

# EXHIBIT 3

1 of 1 DOCUMENT

Standardized Civil Jury Instructions for the District of Columbia

Copyright 2008, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

CHAPTER 11 CONTRACTS

*1-11 Civil Jury Instructions for DC § 11.14*

**§ 11.14 CONTRACT INTERPRETATION—COURSE OF PERFORMANCE**

**[1] Instruction 11-14**

**Contract Interpretation: Course of Performance (D.C. Std. Civ. Jury Instr. No. 11-14)**

**To determine the meaning of a contract, you must first look at the words and phrases actually in the contract. [There is a dispute in this case about the meaning of certain words in the contract.] To determine the meaning of the words in dispute, you may consider the conduct of the parties in relation to those disputed words in the contract. You should give great weight to how the parties acted with respect to the disputed contract provision. You should also consider other evidence presented to you about the meaning of the provisions.**

**Legislative Precedents and Commentary**

*Predecessor:* (None.)

*Statutes:* D.C. Code § 28:1-205 (rules of interpretation in contracts for sales of goods).

*Cases:* *Intercounty Constr. Corp. v. District of Columbia*, 443 A.2d 29, 32-33 (D.C. 1982) (rules of contract interpretation); *Glekas v. Boss & Phelps, Inc.*, 437 A.2d 584, 588 (D.C. 1981) (jury determines contract from conduct of parties); *International Brotherhood of Painters & Allied Trades v. Hartford Accident & Indem. Co.*, 388 A.2d 36, 43 (D.C. 1978) (evidence of parties' negotiations, and parties' course of performance is "particularly significant"); *1901 Wyoming Ave. Coop. Assoc. v. Lee*, 345 A.2d 456, 461-462 (D.C. 1975) (rules of contract interpretation); *Svestka v. Pell*, 224 A.2d 478, 480 (D.C. 1966) (determine parties' intentions from express terms and parties conduct in relation to those terms); *Bergman v. Parker*, 216 A.2d 581, 583 (D.C. 1966) (same); *Roberts v. Veterans Coop. Housing Ass'n*, 88 A.2d 324, 326 (D.C. 1952) (parties' actions are evidence of parties' interpretation); *Cole v. De Bobula*, 38 A.2d 630, 631 (D.C. 1944) (parties' conduct is evidence to clarify uncertain terms); *Klein v. Miles*, 35 A.2d 243, 245 (D.C. 1944) ("great weight, if not controlling weight" must be given to parties' construction of a contract evidenced by their conduct).

**[2] Comment**

The cited cases support this Instruction. There are other canons of interpretation, however, some of which are set forth in this comment.

In interpreting a contract, the courts look first at the express words. The words should be interpreted by what a reasonable person in the parties' position would have thought the words meant [ *District of Columbia v. Langerfelder &*

## 1-11 Civil Jury Instructions for DC § 11.14

*Son*, 558 A.2d 1155, 1159 (D.C. 1989) ; 1901 *Wyoming Ave. Coop. Assoc. v. Lee*, 345 A.2d 456, 461-462 (D.C. 1975)] . The courts presume that the parties were aware of the circumstances surrounding the contract, and that the parties are bound by the usages they knew or should have known [ *District of Columbia v. Langenfelder & Son*, 558 A.2d 1155, 1159 (D.C. 1989)] .

In addition, the courts look to the parties' course of performance to understand how the parties themselves interpreted the contract. The course of performance is of "much importance," and receives "great, if not controlling weight" [ *Klein v. Miles*, 35 A.2d 243, 245 (D.C. 1944) ; 17A Am. Jur. 2d *Contracts* § 354 (2004); Restatement (Second) of *Contracts* § 202(4) (1981)].

There are other canons of interpretation that courts can employ. Restatement (Second) of *Contracts* section 203 recites several, paraphrased here:

- a. Courts prefer to give a reasonable, lawful and effective meaning to all terms rather than an unreasonable, unlawful, or ineffective meaning to any part of the contract.
- b. To ascertain the meaning of a contract, courts prefer, in this order, (1) express terms, (2) course of performance, (3) course of dealing, (4) usage of trade.
- c. Courts give specific terms and exact terms more weight than general terms and language.
- d. Courts give separately negotiated terms or added terms more weight than standardized terms or terms not separately negotiated.

The Uniform Commercial Code approach to contract interpretation differs slightly from the Restatement approach set forth above. Under D.C. Code section 28:1-205, express terms and course of dealing and usage of trade are to be construed as consistent where reasonable; but if such a construction is unreasonable, then the general Restatement section 203(b) priorities above apply [17A Am. Jur. 2d *Contracts* § 361 (2004)].

This Instruction is likely applicable only when the contract is ambiguous [*Virginia Model Jury Instructions--Civil* Instruction No. 45-330 (Michie 1993)].

The course of performance is relevant to establishing waiver or modification of terms inconsistent with performance [D.C. Code § 28:2-208(3)].