

Taking Notice

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A loan document's notice provision is often overlooked as just another boilerplate provision in need of blanks to fill in. However, as technology changes, this section can be a minefield during the life of a 3 to 10 year loan.

At a basic level, a notice provision needs to provide instructions for delivering notice, when notice is deemed delivered, addresses that will be reliable, and a method for the parties to update the addresses in the future.

The surest, if not the easiest, mode of delivery is hand delivery, which is deemed delivered upon delivery. After that, two reliable and frequently permitted methods of delivery are registered or certified mail, return receipt requested, or prepaid overnight delivery with proof of attempted delivery. For overnight delivery, notice is deemed given upon first attempted delivery on a business day and, for certified mail, it is usually deemed given within 3 business days after posting. This is why it is important that all addresses for notice be reliable. You don't want a short notice period to begin after a failed attempt at delivery.

Changing technology has left its mark on notice provisions. One of the few places you will still see a fax number appear is in a legal document's notice provision, with notice deemed given with receipt confirmation. Because fax machines are becoming less common, many agreements only accept facsimile delivery provided one of the other notice methods are also used.

Recently, email addresses are increasingly being added to the notice addresses of parties in legal documents. However, the use of e-mail as a notice method raises a host of issues not previously encountered with other means of providing notice. While there are no federal or state laws prohibiting the use of email for providing notice, parties are often wary of using it as the form of official notice. This is because, as discussed below, email messages often do not provide a reliable way of confirming receipt of delivery. However, if an email address is listed in an agreement without explicit rules around its use, it may be used by the parties and will be accepted as valid by a court. It is therefore important that all parties to an agreement be very clear about the use of email to provide notice and what constitutes effective delivery.

When using registered or certified mail, a proof of delivery or return receipt acknowledges physical delivery to a mailbox. Similarly, a prepaid overnight delivery service provides evidence from an uninterested third party of attempted delivery. These types of delivery ensure that the notice will be received by the intended recipient. An email delivery, on the other hand, does not have the same assurances. Due to email providers' algorithms for sorting emails, sometimes a successfully delivered email may end up in the recipient's spam or junk folder. This is typically the case when the recipient does not have any prior interaction with the sender. In addition, organizations often use an individual's email address for notice, and emails to that address may be lost in the future if that individual leaves the organization.

Generally, courts follow the language of the agreement when determining when a notice becomes effective. While there are federal or state regulations on the use of electronic methods for written contracts, there are no specific restrictions on notice requirements. Thus, parties are free to contract as they wish regarding the notice provision in an

agreement. If a notice provision deems notice to be duly given when sent, an email is effective from the moment it is sent, regardless of where the email ended up (such as spam, junk, etc.). In the absence of any language specifying when a notice becomes effective, the law is that mail notice is effective upon posting. However, there is no established law as to when email notice is effective. Therefore, the parties to a contract should be specific about when email notice can be used (for instance, should it be used only for operational matters such as particular required consents rather than formal default notices?) and when it will be deemed to have been delivered. While we have all come to rely on email for our day-to-day communications, it is difficult to determine if and when an email has been received by the intended party. For this reason, parties should proceed with caution with respect to these matters.

Receipt of an email can be shown in many different ways. A “Delivery Receipt” notification will provide the sender an email upon successful delivery of an email to the recipient’s mailbox. This option is not available for all email providers. For example, Microsoft Outlook may provide this service, but other email service providers may not. This method also does not guarantee that the email would be delivered to the recipient’s inbox. The email may be filtered into a spam, junk, or other folder, and the sender would nevertheless receive a successful delivery notification. A read receipt option, on the other hand, only notifies the sender once the recipient opens the email. This notification method ensures actual delivery to the recipient, but is not without its flaws. Although more widespread than the delivery receipt option, the read receipt option is also not a feature found with all email providers. Furthermore, if a sender opted for a read receipt, but the recipient’s email provider lacks the option, or the recipient has turned the function off for privacy reasons, the notification will not be sent upon opening the email. A third option would be to have the recipient send a reply email confirming receipt. This is the most fool-proof method of confirming email delivery. It does not require any features beyond the rudimentary functions all email providers share, and a reply unequivocally shows the email was indeed delivered successfully. This method only works, however, if the recipient voluntarily replies to the notice email. Requiring a receipt as a condition to a notice’s effectiveness would conceivably allow a recipient to extend a notice period by delaying the response to an email.

Many notice provisions in agreements may allow such notice to be delivered by email but may have language that suggests that mere transmission of the email does not create a presumption that the notice was received. This suggests that the clock would begin upon receiving a receipt of email delivery. This receipt may come in the form of a delivery receipt, read receipt, or a reply from recipient. Each of these methods may present situations where the sender never receives a receipt from the recipient. In those instances, if no receipt of delivery is confirmed within a business day, the parties may opt to treat email notice as a first method of communication. The other methods previously discussed could therefore be used as a second method, and notice would be deemed given based only on the corresponding requirements of the secondary notice method.

During the coronavirus pandemic, many counterparties began to introduce email as an acceptable notice method in their agreements. This is understandable given the difficulties with other modes of delivery when people are being asked to work from home. However, regardless of the reasons parties may want to provide for email notification, they should consider the following points before doing so:

- Be sure to provide current email addresses in the agreement, and any email addresses used should be general accounts monitored by multiple people in an organization, rather than an individual’s email address.
- If email addresses are included with the notice addresses, there must be rules around email notices, such as when a notice by email is deemed given or received and when a notice period starts.
- If an agreement deems email notice to be given upon dispatch, a good practice would be to have a test email sent to the email address on the agreement. The recipient can then add the sender as a trusted contact, ensuring future correspondences from the sender will not be filtered to spam or junk mailboxes.
- Finally, best practice would be to require some other physical form of notice to a physical address with official receipt confirmation. Ultimately, this may be the only way to be certain notice has been received by the intended party.

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