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. 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 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
worded 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. “Bet-
 tween” 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 excep-
tions. In the end, the case did more
to set guidelines for constraining 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 enact-
ments 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-
night.

**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 circum-
stances 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. (Empha-
sis 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 synonym-
ous 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.
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