1988

Contractual Limitations on Remedies

Roy Ryden Anderson
Southern Methodist University Dedman School of Law, rranders@mail.smu.edu

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol67/iss3/3
Contractual Limitations on Remedies

TABLE OF CONTENTS

I. Introduction ............................................ 549
II. Modification or Limitation of Remedies ................... 551
   A. In General ............................................ 551
   B. Standards for Validation .............................. 553
   C. Exclusivity of the Remedy Limitation ............... 557
   D. Conspicuousness ...................................... 560
III. Failure of Essential Purpose .............................. 562
   A. In General/Purpose ................................... 562
   B. In General/Failure .................................... 563
      1. Other Cases ....................................... 569
      2. Unconscionability ................................ 571
   D. Repair or Replacement Remedy ...................... 573
   E. Seller’s Defenses: Reasonable Opportunity .......... 578
IV. Remedies Available Upon Failure of an Exclusive Remedy/Limitation or Exclusion of Consequential Damages ................................................... 581
   A. In General: A Perspective ............................ 581
      1. Unconscionability ................................. 585
      2. CAVEAT: Complex, Experimental, or Prototype Goods .............................................. 591
   B. The Case Law ............................................ 594
      1. Failure of Essential Purpose of Agreed Remedy .... 594
      2. Unconscionability Under Section 2-719(3) ........ 597
         a. In General .......................................... 597
         b. Willful Failure to Honor the Agreed Limited Remedy ........................................... 599

* Professor of Law, Southern Methodist University. B.A., Texas Christian University, 1966; J.D., Southern Methodist University, 1969; L.L.M., Yale University, 1975.

** This article is reprinted from R. ANDERSON, DAMAGES UNDER THE UNIFORM COMMERCIAL CODE (Callaghan 1988). Copyright is reserved by Professor Anderson and Callaghan & Company.
I. INTRODUCTION

Assuming that either party to a goods transaction has an action for breach of contract or that the buyer has an action for breach of a warranty that has not been effectively disclaimed under Section 2-316 of the Uniform Commercial Code, the aggrieved party's remedial recourse may be directly and substantially affected by the agreement between the parties. Section 2-719 allows the parties wide latitude to limit or modify the Code's remedial scheme. As a practical matter, it

1. Section 2-316 of the Uniform Commercial Code provides:
   (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.
   (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."
   (3) Notwithstanding subsection (2)
      (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
      (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
      (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.
   (4) 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).


2. Section 2-719 of the Uniform Commercial Code provides:
is usually the seller rather than the buyer who seeks to take advantage of the opportunity to limit remedies available against him.

Section 2-719 has generated a significant amount of appellate level litigation in recent years. The provision also has been subjected to much professional commentary in law reviews and elsewhere. In the process, the courts and commentators have contributed significantly to an understanding of this rather ethereal provision. Most importantly, it should be kept firmly in mind that Section 2-719, like so many of the provisions of Article Two, "seeks to encourage a method of lawfinding, rather than dictate a particular result." The Section is more a set of guidelines than a firm rule of law. The text speaks with the amorphous tongue of "failure of essential purpose" and "unconscionability" while its Official Comment waxes vaguely with phrases like "minimum adequate remedies," "fair quantum of remedy," "substantial value of the bargain," and, again, "unconscionability." There is much here to cause due trepidation and the opportunity for error by those who attempt to respond effectively to Section 2-719's vague dictates. Over a reasonably short period of time the courts have developed a framework for analysis which provides predictable results for most questions falling within the ambit of the provision. However, this sunny picture is clouded somewhat by the question of the continuing efficacy of a contract provision limiting or excluding liability for consequential damages under subsection (3). In particular, the question is whether, once it has been determined under subsection (2) that circumstances have caused an exclusive remedy "to fail of its essential purpose" and "remedy may be had as provided in this Act," does recovery include consequential damages or, does the separate damage disclaimer survive to limit or bar liability for consequential loss?

(1) Subject to the provisions of subsection (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 repayment 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.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion 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.

The structure of Section 2-719 will set that of this article. Part II will address the standards that a contract provision must meet under Section 2-719(1) in order to validly limit or modify Code remedies. Part III will examine the circumstances in which an initially valid remedy limitation will be found by the courts to have failed under subsection (2). Part IV will consider the validity of clauses which limit or exclude consequential damages under subsection (3). The efficacy of such clauses is often of particular importance because a seller's potential liability for consequential loss may greatly exceed his general damages or the contract price itself. Under subsection (3), the standard for judging the efficacy of a contract provision excluding or limiting consequential damages is conscionability. Despite this particularized standard, a recurring question is whether the "failed of its essential purpose" standard of subsection (2) fixes the conscionability standard of subsection (3). Special focus will be given to the question of whether the failure of essential purpose of a remedy limitation exposes the seller to liability for consequential damages despite a separate provision in the agreement excluding such liability.

II. MODIFICATION OR LIMITATION OF REMEDIES

A. In General

Pursuant to Section 2-719(1), the parties to a sales transaction are allowed to provide for remedies "in addition to or in substitution for" the remedies provided by the Code. While subsection (1) anticipates augmenting remedies, in actual practice parties usually invoke the provision as a means of limiting the remedies available to the buyer when the seller breaches the terms of the agreement.

Subsection (1) grants the contracting parties wide latitude to limit or alter the remedies or damages available to the aggrieved party upon breach. Particular examples of such limitation are given in the form of repayment of the purchase price and repair or replacement of defective goods. The purpose is said to be to leave the parties "free to shape their remedies to their particular requirements" and to give effect to "reasonable agreements limiting or modifying remedies." This purpose is consistent with a broad Code policy favoring freedom of contract.

The parties' right to limit or alter remedies under Section 2-719

5. See id. § 1-102(3), which provides:

The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.
should not be confused with the Code provisions authorizing disclaimers\textsuperscript{6} and stipulation of liquidated damages.\textsuperscript{7} A disclaimer of warranty or other liability defines the basic obligation under the contract. A disclaimer is a liability concept, not a damages one, and as such is beyond the scope of this article. A stipulation or liquidation of damages is just that, an agreement as to the dollar amount of damages that the aggrieved party will receive upon breach. The validity of such an agreement is governed by Section 2-718(1).

The distinctions are important because the Code establishes quite different criteria for the validation of warranty disclaimers under Section 2-316, for liquidated damage provisions under Section 2-718(1), and for remedy limitations under Section 2-719. The occasional failure by courts to properly distinguish between warranty disclaimers and remedy limitations\textsuperscript{8} is perhaps due to the fact that the use of either concept will produce the same result. For instance, with equal effect, a seller may limit the buyer's remedies under a contract by disclaiming all warranties under Section 2-316 or by limiting the buyer's remedy for breach of warranty to repair and replacement under Section 2-719. Under either route, the buyer will be precluded from a damage recovery.\textsuperscript{9}

The confusion between liquidated damage provisions and clauses which limit or modify remedies is no doubt due to the conceptual nexus that exists between these kinds of contractual provisions. A liquidated damage provision is by definition a form of remedy limitation. If a breach occurs which is covered by a liquidated damage provision, that provision, not Code remedies generally, governs the amount of recovery. Not only does Section 2-718 provide separate standards for the validation of liquidated damage provisions, but Section 2-719 specifically subjects itself to those standards.\textsuperscript{10} Most importantly, a liquidated damage provision, properly construed, is not a risk allocator. It

---

\textsuperscript{6} See id. § 2-316.

\textsuperscript{7} See id. § 2-718(1), which provides:

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.

\textsuperscript{8} For cases confusing remedy limitations with warranty disclaimers, see Dessert Seed Co. v. Drew Farmers Supply, 248 Ark. 858, 454 S.W.2d 307 (1970); National Cash Register Co. v. Adell Indus., 57 Mich. App. 413, 225 N.W.2d 785 (1975).


\textsuperscript{10} U.C.C. § 2-719 (1978) provides in part: "Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages." (emphasis added).
LIMITATIONS ON REMEDIES

is merely an attempt to assess damages which are uncertain in amount or otherwise difficult to prove. A remedy limitation, on the other hand, obviously is an allocation of risk. It relieves the breaching party from some liability for which he would otherwise be responsible and places the risk thereof on the aggrieved party. The labels used by the parties, however, are not always determinative. The distinction should be based on the intent of the parties, on whether an allocation of risk was the purpose of the provision. For example, the parties may agree to a sum certain as "liquidated damages," but the amount so agreed might be so obviously small in comparison to any anticipated breach that the parties' intent might be reasonably construed to allocate risk rather than to liquidate damages.

B. Standards for Validation

Subsection (1) of Section 2-719 is in essence a provision governing the drafting of remedy limitations. It speaks to validation at the time of the making of the contract, to leaving the parties "free to shape their remedies to their particular requirements." It is curious, however, that no standards are provided for determining the initial validity of such clauses. Examples of particular remedies are given and include refund of the purchase price and repair or replacement of non-conforming goods or parts. These stated remedies are thus prima facie valid and no doubt will be upheld by the courts unless the bargaining context renders their enforcement unconscionable under Section 2-302.

Surely, however, some remedy limitations are void ab initio on their face. Assume the seller expressly warrants its product to be the standard of the industry, that it will pass with only applause in the trade and that it is gloriously fit for all the buyer's particular purposes. Assume further, however, that the contract expressly and conspicuously limits the buyer's remedy in the event the product fails to measure up to a personally signed letter of apology and condolence on embossed stationery by the president of the seller corporation. Surely

11. See Dow Corning Corp. v. Capitol Aviation, Inc., 411 F.2d 622 (7th Cir. 1969) (applying U.C.C. § 2-719(1)(b) to a liquidated damages provision).
14. Id. 2-719(1)(a).
such a silly provision would not be worth the paper on which it is printed, embossed or not. But to whence does one turn to substantiate that invalidity? The provision is not an invalid attempt to disclaim an express warranty under Section 2-316(1) because the warranty still stands. It is only the remedy for its breach that is in question. Further, nothing in the facts would indicate that the provision runs afoul of that grab bag of loose ends, Section 2-302. Although there is a certain elegance in an argument that the provision is unconscionable because the “Cross References” to Section 2-719 do refer to Section 2-302, a showing of some sort of oppression or unfair surprise is usually the cornerstone of any claim of unconscionability under the Code. Nevertheless there is a nexus between unconscionability under Section 2-302 and the minimum standards for a limited remedy under Section 2-719. These minimum standards lend a particularized example to Section 2-302’s general concept of unconscionability. A remedy limitation which leaves a party with too little relief from the consequences of a breach is simply, in Code parlance, unconscionable. This proposition is manifested not by the text of Section 2-719 but, rather as is so often the case with this loosely written statute, by the Official Comment. The tone is set as follows:

However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus, any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed.

A valid remedy limitation, then, must at a minimum provide for “a fair quantum of remedy.” Otherwise it is unconscionable on its face. The basic fairness of the provision is to be judged in terms of whether the limited remedy will allow the aggrieved party “the substantial value of the bargain.” To return to our silly scenario, the buyer’s bargain was for a virtually flawless good. Clearly, a signed letter of apology and condolence would not allow him that benefit. The remedy limitation is thus void from the inception of the contract. It was never “apparently fair and reasonable.”

To date, there has been virtually no litigation at the appellate level striking remedy limitations as invalid under Section 2-719(1).

15. Id. § 2-302 comment 1, which states: “The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.” For a case invalidating remedy limitations under Section 2-302 on grounds of “trickery,” see Gladden v. Cadillac Motor Car Div., 83 N.J. 320, 332-33, 416 A.2d 394, 400-01 (1980).
17. Id.
18. Id.
Whether because of competitive pressures, a sense of fairness, or that buyers give little coin for letters of apology and condolence, sellers typically provide for sensible and valuable remedies in the event their products fail to perform as warranted. In fact, the limited remedies validated by subsection (1) of refund, repair, or replacement comprise the vast majority of real-world limited remedies.

However, even remedies given approval by Section 2-719, such as replacement or refund, may be found invalid if they do not function to provide the buyer with the substantial value of the bargain or otherwise fail on unconscionability grounds. For example, a limited remedy which does not promise repair but merely replacement of defective parts should be held invalid if such replacement will not function to repair defects in the goods so as to allow them to perform as warranted.19

The cases to date that have stricken remedy limitations as invalid from the inception of the contract usually have done so on the basis of unconscionability under Section 2-302. For instance, in one case plaintiffs recovered $7,500 against a retail drug store and its agent-processor when defendants lost thirty-two reels of home movie film which the drug store had agreed to have spliced into a few larger reels. The language of a receipt given plaintiffs at the time of contracting provided that the drug store assumed no responsibility beyond the retail cost of the film unless otherwise agreed in writing. On appeal, the court upheld the trial court’s decision that the remedy limitation on the receipt was invalid as unconscionable presumably on the basis that, although plaintiffs carefully advised the drug store of the importance of the film to them,20 the drug store manager did not discuss the remedy limitation with plaintiffs nor in any way call it to their attention.21

In a well-known commercial case, the court, by dictum, opined that a clause which barred any claim for defects in yarn after ten days of receipt or processing, whichever came first, might be held invalid under Section 2-719(1). The seller expressly warranted the yarn to be of merchantable quality, and the goods had a latent shading defect which rendered the yarn unmerchantable and which reasonably was

---

19. For a pre-Code case upholding such a provision over vigorous dissent, see Moss v. Gardner, 228 Ark. 828, 310 S.W.2d 491 (1958). But see Rudd Constr. Equip. Co. v. Clark Equip. Co., 735 F.2d 974, 979-82 (6th Cir. 1984)(invalidating such a clause under subsection (2) rather than subsection (1) of Section 2-719).


In a consumer case, one court demonstrated a different context in which a limited remedy of refund of the purchase price might be found invalid at the inception of the contract. Plaintiff had his car rustproofed by defendant. Subsequently, the car rusted through, and plaintiff sued for damages. The defense was based on a contract clause allowing defendant the option of repairing the rust damage or refunding the $79 cost of rustproofing. The trial court allowed damages of $233. The defendant appealed on the basis of the remedy limitation provision. The defendant also argued that the trial court's decision was erroneous because there was no separate hearing on the issue of unconscionability at trial as required by Section 2-302. The court rejected this latter argument, reasoning that the trial court had found the limiting clause to be "illusory" rather than "unconscionable." Although the court did not cite Section 2-719, its basis for affirming the finding of invalidity of the clause was that it would in no way provide the plaintiff with the benefit of his bargain. The plaintiff would be left in the same position as if he had not paid to have his car rustproofed. The court was saying, in effect, that the remedy limitation did not provide for a "fair quantum" of remedy so as to allow the buyer "the substantial value of the bargain." Of course, a refund provision always seeks to return the buyer to the status quo and in no sense is calculated to allow the value of the bargain. However, refund provisions specifically are validated by Section 2-719 and thus are an exception to the benefit of the bargain standard. A refund usually will return the buyer at least to the status quo. In the rustproofing case, however, a mere refund of the contract price would have left the buyer much worse off than he was prior to entering into the contract. Accordingly, the provision was facially invalid for failure to provide a "fair quantum of remedy."

Sales of defective or incorrect type seed or herbicide for farming commonly contain provisions limiting the buyer's remedy to refund of the purchase price. The courts often strike such provisions as invalid on grounds of unconscionability or public policy rather than for failure to provide a minimum adequate remedy under Section 2-719. The unconscionability ground usually is used when the remedy limitation provision has not been carefully communicated to the buyer at the time of contracting. Even absent procedural unconscionability, the

23. The contract was thus one for services, but the court apparently overlooked the fact that it was one to which Article Two of the Uniform Commercial Code does not apply.
provision may be held invalid on public policy grounds of protecting a community of farmers from potential catastrophic losses. Such results are understandable, particularly in farming states.

C. Exclusivity of the Remedy Limitation

Section 2-719(1)(b) provides that "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." Comment 2 apparently requires that the exclusivity of the limitation be expressed clearly in the agreement. It provides: "Subsection (1)(b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed." In short, a remedy limitation which is not made exclusive is not worth the paper on which it is printed.

The one kind of limited remedy to which the exclusivity requirement does not apply is a liquidated damage provision. In one case, for example, the trial court allowed a recovery of actual damages because the liquidated damage provision was not expressly made the exclusive remedy by the agreement. The decision was reversed on appeal, the court holding that Section 2-719(1)(b) was satisfied because "the clear import is that there shall be no remedy other than the return of the deposit." Although the court's result is correct, its conclusion that subsection (1)(b) can be satisfied by import is unfortunate. The requirement is "expressly agreed." A better basis for the decision would be that liquidated provisions are governed by the requirements of Section 2-718(1), which contains no requirement that the provision be expressly made exclusive. Further, Section 2-719 states that it is subject to "the preceding section on liquidation and limitation of damages."

A valid liquidated damages provision always should be found to be an exclusive remedy.

The courts have evidenced little difficulty in applying the "expressly agreed to be exclusive" requirement. The only troublesome question has been the amount of specificity required in the language of the remedy limitation. Although the answer has varied from case to case and court to court, the general rule requires a high threshold of clarity with respect to the exclusivity of agreed remedies.\textsuperscript{32} Nevertheless, a trend is discernible that more precise language is necessary in consumer contracts than in commercial contracts.\textsuperscript{33} For example, in one consumer case the contract provided for an express warranty with a repair or replacement remedy "in lieu of any other express or implied warranty . . . and of any other obligation" on the part of the seller.\textsuperscript{34} The court construed this language to refer only to "warranties and obligations" rather than to remedies and held that the limitation did not satisfy the exclusivity requirement of Section 2-719. Accordingly, the buyer could select from the full panorama of Code remedies.\textsuperscript{35} Almost identical language in a commercial contract, however, was held by another court to be sufficiently specific to meet the exclusivity requirement.\textsuperscript{36}

There is tension between the requirement in Section 2-719 that the exclusivity of agreed remedies be "expressly agreed" and the general Code policy of enforcing the "agreement" actually made. Section 2-719 provides that "the agreement may provide for remedies in addition to or in substitution for those provided" by the Code. "Agreement" is defined to mean "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance."\textsuperscript{37} On balance, one would suppose that the quite specific requirement in subsection (1)(b) that exclusivity of remedies be "expressly agreed" would take priority over the Code’s general concept of "agreement." Neverthe-

\textsuperscript{33} Compare Parsons v. Motor Homes of America, Inc., 465 So. 2d 1285, 1291-92 (Fla. Dist. Ct. App. 1985)(seller’s remedy limitations optional since provision did not include words "exclusive" or "sole" in consumer sale of motor home) with J.D. Pavlak, Ltd. v. William Davis Co., 40 Ill. App. 3d 1, 3-4, 351 N.E.2d 243, 245-46 (1976)(between commercial parties, language stipulating remedies as "full settlement" is sufficient to meet exclusivity requirement). See also Stream v. Sportscar Salon, Ltd., 91 Misc. 2d 99, 397 N.Y.S.2d 677 (N.Y. Civ. Ct. 1977)(seller in a consumer case was found to have limited "liability" rather than "remedy").
\textsuperscript{34} Ford Motor Co. v. Reid, 250 Ark. 176, 180, 465 S.W.2d 80, 82 (1971).
\textsuperscript{35} Id. at 184-85, 465 S.W.2d at 84-85 (1971).
\textsuperscript{36} Evans Mfg. v. Wolosin, 1 U.C.C. Rep. Serv. (Callaghan) 193, 193-94 (Pa. Ct. C.P., Luzerne Co. 1957). See also Fredonia Broadcasting v. RCA, 481 F.2d 781, 797-99 (5th Cir. 1973)(exclusivity of remedy evident by use of phrase "all" obligations); Dow Corning Corp. v. Capitol Aviation, Inc., 411 F.2d 622, 628 (7th Cir. 1969)(the intent of the commercial parties was clearly to limit remedies even though the contract spoke in terms of liabilities).
\textsuperscript{37} U.C.C. § 1-201(3) (1978).
less, on occasion the courts have been willing to look past the express language in the contract and consider prior dealings between the parties and the general usage of trade when determining whether an agreed remedy is exclusive.

In one case, the court held that the course of dealing between the parties did not demonstrate an intention that the repair and replacement remedy specified in the contract be exclusive. On the other hand, the courts have upheld the exclusivity of a remedy limitation when the seller could show a general trade usage in the industry recognizing the exclusivity of a particular remedy. A number of cases involving photographic film illustrate this view. In one case, for example, the court held that the buyers were limited to replacement of defective film because of an industry-wide recognition that this remedy limitation accompanied all film sales. Nevertheless, such cases are in the teeth of the specific wording of subsection (2)(b). Sellers are best advised to rely on prior dealings and trade usage as a last resort and to draft limitations on remedies so as to clearly provide for their exclusivity.

Even in cases in which a seller expressly provides that the agreed remedy is exclusive, the remedy limitation still may fail under Section 2-719(1)(b) if the language does not tie into all breaches or is otherwise too specific. For example, in one case the court found that the exclusive remedy only applied to express warranties set out in the contract and not to other obligations thereunder. The contract contained a specific express warranty and then provided that the seller’s “obligation if the equipment does not meet these warranties is limited solely to correcting the defect or failure, without charge.” The buyer’s action was for breach of an implied warranty, and the court upheld the buyer’s argument that the limited remedy was exclusive only with regard to breach of the express warranty. The buyer was thus held entitled to all applicable remedies provided by the Code.

41. For the view that the seller has a “stiff burden to prove a trade usage as a substitute for ‘exclusive remedy’ language in the contract,” see B. CLARK & C. SMITH, THE LAW OF PRODUCT WARRANTIES ¶ 8.04(1)(b) (1984).
43. Id. at 417-18, 225 N.W.2d at 786 (1975). See also Gramling v. Baltz, 253 Ark. 361, 485 S.W.2d 183, denying rehg to, 253 Ark. 352, 485 S.W.2d 183 (Ark. 1972).
In other cases, courts have found that the exclusivity language was too specific. A seller must state that the exclusive remedy applies to all breaches, not just to those attributable to certain defects. For example, a provision that stipulates repair and replacement as the sole remedy for defects in material and workmanship may not be sufficient to prevent a buyer from successfully arguing that the parties did not expressly state that repair and replacement was the sole remedy in the case of design defects. Thus, a prudent seller will draft his warranty disclaimers and remedy limitations separately so that the remedy is clearly stated to be exclusive with respect to all breaches of warranty, express or implied.

D. Conspicuousness

The courts have split on the question of whether the lack of conspicuousness of the remedy limitation in the written contract will render the limitation invalid. Section 2-719, unlike Section 2-316 on warranty disclaimers, contains no requirement that the remedy limitation be conspicuous. Several courts have relied upon this lack of specific requirement in Section 2-719 and have upheld remedy limitations which were not conspicuously stated.

Although the fact that the limitation was not conspicuous in and of itself should not render it unconscionable under Section 2-302, this

46. The nexus between disclaimers of warranties and limitations of remedies is illustrated by the pitfalls encountered by the seller when the two provisions overlap in a contract. The seller will be better able to argue that the parties expressly agreed that the remedy was to be exclusive if the remedy limitation and warranty disclaimer clauses are kept separate in the contract. See B. CLARK & C. SMITH, supra note 41, ¶ 8.06. In addition, the formal requirements of Section 2-316 regarding conspicuousness of warranty disclaimers is not a requirement of Section 2-719. See Office Supply Co. v. Basic/Four Corp., 538 F. Supp. 776, 786-87 (E.D. Wis. 1982); A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 482-83, 186 Cal. Rptr. 114, 119 (Cal. Ct. App. 1982).
fact should be regarded as an important consideration in the overall unconscionability mix.\(^49\) If the limitation is not conspicuous and there is no showing that the provision was specifically negotiated with the buyer, nor any other reason why the buyer knew or should have known of the provision, a strong case can be made that the provision is unconscionable if its enforcement will substantially restrict remedies otherwise available to the buyer. A fundamental premise of Section 2-302 is to avoid oppression and unfair surprise\(^50\) in the bargaining context. An occasional case has followed this reasoning and invalidated a remedy limitation, not under Section 2-719, but under Section 2-302.\(^51\) Other cases have invalidated inconspicuous remedy limitations under Section 2-719. Although the courts provide little analysis, the reasoning seems to be that, if a warranty disclaimer must be conspicuously stated in the writing, then an attempt to restrict the remedies available for breach of warranty also must be.\(^52\) Although these results are understandable, they are in the teeth of Section 2-316 which, after establishing the requirements for warranty disclaimers, provides in subsection (4): “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 remedies (Sections 2-718 and 2-719).”\(^53\) On the related question of whether a limitation of remedies available for breach of the implied warranty of merchantability need mention merchantability as required for disclaimers of the warranty by Section 2-316(2), the courts generally have reasoned under subsection (4) that no such requirement is mandated by the Code.\(^54\)


\(^54\) See Orrox Corp. v. Rexnord, Inc., 389 F. Supp. 441, 445-46 (M.D. Ala. 1975). But see Desert Seed Co. v. Drew Farmers Supply, 248 Ark. 858, 861-62, 454 S.W.2d 307, 309 (1970) (statute required that merchantability be mentioned where writing purported to modify or exclude implied warranty of merchantability). In actuality, few cases even address the question, regarding it in effect as a non-issue.
III. FAILURE OF ESSENTIAL PURPOSE

A. In General/Purpose

The significant majority of cases that have refused to validate attempts by sellers of goods to limit remedies have done so notwithstanding the fact that the attempt was apparently fair and reasonable at the inception of the contract. In these cases, the courts found that subsequent circumstances caused the exclusive remedy "to fail of its essential purpose." Subsection (2) to Section 2-719 tersely provides: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act."

There is no pre-Code analog to this failure of essential purpose standard, and the drafting history of Section 2-719 offers no guide to its meaning. This phraseology, confusing in its vagueness, was apparently calculated to enchant courts into the process of carefully examining the underlying purpose of the particular remedy limitation in question by exploring the context of the bargain actually made by the parties and the particular warranties made by the seller with respect to the goods. The standard, then, is closely related to the more pervasive standards in Article Two of commercial reasonableness and unconscionability. Its application requires a careful analysis of the contract provision in question against the backdrop of the bargaining phase of the contract and the facts of the case as they developed.

Whatever can be said about the success or failure of the grand design, the courts appropriately have rejected an overly literal reading of subsection (2) and usually have refused to apply it out of context with the facts of the particular case. For example, it has been several years since the courts have had any difficulty in identifying the purpose which must fail in order to invalidate an otherwise reasonable remedy limitation. Sellers no longer can get an appellate level audience for the ingenuous argument that the sole purpose of the remedy limitation provision was to protect the seller from further liability, that it was working in that regard just fine, and that it would "fail" only if the court were to strike it. The courts came to respond to this self-serving position by observing that it stated only half the case. The provision limiting remedies must have had a purpose from the buyer's standpoint as well—a purpose to provide the buyer ultimately with a "fair quantum of remedy" or "minimum adequate remedies." If this was not true, the clause would be invalid from its inception under Section 2-719(1). In the words of one court:

The purpose of an exclusive remedy of replacement or repair of defective parts, the presence of which constitute a breach of an express warranty, is to

55. For a brief discussion of the drafting history of Section 2-719, see Eddy, supra note 3, at 39.
LIMITATIONS
ON
REMEDIES

The basic purpose of Section 2-719 is to allow the seller wide latitude in limiting or modifying the Code's remedial structure and at the same time to guarantee the buyer a fair measure of recourse in the event of breach. The following commentary succinctly states this intent:

If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus,

58. 1 N.Y. State Law Revision Comm'n Study of the Uniform Commercial Code 584 (analysis of Professor Honnold).
60. An argument by the seller that the buyer actually bargained for an inadequate or otherwise unfair measure of remedy is also of no avail. Such an agreement would be invalid under subsection (1) and, perhaps, under Section 2-302 as well. See supra text accompanying notes 13-26.
any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion . . . .

As the courts apply subsection (2)'s amorphous requirements of "minimum adequate remedy," "fair quantum of remedy," and absence of "unconscionability," the results reinforce the broad discretion allowed the courts by the failure of essential purpose standard. Along the way, the most careful drafting efforts of the practitioner may be frustrated because it is quite impossible to draft a contractual provision that will withstand attack regardless of the machinations of the parties or of other circumstances which occur subsequent to contracting.

The distinction between invalidity ab initio and invalidity as a result of intervening circumstances is important. If the remedy limitation is invalid from the inception of the contract, it must be so because of either defects in the bargaining process or because the remedy left to the buyer does not meet minimum standards. In the former case, the matter is one of unconscionability under Section 2-302. In the latter, the provision is substantively invalid under Section 2-719(1). In either case, the question is one of law for the courts. In contrast, whether or not a valid remedy limitation has failed of its essential purpose under subsection (2) presumably is a question of fact. Although an occasional case fails to distinguish the point in time at which the clause became invalid, most courts do make the distinction. In such cases, as will be seen, the courts have demonstrated little difficulty in determining whether the buyer was left with a minimally adequate

---

63. See J. WHITE & R. SUMMERS, supra note 9, at 465-66; Anderson, supra note 12, at 763.
64. Indeed, Section 2-302(2) provides: "When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." U.C.C. § 2-302(2) (1978). See also Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co., 709 F.2d 427 (6th Cir. 1983)(determination of unconscionability under Section 2-719(3) is for the court). See generally Select Pork, Inc. v. Babcock Service, Inc., 640 F.2d 147 (8th Cir. 1981)(despite court's finding of unconscionability at time of contracting, the court based its holding on the failure of essential purpose of the limited remedy); Computerized Radiological Servs. v. Syntex Corp., 595 F. Supp. 1495 (E.D.N.Y. 1984) (separate analysis of Section 2-302 unconscionability and Section 2-719(2) failure of essential purpose). See also J. WHITE & R. SUMMERS, supra note 9, at 465-68; Anderson, supra note 12, at 765; Eddy, supra note 3, at 38.
remedy or with the substantial value of his bargain.

These subsection (2) cases can be divided into two categories. The first involves situations in which the goods manifest latent defects subsequent to their acceptance by the buyer. The second involves limited remedies of repair or replacement of defective goods when the seller is unable or unwilling to perform his obligation under the remedy limitation provision.

C. Latent Defects: Wilson Trading

One of the early cases to give a detailed analysis to the failure of essential purpose standard involved the occurrence or manifestation of latent defects in the goods subsequent to contracting. In Wilson Trading Corp. v. David Ferguson Ltd., the New York Court of Appeals held invalid a remedy limitation clause because a latent defect caused the provision to fail of its essential purpose. The seller sold the buyer a quantity of yarn for processing into sweaters. After washing, the sweaters evidenced a “shading” defect which the buyer argued rendered them unmarketable. Upon non-payment for the yarn by the buyer, the seller sued for the price, and the buyer counterclaimed for damages. Although the contract specifically warranted delivery of good merchantable yarn, the seller defended on the ground that the contract further provided that “no claims relating to... shade shall be allowed if made after weaving, knitting, or processing.” On the basis of this provision, the trial court granted the seller summary judgment for the price. The appellate division affirmed. The New York Court of Appeals, however, reversed and remanded. The court reasoned that a factual issue was raised as to whether the defects were reasonably discoverable before the yarn was knitted and processed into sweaters. If they were not, the remedy limitation failed of its essential purpose “and the buyer is, in effect, without remedy.”

The court apparently was persuaded that the remedy limitation provision was valid at the time of contracting because the court expressly declined to invalidate the provision under Section 2-719(1). The provision would remain valid unless and until something occurred that would impose upon the buyer a risk that the seller should assume. If the remedy limitation provision would place such a risk on

---

68. 23 N.Y.2d 398, 244 N.E.2d 685, 297 N.Y.S.2d 109 (1968).
69. Id. at 405, 244 N.E.2d at 688, 297 N.Y.S.2d at 113 (1968).
the buyer, it would not be acting properly as a risk allocator and should not be enforced. In terms of the text to Section 2-719, circumstances caused the provision “to fail of its essential purpose”; in terms of the Official Comment thereto, enforcement of the clause would deprive the buyer of the substantial value of the bargain by imposing on the buyer a risk which the seller should bear.

In *Wilson Trading* the seller expressly assumed the risk of latent defects in the yarn by warranting in the contract delivery of good merchantable yarn. Without this warranty, the limitation provision probably would have been construed to allocate to the buyer the risk of latent defects discovered subsequent to processing. Although arguably the warranty fell short of an allocation to the seller of all latent defects, courts commonly have left the risk of such defects with sellers when the contract does not provide otherwise, or is ambiguous.70

Under the court’s reasoning in *Wilson Trading*, it was not until the discovery of the latent defect subsequent to contracting that the validity of the remedy limitation provision properly could be called into question. If the defects were not latent, but were reasonably discoverable by the buyer prior to knitting and processing, the court made clear that the remedy limitation provision would remain valid. Further, only if the defect was material so as to render the sweaters unmerchantable would the buyer be allowed to prevail. Only then would the buyer be deprived of the substantial value of his bargain.

Whether or not one agrees with the court’s reasoning, the *Wilson Trading* decision is one of the few cases to date which has given the failure of essential purpose standard in Section 2-719(2) an interpretation which might be applied beyond the particular facts before the court. Commentators have suggested that the court should have reasoned that the clause was invalid from the time of contracting either

---

under Section 2-719(1) or as unconscionable under Section 2-302.71 Further, the concurring opinion suggested that the clause should have been invalid as a manifestly unreasonable time limitation provision under Section 1-204.72 Although there is merit to this criticism, the court in Wilson Trading expressly refused to follow these lines of analysis, apparently to emphasize that Section 2-719(2) applies to situations involving occurrences subsequent to contracting that were unanticipated by the parties. In this sense, subsection (2) is more akin to the Code’s general excuse provision in Section 2-615 than it is to the unconscionability provision of Section 2-302. It is more concerned with the events subsequent to contracting than with the contracting process itself.

This is not to say that the process of contracting is irrelevant to a Section 2-719(2) decision. Whether or not subsequent circumstances will cause a remedy limitation to operate so as to deprive the buyer of the substantial value of the bargain can be determined only in terms of the bargain actually made by the parties. If the buyer agreed to assume the risk of latent defects in the goods, then the subsequent appearance of such defects in no way would undermine the bargain actually made. For example, in one case the court enforced a remedy limitation provision on the basis that the buyer had indeed assumed the risk of latent defects. The contract involved the sale of herbicide. The court emphasized the experimental nature of the product involved and the inability to ascertain in advance its effect on a farmer’s crop. In such circumstances, it was not unreasonable, much less unconscionable, for the risk of latent defects to be allocated to the buyer.73

Similarly, courts have upheld risk allocations to the buyer when the defect was not truly latent. For example, in one case the seller sold steel roof panels to the buyer, a construction firm. The buyer installed the panels in a customer’s building. Some time later, the roof began to leak. The court concluded that the leak did not result from a latent defect but indicated that its conclusion upholding the remedy limitation provision would have been otherwise had the defect been


72. See U.C.C. § 1-204(1) (1978), which provides: “Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.”

latent.  

Wilson Trading, of course, is distinguishable from these cases because the express warranty of merchantability specifically allocated to the seller the risk of latent defects which would render the goods unmerchantable.

The decision in Wilson Trading makes another point of precedential value for future Section 2-719(2) cases. Although by its terms the subsection deals only with a clause providing for limited remedies, the court interpreted it to apply to a contract term placing a general limitation on the availability of remedies. There was no "exclusive or limited remedy" in Wilson Trading "to fail of its essential purpose" in the sense of a repair or replacement or refund remedy. The clause in Wilson Trading was merely a general time limitation provision which restricted not the availability of the remedies themselves but the time during which they could be asserted. The Code does not speak directly to such provisions except where it can be determined from the time of contracting that they were either manifestly unreasonable or unconscionable. Nor was the clause in Wilson Trading a disclaimer of liability subject to the standards of Section 2-316 or an attempt to liquidate damages subject to the standards of Section 2-718(1). It was merely an attempt to place a limitation on remedies, albeit not a limited remedy per se. The court in Wilson Trading determined that the clause was not invalid ab initio under these various Code provisions, but was rendered so by the unanticipated subsequent occurrence of a latent defect in the goods. The decision in Wilson Trading instructs that the requirements of Section 2-719(2) will be assessed against any contractual provision which curtails or alters a party's recourse to the remedial structure of Article Two.

Regardless of how one views the court's analysis in Wilson Trading, it is worth careful reading. The court emphasized the numerous ways under the Code that a clause placing a limitation on a buyer's remedies can be attacked. Most importantly, after selecting Section 2-719(2) from among these alternatives, the court did not attempt to track the rather metaphysical language of "failure of essential purpose." Instead the court emphasized that the provision should not be allowed to operate to deprive the buyer of the substantial value of the bargain. By resurrecting this substantial value test from the Official Comment and by down playing the obtuse language of failure of essential purpose, the court provided a clear focus for subsequent cases dealing with Section 2-719(2).

75. U.C.C. § 1-204 (1978).
76. See id. § 2-302.
1. Other Cases

Other courts have followed the Wilson Trading analysis with regard to latent defects. For example, in one case the seller sold fabric to a buyer for manufacture into roman shades. The seller expressly warranted that the fabric was suitable for that purpose. Nevertheless, the invoice provided that positively no claims were allowed after goods were cut. The fabric subsequently was found to be defective in that it could not be fabricated into roman shades. At trial, the court found that the limitation provision was not unconscionable. On appeal, the court overruled the trial court’s finding, emphasizing that the defect in the material was latent and not reasonably discoverable prior to cutting. The court referred to the Official Comment to Section 2-719 which states that “there must be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract.” The express warranty by the seller allocated to the seller the risk of latent defects in the goods that would render them unsuitable for the buyer’s purpose. The buyer thus was promised a bargain of goods free from such defects. When the latent defects subsequently appeared in the goods rendering them unsuitable, application of the seller’s clause barring claims subsequent to cutting would cause the clause to operate to deprive the buyer of the substantial value of its bargain. Accordingly, the clause failed of its essential purpose under Section 2-719(2).

In another interesting case, the court found limitation clauses invalid both from the time of the making of the contract and because of subsequent circumstances. The buyer had been purchasing for several years a product known as resin former oil, which had been given the grade or designation “U-171.” The product had been developed to meet the buyer’s particular requirements for production of resins for sales to its customers, who in turn used the resins in the manufacture of various products, including floor tiles, shoe soles, and paper coatings. The contract barred claims by the buyer made more than fifteen days after delivery, disclaimed all liability for results obtained from the use of the product in the manufacturing process, and limited the buyer’s remedy for defects in the product exclusively to a return of the purchase price. Performance under the contract proceeded for several years without event. Then, for some unexplained reason, the seller, without advising the buyer, changed its manufacturing process for the resin former oil so as to allow a contaminant known as “ethyl acrylate” into the product. Soon thereafter the buyer began receiving numerous complaints from its customers that the products made from the resins prepared with U-171 had begun to emit a persistent and intolerable odor and, in many cases, had to be destroyed. The buyer

77. Trinkle v. Schumacher Co., 100 Wis. 2d 13, 301 N.W.2d 255 (1980).
brought an action primarily for consequential damages. The court reasoned that the occurrence of latent defects, those “not discoverable by ordinary inspection and testing,” rendered the time limitation clause manifestly unreasonable under Section 1-204 of the Code and caused the exclusive remedy of return of the purchase price to fail of its essential purpose under Section 2-719(2). 79

Although the court's result is unquestionably correct, it is difficult to agree with the court's reasoning that the time limitation provision was manifestly unreasonable at the time of the making of the contract. It appears that the risk of losses arising from the latent defects had been reasonably allocated by the contract to the commercial buyer. The U-171 resin former oil was rather experimental in nature and was geared to the buyer's particular resin requirements. Therefore, the contract provided that: “Buyer assumes all risk and liability for the results obtained by the use of the material delivered hereunder in manufacturing process of Buyer or in combination with other substances.” 80 Nothing in the reported facts indicated that the allocation of risk of latent defects to the buyer at the inception of the contract was in any way unconscionable. The failure of essential purpose or intervening unconscionability was solely attributable to the fault of the seller subsequent to contracting in unilaterally changing the production process by introducing the contaminant into U-171, thereby directly causing the buyer's losses.

To enforce the remedy limitation, or the time limitation provision for that matter, would deprive the buyer of the substantial value of its bargain. Although under the terms of the contract, the buyer initially accepted the risk of losses arising from latent defects, the buyer did so only on the basis of known facts and with the presumption that the seller would not actively engage in a course of conduct calculated to cause injury. When that presumption failed, the clause on which the acceptance was based failed with it. The seller caused, and only the seller could have avoided, the losses in question. Thus, the risk was properly placed notwithstanding the express terms of the contract.

Other latent defect cases might be analyzed with the decisions discussed in those sections of this chapter which deal with the failure of remedy limitation provisions caused by the seller's inability to honor a limited repair or replacement remedy. Such a case, for example, would be one in which the seller limits the remedy exclusively to repair or replacement of defective parts and the goods entirely self destruct as a result of a latent defect. An analogous situation occurred in a case involving the sale of panels for installation in an air traffic con-

80. Id. at 654.
trol tower. The seller limited the remedy exclusively to replacement. Serious latent defects became apparent in the panels subsequent to installation. The court held that the replacement remedy had failed of its essential purpose because the seller was no longer able to correct the defects by replacing the panels once they had been installed in the tower. 81

2. Unconscionability

Remedy limitation provisions in latent defect cases can be held to be invalid from the inception of the contract either because of defects in the bargaining process (procedural unconscionability) or because the provision is invalid per se as violative of public policy (substantive unconscionability). Many cases have been analyzed in these ways. 82 For example, the New York Court of Appeals opined in Wilson Trading that its decision might have been reached by holding the limitation on remedies to be invalid under Section 2-719(1). Presumably, the court meant the provision could be found not to have allowed a fair quantum of remedy to protect the substantial value of the bargain. The seller had given an unlimited express warranty of good merchantable yarn. To allow the seller to make a blanket express warranty in one clause of the contract and then to substantially restrict that warranty by limiting remedies to defects discovered within ten days or prior to processing would be unconscionable. In this sense, the court's analysis would be yet another example of judicial disfavor toward allowing contracting parties "to give in the big print and take away in the small."

Procedural unconscionability can be found for failure to disclose knowledge of the potential of latent defects in the goods sold. One such case involved the sale of bacterial soybean inoculant. The manufacturer was aware that the inoculant was quite experimental, involving a freeze-drying process to preserve the bacteria in a live state. The buyer, a farmer, would have had no means of ascertaining that the product was defective prior to using it. Nevertheless, the manufacturer sought to limit its liability for failure of the product to a refund of the purchase price. The product failed, and the buyer's crop failed along with it. The court struck the remedy limitation provision and allowed the buyer a full recovery for his crop loss. 83 On one level the

81. Coastal Modular Corp. v. Laminators, Inc., 635 F.2d 1102, 1106-07 (4th Cir. 1980) (the court also indicated, however, that the limitation, on its face, did not necessarily exclude consequential damages). See also Earl M. Jorgenson Co. v. Mark Constr. Inc., 55 Haw. 466, 477-80, 540 P.2d 978, 986-88 (1975).
82. Most courts which have refused to allow the seller by contract to insulate himself from liability in latent defect cases have held the attempt to be unconscionable, unreasonable, or violative of public policy. See supra note 70.
clause failed on grounds of procedural unconscionability because of the manufacturer's failure to disclose the experimental nature of the product. It also might be reasoned that the provision was substantively unconscionable, that a provision which seeks to insulate from liability for latent defects in a product known only to the seller to be experimental is unconscionable on its face.

By contrast, in another case involving the sale of agricultural herbicide, the court upheld a provision limiting the buyer's remedy to a refund of the purchase price. The court emphasized the experimental nature of the herbicide and the inability to predict in advance the effect that it might have on particular crops. Unlike the case above, the buyer in this case apparently was aware of the experimental nature of the product and of the risk that it might prove ineffective.84

Similarly, in another case the buyer purchased defective commercial motion picture film for use in making a movie. The movie proved unsatisfactory because of defects in the film. In the ensuing litigation, the seller defended on the basis of a contractual provision limiting the buyer's remedy to replacement of the raw stock. The court upheld the provision, expressly finding it not unconscionable. The court emphasized the many different uses to which such film might be put, the choice of use being with the buyer, and the fact that raw stock insurance was available to the buyer to protect against losses such as those it had suffered. Most importantly, it was found that a trade usage existed in the film industry to the effect that replacement of defective film was the exclusive remedy available against sellers. For all of these reasons, the buyer fairly could bear the risk of latent defects in the film, and a remedy limitation provision expressly allocating that risk to the buyer would not be unconscionable.85

Remedy limitation provisions may be invalidated as substantively unconscionable if they are found to be violative of public policy. This is a common result in farming states in cases involving latent defects in seed or other agricultural products. For example, in one case the seller sold herbicide to a farmer. The contract contained a damage limitation provision. When the herbicide proved ineffective to control foxtail, the court allowed the buyer to recover for his full crop loss. The court found that the damages limitation provision violated the state's public policy as expressed in a local statute governing the proper labeling of pesticides. The court also emphasized the inequality of bargaining power between manufacturers and farmers in con-

---

tracts for the sale of agricultural products.86

D. Repair or Replacement Remedy

The significant majority of Section 2-719(2) cases involve situations in which the seller, after reasonable opportunity, is either unable or unwilling to honor a contractual commitment to replace defective parts or otherwise to repair defects in the goods. In the typical case, the seller, either in addition to or in lieu of other warranties, has expressly warranted the goods to be free from defects for a stated time period or amount of usage. This warranty package is then coupled with an exclusive limited remedy of repair or replacement of defective parts. The repair or replacement remedy limitation is specifically authorized by Section 2-719(1), and thus, there can be no question as to the initial validity of the limitation absent a showing of defects in the bargaining process (fraud, duress, unconscionability, etc.). In the typical scenario, defects develop in the goods some time after contracting but before expiration of the warranty. After being allowed reasonable opportunity to honor the agreed remedy, the seller is either unable or unwilling to repair or replace the defective parts or otherwise cure the defects. The buyer then sues for damages and, on occasion, revocation of acceptance. The seller, of course, defends on the basis of the remedy limitation provision. Assuming the seller had reasonable opportunity to honor the limited remedy, courts have held with regularity that the exclusive remedy has failed its essential purpose under Section 2-719(2). A good statement of the reasoning of the courts in these cases is as follows:

[7] To place the purchaser of a defective vehicle incapable of repair in the anomalous position of having no actionable claim for relief pursuant to the strict language of the express warranty and disclaimer therein, because the precise nature of the defect cannot be determined and the plaintiff cannot identify any defective part, the replacement of which could remedy the defect, would be to defeat the very purpose of the warranty which had been given to the purchaser. Such a result would substantially deprive the buyer of the benefit of his bargain and is unconscionable. Although the warranty and disclaimer, which is strictly limited to parts, is not unconscionable on its face, it cannot be applied to the facts in a conscionable manner.87

What is operating in these cases can be labeled “intervening” unconscionability. Although the remedy limitation provision may have been initially valid, being the product of informed bargaining and having provided for the buyer a fair quantum remedy, intervening circumstances, like the failure of the seller to honor the agreed remedy, have subsequently caused the remedy limitation to operate in an unconscionable manner by depriving the buyer of the substantial value

of the bargain. In this sense, Section 2-719(2) is closely related to Section 2-615, the Code's provision for failure of presupposed conditions. To paraphrase Section 2-615, there has been a nonoccurrence of a condition, the occurrence of which was a basic assumption of the contract. The buyer, as a fundamental element of the bargain, was promised a product free from defects, or alternatively, one that could be so rendered by the seller within a reasonable time. From the buyer's perspective, the essential purpose of the remedy limitation provision was to effectuate the alternative part of that guarantee. If repairs are not forthcoming within a reasonable time, the remedy limitation provision has failed of its essential purpose. In the words of one commentator:

This rosy picture of the limited repair warranty, however, rests upon at least three assumptions: that the warrantor will diligently make repairs, that such repairs will indeed 'cure' the defects, and that consequential loss in the interim will be negligible . . . . But when one of these assumptions proves false in a particular case, the purchaser may find that the substantial benefit of the bargain has been lost.88

The Official Comments to Section 2-719 support this intervening unconscionability analysis. Comment 1 provides:

Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly, 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.89

88. Eddy, supra note 3, at 63.
Of course, it makes no difference with respect to the question of failure of essential purpose under Section 2-719(2) whether that failure resulted from good faith attempts by the seller to cure the defects or from a calculated unwillingness to do so. The focus of subsection (2) is upon the adequacy of the remedy to the buyer and not upon the mindset or actions of the seller. Thus, in holding that proof of a limited remedy's failure of its essential purpose did not require a showing that the seller's inability to repair was willful, dilatory, or even negligent, one court observed that "the damage to the buyer is the same whether the seller diligently but unsuccessfully attempts to honor his promise or acts negligently or in bad faith." The court reasoned that the touchstone was whether the inability or unwillingness to repair or the delay in repairing deprived the buyer of the substantial benefit of the bargain. One lesson for sellers is that they should not dismiss lightly warranty claims by buyers based upon agreed remedies even though the particular seller may have a good faith belief that the goods are not defective or that the agreed remedy is not applicable. For example, in one case, the court found the exclusive remedy had failed of its essential purpose even though the seller's refusal to repair was based on a good faith belief that the automobile's odometer had been turned back and that the warranty had expired.

It is true that there is an early line of cases ending in the late 1970's


which can be read for the proposition that there can be no failure of essential purpose of a limited remedy provision absent intentional refusal of the seller to perform the agreed remedy or at least negligence in the performance.\textsuperscript{93} This line of decisions is probably best understood in the light of the scant precedential authority existing at the time to guide the courts in interpreting Section 2-719(2). Regardless, such decisions were then, and are now, just plain wrong. Nothing in text or commentary under Section 2-719 indicates that a seller's good faith is to play any part in determining whether an exclusive remedy has failed. The question is simply whether the agreed remedy can operate to allow the buyer the substantial value of the bargain. Fortunately, there have been no recent cases making failure of essential purpose under Section 2-719(2) dependent upon the seller's fault.

A good example of typical judicial treatment of failure of the essential purpose of an exclusive repair or replacement remedy involved a suit by a buyer against the remote manufacturer of a defective bulldozer. The applicable contract document, a purchase order, provided that the manufacturer warranted the bulldozer to be free from defects in material and workmanship for six months from the date of delivery and limited the manufacturer's obligation to the repair or replacement of any defective parts.\textsuperscript{94} The purchase order further provided that the warranty was in lieu of all other express or implied warranties and barred liability for incidental and consequential damages. The court found that the buyer signed the purchase order "indicating he had carefully read the instrument and was acquainted with its contents."\textsuperscript{95} The bulldozer evidenced an annoying vibration from the day it was delivered. The seller's attempts to correct the abnormal vibration were unsuccessful. The seller did conclude that the problem was caused by defects in material and workmanship in the manufacture of the dozer.

After the seller's unsuccessful attempts to repair, the buyer hired a mechanic, who took apart the equipment and discovered that certain parts were installed backwards causing the vibration and a corresponding loss in the fair market value of the dozer.\textsuperscript{96} The buyer refused to make further payments on the purchase price and the seller


\textsuperscript{94} Caterpillar Tractor Co. v. Waterson, 13 Ark. App. 77, 80, 679 S.W.2d 814, 816 (1984).

\textsuperscript{95} Id. at 80, 679 S.W.2d at 816-17.

\textsuperscript{96} The buyer experienced other mechanical problems requiring replacement or repair of a number of engine parts. Id. at 80-81, 679 S.W.2d at 817.
The buyer then filed a counterclaim against the seller and the manufacturer. At trial the manufacturer argued that its written warranty and remedy limitation were exclusive and limited the buyer to repair or replacement of defective parts and excluded liability for other damages. The buyer was awarded damages, including lost profits, and the manufacturer appealed.

The court on appeal carefully addressed the issue of whether the repair or replacement limitation had failed of its essential purpose. The court reasoned that Section 2-719(2) might be applicable even though the remedy limitation was valid at the inception of the contract and even though both parties to the litigation were commercially sophisticated. The court held:

Section 2-719(2) is to apply whenever an exclusive remedy, which may have appeared fair and reasonable at the inception of the contract as a result of late circumstances operates to deprive a party of a substantial benefit of the bargain. Where the seller is given reasonable opportunity to correct the defect or defects and the machinery nevertheless fails to operate as should new machinery free of defects, the limited remedy fails of its essential purpose. It makes no difference that the transaction was between commercial parties. We are not dealing with unconscionability or disparity of bargaining power under the facts of this case, but whether a party was deprived of a substantial benefit of the bargain.

The court also looked to the purpose of the remedy limitation and concluded:

The purpose of an exclusive remedy of replacement or repair of defective parts is to give the seller an opportunity to make the goods conforming while limiting the risks to which he is subject by excluding direct and consequential damages that might arise otherwise. From the point of view of the buyer, the purpose of the exclusive remedy is to give him goods that conform to the contract within a reasonable time after a defective part is discovered. When the warrantor fails to correct the defect as promised within a reasonable time, he is liable for breach of that warranty.

The court ultimately concluded that the remedy limitation failed of its essential purpose of providing the buyer goods free from defects within a reasonable time and thereby operated to deprive the buyer of the substantial value of the bargain.

The great weakness in the court's analysis is that it assumed that once the exclusive remedy failed the buyer was entitled to recover damages as provided in Article Two, including consequential damages.

97. The seller and buyer settled their respective claims against each other at trial. The case continued on the buyer's claim against the manufacturer.


99. Id. at 83, 679 S.W.2d at 818. This language closely tracks that of the court in Beal v. General Motors Corp., 354 F. Supp. 423, 426 (D. Del. 1973). Beal was the first case to attempt to define the essential purpose underlying a remedy limitation agreement between parties. Most courts do not address this issue directly, and those that do usually do little more than cite Beal. For an exception, see Coastal Modular Corp. v. Laminators, Inc., 635 F.2d 1102, 1107 (4th Cir. 1980).
The court did not address the fact that the applicable contract document at issue contained express language that barred consequential damages. Under Section 2-719(3), such language is to be given effect unless the bar would "operate in an unconscionable manner."\textsuperscript{100} The court's oversight might be attributable to the fact that the seller did not properly make the argument. The relationship between failure of essential purpose of a remedy limitation and separate contractual provisions excluding liability for consequential damages is discussed later.\textsuperscript{101}

The court's analysis nevertheless is instructive because it is one of the few judicial decisions to predicate its analysis on the purpose of the remedy limitation provision in question.\textsuperscript{102} It is also one of the few decisions to peg its analysis on both litigations, failure of essential purpose and substantial bargain deprivation. Most courts simply use one peg or the other. One line of decisions tracks the language of the text of Section 2-719, holding that a remedy limitation has failed of its essential purpose when the seller is unable or unwilling to make necessary repairs within a reasonable time.\textsuperscript{103} Another line turns to the commentary to the section, holding that when a seller does not make promised repairs within a reasonable time the buyer has been deprived of the substantial value of the bargain.\textsuperscript{104} Regardless of the focus, it is clear that a seller's unwillingness or inability to honor, within a reasonable time, a repair or replacement remedy will cause the limitation to be stricken and allow the buyer access to other remedies provided by the Code.

E. Seller's Defenses: Reasonable Opportunity

There is little room for a seller to defend an allegation that he has been unable or unwilling to honor a repair or replacement remedy. Two avenues appear to be available. One is to argue that he has indeed tendered the agreed remedy. The other is to argue that he has not had a reasonable opportunity to make such a tender.

An example of a successful defense based upon proper tender arose in a case involving the sale of open cut and jack pipe to be used by the

\textsuperscript{100} U.C.C. § 2-719 comment 3 (1978).
\textsuperscript{101} See infra text accompanying notes 115-216.
\textsuperscript{102} The root case is Beal v. General Motors Corp., 354 F. Supp. 423 (D. Del. 1973).
buyer, a construction company, to install underground sewer lines.\textsuperscript{105} During construction, three separate pipe breaks occurred after the pipe had been installed in underground tunnels. Each pipe break caused construction to cease immediately for replacement of the broken pipe. The seller supplied replacement pipes in each instance, and the buyer expended $60,000 to repair the breaks. The buyer brought suit for that amount. The seller defended that the contract limited the buyer's remedy to above-ground repair and replacement of defective pipe, a remedy which the seller had honored by supplying replacement pipes. The court held for the seller, finding that below ground breaks were a foreseeable risk which had been allocated to the buyer by the remedy limitation provision. The court found that the provision was a sensible measure taken by the seller to keep the price of the pipe at a reasonable level.

By supplying replacement pipe above ground, the seller did what it promised to do, and the remedy limitation provision had not failed. The court said that Section 2-719(2) was not triggered unless unanticipated circumstances rendered the seller unable to provide the agreed remedy. This was true regardless of whether the remedy turned out to be no remedy at all. The court did opine that if the pipe breaks were caused by a latent defect which existed in all the pipes, and if the replacement pipes were similarly defective, such unanticipated circumstances would make Section 2-719(2) applicable. The court speculated that the buyer's argument on the instant facts might have been better based on unconscionability. By this, the court presumably meant that the risk allocation to the buyer of underground breaks left no adequate remedy for breaks caused by defects in the pipe not ascertainable by reasonable inspection.\textsuperscript{106} The court expressly reserved opinion as to the merits of such a contention.\textsuperscript{107}

The lesson is obvious. If the seller tendered the agreed remedy, the provision cannot be found to have failed of its essential purpose. One way the seller can make better use of this defense is by drafting the agreed remedy more broadly so as to provide a back-up remedy that can be honored. Such remedies might include refund of the purchase price, replacement of the contracted goods, or even payment of liquidated damages. For example, the contract might provide that the buyer's exclusive remedy will be, at the option of the seller, repair or replacement of defective parts, replacement of the goods themselves, or refund of the purchase price. In the event that the seller subsequently is unable to repair defects in the goods, one of the alter-

\textsuperscript{106} See supra notes 68-69 and accompanying text.
native remedies might be tendered. If this occurs, the court should find no failure of essential purpose.108

Another line of defense to an allegation under Section 2-719(2) that a repair or replacement remedy has failed is that the seller was not allowed a reasonable opportunity to tender the agreed remedy. Numerous decisions under Section 2-719(2) deal with the question of whether the repair or replacement remedy failed due to delay by the seller in correcting the defect. It is generally agreed, of course, that an unreasonable delay will cause the remedy limitation to fail.109 The courts, however, have not been helpful in defining the parameters of reasonableness in these cases. The question is of obvious importance because a corollary to the proposition that a seller must repair within a reasonable time is that the buyer must give the seller a reasonable opportunity to make such repair. In this sense, the seller's right to repair parallels the similar right to cure defects under Section 2-508 in cases in which the buyer rejects defective goods. The case law examining the seller's cure right under Section 2-508 might be helpful in determining the reasonableness of his opportunity to repair under Section 2-719(2).110

Regardless, the question of reasonableness is one for the jury to determine on the particular facts and circumstances of the individual case.111 The buyer, however, is not bound to allow the seller an unlimited amount of time in which to correct defects.112 It is probably fair to say that the courts generally have allowed sellers less time for consumer products than for more complex goods sold in a commercial context.113 The fact that the parties are aware that the goods are of an experimental nature also may extend the time period for repair.114


113. See B. CLARK & C. SMITH, supra note 41, at 8-55.

114. See Waters v. Massey Ferguson, Inc., 775 F.2d 587 (4th Cir. 1985).
LIMITATIONS ON REMEDIES

Most cases will be governed by common sense. Once the buyer gives the seller an opportunity to repair, the seller must make the attempt. If the seller is unable or unwilling to do so, the exclusive remedy has failed. If the seller tenders repairs, the buyer immediately should inspect the goods to ascertain that the repairs have been made properly. If the defects still exist, the buyer should force the seller to state the further time period needed to correct the defects. Unless the seller demands an outrageous period, the buyer should acquiesce. The buyer, after all, has assumed the risk of defective goods for a reasonable period of time. If the seller refuses to state a reasonable period necessary to conduct the repairs, this refusal no doubt will weigh strongly against the seller in subsequent litigation.

The harder cases are those in which the initial repair attempt appears to have been successful, but the defects manifest themselves shortly thereafter. In such circumstances, reasonableness almost always will require that the seller be given another opportunity. No line of work always achieves perfection and this is certainly true for repairs of goods. However, absent extraordinary circumstances, two or three opportunities to repair should stretch the bounds of reasonableness regardless of the nature of the transaction, consumer or commercial.

IV. REMEDIES AVAILABLE UPON FAILURE OF AN EXCLUSIVE REMEDY/LIMITATION OR EXCLUSION OF CONSEQUENTIAL DAMAGES

A. In General: A Perspective

The most perplexing question under Section 2-719 is what remedies are available to the aggrieved buyer once a remedy limitation provision has been found to have failed of its essential purpose. Section 2-719(2) vaguely, but provocatively, provides that “remedy may be had as provided in this Act.” The offending clause is to be stricken and the panorama of remedies available under Article Two is opened to the buyer. Certainly these would include, on appropriate facts, the general damage remedy for accepted goods in Section 2-714,\(^{115}\) the goods oriented remedies of revocation of acceptance under Section 2-608, and, in the rarer case in which the defects arise after contracting but before acceptance, rejection under Section 2-601.\(^{116}\) In rejection or revocation cases, of course, the buyer may be entitled to money dam-

---


Recovery also may include consequential damages under Section 2-715 unless such damages have been properly excluded by the contract. Apparently, an independent disclaimer of consequential damages is necessary to protect a seller's liability once an exclusive remedy has failed of its essential purpose. In those cases in which the contract provided for a limited remedy but for no separate exclusion of consequential damages, the courts usually have held that such damages are recoverable once the limited remedy has failed. Although this rationale arguably ignores that the parties may have intended the limited remedy to perform a dual purpose and that the purpose of insulating the seller from consequential liability may not necessarily have failed, the courts take literally the statement in the Official Comment to Section 2-719 that the offending provision is "subject to deletion" from the contract. In the words of one court:

The direct damage remedy of § 2-714(2), therefore, is applicable only when the exclusive remedy provided in the contract fails of its essential purpose within the meaning of § 2-719(2). Under that section when such a failure occurs recourse may be had to all the remedial provisions of the Code. There is no discernible reason for limiting that recourse to selected remedial provisions as defendant apparently attempts to do. The direct damages section, § 2-714(2), has no greater claims to application here than does the consequential damages section, § 2-714(3), assuming, of course, that this is otherwise 'a proper case' for consequential damages.

But what if the contract, as is typical, further provides a simple statement that "in no event shall seller be liable for incidental, consequential, or other special damages incurred or suffered by the buyer" or words to that effect? What should be the fate of this independent provision disclaiming liability for consequential damages once a remedy limitation provision has been found to have failed?

In attempting to answer this question, three general observations fairly can be made. First, the question is an extremely important one, probably the most important question raised by Section 2-719 in terms of practical effect. Second, the question continues to produce a plethora of appellate level litigation with results all across the board. Third, most of the analysis, although perhaps not the results, in these


decisions has been unsatisfactory on the whole because the courts have failed to notice or emphasize that unconscionability under Section 2-719(3) is not concerned primarily with events at the time of contracting but, instead, with the circumstances which have occurred subsequent thereto.

The relative importance of a consequential damages disclaimer in comparison to a limitation of direct damages is apparent. Certainly a seller would prefer to restrict the liability entirely to repair or replacement of defective parts, for example, than to risk exposure to the spectrum of direct damages remedies provided by Article Two. The limited remedy provision will allow the seller full control over satisfying complaints by the buyer and the flexibility to exercise that control to minimize effort and expenditure. But there is usually little cause for concern if the seller loses this protection so long as immunity from consequential liability remains intact. The buyer then will be able to recover only direct damages and perhaps to revoke acceptance. In case of revocation, unless the market price for the goods has risen dramatically, the seller risks little more than refunding to the buyer payments received in exchange for a return of the defective goods. And in the case of damages for accepted goods, the seller's potential liability usually will not exceed the purchase price unless the buyer has made an exceptionally good deal by purchasing the goods at a price much less than their true value as warranted. In the usual case, then, the seller will be required to do no more than repay some or all of the buyer's money. The direct damages game usually is played with the money of the aggrieved party with the upper end of liability always being the value of the goods as warranted. The seller risks only frustration of a lost expectation in terms of the profit that would have been made on the deal. Certainly no seller likes to cancel a contract and return money, and most sellers probably would regard such an occurrence as a loss. But the loss is only in terms of expectation, is usually paid out of funds already received from the buyer and, most importantly, is measurable by a ceiling of no more than the true value of the goods sold.

Potential liability for consequential damages, on the other hand, presents the horror of the unknown. Although such damages, by definition, must be reasonably calculable to be recoverable, their amount is governed by what the law has long labeled foreseeable “special circumstances” attributable to the unique operating structure of the aggrieved party. Significantly, the amount of consequential damages for which the seller may be held responsible is not limited to, and typically may far exceed, the value of the goods sold and the monies previously paid by the buyer to the seller. This potential liability of

120. See U.C.C. § 2-715(2) (1978).
121. See id. § 1-106 comment 1.
the seller is far in excess of the consideration received under the contract and is an understandable cause for pause by both parties to the contract. It is for this reason that sellers of goods almost always attempt by negotiation or standardized contract forms to disclaim liability for consequential damages in cases in which such damages can foreseeably occur.

Even in negotiated contracts, it should not be difficult for most sellers to convince their buyers of the reasonableness of their concern about the potential for open-ended liability. This concern may be expressed in terms of an empathetic attempt to keep prices at a reasonable level and of the inherent unfairness of requiring the seller to be an insurer of the buyer's use of the goods. In turn, a buyer might understandably acquiesce in a seller's disclaimer of liability for consequential damages at least so long as the seller can give adequate assurance that the buyer's exposure to the risk of consequential loss will be kept to a minimum. Such assurances might take the form of a warranty on the part of the seller that the goods will be free from defects for a certain period of time or amount of use or, in the alternative, that the seller will remedy the defect within a reasonable time. In exchange for these or similar promises and for goods at a mutually agreeable price, the buyer may agree to the allocation to him of the risk of consequential loss.

Although the Official Comment to Section 2-719 labels this an allocation of "unknown or undeterminable risks,"122 such risks are conversely quite reasonably known at the time of contracting and quite reasonably calculable at the time of breach. Otherwise, the seller would face little risk under the law for not disclaiming liability for them. Breaching parties are not liable for unforeseeable damages or for those that cannot be calculated with reasonable certainty. In fact, it is just because such risks are known that the seller typically and reasonably will seek to insulate himself from liability for consequential damages. Thus, in negotiated deals, the seller may make an understandable and reasonable request to disclaim liability for consequential damages in return for firm assurances that the risk to the buyer will be kept to a minimum by the expertise and good faith of the seller in quickly correcting defects that might arise in the goods.

It would be reasonably accurate to characterize this allocation of risk from the seller to the buyer as an implicit partnership or joint venture based upon expressed assurances and the realistic propositions that even careful manufacturers or sellers may make or sell bad goods, that even quality goods can go bad, and that it takes time to correct defective goods during which significant special or consequential losses can be suffered. This scenario, of course, suggests a bargain-

122. See id. § 2-719 comment 3.
ing context in which the parties are at roughly arms’ length, in which the risk allocation was a product of informed and specific negotiation, and in which potential consequential loss suffered by the buyer is agreed to be kept, by prompt and effective action of the seller, within the parameters reasonably anticipated by the parties.

As a practical matter the scenario rarely will be articulated in just this way. First, parties usually think or negotiate in terms of performance rather than breach. Second, even if the parties consider the matter of the goods not being as warranted, the assumption will be that any defects in the goods will be of the usual sort and will be easily and quickly correctable by the seller. Nevertheless, unless consequential damage disclaimers are to be regarded as self-serving talismanic incantations of divine rights and obligations, rather than the reasonable product of informed albeit implicit negotiation, these basic assumptions must be regarded as part and parcel of every contract for the sale of goods unless the contract itself, or the circumstances surrounding its negotiation, clearly indicate otherwise.

There is nothing new or radical in this line of analysis, but there is plenty that is difficult. Proper analysis of a given case under Section 2-719 requires the court to go beyond the bare and cold wording of the contract and to engage in a process of lawfinding to determine what Professor Llewellyn called the “essence” or “core” of the bargain made. A buyer cannot be supposed to have bought goods merely to lay them on the proverbial commercial dunghill. The essence of the buyer’s acceptance of the risk allocation of consequential damages is the seller’s promise to render the goods defect free within a reasonable time. If the seller is unable as circumstances develop to honor this promise, then the “essence” or “core” of the contract has been frustrated, all bets should be off, and the buyer should be allowed recovery for consequential loss suffered after a reasonable period has expired for the seller to repair or replace the goods. Only that consequential loss which occurred during the reasonable time period for correction of the defects was part of the risk assumed by the buyer under the “core essence” of the damages limitation provision.

1. Unconscionability

This perspective of the relationship between the seller’s obligation to honor the limited remedy and the allocation to the buyer of the risk of interim consequential loss is akin to the basic contract law principle that when one party fails to perform his obligations under the con-
tract, the other party is relieved as a matter of law from the obligation of mutually dependent performance. As a general proposition, the buyer's assumption of the risk of consequential loss under the terms of the contract should be viewed as mutually dependent upon the seller's warranty to provide defect-free goods within a reasonable time. What could be more logical or fair than to treat warranty, disclaimer, and remedy limitation as a mutually interdependent package? There is plenty of support for this reasoning in the case law on both sides of the Atlantic.124

Although the English appear to have backed away from their so-called doctrine of "fundamental breach," perhaps the concept would be more in favor if it was properly regarded as a guideline to assessing the circumstances and bargaining context of a particular case rather than as a fixed rule of law for general application. In any event, the doctrine has a great deal of logical and conscionable merit: "Every contract contains a 'core' or fundamental obligation which must be performed. If one party fails to perform this fundamental obligation, he will be guilty of a breach of contract whether or not any exempting clause has been inserted which purports to protect him."125 Any other result might be "unconscionable," to use the Article Two vernacular. But whether the perspective is one of analyzing the "core essence" of the remedy limitation package or of determining the mutual dependency of its component parts, the Code requires more than the mere failure of the seller to honor his obligations thereunder in order to hold the seller liable for consequential damages suffered by the buyer. In order to force liability on the seller, Section 2-719(3) requires that the limitation or exclusion be found unconscionable. With respect to the ongoing efficacy of consequential damage disclaimers, Section 2-719(3) provides: "Consequential damages may be limited or excluded unless the limitation or exclusion 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."126

The most important thing about this provision is, of course, its use of that word "unconscionable" as its base standard, a word having parameters which forever will escape precise definition. The provision thus forces upon the court the process of carefully weighing the facts and circumstances of each case before any determination can be made. The next most important thing about the provision is that it, like subsection (2), is not primarily concerned with the initial validity of the contract provision or with the procedural aspects of the bargaining

124. See generally Restatement (Second) of Contracts § 237 (1979).
process. Matters such as trickery, oppression, unfair surprise, notice, and conspicuousness are the province of Section 2-302 "unconscionability," matters which Professor Leff labeled "procedural unconscionability." Although a great measure of superfluity exists in Article Two provisions dealing with the seamless web of warranty, disclaimer, remedy limitations, liquidated damage provisions, and the like, Section 2-719(3) is much more than a redundancy to Section 2-302. Section 2-302 is concerned by its very terms with unconscionability in contract "at the time it was made." Section 2-719(3), on the other hand is concerned with how a consequential damage disclaimer operates in light of circumstances as they occur after the contract is made. In the words of the Official Comment to the provision: "[S]ubsection (3) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner."

This type of unconscionability can be labeled "intervening unconscionability." To illustrate its application, assume a contract for the sale of consumer goods containing the following clause: "In no event shall seller be responsible for consequential damages suffered by buyer." Assume further no frailties in the bargaining process, that the clause was carefully pointed out to the buyer, and that the parties were of fairly equal bargaining strength. At this point, is the clause valid or invalid? The clause is specifically authorized by Sections 2-316(4), 2-719(1), and 2-719(3), and it in no way violates Section 2-302, Section 2-719(3), or of any other provision of Article Two. The clause is valid. Now assume that the goods go bad and the buyer suffers consequential loss. Whether the clause remains valid under Section 2-719(3) depends on how the clause operates in terms of the occurrence of circumstances subsequent to contracting, not only the failure of the goods to perform as warranted but also the type of loss suffered by the buyer. If the buyer's consequential loss is solely economic, Section 2-719(3) strongly suggests that the clause remains valid; it is not operating in an unconscionable manner. Conversely, if the defect in the goods caused the consumer buyer personal injuries, the clause almost certainly will be stricken; it operates in an unconscionable manner. Similarly, even if the buyer's loss was merely economic, the clause might nevertheless be invalidated under Section 2-719(3) if the seller willfully caused that loss by a callous refusal to honor the agreed remedy of repairing the goods. Otherwise, the provision excluding liability for consequential damages, although perfectly valid at the time of contracting, would be operating in an unconscionable manner.

129. Id. § 2-719 comment 3.
Section 2-719(3), of course, does not focus entirely, merely primarily, on circumstances subsequent to contracting. A provision under Section 2-719(3) can be invalid from the inception of the contract. An obvious example of this is a clause excluding by its express terms liability for personal injuries in the sale of consumer goods. But this would be a case of what Professor Leff calls "substantive unconscionability."\(^{130}\) "Procedural unconscionability," a gross inequity in the bargaining process, remains the province of Section 2-302. The important point, however, is that even if a provision disclaiming liability for consequential damages can escape the snare of Section 2-302, it may still fall prey to Section 2-719(3) if it operates in an unconscionable manner.

To make an accurate determination of intervening unconscionability, Section 2-719(3) requires that the court go through the difficult process of examining not only the language of the contract, but that language in context with the circumstances surrounding the bargaining process and those as they develop subsequent to contracting. The difficulty is not insurmountable. The courts long have engaged successfully in the quite similar process of determining whether a particular breach was of a material (and thus dependent) obligation so as to relieve the aggrieved party of his return performance or was merely a partial breach (of an independent obligation) which would not relieve the aggrieved party. Many of the factors usually considered by the courts in making such determinations would be equally applicable to a determination of whether the seller's failure to honor the agreed remedy would cause the consequential damage disclaimer to operate in an unconscionable manner.\(^{131}\)

Much of the focus should be on whether the seller used best efforts to honor the agreed remedy and thus minimize the buyer's loss or, in cases of good faith efforts, on the magnitude of the consequential loss the buyer suffered. However, Section 2-719(3) requires that leaving the loss on the buyer be much more than unfair; it must be uncon-

\(^{130}\) Leff, supra note 127, at 486-87.

\(^{131}\) See generally Restatement of Contracts § 275 (1932). Section 275 provides:

In determining the materiality of a failure fully to perform a promise, the following circumstances are influential [sic]:

(a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;

(b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;

(c) The extent to which the party failing to perform has already partly performed or made preparations for performance;

(d) The greater or less hardship on the party failing to perform in terminating the contract;

(e) The willful, negligent or innocent behavior of the party failing to perform;

(f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.
scionable. It must be kept in mind that, except in cases of goods to be manufactured to the buyer's specifications or perhaps in cases of prototype or experimental goods, the buyer generally relies on the seller's expertise and knowledge with respect to the goods and upon the seller's promise that the goods will be free from defects or quickly will be rendered so. In return, the buyer agrees to accept allocation of the risk of consequential loss. If the seller intends other than this, if he means that his disclaimer is independent of his promises regarding the limited remedy, if he means to assault common sense with the assertion that his language "in no event shall I be liable" really means "even if all my promises to alleviate your injury fail I am not liable," then at a minimum the seller should be required to articulate the heresy with a great deal more specificity and precision than the cursory language usually used in contracts of this sort.

Again, there is nothing new here. In fact, there is a long line of pre-Code cases and a burgeoning line of post-Code cases which invalidate warranty disclaimers and remedy limitations in cases in which the goods varied significantly from the contract description. Certainly unrepairable, substantially defective goods are significantly different from goods promised either to be free from defects or capable of being so rendered within a reasonable time. Several of the pre-Code cases can be found enshrined in the Official Comment to Section 2-302 as examples of unconscionability.\textsuperscript{132} In perhaps the best known of the group, the buyer was allowed to recover consequential damages in the form of lost profits notwithstanding a limited remedy provision that ostensibly barred their recovery. The seller delivered to the buyer a used and defective machine instead of the new machine called for by the contract. The court said:

Plaintiff was under obligation to deliver to Defendant a machine that complied with the description in the contract; performance of that obligation was a condition precedent, having the force of a warranty after acceptance, with which plaintiff was bound to comply before it was entitled to urge that defendant was precluded from asserting the ordinary remedies available to it for breach of such contract.\textsuperscript{133}

Similar reasoning has been used in Code cases to invalidate provisions limiting or excluding consequential damages. For example, in Wilson Trading the fundamental basis of the court's decision was that

\textsuperscript{132} See Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118 (1922)(vehicle delivered was totally unfit for use as dump truck contracted for); F.C. Austin Co. v. J.H. Tillman Co., 104 Ore. 541, 209 P. 131 (1922)(delivery of asphalt mixing machine that wholly failed to correspond with the description in the contract); Andrews Bros. v. Singer & Co., 1 K.B. 17 (1934)(C.A.)(used car delivered in place of new car contracted for); Robert A. Munro & Co. v. Meyer, 2 K.B. 312 (1930)(delivery of adulterated meat substantially different from that required by the contract); Green v. Arcos, Ltd., 47 T.L.R. 335 (C.A. 1931)(delivery of timber substantially different than that contracted for).

\textsuperscript{133} F.C. Austin Co. v. J.H. Tillman Co., 104 Or. 541, 552, 209 P. 131, 134 (1922).
it would be unseemly, unwise, or unconscionable to allow the seller to shelter behind the remedy limitation provision until it had effectively honored its obligations under other parts of the warranty package by providing the buyer with goods substantially free from latent defects.\textsuperscript{134} The same result should follow whether the seller warrants the goods to be free from latent defects as in Wilson Trading, or free from unrepairable defects, as in cases involving an agreed repair remedy. For example, in a well-known case the court held the buyer was entitled to a recovery of consequential damages notwithstanding the existence of a separate clause excluding such damages. The court had found that the limited repair or replacement remedy failed of its essential purpose under Section 2-719(2). The court said:

"The limitations of remedy and of liability are not separable from the obligations of the warranty. Repudiation of the obligations of the warranty destroys its benefits. The complaint alleges facts that would constitute a repudiation by the defendants of their obligations under the warranty, that repudiation consisting of their willful failure or their careless and negligent compliance. It should be obvious that they cannot at once repudiate their obligations under the warranty and assert its provisions beneficial to them.\textsuperscript{135}

Of course, any good theory can be applied incorrectly. In one case involving a contract for the sale and installation of rain gutters on the buyer's home, the contract specifically limited the seller's responsibility in the event of defects to the cost of labor and materials for repair. When defects became apparent, the seller repaired them in a reasonable manner. In the interim, however, the buyer suffered consequential damages in the amount of $1,759 for water damage to her house. In upholding a recovery in this amount, the court said: "The correction of the defect without compensating the plaintiff for her loss, deprived her of the 'substantial value of the bargain'; thus, the remedy failed of its essential purpose."\textsuperscript{136} The case was incorrectly decided and is probably understandable only on the basis of an implicit consumer protection policy. The buyer's bargain promised her defect-free goods and services or those that could be rendered so within a reasonable time and imposed upon her liability for consequential damages occurring within a reasonable time period necessary for the seller to repair any defects. On the facts given, to allow the buyer's recovery for consequential damages was to ignore the bargain made and to restructure the risks fairly allocated between the parties. Only if the seller was unable to repair within a reasonable time should recovery for damage to the house have been allowed, and that recovery prop-

\textsuperscript{134} See Wilson Trading Corp. v. David Ferguson, Ltd., 23 N.Y.2d 398, 244 N.E.2d 685, 297 N.Y.S.2d 108 (1968); see also supra notes 68-69 and accompanying text.


LIMITATIONS ON REMEDIES

erly should have been limited to the damage occurring after the expiration of a reasonable period of time to allow the seller to conduct repairs. The seller in the case had honored the remedy as agreed.

Conversely, in situations in which the seller is unable to honor the agreed remedy limitation, a court is in error if it insists on giving a provision excluding consequential damages a wholly independent effect by ignoring the question of whether the failure of the agreed remedy would cause the consequential damage exclusion remedy to act in an unconscionable manner. To proceed in this fashion is to ignore the bargain that was in all probability at least implicitly made, and thus to reallocate the risks assumed by the parties by giving the consequential damage disclaimer an effect at variance with the intent of the parties. The interdependency of the warranty disclaimer, remedy limitation package should hold all the more true with respect to standardized contracts or other contracts consummated without detailed negotiation. With respect to such contracts, common sense and common understanding must take precedence over individualized intent outside the course of normal behavior. This often can be accomplished by simply following the basic maxims of contract law of construing the standardized contract most strictly against the party responsible for its drafting.

2. CAVEAT: Complex, Experimental, or Prototype Goods

In sales of standardized goods, a seller's failure to honor an agreed limited remedy of repair or replacement usually should be found to have upset a basic assumption underlying the warranty, remedy limitation, consequential damage disclaimer package. The question under Section 2-719 then becomes whether enforcement of the disclaimer of liability for consequential damages would be unconscionable. However, in the sale of unique, prototype, or experimental goods, or goods manufactured to the buyer's own specifications, the reasonable expectation of the parties regarding the warranty package may be quite different. In such contracts a provision that "in no event shall seller be liable for consequential damages" may mean just that, both in the abstract and in the context of the bargain made.

Often, particularly with respect to goods manufactured to the buyer's specifications, the seller may be unwilling to make any warranty at all other than to provide goods of the contract description. In other cases the seller may be willing to go a bit further and promise to use good faith and diligent efforts to correct defects as they arise, but not that the repair attempts will be successful. In such cases, of course, this very limited remedy should not be found to fail under subsection (2) if the seller has acted with good faith and diligence. In still other unique goods cases, the seller might go even further and warrant repair or replacement of defects as is common with standardized
goods. In all three classes of cases, a clause excluding liability for consequential damages takes on a different meaning than in the sale of standardized goods. In the first two, the provision should be given effect because no agreed remedy has failed. In the first situation, no warranty was made; in the second, the agreed remedy was honored by good faith and diligence.

In the third class of cases, even though the seller warranted repair or replacement, the consequential damages excluder probably should be read quite literally and strictly. Even if the agreed remedy fails, the excluder most often should be regarded as having an independent validity. An excellent case in point is American Electric Power Co. v. Westinghouse Electric Corp., which involved the sale of a complex and somewhat experimental turbine generator. The seller warranted the generator to be "free of defects in workmanship and material" and promised, as the buyer's exclusive remedy, to correct any defects by suitable repair or replacement. The contract also contained a provision limiting the seller's liability for consequential damages to the contract price of the equipment sold. In granting the seller's motion for summary judgment with respect to the buyer's claim for consequential damages, the court strongly emphasized the complex and experimental nature of the goods.

Further, the rule that the agreed-upon allocation of commercial risk should not be disturbed is particularly appropriate where, as here, the warranty item is a highly complex, sophisticated, and in some ways experimental piece of equipment. Moreover, compliance with a warranty to repair or replace must depend on the type of machinery in issue. In the case of a multi-million dollar turbine generator, we are not dealing with a piece of equipment that either works or does not, or is fully repaired or not at all. On the contrary, the normal operation of a turbine-generator spans too large a spectrum for such simple characterizations.

The court, however, refused to grant seller's motion for summary judgment with respect to the buyer's claim for general damages. The buyer alleged that Westinghouse had acted "in bad faith" in conducting repairs and had been "willfully dilatory in rendering repairs, and ha[d] not merely failed to repair or replace, but ha[d] repudiated its obligation to repair and replace." The court reasoned that fact issues had been raised regarding Westinghouse's alleged intentional misconduct. The court held that if these fact issues could be resolved in favor of the buyer, the remedy limitation would have failed of its essential purpose.

It is not clear from the opinion why the court thought that proof of the alleged willful misconduct by the seller would not also cause the consequential damage limitation provision to operate in an uncon-

138. Id. at 458 (footnote omitted).
139. Id. at 453.
scionable manner. The generator had been completely shut down for two separate five-month periods for repairs, and the buyer alleged that the machine never functioned according to rated specifications. Perhaps the court was of the opinion that the consequential loss was attributable solely to the complexity of the goods rather than to any intentional misconduct by the seller. If the buyer had been able to prove a nexus between such misconduct and the consequential loss, surely the court could have found that the clause excluding the loss was unconscionable under the facts as they occurred.

The complex goods factor, as articulated in American Electric Power, was a primary basis for a recent decision of the New Jersey Supreme Court upholding a contractual provision excluding liability for consequential damages even though the limited repair or replacement remedy had been found to have failed of its essential purpose. The case involved the sale for $167,000 of a complex, computer-controlled machine tool to a "sophisticated buyer." In a thoughtful opinion, the court focused on the competing policies of freedom of contract and that of providing the buyer with a fair measure of remedy. The court said:

These competing policies—freedom of contract, including the right to exclude liability for consequential damages, and the insistence upon minimum adequate remedies to redress a breach of contract—frame the issue before us. If a limitation or exclusion of consequential damages is not unconscionable when the contract is made, must it be held unenforceable if the limited remedies provided in the contract do not achieve their intended purpose?

The trial court instructed the jury that it could award consequential damages to the buyer regardless of the excluder provision in the contract if it found that the seller failed to repair the machine to its warranted condition. The court found this instruction inappropriate and held that the contract fairly allocated the risk of consequential loss to the buyer. The court said that, on the facts of the case—in particular, those of a sophisticated buyer purchasing complex equipment—it could not be said that "the allocation of risk through exclusion of consequential damages was inextricably tied to the limitation of remedies."

In another case involving the sale of a complex turbine generator, the court took a different tack. The court concluded that the seller's repair warranty was limited to good faith efforts to make repairs. The court said:

But even if the Court accepts PEPCO's contention that the turbine-generator failed to meet the guaranteed heat rate and that as a result they are faced with increased fuel costs, the defendant has conscientiously and continually ex-

141. Id. at 593, 527 A.2d at 434 (footnote omitted).
142. Id. at 602, 527 A.2d at 439.
erted its best efforts to correct the problem. At no time has Westinghouse repudiated or attempted to escape from the obligations of the warranty. To the contrary, it has continued to promptly employ every means to correct the heat rate problem under the repair and replacement provisions as well as by continuing research, the benefits of which PEPCO also receives.\footnote{Potomac Elec. Power Co. v. Westinghouse Elec. Corp., 385 F. Supp. 572, 578-79 (D. D.C. 1974)(citation omitted).}

The court concluded that the buyer had not suffered consequential damages beyond those reasonably contemplated by the parties. The court said: "Nor has the plaintiff lost the substantial part of its bargain by virtue of the warranty. The unit is still operative and the increased fuel costs as stated by the plaintiff have not been excessive by any standard."\footnote{Id. at 579. See also U.S. Fibers, Inc. v. Proctor & Schwartz, Inc., 358 F. Supp. 449 (E.D. Mich. 1972)(sale of experimental conveyor-oven).} Unique goods cases, then, represent the kind of situation in which the courts quite properly can find that the parties intended the consequential damages clause to be given effect wholly independent of the limited remedy provision.

B. The Case Law

Section 2-719 has generated a prodigious amount of litigation. To date, courts have taken varying approaches to resolving the question of the continued efficacy of a provision excluding consequential damages once an agreed remedy has been found to fail of its essential purpose. Recent cases have demonstrated a concern consistent with the perspective discussed above\footnote{See supra text accompanying notes 115-44.}, on whether the failure of the agreed remedy presents a case of "intervening" unconscionability thereby invalidating the provision allocating to the buyer liability for consequential damages. The results in most cases are quite understandable. Unfortunately, however, many courts continue to analyze unconscionability of clauses excluding or limiting consequential damages in terms of the circumstances as they existed at the time of contracting under Section 2-302 rather than in terms of whether intervening circumstances have caused the clause to operate in an unconscionable manner.\footnote{See generally U.C.C. § 2-719 comment 3 (1978). "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." Id.} The various approaches taken by the courts will be discussed in turn.

1. Failure of Essential Purpose of Agreed Remedy

Under one line of decision a buyer is automatically entitled to recover consequential damages if the remedy limitation is found to have failed under Section 2-719(2). This approach is based on a literal reading of Section 2-719(2) which states that upon failure of an exclusive
remedy, "remedy may be had as provided in this Act."\textsuperscript{147} Once these decisions determine that the remedy limitation has failed, they then often simply state conclusively, without analysis, that consequential damages are, therefore, recoverable despite the separate exclusion language in the agreement.\textsuperscript{148}

Two early cases usually are cited as root precedent for the proposition that failure of the essential purpose of an exclusive remedy under Section 2-719(2) automatically allows a buyer recourse to all Article Two remedies, including consequential damages.\textsuperscript{149} In \textit{Adams v. J.I. Case Co.},\textsuperscript{150} the buyer purchased a tractor for use in his business. The contract contained a standard repair or replacement warranty and explicitly excluded any liability for consequential damages. The tractor developed serious defects, and the buyer returned it to the dealer for repairs. Although the defects could have been corrected in about a week, the dealer kept the tractor for several months before repairing it. The court held that the dealer's dilatory conduct breached an implied warranty to correct defects within a reasonable time, thus causing the limited repair or replacement remedy to fail of its essential purpose. As a result, the court concluded that the buyer was entitled to all remedies under the Code, including consequential damages.\textsuperscript{151}

In \textit{Jones & McKnight Corp. v. Birdsboro},\textsuperscript{152} the federal district court faced an issue of first impression under Illinois law of whether the failure of a limited repair or replacement warranty automatically invalidated a contract provision excluding liability for consequential damages. The court noted that \textit{Adams} was the only reported decision to date that had faced the issue, and the court opted to follow \textit{Adams}. As an additional basis for its decision, the court relied upon the Official Comment to Section 2-719 which provides that when a remedy limitation clause fails, "it must give way to the general remedy provi-

\textsuperscript{147} Id. § 2-719(2). \textit{See also id. § 2-719 comment 1 (if an exclusive remedy is found to have failed, "it must give way to the general remedy provisions of this Article").}

\textsuperscript{148} R.W. Murray Co. v. Shatterproof Glass Corp., 758 F.2d 266 (8th Cir. 1985); Soo Line R.R. v. Fruehauf Corp., 547 F.2d 1365 (8th Cir. 1977); Koehring Co. v. A.P.I., Inc., 369 F. Supp. 882 (E.D. Mich. 1977); Jones & McKnight Corp. v. Birdsboro Corp., 320 F. Supp. 39 (N.D. Ill. 1970); Caterpillar Tractor Co. v. Waterson, 13 Ark. App. 77, 679 S.W.2d 814 (1984); Adams v. J.I. Case Co., 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970). All of these cases found that the limited repair or replacement remedy failed because of the seller's willful misconduct. Although none of the decisions purport to analyze the validity of the consequential disclaimer under a separate unconscionability standard, the decisions perhaps would have been better based on such an analysis. \textit{See infra} text accompanying notes 173-210.


\textsuperscript{150} 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970).

\textsuperscript{151} A better ground for the decision would have been that the seller's willfully dilatory conduct constituted intervening unconscionability under Section 2-719(3).

sions of this Article." 153

Until the late 1970s, the approach of the Adams and Birdsboro courts dominated the decisions across the country on the question of the continued efficacy of contractual provisions excluding or limiting liability for consequential damages. Although subsequently most courts have adopted alternative approaches to analyzing the issue, 154 an occasional decision, usually a consumer case, continues to follow the Adams and Birdsboro line of analysis. 155 For example, the Eighth Circuit in 1985 allowed the buyer to recover consequential damages despite an exclusion of them in the sales contract. 156 The contract limited the seller's liability to replacement of the glass panels which were the subject of the sale. Upon a finding that the seller was unable and unwilling to supply adequate replacements for the defective panels, the court found the limited remedy to have failed of its essential purpose under Section 2-719(2). Although the court acknowledged that many jurisdictions allow an independent consequential damage exclusion to survive failure of a limited remedy, the court stated that Missouri authority permits a recovery of consequential damages in any case in which the exclusive remedy is found to have failed. As authority for its conclusion, the court relied upon the language of Section 2-719(2) and that of Official Comment 1, as well as upon Missouri decisions. 157

The rule set out in these cases is most often applied by courts to consumer transactions. 158 Although the occasional commercial case following this line of analysis usually involves willful or dilatory conduct on the part of the seller, 159 the consumer cases often involve a seller who makes good faith attempts but is unable to repair. 160 Re-

---

156. R.W. Murray Co. v. Shatterproof Glass Corp., 758 F.2d 266 (8th Cir. 1985).
157. Id. at 271-73. Again, a better ground for decision would have been the intervening unconscionability under Section 2-719(3) caused by the seller's willful refusal to honor the limited remedy.
160. See Jacobs v. Rosemount Dodge-Winnebago, 310 N.W.2d 71 (Minn. 1981); Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1977); John Deere Co. v. Hand, 211 Neb. 549, 319 N.W.2d 434 (1982); Goddard v. General Motors Corp., 60 Ohio St. 2d 41, 386 N.E.2d 761 (1979); Osburn v. Bendix Home Sys., Inc., 613 P.2d
gardless of the context of the contract, consumer or commercial, and
even though the cases purport to be relying on the express language of
Section 2-719(2), all of these cases overlook the fact that Section 2-
719(3) establishes a separate standard for judging the validity of a con-
tract clause limiting or excluding consequential damages.

2. Unconscionability Under Section 2-719(3)
   a. In General

Section 2-719(3) provides that the standard for judging the efficacy
of a consequential damage disclaimer is unconscionability, a standard
independent of the failure of essential purpose standard in Section 2-
719(2). This rather obvious point was first made by a court in 1970 in
County Asphalt, Inc. v. Lewis W. Welding & Engineering Corp.:

Plaintiff would have U.C.C. § 2-719 read in such a fashion as to result in all
limitations whatsoever being stricken in any event in which an exclusive rem-
edy should fail of its essential purpose. A better reading is that the exclusive
remedy clause should be ignored; other clauses limiting remedies in less dras-
tic manners and on different theories stand or fall independently of the
stricken clause. Since the clause excluding consequential damages has been
held not unconscionable, and is not otherwise offensive, it will be applied.

Nevertheless, virtually all of the early cases held that failure of an
agreed remedy under Section 2-719(2) automatically resulted in the
failure of a separate provision excluding or limiting liability for conse-
quential damages. Of late, however, the situation has changed dra-
matically. Beginning in the late 1970s and presumably encouraged by the
views of commentators on the point, courts began to hold that con-
tractual provisions limiting or excluding consequential damages must
be judged independently of the agreed remedy. Today, the majority
of courts hold that consequential damage disclaimers are to be judged
separately under the unconscionability standard of Section 2-719(3).

445 (Okla. 1980); Murray v. Holiday Rambler, Inc., 83 Wis. 2d 406, 265 N.W.2d 513
(1978).

161. 323 F. Supp. 1300 (S.D.N.Y. 1970), aff'd, 444 F.2d 372 (2d Cir. 1970), cert. denied,

162. Id. at 1309.

163. See supra text accompanying notes 147-60.

164. Two oft-cited law review articles supporting this proposition are: Anderson,
supra note 12; and Eddy, supra note 3.

165. See Chatlos Sys., Inc. v. National Cash Register Corp., 635 F.2d 1081 (3d Cir.
1980)(unconscionability of consequential damage disclaimer under Section 2-
719(3) is a discrepant question from failure of essential purpose of limited remedy);
1985)(Section 2-719(3) on the exclusion of consequential damages is mutually ex-
clusive from Section 2-719(2)); Belfont Sales Corp. v. Gruen Indus., 112 A.D.2d 96,
491 N.Y.S.2d 652 (1985)(remedy limitation and consequential damage disclaimer
appear in separate clauses, are dealt with by separate provisions in Section 2-719
and, therefore, a separate analysis is required). An occasional court specifically
disavows this position. See Jones & McKnight Corp. v. Birdsboro Corp., 320 F.
Despite this general agreement among courts today that the unconscionability standard is the touchstone for analyzing the efficacy of consequential damage disclaimers, the situation remains a bit chaotic. Courts are divided on the question of the point in time at which unconscionability is to be tested. A majority of the decisions to date address unconscionability in terms of the circumstances as they existed at the inception of the contract. These decisions rely on the Code's general unconscionability provision, Section 2-302, which specifically mandates that unconscionability be judged at the time of the making of the contract.

As suggested above, however, a persuasive argument can be made that Section 2-719(3)'s requirement that the exclusion of consequential damages not be unconscionable is a separate consideration, apart from Section 2-302, that requires the clause excluding liability for consequential damages to be evaluated in terms of whether circumstances since the time of contracting have operated to make the exclusion unconscionable. Of course, if the clause is found to be unconscionable at the inception of the contract under Section 2-302, one need never reach the question of unconscionability under Section 2-719(3). This "intervening unconscionability" approach to analyzing the standard in Section 2-719(3) finds support from several propositions. First, the language in Official Comment 3 to Section 2-719 spe-

---

166. This is a moot issue in the state of Washington which has added local law commentary to its version of Section 2-719. This commentary states that Section 2-719(2) "relates to contractual arrangements which become oppressive by a change of circumstances; [Section 2-719(3)], to contracts oppressive at their inception." Fiorito Bros. v. Fruehauf Corp., 747 F.2d 1309, 1315 (9th Cir. 1984).


169. See supra text accompanying notes 115-44.
specifically states that the concern is that the disclaimer "not operate in
an unconscionable manner."\textsuperscript{170} This language indicates an intent on
the part of the drafters to evaluate the unconscionability of a clause
limiting or excluding liability for consequential damages in light of cir-
cumstances and facts beyond those existing at the inception of the con-
tract. Further, if unconscionability under Section 2-719(3) is the same
as under Section 2-302, then Section 2-719(3) is completely superflu-
ous. Finally, to ignore factors subsequent to contracting in assessing
unconscionability is to risk allowing the contract provision to operate
contrary to the intent and agreement of the parties. Although, to date,
but a few decisions have articulated support for the "intervening un-
conscionability" approach,\textsuperscript{171} it is common for the courts to consider
circumstances subsequent to contracting in determining the uncon-
scionability of consequential damage disclaimers.\textsuperscript{172}

b. Willful Failure to Honor the Agreed Limited Remedy

Willful or dilatory conduct of the seller subsequent to contracting,
for example by unreasonably refusing to honor the agreed limited
remedy, is a major factor bearing on the issue of unconscionability
under Section 2-719(3). These seller’s fault cases represent excellent
examples of intervening unconscionability. However, it is often easier
to predict the result in such cases—recovery of consequential damages
for the buyer—than it is to follow the reasoning of the courts. This is
because the courts continue to focus myopically on the language in
Section 2-302 which refers to an agreement "unconscionable at the
time it was made."\textsuperscript{173} Regardless, the cases consistently hold that the
intervening act of a seller’s willful refusal to honor an agreed remedy
limitation will result in the court’s striking as unconscionable a sepa-
rate provision excluding or limiting consequential damages.\textsuperscript{174}

Many of these cases, particularly the ones involving consumers,
contain little, if any discussion of Section 2-719(3) and apparently rest
on the proposition that the failure of an agreed remedy under Section
2-719(2) automatically invalidates a provision excluding or limiting

\textsuperscript{170} U.C.C. § 2-719 comment 3 (1978).
\textsuperscript{171} See Fiorito Bros. v. Fruehauf Corp., 747 F.2d 1309 (9th Cir. 1984); Chatlos Sys.,
Inc. v. National Cash Register Corp., 635 F.2d 1081 (3d Cir. 1980); S.M. Wilson &
Co. v. Smith Int’l, Inc., 587 F.2d 1363 (9th Cir. 1978).
\textsuperscript{172} See supra notes 173-87.
\textsuperscript{173} U.C.C. § 2-302 (1978).
\textsuperscript{174} See R.W. Murray, Co. v. Shatterproof Glass Corp., 758 F.2d 266 (8th Cir. 1985);
Fiorito Bros. v. Fruehauf Corp., 747 F.2d 1309 (9th Cir. 1984); Select Pork, Inc. v.
Babcock Swine, Inc., 640 F.2d 147 (8th Cir. 1981); Chatlos Sys., Inc. v. National
Cash Register Corp., 635 F.2d 1081 (3d Cir. 1980); KKO, Inc. v. Honeywell, Inc.,
1984).
consequential damages. Unfortunately, this line of reasoning often leads courts to invalidate separate consequential damage disclaimers even though the seller attempted in good faith, albeit unsuccessfully, to honor the agreed limited remedy. Better reasoned decisions, even in consumer cases, hold that if the seller is in good faith in attempting to honor the failed remedy, the separate consequential damage disclaimer remains valid.

The majority of recent decisions consider the issue of unconscionability under Section 2-719(3) independently of the failure of an agreed remedy under Section 2-719(2). Nevertheless, the majority of these cases state that unconscionability is to be assessed in terms of the facts and circumstances at the time of contracting, per Section 2-302. Ironically, the key factor in a finding of unconscionability in many of these cases is the willful or dilatory actions of the seller subsequent to contracting. It is indeed surprising that so many courts remain wedded to the erroneous proposition that unconscionability under the Code must be tied exclusively to pre-contract facts or events.

The conceptual difficulties encountered by failing to distinguish intervening unconscionability under Section 2-719(3) from pre-contract unconscionability under Section 2-302 is well demonstrated in KKO,

178. See supra notes 161-72.
Inc. v. Honeywell, Inc. The case involved two “giant” corporations that had dealt with each other for many years. The dispute arose after the seller made a change in the manufacturing process of electrical contactors it had been selling to the buyer and to its other customers. This change in the manufacturing process was instituted without advising the seller’s customers, and it resulted in the new contactors being defective. The seller then recalled all of the defective contactors, including those sold to customers of the buyer. These latter contactors were replaced with new models, but the contactors remaining in the buyer’s inventory were merely “repaired.” The buyer experienced further difficulty with the repaired contactors and insisted that the seller replace them as well. The seller refused this request and the buyer initiated its own recall of items sold to its customers which contained the defective repaired contactors. The buyer then brought suit against the seller to recover losses incurred as a result of the malfunctioning contactors, most of which losses took the form of consequential damages. The contract of sale at issue contained a standard repair or replacement warranty and a separate consequential damage exclusion. The seller moved for summary judgment based on the consequential damage exclusion. For purposes of the motion, the court assumed that the limited repair or replacement remedy had failed of its essential purpose. If this was true, said the court, then the buyer was entitled to a recovery of consequential damages notwithstanding the existence of the separate clause excluding such damages:

“The limitations of remedy and of liability are not separable from the obligations of the warranty. Repudiation of the obligations of the warranty destroys its benefits. The complaint alleges facts that would constitute a repudiation by the defendants of their obligations under the warranty, that repudiation consisting of their willful failure or their careless and negligent compliance. It should be obvious that they cannot at once repudiate their obligation under the warranty and assert its provisions beneficial to them.”

In reaching its conclusion, the court regarded itself as bound by an Illinois intermediate appellate level decision which apparently held that the failure of a limited remedy under Section 2-719(2) automatically invalidated a separate consequential damage disclaimer. Nonetheless, the language quoted above demonstrates that the court’s conclusion was based largely on the seller’s misconduct subsequent to contracting. To add to confusion, the court went on to hold that, although the consequential damage disclaimer was invalid, it was not unconscionable. The court rejected the buyer’s argument that the seller’s misconduct in refusing to honor the agreed remedy would cause the consequential damage disclaimer to operate in an uncon-

182. Id. at 897 (quoting Adams v. J.I. Case Co., 125 Ill. App. 2d 388, 402-03, 261 N.E.2d 1 (Ill. 1970)).
scionable manner. Instead, the court reasoned that unconscionability was to be judged only under Section 2-302 in terms of "the relative bargaining positions of the parties and the consequences of those relative strengths when the contract was entered into."\(^{184}\) This reasoning is hard to follow because the court based its holding regarding the consequential damage disclaimer primarily on the seller's misconduct. Further, since the two "giant" corporations involved in the litigation were no doubt bargaining at arms' length at the time of contracting, an analysis of unconscionability under Section 2-302 certainly would require a finding that the clause was not unconscionable at its inception. Under the court's view, a consequential damage provision apparently cannot be rendered unconscionable no matter how egregious the conduct of the seller subsequent to contracting.

The proper application of intervening unconscionability under Section 2-719(3) in a willful breach case is demonstrated by \textit{Select Pork, Inc. v. Babcock Swine, Inc.}\(^{185}\) The contracts involved in the case were for the sale of two specific breeds of pigs and included particularized express warranties regarding the animals. The contracts also contained a clause limiting the buyers' remedy to the amount of the purchase price and an exclusion of consequential damages. The seller knowingly delivered pigs that were not of the type or quality warranted. When these pigs developed diseases and other problems, the buyers investigated and discovered that the pigs were not of the blood lines promised. The buyers then brought an action for breach of warranty and recovered in excess of $500,000.

On appeal, the seller asserted that the trial court erred in allowing consequential damages because of the exclusion clause in the contract. The Eighth Circuit upheld the verdict, reasoning that the trial court properly found the consequential damages clause to be unconscionable. The court reasoned:

\begin{quote}
Had Babcock delivered the promised Midwestern Gilts and Meatline Boars, then the clause limiting damages to return of the purchase price would have been reasonable. As events developed, however, the very special pigs promised by Babcock were never delivered. Babcock knew the pigs were not the type promised; plaintiffs did not. The failure to deliver Midwestern Gilts is the heart of this case. Under the circumstances, fairness and the Uniform Commercial Code do not require that plaintiffs be held to a remedial limitation which they thought would be applicable to the Midwestern Gilts which they agreed to buy. Having failed to deliver the highly-touted special pigs, defendants may not now assert a favorable clause to limit their liability.\(^{186}\)
\end{quote}

Intervening circumstances subsequent to contracting had rendered the consequential damage disclaimer unconscionable. Although the case did not involve a willful refusal to honor a limited remedy, it is

\(^{185}\) 640 F.2d 147 (8th Cir. 1981).
\(^{186}\) Id. at 149-50.
LIMITATIONS ON REMEDIES

indistinguishable from such a case. There is no meaningful difference between a seller's willful refusal to repair goods to meet the contract description and his willful failure to provide such goods in the first place.187

c. "Intervening" Unconscionability

The conclusion should not be reached that the seller’s good faith but unsuccessful efforts to honor the agreed remedy always will result in the consequential damages disclaimer being upheld. Recent cases have emphasized that the question of unconscionability under Section 2-719(3) is to be assessed independently in terms of intervening facts and circumstances that have occurred subsequent to contracting so that the clause limiting or excluding consequential damages not be allowed to “operate in an unconscionable manner.”188 Once the agreed remedy is found to have failed of its essential purpose under Section 2-719(2), these cases usually proceed on the basis of a four-fold analysis.189

First, the court examines the situation at the time of contracting—the bargaining context—to determine whether the agreement is unconscionable in the Section 2-302 sense. Second, if the provision passes muster under Section 2-302, the court determines the intent of the parties with respect to the provision excluding or limiting consequential damages. The issue here is whether the provision is to be given effect independent of the consequences resulting from the failure of the agreed remedy under Section 2-719(2). Most often the conclusion is that the warranty, remedy limitation, and consequential damage exclusion were intended as a mutually interdependent package. The exception is cases involving especially complex, experimental, or prototype goods or goods made to the buyer’s specifications.190 Third, if the consequential damage disclaimer is found to be part of an interdependent package, the next question is whether the failure of the agreed remedy caused the buyer to suffer consequential damages beyond those contemplated by the parties at the time of contracting. This test will not be satisfied, of course, if the loss is properly attribu-

187. See also Hydraform Prod. Corp. v. American Steel & Aluminum Corp., 127 N.H. 187, 498 A.2d 339 (1985) (court finds no unconscionability under Section 2-302 but awards the buyer consequential damages upon a finding that the limited replacement warranty failed of its essential purpose due to the seller's defective and tardy replacements).


190. See supra notes 137-44.
table in some way to the fault of the buyer.191 Fourth, if the buyer has suffered consequential loss beyond that contemplated by the parties, the final question is whether that event will make unconscionable the enforcement of the provision limiting or excluding liability for the loss.192

A watershed case for this intervening unconscionability approach is *S.M. Wilson & Co. v. Smith International, Inc.*193 In *S.M. Wilson*, the seller made good faith efforts to repair, and its conduct was not in any way wrongful or dilatory. Nevertheless, the efforts to repair the goods were unsuccessful. Although the court found that the limited remedy had failed of its essential purpose, the court denied the buyer recovery of consequential damages. The contract had a separate provision excluding such liability, and the court held that it should be enforced notwithstanding the failure of the limited remedy. The court held:

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 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 do 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.194

This language is significant in a number of respects. First, the court distinguished a situation in which the seller ignores his obligation under the limited remedy from a situation in which the seller tries but is simply unable to perform. The court almost certainly would have invalidated the consequential damages disclaimer had the


193. 587 F.2d 1363 (9th Cir. 1978).

194. Id. at 1375.
seller’s conduct caused the remedy limitation to fail.\textsuperscript{195} Second, the court did not limit assessment of unconscionability to facts and circumstances at the time of contracting. Finally, the court did limit its holding validating the provision to the facts of the case and emphasized that “each case must stand on its own facts.”\textsuperscript{196}

In a subsequent decision, the court expanded on its analysis in \textit{S.M. Wilson} by emphasizing that, even though a consequential damages exclu-der may not have been unconscionable when the contract was entered into, it may become unconscionable when the limited remedy fails of its essential purpose.\textsuperscript{197} The court again noted that each case must be decided on its own facts to determine whether the exclusive remedy and the exclu-der were intended by the parties to operate as separable elements of risk allocation or as inseparable parts of a comprehensive risk allocation package.

Subsequent to \textit{S.M. Wilson}, a number of courts adopted this intervening unconscionability approach to evaluating provisions excluding or limiting consequential damages under Section \textit{2-719(3)}.\textsuperscript{198} For example, in \textit{Chatlos Systems, Inc. v. National Cash Register Corp.},\textsuperscript{199} the court upheld the exclusion of consequential damages even though the limited repair or replacement remedy had failed of its essential purpose. Nevertheless, the court held:

\begin{quote}
The repair remedy’s failure of essential purpose, while a discreet question, is not completely irrelevant to the issue of the conscionability of enforcing the consequential damages exclusion. The latter term is ‘merely an allocation of unknown or undeterminable risks’ [quoting Comment 3 to Section \textit{2-719}]. Recognizing this, the question here narrows to the unconscionability of the buyer retaining the risk of consequential damages upon the failure of the essential purpose of the exclusive repair remedy.\textsuperscript{200}
\end{quote}

The buyer had purchased a computer system from NCR.\textsuperscript{201} The contract contained a limited repair remedy and a separate clause excluding consequential damages. Despite continued efforts on the part of NCR’s programmers, the system was never able to deliver all its

\textsuperscript{195}. Other courts are more specific and actually state that the bad faith or willfully dilatory conduct on the part of the seller is a material factor in analyzing whether the consequential damage exclusion will survive despite failure of the limited remedy. \textit{See, e.g., Cayuga Harvester, Inc. v. Allis-Chalmers Corp., 95 A.D.2d 5, 465 N.Y.S.2d 606 (1983).}

\textsuperscript{196}. \textit{S.M. Wilson} & \textit{Co. v. Smith Int’l, Inc., 587 F.2d 1363, 1376 (9th Cir. 1978).}

\textsuperscript{197}. \textit{Milgard Tempering, Inc. v. Silas Corp. of America, 761 F.2d 553 (9th Cir. 1985).}

\textsuperscript{198}. \textit{See, e.g., RRX Indus. v. Lab-Con, Inc., 772 F.2d 543 (9th Cir. 1985); Fiorito Bros. v. Fruehauf Corp., 747 F.2d 1309 (9th Cir. 1984); Transamerica Oil Corp. v. Lynes, Inc., 723 F.2d 758 (10th Cir. 1983); Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co., 709 F.2d 427 (8th Cir. 1983); Chatlos Sys., Inc. v. National Cash Register Corp., 635 F.2d 1081 (3d Cir. 1980).}

\textsuperscript{199}. 635 F.2d 1081 (3d Cir. 1980).

\textsuperscript{200}. \textit{Id} at 1083-87.

\textsuperscript{201}. \textit{Chatlos actually entered into a lease arrangement with NCR but the court ruled that the lease was a sale of goods within the meaning of Article 2. \textit{Id} at 1083-84.}
promised functions, all of which were crucial to the buyer’s accounting and inventory process. The court ruled that the seller’s delay in correcting the system’s deficiencies caused the limited remedy to fail of its essential purpose. This finding, however, did not automatically result in the invalidation of the damages excluder. While acknowledging that case law existed on both sides of the issue, the court stated its belief that the better reasoned approach was to treat the consequential damage exclusion as “an independent provision, valid unless unconscionable.”

In examining the circumstances of the case to determine the conscionability of the consequential damage disclaimer, the court found several factors relevant to its determination. Among these were the relative parity in the parties’ bargaining power, the complexity of the equipment (such that the buyer would have had some appreciation of the problems that might be encountered), the clarity of the exclusion provision, and the fact that the buyer was a sophisticated commercial entity rather than a consumer. Based on these factors, all of which existed at the inception of the contract, the court found that the parties had effectively allocated the risk of consequential damages to the buyer.

The court then turned its analysis to post-contract events. In this regard, the court emphasized the foreseeability of the problems that eventually arose in the system and the good faith efforts on the part of the seller to correct the defects. The court distinguished the case from one in which the seller did not act reasonably or acted in bad faith with respect to repair attempts. Most importantly, the court found that the consequential damages suffered by the buyer were not unreasonably large but “came within the realm of expectable losses.” Accordingly, enforcement of the provision excluding liability for consequential damages would not cause it to operate in an unconscionable manner.

In Chatlos, the Third Circuit was applying New Jersey law and, the case being one of first impression, was forced to predict how a New Jersey court would rule on the matter. The court’s prediction was recently proved accurate when the New Jersey Supreme Court relied upon the Chatlos decision and its “intervening unconscionability” analysis to uphold a consequential damage disclaimer even though the limited remedy of repair or replacement was found to have failed of its

---

202. Id. at 1086.
203. Id. at 1087.
204. Thus, unconscionability was not found under the fourth, and perhaps the third, factors discussed above. However, sympathy for the buyer might be undue. Ultimately the buyer recovered approximately $200,000 (almost five times the purchase price of the computer) as general damages under Section 2-714. Chatlos Sys., Inc. v. National Cash Register Corp., 670 F.2d 1304 (3d Cir. 1982).
essential purpose. The court emphasized that subsequent events could render such an excluder unconscionable even though the clause was in no way tainted at the time of the making of the contract. The court said:

Accordingly, we conclude that [Section 2-719] does not require the invalidation of an exclusion of consequential damages when limited contractual remedies fail of their essential purpose. It is only when the circumstances of the transaction, including the seller's breach, cause the consequential damage exclusion to be inconsistent [sic] with the intent and reasonable commercial expectations of the parties that invalidation of the exclusionary clause would be appropriate under the Code. For example, although a buyer may agree to the exclusion of consequential damages, a seller's wrongful repudiation of a repair warranty may expose a buyer to consequential damages not contemplated by the contract, and other Code remedies may be inadequate. In such circumstances, a court might appropriately decline to enforce the exclusion.205

Crucial to a determination of intervening unconscionability under Section 2-719(3) is whether the exclusive remedy and consequential damages exclusion provisions were intended by the parties to operate as "‘separable elements of risk allocation' or as inseparable parts of a comprehensive risk allocation package."206 An excellent case on point is Fiorito Bros. v. Fruehauf Corp.207 In Fiorito, the buyer, a construction company, contracted with the seller for the purchase of thirteen dump truck bodies. The contract limited the buyer's remedy to repair or replacement and specifically excluded liability for consequential damages. Defects in the bodies became apparent after installation onto the trucks. The buyer notified the seller of the defects but received no response. When a service manager of the seller finally examined them he opined that the bodies were not covered under the contract warranty. Further attempts to persuade the seller to repair were unsuccessful, and the buyer itself began repair of the bodies.

At trial, the court found that the facts showed a "‘callous disregard’" by the seller "‘for the purposes for which the exclusive repair-or-replacement remedy was designed—to insure that [the buyer] would acquire defect-free trucks.’"208 The court concluded that the remedy limitation had failed of its essential purpose. The court also awarded consequential damages to the buyer despite the separate excluder in the contract. On appeal, the following reasoning of the trial court was quoted with approval:

‘[The approach] that the Washington courts can be expected to follow, is to examine individually the provisions of each contract to ascertain the intent of

---

206. Milgard Tempering, Inc. v. Silas Corp. of America, 761 F.2d 553, 556 (9th Cir. 1985)(quoting Fiorito Bros. v. Fruehauf Corp., 747 F.2d 1309, 1315 (9th Cir. 1984)(quoting the district court opinion)).
207. 747 F.2d 1309 (9th Cir. 1984).
208. Id. at 1312 (quoting the trial court).
the parties. Under the circumstances of each contract, are the exclusive-remedy and damage-exclusion terms separable elements of risk-allocation, . . . [sic][o]r are they inseparable parts of a unitary package of risk allocation? In the current case, it does not make sense to view the exclusive-remedy and consequential-damage provisions independently. The purpose of the parties in agreeing to this exclusive remedy provision was to [i]nsure that the Plaintiff would not suffer from down time and other such consequential harms that follow from defective conditions in the trucks. . . . It cannot be maintained that it was the parties' intention that Defendant be enabled to avoid all consequential liability for breach by first agreeing to an alternative remedy provision designed to avoid consequential harms, and then scuttling that alternative remedy through its recalcitrance in honoring the agreement.\[209\]

While most courts have not so clearly articulated this causation factor and its effect on the bargained risk allocation of the parties when determining the existence of intervening unconscionability under Section 2-719(3), the more recent decisions at least reflect an implicit consideration of such cause and effect.\[210\]

d. Latent Defect Cases

If on the particular facts the court finds the seller should assume liability for latent defects in goods, and such defects appear subsequent to contracting, then arguably it would be unconscionable to leave on the buyer losses attributable to such defects. A contract provision which operates to charge the buyer with the losses might be stricken as unconscionable. Courts have long invalidated such provisions.\[211\] This was the result reached by the New York Court of Appeals in the well-known case, Wilson Trading Corp. v. David Ferguson, Ltd.\[212\]

Similarly, in another case the court, on appeal, reversed the trial court's denial of consequential damages to the buyer. The buyer had purchased material for the express purpose of processing it into a particular type of window shade. The seller knew of the buyer's plans and expressly warranted that the fabric was suitable for that purpose. The invoice for the goods contained a provision barring claims after the goods had been cut. During processing, the buyer discovered that the goods were defective and unsuitable for the planned window shades. The seller refused to replace the goods. In finding for the

\[209\] Id. at 1315 (quoting the trial court).


buyer, the court invalidated the limitation clause, finding that it would operate to deny the buyer any remedy at all.\footnote{213}

It is unclear, however, whether the courts in these two cases would have reached similar results regarding a recovery of consequential damages had the contracts contained a separate clause insulating the seller from such liability.

It is quite common for courts, particularly in farming states, to invalidate remedy limitations and damage excluders in contracts involving sales to farmers of herbicides\footnote{214} or seed\footnote{215} which manifest latent defects subsequent to sale. Such decisions usually rest on a deep-rooted local public policy favoring extraordinary protection to the farming industry. In such cases, however, the contractual provision is perhaps best understood as invalid \textit{ab initio} under Section 2-719(1) rather than because of intervening circumstances under Section 2-719(3).

\section*{C. Where No Independent Contract Provision Excludes Consequential Damages}

In cases in which an agreed remedy limitation is found to have failed of its essential purpose, the seller may be held responsible for consequential losses of the buyer if there is no separate contractual provision limiting or excluding such damages. The cases uniformly so hold.\footnote{216} This is true even though the intent of the parties may have been for the exclusive remedy to protect the seller from liability for consequential damages. The efficacy of the limited remedy will be judged under Section 2-719(2). If it is stricken thereunder, then nothing in the contract remains to protect the seller from liability for the buyer's consequential losses. Only by putting in the agreement a separate provision limiting or excluding consequential damages can the seller shelter under the protection afforded by the unconscionability standard of Section 2-719(3).

\footnote{213. Trinkle v. Schumacher Co., 100 Wis. 2d 13, 18-20, 301 N.W.2d 255, 258-59 (Wis. Ct. App. 1980).


V. MISCELLANEOUS

A. Personal Injuries in Consumer Cases

As a practical matter, it is virtually impossible for a seller, by agreement, to disclaim liability for personal injuries resulting from the sale of consumer goods. Even if the attempt would be successful for breach of warranty, the seller probably would be vulnerable to a strict liability claim.

Section 2-719(3) creates a presumption against the validity of agreements excluding or limiting liability for personal injuries. It provides: "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."217 It has been said that this provision merely allocates the burden of proof. The seller of consumer goods would have the burden of proving the validity of a clause limiting or excluding liability for personal injuries, whereas the buyer would have the burden of proving invalidity in cases involving other goods or other types of consequential loss.218

No case to date has enforced a contractual provision so as to protect a seller from liability for personal injuries. The lesson is that sellers will find it almost impossible to overcome the presumption against validity. For example, in one case involving the sale of new automobile tires, the buyer suffered fatal injuries when one of the tires failed, causing his station wagon to go out of control and roll over. The tire's failure was evidently caused by a road hazard and not by any defect in the tire. All expert testimony at trial was to the effect that there was no defect in the tire. In addition to a guarantee that the tire would be free from defects for the life of the original tread, the manufacturer's warranty also provided a road hazard guarantee for the same period against any injury to the tire. The warranty package clearly provided that the guarantee did not cover consequential damages, but limited liability merely to repairing or replacing the tire.

At trial, the personal representative recovered a verdict of $125,000 for the buyer's personal injuries. This verdict was affirmed on appeal. The manufacturer argued that the clause excluding liability for personal injuries should have been upheld. The manufacturer emphasized that the personal injuries did not result from any defect in the tire, thus barring any action for strict liability. The buyer's only action was for breach of the road hazard warranty, a warranty that provided the buyer more protection than the law required. In such a case, the manufacturer argued, the presumption against the validity of the con-

sequential damage excluder should be found to have been overcome. Over a vigorous dissenting opinion which agreed with the seller, the court rejected this position as "not consonant with the commercial and human realities."219

In justifying its decision, the court emphasized the manufacturer's public advertising regarding the life-saving capabilities of the tire. The court reasoned that the buyer was "far more likely to have made the purchase decision in order to protect himself and the passengers in his car from death or personal injury in a blowout accident than to assure himself of a refund of the price of the tire in such an event."220 Thus, it would be unconscionable to frustrate these reasonable expectations of the buyer by permitting the manufacturer to limit its liability for personal injuries.221 The unhappy result of the case is that road hazard guarantees for automobile tires soon disappeared from the marketplace, and the lesson is that the presumption in Section 2-719(3) is almost irrebuttable in personal injury cases.

In another tire case, the court sought to explain the reasoning for holding a seller liable for personal injuries even when such injuries are not shown to be the result of a defect in the goods. The court said that the explanation rested on a public policy of consumer protection. The court stated: "In the case of consumer goods to give what looks like relief in the form of an express warranty, but is not, is unconscionable as a surprise limitation and therefore against public policy." The court opined that the seller or manufacturer might avoid such "surprise" by not making a road hazard guarantee but by stating that "he does not guarantee the tire will not blow out, but if it does he promises to replace it."222

It is unlikely that the courts will ever hold that a contractual provision in and of itself will insulate a seller from liability for personal injuries. In order for the seller to carry his burden with respect to the efficacy of such a clause, other factors would have to be present to demonstrate clearly the fairness in allocating the risk to the buyer. One such case might involve the sale of high-risk, experimental goods sold only after the buyer has received careful warning from the seller.

Although the presumption in Section 2-719(3) only applies to personal injuries arising from "consumer goods," the courts will readily allow evidence of unconscionability in cases of personal injuries caused by other types of goods.223 In one interesting case, a personal injury action was brought by the decedent's administratrix against

220. Id. at 263, 315 A.2d at 18.
221. Id.
both the automobile dealer and the manufacturer for the death of the
decedent resulting from injuries received when a wheel on the truck
purchased from the dealer collapsed and caused the truck to overturn.
The court allowed recovery against the dealer despite a warranty pro-
vision which limited its liability to repair or replacement of defective
parts. The court then allowed recovery for the dealer against the
manufacturer. The manufacturer defended that its agreement with
the dealer protected it from liability for consequential damages and
that the presumption in Section 2-719(3) only protected consumers.

The court nevertheless concluded that it would clearly be uncon-
scionable to allow the manufacturer to escape liability. The court em-
phasized that the dealer was a mere conduit between the
manufacturer and the ultimate consumer and that the defect in the
wheel was latent and one which the dealer had no notice or know-
eledge. The court said that Section 2-719(3) need not be read only to
protect consumers.224 The court’s conclusion appears correct. The
presumption in Section 2-719(3) applies to “consumer goods,” not
merely to consumers.

Section 2-719(3) makes a distinction between personal injury and
commercial loss. The presumption of unconscionability applies only
to the former, and the courts generally adhere to this distinction.225
Nevertheless, a seller is well advised to draft the agreement to make
clear that no exclusion of, or limitation on, personal injuries is in-
tended. For example, in yet another automobile tire case, the agree-
ment excluded liability “for any consequential damage.”226 In an
action by the buyer and her husband for personal injuries and prop-
erty damage resulting from a blowout of one of the tires, the court
allowed recovery for both types of consequential loss. The court rea-
soned that, although there was no presumption of unconscionability in
Section 2-719(3) with respect to property damage, the agreement,
which attempted to exclude liability for both personal injury and
property damage, was so tainted with unconscionability as to be
stricken entirely.227

It should be emphasized that the Code makes no presumption of
unconscionability with respect to a disclaimer of warranty as opposed
to a limitation of remedy. Thus, even if a consumer suffers personal
injuries caused by the goods, he either must proceed under strict lia-

225. See Gladden v. Cadillac Motor Car Div., 83 N.J. 320, 416 A.2d 394 (1980); Lobianco
690 (Civ. Ct. 1981)(property damage recovery allowed in consumer case in which
clause excluding liability for consequential damages found to be unconscionable
result of disparity in bargaining power).
bility or have a warranty upon which to base his claim.\textsuperscript{228} Of course, the warranty peg usually will be supplied by the seller's express warranty that the goods will be free from defects for a certain period of time or amount of usage.\textsuperscript{229} Further, the Magnuson-Moss Act, which prohibits disclaimers of implied warranties in many consumer cases, might operate to afford the consumer a warranty claim.\textsuperscript{230}

B. Trade Usage and Course of Dealing

It seems that a remedy limitation may be supplied entirely by usage of trade\textsuperscript{231} or course of dealing\textsuperscript{232} even though the contract between the parties is silent regarding the matter.\textsuperscript{233} Section 2-719 states that the "agreement" may limit or alter both remedies and damages recoverable.\textsuperscript{234} "Agreement" is defined by the Code to mean "the bargain of the parties in fact as found in their language or by implication or from other circumstances including course of dealing or usage of trade or course of performance."\textsuperscript{235}

In one case, for example, the goods were packaged with a statement that defective goods would be replaced and that the goods were sold without any other warranty. A defect in the goods caused the buyer substantial consequential loss. At trial, the seller introduced evidence of a usage of trade that replacement of defective goods was understood to be the exclusive remedy available to the buyer. The court


\textsuperscript{229} See Matthews v. Ford Motor Co., 479 F.2d 399 (4th Cir. 1973). It should be noted that a seller who makes a written warranty with respect to consumer goods is prohibited by the Magnuson-Moss Warranty Act from disclaiming any implied warranties. See infra notes 240-50 and accompanying text.

\textsuperscript{230} See infra notes 240-50 and accompanying text.

\textsuperscript{231} See U.C.C. § 1-205(2) (1978).

\textsuperscript{232} According to Section 1-205(1) of the Uniform Commercial Code: "A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Id. § 1-205(1).

\textsuperscript{233} According to Section 1-205(3) of the Uniform Commercial Code: "A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement." Id. § 1-205(3).

\textsuperscript{234} \textsuperscript{235} See U.C.C. § 2-719(1)(a).

\textsuperscript{236} See infra notes 240-50 and accompanying text.
enforced this usage of trade even though the remedy was not expressly made exclusive as required by Section 2-719 and even though the buyer actually may not have read the remedy limitation language which accompanied the goods. The court also opined that an exclusion of consequential damages could result from a usage of trade even though there was no express agreement between the parties.

In determining that a remedy limitation provision or a clause excluding or limiting liability for consequential damages is not unconscionable, courts often have emphasized the fact that the parties had dealt with each other on a similar basis on prior occasions or that the custom in the trade was to deal on that basis. Such prior course of dealing or usage of trade supports a finding that the buyer knew or should have known of the contractual provision and of its consequences regardless of whether the provision could be shown to be the product of specific negotiation.

C. Magnuson-Moss Warranty Act

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act—may affect a seller's attempt to disclaim, limit, or otherwise alter the Code's remedial scheme. The Act applies to many consumer transactions but, interestingly enough, is not limited to them. The Act governs "consumer products," which are defined to include "any tangible personal property which is distributed in commerce and which is normally used for personal, family or household purposes." Thus, a sale of a household vacuum cleaner to a business entity would be governed by the Act. However, the Federal Trade Commission Regulations exclude "products which are purchased solely for commercial or industrial use" from most of the Act's

236. See supra text accompanying notes 27-46.
Under the Magnuson-Moss Act there is no requirement that sellers warrant their products in writing or otherwise. If a consumer product costing more than $10 is warranted in writing, however, the warranty must be designated as either “full” or “limited.” To qualify as a “full” warranty, four standards must be met: (1) the minimum remedy given by a warrantor must be to repair or otherwise correct any defect or other failure of the product to conform to the warranty; (2) no limitation can be placed on the duration of any implied warranty on the product; (3) any exclusion or limitation of consequential damages must appear conspicuously on the face of the warranty; (4) if the warrantor is unsuccessful in remediing a defect after a reasonable number of attempts, the consumer must be allowed to elect either a refund of the purchase price or a replacement of the product.

Perhaps most provocatively, the Act disallows a warrantor who extends a written warranty to disclaim any implied warranties. Nevertheless, if only a “limited” warranty is given, the duration of implied warranties can be limited to that of the express warranty. If a “limited” warranty is given, the Federal Trade Commission Regulations further require that any limitation or exclusion of consequential damages be conspicuously stated.

One obvious effect of the Act and its regulations on the requirements of Section 2-719 of the Code is to require all provisions excluding liability for consequential damages to be conspicuous in the writing, regardless of whether a “full” or “limited” warranty is involved. If the Act applies, a consequential damage excluder is invalid if it is not conspicuously stated despite the fact that it would not be found to be unconscionable.

The Act also guarantees the buyer a minimum remedy of repair of defects in the goods. This guarantee probably allows no more than does Section 2-719.

The Act provides in the case of a “full” warranty that the buyer may elect either a refund of the purchase price or a replacement of the product if the seller is unable to repair defects in the goods after a reasonable number of opportunities to do so. This provision should not be read to restrict in any way the right of the buyer to recover damages or to avail himself of any other remedy under the Code.

248. See generally supra text accompanying notes 105-14.
249. See supra text accompanying notes 55-114.
The Act subjects itself to state law to the extent such law provides the buyer greater remedy.250

VI. CONCLUSION

In sum, Section 2-719 remains one of the most litigated provisions of the Uniform Commercial Code. However, with each passing set of advance sheets, the case law encrustation on this ethereal provision thickens, acting as a shield from further judicial analysis. With one exception, in fact, it has been at least a decade since new concepts have been brought to bear on analysis of the provision. This exception, the concept of intervening unconscionability, represents an important tool for dealing with the vexed question of the continued efficacy of an excluder of consequential damages once a limited remedy to which it is appended has been found to have failed of its essential purpose.