Welcome to this podcast on Implied Conditions brought to you by CALI. I am Professor Scott J. Burnham. The topic of this podcast is when a court will supply a condition even where the parties have not expressly written one into the contract.

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.

In comparison, 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 1st that is not a condition because that event – a time for performance – is certain to occur.

There are express conditions and implied conditions. Express conditions are expressly included by the parties in the language of the contract. An implied condition, however, is a condition that is not expressly stated in the agreement, but is instead supplied by a court. For example, on February 1st, I tell you I don’t have the money to buy the car. Do you still have to give me the car? No. The promised performances are implied conditions of each other – if I don’t tender the money, you don’t have to tender the car; similarly, if you don’t tender the car, I don’t have to tender the money. This rule is referred to historically as the rule of constructive conditions of exchange – constructive meaning implied or supplied by the court. While the parties don’t expressly state these conditions in the contract, it makes sense that if one party does not perform, the other does not have to perform either. So, we imply conditions here.

When a term is both a promise and a condition, it is sometimes referred to as a *promissory condition*. In our example, the promised exchanges are promissory conditions. If I don’t tender the money to you for the car, there are two consequences. Because tendering the money is a promise, you can recover damages for my breach of promise. For example, you can recover the difference between the market value of the car and the contract price of $10,000. And because my tendering the money is an implied condition of your performance, you don’t have to perform by tendering the car.

Note that when a party extends credit, the creditor gives up the right to make their performances conditional, so the creditor’s only remedy is to recover damages for breach from the borrower. Assume that we agree that you will tender the car on February 1st, but I don’t have to pay until March 1st. In this scenario you are a creditor and I am a borrower for the one month period during which I don’t have to pay for the car. If I don’t pay you the $10,000, then it is too late for you to refuse to give me the car – I already have it. Your only remedy is to sue me for the $10,000 for breach of promise. That is one reason creditors ask for some consideration for taking the risk of not getting paid; part of an interest rate charge reflects that risk. Creditors may also build some additional remedy into the contract, such as taking a security interest in the car – which gives the creditor a right to repossess the car if payment is not made.

Soon after the English courts developed the rule of constructive conditions of exchange, lawyers found a problem with it. Let’s say I agree to build a house to certain specifications for you for $400,000. Because the exchange can’t be simultaneous, the party who has to take time goes first. I build the house and then ask for the money. You inspect it and discover that I did not meet the specifications – I did not put molding around one of the ceilings. You say that under the rule of constructive conditions of exchange, I did not bring about the event that had to occur in order to get paid – I did not build the house to the specifications – and therefore you don’t have to pay me due to the implied condition. To address this problem, the English courts developed the theory of substantial performance – an immaterial breach is treated as if the implied condition was satisfied. It is still a breach, so the injured party can recover damages, but it is not a failure to satisfy the constructive condition of exchange, so the other party’s performance is not excused. In this case, you would still have to pay me the $400,000 less the damages for breach – the cost of installing the missing molding.

Recall that express conditions are conditions stated in the parties’ contract. See the CALI podcast on Express Conditions. It is important to note that there is no such thing as substantial performance of an express condition. Suppose our contract said, “If the builder does not put molding around the ceiling, then the owner does not have to pay for the house.” When parties include an express condition, it would not matter that the builder had done most of the work. In such a situation, a court may strain to find a way to avoid this harsh result.

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 the CALI podcast called Excuse of Conditions. For example, if when I built the house, I failed to meet many of the specifications, then I did not come close enough to substantial performance for a court to deem the condition satisfied. Therefore, your performance of paying me on the contract would be excused. If you want to know if there is any relief for me in this situation, 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 implied condition is not stated in the parties’ agreement but is supplied by a court. One example of implied conditions is the rule of constructive conditions of exchange. Where there is substantial performance, the court determines that the implied condition is satisfied. 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 Implied Conditions.

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