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# The Voice - 4th Quarter



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## LEGAL UPDATE

Form 2104's 2-DAY NOTICE TO CURE PROVISION – BREAKING IT DOWN

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Summer of 2021 we added the Deadline Default provision to the Residential Purchase Agreement (Para. 37(A)). The provision requires that if a Deadline Default occurs, the non-defaulting party must serve the defaulting party with a two-day notice to cure, Form 2112 (“2-Day Notice”). If the defaulting party cures the default within the two days, the non-defaulting party must proceed with performance under the Agreement; however, if the defaulting party fails to cure the default within the two days, the non-defaulting party has all options available by the contract and the law, including, but not limited to the recovery of damages and in the event of a material default, the option to stop performing and terminate the contract. In the case of a buyer default, the seller would have the right to retain the earnest money.

The Two Elements of Deadline Default First, there must be a date and/or time by which one party has to perform. Examples of defaults with a deadline include (but are not limited to):

- The buyer’s obligation to deposit TOM Fee and/or Earnest Money by a certain date;
- The buyer’s obligation to deliver the pre-qualification letter or proof of funds by a certain date;

- The seller's obligation to deliver a document by a certain date;
- A party's failure to Close by the Closing Date may be considered a Deadline Default (assuming the failure to Close is not due to a contingency not being satisfied).

REMEMBER – NO DEADLINE, NO DEADLINE DEFAULT!

Second, the failure to perform by the deadline must constitute a DEFAULT. Whether a failure to perform by a deadline is a default (or not), depends on a couple of factors.

Is the performance an obligation or a right?

- If it's an obligation (and therefore, required), then failure to perform constitutes a default. It's often "required" if the beneficiary of the performance is NOT the party responsible for the performance. For example, the seller is to provide the buyer with the documents in Para. 19. These documents are provided by the seller for the benefit of the buyer. Therefore, performance by the seller is an obligation and is required (unless waived by the buyer).

- If it's a right, then failure to perform may constitute a waiver of that right, but failure to perform would not be considered a default. It's often a right, and therefore, "optional" if the beneficiary of the performance is the same party charged with performing. Examples of a right or option to perform include the buyer's right to conduct inspections and the buyer's right to object to observations, inspections or documents. These rights under the Agreement are to be performed by the buyer for the benefit of the buyer. They are optional, not required. Therefore, a buyer's failure to timely exercise any of these rights is not a default, but rather a waiver of the buyer's right to make objections or terminate as applicable.

Does the missed deadline result in an automatic termination?

In the event the missed deadline results in an automatic termination, neither party is required/obligated to perform, neither party has a right to perform and the failure of one or both parties to perform is not a default. For example, if the parties do not reach a Resolution by the Resolution Deadline, the Agreement terminates. The parties are not obligated to reach an agreement and failure to do so does not constitute a waiver of a right or a default. Therefore, the Deadline Default would not be applicable to these situations.

## REMEMBER – NO DEFAULT, NO DEADLINE DEFAULT

### Additional Comments:

- The non-defaulting party may choose NOT to send the 2-Day Notice. Nothing requires the non-defaulting party to send the 2-Day Notice, but if they don't send it (and the 2-Notice is required), then the non-defaulting party is not afforded the rights associated with the default. For example, if a buyer defaults, a seller may have the right to refuse to sell the house to that buyer and/or may choose to sue the buyer for damages, but the seller would not be afforded these rights if the seller failed to give the buyer the opportunity to cure the default. And again, if the buyer did timely cure the default, the seller would have no further recourse, but if the buyer failed to do so, then the seller could pursue the above options.
- The Purchase Agreement does not require that the 2-Day Notice be sent within a certain time frame. Consequently, if a Deadline/Curable Default occurs, the non-defaulting party may send the 2-Day Notice at any point after the default. And regardless of when it is sent, the two days starts running.
- Note the definition of days (Para. 33(E)) for purposes of calculating time under the 2-Day Notice.

### WHY WAS THE 2-DAY NOTICE TO CURE ADDED?

In short, for the benefit of the buyers, sellers and brokers.

In contract law, courts analyze defaults (or breaches) as either “material” or “non-material” Why is this relevant? A non-material breach may entitle the non-defaulting party to damages, but it would not relieve the non-defaulting party from performance. For example, if a court determined that the buyer's failure to timely deliver earnest money was a non-material default/breach, the court may award the seller damages for that default (if the seller had any damages), but the court would not likely say that the seller no longer had to sell to the buyer. But, if the buyer failed to timely deliver the earnest money and the seller gave the buyer the opportunity to cure that default and the buyer failed to timely cure the default, it is more likely that the court would enforce the default and relieve the seller from their obligation to sell to the buyer. In the above scenario, the buyer is the defaulting party, but a seller could also be a defaulting party. For example, the seller could fail to timely deliver a document. In that case, the same analysis would apply.

As you can see, not only does the 2-Day Notice benefit the defaulting party, by giving them an opportunity to cure the default, but it helps the non-defaulting party, as it strengthens the non-defaulting parties' position when enforcing the default (if the default is not cured within 2 days).

Further, in some cases, the failure to meet a deadline is not the fault of the defaulting party, but rather the defaulting parties' broker. The NMREC's Broker Duties requires brokers to assist their client/customer in meeting the terms of the Purchase Agreement and failure to do so may constitute a breach of those Broker Duties. But that's just the beginning of the liability the broker may have. What if a buyer gives an earnest money check to a buyer's broker, but the buyer's broker fails to timely deliver the earnest money to the title company? Not only could the buyer's broker be found in violation of their Broker Duties, but if the seller elected to terminate the contract as a result, the buyer who lost the home may pursue those damages against the buyer's broker who failed to timely deliver the earnest money. But with a 2-Day Notice to Cure, the buyer's broker has an opportunity to "make it right", keep the contract from terminating and keep themselves from being found in violation of Broker Duties and/or getting sued for negligence.

Lastly, while this is new to Form 2104, it is not a new concept; an opportunity to cure is common in contracts. For example, the NMAR Commercial Purchase Agreement has always had a 5-day cure period. Unlike terms that have come and gone from the Residential Purchase Agreement over the years, this one is here to stay, so familiarize yourself with it – for your client's benefit, as well as your own.

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