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"It's Too Late" 

Boilerplate Notice Provisions May Have Unexpected Consequences

Many standard notice provisions in leases and other real estate contracts include the concept of a notice being "deemed given" some period of time after being sent (e.g., 5 days if sent by certified mail or the next business day if sent by a reputable overnight courier). **The problem with a notice being "deemed given" is that even if the notice is not received, the intended recipient will be treated as if the notice has arrived.** This could cause all sorts of problems, such as:

- A party's cure period expires before that party ever receives actual notice of the default.
- A party ("Optionor") believes that the other party ("Optionee") failed to exercise some option, only to find out later (after entering into a contract with a third party in reliance on Optionee's supposed failure to exercise its option) that the Optionee did, in fact, exercise the option and that the Optionor is deemed to have received notice of such exercise.

Being treated as if you have been told what you have not been told can obviously be a problem. But how likely is it that delivery delays or failures will happen?

- **Certified Mail ("Through rain, sleet or snow . . .").** Whenever a notice is given by certified mail, it is being transmitted through the U.S. Mail. Notwithstanding the U.S. Postal Service's valiant efforts to deliver mail regardless of the weather, we have all experienced having a letter we sent (or were supposed to receive) either never arrive or take an incredibly long time to reach its destination.
- **"Reputable" Overnight Courier.** Parties may feel a lot safer using an overnight courier, but it is not a complete panacea for the "deemed given" problem. One not-so-lucky San Francisco attorney received three gift baskets in one year from two different well known "reputable" overnight couriers because they had totally bungled their deliveries. On another occasion, a box sent from New York and addressed to the same attorney in the San Francisco Financial District ended up at a record store in the Haight Ashbury District of San Francisco. So much for

"reputable" overnight couriers.

Given the uncertainty of our mail and courier services, it is very risky for a contracting party to agree that it will be deemed to have received any important notice after some fixed period of time. So what should parties to a contract do?

SUGGESTED SOLUTION: Instead of providing for a notice to be deemed given after some period of time, parties can **avoid the problem identified above by providing that a notice will be deemed given upon *actual* receipt or refusal of receipt.**



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