
A course of performance is the way the parties have conducted themselves in the performance of [this contract, reflecting a]the contract which it is reasonable to regard as establishing the parties’ common understanding of the meaning of the term[s] in dispute.

USE NOTES

This instruction should be given in conjunction with UJI 13-825 NMRA when a question of interpretation exists as to a term or terms in a contract and [there is evidence submitted concerning course of performance]evidence is submitted concerning the parties’ course of performance under the contract.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — [How the parties have performed the obligations of the contract at issue may be relevant to the construction of that contract and hence admissible. Such evidence is considered “course of performance” and should be distinguished from “course of dealing” (see UJI 13-827 NMRA) and “trade custom” (see UJI 13-826 NMRA).

In order for performance of the contract to constitute a “course” of performance, the evidence must describe more than just an isolated act or instance, but must be sufficiently established to indicate reliably the intents of the parties. See J. A. Farnsworth, Contracts § 7.13.

The concept of course of performance is closely associated with the concepts of waiver (see UJI 13-842 NMRA) and modification of the contract (see UJI 13-817 NMRA).]
Evidence of how the parties have performed the obligations of the contract at issue is admissible for the factfinder to consider in determining the meaning of an ambiguous term in the contract. See Allsup’s Convenience Stores, Inc. v. N. River Ins. Co., 1999-NMSC-006, ¶ 31, 127 N.M. 1, 976 P.2d 1. The conduct of the parties after the contract is made may indicate the meaning that they attach to the term(s) in question. 2 Zachary Wolfe, Farnsworth on Contracts § 7.16 (4th ed. 2019). A course of performance, which involves the parties’ performance of the contract at issue, should not be confused with a course of dealing, which involves conduct prior to the contract in question. Id.

[Amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]