

# Enforcing non-waiver clauses in contracts: Proceed with caution

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Most contracts include provisions called “non-waiver” clauses that are meant to preserve one party’s claims under the contract in the event that the party fails to take action with respect to a breach of contract.

In the consumer finance world, “non-waiver” clauses can be found in auto loans and leases, mortgages, retail installment contracts, and a myriad of other types of contracts. Many times, “non-waiver” clauses come into play when a lender looks to declare the borrower in default and accelerate the debt owed.

Here’s an example scenario:

John Doe takes out a car loan from Lender X. The credit agreement states that John Doe’s payment is due by the first day of every month. The contract also states that Lender X has the right to declare John Doe in default and accelerate the amount of the entire debt if he is ever late on a payment.

The contract contains a “non-waiver” clause that provides, “a failure or delay in enforcing an obligation, or exercising a right or remedy, does not amount to a waiver of that obligation, right or remedy.” In non-legal terms, this means, “if we don’t call you in breach of contract and enforce our rights, it doesn’t mean we can’t call you in breach of contract and enforce our rights in the future.”

While John Doe makes his first seven monthly payments on time, he’s late with his eighth payment. John Doe calls Lender X and says he’s sorry and he’ll send payment within a week. Lender X says, “OK, not to worry.” While John Doe gets back on time with his ninth payment, he again makes late payments in the tenth, eleventh, and twelfth months.

Lender X, while making a few phone calls to check on the payments, accepts all of the late payments during those months. By the time the thirteenth month comes around, John Doe is late on his payment again. Lender X decides it’s time to declare John Doe in default on his loan, accelerate his debt and repossess the car via the default provisions in the contract. When this happens, lenders need to be wary of relying on the “non-waiver” clause in the contract.

Courts in various jurisdictions across the country have held that if a lender accepts late payments or fails to enforce provisions of the contract in its course of dealing with the borrower, it must provide written notice to the borrower that it will no longer accept late payments prior to enforcing its default rights under the contract. If a lender relies on the “non-waiver” clause without providing the borrower this notice, it potentially opens itself up to civil penalties.

It's important to note that courts in other jurisdictions have held that "non-waiver" clauses are effective even in the event the lender failed to enforce its contractual right in prior instances. In these jurisdictions, the lender does not need to provide the borrower with written notice of its intent to enforce its rights.

Accordingly, lenders should find out what the requirements are in that jurisdiction before relying on "non-waiver" provisions and enforcing their contractual rights.

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