UCC Section 2-719: Limited Remedies and Consequential Damage Exclusions

Kathryn I. Murtagh

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NOTES

UCC SECTION 2-719: LIMITED REMEDIES AND CONSEQUENTIAL DAMAGE EXCLUSIONS

I

INTRODUCTION

Many commercial contracts contain both a limited remedy provision and a consequential damage exclusion. A limited remedy clause limits the Seller's liability under the contract; if the Seller delivers a defective product, his contractual obligation is to provide a conforming product, by repairing or replacing the goods already delivered. A consequential damage exclusion clause further limits the Seller's contractual liability. It provides that under all circumstances the Buyer bears the risk of consequential loss. Even if the Seller breaches the agreement, the exclusion bars the Buyer from recovering consequential damages. Contracts with both limited remedy and consequential damage clauses limit the Buyer's remedy for the Seller's breach of contract to repaired or replaced goods.

Contracts containing both a limited remedy clause and a consequential damage exclusion present a difficult problem when the Seller either refuses or is unable to perform the limited remedy of

1 This note discusses only commercial transactions. Also, for simplicity, this note refers to the parties as "Seller," the party who manufactured or supplied the defective goods, and "Buyer," the party who purchased or received the defective goods from the Seller. In most cases, the Buyer sues the Seller to recover damages once the limited remedy has failed. The Seller, however, may initiate an action to recover the purchase price of the goods. Because either party may initiate the action, this note avoids the terms "Plaintiff" and "Defendant."

2 A typical contract clause which limits a Buyer's remedy to repair or replacement and excludes consequential damage recovery may provide: "The Vendor warrants the equipment sold hereunder to be free from defects in material or workmanship . . . . In case of any such defects, Vendor's liability is limited to replacement . . . of any material, parts or equipment which may be defective . . . . Vendor assumes no liability for consequential damages of any kind." Jones & McKnight Corp. v. Birdsboro Corp., 320 F. Supp. 39, 40 & n.2 (N.D. Ill. 1970).

3 Section 2-715 of the Uniform Commercial Code defines consequential damages to 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." U.C.C. § 2-715 (1978). Under certain circumstances, the Seller may not exclude consequential damages. For example, in the case of consumer goods, the Seller may not exclude consequential damages for personal injury. See U.C.C. § 2-719(3). The restrictions placed on modifying and rescinding express and implied warranties are analogous. See U.C.C. § 2-316.

4 The Seller's breach of a contract by failing to perform the limited remedy does
repair or replacement. In that case, if the contract bars consequential damage recovery, the Buyer is left with nonconforming goods and no contractual remedy. This situation presents the issue of whether the Buyer should be able to recover consequential damages, even though the contract prohibits their recover, when the Seller fails to perform the only remedy (repair or replacement) contractually available to the Buyer.

Section 2-719 of the Uniform Commercial Code addresses this issue. Courts divide sharply on whether section 2-719 permits consequential damage recovery despite an exclusion clause when the seller cannot perform the limited remedy. Some courts award consequential damages only if the exclusion clause is unconscionable, regardless of the effectiveness of the repair or replacement remedy. This note refers to these courts as "independent courts." Other courts automatically void the consequential damage exclusion clause whenever the limited remedy is unavailable. This note refers to these courts as "dependent courts." Neither approach, however, adequately resolves the issue.

This note proposes a hybrid method to determine the effect of a failed limited remedy upon the validity of a consequential damage exclusion. Under the hybrid method, when the limited remedy is unavailable, a court should void the consequential damage exclusion unless the contract otherwise provides a fair measure of relief to the injured Buyer. By using a fact-specific inquiry into the parties' intent, this method resolves the problems inherent in both current approaches.

II
ANALYSIS OF CURRENT APPROACHES

Section 2-719 of the Uniform Commercial Code addresses consequential damage exclusion and limited remedy clauses. This section provides in pertinent part: "(2) Where the circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act. (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." Currently, courts offer two distinct interpretations

not prevent him from seeking protection under the consequential damage exclusion clause. For a general discussion of the role of agreed remedies in damage calculation, see E. Farnsworth, CONTRACTS §§ 12.8-9, 12.18 (1982). See also infra notes 50-54 and accompanying text for a discussion of the equitable concerns raised by allowing the Seller to claim protection under the consequential damage exclusion after he has repudiated the agreement by failing to perform the limited remedy.

5 See infra notes 9-41 and accompanying text.
6 See infra notes 42-61 and accompanying text.
7 U.C.C. § 2-719.
of this provision.

A. Independent Courts

Independent courts evaluate consequential damage exclusion and limited remedy clauses in the same agreement as independent of each other. These courts void the consequential damage exclusion only if the exclusion is unconscionable, regardless of whether a limited remedy in the same agreement has failed of its essential purpose. Thus, the Buyer recovers consequential damages only if he can establish the unconscionability of the consequential damage exclusion. The Seller's failure to honor the limited remedy clause does not affect the validity of the consequential damage exclusion.

Independent courts interpret the remedy clauses literally and interpret section 2-719 narrowly to justify their approach. Under this view, if the contract does not expressly condition the validity of the consequential damage exclusion upon the availability of the limited remedy, the failure of the latter does not automatically invalidate the former. These courts further reason that since 2-719 provides two separate subsections with two distinct standards for evaluating consequential damage and limited remedy clauses, each clause must be evaluated separately under the appropriate standard. Finally, independent courts interpret official comment to section 2-719, which provides that a consequential damage exclusion is "merely an allocation of unknown and indeterminable risks," to shift the risk of consequential loss to the Buyer unless evidence of unconscionability exists.

Some commentary supports the independent courts' ap-

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8 See, e.g., Kaplan v. RCA Corp., 783 F.2d 463, 467 (4th Cir. 1986) (even if remedy of repair or replacement failed of its essential purpose, plaintiffs entitled only to alternative remedy provided for in contract—the refund of purchase price); Chatlos Sys., Inc. v. National Cash Register Corp., 635 F.2d 1081, 1086-87 (3d Cir. 1980), cert. dismissed, 457 U.S. 112 (1982) (disclaimer of consequential damages must be evaluated on its own merits); S.M. Wilson & Co. v. Smith Int'l, Inc., 587 F.2d 1363, 1375 (9th Cir. 1978) (failure of limited remedy to serve its purpose does not require permitting recovery of consequential damages).

9 See, e.g., Kaplan, 783 F.2d at 467 ("[A] finding that the repair and replacement warranty had failed would not void [the] exclusion of consequential damages provisions as well."); Chatlos Sys., 635 F.2d at 1083 ("Although we accept the determination on the failure of the contractual remedy, we do not agree that the disclaimer of consequential damages is ineffective as a result...[t]hat clause must be evaluated on its own merits."); S.M. Wilson & Co., 587 F.2d at 1375 ("[T]he issue remains whether the failure of the limited repair remedy...requires permitting the recovery of consequential damages... We hold it does not.").

10 See infra notes 15-23 and accompanying text.

11 See infra notes 24-36 and accompanying text.

12 U.C.C. § 2-719 comment 3.

13 See infra notes 33-34 and accompanying text.
The approach, though facially logical, is inherently weak; it relies on imprecise assumptions about the parties’ intent and an unpersuasive interpretation of section 2-719.

1. Contract Interpretation

Independent courts justify their approach by a strictly literal construction of the parties’ agreement. Because the parties typically draft the consequential damage exclusion and limited remedy clauses in two separate contract provisions with no language conditioning the validity of the exclusion clause upon the availability of the limited remedy, independent courts reason that the clauses must be considered separately. Independent courts assert that the parties’ decision to draft the remedy clauses separately demonstrates an intent to unconditionally shift the risk of consequential loss to the Buyer.

_Cayuga Harvester v. Allis Chalmers Corp._ illustrates the independent courts’ approach to interpreting the parties agreement. In that case, the contract provided that “[t]he company’s liability . . . shall be limited exclusively to repairing or replacing parts . . . and in no event will the company be liable for consequential damages.” The court interpreted the consequential damage exclusion and the limited remedy clause independently because “no wording in the [contract] itself indicates that the provisions are interrelated or that the failure of defendant to adequately perform under the repair or replace warranty deprives it of the protection of the consequential

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16 See, e.g., Cayuga Harvester v. Allis-Chalmers Corp., 95 A.D.2d 5, 14, 465 N.Y.S.2d 606, 613 (1983) (no wording in the clause itself “indicates that the provisions are interrelated or that the failure of [the Seller] to perform under to repair and replacement warranty deprives it of the protection of the consequential damage exclusion.).

17 See, e.g., Office Supply Co., 538 F. Supp. at 787-88 (“Even if the repair remedy fails of its essential purpose, the buyer is limited to his breach of the bargain damages . . . unless he can prove that the exclusion of incidental and consequential damages was unconscionable.”); Cayuga Harvester, 95 A.D.2d at 14, 465 N.Y.S.2d at 613 (“It defies reason to suppose the [the Seller] could have intended to assume [consequential damages] risks.”).


19 Id. at 13, 465 N.Y.S.2d at 611.
damage exclusion." Additionally, the court noted that the most plausible risk allocation to be drawn from such contract language was that the defendant did not assume the risk of consequential loss in the face of a failed limited remedy.

The independent courts' literal construction of the parties' contract encourages overly formalistic drafting. Under this approach, the mere existence of two separate clauses not expressly conditioned upon each other requires an independent construction of each clause. This approach creates several problems. First, it requires the parties to explicitly address the effect of a failed limited remedy upon the validity of the consequential damage exclusion to ensure that a court will later respect their intent. Parties may anticipate the failure of a limited remedy, but few will be able to draft a workable remedy. Second, overly formalistic contract interpretation unfairly favors the party who can afford sophisticated bargaining techniques to ensure the use of his contract terms. Consequently, the party with greater resources can impose his contract terms on the other party. The contract terms will rarely reflect the true intent of the party with fewer resources because he can not afford the resources required to incorporate his terms into the agreement.

Furthermore, independent courts mistakenly presume that the contract demonstrates the parties' intent that the Buyer bear the risk of consequential loss when the limited remedy fails. A consequential damage exclusion by itself demonstrates some intent to shift the risk of consequential loss to the Buyer in case of breach. When coupled with a separate limited remedy clause, however, a consequential damage limitation does not conclusively establish the parties' intent to allocate the risk of consequential loss to the Buyer.

20 Id. at 14, 465 N.Y.S.2d at 613.
21 Id. at 14-15, 465 N.Y.S.2d at 613-14.
22 Some may argue that the Buyer should have bargained for more appropriate terms if his intent differed from the literal language of the contract. Under this view, courts that infer intent not expressed in the contract language improperly engage in a paternalistic effort to protect the Buyer from his own incompetently bargained agreement. While it may be theoretically correct, this argument ignores the practical difficulties of contract interpretation that the widespread use of form contracts in commercial transactions raises. Often, the Seller imposes its form language on the Buyer. The Buyer can not secure terms that demonstrate his willingness to assume the risk of consequential loss only if the limited remedy is available. For a complete discussion of the impact of form contracts on contract interpretation, see infra notes 46-48 and accompanying text. See also Dusenberg, Uniform Commercial Code Annual Survey: Sales & Bulk Transfers, 37 Bus. Law. 949, 961 (1982) (suggesting that the best way to avoid the section 2-719 conflict is to provide a limited remedy which never fails, such as a return of the purchase price).
23 Conceivably, a consequential damage exclusion coupled with a limited remedy shows some intent to shift the risk of consequential loss to the Buyer while the limited remedy remains effective. When the limited remedy fails, however, the damage exclusion itself does not demonstrate the intended risk allocation.
when the limited remedy fails. The language structure itself does
not indicate that the parties even considered the possibility of the
ineffective limited remedy. Moreover, the language fails to address
any intended consequences of the unavailability, as opposed to the
failure, of the limited remedy. Since the contract does not set forth
the interaction of the two clauses upon failure of the limited rem-
ey, courts should not presume from the mere existence of two sep-
ate clauses that the Buyer bears the entire risk.

2. Interpretation of Section 2-719

Independent courts interpret section 2-719 narrowly to support
their approach. Because the Code sets out two distinct standards in
two separate subsections for evaluating consequential damage ex-
clusion and limited remedy clauses, independent courts evaluate the
two contract clauses separately. They apply section 2-719(2)'s
failure-of-essential-purpose test to determine the validity of the lim-
ited remedy. Regardless of the validity of the limited remedy, the
courts then evaluate the consequential damage exclusion under the
unconscionability standard of section 2-719(3). Under the in-
dependent theory, the effectiveness of the limited remedy does not
affect the validity of the consequential damage clause.

Carboline Co. v. Oxmoor Center illustrates the independent
courts' interpretation of section 2-719. In Carboline, the parties' con-
tract limited the Seller's liability to repair or replacement, and ex-
cluded consequential damage recovery. Because the damage
exclusion itself was not unconscionable, the court refused to award
the Buyer consequential damages even though the limited remedy
had failed. Because the court interpreted sections 2-719(2) and 2-
719(3) as "mutually exclusive," the limited remedy's failure did
"not necessarily invalidate a separate provision of [the] agreement
excluding liability for consequential damages." The court denied
the Buyer consequential damages after it concluded that the exclu-
sion clause was not unconscionable.

The independent courts' interpretation of section 2-719 ig-

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24 See, e.g., Carboline Co. v. Oxmoor Center, 40 U.C.C. Rep. Serv. 1728, 1733 (Ky.
Ct. App. 1985) ("the provisions of [Section 2-719(2)] governing rights on a failure of
essential purpose, and the provision of [Section 2-719(3)] authorizing an express limita-
tion on consequential damages are mutually exclusive"); Cayuga Harvester v. Allis-Chal-
has two separate standards for evaluating consequential damage exclusions and limited
remedies).


26 Id. at 1733.

27 Id.

28 Id.

29 Id.
nores the specific purpose of the section and the general goal of Article 2. Generally, Article 2 promotes freedom of contract and allows the parties to formulate their own agreement. Section 2-719 tempers this general freedom by requiring that the breaching party fairly compensate the injured party for breach of the contract. Thus, courts should interpret section 2-719 to require fair compensation in case of breach, yet respect the parties' prerogative to exclude consequential damages.

Moreover, evaluating a consequential damage exclusion clause and a limited remedy clause by the separate standards given in section 2-719 improperly divides the transaction into distinct time periods. An example illustrates this problem. When a Buyer sues a breaching Seller for compensation under a contract, the court must first evaluate the limited remedy clause under section 2-719(2)'s failure-of-essential-purpose standard. The official comments to section 2-719 provide that "where an apparently fair and reasonable clause because of circumstances fails in its purpose . . . , it must give way to the general remedy provisions of this Article." This comment suggests that a court should focus on events that occurred after the parties entered the contract to determine if the limited remedy failed of its essential purpose. The court then must evaluate the consequential damage exclusion clause by the unconscionability standard of section 2-719(3). Unlike the failure-of-essential-purpose test, the unconscionability test focuses solely on events surrounding the formation of the contract. Unconscionability requires overreaching or oppression by the Seller when the parties formed the contract. By

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30 See, e.g., U.C.C. §§ 2-719 (damage limitations), 2-316 (exclusion and modification of warranties).
31 See U.C.C. § 2-719 comment 1 (parties "must accept the legal consequences that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract").
32 Several commentators recognize the error of evaluating each remedy clause by events in a separate time period. See, e.g., Eddy, supra note 14, at 31 ("Contract clauses do not change their scope of application, having one application at the time of formation and another at the time of decision. Therefore it is not strictly accurate to speak of an 'initially' fair remedy that 'later' operates unfairly."). But see Fahlgren, Unconscionability: Warranty Disclaimers and Consequential Damage Limitations, 20 St. Louis U.L.J. 435, 456 (1976) ("exclusion of consequential damages may become unconscionable due to seller's failure to live up to his express warranty") (emphasis in original).
33 U.C.C. § 2-719. See also E. Farnsworth, supra note 4, § 4.28, at 317-18 ("[2-719(2)] seems intended for a situation in which unexpected circumstances cause a clause that did not seem oppressive at its inception to misfire."); Note, supra note 14, at 674 (when goods develop various defects, and the Seller is either unable or unwilling to perform his sale repair or replacement, then the limited remedy will likely failed of its essential purpose).
34 The Code provisions addressing unconscionability do not define the concept. U.C.C. §§ 2-302, 2-719. For a definition of unconscionability, see generally E. Farnsworth, supra note 4, § 4.28, at 314-16 ("[u]nconscionability is broadly conceived to encompass not only the employment of sharp practices and the use of fine print and
focusing on events occurring after the contract formation when evaluating the limited remedy provision, but focusing exclusively on events surrounding the contract formation when evaluating the consequential damage exclusion, independent courts analyze the limited remedy and consequential damage exclusion clauses from two different time perspectives.\textsuperscript{35}

Evaluating the contract clauses under two time periods prejudices the injured buyer because the unconscionability inquiry, by definition, ignores the very events that required the court to evaluate the consequential damage exclusion clause—the events that caused the limited remedy to fail. Courts need to evaluate consequential damage exclusions only after they determine that a limited remedy failed to provide the Buyer with an adequate remedy. Yet, independent courts ignore the events that made the limited remedy inadequate when they evaluate the consequential damage exclusion in terms of the events of the contract formation. To compensate the Buyer fairly, courts should consider the events after the parties enter the contract in evaluating the consequential damage exclusion.

The inquiry ultimately focuses on the fairness of the Buyer’s recovery.\textsuperscript{36} Subsequent events bear directly on the fairness of the Buyer’s recovery, and courts should consider these events in evaluating a consequential damage exclusion. Even if a consequential damage exclusion clause is conscionable, the Buyer may not be fairly compensated without receiving consequential damages. The independent courts produce an inequitable result when they fail to consider the consequential damage clause in light of the events that required an evaluation of the exclusion.

\textbf{3. Presumed Risk Allocation}

Finally, independent courts justify their approach by presuming that because a contract contains a consequential damage exclusion clause, the risk of consequential loss in any situation, including failure of a limited remedy, most properly belongs to the Buyer. The convoluted language, but a lack of understanding and an inequity of bargaining power."; Eddy, \textit{supra} note 14, at 41 (suggesting that the unconscionability test should be applied "at the time [the contract] was made"); Fahlgren, \textit{supra} note 32, at 456 (elements of unconscionability include: one party misled as to the nature of the bargain, severe imbalance of bargaining power, specific terms appear outrageous).

\textsuperscript{35} Essentially, these courts consider subsequent events in evaluating the limited remedy, but limit their inquiry to conditions at the formation of the contract when determining the validity of the consequential damage exclusion.

\textsuperscript{36} For a discussion of the appropriate standard for reviewing a consequential damage limitation in light of a failed limited remedy, see \textit{infra} notes 61-72 and accompanying text.
Cayuga Harvester\textsuperscript{37} court relied on the presence of a consequential damage exclusion clause in the contract to deny the Buyer recovery. Independent courts mistakenly rely on section 2-719's official comments to establish a presumptive risk allocation. While the comments recognize that a consequential damage exclusion clause is "merely an allocation of unknown and indeterminable risks,"\textsuperscript{38} they do not suggest which party assumes the risk when a limited remedy fails. They merely state a truism—a consequential damage exclusion clause is a risk allocation device. The comments do not indicate which party bears the risk under all circumstances, nor do they support a presumption of risk allocation.

4. Other Concerns

Secondary concerns also undermine the independent courts' approach. Specifically, many courts presume the conscionability of terms in commercial contracts and place the burden of proof upon the Buyer to establish unconscionability.\textsuperscript{39} The independent courts' use of an unconscionability standard that focuses only on events at the time the parties entered the contract, coupled with a presumption of conscionability, essentially precludes a commercial Buyer from recovering consequential damages upon the failure of a limited remedy.\textsuperscript{40} The Buyer has the difficult task of overcoming the

\begin{itemize}
\item \textsuperscript{37} 95 A.D.2d 5, 465 N.Y.S.2d 606 (1983). (The court relied on the official comments to section 2-719 to support its argument.)
\item \textsuperscript{38} U.C.C. § 2-719 comment 3.
\item \textsuperscript{40} Independent courts rarely invalidate a consequential damage exclusion clause. When courts invalidate a damage exclusion, the cases usually involve consumers—where unconscionability is more easily established, or acts of oppression or unfair surprise in the commercial context. See, e.g., Waters v. Massey-Ferguson, Inc., 775 F.2d 587 (4th Cir. 1985) (consumer allowed to recover lost profits when Seller unable to repair or replace defective machinery); Kelyn, v. Yamaha Motor Corp., 152 Mich. App. 102 (1986) (consumer allowed to rescind contract for purchase of motorcycle after repair prevented thirteen weeks of use).
\item Commentators recognize the problems created by the independent courts' use of a limited unconscionability standard to evaluate a consequential damage limitation clause coupled with a presumption of conscionability in commercial settings. See generally Eddy, supra note 14, at 41 ("[S]ection 2-719(3) . . . makes an unconscionability attack upon a clause excluding consequential economic loss considerably more difficult than it might have been under section 2-302 alone."); Fahlgren, supra note 32, at 445 n.83 (suggesting that the language of section 2-719(3) itself creates a presumption of conscionability in commercial transactions).\end{itemize}
B. Dependent Courts

In contrast to independent courts, dependent courts evaluate consequential damage exclusion clauses as necessarily dependent upon the availability of the limited remedy clause in the same agreement. Dependent courts follow a two-step analysis. First, they evaluate the limited remedy under section 2-719(2) to determine if the clause has failed of its essential purpose. If the limited remedy has failed, the consequential damage exclusion is automatically void. If the limited remedy is effective, however, the Buyer must show that the consequential damage exclusion is unconscionable to recover. Thus, the enforceability of the consequential damage exclusion depends on the effectiveness of the limited remedy; the courts analyze the clauses as dependent upon each other.

Dependent courts rely on a presumption about the Buyer's intent, a literal interpretation of section 2-719, and equity to justify their approach. Dependent courts presume that a Buyer will only disclaim consequential damage recovery on the assumption that the Seller will perform the limited remedy promised under the contract. Dependent courts use this presumption as the first step in interpreting the parties contract. Second, dependent courts interpret section 2-719 to make all Code remedies available upon the failure of a limited remedy. Third, dependent courts rely on the equitable principle that a consequential damage exclusion clause shall not protect a Seller from consequential damages he caused in repudiating a limited remedy in the same agreement. Although it reflects the true intent of the parties more closely, the dependent courts' approach suffers from weaknesses similar to those of the independent courts' approach.

41 For a discussion of the process of proof involving a judicially created presumption, see generally I. WEINSTEIN & M. BERGER, EVIDENCE § 301 (1986) (defining judicial presumptions and their effects on the burden of proof); 9 J. WIGMORE, EVIDENCE § 2488 (chadbourn rev. 1981) (defining tests for ascertain the burden of proof given a judicial presumption).

42 See, e.g., R.W. Murray, Co. v. Shatterproof Glass Corp., 758 F.2d 266, 272 (8th Cir. 1985) (a failed limited remedy voids the consequential damage disclaimer); Matco Mach. & Tool Co. v. Cincinnati Milacron Co., 727 F.2d 777, 780 (8th Cir. 1984) ("Where circumstances cause an exclusive remedy to fail of its essential purpose, the Buyer may recover direct damages as well as consequential damages notwithstanding an express provision excluding such damages); Soo Line R.R. v. Freuhauf Corp., 547 F.2d 1365, 1373 (8th Cir. 1977) ("Despite the fact that limited remedy failed of its essential purpose, contract did not effectively bar consequential recovery."). See also Fahlgren, supra note 32, at 456 (suggesting failure of a limited remedy overcomes the presumption of conscionability raised by section 2719 in commercial contexts).
1. *Contract Interpretation*

Dependent courts begin by presuming that the parties intended to link the consequential damage exclusion and limited remedy.\(^{43}\) They recognize that a rational Buyer may agree to assume the risk of consequential loss to secure a promise of repair or replacement. Dependent courts further presume, however, that a rational Buyer would not enter such an agreement if the limited remedy he accepted as his exclusive remedy would be unavailable. Consequently, dependent courts conclude that the parties intended the validity of the consequential damage exclusion to depend on the effectiveness of the limited remedy; if the limited remedy fails, so does the consequential damage exclusion.

Although the dependent courts' approach may more closely approximate the actual intent of most commercial parties, it suffers from defects similar to those encountered under the independent courts' approach. It fosters overly formalistic drafting and undermines the actual intent of the parties.\(^{44}\) Any presumption of intent requires the parties to expressly address the effect of a failed limited remedy on the availability of consequential damages or risk a judicially imposed intent. Moreover, a contract that does not address a given contingency offers an inadequate basis for any presumption of intent.\(^{45}\)

The widespread use of standard form contracts in commercial transactions further undermines both the independent and dependent courts' sole reliance on contract language to determine the parties' intended allocation of consequential loss upon the failure of a limited remedy. Standard form contracts often contain both lim-

\(^{43}\) See, e.g., Soo Line R.R., 547 F.2d at 1373 (recognizing that a "Buyer, when entering into a contract, does not anticipate the sole remedy available to him will be rendered a nullity"); Jones & McKnight Corp. v. Birdsboro Corp., 320 F. Supp. 39, 43 (N.D. Ill. 1970) (Buyer had knowledge of Seller's limited liability, but was entitled to assume that the Seller would not unreasonably refuse to make good on the repair or replace remedy); Adams v. J.I. Case Co., 125 Ill. App. 2d 388, 261 N.E.2d 1, 7 (1970) (Buyer purchased with knowledge of the limited remedy, but could not have known Seller would unreasonably refuse to honor his obligations of repair or replacement); Kearney & Trecker Corp. v. Master Engraving Co., 211 N.J. Super. 376, 511 A.2d 1227 (1986) (risk allocation achieved by excluding consequential damages inextricably linked to limitation of remedies).

\(^{44}\) See *supra* notes 16-22 and accompanying text.

\(^{45}\) Neither independent nor dependent courts enforce the true intent of the parties. Instead, they rely on presumed intent which the contract language inadequately supports. The independent courts' literal interpretation yields a presumption that the Buyer assumed the risk of consequential loss under all circumstances, regardless of the availability of the limited remedy. Dependent courts presume that a rational Buyer would never agree to forego consequential damage recovery if his sole remedy of repair or replacement would be unavailable. When a limited remedy fails, the courts simply cannot presume the parties' intended risk allocation of consequential damage from the contract alone.
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ited remedy and consequential damage exclusion clauses. The use of pre-drafted forms, rather than documents specifically tailored to meet the individual requirements of a transaction, complicates contractual interpretation because parties often agree to the pre-drafted language with little or no bargaining. Often, the Seller can impose its form contract on the Buyer because of its superior bargaining position. When this occurs, the terms may fail to adequately reveal the actual agreement of the parties. Thus, standard form language often fails to demonstrate the parties’ true intent. Under such circumstances, the contractual language itself provides an insufficient basis from which courts can presume intent.

2. Application of Section 2-719

Dependent courts also justify their approach by interpreting section 2-719(2) literally to require the availability of all Code remedies whenever a limited remedy fails of its essential purpose. Dependent courts focus exclusively on the language of section 2-719(2), which provides that “where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.” Whenever the limited remedy fails dependent courts use section 2-715, which provides for consequential damage recovery, to grant the injured Buyer relief re-

A majority of the cases cited in this note use form contracts. See supra note 2 for an example of form contract language used to limit remedies and exclude consequential damage recovery.

For a discussion of the impact of form contracts on the Buyer’s ability to secure contract language which adequately evidences his intent, see supra note 22.

See Restatement (Second) of Contracts § 211(2) (1979) (a standard form contract “is interpreted whenever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms in the writing”); E. FARNSWORTH, supra note 4, § 7.12, at 501 (“[The rule of Restatement § 211(2)] plainly subordinates the meaning that an individual party may have attached to the contract language to the goal of equality of treatment for parties who are similarly situated.”).

See, e.g., Soo Line R.R. v. Freuhauf Corp., 547 F.2d 1365, 1373 (8th Cir. 1977) (the “fundamental intent of section 2-719(2) reflects that a remedial limitation’s failure of essential purpose makes available all contractual remedies, including consequential damages”); Jones & McKnight Corp. v. Birdsboro Corp., 320 F. Supp. 39, 44 (N.D. Ill. 1970) (the comments to section 2-719 indicate that the failure of the Seller to meet its repair or replacement obligations under the contract should deprive it of the benefits of the consequential damage exclusion).

U.C.C. § 2-719(2) (emphasis added).

See, e.g., R.W. Murray, Co. v. Shatterproof Glass Corp., 758 F.2d 266, 272-73 (8th Cir. 1985) (a failed limited remedy voids the consequential damage disclaimer); Matco Mach. & Tool Co. v. Cincinnati Milacron Co., 727 F.2d 777, 780 (8th Cir. 1984) (a Buyer may recover consequential damages whenever an exclusive remedy fails of its essential purpose regardless of a consequential damage exclusion in the same agreement); Soo Line R.R., 547 F.2d at 1373 (holding that a damage exclusion clause does not bar consequential damage recovery if the limited remedy fails of its essential purpose).
gardless of any remedy limitation in the contract itself.\(^5\)

The language of section 2-719, however, does not support the dependent courts' interpretation. The Code permits parties to limit their remedies and encourages freedom of contract.\(^5\) Consistent with this broad objective, courts should interpret the "remedy provided" by the Act to include contractual remedy limitations. Furthermore, the comments to section 2-719 do not suggest that courts should automatically void all contractual remedy exclusions whenever a limited remedy fails.\(^5\) The comments merely require a "fair quantum of relief" given the "essential bargain of the parties."\(^5\)

This flexible standard falls far short of requiring courts to invalidate all damage exclusion clauses upon the failure of a limited remedy. Courts should interpret section 2-719(2) to require less than a complete invalidation of a consequential damage exclusion upon failure of a limited remedy.

3. **Equity**

Dependent courts rely on equity as a final justification for their approach. They reason that fairness prohibits the Seller from claiming the protection of a consequential damage limitation after he caused the consequential damages complained of by repudiating the limited remedy in the same agreement.\(^5\) To implement their con-

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\(^5\) This interpretation of section 2-719 also ignores the general purpose of Article 2 and the specific purpose of this section. For a complete discussion of the purposes of section 2-719, see *supra* note 33.

\(^5\) For the Code authority that permits parties to limit contractual remedies for breach, see U.C.C. §§ 2-719(1) ("the agreement may . . . limit or alter the measure of damages recoverable under this Article"), 2-316(4) ("remedies for breach of warranty can be limited in accordance with §§ 2-718 and 2-719"), 2-316 comment 2 ("This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty."). See also Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC*, 53 Tex. L. Rev. 60, 75 (1974) (noting that the Code distinguishes between exclusions of warranties and limitations or exclusions of damages for breach of an existing warranty).

\(^5\) U.C.C. § 2-719 comment 1 (it is the "very essence of a sales contract that at least minimum adequate remedies . . . [and] at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract [be available]").

\(^5\) U.C.C. § 2-719 comments 1-3.

\(^5\) See, e.g., Koehring Co. v. A.P.I., Inc., 369 F. Supp. 882, 890 (E.D. Minn. 1974) (noting that "it would not be equitable to allow the seller to refuse to perform the one remedy available to the buyer and then be freed of any responsibility caused by this failure"); Jones & Mc Knight Corp. v. Birdsboro Corp., 320 F. Supp. 39, 43 (N.D. Ill. 1970) (holding that "the court would be in an untenable position if it allowed the [Seller] to shelter itself behind one segment of the warranty when it allegedly repudiated and ignored its very limited obligations under another segment of the same [agreement]"); Adams v. J.I. Case Co., 125 Ill. App. 2d 388, 261 N.E.2d 1, 7 (1970) (only if the Seller reasonably complies with the limited remedy can he claim the benefit of the consequential damage exclusion).
cept of fairness, dependent courts automatically void a damage exclusion whenever a limited remedy fails of its essential purpose. Dependent courts typically award consequential damages, however, only in factually compelling situations,\textsuperscript{57} such as when the Seller willfully breaches the agreement.\textsuperscript{58}

Awarding consequential damages because the Seller willfully breached the agreement confuses consequential damages with punitive damages.\textsuperscript{59} Consequential damages, by definition, compensate the Buyer for injury flowing from the Seller's breach. Punitive damages, on the other hand, punish the injuring party for particularly egregious behavior.\textsuperscript{60} Traditionally, punitive damages are not available for breach of contract.\textsuperscript{61} Dependent courts, by focusing exclusively on the Seller's conduct, condition the availability of consequential damages on the harshness of the Seller's behavior rather than on the injury the Buyer suffers. Awarding consequential damages because of the Seller's behavior, rather than the Buyer's injury, transforms consequential damages into punitive damages.\textsuperscript{62}

In addition, by basing their award on the facts of the situation, courts can achieve more equitable results. While the Seller's conduct may influence the recovery, circumstances may not require the

\textsuperscript{57} See, e.g., Caterpillar Tractor Co. v. Waterson, 13 Ark. App. 77, 679 S.W.2d 814, 817 (1984) (Seller's failure to repair machinery as provided under the contract resulted in 68 days down-time); Adams v. J.I. Case Co., 125 Ill. App.2d 388, 261 N.E.2d 1, 10 (1970) (Seller's refusal to repair machinery as provided under the contract caused 810 lost hours of operation).

\textsuperscript{58} Dusenberg, supra note 22, at 960 (suggesting that a court's award of consequential damages "seems often to be affected by the good faith of the seller in attempting to comply with the remedy, as distinguished from where he is willfully recalcitrant").

\textsuperscript{59} Many commentators also erroneously equate consequential damages with punitive damages. See, e.g., Note, RRX Industries, Inc. v. Lab-Con, Inc.: Is the Ninth Circuit's Inconsequential Treatment of Consequential Damages Limitations Under U.C.C. § 2-719 Unconscionable?, 20 Loy. L.A. L. REV. 181 (1986) (suggesting that courts should render a consequential damage exclusion clause unenforceable whenever the Seller willfully refuses to repair or replace the defective goods); Note, supra note 14, at 681 (suggesting that courts who treat consequential damage exclusions as dependent upon limited remedies rely on a willful-refusal-to-perform-causes-the-consequential-damages-alleged argument).

\textsuperscript{60} Restatement (Second) of Torts § 908(1) (1977) ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.").

\textsuperscript{61} Restatement (Second) of Contracts § 355 (1979) ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.").

\textsuperscript{62} This argument does not suggest that the Seller's conduct should not influence an equitable determination of the availability of consequential damages. Rather, it suggests that a court should not rely exclusively on the Seller's conduct in fashioning an equitable remedy. Many factors beyond the Seller's conduct bear on whether a Buyer has received fair compensation for his injuries. Indeed, a Seller who could not perform the limited remedy may be liable for consequential damages even if his breach was not willful.
courts to void the consequential damage exclusion completely. For example, the court could award only the consequential damages suffered after the Seller is given a reasonable time to repair or replace, the consequential damages stemming directly from the failed limited remedy, or the consequential damages that the Buyer could not reasonably avoid. All these remedies more fully serve the dependent courts’ equitable goal.

III

Hybrid Method

A. Description of the Method

The problems inherent in both the independent and dependent courts’ approaches illustrate the need to develop another method for evaluating the validity of a consequential damage exclusion clause upon the failure of a limited remedy in the same agreement. The hybrid method represents one method designed to alleviate the shortcomings of both current approaches. Under the hybrid method, a consequential damage exclusion is void when a limited remedy fails unless the contract provides the Buyer a fair measure of relief given the purpose of the parties’ bargain.

The hybrid method requires a multi-step application. First, a court must determine the purpose of the parties’ bargain. Specifically, the court must ascertain as nearly as possible the intended allocation of consequential loss upon the failure of the limited remedy. This analysis requires a fact-specific inquiry. The con-

Several courts use an approach similar to the hybrid method. See, e.g., RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543, 547 (9th Cir. 1985) (awarding consequential damages because the “facts justify the result”); Fiorito Bros., Inc. v. Freuhauf Corp., 747 F.2d 1309, 1315 (9th Cir. 1984) (consequential damages awarded on the theory that “[j]udging each case and each contract on its own merits will better allow courts to give effect to the parties’ intentions regarding the risk allocation and will lead less frequently to unjust results”); AES Technological Sys., Inc. v. Coherent Radiation, 583 F.2d 933, 940 (7th Cir. 1978) (holding that “[a]n analysis to determine whether consequential damages are warranted must carefully examine the individual factual situation” and noting that “[t]he purpose of the courts... is not to rewrite contracts... Rather it is to interpret the existing contract as fairly as possible”); Agristar Credit Corp. v. Schmidlin, 601 F. Supp. 1307, 1310 (D. Or. 1985) (notwithstanding contractual language barring their recovery, courts should determine whether or not consequential damages are available in light of the relevant facts of the case).

This method proceeds on the assumption that the parties actually considered the possibility of a limited remedy and formed an intent with regard to the allocation of consequential damages under these circumstances. Conceivably, some parties never consider, much less form an intent, about such circumstances. This note recognizes that such cases exist, and limits the hybrid method analysis to those cases where the parties actually intended a consequential damage allocation.

The use of extrinsic evidence to determine the parties’ intended effect of the failed limited remedy on the validity of the consequential damage disclaimer does not violate the parol evidence rule. See U.C.C. § 2-202, which provides that the contract
tract itself provides some evidence of the parties' bargain. If the language is unclear, however, the court must supplement the contract provisions with other evidence to determine the parties' intended risk allocation upon failure of a limited remedy.66

After determining the parties' risk allocation and concluding that the limited remedy has failed of its essential purpose,67 the court must decide whether the contract, as written, provides a fair measure of relief68 to the Buyer. The unconscionability standard applied by independent courts provides a floor on fair compensation; to provide fair relief to the injured Buyer a court must void any consequential damage exclusion extracted by oppression or unfair surprise. Beyond the unconscionability floor, however, the equitable concept of fair relief is more difficult to define. A court should consider several factors to determine whether the contractual remedies fairly compensate the injured Buyer.69 A court it should consider the availability of the goods promised from alternative sources, the degree to which the current unavailability of the product aggravates the Buyer's damages, whether the parties could have reasonably anticipated the contingency that caused the limited remedy to fail at the time they decided to exclude consequential damages, whether the act that caused the limited remedy to fail also resulted in the consequential loss, the adequacy of the recovery

may be "explained or supplemented" by extrinsic evidence. See generally E. Farnsworth, supra note 4, at §§ 7.3, 7.8; J. White & R. Summers, Uniform Commercial Code § 2-9 (3d ed. 1988).

66 A contract that does not clearly demonstrate intent is vague and should be supplemented by extrinsic evidence.

67 This note addresses the validity of a consequential damage exclusion clause when a limited remedy fails to achieve its essential purpose. Thus, this note does not discuss the standard for determining whether a limited remedy has so failed. For a general discussion of the standards courts use to determine whether a limited remedy has failed of its essential purpose, see Note, supra note 14, at 674 (suggesting that a limited remedy fails of its essential purpose whenever the Seller is either unable or unwilling to make good on the repair or replace remedy, or when the Seller does repair or replace, but does so in an unreasonable period of time).

68 The "fair relief" standard of the hybrid method, like any other standard based on equitable principles, is inherently flexible and imprecise.

69 Commentators have suggested many standards for awarding consequential damages upon the failure of the limited remedy in the same agreement. See Anderson, Failure of Essential Purpose and Essential Failure on Purpose: A Look at Section 2-719 of the Uniform Commercial Code, 31 Sw. L.J. 759, 776-77 (1977) (suggesting that a consequential damage limitation is unconscionable "[i]f there is a direct causal relationship between the failure of the exclusive remedy and the occurrence of consequential damages which the buyer had not agreed to assume"); Note, The Validity of Consequential Damage Disclaimers Following Failure of Essential Purpose of an Exclusive Remedy: S.M. Wilson & Co. v. Smith Int'l, Inc., 33 Sw. L.J. 930, 934 (1979) (suggesting that "an exclusion of consequential damages should be unenforceable upon failure of [the] essential purpose of an exclusive remedy only if in those cases where the seller's refusal or inability to perfect the exclusive remedy directly caused consequential damages that the buyer did not agree to assume").
without consequential damages, and the Seller's conduct.  

The fair measure of relief standard does not require a court to award or deny the Buyer all the consequential damages he seeks. Rather, the standard gives a court the flexibility to award the most appropriate amount of damages under the circumstances. In extreme cases, a court will either award or withhold all consequential damages. More often, however, a court must carefully weigh the circumstances in each case and award the amount of consequential damages that fairly compensates the Buyer.

A few hypotheticals illustrate the application of the fair measure of relief standard. Some circumstances justify an award of all the Buyer's consequential damages. Assume a Seller's breach of a limited remedy provision directly results in the Buyer's consequential loss. For example, assume that the Buyer of a machine notifies the Seller that the machine has malfunctioned and the Seller promises to repair the machine within one week. The Buyer waits this week in good faith reliance on the Seller's promise to repair. During this period, the Buyer incurs consequential damages. At the week's end, the Buyer contacts the Seller and again requests that he repair the machine; the Seller refuses. Because the same act that caused the


Courts, of course, can award damages flexibly under any approach. Under the independent and dependent courts' approaches, however, courts award either full recovery of consequential damages or no recovery at all. This dichotomy ignores the circumstances of individual cases which may justify a partial award of consequential damages.

The linear equation \[ \sum_{x=1}^{n} A_i X_i \] best conceptualizes the hybrid method's approach to calculating consequential damage recovery. In this equation, \( X_i \) represents the factors a court should consider. The degree to which each factor is present in a case determines the value of the \( X_i \) variable. For example, if the goods promised under the contract are unavailable from another source, a court may assign this factor the weight of 10 on a scale of 1 through 10. If the goods are available, however, but only at great expense to the Buyer, a court may assign the weight of 8 on the 10 point scale. Finally, if the goods are readily available in the open market, a court may assign a weight of only 2. The coefficient \( A_i \) represents the degree of importance the courts attach to each factor. A court that finds that the current availability of goods is more important than the Seller's conduct would assign a larger coefficient to the weight it attributes to the availability of the goods.

After the court has assigned all the appropriate values, the summation yields a value corresponding to a percentage of the total recovery possible where all the consequential damages represent the maximum possible \( A_i X_i \) value. This approach permits a variable recovery of consequential damages depending on the circumstances of each case. Though it appears to require mathematical precision, this approach actually allows a great deal of flexibility. Courts can change the degree to which a factor determines consequential damage recovery by altering the factor's coefficient or variable value.
limited remedy to fail also resulted in the consequential loss, the court should award all consequential damages to fairly compensate the Buyer.

Other circumstances require only a partial recovery of consequential loss to fairly compensate the Buyer. For example, assume a Seller's failure to repair or replace results in an initial consequential loss of $100,000. Replacement goods are available from other sources. When the Seller notifies the Buyer that he will not repair the goods, the Buyer refuses to purchase substitute goods and insists upon repair. The Buyer's refusal causes an additional $100,000 in consequential loss. The court should award only the first $100,000 of consequential loss to fairly compensate the Buyer. Because the goods were available from other sources, the Buyer could have avoided the additional $100,000 loss.

Finally, a court should deny a Buyer all consequential recovery in some circumstances. Assume that a Seller agrees to specially manufacture machinery for the Buyer. Both parties recognize the risks inherent in the experimental nature of the project, but agree to proceed after extended negotiations. Despite good faith efforts at repair, the Seller cannot deliver the machine as promised. The court should not award the Buyer consequential damages. The Seller acted in good faith and the Buyer should have reasonably anticipated the event that caused the limited remedy to fail at the time he assumed the risk of consequential loss.

B. Resolution of Current Problems

The problems inherent in the independent and dependent courts' approaches fall into two broad categories: contract interpretation and application of section 2-719. Both approaches threaten to foster overly formalistic contract drafting and override the parties' true intent by judicially presuming an intended allocation of risk. The use of form contracts in commercial transactions compounds this problem. In addition, both approaches' application of section 2-719 create difficulties such as improperly dividing the events of a transaction into separate time periods and presuming conscionability in commercial transactions. Finally, neither approach adequately considers providing an equitable level of compensation. The hybrid method addresses these problems more successfully.

1. Interpreting Contract Language

A court's primary task in interpreting any contract is to deter-
mine the parties’ intent. Neither the independent court’s strictly literal approach nor the dependent court’s presumption of intent adequately determines the parties’ intended allocation of consequential loss upon the failure of the limited remedy. In contrast, the hybrid method focuses directly on the parties’ intent. If the explicit language of the contract does not clearly indicate the intended allocation of consequential loss upon the failure of the limited remedy, courts must look to extrinsic evidence to more accurately determine the parties’ intent. In examining the extrinsic evidence, courts must consider the parties’ knowledge of the likelihood that the limited remedy would fail and the parties’ negotiations of the issue. Thus, courts following the hybrid method determine as accurately as possible the parties’ intended risk allocation and then interpret the contract language consistently with this intent.

2. Applying Section 2-719

Section 2-719 does not expressly address the consequences of an ineffective limited remedy on the validity of a consequential damage exclusion. The section’s silence permits several interpretations, including those of the independent and dependent courts. The courts’ approaches to section 2-719, however, generate several problems. The independent court’s view that the section requires independent consideration of the two remedy clauses unfairly prejudices the Buyer. The dependent court’s view that section 2-719(2) requires a full consequential damages recovery whenever a limited remedy fails leads to inequitable results. The hybrid method avoids both problems by interpreting section 2-719 in light of its specific purpose and the general purpose of Article 2.

The comments to section 2-719 suggest that courts should interpret the section to provide a sufficient remedy to the injured

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73 E. Farnsworth, supra note 4, § 7.9, at 492 (suggesting that courts can interpret a contract to carry out the intent of the parties only “in those relatively rare cases in which the parties attached the same meaning to the language in question”; otherwise, the court’s job is more complex). See also Restatement (Second) of Contracts § 202(1) (1979) (“if the principal purpose of the parties is ascertainable it is given great weight”).
74 See supra notes 15-23 and accompanying text for a discussion of the independent courts’ strictly literal interpretation of contract language.
75 See supra notes 43-48 and accompanying text for a discussion of the dependent courts’ presumption of the parties’ intent.
76 For the text of section 2-719, see supra text accompanying note 7.
77 See supra note 32 and accompanying text for a discussion of the prejudice that results from evaluating the remedy clauses using separate time periods.
78 See supra notes 56-63 and accompanying text for a discussion of the equity concerns inherent in automatically voiding a consequential damage exclusion clause upon the failure of the limited remedy in the same agreement.
79 For a general discussion of the purposes of Article 2 and section 2-719, see supra note 24.
Buyer considering all the circumstances of the breach—both at the
time the parties entered the agreement and during the performance
of the contract. Further, Article 2 recognizes the rights of parties
to formulate their own agreements. Together, the specific purpose
of section 2-719 and the general purpose of Article 2 recognize
that the Seller’s responsibility to provide fair relief for the injured
Buyer must temper the parties’ freedom of contract. Any applica-
tion of section 2-719 must consider the parties’ agreement and the
fairness of the Buyer’s compensation under the agreement if the
Seller breaches. The hybrid method requires courts to apply sec-
tion 2-719 in this manner. A court must recognize the parties’ right
to limit consequential damage recovery but must also consider the
circumstances of each case to ensure that the agreement fairly com-
.compensates the Buyer.

By considering all the circumstances of each case, both when
the parties entered and when they performed the agreement, the
hybrid method avoids the prejudice to the Buyer that results from
evaluating each remedy clause in separate time frames. The hy-
brid method also avoids the unfairness that occurs when dependent
courts automatically void a consequential damage exclusion upon
the failure of a limited remedy. Equity does not require a court to
void a consequential damage exclusion whenever a limited remedy
fails. By examining the fairness of the Buyer’s remedy under the
parties’ agreement, the hybrid method ensures a more equitable
recovery.

3. Additional Concerns

The hybrid method offers no panacea. It generates some costs
not present in the independent and dependent courts’ mechanical
approaches. For example, the flexible, case-by-case analysis creates
uncertainty for the contracting parties, and may engender some
overly formalistic drafting. Additionally, applying the hybrid
method requires much judicial time and sophistication. Thus, it
may further strain an overly burdened judicial system. These costs,
however, may be the price of effectuating the intent of the parties
while ensuring that the injured Buyer receives adequate compensa-

80 U.C.C. § 2-719 comment 1 (sales contract must provide “at least minimum ade-
quate remedies” and a “fair quantum of remedy for breach of the obligations or duties
outlined in the contract . . . . Where an apparently fair and reasonable clause because of
circumstances fails in its essential purpose . . . ., it must give way to the general remedy
provisions of this Article.”). See also supra note 55 and accompanying text.
81 For a discussion of Article 2’s freedom of contract provisions, see supra note 53.
82 See supra note 32 and accompanying text for a discussion of the prejudice inher-
ent in evaluating the remedy clauses from separate time periods.
CONCLUSION

The hybrid method best resolves the issue courts face when a contract excludes consequential damages and leaves the Buyer with an ineffective limited remedy. Under the hybrid method, a consequential damage exclusion clause is void upon the failure of the limited remedy unless the contract otherwise provides a fair measure of relief. Unlike the independent and dependent courts approaches, the hybrid method respects the underlying purpose of section 2-719—to provide a fair measure of relief to the injured Buyer. The hybrid method focuses on the intended risk allocation of the parties, rather than relying on a literal or presumed interpretation of their contract. The hybrid method recognizes the problems posed by the use of form contracts in commercial transactions and the presumption of conscionability of commercial contract terms raised in some jurisdictions. Through this analysis, the hybrid method ensures an equitable measure of relief for breach of contract.

Kathryn I. Murtagh