Contracts: Whether an ‘Unless’ Clause is a Condition Precedent or a Condition Subsequent

Ken Adams of **Adams on Drafting** writes that he has recommended that contract drafters not use in the terms of art *condition precedent* and *condition subsequent*. But drafters should be aware of the underlying concepts, he explains in a recent post on his site, considering the recent opinion in *Total Recall Techs. v. Luckey*.

He **discusses the case**, which involved the alleged breach of a confidentiality agreement, in that the nondisclosure and exclusivity provisions had never taken effect. He explains that obligations can use a dynamic verb (*pay*, *sell*, *terminate*) or they can use a stative verb (*keep*, *maintain*, *preserve*).

“Critiquing how courts interpret confusing contract language has its interest, but what’s more important to anyone drafting or reviewing contracts is how you avoid this sort of fight. In this case, it’s simple enough: with an obligation containing a stative verb, it would be clearer to replace an *unless* conditional clause with *except that* and an *if* conditional clause,” he writes.

Read the article.