

LITIGATION

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This month, the Texas Supreme Court decided for the first time in over 100 years that a contract requiring written notice requires *written* notice.

The Texas Supreme Court reasoned that the writing requirement helps close the door on factual disputes about whether proper contractual notice was given—the very kinds of disputes that the writing requirement is intended to foreclose. This is important, as many construction contracts require notice to be in writing, such as the AIA A201 General Conditions. The notice requirement can impact a wide array of claims and issues, such as termination for default; delay; deficient work; impacts; safety violations; and final inspection.

The *James Construction* case had difficult facts: Gregory Price, 55, suffered a fatal injury while working on a construction project in December 2012 as a result of a serious safety violation by his employer, James Construction. Price was standing on a ladder leaning against a truck when a co-employee flagged the truck forward without checking to see if Price was clear, even though that violated standard protocol. Price fell, suffered a closed head injury, and died. OSHA issued James multiple citations.

The contract authorized Westlake to terminate James Construction for serious safety violations, and required written notice. It was undisputed that Westlake did not provide such written notice, but instead provided oral notices.

At trial, the jury determined that the notices Westlake provided “substantially complied” with the contract’s notice provision. The intermediate appellate court affirmed, noting that the Texas Supreme Court had not addressed this issue in more than 100 years, when the court held that “less than strict compliance with [a contract]’s certificate condition did not defeat the contractor’s right of recovery.” *Linch v. Paris Lumber*, 80 Tex. 23 (Tex. 1891). The intermediate appellate court acknowledged that other Texas courts had held that written notice requirements could be strictly enforced, but not in the construction context. For example, the co-author of this article had a case 25 years ago where the San Antonio appellate court held that oral notice was sufficient, despite the contract requiring written notice. *Chilton Ins. Co. v. Pate & Pate*, 930 S.W.2d 877, 893-94 (Tex. App. – San Antonio 1996).



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To "Go Green", our firm uses recyclable paper or ceramic cups and no longer uses Styrofoam cups. In addition, we have adopted a less-paper office environment.

We hope that these changes make big differences in the future.

Well done is better than well said.

- Benjamin Franklin



The Supreme Court reversed, and thereby implicitly overruled the other Texas courts that held oral notice could be sufficient despite a written notice requirement. When the contract requires notice to be in writing, it is no longer sufficient in Texas to argue that the opposing party had actual notice (such as oral notice)

The failure to give written notice meant a failure to meet a condition precedent so the related damages could not be awarded. This failure to give the requisite notice did not, however, constitute a material or non-material breach of the contract, even though the Court "did not disagree" with the general principle that wrongful termination of a contract can constitute a material breach.

Westlake argued it could nonetheless recover its damages under a clause that broadly allowed Westlake to intervene "in any appropriate way." This clause contained no notice requirement and no requirement to give James Construction an opportunity to remediate. The contract has to be interpreted as a whole, with effect given to each provision. If this separate section with less stringent requirements allowed Westlake to recover the same costs, there would be no reason to invoke the section that requires written notice and an opportunity to cure. In other words, the more stringent provision cannot be swallowed by the broad, less stringent provision. This could have implications in cases where, for example, an owner or contractor seeks to recover its costs under a generic indemnity clause, bypassing a provision that requires notice and an opportunity to cure.

The Supreme Court also addressed the issue of direct damages vs. consequential damages, and a purported covenant not to sue for consequential damages. The court noted that the distinction between direct and consequential damages often is not a bright line. Thus, a party seeking damages that it believes in good faith, but ultimately incorrectly, are direct rather than consequential will not know whether it is in breach by asserting a claim until the nature of the claim has been determined on the back end of the suit. The court held that the provision merely waived liability for consequential damages, but was not a covenant that Westlake breached by seeking damages that were ultimately determined to be consequential.

The next issue was attorneys' fees. Because of the significant reduction in damages awarded, and because the jury awarded fees based in part on the "results obtained," Westlake's award of \$2,923,600.50 in attorneys' fees plus conditional appellate fees could not stand.

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