

A P P E L L A T E

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## EXTENSION OF TIME TO APPEAL MAY NOT BE AVAILABLE WHEN A PARTY HAS FAILED ADEQUATELY TO MONITOR EVENTS IN A CASE

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If you do not learn of a federal trial court's dispositive order until more than 30 days after the order's entry, can you still appeal? A recent decision in Texas instructs that the answer may be "No." In *Two-Way Media, LLC v. AT&T Operations, Inc.*, No. SA-09-CA-00476-OCG (W.D. Tex. Feb. 6, 2014), *appeal pending*, No. \_\_\_\_\_ (Fed. Cir., filed Feb. 13, 2014) (not yet docketed), the U.S. District Court for the Western District of Texas declined to extend or reopen the time to file a notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a), because it concluded that the would-be appellants failed properly to monitor the case to learn if appealable orders had been entered.

Several substantive and administrative motions were pending before the district court, including defendants' post-trial motions for judgment as a matter of law and a new trial. The court issued orders resolving all of the motions on the same day, but the notices defendants received from the court's electronic case filing (ECF) system did not state that the court had denied the substantive post-trial motions. Rather than reading the actual orders, counsel for the defendants relied on the descriptions in the ECF notices. Based on those descriptions, they believed the substantive post-trial motions were still pending. They did not learn otherwise until more than 30 days after the orders were entered. They then moved under Rule 4(a) to extend or reopen the time to file an appeal because they did not receive sufficient notice of the substance of the orders.

A notice of appeal must be filed within 30 days after entry of the judgment or order from which the appeal is taken. However, under Rule of Appellate Procedure 4(a)(5), the court may extend the time to file the notice of appeal upon a showing of good cause or excusable neglect, and, under Rule 4(a)(6), it may reopen the time for filing an appeal if, among other criteria, the moving party did not receive notice of the entry of the judgment or order within 21 days of its entry. Defendants' motion was filed under both provisions, but the court denied the motion.

The court held that the defendants failed to show good cause or excusable neglect because they were under a duty to monitor the status of a case and, in particular, to read all orders issued. It held that Rule 4(a)(6) did not apply because, although the ECF notice was incorrect, the defendants did actually receive and download the orders. In dicta, the court cited a number of federal appellate decisions holding that parties are under an obligation to monitor events in a case and, even, to inquire periodically into the status of litigation if they do not receive notices of docket activity. The court emphasized that, under Rule 77(d)(2) of the Federal Rules of Civil Procedure, lack of notice of entry of an order does not affect the time to appeal if a party is unable to make the showing required under Appellate Rule 4(a).

The idea that a party must monitor a case and may lose a right to appeal if it fails to receive notice of an order from the court is troubling. In light of their heavy caseloads, federal courts often may experience delays in disposing of dispositive motions — particularly in civil cases, which often are not subject to the same requirements for speedy disposition that apply to criminal matters. Failure to dispose of such a motion within 30 days therefore is not unusual. In addition, as the court in *Two-Way Media* noted, Rule 77(d)(2) is based on an acknowledgment that the failure of busy clerks' offices to provide notices may be increasing. A requirement that, under penalty of losing a right to appeal, parties must inquire periodically to determine if dispositive motions have been decided can be particularly onerous. Rule 4(a)(6) was designed to avoid the harsh result of foreclosing an appeal when litigants do not receive notice, but courts have not interpreted that rule uniformly.

In *Abulkhair v. Liberty Mutual Insurance Co.*, 405 F. App'x 570 (3d Cir. 2011), the Third Circuit held that a district court did not abuse its discretion when it denied a motion

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to extend the appeal deadline under Rule 4(a)(5) because the plaintiff-appellant, who asserted that he did not receive timely notice of a dispositive court order, did not demonstrate any effort to monitor the docket. However, the court remanded for a determination whether the plaintiff was entitled to relief under Rule 4(a)(6) because he asserted that he did not receive timely notice of the order at issue.

Other courts of appeal are generally in agreement that parties have an independent duty to remain informed of developments in their case, but are split as to how actions by officers of the court might affect that duty. *See e.g., Mirpuri v. ACT Mfg., Inc.*, 212 F.3d 624 (1st Cir. 2000) (an attorney's reliance on a verbal inquiry to the clerk does not provide good cause for failure to check the docket or constitute circumstances of excusable neglect); *Mennen Co. v. Gillette Co.*, 719 F.2d 568 (2d Cir. 1983) (if a failure to monitor the docket is because the party was misled by the action of the court or its officers, the neglect may be excusable).

While Rule 4(a)(6) may provide an opportunity for relief, some courts are less likely to reopen the time to appeal if the failure to receive notice is attributable to fault by the putative appellant. For example, the Seventh Circuit held that a plaintiff could not claim he did not receive notice under Rule 4(a)(6) simply because he did not open the envelope containing the notice and read its contents until after the time for an appeal had lapsed. *See Khor Chin Lim v. Courtcall, Inc.*, 683 F.3d 378 (7th Cir. 2012). Similarly, the Second Circuit held that reopening the time to appeal under Rule 4(a)(6) is not warranted where a party's own negligence caused the failure to receive notice. *See In re Worldcom*, 708 F.3d 327 (2d Cir. 2013). More harshly, the Sixth Circuit found that even under Rule 4(a)(6), a failure to receive notice does not warrant the reopening of the time to appeal when the moving party did not monitor the electronic docket. *See Kuhn v. Sulzer Orthopedics, Inc.*, 498 F.3d 365 (6th Cir. 2007) (noting that a rule that "allowed parties to ignore entirely the electronic information at their fingertips would severely undermine the benefits ... fostered by the CM/ECF system").

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In summary, although Rule 4(a)(6) *may* rescue an untimely appeal if a party shows that it did not receive notice of entry of judgment, courts of appeal treat this rule as discretionary, and litigants should be aware that some circuits impose a duty to monitor the docket under both subsections of Rule 4. Moreover, if the notice was actually received, failure to read an order or the fact that a notice did not clarify all orders to which it applied may not constitute excusable neglect or good cause under Rule 4(a)(5) sufficient to save an untimely appeal.

In a large case in which many lawyers are working together, it can be easy to assume that someone else has checked the docket or read an order. Rather than rely on such assumptions, all lawyers should accept responsibility for monitoring the docket and reading all orders entered. In the event this is not practical, litigation teams should designate specific individuals (preferably, more than just one person) who have explicit responsibility for this task, especially if motions are pending. ♦

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