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Unconscionability and the Fundamental Breach Doctrine in Computer Contracts

Small businesses are responsible for much of the increased demand that has tripled the market for minicomputers and microcomputers since 1975.¹ A suitable and properly functioning computer system² can improve a small business’s efficiency and profits.³ A malfunctioning computer system, or one not suited to the business’s needs, however, can severely damage or destroy a small business.⁴ A vast increase in the amount of computer litigation⁵ has accompanied the increase in computer sales.⁶ The common complaint of small business litigants is that their new computer system does not perform as expected.⁷

Computer litigation has strained the traditional legal theories that evolved in a computerless society.⁸ Litigation involving computer systems requires a new analysis because the traditional legal theories of fraud and breach of warranty, as courts presently apply them, ignore the inherent differences between computers and ordinary business equipment.⁹ Many small businessmen who have relied on vendors to provide them with a suitable system thus find them-

² A “computer system” includes the hardware and software necessary to perform electronic data processing. Telex v. IBM, 4 C.L.S.R. 275, 293 (N.D. Okla. 1973). See also Smith, A Survey of Current Legal Issues Arising From Contracts For Computer Goods and Services, 1 COMP. L.J. 475, 477 (1979) [hereinafter cited as Smith].
³ Ackland, supra note 1, at 1, col. 1.
⁴ See Touhy & Shapiro, Suits Say Small Computers Aren’t What They’re Cracked Up To Be, 3 CHICAGO L.J., Dec. 1980, at 4, Col. 4 [hereinafter cited as Touhy & Shapiro].
⁵ Computer litigation refers to litigation between parties to an agreement for the purchase or lease of a computer system.
⁶ See Touhy & Shapiro, supra note 4, at 6, col. 3 (predicting 5,000 suits in next ten years); Ackland, supra note 1, at 1, col. 1 (presently “at least 600 cases nationwide”).
⁹ See text accompanying notes 48-61 infra.
selves with a computer that does not suit their needs and with no legal recourse.

This note initially discusses the problems plaintiffs encounter when trying to recover for fraud or breach of warranty in computer litigation. Part two examines the unconscionability doctrine as courts now apply it to computer contracts. Part three urges courts to use the fundamental breach analysis in applying unconscionability to computer contracts. Finally, this note investigates the support for applying a fundamental breach analysis found in the Uniform Commercial Code.

I. Recovery for Fraud or Breach of Warranty

Courts draw a very fine line between misunderstanding and misrepresentation in computer litigation. Plaintiffs alleging fraud have thus met with little success. In *Chatlos Systems, Inc. v. NCR Corp.*, the defendant represented that the computer system was a good investment, that it would solve inventory problems, that it would save labor costs, and that it would be “up and running” within six months. Although NCR failed to fulfill any of these promises, the United States Court of Appeals for the Third Circuit affirmed the district court’s conclusion that NCR’s representations were “overly optimistic, not fraudulent.”

In *Westfield Chemical Corp. v. Burroughs Corp.*, the defendant represented that the computer would generate efficiency and time savings and that it suited the plaintiff’s accounting system. When the computer failed to perform as represented, the plaintiff alleged fraud. The court dismissed the fraud claim stating: “[a]ny alleged misrepresentation concerning the function of the computer related to future performances not susceptible of actual knowledge and cannot serve as a basis for recovery in fraud.”

Generally, computer contracts fall within the scope of Uniform Commercial Code. See *Chatlos Systems, Inc. v. NCR Corp.*, 479 F. Supp. 738, 749 (D.N.J. 1979) for a discussion of the legal issues in computer contracts.

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10 635 F.2d 1081 (3d Cir. 1980).
11 *Id.* at 1083.
14 *Id.* at 1295, 6 C.L.S.R. at 439.
15 *Id.* But see Clements Auto Co. v. Service Bureau Corp., 444 F.2d 169 (8th Cir. 1971), where the defendant represented that the proposed computer system would “constitute an effective and efficient tool to be used in inventory control.” *Id.* at 181. Because the system failed to work, the court concluded that the defendant was liable for fraud. *Id.* at 186. Under Minnesota state law, as applied in *Clements*, however, scienter is not an element necessary to recover for fraud.
Commercial Code (U.C.C.) Article Two on sales. In disputes arising about the fitness or suitability of a computer system, sections 2-313, 2-314, 2-315, dealing with express and implied warranties, should provide the small businessman with sufficient protection. Courts, however, have routinely enforced clauses commonly contained in computer contracts that limit the effect of the express and implied warranties. For example, the defendant in *Garden State Food Distributors, Inc. v. Sperry Rand Corp.*, admitted that it had breached various warranties, yet the court enforced a clause limiting Sperry's liability and dismissed the plaintiff's damages claim.

In *Bakal v. Burroughs Corp.*, the plaintiff alleged breach of the implied warranties of merchantability and fitness for a particular purpose. The court dismissed the claim ruling that the defendant had successfully disclaimed all implied warranties. Similarly, in *Badger Bearing Corp. v. Burroughs Corp.* the court found it "unnecessary to determine whether Burroughs violated any express or implied warranty because . . . Burroughs effectively disclaimed all warranties . . . ."

II. Unconscionability

Since computers are inherently different from ordinary business equipment, a proper issue in computer litigation is whether courts should continue to routinely enforce exculpatory clauses. Under the general principle of freedom of contract, a court should enforce an exculpatory clause that the parties bargained for and made an inte-

16 See Chatlos Systems, Inc. v. NCR Corp., 635 F.2d 1081, 1084 (3d Cir. 1980); Earman Oil Co. v. Burroughs Corp., 625 F.2d 1291, 1297 (5th Cir. 1980).

17 If a businessman can prove breach of warranty, he can then recover damages as defined by U.C.C. § 2-714(2): The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.


19 Id. at 978.


21 Id. at 203, 343 N.Y.S.2d at 543.

22 Id. at 205, 343 N.Y.S.2d at 544-45.


24 Id. at 922. See also Moorhead, *supra* note 8, at 141; Bigelow, *Contract Caveats* in 2 COMP. L. SERV. (CALL.) § 3-1 (1978). The Parol Evidence Rule is also a particularly strong tool for a vendor, because a properly drafted integration clause can effectively exclude from the contract promises made by a computer salesman during sales presentations. Smith, *supra* note 2, at 485. Since the user cannot prove an express warranty, he cannot recover for breach of an express warranty.

25 See text accompanying notes 48-61 *infra*. 

NOTE
gral part of the contract. If, however, the exculpatory clause is unconscionable, or "contrary to the essential purpose of the agreement,"26 a court should "so limit the application of [the] unconscionable clause as to avoid any unconscionable result."27

A. Majority View

In computer litigation, the majority of courts have looked to the parties' relative commercial sophistication in deciding whether exculpatory clauses are unconscionable. The court in Bakal found "nothing unconscionable as far as the agreement between [the] parties,"28 since the clause limiting liability was common to commercial agreements and since "limitation of damages where the loss is commercial is not [unconscionable]."29 In Badger, the court upheld a clause disclaiming warranties after ruling that the failure to timely raise the unconscionability issue precluded an inquiry into it.30 The court, however, then stated that the disclaimer clause was not unconscionable. "Although the plaintiff was less knowledgeable about computers than the defendant, as a businessman he must be deemed to possess some commercial sophistication and familiarity with disclaimers."31

B. Minority View

Instead of focusing on the parties' relative commercial sophistication, a minority of courts have looked to the parties' relative computer sophistication. In Chatlos Systems, Inc. v. NCR Corp.,32 for instance, the Third Circuit found "no great disparity in the parties' bargaining power or sophistication"33 since the plaintiff was "a manufacturer of complex electronic equipment, [and] had some appreciation of the problems that might be encountered with a computer system."34 Only after determining that the parties were of relatively equal computer sophistication did the court uphold a clause limiting NCR's liability for breach of warranty.

A California district court in Glovatorium, Inc. v. NCR Corp.35 also

26 U.C.C. § 2-302, Comment 2.
27 U.C.C. § 2-302(1).
29 Id. at 204, 343 N.Y.S.2d at 544.
31 Id.
32 635 F.2d 1081 (3d Cir. 1980).
33 Id. at 1087.
34 Id.
examined the parties' relative computer sophistication, but refused to uphold a limitation of liability clause stating:

[I]f there was ever a case of unconscionability, this is the classic case. The very idea of marketing this product was to — it was targeted at the first-time computer user, that is people who didn't know — not only didn't know anything about computers, but had no experience with them, and didn't know what the consequences would be of an inadequate product. . . . NCR was under a special obligation in dealing with the first-time computer user . . . .

The question, therefore, is whether in computer litigation courts should focus on the parties' relative commercial sophistication or on their relative computer sophistication when deciding if an exculpatory clause in a computer contract is unconscionable. Since an unconscionable clause is one that is "contrary to the essential purpose of the agreement," courts must first determine the contract's essential purpose. Courts can make this determination by looking to the fundamental breach doctrine.

III. Fundamental Breach Analysis

A. Definition

The fundamental breach doctrine was developed chiefly by post-war British courts. One commentator summarized the doctrine as follows:

Every contract contains a "core" or fundamental obligation which must be performed. If one party fails to perform this fundamental obligation, he will be guilty of a breach of the contract whether or not any exempting clause has been inserted which purports to protect him.


37 The question of commercial versus computer sophistication is important because a businessman "must be deemed to possess some commercial sophistication and familiarity with disclaimers." Badger, 444 F. Supp. at 923 (E.D. Wis. 1977). A court focusing on the parties' relative commercial sophistication, therefore, is less likely to deem unconscionable an exculpatory clause in a computer contract. Since few businessmen are familiar with computers, however, a court focusing on the parties' relative computer sophistication is more likely to find unconscionable an exculpatory clause in a computer contract.

38 U.C.C. § 2-302, Comment 2.


Great Britain's Court of Appeal made this doctrine law in *Kar-sales (Harrow) Ltd. v. Wallis.*\(^{41}\) In this case, the defendant inspected a used car and agreed to purchase it on conditional sale.\(^{42}\) Upon delivery, the defendant discovered that the car was totally inoperable.\(^{43}\) The plaintiff argued that the defendant was still liable for the purchase price because of a contractual disclaimer stating that "[n]o condition or warranty that the vehicle is roadworthy, or as to its age, condition or fitness for any purpose is given by the owner or implied herein."\(^{44}\) The court, however, ruled that the vendor breached a fundamental obligation by failing to deliver a car that "would go."\(^{45}\) The court thus rejected the vendor's claim for payment based on the exculpatory clause.\(^{46}\)

**B. Fundamental Obligation**

*Karsales'* "fundamental obligation" is the same as the U.C.C.'s "essential purpose."\(^{47}\) Thus, to deduce a computer contract's essential purpose, a court should determine the parties' fundamental obligations.\(^{48}\) The vendor's fundamental obligation in an ordinary computer contract is to provide a system that operates properly and is suitable to the user's needs. This fundamental obligation stems from the nature of both the computer and the negotiation process, and the user's reliance on the vendor.

1. Nature of the Computer

A computer differs inherently from ordinary business equipment because of its extremely complex operations. Consisting of the hard-
ware and software necessary to perform electronic data processing,\(^1\) a computer system operates without human intervention and performs a large number of consecutive and complicated functions while evaluating its own performance.\(^2\) This capability enables a computer system, unlike ordinary business equipment, to take over and control large segments of a business's operations.\(^3\)

Although a businessman need not understand the internal complexities of a computer system before using one,\(^4\) his problems begin when he neither appreciates the computer system's addictive power nor foresees how vulnerable his business will become once computerized. "Many computer systems have the unique quality of quickly and more completely becoming an integral part of their user's operation than almost any other technology. So quickly, in fact, that one can become dependent upon [an ordered] system . . . . long before it commences operation."\(^5\) When a small business converts to a computer system, its "very survival as a business is tied to the performance and reliability of the [system] . . . ., and to the capacity and willingness of the manufacturer to stand behind it and provide the necessary support."\(^6\)

*Carl Beasley Ford, Inc. v. Burroughs Corp.*\(^7\) illustrates the problems a small businessman can encounter with a new computer system. In *Beasley*, the plaintiff purchased a computer system to produce accounting records for submission to Ford Motor Company under its car dealership franchise agreement.\(^8\) Upon delivery of the system, the vendor instructed the plaintiff to discontinue his reliance on outside accountants.\(^9\) Because the computer system failed to oper-

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49 Hardware is a computer's tangible components and software consists of the computer programming. *See* Smith, *supra* note 2, at 476 n.5 & 9.

50 "Electronic data processing (EDP) is the conversion of words, letters, numbers, or combinations of words, letters and numbers, or other types of data, into electronic signals; the data is then collected, stored, sorted, analyzed, compared or computed." *Telex v. IBM*, 4 C.L.S.R. 275, 293, (N.D. Okla. 1973). The computer times transmissions in billionths of seconds (nanoseconds) and measures storage capacity (memory) by millions of combinations of information bits (megabytes). *Id.* at 283. The computer separately but simultaneously works on and instantly solves numerous problems involving logic or arithmetic functions. *Id.* at 294.

51 *Id.* at 294.

52 *See* Freed, *Negotiating for a Computer Without Negotiating Trouble*, in 2 COMP. L. SERV. (CALL.) § 3-2, at 1 (1978) [hereinafter cited as Freed].

53 *See* C. TAPPER, COMPUTER LAW 44 (1978) [hereinafter cited as TAPPER].

54 Freed, *supra*, note 51, at 1; *see also* TAPPER, *supra* note 53, at 42-44.


57 361 F. Supp. at 329.

58 *Id.* at 328.
ate satisfactorily, the plaintiff had to rehire the outside accountants to reconstruct an entire year's accounting records.59

Triangle Underwriters, Inc. v. Honeywell, Inc.60 presents a more dramatic example of the problems a small business can have with a defective computer system. Honeywell employees attempted unsuccessfully for more than a year to make the system operational,61 but the computer system's incorrect billings and improper payments eventually forced Triangle out of business.62

2. Negotiation Process

The acquisition of a computer system thus exposes a business to substantially more risks than does the acquisition of ordinary business equipment. Since "[t]he parties too often bring to the negotiations too dissimilar a background of competence and knowledge,"63 the businessman cannot comprehend these risks; therefore, the businessman is at a distinct disadvantage when negotiating with the vendor. In Clements Auto Co. v. Service Bureau Corp.64 the Eighth Circuit took judicial notice of the inequality of knowledge between the vendor and the small businessman.65 The court recognized that the defendant "was clearly the expert in the computer field and must be held responsible for superior knowledge in that field."66

Hiring a computer analyst will not necessarily solve the problem caused by the small businessman's lack of knowledge. Even if a small businessman can afford to hire an analyst, he may still be at a disadvantage if the analyst can communicate no better with the businessman than can the vendor. One district court recognized that the problem lies in the nature of the computer business and not necessarily with the people involved:

[I]n the computer age, lawyers and courts need no longer feel ashamed or even sensitive about the charge, often made, that they confuse the issue by resort to legal "jargon," law Latin or Norman French. By comparison, the misnomers and industrial shorthand of the computer world make the most esoteric legal writing seem as clear and lucid as the Ten Commandments or the Gettysburg Address; and to add to this Babel, the experts in the computer field,

59 Id. at 329.
60 604 F.2d 737 (2d Cir. 1979).
61 Id. at 740.
62 See Touhy & Shapiro, supra note 4, at 4, col. 4.
63 TAPPER, supra note 53, at 44.
64 444 F.2d 169 (8th Cir. 1971).
65 Id. at 183.
66 Id.
while using exactly the same words, uniformly disagree as to precisely what they mean. . . .

[A computer's] components are myriad, each identified by a separate English word whose meaning in the industry is wholly unrelated to that contained in the dictionary. 67

To add to the language barrier, negotiations for the acquisition of a small business computer system can extend for months or even years. 68 The technology available at the completion of negotiations may be quite different from what was available or promised at the beginning of the negotiations. 69 The vendor again has the advantage because he is in the best position to know what technology is available and when it will be available.

3. Reliance

The typical small businessman, unlike the vendor, does not have the requisite expertise to judge whether a computer system operates properly and suits his needs. 70 As a result, most small businessmen rely heavily on vendors while negotiating for the acquisition of a computer system. 71 U.C.C. section 2-315 is particularly relevant to such situations:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose. 72

Computer contract negotiations strengthen the small businessman's expectations of receiving a system fit for a particular purpose. Not only does the vendor have "reason to know" of the user's particular purpose, but often the vendor will actually have formulated that particular purpose. 73 Furthermore, the vendor knows that the user is relying on the vendor's skill or judgment, and may have even solicited that reliance. 74 From the small businessman's standpoint, there-

68 Smith, supra note 2, at 485.
69 See United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966).
70 See Moorhead, supra note 8, at 142; Tapper, supra note 53, at 44.
71 See Tapper, supra note 53, at 44; Smith, supra note 2, at 478.
72 U.C.C. § 2-315.
fore, the very essence of the computer contract is to receive a computer system that is operable and suitable to his needs.\footnote{The parties often have differing perceptions of exactly what the contract obliges the vendor to deliver. See Lovable Co. v. Honeywell, Inc., 431 F.2d 668 (8th Cir. 1970), in which the court viewed the contract from the vendor's perspective and agreed that Honeywell was obliged merely to furnish the equipment and keep it running. The dissenting judge, however, in viewing the contract from the user's perspective, urged: "I simply cannot conceive of two capable businessmen negotiating for the sale or lease of a computer system except on the basis of what it would do. Ultimately this is what Honeywell was selling and this is what Lovable thought it would get." \textit{Id.} at 677. See \textit{generally} note 7 supra.}

Several Canadian courts have applied the fundamental breach doctrine in computer litigation upon determining that the user's reliance and reasonable expectations imposed a fundamental obligation on the vendor. In \textit{Burroughs Business Machines, Ltd. v. Feed-Rite Mills (1962), Ltd.},\footnote{42 D.L.R.3d 303 (Man. C.A. 1973), \textit{aff'd mem.}, 64 D.L.R.3d 767 (Can. 1976).} the vendor recommended the purchase of a specific Burroughs' system. The vendor assured the purchaser that the system would meet its needs and perform its entire accounting functions.\footnote{\textit{Id.} at 304-05.} Almost a year after installation, the system still failed to operate satisfactorily and many programs remained unwritten.\footnote{\textit{Id.}} After Feed-Rite asked Burroughs to remove the system and cancel the contract, Burroughs sued to recover the balance of the purchase price.\footnote{\textit{Id.} at 307.} The court, however, ruled that Burroughs had breached a fundamental obligation:

Feed-Rite purchased a computer to do its complete accounting. Due to defects in the equipment and the failure of plaintiff to fully programme the unit there was a breach of the contract of such severity that it went to the root of the matter. The defendant was deprived of the whole benefit it was intended to obtain from the contract.\footnote{[1973] 2 O.R. 472, 34 D.L.R.3d 320 (1973), \textit{aff'd}, 52 D.L.R.3d 481 (Ont. C.A. 1974).}

In \textit{P.U.C. of Waterloo v. Burroughs Business Machines, Ltd.},\footnote{\textit{aff'd}, 52 D.L.R.3d 481 (Ont. C.A. 1974).} the trial court found that the computer system could not do the work the plaintiff had specified. The court stated that the vendor bore the responsibility "to see to it that the programming was right and that the hardware would process the programmes efficiently."\footnote{34 D.L.R.3d at 325.} Since the computer could not perform the work specified, it did not suit the purposes for which the plaintiff had ordered it;\footnote{52 D.L.R.3d at 488.} hence, the vendor
committed a fundamental breach of the contract.84

A computer contract's essential purpose is for the vendor to deliver to the buyer an operable and suitable computer system. A clause that allows the vendor to deliver anything less without liability for breach of warranty defeats the essential purpose of the contract, and is thus unconscionable.85 An exclusionary clause is not unconscionable, however, if the parties freely and knowingly bargained for its inclusion. A court can determine if the parties freely and knowingly bargained for the clause only by examining their relative computer sophistication. If the small businessman has little or no appreciation for the consequences of an inadequate system, then he could not have freely consented to an exculpatory clause that releases the vendor from liability for delivering an inoperable or unsuitable system.

IV. U.C.C. Support for Fundamental Breach Analysis

Using a fundamental breach analysis to decide whether exculpatory clauses are unconscionable would expand the present application of U.C.C. section 2-302. However, even though no United States court has explicitly adopted the fundamental breach doctrine,86 elements of the doctrine can be found throughout Article Two of the U.C.C.

84 Id. at 489 ("What occurred in the case at bar was also a fundamental breach of contract . . . .").
85 See U.C.C. § 2-302, Comment 2.
86 Federal courts have applied a limited version of the fundamental breach doctrine in actions against common carriers. The Second Circuit has labeled this doctrine the "quasi-deviation rule." The doctrine provides that if the carrier deviates substantially from the contracted-for voyage or stowage, it cannot rely on clauses limiting its liability. See Elgie & Co. v. S.S. "S.A. Nederburg", 599 F.2d 1177 (2d Cir. 1979), cert. denied, 444 U.S. 1072 (1980); accord, Searoad Shipping Co. v. E.I. duPont de Nemours & Co., 361 F.2d 833 (5th Cir.), cert. denied, 385 U.S. 973 (1966) (carrier liable for full value of lost cargo when bill of lading called for below deck stowage and carrier actually carried the goods above deck).

State courts have also applied a version of the fundamental breach doctrine. In Philco Corp. v. Flying Tiger Line, Inc., 18 Mich. App. 206, 171 N.W.2d 16 (1969), an action against an air carrier for materially deviating from the carriage contract, the court observed:

To uphold the carrier’s contention that the limitation of liability is absolute, regardless of a fundamental breach which goes to the very essence of its undertaking, would permit any carrier to violate with recklessness the terms of the bill of lading knowing it cannot be called upon to pay more than 50 cents per pound.

Id. at 224, 171 N.W.2d at 24-25.

 Accord, Information Control Corp. v. United Airlines, 73 Cal.App.3d 630, 641, 140 Cal.Rptr. 877, 844 (1977) (explicitly adopting the Philco rationale to hold a carrier liable when its material deviation from the stowage contract caused damage to the goods); Cassidy v. Airborne Freight Corp., 565 P.2d 360, 362 (Okla. 1977) ("if a carrier commits a breach of
Section 1-102(3)\textsuperscript{87} permits consenting parties to alter, limit, or exclude contractual duties, yet it prohibits those parties from altering or excluding certain fundamental obligations. Section 1-203 imposes on all transactions a good faith obligation which under section 1-102(3) cannot be disclaimed. \textit{Vases v. Montgomery Ward \& Co.}\textsuperscript{88} illustrates how good faith is, in effect, a fundamental obligation. The Third Circuit in \textit{Vases} held that a warranty disclaimer clause would violate the duty of good faith if it relieved the seller of liability for selling worthless goods.\textsuperscript{89}

The Official Comment to U.C.C. Section 2-313 indicates that express warranties are also fundamental obligations. Because express warranties define "the essence of [the] bargain,"\textsuperscript{90} disclaimer clauses are repugnant and void.\textsuperscript{91} If the seller violates the warranty, he will, in effect, "be guilty of a breach of the contract whether or not any exempting clause has been inserted which purports to protect him."\textsuperscript{92}

Although the U.C.C. prohibits parties from disclaiming all liability for breach of contract, section 2-719(1) permits parties to limit recoverable damages.\textsuperscript{93} Section 2-719(2), however, imposes a fundamental obligation on the seller. The comment explicitly states that "it is the very essence of a sales contract that at least minimum ade-

\textsuperscript{87} "The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement . . . ." U.C.C. § 1-102(3).

\textsuperscript{88} 377 F.2d 846 (3d Cir. 1967).

\textsuperscript{89} \textit{Id.} at 850.

\textsuperscript{90} U.C.C. § 2-313, Comment 4.

\textsuperscript{91} \textit{Id.}, Comment 1.

\textsuperscript{92} Guest, \textit{supra} note 40, at 99.

\textsuperscript{93} U.C.C. § 2-719.
quate remedies be available."

Upon the seller's breach of the fundamental obligation to provide adequate remedies, section 2-719(2) permits the buyer to resort to any other remedies in the U.C.C. Because the U.C.C. prevents a seller from disclaiming all contractual liability, it effectively requires the seller to perform the "essence" of the contract and supply minimum adequate remedies.

Under the fundamental breach doctrine, failure to perform a fundamental obligation prevents a party from invoking an exempting clause that would otherwise protect him. U.C.C. section 2-302 concerning unconscionability gives to the courts the power to effect a similar result:

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 the unconscionable clause as to avoid any unconscionable result.

The Official Comment to section 2-302 lists a number of English and American cases which "illustrate" unconscionability. An examination of these cases indicates that fundamental breach and unconscionability are, in fact, closely related. In an early illustration of the fundamental breach doctrine, Andrews Bros. Bournemouth, Ltd. v. Singer & Co., Ltd., the buyer purchased a new car but received a used car instead. The court ruled that the term "new Singer car" was an express term of the contract that the seller had breached. The seller, therefore, could not avoid liability by claiming the protection of an exculpatory clause.

In Meyer v. Packard Motor Car Co., also cited in the Official Comment, the plaintiff purchased a reconditioned truck that was unfit for "substantial service as a dump truck." The court held that

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94 Id., Comment 1 (emphasis added).
95 "If the parties intend to conclude a contract for sale within this Article they must accept the legal consequences that there must be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract." Id.
96 See, e.g., Chatlos Systems, Inc. v. NCR Corp., 635 F.2d 1081, 1087 (3d Cir. 1980).
97 See Guest, supra note 40, at 98.
98 U.C.C. § 2-302.
99 Id., Comment 1.
100 See Ellinghaus, supra note 39, at 798.
102 Id. at 17.
103 106 Ohio St. 328, 140 N.E. 118 (1922).
104 Id. at 336, 140 N.E. at 120.
an integration clause did not exclude an implied warranty.\textsuperscript{105} Note the Ohio Supreme Court’s language:

The consideration to be given to Meyer for his $4200 was not merely a shape of a 5-ton size, but a thing fitted for practical, useful, substantial service as a dump truck.\textsuperscript{106}

The Ohio Supreme Court in effect held that the vendor was obliged to deliver the substance and not merely the form of what the buyer expected.

In \textit{Austin Co. v. J.H. Tillman Co.},\textsuperscript{107} since “the machine delivered failed in substantial and vital particulars to correspond with the description in the contract,”\textsuperscript{108} the court refused to uphold a clause limiting remedies.\textsuperscript{109} Again, the court was concerned that the buyer receive the essence of that for which he bargained.

V. Conclusion

While the U.C.C. contains some of the elements of the fundamental breach doctrine, courts should not limit their analysis merely to those elements. Section 1-103 provides that “the principles of law and equity, including . . . [among other things, any] other validating or invalidating cause shall supplement [the Code’s] provisions.”\textsuperscript{110} When applying section 2-302 on unconscionability, courts can look beyond the U.C.C.’s present application. In computer litigation, courts should use the closely related fundamental breach analysis when applying section 2-302, thereby focusing their attention on the parties’ relative computer sophistication. Only by focusing on the parties relative computer sophistication can a court accurately determine whether exculpatory clauses are unconscionable.

\textit{James B. Niehaus}

\textsuperscript{105} \textit{Id.} at 328 headnote 2, 140 N.E. at 118.
\textsuperscript{106} \textit{Id.} at 336, 140 N.E. at 120.
\textsuperscript{107} 104 Or. 541, 209 P. 131 (1922).
\textsuperscript{108} \textit{Id.} at 555, 209 P. at 135.
\textsuperscript{109} \textit{Id.} at 556, 209 P. at 135-36.
\textsuperscript{110} U.C.C. § 1-103(1).