

An actor straight out of drama school and an agent entered into a one-year written contract that described the services the agent would provide. Because he was eager for work, the actor agreed, in the contract, to pay the agent 15% of his yearly earnings. At the end of the year, the actor was so pleased with his many roles that he gave the agent 20% of his earnings. After the first contract had expired, the actor and the agent decided to continue working together. They photocopied their old contract, changed the date, and signed it. At the end of the year, a dispute arose as to what percentage of earnings the actor owed. It is a trade practice in the acting profession for actors to pay their agents 10% of their yearly earnings, payable at the end of the year.

What percentage of the actor's earnings is a court most likely to award the agent?

- A. 20%, because course of dealing is given greater weight than trade usage.
- B. 15%, because it was an express term of the contract.
- C. 10%, because trade usage is the applicable default rule.
- D. Nothing, because the contract is too indefinite.

Explanation:

Course of performance, course of dealing & trade usage

Course of performance	Sequence of conduct that is relevant to understanding agreement between parties if: <ul style="list-style-type: none">• agreement involves repeated occasions for performance by one party AND <ul style="list-style-type: none">• other party accepts performance without objection
Course of dealing	Sequence of conduct concerning previous transactions between parties that establishes common basis of understanding for interpreting their conduct
Trade usage	Practice or method of dealing in parties' business or industry that is observed with enough regularity to justify expectation that it will be observed in instant case

Courts adhere to **rules of construction** when **interpreting contracts**. The purpose of these rules is to assist the court in determining the meaning of ambiguous terms. Evidence relevant to this determination includes the contract's **express terms**, the parties' **course of performance**, the parties' **course of dealing**, and the industry's **trade usage**. When these are inconsistent with one another, **priority** is given as follows:

1. Express terms
2. Course of performance
3. Course of dealing
4. Trade usage

Here, the second contract executed by the actor and the agent *expressly* stated that the agent would receive 15% of the actor's yearly earnings. Although the actor gave 20% of his yearly earnings to the agent when the first contract ended, this was not a course of dealing between the parties because it occurred only once (**Choice A**). And even though the acting profession's practice is to pay agents 10% of yearly earnings, an express term is given greater weight than trade usage when they are inconsistent. Therefore, a court will likely award the agent 15% (**Choice C**).

(Choice D) A contract may be void if certain essential terms (eg, subject matter, consideration, duration) are indefinite. But here, the essential terms of the contract were *not* indefinite—ie, the subject matter was the agent's services, the consideration was 15% of the actor's yearly earnings, and the duration was one year.

Educational objective:

In interpreting contracts, (1) express terms prevail over all others, (2) course of performance prevails over course of dealing and trade usage, and (3) course of dealing prevails over trade usage.

References

- Restatement (Second) of Contracts § 203 (Am. Law Inst. 1981) (rules of construction to interpret a contract).

Copyright © 2011 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.