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The Enforceability of Contractual Clauses Excluding Sellers from Liability for Consequential Damages Under Section 2-719 of the Uniform Commercial Code

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NOTES

THE ENFORCEABILITY OF CONTRACTUAL CLAUSES EXCLUDING SELLERS FROM LIABILITY FOR CONSEQUENTIAL DAMAGES UNDER SECTION 2-719 OF THE UNIFORM COMMERCIAL CODE

I. INTRODUCTION

A primary purpose and policy underlying the Uniform Commercial Code (UCC) is "to make uniform the law among the various jurisdictions."[1] In interpreting and applying section 2-719,[2] however, the courts have reached inconsistent results on the enforceability of contractual provisions purporting to hold sellers harmless from liability for consequential damages for commercial losses[3] when the buyer's exclusive and limited contractual remedy for the seller's breach of warranty "fails of its essential purpose."[4]

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1. U.C.C. § 1-102(2)(c). All states, except Louisiana, have adopted article 2 of the UCC. Congress also has enacted this article for the District of Columbia. *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM CODE 1 (1972).

2. Section 2-719 governs "Contractual Modification or Limitation of Remedy." For the text of and official comments to § 2-719, see notes 10 & 15 *infra*.

3. The UCC does not define "commercial loss," but this Note assumes that it can be equated with "economic loss." Economic loss can be distinguished from other types of loss for which damages may be sought. An action for economic loss is "an action brought to recover damages for inadequate value, costs of repair, and replacement of defective goods or consequent loss of profits." J. WHITE & R. SUMMERS, *supra* note 1, at 332. Other types of loss include physical damage to property and personal injury. *Id.* The distinction between property damage and economic loss is sometimes difficult to make. *See* Edmeades, *The Citadel Stands: The Recovery of Economic Loss in American Products Liability*, 27 CASE W. RES. L. REV. 647 (1977); Zammit, *Manufacturers' Responsibility for Economic Loss Damages in Products Liability Cases: What Result in New York?*, 20 N.Y.L.F. 81, 81-82 (1974). Lost profits, however, are clearly economic losses and are "the most sought after item of consequential damages." J. WHITE & R. SUMMERS, *supra* note 1, at 319.

By limiting the scope of this Note to commercial losses, only commercial sales transactions will be discussed. Distinguishing a consumer transaction from a purely commercial one also is difficult, but an appropriate definition of a commercial sales transaction might be one between "merchants" as defined in U.C.C. § 2-104(1). A consumer transaction is governed by more stringent standards than a commercial transaction. *See, e.g.*, McCarty v. E.J. Korvette, Inc., 28 Md. App. 421, 347 A.2d 253 (1975); Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd., 29 A.D.2d 303, 287 N.Y.S.2d 765 (1968).

4. U.C.C. § 2-719(2). *See* note 2 *supra*.

The problem most frequently arises when a sales contract includes a warranty provision that limits the seller's obligations, in the event of breach,[5] to repair or replacement of defective parts,[6] and also provides explicitly that the seller shall not be held liable for consequential damages.[7] Upon the seller's breach, the buyer sues on the contract[8] to re-

5. The one most common allegation of breach is the seller's failure, either by action or inaction, to meet his obligations under the contract's warranty provisions. The nature of the seller's breach may affect the determination of liability for which he is responsible. *See* notes 69-101 *infra* and accompanying text.

6. A remedy for repair or replacement of defective parts is not the only type of limited or exclusive remedy. Any remedial limitation not in contravention of the limitations found in § 2-719 is permissible. *See, e.g.,* Dow Corning v. Capital Aviation, Inc., 411 F.2d 622 (7th Cir. 1969) (exclusive remedy of return of deposit held valid). For the text of § 2-719, see notes 10 & 15 *infra.*

7. The parties may exclude liability for consequential damages in the same sentence as the one providing for the limited remedy, in a different sentence in the same paragraph, or in a different paragraph. How the exclusion is stated may have important consequences. *See* note 52 *infra* and accompanying text.

8. This Note examines only the buyer's action on a breach of contract theory (breach of warranty). An injured buyer also may seek to recover damages on alternate theories of liability such as negligence, strict liability, fraud, or misrepresentation. A tort liability theory is useful in cases in which privity of contract cannot be established or personal injuries are involved.

A dispute currently exists on whether a buyer should be permitted to recover only on a contract theory if economic loss is the sole form of damage, or whether economic loss should also be permitted as a basis for finding tort liability. *See generally* W. PROSSER, HANDBOOK ON THE LAW OF TORTS 665 (4th ed. 1971); Edmeades, *supra* note 3; Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974 (1966); Speidel, *Products Liability, Economic Loss and the UCC*, 40 TENN. L. REV. 309 (1973); Tracy, *Disclaiming and Limiting Liability for Commercial Damages*, 83 COM. L.J. 8 (1978); Zammit, *supra* note 3, at 81; Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966); *Products Liability: The Manufacturer's Responsibility for Economic Loss—Another Look*, 8 MEM. ST. U.L. REV. 653 (1978); Note, *Products Liability in Commercial Transactions*, 60 MINN. L. REV. 1061 (1976); Comment, *The Vexing Problems of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy*, 4 SETON HALL L. REV. 145 (1972). Courts holding that purely economic loss can be recovered on a tort theory include: Fredonia Broadcasting Corp. v. RCA Corp., 481 F.2d 781 (5th Cir. 1973); Bright v. Goodyear Tire & Rubber Co., 463 F.2d 240 (9th Cir. 1972); Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp., 422 F.2d 1013 (9th Cir.), *cert. denied*, 400 U.S. 902 (1970); Plainwell Paper Co. v. Pram, Inc., 430 F. Supp. 1386 (W.D. Pa. 1977); Arizona v. Cook Paint & Varnish Co., 391 F. Supp. 962 (D. Ariz. 1975); Cooley v. Salopian Indus., Ltd., 383 F. Supp. 1114 (D.S.C. 1974); Morrow v. New Moon Homes, 548 P.2d 279 (Alaska 1976); Beauchamp v. Wilson, 21 Ariz. App. 14, 515 P.2d 41 (1973); Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Anthony v. Kelsey-Hayes Co., 25 Cal. App. 3d 442, 102 Cal. Rptr. 113 (1972); Hiigel v. General Motors Corp., 190 Colo. 57, 544 P.2d 983; Long v. Jim Letts Oldsmobile, Inc., 135 Ga. App. 293, 217 S.E.2d 602 (1975); Alfred N. Koplin & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977); Rhodes Pharmacal Co. v. Continental Can Co., 72 Ill. App. 2d 362, 219 N.E.2d 726 (1966); Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973); Avenell v. Westinghouse Elec. Corp., 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974); Price v. Gatlin, 241 Or. 315, 405 P.2d 502 (1965); Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77 (Tex. 1977). Courts holding that purely economic

cover damages for all commercial losses caused by the breach. The seller asserts in defense that the limited remedy of repair or replacement bars the buyer's recovery on the contract, and more particularly, that the parties' contractual exclusion of liability for consequential damages independently precludes the buyer's claim for relief. The buyer, in turn, asserts that the limited remedy fails of its essential purpose, and that the contractual exclusion of consequential damages, as part of the limited remedy, must fail with it under section 2-719(2) or is unconscionable under section 2-719(3).

This Note first examines the differing approaches that courts have used to resolve the issue, and then proposes an analysis by which the courts may better effectuate the uniform interpretation of section 2-719.

II. THE STATUTORY AMBIGUITY

Sections 2-714 and 2-715 of the UCC provide for recovery by the buyer of consequential damages upon a seller's breach.[9] Section 2-719(3), however, specifically permits a seller to contractually exclude or

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loss cannot be recovered on a tort theory include: Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978); Herbstman v. Eastman Kodak Co., 68 N.J. 1, 342 A.2d 181 (1975); Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); City of La Crosse v. Schubert, Schroeder & Assoc., 72 Wis. 2d 38, 240 N.W.2d 124 (1976).

9. The Code provides for buyer's damages for breach of warranty in regard to accepted goods:

> (1) Where the buyer has accepted goods and given notification (subsection (3) of section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
>
> (3) In a proper case any incidental and consequential damages under the next section may also be recovered.

U.C.C. § 2-714.

The Code also provides for buyer's recovery of incidental and consequential damages:

> (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
>
> (2) Consequential damages resulting from the seller's breach include
>
> (a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
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> (b) injury to person or property proximately resulting from any breach of warranty.

limit liability for consequential damages provided that the exclusion or limitation is not unconscionable.[10] Conscionability is generally defined

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Id. § 2-715.

Section 2-715(2) reflects the general contract principle of consequential damages laid down in Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854). " 'Consequential' or 'special' damages . . . are not defined in terms in the Code, but are used in the sense given them by the leading cases on the subject." *Id.* § 1-106, Comment 3. The official comments to § 2-715, however, delimit the applicability of all case law by rejecting the "tacit agreement" test for recovery of consequential damages followed by some courts. *See id.* § 2-715, Comment 2. This test required the plaintiff to prove that the parties had specifically contemplated that consequential damages could result and that the defendant had assumed the risk of such damages. *See* J. WHITE & R. SUMMERS, *supra* note 1, at 316-18. The official comments to § 2-715 further elaborate:

> Although the older rule at common law which made the seller liable for all consequential damages of which he had 'reason to know' in advance is followed, the liberality of that rule is modified by refusing to permit recovery unless the buyer could not reasonably have prevented the loss by cover or otherwise.

U.C.C. § 2-715, Comment 2. *See generally* J. WHITE & R. SUMMERS, *supra* note 1, at 314-24.

Technically, recovery of consequential damages upon a buyer's breach is not an available remedy under the UCC. *Compare* § 2-703 (seller's remedies in general) *with* § 2-715 (buyer's incidental and consequential damages). Under circumstances not involving single sales of completed goods, however, the seller may be permitted to recover lost profits. *See* Jones, *Remedies Under Article 2*, 30 MO. L. REV. 212, 216-17 (1965).

It also should be noted that even if the contract excludes consequential damages, the buyer still has available a minimum remedy of direct and incidental damages. U.C.C. §§ 2-714, 2-715(1).

10. Section 2-719 covers "Contractual Modification or Limitation of Remedy." Subsection (1) provides:

> (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages.
>
> (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and replacement of the price or to repair and replacement of non-conforming goods or parts; and
>
> (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

U.C.C. § 2-719. The official comments state: "Under this section parties are left to shape their remedies to their particular requirements . . . ." *Id.*, Comment 1.

Subsection (3) specifically provides:

> Consequential damages may be limited or excluded unless the limitation is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Id. § 2-719(3). The official comments state:

> Subsection (3) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316.

Id., Comment 3.

There is, of course, the alternate method of limiting liability by contractual agreement to liquidated damages. *See id.* § 2-718. Section 2-718 provides in part:

in section 2-302,[11] but an exclusion of liability for consequential damages for commercial loss is prima facie conscionable under section 2-719(3).[12] Thus, if a clause excluding a seller's liability for consequential damages for commercial losses is analyzed under the conscionability test of sections 2-302 and 2-719(3),[13] it generally will be

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

Id. § 2-718(1).

11. This section states:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

U.C.C. § 2-302(1). The official comments to this section state:

The basic test is whether, in the light of the general commercial background and commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.

Id., Comment 1.

The scope of unconscionability principle under § 2-302 is not clear and has given rise to substantial scholarly discussion. Professor Leff suggests that unconscionability under § 2-302 is a combination of substantive and procedural unconscionability. Substantive unconscionability involves those cases in which a clause or term in the contract is alleged to be one-sided or overly harsh; procedural unconscionability relates to impropriety during the process of forming a contract. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967). *See* Fleischmann Distilling Corp. v. Distillers Co., 395 F. Supp. 221 (S.D.N.Y. 1975). *See also* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). Professor Murray suggests that there is a "circle of assent" within which the disputed action or term must fall to be conscionable. Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969). For further discussion, analysis, and application of unconscionability under the Code, see Braucher, *The Unconscionable Contract or Term*, 31 U. PITT. L. REV. 337 (1970); Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Murray, *The Realism of Behaviorism Under the Uniform Commerical Code*, 51 OR. L. REV. 269 (1972); Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969).

12. U.C.C. § 2-719(3); *see* note 10 *supra*. Arguably, § 2-719(3)'s use of a negative statement—"limitation of damages where the loss is not [prima facie unconscionable]"—should not be interpreted affirmatively to mean "limitation of damages where the loss is commercial is prima facie conscionable." This argument, however, has never gained support, and the double negative in § 2-719(3) has been uniformly interpreted to mean that consequential damage clauses carry a presumption of conscionability in a commercial context. *See* Fahlgren, *Unconscionability: Warranty Disclaimers and Consequential Damage Limitations*, 20 ST. LOUIS L.J. 435 (1976); Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC*, 53 TEX. L. REV. 60 (1974).

13. It is generally accepted that the test of unconscionability under § 2-302, however defined, is the same test applied under § 2-719(3). Additionally, § 2-719 cross references to § 2-302. *See*

upheld.[14]

Majors v. Kalo Laboratories, Inc., 407 F. Supp. 20 (N.D. Ala. 1975); J.D. Pavlak, Ltd. v. William Davies Co., 40 Ill. App. 3d 1, 351 N.E.2d 243 (1976); Schroeder v. Fageol Motors, Inc., 86 Wash. 2d 256, 544 P.2d 20 (1975).

Professor Leff has suggested that because "§ 2-719 applies to substantively offensive clauses whether bargained about or not, the question [of the validity of exclusions of seller's liability for consequential damages for commerical loss] cannot turn on procedural unconscionability considerations." Leff, *supra* note 11, at 520 n.30. Leff's analysis of § 2-719, however, is not necessarily the accepted position. *See* Johnson v. Mobil Oil Corp., 415 F. Supp. 264, 268 (E.D. Mich. 1976) ("a determination of unconscionability cannot, therefore, be based on [the] substantive content alone [of clauses excluding consequential damages]"). Courts seem to accept Professor Eddy's view that consequential damages may be analyzed under either the substantive or procedural conscionability tests or the more general approach of unfair surprise and oppression. Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)*, 65 CALIF. L. REV. 28, 41-58 (1977).

14. *See* V-M Corp. v. Bernard Distr. Co., 447 F.2d 864, 869 (7th Cir. 1971) (unconscionability clause does not automatically require disregard of parties' agreement); Envirex, Inc. v. Ecological Recovery Assn., 454 F. Supp. 1329, 1336 (M.D. Pa. 1978) (provision agreed upon by parties of equal bargaining power should be set aside only in unusual cases), *aff'd*, 601 F.2d 574 (3d Cir. 1979); American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435, 457-59 (S.D.N.Y. 1976) (unconscionability clause does not justify disturbance of consensual allocation of risk); County Asphalt, Inc. v. Lewis Welding and Eng'r Corp., 323 F. Supp. 1300, 1308 (S.D.N.Y. 1970) (unconscionability claim allowed only in exceptional commercial settings), *aff'd*, 444 F.2d 372 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971). The most important factor that a court considers in determining conscionability is the experience and knowledge of the contracting parties. *See* Cryogenic Equip., Inc. v. Southern Nitrogen, Inc., 490 F.2d 696, 699 (8th Cir. 1974) (expert negotiators; complete absence of evidence of disparity of bargaining power); Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp., 422 F.2d 1013, 1018 (9th Cir.), *cert. denied*, 400 U.S. 902 (1970) (experienced purchasing departments, engineering staffs, and legal departments available to all companies); Wyatt Indus., Inc. v. Publicker, Inc., 420 F.2d 454, 457 (5th Cir. 1969) (both parties had full knowledge and appreciation of all material facts); Cyclops Corp. v. Home Ins. Co., 389 F. Supp. 476, 481 (W.D. Pa. 1975), *aff'd*, 523 F.2d 1050 (3rd Cir. 1975) (large business entities); Orrox Corp. v. Rexnord, Inc., 389 F. Supp. 441, 446 (M.D. Ala. 1975) (close collaboration between buyer and seller); Potomac Elec. Power Co. v Westinghouse Elec. Corp., 385 F. Supp. 572, 579 (D.D.C. 1974), *rev'd on other grounds*, 527 F.2d 853 (D.C. Cir. 1975) (negotiation between two sophisticated corporations with comparable bargaining power and full awareness of their actions); Royal Indemnity Co. v. Westinghouse Elec. Corp., 385 F. Supp. 520, 525 (S.D.N.Y. 1974) (three years of bargaining between two industrial giants); J.D. Pavlak, Ltd. v. William Davies Co., 40 Ill. App. 3d 1, 4-5, 351 N.E.2d 243, 246 (1976) (provision adopted by two experienced parties of substantially equal bargaining power); Kansas City Structual Steel Co. v. L.G. Barcus & Sons, Inc., 217 Kan. 88, 95, 535 P.2d 419, 424 (1975) (parties not "neophytes or babes in the brambles of the business world"); K & C, Inc. v. Westinghouse Elec. Corp., 437 Pa. 303, 308, 263 A.2d 390, 393 (1970) ("buyer was hardly the sheep keeping company with wolves that it would have us believe"). *Cf.* D.O.V. Graphics, Inc. v. Eastman Kodak Co., 46 Ohio Misc. 37, 347 N.E.2d 561 (1976) (clause excluding consequential damages and limiting remedy to replacement of photographic paper on a sale held conscionable between commercial parties under Ohio law, even though not "negotiated," because plaintiff knew of limited liability label on each package). *See also* U.S. Fibres, Inc. v. Proctor & Schwartz, Inc., 509 F.2d 1043 (6th Cir. 1975); Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975); Fredonial Broadcasting Corp. v. RCA Corp., 481 F.2d 781 (5th Cir.

Section 2-719(2) also affects the enforcement of limited remedies. Section 2-719(2) provides that when circumstances cause the limited remedy to "fail of its essential purpose," the general remedies provided under the Code become available to the injured buyer.[15] The exact

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1973); Lincoln Pulp & Paper Co., Inc. v. Dravo Corp., 436 F. Supp. 262 (N.D. Me. 1977); Raybond Electronics, Inc. v. Glen-Mar Door Mfg. Co., 22 Ariz. App. 409, 528 P.2d 160 (1975). *But see* Johnson v. Mobile Oil Corp., 415 F. Supp. 264 (E.D. Mich. 1976); Weaver v. American Oil Co., 276 N.E.2d 144 (Ind. 1971); Allen v. Michigan Bell Tel. Co., 18 Mich. App. 632, 171 N.W.2d 689 (1969); Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974); Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433 (W. Va. 1976).

Standardized form contracts present special problems in determining the conscionability of a contract at its inception. For a fuller analysis of the judicial and legislative treatment of standardized contracts, see generally Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Kornhauser, *Unconscionability in Standardized Forms*, 64 CALIF. L. REV. 1151 (1976); Oldfather, *Toward a Usable Method of Judicial Review of the Adhesion Contractor's Lawmaking*, 16 U. KAN. L. REV. 303 (1968); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); Note, *Unconscionability and Standardized Contracts*, 5 N.Y.U. REV. L. & SOC. CHANGE 65 (1975).

Clauses limiting consequential damages for personal injury are prima facie unconscionable. U.C.C. § 2-719(3); *see* note 10 *supra*. This view has imposed virtually strict liability on the seller. *See, e.g.*, Matthews v. Ford Motor Co., 479 F.2d 399 (4th Cir. 1973); Collins v. Uniroyal, Inc., 64 N.J. 260, 315 A.2d 16 (1974), *noted in* 14 WASHBURN L.J. 708 (1975). The Magnuson-Moss Act—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (Supp. V. 1975), now covers most issues regarding personal injuries and consumer warranties. *See* Anderson, *Failure of Essential Purpose and Essential Failure on Purpose: A Look at Section 2-719 of the Uniform Commerical Code*, 31 SW. L.J. 759, 762 n.18 (1976); Fahlgren, *Unconscionability: Warranty Disclaimers and Consequential Damage Limitations*, 20 ST. LOUIS L.J. 435, 463-71 (1976). *See generally* Brickey, *The Magnuson-Moss Act—An Analysis of the Efficacy of Federal Warranty Regulation as a Consumer Protection Tool*, 18 SANTA CLARA L. REV. 73 (1978); Rothschild, *The Magnuson-Moss Warranty Act: Does it Balance Warrantor and Consumer Interests?*, 44 GEO. WASH. L. REV. 335 (1976).

15. "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act." U.C.C. § 2-719(2). General remedies are available to an injured buyer upon the seller's breach:

> (1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
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> (a) cover and have damage under the next section as to all the good affected whether or not they have been identified to the contract; or
>
> (b) recover damages for non-delivery as provided in this Article (Section 2-713).
>
> (2) Where the seller fails to deliver or repudiates the buyer may also
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> (a) if the goods have been identified recover them as provided in this Article (Section 2-502); or
>
> (b) in a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2-716).
>
> (3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care

meaning of "fail of its essential purpose" is unclear,[16] but limited remedies have been found to fail of their essential purpose if "defects in the goods are latent and not discoverable upon receipt of shipment and reasonable inspection . . . [or if] the seller or other party is required to provide a remedy but, by its action or inaction, causes the remedy to fail."[17]

Underlying the question of enforcement of limited remedies is the UCC's distinction between a disclaimer of warranty and a limitation of remedy.[18] A disclaimer of warranty operates to reduce the number of situations in which the seller can be found in breach.[19] A clause excluding or limiting a remedy, in contrast, restricts the remedies avail-

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and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

Id. § 2-711.

16. The official comments to § 2-719(2) explain that "under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article." *Id.* § 2-719(2), Comment 1. Courts have yet to define with clarity the phrase "fail of its essential purpose."

17. Anderson, *supra* note 14 at 764. The court in E.M. Jorgenson Co. v. Mark Constr. Co., 56 Hawaii 466, 540 P.2d 978 (1975), accepted and followed the Anderson definition. *See generally* J. WHITE & R. SUMMERS, *supra* note 1, at 379-83. *See also* Eddy, *supra* note 13 (talismanic approach, focusing on form of limited remedy rather than on intended purpose). Cases that are consistent with Anderson's summary include: Riley v. Ford Motor Co., 442 F.2d 670 (5th Cir. 1971); Neville Chemical Co. v. Union Carbide Corp., 294 F. Supp. 649 (W.D. Pa. 1968), *aff'd in part, rev'd in part*, 422 F.2d 1205 (3rd Cir.), *cert. denied*, 400 U.S. 826 (1970); Wilson Trading Co. v. David Ferguson, Ltd., 23 N.Y.2d 398, 244 N.E.2d 685 (1968).

18. A warranty and a limitation of remedy are related in a practical sense. "A limitation of remedy or limitation of liability clause assumes the existence of a warranty but states that if that warranty is breached then the buyer is limited to recovering from the seller only a certain type of remedy or certain type of damage." Tracy, *supra* note 8, at 11. Nevertheless, some courts fail to make this distinction. *See, e.g.,* Jones & McKnight Corp. v. Birdsboro Corp., 320 F. Supp. 39 (N.D. Ill. 1970); Gramling v. Baltz, 253 Ark. 361, 485 S.W.2d 183 (1972); Ford Motor Co. v. Tritt, 224 Ark. 883, 430 S.W.2d 778 (1968); Adams v. J.I. Case Co. 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970).

19. J. WHITE & R. SUMMERS, *supra* note 1, at 383-84. Warranties can be excluded entirely if the requirements of U.C.C. § 2-316 are met. One important difference between a disclaimer of warranty and a limitation of remedy is that a disclaimer of warranty must be conspicuously reprinted, *see* U.C.C. § 2-316(2), but no such requirement exists for a limitation of remedy under § 2-719. This difference raises an interesting question on whether the conscionability requirement of § 2-302, which is applicable to consequential damage exclusions under § 2-719(3) and to limitations of remedy generally under § 2-302, also can be applied to disclaimers of warranties. Several courts have applied the concept of conscionability to warranty disclaimers. *See, e.g.,* Walsh v. Ford Motor Co., 50 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. 1969); Eckstein v. Cummins, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974). *See generally* Fahlgren, *supra* note 10, at 437-45; Weintraub, *supra* note 10, at 80-83. *But see* Leff, *supra* note 11, at 523-25 ("common assumption that section 2-302 *is* applicable to warranty disclaimers [is] . . . frankly, incredible").

able once a breach is established.[20]

Remedies otherwise available under the Code can be restricted or limited in two ways. One method is to provide affirmatively a particular remedy in substitution for all other remedies.[21] An offer to repair or replace defective parts is a common example of this type of limitation.[22] The second method of limiting a remedy is to disclaim it explicitly, such as when the parties exclude liability for consequential damages. Thus, the seller's ultimate liability or obligation upon breach of warranty depends not only on the extent to which the warranty is disclaimed, but also on the extent to which the remedy is limited.

If a limited remedy fails of its essential purpose, but the contract specifically excludes consequential damages, the question arises whether this exclusion will become unenforceable along with the limited remedy. Section 2-719(2) can be interpreted to mean that the buyer always can recover consequential damages as part of the general remedies provided under the Code, regardless of a specific exclusion. This interpretation is obviously unfavorable to the seller, who seeks to limit liability for his breach.[23] Alternatively, it can be argued that section 2-719(3) requires that a contractual exclusion of consequential damages be treated as a separate allocation of risk upon breach, re-

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20. "Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719)." U.C.C. § 2-316(4). The official comments add: "Under subsection (4), the question of limitation of remedy is governed by the sections referred to rather than by this section." *Id.*, Comment 2. This section is consistent with the official comments that follow § 2-719: "The Seller in all cases is free to disclaim warranties in the manner provided in Section 2-316." *Id.*, § 2-719, Comment 3.

21. Whether the limited remedy provided in the contract is exclusive, rather than cumulative, is significant. If the remedy is exclusive, the seller decreases its potential liability upon its own breach. If the remedy adds to the remedies normally available to the buyer upon breach, the seller increases its potential liability. Section 2-719(1) "creates a presumption that clauses prescribing remedies are cumulative rather than exclusive." U.C.C. § 2-719, Comment 2. Thus, whether a remedy operates to provide a buyer with a "minimum adequate remedy" to satisfy the requirements of § 2-719(2) may hinge upon whether the presumption of cumulative rather than exclusive remedy has been rebutted. *See, e.g.,* Council Bros., Inc. v. Ray Burner Co., 473 F.2d 400 (5th Cir. 1973); Wyatt Indus., Inc. v. Publicker Indus., Inc., 420 F.2d 454 (5th Cir. 1969); Lincoln Pulp & Paper Co. v. Dravo Corp., 436 F. Supp. 262 (N.D. Me. 1977); Ford Motor Co. v. Reid, 250 Ark. 176, 465 S.W.2d 80 (1971). *See generally* J. WHITE & R. SUMMERS, *supra* note 1, at 376-79.

22. For other examples, see note 6 *supra*.

23. The high economic risk associated with liability for consequential damages is probably the primary reason that the seller oonsiders the clause to be necessary. *See* Anderson, *supra* note 16, at 774; Note, *Fairness, Flexibility, and the Waiver of Remedial Rights by Contract*, 87 YALE L.J. 1057, 1079 n.108 (1978).

gardless of whether the limited remedy fails of its essential purpose. This interpretation clearly favors the seller because the exclusionary clause, under the section 2-719(3) test of conscionability, most likely will be enforced to bar the seller from liability for consequential damages.

Both interpretations find support in the UCC's language and policies. The plain language of section 2-719(2), which specifically states that all remedies are available to the buyer when circumstances cause an exclusive or limited remedy to fail of its essential purpose,[24] lends credence to the first view. Further, section 1-106 provides that remedies shall be liberally construed.[25] Thus, it can be argued that any ambiguity should be resolved in favor of the buyer's recovery of all damages, including consequential damages.

On the other hand, section 102(2)(b) states that the UCC seeks to permit parties to allocate freely unknown risks.[26] This policy is reiter-

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24. For the text of § 2-719(2), see note 15 *supra*.

25. (1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

(2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.

U.C.C. § 1-106. The official comments to § 2-711 on buyer's general remedies provide: "It should also be noted that this Act requires its remedies to be liberally administered and provides that any right or obligation which it declares is enforceable by action unless a different effect is specifically prescribed (Section 1-106)." *Id.* § 2-711, Comment 3.

Section 1-102 provides in part:

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

. . . .

Id. § 1-102. The official comments to § 1-102 state:

The text of each section should be read in the light of the purpose and policy of the rule or principle in question, and also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

Id., Comment 1. Further, "freedom of contract is a principle of the Code." *Id.*, Comment 2. However, "[s]ection 1-102(2) does not exhaustively specify all the Code's underlying purposes. A further one is simply that the law of commercial transactions be, so far as reasonable, liberal and non-technical." J. WHITE & R. SUMMERS, *supra* note 1, at 14.

26. U.C.C. § 102(2)(b); *see* note 25 *supra*.

ated in the official comments following section 2-719.[27] Thus, it can be argued that a contractual provision excluding consequential damages should not be denied enforcement because a limited remedy turns out to be unenforceable. The textual arrangement of section 2-719 further supports this interpretation. The "failure of essential purpose" subsection is set apart from the one on consequential damages; moreover, the subsections do not refer to one another. It can be argued, therefore, that the drafters of the Code intended separate analyses to govern the provisions on limited remedy and exclusion of consequential damages; otherwise, the conscionability requirement of section 2-719(3) could have been subsumed under the "failure of essential purpose" test of section 2-719(2). Finally, the statutory construction rule of "the specific governs the general" supports this interpretation. The subsection on "failure of essential purpose" appears to be a more general provision, referring to all remedies under the Code. Subsection 2-719(3), in comparison, refers specifically to the exclusion of consequential damages. As a result, the enforcement of a contractual provision excluding consequential damages should be determined by the more specific provision of section 2-719(3) rather than by the more general language of section 2-719(2).[28]

III. Judicial Approaches to the Issue

Although most decisions on the issue lack clear reasoning, they suggest three judicial approaches to interpreting provisions holding sellers harmless for consequential damages. One group of decisions characterizes a provision excluding liability for consequential damages as merely an elaboration of the exclusiveness of the limited remedy. Thus, if the exclusive remedy fails, so does the exclusion of consequential damages.[29] A second set of decisions takes the position that if the limited remedy fails of its essential purpose, the exclusion of liability for consequential damages is void as a matter of law.[30] Some courts

27. "Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect." U.C.C. § 2-719, Comment 1.

28. Following this line of reasoning, the two subsections would refer to one another, or would be in reverse order, if the drafters had intended exclusions of consequential damages to be subject to the standards for failure of an exclusive, limited remedy. *See* Anderson, *supra* note 14, at 773 n.80.

29. *See* notes 33-53 *infra* and accompanying text.

30. *See* notes 54-70 *infra* and accompanying text.

qualify this holding by requiring that the seller be found to have willfully caused the limited remedy to fail of its essential purpose.[31] The third group upholds the exclusion of consequential damages as the parties' intended allocation of risk, apart from their agreement on limited remedy.[32]

A. *Exclusion of Consequential Damages as Merely an Elaboration of the Limited Remedy's Exclusiveness*

A number of courts find that a purported exclusion of liability for consequential damages is merely a reiteration of the exclusiveness of the limited remedy provided in the contract.[33] The "exclusion" has no legal significance independent of the limited remedy. Thus, if the limited remedy fails of its essential purpose or is otherwise voided, the "exclusion" also will be void. Likewise, if the limited remedy does not fail of its essential purpose and is a valid limitation, the "exclusion" of consequential damages will be enforced.

Koehring Co. v. A.P.I., Inc.[34] exemplifies this approach. The warranty for the sale of goods in *Koehring* limited the seller's liability to either repair or replacement of a defective product within six months after date of delivery.[35] The warranty provision further specified that the seller's obligation under the warranty did not include liability for consequential damages.[36] The court, applying Michigan law,[37] found that if the seller had willfully breached the warranty, the limited repair or replacement remedy failed of its essential purpose under section 2-719(2),[38] entitling the injured buyer to all remedies available under the Code, including consequential damages.[39] In reaching this holding, the

31. *See* notes 71-101 *infra* and accompanying text.

32. *See* notes 102-41 *infra* and accompanying text.

33. *See* note 21 *supra*.

34. 369 F. Supp. 882 (E.D. Mich. 1974).

35. *Id.* at 885.

36. "Our obligation under this Warranty shall not include . . . any liability for direct, indirect or consequential damage or delay." *Id.*

37. MICH. COMP. LAWS ANN. § 440.2719 (MICH. STAT. ANN. § 19.2719 (Callaghan 1974)).

38. The *Koehring* case came before the court on a motion by the seller to dismiss. As a result of this procedural posture, the court did not decide whether the breach was willful—willfulness being a question of fact. 369 F. Supp. at 891. The court stated, however, that "defendants might not be entitled to additional remedies if they fail to prove that plaintiff failed to repair and such failure was wilfully dilatory." *Id.*

39. *Id.* at 890.

court followed two earlier cases,[40] which had reasoned that it would be inequitable to allow a seller to benefit from his refusal to perform under the warranty.[41] The *Koehring* court thus concluded that the consequential damages clause "should be treated as an elaboration of the limitation of liabilities language such that if the exclusive remedy of repair and replacement is avoided, so too would the exclusion of consequential damages be avoided."[42]

In *Fargo Machine & Tool Co. v. Kearney & Trecker Corp.*,[43] the seller's warranty on a sophisticated piece of automated industrial equipment, in a single sentence, both limited buyer's remedy to repair, replacement, or repurchase at purchase price and disclaimed liability for consequential damages.[44] Holding that the limited remedy failed of its essential purpose,[45] the court noted that the contract's exclusion of consequential damages was not unconscionable if viewed independent of the limited remedy of repair or replacement.[46] As an elaboration of the limited remedy, however, the court gave it no effect,[47] and the seller became liable for lost profits under sections 2-714 and 2-715.[48]

In both *Koehring* and *Fargo Machine*, the courts' characterization of the exclusionary language as an elaboration of the limited remedy was conclusory. In determining the enforceability of the parties' exclusion of liability for consequential damages, neither court expressly considered the parties' intent in incorporating the exclusionary language in their agreement, although this finding is implicit in other courts' holdings. It appears that the *Koehring* and *Fargo Machine* courts decided at the outset to refuse enforcement of the seller's limitation of its liability

40. Jones & McKnight Corp. v. Birdsboro Corp., 320 F. Supp. 39 (N.D. Ill. 1970); Adams v. J.I. Case Co., 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970). For a fuller discussion of these cases, see notes 71-87 *infra* and accompanying text.

41. "[I]t would not be equitable to allow the seller to refuse to perform the one remedy available to the buyer and then be freed of any responsibility caused by this failure." 369 F. Supp. at 890. This statement is not entirely true. Even if the limited remedy had failed of its essential purpose and the clause excluding consequential damages was upheld, the buyer could recover its incidental damages in recovering the purchase price. *See* note 124 *infra* and accompanying text.

42. 369 F. Supp. at 887. The seller thus became liable for as much as $2,000,000. *Id.* at 884.

43. 428 F. Supp. 364 (E.D. Mich. 1977).

44. "Seller shall not be liable for loss of profits or consequential damages and seller's maximum liability under no circumstances shall exceed the replacement of the part or product, or at seller's option, the repurchase at buyer's purchase price of the product." *Id.* at 381.

45. *Id.* at 382.

46. *Id.*

47. *Id.*

48. *Id.* at 384. Liability for lost profits would amount to at least $2,640. *Id.*

and then characterized the exclusion as an elaboration of the limited remedy to justify their results. This approach does not seem satisfactory under the Code, which favors a policy of freedom of contract and emphasizes giving legal effect to the intent of the parties.[49]

Courts might consider several factors in determining whether language that purports to exclude a seller from liability for consequential damages is, as a matter of fact, an elaboration of an exclusive, limited remedy, rather than a separate and special allocation of risk. Courts could examine the language of the contract itself. A clear statement of the specific intent of the liability exclusion obviously would remove ambiguity.[50] Even in the absence of a clear statement of intent, courts could focus on the location of the exclusionary language within the contract. Language positioned in the same paragraph or sentence as the limited or exclusive remedy would support an inference that the purported exclusion was intended to be an elaboration of the remedy.[51] Exclusionary language positioned in an entirely separate paragraph from the provision for a limited remedy might support an inference that it was intended to be a separate allocation of risk.[52] Finally, courts might consider external evidence of the parties' intent in including an exclusion of consequential damages within their agreement. Courts could consider, for example, whether the parties particularly negotiated or considered the issue of the special allocation of risk of consequential

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49. *See* notes 26-27 *supra* and accompanying text.

50. *Compare, e.g.,* Adams v. J.I. Case Co., 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970) (language appears to deny unequivocally any liability for consequential damages; *see* note 72 *infra* and accompanying text) *with* E.M. Jorgensen Co. v. Mark Constr. Inc., 56 Hawaii 466, 540 P.2d 978 (1975) (opinion states that remedy is exclusive in same sentence that denies liability for consequential damages; *see* note 90 *infra* and accompanying text).

51. On the basis of this rationale, the *Fargo Machine* case may have been correctly decided, because the provision for limited remedy and the disclaimer of liability for consequential damages appeared in the same sentence. *See* note 44 *supra.*

52. This finding has apparently influenced many jurisdictions to hold the exclusion to be a separate and conscionable allocation of risk. *See* notes 102-41 *infra* and accompanying text. At least one court, however, has held that the location of the exclusionary language does not alone determine its enforcement. J.A. Jones Constr. Co. v. City of Dover, 372 A.2d 540 (Del. Super. Ct. 1977). The court stated:

> [T]he warranty and limitation of liability provisions in these contracts are separate provisions. While this is a factual distinction, it is not determinative. I do not find that the scope or effect of § 2-719 turns upon the location of the clause within the contract. The same observations are applicable to . . . the subject of excluding consequential damages . . . .

Id. at 551.

damages apart from their agreement on the limited remedy.[53]

B. *Exclusion of Consequential Damages Unenforceable*

The previous section grouped cases in which courts held unenforceable an exclusion of liability for consequential damages if the exclusion was merely an elaboration of a void, limited remedy. This section collects decisions in which courts, as a matter of law, refused enforcement of the exclusion if the limited remedy failed of its essential purpose under section 2-719(2). This group of decisions actually encompasses two subgroups, the latter of which requires proof that the seller's breach was willful.

1. *Exclusion of Consequential Damages is Void if the Limited Remedy Fails of Its Essential Purpose*

In *Majors v. Kalo Laboratories, Inc.*[54] defendant-distributors sold plaintiff-retailers soybean inoculant subject to a warranty that provided for a limited remedy of return of purchase price if the claim was filed within 120 days.[55] Applying Alabama law,[56] the court held the limited remedy to be unenforceable. Finding that the defects in the goods were latent and thus not readily discoverable within the time period provided by the warranty, the court considered the contractual remedy illusory.[57] In reaching this conclusion, the court did not distinguish the conscionability test of section 2-719(3) from the failure of essential pur-

53. In Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978), the Idaho Supreme Court struck down as an adhesion contract an agreement between a corporation and custom farmers. The court found that the terms of the printed form contract indicated significant disparity in the bargaining power of the parties. The court also found that the parties' exclusion of liability was an "integral" part of the limited remedy, and that a failure of the limited remedy would materially alter the balance of risk set by the parties in the contract. *Id.* at 343, 344, 581 P.2d at 801, 802. The court thus reasoned that the general remedy provisions of the UCC should govern the rights of the parties, and granted consequential damages of $25,000 for lost profits under § 2-715. *Id.* at 347, 581 P.2d at 805. *Cf.* Steele v. J.I. Case Co., 197 Kan. 554, 419 P.2d 902 (1966) (warranty limiting farm machinery manufacturer's liability to return of cash or notes actually received by and on account of purchase price of manufacturer's product or part held to be unconscionable as an adhesion contract).

54. 407 F. Supp. 20 (M.D. Ala. 1975).

55. The warranty guaranteeing refund of the purchase price was on the promotional brochure and on each package of the inoculant. The distributorship contract provided for the waiver of all claims received by the distributor more than 120 days after the sale. *Id.* at 21-22.

56. ALA. CODE § 2-719 (1975).

57. 407 F. Supp. at 23.

pose test of section 2-719(2).[58] Instead, it analyzed the enforceability of the limited remedy under a general test of prevention of unfair surprise.[59] The court, however, clearly merged the exclusion-of-consequential-damage and the limited-remedy provisions in its analysis: because the limited remedy of return of purchase price was void, the distributor also was liable, as a matter of law, for the retailers' consequential damages.[60]

In *Soo Line R.R. Co. v. Fruehauf Corp.*[61] the court applied a similar analysis. In *Soo Line* the contract for the sale of railroad cars included a limited warranty that restricted seller's remedial obligations to repair or replacement, and disclaimed any implied warranty and any liability for consequential damages.[62] The jury nevertheless found that the seller had failed to perform its obligations under the limited remedy and, accordingly, awarded consequential damages.[63] Applying Minnesota law,[64] the Eighth Circuit upheld the consequential damages award, reasoning that it was a "fundamental intent" of the Code that a failure of essential purpose under section 2-719(2) makes available all contractual remedies.[65] In addition, the court noted that section 1-106 requires the liberal administration of all remedies.[66]

The approach taken by *Majors*, *Soo Line*, and their progeny is inflexible and absolute. It either disregards or fails to consider the intent of the parties in including language in the contract that excludes liabil-

58. Applying the conscionability test, the court found the limited remedy unconscionable because the consequential damages were "likely to be grossly disproportionate to the cost of the product" and the defect was latent. *Id.* at 23. The court's test seems synonymous with the test usually made under § 2-719(2), *i.e.*, whether the buyer received "substantial value" with the limited remedy. *See* notes 16-17 *supra* and accompanying text.

59. 407 F. Supp. at 24.

60. *Id.* at 23-24. *See also* Neville Chemical Co. v. Union Carbide Corp., 294 F. Supp. 649 (W.D. Pa. 1968), *vacated on other grounds*, 422 F.2d 1205 (3rd Cir.) (recovery of consequential damages permitted, despite exclusionary language, because latent defect caused exclusive remedy (refund of purchase price) to fail of essential purpose), *cert. denied*, 398 U.S. 927 (1970).

61. 547 F.2d 1365 (8th Cir. 1977).

62. "This warranty is expressly in lieu of all other warranties . . . and we shall not be liable for indirect or consequential damages resulting from any such defects in material or workmanship." *Id.* at 1370.

63. Consequential damages amounted to $262,784. *Id.* at 1373 n.12.

64. MINN. STAT. ANN. § 336.2-719(2) (1960).

65. 547 F.2d at 1373. *Accord,* Riley v. Ford Motor Co., 442 F.2d 670 (5th Cir. 1971); Beal v. General Motors Corp., 354 F. Supp. 423 (D. Del. 1973); Ehlers v. Chrysler Motor Corp., 88 S.D. 612, 226 N.W.2d 157 (1975).

66. *See* note 25 *supra.*

ity for consequential damages and provides for a limited remedy.[67] Under this approach the question of whether exclusion of liability for consequential damages was negotiated as a separate allocation of risk apparently is irrelevant. The provision excluding seller's liability for consequential damages always will be voided if the limited remedy fails of its essential purpose.

This position seems contrary to the general policy underlying the Code and, in particular, to the official comments following section 2-719, both of which grant parties the freedom to allocate risks and liabilities.[68] If the parties consider carefully all possible limitations on liability and negotiate specifically to exclude consequential damages, the court's summary joinder of the contract's exclusion of consequential damages with all other limitations on remedy will operate unexpectedly, upon a failure of essential purpose, to burden the seller and compensate the buyer.[69] Predictability and certainty of outcome seem to be the only advantages of this absolute interpretation of section 2-719(2).

2. *Exclusion of Consequential Damages is Void if the Seller Willfully Causes the Limited Remedy to Fail of Its Essential Purpose*

Some courts hold that the exclusion of liability for consequential damages is void if the seller willfully fails to comply with its obligations under the warranty.[70] The willfullness element is crucial in that it not only causes the limited remedy to fail of its essential purpose, but also voids the exclusion of consequential damages.

Adams v. J.I. Case Co.[71] presents an early application of this ap-

67. If analyzed under the "elaboration of limited remedy" approach, *see* notes 33-53 *supra* and accompanying text, the court might have reached the same result. Because the exclusion of consequential damages and the limitation of remedy were joined in the same sentence, it may be inferred that the parties intended the exclusion of consequential damages to be a mere elaboration of the exclusiveness of the limited remedy. *See* notes 40, 49 *supra* and accompanying text.

68. *See* notes 26-27 *supra* and accompanying text.

69. On the other hand, the contract's exclusion of consequential damages could be simply the result of a careful drafter who rephrased the exclusiveness of the limited remedy by setting forth with particularity the remedies intended to be replaced by the limited remedy. If a separate analysis of the exclusion of consequential damages, with its presumption of validity, is applied to this situation, an exclusive remedy might be upheld to the unexpected benefit of the seller and detriment of the buyer. This observation underscores the need for judicial scrutiny of the intent of the parties, including analysis of the particular exclusionary language used by the parties.

70. *See* notes 102-41 *infra* and accompanying text.

71. 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970).

proach. In *Adams* a bulldozing contractor bought a tractor subject to a written warranty provision that, in one sentence, limited the seller's obligations to repair or replacement of defective parts and, in a separate sentence, excluded liability for consequential damages.[72] An Illinois appellate court held[73] that the repair-or-replacement remedy failed of its essential purpose under section 2-719(2) because the seller was willfully dilatory in making repairs under the warranty.[74] Although the court found no unconscionability in the making of the contract,[75] it reasoned that the seller, in willfully repudiating its obligation under the warranty, lost the right to claim the benefits of the provision excluding consequential damages[76] because "the limitations of remedy and of liability are not separable from the obligations of the warranty."[77]

The *Jones & McKnight Corp. v. Birdsboro Corp.*[78] court reached a similar result. In this case the seller contracted to manufacture and deliver automated machinery to the buyer. The seller's "General Terms and Conditions" form, held to be part of the contract,[79] contained a written warranty identical to that in *Adams*—one sentence limiting buyer's remedy to repair or replacement of defective parts and a second sentence denying liability for consequential damages.[80] The buyer alleged that the seller had breached the warranty by being willfully dilatory in making repairs, causing plaintiff substantial economic loss.[81] An Illinois district court, applying Pennsylvania law,[82] held that

72. "In no event shall Dealer or Company be liable for consequential damage of any kind or nature." *Id.* at 399, 261 N.E.2d at 6.

73. The court applied Illinois law. ILL. ANN. STAT. ch. 26, § 2-719(2) (Smith-Hurd 1973).

74. 125 Ill. App. 2d at 403, 261 N.E.2d at 8.

75. "Plaintiff does not plead any coercive, fraudulent, overreaching or unconscionable sales tactics, so presumably the original limitation of liability was not unreasonable and from all that appears, the plaintiff made his purchase with full knowledge of the limitations." *Id.* at 402, 261 N.E.2d at 7. This finding would amount to procedural conscionability under the Leff analysis. *See* note 11 *supra*.

76. 125 Ill. App. 2d at 402-03, 261 N.E.2d at 7-8.

77. *Id.* at 402, 261 N.E.2d at 7. The buyer sought $9,995 in consequential damages for economic losses consisting of unnecessary repair costs, 810 hours of working time at $12 per hour, and profits from lost jobs. The court remanded the damages issue for proof on plaintiff's claim of repair costs. *Id.* at 407, 261 N.E.2d at 10.

78. 320 F. Supp. 39 (N.D. Ill. 1970).

79. *Id.* at 42.

80. "In case of any defects, Vendor's liability is limited to the replacement . . . of any material, parts or equipment. . . . Vendor assumes no liability for consequential damages of any kind." *Id.* at 41 n.2.

81. The buyer sought consequential damages for (a) the cost of down time; (b) the cost of material ruined during production; (c) the labor cost of the ruined material; (d) the value of lost

even though the clause excluding consequential damages was authorized and conscionable under section 2-719(3),[83] the injured buyer would be entitled to all remedies under the Code, including consequential damages, if the exclusive remedy failed of its essential purpose under section 2-719(2).[84] Because the seller's willful breach of the warranty caused the bulk of the buyer's damages, the court would not allow the seller to "shelter itself behind one segment of . . . the same warranty, which alleged repudiation has caused the very need for relief which the defendant is attempting to avoid."[85] The court also reasoned that the official comment to section 2-719(2) "manifestly indicates that the alleged failure of the defendant to meet its warranty obligations should deprive it of the benefits of the limited remedy clause."[86]

Neither *Adams* nor *Jones & McKnight* distinguished a warranty from a limitation of liability. This failure may explain why the courts also did not differentiate between a limited remedy and a disclaimer of a remedy:[87] if a court failed to recognize the UCC's distinction between a reduction of substantive obligations and a reduction of remedies for breach, it probably would not consider the distinction between different kinds of reductions in remedies.

This explanation for the results in *Adams* and *Jones & McKnight Corp.*, however, is not adequate for the decision in *E.M. Jorgensen Co. v. Mark Constr. Inc.*[88] In *E.M. Jorgensen* the seller of sectional steel plate brought an action for purchase price, and the buyer counterclaimed for damages caused by the seller's breach of warranty for replacement or refund of the purchase price. The trial court, granting the

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production or lost profits; (e) the excessive material and labor costs resulting from efforts to make plaintiff's mill operate efficiently; and (f) the excessive overhead and costs incurred in operating the mill. *Id.* at 40 n.1.

82. 12A PA. CONS. STAT. ANN. § 2-719(2) (Purdon 1956).

83. 320 F. Supp. at 43. The court's holding in *Jones & McKnight Corp.* accords with that in Adams v. J.I. Case Co., 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970). *See* note 75 *supra* and accompanying text.

84. 320 F. Supp. at 44. The court dismissed the seller's motion for summary judgment and granted the buyer's motion to amend its complaint to allege the seller's willful dilatoriness in repair of defective parts. *Id.* at 45.

85. *Id.* at 43-44.

86. *Id.* at 44.

87. *See* notes 15-18 *supra* and accompanying text.

88. 56 Hawaii 466, 540 P.2d 978 (1975). *Accord,* Cyclops Corp. v. Home Ins. Co., 389 F. Supp. 476, 482 (W.D. Pa.), *aff'd*, 523 F.2d 1050 (3rd Cir. 1975) (consequential damages exclusion enforceable under Ohio law because, *inter alia*, sellers did not breach warranty by willfully dilatory behavior).

seller's motion for summary judgment, dismissed the buyer's counterclaim[89] by giving effect to the "Limitation of Warranty Liability" paragraph. This paragraph, in one sentence, disclaimed any liability for consequential damages and limited the buyer's remedies to those exclusively set forth in the contract.[90] On interlocutory appeal, the Hawaii Supreme Court specifically found the exclusion of consequential damages clause to be conscionable under section 2-719(3), because there was no evidence of disparity in bargaining power or unfair surprise in the making of the contract.[91] Nonetheless, the court held that if the seller had caused the limited remedy to fail of its essential purpose—a question of fact—then the buyer would be entitled to the "array of remedies provided a buyer by the Uniform Commercial Code."[92] The court thus reinstated the buyer's counterclaim and remanded the case to the trial court for a determination of the facts.[93]

The statutory support for these courts' grounding their holdings on a finding of willfullness is questionable. Fault and absence of good faith are not synonymous under the UCC. "Good faith" is defined as "honesty in fact in the conduct or transaction concerned."[94] A court might be justified in setting aside any contractual benefit to the seller if the fundamental assumption of good faith is absent, but none of the courts made this finding. "Fault," by comparison, is defined as "wrongful act, omission or breach."[95] Because the Code sets forth remedies in the event of breach,[96] fault should not provide an independent justification for setting aside a contractual exclusion of liability for consequential damages. Thus, it does not seem reasonable for courts to deny sellers,

89. 56 Hawaii at 467, 540 P.2d at 980.

90. In no event shall Seller be liable for any labor claims or special, indirect, consequential or other damages . . . and the remedies of Buyer expressed herein are exclusive. . . . This warranty is made in lieu of all other express and implied warranties . . . and of the other obligations or liability on the part of Seller . . . .

Id. at 470, 540 P.2d at 982.

In addition, the seller conspicuously printed on the front page of its offer: "NOTICE—PROVISIONS PRINTED ON THE REVERSE SIDE HEREOF COMPRISE ADDITIONAL TERMS OF THIS CONTRACT LIMITING THE SELLER'S WARRANTY OBLIGATION AND EXCLUDING LIABILITY FOR CONSEQUENTIAL DAMAGES." *Id.* at 469, 540 P.2d at 981.

91. 56 Hawaii at 474-75, 540 P.2d at 984-85 (applying HAWAII REV. STAT. § 490:2-719 (1976)).

92. *Id.* at 480, 540 P.2d at 988.

93. *Id.*

94. U.C.C. § 1-201(19).

95. *Id.* § 1-201(16).

96. *See* note 15 *supra* and accompanying text.

as a matter of law, an exclusion of liability for consequential damages simply because the seller willfully caused the limited remedy to fail of its essential purpose.[97]

Some courts, in determining the enforceability of an exclusion of consequential damages, have specifically refused to attach legal significance to whether the seller's breach was willful. In *American Elec. Power Co., Inc. v. Westinghouse Corp.*,[98] for example, a federal district court considered a "Limitation of Liability" provision similar to that in *E.M. Jorgensen Co.*[99] The court, presuming a willfully dilatory breach by the seller of its warranty to repair or replace, held that the consequential damage exclusion would be given effect.[100] Recognizing that *Jones & McKnight Corp.*, also decided under Pennsylvania law, might be inconsistent with its reasoning, the court pointed out that it was not bound by an interpretation made by another federal district court.[101]

C. *Exclusion of Consequential Damages Enforceable as a Conscionable and Intended Allocation of Risk, Regardless of Whether the Limited Remedy Fails of Its Essential Purpose*

The cases discussed in this section reject the approaches presented in the previous sections in favor of an independent analysis of the exclusionary clause to determine its conscionability under sections 2-302 and 2-719(3).

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97. Professor Anderson seems to condone this result in certain circumstances:

> The proper focus for analysis is on the contemplation of the parties when the risk of consequential damages was allocated to the buyer, on whether the seller's unwillingness or inability to perform the limited remedy warranty caused the buyer's consequential losses, and on whether that causation, if present, sufficiently goes against the contemplations of the parties that it would be unconscionable to leave the risk allocation of consequential damages on the buyer.

Anderson, *supra* note 14, at 782. Although Anderson apparently agrees that, in determining whether the exclusion of liability for consequential damages is enforceable, the parties' intent should receive primary consideration, he also focuses on the causation element—whether the seller's action or inaction caused the consequential damages. This emphasis on causation seems unnecessary because the buyer cannot recover consequential damages under § 2-715 except upon proof that the losses arose from the seller's breach. A better approach would be to examine first the allocation of risks at the inception of the contract to determine whether the risk of damages attributable to the seller's fault was included.

98. 418 F. Supp. 435 (S.D.N.Y. 1976); *see* notes 120-28 *infra* and accompanying text.

99. *See* note 90 *supra* and accompanying text.

100. 418 F. Supp. at 454 n.35.

101. *Id.* at 459 n.43. *Accord,* AES Technology Sys., Inc. v. Coherent Radiation, 583 F.2d 933, 939 n.6 (7th Cir. 1978); Soo Line R.R. Co. v. Fruehauf Corp., 547 F.2d 1365, 1371 n.8 (8th Cir. 1977).

An early example of this approach appeared in *County Asphalt, Inc. v. Lewis Welding and Eng'r Corp.*[102] In separate sentences, the parties' contract for the sale and installation of asphalt plants and automatic batch control systems limited the buyer's remedy to repair or replacement of defective parts[103] and excluded the seller from liability for consequential damages.[104] The district court did not determine whether the limited remedy failed of its essential purpose because the seller wholly failed to provide the remedy.[105] A special appendix to the court's decision, however, addressed the enforceability of the contract's exclusion of consequential damages and the relationship of sections 2-719(2) and 2-719(3) under Ohio and New York law.[106] The court found no unconscionability in the exclusion of consequential damages, in the absence of a showing of bad faith[107] or unequal bargaining power.[108] The parties negotiated the contract with care;[109] furthermore, an adequate remedy remained—recovery of the purchase price.[110] The court also considered whether all limitations on a seller's liability should be voided upon failure of a limited remedy's essential purpose, but concluded that "the exclusive remedy clause should be ignored; other clauses limiting remedies in less drastic manners and on different theories would be left to stand or fall independently of the stricken clause."[111] Thus, the exclusion of consequential damages, because it was not unconscionable, would be enforced to protect the seller from liability for consequential damages.[112]

The Seventh Circuit Court of Appeals agreed with this reasoning in *V-M Corp. v. Bernard Distrib. Co.*[113] In *V-M Corp.* a wholesale distrib-

102. 323 F. Supp. 1300 (S.D.N.Y. 1970), *aff'd*, 444 F.2d 372 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971).

103. 323 F. Supp. at 1309.

104. The seller "shall in no event have any liability for loss of profits, losses caused by shutdowns or delay or other similar or dissimilar consequential damages." 444 F.2d 372, 378 (2d Cir. 1971).

105. 323 F. Supp. at 1302.

106. Although the court applied Ohio law, *see* OHIO REV. CODE ANN. § 1302.93 (Page 1979), it stated that the same result would obtain under New York law. 323 F. Supp. at 1309.

107. The court suggested that had "the defendant [been] guilty of bad faith, it might have been estopped from asserting exculpatory contractual language." 323 F. Supp. at 1308.

108. *Id.*

109. *Id.* at 1309.

110. *Id.*

111. *Id.*

112. *Id.*

113. 447 F.2d 864 (7th Cir. 1971).

utorship contract for electronic equipment included a warranty provision for the replacement of defective goods.[114] Separate "Limitation of Liability" and "No Liability for Termination" provisions excluded the distributor's liability for consequential damages.[115] The court held that the limited remedy did not fail of its essential purpose because the distributor met its obligations under the limited remedy.[116] The court also noted that "[s]ection 2-719(2) need not automatically require disregard of the particular limitations upon liability specified by the contracting parties,"[117] because section 2-719 was intended to encourage consensual allocation of risks, particularly in the commercial context.[118] The court found "nothing in this record to justify protection of the distributor's profits or expenditures at the expense of the manufacturer's."[119]

Similarly in *American Elec. Power Co. v. Westinghouse Elec. Corp.*,[120] a public utility holding company and its subsidiaries brought an action against the seller-manufacturer of a steam turbine generator for breach of a warranty obligating defendant to repair or replace defective parts for one year after initial synchronization.[121] Exclusion of liability for consequential damages appeared in a separate paragraph.[122] The court rejected the buyer's claim that "once a limited remedy, such as the warranty to repair or replace, has failed of its essential purpose, a buyer may resort to all the remedies for breach provided in the Uniform Commercial Code without regard to any contractual limitation of lia-

114. *Id.* at 868.

115. "In no event shall V-M be liable for consequential or special damages . . . ." *Id.* "Neither V-M nor the Distributor shall, by reason of termination or nonrenewal of the Distributor's distributorship of said products, be liable for compensation, reimbursement or damages on account of loss of prospective products on anticipated sales . . . ." *Id.* at 869.

116. *Id.* at 868.

117. *Id.* at 869.

118. *Id.*

119. *Id.*

120. 418 F. Supp. 435 (S.D.N.Y. 1976).

121. *Id.* at 440. The warranty also obligated the seller to replace for one year those parts which replaced defective parts. *Id.*

122. Except as otherwise agreed herein, the Seller shall not be liable for special, or consequential damages, such as, but not limited to, damage or loss of other property or equipment, loss of profits or revenue, loss of use of power system, cost of capital, cost of purchased or replacement power, or claims of customers or purchaser for service interruptions. The remedies of the purchaser set forth herein are exclusive, and the liability of the Seller . . . shall not, except as expressly provided herein, exceed the price of the equipment of [or] part on which such liability is based.

Id. at 440-41.

bility."[123] The court also held that the warranty of repair or replacement and the clause excluding consequential damages should be read as independent provisions[124] for three reasons. First, the limited remedy to repair or replace defective parts was in a paragraph totally separate from the consequential damages exclusion, indicating that the parties intended the two provisions to be separate allocations of business risk.[125] If the court refused to give effect to the exclusion of liability for consequential damages, which was otherwise conscionable under 2-719(3), it would disturb the "consensual allocation of business risk."[126] Second, the contract had been "painstakingly negotiated between industrial giants;"[127] thus, it presented no adhesion contract problems. Third, the seller's failure to replace or repair, although it caused the limited remedy to "fail of its essential purpose," still left the buyer with a remedy of direct damages to cover the purchase price of all defective parts.[128]

The Ninth Circuit Court of Appeals also has adopted this approach. In *S.M. Wilson & Co. v. Smith Int'l*[129] the contract for a tunnel boring machine contained a warranty that in separate clauses provided for a limited remedy and disclaimed liability for consequential damages.[130] The machine failed to operate properly and the buyer sued, seeking consequential damages.[131] Considering the same factors as analyzed in *American Elec. Power Co.*,[132] the court held that the parties' consensual allocation of risk should not be disturbed, and gave full effect to the exclusion of consequential damages.[133]

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123. *Id.* at 455.

124. *Id.* at 456. In reaching this conclusion, the court presumed that the seller had been willfully dilatory in making repairs. *Id.* at 454 n.35, 459 n.43. Applying the approach presented in notes 70-101 *supra* and accompanying text, a court would have refused to enforce the exclusion of consequential damages, regardless of its independent analysis, because of the seller's willful dilatoriness in repair.

125. 418 F. Supp. at 458.

126. *Id.*

127. *Id.*

128. *Id.*

129. 587 F.2d 1363 (9th Cir. 1978).

130. *Id.* at 1366-67 n.2.

131. *Id.* at 1369-70.

132. *See* notes 124-26 *supra* and accompanying text.

133. In reaching this conclusion we are influenced heavily by the characteristics of the contract between Smith and Wilson. . . . Parties of relatively equal bargaining power negotiated an allocation of their risks of loss. Consequential damages were assigned to the buyer, Wilson. The machine was a complex piece of equipment designed for the buyer's purposes. The seller Smith did not ignore his obligation to repair; he simply was

The court in *AES Technology Sys., Inc. v. Coherent Radiation*[134] extended this analysis one step further. In *Coherent Radiation* a contract for the sale of a laser contained as the seller's "sole liability" a warranty to repair or replace defective parts.[135] Unlike the contracts in the majority of cases previously considered, this one contained no written clause excluding liability for consequential damages. The court, nevertheless, found that the wording of the repair-or-replacement warranty implied an exclusion of the seller's liability for consequential damages.[136] In determining whether consequential damages are warranted if the limited remedy fails of its essential purpose, the court must examine the parties' intent on the basis of the individual fact situation, the type of goods, the parties, and the precise nature and purpose of the contract.[137] The court concluded that if the parties intended the buyer to bear the risk of the project, then incidental damages would provide a "minimum adequate remedy."[138]

The significance of the *AES* decision lies in the court's willingness to find that the parties intended the risk of consequential damages to be borne by the buyer even in the absence of specific contractual language to that effect. This approach seems inconsistent with the plain language of section 2-719(2), which states that all remedies are available under the Code once a limited remedy fails of its essential purpose. It is the existence of the specific exclusionary clause that gives rise to an inference that the parties intended the exclusion to have special meaning. This inference requires a separate analysis under section 2-719(3).

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unable to perform it. This is not enough to require that the seller absorb losses the buyer plainly agreed to bear. Risk shifting is socially expensive and should not be undertaken in the absence of a good reason. An even better reason is required when to so shift is contrary to a contract freely negotiated. The default of the seller is not so total and fundamental as to require that its consequential damage limitation be expunged from the contract.

587 F.2d at 1375.

The court warned, however, that each case must stand on its own facts, and the decision should not be taken to "establish that a consequential damage bar always survives a failure of the limited repair remedy to serve its essential purpose." *Id.* at 1375-76.

134. 583 F.2d 933 (7th Cir. 1978).

135. *Id.* at 941 n.9.

136. *Id.* "Here it makes no difference that the clause limiting damages did not refer specifically to consequential damages. The consequential damages were limited in the section stating: THE FOREGOING WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, WHETHER WRITTEN, ORAL, OR IMPLIED, AND SHALL BE THE BUYER'S SOLE REMEDY AND SELLER'S SOLE LIABILITY ON CONTRACT OR WARRANTY OR OTHERWISE FOR THE PRODUCT." *Id.*

137. *Id.* at 941.

138. *Id.* at 942. The case was remanded for a determination of damages. *Id.*

Furthermore, because this inference can be rebutted by a finding that the parties intended the special exclusionary language to be a mere elaboration of the exclusiveness of the limited remedy provided,[139] the *AES* court seems to run afoul of section 2-719(2)'s command to give effect to all remedies under the Code.[140] The *AES* court essentially rewrote the contract to include an exclusion of liability for consequential damages—the precise result that the court said it deplored.[141]

IV. CONCLUSION

The UCC defines neither the relationship between sections 2-719(2) and 2-719(3) nor the proper scope of each. As might be expected, therefore, judicial attempts to resolve these ambiguities have been inconsistent. Some courts have held that the exclusion of liability for consequential damages must be voided as a matter of law if the limited remedy fails of its essential purpose;[142] other courts have ruled that the exclusion need be voided only if unconscionable.[143] The former approach provides certainty and predictability in outcome; the latter approach better serves the underlying purposes of section 2-719 by balancing the conflicting policies of freedom of contract and prevention of contractual oppression.

A logical approach for resolving this ambiguity would be to determine first, as a matter of fact, whether the purported exclusion is an elaboration of the limited remedy or, instead, a separate, intentional allocation of risk. If the exclusion is found to be an elaboration of the limited remedy, then it should be analyzed under section 2-719(2) to determine if it has failed of its essential purpose. If, however, the exclusion of liability for consequential damages is found to be a separate, special allocation of risk, it should be analyzed under section 2-719(3) to determine if the presumption of conscionability has been rebutted.[144]

Absent evidence of bad faith,[145] adhesion,[146] or unconscionable con-

139. *See* notes 33-53 *supra* and accompanying text.

140. *See* note 15 *supra*.

141. "The purpose of the courts in contractual disputes is not to rewrite contracts by ignoring parties' intent; rather, it is to interpret the existing contract as fairly as possible when all events did not occur as planned." 583 F.2d at 941.

142. *See* notes 52-101 *supra* and accompanying text.

143. *See* notes 102-41 *supra* and accompanying text.

144. *See* note 13 *supra*.

145. *See* note 94 *supra* and accompanying text.

146. *See* notes 13-14 *supra*.

duct by the seller,[147] this method of analysis would safeguard against oppression or unfair surprise because the parties would have intended the exclusion to have special meaning. In addition, even if the buyer could not recover consequential damages, direct and incidental damages would still be available under section 2-714 if the limited remedy failed of its essential purpose. Application of this analysis also would preserve the distinction made by the drafters between the failure of a limited remedy's essential purpose and the conscionability of an exclusion of consequential damages.

Until the courts clearly resolve the issue and establish a uniform interpretation of the two subsections, however, drafters of contracts must make clear whether an exclusion of consequential damages is intended to be an elaboration of the exclusiveness of the limited remedy or a separate allocation of the risk of loss.[148]

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147. *See* notes 11-14 *supra* and accompanying text.

148. For sample drafts of separate consequential damages and exclusive limited remedy provisions, see W. HAWKLAND, 2 A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 952 (1964). A careful draft should keep the two provisions in separate and distinct paragraphs to make clear that the exclusion of consequential damages is not an elaboration of the exclusive remedy.