IN THE SUPREME COURT OF TEXAS

NO. 15-0635

BANKDIRECT CAPITAL FINANCE, LLC,
A SUBSIDIARY OF TEXAS CAPITAL BANK, N.A., PETITIONER,

v.

PLASMA FAB, LLC AND RUSSELL MCCANN, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

JUSTICE JOHNSON, joined by CHIEF JUSTICE HECHT, dissenting.

I do not disagree with the Court's conclusion that Insurance Code section 651.161 requires an insurance premium finance company to cancel an insurance policy in accordance with the statute's requirements. TEX. INS. CODE § 651.161(a). It is clear that the statute requires such a company to mail a written notice to the insured explaining that the company will cancel the insured's policy as a result of default unless the default is cured at or before the time stated in the notice. *Id.* § 651.161(b). The statute further requires that the stated time "may not be earlier than the 10th day after the date the notice is mailed." *Id.*

However, the Court stops its analysis without considering the statute's lack of consequences for noncompliance with the requirement set out in the last sentence of section 651.161(b) regarding the time for a finance company to mail the notice. The Court says that "BankDirect failed to meet

the law's unambiguous requirements, and the Legislature enacted an austere consequence for noncompliance: BankDirect 'may not cancel' the policy." *Ante* at ___. But that approach short circuits all the steps in a statutory analysis. We are required to look at the factors and language in the Code Construction Act and our decisions regarding statutory language for assistance in determining the effect of noncompliance with the "10th day" language. As explained below, consideration of these factors and our prior cases indicate that section 651.161(b)'s ten-day requirement should be measured by substantial compliance in order to effectuate the Legislature's intent. And measured by that standard, BankDirect complied with the statutory requirements.

I would reverse the judgment of the court of appeals and reinstate the judgment of the trial court.

I. The Law

Our primary objective in construing section 651.161(b)—as it is with any statute—is to determine and give effect to the Legislature's intent, which, if possible, we ascertain from the plain meaning of the words in the statute. *E.g.*, *Greater Hous. P'ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015); *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011) ("The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results."). We presume the Legislature deliberately and purposefully selected the words and phrases it enacted, as well as deliberately and purposefully omitted words and phrases it did not enact. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 438 (Tex. 2016) (citing *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012)).

The Code Construction Act (Act) provides guidance regarding some of the words and phrases used in statutes. *See* TEX. GOV'T CODE § 311.003. Particularly, the Legislature specified its intent as to the meaning of certain words that are used in section 651.161:

> The following constructions apply unless the context in which the word or phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute:
>
> (1) "May" creates discretionary authority or grants permission or a power.
> (2) "Shall" imposes a duty.
> (3) "Must" creates or recognizes a condition precedent.
> . . . .
> (5) "May not" imposes a prohibition and is synonymous with "shall not."

Id. § 311.016. The Act likewise provides that the Legislature intends for statutes to have a just and reasonable result. *Id.* § 311.021(3). In construing statutes, courts may consider, among other matters, the object sought to be obtained and the consequences of a particular construction. *Id.* § 311.023(1), (5).

II. Discussion

The language in the power of attorney conditioned BankDirect's authority to cancel the policy upon the occurrence of two events: (1) Plasma Fab's default and (2) BankDirect's mailing of "proper notice . . . as required by law." Unless both of these events occurred, BankDirect did not have authority under the power of attorney to cancel Plasma Fab's insurance policy. There is no question that the first condition was satisfied by Plasma Fab's failure to timely make its November payment. The dispute is whether BankDirect mailed proper notice "as required by law," satisfying the second condition, before it instructed Scottsdale to cancel the policy.

BankDirect does not dispute that use of the phrase "may not" in Insurance Code section 651.161(a) prohibited it from cancelling the Scottsdale policy for a delinquent payment unless, as relevant to the question before us, it complied with the requirements of section 651.161(b) in sending notice of its intent to cancel. TEX. GOV'T CODE § 311.016(5) ("'May not' imposes a prohibition . . . ."); TEX. INS. CODE § 651.161(a) ("An insurance premium finance company may not cancel an insurance contract listed in a premium finance agreement except as provided by this section . . . ."). Nor does it dispute that section 651.161(b) required it to mail Plasma Fab a written notice complying with the provision's requirements as a condition precedent to its having the right to cancel the policy. *See* TEX. GOV'T CODE § 311.016(3) ("'Must' creates or recognizes a condition precedent."); TEX. INS. CODE § 651.161(b) ("The insurance premium finance company must mail to the insured a written notice . . . ."). Section 651.161(b) prohibits stating in the notice that the due date for the delinquent payment is earlier than the tenth day after the notice was mailed. *See* TEX. GOV'T CODE § 311.016(5) ("'May not' imposes a prohibition . . . ."); TEX. INS. CODE § 651.161(b) ("The stated time may not be earlier than the 10th day after the date the notice is mailed."); and it is undisputed that BankDirect did not strictly comply with the requirements of section 651.161(b) because it mailed a notice specifying a date for payment that was less than ten days after the notice was mailed.

Based on the cancellation date specified in the notice, BankDirect mailed the notice of intent to cancel one day later than it was required to under the statute. Or, said another way, its notice specified that the date before which Plasma Fab must make its delinquent payment was less than "the 10th day after the date the notice [was] mailed." *Id.* § 651.161(b). One day is as close to complying

with the statute as BankDirect could get, yet still not strictly comply with it. If substantial compliance is what the statute requires, then BankDirect complied with the statute.

The Court says we have explained "substantial compliance with a statute means compliance with its essential requirements." *Ante* at ___ (quoting *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 403 (Tex. 2009)). Not to put too fine a point on the matter, but in *Chemical Lime* we did not "explain" what substantial compliance means, but only assumed its meaning because the parties agreed on that definition and it was included in the jury charge. *Id*. at 403. That aside, I do not disagree with the definition the Court uses; it echoes the definition used by several courts of appeals: substantial compliance with a statute is where compliance with a statute's *essential* requirements has taken place, even though literal and exact compliance with its *every* requirement has not. *See, e.g.*, *Carter v. Harris Cty. Appraisal Dist.*, 409 S.W.3d 26, 32 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("'Substantial compliance' means that one has performed the 'essential requirements' of a statute and it 'excuse[s] those deviations from the performance required by statute which do not seriously hinder the legislature's purpose in imposing the requirement.'" (quoting *U. Lawrence Boze' & Assocs., P.C. v. Harris Cty. Appraisal Dist.*, 368 S.W.3d 17, 27 (Tex. App.—Houston [1st Dist.] 2011, no pet.))); *City of Beaumont v. Spivey*, 1 S.W.3d 385, 391 (Tex. App.—Beaumont 1999, pet. denied); *Santos v. Guerra*, 570 S.W.2d 437, 440 (Tex. App.—San Antonio 1978, writ ref'd n.r.e.). However, "substantial compliance" is not a buzzword for courts to substantively, by opinion, amend statutes. *E.g.*, *Goldman v. Torres*, 341 S.W.2d 154, 158 (Tex. 1960) ("[T]his court cannot, under the guise of liberal construction, usurp the power of the legislature by reading into the Act a provision that is not there.").

In determining the effect of a failure to comply with every requirement of a statute and whether substantial compliance will suffice, we have looked to whether the statute is mandatory or directory. *See, e.g.*, *Chem. Lime*, 291 S.W.3d at 404–05; *City of Desoto v. White*, 288 S.W.3d 389, 395–96 (Tex. 2009); *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493–94 (Tex. 2001). And in determining whether the Legislature intended a statute's requirements to be mandatory or directory, we "consider the plain meaning of the words used, as well as the entire act, its nature and object, and the consequences that would follow from each construction." *Wilkins*, 47 S.W.3d at 494. If a statute is silent regarding the penalty for noncompliance, we look to the purpose of the statute for guidance. *See Chem. Lime*, 291 S.W.3d at 404; *Hines v. Hash*, 843 S.W.2d 464, 468 (Tex. 1992). A statute is generally considered directory if it requires an act to be done within a certain amount of time and fails to state the consequences for noncompliance. *Chisholm v. Bewley Mills*, 287 S.W.2d 943, 945 (Tex. 1956); *see also Thomas v. Groebl*, 212 S.W.2d 625, 630–31 (Tex. 1948).

Section 651.161(b) provides that the "stated time may not be earlier than the 10th day after the date the notice is mailed," but does not specify consequences or a penalty for a failure to comply with this provision. TEX. INS. CODE § 651.161(b). The term "may not" imposes a prohibition and is to be interpreted as synonymous with "shall not" unless the context in which the phrase appears necessarily requires a different construction or if a different construction is expressly provided for by statute. TEX. GOV'T CODE § 311.016. "Shall" generally imposes a duty. *Id.* § 311.016(2). By providing that a premium finance company may not cancel an insurance policy except as provided by the statute and requiring that the stated time of cancellation may not be earlier than the tenth day after the date the notice is mailed, the Legislature seemingly imposed a mandatory duty on premium

finance companies to carry out these specific requirements. However, this Court has instructed that although statutory language may appear to impose a mandatory duty, the language may yet be directory when such an interpretation is most consistent with the Legislature's intent. *See Wilkins*, 47 S.W.3d at 493; *see also Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1976) ("Provisions which do not go to the essence of the act to be performed, but which are for the purpose of promoting the proper, orderly, and prompt conduct of business, are not ordinarily regarded as mandatory."). Because section 651.161(b) lacks a penalty for noncompliance with its terms, we must "consider the plain meaning of the words used, as well as the entire act, its nature and object, and the consequences that would follow from each construction" in determining whether the time requirement in section 651.161(b) is mandatory or directory. *Wilkins*, 47 S.W.3d at 494.

An example of the foregoing is *Hines v. Hash*, where we focused on statutory language similar to that at issue in this case. 843 S.W.2d 464 (Tex. 1992). In *Hines*, the statute provided that as a prerequisite to filing a suit for damages under the Texas Deceptive Trade Practices Act, "a consumer shall give written notice to the person at least 30 days before filing the suit advising the person of the consumer's specific complaint and the amount of actual damages and expenses." *Id.* at 466–67 (quoting TEX. BUS. & COM. CODE § 17.50A[1]). Because the statute was silent on the consequences for failing to comply, this Court looked to its purpose for guidance and concluded that if a plaintiff files an action under the DTPA without first giving the required notice, and a defendant requests abatement, the trial court must abate the proceedings. *Id.* at 469. Although the notice

[1] The current version of this statute is Texas Business and Commerce Code § 17.505(a).

requirement was clearly mandatory, that feature alone did not determine the consequences for failure to comply with it. *Id.* at 467. Because the statute was silent as to the consequences of non-compliance, the purpose of the statute favored the consequence of abating the case to allow the plaintiff time to comply with the notice requirement rather than dismissing the action altogether. *Id.* at 469.

Section 651.161(b) likewise does not specify consequences for noncompliance with its ten-day requirement, so we must look beyond its plain language for assistance. In that regard, we look to see if the Code Construction Act gives guidance. And it does. There, the Legislature clarifies that in enacting statutes it intends: (1) a just and reasonable result, (2) that fulfills the object to be obtained, (3) in light of the consequences of how the language is construed. *See* TEX. GOV'T CODE §§ 311.021(3), 311.023(1), (5).

As to the just and reasonable result and consequences factors, we look at the consequences of construing section 651.161(b) to require strict compliance, as well as the consequences of construing it to require substantial compliance. If strict compliance is the standard, then a lender, such as BankDirect, that mails a notice of intent to cancel one day late may end up being liable for damages from an occurrence or loss that would have been covered by the cancelled insurance except for the occurrence or loss happening days, as in this case, or weeks or months after the insurance was cancelled. This result could follow even though, as in this case, Plasma Fab's policy was cancelled because Plasma Fab (1) failed to make payment when and as it agreed; (2) was reminded of its delinquency by the premium finance company, yet did not make payment; (3) was given notice that its insurance would be cancelled on a specific date if the payment was not made, and yet still failed

to make payment; and (4) received notice that the lender directed the insurance to be cancelled as of the specific date earlier specified—albeit the date was one day less than prescribed by statute. Such a result could, in substance, turn premium finance lenders into post-cancellation insurers of their borrowers despite the borrowers having lost coverage because they failed to pay loan installments as agreed, or by timely curing their default after written notice that failure to pay was jeopardizing the very insurance the loan allowed them to purchase. It is difficult to view such consequences to either the borrower or the lender as just and reasonable. But if substantial compliance is the standard and, as BankDirect posits, the notice of cancellation is not effective until the earliest day contemplated by the statute, then a borrower receives all of the benefits and protections of section 651.161(b) while a premium lender, such as BankDirect, is held to the requirements the Legislature built into the statute to protect borrowers. Thus, construing section 651.161(b) as requiring substantial compliance such that the lender's cancellation of the borrower's insurance is effective no earlier than the earliest date permitted by the statute comports with the Legislature's intent that section 651.161(b) yields results and consequences that are just and reasonable.

Looking next to the legislative object to be obtained, *see* TEX. GOV'T CODE § 311.023(1), it cannot be doubted that the Legislature intended to protect insureds by circumscribing the practices of premium lenders. Nor can it be doubted that the Legislature also intended to allow lenders to protect themselves when borrowers do not pay as agreed by permitting them to cancel the policy purchased with the loan proceeds and receive the unearned premium to be applied to the borrower's remaining balance on the loan. *See* TEX. INS. CODE § 651.162; *see also Serv. Fin. v. Adriatic Ins.*

Co., 46 S.W.3d 436, 447 (Tex. App.—Waco 2001), *judgm't vacated w.r.m.*, 51 S.W.3d 450 (Tex. App.—Waco 2001, no pet.) (noting that the Insurance Code clearly evinces an intent to protect the premium finance industry). The object to be obtained—striking a balance between protecting the rights of both borrowers and premium finance lenders—is also apparent from the language in section 651.161(b). That section provides for an insured who finances premiums to have a reasonable amount of advance notice that its insurance policy will be cancelled if delinquent payments are not made, as well as being advised of a specific date before which the insured can make a delinquent payment and be assured that its insurance will remain in force. The statutory requirement that the specific date must be included in a lender's notice of intent to cancel links the notice's time requirement to the lender's action in mailing the notice instead of the borrower's receipt of the notice. Thus, section 651.161(b) does not provide for the borrower to have a fixed amount of time after receiving the notice to cure its payment default and avoid cancellation of the insurance.

Because the Legislature did not specify the consequences of a premium finance company failing to strictly comply with section 651.161(b)'s ten-day requirement, and the factors and language in the Code Construction Act indicate, on balance, that the requirement should be measured by substantial compliance, I conclude that the Legislature did not intend to require strict compliance with that specific provision in the statute. I further conclude that the object of section 651.161(b)'s ten-day requirement will be fulfilled so long as an insured has at least until the tenth day after the lender mails the notice of intent to cancel to make the payment. I would hold that if the date specified for cancellation in the notice is before the tenth day after the notice is mailed, then the time for the borrower to make its delinquent payment and maintain its insurance in force is extended to

the tenth day after the notice is mailed or the date specified in the notice of intent to cancel, whichever is later.

The Court cites thirteen statutes in which the Legislature has expressly provided that substantial compliance with statutory terms is sufficient. First, it is worth noting that only two of the statutes mention a time requirement. *See* TEX. ELEC. CODE § 18.065(a) (allowing for Secretary of State to monitor voting registrars' substantial compliance with various sections, one of which is a hard deadline of November 30 rather than a "not later than" time frame); *see also* TEX. INS. CODE § 826.105 (allowing substantial compliance with notice requirements of the chapter, including filing an organizational conversion plan "[n]ot later than the 30th day" after members approve the plan under Insurance Code section 826.104). Second, and more importantly, this Court has repeatedly held that if the statute at issue does not provide consequences for failure to strictly comply with its terms, we look to "the plain meaning of the words used, as well as the entire act, its nature and object, and the consequences that would follow from each construction." *Wilkins*, 47 S.W.3d at 494; *see also AHF-Arbors at Huntsville I, LLC v. Walker Cty. Appraisal Dist.*, 410 S.W.3d 831, 835–36 (Tex. 2012); *City of Desoto*, 288 S.W.3d at 397; *Hines*, 843 S.W.2d at 469 (noting that the consequence of noncompliance may be limited to enforcement of the purpose of the notice); *Chisholm*, 287 S.W.2d at 945; *Thomas*, 212 S.W.2d at 629–30. If BankDirect had failed to mail a notice of intent to cancel to Plasma Fab, there would be no question that BankDirect failed to strictly comply with section 651.161's cancellation requirements, because mailing of the notice is undoubtedly an essential statutory requirement that must be strictly complied with. On the other hand, the ten-day time requirement in section 651.161(b) is not essential, meaning that substantial

compliance with that provision will suffice because substantial compliance will not seriously hinder the Legislature's purpose in imposing the requirement—that the borrower is given notice of a specific cancellation date.

It is worth noting that both the Court and the concurrence discuss *Chemical Lime* for the proposition that "[a] deadline is not something one can substantially comply with." *Ante* at ___ (quoting *Chem. Lime*, 291 S.W.3d at 403). I agree. However, in *Chemical Lime*, the deadline was "a specific, calendar date by which permit applications were required to be filed." *Id*. There is no doubt that one cannot substantially comply with a specific, calendar date. Performance on any date other than that specific, calendar date would be "a miss as good as a mile." *Id*. Here, by contrast, the deadline was "not earlier than the 10th day after the date the notice is mailed." TEX. INS. CODE § 651.161(b). Substantial compliance is possible under the structure of this statute which provides for a number of days—such as section 651.161(b)'s ten-day time period— rather than one, and only one, specific, calendar date. 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. As long as an insured has at least until the tenth day after the date of mailing to cure his or her default, there has been substantial compliance with the statute's ten-day time period.

Applying the foregoing in this case, Plasma Fab could have made its delinquent payment at any time on or before the tenth day after BankDirect mailed the notice of intent to cancel the policy.

If it had done so, BankDirect would have lacked authority under the power of attorney to cancel the policy. BankDirect did not receive Plasma Fab's payment until December 9, 2008, which was unquestionably beyond the tenth day following the date BankDirect mailed the notice. BankDirect's notice of intent to cancel the policy was in substantial compliance with the statute, and in my view it mailed "proper notice . . . as required by law."

III. Conclusion

BankDirect substantially complied with section 651.161(b)'s requirements in giving notice to Plasma Fab and in cancelling the insurance policy. Accordingly, I would hold that BankDirect did not exceed its authority under the power of attorney granted to it by Plasma Fab when it cancelled the policy.

I would reverse the judgment of the court of appeals as to BankDirect and reinstate the judgment of the trial court.

Because the Court does not do so, I respectfully dissent.

_____

Phil Johnson
Justice

OPINION DELIVERED: May 12, 2017