THE SWORD AND THE SHIELD
THE THIRTY DAYS WAR

I have seen an increasing number of agents misconstrue the REIN Standard Purchase Agreement's provision concerning termination thirty days after the specified closing date. Specifically, this clause is being interpreted by some to mean that a party *automatically* has thirty days after the specified date in which to close. In my opinion, that interpretation is wrong.

To understand the provision, one needs to understand history. And I do not refer to the Hundred Years War, which if lawyers had been involved would have been called the Reasonable Length of Time War.

Most of you are aware that the phrase "time is of the essence" is a legal phrase of art. Succinctly, it means that the parties have specifically and expressly contemplated and contracted for performance to occur on a given date, and if performance does not occur on that date then the party unable to close is almost certainly in breach of contract or in default. In other words, there are no excuses for not closing on time.

By implication, if time is not "of the essence" then the parties will be deemed to have a reasonable period of time after the specified date to close. In fact, prior versions of our contract expressly provided such "reasonable" language. Typically however, that language did not admit itself of practical advice: when asked, we lawyers would say that "reasonable" meant whatever a judge would say under the facts, and that could be anywhere from a day to sixty days. Obviously, this was not a practical answer to an everyday problem, so over time we tried to solve that problem by including a drop-dead date, or definition if you will, to the term "reasonable."

Essentially then the contract as written now says the parties intend for the deal to close on the specified date, but if it does not then it should close within a reasonable

period of time thereafter, the back-end of which cannot exceed thirty (30) days unless there is consent to do so.

The clause does not mean that one party can unilaterally choose not to close on the specified date on the theory that they have up to thirty (30) days in which to do so. Paragraph 7 provides, in part, as follows:

> If through no fault of seller settlement has not occurred within thirty (30) days after the settlement date, then seller, at seller's option, may terminate this agreement by written notice to buyer.

I think agents sometimes view this 30 day provision as a 30 day *grace* period. That is simply not an accurate way to view it. Rather, the parties still have an affirmative obligation to do each and every act necessary to close on the date specified. And so if a party does not do each and every such act in a timely manner, and that causes a delay, then that party is in breach of contract and liable for damages. Likewise, if a party is able to close on time, but chooses not to close, then that party is in breach. Note here there is a difference between default and breach.

The thirty day language really only applies to those situations where a party is unable to close on the date specified for reasons beyond their control and not attributable to them. In such a limited case, they are not in breach for not closing on time and continue to have a reasonable period of time in which to close. But the other side has the right to cut that off after thirty days. (Also, it could be used to terminate a contract where a party is in breach for not closing, yet still says they want to close, but will need in excess of 30 days.)

And in our practical world we understand how delays occur: underwriting problems, appraisal issues, settlement agent delays (what, that happens?), etc. In each of these circumstances the party who is delaying closing

only does so because they can't control the outcome, not because they chose to delay. This is where the friction occurs. For example, I do not believe a buyer or seller can say I do not want to close on a given date because it was inconvenient, or I can't find a babysitter, or the weather is supposed to be bad over the weekend and I don't want to move in the rain, etc. In those cases the buyer may not be "in default" by totally refusing to close, but they are in breach of contract and in my estimation are liable to the seller for damages sustained by the delayed closing.

There may be some circumstances where the particular agreement of the parties can affect the outcome. For example, I was recently asked whether a seller could take advantage of the 30 day provision where a seller's new construction replacement home was not ready. If the replacement home was not a contingency under the contract, then it is not the purchaser's problem that the seller will have no place to live; therefore, the seller would be in breach of contract for not closing. However, if the contract were in fact contingent on the replacement home then as of the specified date of the closing the contingency is not met and the seller has every right to delay closing accordingly. However, if that contingent replacement home is not ready in 30 days then the buyer can terminate the contract, and it would be irrelevant whether it was the seller's "fault" (in other words whether seller's builder is the cause of the delay is irrelevant because seller fault is irrelevant to a buyer's paragraph 7 ability to void the contract).

In summary, the 30 day clause is a Sword to be used by the party ready, willing and able to close, it is not a Shield to be used by a party who wants to delay. Each party has a duty to close on time. In the event closing cannot occur through no fault or choice of a party, then there is a reasonable period of time thereafter to resolve the problem and close. If that delay exceeds thirty (30) days, however, then the other party will then have a right to terminate the contract, but

the party holding the termination right does not have to exercise it, in which case an existing duty to close might survive beyond 30 days.

As you can see, this is a fairly complex question that does not lend itself well to resolution or explanation in an article (at least by me anyway) as there are just many factual nuances that might dictate a different answer, or this discussion may well have generated questions I have not answered. If you would like, I am more than willing to attend a sales meeting or training at your firm's office in order to discuss this topic in more detail (or any other timely legal topics you might have). Please feel free to email me at bdlytle@lytlelaw.com if you have any questions or comments.