

Electronic Case Filing: What Happens When Counsel Does Not Receive Email Notices?

by
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I. INTRODUCTION

Courts across the United States are moving toward implementing Electronic Case Filing (“ECF”) procedures, with many courts making ECF mandatory in most cases. With this new technology gaining popularity, novel issues are emerging as the difficulties and challenges with the procedures reveal themselves. Familiar disputes over notice and presumption of delivery are cast in the new light of computer glitches and technological snags. *American Boat Co. v. Unknown Sunken Barge* is one of the first electronically filed cases to surface at the federal appellate level with such issues.¹

The Eighth Circuit articulates important factors to consider when analyzing whether a party has successfully rebutted the presumption of delivery where a court is utilizing ECF and automatic email notices.² The decision refreshingly acknowledges the “glitches” that are inherent with new automated procedures and provides a guideline for rebutting the presumption of delivery.³ Yet, given the long-standing tradition for a strong presumption of delivery with other forms of communication, does *American Boat* unnecessarily muddy the waters or does it signal an evolution of the law in light of changing technology? While the openness of adapting the law to changing technology is commendable, the *American Boat* decision unnecessarily burdens courts by requiring a factual analysis when there is a viable alternative of placing the responsibility on the attorney to monitor the docket.

II. PROCEDURAL AND FACTUAL BACKGROUND

In *American Boat Co. v. Unknown Sunken Barge*, towboat operator American Boat Co. filed a civil suit against the United States alleging failure

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1. *Am. Boat Co. v. Unknown Sunken Barge*, 418 F.3d 910 (8th Cir. 2005).
2. *Id.* at 914.
3. *Id.*

to mark or remove a sunken barge in the Mississippi River.⁴ American Boat's tugboat struck the sunken barge on February 15, 2000, causing the boat to take on water and sink.⁵ The district court granted summary judgment in favor of the United States on September 2, 2003.⁶

While the case was pending in the district court of the Eastern District of Missouri, the court began operating an Electronic Case Filing System.⁷ In fact, the court required that all documents filed after October 14, 2003 utilize the ECF system, unless otherwise permitted.⁸ The attorneys for American Boat registered with the court's electronic system to receive notice of court filings via e-mail.⁹ The Eastern District of Missouri's Administrative Procedures Case Management/Electronic Case Filing (CM/ECF) manual provides that whenever a document is filed electronically, the System generates a "Notice of Electronic Filing".¹⁰ The notice is e-mailed to any registered users associated with the pending case and "will constitute service pursuant to Federal Rules of Civil Procedure 5."¹¹

After the court granted summary judgment in favor of the United States, American Boat filed a Motion to Amend Judgment, or in the alternative, for Reconsideration.¹² The district court denied the motion on November 5, 2003.¹³ However, counsel for American Boat did not receive notice of this order by email or any other means until he saw the order on PACER on March 4, 2004, long after time for filing an appeal expired.¹⁴ On March 9, 2004 American Boat filed a Motion to Reopen the Time to File an Appeal of the Court's Order granting the United States' Motion for Summary Judgment due to lack of notice of the court's November 5, 2003 order.¹⁵ However, on July 1, 2004, the district court denied American Boat's motion, finding it had

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4. *Am. Boat Co. v. Unknown Sunken Barge*, 299 F. Supp. 944, 947 (E.D. Mo. 2003).
 5. *Id.* at 947.
 6. *Id.* at 952.
 7. *Am. Boat Co.*, 418 F.3d at 911.
 8. United States District Court Eastern District of Missouri, *Administrative Procedures for Case Management/Electronic Case Filing (CM/ECF)*, 1 (2004), http://www.moed.uscourts.gov/CMECF/AdminProceduresForCM_ECF.pdf.
 9. *Am. Boat Co.*, 418 F.3d at 911.
 10. United States District Court Eastern District of Missouri, *Administrative Procedures for Case Management/Electronic Case Filing (CM/ECF)* at 9.
 11. *Id.*
 12. *Am. Boat Co.*, 418 F.3d at 911.
 13. *Id.* at 912.
 14. *Id.*
 15. *Id.*

received timely notice.¹⁶ On July 14, 2004, American Boat filed a Motion to Reconsider, which was denied on August 12, 2004.¹⁷ American Boat filed a *second* Motion to Reconsider, arguing the district court's system had failed to send notice of the August 12, 2004 order, which is further reason to reconsider the possibility of lack of notice of the November 5, 2003 order.¹⁸ The district court denied American Boat's second Motion to Reconsider.¹⁹ American Boat appealed to the Eighth Circuit on the district court's denial of its original Motion to Reopen Time to File an Appeal and the denial of the two subsequent motions to reconsider.²⁰

III. EIGHTH CIRCUIT'S HOLDING AND REASONING

The Eighth Circuit reversed the judgment of the district court, holding American Boat made a sufficient showing to warrant evidentiary hearing to rebut the presumption of delivery.²¹ The circuit court's analysis began by discussing the requirements for reopening the time to file an appeal, including a requirement that the moving party show it was entitled to notice of the judgment entry, but did not receive the notice from the district court or any party within 21 days after entry.²² The district court previously held American Boat received notice of the November 5, 2003 order and could not reopen the time to file an appeal.²³ The district court based this on the presumption of delivery inherited from generations of case law and applied to postal mail, telegrams, faxes and, more recently, emails.²⁴

In this case, the court's ECF entries, constituting the official clerk's docket entries, reflected the e-mail notification had been sent.²⁵ Further, no e-mails were returned as undeliverable, so the presumption of delivery applied.²⁶ American Boat sought to overcome the presumption of delivery by introducing evidence in an effort to show that while the electronic docket reflected delivery, the system actually failed to deliver the emails.²⁷ In its initial Motion to Reconsider, filed July 14, 2004, American Boat provided an affidavit of the law firm's computer technician stating "with near to absolute

16. *Id.*

17. *Id.*

18. *Id.* at 913.

19. *Id.*

20. *Id.*

21. *Id.* at 914.

22. *Am. Boat Co.*, 418 F.3d at 914; *See* Fed. R. App. P 4(a)(6)(B).

23. *Am. Boat Co.*, 418 F.3d at 912.

24. *Id.* at 914; *See also* Kennell v. Gates, 215 F.3d 825,829 (8th Cir. 2000).

25. *Id.* at 913.

26. *Id.*

27. *Id.*

certainty the November 5, 2003 notice of filing was never received by the computer at the office.”²⁸ American Boat filed another Motion to Reconsider after counsel failed to receive e-mail notification of the August 12, 2004 order denying the initial Motion to Reconsider.²⁹ In support of their argument American Boat offered further evidence:

(1) the affidavits of three attorneys stating that they had neither received notice via U.S. Mail nor e-mail, (2) an affidavit of Greable, stating that she had not received notice (3) a printout of Geable’s Inbox, which showed she had received 13 other e-mail notifications from the district court between October 31, 2003 and November 21, 2003, but did not show the e-mail notification at issue.³⁰

An affidavit from a network operations director at an internet service provider opined that the “e-mail system did not receive a message . . . from the district court’s e-mail system from August 12 through August 13, 2004.”³¹ The district court considered American Boat’s evidence of non-delivery, but despite all of the evidence, held that it did not successfully rebut the presumption of delivery.³²

In reversing the judgment of the district court, the Eighth Circuit articulated strong factors unique to ECF and e-mail notice that should be considered in determining the strength of the rebuttal.³³ The court agreed e-mails should fall under the same presumption of delivery as other forms of communication, such as postal service or telegram.³⁴ Yet, in light of the circumstances of this case, the court concluded that American Boat is at least “entitled to an evidentiary hearing on the issue of whether they have adequately rebutted the presumption.”³⁵

The Eighth Circuit noted various factors in considering the strength of American Boat’s rebuttal. First, the court acknowledged that new computer systems are “subject to a certain number of ‘glitches.’”³⁶ The court considered this factor first as they analyzed the strength of American Boat’s rebuttal and found sufficient evidence existed to merit further consideration.³⁷

28. *Id.* at 912.

29. *Am. Boat Co.*, 418 F.3d at 913.

30. *Id.* at 914.

31. *Id.* at 913.

32. *Id.* at 914.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

Second, this factor held strength even though the clerk's office undoubtedly thoroughly tested the system before implementation.³⁸ The court also considered the undisputed evidence that the attorneys designated to receive paper notice did not receive notice, indicating the system was not functioning correctly.³⁹

Finally, the court found evidence that the government's co-counsel "had no record of having received e-mail notification" despite the fact "she had also registered to receive notification in that format."⁴⁰ The computer technician's statement American Boat previously submitted raised concerns with the court about "whether notice was actually sent and received."⁴¹ These factors and concerns led the court to reverse the judgment of the district court that American Boat failed to overcome the presumption that the electronic docket "accurately reflected delivery of the November 5, 2003 e-mail notification."⁴² The court's articulation of factors to consider in determining the rebuttal strength was a novel development in the law prompted by the advanced technology courts use today.

IV. CRITIQUE OF COURT'S APPROACH

In a refreshing departure from the long-standing and strong presumptions of delivery with other notification methods, the court recognized computer systems are fallible (a proposition the average layperson has long recognized) and articulated this as a factor in rebutting the presumption. However, by bringing such considerations into the analysis, the Eighth Circuit actually weakens the presumption of delivery for the growing number of cases filed by ECF and unnecessarily burdens the courts.

The presumption of delivery has a long legal history beginning with postal delivery and carrying over to other methods of communication, such as telegrams, fax and email. Courts have long held that properly addressed, stamped and posted mail carries a presumption of receipt by the intended receiver.⁴³ The Ninth Circuit referred back to precedent arising in the late 1800's stating "the presumption of receipt after proper dispatch of a telegram [is] analogous to letters properly mailed."⁴⁴ The Eighth Circuit itself opined that there is no reason why this same presumption would not be made regarding other forms of communication, including electronic mail "provided they

38. *Id.*

39. *Id.*

40. *Id.*

41. *Am. Boat Co.*, 418 F.3d at 914.

42. *Id.*

43. *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884).

44. *Wagner Tractor, Inc. v. Shields*, 381 F.2d 441, 446 (9th Cir. 1967).

are accepted as generally reliable and that the particular message is properly dispatched.”⁴⁵

This presumption of delivery is rebuttable when evidence exists recipient never received the letters.⁴⁶ A determination of whether the recipient actually received the letters involves this rebuttal evidence and all other circumstances of the case.⁴⁷ Under the modern procedural rules, however, courts have disagreed on what evidence is sufficient to rebut the presumption or to even garner an evidentiary hearing on the issue. The Eighth Circuit previously held a sworn affidavit stating sender mailed the letter by regular mail and the recipient never received notice was sufficient to require an evidentiary hearing; yet the court suggested in dicta it might not be sufficient to overcome the stronger presumption applied to certified mail.⁴⁸ Comparatively, the Second Circuit held that “mere denial of receipt does not raise a question of fact” sufficient to require further hearing on the potential presumption defeat.⁴⁹ The Supreme Court of New Jersey acknowledged “[a]s new technologies continue to develop, the sort of proofs required to demonstrate proof of mailing and receipt will likewise change.”⁵⁰ Thus, it appears the Eighth Circuit attempted to establish a new analytical framework in light of the admitted fallacies of modern technology by allowing certain considerations for the nature of new technology when rebutting the presumption of delivery.

Nevertheless, other courts rejected arguments that failure to receive electronic notice is an acceptable excuse for lack of response to a filing, even when the ECF system malfunctioned. *Fox v. American Airlines* presented similar issues on appeal in the Ninth Circuit. There the court scoffed when counsel argued he was unable to respond to a motion to dismiss because he did not receive electronic notice.⁵¹ Looking to the lower court’s decision, the Ninth Circuit noticed the district court held fast to the language of the court rules that “[s]ervice by electronic means is complete on transmission.”⁵² The district court stated that regardless of whether counsel did or did not receive the email notice, “it does not relieve him of his responsibility to monitor the court’s docket.”⁵³ The Ninth Circuit characterized the argument that counsel never received notice due to a malfunction in the ECF system as “nothing but

45. *Kennell v. Gates*, 215 F.3d 825, 829 (8th Cir. 2000).

46. *See Rosenthal*, 111 U.S. at 194.

47. *Id.*

48. *Ghounem v. Ashcroft*, 378 F.3d 740, 744 (8th Cir. 2004).

49. *Meckel v. Cont’l Res. Co.*, 758 F.2d 811, 817 (2d Cir. 1985).

50. *SSI Med. Servs., Inc. v. New Jersey*, 685 A.2d 1, 624 (N.J. 1996).

51. *Fox v. Am. Airlines*, 389 F.3d 1291, 1294 (D.C. Cir. 2004).

52. *Fox v. Am. Airlines*, 295 F. Supp. 2d 56, 59 (D.D.C. 2003).

53. *Id.*

an updated version of the classic ‘my dog ate my homework’ line.”⁵⁴ The opinion went on to state that “[i]mperfect technology may make a better scapegoat than the family dog in today’s world, but not so here.”⁵⁵ The court gave no weight to the excuse, finding it unacceptable and not worthy of being a sufficient rebuttal to the presumption of delivery.⁵⁶

The Ninth Circuit was not alone in dismissing these types of arguments and stressing the duty to monitor the court’s docket. In a case preceding the *American Boat* decision, the Eighth Circuit stressed that failure to receive court notices was not an acceptable excuse when counsel registered for electronic filing and had access to the court’s electronic filing system, whereby he could monitor the docket.⁵⁷ In addition, in a case with facts similar to *American Boat*, the Second Circuit refused to reopen time for an appeal under the Federal Rules of Appellate Procedure 4(a)(b) because “parties have an obligation to monitor the docket sheet to inform themselves of the entry of orders they wish to appeal.”⁵⁸

Thus, while it took into consideration the sometimes fickle nature of modern technology, the *American Boat* decision opened the door to “the dog ate my homework” excuse and weakened the presumption of delivery that has historically worked for other forms of communication. This decision could lead to an increase in appeals and motions to reconsider where counsel takes up precious court time arguing lack of notice on a highly factual basis. On the other hand, *Fox v. American Airlines* gave no weight to the argument that recipient did not receive ECF notice and relied instead on the duty to monitor the court’s docket. Here now, we see how muddy the waters are. With such confusion afoot, it is ironic that the Eastern District of Michigan recently noted in a case involving notice issues with mail delivery that “any problem with mail delivery could have easily been avoided had Plaintiff’s counsel decided to participate in the court’s electronic filing system.”⁵⁹

V. OBLIGATIONS OF ATTORNEYS

Given this discrepancy in the case law, what can attorneys practicing with ECF systems everyday do to protect themselves and their clients? The ECF systems are only becoming more common and these types of problems will continue to occur as long as the technology is subject to unexplainable error. Until the discrepancy in the approach to presumption of delivery and rebuttal of presumption is resolved, it is clear that an attorney must take

54. *Fox*, 389 F.3d at 1294.

55. *Id.*

56. *Id.*

57. *Widtfeldt v. United States*, 132 Fed.Appx. 77, 78-79 (8th Cir. 2005).

58. *U.S. ex rel. McAllan v. City of New York*, 248 F.3d 48, 53 (2d Cir. 2001).

59. *Schindler Elevator Corp. v. Chelsea Milling Co.*, No. 03-CV-72406-DT, 2005 WL 1030346, at *5 (E.D. Mich. 2005).

action to ensure notice of court filings, or if the attorney does not receive notice in a timely manner, that he or she has reliable evidence to rebut the strong presumption of delivery.

First, if the *American Boat* decision becomes *de rigueur*, attorneys must ensure they have clear and reliable evidence to support the assertion that they did not receive notice. This includes, for example, ensuring records of all e-mails received are backed up and archived for possible future use. Evidence of the sort *American Boat* introduced, such as affidavits of computer technicians and internet service provider employees, would serve to corroborate the records of the attorney. This might put an added burden on law firms and, to a greater degree, on solo practitioners to budget the resources needed to capture and archive electronic data. If law firms and attorneys practicing in jurisdictions using ECF have not yet seen the need for such diligence, the time is ripe. To practice in the age of advanced technology courts use, practitioners must ensure their own management of electronic data protects them against the all too common “glitch.”

Secondly, if courts choose to dismiss the modern-day “the dog ate my homework” excuse as the Ninth Circuit did, then practitioners have a clear duty to monitor the dockets of all cases filed through ECF. Since the ECF system makes access to dockets so much easier than in the “ancient” times of paper filing, this duty does not place an undue burden on the attorney. Practitioners can set up a “tickler” system used to remind them to check the docket of active cases on a regular, pre-determined basis so that any failure of the e-mail notification system will be caught and any action in response to a filing can be taken in a timely manner, if warranted. This may require more work than the alternative, but it will preserve precious court resources and ultimately serve the client in a more efficient, competent manner. It does the client a disservice to depend solely on an e-mail from the court’s ECF system when their rights could potentially be lost if a computer error occurs, and there is insufficient evidence to rebut the presumption of delivery.

VI. CONCLUSION

The *American Boat* decision attempted to adapt to the changing technology by articulating factors considered in rebutting the presumption of delivery of e-mail notice, but the effect was a weakening of the long-standing presumption of delivery that potentially could open the floodgates of appeals and motions to reopen time for appeal. In essence, this would cause court resources to be consumed with factually rich analyses of the circumstances surrounding an alleged failure of the ECF system, leaving room for unscrupulous attempts to beat the system or cause delay by claiming lack of notice. Because the ECF system allows for easy monitoring of the court docket where counsel can view notice of filings, the courts have an alternative to put the burden on counsel to monitor the docket, rather than allow the mere claim that the attorney did not receive email notice lead to a time-consuming factual analysis.

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The Eighth Circuit's recognition of the fallible nature of relatively new technologies was commendable. Such an attitude and openness to examining long-standing judicial presumptions in the light of new technology may be needed when other issues relating to ECF begin to arise and be considered. However, with notice issues where the attorney should be expecting some action in response to a filing or motion, there is a more reasonable alternative to the factor analysis offered by the Eighth Circuit. In such cases, imposing a duty to monitor the electronic docket serves the client and the courts better in the long run. Until the courts decide on a more uniform approach, however, practitioners can take the steps noted above to protect their clients' interests and avoid the problems which arise when notice is not received.

