

Must Perfect Be the Enemy of the Good? Compliance with the Franchise Agreement's Notice Provision

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To the untrained eye, a franchise agreement's notice provision may seem like a boilerplate term, undeserving of scrupulous review. After all, the parties often bury these provisions in the miscellaneous section of an agreement and, in practice, franchisors routinely communicate with their franchisees on day-to-day operational matters through informal channels such as calls, emails, and even text messages or other messaging apps. However, certain types of notices, such as notices of default and termination, typically impose an affirmative formal written notice obligation.

The requisite method and means by which to furnish written notice are generally detailed in the often-overlooked notice provision. This provision may require and/or permit that notices be delivered via personal hand delivery (likely, an older form of franchise agreement) or via the U.S. Postal Service, overnight couriers, or electronic mail. Similarly, the notice provision will often specify whether the notice is effective upon delivery, receipt, or some other calculation.

Strict compliance with formal notice requirements may seem simple and straightforward; however, franchisors and franchisees routinely deviate from them, whether unintentionally or by design. For example, a party may inadvertently send the notice via the

U.S. Postal Service when the agreement calls for an overnight courier, such as the United Parcel Service. In the alternative, a party may intentionally deviate from the notice provision, such as where the provision specifies an address from which the recipient has since moved or designated a recipient who is no longer employed by the other party to the agreement.

These examples beg the question: Must a party strictly comply with a franchise agreement's notice provision for its notice to be considered valid and enforceable?

Case Law

Case law surrounding this question remains relatively sparse, and most cases address this issue from a general contract law standpoint rather than in the specific context of franchising. As discussed in more depth below, many courts hold that strict compliance with a notice provision is unnecessary. However, whether a notice that fails to strictly comply is valid and enforceable will depend on myriad factors, such as whether a party actually received the notice and the facts and circumstances contributing to the deviation from the notice provision requirements. However, these decisions are not universal; certain other cases have found that strict compliance is, in fact, required.

Strict Compliance Is Not Necessary

Actual Notice Is Sufficient

Many of the courts holding that strict compliance is unnecessary have done so on the basis that a party achieved actual notice.

In *Dunkin' Donuts, Inc. v. Towns Fam., Inc.*, No. 95 C 3666 (N.D. Ill. Oct. 4, 1995), the franchisor delivered notices of default and termination to the franchised location, as required by the franchise agreement, but only addressed the notices to one of the franchisee parties (where the franchisee was comprised of multiple parties) and not the other(s). Analyzing this issue on a motion to dismiss, the court determined that noncompliance with the technical requirements of the notice provision did not preclude the noticing party from enforcing its rights under the contract, as long as the intended recipient received actual notice. Thus, because the franchisor was able to show that all parties received notice, the court found that the franchisor's notice was sufficient.

In *Tim Hortons USA, Inc. v. Singh*, No. 16-23041-CIV, (S.D. Fla. Apr. 5, 2017), although the franchise agreement required notice to be provided by personal delivery or telefax, the franchisor sent a default notice to the franchisee via email. Following the *Dunkin' Donuts* approach, the court held that the notice was valid because the franchisor could prove that, notwithstanding the requirements of the franchise agreement, the franchisee actually received the notice.

For other cases adopting a similar approach, see *Misty Cleaning Serv. Inc. v. Indep. Grp. Home Living Program, Inc.*, 66 Misc. 3d 1209(A), 120 N.Y.S.3d 709 (N.Y. Sup. Ct. 2020) (finding that the failure to strictly comply with an agreement's notice precepts does not prevent the enforceability of a notice where the noticed party made no claim that it failed to actually receive the notice or that it was prejudiced in any way by the deviation); *Megacenter US LLC v. Goodman Doral 88th Court LLC*, 273 So. 3d 1078, 1084 (Fla. Ct. App. 3d Dist. 2019) (although the subject agreement did not contemplate delivery of a termination notice via email, the court nevertheless held it to be sufficient since the recipient actually received the notice); *11-01 36 Ave. LLC v. Quamar*, 41 N.Y.S.3d 684 (2016) (holding that although a party sent notice via email and Federal Express, in contravention to the agreement's notice provision, such notice was nevertheless sufficient because the sender achieved actual notice and the noticed party was not prejudiced by the deviation); *Life Plans, Inc. v. Sec. Life of Denver Ins. Co.*, No. 11 C 8449, 2013 WL

4052678, at *2 (N.D. Ill. Aug. 12, 2013), rev'd and remanded on other grounds, 800 F.3d 343 (7th Cir. 2015) ("when confronted with less than literal compliance with a notice provision, courts have required that a party substantially comply with the notice provision. To hold otherwise would exalt form over substance and produce an unnecessarily harsh result where the purpose of [the notice provision] clearly has been met."); *Baygold Assocs., Inc. v. Congregation Yetev Lev of Monsey, Inc.*, 916 N.Y.S.2d 639, 640 (2011) (finding that although New York precedent holds that "strict compliance with contractual notice provisions need not be enforced where the adversary party does not claim the absence of actual notice or prejudice by the deviation," in the subject case, there was no evidence that the adversary party ever actually received the noticing party's alleged notice).

Substantial Compliance May Be Sufficient, Depending on the Circumstances

Courts also consider the particular facts and circumstances surrounding the delivery of a notice and why a party deviated from notice provision requirements, particularly where the noticing party can show that strict compliance with an agreement's notice requirements would be impossible or would impair the receiving party's ability to actually receive effective and timely notice.

For example, in *Corporate Property Associates 6 v. Hallwood Group Inc.*, 792 A.2d 993 (Del.Ch. 2002), overruled on other grounds in *Corp. Prop. Associates 6 v. Hallwood Group Inc.*, 817 A.2d 777 (Del.Ch. 2003), instead of sending a notice to the attention of the particular executive named in the subject agreement's notice provision, the defendant instead sent a notice to a different high-level company executive with whom it had been in communication following the original designated recipient's departure from the company. The court agreed with the defendant that literal compliance with the subject agreement's notice provision would be senseless and that, instead, substantial compliance sufficed. In reaching its decision, the court focused on the intent of the notice provision—to provide notice to the responsible executives of the company—and found that the notice provided complied with that intent.

In deciding this issue, courts also consider whether the noticing party acted reasonably. By way of example, in *PR Acquisitions, LLC v. Midland Funding LLC*, 2018 WL 2041521 (Del. 2018), instead of sending written notice to the plaintiff as required under the agreement, the noticing party sent written notice to a third party and simply called the plaintiff to

inform it of the same. Holding for the plaintiff, the court found that the noticing party offered “no reason other than its own error for its failure to comply with the notice provision it negotiated in the escrow agreement.” *Id.* at 8. The court in *Gildor v. Optical Solutions, Inc.*, 2006 WL 4782348 (Del. 2006), also imposed a rationality component when considering the noticing party’s actions. In particular, where the subject notice provision failed to include a notice address, the noticing party sent notice to just one of multiple addresses that it had on record. The noticing party subsequently learned that the other party never received its notice yet neglected to take any other steps to provide notice. Because the noticing party had other mailing addresses and an email address on file, the Delaware Court of Chancery found that it did not take “reasonable efforts” to provide actual notice to the other party.

Strict Compliance Is Necessary

While the cases above indicate that courts may accept a party’s substantial compliance with notice requirements, particularly when it achieves actual notice, exceptions exist.

In *Grosso Enterprises, Inc. v. Domino’s Pizza LLC*, No. CIV.A. 11-1484 (E.D. Pa. Mar. 9, 2011), the Domino’s franchise agreement’s notice provision allowed for email notices but required that the franchisor address all emailed written communications to the franchisee and include in the body of the email the franchisee’s most current principal business address or most current home address. The court noted that the purpose of this requirement was to focus a franchisee’s attention on emails specific to the franchisee and to distinguish them from regular mass emails from the franchisor. In delivering a default notice via email, however, the franchisor failed to include the franchisee’s address in the default notice. As such, the court determined that the franchisor failed to properly default the franchisee and, therefore, lacked proper grounds for terminating the franchise agreement. For a similar holding, see *In re Supernatural Foods, LLC*, 268 B.R. 759, 771–772 (Bankr. M.D. La. 2001) (finding strict compliance necessary, the court would not “strip the contract of unequivocal language in an attempt to validate that which the contract does not itself validate”).

Practice Pointers

Perfect compliance begins at the drafting stage of a franchise agreement. A notice provision should always be clear, reasonable, and consistent with the

parties’ actual standard practices. It should describe required information for any notice, such as the purpose of the notice, the proper recipient of the notice, and when the sender may deem the notice complete. Parties should also draft a notice provision to take modern practical realities into account. While some franchise agreements may still allow notice by facsimile transmission, most people no longer have fax machines. Conversely, with the use of email now ubiquitous in businesses, allowing the delivery of notice via email or electronic transmission may most accurately reflect current business practices. Email transmission has proven especially advantageous during the COVID-19 pandemic and the corresponding rise in remote work, with fewer and fewer people tethered to a physical office.

Where a party may send notice via email and overnight courier mail, the noticing party should consider utilizing both options in tandem. While perhaps more administratively burdensome than simply choosing one delivery method, this approach increases the likelihood that the counterparty will actually receive the notice and helps to avoid questions as to whether the noticing party acted reasonably in sending the notice. Noticing parties should also consider enabling tracking tools, such as delivery and read receipts, when sending email and retaining those receipts (as well as any physical delivery receipts) with a copy of the notice sent.

Conclusion

Although numerous courts have held that the failure to strictly comply with a notice provision may not necessarily render a default notice invalid, these holdings are not uniform. Even when a noticing party prevails, it will have the burden of proving that the counterparty actually received the notice, explaining why the noticing party failed to comply with the notice provision, and justifying the reasonableness of its actions. Thus, noticing parties (franchisors and franchisees alike) should remain vigilant in (a) drafting reasonable notice provisions that accurately reflect their actual practices; (b) strictly complying with agreed-upon notice provisions in their franchise agreements; and (c) prior to sending a notice, determining whether any special circumstances may require either party to take reasonable additional or different steps to ensure that their counterparty receives the actual notice. ■