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

The topic of this podcast is when language in a contract is an express condition, such that failure to satisfy the condition results in a performance not being due.

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*. If we agree that the exchange of the money for the car will take place on February 1, the time for performance is not a condition because that event is certain to occur. Suppose we agree that if the Seahawks win the Super Bowl, then I will buy your car for $10,000. Now we have a condition. If the event does not occur -- the Seahawks do not win the Super Bowl -- then the performances are not due. This type of condition is called an express condition because the parties have stated it expressly in their contract.

By the way, we should note in passing that an express condition is an exception to the parol evidence rule. See Restatement (Second) of Contracts § 217. Suppose we write down our agreement for the sale of the car, which is a good idea since the transaction is within the statute of frauds, but we don’t write down our agreement that the sale is conditioned on the Seahawks winning the Super Bowl. Suppose the Seahawks don’t win, but I tender the $10,000 and ask for the car. You claim that you don’t have to sell the car to me because the Seahawks did not win. I will counter that the condition regarding the Seahawks is not written in the contract. However, even if the contract is otherwise fully integrated, you will be able to offer evidence of the oral condition regarding the sale being conditional on the Seahawks winning the Super Bowl.

A condition can be a good way to hedge in case a party is concerned that it can’t meet its commitments and wants to avoid being in breach of contract. Suppose I am negotiating to buy your car for $10,000, but I don’t have that much cash on hand. So I add an express condition to the contract: I will buy your car for $10,000 if I can obtain bank financing. I have turned my unconditional commitment to purchase the car into a conditional one. If the event – getting the financing – does not occur, then my performance is excused and I am not in breach of contract for failing to purchase the car.

Sometimes it can be hard to tell whether the language of the parties creates an express condition. A drafter should use “if” or “on condition that” to make clear that a term is a condition, but drafters don’t always do that. Let’s say a contractor has a contract with an owner to do a project. The contractor hires a subcontractor to do part of the work and they agree that the contractor will pay the subcontractor “when the owner pays the contractor.” The subcontractor does the work but the contractor does not pay because the owner did not pay the contractor. The contractor is claiming that “*when* the owner pays me” means “*if* the owner pays me.” Restatement (Second) of Contracts § 227 has a rule that in case of doubt, the language is construed to be a promise rather than a condition because the failure to satisfy a condition can have a harsh result. So the result here would likely be that “when the owner pays the contractor” does not mean “if the owner pays the contractor” but means the contractor promises to pay in a reasonable time.

Conditions can have a harsh result because if a condition does not occur, then a party does not have to perform, while if a promise is breached, then the remedy is damages. For example, a homeowner buys property insurance and the contract states that the homeowner shall report a loss within 10 days of the loss. The homeowner has a fire and reports it to the insurance company 12 days later. The homeowner has breached the promise, but the insurance company still has to perform by paying for the loss, less any damages caused by the breach. On the other hand, suppose the contract states that if the homeowner does not report a loss within 10 days of the loss, then the insurance company is not liable for the loss. The homeowner has a fire and reports it to the insurance company 12 days later. The insurance company is not liable for the loss. Note that there was no breach by the homeowner because the homeowner did not promise to do anything. Rather, there was a condition and the homeowner failed to bring about the event on which the performance of the insurance company was conditioned.

An express condition can be a strong incentive for a party to perform. In a rather curious case, *Clark v. West Publishing Company*, Professor Clark contracted to write a treatise for West. Apparently the good professor was a notorious lush, because the contract provided that if he drank while writing the book, his royalty would be reduced. Note that if he had merely promised not to drink while writing the book, and he breached that promise, then West would be entitled to damages, but it would be hard for them to prove what those damages were. By making it a condition, West didn’t have to prove any damages – it just had to prove that the event occurred.

Before concluding, let’s introduce another type of condition: implied conditions. Whereas an express condition is stated in the language of the contract, an implied condition is supplied by a court. See the CALI podcast on Implied Conditions. Once the court determines that there is an implied condition, then it has the same effect as an express condition. Because conditions can often lead to a harsh result, courts often look for ways to excuse the condition. The ways in which courts do that is the subject of another CALI podcast, Excuse of Conditions. If you want to know what happened to Professor Clark, check out that podcast.

Let’s briefly review this podcast. At this point, you should be able to distinguish between a promise and a condition. A condition is an event, not certain to occur, which must occur before some performance is due. An express condition is stated in the parties’ agreement. You should also be able to state what the remedy is when a promise is breached and when a condition is not satisfied. When a condition does not occur, then some performance is not due.

I hope you’ve enjoyed this podcast on Express Conditions.

Lawdibles are produced and distributed by CALI, The Center for Computer-Assisted Legal Instruction. Find more Lawdibles at www.cali.org/lawdibles. Send your questions and feedback to lawdibles@cali.org. The Lawdibles theme music is “Ask Me No Question” by [Learning Music](http://freemusicarchive.org/music/Learning_Music/). Lawdibles are for educational purposes only. Please seek an attorney if you need legal advice.

CREDIT: Ask Me No Question by Learning Music is licensed under an [Attribution-Noncommercial-Share Alike 3.0 United States License.](http://creativecommons.org/licenses/by-nc-sa/3.0/us/)