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Article

WHEN TO APPLY THE DOCTRINE OF FAILURE OF ESSENTIAL PURPOSE TO AN EXCLUSION OF CONSEQUENTIAL DAMAGES: AN OBJECTIVE APPROACH

Howard Foss 551

Under the Uniform Commercial Code the parties may agree upon a limited remedy in lieu of the normal Code remedies. If such a limited remedy is found to fail of its essential purpose, the Code provides that the limited remedy is stricken from the contract and the normal Code remedies are restored. An unanswered question is whether, when the limited remedy is so stricken, a contractual exclusion of consequential damages is thereby also stricken. The author reports the various approaches taken by the courts and suggests an objective approach, based on factual circumstances, to resolve the fate of an exclusion clause when a companion limited remedy fails. The objective approach is then applied to specific situations and a result is suggested in each situation.

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