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Government Contract Interpretation

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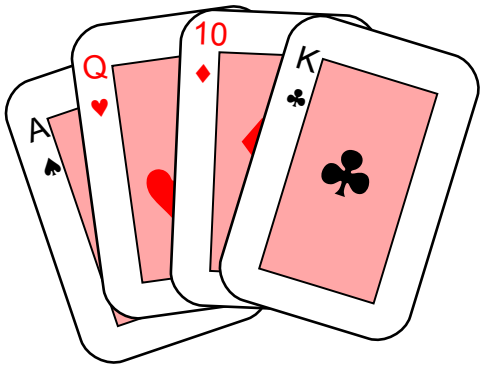
GOVERNMENT CONTRACT LAWYERS

"The most frequently litigated issue in government contracting is probably the correct interpretation of contract language."

4 Nash & Cibinic Rep. ¶ 25

Contract Interpretation

- Contract Dispute = Competing Interpretations
  - Each side has a reason they should win
  - Rules dictate who will prevail
  - Not all rules are created equal
- Hierarchy of rules is like a deck of cards



Hierarchy of Rules

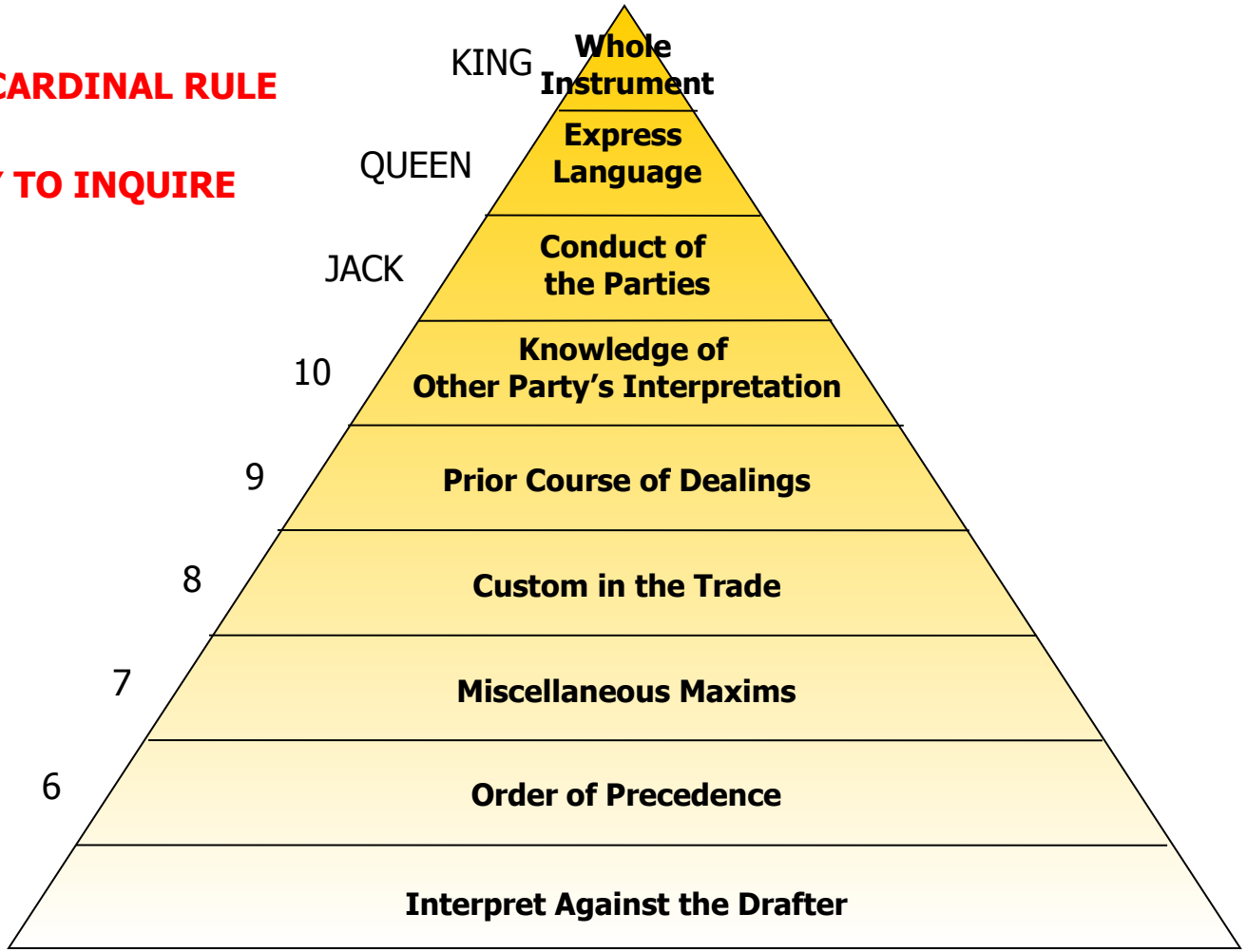
Ace

Wild Card

THE CARDINAL RULE

DUTY TO INQUIRE

*Secondary Rules**

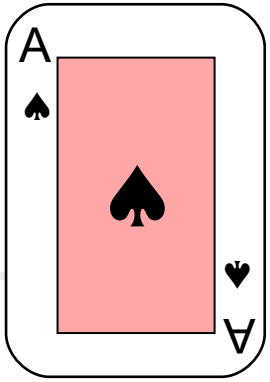


Intent Rules

Mechanical Rules

* Complete analysis requires consideration of the cardinal rule & the duty to inquire rule.

The Cardinal Rule



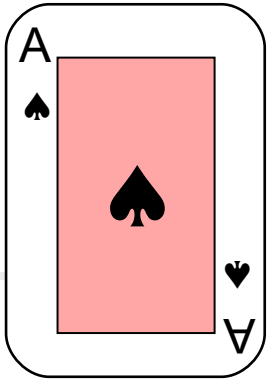
- The highest rule of contract interpretation:
  - Requires that a contract be interpreted to carry out the **mutual intent** of the parties
  - Gives effect to "spirit and purpose" of the agreement

11 *Williston on Contracts* § 32:2 (4th ed.); *Nicholson v. United States*, 29 Fed. Cl. 180, 194 (1993); *Tri-Star Elecs. Int'l, Inc. v. Preci-Dip Durtal SA,* 619 F.3d 1364, 1367 (Fed. Cir. 2010); *M.A. Mortenson Co.*, ASBCA No. 53062, 01-2 BCA (CCH) ¶ 31573 (Aug. 17, 2001).

Cardinal Rule and Parol Evidence

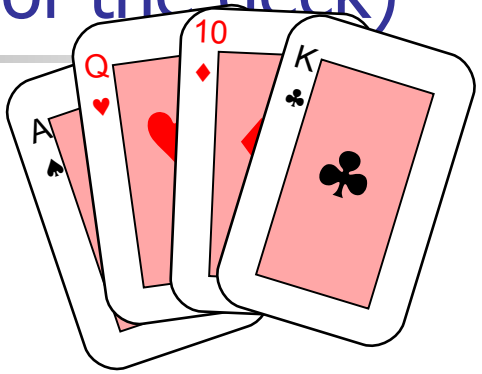
- Professor Williston: "In construing a contract, the primary object is to ascertain and give effect to the intention of the parties. That intention must, in the first instance, be derived from the language of the contract. The words, phrases and sentences employed are to be construed in the light of the expressed objectives and fundamental purposes of the parties to the agreement."
- "[O]nly if arrival at the intention of the parties becomes uncertain or ambiguous does the issue arise whether the parol evidence rule may, or may not, apply."
- The "basic notion [of the parol evidence rule] is that a writing intended by the parties to be a final embodiment of their agreement may not be contradicted by certain kinds of evidence." *Nicholson v. United States*, 29 Fed. Cl. 180, 193 (1993), citing *The Law of Contracts* § 3–2, at 135–36.

The Cardinal Rule



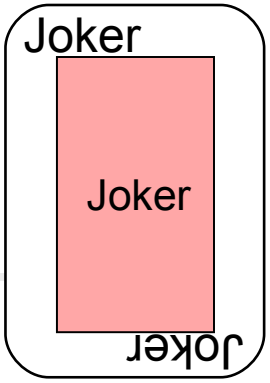
- **Example:** COFC rejected government's proposed interpretation that CRADA agreement did not protected contractor's proprietary information because such an interpretation would violate the cardinal rule and frustrate the intent of the intent of the agreement.
- *Spectrum Scis. v. United States*, 84 Fed. Cl. 716, 725 (2008).

Secondary Rules (rest of the deck)



- Apply when mutual intent unclear
- Maybe parties never had same intent
- Secondary rules ascertain the most probable intent

The Duty to Inquire Rule



- The "Wild Card" – applies to <u>patent ambiguities</u>
- Can overcome any secondary rule (under proper circumstances)
- Works as "preventive hygiene" - does <u>not</u> focus on intent

Ambiguity

- Being open to more than one interpretation.
- Can be:
  - Patent
  - Latent

Patent Ambiguity

"[a] patent ambiguity in a solicitation 'is one that is "obvious, gross, [or] glaring."'" *Visual Connections, LLC v. United States*, 120 Fed. Cl. 684, 697 (2015), citing *CliniComp Int'l, Inc. v. United States*, 117 Fed. Cl. 722, 738 (2014)(quoting *NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1162 (Fed. Cir. 2004)).

Latent Ambiguity

"A latent ambiguity 'is not apparent on the face of the solicitation and is not discoverable through reasonable or customary care.'" *Visual Connections, LLC v. United States*, 120 Fed. Cl. 684, 697 (2015), citing *J.C.N. Constr., Inc. v. United States*, 107 Fed. Cl. 503, 512 (2012).

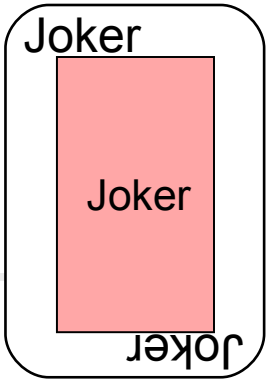
Patent Ambiguity - Waiver

The distinction between a latent ambiguity and a patent ambiguity is "critical for the purpose of waiver, since 'a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection afterwards.'" *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d at 1315).

How Determined.

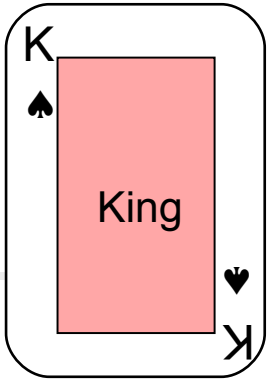
"[w]hether an ambiguity is patent or latent is a question of law, and a determination to be made on a case-by-case basis." *Interstate Gen. Gov't Contractors, Inc. v. Stone*, 980 F.2d 1433, 1435 (Fed. Cir. 1992).

The Duty to Inquire Rule



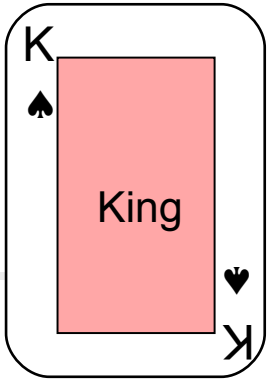
- **Example**: Where solicitation amendment created apparent conflict regarding fuse sizing for transformers, contractor had a duty to seek clarification and was therefore not entitled to equitable adjustment for providing more expensive fuses.
- *Bick-Com Corp.*, ASBCA No. 27258, 89-2 B.C.A. (CCH) ¶ 21623 (Feb. 2, 1989).

The Whole Instrument Rule



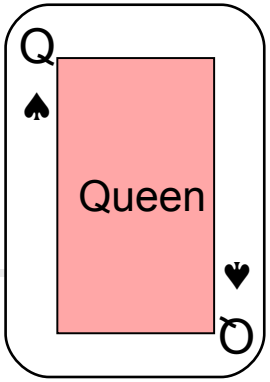
- Gives reasonable meaning to all parts of the contract
  - No portion is useless
  - Consistent reading is preferred
  - Prohibits taking terms out of their context

The Whole Instrument Rule



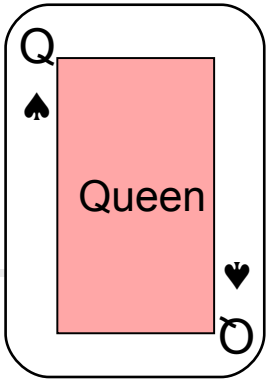
- **Example:** Where specifications called for complete motor driven sliding doors, ready for operation, but electrical plans neglected wiring, "whole instrument" required wiring. *Sante Fe Engineers, Inc.*, ASBCA No. 36755, 90-2 B.C.A. (CCH) ¶ 22717 (Feb. 13, 1990).

The Express Language Rule



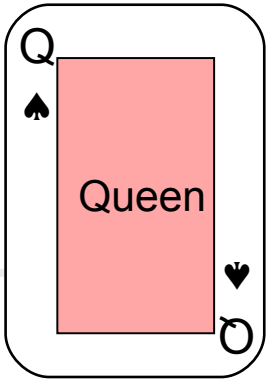
- When there is only one reasonable interpretation of express language, that interpretation should prevail
- Absent highly unusual circumstances, the parties should be able to rely on the express language of their contract

The Express Language Rule



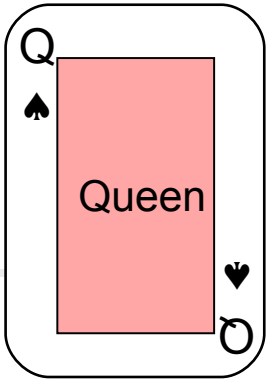
- "If this were not the rule there would be little purpose to [drafting] a written contract. It would be tentative rather than definitive with the parties virtually free to redraft the contract upon 'refreshing their memories.'" *McDonnell Douglas Corp.*, NASA BCA No. 683-25, 83-2 B.C.A. (CCH) ¶ 16872 (Oct. 11, 1983)

The Express Language Rule



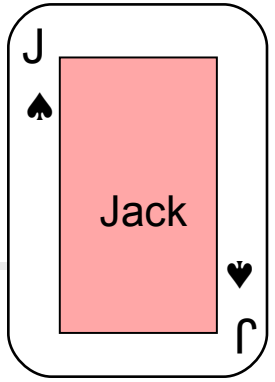
- **Example:** Contractor who delivered ice-makers with "air barriers" rather than insulation required by specifications could not escape performance by claiming air barrier satisfied government's needs.
  - "Trade practice or custom do not overrule unambiguous contract provisions."
- *Snowbird Indus., Inc.*, ASBCA No. 33027, 89-3 B.C.A. (CCH) ¶ 22065 (June 7, 1989).

The Express Language Rule



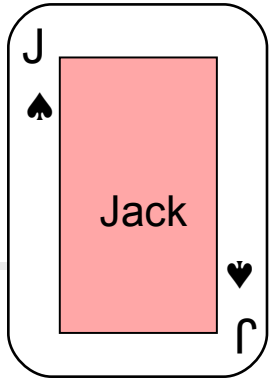
- **Lesson:** An offeror who bids without reading all of the specifications does so at is own peril.
  - "[A]bsent a showing of fraud or mental incompetence, one who reads a document, or signs it even without reading it, is bound by its terms."
  - *Alaska Am. Lumber Co. v. United States*, 25 Cl. Ct. 518, 529 (1992).

Conduct of The Parties



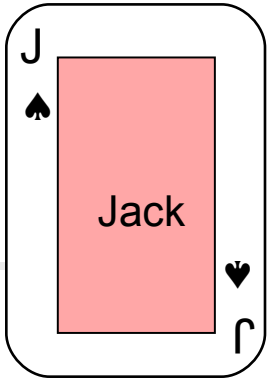
- Use when express language not sufficient
- Actions (before dispute) speak louder than words

Conduct of the Parties



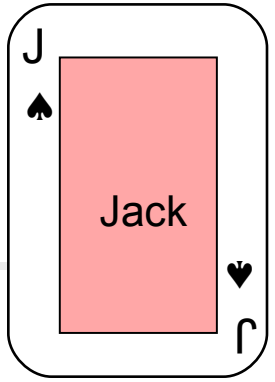
- **Example 1:** Contractor who submitted construction shop drawings with ceiling anchors could not argue later that anchors not required by contract.
  - "Considering the nature of the change, the clear directives in the contract before us, and the concurrent interpretation of the parties before this dispute arose, we conclude that appellant's contract required it to perform the disputed anchor installation."
- *Acoustical Design, Inc.*, GSBCA No. 4839, 79-2 B.C.A. (CCH) ¶ 14112 (Aug. 16, 1979).

Conduct of The Parties



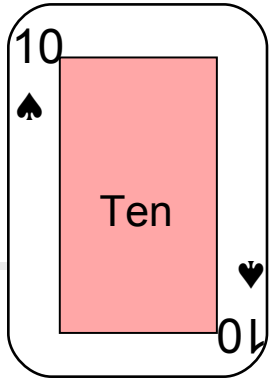
- **Example 2:** Building owner sought for GSA to continue paying municipal tax on leased building after lease renewal.
  - "GSA's payment of its share of the Supplemental Tax/Surcharge for seven years cannot be regarded as an error or mistake. Rather, the GSA knowingly paid the tax for seven years, and then abruptly changed its position after negotiating a 15–year lease renewal. The GSA adopted a new interpretation of the Tax Adjustment clause after it had extracted from CCLP favorable terms for the lease extension."
- *City Crescent Limited Partnership v. United States*, 71 Fed. Cl. 797 (2006).

Conduct of The Parties



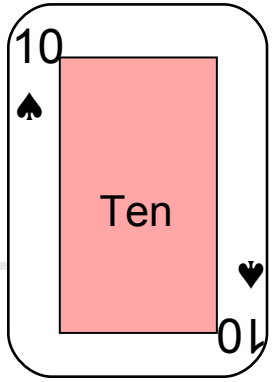
- **Example 3:** Contractor not entitled to compensation for the cost of repairing corrosion discovered on an aircraft leased to Coast Guard. When the corrosion was first discovered, the contractor assumed that it was responsible for the repair; did not assert that Coast Guard was responsible until months later (post-dispute) after being assessed downtime for the repair.
- *TKC Aerospace, Inc.,* 12-1 B.C.A. (CCH) ¶ 34937 (Jan. 31, 2012).

Knowledge of the Other Party's Interpretation



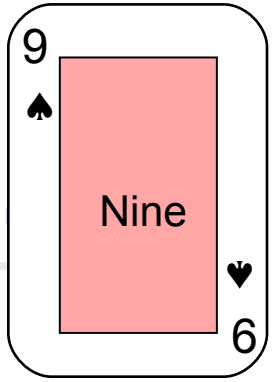
- If you know, you are bound
- Failure to object is acquiescence (Contractor or Government)

Knowledge of the Other Party's Interpretation



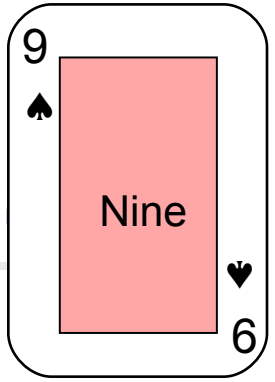
- **Example:** Where contractor knew before award that the government wanted a permanently welded iron gate, he could not later seek reimbursement for shipment of single pieces, even though contract arguably supported such shipment.
  - "It is well-established that a party is bound by the known pre-bid, pre-award interpretation of the other party unless it unambiguously manifests disagreement before award."
- *Amerifab Indus., Inc.*, ENGBCA No. 4981, 87-1 B.C.A. (CCH) ¶ 19400 (Oct. 24, 1986).

The Prior Course of Dealing



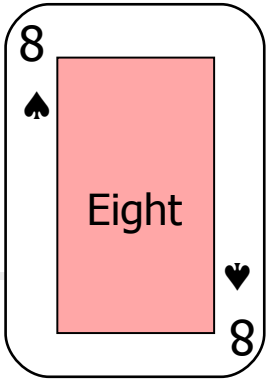
- Does not focus on current conduct
- Interpretation of past similar contracts is evidence of present intent
- One prior similar contract is not enough; must be a series with the same parties

The Prior Course of Dealing



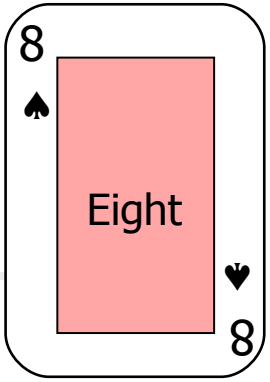
- **Example:** Several contracts over 18-year period, where the U.S. Forestry Service provided scaling services to measure volume of lumber processed by mill, created a standard that the mill owner could expect.
  - "[W]e hold that through a long-standing course of conduct, both the USFS and Appellant had come to provide, expect, and depend upon scaling services adequate to operate the mill. Insofar as the USFS failed to do this, it was in breach of the timber sale contracts…."
- *Bates Lumber Co., Inc.*, AGBCA No. 81-242-1, 88-2 B.C.A. (CCH) ¶ 20707 (Apr. 18, 1988).

Custom in Trade



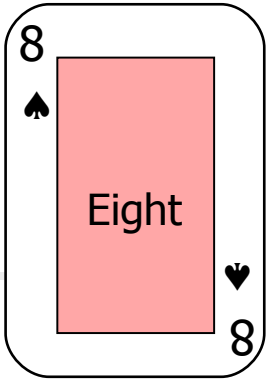
- Presumptions:
  - Parties competent in the subject matter of their contract
  - Parties aware of general usage or custom
- Expectation that trade customs will supplement and inform (but not contradict) express language

Custom in Trade



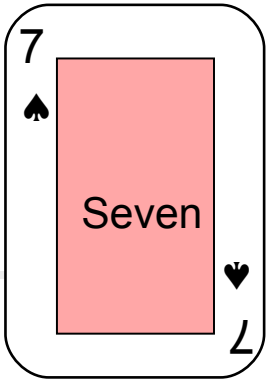
- **Example 1:** Government lost argument that contractor should have used 3 5/8" studs, rather than 2 ½" studs, as routinely used in VA hospital contracts. Government failed to show practice generally recognized in construction industry.
  - "First, is there a trade practice, and second, if so, would a commercial contractor know about that practice without specific direction from the plans and/or specifications? The party who argues trade practice in defense of its interpretation has the burden of proving that the alleged practice is well recognized."
- *A.F. Lusi Const., Inc.*, VABCA No. 2595, 88-3 B.C.A. (CCH) ¶ 21068 (Aug. 17, 1988).

Custom in Trade



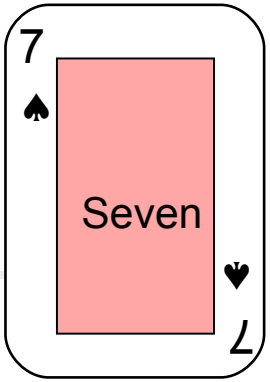
- **Example 2:** Contractor was allowed to provide evidence of trade usage to show that contract term requiring wrapping of underground "metallic pipe" with protective tape did not apply to metal pipe with pre-applied protective coating.
- *Western States Construction Co. v. United States*, 26 Cl. Ct. 818 (1992).

Miscellaneous Maxims



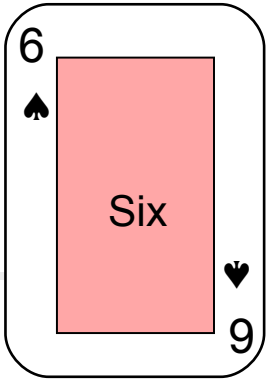
- Mechanical rules infer "most probable intent"
- Specific over general
  - *Hill Materials Co. v. Ricei*, 982 F. 2d 514 (Fed. Cir. 1992).
- Written over printed
  - *H. & B. Am. Mach. Co. v. United States*, 11 F. Supp. 48, 52 (Ct. Cl. 1935).

Miscellaneous Maxims



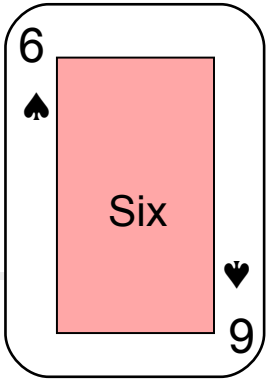
- Punctuation is a weak argument for intent:
  - "Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the Court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent, on judicially inspecting the whole, the punctuation will not be suffered to change it."
  - *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 976 (Ct. Cl. 1965).

Order of Precedence



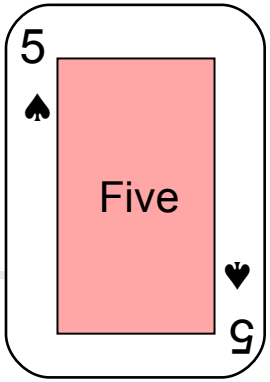
- An agreement on resolving inconsistencies
  - Common Example: "In case of differences between drawings and specifications, the specifications shall govern."
- "All of these clauses are based on Government mistake…. In this very real sense they are exculpatory, and should be strictly construed against the drafter."
  - *Arnell Constr. Corp. Foot of W. 23 St. Pier 63, N. River New York, Ny 10011*, GSBCA No. 6994, 1984 WL 13743 (Sept. 11, 1984).

Order of Precedence



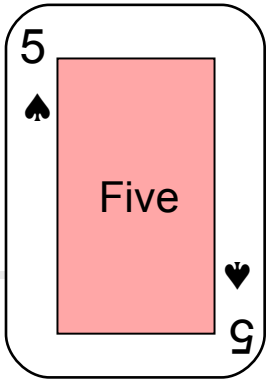
- **Example:** Where a specification requires the construction of only six dog kennels but the drawings showed eight kennels, the contractor was only required to construct the six kennels set forth in the specifications.
- *Sommers Bldg. Co., Inc.*, ASBCA No. 32232, 86-3 B.C.A. (CCH) ¶ 19223 (July 28, 1986)

Interpret Against the Drafter



- Rule of last resort-exhaust all others
- Mechanical rule-consequence for lack of clarity upon the drafter
- Discourages the drafter from being vague
- Does not apply to clauses that have their basis in statute/regulation

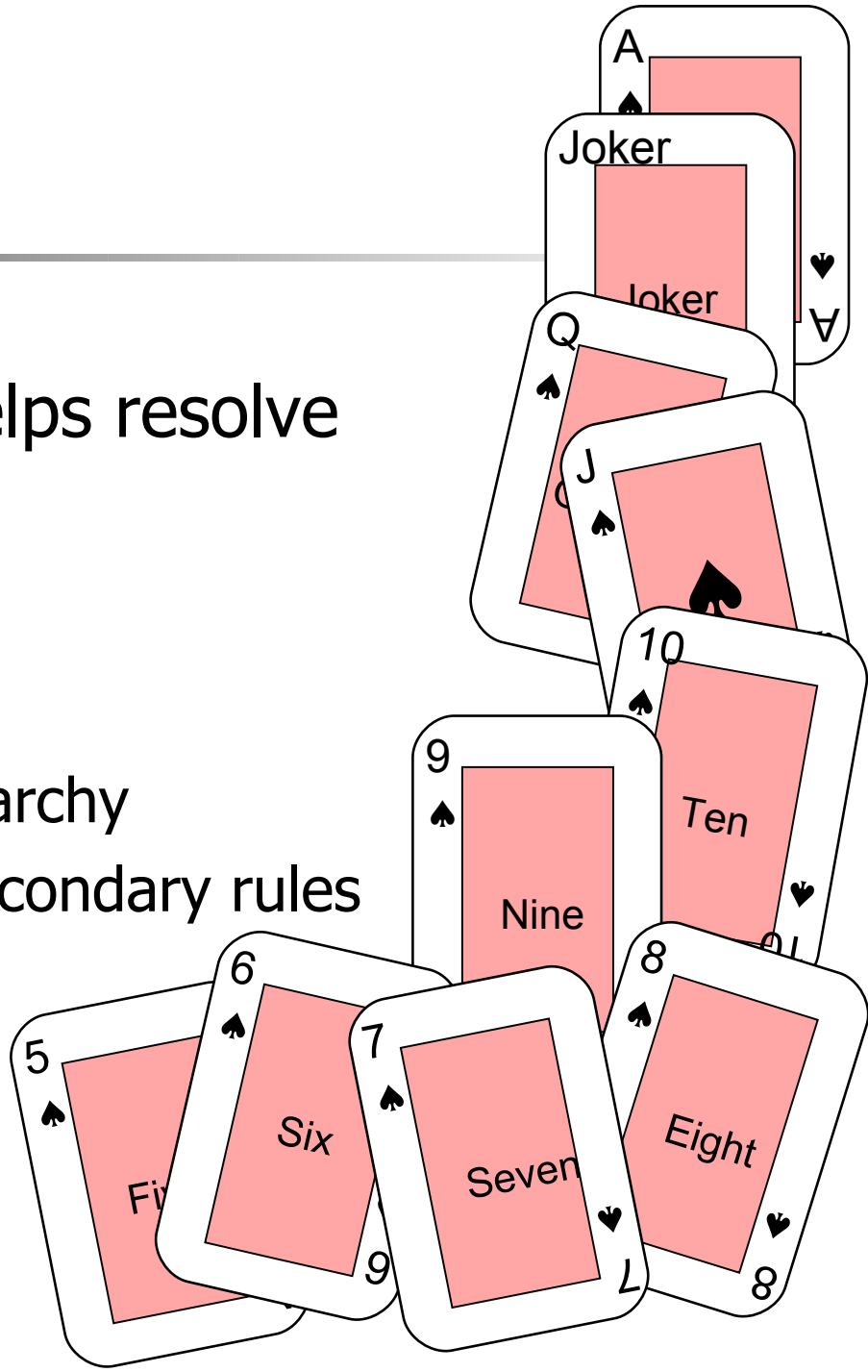
Interpret Against the Drafter

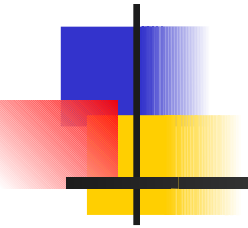


- **Example:** "The BCA's approach to construction of the contract language and to the doctrine of *contra proferentem* is misplaced. Ascertaining the most reasonable construction of contract language utilizing other tools of contract interpretation must be the first priority. In contrast the doctrine of *contra proferentem* is applied only when other approaches to contract interpretation have failed."
- *Gardiner, Kamya & Assocs., P.C. v. Jackson*, 467 F.3d 1348, 1353 (Fed. Cir. 2006).

Conclusion

- Understanding the rules helps resolve disputes
- Analogous to a card game
- Cardinal Rule is the Ace
  - Secondary rules have a hierarchy
  - Wild Card overcomes any secondary rules





Questions & Answers

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