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UNDER CONSTRUCTION

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Contract Interpretation: How Courts Resolve Ambiguities in Contract Documents

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Many construction disputes arise out of terms set forth in the contract. Unfortunately, many construction contracts were never reviewed by a construction attorney and are not models of clarity. Because many disputes are won or lost depending on the interpretation of the contract terms, it is imperative that those in the construction industry have in their skill set at least a basic knowledge of the rules and law governing contract interpretation.

One key issue in any contractual dispute is whether the court will allow the parties to introduce extrinsic evidence regarding how the subject contract should be interpreted. This evidence could include testimony from witnesses about what they thought the contract meant, e-mails or other correspondence discussing contractual terms, or evidence of how the parties conducted themselves under a separate contract containing similar provisions.

While the law varies from jurisdiction to jurisdiction, generally two competing philosophies exist with respect to when extrinsic evidence may be admitted to explain or interpret the contract. The “four corners” philosophy (also known as the “plain language” approach) typically requires a court or trier of fact to discover an ambiguity *before* allowing the introduction of extrinsic or parol evidence to supplement or explain contractual terms. On the other hand, the “intent of the parties” philosophy (also often referred to as the “Corbin” approach) typically allows the introduction of extrinsic and/or parol evidence *regardless* of whether the underlying contract is determined to be ambiguous. The “four corners” method has been, and continues to be, the most widely accepted method of contract interpretation in the United States. On the other

hand, the “intent of the parties” approach, along with numerous variations, appears to have gained momentum and has been adopted in several states, including Arizona and California.

For example, Arizona has adopted a modified Corbin standard requiring a court to (1) consider the proffered interpretation of the contract; (2) determine if the contractual language is “reasonably susceptible” to the proffered interpretation; and, if so, (3) admit the extrinsic and/or parol evidence for further consideration. This rule appears to adopt a sort of “sliding scale” test with respect to how courts are to evaluate evidence and interpretations. A highly improbable interpretation will require very convincing evidence in order for a court to permit the admission of extrinsic evidence. On the other hand, a much less strict standard will apply to evidence supporting reasonable (or likely) interpretations of contractual language. It also follows that contract terms that can reasonably be interpreted in more than one way (or “ambiguous” terms) will usually lead to more plausible alternatives for interpretation, likely lessening the burden in convincing a court to allow extrinsic evidence. A good construction attorney will evaluate what his or her client’s intent was and then marshal the available evidence to prove that intent. This may be the difference between winning and losing the case, and/or may provide the attorney additional leverage during settlement discussions or mediation proceedings.

In addition, courts and tribunals utilize various well-known rules of contractual interpretation in testing the reasonableness of proffered contractual interpretations. A list of these rules and a brief description of these rules of contract interpretation are set forth below.

A. **The “Whole Agreement” Rule**: Simply put, the “whole agreement” or “harmonize” rule expresses the preference that the interpretation of the contract that renders all portions of the contract valid and enforceable, or in harmony, as opposed to rendering any portion of the contract superfluous, inoperative, or void, is preferred. In the majority of cases, the invocation of the “whole agreement” rule benefits owners over contractors because the rule typically operates to place upon contractors the obligation to perform work when any part or portion of the contract can be construed to require the work.

B. **Specific Versus General Contract Terms**: This well-known and often used rule holds that specific terms and exact terms are given greater weight than general contract language.

C. **Ordinary and Normal Meanings of Contract Language**: Pursuant to this rule, contractual language is to be given its normal and ordinary usage unless circumstances exist to consider alternative meanings.

D. **Technical Meaning Governs Over Ordinary Meaning**: While contractual language is to be given its normal and ordinary meaning, some words have both an ordinary and technical meaning. This rule holds that courts interpreting contracts that contain words that have both ordinary and technical meanings should utilize the technical meaning unless evidence suggests that the parties intended otherwise.

E. ***Expressio Unius Est Exclusio Alterius***: This rule, translated as "inclusion of one is exclusion of the others," typically applies when lists of items or services are included in construction contracts. When disputes arise regarding scopes of work or materials to be provided, this rule can be invoked to demonstrate that the specific inclusion of lists of work and/or materials that are included in the scope of work demonstrates that the parties did not intend for work or materials that were not listed to be included in the scope of work.

F. **Course of Dealing**: If the disputing parties have acted a certain way in interpreting similar language in the past, this "course of dealing" may be used to demonstrate that the parties intended to treat the disputed language in the same way.

G. **Construing Ambiguities Against the Drafter**: Finally, many jurisdictions hold that contract ambiguities are construed against the drafter of the document, especially if the application of other rules of construction fails to resolve the issue.

These rules, as well as rules regarding the admission of extrinsic evidence, vary by jurisdiction, so please consult with your local construction attorney to confirm that these rules apply in your particular jurisdiction.

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