4.10 BILATERAL CONTRACTS

H. INTERPRETATION OF CONTRACT TERMS
(Approved 5/98)

1. No Dispute over Meaning

In this case, the plaintiff and the defendant agreed to various terms that are part of the contract. Under these terms, the plaintiff was required to:

[State Terms]

The defendant was required to:

[State Terms]

NOTE TO JUDGE

When the contract terms are unambiguous, construction of the contract is a question of law for the courts.[1] The preceding charge is to be used where the parties do not dispute the existence of a contract, the terms are unambiguous and the basic dispute is over whether the contract terms were breached by either party. In such a case, the preceding may be incorporated by charging the above immediately following the first sentence in 4.10A.

[1] *See State Farm Mutual Auto Insurance Co. v. Anderson,* 70 *N.J. Super.* 520 524 (App. Div. 1961).

2. Dispute over Meaning

NOTE TO JUDGE

When the contract terms are ambiguous and the parties dispute their meaning, construction of the contract and application of any evidence submitted to prove the surrounding circumstances are for the jury.[2]

The plaintiff claims the following terms were part of the contract.

[State Terms]

Plaintiff further claims that the parties intended this language to mean *[state meaning]*. The defendant denies this. The defendant contends that *[state meaning]*. You must decide whether the plaintiff is correct.

The plaintiff has the burden to prove what the parties intended the contract to mean. The contract is to be interpreted so as to give effect to the parties' intentions. You cannot make for the parties a better contract than the parties made for themselves.[3] It is the intent expressed or apparent in the writing that controls.[4]

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[2]*State Farm Mutual Auto Insurance Co., supra.*

[3]*Karl's Sales & Service v. Gimbel Brothers,* 249 *N.J. Super.* 487, 493 (App. Div. 1991), *certif. denied,* 127 *N.J.* 548 (1991).

[4]*Friedman v. Tappan Development Corp.*, 22 *N.J.* 523, 531 (1956).

[The interpretive principles which follow are not intended to be exhaustive,[5] *but they are intended to cover the most frequently utilized principles.]*

In deciding what the parties intended, you may consider the relations of the parties, the attendant circumstances and the result the parties sought to attain.

A supporting or less significant provision of the contract is not to be interpreted to conflict with an obvious, dominant or principal purpose of the contract.[6]

You should carefully consider the wording that was used in the contract. The terms of a contract, generally, are to be understood in their plain ordinary sense. The contract is to be considered as a whole and its provisions are to be read together.

The conduct of the parties, however, after they entered into the contract and before they discovered that they disagreed with one another, can be significant evidence of their agreed intent.[7] It is up to you to decide what the

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[5]*See Restatement (Second) of Contracts*, Sec. 201 (Whose Meaning Prevails), Sec. 202 (Rules in Aid of Interpretation), Sec. 203 (Standards of Preference in Interpretation) and Sec. 204 (Supplying an Omitted Essential Term) (1981).

[6]*Newark Publisher's Ass'n v. Newark Typographical Union*, 22 *N.J.* 419, 426-27 (1956).

[7]"[T]he conduct of the parties after execution of the contract is entitled to great weight in determining its meaning." *Joseph Hilton and Assoc., Inc. v. Evans*, 201 *N.J. Super.* 156, 171 (App. Div.), *certif. denied*, 101 *N.J.* 326 (1985).

conduct of the parties was, whether the conduct is reasonably related to the terms in question and whether it reveals what they intended by the contract.

A course of dealing is the manner by which parties to the contract have previously dealt with each other. Such a course of previous dealing, can, unless specifically rejected in the contract, fairly be regarded as establishing a basis for interpreting and giving meaning to the parties' intention as it relates to this contract.

If any contract words or terms have a technical meaning, or as used in a trade or by custom mean something different from their ordinary meaning, you shall give them their technical trade or custom meaning if (1) the contract was made in view of this technical meaning, trade or custom usage, and (2) the technical meaning or trade or custom usage was either generally used or was actually known to the parties.

NOTE TO JUDGE

> The following instruction is appropriate if the contract was drafted by just one of the parties. No case has been located which approves this instruction as modified and applied to particular paragraphs when the entire contract has been the product of joint drafting.

If you have considered all of the evidence to ascertain the intentions of the parties and you are still unable to decide what the parties originally intended the

disputed contract language to mean, then that language as it exists should be interpreted against the party who wrote the contract.[8] Although the general rule is that ambiguity in a contract provision should be resolved against the drafter,[9] the ambiguous provision must still be read sensibly and consistent with the expressed intent of the parties.[10]

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[8]It may be argued that when the non-drafting party is "sophisticated," the rule that ambiguity should be resolved against the drafter should not apply. The Supreme Court has addressed the issue in the analogous case of insurance contracts, which arguably involve drafters who often exercise greater control and are therefore less deserving of an exception to the rule than drafters of other contracts. The Supreme Court stated that the rule that ambiguous insurance contracts are construed against the insurer would not apply in the case of a sophisticated insured. *See Owens-Illinois, Inc. v. United Ins. Co.*, 138 *N.J.* 437, 471 (1994). ("As the Appellate Division noted, 'O-I was a sophisticated insured and cannot seek refuge in the doctrine of strict construction by pretending it is the corporate equivalent of the unschooled, average consumer.'") However, the law is not entirely clear as to what qualifies a party as a "sophisticated" insured. The Appellate Division in *Owens-Illinois, Inc.* described the law in other jurisdictions to be that "only where it is clear that an insurance policy was actually negotiated or jointly drafted,' and where the policyholder has bargaining power and sophistication, is the rule of strict construction of policy terms against the insurer not invoked." *Owens-Illinois, Inc. v. United Ins. Co.*, 264 *N.J. Super.* 460, 489 (App. Div. 1993), *rev'd on other grounds*, 138 *N.J.* 437 (1994). *See also Diamond Shamrock Chem. Co. v. Aetna Casualty & Surety Co.*, 258 *N.J. Super.* 167, 209 (App. Div. 1992), *certif. denied*, 134 *N.J.* 481 (1993). If "sophisticated" is simply shorthand for a co-drafter, then the rule that ambiguity is resolved against the drafter would not apply simply because both parties drafted the contract. However, if the sophisticated party with bargaining power "negotiated" the substance of a contract term, but did not actually draft the contract language, perhaps he or she would not enjoy the benefits of the rule of interpretation.

[9]*In re Miller*, 90 *N.J.* 210, 221 (1982).

[10]*Karl's Sales and Serv., Inc. v. Gimbel Bros., Inc., supra.*