What happens to a contract after the 14-day delay period has passed?

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QUESTION: If a contract written using the Offer to Purchase and Contract (Form 2-T) goes more than fourteen days past the Settlement Date but the buyer and seller are both moving forward to closing in good faith, can the initial contract be extended or does a new contract need to be executed?

ANSWER: A contract written using the Offer to Purchase and Contract doesn't become void simply because the 14-day permitted delay period has passed. According to paragraph 12, "[i]f the parties fail to complete Settlement and Closing within fourteen (14) days of the Settlement Date…the Delaying Party shall be in breach and the Non-Delaying Party *may* terminate this Contract[.]" Legally speaking, the contract is *voidable* at the option of the Non-Delaying Party, but it is not *void*.

Since the existing contract isn't void after the 14-day delay period has passed, it's not necessary for the parties to sign a new one. The contract *may* be extended in writing by the parties signing an Agreement to Amend Contract (Form 4-T) with a new Settlement Date. Of course, that requires the mutual consent of the buyer and seller. The Delaying Party typically would like for the Non-Delaying Party to "give up" the right to terminate the contract immediately by agreeing in writing to a new Settlement Date. On the other hand, the Non-Delaying Party may want some concession from the Delaying Party in exchange for agreeing to a new Settlement Date, and may possibly insist on time being made "of the essence" regarding any new Settlement Date.

The Non-Delaying Party should not assume that the right to terminate immediately due to the Delaying Party's failure to complete Settlement and Closing within the 14-day permitted delay period lasts indefinitely. A party who fails to exercise a contractual right within a reasonable time may be found by a court to have waived that right, depending on an analysis of the particular circumstances.

Let's say the sellers choose not to terminate a contract soon after the 14-day period has elapsed, and are aware that the buyers are making a considerable effort to arrange alternate financing in order to complete the purchase after their first loan fell through unexpectedly at the last minute. Under these circumstances, if the sellers later attempt to exercise their unilateral right of termination in order to enter into a contract with a second buyer who makes an attractive offer, a court might well conclude that the sellers had waived the right to terminate and require the sellers to honor the contract, assuming the first buyer's new source of financing comes through. This example illustrates the fact that it is likely also in the Non-Delaying Party's best interests to negotiate a written extension of the contract so that their rights will be clear. Brokers should advise their clients to seek legal advice if they have questions about their rights and obligations in situations like this, and for a lawyer to draft any non-standard terms on which the parties may agree.

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