

3051 CONTRACTS: AMBIGUOUS LANGUAGE

The parties dispute the meaning of the following language in their contract: (*insert language found by the court to be ambiguous*).¹

It is your duty to interpret the contract to give effect to what the parties intended when they made their agreement.² In determining the meaning of the language, you should consider [include such of the following as are supported by the evidence]:

- the words in dispute,³
- the purpose of the contract,⁴
- the circumstances surrounding the making of the contract,⁵
- the subsequent conduct of the parties,⁶
- other language in the contract,⁷
- [list any other specific factors relating to the case]⁸

If you are unable to decide the intention of the parties after considering these factors, then you should interpret the disputed language against the party who prepared the contract.⁹

NOTES

1. This instruction concerns contracts that are enforceable, but contain one or more ambiguous provisions. (JI-3022 addresses contracts alleged to be so vague and indefinite as to be unenforceable.) It may be given to the jury, but only after the court has concluded that language in the contract is ambiguous. "Whether ambiguity exists in a contract is a question of law." Brown v. Maxey, 124 Wis. 2d 426, 442 (1985). "The existence of ambiguity is an issue of law to be decided by the court, not an issue of fact to be decided by the jury." S. A. Healy v. Milwaukee Metropolitan Sewerage District, 50 F. 3d 476, 480 (7th Cir. 1995). Once the court determines that a provision is ambiguous, interpretation of that provision then becomes a question of fact for the jury. Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co., 206 Wis.2d 158, 177 (1996).

2. "The primary goal in contract interpretation is to give effect to the parties' intentions." Seitzinger v. Community Health Network, 270 Wis. 2d 1, 22 (2004).
3. "We ascertain the parties' intentions by looking to the language of the contract itself." *Id.*
4. "Ambiguities in an agreement must be construed in a manner consonant with its dominant purpose and conducive to the accomplishment of that purpose." Capital Investments, Inc. v. Whitehall Packing Co. Inc., 91 Wis. 2d 178, 191 (1979) quoting from Huck v. Chicago St. Paul M & O Ry. Co., 5 Wis.2d 124, 128 (1958).
5. "Where the acts of the parties are inconsistent indicating different constructions, the court will look to the purpose of the contract and the circumstances surrounding its execution to determine the intent." Jones v. Jenkins, 88 Wis. 2d 712, 723 (1979).
6. "It is a well-settled principle of Wisconsin law that, where contract terms may be taken in two senses, evidence of practical construction by the parties is highly probative of the intended meaning of those terms and the court will normally adopt that interpretation of the contract which the parties themselves have adopted." Zweck v. D. P. Way Corp., 70 Wis.2d 426, 435 (1975).
7. "The contract must be read as a whole and every part will be read with reference to the whole." "The general rule as to the construction of contracts is that the meaning of particular provisions in the contract is to be ascertained with reference to the contract as a whole." Seitzinger, supra at 37 (Abrahamson, dissenting) (other citations omitted).
8. "In resolving the ambiguity and determining the parties' intent, the court may look beyond the face of the contract and consider extrinsic evidence. Additionally, the court may rely on the canons of construction which are designed to ascertain the intentions of the parties entering into a contract." Capital Investments, Inc., supra, at 190. In individual cases, there may be other factors relating to contract interpretation which are appropriate, *e.g.* custom in the trade, etc.
9. Wisconsin courts have consistently restated the well-established rule that in cases of contract ambiguity, the contract is to be construed against the party that drafted it. See, *e.g.* Seitzinger, supra, at 22. A closely related question that has not been specifically addressed in any reported Wisconsin appellate decision is: At what point in its analysis does the finder of fact apply this rule? Many other courts have held that an ambiguous contract is only construed against the drafter if its meaning is not established by other extrinsic evidence. See, *e.g.* Affiliated F. M. Ins. Co. v. Constitution Reinsurance Corp., 626 N.E. 2d 678 (Mass. 1994).

The Committee believes if presented with the issue, Wisconsin appellate courts would not invoke the rule that a contract is construed against the drafter unless the ambiguity cannot be resolved by other evidence. First, as the supreme court has stated the rule, construing the contract against the drafter comes after the consideration of extrinsic evidence. "If the language within the contract is ambiguous, two further rules are applicable: (1) evidence extrinsic to the contract itself may be used to determine the parties' intent and (2) ambiguous contracts are interpreted against the drafter." Seitzinger, supra, at 14. Second, Restatement (Second) of Contracts 2d §206 appears to follow the rule that the contract is only construed against the drafter if other evidence is inconclusive. The Comment to §206 states that "In cases of doubt, therefore, *so long as other factors are not decisive*, there is substantial reason for preferring the meaning of the other party." (emphasis added). Third, although the Wisconsin Supreme Court has not directly addressed the question, the issue is

discussed in a concurrence. In Roth v. City of Glendale, 237 Wis. 2d 173 (2000) Justice Sykes wrote as follows:

"A 'default rule,' properly understood, is a judicial canon of contract construction (such as the rule that we construe contracts against the drafter) that applies only in the event of an unresolvable ambiguity—a tie—and only at the end of the process after extrinsic evidence has failed to clear up the question." Roth v. City of Glendale, 237 Wis. 2d 173 (2000) (J. Sykes, concurring).

The Committee concludes the jury should be instructed to construe the contract against the drafter only if the ambiguity cannot be resolved following consideration of other extrinsic evidence.

COMMENT

The instruction and comment were approved in 2011.

The last sentence in the instruction may have to be modified if there is a dispute concerning which party prepared either the entire contract or the specific language found by the court to be ambiguous. There may be other situations in which the sentence should be eliminated entirely, such as where the contract is a result of negotiations between the parties and the evidence would not sustain a finding that either party alone prepared the contract or the ambiguous language.