

11 Williston on Contracts § 32:14 (4th ed.)

Williston on Contracts | November 2018 Update

Chapter 32. Rules of Interpretation

III. Secondary Rules

§ 32:14. Practical interpretation or construction

[References](#) | [Correlation Table](#)

West's Key Number Digest

- West's Key Number Digest, [Contracts](#) 🔑 143, 150

Legal Encyclopedias

- [Am. Jur. 2d, Contracts §§ 393, 394](#)
- [C.J.S., Contracts § 427](#)

Given that the purpose of judicial interpretation is to ascertain the parties' intentions,¹ the parties' own practical interpretation of the contract—how they actually acted, thereby giving meaning to their contract during the course of performing it—can be an important aid to the court.² Thus, courts give great weight to the parties' practical interpretation.³

Nonetheless, the parties' conduct, no matter how probative in the abstract, will not be considered by many and perhaps most courts unless the contract is ambiguous.⁴ Other courts, as well as the Uniform Commercial Code and the Restatement Second, permit consideration of the parties' conduct regardless of the existence of any ambiguity.⁵ Indeed, sometimes it is difficult to determine within a given jurisdiction whether an ambiguity must exist before the parties' conduct may be considered.⁶ Once it is determined in a particular jurisdiction that the underlying requirements have been met so as to permit evidence of the parties' conduct, their own interpretation "may be shown by acts of the parties as well as precise words."⁷ It has been stated as well that the principle of practical interpretation or construction is equally applicable, if not more so, to an oral contract.⁸

Litigants frequently assert an interpretation of a contract different from that suggested by their conduct or words during the course of their performance of the contract. The reasons for their so doing are too varied to permit classification, although some, such as a change of management⁹ or technological developments,¹⁰ are apparent. Whatever the reason, the courts will still give great weight to the parties' contemporaneous and subsequent practical interpretation,¹¹ unless it is contrary to the plain meaning of the contract,¹² or clearly one sided.¹³

Even when the terms of a contract are clear and unambiguous, the subsequent conduct of the parties may evidence a modification of their contract. Accordingly, while their conduct may not be used to support an interpretation contrary to the plain meaning of the contract, it may nonetheless be used to prove the existence of a modification of the original contract terms.¹⁴

Conduct which demonstrates an intent to be bound by an agreement may also be admitted to prove the terms of a contract that may have originally been too vague for enforcement. Thus, when the parties' actual performance supplies the requisite certainty to the agreement, the courts will adopt the parties' interpretation and enforce the agreement.¹⁵

On this basis, an employment contract that would have been unenforceable for want of mutuality was held enforceable by the parties' performance.¹⁶ Likewise, on the basis of the parties' conduct, a court enforced a contract term that the defendant contended had never been explicitly made a part of the parties' contract.¹⁷ However, it has also been said that while courts may look to the past practice of the parties to give definition and meaning to language in an agreement which is ambiguous, past practice is merely an interpretive tool and cannot be used to create a contractual right independent of some express source in the underlying agreement.¹⁸

The conduct of the parties, then, provides nearly conclusive evidence of the parties' contractual intentions. This is particularly true when the contract is ambiguous. Even if the parties' conduct cannot be used to determine the meaning of a contract, it may be used to show the existence of a modification to the contract and, under certain circumstances, may be used to establish the existence of a particular contract term or the existence of a contract itself.

CUMULATIVE SUPPLEMENT

Cases:

Once it is determined in a particular jurisdiction that the underlying requirements have been met so as to permit evidence of the parties' conduct, their own interpretation may be shown by acts of the parties as well as precise words. [Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.](#), 773 F.3d 110 (2d Cir. 2014) (quoting text).

Typically, when different terms are employed within the same writing, different meanings are intended. [Lexington Ins. Co. v. Lexington Healthcare Group, Inc.](#), 309 Conn. 1, 68 A.3d 1121 (2013), opinion superseded on reconsideration, 311 Conn. 29, 84 A.3d 1167 (2014).

Where an agreement is ambiguous, the courts will consider the parties' practical construction of the contract as evidence of their intention and as controlling weight in determining the contract's interpretation. [Matter of County of Atlantic](#), 230 N.J. 237, 166 A.3d 1112 (2017).

The practical construction of an agreement to be derived from the acts and conduct of the parties is an available tool only when ambiguity appears to be present. [Hensley v. State Farm Fire and Casualty Company](#), 2017 OK 57, 398 P.3d 11 (Okla. 2017).

The acts of the parties in relation to a contract establish a practical construction of it. [Robinson-Huntley v. George Washington Carver Mut. Homes Ass'n, Inc.](#), 287 Va. 425, 756 S.E.2d 415 (2014).

[END OF SUPPLEMENT]

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Footnotes

- 1 See § 32:2.
- 2 **Federal Circuit**
[Daewoo Engineering and Const. Co., Ltd. v. U.S.](#), 557 F.3d 1332 (Fed. Cir. 2009) (quoting text; applying practical interpretation to construe the federal Contract Disputes Act, 41 U.S.C. §§ 601 et seq. and determine whether a "claim" had been filed under the Act)
[SiRF Technology, Inc. v. International Trade Com'n](#), 601 F.3d 1319 (Fed. Cir. 2010) (quoting text; using the parties' conduct to conclude that no other owner of a patented device existed, so that a standing requirement was met)
- 3 **First Circuit**
[Jamesbury Corp. v. Worcester Valve Co.](#), 318 F. Supp. 1 (D. Mass. 1970), judgment aff'd, 443 F.2d 205 (1st Cir. 1971) (citing text)
Second Circuit
[IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp.](#), 26 F.3d 370 (2d Cir. 1994) (citing text)
[Crescent Oil and Shipping Services, Ltd. v. Phibro Energy, Inc.](#), 929 F.2d 49, 13 U.C.C. Rep. Serv. 2d 977 (2d Cir. 1991) (dissenting opinion citing text)
[Ocean Transport Line, Inc. v. American Philippine Fiber Industries, Inc.](#), 743 F.2d 85 (2d Cir. 1984)
[Globe Transport & Trading \(U.K.\) Ltd. v. Guthrie Latex, Inc.](#), 722 F. Supp. 40 (S.D. N.Y. 1989) (citing text)
[Gerlach v. The Horn & Hardart Co.](#), 683 F. Supp. 342 (S.D. N.Y. 1988) (citing text)
[Dow Chemical Co. v. S. S. Giovanella D'Amico](#), 297 F. Supp. 699 (S.D. N.Y. 1969) (citing text)
[In re Macmillan](#), 204 B.R. 378 (Bankr. S.D. N.Y. 1997) (citing text)
Third Circuit
[Capitol Bus Co. v. Blue Bird Coach Lines, Inc.](#), 478 F.2d 556 (3d Cir. 1973) (footnote quoting text)
[Atlas Trading Corporation v. S. H. Grossman, Inc.](#), 169 F.2d 240 (C.C.A. 3d Cir. 1948)
[Cinema Patents Co. v. Craft Film Laboratories](#), 64 F.2d 42 (C.C.A. 3d Cir. 1933)
[Philip Morris Inc. v. Pittsburgh Penguins, Inc.](#), 589 F. Supp. 912 (W.D. Pa. 1983), judgment aff'd, 738 F.2d 424 (3d Cir. 1984) (citing text)
[Indian Coffee Corp. v. Procter & Gamble Co.](#), 482 F. Supp. 1098 (W.D. Pa. 1980), judgment aff'd, 752 F.2d 891, 17 Fed. R. Evid. Serv. 319 (3d Cir. 1985) (citing text)
Fourth Circuit
[Gurney Industries, Inc. v. St. Paul Fire & Marine Ins. Co.](#), 467 F.2d 588, 11 U.C.C. Rep. Serv. 261 (4th Cir. 1972) (applying North Carolina law)
[Nalle v. First Nat. Bank of Baltimore](#), 412 F.2d 881 (4th Cir. 1969) (citing text)
Fifth Circuit
[Pennzoil Co. v. F.E.R.C.](#), 645 F.2d 360, 31 U.C.C. Rep. Serv. 1242 (5th Cir. 1981)
[Mapco Inc. v. Pioneer Corp.](#), 615 F.2d 297 (5th Cir. 1980) (citing text)
[Vans Agnew v. Fort Myers Drainage Dist.](#), 69 F.2d 244 (C.C.A. 5th Cir. 1934)
Sixth Circuit
[Lincoln Elec. Co. v. St. Paul Fire and Marine Ins. Co.](#), 210 F.3d 672, 41 U.C.C. Rep. Serv. 2d 753, 2000 FED App. 0152P (6th Cir. 2000) (considering the distinction between a "course of conduct" and either a "course of performance" or "course of dealing.")
[A. L. Pickens Co., Inc. v. Youngstown Sheet & Tube Co.](#), 650 F.2d 118 (6th Cir. 1981)

Seventh Circuit

[Murray v. Chicago, St. P., M. & O. Ry. Co.](#), 65 F.2d 312 (C.C.A. 7th Cir. 1933)

Eighth Circuit

[Wheeler v. Fidelity & Deposit Co. of Maryland](#), 63 F.2d 562 (C.C.A. 8th Cir. 1933)

Ninth Circuit

[Cordingley v. Allied Van Lines, Inc.](#), 563 F.2d 960 (9th Cir. 1977)

[Acheson v. Falstaff Brewing Corp.](#), 523 F.2d 1327 (9th Cir. 1975)

Tenth Circuit

Cf: [Jennings v. General Medical Corp.](#), 604 F.2d 1300 (10th Cir. 1979) (a court must be extremely careful in considering the parties' post-contract conduct as an aid in interpretation, particularly when that conduct consists of the actions of one party that are not concurred in by the other)

[Denver Metropolitan Ass'n of Plumbing, Heating, Cooling Contractors v. Journeyman Plumbers & Gas Fitters Local No. 3 & Pipefitters Local No. 208](#), 586 F.2d 1367 (10th Cir. 1978)

Eleventh Circuit

[Noell v. American Design, Inc., Profit Sharing Plan](#), 764 F.2d 827 (11th Cir. 1985) (quoting text)

D.C. Circuit

[Tymshare, Inc. v. Covell](#), 727 F.2d 1145 (D.C. Cir. 1984)

Federal Circuit

[Blinderman Const. Co., Inc. v. U.S.](#), 695 F.2d 552 (Fed. Cir. 1982)

Court of Claims

[Merritt-Chapman & Scott Corp. v. U. S.](#), 178 Ct. Cl. 883, 1967 WL 8814 (1967) (citing text)

[Northbridge Electronics, Inc. v. U. S.](#), 175 Ct. Cl. 426, 1966 WL 8866 (1966) (citing text)

Ala.

[University Federal Credit Union v. Grayson](#), 878 So. 2d 280 (Ala. 2003)

[Alfa Life Ins. Corp. v. Johnson](#), 822 So. 2d 400 (Ala. 2001)

[Conway v. Andrews](#), 286 Ala. 28, 236 So. 2d 687 (1970)

Ariz.

[Associated Students of University of Arizona v. Arizona Bd. of Regents](#), 120 Ariz. 100, 584 P.2d 564 (Ct. App. Div. 2 1978)

Ark.

[Sternberg v. Snow King Baking Powder Co.](#), 186 Ark. 1161, 57 S.W.2d 1057 (1933)

[Synergy Gas Corp. v. H.M. Orsburn & Son, Inc.](#), 15 Ark. App. 128, 689 S.W.2d 594 (1985)

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[King v. Moore](#), 220 Cal. 449, 31 P.2d 377 (1934)

[Lemat Corp. v. American Basketball Assn.](#), 51 Cal. App. 3d 267, 124 Cal. Rptr. 388 (1st Dist. 1975)

[Bares v. Quincy Sanitary District](#), 128 Cal. App. 2d 530, 275 P.2d 827 (3d Dist. 1954)

Colo.

[Concerning Application for Water Rights of Town of Estes Park in Larimer County, In South Platte River and Its Tributaries v. Northern Colorado Water Conservancy Dist.](#), 677 P.2d 320 (Colo. 1984)

Conn.

[19 Perry Street, LLC v. Unionville Water Co.](#), 294 Conn. 611, 987 A.2d 1009 (2010)

[Connecticut Co. v. Division 425 of Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emp. of America](#), 147 Conn. 608, 164 A.2d 413 (1960)

[W. G. Maltby, Inc. v. Associated Realty Co.](#), 114 Conn. 283, 158 A. 548 (1932)

[Gulash v. Stylarama, Inc.](#), 33 Conn. Supp. 108, 364 A.2d 1221, 20 U.C.C. Rep. Serv. 603 (C.P. 1975)

Del.

[Artesian Water Co. v. State, Dept. of Highways and Transp.](#), 330 A.2d 441 (Del. 1974)

Fla.

[Ace Elec. Supply Co. v. Terra Nova Elec., Inc.](#), 288 So. 2d 544 (Fla. 1st DCA 1973)

[Lalow v. Codomo](#), 101 So. 2d 390 (Fla. 1958)

Haw.

[In re Taxes, Aiea Dairy, Ltd.](#), 46 Haw. 292, 46 Haw. 403, 380 P.2d 156 (1963) (citing text)

Idaho

Commercial Credit Corp. v. S & E Enterprises, Inc., 97 Idaho 441, 546 P.2d 396 (1976)

Ill.

Gillett v. Teel, 272 Ill. 106, 111 N.E. 722 (1916)

Clark v. University of Illinois, 103 Ill. App. 261, 1902 WL 3994 (3d Dist. 1902)

Ind.

Kerfoot v. Kessener, 227 Ind. 58, 84 N.E.2d 190 (1949)

Iowa

Kroblin v. RDR Motels, Inc., 347 N.W.2d 430 (Iowa 1984)

State ex rel. State Highway Commission v. City of Davenport, 219 N.W.2d 503 (Iowa 1974) (citing text)

Porter v. Iowa Power & Light Co., 217 N.W.2d 221 (Iowa 1974) (citing text)

Kan.

Cline v. Angle, 216 Kan. 328, 532 P.2d 1093 (1975)

Missouri Pac. R. Co. v. Chicago Great Western R. Co., 137 Kan. 217, 19 P.2d 484 (1933)

City of Baxter Springs v. Baxter Springs Light & Power Co., 64 Kan. 591, 68 P. 63 (1902)

Me.

Lewiston & A.R. Co. v. Grand Trunk Ry. Co., 97 Me. 261, 54 A. 750 (1903)

Md.

Eisenberg v. Air Conditioning, Inc., 225 Md. 324, 170 A.2d 743 (1961) (citing text)

James F. Powers Foundry Co. v. Miller, 166 Md. 590, 171 A. 842 (1934)

Mass.

Pittsfield & N.A.R. Corp. v. Boston & A.R. Co., 260 Mass. 390, 157 N.E. 611 (1927)

Inhabitants of Town of Southborough v. Boston & Worcester St. Ry. Co., 250 Mass. 234, 145 N.E. 422 (1924)

N. J. Gendron Lumber Co. v. Great Northern Homes, Inc., 8 Mass. App. Ct. 411, 395 N.E.2d 457, 27 U.C.C. Rep. Serv. 1042 (1979) (citing text)

Lembo v. Waters, 1 Mass. App. Ct. 227, 294 N.E.2d 566 (1973)

Mich.

Detroit Greyhound Emp. Federal Credit Union v. Aetna Life Ins. Co., 381 Mich. 683, 167 N.W.2d 274 (1969)

Minn.

Donnay v. Boulware, 275 Minn. 37, 144 N.W.2d 711 (1966)

Koch v. Han-Shire Investments, Inc., 273 Minn. 155, 140 N.W.2d 55 (1966) (citing text)

Miss.

Warren v. Derivaux, 996 So. 2d 729 (Miss. 2008)

Hessig-Ellis Drug Co. v. Parks, 150 Miss. 322, 116 So. 435 (1928)

Mo.

TAP Pharmaceutical Products Inc. v. State Bd. of Pharmacy, 238 S.W.3d 140 (Mo. 2007)

Celatron, Inc. v. Cavic Engineering Co., 432 S.W.2d 794 (Mo. Ct. App. 1968)

C.D. Smith Drug Co. v. Saunders, 70 Mo. App. 221, 1897 WL 1831 (1897)

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Ophus v. Fritz, 2000 MT 251, 301 Mont. 447, 11 P.3d 1192 (2000)

Rentfro v. Dettwiler, 95 Mont. 391, 26 P.2d 992 (1933)

Neb.

Strayer v. City of Omaha, 209 Neb. 734, 311 N.W.2d 510 (1981)

Nev.

Lorenz v. Beltio, Ltd., 114 Nev. 795, 963 P.2d 488 (1998)

Lagrange Const., Inc. v. Kent Corp., 88 Nev. 271, 496 P.2d 766 (1972)

N.J.

Corn Exchange Nat. Bank & Trust Co. of Philadelphia v. Taubel, 113 N.J.L. 605, 175 A. 55 (N.J. Ct. Err. & App. 1934) (citing text; the court said: "The interpretation of the contract given by the parties themselves, as shown by their conduct, such as their acts in partial performance, will be adopted by the courts. ... This is termed a secondary rule of construction. Its object is to ascertain the true meaning of

the words in a written contract, about which there is doubt. ... The practical construction thus given by the parties is a clue to their intention, and is admissible for this purpose solely, where the language employed permits of more than one construction. The most recent statement of the rule is that if the conduct of the parties, subsequent to a manifestation of intention, indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation.")

American Exp. Co. v. Rona Travel Service, Inc., 77 N.J. Super. 566, 187 A.2d 206 (Ch. Div. 1962) (citing text)

N.M.

Manuel Lujan Ins., Inc. v. Jordan, 100 N.M. 573, 673 P.2d 1306 (1983)

Schultz & Lindsay Const. Co. v. State, 83 N.M. 534, 494 P.2d 612 (1972) (citing text)

N.Y.

208-234 Falls St. Inc. v. New York Cent. R. Co., 21 N.Y.2d 172, 287 N.Y.S.2d 22, 234 N.E.2d 205 (1967) (citing text)

Marks v. Cowdin, 226 N.Y. 138, 123 N.E. 139 (1919)

Mobil Oil Corp. v. Fraser, 55 A.D.2d 824, 389 N.Y.S.2d 954 (4th Dep't 1976) (citing text)

Susskind v. 1136 Tenants Corp., 43 Misc. 2d 588, 251 N.Y.S.2d 321 (N.Y. City Civ. Ct. 1964) (citing text)

McMartin v. General Agents' Policyholders Service Office, Inc., 15 Misc. 2d 1071, 186 N.Y.S.2d 550 (Sup 1959) (the court "applying a well-settled rule of law that the practical construction of an arrangement between parties may be determined by what they themselves have done pursuant thereto")

N.C.

Town of Scotland Neck v. Western Sur. Co., 301 N.C. 331, 271 S.E.2d 501 (1980)

Ohio

St. Marys v. Auglaize Cty. Bd. of Commrs., 115 Ohio St. 3d 387, 2007-Ohio-5026, 875 N.E.2d 561 (2007)

Or.

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Pa.

Fenestra, Inc. v. John McShain, Inc., 433 Pa. 137, 248 A.2d 835 (1969)

S.C.

Langston v. Niles, 265 S.C. 445, 219 S.E.2d 829 (1975)

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Tenn.

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Bailey v. Brister, 49 Tenn. App. 191, 353 S.W.2d 564 (1961) (quoting text)

Tex.

Henry v. Powers, 447 S.W.2d 738 (Tex. Civ. App. Houston 1st Dist. 1969)

Vt.

Kopper v. Fulton, 71 Vt. 211, 44 A. 92 (1899)

W. Va.

Zimmerer v. Romano, 223 W. Va. 769, 679 S.E.2d 601 (2009)

Ramage v. South Penn Oil Co., 94 W. Va. 81, 118 S.E. 162, 31 A.L.R. 1509 (1923)

Wyo.

Cf. *Hunter v. Reece*, 2011 WY 97, 253 P.3d 497 (Wyo. 2011) (citing Williston)

Sunburst Exploration, Inc. v. Jensen, 635 P.2d 822 (Wyo. 1981)

First Nat. Bank v. Ennis, 44 Wyo. 497, 14 P.2d 201 (1932)

Fifth Circuit

Mapco Inc. v. Pioneer Corp., 615 F.2d 297 (5th Cir. 1980) (a person's construction of his own language in a contract constitutes the highest evidence of his intentions, but it can only be considered if the contract is ambiguous or doubtful and the rule does not apply to any agreement that is free of ambiguity)

Sixth Circuit

[A. L. Pickens Co., Inc. v. Youngstown Sheet & Tube Co.](#), 650 F.2d 118 (6th Cir. 1981) (applying Kentucky law; when a contract is reasonably subject to more than one interpretation, the courts will examine the parties' contemporaneous construction of the contract)

Ninth Circuit

[United Steelworkers of America, AFL-CIO v. Northwest Steel Rolling Mills, Inc.](#), 324 F.2d 479 (9th Cir. 1963) (citing text)

D.C. Circuit

[Cities of Bethany, Bushnell, Cairo, Carmi, Casey, Flora, Greenup, Marshall, Metropolis, Newton, Rantoul, and Roodhouse, Illinois v. F.E.R.C.](#), 727 F.2d 1131 (D.C. Cir. 1984) (citing text)

Ala.

[Alfa Life Ins. Corp. v. Johnson](#), 822 So. 2d 400 (Ala. 2001) (the intent of the parties to a contract controls its meaning, with the words of the contract the primary determinant of that intent; however, when a contract is ambiguous, so that a court must go beyond the four corners of the agreement, the courts must consider the "practical construction" of the contract, that is, how the parties themselves understood the contract, as measured by how they performed under it)

[Quick v. Campbell](#), 412 So. 2d 264 (Ala. 1982) (when a contract is subject to more than one meaning and thus is ambiguous, the courts may look to the parties' conduct, the contract provisions and its subject matter in order to ascertain the parties' intent and give the contract a reasonable construction to avoid unconscionable results)

Cal.

[Sterling v. Taylor](#), 40 Cal. 4th 757, 55 Cal. Rptr. 3d 116, 152 P.3d 420 (2007) (quoting Williston)

Conn.

[Tinty v. Profita](#), 1992 WL 119199 (Conn. Super. Ct. 1992) (citing text)

Del.

[Hibbert v. Hollywood Park, Inc.](#), 457 A.2d 339 (Del. 1983) (citing text)

Ill.

[Lenzi v. Morkin](#), 103 Ill. 2d 290, 82 Ill. Dec. 644, 469 N.E.2d 178 (1984) (absent an ambiguity, the parties' intention must be interpreted solely through the language of the agreement, and not by the parties' own construction of the agreement)

Kan.

[Arkansas Louisiana Gas Co., A Div. of Arkla, Inc. v. State](#), 234 Kan. 797, 675 P.2d 369 (1984)

Ky.

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Md.

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Mass.

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Mich.

[Ditzik v. Schaffer Lumber Co.](#), 139 Mich. App. 81, 360 N.W.2d 876 (1984) (when contract is clear and unambiguous, contract language cannot be altered by prior course of performance)

Mont

[Brown v. Griffin](#), 150 Mont. 498, 436 P.2d 695 (1968) (the language of a contract governs its interpretation unless the language is doubtful or ambiguous in which case the conduct of parties under contract is one of best indications of their true intent)

N.J.

[Corn Exchange Nat. Bank & Trust Co. of Philadelphia v. Taubel](#), 113 N.J.L. 605, 175 A. 55 (N.J. Ct. Err. & App. 1934)

N.Y.

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Ohio

[St. Marys v. Auglaize Cty. Bd. of Commrs.](#), 115 Ohio St. 3d 387, 2007-Ohio-5026, 875 N.E.2d 561 (2007)

Okla.

[Mercury Inv. Co. v. F.W. Woolworth Co.](#), 1985 OK 38, 706 P.2d 523 (Okla. 1985) (courts may consider the parties' practical construction only in the event of an ambiguity in the agreement)

Tex.

[East Montgomery County Municipal Utility Dist. No. 1 v. Roman Forest Consol. Municipal Utility Dist.](#), 620 S.W.2d 110 (Tex. 1981) (the parties' conduct is ordinarily immaterial in determining the meaning of an unambiguous contract)

Wash.

[Green v. Lupo](#), 32 Wash. App. 318, 647 P.2d 51 (Div. 2 1982) (when a contract is unambiguous, the court may not consider other matters, but when it is ambiguous, the court may consider extrinsic matters including the parties' conduct)

W. Va.

[Cummins Engines of West Virginia, Inc. v. Park Corp.](#), 170 W. Va. 704, 296 S.E.2d 345 (1982)

Wis.

[Hortman v. Otis Erecting Co., Inc.](#), 108 Wis. 2d 456, 322 N.W.2d 482 (Ct. App. 1982) (when contract terms are plain and unambiguous, the court must construe the contract as it stands even though the parties may have interpreted it differently)

[A. J. Sweet of La Crosse, Inc. v. Industrial Commission](#), 16 Wis. 2d 98, 114 N.W.2d 141 (1962) (citing text)

Wyo.

[Hunter v. Reece](#), 2011 WY 97, 253 P.3d 497 (Wyo. 2011) (citing Williston)

[Chandler-Simpson, Inc. v. Gorrell](#), 464 P.2d 849 (Wyo. 1970) (because the parties' contract was not ambiguous, uncertain, or indefinite, it was not subject to a construction based on the acts of the parties)

U.C.C. § 1-103 [Rev].

U.C.C. § 2-208.

Restatement Second, Contracts § 202(4).

Alaska

[Leisnoi, Inc. v. Stratman](#), 956 P.2d 452 (Alaska 1998)

Mo.

[Phipps v. School Dist. of Kansas City](#), 645 S.W.2d 91, 9 Ed. Law Rep. 413 (Mo. Ct. App. W.D. 1982) (citing Williston and Restatement Second, Contracts §§ 200, 202)

Neb.

[Professional Service Industries, Inc. v. J.P. Const., Inc.](#), 241 Neb. 862, 491 N.W.2d 351 (1992) (when construction of a contract is necessary, the court may consider the parties' conduct in performing the contract to ascertain their intent; after examining the parties' conduct, the court found the contract to be unambiguous)

N.D.

[Matter of Jawaski](#), 446 N.W.2d 258 (N.D. 1989) (interpreting a trust document, the court looked to the parties' conduct without regard to the existence of an ambiguity; indeed, the petitioner contended that the document was unambiguous and that extrinsic evidence had been erroneously admitted by the trial court; the court ruled: "We are not persuaded that the trial court erred in allowing extrinsic evidence as to the amount of money that Jawaski intended to place in trust. 'It is axiomatic that the surrounding circumstances from which a contract stems are to be considered when interpreting its provisions.' ... 'It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context.' Restatement Second, Contracts § 212, comment b (1981) "'The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning.' Restatement Second, Contracts § 202, comment g (1981). Immediately after executing the trust instrument, Jawaski and the Trustees 'went direct to the bank,' where Jawaski handed a bank employee the certificates of deposit listed in Schedule A, purchased a certificate of deposit for \$90,000 and placed the rest of the money in a new checking account. Jawaski and the Trustees left the bank and went directly to Jawaski's house, where Jawaski instructed the

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Trustees to issue \$5,000 checks from that account to each of his seven children other than the primary beneficiaries of the trust. The checks were drawn and Jawaski placed them in Christmas cards, which were then mailed. From our review of the evidence, we have not been left with a definite and firm conviction that the trial court was mistaken in finding that Jawaski intended to place only \$90,000 in trust, and that finding is, therefore not clearly erroneous. Distribution of the funds in excess of \$90,000 to the secondary beneficiaries of the trust was permissible, because Jawaski intended to place only \$90,000 in trust.").

Or.

[Bruckman v. Breitenbush Hot Springs, Inc.](#), 272 Or. 1, 534 P.2d 971 (1975) (conduct inconsistent with a declared agreement is a significant, and sometimes controlling, factor in interpreting the agreement)

Wash.

[Stender v. Twin City Foods, Inc.](#), 82 Wash. 2d 250, 510 P.2d 221 (1973) (the court examined the parties' conduct even though it appeared to treat the contract as unambiguous)

[Jacoby v. Grays Harbor Chair & Mfg. Co.](#), 77 Wash. 2d 911, 468 P.2d 666 (1970) (the parties' conduct may be considered only when an ambiguity exists)

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Pa.

[Westinghouse Elec. Co. v. Murphy, Inc.](#), 425 Pa. 166, 228 A.2d 656 (1967)

See also:

Second Circuit

[Tyler v. New York Tel. Co.](#), 192 F. Supp. 52 (S.D. N.Y. 1961)

Third Circuit

[Ludwig Honold Mfg. Co. v. Fletcher](#), 405 F.2d 1123 (3d Cir. 1969) (citing text)

[Cinema Patents Co. v. Craft Film Laboratories](#), 64 F.2d 42 (C.C.A. 3d Cir. 1933)

Fifth Circuit

[Vans Agnew v. Fort Myers Drainage Dist.](#), 69 F.2d 244 (C.C.A. 5th Cir. 1934)

Seventh Circuit

[Murray v. Chicago, St. P., M. & O. Ry. Co.](#), 65 F.2d 312 (C.C.A. 7th Cir. 1933)

Eighth Circuit

[Wheeler v. Fidelity & Deposit Co. of Maryland](#), 63 F.2d 562 (C.C.A. 8th Cir. 1933)

Ninth Circuit

[Timber Conservation Co. v. U.S.](#), 208 F. Supp. 626 (D. Or. 1962) (citing text)

Tenth Circuit

[C. H. Coddling and Sons v. Armour & Co.](#), 404 F.2d 1 (10th Cir. 1968) (citing text)

Ala.

[Alfa Life Ins. Corp. v. Johnson](#), 822 So. 2d 400 (Ala. 2001)

Alaska

[Munn v. Thornton](#), 956 P.2d 1213 (Alaska 1998) (past dealings and business customs)

Ark.

[Sternberg v. Snow King Baking Powder Co.](#), 186 Ark. 1161, 57 S.W.2d 1057 (1933)

Cal.

[King v. Moore](#), 220 Cal. 449, 31 P.2d 377 (1934)

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Bares v. Quincy Sanitary District, 128 Cal. App. 2d 530, 275 P.2d 827 (3d Dist. 1954)

Colo.

Pepcol Mfg. Co. v. Denver Union Corp., 687 P.2d 1310 (Colo. 1984) (citing text)

Conn.

Panaroni v. Johnson, 158 Conn. 92, 256 A.2d 246 (1969) (citing text)

W. G. Maltby, Inc. v. Associated Realty Co., 114 Conn. 283, 158 A. 548 (1932)

Del.

Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc., 297 A.2d 28 (Del. 1972) (citing text)

Fla.

South Florida Beverage Corp. v. Figueredo, 409 So. 2d 490 (Fla. 3d DCA 1981) (citing text)

Lalow v. Codomo, 101 So. 2d 390 (Fla. 1958)

Ill.

Gillett v. Teel, 272 Ill. 106, 111 N.E. 722 (1916)

Kan.

Missouri Pac. R. Co. v. Chicago Great Western R. Co., 137 Kan. 217, 19 P.2d 484 (1933)

Me.

Lewiston & A.R. Co. v. Grand Trunk Ry. Co., 97 Me. 261, 54 A. 750 (1903)

Md.

James F. Powers Foundry Co. v. Miller, 166 Md. 590, 171 A. 842 (1934)

Mass.

Pittsfield & N.A.R. Corp. v. Boston & A.R. Co., 260 Mass. 390, 157 N.E. 611 (1927)

Minn.

Effengham v. Pesch, 182 Minn. 586, 235 N.W. 278 (1931)

Miss.

Hessig-Ellis Drug Co. v. Parks, 150 Miss. 322, 116 So. 435 (1928)

Mo.

Wentzel v. Lake Lotawana Development Co., 226 Mo. App. 960, 48 S.W.2d 185 (1932)

C.D. Smith Drug Co. v. Saunders, 70 Mo. App. 221, 1897 WL 1831 (1897)

Mont

Rentfro v. Dettwiler, 95 Mont. 391, 26 P.2d 992 (1933)

N.J.

American Exp. Co. v. Rona Travel Service, Inc., 77 N.J. Super. 566, 187 A.2d 206 (Ch. Div. 1962)

N.M.

Schultz & Lindsay Const. Co. v. State, 83 N.M. 534, 494 P.2d 612 (1972)

N.Y.

Mimnorm Realty Corp. v. Sunrise Federal Sav. and Loan Ass'n, 83 A.D.2d 936, 442 N.Y.S.2d 780 (2d Dep't 1981) (citing text)

In re Field's Will, 11 A.D.2d 774, 204 N.Y.S.2d 947 (2d Dep't 1960) (the court said: "'The interpretation given by the parties themselves, as shown by their acts, will be adopted by the Court, and to this end, not only the acts but the declarations of the parties may be considered.' ... 'The courts in determining the obligations of a contract should, when possible, apply the same measure as the parties have applied'")

Vogel v. Pathe Exchange, 234 A.D. 313, 254 N.Y.S. 881 (2d Dep't 1932)

Susskind v. 1136 Tenants Corp., 43 Misc. 2d 588, 251 N.Y.S.2d 321 (N.Y. City Civ. Ct. 1964) (citing text)

McMartin v. General Agents' Policyholders Service Office, Inc., 15 Misc. 2d 1071, 186 N.Y.S.2d 550 (Sup 1959)

Okla.

Farmer v. Trepp, 1962 OK 255, 376 P.2d 596 (Okla. 1962)

Sykes v. Dillingham, 1957 OK 225, 318 P.2d 416 (Okla. 1957)

Pa.

City of Erie v. R. D. McAllister and Son, 416 Pa. 54, 204 A.2d 650 (1964)

Finley v. McNair, 128 Pa. Super. 161, 193 A. 103 (1937)

S.C.

[Pennell & Harley v. Hearon](#), 169 S.C. 16, 168 S.E. 188 (1933)

Tenn.

[American Barge Line Co. v. Jones & Laughlin Steel Corp.](#), 179 Tenn. 156, 163 S.W.2d 502 (1942)

[Bailey v. Brister](#), 49 Tenn. App. 191, 353 S.W.2d 564 (1961) (quoting text)

Tex.

[Rio Bravo Oil Co. v. Weed](#), 121 Tex. 427, 50 S.W.2d 1080, 85 A.L.R. 391 (1932)

Vt.

[Kopper v. Fulton](#), 71 Vt. 211, 44 A. 92 (1899)

W. Va.

[Ramage v. South Penn Oil Co.](#), 94 W. Va. 81, 118 S.E. 162, 31 A.L.R. 1509 (1923)

Wis.

[Ganson v. Madigan](#), 15 Wis. 144, 1862 WL 966 (1862)

Wyo.

[First Nat. Bank v. Ennis](#), 44 Wyo. 497, 14 P.2d 201 (1932)

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Fla.

[Scotch Mfg. Co. v. Carr](#), 53 Fla. 480, 43 So. 427 (1907) (the court said: "If it be true, even in the case of a written contract the terms of which are doubtful or ambiguous, that the construction placed thereon by the parties themselves may be shown and shall govern, as the cited cases hold, with how much more force does this principle apply to oral contracts? The principles of technical nicety cannot be strictly applied in the construction of these everyday oral contracts made by plain business men in their course of trade and traffic. To do so would frequently result in overthrowing the meaning and understanding of the parties.")

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Second Circuit

[Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc.](#), 178 F. Supp. 655 (S.D. N.Y. 1959), judgment aff'd, 280 F.2d 197 (2d Cir. 1960) and distinguished, [TAM 7704079940A](#), 1977 WL 191022 (I.R.S. TAM 1977) (in which plaintiff sought to be relieved of an obligation it had honored for many years, in accordance with a contract executed by its assignor, to make periodic payments to the defendants based on the manufacture and sale of an antiseptic preparation; plaintiff urged that, because the formula was no longer secret, it should be relieved of its obligation to make the periodic payments; the court said: "This action was commenced in 1956. Thus, some 25 years elapsed between public disclosure, of which the plaintiff's predecessor was fully and completely aware, and the time when the plaintiff asserted its right to terminate this obligation because of such disclosure. During that entire period the plaintiff's predecessor, with full knowledge of the facts on which it now relies, continued to make the periodic payments required by the contract without protest and without the slightest indication that it considered that its obligation had been terminated. These payments amounted to over 10 million dollars. During this period the Lambert Company was no innocent lamb wandering in the wilderness of big business ready to be shorn. It carried on a highly successful business on a large scale. It had available the advice of competent counsel. It was well aware of what it considered to be the unfortunate consequences of the American Medical Association disclosures. Yet no hint of the plaintiff's present position was given by its predecessor, and, indeed, significantly enough, the present claim was not raised until after the plaintiff's predecessor was merged into the present plaintiff in 1956 and new management took control

...

"The continued periodic payments and the affirmance of the obligation by plaintiff's predecessor long after the event upon which plaintiff relies occurred, is strong evidence that the obligation to pay still continues in force and effect, if any such evidence were needed.")

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Fifth Circuit

[Colonial Life & Acc. Ins. Co. v. Wilson](#), 246 F.2d 922 (5th Cir. 1957) (practice of insurer in providing an annual premium notice with "series checks" generated by its computer on which were printed the policy date, name of the policyholder's bank on which the check was drawn, the predetermined postdate for each of the successive 12 checks and the amount due, requiring only the signature of the

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policyholder—along with subsequent notices of nonpayment stating that "if you have already mailed a series of checks on this policy please disregard this notice"—established a construction of the contract that mailing a signed "series check" was sufficient, even though there was no proof that the check was actually received and cashed)

Second Circuit

Pressed Steel Car Co. v. Union Pac. R. Co., 297 F. 788 (C.C.A. 2d Cir. 1924)

Third Circuit

Wilson v. Homestead Valve Mfg. Co., 217 F.2d 792 (3d Cir. 1954)

Fifth Circuit

Glades County, Fla. v. Detroit Fidelity & Sur. Co., 57 F.2d 449 (C.C.A. 5th Cir. 1932)

Sixth Circuit

Day & Night Nat Bank v. Coffey, 25 F.2d 403, 58 A.L.R. 1002 (C.C.A. 6th Cir. 1928)

Seventh Circuit

Prince v. Packer Mfg. Co., 419 F.2d 34, 13 Fed. R. Serv. 2d 1154 (7th Cir. 1969)

Ninth Circuit

Pekovich v. Coughlin, 17 Alaska 691, 258 F.2d 191 (9th Cir. 1958)

Tenth Circuit

U.S. v. Cross, 477 F.2d 317 (10th Cir. 1973) (applying Colorado law)

Court of Claims

J. A. Maurer, Inc. v. U. S., 202 Ct. Cl. 813, 485 F.2d 588 (1973)

Ala.

Alfa Life Ins. Corp. v. Johnson, 822 So. 2d 400 (Ala. 2001)

Hill v. Davis, 272 Ala. 166, 130 So. 2d 39 (1961)

Ark.

Clark v. J.R. Watkins Medical Co., 115 Ark. 166, 171 S.W. 136 (1914)

Cal.

Warner Constr. Corp. v. City of Los Angeles, 2 Cal. 3d 285, 85 Cal. Rptr. 444, 466 P.2d 996 (1970)

Colo.

Belmont Elec. Service, Inc. v. Dohrn, 516 P.2d 130 (Colo. App. 1973)

Conn.

19 Perry Street, LLC v. Unionville Water Co., 294 Conn. 611, 987 A.2d 1009 (2010)

New Haven Water Co. v. City of New Haven, 106 Conn. 562, 139 A. 99 (1927)

Ga.

Reeves v. Daniel, 143 Ga. 569, 85 S.E. 756 (1915)

Ill.

Vermont Marble Co. v. Bayne, 356 Ill. 127, 190 N.E. 291 (1934)

Ind.

Johnson Oil Refining Co. v. Indian Refining Co., 94 Ind. App. 416, 179 N.E. 179 (1932)

Iowa

Fort Dodge Co-op. Dairy Marketing Ass'n v. Ainsworth, 217 Iowa 712, 251 N.W. 85 (1933)

Kan.

Fred Mosher Grain v. Kansas Co-op. Wheat Marketing Ass'n, 136 Kan. 269, 15 P.2d 421 (1932)

Ky.

Piercy v. Louisville & N. Ry. Co., 198 Ky. 477, 248 S.W. 1042, 33 A.L.R. 322 (1923)

Me.

Everett v. Rand, 152 Me. 405, 131 A.2d 205 (1957) (citing text)

Md.

Service Realty Co. v. Luntz, 210 Md. 228, 123 A.2d 201 (1956)

Mass.

Kenney v. Blackman, 282 Mass. 268, 184 N.E. 661 (1933)

Mich.

Detroit Greyhound Emp. Federal Credit Union v. Aetna Life Ins. Co., 381 Mich. 683, 167 N.W.2d 274 (1969)

Minn.

Wells Const. Co. v. Goder Incinerator Co., 173 Minn. 200, 217 N.W. 112 (1927)

Mo.

School Dist. of Independence ex rel. Whalen v. Wilcox, 58 S.W.2d 1009 (Mo. Ct. App. 1933)

Neb.

Sesto v. City of Omaha, 121 Neb. 730, 238 N.W. 357 (1931)

Nev.

Smith v. Rahas, 73 Nev. 301, 318 P.2d 655 (1957)

N.J.

Albert v. Ford Motor Co., 112 N.J.L. 597, 172 A. 379 (N.J. Ct. Err. & App. 1934)

N.M.

Schultz & Lindsay Const. Co. v. State, 83 N.M. 534, 494 P.2d 612 (1972)

N.Y.

Muzak Corp. v. Hotel Taft Corp., 1 N.Y.2d 42, 150 N.Y.S.2d 171, 133 N.E.2d 688 (1956)

N.C.

T. A. Loving Co. v. Latham, 20 N.C. App. 318, 201 S.E.2d 516 (1974)

Ohio

Courtright v. Scrimger, 110 Ohio St. 547, 2 Ohio L. Abs. 135, 2 Ohio L. Abs. 407, 144 N.E. 294 (1924)

Okla.

Currey v. Willard Steam Service, Inc., 1958 OK 23, 321 P.2d 680 (Okla. 1958)

Or.

Dickenson v. Cox, 118 Or. 88, 244 P. 877 (1926)

Pa.

Markides v. Soffer, 172 Pa. Super. 215, 93 A.2d 99 (1952)

R.I.

Phetteplace v. British & Foreign Marine Ins. Co., 23 R.I. 26, 49 A. 33 (1901)

S.C.

McGregor v. Hurst, 140 S.C. 464, 138 S.E. 865 (1927)

Tenn.

Fidelity-Phenix Fire Ins. Co. of New York v. Jackson, 181 Tenn. 453, 181 S.W.2d 625 (1944)

Tex.

Modular Technology Corp., Metal Bd. Division v. City of Lubbock, 529 S.W.2d 273 (Tex. Civ. App. Amarillo 1975), writ refused n.r.e., (Feb. 18, 1976)

Utah

Hardinge Co. v. Eimco Corp., 1 Utah 2d 320, 266 P.2d 494 (1954)

Vt.

Douglass & Varnum v. Morrisville, 89 Vt. 393, 95 A. 810 (1915)

Va.

Robin v. Sydeman Bros., 158 Va. 289, 163 S.E. 103 (1932)

Wash.

Carlyle v. Majewski, 174 Wash. 687, 26 P.2d 79 (1933)

W. Va.

Copenhaver v. United Fuel Gas Co., 110 W. Va. 69, 156 S.E. 884 (1931)

Wyo.

Cf: Hunter v. Reece, 2011 WY 97, 253 P.3d 497 (Wyo. 2011) (Williston)

Second Circuit

Portsmouth Baseball Corp. v. Frick, 278 F.2d 395 (2d Cir. 1960)

Seventh Circuit

Elkhart Lake's Road America, Inc. v. Chicago Historic Races, Ltd., 158 F.3d 970 (7th Cir. 1998)

In re Chicago & E.I. Ry. Co., 94 F.2d 296 (C.C.A. 7th Cir. 1938) (the court said: "It is said that the conduct of the parties ... is of material weight in the determination of what the parties intended. As we recognized ... , in case of ambiguity, the practical construction given by the parties to the contract over a period of years is persuasive. But when the contract is clear, the fact that the parties followed a

different plan cannot work a revocation of the plain agreement. 'Where there is doubt as to the proper construction of an instrument,' the conduct of the parties 'is entitled to great consideration. But where its meaning is clear in the eye of the law, the error of the parties cannot control its effect.' ... The conduct of the parties may fix a meaning to words of doubtful import. It may not change the terms of the contract. ...

"If by mistake the parties followed a practice in violation of the terms of the agreement, the court should not perpetuate the error.").

Seventh Circuit

[Twentieth Century-Fox Film Corp. v. Woods Amusement Corp.](#), 304 F. Supp. 23 (N.D. Ill. 1969)

Ala.

[Alfa Life Ins. Corp. v. Johnson](#), 822 So. 2d 400 (Ala. 2001)

Conn.

[Connecticut Co. v. Division 425 of Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emp. of America](#), 147 Conn. 608, 164 A.2d 413 (1960)

Fla.

[American Agronomics Corp. v. Ross](#), 309 So. 2d 582 (Fla. 3d DCA 1975)

Ill.

[Uscian v. Blaconeri](#), 35 Ill. App. 3d 80, 340 N.E.2d 618 (1st Dist. 1975)

Ind.

[House v. Lesow](#), 167 Ind. App. 449, 339 N.E.2d 86 (1975)

Ky.

[Wathen v. Schleicher](#), 510 S.W.2d 22 (Ky. 1974)

Md.

[Ensor v. Wehland](#), 243 Md. 485, 221 A.2d 699 (1966)

N.J.

[County of Morris v. Fauver](#), 153 N.J. 80, 707 A.2d 958 (1998) (if terms of a contract are clear, the court must enforce it as written, and will not follow both parties' erroneous construction)

Pa.

[Westinghouse Elec. Co. v. Murphy, Inc.](#), 425 Pa. 166, 228 A.2d 656 (1967)

Tex.

[Bifano v. Econo Builders, Inc.](#), 401 S.W.2d 670 (Tex. Civ. App. Dallas 1966), writ refused n.r.e., (July 13, 1966)

Wyo.

[Hunter v. Reece](#), 2011 WY 97, 253 P.3d 497 (Wyo. 2011) (citing Williston)

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Mich.

[Gaydos v. White Motor Corp.](#), 54 Mich. App. 143, 220 N.W.2d 697 (1974) (a one-sided, self-serving interpretation of a contract is of no assistance to the court in interpreting the contract)

Mo.

[Leggett v. Missouri State Life Ins. Co.](#), 342 S.W.2d 833 (Mo. 1960) (the construction put on a contract by the parties is not conclusive, since the rule is based on the notion that each party tends to construe the contract most favorably to itself, and each construction is entitled to greater or lesser weight depending on the presence or absence of divergence or adversity of interests and the vigor or lack of vigor with which the parties press or assert rights inuring to their own selfish interest)

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Second Circuit

[Radio and Television Broadcast Engineers Union, Local 1212 v. WPIX, Inc.](#), 716 F. Supp. 777 (S.D. N.Y. 1989), judgment aff'd, 895 F.2d 1411 (2d Cir. 1989) (quoting text)

[Buckeye Cellulose Corp. v. Atlantic Mut. Ins. Co.](#), 643 F. Supp. 1030 (S.D. N.Y. 1986) (citing text)

Third Circuit

[Matter of Monsour Medical Center](#), 8 B.R. 606 (Bankr. W.D. Pa. 1981), order aff'd, 11 B.R. 1014 (W.D. Pa. 1981) (citing text)

Fourth Circuit

[Northeastern Const. Co. v. City of Winston-Salem](#), 83 F.2d 57, 104 A.L.R. 1142 (C.C.A. 4th Cir. 1936)

Ninth Circuit

Matanuska Valley Farmers Coop. Ass'n v. Monaghan, 13 Alaska 323, 188 F.2d 906 (9th Cir. 1951) (citing text)

Tenth Circuit
Amoco Production Co. v. Kansas Power & Light Co., 505 F. Supp. 628 (D. Kan. 1980) (citing text)

Colo.
Kelley v. Silver State Sav. and Loan Ass'n, 534 P.2d 326 (Colo. App. 1975) (citing text)

Conn.
May Centers, Inc. v. Paris Croissant of Enfield Square, Inc., 42 Conn. Supp. 77, 599 A.2d 407 (Super. Ct. 1991) (citing text)

Del.
Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc., 297 A.2d 28 (Del. 1972) (citing text)

La.
Davis v. Laster, 242 La. 735, 138 So. 2d 558, 96 A.L.R.2d 332 (1962)

Md.
Solomon's Marina, Inc. v. Rogers, 221 Md. 194, 156 A.2d 432 (1959)
Saul v. McIntyre, 190 Md. 31, 57 A.2d 272 (1948)

Mass.
O'Brien v. Peck, 198 Mass. 50, 84 N.E. 325 (1908)

N.J.
Corn Exchange Nat. Bank & Trust Co. of Philadelphia v. Taubel, 113 N.J.L. 605, 175 A. 55 (N.J. Ct. Err. & App. 1934) (citing text)
Independent Directory Corp. v. Sherman Indus. Electronics Co., 6 N.J. Super. 32, 69 A.2d 746 (App. Div. 1949)

N.Y.
Muzak Corp. v. Hotel Taft Corp., 1 N.Y.2d 42, 150 N.Y.S.2d 171, 133 N.E.2d 688 (1956) (specific modifications which extended the contract period were held "acts of parties" and superseded a general termination clause in the original contract)

Or.
Cf: Southwest Forest Industries, Inc. v. Vanply, Inc., 43 Or. App. 347, 602 P.2d 1113 (1979) (when the plaintiffs did not argue that the contract had been modified, the trial court erred in concluding that the parties' conduct constituted a practical construction of the contract)

Pa.
Monongahela St. Ry. Co. v. Philadelphia Co., 350 Pa. 603, 39 A.2d 909 (1944)

Tenn.
Earle v. Illinois Cent. R. Co., 25 Tenn. App. 660, 167 S.W.2d 15 (1942)

U.S. Supreme Court
Willard, Sutherland & Co. v. U.S., 262 U.S. 489, 43 S. Ct. 592, 67 L. Ed. 1086 (1923)

Second Circuit
Pillois v. Billingsley, 179 F.2d 205 (2d Cir. 1950)

Eighth Circuit
Williams v. Cow Gulch Oil Co., 270 F. 9 (C.C.A. 8th Cir. 1921)

Tenth Circuit
Whitebird v. Eagle-Picher Co., 390 F.2d 831 (10th Cir. 1968) (citing text)
General Paint Corp. v. Kramer, 57 F.2d 698 (C.C.A. 10th Cir. 1932)

Court of Claims
Updike v. U.S., 69 Ct. Cl. 394, 1930 WL 2478 (1930)

Ala.
Wagner v. Alabama Farm Bureau Federation, 225 Ala. 513, 143 So. 909 (1932)

Ariz.
Little Butte Consol. Mines Co. v. Girand, 14 Ariz. 9, 123 P. 309 (1912)

Ark.
El Dorado Ice & Planing Mill Co. v. Kinard, 96 Ark. 184, 131 S.W. 460 (1910)

Cal.

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[Bohman v. Berg](#), 54 Cal. 2d 787, 8 Cal. Rptr. 441, 356 P.2d 185 (1960) (citing Williston; the court said: "It is well-settled law that, although an agreement may be indefinite or uncertain in its inception, subsequent performance by the parties under the agreement will cure this defect and render it enforceable. When one party performs under the contract and the other party accepts his performance without objection it is assumed that this was the performance contemplated by the agreement. ...

"This rule is in accord with the cardinal rule of construction that when a contract is ambiguous or uncertain the practical construction placed upon it by the parties before any controversy arises as to its meaning affords one of the most reliable means of determining the intent of the parties. [In] all cases where the terms of their contract, or the language they employ, raises a question of doubtful construction, and it appears that the parties themselves have practically interpreted their contract, the courts will follow that practical construction. It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law. ... The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions.' ...

"When the parties perform without objection under a contract the terms of which appear to be indefinite, they have indicated that its terms were sufficiently certain so that they, at least, could perform it").

Cal.

[Long Beach Drug Co. v. United Drug Co.](#), 13 Cal. 2d 158, 88 P.2d 698 (1939)

[Hunter v. Sparling](#), 87 Cal. App. 2d 711, 197 P.2d 807 (1st Dist. 1948) (an offer too uncertain to create a bilateral contract if accepted may, by performance by the offeree, create a unilateral contract)

Conn.

[Palumbo v. George A. Fuller Co.](#), 99 Conn. 353, 122 A. 63 (1923)

Ill.

[Dunshee v. Dunshee](#), 255 Ill. 296, 99 N.E. 593 (1912)

[Work v. Welsh](#), 160 Ill. 468, 43 N.E. 719 (1896)

Ky.

[Curry v. Kentucky Western Ry. Co.](#), 25 Ky. L. Rptr. 1372, 78 S.W. 435 (Ky. 1904)

La.

[Caddo Oil & Mining Co. v. Producers' Oil Co.](#), 134 La. 701, 64 So. 684 (1913)

Md.

[Harris v. Kirshner](#), 194 Md. 139, 70 A.2d 47 (1949) (quoting text)

[Scarlett v. Young](#), 170 Md. 358, 185 A. 129 (1936)

[Parks v. Griffith & Boyd Co.](#), 123 Md. 233, 91 A. 581 (1914)

Mass.

[Cygan v. Megathlin](#), 326 Mass. 732, 96 N.E.2d 702 (1951)

Mich.

[Raymond v. White](#), 119 Mich. 438, 78 N.W. 469 (1899)

Minn.

[Bundy v. Meyer](#), 148 Minn. 252, 181 N.W. 345 (1921)

Miss.

[Moselage v. Benevolent & Protective Order of Elks](#), 118 Miss. 5, 78 So. 947 (1918)

Mo.

[Roberts v. Harmount Tie & Lumber Co.](#), 264 S.W. 448 (Mo. Ct. App. 1924)

[Saginaw Medicine Co. v. Dykes](#), 210 Mo. App. 399, 238 S.W. 556 (1922)

N.J.

[Atlantic Pebble Co. v. Lehigh Valley R. Co.](#), 89 N.J.L. 336, 98 A. 410 (N.J. Ct. Err. & App. 1916)

N.Y.

[Grundt v. Shenk](#), 222 A.D. 82, 225 N.Y.S. 317 (2d Dep't 1927), [aff'd](#), 248 N.Y. 602, 162 N.E. 541 (1928)
[Chard v. Ryan-Parker Const. Co.](#), 182 A.D. 455, 169 N.Y.S. 622 (1st Dep't 1918)
[Kenilworth Realty Trust v. Bankers Trust Co.](#), 112 Misc. 2d 523, 447 N.Y.S.2d 210 (Sup 1982) (citing text)

[Barnard Bakeshops, Inc. v. Dirig](#), 173 Misc. 862, 19 N.Y.S.2d 224 (Sup 1940) (quoting text; any lack of definiteness and certainty, any ambiguity which might have existed in the contract itself, was removed by the subsequent acts of the parties)

N.C.

[Erskine v. Chevrolet Motors Co.](#), 185 N.C. 479, 117 S.E. 706, 32 A.L.R. 196 (1923)

Okla.

[J.W. Cherry Co. v. Consolidated Flour Mills Co.](#), 1930 OK 226, 143 Okla. 99, 287 P. 1019 (1930)

Pa.

[Kisinger v. Pennsylvania Trust Co. of Pittsburgh](#), 119 Pa. Super. 16, 180 A. 79 (1935) (quoting text)

S.C.

[Oxweld Acetylene Co. v. Davis](#), 115 S.C. 426, 106 S.E. 157 (1921)

S.D.

[In re Kueter's Estate](#), 45 S.D. 341, 187 N.W. 625, 21 A.L.R. 1330 (1922)

Tex.

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