UCC Sections 2-719(2) and (3): The Dependent & Independent Divide as a Matter of Contract Interpretation

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Section 2-719(1) of the Uniform Commercial Code (UCC) permits contractual modifications of remedies and, importantly, allows sellers to limit remedies to "repair and replacement." This powerful ability to limit remedies is curtailed by Section 2-719(2), which provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided" in the Code. UCC Official Comments make clear that should such a remedy fail, then the limited remedy clause "must give way to the general remedy provisions" of Article 2. This would appear to include consequential damages. But interestingly, Section 2-719(3) has its own provision regarding consequential damages, caveating that exclusion of consequential damages clauses are permissible so long as they are not unconscionable. The section further provides that in the case of consumer goods, if the exclusionary clause disclaims personal injuries, then it is "prima facie unconscionable."

The presence of these two clauses—the exclusive remedy clause and the exclusionary clause—has led courts and commentators to disagree on the effect of a limited or exclusive remedy failing of its essential purpose. Some have argued that the clauses are dependent on each other, meaning that if a remedy fails of its essential purpose, then so too does the exclusionary clause. Others have argued that the two clauses are independent, so that even if an exclusive remedy fails, consequential damages are still excluded by a clause so providing unless unconscionable. A subset of this group further maintains that though

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independent, the facts of the case can be judged ex post to determine whether the exclusionary clause is unconscionable. A third approach, which seems to have waned in its popularity, takes a case-by-case approach to the issue.

This Article argues that all these approaches miss the mark in that they focus too heavily on the language of Section 2-719. Instead, I argue that the proper lens through which to view such cases is Section 2-202, which addresses parol evidence. In the absence of a clear indication that the parties intended the clauses to be dependent or independent, courts should engage in an analysis of what the proper construction or interpretation is and resolve the matter as they would do for any other partially integrated or ambiguous contract. This approach, which would provide a more consistent basis for resolving this conflict, is supported by the Code as well as some of the decisions that are purporting to adopt the dependent and independent approaches.

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INTRODUCTION

Imagine a fictional storage company registered as Noah's Storage Corp. contracts to buy air conditioning (A/C) units for its climate-controlled storage facilities. Noah's Storage contracts with CoolClimate, Inc. to purchase A/C units and pays more for a ten-year limited warranty.To limit its contractual liability, CoolClimate restricts the warranty coverage to an exclusive repair or replace remedy and includes

in the contract a clause excluding consequential damages. Noah's Storage agrees to these conditions with the understanding that, should the A/C units fail, CoolClimate shall promptly fix them to prevent Noah's Storage from losing customers. The exclusive remedy clause reads as follows:

> CoolClimate warrants that A/C units shall be defect-free for a period of ten years. Upon receipt of written notice of defect, CoolClimate warrants that it shall repair or replace the A/C units at no charge to Noah's Storage. CoolClimate shall perform these services without delay. The choice between repair and replacement shall be made by CoolClimate. This is the sole and exclusive remedy available to Noah's Storage for breach of its limited warranty. All other remedies are excluded.

The exclusionary clause provides:

> In no event shall CoolClimate be liable to Noah's Storage for consequential damages.

In the first year, multiple A/C units fail. Noah's Storage promptly emails CoolClimate to notify them of the breach of warranty. CoolClimate comes out the next day to repair the A/C units, but the fix only lasts one week. Subsequent repairs fail and CoolClimate's response time gets longer and longer. Noah's Storage starts losing customers due to the lack of consistent climate control in its storage facilities. After one year, Noah's Storage purchases replacement units at a higher cost.

Now, Noah's Storage wishes to sue CoolClimate for breach of warranty and consequential damages. But will the exclusive remedy clause be given effect in this case? This important question is one that has yielded different results across multiple jurisdictions and resulted in several legal approaches.[1] While the Uniform Commercial Code (UCC) explicitly provides that warranties may be limited,[2] it also provides that if an exclusive remedy should "fail of its essential purpose," then "remedy may be had as provided" in the Code.[3] Assuming that CoolClimate's failure to repair has caused the exclusive repair or replace remedy to fail of its essential purpose, Noah's Storage should be entitled to claim direct damages.[4] But what about the consequential damages? Should the clause excluding them fall with the exclusive remedy, or does it survive independently?

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1. *See infra* Part II (discussing different approaches to interpreting Sections 2-719(1) and (3)'s conflicting provisions on remedies for breach of contract).
2. U.C.C. § 2-316(4) cmt. 2 (A.L.I. & UNIF. L. COMM'N 2023); *id*. § 2-719(1).
3. U.C.C. § 2-719(2).
4. *See id*. § 2-714(1) (stating that a buyer may recover damages for the losses "resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.").

Courts grappling with the question of consequential damages have largely addressed the use of the exclusive remedy clause and consequential damages as an issue of statutory interpretation.[5] Relying on the text and UCC Official Comments, some courts have held that the exclusion of consequential damages clause is dependent on the survival of the exclusive remedy—if the exclusive remedy fails of its essential purpose, the exclusion of consequential damages clause will also fail.[6] Other courts have taken the opposite approach, finding that the very existence of Section 2-719(3)—which specifically addresses the exclusion of consequential damages and provides that they survive unless unconscionable—indicates that clauses excluding consequential damages stand independent of the exclusive remedy provision and should only be struck if unconscionable.[7] Despite sellers faring better under the independent approach, some courts using this approach appear to apply an ex post analysis of unconscionability to find for buyers.[8] In some older cases, courts have applied a contextual approach to determine whether the parties intended the clauses to be dependent or independent.[9] Nevertheless, the dependent and independent approaches have dominated the judicial reasoning of courts, particularly in the last decade.

This Article argues that approaching the question of consequential damages as one of statutory interpretation is wrong, and the proper approach lies in a different section of the UCC—namely, Section 2-202, which addresses the parol evidence rule.[10] Implicit in both the dependent and independent approaches is an assumption about what the parties intended to include in the contract. However, if the contract is silent on the parties' intention, it must be determined whether the contract is fully or partially integrated, or whether the contract is ambiguous. If the contract is partially integrated, courts should consider "evidence of consistent additional terms" to resolve the matter.[11] Similarly, if the contract is ambiguous, courts should permit a fact-finder to resolve the ambiguity by utilizing contextual evidence. Such an approach would provide more uniformity to addressing the dependent/independent question, at least in how the question is approached.

Part I of this Article discusses the application of Section 2-719 and its interaction with limited warranty clauses. It then returns to the

5. *See infra* Part II.
6. *See infra* Part II.A.
7. *See infra* Part II.B.
8. *See infra* Part II.C.
9. *See infra* Part II.D.
10. U.C.C. § 2-202 (A.L.I. & UNIF. L. COMM'N 2023).
11. *Id.* § 2-202(b).

hypothetical with Noah's Storage to further expand on the issue of consequential damages. Next, Part II recounts the various approaches adopted by courts and some suggested by commentators. Finally, Part III explains how neither the dependent nor independent approaches accurately resolve the issue and why Section 2-202 creates a cleaner, more consistent approach with the purposes of the Code.

I. THE BASICS TO UCC SECTION 2-719

The UCC does not require sellers to make warranties, though there are implied warranties that may be disclaimed.[12] Even if a seller makes a warranty, the Code provides that the seller may limit the remedies for a breach "in accordance with the provisions" of Section 2-718 on the "liquidation or limitation of damages" and Section 2-719 on the "contractual modification of remedy."[13] Section 2-719, which permits parties to limit the remedies available for a breach of warranty, states in subsection (1)(a) that

> 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.[14]

Subsection (2) places an important caveat on this ability to limit a remedy, by providing that when "circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act."[15] Official Comment (1) to UCC Section 2719 further explains the purpose of these two subsections, by stating:

> [I]t 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. . . . [W]here 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.[16]

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12. *See id*. §§ 2-314–316 (stating that unless explicitly excluded, there exists in a contract an implied warranty that the goods will be fit for purpose).

13. *Id.* § 2-316(4); *see also id.* § 2-718 (addressing liquidated damages).

14. *Id.* § 2-719(1)(a).

15. *Id.* § 2-719(2).

16. *Id.* § 2-719, cmt. 1; *see* Mercedes-Benz of N. Am., Inc. v. Dickenson, 720 S.W.2d 844, 854 (Tex. App. 1986) (discussing the essential purpose of limited remedy within the UCC text and case

Generally, an exclusive remedy will not fail of its essential purpose where each defect that has occurred has been repaired.[17] However, an exclusive remedy occasionally may fail of its essential purpose and deprive the buyer of the substantial value of the bargain where the warrantor is unwilling or unable correct the defect within a reasonable time.[18] Essentially, this issue may arise when (1) there are repeated and failed attempts by the seller to correct a defect; (2) the seller is capable of repairing or replacing the goods but refuses to do so; and (3) the seller is willing but cannot repair or replace, perhaps due to supply shortages.[19] It should be noted that the failure also must relate to the purpose of the exclusive remedies—not the purposes of the UCC or of overall equity.[20]

The case of *Mercedes-Benz of North America, Inc. v. Dickenson* provides a good example of when a limited or exclusive remedy failed in its essential purpose. [21] In *Mercedes-Benz*, a car buyer had returned the vehicle seven times to the dealer for repair over an eight-month period.[22] During that period, the car's transmission had to be replaced twice, and there was evidence that the car was still defective.[23] The buyer also

law); *see also* Riley v. Ford Motor Co., 442 F.2d 670, 673 (5th Cir. 1971) (explaining the functionality of Section 2-719 relating to remedies for breach of warranty).

17. *See* Henderson v. Ford Motor Co., 547 S.W.2d 663, 669 (Tex. Civ. App. 1977) (holding that a limited warranty to repair defects in an automobile did not fail of its essential purpose where all of the complained defects were completely remedied in four trips and within three and one-half months from the date of the automobile's purchase); *see also* Lankford v. Rogers Ford Sales, 478 S.W.2d 248, 251 (Tex. Civ. App. 1972) (holding that a warranty limiting the manufacturer's liability to repair an automobile or replace an automobile's defective parts had not failed of its essential purpose where the automobile dealer repaired each defect that had occurred).

18. JAMES J. WHITE, ROBERT S. SUMMERS & ROBERT A. HILLMAN, UNIFORM COMMERCIAL CODE, PRACTITIONER TREATISE SERIES 1132–33 (6th ed. 2012) (explaining circumstances under Section 2-719(2) where an exclusive remedy may fail of its essential purpose); *see also* TEX. JUR. III 351 (3d 2002) (citing *Mercedes-Benz*, 720 S.W.2d at 854).

19. WHITE, SUMMERS & HILLMAN, *supra* note 18, at 1132–33.

20. *Id*. at 1132. The purpose of the UCC is articulated in Section 1-103(a): "[t]he [Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions." U.C.C. § 1-103(a). Courts have frequently used Section 2-719(2) to strike "repair and replacement" remedy limitations when a seller is unable or unwilling to repair or replace. *Id.* § 2-719(1)(a). *See* Delhomme Indus., Inc. v. Hou. Beechcraft, Inc., 735 F.2d 177, 183–84 (5th Cir. 1984) (discussing UCC principles for limited remedy and their harmony with the Kansas UCC remedies for breach of warranty); *see also Riley*, 442 F.2d at 673 (explaining the remedies for breach of warranty which are outlined in Code of Alabama Section 2-316(2)); *see also* Chatlos Sys., Inc. v. Nat'l Cash Reg. Corp., 635 F.2d 1081, 1086 (3d Cir. 1980) (discussing the discrepancy between Sections 2-719(2) and (3) and stating that New Jersey has yet to take a position on the question of whether consequential damages are barred when a limited remedy fails of its purpose).

21. *Mercedes-Benz*, 720 S.W.2d at 854.

22. *Id.* at 847.

23. *Id.*

complained about several other uncorrected defects.[24] Discussing Section 2-719, the court stated that a "limited remedy fails of its essential purpose and deprives the buyer of the substantial value of the bargain when the warrantor does not correct the defect within a reasonable time."[25] Based upon the failure to remedy the car problems, the court concluded that the limited warranty had failed of its essential purpose since the dealer was unable to correct the defects within a reasonable time.[26]

The consequence of an exclusive remedy failing of its essential purpose is that a plaintiff may seek further remedies available under Article 2 of the UCC (hereinafter "Article 2").[27] This is supported by Official Comment (1) to UCC Section 2-719, which provides that when this happens, the exclusive remedy "must give way to the general remedy provisions of this Article."[28] The "general remedy provisions" for aggrieved buyers can be found in Sections 2-714 and 2-715.[29]

Section 2-714 governs an aggrieved buyer's remedies when accepted goods fail to conform. It provides in subsection (1) that "[w]here the buyer has accepted goods and given notification (subsection (3) of Section 2-607)[,] he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach[,] as determined in any manner which is reasonable."[30]

Section 2-715 further provides that an aggrieved buyer is entitled to incidental damages reasonably incurred as well as consequential damages.[31] It then notes in subsection (2) that consequential damages

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24. *Id*.

25. *Id*. at 854 (first citing Beal v. Gen. Motors Corp., 354 F. Supp. 423, 426 (D. Del. 1973); and then citing *Riley*, 442 F.2d at 673).

26. *Mercedes-Benz*, 720 S.W.2d at 854. Similarly, the U.S. District Court for the Southern District of Texas, in *Metro National Corporation. v. Dunham-Buch, Inc.*, agreed that where repeated efforts to correct a product defect failed to remedy the problem, a limited warranty failed of its essential purpose. *See* Metro Nat'l Corp. v. Dunham-Bush, Inc., 984 F. Supp. 538, 560 (S.D. Tex. 1997) (explaining that a company's attempt to limit its express warranties by offering a limited warranty and disclaiming all implied warranties was ineffective and failed of its essential purpose under Texas law); *see*, *e.g.*, Nation Enter., Inc. v. Enersyst, Inc., 749 F. Supp. 1506, 1513–14 (N.D. Ill. 1990) (applying Texas law); *see also* Chatlos Sys., Inc. v. Nat'l Cash Reg. Corp., 635 F.2d 1081, 1085 (3d Cir. 1980) (holding that "[t]o be effective the repair remedy must be provided within a reasonable time after discovery of the defect." (first citing *Beal*, 354 F. Supp. at 426; and then citing U.C.C. § 2-309(1))); *see also Riley*, 442 F.2d at 673 (explaning that "the seller does not have an unlimited time for the performance of the obligation to replace and repair.").

27. *See* U.C.C. § 2-719(2) (A.L.I. & UNIF. L. COMM'N 2023) (permitting remedy to "be had as provided in this Act").

28. *Id*. § 2-719 cmt. 1; *see Metro Nat'l*, 984 F. Supp. at 560 (agreeing that upon the failure of a limited remedy, "a buyer is entitled to more expansive remedies")

29. U.C.C. §§ 2-714–715.

30. *Id*. § 2-714(1).

31. *Id*. § 2-715.

"resulting from the seller's breach" include "(a) any loss resulting from general or particular requirements and needs of which the seller[,] at the time of contracting[,] had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty."[32]

Though Section 2-715 permits the recovery of consequential damages, Section 2-719 allows sellers to eliminate them entirely. Subsection (3) provides that "[c]onsequential 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."[33]

Returning to the hypothetical with Noah's Storage Corp. helps draw this conflict into focus. There, CoolClimate, Inc. unsuccessfully attempted to repair air conditioner units sold to Noah's Storage. The essential purpose of the exclusive remedy was to ensure a quick repair or replacement, thereby preventing a loss of customers for Noah's Storage. The defects constituted a breach of warranty and CoolClimate's inability to address them after multiple attempts deprived Noah's Storage of the essential purpose of its exclusive remedy.

It is clear that direct damages may be available to Noah's Storage under Article 2. But will the exclusionary clause prevent it from receiving consequential damages?

II. UCC SECTIONS 2-719(2) AND (3): APPROACHES TO RESOLVING THE CONFLICTING PROVISIONS

Courts grappling with the issue of consequential damages have primarily treated it as one of statutory interpretation. In doing so, courts have drawn insights from the UCC Official Comments and Sections 2-719(2) and (3) to determine whether an exclusion of consequential damages survives after an exclusive remedy fails of its essential purpose.[34] Interestingly, though there once appeared to be a variety of approaches to the problem, modern case law seems to have coalesced around two very different approaches.[35] One is the dependent approach,

32. *Id*. § 2-715(2).

33. *Id*. § 2-719(3).

34. *See* Howard Foss, *When to Apply the Doctrine of Failure of Essential Purpose to an Exclusion of Consequential Damages: An Objective Approach*, 25 DUQ. L. REV. 551, 556 (1987) (explaining how courts analyze the issue as a matter of statutory construction).

35. *Id*. at 556–58 (discussing the two different approaches, dependent and independent, adopted among different jurisdictions); *see also* Kathryn I. Murtagh, *UCC Section 2-719: Limited Remedies*

under which the exclusion of consequential damages falls with the exclusive remedy.[36] The other is the independent approach, which holds that a clause excluding consequential damages survives as an independent limitation on the available remedies.[37] These two approaches, as well as others, are discussed below.

A. Dependent Approach

Several courts have held that once an exclusive remedy fails of its essential purpose, consequential damages may be obtained despite the presence of an exclusionary clause.[38] This approach is based upon the

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and Consequential Damages Exclusion, 74 CORN. L. REV. 359, 361, 368 (1989) (describing the opinions and approaches of "dependent" and "independent" courts).

36. *See* Fiorito Bros., Inc. v. Fruehauf Corp., 747 F.2d 1309, 1313–15 (9th Cir. 1984) (following the dependent approach and holding that a failure to perform under a "repair or replace" clause could invalidate an exclusion of consequential damages); *see also* Cooley v. Big Horn Harvestore Sys., Inc., 813 P.2d 736, 743–45 (Colo. 1991) (arguing that consequential damages can be recovered when a limitation of liability clause fails of its essential purpose); *see also* Koehring Co. v. A.P.I., Inc., 369 F. Supp. 882, 886 (E.D. Mich. 1974) (holding that consequential damages may not be limited or excluded when the limitation or exclusion would be unconscionable); *see also* Forest River, Inc. v. Posten, 847 So.2d 957, 960–61 (Ala. Civ. App. 2002) (allowing an award of consequential damages when a limited warranty has failed of its essential purpose).

37. *See* Reynolds Metals Co. v. Westinghouse Elec. Corp., 758 F.2d 1073, 1079 (5th Cir. 1985) (following the independent approach and upholding the enforcement of an express disclaimer of consequential damages even in the event of a breach of another warranty provision).

38. *See*, *e.g.*, Sanchelima Int'l, Inc. v. Walker Stainless Equip. Co., LLC, 920 F.3d 1141, 1144–45 (7th Cir. 2019) (explaining that the Wisconsin Supreme Court has adopted the dependent approach when interpreting Sections 2-719(2) and (3)); *see also* Ragen Corp. v. Kearney & Trecker Corp., 912 F.2d 619, 625 (3d Cir. 1990) (concluding that the Wisconsin Supreme Court would permit recovery of consequential damages under the UCC because the exclusive limited remedy failed of its essential purpose); *see also* Miss. Chem. Corp. v. Dresser-Rand Co., 287 F.3d 359, 366–67 (5th Cir. 2002) (permitting consequential damages when a repair or replace remedy failed of its essential purpose); *see also* Arabian Agric. Servs. Co. v. Chief Indus., Inc., 309 F.3d 479, 485–86 (8th Cir. 2002) (discussing the logic behind permitting the recovery of consequential damages when the exclusive limited remedy failed its essential purpose); *see also* Webco Indus., Inc. v. Thermatool Corp., 278 F.3d 1120, 1131 (10th Cir. 2002) (explaining that under Michigan law, a seller is required to fulfill their warranty obligation within a reasonable time under the circumstances of the case, and, if not, recovery of consequential damages is permitted); *see also* Soo Line R.R. Co. v. Fruehauf Corp., 547 F.2d 1365, 1373 (8th Cir. 1977) (concluding that a contract does not effectively bar liability for consequential damages despite its specific bar against such damages existing independently of the exclusive remedy to repair because of the court's belief that remedies should be liberally administered); *see also* Caudill Seed & Warehouse Co. v. Prophet 21, Inc., 123 F. Supp. 2d 826, 833 (E.D. Pa. 2000) (concluding that where the plaintiff has adequately stated a claim that defendant's conduct resulted in the failure of the essential purpose of an agreement, the plaintiff may seek the full range of damages available under the UCC, including consequential damages); *see also* Bishop Logging Co. v. John Deere Indus. Equip. Co., 455 S.E.2d 183, 190–93 (S.C. Ct. App. 1995) (holding that the court was correct when disregarding limitations and exclusion on the defendant's warranties and allowing for recovery of consequential damages where the warranty failed of its essential purpose); *see also* Krupp PM Eng'g, Inc. v. Honeywell, Inc., 530 N.W.2d 146, 149 (Mich. Ct. App. 1995) (explaining that where a warranty fails its essential purpose, the buyer is entitled to pursue other remedies); *see also* John Deere Co.

commentary language to Section 2-719, which provides that once a limitation clause fails of its essential purpose, it gives way to the general remedy provisions of Article 2.[39] Article 2 makes consequential and incidental damages available to an aggrieved buyer.[40] Under this rather straight-forward approach, if the limited repair or replace warranty fails of its essential purpose, the consequential damages limitation also falls away, thereby making all Article 2 remedies available to the buyer.

The case of *Waters v. Massey-Ferguson* is an oft-cited example of the dependent approach, with the court's rationale offering valuable insight.[41] Waters, a soybean farmer, purchased a new tractor from Massey-Ferguson for $31,000 in September 1977.[42] Within a year of the purchase, and at a time when the tractor was essential to planting crops, the tractor suffered hydraulic failures.[43] Masey-Ferguson was unable to resolve the issue within the crucial timeframe, which forced Waters to hire a neighbor to plant his crop at a much higher expense and with suboptimal results due to the delay.[44] The following year, Waters again returned the tractor to Massey-Ferguson to resolve the issue, but again

v. Hand, 319 N.W.2d 434, 437 (Neb. 1982) (concluding that in a suit between farmer and seller of farm implements, if "the seller is given a reasonable chance to correct the defects and the equipment still fails to function properly," the limited remedy has failed of its essential purpose, and the plaintiff can recover "provable consequential damages, even though specifically excluded by the written warranty."); *see also* Durfee v. Rod Baxter Imp., Inc., 262 N.W.2d 349, 357 (Minn. 1977) (permitting recovery of incidental damages, despite disclaimer, when exclusive remedy failed of its essential purpose); *see also* Murray v. Holiday Rambler, Inc., 265 N.W.2d 513, 526 (Wis. 1978) (holding that where an express warranty excludes consequential damages, the buyer may recover under sec. 402.715, Stats. as though the limitation had never existed to ensure a remedy is available where a limited contractual remedy excluding damages has failed); *see also* Clark v. Int'l Harvester Co., 581 P.2d 784, 802 (Idaho 1978) (explaining that according to Idaho state law and case law, if plaintiffs are able to prove that a limited remedy provided by a warranty failed of its essential purpose, then they are entitled to the full array of damages, including consequential damages, provided by the UCC); *see also* Ehlers v. Chrysler Motor Corp., 226 N.W.2d 157, 161 (S.D. 1975) (providing that if a warranty was breached, causing the available remedy to fail of its essential purpose, all otherwise available remedies under the UCC remain available, including consequential and incidental damages); *see also* Robert J. Williams, *Getting What You Bargained For: How Courts Might Provide a Coherent Basis for Damages That Arise When Remedies Fail of Their Essential Purpose*, 5 VA. L. & BUS. REV. 131, 135, 147 (2010) (explaining that "[m]ost U.S. courts of appeals have determined that when a remedy fails of its essential purpose, consequential damages may be awarded even if the parties had bargained them away in the sales contract.").

39. *See* U.C.C. § 2-719 cmt. 1 (A.L.I. & UNIF. L. COMM'N 2023) (stating that where an apparently reasonable clause fails of its essential purpose, it must give way to general remedy provisions).

40. *Id*. § 2-715(2).

41. Waters v. Massey-Ferguson, Inc., 775 F.2d 587, 591 (4th Cir. 1985) (explaining their reasoning behind favoring the dependent approach and awarding consequential damages in the circumstances of the case at bar).

42. *Id*. at 589.

43. *Id*.

44. *Id*.

they were unable to fix the hydraulic issues, causing Waters to suffer damages due to his poor crop yield.[45] Waters then sued for breach of warranty damages, including consequential damages.[46] In its defense, Massey-Ferguson pointed to its limited repair remedy and connected disclaimer of the consequential and incidental damages clause.[47] The trial court permitted Waters' claims and a jury awarded him both direct and indirect damages, including consequential damages.[48]

On appeal, the court acknowledged the perceived tension between Sections 2-719(2) and (3) but concluded that the threshold issue was one of contractual construction.[49] Moreover, the court noted that there were, in fact, two breaches at issue.

> Because Massey-Ferguson has both sold Waters a defective tractor and proved unable to remedy its defects, 'there are two breaches of the contract; the first being the failure to deliver goods conforming to the express warranty, and the second being the failure to correct the nonconformity as was promised in the parties' agreement.'[50]

The court then analyzed whether the exclusion of consequential damages applied not just to the breach of warranty, but also to the second breach—i.e., the failure to remedy the breach.[51] The court also examined the language from three perspectives: the written context, the creative context, and the commercial context.[52] After doing so, the court concluded that the exclusion of the consequential damages clause was dependent on the limited remedy to repair clause.[53] In doing so, the court held that the language of the contract "reveals an unequivocal assumption that Massey-Ferguson will be able to correct any mechanical problem in the tractor."[54] The court continued:

> The definition of Waters' remedies flatly states that 'the Company *will* repair or replace . . . any defective part of the equipment' (emphasis added). In a significant contrast, the contract explicitly recognizes that Massey-Ferguson might break its other promise, the promise to deliver satisfactory new goods, but nowhere suggests—much less provides for—the possibility that repair may be impossible.[55]

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45. *Id*.
46. *Id*.
47. *Id*. at 589–90.
48. *Id*. at 590.
49. *Id*. at 591.
50. *Id*. (quoting Koehring Co. v. A.P.I., Inc., 369 F. Supp. 882, 890 (E.D. Mich. 1974)).
51. *Waters*, 775 F.2d at 591 (quoting Jonathan A. Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)*, 65 CAL. L. REV. 28, 65 (1977)).
52. *Waters*, 775 F.2d at 591.
53. *Id*. at 591–92.
54. *Id*. at 591.
55. *Id*.

Although *Waters* has been pointed to as an adoption of the dependent approach, the decision was decidedly based upon the contract language itself.[56] *Waters*' treatment of the breach of warranty as one breach and of the failure to remedy the breach as its own, separate breach is persuasive. Other courts adopting a dependent approach have frequently cited *Waters*.[57]

B. Independent Approach

In contrast with the dependent approach, a number of courts have adopted the independent approach. This approach views the presence of Section 2-719 as indicative that limitations on consequential damages should be treated differently from exclusive repair or replace limitations. Whereas exclusive repair or replace clauses should be assessed as to whether they fail of their essential purpose,[58] limitations on consequential damages are exclusively to be evaluated under the unconscionability doctrine.[59]

American Electric Power Co. v. Westinghouse Electric Corp.[60] is considered one of the leading cases representing the independent approach.[61] However, a closer examination of the opinion reveals that the court might have engaged in a fact-dependent assessment rather than simply concluding that all such clauses are to be viewed as independent. American Electric Power Company (AEP) contracted Westinghouse in 1968 to design, manufacture, and build a new turbine generator for a total cost of $12,260,580.08.[62] The contract contained an exclusive repair or replace provision that stated:

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56. *Id*. at 593 (noting each case must stand on its own facts).

57. *See* Bishop Logging Co. v. John Deere Indus. Equip. Co., 455 S.E.2d 183, 192 (S.C. Ct. App. 1995) (citing *Waters,* 775 F.2d at 588–89, 593); *see also* Nyquist v. Randall, 819 F.2d 1014, 1019 (11th Cir. 1987) (citing *Waters,* 775 F.2d at 589); *see also* Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 709 (9th Cir. 1990) (comparing *Waters*, 775 F.2d at 590–91 with Fiorito Bros., Inc. v. Fruehauf Corp., 747 F.2d 1309, 1315 (9th Cir. 1984)).

58. U.C.C. § 2-719(2) (A.L.I. & UNIF. L. COMM'N 2023).

59. *Id*. § 2-719(3); *see* Bray Int'l, Inc. v. Comput. Assocs. Int'l, Inc., No. H-02-98, 2005 WL 6792280, at *14 (S.D. Tex. Sept. 30, 2005) (finding a reading of Sections 2-719(2) and (3) as dependent on one another would not give full effect to the unconscionability requirement), *rev'd in part*, Bray Int'l, Inc. v. Comput. Assocs. Int'l, Inc., No. CIV H-02-0098, 2005 WL 3371875, at *6 (S.D. Tex. Dec. 12, 2005).

60. Am. Elec. Power Co., Inc., v. Westinghouse Elec. Corp., 418 F. Supp. 435 (S.D. N.Y. 1976).

61. WHITE, SUMMERS & HILLMAN, *supra* note 18, at 1145; JAMES J. WHITE ET AL., UNIFORM COMMERCIAL CODE, HORNBOOK SERIES 541 (7th ed. 2022) (describing *American Electric Power* and *Razor v. Hyundai Motor America*, 854 N.E.2d 607, 617 (Ill. 2006) as the authors' favored line of cases and implicitly suggesting their prominence).

62. *Am. Elec. Power Co.*, 418 F. Supp. at 439–41.

> Any component requiring repair or replacement should hereafter carry a one year warranty starting from the date the unit is again returned to service after such correction.
>
> This warranty is exclusive and is in lieu of any warranty of merchantability, fitness for purpose or other warranty of quality, whether express or implied, except of title and against patent infringement.
>
> Correction of non-conformities, in the manner and for the period of time provided above, shall constitute fulfillment of all liabilities of the Company to the purchaser, whether based on contract, negligence or otherwise with respect to, or arising out of such equipment.[63]

The contract also contained a very detailed "LIMITATION OF LIABILITY" section that provided:

> Except as otherwise agreed herein, the Seller shall not be liable for special, or consequential damages, such as, but not limited to, damage or loss of other property or equipment, loss of profits or revenue, loss of use of power system, cost of capital, cost of purchased or replacement power, or claims of customers of purchaser for service interruptions. *The remedies of the purchaser set forth herein are exclusive, and the liability of Seller with respect to any contract, or anything done in connection therewith* such as the performance or breach thereof, or from the manufacture, sale, delivery, resale, installation or technical direction of installation, repair or use of any equipment covered by or furnished under this contract whether in contract, in tort, under any warranty, or otherwise, shall not, except as expressly provided herein, exceed the price of the equipment of (or) part on which such liability is based.[64]

The generator was installed in April 1970 but suffered numerous defects over the next several years.[65] Each time Westinghouse received notice of defects it attempted to remedy them, but AEP was ultimately unable to run the generator at its maximum warranted capacity.[66] In April 1974, AEP commenced suit against Westinghouse, claiming, among other things, breach of express and implied warranties.[67]

Westinghouse moved to dismiss AEP's claims for breach of warranty and claims for consequential damages based on the exclusions and limitations found in the contract.[68] The court agreed that the implied warranties were properly disclaimed.[69] However, the court refused to

63. *Id*. at 440.

64. *Id*. at 440–41 (emphasis added) (noting the language of the disclaimer played a key role in the court's decision; it has been reprinted in full).

65. *Id*. at 441–42.

66. *Id*.

67. *Id*. at 442.

68. *Id*. at 451.

69. *Id*.

dismiss AEP's claim that the limited warranty failed of its essential purpose, finding that fact issues remained "regarding Westinghouse's alleged intentional misconduct and the adequacy of its repair work."[70] With regard to the exclusion of consequential damages, AEP argued that because the limited remedy was alleged to have failed of its essential purpose, the exclusion should also fail.[71] Westinghouse countered that the exclusion clause should be viewed independently.[72]

Ultimately, the court sided with Westinghouse, stating: "I am persuaded that the interpretation of § 2-719(2) of the Uniform Commercial Code urged by the defendant is the more appropriate one given the facts of this case."[73] Despite the court framing its decision as one interpreting Section 2-719, the court's analysis was more dependent on the facts of the case.[74] The court gave three primary reasons for interpreting the exclusion clause as independent of the limited repair or replace remedy clause.[75] First, the court noted the relative positions of the two clauses, placing importance on the fact that they were totally separate.[76] Second, the court observed that the contract at issue was "painstakingly negotiated between industrial giants" and "the warranted item" was a "highly complex, sophisticated, and in some ways experimental piece of equipment."[77] The court concluded that the exclusion of consequential damages clause was intentionally incorporated with the understanding that there could be problems with the generator.[78]

Finally, and most importantly, the court examined the exclusionary language itself, noting that it explicitly addressed what would happen should Westinghouse breach the exclusive remedy and made a provision for damages.[79] Citing Official Comment (1) to UCC Section 2-719, the

70. *Id*. at 454 ("Thus, this is not a case where it is 'undisputed' that the defendant has complied with its warranty obligation to repair or replace.").

71. *Id*. at 455–56.

72. *Id*. at 457.

73. *Id*.

74. *Id*.

75. *Id*. at 458.

76. *Id*.

77. *Id*.

78. *Id.* ("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. It is for this very reason that the Mitchell Unit I contract incorporates within it the limitation on the Seller's liability.").

79. *Id*. at 458–59 ("In the event that this court finds that the defendant has totally failed to perform its warranty to repair or replace, damages at least in an amount equal to the price of all uncorrected parts will be recoverable. Thus, if the generator, as a unit, cannot or has not been

court concluded that, based on the exclusionary language, the buyer was being provided with a "minimum adequate remedy."[80] All told, the court's decision appears to be based more on the language of the contract and the parties' intent than on a true interpretation of how Sections 2-719(2) and (3) interact together.

Chatlos Systems, Inc. v. National Cash Register Corp. is another oft-cited case that establishes a less case-specific reasoning under the independent approach.[81] Chatlos purchased a computer system from National Cash Register (NCR) in 1974, with an anticipated operational date of March 1975.[82] Unfortunately, the system was delayed and suffered multiple problems once installed.[83] NCR, in accordance with its limited warranty, attempted multiple unsuccessful fixes over the course of the following year.[84] Chatlos then filed suit.[85] Upon finding that NCR had breached the warranty, the district court awarded Chatlos direct and consequential damages, despite the presence of a consequential damages disclaimer.[86]

On appeal, the court agreed with the lower court's finding that a breach of warranty had occurred and concluded that the exclusive remedy had in fact failed of its essential purpose.[87] The appellate court disagreed, however, with the district court's allowance of consequential damages in light of the exclusion clause.[88] While acknowledging that some courts have held that such clauses fall with the exclusive remedy, the appellate court believed that those courts following an independent approach were the better reasoned.[89] The court explained its logic:

> It appears to us that the better reasoned approach is to treat the consequential damage disclaimer as an independent provision, valid unless unconscionable. This poses no logical difficulties. A contract may well contain no limitation on breach of warranty damages but specifically exclude consequential damages. Conversely, it is quite conceivable that some limitation might be placed on a breach of warranty award, but consequential damages would expressly be permitted.

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repaired so as to meet contract specifications, and has not been replaced by a generator that can, the full purchase price of the generator may be recovered as damages by the plaintiff.").

80. *Id*. at 458.
81. Chatlos Sys., Inc. v. Nat'l Cash Reg. Corp., 635 F.2d 1081, 1086 (3d Cir. 1980).
82. *Id*. at 1083.
83. *Id*. at 1083–84.
84. *Id*.
85. *Id*. at 1084.
86. *Id*.
87. *Id*. at 1084.
88. *Id*. at 1084–85.
89. *Id*. at 1086.

> The limited remedy of repair and a consequential damages exclusion are two discrete ways of attempting to limit recovery for breach of warranty. The Code, moreover, tests each by a different standard. The former survives unless it fails of its essential purpose, while the latter is valid unless it is unconscionable. We therefore see no reason to hold, as a general proposition, that the failure of the limited remedy provided in the contract, without more, invalidates a wholly distinct term in the agreement excluding consequential damages. The two are not mutually exclusive.[90]

On the issue of adopting the independent approach, the court interestingly assumed, based on its interpretation of Section 2-719, that this approach expressed the intent of the parties. Turning to the issue of whether the exclusion of consequential damages was unconscionable under Section 2-719(3), the court quickly disposed of the argument, noting that both parties were sophisticated entities, and the limitation would not surprise Chatlos.[91]

While the independent approach was considered the minority approach at the time of the *Chatlos* decision,[92] it appears to now be the more accepted approach, with many courts following the same or similar reasoning.[93] In their practitioner treatise, White, Summers, and Hillman explicitly endorse the independent approach as the better reasoned approach, even in cases involving consumers, by stating:

> In general, we favor the *American Electric Power* and *Razor* line of cases. Those cases are most true to the Code's general notion that the parties should be free to contract as they please.

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90. *Id*. (internal citations omitted). The court's reasoning on this point is somewhat suspect as it assumes that when a clause disclaiming consequential damages is present, it is meant to apply even if the exclusive remedy fails. The court claims the two are not mutually exclusive, but neither are they certain to be read apart. While the contract could be clearer that they are to be read together, the same could be said of reading them apart and as independent.

91. *Id*. at 1087.

92. *See* Debra L. Goetz et al., *Article Two Warranties in Commercial Transactions: An Update*, 72 CORN. L. REV. 1159, 1307 (1987) ("A majority of cases have answered correctly that the failure of an exclusive remedy voids the consequential damages exclusion clause . . . ."); *see also* Williams, *supra* note 38, at 149, 156 (citing to earlier cases to state that a small majority of U.S. courts of appeals followed the "pro-damages" or dependent approach).

93. *See* Razor v. Hyundai Motor Am., 854 N.E.2d 607, 617 (Ill. 2006) (responding to the plaintiff's contention that the dependent approach was followed by a majority of jurisdictions, the Illinois Supreme Court made the following observation: "While this may have been true 15 to 20 years ago [internal citation omitted], it is no longer the case."); *see also* Bray Int'l, Inc. v. Comput. Assocs. Int'l, Inc., No. H-02-98, 2005 WL 6792280, at *10 (S.D. Tex. Sept. 30, 2005) (finding that "under Texas law, [S]ections 2-719(b) and 2-719(c) are independent and free-standing provisions."); *see also* Reynolds Metals Co. v. Westinghouse Elec. Corp., 758 F.2d 1073, 1079 (5th Cir. 1985) (upholding enforcement of and express disclaimer of consequential damages in the event of a breach of another warranty).

> The text of the Code disfavors judges' and juries' rewriting contracts that allocate risks between the parties. UCC sections 1–302, 2–316, 2–719, and many others accord primacy to the terms of the contract over the general law of the Code. Indeed, as to remedies, 2–719(1)(a) and (b) provide that the parties may provide for remedies 'in substitution for those provided in the article' and that the parties may make such remedies 'exclusive.'
>
> . . . .
>
> In our view, the parties, better than the State, can allocate the loss to the party who can avoid it at the least cost. The State's agents should respect that allocation. This is particularly true when a knowledgeable buyer is using an expensive machine or consuming a commodity in a business setting. The buyer operates the machine, adjusts it, and understands the consequences of its failure. Sometimes, flaws are inherent and attributable to the seller's faulty design or manufacture. But the fault may also lie in buyer neglect, inadequate training and supervision of the operators, failure to report difficulties, or even in intentional use in ways forbidden by the seller. Believing the parties to know their own interests best, we favor their allocations.
>
> Although the consumer purchaser makes a more sympathetic case for court intervention, at least two of us would apply *American Electric* in those cases as well. If the consequential damages consist of personal injury or property damage, the buyer can recover in tort without regard to the 2–719 limitation. If it consists of other loss, the consumer may be the lowest-cost risk avoider. Even consumers can read instructions; even they can appreciate the danger of lighting a match in the presence of gas fumes.[94]

Thus, under the independent approach, the only way to avoid the application of the consequential damages exclusion is under an unconscionability analysis. However, many courts adopting the independent approach appear to take a rather liberal approach to their application of unconscionability.

C. Independent Ex Post Unconscionability Review

Under the independent approach, once an exclusive remedy fails of its essential purpose, the only way to strike the exclusion of consequential damages clause is if it is found to be unconscionable.[95] Despite being addressed in Section 2-719(3), the general unconscionability standard is found in Section 2-302, which provides:

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94. WHITE, SUMMER & HILLMAN, *supra* note 18, at 1145–46; *see also* WHITE ET AL., *supra* note 61, at 542. As with the *Chatlos* decision, this reasoning assumes that an independent approach reflects the true intention of the parties. As explored below, this assumption does not seem justified in all cases.

95. *See* Foss, *supra* note 34, at 557 (explaining the reasoning of independent courts).

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made[,] the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause[,] as to avoid any unconscionable result.
>
> (2) 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.[96]

Although the Code does little to add to the understanding of what constitutes an unconscionable clause, Official Comment (1) to UCC Section 2-302 provides some guidance, noting that the principle is one meant for the "prevention of oppression and unfair surprise," and that "[t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable *under the circumstances existing at the time of the making of the contract.*"[97]

Two common elements to the doctrine of unconscionability have emerged—procedural and substantive unconscionability.[98] Procedural unconscionability deals with problems in contract formation, such as unequal bargaining power and lack of sophistication.[99] Substantive unconscionability deals with the contractual terms themselves and tests whether such terms are unfairly one-sided.[100] The doctrine is normally difficult to satisfy, especially in a commercial context.[101] Nevertheless, many courts require a showing of both before finding a contract or clause unconscionable.[102]

Given that all contract clauses are subject to Section 2-302, Section 2-719(3)'s statement that limitations on consequential damages are subject to an unconscionability review adds little to the Code. Nonetheless, the statement does add a presumption for consumers that such exclusion clauses are prima facie unconscionable when it comes to personal injuries. Outside of this context, however, the standard analysis that

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96. U.C.C. § 2-302 (A.L.I. & UNIF. L. COMM'N 2023).

97. *Id*. at cmt. 1.

98. *See* Eddy, *supra* note 51, at 41 (discussing unconscionability within the context of Section 2-719).

99. *Id*. at 42.

100. *Id*. at 44–45.

101. WHITE, SUMMER & HILLMAN, *supra* note 18, at 1151 ("Findings of unconscionability should be and are rare in commercial settings."); WHITE ET AL., *supra* note 56, at 544.

102. Eddy, *supra* note 51, at 41; *see also* WILLISTON ON CONTRACTS § 18:10 (4th ed. 2010) (stating that "this formulation requires a showing that the contract was both procedurally and substantively unconscionable when made.").

follows any unconscionability review should apply. Remarkably, a number of courts following the independent approach still find for buyers on the issue, particularly consumers, sometimes in ways that appear to run at odds with a standard unconscionability analysis.

Razor v. Hyundai Motor America provides a more recent example not only of an application of the independent approach, but also of how a court may take a more consumer-friendly approach to unconscionability.[103] Shante Razor purchased a new Hyundai Sonata from Gartner Buick, Inc. with a remote starter option in August 2001.[104] The purchase contract contained both a limited warranty covering repair or replacement of parts and a clause excluding incidental and consequential damages.[105] Subsequently, Razor experienced difficulties starting the vehicle with the remote starter.[106] Despite numerous attempts at repair by Gartner over the course of several months, the car continued to have problems and Razor brought suit against Hyundai for breach of warranty.[107] The trial court held that the disclaimer of consequential damages was unconscionable, and a jury awarded $5,000 in breach of warranty damages and $3,500 in consequential damages to Razor.[108]

On appeal, Hyundai admitted that the limited remedy failed of its essential purpose but argued that the exclusion of consequential damages should be upheld.[109] The Illinois Supreme Court reviewed various approaches—independent, dependent, and case-by-case—as well as the reasoning supporting each.[110] The court noted that although the dependent approach may have once been the majority, the independent approach appeared to be the one adopted by most courts.[111] Moreover, the court rejected the case-by-case approach as not supported by the UCC and as being less predictable than the independent approach.[112] Further, the court dismissed the dependent approach, noting that "[n]othing in the text or the [O]fficial [C]omments to [S]ection 2-719 indicates that where a contract contains both a limitation of remedy and an exclusion of consequential damages, the latter shares the fate of the former."[113]

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103. Razor v. Hyundai Motor Am., 854 N.E.2d 607 (Ill. 2006).
104. *Id*. at 611.
105. *Id*.
106. *Id*. at 611–12.
107. *Id*.
108. *Id*. at 613.
109. *Id*. at 613–14.
110. *Id*. at 615–18.
111. *Id*. at 616–17.
112. *Id*. at 617.
113. *Id*. at 618.

However, the court went on to analyze the exclusion of consequential damages clause under the doctrine of unconscionability. The court began its analysis with the familiar procedural/substantive recitations of law, expounding that "[p]rocedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it, and also takes into account a lack of bargaining power."[114] The court then found that the exclusion of consequential damages was unconscionable based solely on procedural unconscionability. In this regard, the court noted that the "plaintiff testified without contradiction that she never saw any part of the written warranty, much less the disclaimer of consequential damages, until she looked in her owner's manual after she had signed the contract and driven the car off the lot."[115]

A few things are notable about the court's unconscionability finding. First, though the court cited to authority requiring both procedural and substantive unconscionability—and many courts do in fact require both[116]—it rested its decision solely on procedural unconscionability.[117] Second, despite finding that the exclusion was unconscionable due to the warranty not being made available prior to purchase, the court raised the issue *sua sponte* and was unbothered by the fact that the warranty, which was being sued under, also was not available prior to purchase. These facts were noted by the dissent:

> The majority reasons that, because Hyundai's consequential damages disclaimer was not provided to plaintiff at or before the time she signed the purchase contract, this exclusion was not part of the agreement and is void and unenforceable. However, according to the record evidence cited by the majority, it was the entire warranty, and not just the consequential damages exclusion, that was unavailable to plaintiff at the time she signed the contract.
>
> . . . .
>
> Under the majority's reasoning, if the consequential damages exclusion is void because it was not made available to plaintiff and was not part of the agreement entered into by plaintiff, the same is also true of the

114. *Id*. at 622.

115. *Id*. at 623–24 (explaining that their logic in the above-line quote was bolstered by Hyundai's violations of the Magnuson-Moss Warranty Act).

116. WHITE ET AL., *supra* note 56, at 179; JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 338 (6th ed. 2009) (explaining the distinction between "substantive" and "procedural" unconscionability and the requirement of at least one, but sometimes both, before a finding of unconscionability can be made); Sanchelima Int'l, Inc. v. Walker Stainless Equip. Co., LLC, 920 F.3d 1141, 1145 (7th Cir. 2019) ("The litigant must still prove procedural and substantive unconscionability to invalidate a limitation on consequential damages.").

117. *Razor*, 854 N.E.2d at 622 (citing *Rosen v. SCIL, LLC*, 799 N.E.2d 488 (Ill. App. 2003) for the proposition that a term must be both procedurally and substantively unconscionable).

> warranty as a whole. It follows that, if the warranty itself is void, i.e., not part of the agreement, plaintiff should not be able to bring suit against Hyundai under the warranty. Nevertheless, in the case at bar, the majority holds, *sua sponte*, that Hyundai's exclusion is void because it was not conveyed to plaintiff. The majority does not, however, reach the same conclusion regarding the warranty as a whole. This is inconsistent.[118]

Finally, although it did not necessarily play into the court's analysis, the court made an interesting pronouncement regarding the time frame from which to view unconscionability. Citing the *Chatlos* decision, the court stated that "[t]he unconscionability determination is not restricted to the facts and circumstances in existence at the time the contract was entered into," suggesting that the analysis could be viewed from the perspective of later events.[119] This reasoning runs at odds with Official Comment (1) to UCC Section 2-302, which states that "[t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable *under the circumstances existing at the time of the making of the contract*."[120]

Thus, despite the court in *Razor* adopting the independent approach, the court gave itself the maximum amount of latitude to still find for the plaintiff under the unconscionability doctrine. The *Razor* court is not alone in this regard. Some courts also appear to assess limitations on consequential damages in a manner that, to some extent, mirrors the dependent analysis.[121]

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118. *Id*. at 632–33.

119. *Id*. at 621.

120. U.C.C. § 2-302 cmt. 1 (A.L.I. & UNIF. L. COMM'N 2023) (emphasis added).); *see also* WHITE ET AL., *supra* note 56, at 177 ("[T]hat it appear unconscionable at the time of performance is irrelevant. The test is not by hindsight."); Bray Int'l, Inc. v. Comput. Assocs. Int'l, Inc., No. CIV H-02-0098, 2005 WL 3371875, at *5 (S.D. Tex. Dec. 12, 2005) ("Texas law tests unconscionability not according to performance, but according to fairness of the terms and the relative bargaining power of the parties."). *But see* Edward Samuels, *The Unconscionability of Excluding Consequential Damages Under the Uniform Commercial Code When No Other Meaningful Remedy is Available*, 43 U. PITT. L. REV. 197, 242–43 (1981) (arguing that a case could be made to look at whether circumstances have changed to make a clause that was conscionable upon contract formation, unconscionable).

121. *See, e.g.*, Viking Yacht Co., Inc. v. Composite One LLC, 385 F. App'x 195, 208–09 (3d Cir. 2010) (analyzing "whether it was unconscionable for the buyer to retain the risk" of not being able to sue for consequential damages when the limited remedy failed of its essential purpose); *see also* Coop's Pretzels, LLC v. Intertape Polymer Corp., 661 F. Supp. 3d 932, 936–37 (D. S.D. 2023) (considering post-contract events in determining whether a provision limiting consequential damages was unconscionable and finding that the provision, coupled with the seller's repeatedly unsuccessful repair attempts and multiple refusals to refund, plausibly operated in a substantively unconscionable manner).

The case of *Pierce v. Catalina Yachts, Inc.*, cited positively by the *Razor* court, is illustrative of this. [122] The Pierces purchased a sailboat from Catalina Yachts in June 1992. The boat came with a limited warranty "promising to repair or pay for repair of any below-waterline blisters that might appear in the gel coat—a smooth outer layer of resin on the boat's hull," and a disclaimer of consequential damages.[123] In June 1994, upon discovering gel-coat blisters on the boat's hull and rudder, the Pierces notified Catalina of the issue and submitted an estimate for repair of $10,645. Catalina refused to accept this estimate, and after six months of repeated efforts to get Catalina to address the issue, the Pierces sued Catalina for breach of contract.[124] The trial court found that the clause limiting consequential damages was not unconscionable, and a jury returned a verdict in favor of the Pierces for breach of warranty damages.[125]

On appeal, the Pierces pressed that the exclusion clause should be stricken when the exclusive remedy fails of its essential purpose.[126] As with other courts, the *Pierce* court began by reviewing the dependent, independent and case-by-case approaches and ultimately adopted the independent approach.[127] Turning to whether the clause itself was unconscionable, the court—like the court in *Razor*—cited to *Chatlos* for the proposition that the analysis should be viewed from the perspective of later events.[128] Further, the court noted that failure of essential purpose was not irrelevant to the unconscionability analysis, and the seller's reasonableness or good faith should also be considered.[129] The court ultimately found that the clause was unconscionable, using reasoning strikingly similar to arguments in support of the dependent approach. The court held:

> Because the jury found that Catalina consciously deprived the Pierces of their rights under the warranty, the company cannot conscionably demand to enforce its own warranty rights against the Pierces:
>
> This Court would be in an untenable position if it allowed the defendant to shelter itself behind one segment of the warranty[,] when it has allegedly repudiated[,] and ignored its very limited obligations under another segment of the same warranty, which alleged repudiation

122. Pierce v. Catalina Yachts, Inc., 2 P.3d. 618, 624 (Ala. 2000).
123. *Id*. at 620.
124. *Id*.
125. *Id*.
126. *Id*.
127. *Id*. at 622–23.
128. *Id*. at 623.
129. *Id*. (quoting Chatlos Sys., Inc. v. Nat'l Cash Reg. Corp., 635 F.2d 1081, 1086–87 (3d Cir. 1980).

> has caused the very need for relief which the defendant is attempting to avoid.
>
> Moreover, in light of Catalina's bad faith, allowing the company to enforce the consequential damages bar would conflict with the commercial code's imperative that '[e]very contract or duty in the code imposes an obligation of good faith in its performance or enforcement.' Finally, because it is self-evident that the Pierces did not bargain to assume the risk of a bad faith breach by Catalina, enforcing the bar against consequential damages would thwart AS 45.02.719's basic goal of implementing the parties' agreement.[130]

The court's justification bears a close resemblance to the *Waters* court's justification. Recall that *Waters* broke the warranty down into two parts: breach of warranty as one breach, and the failure to remedy the breach as its own, separate breach.[131] Though *Pierce* is couched in terms of bad faith, it still rests its finding of unconscionability upon the same concept—namely, that there is a separate breach in the failure to remedy the original breach, thus making it unfair to leave the exclusion of consequential damages clause in place.

While the above decisions involved a consumer, this looser approach to unconscionability is not merely limited to consumer transactions. *Coop's Pretzels, LLC. v. Intertape Polymer Corp.* offers a recent example of this.[132] Coop's Pretzels, a food manufacturing and packaging company, contracted in 2021 with Intertape to purchase a Pouch Machine designed to package food products into individual packages.[133] The agreement contained an exclusive repair or replace warranty, which provided:

> In the event that an item of Machinery shall prove to be defective in materials, design[,] or workmanship during the aforesaid warranty period, [Intertape] shall, in its sole discretion, repair said defective item of Machinery, replace it[,] or credit [Coop's Pretzels'] account for the cost to [Coop's Pretzels] of the same from [Intertape] . . . .[134]

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130. *Pierce*, 2 P.3d. at 624 (quoting *Jones & McKnight Corp. v. Birdsboro Corp.,* 320 F. Supp. 39, 43–44 (N.D. Ill. 1970)) (applying Alaska's statutory provisions that embody the principles of UCC's adopted version Section 2-719 and stating "[t]his Court would be in an untenable position if it allowed the defendant to shelter itself behind one segment of the warranty when it has allegedly repudiated and ignored its very limited obligations under another segment of the same warranty, which alleged repudiation has caused the very need for relief which the defendant is attempting to avoid.").

131. Waters v. Massey-Ferguson, Inc., 775 F.2d 587, 591 (4th Cir. 1985).

132. Coop's Pretzels, LLC v. Intertape Polymer Corp., 661 F. Supp. 3d 932, 936 (D. S.D. 2023).

133. Coop's Pretzels, LLC v. Intertape Polymer Corp., 2022 WL 18587418, at *1 (D. S.D. May 26, 2022).

134. *Id*. at *7.

The agreement also contained an exclusion of consequential damages clause, which stated:

> [Intertape's] liability under such warranties shall be limited solely to the cost of any necessary repairs to, replacements of[,] or refunds of the applicable portion of the Purchase Price for, the Machinery and [Intertape] assumes no risk of, and shall not in any case be liable for, any other damages, including, without limitation, any special, incidental, consequential[,] or punitive damages, arising out of breach of warranty or contract, negligence[,] or any other legal theory, including, without limitation, loss of goodwill, profits or revenue, loss of use of the Machinery or any other associated equipment, cost of capital, cost of any substitute equipment, facilities or services, downtime costs, or claims of any party dealing with [Coop's Pretzels] for such damages.[135]

The machine failed to work properly during a factory acceptance test in June 2021, but Intertape made assurances that the defects would be addressed prior to delivery.[136] However, the machine failed upon first use while trying to meet a large order for a significant Coop's Pretzels client in late June 2021.[137] Intertape made attempts to fix the machine over the next week, but to no avail, causing Coop's Pretzels to incur overtime payment expenses for employees and lose a substantial amount of food product.[138] Coop's Pretzels filed suit for breach of contract and express warranty, and Intertape moved to dismiss.[139]

On the issue of whether the exclusive remedy failed of its essential purpose, the court found that this was a fact-driven question and denied Intertape's motion to dismiss on that ground.[140] With regard to the exclusion of consequential damages, the court noted that it was bound by Illinois law and thus adopted the independent approach.[141]

Turning to whether the clause was unconscionable, the court, quoting *Razor*, explicitly adopted the ex post review, despite Intertape's objections.[142] Further, the court added that it could find for Coop's Pretzels on either the procedural or substantive prong and consider whether Intertape's conduct was deliberate.[143] On the procedural prong,

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135. *Id*.
136. *Id*. at *2.
137. *Id*.
138. *Id*. at *3.
139. *Id*.
140. *Id*. at *7.
141. Coop's Pretzels, LLC v. Intertape Polymer Corp., 661 F. Supp. 3d 932, 939–41 (D. S.D. 2023). Initially Coop's had not adequately pled unconscionability, but it raised it in its Third Amended Complaint before the court. *Id.* at 939.
142. *Id*. at 940.
143. *Id*. at 942.

the court eventually found for Intertape, noting that Coop's Pretzels had "not alleged that Intertape [had] engaged in any kind of coercion or overreaching. To the contrary . . . Coop's Pretzels had over three weeks to review this Purchase Agreement . . . ."[144] On the substantive prong, the court was bothered by the language of the exclusive remedy and observed that Intertape "had sole discretion to determine what to do in the event the Pouch Machine was defective, and simultaneously denied Coop's Pretzels recovery of any potential incidental or consequential damages that may result from Intertape's potential failed attempts of addressing a defective machine."[145] Though the language alone was not sufficient to find it substantively unconscionable, the court also looked at Intertape's conduct, which included five unsuccessful attempts to repair the machine.[146] Ultimately, the court concluded that the language of the exclusive remedy and conduct of insisting on attempting unsuccessful repairs coupled with the exclusion of consequential damages may have rendered the clause substantively unconscionable. In this regard, the court explained:

> [T]he text explicitly provides that Intertape had sole discretion to choose a remedy, which included insisting that Intertape repair the Pouch Machine. And as it played out in this case, that's precisely what happened: Coop's Pretzels repeatedly brought the Pouch Machine's defects to Intertape's attention over the course of two weeks, and Intertape repeatedly insisted on trying to fix the problem. Intertape's failure to timely address the problem resulted in Coop's Pretzels having to pay workers more overtime hours, losing substantial amounts of food, nitrogen, and packaging, and dealing with overdue shipments. Coop's Pretzels also had to purchase a different Pouch Machine to be able to keep up with production. Thus, based on the Provision's express text allowing Intertape unlimited attempts to fix the Pouch Machine, coupled with Intertape's numerous attempts to fix the problem, Intertape's continued failure to fix the problem in a timely manner, and Coop's Pretzels' inability to recover consequential and incidental damages, the court finds that it is plausible that the provision excluding consequential and incidental damages, as alleged, operated in a substantively unconscionable way.[147]

As with *Pierce*, the *Coop's Pretzels* court's reasoning, though couched in terms of unconscionability, mirrors *Waters*. Moreover, *Coop's Pretzels* involved two sophisticated parties with no procedural unconscionability. Implicit in the court's substantive unconscionability analysis is a concern

144. *Id.* at 943.
145. *Id.* at 945.
146. *Id.*
147. *Id*. at 945–46.

over a failure to remedy a defect, causing mounting consequential damages. In other words, a breach of the duty to adequately remedy the defects—as in *Waters*—caused a further harm that was unconscionable in its effect. That subsequent harm, however, could have simply been resolved by ruling that the harm was not within the contemplation of the parties when entering into the exclusion of consequential damages.

D. Case-by-Case Approach

The third major approach to the question of consequential damages is the case-by-case approach.[148] Under this approach, "[a]n analysis to determine whether consequential damages are warranted must carefully examine the individual factual situation including the type of goods involved, the parties and the precise nature and purpose of the contract."[149] This approach has been criticized as not supported by the Code or the UCC Official Comments and as providing less predictability than the dependent or independent approaches.[150] Interestingly, there has been some confusion—as to whether courts adopting independent and dependent approaches are, in fact, applying a case-by-case approach—with courts and commentators labeling independent and dependent approach cases, as the case-by-case approach.[151]

Adams v. J.I. Case Co. is one such case in which the court, upon consideration of the facts and context of the transactions, concluded that the exclusion clause fell with the limited remedy in such a way that it could be mistaken for a dependent approach case. [152] Adams purchased a tractor in 1966 for use in his business as a general contractor.[153] At the time of purchase, Adams had many upcoming jobs requiring use of the tractor—a fact that was known to J.I. Case.[154] Soon after the purchase,

148. Razor v. Hyundai Motor Am., 854 N.E.2d 607, 617 (Ill. 2006).

149. AES Tech. Sys., Inc. v. Coherent Radiation, 583 F.2d 933, 941 (7th Cir. 1978); *see also Razor*, 854 N.E.2d at 617 (quoting *AES Technology Systems* with regard to the case-by-case approach); Daniel C. Hagen, *Sections 2-719(2) & 2-719(3) of the Uniform Commercial Code: The Limited Warranty Package & Consequential Damages*, 31 VAL. U. L. REV. 111, 131–32 (1996) ("When courts employ this approach, they look at the facts and circumstances of each case to determine whether the clause excluding consequential damages should be excluded.").

150. *Razor*, 854 N.E.2d at 617; *see also* Hagen, *supra* note 149, at 132 (stating that "[t]his approach is not supported by the Code or its official comments.").

151. *See Razor*, 854 N.E.2d at 617 (noting authorities have sometimes confused the case-by-case approach with the independent approach); *compare id.* at 615–16 (noting that *Adams v. J.I. Case Co.* is a seminal case establishing the dependent approach) *with* Henry Mather, *Consequential Damages When Exclusive Repair Remedies Fail: Uniform Commercial Code Section 2-719*, 38 S.C. L. REV. 673, 678–79 (1987) (grouping the *Adams* case outside of the dependent group).

152. Adams v. J.I. Case Co., 261 N.E.2d 1, 10 (Ill. App. 1970), *abrogated by*, *Razor*, 854 N.E.2d 607.

153. *Id.* at 5.

154. *Id.*

defects in the radiator and hydraulic system prevented Adams from using the tractor.[155] Upon return of the tractor, J.I. Case failed to correct the defects until a year after the initial purchase, causing Adams to suffer damages due to his inability to complete the planned jobs.[156] The tractor came with a limited repair or replace warranty as well as an exclusion of consequential damages clause.[157]

Looking to the contract and the context, the court of appeals concluded that there was an implied warranty that defects would be corrected within a reasonable time—a warranty that was violated either willfully or negligently.[158] Moreover, the court bolstered its opinion by noting that the Official Comment to UCC Section 2-314 regarding implied warranties explicitly references trade usage and course of dealing as being the basis for creating an implied warranty.[159] Further, the court conceded that the warranty and damage limitations were authorized under the Code and that the provisions were conscionable. Nonetheless, it held:

> [The] plaintiff could not have made his bargain and purchase with knowledge that [the] defendants would be unreasonable, or, in the words of his complaint, wilfully dilatory[,] or careless and negligent in making good their warranty in the event of its breach. The manufacturer and the dealer have agreed in their warranty to repair or replace defective parts while also limiting their liability to that extent. Had they reasonably complied with their agreement contained in the warranty[,] they would be in a position to claim the benefits of their stated limited liability and to restrict plaintiff to his stated remedy. The limitations of remedy and of liability are not separable from the obligations of the warranty. Repudiation of the obligations of the warranty destroy[s] 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 their warranty and assert its provisions beneficial to them.[160]

It has been suggested that *Adams* merely stands for the proposition that a willful breach of the limited warranty is the basis for disregarding an exclusion of consequential damages clause.[161] However, such an

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 7.
159. *Id.* at 8.
160. *Id.* at 7–8.
161. *See* Mather, *supra* note 151, at 678–79 (highlighting *Adams* as the leading case, which holds that whether a buyer can recover consequential damages is dependent on the seller's misconduct).

approach would not be supported by Section 2-719 or the facts of *Adams*. The *Adams* court recognized that the breach of warranty may have been willful *or* negligent.[162] Further, the court cited other factual circumstances that may have influenced its decision, such as J.I. Case's knowledge of the Adams's other contracts as well as the fact that Adams "had purchased several tractors similar to the one involved from the defendants and had never experienced any serious difficulty with any of them."[163] The court also noted that Adams "completely relied upon the skill and ability of the defendants to produce and service a good satisfactory tractor of the type purchased."[164]

E. Other Suggested Approaches

The conflicting approaches to Sections 2-719(2) and (3) often comes down to what courts think the parties intended with the inclusion of such clauses. Buyers will argue that they only agreed to the exclusion of consequential damages on the assumption that the good would be fixed;[165] thus the consequential damages clause should fall with the exclusive remedy.[166] Buyers will further argue that the consequential damages exclusion was only meant to cover periods during which repairs were being made.[167] Sellers will counter that they only agreed to the sales price on the assumption that no consequential damages would be recoverable.[168] Sellers will also contend the buyers' reading renders the consequential damages clause unnecessary, as an exclusive remedy would exclude consequential damages.[169] If a limited remedy did not fail its essential purpose, there would be no need to resort to the consequential damages clause, thereby rendering the buyers' reading a nullity—a reading courts should avoid.[170]

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162. *Adams*, 261 N.E.2d at 7–8.

163. *Id.* at 5.

164. *Id*.

165. *See* Waters v. Massey-Ferguson, Inc., 775 F.2d 587, 591 (4th Cir. 1985) (highlighting the "unequivocal assumption" of the buyer); *see also* Mather, *supra* note 151, at 684–87 (explaining that "it is quite likely that both parties assumed that any defects could and would be corrected, and thus did not think about what might happen if defects are not corrected" which leads the buyer and seller to reasonably attach very different meanings to the same contract terms).

166. *See* Mather, *supra* note 151, at 687 (illustrating how buyers could easily assume that should the exclusive remedy fail, they would have reasonable expectations for recovery of damages).

167. *Id.* at 695–97.

168. Chatlos Sys., Inc. v. Nat'l Cash Reg. Corp., 635 F.2d 1081, 1086 (3d Cir. 1980); *see also* Razor v. Hyundai Motor Am., 854 N.E.2d 607, 617 (Ill. 2006) (stating that the independent "school of thought holds that a limitation of consequential damages must be judged on its own merits and enforced unless unconscionable . . . .").

169. *Chatlos*, 635 F.2d at 1086.

170. *Id.*

These divergent views naturally lead to buyers favoring the dependent approach and sellers favoring the independent approach, with each pointing to Section 2-719 and its Official Comments for support. Proponents of the dependent approach will argue that Official Comment (1) to UCC Section 2-719 supports the approach as the comment provides that "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 Article 2.[171] Moreover, if the direct damages are small but the consequential damages are large, buyers will argue that consequential damages may provide the only meaningful remedy.[172] Furthermore, sellers are still protected from unforeseeable pure economic damages under Section 2-715, which provides that buyers may recover consequential damages "resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise."[173]

Proponents of the independent approach will contend that the dependent approach relies too heavily on the Official Comments and ignores the text of Section 2-719(3), which provides the only standard by which consequential damages clauses should be judged—unconscionability.[174] They will assert that the dependent approach renders Section 2-719(3) a nullity while the independent approach gives it meaning in line with rules of statutory construction.[175] Further, such proponents will maintain that giving meaning to the exclusion clause is necessary to protect sellers from foreseeable—but still excessive—consequential damages which they had sought to avoid by including such clauses.[176]

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171. U.C.C. § 2-719 cmt. 1 (A.L.I. & UNIF. L. COMM'N 2023); *see also* Mather, *supra* note 151, at 674–75 (suggesting that a buyer may recover consequential damages subject to the usual limitations when the exclusive repair or replace remedy has failed of its essential purpose).

172. *See* Eddy, *supra* note 51, at 86 (discussing how the award of consequential damages may be equitable in some cases where it prevents the defendant from "shelter[ing] itself behind one segment of the warranty . . . .").

173. U.C.C. § 2-715(2)(a).

174. *See* Williams, *supra* note 38, at 139 (describing how the unique language of Section 2-719(3) affirms that parties may exclude consequential damages only when their exclusion would not be unconscionable).

175. *Id.* ("The separate and distinct treatment of the exclusion of consequential damages, juxtaposed with the general limitation of remedies (which notably includes consequential damages), strongly favors an interpretation of [S]ection 2-719 that permits the exclusion of consequential damages even when other limited or substituted remedies fail of their essential purpose.").

176. *Id.* at 157.

Interestingly, at the heart of the arguments for each approach is a criticism that the other approach ignores or assumes the intention of the parties. This suggests support for a case-by-case approach—an approach that has not been widely adopted. Instead, courts appear to have coalesced around one of the two major approaches, with the independent approach gaining the most traction. However, neither approach is supported by Section 2-719 or its Official Comments.[177] Indeed, the National Conference of Commissioners of Uniform State Laws knew of this ambiguity and sought to possibly address it over two decades ago but ultimately withdrew revisions to Article 2.[178] As one commentator summarized:

> It is apparent that the Commissioners at some point came to understand the conflict between [S]ections 2-719(2) and (3), because between March 1998 and March 2000 several proposed amendments to [S]ection 2-719 were offered in various forms to address the conflict. In March 1998[,] the Drafting Committee to Revise Uniform Commercial Code Article 2 Sales made proposals to the American Law Institute and the National Conference of Commissioners of Uniform State Laws. Although the ideas in the draft cannot be attributed to the Commissioners, they are a source of scholarly insight and reveal the fact that a genuine conflict exists between [S]ections 2-719(2) and (3), a fact that Comment 1 does not acknowledge.
>
> . . . The amendments reveal the deep conflict in the Code with which the Commissioners wrestled. One proposed provision would have made a limitation on consequential damages per se unconscionable if an exclusive remedy failed to provide 'a minimum adequate remedy for breach of the obligations in the contract.' This proposal was rejected, as illustrated by the March 2000 revisions.
>
> To summarize, the proposed changes to the Code in their final form, before the March 2000 convention struck them, codified the Third Circuit's decision in Chatlos by enforcing all limitations on consequential damages in a commercial sales contract unless such limitation was determined to be unconscionable. Other general remedies would still be available. It is to these remedies that an injured buyer in a failed remedy situation should turn to provide the quantum of relief the parties bargained for.[179]

Given the ambiguity inherent in Section 2-719, it would seem that a case-by-case approach would be justified. But as noted, this case-by-case

177. *See id.* at 167 (recognizing the inconsistencies of courts in applying Section 2-719 and the Commissioners' lack of clarity in Comment 1 discussing the interaction between Sections 2-719(2) and (3)).

178. *See id.* at 167–68 (describing the amendments to Section 2-719 proposed between March 1998 and March 2000, which were ultimately rejected).

179. *Id.* at 167–68.

approach has not been widely adopted—in part due to the lack of support found in the text and Official Comments to UCC Section 2-719.[180]

To address the conflict between these approaches, several commentators have offered alternative solutions when failure of essential purpose collides with an exclusion of consequential damages clause. Professor Howard Foss proffered an objective approach.[181] Professor Foss analyzed several cases featuring this issue to catalog the various factors a court might consider.[182] Foss proposed using objective factors, such as the seller's conduct, foreseeability, contract language, and other contextual factors to assist courts.[183] However, the Foss approach seems to do nothing more than mirror the case-by-case approach—but with more guidance.[184]

In the most recent article to address the problem, Robert J. Williams advocated a limited consequential damages approach. Williams argued that consequential damages should be awarded for breach of promise to remedy a defect unless such damages are explicitly excluded by contract.[185] But Williams asserted that such damages should be limited to "those losses incurred after the point in time that the limited remedies promised under the contract fail of their essential purpose."[186] In other words, losses incurred during the remedial period would not be recoverable.[187]

In a similar vein, Professor Henry Mather argued that the solution should be a presumption that "[i]n the absence of an explicit or clear indication to the contrary," the "buyer [has] agreed to exclude consequential damages only on the condition that the defects are corrected by repair or replacement within a reasonable time."[188]

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180. *See* Karl S. Yohe, *The Inherent Ambiguity of Uniform Commercial Code Section 2-719: "Failure of Essential Purpose" v. "Unconscionability,"* 1987 U. ILL. L. REV. 523, 536–37 (1987) (highlighting that the "Uniform Commercial Code does not suggest that unsophisticated consumers are entitled to special protection for economic loss," and thus does not support the case-by-case approach).

181. *See generally* Foss, *supra* note 34, at 551–52 (applying an objective approach to the issue of "whether the exclusion of consequential damages will be respected in the face of [a] [s]eller's failure to repair.").

182. *Id.* at 556–78.

183. *Id.* at 578–87.

184. *See id.* at 578 (arguing that the purpose of the objective approach is to determine whether the parties intended to allocate certain risks to the buyer).

185. Williams, *supra* note 38, at 160–61.

186. *Id.* at 161.

187. *Id.*

188. Mather, *supra* note 151, at 691; *see also* Yohe, *supra* note 180, at 524 (arguing that a similar rebuttable presumption should be codified).

Despite the existence of these various proposals—sometimes for many decades—courts have continued to gravitate toward one of the two major approaches: dependent or independent.

III. CONTRACT CONSTRUCTION/INTERPRETATION AS A SOLUTION

The dependent and independent approaches cannot be definitively supported by the text or Official Comments to UCC Section 2-719, as provisions can be cited that both support and work against each approach.[189] Yet courts have been reluctant to embrace a case-by-case approach, partially due to a lack of support for such an approach in the UCC.[190] But what if there were support in the UCC, just not in the section to which the courts keep looking? In fact, there is support in Section 2-202, which addresses the parol evidence rule.

To explain why Section 2-202 is implicated, let us return to the introductory hypothetical. Recall that Noah's Storage Corp. had purchased A/C units from CoolClimate, Inc. with an exclusive repair or replace remedy and a limitation of consequential damages clause. After purchase, the A/C units failed, causing Noah's Storage to incur consequential damages. This interplay of an exclusive remedy failing of its essential purpose and what then to do with the exclusion of consequential damages is a recurring one. But what if the consequential damages clause had the following added language: "This clause shall have no effect if the exclusive remedy fails of its essential purpose"? If such a clause was present, then Noah's Storage would undoubtedly win, as explicit terms should control. Similarly, if the clause had the following language: "This clause shall survive even if the exclusive remedy fails of its essential purpose," CoolClimate should win because again, the explicit terms should control.

When courts apply the dependent or independent approach, they are essentially construing into the contract the above language. The dependent approach reads into the contract the former language, and the

189. *See* Yohe, *supra* note 180, at 523 ("Authorities generally agree that [S]ubsections 2-719(2) and 2-719(3) of the Uniform Commercial Code conflict."); *see also* Williams, *supra* note 38, at 149, 156, 167–68 ("It is apparent that the Commissioners at some point came to understand the conflict between [S]ections 2-719(2) and (3), because between March 1998 and March 2000 several proposed amendments to [S]ection 2-719 were offered in various forms to address the conflict. In March 1998 the Drafting Committee to Revise Uniform Commercial Code Article 2 Sales made proposals to the American Law Institute and the National Conference of Commissioners of Uniform State Laws. Although the ideas in the draft cannot be attributed to the Commissioners, they are a source of scholarly insight and reveal the fact that a genuine conflict exists between [S]ections 2-719(2) and (3), a fact that Comment 1 does not acknowledge." (internal citations omitted)).

190. *See* Hagen, *supra note* 149, at 132 (noting the approach is applied relatively infrequently and that it "is not supported by the Code or its official comments").

independent approach reads into the contract the latter language. Alternatively, we could view courts as simply treating the clauses as either dependent or independent—as a matter of interpretation.[191] In either case, Section 2-202 provides guidance on how to resolve the issue.

A. UCC Section 2-202 and Contract Construction/Interpretation

Section 2-202, which deals with parol or extrinsic evidence, states the following:

> Terms with respect to which the confirmatory memoranda of the parties agree[,] or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to such terms as are included therein[,] may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement[,] but may be explained or supplemented
>
> (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
>
> (b) by evidence of consistent additional terms unless the court finds the record to have been intended also as a complete and exclusive statement of the terms of the agreement.[192]

This provision is hardly a model of clarity, but courts have applied it—similar to the approaches found in the common law as to when and why parol evidence should be introduced. Section 2-202 provides that if the contract is a complete and exclusive statement of the terms of the agreement, then consistent additional terms should not be introduced.[193] This is akin to a finding that the contract is fully integrated.

Courts rule on whether a contract is fully integrated as a matter of law.[194] In considering whether a contract is fully integrated, some courts utilize a four corners approach—only permitting outside evidence if the contract on its face does not appear to be a complete and exclusive statement of the terms.[195] However, this approach does not appear to be favored by the UCC,[196] and the Official Comments provide that

191. *Cf.* Samuels, *supra* note 120, at 240–41 ("[I]t is possible that the net effect of subsection (2) [of 2-719] is simply to direct inquiry to whether the damages incurred are of the type which are included within the limitation . . . . That is, it is but a test for determining intent, which is as the heart of contract interpretation anyway.").

192. U.C.C. § 2-202 (A.L.I. & UNIF. L. COMM'N 2023).

193. *Id.* § 2-202(b).

194. *See* ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 270, 278 (West 3d ed. 2014) (stating that courts, but not all courts, "follow Williston by determining whether a writing is complete (fully integrated) without the aid of extrinsic evidence.").

195. *Id.* ("One approach, favored by those who believe the parol evidence rule serves a useful role, requires the judge to determine the admissibility of parol evidence simply by reading the contract, without resort to extrinsic evidence . . . .").

196. WHITE, SUMMERS & HILLMAN, *supra* note 18, at 225–26.

consistent additional terms may be admitted so long as they would certainly have been included had they been agreed upon.[197]

Instead of a four corners approach, other courts adopt a contextual approach and consider outside evidence before determining whether the contract is fully integrated.[198] If the contract is a final expression as to the matters it addresses, but is not a complete and exclusive statement of the terms, then the contract is said to be partially integrated.[199] In such a case, outside terms may be introduced to explain or supplement, but not to contradict what is in the writing.[200] However, even if a contract is fully integrated, trade usage, course of performance, and course of dealing may be introduced—again to explain or supplement, but not to contradict what is in the writing.[201]

A related concept to integration is ambiguity.[202] Though Section 2-202 does not use the words ambiguity, it is addressed in the Official Comments.[203] As with the issue of integration, courts decide as a matter of law whether a contract term is ambiguous or unambiguous.[204] However, Official Comment (1) to UCC Section 2-202 explicitly rejects a four corners approach. It states: "[t]his section definitely rejects . . . (c) [t]he requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous."[205] Thus, once a court finds that a term is ambiguous, extrinsic evidence may be introduced to resolve the ambiguity.[206] And—as with fully integrated contracts—even if a court finds that a term is unambiguous, trade usage, course of performance, and course of dealing may be introduced to explain or supplement—but not contradict—the terms.[207]

Turning to the interaction between a limited remedy and an exclusion of consequential damages clause, a court could address the issue as one in which the terms present either an issue of integration or ambiguity. If

197. U.C.C. § 2-202, cmt. 3 ("If the additional terms are such that, if agreed upon, they would certainly have been included in the record in the view of the court, then evidence of their alleged making must be kept from the trier of fact.").

198. HILLMAN, *supra* note 194, at 270–71, 278.

199. *Id.* at 278.

200. *Id.* at 277–78.

201. WHITE, SUMMERS & HILLMAN, *supra* note 18, 238.

202. HILLMAN, *supra* note 194, at 272.

203. U.C.C. § 2-202 cmt. 1 (A.L.I. & UNIF. L. COMM'N 2023).

204. *See* HILLMAN, *supra* note 194, at 272.

205. U.C.C. § 2-202 cmt. 1.

206. HILLMAN, *supra* note 194, at 272 ("The idea behind the ambiguity exception is that a court must admit parol evidence if a writing is unclear, even if the parties intended the writing to be complete.").

207. WHITE, SUMMERS & HILLMAN, *supra* note 18, 238–40.

buyers seek to introduce statements that the exclusion of consequential damages was limited to the exclusive repair or replace remedy, the court would be faced with an integration issue. However, it seems that the issue is more likely to arise as an ambiguity issue. As Professor Foss noted, "[e]xtrinsic evidence should be admissible to interpret the exclusion. After all, there is a necessary ambiguity in the meaning of the exclusion when the limited remedy fails. The ambiguity is whether the exclusion continues in such event to be applicable."[208]

B. Contract Construction/Interpretation as a Uniform Approach

Though Section 2-719 does not make direct reference to Section 2-202, it does interact with that section via the invocation of a limited remedy as a form of warranty. Section 2-316 is the relevant section addressing a seller's ability to limit remedies. It provides in subsection (1) that

> [w]ords 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.[209]

The reference to Section 2-202 is meant to address the situation where sellers do not want to be bound by the unauthorized statements of their representatives.[210] However, its invocation recognizes that limited warranties may call into question what was promised or intended by a limited warranty. Even without express reference in Section 2-202, the question of whether an exclusion of consequential damages clause applies when a limited remedy fails presents an issue of ambiguity—unless the contract expressly addresses the matter.

This issue was presented before the court in *AMF, Inc. v. Computer Automation, Inc.*[211] AMF purchased computer equipment from Computer Automation, Inc. (CAI) in the late 1970s.[212] AMF sued alleging that the equipment was faulty.[213] CAI had included an exclusive repair or replace provision as well as a disclaimer of all indirect damages, including consequential damages.[214] On motion for summary judgment, each party

208. Foss, *supra* note 34, at 573.

209. U.C.C. § 2-316(1) (emphasis added).

210. *Id.* § 2-316 cmt. 2.

211. AMF Inc. v. Comput. Automation, Inc., 573 F. Supp. 924, 928 (S.D. Ohio 1983), *abrogated by*, RB-3 Assocs. v. M.A. Bruder & Sons, Inc., No. C–3–95–198, 1996 WL 1609231 (S.D. Ohio Aug. 26, 1996).

212. *AMF*, 573 F. Supp. at 926.

213. *Id.*

214. *Id.* at 927.

disputed whether the remedy had failed of its essential purpose.[215] The court held that a genuine issue of fact prevented it from ruling on the issue. Moreover, CAI moved that the consequential damages provision should stand if the remedy failed of its essential purpose.[216] Noting the possible ambiguity in the contract language, the court denied CAI's motion, holding that

> [t]he relevant language arguably is ambiguous . . . . Even if this ambiguity can be explained away, California follows a relatively liberal policy of usually permitting [the] introduction of parol evidence to enable a trier of fact to determine the intent of the parties, even if the contractual language is unambiguous. Based on this policy, the intent of the parties regarding the aforementioned contractual language represents another triable issue.[217]

Treating the conflict between a limited remedy that has failed of its essential purpose and an exclusion of consequential damages clause as an issue of contract interpretation presents a uniform approach that avoids the deficiencies observed in the dependent and independent approaches. Contract interpretation will necessarily incorporate elements of the case-by-case approach but in a way consistent with the UCC. Further, it may offer a more accurate explanation of the so-called dependent approach (and why other courts and commentators struggled to accurately label decisions such as *American Electric Power* and *Adams*).[218] Indeed, Professor Foss noted that this approach may provide a more accurate description of the court's reasoning in *Waters*— a decision often cited as adopting the dependent approach.

> The use of extrinsic evidence to interpret the meaning of an exclusion was demonstrated in *Waters v. Massey-Ferguson, Inc.* Despite exclusionary language providing in part that 'in no event shall the owner be entitled to recover for incidental, special or consequential damages,' the court interpreted the exclusion to mean that the buyer could recover for consequential damages caused by the seller's failure to repair a tractor pursuant to the repair and replace remedy. What seems [to be] a strained interpretation makes sense in light of the extrinsic evidence. The court considered the language itself, the creative context, and the commercial context and concluded that the parties [had] contemplated that repair of the tractor was a certainty. Therefore, the exclusion could not have been intended to exclude consequential

215. *Id.* at 927–28.

216. *Id.* at 928.

217. *Id.* at 929.

218. *See supra* notes 65–72, 141–156 and accompanying text (discussing the courts' rationales in *American Electric Power*, *AES Technology Systems*, *Razor*, and *Adams*).

> damages arising from an event as unexpected as a failure to repair the tractor.
>
> The language interpretation approach used in *Waters* seems calculated to avoid the issue of whether the failure of a limited remedy invalidates an exclusion of consequential damages [clause]. To the contrary, however, the *Waters* approach simply rephrases the issue in terms of the reasonably intended meaning of the exclusion language upon a failure of the limited remedy. The question still being answered is whether the exclusion survives the failure, and the *Waters* court gives us a useful insight into how to answer this question. The court looked at the entire context of the deal. From the context comes the objective meaning of the language and an objectively intended result regarding the continued validity of the exclusion upon a failure of the limited remedy. The same inquiry concerning the complete context should be made when the issue is phrased in terms of whether the exclusion survives the failure. It is the complete context of the deal that offers the best guidance for resolving the issue.[219]

This "language interpretation approach" may also help explain the independent approach cases. Rather than viewing such cases as adopting a per se independent approach, they could also be viewed as cases in which the courts did consider the ambiguity argument and simply rejected or resolved it in favor of an independent approach.

American Electric Power, for instance, is much better explained as a case in which the court looked at the contract language and context of the transaction and found that it unambiguously favored the seller. Alternatively, it could be viewed as a case where the perceived ambiguity was resolved by the placement of the clauses in the contract and the context of the transaction.[220]

Chatlos explicitly found that the existence of the consequential damages clause was meant to survive but still noted that failure of essential purpose was not irrelevant—it simply moved this consideration to the unconscionability determination.[221] Viewed another way, the court found that the contract was a complete and exclusive statement of the terms that unambiguously provided for survival of the clause.

Razor likewise cited to the plain language of the contract as supporting a finding that the clause was independent.[222] Moreover, treating the issue

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219. Foss, *supra* note 34, at 573–74.

220. *See supra* notes 65–72 and accompanying text (discussing the *American Electric Power* court's rationale).

221. Chatlos Sys., Inc. v. Nat'l Cash Reg. Corp., 635 F.2d 1081, 1086–87 (3d Cir. 1980).

222. Razor v. Hyundai Motor Am., 854 N.E.2d 607, 620 (Ill. 2006) ("But this seems to ignore the plain language of the contract in a fundamental way—for if the buyer does not intend to renounce consequential damages when the limited remedy has failed, in what context *could* the disclaimer of consequential damages operate?").

as one of contract interpretation prevents courts from resorting to strained unconscionability analyses to achieve the same result as simply stating that under the circumstances—in fact the same circumstances that the courts look at for unconscionability—the term is ambiguous and favors the buyer's reading.

Pierce and *Coop's Pretzels* are much easier cases to decide as contract interpretation cases. In both, looking to whether the exclusion was meant to address a situation where the seller, either willfully or negligently, failed to meet its obligations under a limited remedy would permit the court to consider the very same facts that led to a finding of unconscionability.[223] Under this approach, sellers could still protect themselves by simply removing the ambiguity and explicitly addressing the issue in the contract.

CONCLUSION

Courts and commentators have long debated the proper way to resolve the issue of whether a clause excluding consequential damages should survive when a limited remedy fails of its essential purpose. The two main approaches—the dependent and independent approaches—have often been justified based on citations to conflicting provisions of Section 2-719 and its Official Comments. But it is clear that Section 2-719 is itself ambiguous and an inadequate source for justifying either approach. Furthermore, rigid application of the independent approach has led to some decisions in which courts—bound by the conclusion that the consequential damages clause must survive—resort to strained unconscionability analyses to strike the exclusion clause and find for the buyer.

A better approach to the issue of consequential damages—and one supported by the UCC—is to treat it as one of contract construction or interpretation under Section 2-202, rather than as an issue of statutory construction under Section 2-719. When these two common contract clauses collide, an ambiguity necessarily arises as to whether the exclusion of consequential damages survives when the exclusive remedy fails of its essential purpose. Under such an approach, courts should consider the context in which the contract was made—similar to the case-by-case approach—for the purpose of deciding whether the term is ambiguous and resolving ambiguity if the court is also the trier of fact.

223. Pierce v. Catalina Yachts, Inc., 2 P.3d. 618, 624 (Ala. 2000); Coop's Pretzels, LLC v. Intertape Polymer Corp., 661 F. Supp. 3d 932, 946 (D. S.D. 2023).