



The Importance of Operational Procedures Whenever Statutory Notice is Required

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A business' routine and seemingly mundane operational practices can sometimes have material legal consequences, a/k/a it is not important until it is. The Kentucky Supreme Court recently addressed a case in which lowly mail operations, and its procedures and record keeping, played a decisional role.

Two transformative trends have impacted all businesses over the past decades. The first is that of increasing technological innovation and automation of nearly every aspect of their operations. The second major trend has been the increasing codification by statutes of parties' rights. If there is a perceived wrong, then there should be a statutorily enshrined set of rules to fix or control it, or so appears to go the legislative mindset. Included are often legislatively memorialized notice obligations, particularly notice which must be given whenever some other statutory right is exercised. While business leaders always hope to harmonize those two trends, sometimes it is only with hindsight that one realizes the marriage was not perfectly made.

On January 21, 2021, the Kentucky Supreme Court announced its decision in *Pleasant Union LLC v. Kentucky Tax Company, LLC, et al.* The litigation arose from a tax purchaser's effort to enforce its statutory right to recovery from a taxpayer the money it had paid to the state in satisfaction of the past due tax debt. The taxpayer challenged the right of the Kentucky Tax Company to collect unpaid taxes. The taxpayer's defenses include arguments that it had been denied its statutory right to receive certain notices. In particular, the controlling law required notice be sent "by first-class mail with proof of mailing." See KRS 134.490.2.

The first issue addressed was whether the taxpayer was entitled to receive both notice by first-class mail and proof of the mailing of the same. The Kentucky Supreme Court resolved the statutory ambiguity. An unreasonable, if not illogical, situation would result if

the statute was construed to require a tax purchaser to send the required notice by mail and then also communicate to the delinquent taxpayer proof of the fact that the subject mailing had been made. This small point may be more consequential than it appears on a first reading of the decision, as too often it seems we find legislative enactments with that phrase or something similarly incongruous.

Next the court moved on to the questions that likely is more important to all businesses. If a statute requires notice to be provided in a particular fashion, but does not specify the character of the proof that is required to establish the fact that notice was accomplished – as candidly many statutes do not – then what proof shall suffice? In the *Pleasant Union* case, the tax purchaser offered an affidavit from counsel, whose office purportedly accomplished the mailing. In summary, the Kentucky Supreme Court’s analysis implicitly recommends that businesses, whenever statutory notice is required, use a delivery or courier service that provides the sender documentary proof of the actual mailing.

Legally consequential mailing should be considered for disparate handling by the business’ mailing room or assigned staff. However, if this cannot be done, or was not done, then things get dicey. Reliance on common procedures (a/k/a “That is the way we always do things”), even with uncontested proof of internal processes, may not suffice. The court ruled, “If the person or entity required to send notice relies on proof of a regular course of business..., that party must offer proof of a standard office mailing procedure designed to ensure that the notices are properly addressed and mailed by first-class mail, sworn to by someone with personal knowledge of the business procedure, as well as proof of compliance with that regular business procedure in this specific instance.”

But for the want of a nail, so to speak, the tax purchaser lost its grant of summary judgment to collect its purchased tax debt, in the *Pleasant Union* case, and the matter was remanded back to the trial court for additional fact finding. Many businesses long ago automated their mailing operations. Where legally consequential notices are handled by those automated processes, businesses must ensure that records are created and retained (and can be

retrieved) in legally evidentiary format.

This “proof” functionality, which may vary from state to state or by statute, should be evaluated when considering any vendor’s mail management system. If the selected technology fails in that functionality, then the business’ trial counsel must not overlook the importance of establishing a solid evidentiary record as early as possible in the pre-suit investigation or litigation proceedings. There no longer will be any free passes in Kentucky when it comes to statutorily mandated notice. And all businesses may expect that more of these notice-based defenses will be raised in the future.

For questions about this article, please contact [Bill Repasky](#) (brepasky@fbtlaw.com) or any attorney with Frost Brown Todd’s [Financial Services Industry Team](#).

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