

EXHIBIT B



1 of 1 DOCUMENT

Judicial Council of California Civil Jury Instructions (CACI)

© 2010 by the Judicial Council of California. All rights reserved. No copyright is claimed by the Judicial Council of California to the Table of Contents, Table of Statutes, Table of Cases, Index, or Table of Related Instructions.

© 2010, Matthew Bender & Company, Inc., a member of the LexisNexis Group. No copyright is claimed by Matthew Bender & Company to the jury instructions, Verdict Forms, Directions for Use, Sources and Authority, User's Guide, Life Expectancy Tables, or Disposition Table.

Series 300 CONTRACTS

1-300 CACI 314

314 Interpretation--Disputed Term

[Name of plaintiff] and [name of defendant] dispute the meaning of the following term contained in their contract: [insert text of term].

[Name of plaintiff] claims that the term means [insert plaintiff's interpretation of the term]. [Name of defendant] claims that the term means [insert defendant's interpretation of the term]. [Name of plaintiff] must prove that [his/her/its] interpretation of the term is correct.

In deciding what the terms of a contract mean, you must decide what the parties intended at the time the contract was created. You may consider the usual and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract.

[The following instructions may also help you interpret the terms of the contract:]

New September 2003

Directions for Use

Read any of the following instructions (as appropriate) on tools for interpretation (CACI Nos. 315 through 320) after reading the last bracketed sentence.

Sources and Authority

- Section 200 of the Restatement Second of Contracts provides: "Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning."
- Civil Code section 1636 provides: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

- Civil Code section 1647 provides: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."
- "Juries are not prohibited from interpreting contracts. Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence. But when, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [75 Cal.Rptr.3d 333, 181 P.3d 142], footnote and internal citations omitted.)
- California courts apply an objective test to determine the intent of the parties: "In interpreting a contract, the objective intent, as evidenced by the words of the contract is controlling. We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." (*Lloyd's Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197-1198 [32 Cal.Rptr.2d 144], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 741-743

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.04[2][b], 21.14[2]



1 of 1 DOCUMENT

Judicial Council of California Civil Jury Instructions (CACI)

© 2010 by the Judicial Council of California. All rights reserved. No copyright is claimed by the Judicial Council of California to the Table of Contents, Table of Statutes, Table of Cases, Index, or Table of Related Instructions.

© 2010, Matthew Bender & Company, Inc., a member of the LexisNexis Group. No copyright is claimed by Matthew Bender & Company to the jury instructions, Verdict Forms, Directions for Use, Sources and Authority, User's Guide, Life Expectancy Tables, or Disposition Table.

Series 300 CONTRACTS

1-300 CACI 315

315 Interpretation--Meaning of Ordinary Words

You should assume that the parties intended the words in their contract to have their usual and ordinary meaning unless you decide that the parties intended the words to have a special meaning.

New September 2003

Sources and Authority

- Civil Code section 1644 provides: "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."
- "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. Such intent is to be inferred, if possible, solely from the written provisions of the contract. The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage,' controls judicial interpretation. Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 [71 Cal.Rptr.2d 830, 951 P.2d 399], internal citations omitted.)
- "Generally speaking, words in a contract are to be construed according to their plain, ordinary, popular or legal meaning, as the case may be. However, particular expressions may, by trade usage, acquire a different meaning in reference to the subject matter of a contract. If both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage and parol evidence is admissible to establish the trade usage even though the words in their ordinary or legal meaning are entirely unambiguous. [Citation.]" (*Hayter Trucking Inc. v. Shell Western E & P, Inc.* (1993) 18 Cal.App.4th 1, 15 [22 Cal.Rptr.2d 229].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 745

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.20



1 of 1 DOCUMENT

Judicial Council of California Civil Jury Instructions (CACI)

© 2010 by the Judicial Council of California. All rights reserved. No copyright is claimed by the Judicial Council of California to the Table of Contents, Table of Statutes, Table of Cases, Index, or Table of Related Instructions.

© 2010, Matthew Bender & Company, Inc., a member of the LexisNexis Group. No copyright is claimed by Matthew Bender & Company to the jury instructions, Verdict Forms, Directions for Use, Sources and Authority, User's Guide, Life Expectancy Tables, or Disposition Table.

Series 300 CONTRACTS

1-300 CACI 317

317 Interpretation--Construction of Contract as a Whole

In deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together.

New September 2003

Sources and Authority

- Civil Code section 1641 provides: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."
- "[T]he contract must be construed as a whole and the intention of the parties must be ascertained from the consideration of the entire contract, not some isolated portion." (*County of Marin v. Assessment Appeals Bd. of Marin County* (1976) 64 Cal.App.3d 319, 324-325 [134 Cal.Rptr. 349].)
- Contracts should be construed as a whole, with each clause lending meaning to the others. Contractual language should be interpreted in a manner that gives force and effect to every clause rather than to one that renders clauses nugatory, inoperative, or meaningless. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 473 [80 Cal.Rptr.2d 329]; *Titan Corp. v. Aetna Casualty and Surety Co.* (1994) 22 Cal.App.4th 457, 473-474 [27 Cal.Rptr.2d 476].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 746-747

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.19



1 of 1 DOCUMENT

Judicial Council of California Civil Jury Instructions (CACI)

© 2010 by the Judicial Council of California. All rights reserved. No copyright is claimed by the Judicial Council of California to the Table of Contents, Table of Statutes, Table of Cases, Index, or Table of Related Instructions.

© 2010, Matthew Bender & Company, Inc., a member of the LexisNexis Group. No copyright is claimed by Matthew Bender & Company to the jury instructions, Verdict Forms, Directions for Use, Sources and Authority, User's Guide, Life Expectancy Tables, or Disposition Table.

Series 300 CONTRACTS

1-300 CACI 318

318 Interpretation--Construction by Conduct

In deciding what the words in a contract meant to the parties, you may consider how the parties acted after the contract was created but before any disagreement between the parties arose.

New September 2003

Sources and Authority

- "In construing contract terms, the construction given the contract by the acts and conduct of the parties with knowledge of its terms, and before any controversy arises as to its meaning, is relevant on the issue of the parties' intent." (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1242 [88 Cal.Rptr.2d 777].)
- This instruction covers the "rule of practical construction." This rule "is predicated on the common sense concept that 'actions speak louder than words.' Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent." (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754 [8 Cal.Rptr. 427, 356 P.2d 171].)
- "The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions." (*Kennecott Corp. v. Union Oil Co. of California* (1987) 196 Cal.App.3d 1179, 1189 [242 Cal.Rptr. 403].)
- "[T]his rule is not limited to the joint conduct of the parties in the course of performance of the contract. As stated in Corbin on Contracts, 'The practical interpretation of the contract by one party, evidenced by his words or acts, can be used against him on behalf of the other party, even though that other party had no knowledge of those words or acts when they occurred and did not concur in them. In the litigation that has ensued, one who is maintaining the same interpretation that is evidenced by the other party's earlier words, and acts, can introduce them to support his contention.' We emphasize the conduct of one party to the contract is by no means conclusive evidence as to the meaning of the contract. It is

relevant, however, to show the contract is reasonably susceptible to the meaning evidenced by that party's conduct." (*Southern California Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851 [44 Cal.Rptr.2d 227] , internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 749

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract--Absence of Essential Element*, 13.51



LEXSTAT CACI 3903N

Judicial Council of California Civil Jury Instructions (CACI)

© 2010 by the Judicial Council of California. All rights reserved. No copyright is claimed by the Judicial Council of California to the Table of Contents, Table of Statutes, Table of Cases, Index, or Table of Related Instructions.

© 2010, Matthew Bender & Company, Inc., a member of the LexisNexis Group. No copyright is claimed by Matthew Bender & Company to the jury instructions, Verdict Forms, Directions for Use, Sources and Authority, User's Guide, Life Expectancy Tables, or Disposition Table.

Series 3900 DAMAGES

2-3900 CACI 3903N

3903N Lost Profits (Economic Damage)

[Insert number, e.g., "13."] **Lost profits.**

To recover damages for lost profits, [name of plaintiff] must prove it is reasonably certain [he/she/it] would have earned profits but for [name of defendant]'s conduct.

To decide the amount of damages for lost profits, you must determine the gross amount [name of plaintiff] would have received but for [name of defendant]'s conduct and then subtract from that amount the expenses [including the value of the [specify categories of evidence, such as labor/materials/rents/all expenses/interest of the capital employed]] [name of plaintiff] would have had if [name of defendant]'s conduct had not occurred.

The amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

Directions for Use

This instruction is not intended for personal injury cases. Instead, use CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*. (See *Pretzer v. California Transit Co.* (1930) 211 Cal. 202, 207-208 [294 P. 382].)

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

Sources and Authority

- "The measure of damages in this state for the commission of a tort, as provided by statute, is that amount which will compensate the plaintiff for all detriment sustained by him as the proximate result of

the defendant's wrong, regardless of whether or not such detriment could have been anticipated by the defendant. It is well established in California, moreover, that such damages may include loss of anticipated profits where an established business has been injured." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 Cal.App.2d 675, 702 [39 Cal.Rptr. 64] , internal citations omitted.)

- "[E]vidence of lost profits must be unspeculative and in order to support a lost profits award the evidence must show 'with reasonable certainty both their occurrence and the extent thereof.' " (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907 [215 Cal.Rptr. 679, 701 P.2d 826] , internal citation omitted.)

- "It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits." (*S. C. Anderson, Inc. v. Bank of America N.T. & S.A.* (1994) 24 Cal.App.4th 529, 536 [30 Cal.Rptr.2d 286] , internal citations omitted.)

- "Damages for loss of profits may be denied to an 'unestablished' or new business as being too uncertain and speculative if they cannot be calculated with reasonable certainty. 'The ultimate test is whether there has been "operating experience sufficient to permit a reasonable estimate of probable income and expense" ... or, ... "anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." ' " (*Maggio, Inc. v. United Farm Workers of America, AFL-CIO* (1991) 227 Cal.App.3d 847, 870 [278 Cal.Rptr. 250] , internal citations omitted.)

- The rule denying profits to an unestablished business "is, however, 'not a hard and fast one.' The issue is, rather, whether the damages can be calculated with reasonable certainty." (*S. Jon Kreedman & Co. v. Meyers Bros. Parking-Western Corp.* (1976) 58 Cal.App.3d 173, 184-185 [130 Cal.Rptr. 41] , internal citations omitted.)

- "Lost profits to an established business may be recovered if their extent and occurrence can be ascertained with reasonable certainty; once their existence has been so established, recovery will not be denied because the amount cannot be shown with mathematical precision. Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. In either case, recovery is limited to net profits." (*Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 161-162 [190 Cal.Rptr. 815] , internal citations omitted.)

- "If the occurrence and extent of anticipated profits is shown by evidence of reasonable reliability damages are recoverable; uncertainty as to the amount of damages is not fatal; uncertainties are to be resolved against [defendant]." (*Aronowicz v. Nalley's, Inc.* (1972) 30 Cal.App.3d 27, 40, fn. 11 [106 Cal.Rptr. 424] , internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1729

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.12, 52.37 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)