 1981) (declaring that "[w]hile courts are entitled to enforce compliance with the time limits of the Rules by various means, the extreme sanction of a default judgment must remain a weapon of last, rather than first, resort.").

18. *See, e.g.*, FED. R. CIV. P. 37(b)(2)(a) (regarding penalties for blown discovery deadlines).

19. Buxton, *supra* note 9, at 114.

docket carefully and appealed late.[20] Courts emphasize that a lawyer is the client's freely chosen agent and an agent's actions bind the principal.[21]

Ambiguous time-extension standards increase courts' discretion. For example, Federal Rule of Civil Procedure 6(b)(1)(B) allows district judges to extend missed deadlines if a tardy litigant proves that she filed late because of "excusable neglect."[22] Other federal rules, such as Bankruptcy Rule 9006(b)(1), contain an analogous excusable-neglect standard, while others, such as Appellate Rule 26, contain a "good-cause" standard. Courts interpret these phrases inconsistently and some circuits construe them narrowly, which allows judges to dismiss meritorious cases and bar appeals even when an extension would not harm other parties or judicial efficiency.

The Supreme Court attempted to standardize the rules by creating a four-factor test for proving excusable neglect in *Pioneer Investment Services Co. v. Brunswick Associates L.P.* The *Pioneer* standard requires courts to consider "[1] the danger of prejudice to the [opposing parties], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith."[23] Though *Pioneer* sought to clarify how judges should make deadline-extension decisions, the opinion left courts with so much discretion that different circuits devised plausible but diametrically opposed interpretations of the four-factor test. Circuits do not merely assign different weights to various *Pioneer* prongs. Rather, there is a fundamental disagreement about whether neglect may be excused even if there is no "pardonable" explanation. Courts also diverge regarding whether misunderstanding or ignorance of a clear deadline can ever constitute excusable neglect.

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20. Ryan Davis, *Sidley Austin Attys Missed Deadline to Appeal $40M Verdict*, LAW360 (Feb. 12, 2014), https://www.law360.com/articles/509440 [https://perma.cc/9XZ9-CEE2].

21. Link v. Wabash R.R. Co., 370 U.S. 626, 633 (1962) (holding that a district court could dismiss a plaintiff's case for want of prosecution even though the error was the plaintiff's lawyer's fault); *see also* Adam Liptak, *Agency and Equity: Why Do We Blame Clients for Their Lawyers' Mistakes?*, 110 MICH. L. REV. 875, 875 (2012).

22. FED. R. CIV. P. 6(b)(1)(B).

23. 507 U.S. 380, 395 (1993).

This Note focuses on what the Supreme Court calls "claim-processing" deadlines. These time limits "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[24] Claim-processing rules are legally distinct from "jurisdictional" deadlines, which limit courts' subject-matter jurisdiction by making timely actions prerequisites to initiating suits and appeals.[25] The Note discusses one jurisdictional rule, the deadline to appeal in civil cases, which can be extended pursuant to *Pioneer* for limited periods after its expiration.[26] This is the first paper to propose trans-substantive changes to federal rules of procedure regarding deadline extensions in civil litigation.[27]

Previous scholarship has critiqued *Pioneer*[28] and particular claim-processing standards[29] without proposing a new, broad framework for

24. Henderson ex. rel. Henderson v. Shinseki, 562 U.S. 428, 435 (2011).

25. Karen Petroski, *Statutory Genres: Substance, Procedure, Jurisdiction*, 44 LOY. U. CHI. L.J. 189, 215 (2012).

26. FED. R. APP. P. 4(a).

27. For analytical clarity, this Note discusses deadlines in civil litigation only, even though the Rules of Criminal Procedure also include an extension provision based on excusable neglect. FED. R. CRIM. P. 45. The stakes are different in criminal cases because neither the prosecution nor the defense can be removed from court for missing a deadline. But given a criminal defendant's strong interest in a full and fair hearing when her liberty is on the line, many of the principles discussed here could apply with special force in the criminal context.

28. *See, e.g.*, Taylor Simpson-Wood, *A Litmus Test for* Pioneer*: Ethical Considerations and the Delegation Situation*, 31 J. LEGAL PROF. 171 (2007) (explaining how *Pioneer* ought to be clarified to apply in cases of neglect caused by an attorney who delegated responsibility to and then failed to supervise a non-lawyer, such as a paralegal); Beth Anne Harrill, Comment, *Equitable Standards of Excusable Neglect: A Critical Analysis of* Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 11 BANKR. DEV. J. 181 (1995) (contending that the *Pioneer* doctrine is not objective and will yield "unpredictable results"); Sue Patton Mosley, Note, *Bankruptcy-Excusable Neglect-Late Filings of Bankruptcy Proofs of Claims Are Not Limited to Those Beyond The Filer's Ability to Control.* Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership*, 113 S. Ct. 1489 (1993)*, 16 U. ARK. LITTLE ROCK L.J. 47 (1994) (explaining that "[t]he full impact of *Pioneer* has not been determined," but that the decision "is subject to varied interpretation." [*sic*]).

extensions,[30] though one author did suggest equitable reforms to how courts treat jurisdictional deadlines regarding post-trial motions and notices of appeal.[31] Claim-processing deadlines deserve attention because they are the vast majority of time limits in civil litigation. They serve two primary purposes: promoting efficiency and avoiding prejudice to opposing parties. These deadlines help lawsuits progress at a reasonably predictable pace and ensure that delays are not endless, so as to prevent

29. *See, e.g.*, Debrah L. Thorne and Kathleen L. Matsoukas, *Rule 4(m): An Impermissible Detour Around § 546's Statute of Limitations*, 29-JAN AM. BANKR. INST. J. 34 (2011) (arguing that "bankruptcy judges should not use Rule 4(m)['s time enlargement provision for service of process] to extend the statute of limitations beyond that authorized in [11 U.S.C.] § 546 [part of the Bankruptcy Code]."); Gregory M. Capone, Note, *You Got Served: Why an Excusable Neglect Standard Should Govern Extensions of Service Time After Untimely Service Under Rule 4(m)*, 83 ST. JOHN'S L. REV. 665 (2009); Brett Warren Weathersbee, Note, *No More Excuses: Refusing to Condone Mere Carelessness or Negligence Under the "Excusable Neglect" Standard in Federal Rule of Civil Procedure 60(B)(1)*, 50 VAND. L. REV. 1619 (1997) (criticizing *Pioneer*'s "liberal balancing test" for sacrificing efficiency and finality (among other things); arguing that the decision does not (and should not) apply to Civil Rule 60(b)(1)'s excusable-neglect standard regarding relief from final judgments).

30. In general, jurisdictional deadlines have attracted more scholarly attention than claim-processing rules. *See, e.g.*, E. King Poor, *The Jurisdictional Time Limit for An Appeal: The Worst Kind of Deadline—Except for All Others*, 102 NW. U. L. REV. COLLOQUY 151 (2008) (defending *Bowles v. Russell*, an important Supreme Court decision about jurisdictional deadlines); Jonathan A. Rhodes, *The Jurisdictional Nature of Statutory Time Restrictions [*Bowles v. Russell, *127 S. Ct. 2360 (2007)]*, 47 WASHBURN L.J. 605 (2008) (criticizing *Bowles*); Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. COLLOQUY 64, 68 (2007) (also criticizing *Bowles*).

31. Christopher W. Robbins, Comment, *Jurisdiction and the Federal Rules: Why the Time Has Come to Reform Finality by Inequitable Deadlines*, 157 U. PA. L. REV. 279 (2008). The author proposed making a new "unique circumstances" doctrine apply to "all deadlines contained in the [federal rules]," but did not discuss the idea beyond the context of enforcing the deadline to file a notice of appeal. *Id.* at 338. The author argued that if a court mislead a party about the length of the notice-of-appeal time limit, this unique circumstances doctrine would prevent the litigant from losing the right to appeal because he relied on the judge's instructions. *Id.* at 337-39. The author did not develop the proposed unique circumstances doctrine into a full-fledged framework for extension decisions.

backlogged cases from clogging court dockets. Time limits also mitigate the risk that litigants will delay proceedings in order to gain an unfair advantage over their opponents. For instance, it would be inequitable to allow a party to wait to file a pleading until her opponent no longer has access to evidence and witnesses that could support a rebuttal.

This Note's thesis, however, is that minor tardiness should not trigger harsh sanctions such as dismissal, default, or the denial of the right to appeal. It is unacceptable that certain circuits require litigants to provide a "pardonable" reason for all delays, no matter how trivial, and refuse to forgive any misunderstanding or neglect of deadlines in the rules. To remedy the post-*Pioneer* circuit splits, this Note proposes a uniform time-extension framework that would guide enlargement decisions. The framework's most important principles are (in abbreviated form): (1) an equitable presumption favoring an extension if the movant acted in good faith and the extension would not harm other litigants (a presumption that weakens in proportion to the number of extensions the court has granted the movant previously); (2) a requirement that penalties for exceeding time limits be proportional to the harm caused by the delay; and (3) a rule that courts should err on the side of sanctioning a lawyer rather than penalizing the client when the lawyer is responsible for the missed deadline. With some subject-specific exceptions, these provisions should govern motions to extend all claim-processing time limits as well as deadlines to appeal.

The Note proceeds in four parts. Part I surveys current time enlargement provisions, highlighting how the rules' operative terms—namely "excusable neglect"—create ambiguity regarding how courts should make extension decisions. Part II illustrates the need for reform by examining two fundamental circuit splits about the meaning of *Pioneer*. Part III argues that relaxing deadline enforcement would not jeopardize efficiency or professional standards and that an equity-enhancing framework is necessary to protect substantive rights (especially the rights of unrepresented parties). Finally, Part IV proposes a new, equitable time-extension rule and refutes potential objections.

I. OVERVIEW OF CURRENT TIME-EXTENSION RULES

There are several time-extension provisions in the Federal Rules of Civil, Appellate, and Bankruptcy Procedure and the Rules of the Supreme Court. Many of these rules employ an excusable-neglect standard, others include a good-cause test, and the Supreme Court's extension rule is virtually open-ended. Different rules exempt certain subject-specific time limits from the generally-applicable extension frameworks to preserve the

finality of judgements. The key takeaway is that the current rules' operative terms are so ambiguous that they do not give judges clear guidance about how to make time enlargement decisions. The rules' ambiguity caused the circuit splits examined in Part II.

A. Time Extensions in the Rules of Civil Procedure

Civil Rule 6(b) gives district courts broad latitude to extend time periods in federal rules, local rules, court orders, and statutes that do not include a method for computing time, both before and after the limits expire. Appellate courts may only review these decisions for abuse of discretion.[32] The Advisory Committee of 1937 sought to allow courts to grant equitable extensions while ensuring that at some point judgments would be final.[33] Thus, although Rule 6(b) applies to almost all deadlines in the Federal Rules of Civil Procedure, the Advisory Committee ensured that it did not govern Rule 59's time limits regarding motions for new trials or statutory deadlines for filing appeals.[34] There is a dispute among the circuits regarding whether Rule 6(b) applies to extensions under Rule 4(m)—the rule at issue in Bobby Chen's case—after the 120-day service deadline has passed.[35]

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32. 4B CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1165 at 1 (4th ed. Jan. 2017 Update).

33. Steven S. Gensler, *Rule 6. Computing and Extending Time; Time for Motion Papers*, *in* 2 FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY APPENDIX A RULE 6, WEST 1 (Feb. 2017 Update), http://1.next.westlaw.com/Document/I8686b5f3c15111ddb9c7909664ff7808/View/FullText.html [https://perma.cc/8DA7-H7H6] (reprinting Advisory Committee notes).

34. *Id.*

35. *See* Capone, *supra* note 29, at 679-81. Rule 6(b)(2) does not list Rule 4(m) among the time limits exempt from the excusable-neglect standard. Rule 4(m) states that if a plaintiff "shows good cause" for the failure to serve a defendant on time, then "the court must extend the time for service for an appropriate period." The Seventh, Ninth, and Eleventh Circuits hold that courts should look only to Rule 4(m) when evaluating initial motions to extend the service due date. United States v. McLaughlin, 470 F.3d 698, 700 (7th Cir. 2006); *see also* Horenkamp v. Van Winkle & Co., 402 F.3d 1129, 1132 (11th Cir. 2005); United States v. 2,164 Watches, More or Less, Bearing a Registered Trademark of Guess?, Inc., 366 F.3d 767, 772 (9th Cir. 2004). These circuits maintain that Rule 6(b) applies only if "only if the plaintiff failed to meet the new [service] deadline and filed a motion for [another]

The current Rule 6(b) states (operative terms are italicized):

(1) In General. When an act may or must be done within a specified time, the court may, *for good cause*, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of *excusable neglect*.

(2) Exceptions. A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

The Federal Rules of Appellate and Bankruptcy Procedure contain similar provisions regarding extensions for good cause or excusable neglect.

B. Time Extensions in the Rules of Appellate Procedure

The Appellate Rules' primary time extension standard is "good cause." Rule 26(b) provides that "[f]or good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires."[36] In the Advisory Committee's notes to Rule 4, the Committee explained the relationship between good cause and excusable neglect.[37] The terms are not "interchangeable, and one is not inclusive of the other."[38] The excusable-neglect test governs circumstances "in which there is fault;" i.e. when "something within the control of the movant" causes a delay.[39] Conversely, the good cause test "applies in situations in which there is no fault—excusable or otherwise."[40] These are circumstances when something outside the movant's control creates the need for an extension.[41]

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extension of time." *McLaughlin*, 470 F.3d at 700. In contrast, the Fifth and Sixth Circuits apply Rule 6(b)'s excusable-neglect standard when considering initial extension motions after the 120-day service time limit has elapsed. Turner v. City of Taylor, 412 F.3d 629, 650 (6th Cir. 2005); McGuire v. Turnbo, 137 F.3d 321, 324 (5th Cir. 1998).

36 FED. R. APP. P. 26(b).

37. FED. R. APP. P. 4 & Advisory Committee notes.

38 *Id.*

39 *Id.*

40 *Id.*

41. *Id.*

The Supreme Court held that filing a timely notice of appeal in a civil case is a "jurisdictional requirement"—and thus is not subject to equitable exceptions—because Congress codified the deadline in 28 U.S.C. § 2107.[42] However, if a party moves to extend the time limit to appeal within thirty days of missing it per Rule 4(a)(5)(A)(i), a court may extend the deadline for good cause or if it decides there was excusable neglect.[43]

C. Time Extensions in the Rules of Bankruptcy Procedure

"An adaptation of [Civil] Rule 6," Bankruptcy Rule 9006 includes cause and excusable neglect-based extension provisions and applies to most bankruptcy deadlines.[44] However, there are more exceptions in bankruptcy procedure than in civil procedure. Judges cannot enlarge time under six bankruptcy rules[45] and, per Rule 9006(b)(3), there are several rules that contain their own time extension provisions separate from the general Rule 9006(b)(1).

Similar to Appellate Rule 4(a), Bankruptcy Rule 8002(d) limits the time in which a party can move to extend the period to appeal after the deadline has passed, though the window is twenty-one days rather than

42. Bowles v. Russell, 551 U.S. 205, 209-14 (2007). Jurisdictional deadlines are rigid because Article III, Section 1 of the Constitution is understood to entrust Congress with defining the jurisdiction of federal courts. Stephen R. Brown, *Hearing Congress's Jurisdictional Speech: Giving Meaning to the "Clearly- States" Test in* Arbaugh v. Y & H Corp., 46 WILLAMETTE L. REV. 33, 33 (2009). As the Supreme Court said in *Bowles*, "[b]ecause Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Bowles*, 551 U.S. at 213. Unlike jurisdictional time limits, claim-processing deadlines "do not create or withdraw federal jurisdiction." Kontrick v. Ryan, 540 U.S. 443, 453 (2004) (citing Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978)). They are judge-created and courts have more freedom to extend them.

43. FED. R. APP. P. 4(a)(5)(A)(i)-(ii). Extensions are limited to thirty days after the original deadline or fourteen days after the date of the order granting the enlargement, whichever is later. FED. R. APP. P. 4(a)(5)(C). However, the Supreme Court clarified that Rule 4(a)(5)(C)'s limitation on extensions is *not* jurisdictional because it is not codified in a statute. *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 21 (2017).

44. FED. R. BANK. P. 9006 & Advisory Committee notes.

45. *See id.* 9006(b)(2).

thirty days. Rule 8002(a)'s general, fourteen-day deadline to appeal is also shorter than Appellate Rule 4(a)'s thirty-day period (so as to facilitate the prompt resolution of bankruptcy cases).[46] Rule 8002(d)(2) lists judgments, orders, and decrees with hard appellate deadlines that cannot be extended.[47]

D. Time Extensions in the Rules of the Supreme Court

Rule 30 of the Rules of the Supreme Court gives the Justices very broad discretion regarding extension decisions.[48] The rules do not explain what standard governs extension decisions in ordinary circumstances, though Rule 30.4 provides that litigants should set out "specific reasons why an extension of time is justified."

Under Rule 30.2, enlargement motions must be filed "within the period sought to be extended." Moreover, applications for extensions of time to file certiorari petitions or jurisdictional statements "must be filed at least 10 days before the specified final filing date as computed under these Rules." Exceptions to Rule 30.2 will be granted only "in the most extraordinary circumstances."

II. CONFLICTING CASE LAW ON EXCUSABLE NEGLECT

The federal rules' use of the ambiguous phrase "excusable neglect" caused decades of disagreement among the circuits. The Supreme Court's attempt to resolve one circuit conflict in the 1990s inspired two more splits that remain unresolved, creating the need for additional intervention to establish a uniform time-enlargement framework. But the problem is not merely a lack of uniformity among the federal courts. Rather, certain circuits have adopted narrow interpretations of excusable neglect that

46. *Historical and Revision Notes (FRBP 8002)*, WEBER LAW FIRM, P.C. (July 30, 2018), https://weberlaw.com/BAPCPA/rules/htm/bk/notes/80/frbp-notes-8002.htm [https://perma.cc/2UYV-ZU3C] (reprinting Advisory Committee notes). Some lower courts have held that Rule 8002(a)'s deadline to appeal is jurisdictional. *See, e.g.*, In re Wilkins, 587 B.R. 97, 103 (B.A.P. 9th Cir. 2018); In re Sobczak-Slomczewski, 826 F.3d 429, 432 (7th Cir. 2016). The Supreme Court has not provided a definitive ruling on the question.

47. *See* FED. R. BANK. P. 8002(d)(2).

48. SUP. CT. R. 30.

allow judges to dismiss meritorious cases and bar appeals on technicalities.

When interpreting "excusable neglect" in the federal bankruptcy and appellate rules in the early 1990s, federal appellate courts were divided on the question of whether a movant had to demonstrate that circumstances outside her control caused the delay.[49] The Supreme Court's opinion in *Pioneer Investment Services Co. v. Brunswick Associates L.P.* tried to resolve the confusion and established the current criteria governing excusable neglect claims.[50] *Pioneer* was a bankruptcy case, but the Justices recognized that the relevant bankruptcy rule was "patterned" after Federal Rule of Civil Procedure 6(b) and discussed the latter in detail.[51]

The *Pioneer* Court maintained that "[a]lthough inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' under Rule 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant."[52] Noting that Congress offered few "guideposts for determining what sorts of neglect will be considered 'excusable,'" the Justices determined that courts applying the excusable-neglect standard should consider "all relevant circumstances" surrounding the missed deadline.[53] Four specific factors include "[1] the danger of prejudice to the [opposing parties], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith."[54] The majority noted that "the lack of any prejudice to the [opposing party] or to the interests of efficient judicial administration, combined with the good faith of [movants] and their counsel, weigh strongly in favor of permitting the tardy claim."[55] "[A]t bottom," the Court said, the deadline-extension inquiry is "an equitable one."[56]

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49. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 387 n.3 (1993) (discussing the circuit split).

50. *Id.* at 395.

51. *Id.* at 391-94.

52. *Id.* at 392.

53. *Id.* at 395.

54. *Id.*

55. *Id.* at 398.

56. *Id.* at 395.

A. The First Circuit Split: Whether Litigants Must Provide a "Pardonable" Reason for a Late Filing

Pioneer gave courts so much discretion that different circuits devised plausible but diametrically opposed interpretations of the four-factor test. As the U.S. Court of Appeals for the Ninth Circuit observed in 2004, "the authorities interpreting *Pioneer* in a number of circuits are in some disarray" and "various . . . opinions have cited similar portions of *Pioneer* to support their respective but differing conclusions."[57] Of course, any multifactor standard encompassing "all relevant circumstances" will lead to varying judicial applications. But different circuits do not merely emphasize different *Pioneer* factors depending on the characteristics of specific cases. The First and Seventh Circuits have transformed *Pioneer* from a balancing test into a completely different kind of framework, a de facto two-step inquiry in which the reason-for-the-delay prong precludes the consideration of any other factors. Tardy litigants must make a threshold showing that the reason for the delay was satisfactory before they may contend that the balance of "all relevant circumstances" justifies an extension. The First and Seventh Circuits do not describe the test as involving two separate steps, but in practice this is how they apply the standard. In contrast, the Ninth Circuit does not require litigants to provide a colorable excuse for a delay.

In an influential opinion, Judge Richard Posner of the Seventh Circuit held that "[t]he word 'excusable' would be read out of the rule if inexcusable neglect were transmuted into excusable neglect by a mere absence of harm."[58] Subsequently the Seventh Circuit decided that "[m]issing a filing deadline because of slumber is fatal" and that "inattentiveness to the litigation is not excusable."[59] Another opinion said that though an excuse need not be "particularly compelling," "the reasons behind some delays will be unexcused no matter what the countervailing factors."[60] The First Circuit agrees, requiring tardy litigants to provide a

57. Pincay v. Andrews, 389 F.3d 853, 857 (9th Cir. 2004).

58. Prizevoits v. Indiana Bell Tel. Co., 76 F.3d 132, 134 (7th Cir. 1996).

59. Matter of Plunket, 82 F.3d 738, 742 (7th Cir. 1996).

60. United States v. Brown, 133 F.3d 993, 997 (7th Cir. 1998) (citing *Prizevoits*, 76 F.3d at 133).

"pardonable reason" for a late filing even if the delay was as brief as one day and created "little danger of prejudice" to opposing parties.[61]

Judge Posner's interpretation of *Pioneer* creates harsh results. For instance, consider the U.S. District Court for the Southern District of Mississippi's invocation of his opinion in its dismissal of a civil rights action by Ronnie Tuesno. Tuesno was a pro se pretrial detainee who missed the deadline to file a notice of appeal and submitted a timely extension motion under Appellate Rule 4(a)(5). The district court had granted summary judgment in favor of law-enforcement defendants, and Tuesno's attorney had withdrawn from the case. The lawyer did not notify Tuesno of his withdrawal until nineteen days after the final judgment, leaving the plaintiff with eleven days to file a notice of appeal on his own. Tuesno did not receive a personal copy of the judgment until two days before the deadline. He urged the district court to consider these circumstances, along with the difficulties created by his incarceration, as reasons to grant an extension.[62] But the district judge denied the extension motion, citing a Fifth Circuit case quoting Judge Posner for the proposition that "the absence of prejudice alone is not grounds for finding 'excusable' neglect."[63] According to the district judge, Tuesno had all of the information he needed to file the notice of appeal when his attorney called him about the withdrawal eleven days before the deadline. Thus, Tuesno could not satisfy the reason-for-the-delay prong. The plaintiff's pro se status did not "excuse a late filing."[64]

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61. Hospital del Maestro v. N.L.R.B., 263 F.3d 173, 175 (1st Cir. 2001) (holding that "the [party] has offered no pardonable reason why it misconstrued the plain, unambiguous meaning of the [deadline]. The favorable juxtaposition of the other *Pioneer* factors does not, therefore, excuse the [party's] oversight."); *In re* Sheedy, 875 F.3d 740, 744 (1st Cir. 2017) (citing *Hospital del Maestro* for the proposition that "[e]ven where there is no prejudice, impact on judicial proceedings, or trace of bad faith, '[t]he favorable juxtaposition of the[se] factors' does not excuse the delay where the proffered reason is insufficient.").

62. Tuesno v. Jackson, No. 5:08-cv-302, 2013 WL 685928, at *2 (S.D. Miss. Feb. 25, 2013). The strict confines of jail give pro se litigants little control over their schedules and diminish their ability to prepare and file legal documents.

63. *Id.* at *2 n.2 (quoting *Prizevoits*, 76 F.3d at 134).

64. *Id.* at *2-*4.

The Ninth Circuit interprets the *Pioneer* test more liberally than the First and Seventh Circuits. The court will excuse simple mistakes in some circumstances, particularly if a tardy litigant acted in good faith and there was no prejudice to the opposing party.[65] This approach focuses on the consequences of a delay more than the culpability of the client or lawyer.

In the Ninth Circuit case *Pincay v. Andrews*, dueling opinions by Judges Alexander Kozinski (dissenting) and Marsha Berzon (concurring) distilled the debate over the meaning of excusable neglect. Judge Kozinski acknowledged that *Pioneer* "[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, though flouting does happen on occasion."[66] But even if these three factors cut in favor of an extension, a tardy litigant "need[s] to show *something*" to satisfy the reason-for-the-delay prong, which does "most of the work" in the *Pioneer* analysis.[67] Judge Kozinski contended that failure to put forth a satisfactory reason "may balance out any findings under the other factors" because, ultimately, excusable neglect "must . . . be excusable."[68] In his view, failing to demand a pardonable explanation from tardy litigants would "ratchet[] down the standard for professional competence" by "reward[ing]" careless lawyering.[69]

Judge Berzon countered that *Pioneer* is a *balancing* test; the reason-for-the-delay factor is not "an independent element with moral content" that precludes consideration of the other three prongs. The standard "indicates that a district court may find neglect 'excusable' if it is caught quickly, hurts no one, and is a real mistake, rather than one feigned for some tactical reason—*even if* no decent lawyer would have made that error." For Judge Berzon, "excusable" means "nothing more than 'appropriate to excuse.'"[70] The appropriateness of an extension turns on weighing multiple equitable factors without giving dispositive status to any particular prong.

65. Pincay v. Andrews, 389 F.3d 853, 855 (9th Cir. 2004); Briones v. Riviera Hotel & Casino, 116 F.3d 379, 382 (9th Cir. 1997).

66. *Pincay*, 389 F.3d at 861 (Kozinski, J., dissenting) (internal citation omitted).

67. *Id.* at 861-62.

68. *Id.*

69. *Id.* at 863.

70. *Id.* at 860 (Berzon, J., concurring).

B. The Second Circuit Split: Whether Ignorance or Misunderstandings of Clear Deadlines Can Ever Be Excused

In a second circuit split, seven circuits hold that "[t]he excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules."[71] Only the Ninth[72] and D.C.[73] Circuits reject that per se rule explicitly.

The Eleventh Circuit argued that without such a rule, lawyers would plead their own "inability to understand the law when [they] fail[] to comply with a deadline."[74] The U.S. District Court for the District of Rhode Island used this rationale in an opinion denying an extension after plaintiffs filed a notice of appeal one day late. The plaintiffs had lawyers in multiple states, and an out-of-state attorney mailed the notice of appeal to the Rhode Island counsel shortly before the deadline. The package did not arrive until the due date because the out-of-state lawyer used an incorrect address, and the Rhode Island attorney did not receive the document from his secretary until the day after the time expired. The lawyer filed the notice of appeal right away, indicating that, on the due date, he mistakenly thought that the deadline to submit the document was sixty days instead of thirty.[75] The Rhode Island district court refused to lengthen the time to appeal even though the plaintiffs acted in good faith, the delay was only one day, and an extension would create "little danger of prejudice" to the

71. Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 368 (2d Cir. 2003); *see also* United States v. Torres, 372 F.3d 1159, 1163-64 (10th Cir. 2004); McCurry v. Adventist Health Sys./Sunbelt, Inc., 298 F.3d 586, 595 (6th Cir. 2002); Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 463 (8th Cir. 2000); Mirpuri v. ACT Mfg., Inc., 212 F.3d 624, 631 (1st Cir. 2000); Advanced Estimating Sys., Inc. v. Riney, 130 F.3d 996, 998 (11th Cir. 1997); Prizevoits v. Indiana Bell Tel. Co., 76 F.3d 132, 133 (7th Cir. 1996).

72. Pincay v. Andrews, 389 F.3d 853, 860 (9th Cir. 2004) (rejecting per se rules "against late filings attributable to any particular type of negligence" as inconsistent with *Pioneer*).

73. *In re* Vitamins Antitrust Class Actions, 327 F.3d 1207, 1209 (D.C. Cir. 2003) (stating that "[t]he Court in *Pioneer* purposely fashioned a flexible rule which, by its nature, counsels against the imposition of a *per se* rule on attorney neglect.").

74. *Advanced Estimating Sys., Inc.,* 130 F.3d at 998.

75. Graphic Commc'ns Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1, 2-3 (1st Cir. 2001) (district court opinion unavailable).

defendant.[76] The judge explained that, absent "unique or extraordinary circumstances . . . [finding] this neglect to be 'excusable' would only serve to condone and encourage carelessness and inattention in practice before the federal courts, and render the filing deadline set in Fed. R. App. P. 4(a)(1) a nullity."[77] The First Circuit affirmed.[78]

Unlike the aforementioned courts, the D.C.[79] and Ninth Circuits hold that per se rules "against late filings attributable to any particular type of negligence" are inconsistent with *Pioneer*:[80] Though he argued that litigants must provide a minimally acceptable reason for a delay, even Judge Kozinski agreed that "*Pioneer* forecloses any per se rule against 'mistakes construing the rules.'"[81]

All of the divided circuits have colorable interpretations of *Pioneer*: On one hand, the Supreme Court said that good faith plus a lack of prejudice or harm to judicial administration "weigh[s] strongly in favor of permitting" a tardy filing.[82] However, courts reluctant to grant extensions can point to *Pioneer*'s statement that "inadvertence, ignorance of the rules, or mistakes construing the rules do not *usually* constitute 'excusable' neglect."[83] The Supreme Court did not resolve whether "excusable neglect" means neglect that is appropriate to excuse on consequentialist grounds or neglect that can be morally or ethically exonerated, consequences aside.

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76. *Id.* at 7.

77. *Id.* at 8.

78. *Id.*

79. *In re* Vitamins Antitrust Class Actions, 327 F.3d 1207, 1209-10 (D.C. Cir. 2003) (stating that "[t]he Court in *Pioneer* purposely fashioned a flexible rule which, by its nature, counsels against the imposition of a *per se* rule on attorney neglect.").

80. Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253, 1261 (9th Cir. 2010) (discussing the liberal construction of Federal Rule of Procedure Rule 6(b)); Pincay v. Andrews, 389 F.3d 853, 860 (9th Cir. 2004) (rejecting per se rules "against late filings attributable to any particular type of negligence" as inconsistent with *Pioneer*).

81. *Pincay*, 389 F.3d 853 at 863 (Kozinski, J., dissenting).

82. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 398 (1993).

83. *Id.* at 392 (emphasis added). According to Judge Kozinski, *Pioneer*'s use of the word "'usually' suggests that [courts] should not apply the balancing test so that virtually *no* type of mistake is off limits for excusable neglect." *Pincay*, 389 F.3d at 863 (Kozinski, J., dissenting).

System-wide intervention is necessary because plausible but harsh interpretations of *Pioneer* jeopardize the substantive rights of litigants who make minor procedural mistakes. Since these doctrines are consistent with current law (which the Supreme Court has declined to clarify),[84] and because circuits are unlikely to depart from their own precedent, the clearest way to reform extension decisions is by updating the federal rules of procedure. Reformers cannot depend on case-by-case exercises of judicial discretion when entire circuits have stacked the deck in favor of overly-rigid deadline enforcement.

III. WHY DEADLINE-EXTENSION DECISIONS SHOULD BE MORE EQUITABLE

Policy arguments for interpreting *Pioneer* strictly reflect concerns about judicial economy and the need to maintain high professional standards for lawyers. As the Second Circuit said, "the legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced—where every missed deadline was the occasion for the embarkation on extensive trial and appellate litigation to determine the equities of enforcing the bar."[85] In addition, Judge Kozinski contended that excusing lawyers' careless mistakes would encourage more carelessness.[86] Professor Taylor Simpson-Wood agreed with Judge Kozinski, arguing that courts must prevent attorneys from delegating deadline-monitoring to non-lawyer staff and then pleading excusable neglect in the event of a tardy filing.[87] Simpson-Wood advocated "a strong presumption that where the neglect of an attorney consists of the failure to properly supervise in a delegation situation, that neglect is inexcusable."[88]

Yet enforcing deadlines "rigorously" and not enforcing them at all is a false dichotomy, and clients should not pay for the procedural errors of

84. *See, e.g.*, Pincay v. Andrews, 544 U.S. 961 (2005) *denying cert. to* 389 F.3d 853 (declining to resolve a circuit split regarding whether a lawyer misunderstanding a clear appellate deadline can constitute excusable neglect under *Pioneer*).

85. Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 368 (2d Cir. 2003).

86. Pincay v. Andrews, 389 F.3d 853, 863 (9th Cir. 2004) (Kozinski, J., dissenting).

87. Simpson-Wood, *supra* note 28.

88. *Id.* at 197-98.

their attorneys. Moreover, courts need not sacrifice clients' rights to penalize lawyers for missing deadlines. For these reasons, strict interpretations of *Pioneer* are difficult to defend on policy grounds—especially considering the harm inflexible deadline enforcement inflicts on pro se litigants.

A. The Ninth Circuit's Experience Demonstrates that Efficiency Concerns Are Overblown

First, experience in the Ninth Circuit rebuts dire warnings about a more permissive extension framework jeopardizing efficiency. The Ninth Circuit is known for its heavy caseload and significant backlog,[89] but these problems are a result of the circuit's size, not its interpretation of the *Pioneer* test. The Ninth Circuit's implementation of a relatively lenient deadline-extension doctrine suggests that courts can excuse delays caused by mistakes without compromising time limits generally. Fifteen years after *Pincay v. Andrews*,[90] the decision is still good law and the Ninth Circuit has not been overwhelmed with *Pioneer* litigation caused by careless lawyering.

Although there are no statistics on the average duration of delays caused by missed deadlines, even Judge Kozinski admitted that these delays "are seldom long."[91] This is especially true in cases involving parties who miss the deadline to appeal. Such delays are minimal because litigants have only thirty days after the deadline to request an extension. In most cases, the Second Circuit noted that "the court's sympathy will lie with the applicant [for an extension of the time limit to appeal]: the hardship of being denied an appeal is great . . . while the hardship to the prospective appellee is usually small."[92] The Seventh and Eighth Circuits made similar observations.[93]

89. See Mark Brnovich & Ilya Shapiro, *Split Up the Ninth Circuit—But Not Because It's Liberal*, WALL ST. J. (Jan. 11, 2018), https://www.wsj.com/articles/split-up-the-ninth-circuitbut-not-because-its-liberal-1515715542 [https://perma.cc/6JRX-DGVD] (discussing the Ninth Circuit's size and backlog).

90. *Pincay*, 389 F.3d at 861 (Kozinski, J., dissenting).

91. *Id.*

92. *Silivanch*, 333 F.3d at 367 (quoting opinion below).

93. Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 463 (8th Cir. 2000) (stating that, in the context of missed deadlines to appeal, "it seems that the

B. Time Limits Are Flexible

Moreover, as the Ninth Circuit emphasized,[94] time limits themselves are flexible. Courts regularly grant enlargements *before* deadlines expire. The Wright & Miller treatise on *Federal Practice & Procedure* observes that such extensions "normally will be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party."[95] Of course, it is legitimate for judges to enforce deadlines more strictly after they expire than when a party requests an extension before a due date. Courts should incentivize making such requests in a timely manner. But when a party acting in good faith misses a deadline and prejudice is minimal or nonexistent, substantive rights should not be sacrificed to enforce deadlines that are otherwise malleable.

C. Clients Should Not Pay for Counsel's Procedural Mistakes

Writing in the habeas corpus context, Jonathan Atkins, Danielle Rosenthal, and Joshua Weiss make strong arguments about the unfairness of holding clients responsible for attorneys' technical errors such as filing documents late.[96] For one, doing so is inequitable given that lay people hire lawyers precisely because lay people have difficulty navigating

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delay always will be minimal in actual if not relative terms, and the prejudice to the non-movant will often be negligible, since the Rule requires a 4(a)(5) motion to be filed within thirty days of the last day for filing a timely notice of appeal"); Prizevoits v. Indiana Bell Tel. Co., 76 F.3d 132, 134 (7th Cir. 1996) ("We do not think it can make a difference that no harm to the appellee has been shown. There is unlikely ever to be harm in the Rule 4(a)(5) setting, because the neglectful appellant has only 30 days after the expiration of his time for appealing in which to request relief.").

94. Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253, 1258-59 (9th Cir. 2010) (quoting 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1165 (3d ed. 2004)).

95. 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1165 (4th ed. 2018).

96. Jonathan Atkins et al., *The Inequities of AEDPA Equitable Tolling: A Misapplication of Agency Law*, 68 STAN. L. REV. 427, 444-45 (2016). These authors argue that it is particularly unfair to punish a prisoner who cannot realistically supervise his lawyer and whose liberty is at stake in the proceedings. The analysis still applies outside of the habeas context.

complicated legal procedures on their own; clients should not be expected to supervise their lawyers' compliance with those same rules. Furthermore, although agency law generally provides that a principal is responsible for her agent's conduct, agents with specialized skills—such as lawyers—have a duty to apply their expertise with care "normally exercised by agents with such skills or knowledge."[97] Even legally-trained clients hire outside counsel with the expectation that counsel will handle procedural minutiae. Clients should not be punished when their attorneys fail to meet the low bar of following their profession's rules of procedure.

Courts can extend deadlines while still sanctioning the lawyer who filed late. Notwithstanding Supreme Court precedent, including *Pioneer*,[98] that authorizes judges to punish clients for their attorneys' procedural mistakes, the Third and Fourth Circuits already urge lower courts to penalize offending lawyers rather than clients in civil cases.[99] If this practice were applied in the deadline-extension context, this approach would protect clients' rights without undermining lawyers' professional duty of competence.

D. Harsh Deadline Enforcement Harms People Who Cannot Afford Lawyers

When weighing competing concerns about equity and efficiency, it is important to consider the impact of harsh deadline enforcement on unrepresented parties. In Fiscal Year 2018, half of the new cases in federal appellate courts[100] and more than one quarter of the civil cases initiated in

97. *Id.*; *see* RESTATEMENT (THIRD) OF AGENCY § 8.08 (AM. LAW. INST. 2006).

98. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 396-97 (1993) (stating that "clients must be held accountable for the acts and omissions of their attorneys," including omissions regarding deadlines).

99. Atkins et al., *supra* note 97, at 456-57; *see* Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 811 (4th Cir. 1988) (per curiam) ("[J]ustice . . . demands that a blameless party not be disadvantaged by the errors or neglect of his attorney.") (quoting United States v. Moradi, 673 F.2d 725, 728 (4th Cir. 1982)); Carter v. Albert Einstein Med. Ctr., 804 F.2d 805, 807 (3d Cir. 1986) ("[W]e have increasingly emphasized visiting sanctions directly on the delinquent lawyer, rather than on a client who is not actually at fault.").

100. *Judicial Business 2018*, *supra* note 10.

federal district courts were filed pro se.[101] Since many pro se litigants lack significant education and almost all of them have no legal training, it is difficult for them to understand, remember, and satisfy procedural requirements such as time limits.

Deadlines are only one thing pro se litigants have to monitor during the course of a lawsuit. Other critical tasks include satisfying pleading requirements, tracking hearing dates, responding to opposing filings, arranging transportation to and from court, taking time off work, making childcare arrangements during appearances, and so forth. Unrepresented parties also struggle to conduct factual investigations, perform legal research, navigate court dockets and filing systems, and present their claims in a compelling manner. These rigorous, time-consuming tasks are even more challenging for unrepresented prisoners, who submitted seventeen percent of new federal district-court cases in Fiscal Year 2018.[102] Prisoners must operate under the constraints of incarceration, including limited access to often inadequate legal materials.[103] Many incarcerated people have mental illnesses that exacerbate all of these obstacles. In short, some procedural mistakes are inevitable even if pro se parties try strenuously to avoid them.

One might worry that courts cannot afford to allow pro se litigants to clog their dockets with innumerable procedural irregularities. However, unrepresented parties do not burden the system as much as some observers might think. Compared to cases in which both parties are represented by counsel, pro se matters settle at approximately the same rate[104] and actually take less time to resolve.[105] One study found that

101. *U.S. District Courts–Civil Pro Se and Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2018*, *supra* note 11.

102. *Id.*

103. Adam Wisnieski, *Access Denied: The Digital Crisis in Prisons*, CRIME REP. (Aug. 6, 2018), http://thecrimereport.org/2018/08/06/access-denied-the-digital-crisis-in-prisons [https://perma.cc/4E2T-AXUL].

104. Rory K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 597 n.57 (2011) (referencing a study finding that pro se parties' "rate of settlement was virtually identical to the rate in the general sample of represented parties"); *see* Buxton, *supra* note 9, at 145-46; Spencer G. Park, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 841 (1997).

"counseled suits" had fifty percent more docket entries than noncounseled cases.[106] Counseled suits are a greater burden on the courts because they tend to involve more complex claims and parties draw them out because their lawyers are more familiar with litigation tactics.[107] In addition, though pro se filings can be difficult to understand due to the authors' poor language skills and lack of legal training, submissions by attorneys tend to be longer and more numerous.[108] Unrepresented parties are wrongly blamed for overextending the legal system and that stigma makes courts less likely to take pro se claims seriously.[109]

In short, since judges extend deadlines routinely, the Ninth Circuit has successfully implemented a relatively indulgent *Pioneer* doctrine, and since pro se litigants are not central contributors to judicial inefficiency, it would be feasible to implement a more equitable deadline-extension framework. An equity-enhancing standard is fully compatible with disciplining lawyers for carelessly exceeding time limits. Large gains in equity are worth small sacrifices in efficiency, especially when litigants' substantive rights are at stake.

IV. A MORE EQUITABLE FRAMEWORK FOR EXTENDING DEADLINES

To remedy the post-*Pioneer* circuit splits and make time-enlargement decisions more equitable, the federal rules should be updated to include a trans-substantive time-extension framework. This framework should encourage judges to resolve cases on their merits; lawsuits and appeals should not be thrown out because of trivial delays that neither harm opposing parties nor undermine judicial efficiency. The key elements of the standard are: (1) weighing principles to guide courts' application of the *Pioneer* factors; (2) a requirement that penalties for missed deadlines be proportional to the harm caused by delays; and (3) a rule that courts

105. Jonathan D. Rosenblum, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 358-59 (2002) (stating that "counseled cases were pending on the court's docket 70-80% longer than non-counseled cases."); Schneider, *supra* note 104, at 597 n.56.

106. Rosenblum, *supra* note 106, at 359.

107. Schneider, *supra* note 104, at 597 n.57.

108. *Id.* at 598.

109. *Id.* at 597-98.

should err on the side of sanctioning a lawyer rather than penalizing the client when the attorney is to blame for the blown due date. Civil Rule 6(b), Bankruptcy Rule 9006(b), Appellate Rule 26(b), and Supreme Court Rule 30 should be amended to incorporate the new framework, though they should retain certain subject-specific exceptions discussed later in this Part.

A. Trans-Substantive Rule Changes

1. The New Model Rule

The following model rule is an expanded version of current Civil Rule 6(b). Changes are italicized.

> (1) In General. When an act may or must be done within a specified time, the court may for good cause, extend the time:
>
> > (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
> >
> > (B) on motion made after the time has expired if the party failed to act because of excusable neglect *or when there is no fault—excusable or otherwise.*
>
> *(2) When weighing extension requests under Rule 6(b)(1), courts shall apply the following principles:*
>
> > *(A) There is an equitable presumption favoring an extension if the movant acted in good faith and an extension would not prejudice opposing parties. A litigant or her attorney demonstrates good faith by diligently attempting to obey deadlines and by acting without improper motives, such as the desire to take advantage of technicalities or delays.*
> >
> > > *(i) The presumption may be rebutted if an extension would harm the proceedings or the public interest.*
> > >
> > > *(ii) The presumption weakens in proportion to the number of extensions the court has granted the movant before the pending motion.*
> >
> > *(B) When evaluating whether an extension would prejudice opposing parties, courts should define prejudice in concrete terms, such as the deterioration of evidence or a significant*

cost incurred as a result of the delay. Delay alone does not constitute prejudice.

(C) A tardy litigant's status as a plaintiff or a defendant should not impact a court's decision to extend or not extend a deadline.

(D) Courts should err on the side of sanctioning a lawyer rather than penalizing a client when the lawyer is responsible for the missed deadline. Punishment may be imposed on a lawyer even if the deadline is extended.

(3) If the court declines to extend a deadline, the penalty must be proportional to the harm caused by the delay. Dismissals and default judgments should be used as last resorts. Example remedies include:

(A) Penalties for Litigants.

(i) Limiting the party's time to engage in discovery or prepare pleadings by a number of days equal to the delay caused by the missed deadline.

(ii) Ordering payment to the opposing party for part or all of the reasonable attorneys' fees and other expenses directly resulting from the missed deadline.[110]

(iii) Ordering payment of a fine to the court.

(iv) Prohibiting the tardy litigant from introducing designated items into evidence.[111]

(B) Penalties for Lawyers.[112]

(i) Public reprimand by the court.

(ii) Ordering payment of a fine to the court.

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110. This sanction is currently available under FED. R. CIV. P. 11(c)(4) for causing unnecessary delays, frivolous argumentation, harassment, or making factual contentions that lack evidentiary support.

111. This sanction is currently available under FED. R. CIV. P. 37(b)(2)(A)(ii) for failing to obey a discovery order.

112. Aside from the fine, these penalties are inspired by MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT r. 10 (AM. BAR ASS'N 2017).

> *(iii) Ordering payment of restitution to parties harmed by the delay, such as costs and reasonable attorneys' fees.*
>
> *(iv) Suspension from practice before the court for a fixed term of up to one year.*

2. Why Weighing Principles Are Necessary

The most significant change to the rules is the addition of weighing principles to guide the judiciary's application of the *Pioneer* factors. Incorporating instructions for weighing different factors would promote uniform extension decisions and would help protect parties from being punished unfairly for minor technical mistakes. Without weighing principles, some courts may continue to treat *Pioneer* as a two-part test requiring parties to provide a satisfactory excuse for a delay before arguing that the balance of the other factors justifies an extension.

One might argue that incorporating weighing principles into time-extension rules would unduly limit courts' flexibility. After all, the *Pioneer* Court called excusable neglect an "elastic" concept precisely because extension decisions depend on circumstances that vary from one case to the next. However, adding weighing principles is necessary to establish a normative baseline to anchor the application of the standard. A common problem with multifactor tests is that they include every relevant factor under the sun.[113] These standards exclude irrelevant considerations but also provide little decision-making guidance. According to Professor Robert G. Bone, "to strike a sound balance, the judge must assign weights and compare values across the various factors. Without clear principles to guide this normative task, the resulting process can easily turn into ad hoc weighing that lacks meaningful constraint and jeopardizes principled consistency over the system as a whole."[114] In other words, judges with different normative assumptions can create completely inconsistent versions of the same test—just as the various circuits did with *Pioneer*.[115]

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113. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2016 (2007).

114. *Id.*; *see also* Cass Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 1012 (1995) ("[W]ithout rules the agent might become uncontrollable. This is so especially in light of the fact that a system of factors usually allows the agent to weigh each factor as he chooses.").

115. Bone, *supra* note 113, at 2017 ("There is no reason to believe that trial judges are well equipped to resolve the complex normative issues . . . on a

In the mass-tort class action context, Professor Bone provides an example of how introducing a weighing principle into a federal rule would be helpful. Mass tort cases combine many plaintiffs' damages claims even when individual recoveries would be large enough to make separate lawsuits feasible.[116] Bone observes that Federal Rule of Civil Procedure 23—the rule governing class actions—does not establish "how to reconcile individual participation rights with aggregate treatment" in these mass-tort cases.[117] The omission leaves trial judges at a normative crossroads, particularly when deciding how many subclasses to create and whether to certify a heterogenous class. These decisions depend on how a judge thinks about the value of individual plaintiff participation in the action.

If participation is important because it enables class members reach a favorable litigation outcome, then aggregation would be acceptable as long as it yields reasonably good results for individual plaintiffs. However, if participation is important because each plaintiff has a right to personally influence the litigation, regardless of the outcome, then heterogenous class certification becomes more suspect.[118] Heterogenous classes are less effective at representing individual plaintiffs' interests because lead plaintiffs are not necessarily emblematic of the diverse group. Rule 23's failure to give judges normative guidance jeopardizes principled consistency in heterogenous class and subclass certification decisions.

The Berzon-Kozinski debate about excusable neglect also illuminates a normative crossroads. Judge Berzon evaluates the *Pioneer* factors through a consequentialist lens. "Excusable" neglect is neglect that is "appropriate to excuse" because it is "caught quickly, hurts no one, and is a real mistake, rather than one feigned for some tactical reason—*even if* no decent lawyer would have made that error."[119] For Judge Kozinski, even if the other three factors cut in favor of an extension, a tardy litigant "need[s] to show *something*" to satisfy the reason-for-the-delay prong.[120] That factor operates as an independent, moralistic criterion concerning the tardy

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case-by-case basis without meaningful guidance. Sometimes the Committee should resolve issues expressly in the Rule itself.").

116. *Id.* at 2020.

117. *Id.* at 2021.

118. *Id.* at 2021-22.

119. Pincay v. Andrews, 389 F.3d 853, 860 (9th Cir. 2004) (Berzon, J., concurring) (emphasis in original).

120. *Id.* at 862 (Kozinski, J., dissenting) (citation omitted).

litigant or lawyer's blameworthiness. *Pioneer* and the text of time-extension rules provide no guidance regarding which path to take. This Note's framework would resolve the dilemma by introducing equitable weighing principles into time-extensions rules in the spirit of Judge Berzon's opinion.

3. The Details of the Proposed Rule

Proposed Rule 6(b)(1)(B) includes causes outside the movant's control in addition to excusable neglect as a basis for granting an extension. This change responds to the reality that not all missed deadlines are a result of *neglect* by the tardy litigant. Since events such as failure by the postal service and extreme weather may prevent diligent parties from filing on time, courts should be able to grant extensions accordingly.

Proposed Rule 6(b)(2)(A)'s presumption in favor of granting an extension could be rebutted pursuant to 6(b)(2)(A)(i) and (ii), but the presumption would reflect how the equity analysis ought to play out in most cases involving good faith and no prejudice. Deadlines should be enforced to avoid concrete harm to other parties or to judicial economy, not to teach derelict lawyers or pro se litigants a lesson for harmless delays. 6(b)(2)(A)'s presumption would supersede *Pioneer's* contrary statement that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect."[121] To avoid endless delays, proposed Rule 6(b)(2)(A)(ii) would allow judges to consider whether parties have received extensions in the past, creating a soft deterrent against missing deadlines.[122] After too many tardy filings, a judge should be able to put her foot down for the sake of efficiency.

Proposed Rule 6(b)(2)(B) would require courts to be specific about what constitutes prejudice to opposing parties and 6(b)(2)(C) would ensure that plaintiffs' and defendants' enlargement motions receive equal

121. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 392 (1993).

122. *See* Cohen v. Bd. of Trs. of the Univ. of D.C., 819 F.3d 476, 480 (D.C. Cir. 2016) (affirming the district court's finding that a litigant did not show excusable neglect after missing a fourth deadline, despite there being minimal prejudice and no bad faith; the district court reasoned that counsel's "repeated failure 'to meet almost every relevant deadline' created a pattern that could, taken together, burden judicial proceedings") (quoting decision below).

treatment. The latter provision is appropriate because "civil litigants in federal court share equally the protections of the Fifth Amendment's Due Process Clause" and "[d]enomination as a civil defendant or plaintiff . . . is often happenstance based on which party filed first or on the nature of the suit."[123] In light of the basic parity between civil litigants, courts should treat them equally in the deadline-extension context.

Proposed Rules 6(b)(2)(D) and 6(b)(3) affirm that courts should punish negligent lawyers rather than blameless clients and that sanctions should be proportional. Both provisions would discourage courts from resolving lawsuits on the basis of a missed deadline. Most of the example sanctions are inspired by Federal Rules of Civil Procedure or Rule 10 of the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement.[124]

Pro se litigants present a more difficult challenge when it comes to sanctions. They will often lack the funds to pay fines and attorneys' fees, but courts can still design equitable penalties short of dismissal or default. For instance, if a self-represented party missed a discovery deadline, a district judge could proportionally limit that litigant's remaining time to engage in discovery or prevent the party from entering certain items into evidence. The latter penalty is already available under Civil Rule 37(b)(2)(A)(ii) for failing to obey a discovery order of any kind. If a pro se litigant significantly delayed proceedings by missing multiple deadlines and lesser sanctions did not solve the problem, the new rule would still allow the court to deny an extension motion.

These rule changes would not wipe away all previous *Pioneer* jurisprudence. Earlier opinions discussing what makes a compelling justification for a delay could still be consulted as persuasive authority. Trial judges would retain significant discretion that would provide flexibility in applying the updated framework. But the new weighing principles would provide a more equitable normative baseline to ensure more consistent and fair treatment of parties seeking extensions.

123. Green v. Boch Laundry Mach. Co., 490 U.S. 504, 510 (1989).

124. FED. R. CIV. P. 11(c)(1) (authorizing penalties for causing unnecessary delays, frivolous argumentation, harassment, or making factual contentions that lack evidentiary support); FED. R. CIV. P. 37(b)(2)(A) (permitting sanctions for failing to obey a discovery order); MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT r. 10 (AM. BAR ASS'N 2017) (authorizing punishments for derelict lawyers).

B. Subject-Specific Rule Changes

Several idiosyncrasies in current time-extension rules can be eliminated. First, to resolve a split among the circuits mentioned in Part I.A, the amended civil rules should specify that extensions of the deadline to serve process under Rule 4(m) now fall under the new extension framework of the proposed Rule 6(b). In addition, current Bankruptcy Rule 9006(b)(3) lists several bankruptcy rules that have their own time extension standards separate from the generally-applicable excusable-neglect test.[125] Some of these exceptions needlessly complicate the rules. For instance, under Rule 1006(b)(2), the deadline for paying any installment of a filing fee may be extended "for cause shown,"[126] while Rule 1007(b)(7)'s deadline for a debtor to submit a statement of completion of a personal-finance course can be extended at a judge's "discretion" per Rule 1007(c).[127] This Note's proposed time-extension rule is preferable because it is more specific and allows extensions for both good cause and excusable neglect.

However, current finality-based exceptions in the rules can be maintained. For example, keeping Appellate Rule 4 and Bankruptcy Rule 8002's limited windows in which parties can move to extend the deadline to appeal would ensure that judgments are not subject to challenge indefinitely. Similarly, there is a good reason for Bankruptcy Rule 4004 to deviate from a generally-applicable enlargement standard.[128] Rule 4004(b)(1) permits for-cause extensions of the deadline to object to a

125. *See* Part I.C, *supra*.

126. FED. R. BANK. P. 1006(b)(2) & Advisory Committee notes. This rule limits extensions by providing that the final installment must be paid within 180 days after the filing of the bankruptcy petition. The Advisory Committee emphasized that prolonging the payment period beyond 180 days causes "undesirable delays in administration." But Rule 1006(b)(2) could keep its 180-day limit while still having judges apply this Note's framework to extensions within that period.

127. FED. R. BANK. P. 1007(c) & Advisory Committee notes. The Advisory Committee did not place any "specific restriction" on judges' discretion because "no party is harmed" by enlarging the deadline for a debtor to finish a course in personal finance. This Note's framework would reflect the Committee's lenient attitude toward the deadline by discouraging judges from enforcing the time limit harshly.

128. FED. R. BANK. P. 4004 & Advisory Committee notes.

debtor's discharge, provided that the motion to extend time is filed before the original deadline expires. Late extension motions may be granted under Rule 4004(b)(2) "if (A) the objection is based on facts that, if learned after the discharge, would provide a basis for revocation under § 727(d) of the [Bankruptcy] Code, and (B) the movant did not have knowledge of those facts in time to permit an objection."[129] In other words, to facilitate the timely discharge of debt, Rule 4004 requires parties to object promptly unless they could not have discovered the grounds for an objection until after the original deadline passed.[130] This time limit is worth preserving even in a broader effort to update and streamline federal deadline enlargement rules.

Of all of this Note's proposed reforms, the least realistic is the suggestion that the Supreme Court should abandon its broad time-extension rule in favor of the one proposed here. Supreme Court Justices guard their discretion even more jealously than other judges. Nevertheless, the equitable principles underlying the proposed extension rule apply with equal force in cases before the high court. Bobby Chen's case demonstrated that the Justices' time-extension decisions could be more equitable.

C. Potential Objections

One potential criticism of this Note's approach is that it would harm judicial economy by diminishing the incentive to obey time limits. As Part III mentioned, the Second Circuit worried that relaxing deadline enforcement would create "uncertainty" and inspire a flurry of deadline-related litigation that would destabilize the legal system.[131] It is true that this Note's framework would make it more likely that judges would extend

129. *Id.*

130. *Id.* Moreover, in the intervening period "the debtor may commit an act that provides a basis for both denial and revocation of the discharge. In those situations, [Rule 4004] (b)(2) allows a party to file a motion for an extension of time to object to discharge based on those facts so long as they were not known to the party before expiration of the deadline for objecting." *Id.*

131. Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 368 (2d Cir. 2003) ("[T]he legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced—where every missed deadline was the occasion for the embarkation on extensive trial and appellate litigation to determine the equities of enforcing the bar.").

blown due dates. Litigants would probably fear missing deadlines more in a court that adopted Judge Kozinski or Judge Posner's interpretation of *Pioneer*. Yet as far as uncertainty goes, this Note offers more predictability than the prevailing approach in the Ninth Circuit. That court's application of *Pioneer* is "uncertain" in the sense that it does not prioritize any *Pioneer* factor over the others or create a Posner-style two-step inquiry. Litigants who read *Pincay v. Andrews* and Judge Berzon's concurrence know that judges in the Ninth Circuit might excuse their mistakes or they might not.[132] Extension decisions depend on individual judges' application of the circuit's relatively liberal version of an open-ended balancing test. And yet the Ninth Circuit, the largest in the country, is not overwhelmed with litigation about extending deadlines under *Pioneer*.

If the Ninth Circuit's approach to *Pioneer* is workable, then so is this Note's comparatively-specific framework. Several aspects of the proposal would reduce uncertainty and ensure that litigants do not abuse the system. First, by adding weighing principles to guide the application of the *Pioneer* factors, judges could resolve deadline-related disputes more predictably and efficiently than they do in the status quo. Second, to encourage good behavior by parties, proposed Rule 6(b)(2)(A) would define good faith as striving to obey deadlines without improper motives such as the desire to take advantage of technicalities. Subjective assessment is an inevitable part of judicial determinations of good faith, but at least Rule 6(b)(2)(A) would define the term—*Pioneer* does not. Third, judges could enforce deadlines more strictly if parties missed more than one, thereby discouraging litigants from repeatedly filing late. Fourth, the provisions empowering judges to levy (proportional) sanctions against parties for missing deadlines would maintain a hard incentive against flouting the rules. Fifth, the Note's framework would do more to deter attorney misconduct than the current system. Not only would the new framework penalize tardy lawyers more than clients, but also it would allow judges to impose sanctions *even if they extend deadlines*. The new system would safeguard clients' rights while motivating lawyers to obey time limits. Finally, if formal sanctions are not enough, external pressures such as the need to maintain good standing with clients, colleagues, and judges would also encourage lawyers to file on time. This is true regardless of which extension framework courts adopt, but it would still help

132. Pincay v. Andrews, 389 F.3d 853, 860 (9th Cir. 2004) (Berzon, J., concurring).

maintain compliance with deadlines if this Note's framework went into effect.

One might also wonder why a malpractice suit is insufficient to make a client whole after her lawyer misses a deadline. To begin, malpractice suits are inconvenient, expensive, time consuming, and hard to prosecute.[133] A plaintiff must win "a case within a case" by demonstrating that, but for counsel's error, he would have prevailed in the original action.[134] In addition, the client may also lack the resources to support a new lawsuit against his attorney from the first case, and the client may not even know about malpractice claims or their brief statute of limitations.[135] Malpractice suits also cannot help clients when the lawyer cannot afford to compensate them for losing the first case.

This is not to say that a malpractice remedy is never an appropriate solution to lawyerly misconduct. Rather, if the misconduct is self-evident—i.e., because the record reflects that counsel missed a deadline—the client should not have to go through the ordeal of a malpractice action when there is a more straightforward, equitable, and *efficient* solution: allow the client to continue with the case unencumbered and penalize the lawyer. This approach is actually fairer to the attorney because she would have to pay only what is necessary to rectify the harm the delay caused to judicial economy or to opposing parties. In a malpractice case, the lawyer would be on the hook for the entire judgment the client would have won had the attorney not blown the deadline. From an equity standpoint and an efficiency standpoint, sanctioning tardy attorneys without punishing clients is the proper course.

CONCLUSION

Although this Note proposes a framework that could have helped Bobby Chen in the district court, these reforms would not save Chen after he missed the deadline at the Supreme Court. If a litigant disappears, eventually the court will have to dismiss his case. But the Justices' refusal to grant Chen's rehearing petition speaks to a larger problem. The Court

133. Atkins et al., *supra* note 97, at 460-61. *But see id.* at 450 (suggesting that malpractice remedies are generally appropriate in non-habeas civil cases, but mentioning the reasons why such remedies can sometimes be inadequate, particularly in the case of missed deadlines).

134. *Id.* at 465.

135. *Id.* at 460-61.

declined to excuse the mistake even though Chen proceeded pro se when he missed the deadline; even though he raised an acknowledged circuit split; and even though he reappeared quickly with a veteran litigator who has never missed a deadline. The decision suggests a prioritization of procedure over substance, of efficiency over equity. This Note seeks to reaffirm the importance of equity in deadline-enlargement decisions.

For too long, judges have applied fundamentally inconsistent and often narrow understandings of excusable neglect, a direct consequence of the federal rules' ambiguity and overbroad grant of discretion. The similarly malleable *Pioneer* criteria failed to rectify the problem. By adopting the proposed changes to the federal rules, policymakers would move toward a more equitable framework for granting extensions.