

IN THE SUPREME COURT OF TEXAS

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No. 15-0635
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BANKDIRECT CAPITAL FINANCE, LLC,
A SUBSIDIARY OF TEXAS CAPITAL BANK, N.A., PETITIONER,

v.

PLASMA FAB, LLC AND RUSSELL MCCANN, RESPONDENTS

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS
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JUSTICE GUZMAN, concurring.

Consistent with our recent opinion in *Roccaforte v. Jefferson County*,¹ which construed a similar notice statute, an insurance premium finance company could satisfy section 651.161 of the Insurance Code though not strictly complying with all of its terms.² While I do not agree with the Court's conclusion that failing to "state" a ten-day post-mailing cure deadline is, in and of itself,

¹ 341 S.W.3d 919 (Tex. 2011).

² Compare *Roccaforte*, 341 S.W.3d at 926-27 (holding hand-delivered notice substantially complied with statute requiring written notice to be "delivered by certified or registered mail") (citing TEX. LOC. GOV'T CODE § 89.0041(b)) with TEX. INS. CODE § 651.161(b), (c) (requiring the insurance premium finance company to "mail" written notice to the insured and insurance agent or broker). The Court attempts to distinguish *Roccaforte* by noting "*Roccaforte* concerned the *manner* of timely notice, not the *mandate*" and concluding *Roccaforte* "went beyond what the statute required" by hand-delivering notice. *Ante* at _____. But when an act differs from what the statute requires, going "beyond" the statute equates to *not strictly complying with it*. The Court identifies no textual distinction between the statute in *Roccaforte* and section 651.161 of the Insurance Code that explains how substantial compliance could be sufficient in *Roccaforte* while it could never be sufficient under section 651.161.

insufficient compliance, I nevertheless concur in the Court’s judgment that BankDirect did not comply with section 651.161, substantially or otherwise, because Bank Direct both stated a shortened cure deadline and prematurely cancelled the insurance policy.

Section 651.161 prohibits an insurance premium finance company from cancelling an insurance contract listed in a premium finance agreement unless the following conditions are met:

(b) The insurance premium finance company must mail to the insured a written notice that the company will cancel the insurance contract because of the insured’s default in payment unless the default is cured at or before the time stated in the notice. The stated time may not be earlier than the 10th day after the date the notice is mailed.

....

(d) After the time stated in the notice required by Subsection (b), the insurance premium finance company may cancel each applicable insurance contract by mailing a notice of cancellation to the insurer.³

BankDirect failed to comply with the statute in the following respects: (1) on November 25, BankDirect mailed to Plasma Fab a notice of intent to cancel the policy with a stated cure deadline of December 4—only nine days after notice was mailed and one day less than the statute prescribes; and (2) BankDirect sent notice of cancellation to the insurer Scottsdale Insurance Company *on* December 4—the same date as the cure deadline stated in the notice—not “*after* the time stated in the notice.”⁴ Accordingly, BankDirect had no authority to cancel the insurance contract unless both

³ TEX. INS. CODE § 651.161(b), (d).

⁴ *Id.* § 651.161(d) (emphasis added).

shortening the stated cure deadline by a day and mailing the cancellation notice to the insurer on the stated cure deadline date substantially complies with the statute.

Analogous authority considering filing deadlines leads me to conclude that BankDirect did not comply, substantially or otherwise, with the statute. In *Edwards Aquifer Authority v. Chemical Lime, Ltd.*, we considered whether Chemical Lime substantially complied with a permit application process when it complied with all the statutory requirements except a filing deadline.⁵ We “assume[d]” that the statute permitted substantial compliance and that “substantial compliance with a statute means compliance with its essential requirements.”⁶ But we concluded that the Legislature’s “intent that applicants *strictly* adhere to the deadline is [] fairly clear,” based on the statute’s fixed filing deadlines and the absence of an extension provision.⁷ Accordingly, we held Chemical Lime’s late filing did not substantially comply with the statute’s permitting requirements because “[a] deadline is not something one can substantially comply with. A miss is as good as a mile. . . . ‘A filing deadline cannot be complied with, substantially or otherwise, by filing late—even by one day.’”⁸ The reasoning: “‘If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline.’”⁹

⁵ 291 S.W.3d 392, 402-05 (Tex. 2009).

⁶ *Id.* at 402-03.

⁷ *Id.* at 403-04 (emphasis added).

⁸ *Id.* at 403, 405 (quoting *U.S. v. Lock*, 471 U.S. 84, 101 (1985)).

⁹ *Id.* (quoting *Lock*, 471 U.S. at 101).

Though undercutting a cure period is different than exceeding a deadline, the concepts are logically analogous. The importance of delaying cancellation until after the stated cure deadline passes is clear—it provides an insured with a date certain by which a default can be cured without cancellation of the insurance policy. The date after which an insurance premium finance company may mail a cancellation notice to the insurer, pursuant to section 651.161(d), is especially noteworthy because, as the dissent correctly recognizes, the actual number of days to cure between the insured receiving a section 651.161(b) notice of intent to cancel and the stated cure deadline is imprecise:

Section 651.161(b) does not require that the borrower *receive* at least ten days notice before cancellation may occur; it requires that the specified date for payment not be less than ten days after the notice is *mailed*. Because the borrower will actually receive less than ten days notice of the specified date—in some cases several days less, depending on how long it takes the mail to reach the borrower—there is no hard and fast minimum notice time requirement provided to the borrower.¹⁰

While I agree with this description of subsection (b)’s effect, subsections (b) and (d) *together* create a firm deadline; an insurance premium finance company must wait until “after” the “stated” cure deadline passes before sending the cancellation notice to the insurer. When a statute provides an essential, specific, and clear time restriction, as it does here, a party must adhere to that requirement.

The Court, meanwhile, focuses primarily on the notice’s “stated” cure deadline, concluding the notice must always state a deadline providing at least ten days for the cure period, regardless of how much time the insured actually had to cure and without regard to when the section 651.161(d)

¹⁰ *Post* at ____.

cancellation notice was actually mailed.¹¹ I do not agree that “stating” a ten-day deadline is essential¹² or that *actually* giving the insured more than ten days to cure before sending the cancellation notice would not substantially comply with section 651.161. In my view, such a position would be inconsistent with *Roccaforte*.¹³ But here BankDirect both stated a cure deadline “earlier than the 10th day after the date the notice [was] mailed” and mailed the cancellation notice to the insurer on the *same* day stated in the notice instead of waiting until “[a]fter the time stated in the notice.”¹⁴ I therefore conclude BankDirect did not comply with section 651.161, because Plasma Fab did not actually receive the minimal cure period the statute requires. Accordingly, I respectfully concur in the Court’s judgment.

Eva M. Guzman
Justice

OPINION DELIVERED: May 12, 2017

¹¹ *Ante* at ____.

¹² *See Chem. Lime*, 291 S.W.3d at 404 (“Had Chemical Lime filed an incomplete or inaccurate application, its argument for substantial compliance would be stronger.”).

¹³ *Roccaforte v. Jefferson Cty.*, 341 S.W.3d 919, 926-27 (Tex. 2011) (fulfilling essential purpose of the notice statute in a different way than provided substantially complies with the requirements of the statute).

¹⁴ TEX. INS. CODE § 651.161(b), (d) (emphasis added).