

**RULES OF CONTRACT CONSTRUCTION**  
**HOW COURTS INTERPRET CONTRACTS**

By

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**HBA LITIGATION SECTION**  
**DOWNTOWN MEETING**  
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## **PREFACE**

The purpose of this paper is to set forth Texas law concerning contract construction. Parties to a contract usually attempt to draft it in such a way that it will clearly set forth the parties' respective rights and obligations during each phase of the future performance of the contract. Try as they might, however, it is rare for negotiating parties to end up with a written contract that will guide them through future difficulties without any disagreement as to what the contract requires. When parties come to a disagreement over the subject matter of a contract, they or their lawyers frequently find that they have differing interpretations of language in the contract.

With few exceptions, a party to a contract has an absolute right to breach the contract. *Hurd Enters. v. Bruni*, 828 S.W.2d 101, 112 (Tex. App.--San Antonio, 1992, writ denied). Thus, the non-breaching party has no option but to consider seeking damages in court. The court will then interpret and construe the contract. That is, the court will determine the meaning of the language used and determine its legal effect. *TM Prods. v. Nichols*, 542 S.W.2d 704 (Tex. Civ. App.--Dallas 1976, no writ). This paper should be helpful in evaluating the merits of a contract case before it is filed. It is hoped that this paper may assist parties in negotiating a compromise short of litigation. If a settlement cannot be negotiated, this paper should help the parties brief their interpretations of the contract for the court.

## **INTERPRETING CONTRACTS: THE ROLE OF THE COURT**

If there is no ambiguity, the construction of a written instrument is a question of law of the court. *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex. 1968). As a matter of law, the meaning of a contract is determined by the language used therein, *Tower*



*Contracting Co. v. Flores*, 157 Tex. 297, 302 S.W.2d 396 (Tex. 1957), and that language is to be construed by the court. *Republic Nat'l Life Ins. Co. v. Spillars*, 368 S.W.2d 92 (Tex. 1963).

### **INTENT OF THE PARTIES IS PARAMOUNT**

The construction of a written contract is a quest for the intention of the parties to it. *Jim Walter Homes, Inc. v. Schuenemann*, 668 S.W.2d 324 (Tex. 1984). In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. *Gracia v. RC Cola-7-Up Bottling Co.*, 667 S.W.2d 517 (Tex. 1984).

As stated by Justice Hecht:

When we construe a contract or deed, we say what the parties intended by the language they agreed to. Discerning what someone else intended by a particular expression, though a routine enterprise for courts, is often a difficult one. The chosen words may not be clear, or their application in the present context may not have been anticipated or fully appreciated when they were written. A court must be careful not to substitute its own view of what should have been intended for what was intended.

*Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 10 S.W.3d 308, 321 (Tex.2000)(Hecht, J., concurring). The common law rules of contract construction will not supersede the parties' intent. *Allied Chemical Corp. v. American Independent Oil Co.*, 623 S.W.2d 760 (Tex. App.--Houston [1st Dist.] 1981, writ ref'd n.r.e.).

## **DETERMINING AMBIGUITY**

### **Question of Law**

Whether a contract is ambiguous is a question of law for the court and must be decided by looking at the contract as a whole in light of the circumstances present when the contract was entered into. *Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983). If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law. *Id.*; *Ideal Lease Serv., Inc. v. Amoco Prod. Co., Inc.*, 662 S.W.2d 951 (Tex. 1983). Appellate courts construe unambiguous contracts *de novo* because interpretation of an unambiguous contract is a question of law, not of fact. *In Re Conseco Finance Servicing Corp.*, 19 S.W.3d 562, 568 (Tex.App.–Waco 2000, orig. proceeding).

### **When To Apply Rules of Contract Construction**

There is confusion in the case law as to when courts should apply the rules of construction. Some cases, especially older cases, hold that resort to rules of construction is not permissible where there is no ambiguity in the language of a contract. *Wood Motor Co. v. Nebel*, 150 Tex. 86, 238 S.W.2d 181 (Tex. 1951) (ironically, the Court actually applied rules of construction to construe the meaning of the contract). *Steeger v. Beard Drilling, Inc.*, 371 S.W.2d 684, 688 (Tex. 1963). The more frequently used approach is that a fact issue is not created unless the court still finds that the contract is ambiguous *after* applying the pertinent rules of construction. *R&P Enterprises, Inc. v. LaGuarta, Gaurel & Kirk, Inc.*, 596 S.W.2d 517, 519 (Tex. 1980); *Harris v. Rowe*, 593 S.W.2d 303 (Tex. 1979); *Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 131 (Tex.App.–Houston [14th Dist.] 2000, pet. dism'd); *Cohen v. Rains*, 769 S.W.2d 380 (Tex. App.–Fort Worth 1989, writ denied); *Criswell v.*

*European Crossroads Shopping Center, Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990) (used this approach without stating the rule); *Coker v. Coker*, 650 S.W.2d 391, 393-94 (Tex. 1983) (same).

### **Should Be Pled**

Ordinarily, before a court will undertake to determine whether a contract is ambiguous at least one party must plead that, because ambiguity of contract is an affirmative defense that must be pleaded. TEX. R. CIV. P. 94; *Old Republic Surety Co. v. Palmer*, 5 S.W.3d 357, 360 (Tex.App–Texarkana 1999, no pet.). There are exceptions, however. A court may determine a contract is ambiguous on its own motion, if the issue is tried by consent or the language in question is so ambiguous as to require a trial on the issue. *Old Republic, supra*, citing *Sage Street Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 445 (Tex.1993). Where ambiguity is raised for the first time on appeal, construction of the contract is a question of law for the court, not the fact-finder. *Praeger v. Wilson*, 721 S.W.2d 597 (Tex. App.–Fort Worth 1986, writ ref’d n.r.e.). An example of this is when the parties file cross-motions for summary judgment in the trial court and the trial declares the meaning of the contract as a matter of law. On appeal, the court of appeals can affirm, reverse and render based on its own interpretation of the contract, or determine ambiguity for the first time on appeal and reverse and remand for a jury to decide the meaning of the contract. *K3 Enterprises v. McDaniel*, 8 S.W.3d 455, 458-59 (Tex.App.–Waco 2000, pet. denied). This is true even if neither of the litigants raised the issue of ambiguity either in the trial court or the court of appeals. *See Id.*

### **Conflicting Interpretations**

Where the uncertainty arises not to the meaning of the language used in a contract but as to the legal effect of such language, the question is one of legal construction for the court to decide and there is no need for extrinsic interpretive evidence. *Exchange Bank & Trust Co. v.*

*Lone Star Life Ins. Co.*, 546 S.W.2d 948 (Tex. Civ. App.--Dallas 1977, no writ). A contract is not ambiguous merely because the parties disagree upon the interpretation. *D.E.W., Inc. v. Local 93, Laborers' Int'l Union of N. Am.*, 957 F.2d 196 (5th Cir. 1992); *Medical Towers, Ltd. v. St. Luke's Episcopal Hosp.*, 750 S.W.2d 820, 822 (Tex. App.--Houston [14th Dist.] 1988, writ denied). The court must decide on its own whether the contract is ambiguous. *City of Bunker Hill Village v. Memorial Villages Water Auth*, 809 S.W.2d 309 (Tex. App.--Houston [14th Dist.] 1991, no writ); *Exxon Corp. v. West Texas Gathering Co.*, 868 S.W.2d 299, 302 (Tex. 1993). For an ambiguity to exist, both of the conflicting interpretations must be reasonable. *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 861 (Tex.2000); Black's Law Dictionary 41 (5th ed. 1983). If contract language can be given a definite legal meaning, and it is not reasonably susceptible to more than one meaning, it is unambiguous. *Lopez, supra*.

A written contract is ambiguous when its meaning is uncertain and doubtful or if it is reasonably susceptible to more than one meaning, taking into consideration the circumstances present when the contract was executed. *Towers of Tex., Inc. v. J & J Sy., Inc.*, 834 S.W.2d 1 (Tex. 1992). Lack of clarity in language is not sufficient to render a contract ambiguous; if it is so worded that it can be given a definite and certain legal meaning, it is not ambiguous. *Gibson v. Bentley*, 605 S.W.2d 337 (Tex. Civ. App.--Houston [14th Dist.] 1980, writ ref'd n.r.e.); *see also Brewer v. Myers*, 545 S.W.2d 235 (Tex. Civ. App.--Tyler 1976, no writ) (unless it is ambiguous on its face, a contract will be enforced as written when neither party asserts it is ambiguous, even if precise meaning of language used may be doubtful).

### **Latent Ambiguity**

One instance in which a contract which is definite on its face can, nevertheless, be determined to be ambiguous is when there is a latent ambiguity. An ambiguity in a contract may

be either latent or patent. *Friendswood Development Co. v. McDade + Co.*, 926 S.W.2d 280, 282 (Tex.1996). A patent ambiguity is evident on the face of the contract, so the contract is not clear and definite as a matter of law. *Id.* A latent ambiguity, on the other hand, exists when a contract is unambiguous on its face, but fails by reason of some collateral matter when it is applied to the subject matter with which deals. *Id.*; *Zeolla v. Zeolla*, 15 S.W.3d 239, 242 (Tex.App.–Houston [14th Dist.] 2000, pet. denied); *GTE Mobilnet of South Texas Limited Partnership v. Telecell Cellular, Inc.*, 955 S.W.2d 286, 290 (Tex.App.–Houston [1st Dist.] 1997, writ denied). For example, if a contract called for goods to be delivered to “the green house on Elm Street,” and there were in fact two green houses on the street, it would be latently ambiguous. *National Union Fire Ins. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 n.4 (Tex.1995). Thus, the collateral facts which create the latent ambiguity must be physically and objectively verifiable. If a party must rely on testimony about its understanding of the meaning of the contract, no matter how reasonable, that will violate the parol evidence rule and will not be allowed to create a latent ambiguity. *Friendswood*, 926 S.W.2d at 282-83; see also *K3 Enterprises v. McDaniel*, 8 S.W.3d 455, 458 (Tex.App.–Waco 2000, pet denied); *GTE Mobilnet*, 955 S.W.2d at 289 (appellee’s argument that some of appellant’s own employees did not agree about the contract language and thought it was unclear held to be irrelevant). Generally, where neither party alleges that the contract is vague or ambiguous, construction of the contract is a question of law for the court. *Southwestern Gas Pipeline v. Scaling*, 870 S.W.2d 180, 183 (Tex. App.–Fort Worth 1994 , writ denied); *Community Dev. Serv., Inc. v. Replacement Parts Mfg.*, 679 S.W.2d 721 (Tex. App.–Houston [1st Dist. 1984, no writ); see also *MJR Corp. v. B & B Vending Co.*, 760 S.W.2d 4 (Tex. App.–Dallas 1988, writ denied).

## **Fact Questions**

If a court decides that a contract is ambiguous, interpretation of the ambiguity is a fact question to be resolved by the fact finder. *Phillips v. Parrish*, 814 S.W.2d 501 (Tex. App.--Houston [1st Dist.] 1991, writ denied); *Insurance Co. v. N. Am. v. Cypress Bank*, 663 S.W.2d (Tex. App.--Houston [1st Dist.] 1983, no writ). If there is an ambiguity, but undisputed parol evidence resolves the ambiguity, then the court, not the jury, should construe the contract. *Security Sav. Ass'n v. Clifton*, 755 S.W.2d 925 (Tex. App.-- Dallas 1988, no writ). If factual disputes about the conduct of contracting parties remain after the trial court has determined their obligations under an unambiguous contract, then such issues are to be decided by the jury. *Anheuser-Busch Companies, Inc. v. Summit Coffee Co.*, 858 S.W.2d 928, 935 (Tex. App.--Dallas 1993, writ denied), vacated and remanded on other grounds, 514 U.S. 1001 (1995).

## **GENERAL RULES OF CONSTRUCTION**

### **Strict Construction**

Contracts are said to be the law between two parties and are sometimes enforced in a manner that was not intended by either of the parties. For instance, it has been held that courts will enforce an unambiguous instrument as written, and the writing alone will be deemed to express the intention of the parties, even if the parties interpreted the contract over a long period of time differently from the court. *Mobil Oil Corp. v. Waste Sys., Inc.*, 703 S.W.2d 386 (Tex. App.--Beaumont 1986, writ ref'd n.r.e.). The question for the court is not what did the parties mean to say, but rather, what is the meaning of what they did say. *Alford v. Krum*, 671 S.W.2d 870 (Tex. 1984); *Ideal Lease Service, Inc. v. Amoco Production Co., Inc.*, 662 S.W.2d 951 (Tex. 1984) (where indemnity covered employee of contractor and subcontractor, it did not cover sole

proprietor or sole proprietorship hired as a subcontractor because the sole proprietorship was an independent contractor not an employee). Courts cannot make contracts for the parties. *Baty v. Protech Ins. Agency*, 63 S.W.3d 841, 848 (Tex.App.–Houston [14th Dist.] 2002, pet. denied). Courts do not have the authority to place an interpretation upon a contract which the parties did not express. *Id.* The parties' own interpretations of a contract are irrelevant if the meaning of the contract is plain from its face. *GTE Mobilnet of South Texas Limited Partnership v. Telecell Cellular, Inc.*, 955 S.W.2d 286, 289 (Tex.App.–Houston [1st Dist.] 1997, writ denied). It has been held that written contracts will be construed according to the intention of the parties, notwithstanding errors and omissions. *American 10-Minute Oil Change, Inc. v. Metropolitan Nat'l Bank-Farmers Branch*, 783 S.W.2d 598 (Tex. App.--Dallas 1989, no writ). Courts will not stretch the language of a contract just because a party failed to include a provision it easily might have. *The Monrosa v. Carbon Black Export*, 359 U.S. 180, 183 (Tex. 1959).

### **Contract Will Not Be Rewritten**

Texas has a strong public policy favoring the freedom of parties to contract as they see fit. *Lawrence v. CDB Services, Inc.*, 44 S.W.3d 544, 553 (Tex. 2001). Courts are not at liberty to revise an agreement while professing to construe it. *Southwestern Gas Pipeline v. Scaling*, 870 S.W.2d 180, 183 (Tex. App.--Fort Worth 1994, writ denied). Courts must enforce contracts as written and cannot make new contracts between the parties. *Nielson v. Allstate Ins. Co.*, 784 S.W.2d 735 (Tex. App.--Houston [14th Dist.] 1990, no writ). This is true whether the parties have contracted wisely or foolishly and without regard to whether, in the light of subsequent events, a hardship was effected. *Dedier v. Grossman*, 454 S.W.2d 231, 235 (Tex. Civ. App.--Dallas 1970, writ ref'd n.r.e.). The only exceptions are for fraud and mutual mistake. *Eagle Life Ins. Co. v. G.I.C. Ins. Co.*, 697 S.W.2d 648 (Tex. App.--San Antonio 1985, writ ref'd n.r.e.).

Otherwise, courts are without authority to supply missing terms of a contract which the parties themselves had either not seen fit to place in their agreement, or which they omitted to agree upon. *Dempsey v. King*, 662 S.W.2d 725 (Tex. App.--Austin 1983, writ dismissed); but see *Ussery Invs. v. Canon & Carpenter, Inc.*, 662 S.W.2d 591 (Tex. App.--Houston [1st Dist.] 1983, writ dismissed) (written contracts will be construed according to the intentions of the parties, notwithstanding errors and omissions, by perusing the entire document, and to this end, words, names, and phrases obviously intended may be supplied). “The fact that the parties may have intended to make a different contract from that embodied in the writing, or afterwards thought that they had actually made a different one, becomes immaterial, in the absence of a plea of fraud, accident, or mistake.” *Maxwell v. Lake*, 674 S.W.2d 795, 802 (Tex. App.--Dallas 1984, no writ). As one court put it:

To argue that we must enforce only reasonable contracts which reasonable men enter into, mistakes our function: We can and do enforce unreasonable contracts if they be clear. Unreasonable men make reasonable contracts and reasonable men may make unreasonable contracts. We dissect the words for meaning; we do not respect them.

*Henry S. Miller Co. v. Ulmer*, 701 F.Supp. 598, 600 (S.D. Tex. 1988), quoting *Howell v. Union Producing Co.*, 392 F.2d 95, 115 (5th Cir. 1968); see also *RGS, Cardox Recovery, Inc. v. Dorchester Enhanced Recovery Co.*, 700 S.W.2d 635, 639 (Tex. App.--Corpus Christi 1985, writ refused n.r.e.).

Similarly, courts will refrain from a construction of a writing which would require insertion of a qualifying phrase, when doing so would alter the ordinary meaning of the writing.



*Praeger v. Wilson*, 721 S.W.2d 597 (Tex. App.--Fort Worth 1986, writ ref'd n.r.e.). A court should be reluctant to hold a contract unenforceable for uncertainty; however, courts have no authority to insert essential terms in order to uphold a contract. *Guzman v. Acuna*, 652 S.W.2d 315 (Tex. App.--San Antonio 1983, writ disp'd w.o.j.).

### **Utilitarian Analysis**

The Texas Supreme Court has held that courts should construe contracts from a utilitarian standpoint, bearing in mind the particular business activity sought to be served by the parties. *Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527 (Tex. 1987). Courts need not embrace strained rules of interpretation to avoid ambiguity at all costs, but should strive to determine what the parties intended based on what they were trying to accomplish. *See Id.*; *United Gas Pipe Line Co. v. Mueller Eng'g Corp.*, 809 S.W.2d 597 (Tex. App.--Corpus Christi 1991, writ denied).

### **Construction To Be Reasonable**

Courts will, when possible and proper, avoid a construction of a contract that is unreasonable, inequitable, and oppressive. *Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527 (Tex. 1987); *Westwind Exploration, Inc. v. Homestate Sav. Ass'n*, 696 S.W.2d 378 (Tex. 1985); *Austin Co. v. Vaughn Bldg. Corp.*, 643 S.W.2d 113 (Tex. 1982) (application of the foregoing rule together with rule that contract is to be construed most strictly against its author). Courts will not construe a contract to mean that the parties have agreed to act contrary to what common sense and the circumstances obviously demand, unless the contract is explicit and clear in that meaning. *Fujimoto v. Rio Grande Pickle Co.*, 414 F.2d 648 (5th Cir. 1969); *Parks v. Frankfurt*, 476 S.W.2d 717 (Tex. Civ. App.--Beaumont 1972, writ ref'd n.r.e.). On the other hand, equity

cannot be invoked to create a contract which the court considers should have been made but was not. *Ulhorn v. Reid*, 398 S.W.2d 169, 175 (Tex. Civ. App.--San Antonio 1965, writ ref'd n.r.e.).

### **Objective Intent**

When a contract is unambiguous, the courts will give effect to the intentions of the parties as expressed or as is apparent in the writing. *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515 (Tex. 1968). In the usual case, the instrument alone will be deemed to express the intention of the parties because it is the objective, not the subjective, intent that controls. *Id.*; *A.R. Clark Inv. Co. v. Green*, 375 S.W.2d 425 (Tex. 1964). This is known as the “four corners rule.” *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1992). The question is, therefore, not what the parties meant to say, but the meaning of what they did say. *Stark v. Morgan*, 602 S.W.2d 298 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.). Even if the parties may actually have had something else in mind, they will be held responsible for what they have inserted in their signed agreement. *Estes v. Republic Nat'l Bank*, 450 S.W.2d 397 (Tex. Civ. App.--Dallas 1969), *aff'd*, 462 S.W.2d 273 (Tex. 1970).

### **Considering Circumstances At Time Of Execution**

In construing a contract, a court should consider the circumstances surrounding its execution. *Block 316 Garage, Ltd. v. Wortham & Van Liew*, 705 S.W.2d 249 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Wadsworth Properties v. ITT Employment & Training Sys.*, 816 S.W.2d 819 (Tex. App.--Houston [1st Dist.] 1991, writ denied); *but see Humble Exploration Co. v. Amcap Petroleum Assocs.*, 658 S.W.2d 860, 862 (Tex. App.--Dallas 1983, writ ref'd n.r.e.). When there is a question relating to the construction of a contract, the court is to consider the wording in light of the surrounding circumstances in order to ascertain the meaning that would be attached to the wording by a reasonably intelligent person acquainted

with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the contract, other than oral statements by the parties of what they intended it to mean. *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 731 (Tex. 1981). “If, in the light of surrounding circumstances, the language of the contract appears to be capable of only a single meaning, the court can then confide itself to the writing.” *Id.* The circumstances surrounding the execution of a contract help to illuminate the contractual language chosen by the parties and enable evaluation of the objects and purposes that they intended to accomplish. *Medical Towers, Ltd. v. St. Luke’s Episcopal Hosp.*, 750 S.W.2d 820, 823 (Tex. App.--Houston [14th Dist.] 1988, writ denied). Evidence of the circumstances surrounding the execution of an unambiguous contract may be considered when construing that contract, even though oral statements of the parties’ intent are inadmissible to vary or contradict its terms. *Id.*; *Baty v. Protech Ins. Agency*, 63 S.W.3d 841, 848 (Tex.App.–Houston [14th Dist.] 2002, *pet. denied*). For instance, in seeking to determine the ordinary meaning of a contractual term at the time the contract was executed, it is proper and frequently necessary for the court to consult other contemporary documents employing the phrase. *Gigowski v. Russell*, 718 S.W.2d 16 (Tex. App.--Tyler 1986, writ ref’d n.r.e.). The circumstances surrounding the contract are merely an aid in construction of the contract’s language and do not constitute a rule of construction. *KMI Continental Offshore Prod. Co. v. ACF Petroleum Co.*, 746 S.W.2d 238 (Tex. App.--Houston [1st Dist.] 1987, writ denied).

### **The Parties’ Own Construction**

When a contract is ambiguous, conduct of the parties which indicates a construction that the parties have themselves placed on the contract may be considered in determining the parties’ true intent. *Consolidated Eng’r Co. v. Southern Steel Co.*, 699 S.W.2d 188 (Tex. 1985). The objective intent of the parties as manifested by their conduct governs the construction of the

contract, not the subjective or secretive intent of such parties. *Harrison v. Facade, Inc.*, 355 S.W.2d 543 (Tex. Civ. App.--Dallas 1962, no writ). There is authority that when a provision is ambiguous, the court must take into account the parties' understanding of it. *Hoyt R. Matise Co. v. Zurn*, 754 F.2d 560 (5th Cir. 1985); *Connelly v. Paul*, 731 S.W.2d 657 (Tex. App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.).

The construction the parties themselves place on a contract is entitled to great, if not controlling weight, because the parties are in the best position to know what was intended by the language they used. *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1980); *Alkas v. United Sav. Ass'n*, 672 S.W.2d 852 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.); *Garcia v. Rutledge*, 649 S.W.2d 307 (Tex. App.--Amarillo 1982, no writ); *McMullan v. Friend*, 642 S.W.2d 15 (Tex. App.--El Paso 1982, no writ) (the interpretation placed on a contract by the parties is to be considered by the court, not the jury, in construing the contract). "There is no stronger rule for construing a contract of doubtful meaning than that which gives effect to the parties' own interpretation." *United Founders Life Ins. Co. v. Carey*, 363 S.W.2d 236, 243 (Tex. 1962). There is authority that the rule of applying the parties' own construction trumps all other rules of construction because other rules of construction apply only where the intention of the parties cannot be discerned from the parties' conduct. *Jochev v. Clayburne*, 863 S.W.2d 516, 520 (Tex.App.--Austin 1993, writ denied).

If a contract is unambiguous, however, it will be enforced as written even if the parties interpreted it over a long period of time differently from the court. *Mobil Oil Corp. v. Waste Sys., Inc.* 703 S.W.2d 386 (Tex. App.--Beaumont 1986, writ ref'd n.r.e.); *see also Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726 (Tex. 1981). When a contract is unambiguous, extrinsic evidence of the subsequent conduct of the parties is inadmissible. *Cherokee Water Co.*

*v. Forderhouse*, 641 S.W.2d 522 (Tex. 1982); *see also Texas Gas Corp. v. Hankamer*, 326 S.W.2d 944, 959 (Tex. Civ. App.--Houston [1st Dist.] 1959, writ ref'd n.r.e.) (letters are not admissible as evidence of how parties interpreted an unambiguous contract). Likewise, evidence of custom and usage in the industry cannot be used to contradict an express term of a contract. *4N International, Inc. v. Metropolitan Transit Authority*, 56 S.W.3d 860, 862-63 (Tex.App.--Houston [1st Dist.] 2001, pet. denied).

### **Course of Dealing and Usage of Trade**

Contracts for the sale of goods governed by the Uniform Commercial Code cannot be contradicted by prior or contemporaneous oral agreements but may be *explained or supplemented* by course of dealing, usage of trade, or course of performance. Tex. Bus. & Com. Code § 2.202. A “course of dealing” is “a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis for understanding for interpreting their expressions and other conduct.” Tex. Bus. & Com. Code § 1.205. “Usage of trade” is “any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.” *Id.* Where a contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced it without objection shall be relevant to determine the meaning of the agreement. Tex. Bus. & Com. Code § 2,208. The UCC also prioritizes these matters.

The express terms of the agreement and any course of performance, as well as any course of dealing and usage of trade, shall be construed wherever reasonable as consistent with each other;

but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade.

*Id.* Contracts not governed by the UCC can also be construed in light of course of dealing and usage of trade. See *Energen Resources Maq, Inc. v. Dalbosco*, 23 S.W.3d 551, 557 (Tex. App. -- Houston [1st Dist.] 2000, pet denied) (evidence of custom and usage is admissible to add to a contract that is silent on a particular matter).

### **Give Meaning To Every Clause**

Courts should prefer a construction that does not render any clause in the contract meaningless. *Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983); *Blaylock v. American Guarantee Bank Liab. Ins. Co.*, 632 S.W.2d 719 (Tex. 1982) (contract will not be construed so as to render some if its terms meaningless). It is assumed that the parties intended to give effect to every clause in the agreement and did not intend to render any clause meaningless. *Phillips Natural Gas Co. v. Cardiff*, 823 S.W.2d 314 (Tex. App.--Houston [1st Dist.] 1991, writ denied). Generally, the parties to a contract intend every clause to have some effect, and the court will not strike down any portion of the contract unless there is an irreconcilable conflict. *Ogden v. Dickinson State Bank*, 662 S.W.2d 330 (Tex. 1983); *Reynolds v. McCullough*, 739 S.W.2d 424 (Tex. App.--San Antonio 1987, writ denied). Courts will not strain to find an artificial conflict between two contract provisions. *4N International, Inc. v. Metropolitan Transit Authority*, 56 S.W.3d 860, 863 (Tex.App.--Houston [1st Dist.] 2001, pet. denied). There is no rule prohibiting a construction under which two provisions have the same or similar meanings, so just because a contract contains two clauses with the same or overlapping meaning does not mean that one of the clauses is rendered meaningless. *GTE Mobilnet of South Texas Limited Partnership v.*

*Telecell Cellular, Inc.*, 955 S.W.2d 286, 289 (Tex.App.–Houston [1st Dist.] 1997, writ denied).

If there is an irreconcilable conflict, the clause which contributes most essentially to the contract is entitled to greater weight. *Storm v. United States*, 243 F.2d 708 (5th Cir. 1957); *Young v. De La Garza*, 368 S.W.2d 667 (Tex. Civ. App.--Dallas 1963, no writ).

### **Consider Contract As A Whole**

A contract must be read as a whole, rather than by isolating a certain phrase, sentence, or section of the agreement. *Baty v. Protech Ins. Agency*, 63 S.W.3d 841, 848 (Tex.App.–Houston [14th Dist.] 2002, pet. denied). A single contract provision may not be interpreted so as to distort and contradict other express provisions and the whole tenor and effect of the parties' contract. *Priem v. Shires*, 697 S.W.2d 860 (Tex. App.--Austin 1985, no writ). The entire contract must be considered in determining its meaning and no individual provision within the contract should be considered in isolation. *Eagle Life Ins. Co. v. G.I.C. Ins. Co.*, 697 S.W.2d 648 (Tex. App.--San Antonio 1985, writ ref'd n.r.e.); *International Ins. Co. v. Dresser Indus. Inc.*, 841 S.W.2d 437 (Tex. App.--Dallas 1992, writ denied). In construing a contract, the court must consider and attempt to give effect to all of it, while mindful of the intentions existing at the time it was executed. *Borders v. KRLB, Inc.*, 727 S.W.2d 357 (Tex. App.--Amarillo 1987, writ ref'd n.r.e.). On the other hand, even though the entire contract should be considered, in some cases the parties' primary intent concerning a particular matter can be determined from only one portion of the contract. *C & C Partners v. Sun Exploration & Prod. Co.*, 738 S.W.2d 707 (Tex. App.--Dallas 1989, writ denied).

### **Give Effect to Words Used**

If two constructions of a contract are possible, the construction that renders the contract possible of performance will be preferred to the one that renders its performance impossible or

meaningless. *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793 (Tex. 1984); *Republic Nat. Bank v. Northwest Nat. Bank*, 578 S.W.2d 109, 115 (Tex. 1979). It is presumed that parties to a contract intend every clause to have some effect and in some measure to evidence their agreement. *Westwind Exploration, Inc. v. Homestate Sav. Ass'n*, 696 S.W.2d 378 (Tex. 1985). The parties are presumed to have made an agreement that is effectual, not nugatory. *Texas Gas Utilities Co. v. Barrett*, 460 S.W.2d 409 (Tex. 1970). Thus, contractual provisions must be construed, if possible, to mean something rather than nothing. *Palmer v. Liles*, 677 S.W.2d 661 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Olshan Demolishing Co. v. Angleton Indep. School Dist.*, 684 S.W.2d 179 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.).

### **Existing Law Deemed To Be Part of Contract**

The law existing at the time a contract is made becomes a part of the contract and governs the transaction. *Wessely Energy Corp. v. Jennings*, 736 S.W.2d 624 (Tex. 1987); *Beck v. Beck*, 792 S.W.2d 813 (Tex. App.--Dallas 1990); *aff'd*, 814 S.W.2d 745 (Tex. 1991), *cert. denied*, 112 S. Ct. 1266 (1992). For example, the terms of the Texas usury statutes become implied terms in contracts entered into in Texas. *Concrete Constr. Supply, Inc. v. M.F.C., Inc.*, 636 S.W.2d 475 (Tex. App.--Dallas 1982, no writ). Antitrust laws are also impliedly incorporated into private contracts. *Savin Corp. v. Copy Distrib. Co.*, 716 S.W.2d 690 (Tex. App.--Corpus Christi 1986, no writ). When the parties to a contract select a judicially construed clause, it can be inferred that they intended to adopt the meaning that the courts have given it. *Hardware Dealers Mut. Ins. Co. v. Berglund*, 393 S.W.2d 309 (Tex. 1965). A substantive right conferred by existing law constitutes part of the agreement by implication and will not be defeated by a subsequent amendment of the law. *Estate of Griffin v. Sumner*, 604 S.W.2d 221 (Tex. Civ. App.--San Antonio 1980, writ ref'd n.r.e.).



If a contract is susceptible of more than one reasonable construction, courts will adopt the construction that comports with legality. *Cecil v. Zivley*, 683 S.W.2d 853 (Tex. App.--Houston [14th Dist.] 1984, no writ); *Sumrall v. Navistar Fin. Corp.*, 818 S.W.2d 548 (Tex. App.--Beaumont 1991, writ denied). Courts will presume that the parties intend to obey the law. *Asmussen v. Wilson*, 775 S.W.2d 676 (Tex. App.--San Antonio 1989, no writ). On the other hand, when a written agreement contains an express provision, the express provision, not the common law on that subject, controls. *Phillips Natural Gas Co. v. Cardiff*, 823 S.W.2d 314, 317 (Tex. App.--Houston [1st Dist.] 1991, writ denied). A contract in violation of the Constitution, statutes, regulations, or public policy will not be enforced. *First Tex. Sav. Ass'n v. Dicker Ctr.*, 631 S.W.2d 179, 186 (Tex. App.--Tyler 1982, no writ); *Baron v. Mullinax, Wells, Mauzy & Baab, Inc.*, 623 S.W.2d 457, 461 (Tex. App.--Texarkana 1981, writ ref'd n.r.e.); *Lewis v. Davis*, 145 Tex. 468, 199 S.W.2d 146 (Tex. 1947).

### **Construction Against The Drafter**

A contract is generally construed most strictly against its author and in such a manner as to reach a reasonable result consistent with the apparent intent of the parties. *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793 (Tex. 1984). This rule is particularly applicable where the contract purports to exempt the drafter from liability. *Manzo v. Ford*, 731 S.W.2d 673 (Tex. App.--Houston [14th Dist.] 1987, no writ). A contract is construed against its drafter, however, only as a last resort after application of ordinary rules of construction leave reasonable doubt as to its interpretation. *Forest Oil Corp. v. Strata Energy, Inc.*, 929 F.2d 1039 (5th Cir. 1991).

Where only one reasonable meaning clearly emerges after applying established rules of interpretation to the contract, the rule of strong construction against the author cannot be invoked. *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154 (Tex. 1951).

## **Covenants Versus Conditions**

When the circumstances under which parties are performing a contract differ from those they anticipated, the language in the contract may not exactly mirror reality. The party in breach may then argue that conditions precedent to his performance have not been satisfied, thereby excusing his performance. When a court construes the contract, finding a forfeiture due to the failure of a condition precedent should be avoided when another reasonable reading of the contract is possible. *Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990). Terms such as “if,” “provided that,” “on condition that,” and similar language often set forth conditions precedent. *Id.* Absent clear conditioning language, the rule is that when the intent of the parties is doubtful or when a condition would impose an absurd or impossible result, the agreement will be interpreted as creating a covenant rather than a condition. *Id.*

## **If Contract is Silent**

No two parties will successfully anticipate every issue that could arise during a prospective contractual relationship. *Maxwell v. Lake*, 674 S.W.2d 795 (Tex. App.--Dallas 1984, no writ). “The rule permitting extrinsic evidence to explain an ambiguous writing has application only when the intention is expressed but in uncertain language susceptible of more than one interpretation.” If a written contract is silent on a particular issue that comes up between the parties, the question for the court is not one of interpreting the language of the contract but, rather, one of determining the legal effect of the contract. *Id.* “Where a written contract does not purport to deal with a particular subject, the failure of the contract to express the parties’ intentions on that subject does not permit extrinsic proof of such intentions on the theory that the writing is ambiguous. The rule permitting oral testimony to explain an ambiguous writing has application only when the intention is expressed but is in uncertain

language susceptible of more than one interpretation.” *Summit Ins. Co. of New York v. Central Nat. Bank of Houston*, 624 S.W.2d 222, 226 (Tex. App.--Houston [1st Dist.] 1981, writ ref’d n.r.e.). It has been held, however, that a contract’s silence on a particular subject can create a latent ambiguity and therefore create a fact issue for trial. See *Zeolla v. Zeolla*, 15 S.W.3d 239, 242 (Tex.App.--Houston [14th Dist.] 2000, pet. denied) (agreement was silent as to husband’s obligations if he retired at any age other than 65, so latent ambiguity arose when he retired at 57); *Franklin v. Jackson*, 847 S.W.2d 306, 310-311 (Tex.App.--El Paso 1992, writ denied) (because agreement for lease of peanut allotment was silent with respect to disposition of increase in allotment, increase in allotment created latent ambiguity).

### **Implied Terms**

If parties to a contract have expressly stated the terms of their agreement, implied terms that conflict with the express terms will not be read into the agreement. *Exxon Corp. v. Atlantic Richfield Co.*, 678 S.W.2d 994 (Tex. 1984); *Emmer v. Phillips Petroleum Co.*, 668 S.W.2d 487 (Tex. App.--Amarillo 1984, no writ). For example, a duty of confidentiality will not be implied into an agreement. *J.C. Kinley Co. v. Haynie Wire Line Serv.*, 705 S.W.2d 193 (Tex. App.--Houston [1st Dist.] 1985, writ ref’d n.r.e.). An additional term will be implied only when it is necessary to effectuate the intent of the parties. *Lone Star Steel Co. v. Wahl*, 636 S.W.2d 217 (Tex. App.--Texarkana 1982, no writ). A term will be implied only when it is so patently obvious that there was no need to spell it out, or it is absolutely essential to give effect to the purpose of the contract as a whole. *Tejas Grain Makers, Inc. v. Cactus Feeders, Inc.*, 762 S.W.2d 734 (Tex. App.--Amarillo 1988, no writ). For example, it has been held that every contract contains an implied promise that a party will not do anything to delay or prevent the other party from performing his part of the contract. *Hallmark v. Hand*, 833 S.W.2d 603 (Tex.

App.--Corpus Christi 1992, writ denied); *Hyatt Cheek Builders v. Board of Regents*, 607 S.W.2d 259, 267 (Tex. Civ. App.--Texarkana 1980, writ dismissed) (law implies that contractor will perform his work so that the subcontractor's work is not prevented or impaired). Likewise, the continued life of the promisor in a personal services contract is an implied condition to the further obligation of either party to such a contract. *TPS Freight Distribs. v. Texas Commerce Bank-Dallas*, 788 S.W.2d 456 (Tex. App.--Fort Worth 1990, writ denied). A grant of minerals carries with it the right to enter and extract them. *Tarrant Co. Water Control and Imp. Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 909 (Tex. 1993).

A term will not be implied just because it is necessary to make the contract fair, or that without such a term the contract would be improvident or unwise, or it would operate unjustly. *Danciger Oil & Refining Co. of Texas v. Powell*, 154 S.W.2d 632, 635 (Tex. 1941). To be implied, a term must be "so clearly within the contemplation of the parties that they deemed it unnecessary to express it." *Id.* For example, a court will not infer that time is of the essence in a contract unless the contract compels such a construction. *HECI Exploration Co. v. Clajon Gas Co.*, 843 S.W.2d 622 (Tex. App.--Austin 1992, writ denied). Where, however, the contract leaves open the time and place of performance, the law will imply that the time of performance is to be a reasonable time, which depends on the facts and circumstances as they existed at the date of the contract. *Solomon v. Greenblatt*, 812 S.W.2d 7 (Tex. App.--Dallas 1991, no writ).

### **Construing Several Agreements Together**

Separate documents executed between the same parties, at the same time, for the same purpose, and in the course of the same transaction are to be construed together to ascertain the entire agreement between the parties. *Jim Walter Homes, Inc. v. Schuenemann*, 668 S.W.2d 324 (Tex. 1984); *see also Bush v. Brunswick Corp.*, 783 S.W.2d 724 (Tex. App.--Fort Worth 1989,

writ denied) (even if instruments were executed at different times and do not expressly refer to each other, they may be construed together to ascertain the parties' intent if they pertain to the same transaction); *American Petrofina, Inc. v. PPG Indus., Inc.*, 679 S.W.2d 740 (Tex. App.--Fort Worth 1984, writ dism'd by agr.) (separate contracts executed at the same time, for the same purpose, and in the course of the same transaction are to be considered as one instrument, even though they are not between the same parties). To be construed together, documents do not have to refer to each other. *Milam Dev. Corp v. Wurzbach Tower Council of Co-Owners*, 789 S.W.2d 942 (Tex. App.--San Antonio 1990, writ denied).

The foregoing rule does not, however, render the court incapable of interpreting several documents according to their plain meaning discernible from the face of each. *Jon-T Chems., Inc. v. Freeport Chem. Co.*, 704 F.2d 1412 (5th Cir. 1983); *First Nat'l Bank v. Jarnigan*, 794 S.W.2d 54 (Tex. App.--Amarillo 1990, writ denied). For instance, where prior and subsequent instruments are separate and completely different, the first is not considered in construing the second. *Hydro-Line Mfg. Co. v. Pulido*, 674 S.W.2d 382 (Tex. App.--Corpus Christi 1994, writ ref'd n.r.e.). A later contract will, however, be incorporated with or correlated to a prior agreement when this is the intention of the parties as expressed in the later agreement. *Western Auto Supply Co. v. Brazosport Bank of Tex.*, 840 S.W.2d 157 (Tex. App.--Houston [1st Dist.] 1992, no writ). When a second contract deals with the same subject matter as did the first, but does not state that it discharges or supersedes the first, the second will control to the extent of any inconsistency. *Courage Co. v. Chemshare Corp.*, 93 S.W.3d 323, 333 (Tex. App. -- Houston [14th Dist.] 2002, no pet. hist.); In construing two contracts of equal dignity which are in apparent conflict, courts must, if possible, give to each contract a construction that allows each

to stand. *Guadalupe-Blanco River Auth. v. Tuttle*, 171 S.W.2d 520 (Tex. Civ. App.--San Antonio), *error refused*, 141 Tex. 523, 174 S.W.2d 589 (Tex. 1943).

### **Parol Evidence To Ascertain Intent**

Parol evidence (oral testimony about what was intended in an agreement) is inadmissible to contradict or vary the terms of an unambiguous written contract. *Massey v. Massey*, 807 S.W.2d 391 (Tex. App.--Houston [1st Dist.] 1991, no writ). Where, however, the language in a contract, when applied to the subject matter of the contract, creates a genuine uncertainty as to which of two meanings is correct, the issue is properly resolved by the jury, unless the relevant parol evidence is undisputed and resolves the ambiguity as a matter of law. *Security Sav. Ass'n v. Clifton*, 755 S.W.2d 925 (Tex. App.--Dallas 1988, no writ); *Amistad, Inc. v. Frates Communities, Inc.*, 611 S.W.2d 121 (Tex. Civ. App.--Waco 1980, writ ref'd n.r.e.). An exception to that parol evidence rule is also available where a fraud, accident, or mistake led to the execution of the contract. *Stavert Properties, Inc. v. RepublicBank of N. Hills*, 696 S.W.2d 278 (Tex. App.--San Antonio 1985, writ ref'd n.r.e.). For example, the parol evidence rule will not operate to preclude misrepresentations made before a contract is executed, but parol testimony of express or implied warranties, not contained in the contract, is inadmissible. *Anthony Industries, Inc. v. Ragsdale*, 643 S.W.2d 167, 174 (Tex. App.--Fort Worth 1982, writ ref'd n.r.e.). The parol evidence rule is particularly strong where the contract recites that it contains the entire agreement between the parties or a similarly worded merger provision. *Smith v. Smith*, 794 S.W.2d 823 (Tex. App.--Dallas 1990, no writ); *Weinacht v. Phillips Coal Co.*, 673 S.W.2d 677 (Tex. App.--Dallas 1984, no writ). Before resorting to parol evidence, the court must try to harmonize and reconcile the provisions of the contract if at all possible. *Mattison, Inc. v. W.F. Larson, Inc.*, 529 S.W.2d 271 (Tex. Civ. App.--Amarillo 1975, writ ref'd n.r.e.).

### **Typographical Errors**

A typographical error does not necessarily create an ambiguity or defeat a motion for summary judgment. If the court, after considering the subject matter of the contract and the surrounding facts and circumstances, can determine that the term at issue was a clerical error and can determine the true intent of the parties, then the court may construe the term as if it were typed correctly in accordance with the true intent of the parties as found by the court. *Safeco Ins. Co. of America v. Gaubert*, 829 S.W.2d 274, 281 (Tex. App.--Dallas 1992, writ denied).

### **Expert Testimony On Meaning Of Contract**

Generally, the meaning of a contract is for the court to decide and expert opinions are inadmissible. *St. Paul Ins. Co. v. Rahn*, 641 S.W.2d 276 (Tex. App.--Corpus Christi 1982, no writ); *Cluett v. Medical Protective Co.*, 829 S.W.2d 822 (Tex. App.--Dallas 1992, writ denied); *American Nat. Bank & Trust Co. v. First Wisconsin Mortgage Trust*, 577 S.W.2d 312, 320 (Tex. Civ. App.--Beaumont 1979, writ ref'd n.r.e.). It has been held that writings employing technical terms are susceptible to interpretation by expert opinion. *Mescalero Energy, Inc. v. Underwriters Indemnity General Agency, Inc.*, 56 S.W.3d 313, 323-34 (Tex.App.--Houston [1st Dist.] 2001, pet. denied) (court considered expert's affidavit as to meaning of technical term and found that a fact issue was raised so summary judgment had to be reversed); *Esteve Cotton Co. v. Hancock*, 539 S.W.2d 145 (Tex. Civ. App.--Amarillo 1976, writ ref'd n.r.e.). Likewise, expert testimony may be considered to establish the meaning of trade terms or terms that are used in a local sense, if the meaning is not otherwise plain. *Hellenic Inv., Inc. v. Kroger Co.*, 766 S.W. 861 (Tex. App.--Houston [1st Dist.] 1989, no writ); *Atkins v. Fine*, 508 S.W.2d 131 (Tex. Civ. App.--Austin 1974, no writ), *Oil Ins. Ass'n v. Royal Indem. Co.*, 519 S.W.2d 148, 150 (Tex. Civ.

App.--Houston [14th Dist.] 1975, writ ref'd n.r.e.); *Sivert v. Continental Oil Co.*, 497 S.W.2d 482 (Tex. Civ. App.--San Antonio 1973, writ ref'd n.r.e.).

### **Ejusdem Generis**

*Ejusdem generis* is a rule of contract construction used to determine whether a given thing should be included or excluded from a non-exhaustive list of things in a contract. For example, if a contract provides that the “vendor will deliver all of purchaser’s requirements for Coke, Pepsi, Dr. Pepper, Gatorade and other drinks” would the vendor be required to supply milk? beer? The rule of *ejusdem generis* provides that where general words follow an enumeration of things by words of a particular and specific meaning, those general words are not to be construed in their widest meaning, but are limited to things of the same kind of class as those specifically mentioned. *Dawkins v. Meyer*, 825 S.W.2d 444, 447 (Tex. 1992); *Tomlin v. Petroleum Corp. of Texas*, 694 S.W.2d 441 (Tex. App.--Eastland 1985, no writ). In the example given, unless the circumstances surrounding the execution of the contract indicated that milk and beer were contemplated by the parties, a court might feel constrained by *ejusdem generis* to hold that only soft drinks or Gatorade-type drinks were meant to be included. The *ejusdem generis* rule serves to prevent general words loosely used in connection with specific terms from extending the operation of a contract into a field not really intended. *Phillips v. Houston Nat’l Bank*, 108 F.2d 934 (5th Cir. 1940). Where the general words do not follow but precede the specific words, the *ejusdem generis* rule does not apply. *Jones v. St. Paul Ins. Co.*, 725 S.W.2d 291, 292 (Tex. App. -- Corpus Christi 1987, no writ).

### **The Expression Of One Thing May Exclude Other Things**

*Expressio unius exclusio alterius* is a doctrine of contract construction holding that the expression in a contract of one or more things of a class implied the exclusion of all not



expressed even though all have been implied had non been expressed. For example, a gas sales contract giving the seller the right to meet or beat any price for gas quoted to the buyer “by a reputable, responsible, and then existing, gas pipe line distributing company” was held to mean that if the competing offer came from a gas company that did not fit the description, then the seller had no right to meet or beat that price and the buyer was free to buy from the other source. *Southern Coast Corp. v. Sinclair Refining Co.*, 181 F.2d 960, 961-62 (5th Cir. 1950). In another case, where a drilling contract provided that the contractor indemnified the operator and “its officers, directors, employees and joint owners,” The *expressio unius* doctrine was invoked to deny indemnity to the operator’s “company man” consultant as well. *Melvin Green, Inc. v. Questor Drilling Corp.*, 946 S.W.2d 907, 910 (Tex. App.--Amarillo 1997, no writ). In another case, a release acknowledging payment in full *for gas* was held not to release the seller’s claim *for interest* on the past-due payments for the gas because that is something different and it was not expressed. *Phillips Petroleum Co. v. Gillman*, 593 S.W.2d 152, 154 (Tex. Civ. App.--Amarillo 1980, writ ref’d n.r.e.).

### **Written Or Typed Terms Versus Printed Terms**

Where handwritten and printed terms in a contract are in conflict, the handwritten terms will control. *Montgomery Ward & Co. v. Dalton*, 665 S.W.2d 507 (Tex. App.--El Paso 1983, no writ). Likewise, typewritten provisions will trump printed provisions when they are in conflict. *Meisler v. Republic of Tex. Sav. Ass’n*, 758 S.W.2d 878 (Tex. App.--Houston [14th Dist.] 1988, no writ); *Westech Engineering, Inc. v. Clearwater Constructors, Inc., a Div. of Phelps, Inc.*, 835 S.W.2d 190 (Tex. App.--Austin 1992, no writ). Written or typewritten contract provisions are to be given effect over printed provisions. *Southland Royalty Co. v. Pan Am. Petroleum Co.*, 378 S.W.2d 50 (Tex. 1964). Handwritten terms generally control over typewritten terms. *Roylex*,

*Inc. v. Avco Community Devs.*, 559 S.W.2d 833 (Tex. Civ. App.-- Houston [14th Dist.] 1977, no writ). The rationale is, of course, that written or typewritten clauses are the immediate language of the parties themselves, whereas, printed form language is intended for general use only, without reference to particular aims and objectives of the parties. *Innes v. Webb*, 538 S.W.2d 237 (Tex. Civ. App.--Corpus Christi 1976, writ ref'd n.r.e.) (also holding that the foregoing rule trumps the rule that language must be construed against its author).

### **Specific Versus General Terms**

If there is a conflict between specific provisions and general provisions in a contract, the specific provisions will govern. *United States Postal Service v. American Postal Workers Union, AFL-CIO*, 922 F.2d 256 (5th Cir.), *cert. denied*, 112 S. Ct. 297 (1991); *City of San Antonio v. Heath and Stich, Inc.*, 567 S.W.2d 56 (Tex. Civ. App.--Waco 1978, writ ref'd n.r.e.); *Hatcher v. Weatherall*, 551 S.W.2d 179 (Tex. Civ. App.--Texarkana 1977, no writ); (where contract specified total sale price of \$15,000 but then went on to specifically enumerate three payments totalling more than \$15,000, court held that the three specific clauses governed).

### **Prior Versus Later Terms**

In harmonizing conflicting provisions of a contract, terms stated earlier in the agreement must be favored over those stated later. *Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983).

### **Same Meaning Throughout**

Words used in one sense in one part of a contract are, as a general rule, deemed to have been used in the same sense in another part of the instrument, where there is nothing in the context to indicate otherwise. *Gonzalez v. Mission American Ins. Co.*, 795 S.W.2d 734, 736 (Tex.1990).

### **Headings and Captions**

In construing a contract, greater weight should be given to operative contractual clauses rather than captions, because an instrument is that which its language shows it to be, without regard to what it is labeled. *Neece v. A.A.A. Realty Co.*, 159 Tex. 403, 322 S.W.2d 597 (Tex. 1959).

### **Words Versus Numbers**

The written words in an instrument prevail over numeric figures. *Rankin v. Belvin*, 507 S.W.2d 908 (Tex. Civ. App.--Houston [14th Dist.] 1974, writ ref'd n.r.e.); *Duvall v. Clark*, 158 S.W.2d 565 (Tex. Civ. App.--Waco 1941, writ ref'd w.o.m.).

### **Recitals**

Recitals in a contract are generally not considered to be a part of the operative contract language unless the parties so indicate. *Gardner v. Smith*, 168 S.W.2d 278 (Tex. Civ. App.--Beaumont 1942, no writ). Where, however, recitals are clear, and the operative part of the contract is ambiguous, the recitals will govern the construction of the contract. *Id.*

### **Deletions**

Where a written instrument shows that certain words have been deleted by the parties, the deletion may be considered by the court in determining the true meaning and intention of the parties. *Lebow v. Weiner*, 454 S.W.2d 869, 971 n.2 (Tex. Civ. App.--Beaumont 1970, writ ref'd n.r.e.).

### **Words Control Over Punctuation**

The words contained in a contract, and not the punctuation, should be the controlling guide in construing the contract. *Criswell v. European Crossroads Shopping Ctr, Ltd.*, 792

S.W.2d 945, 948 (Tex. 1990). There is, however, no rule which requires courts to disregard all punctuation and look solely to the language of the instrument, and punctuation can be an aid in construing the words used in an instrument. *Id.* (semicolon held to indicate alternate and independent means of performing the contract). Punctuation or the absence of punctuation will not of itself create ambiguity. *Mattison, Inc. v. W.F. Larson, Inc.*, 529 S.W.2d 271 (Tex. Civ. App.--Amarillo 1975, writ ref'd n.r.e.) However, "[u]nderlying all the legal rules applicable to construction of contracts are grammatical rules of the English language, and these rules must first be applied that therefrom there might be established a reason and occasion for the application of the legal rules." *Zephyr Oil Co. v. Cunningham*, 265 S.W.2d 169, 173 (Tex. Civ. App.--Fort Worth 1954, writ ref'd n.r.e.) (grant of overriding royalty found to be a complete sentence and thus not limited by clause (following); *Porter v. Milner*, 352 S.W.2d 787, 789 (Tex. Civ. App.--Fort Worth 1961, no writ) (court actually corrected sentence in contract it found to be "grammatically inept" in order to effectuate the intent of the parties which it found to be "obvious and certain").

### **Definition Of Words Used**

The language used by parties in a contract should be accorded its plain, grammatical meaning unless it definitely appears that the intent of the parties would thereby be defeated. *Lyons v. Montgomery*, 701 S.W.2d 641 (Tex. 1985). A word used in a contract will not be assigned a meaning different than its ordinary meaning unless the context reveals a strong reason for assigning that different meaning. *Travis Bank & Trust v. State*, 660 S.W.2d 851 (Tex. App.--Austin 1983, no writ).

Generally, words and phrases should be given their ordinary, popular, and commonly accepted meanings. *Phillips v. Union Bankers Ins. Co.*, 812 S.W.2d 616 (Tex. App.--Dallas

1991, no writ). Absent a definition in the contract, courts are free to consult an ordinary dictionary. *City of Corpus Christi v. Bayfront Assocs. Ltd.*, 814 S.W.2d 98 (Tex. App.--Corpus Christi 1991, writ denied); *Bybee v. John Hancock Mut. Life Ins. Co.*, 507 S.W.2d 330, 332 (Tex.Civ.App.-- Tyler 1974, writ ref'd n.r.e.) (court consulted Webster's for the meaning of one word and American Heritage for the meaning of another). When, however, contracting parties set forth their own definitions of the terms they employ, courts are not at liberty to disregard such meanings and substitute other meanings. *Fulton v. Texas Farm Bureau Ins. Co.*, 713 S.W.2d 391 (Tex. App.--Dallas 1989, writ denied). When the instrument itself shows that words are being used in a technical or different sense, the court should not base its reading on their ordinary meanings. *City of Corpus Christi, supra*; see also *Amarillo Oil Co. v. Energy-Agri Products, Inc.*, 794 S.W.2d 20 (Tex. 1990) (by failing to insert their own definition of "casinghead gas" parties to lease evidenced their intent to be bound by the statutory definition). Absent a request by either party for a special or technical definition, however, the jury is left free to consider the ordinary meaning of the words in a contract). *Wilson v. John Frantz Co.*, 723 S.W.2d 189 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Wolfe v. Schuster*, 591 S.W.2d 926 (Tex. Civ. App.--Dallas 1979, no writ) (since note was a formal legal document prepared by a lawyer, the technical legal phrases therein were presumed to have been used in their technical sense). Where it is shown that words do not have a special, technical meaning, they should be given their plain and ordinary meaning. *Texas W. Oil & Gas Corp. v. El Paso Gas Transp. Co.*, 631 S.W.2d 521, 522-23 (Tex. App.--El Paso 1982, writ ref'd n.r.e.). Words used in one sense in one part of a contract are, as a general rule, deemed to have been used in the same sense in another part of the contract when there is nothing in the context to indicate otherwise. *Gonzalez v. Mission Am. Ins. Co.*, 795 S.W.2d 734 (Tex. 1990). Strict interpretation and narrow reading of a contract do not

permit a court to disregard the plain meaning of the words used. *Young v. Kilroy Oil Co. of Texas, Inc.*, 673 S.W.2d 236 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

### **Meaning Of Certain Commonly Used Words**

In common usage, the word “**and**” is conjunctive and “**or**” is disjunctive and they are not usually interchangeable. They will, however, be interpreted as synonymous when the context of a contract so requires in order to give effect to its manifest intent. *Aerospatiale Helicopter Corp. v. Universal Health Servs.*, 778 S.W.2d 492 (Tex. App.--Dallas 1989), *cert. denied*, 111 S.Ct. 149 (1990); *Board of Ins. Comm'rs of Tex. v. Guardian Life Ins. Co.*, 142 Tex. 630, 180 S.W.2d 906 (Tex. 1944).

“**Forthwith**” does not mean immediately, but rather as soon as the required tasks may reasonable be performed with diligent exertion. *King v. Texacally Joint Venture*, 690 S.W.2d 618 (Tex. App.--Austin 1985, writ ref'd n.r.e.).

“**Hereby**” indicates an act that is presently occurring. *Pan Am Bank v. Nowland*, 650 S.W.2d 879 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.).

“**Subject to**” are words of limitation and do not create any affirmative contractual obligations. *Rourke v. Garza*, 511 S.W.2d 331 (Tex. Civ. App.--Houston [1st Dist.] 1974), *aff'd*, 530 S.W.2d 794 (Tex. 1975). “Subject to” means “Subservient to” or “limited by.” *Averyt v. Grande, Inc.*, 686 S.W.2d 632 (Tex. App.--Texarkana 1984, writ ref'd n.r.e.), *aff'd*, 717 S.W.2d 891 (Tex. 1986).

“**Notwithstanding anything in this agreement to the contrary**” will cause the clause following to take precedence over any other contract terms. *N.M. Uranium, Inc. v. Moser*, 587 S.W.2d 809 (Tex. Civ. App.--Corpus Christi 1979, writ ref'd n.r.e.).

“**Any**” is equivalent to “every” or “all.” *Branham v. Minear*, 199 S.W.2d 841 (Tex. Civ. App.--Eastland 1947, writ ref'd n.r.e.).

“**Approximately**” means “about” or “in the neighborhood.” *American Weekly v. Houston Printing Corp.*, 134 F.2d 447 (5th Cir. 1943).

Whether the word “**until**” is a word of inclusion or exclusion cannot be determined by any general rule. *BA Commerical Corp. v. Hynutek, Inc.*, 705 S.W.2d 713 (Tex. App.--Dallas 1986, no writ).

“**Profits**” generally means that which remains of gross receipts of a business after all legitimate expenses have been deducted; however meaning may differ depending on language in the contract or the conditions and circumstances surrounding its execution. *Martin v. Davis Constructors, Inc.*, 552 S.W.2d 873 (Tex. Civ. App.--San Antonio 1977, writ ref'd n.r.e.).

“**Default**” means “omission,” “failure,” or “breach.” *Alaniz v. Yates Ford, Inc.*, 790 S.W.2d 38 (Tex. App.--San Antonio 1990, no writ).

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