Welcome to this podcast on Excuse of Conditions brought to you by CALI. I am Professor Scott J. Burnham.

The topic of this podcast is when a court will excuse satisfaction of a condition to avoid the harsh effects of forfeiture when a condition fails.

At the outset, it is important to distinguish between a promise and a condition. A promise, as defined in Restatement (Second) of Contracts § 2, is a manifestation of a commitment to do or not to do something. In a bilateral contract, there are always two promises. If we agree that I will buy your car for $10,000, then I have promised the $10,000 and you have promised the car.

A condition, as defined in Restatement (Second) of Contracts § 224, is an event, not certain to occur, which must occur before some performance is due. It is important to remember that a condition is an *event*. As we have seen in the CALI podcasts on Express Conditions and Implied Conditions, an express condition is a condition that is expressly stated in the agreement, while an implied condition is one supplied by a court.

The failure of a condition can cause a hardship for a party that has not satisfied the condition. For that reason, if there is any doubt as to whether a term is a promise or a condition, the doubt is resolved in favor of the contract language being a promise. And in some circumstances, particularly in service contracts, if a party does not fully perform, the court may nevertheless determine that the party has substantially performed, that is, the court will deem that the implied condition is satisfied so the performance of the other party is still due.

We will now look at what happens when a court has determined that there is a condition and the failure of the condition might cause a hardship. Sometimes the court will find a waiver in order to avoid the harsh effect of the condition. A waiver is a relinquishment of a contract right. For example, you are the attorney for a bank. Your client shows you a contract it has with the borrower on an auto loan. The contract states that if a payment is not made on the first of the month, the bank may declare the entire balance due and repossess the car. The client tells you that it is now the 10th of the month, the borrower has not paid, and it wants to know if it can repossess the car.

You are about to say yes, because you see that an express condition of the contract has not been satisfied, but then you remember something you learned in a CALI lesson. You ask the client, “What is the payment history?” The client tells you that the borrower made other payments late and the bank did nothing. You inform the client that there has likely been a waiver – the bank had the legal right to act on the failure of the condition and repossess the car. However, the bank relinquished that right by leading the borrower to believe that nothing terrible would happen if the borrower did not satisfy the condition of paying by the first of the month.

In the lesson on Express Conditions, we discussed the case of *Clark v. West Publishing Company*, where Professor Clark’s contract with West contained the express condition that if he drank while writing the book, he would be paid a reduced royalty. Clark claimed that West knew he was drinking and told him that would not be a problem. If Clark could prove that was true, he would establish a waiver of West’s right to assert that Clark had failed to satisfy the condition.

Another tactic to excuse a condition that does not arise very often is to claim a divisible contract. Let’s say a contractor agreed to pave five similar lots for the owner for $5,000. The contractor paved two of them and breached. The contractor cannot claim substantial performance as it only paved two of the lots, so the paver has not satisfied the constructive condition. However, if the performances are “agreed equivalents,” that is, the contractor paving one lot is the equivalent of the owner paying $1,000, then the court might determine that the contract is divisible into five parts. Since the contractor has performed two of those five parts, the court will award it $2,000, less any damages caused by the breach.

The doctrine of divisible contract is not used in contracts for the sale of goods under Article 2 of the U.C.C., however. Section 2-607 says that the buyer must pay at the contract rate for any goods accepted. Suppose that a buyer orders five identical widgets for $5,000, but receives only two of them. If the buyer keeps the two widgets, the buyer must pay the seller $2,000 for the widgets it accepted, less any damages caused by the breach.

Another doctrine that assists the party that suffers a forfeiture due to the failure of a condition is restitution. Let’s say I agreed to build a house for you for $400,000. I built half of the house and breached by walking off the job entirely. Here, I did not substantially perform, so I cannot recover under the contract. However, it seems that I did confer a benefit on you. The modern rule, found in Restatement (Second) of Contracts § 374, is that I can recover in restitution for the benefit conferred even though I am the breaching party. Remember that the expectancy of the non-breaching party comes before recovery in restitution for the breaching party. If I claim that I conferred a benefit on you of $200,000, but it reasonably cost you another $250,000 to have the house completed, the most I can get is $150,000 since your expectancy is to get the house at a cost of $400,000.

Finally, assume none of these tactics work to avoid the harsh effect when a condition fails. In such cases, you have to throw yourself on the mercy of the court and ask it to excuse the condition. Restatement (Second) of Contracts § 229 states: “To the extent that the non-occurrence of a condition would cause a disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.”

Take the example where the insurance contract provides that if the insured does not give the insurance company notice of the loss within 10 days, then the insurance company is not liable for the loss. The insured gives the notice in 12 days. The condition is not satisfied, but a court might excuse it if it found that the 10 days provision was not material. On the other hand, suppose a contract between an insurance company and a business stated that the insurance company would pay for fire loss if the business installed smoke detectors. The company did not install smoke detectors, suffered a fire loss, and asked the court to excuse the condition. A court would likely find that the condition was a material part of the exchange and would not excuse it.

Let’s briefly review this podcast. A condition is an event, not certain to occur, which must occur before some performance is due. Failure by one party to satisfy the condition can cause a hardship since it excuses performance by the other party. In looking for relief for a harsh consequence, a court might look to 1) waiver, 2) divisible contract, 3) restitution, and 4) excuse of condition. You should be able to provide examples of each of these methods of excusing a condition.

I hope you’ve enjoyed this podcast on Excuse of Conditions.

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