

How to interpret a contract.

This primer provides a brief overview of how judges and arbitrators approach the difficult problem of interpreting the meaning of a contract. Sometimes Brokers don't understand how contract interpretation works or think that a contract is merely a guideline. This often occurs with part time brokers or those with little experience, In practice it is sometimes better to let them be wrong so long as it has no negative effects to a client, as it is not your job to educate them, but their broker should.

“A meeting of the minds” All contracts require an overarching “meeting of the minds” (Buyer wants to buy, Seller wants to sell.) **A Meeting of the minds refers to mutual assent by all parties to the formation of a contract. For a meeting of the minds to occur, the parties must agree to the same terms, conditions, and subject matter. Modern contract doctrine requires objective manifestations of assent and is judged only by the outward expressions of the parties (In real estate these outward expressions of assent must be written and within the “four corners” of the contract.)** Thus, a meeting of the minds occurs even if one party subjectively did not agree, as long as both parties' outward expressions manifested assent, such as signing a purchase contract. The moral is confirm the client understands what they are signing before they sign.

Some common rules of contract interpretation

INTENT: Determination of the intent of the parties. Resolution of many contract disputes turns on what the terms and provisions of the contract really mean. The reviewing body tries to determine the intent of the parties when they entered into the contract.

Express (Written for real estate) Contract Terms.

Perhaps nothing can express the intent of a party to be bound by a contract provision more clearly than signing a contract containing the express provisions. By signing a contract, the parties indicate their intention to be bound by each provision in the contract. If the provision is express and clear, there is no need to look further. However, if the contract is silent or the expressly stated provisions can be viewed as unclear, it is necessary to search for other manifestations of intent.

How to interpret an “express” contract

- 1) First, and most important, the contract must be read as a whole, not as a series of isolated parts. The parts of one section relate to the rest of that section and then the sections to the contract as a whole.
- 2) The contract must also be read with an attempt to give reasonable meaning to each provision. No provision in the contract can be arbitrarily regarded as meaningless. Otherwise, why would the parties have included that provision in the contract?
- 3) The whole of the contract is to be taken together to give effect to every part, each clause helping to interpret the other. This principle of interpretation gives lawful and reasonable meaning to all the other provisions of the contract.
- 4) Each provision will be read so that it will not conflict or be inconsistent with other provisions in the contract. The object of a contract is to ascertain the intention of the parties as a whole, not from particular words or phrases randomly pulled from the contract but from the entire context of the agreement.

Redrafting: While contracts can be amended or terminated or replaced, a existing contract should not be redrafted. The contract must be interpreted as it is. The contract must not be redrafted to reflect what the reviewing body believes “it should have said.”

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Generalized rules of contract Interpretation.

Generally, the above express contract terms control, but if the terms are unclear we turn to generalized rules of contract Interpretation. We determine the relative importance of the differing manifestations of intent.

If irreconcilable conflicts or ambiguities remain after reading the express contract as a whole, the various manifestations of intent should then be examined to see if they shed light on what the parties intended. In doing that, the relative importance of the various manifestations are usually weighted as follows:

- 1) Express contract terms are more important than course of performance, course of dealing, or the customs and trade practices of the industry.
- 2) Course of performance is more important than course of dealing or the customs /trade practices of the industry.
- 3) Course of dealing will take precedence over the customs /trade practices of the industry.
- 4) Separately negotiated or added terms will take precedence over boilerplate language.

The law is generally consistent. While the UCC does not apply to Real estate, as the UCC applies only to goods, a clear articulation of the preceding principles is set forth in Article 2-208 of the Uniform Commercial Code, subparagraph (2) which states: **The expressed terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, expressed terms shall control course of performance and course of performance shall control both course of dealing and usage of trade.**

Course of Performance,

After using the steps of interpreting an express contract as written if the terms remain unclear, ONLY THEN apply the “course of performance. Course of performance means the sequence of events during the contract from its beginning up to some particular point in time. **The actions of the parties during the period prior to the occurrence of a dispute reveal how each party to the contract understood the contract’s meaning and how each responded to the causal events leading to the dispute.**

Course of Dealing

The next manifestation of intent is “course of dealing”. This means how the parties have previously dealt with each other, and others on the subject in question prior to entering into the current contract. **Past actions indicate what the parties are likely to have intended in a new contract that on its face is unclear.**

Separately Negotiated Terms

Customs /Trade Practices

Another manifestation of intent is an express or implied reference to the customs and trade practices of the industry. Customs and trade practices are sometimes determinate in resolving unclear contract meaning, particularly when the contract expressly provides that normal trade practices are intended to apply. Even when normal trade practices are not specifically mentioned, there is an implied presumption that they were meant to apply. **Parties to the contract are generally expected to interact according to the customs and trade practices of the industry in the absence of express indications to the contrary.**

Parole Evidence Rule

Parole evidence is evidence of the intent of the parties other than the express provisions of the contract itself

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examples include: Previous oral or written understandings or agreements between the parties, **This includes letters and other written forms of communications not part of the contract. If an express contract provision is clear and prominent the courts will give it full force and effect to the written or express contract and will not consider parole evidence.**

Doctrine of Contra Proferentem

When a contract provision is ambiguous and all of the preceding steps, including consideration of parole evidence, fail to resolve the ambiguity, the doctrine of contra proferentem will control. This rule requires that the meaning of an ambiguous contract provision be construed against the drafter. The drafter is the party that had the opportunity to make the provision clear, and the drafter bears the burden of failure to do so.

The rule cannot be successfully invoked simply because one party does not agree with the other party's interpretation of a particular contract provision. The provision in question must be determined to be ambiguous—that is, the provision must be susceptible to more than one interpretation.

Separately negotiated terms. If a contract contains separately negotiated terms or provisions as opposed to standard “boilerplate” language, those terms are taken as a very strong manifestation of intent. **Separately negotiated terms mean those that were obviously drafted for that particular contract. The inclusion of such provisions clearly shows that the parties intended them to apply. Otherwise, why would they have taken the trouble to draft the special language?**

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