

## CourtAlert ECF Assurance – Relevant Rules and Case Law

*"Although the court did not send updated NEFs, the district court promptly corrected the docket entries to state that the orders denied the underlying JMOL motions. The civil docket, therefore, had a complete description of those orders had AT&T bothered to check the docket, as it should have done." [Click here for the entire opinion.](#)*

**Opinion decided 3/19/2015 on [14-1302], U.S. Court of Appeals for the Federal Circuit (Washington). The damage to the law firm client exceeded \$45 Million**

### Circuit Courts

#### Second Circuit

##### **Porter v. City of New York 08-5374**

"Indeed, this Court has suggested that under Rule 60(b) an applicant must go beyond the requirement of excusable neglect and show that he made diligent but unsuccessful efforts to determine the status of the case."

#### Eighth Circuit

##### **American Boat Company v. Unknown Sunken Barge 08-2166**

"...this court held that a presumption of delivery and receipt should apply to emails sent via the court's CM/ECF system."

#### Ninth Circuit

##### **Singh v. Gonzales 04-72701**

"[a] party has an independent duty to keep informed and mere failure of the clerk to notify the parties that judgment has been entered does not . . . warrant an extension of time." Id. at 1412; see also Mennen Co. v. Gillette Co., 719 F.2d 568, 570 (2d Cir. 1983) (holding that, in the context of Rule 77(d), "it is customarily the duty of trial counsel to monitor the docket and to advise himself when the court enters an order against which he wishes to protest.").

#### Sixth Circuit

##### **Yeschick v. Mineta 10-4151**

"In the motion, Yeschick's counsel, Gino Pulito, claimed that he did not receive notice of filings in Yeschick's case because his email address was terminated and "ceased notification of e-mails . . . and had bounced all e-mails delivered after May 15, 2009." Pulito's original email address on file with the Clerk of Court was an "alltel.net" email address. In 2009, all alltel.net email addresses became "windstream.net" addresses. After May 15, 2009, all alltel.net email addresses

stopped working. On July 12, 2010, the district court denied Yeschick's motion for relief from judgment. The district court observed that "Courts in this Circuit have reiterated the affirmative duty of monitoring a case's docket, and denying excusable neglect where, as here, it is evident that the lack of notice is the result of counsel's own inaction in failing to monitor the docket or review counsel's current address" and found that "Yeschick's counsel has not demonstrated that he has established the excusable neglect necessary to warrant relief from this Court's judgment on the merits."

### Seventh Circuit

#### **Cohen v. Hoyer 01-2398**

“Regardless the plaintiffs received the court’s order, attorneys have an obligation to monitor their cases and review the docket sheet occasionally.”

### Columbia Circuit

#### **Kerry Fox v. American Airlines 04-7006**

“..did not relieve counsel of his independent obligation to monitor the court’s docket. And had he checked the docket...he would have discovered the motion. “

### Fourth Circuit

#### **Robinson v. Wix Filtration 09-1167**

"..computer problems did not relieve Plaintiff’s counsel of his obligation to continue to monitor the docket in this case,"

"had counsel checked the docket or contacted opposing counsel or the court, counsel would have learned that a dispositive motion had been filed.. More amazingly, he chose not to check with the district court either. In other words, Appellant’s counsel made the affirmative decision to remain in the dark...The Model Rules of Professional Conduct promulgated by the American Bar Association support our view that Appellant’s counsel had an obligation to his client to be attentive toward the litigation. Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."

### District Courts

#### **Hodge v. United Airlines 07-1527 District of Columbia**

“Attorneys are "responsible for monitoring their email accounts" for ECF notices. Attorneys also bear the responsibility of regularly monitoring the Court’s docket.”

#### **Helton v. Chattanooga Police 05-357 Eastern District of Tennessee**

“It is the duty of any party not represented by counsel to promptly notify the Clerk and the other parties to the proceedings of any change in his or her address, to monitor the progress of the case”

#### **Fox v. American Airlines 02-2069 District of Columbia**

“In addition, "counsel ... [is] responsible for monitoring their e-mail accounts" for notice of service. Even if plaintiffs' counsel did not receive the motion, it does not relieve him of his responsibility to monitor the court's docket. [a]n attorney may not simply sit back and rely on the court to keep him or her up to date”

#### **Institute for Policy v. CIA 06-960 District of Columbia**

“Defendant proffers that the “miscalendaring of the due date” ..This mistake could have been remedied by a simple look at the docket or the ECF notification’s time-stamp. The day has long since arrived whereby an attorney can view a docket in an instant at any time from anywhere, thanks to electronic case filing. With that change has come a lessening of sympathy by the court for docket-related errors. Defendant’s failure to timely file the Opposition was not the result of excusable neglect.”

**Flowers v. UPS 08-552 Northern District of Illinois**

“In view of the fact that this so-called “gap” in the system is readily apparent and is concededly known to the US Attorney’s Office, it is incumbent on that Office as a whole, and AUSAs in particular, to take the necessary steps to ensure that an AUSA assigned to a case actually receives NEFs relating to that case. Attorneys are, after all, responsible for keeping abreast of their cases and there is no basis to relax this requirement for lawyers representing the government.

In addition, the breakdown of internal office procedures – the US Attorney’s Office failure to take steps to forward NEFs received in the general mailbox to the assigned AUSA – is insufficient to support a finding of good cause.

Finally, to avoid recurrence of this situation in the future (in both this and other cases), the US Attorney’s Office will have to establish an internal procedure by which an AUSA assigned to a civil cases is required to file a designation form with the Clerk at or before the time he files his first document with the Clerk in the case.”

**Vargus v. Toledo 07-2002 District of Puerto Rico**

“..because parties have an obligation to monitor the docket sheet to inform themselves of the entry of orders they wish to appeal.”) Regardless of whether the defendants received notice that an entry of judgment was entered into the case docket, and regardless of why they did not receive notice, it was their ongoing responsibility to monitor the docket. Considering the particular circumstances here, defendants' failure to monitor the docket is particularly egregious because the jury verdict in this case was reached on October 13, 2009, and defendants should therefore have been especially vigilant in their oversight of the docket to keep an eye out for the predictable entry of a judgment.”

**Powell v. American President Lines 08-1606 Western District of Washington**

“Rather, his attorney states that his paralegal who normally checked court filings retired in November 2009, and that he and his remaining staff members thereafter “lack[ed] the knowledge” to check that electronic mailbox. Under these circumstances, no relief under FRAP 4(a)(6) is available.”

**Draim v. Virtual 01-2690 District of Columbia**

“...that counsel has an independent responsibility to monitor the docket”

**McMillian v. District of Columbia 04-2036 District of Columbia**

“An attorney . . . who obtains a CM/ECF password consents to electronic service of all documents subsequent to the original complaint” and “service by electronic means is complete on transmission.” LCvR 5.4(b)(6); FED. R. CIV. P. 5(b)(2)(D). In addition, attorneys are “responsible for monitoring their e-mail accounts” for notice of service...

The parties to a case bear the responsibility of monitoring the court’s docket. ..and calling a party’s excuse for failing to respond to a motion due to a lack of e-mail notification “nothing but an updated version of the classic ‘my dog ate my

homework' line") because "parties have an obligation to monitor the docket sheet to inform themselves of the entry of orders they wish to appeal");

it is the attorney's duty to monitor the docket and that "an attorney may not simply sit back and rely on the court to keep him or her up to date;"

**Winston Burke v. Versa-Tags 09-0521 Eastern District of Missouri**

"The courts who have addressed this issue have generally held that Plaintiff's attorney is responsible for monitoring the electronic docketing system for any new filings."

**Wayne Wheat v. John Paul Riser 11-28 Southern District of Ohio**

"Courts in this Circuit have reiterated the affirmative duty of monitoring a case's docket, and denying excusable neglect where... It is evident that lack of notice is the result of counsel's own inaction in failing to monitor the docket or review counsel's current address." Yeschick v. Mineta, No. 1:03-cv-2510, 2010 WL 2774310, \*2 (N.D. Ohio Jul. 12, 2010) (citing Kahn v. Sulzer Orthopedics, Inc., 498 F.3d 365 (6th Cir. 2007)); see also Snyder v. Barry Realty, Inc., 60 Fed. 613, 615 (7th Cir. 2003) (stating that attorneys have a "duty to monitor their case[s] by regularly checking the court's docket").

## Bankruptcy Courts

**Matter of Philbert 05-12501 Northern District of Indiana**

"It is incumbent upon attorneys to adopt internal office procedures that ensure the court's notices and orders are brought to their attention once they have been received. In re Schlosser, 100 B.R. 348, 350 (Bankr. S.D. Ohio1989); Greene v. Union Mut. Life Ins. Co., 102 F.R.D. 598, 603 (D. Maine 1984). This is just as true in these days of electronic noticing as it was when things were sent by first class mail. To rely on procedures that treat the court's electronic notices as the functional equivalent of junk mail is not acceptable. Furthermore, it is counsel's responsibility to monitor the progress of their cases and the court's docket."

**In Re Heartland Memorial Hospital 07-20188 Northern District of Indiana**

"In short, when one receives notification of the entry of an order, which one's client may desire to appeal, it is incumbent upon one to review the court's docket record to make certain what the date of entry of the order is. For whatever reason, Attorney Browne's office simply failed to perform this simple task, and no comprehensible reason has been provided for that failure."

**Exum v. Portfolio Recovery Assts 2012WL 1831572 Northern District Iowa**

Plaintiff failed to respond to the motion by the deadline and, three days after the deadline to respond to the motion had passed, moved for leave to file a response. Plaintiff argued that due to a technical error or e-mail malfunction, its counsel never received CM/ECF notification of the motion. The Court denied plaintiff's motion for leave to extend the deadline to respond to the motion.