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CALCULATING TIME IN PROMULGATED FORMS

HOW TO DETERMINE THE START AND END DATES FOR REAL ESTATE CONTRACTS

If a buyer has seven days to terminate a contract following inspection, determining when the seven days begin and end is critical. With the addition of Paragraph 7D(1) to the promulgated forms, the accurate measurement of time (more precisely, the measurement of days) becomes important to real estate practitioners.

Surprisingly, only a small number of Texas appellate cases address the measurement of time in private contracts. Those will be discussed later. However, two statutes, Chapters 311 and 312 of the Texas Government Code (TGC), provide significant insight.

THE TEXAS GOVERNMENT CODE

Texas legislatures place new laws in either codes or statutes. Chapter 311 of the TGC, better known as the Code Construction Act, provides help in understanding the language in the codes, such as the Texas Property Code. Chapter 312 of the TGC, better known as the Construction of Laws, provides guidance to interpreting all civil statutes, such as Texas Civil Statutes Section 6573(a), better known as the Texas Real Estate Licensing Act.

But how do the rules for interpreting the codes and statutes apply to the promulgated contract forms? There is no authority that says they do. A good argument can be made, though, that they possess at least pseudo-statutory status.

The Texas Real Estate Licensing Act, cited earlier, established the Texas Real Estate Commission and gave it the responsibility to draft the promulgated contract forms that appear in the Texas Administrative Code. So, although the contract forms do not appear in the statutes, they are authorized by statute and are codified in the administrative code. The same argument cannot be made for the promulgated contracts drafted by the Texas Association of Realtors (TAR) or the State Bar of Texas.

Exclude the First Day, Include the Last

The statutory guidelines are not exclusive but meant to describe and clarify common situations. Only a limited number apply to the calculation of time. Those that do, convey the rules by definitions and examples.

The pertinent rules for computing days and months appear in Section 311.014 of the TGC. In computing a period of days, the first day is excluded and the last day is included. Accordingly, if a buyer has seven days to terminate a contract beginning on June 10, the seven days end on June 17. The first day (June 10) is excluded, while the last day (June 17) is included.

There is one exception to the rule. If the last day of the period occurs on a Saturday, Sunday or legal holiday, then the period is extended until the next day that is not a Saturday, Sunday or legal holiday. (The term

“legal holiday” is not defined.) Saturdays, Sundays and legal holidays, occurring in the interim, but not at the end, count.

Take the following example. Assume the last day to terminate a contract is Saturday, July 2. The following Monday is Independence Day. In this case, the critical day for the buyer’s decision is Tuesday, July 5.

The section concludes with rules for computing a period of months from a particular day. In making the computations, the period ends on the same numerical day of the concluding month as the period began. If there is no corresponding numerical day in the concluding month, the period ends on the last day of the concluding month.

The case of *Pitcock v. Johns*, 326 S.W.2d 563 (1959) illustrates the first part of the rule. According to a former statute, a materialman had six months from the day the last materials and services were furnished to file a mechanics lien. In this case, the six months started on February 28. The materialman filed the lien on August 29. After applying the rule, the court found the last day to file the lien was August 28.

The statute does not address specifically whether the time is extended in the calculations of months when the last day falls on a Saturday, Sunday or legal holiday. As discussed earlier, extensions

occur in calculating a period of days.

The following illustrates the second part of the rule. Assume a buyer has two months to accept a contract commencing December 29. The buyer's last day to make a decision is February 29. If it is not a leap year, the buyer must make the decision in the last day of that month, which is February 28.

A few appellate cases address the calculation of time in contracts. All were decided between 1897 and 1922. In the first case, *Demilly v. Texas & N.O.R. Co.*, 42 S.W. 540 (1897), the Texas Supreme Court examined the meaning of "from" when used in a contract. Here, the court held that "from" means "after." The term (or terms) excludes the date from which the measurement begins but includes the last day.

The rule parallels Section 311.014 of the TGC mentioned earlier in computing periods of days. The first day is excluded, and the last day is included. In *Demilly*, though, the wording stated the performance was "on and from" the date stamped on the back of a ticket. In this case, the word "on"

allowed performance to begin on the date stated.

In the second case, *Shelton v. Jackson*, 49 S.W. 415 (1899), the court scrutinized the meaning of "between." If performance is required between June 10 and June 17, the first day to perform is June 11, and last date to perform was June 16. "Between" excluded the dates marking the time boundaries.

In the last case, *J.C. Engelman Land Co. v. La Blanco Agr. Co.*, 239 S.W. 937 (1922), the court attempted to construe the meaning of the terms "by" and "until" in a contract. As a general rule, the word "by" means "before." The same applies to the word "until." Consequently, if performance is required by, before or until June 17, June 16 is the final day.

However, the court noted that these rules are not without exceptions. In the end, the case did more

to set guidelines for construing the terms in different contexts than to establish precedents for defining and applying them.

Time of Day

Assuming the last critical day is February 28, and it does not fall on a Saturday, Sunday or legal holiday, what time during the day must the acceptance be communicated? More intriguing, what is the critical time if the property is in Mountain Standard Time and both parties reside and sign the contract in a Central Standard Time zone?

As to the first question, the word "day" as used in legislative enactments and in contracts generally means the 24-hour period from midnight to midnight. (*Long v. Wichita Falls*, 176 S.W.2d 936 [1944]). The rule was adopted to avoid the necessity of having to make calculations by hours, minutes and seconds. In *Lincoln Income Life Insurance Co. v. Mayberry*, 341 S.W.2d 199 [1960], the court held that September 1 consists of the time between 12:01 a.m. and 12:00 mid-

Unless otherwise expressly provided, a reference in a rule to the time in which an act shall be performed means the appropriate standard time provided by the statute. But, the statute makes no mention of the appropriate time when the parties live in one time zone and the land lies in another. The question should be addressed in the contract if critical.

To make the issue more complicated, the Texas statute references Central Standard and Mountain Standard Time, not daylight-saving time. Consequently, when Texas observes daylight time, there is an hour's difference between what the statute and clock say is midnight.

Time is of the Essence

Perhaps the reason for the lack of defining case law lies with a concept known as "time is of the essence." A party's failure to perform by some specified date is not a breach of the contract unless the contract states or implies "time is of the essence."

Generally, time is not of essence unless the contractual language compels it or the surrounding circumstances reveal an intent. However, Texas courts have held *time is of essence* in real estate transactions involving:

- oil and gas leases,
- option contracts,
- contracts to repair dams and
- sales contracts when property values rapidly fluctuate.

So, while the promulgated sales contracts do not make time of the essence, Paragraph 7D(1) creating an option does. It states, among other things, that the buyer has, for the tender of a negotiated fee, the unrestricted right (or option) to terminate the contract by giving notice within _____ days **after** the effective date of the contract. (Emphasis added).

So, according to the *Demilly* case cited earlier and to Section 311.014 of the TPC regarding the computation of days, "after" and "from" are synonymous and exclude the day from which the measurement begins. Also, unless otherwise stated, the buyer has until midnight of the last day to make and communicate the decision. ☐

Failure to perform by a specified date is not necessarily a breach of contract.

night. The fractions of a day are not generally considered in the computation of time (*Rudco Oil & Gas C. v. Lemasters*, 146 S.W.2d 806 [1940]). Specific contractual provisions negate these rules.

A more perplexing problem, though, is determining exactly when the stroke of midnight occurs. According to Section 312.016 (a) of the TGC, standard time in Texas is the time at the 90th meridian longitude west from Greenwich, commonly known as Central Standard Time.

Texas is in two time zones. According to Section 312.016(b) of the TGC, the standard time in a region of the state that used Mountain Standard Time before June 12, 1947, is the time at the 105 meridian longitude west from Greenwich, commonly known as Mountain Standard Time.

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