

# A Look At Del. Compliance Standards For Notice Provisions

By **Lance Phillips and Danielle Simms** (July 1, 2019, 1:33 PM EDT)

Contracting parties looking to provide notice under their agreements may wonder how they could have agreed to such a burdensome communication process. Contracts continue to require that notices and other communications be provided by antiquated methods, such as certified mail, registered mail, courier service and personal delivery. Where email is permitted, often it is effective only when receipt is confirmed by the recipient, or it must be accompanied by a hard copy, making it an unattractive alternative to the other methods. Waiting periods before delivery is deemed effective are also common.

Given the ease and reliability of email, contracting parties may be tempted to cut the corners of a demanding notice provision, particularly for more routine communications. But what does Delaware law say about failure to strictly comply with notice requirements? According to a recent case in the Court of Chancery and its progeny, failure to strictly comply with a notice provision may occasionally be excused if “substantial compliance” can be shown.

In *Vintage Rodeo Parent LLC v. Rent-A-Center Inc.*,<sup>[1]</sup> the Delaware Court of Chancery determined that Vintage Rodeo failed to extend the “end date” in a merger agreement because it did not deliver notice of extension to Rent-A-Center as required by the merger agreement. While the Vintage case involved the failure to provide written notice altogether (the court surmised that Vintage Rodeo “simply forgot”), the court took the opportunity to explain the circumstances in which deviations from the strict requirements of a notice provision will be permitted.<sup>[2]</sup>

In most cases, judicial review stops if the terms of a contract are clear and unambiguous.<sup>[3]</sup> However, in certain circumstances a party may justify deviation from clear and unambiguous terms of a notice provision, including by, for instance, “showing that it has acted reasonably, in light of the circumstances, to substantially comply in a way that preserves the benefits of the contract to the counterparty.”<sup>[4]</sup> “To the extent a reviewing court contemplates condoning such deviation, it must be scrupulous to preserve the benefits of the counterparty’s bargain.”<sup>[5]</sup>

Where a party has “substantially complied” with a notice provision in this manner, its deviation from the literal requirements is deemed not to be a breach and is “without consequence.”<sup>[6]</sup>

The application by Delaware courts of a “substantial compliance” standard to compliance with a notice provision is not new. The 1910 case of *Real Estate Trust Co. of Philadelphia v. Wilmington & N.C. Electric Ry. Co.*<sup>[7]</sup> involved an action by the plaintiff to foreclose on the defendant’s mortgage. The defendant opposed the foreclosure on the grounds that, prior to instituting foreclosure proceedings, the plaintiff had not notified certain officers of the defendant at the defendant’s “principal office” as required by the mortgage. The officers had in fact received the required notice, just not at the defendant’s principal office.

According to the Court of Chancery, “[t]he important thing, of course, was that the three officers



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named should have the notice required by the mortgage to be given; and it is a fair construction of such provisions to hold that if it is shown that the president, secretary and treasurer of the company did in fact receive such notice, even though it was not delivered to them at the principal office of the company, the requirement of the mortgage has been substantially complied with. To hold otherwise would be unreasonable and entirely too technical.”[8]

In the 2003 case of *Corporate Property Associates v. Hallwood*[9] the Delaware Court of Chancery again excused the defendant’s technical noncompliance with a notice provision on the basis of substantial compliance. In *Hallwood*, a notice provision in a settlement agreement required that all communications to the plaintiff be provided to the attention of an individual whose employment with the plaintiff had terminated. The defendant directed the communication to a different executive of the plaintiff, and the plaintiff objected.

The court determined that the defendant “substantially and to the extent reasonably practicable, complied with the notice provision,” and did not breach it.[10] The court noted that the prior conduct of the parties indicated that a communication addressed to any responsible executive of the defendant would suffice, and that the intent of the parties had been carried out.

The 2006 case of *Gildor v. Optical Solutions Inc.*[11] reinforced the substantial compliance doctrine in Delaware as applied to notice provisions. In *Gildor*, a stockholder agreement required that notice be provided to the address set forth in the stockholder agreement, but no address was listed. The defendant sent the notice to an address for the stockholder in another document, but that notice never reached the stockholder, and the defendant knew it.

Citing *Hallwood*, as well as cases from courts in Oregon and Wisconsin, and various contracts treatises, the court noted that “when confronted with less than literal compliance with a notice provision, courts have required that a party substantially comply with the notice provision” and that the “requirement of substantial compliance is an attempt to avoid ‘harsh results ... where the purpose of these [notice] requirements has been met.’”[12] The court held that the defendant had not substantially complied with the notice provision because it had not taken “reasonable steps” to ensure the stockholder received actual notice.

Since *Hallwood* and *Gildor*, a number of Delaware cases have endorsed substantial compliance as a concept, with varying outcomes. For example, deviation from the literal terms of a notice provision was excused on substantial compliance grounds in *Kelly v. Blum*[13] and *Glazeski v. Capital School District*,[14] and not excused in *PR Acquisitions LLC v. Midland Funding LLC*[15] and *Vintage*. [16]

Although there are situations in Delaware in which less than perfect compliance can still be deemed compliance, getting to this result will require the court to undertake a facts and circumstances analysis, with the burden on the noncompliant party to show that its noncompliance did not deprive the other party of any benefits of the negotiated notice requirements. The risk of noncompliance is heightened when the requirements of the notice provision do not align well with the way the parties communicate in practice. Many notice provisions apply to not only notices but also requests, demands, directions and other communications, giving the provision a broad reach.

Delaware lawmakers in recent years have shown increasing support for modern forms of communication, including in the proposed 2019 amendments to the General Corporation Law which, among other things, liberally permit notices to be delivered electronically, except where the parties have agreed otherwise.[17] Prior to signing a contract the parties should consider how they plan to communicate with each other, and should draft realistic notice provisions accordingly.

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[1] See No. CV 2018-0927-SG, 2019 WL 1223026, at \*17 (Del. Ch. Mar. 14, 2019).

[2] See id. at \*23.

[3] See id. at \*14.

[4] See id.

[5] See *Vintage*, 2019 WL 1223026, at \*14.

[6] See id.; see also *Corp. Prop. Assocs. 6 v. Hallwood Grp. Inc.*, 792 A.2d 993, 1001 (Del. Ch. 2002), rev'd on other grounds, 817 A.2d 777 (Del. 2003)

[7] 77 A. 756 (Del. Ch. Sep. 29, 1910).

[8] See also *Finkel's, Inc. v. Shields Dev. Co.*, No. CIV.A. 5981, 1980 Del. Ch. LEXIS 519 (Del. Ch. June 2, 1980) for another early application of the doctrine to excuse failure to strictly comply with a contractual notice provision.

[9] 792 A.2d 993.

[10] See id. at 1001.

[11] No. 1416-N, 2006 WL 4782348 (Del. Ch. June 5, 2006)

[12] See id. at \*7.

[13] No. CIV.A. 4516-VCP, 2010 WL 629850 (Del. Ch. Feb. 24, 2010) (finding substantial compliance where the notice provision required a fax be accompanied by a confirmed copy sent on the same day by first class mail, but the defendant sent a fax accompanied by overnight commercial delivery service).

[14] C.A. No. 03C-08-055 (JTV) (Del. Super. Ct. March 30, 2005) (finding substantial compliance where the defendant hand delivered a notice letter rather than sending it by certified mail as required by the contract).

[15] No. CV 2017-0465-TMR, 2018 WL 2041521 (Del. Ch. Apr. 30, 2018) (rejecting the defendant's argument that the plaintiff's actual notice of an indemnification claim was sufficient to excuse its non-compliance with a notice provision in an escrow agreement).

[16] No. CV 2018-0927-SG, 2019 WL 1223026, at \*17 (Del. Ch. Mar. 14, 2019).

[17] S.B. 88, 150th Gen. Assemb., Reg. Sess. (Del. 2019).