HIGH DAMAGES OR MERE REFUNDS? UNCONSCIONABILITY AND FAILURE OF ESSENTIAL PURPOSE IN CONTRACTS FOR DEFECTIVE HEMP SEED

Jacob Mohr†

† Jacob Mohr graduated from the University of Wisconsin Law School in 2019 and is currently practicing commercial and corporate law in Vietnam.

ABSTRACT

The explosive growth of industrial hemp production in the United States, inherent characteristics of hemp, lack of stable, field-proven hybrids, and producer inexperience will lead to legal disputes over the allegedly defective seed. The outcomes of these disputes will vary greatly by state. In one group of states, the warranty disclaimers and limited liability provisions will limit a producer's recovery to a mere refund. Alternatively, in another group of states, those same warranty disclaimers and limited liability provisions will be struck down and expose the seed dealer to potential seven-figure damages claims. This paper first distinguishes industrial hemp production from conventional crops and highlights how the characteristics of hemp production create a fertile environment for disputes over the defective seed. It next explores case law concerning defective seed transactions and notes the distinct divergence of two groups of courts in upholding or invalidating warranty disclaimers and limited liability provisions in contracts for the sale of seed. Lastly, with this split in mind, it concludes with contracting practice recommendations for hemp producers and hemp seed dealers.

I. INTRODUCTION AND BACKGROUND

Consider Farmer Bob, a hemp producer who purchased $13,610 worth of high cannabidiol (CBD), low tetrahydrocannabinol (THC) hemp seeds for a dollar each from Fast Budz, a licensed hemp seed dealer. Farmer Bob successfully navigated the lengthy process of obtaining a hemp license, prepared five acres of field rows and supports for the plants, purchased fertilizer and natural pesticides, meticulously planted each seed, and lovingly hand weeded his crop. Three months into the growing season, his state's Department of Agriculture tested his seeds for THC—the psychoactive component in cannabis. The lab results showed his crop has THC levels greater than the legally allowed level of 0.3%. Farmer Bob is subsequently forced to destroy his entire crop, leaving him without anything to show for his investment, time, and labor. Upon contacting Fast Budz, Farmer Bob was told if he brought a lawsuit against Fast Budz and was successful, he would only be able to recover the purchase price of the seed. Fast Budz reminded Farmer Bob that the warranty disclaimer and limitation of liability to the exclusive remedy of a purchase price refund were on the advertising materials, invoices, and seed tags sent to Bob. Farmer Bob's next step depends on which state he inhabits. If he lives in Michigan, Colorado, Georgia, South Dakota, Florida, Louisiana,

Washington, or Arizona, he has a strong chance of invalidating the warranty disclaimers and exclusive remedy provisions for unconscionability, failure of essential purpose, and a six-figure damages award. But if he lives in North Dakota, California, Alabama, Minnesota, North Carolina, Texas, Ohio, New York, or Iowa, he is indeed stuck with suing for a mere refund. This disparity in potential results requires seed dealers and hemp producers to proceed with caution when entering a transaction for seeds in the booming hemp economy.

The "explosive" rate of growth in the market for hemp products[1] has spurred hemp production acreage in the United States to increase from 25,000 acres in 2017 to 78,000 in 2018,[2] and this growth is on pace to continue. For the 2019 growing year, three states have reported registered hemp acreages combining for over 125,000 acres,[3] with other states, such as Wisconsin, seeing a 550% increase in producer applications.[4] Hemp breeders have not been able to keep up with this growth and there are few established seed dealers in the hemp industry.[5] Because it can take years for breeders to establish the stable genetics required for commercial production,[6] it will require a few growing seasons for the supply of reliable seeds to catch up with demand.[7] The inexperience of new hemp producers, dearth of established seed dealers and certified seed,[8] and inherent characteristics of hemp production will lead to contract disputes over defective seeds—which may or may not actually be defective.

Limited case law exists concerning contracts and defective seeds. Furthermore, few, if any, legislatures have made it a priority to enact laws concerning remedies for agricultural producers who are sold defective seeds.[9] One

1. Andre Bourque, *How Hemp And The Farm Bill May Change Life As You Know It*, FORBES (Dec. 17, 2018), https://perma.cc/63RT-8GQQ.

2. Jeff Gelski, *U.S. hemp acres more than triple*, FOOD BUS. NEWS (Jan. 29, 2019), https://www.foodbusinessnews.net/articles/13224-us-hemp-acres-more-than-triple.

3. Laura Drotleff, *Hemp boom: States report dramatic licensing increases for 2019*, HEMP INDUSTRY DAILY (Mar. 25, 2019), https://perma.cc/9NG6-TK2Z (Colorado (50,000 acres), Kentucky (more than 50,000 acres), and Oregon (25,414 acres)).

4. *See* Shamane Mills & The Associated Press, *DATCP Takes Nearly 2.1K Hemp Grower, Producer Applications*, WIS. PUB. RADIO (Mar. 4, 2019) (showing an increase in grower applications from 247 in 2018 to 1,405 grower applications in 2019), https://perma.cc/44P6-9BVP.

5. Annie Rouse, *Farmers Struggle to Find Certified Hemp Seeds*, HEMP (July 20, 2018), https://perma.cc/AR2Q-CZUX.

6. *Id.*

7. *See id.*

8. This paper will not cover dealer liability for "clone" sales.

9. *See* ARK. CODE ANN. § 2-23-103 (2018) (providing remedies for producers sold defective seed).

would expect more developed law and case law regarding defective seeds considering over 239 million acres were planted with corn, soybeans, wheat, and cotton,[10] plus millions of acres devoted to other crops and vegetables in the United States in 2018.[11] Explanations for the lack of legal disputes over defective seeds might be the genetic stability long-cultivated crops[12] or producer experience with crops, allowing them to spot problems early. Alternatively, suits may be limited due to the terms in seed contracts, disclaiming all warranties and capping remedies to a refund, which may dissuade producers from filing suit against their seed dealers. Additionally, seed dealers may compensate their customers above and beyond the refund price if they wish to retain the customer after delivering a bad batch of seed.

Courts around the country have heard only a handful of cases on seed warranty disclaimers and purchase price remedies. The courts are split on whether they should be upheld or found invalid for unconscionability or failure of essential purpose. One group of courts[13] have found that such disclaimers are unconscionable and purchase price remedies "fail of their essential purpose," and thus allowed damages exceeding the purchase price of the seed.[14] Another group,[15] however, found the disclaimers and purchase price remedies valid and enforceable, and held the producer's damages were capped by the contract to the purchase price of the seed. This paper will explore case law on unconscionability and a remedy's failure of essential purpose in the context of seed transactions, apply case law to hemp seed transactions, and identify ways for producers and seed dealers to protect themselves from falling victim to this split in case law.

First, this paper will briefly discuss express and implied warranties and disclaimers, as well as limited remedies to provide a foundation for the legal discussion. Second, a discussion of hemp production, which highlights the differences between hemp and other industrial crops, shows how those differences

10. Kent Thiesse, *2018 acreage estimates*, FARMPROGRESS (Mar. 16, 2018), https://perma.cc/TL37-VVNM.

11. DANIEL P. BIGELOW & ALLISON BORCHERS, ECON. RESEARCH SERV., MAJOR USES OF LAND IN THE UNITED STATES, 2012 at 14 (Aug. 2017).

12. Hybrid corn has been bred for production in the United States since the early 1930s. *See generally* James F. Crow, *90 Years Ago: The Beginning of Hybrid Maize*, 148 GENETICS 923, 924 (1998).

13. The 10th Circuit (applying Colorado law), the 6th Circuit (applying Michigan law), Arizona, Florida, Georgia, Louisiana, South Dakota, and Washington.

14. *See infra* Section VI(A); *see* Nomo Agroindustrial SA DE CV v. Enza Zaden N. Am., Inc., 492 F. Supp. 2d 1175, 1181-82 (D. Ariz. 2007).

15. Alabama, California, Iowa, Minnesota, New York, North Carolina, North Dakota, Ohio, and Texas.

present contractual difficulties for both dealers and producers, and provides a hypothetical example of potential damages against seed dealers for defective seed. Next this paper will survey defective seed case law from around the country, beginning with cases where courts held the warranty disclaimers and exclusive remedy of a refund were unconscionable or the remedy failed to meet its essential purpose. An exploration of cases in which courts found warranty disclaimers and exclusive remedies conscionable will follow. Finally, this paper will outline how seed dealers may protect themselves from high damage claims from defective seeds by altering the terms of their standard form contracts, and recommend several pre-agreement strategies for producers to avoid unfavorable contracts.

II. EXPRESS AND IMPLIED WARRANTIES BASICS

Warranties, express or implied, are agreements by a seller to a buyer concerning the seller's responsibility to indemnify the buyer for product defects or quality shortfalls.[16] Express warranties are explicit representations to the buyer about the nature of the goods[17] and are created by any affirmation of fact or description of the goods which becomes part of the basis for the bargain.[18] Implied warranties are not created by the bargaining parties, but are read into contracts by the Uniform Commercial Code (U.C.C.).[19] There are two types of implied warranties: the warranty of merchantability and the warranty of fitness for a particular purpose.[20] To satisfy an implied warranty of merchantability, in the absence of a disclaimer, goods must meet six requirements under the U.C.C.:

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and

16. 17A AM. JUR. 2D *Contracts* § 390 (2018).

17. J. W. Looney, *Warranties in Livestock, Feed, Seed, and Pesticide Transactions*, 25 U. MEM. L. REV. 1123, 1125 (1995).

18. 67A AM. JUR. 2D *Sales* § 627 (2019).

19. Looney, *supra* note 17, at 1124.

20. 67A AM. JUR. 2D *Sales* § 647 (2019).

- (f) conform to the promise or affirmations of fact made on the container or label if any.[21]

An implied warranty of fitness for a particular purpose exists only if the seller had reason to know the buyer sought goods for a particular purpose, and the buyer relied on the seller's knowledge the provided goods were fit for that purpose.[22]

Express and implied warranties can be disclaimed and excluded by a seller under Section 2-316 of the U.C.C.[23] Implied warranties can be modified by a course of dealing or performance, but are often excluded in writing.[24] In order for a written exclusion of implied merchantability to be valid, it must be conspicuous and explicitly mention merchantability.[25] Implied warranties of fitness for a particular purpose can be excluded with more general language.[26] These exclusions must be part of the bargain, and cannot be sprung upon a buyer after an agreement is reached.[27] Warranty disclaimers can be found invalid for unconscionability.[28] In Farmer Bob's case, Fast Budz had an express warranty that the seeds were viable hemp seeds, but disclaimed any implied warranties about the fitness of the seeds for a particular purpose—such as CBD production.

III. BRIEF INTRODUCTION ON LIMITED REMEDIES

In addition to warranty disclaimers, sellers can contractually limit the remedies available to a buyer or a seller in case of a breach, in lieu of using remedies provided for in the U.C.C.[29] Remedies can be limited to refunds, repair or replacement, exclude consequential and incidental damages, or be capped at a certain amount.[30] Parties can expressly agree to the listed remedy as the sole remedy available to either party, or include it as an addition to the U.C.C. remedies.[31] The remedies offered must provide "a fair quantum of remedy for

21. U.C.C. § 2-314 (AM. LAW INST. & UNIF. LAW COMM'N 1951).
22. U.C.C. § 2-315 (AM. LAW INST. & UNIF. LAW COMM'N 1951); Looney, *supra* note 17, at 1128.
23. U.C.C. § 2-316 (AM. LAW INST. & UNIF. LAW COMM'N 1951).
24. *See id.*
25. *Id.* at (2).
26. *Id.*
27. 67A AM. JUR. 2D *Sales* § 724 (2019).
28. U.C.C. § 2-719 (AM. LAW INST. & UNIF. LAW COMM'N 1951).
29. *Id.*
30. *Id.* at (1)(a).
31. *Id.* at (1)(b).

breach of the obligations or duties outlined in the contract."[32] Remedies that do not provide the buyer the "benefit of the bargain" can be invalidated for unconscionability or failure of essential purpose.[33] In our example, Fast Budz limited the potential remedies available to Farmer Bob to a refund, and did not allow for other types of remedies to be pursued.

IV. SEED INDUSTRY CONTRACTING PRACTICES AND THE RISKS OF HEMP PRODUCTION

Transactions for the sale of seed make extensive use of warranty disclaimers and exclusive remedies.[34] Hemp seed transactions use similar contract provisions, but hemp production carries more risk than corn or soybean production, often rendering the generic form of these contracts ineffective for protecting hemp seed dealers and producers. This part explores general seed contracting practices and examines how the unique nature of hemp production impacts warranty disclaimers and purchase price remedies, as well as potential damages available to producers.

A. Seed Industry Practices During the Making of a Contract for the Sale of Seed Can Leave Them Exposed to Liability Due to Unconscionability or Failure of Essential Purpose

In the seed industry, warranty disclaimers and limits on remedies are common.[35] Seed sales are often concluded orally, and the warranty disclaimer and remedy limitations are usually not discussed. Producers typically first learn about these disclaimers and limitations by reading promotional materials, seed tags, or the seed bags themselves. These oral contracts, despite being for merchandise worth $500 or more, are valid under Section 2-201(3)(c) of the U.C.C., which holds that a writing is not required if payment for the goods was accepted or if the goods were received and accepted.[36] The disclaimers and limits are incorporated into the agreement upon acceptance of the goods. However, courts often cite the delay between the initial agreement and the buyer's discovery of the disclaimers and limited remedies as a weighty factor in their unconscionability analysis.[37]

32. *Id.* at cmt. 1.

33. 2 WILLIAM D. HAWKLAND ET AL., HAWKLAND'S UNIFORM COMMERCIAL CODE SERIES § 2-719:3 (2014 Supp. 2019).

34. *See* Looney, *supra* note 17, at 1141-42.

35. *See generally id.*

36. U.C.C. § 2-201(3)(c) (AM. LAW. INST. & UNIF. LAW COMM'N 1951).

37. *See infra* Section VI(A).

Below is an example of a common warranty disclaimer and remedy limitation from the website of a non-hemp seed dealer:

> We give no warranty, expressed or implied, as to productiveness of any seeds we sell, and we will not be in any way responsible for the crop. The seeds which you purchase are **GUARANTEED** to conform with the description set forth on the label attached to this bag within the recognized industry tolerances, when contained in the original **MERSCHMAN SEEDS** bag during the valid period of analysis, to the express exclusion of all other warranties, expressed or implied, specifically including but not limited to, the warranty of merchantability, the exclusive remedy to purchaser is return of the purchase price of the seeds.[38]

A liability limitation may be valid if it is seen as properly bargained for, agreed to, and incorporated in the contract. However, courts may find the limitation to be unconscionable or invalid for failing to meet the essential purpose of the remedy. As will be discussed below, courts around the country have gone both ways on various issues regarding seed transactions. Despite the lack of enforceability in some states, these provisions are still commonly found in seed brochures, seed bags, and seed dealer paperwork.[39]

B. The Unique Character of Hemp Production Creates Particular Risks for Producers and Seed Dealers

The widespread use of potentially invalid disclaimers, a surge in hemp production, and the complexity of hemp genetics and production creates an environment ripe for litigation. Hemp production has taken off in recent years due to gradual state legalization and will only increase after federal legalization.[40] The 2018 Farm Bill now allows all states, if so desirous, to implement hemp production programs,[41] which will allow more states to produce hemp. Part of this increase will be driven by the "skyrocketing" demand for CBD oil.[42] CBD retail sales are

38. *Seed Disclaimer*, MERSCHMAN SEEDS, https://perma.cc/J642-7MB3 (archived Sept. 2, 2019) (emphasis in original).

39. *See, e.g.*, GREEN LYNX FARMS, BRILLIANCE: HIGH CBD, FEMINIZED HEMP SEEDS (2019), https://perma.cc/EVQ5-ZYFW; *Disclaimer*, WHITE SEED CO., https://perma.cc/Z65X-AA6P (archived September 2, 2019); *Terms & Conditions*, BURRUS, https://perma.cc/HAD4-KKYT (archived Aug. 28, 2019).

40. *See* Bourque, *supra* note 1.

41. 7 U.S.C. §§ 1639o-1639s (2018).

42. Tom Still, *Industrial hemp may be agriculture's next big thing, but Wisconsin can't dawdle*, WIS. TECH. COUNCIL (Feb. 27, 2019), https://perma.cc/LW2P-ML49.

projected to reach $1.5 billion in 2020,[43] dwarfing expected sales for hemp seed and fiber.[44]

The production of hemp is not as straightforward as corn or soy production. There are pre-production license applications and field registrations that must be completed.[45] Applications often require GPS coordinates for the planned fields, criminal background checks, and fees for licenses and registration.[46] Once a license has been granted, a producer can carry out normal farming activities such as weeding, fertilizing, and irrigating, but must constantly be aware of growing conditions that can spike THC levels and respond accordingly. At a certain time before harvest, the regulatory agency in charge of hemp production in the producer's state will take representative samples of the crop to determine THC percentages.[47] If the plants are found to have THC levels exceeding 0.3% they are "hot" and must be destroyed.[48] If the plants are not hot, the producer will harvest and prepare the crop for sale, which is a labor intensive process regardless of whether the end product is CBD, seed, or fiber.[49] Like corn and soybeans, hemp is responsive to climatic conditions, but for hemp, climatic conditions can cause spikes in THC levels. Plant stress due to excessive or deficient nutrients can increase THC levels, as can differences in elevation, temperature, and humidity.[50] Producers who have purchased low THC seeds may find themselves forced to destroy their hot crops if the weather does not cooperate at critical growth stages.[51]

Hot hemp is costly not only for producers, but also for seed dealers if a court finds they are not protected by their warranty disclaimers and exclusive remedy provisions. The origin of elevated THC levels might be due to a bad batch of seed

43. HEMP INDUS. DAILY, 2018 FARM BILL: WHAT'S NEXT FOR HEMP? 10 (2019).

44. Kip Hill, *Could hemp be Washington's next cash crop?*, SPOKESMAN-REV. (Mar. 21, 2019), https://perma.cc/CXB2-SLZY (explaining 70% of hemp planted in 2017 was processed into CBD oil, 20% for seed production, and 10% for fiber products).

45. *See* Dep't of Agric., Trade & Consumer Prot., *Industrial Hemp Inspection and Testing*, WISCONSIN.GOV, https://perma.cc/F364-5KJT (archived Aug. 28, 2019) [hereinafter *Industrial Hemp Inspection and Testing*].

46. *See* Dep't of Agric., Trade & Consumer Prot., *Hemp Licensing, Registration and Fees*, WISCONSIN.GOV, https://perma.cc/FXN4-ZTGF (archived Mar. 31, 2020).

47. *See Industrial Hemp Inspection and Testing*, *supra* note 45.

48. *See* 7 U.S.C. § 1639o (2018); *Industrial Hemp Inspection and Testing*, *supra* note 45.

49. Chris Bennett, *How to Grow Hemp for CBD, Seed or Fiber*, AGPRO (Feb. 25, 2019), https://perma.cc/7MHN-GXAJ.

50. George Place, *Hemp Production – Keeping THC Levels Low*, N.C. COOPERATIVE EXTENSION (May 2, 2019), https://perma.cc/3Z8P-75F5.

51. Matthew Van Deventer, *Hot Hemp: How High THC Levels Can Ruin a Legal Hemp Harvest*, WESTWORD (Feb. 14, 2018), https://perma.cc/D7UN-6E3Y.

being sold or it may be due to unfavorable growing conditions that caused a spike.[52] Seed dealers and hemp producers in litigation over hot hemp have to drill into the particular growing conditions and producer practices to determine the cause of high THC levels. Express and limited warranty disclaimers ensure a seed dealer is not guaranteeing certain THC levels, but if those provisions are not upheld, seed dealers may face breach of implied warranty claims for selling seeds not fit for hemp production. Hemp producers in states where warranty disclaimers and exclusive remedy provisions are valid will only be able to receive a refund for hot hemp seeds.

In addition to the legal regulations governing production and THC levels, hemp production is also different from corn and soybean production because hemp is dioecious, meaning it typically has male plants with pollen producing pistils and female plants with stamens which collect pollen—though monecious plants do occur, which have both male and female reproductive organs.[53] Corn and soybeans have both pistils and stamens and can thus self-pollinate. Alternatively, male and female hemp plants must be present for pollination to occur, although self-pollination can occur with monoecious plants.[54] Monoecious plants can develop from single sex plants under environmental stress or after exposure to certain chemicals.[55] Depending on the purpose of production, the presence of males and females can be critical or detrimental.[56] While the presence of male plants does not necessarily impact fiber production,[57] pollen is vital to hemp seed production.[58] CBD is mainly developed in female flowers with the highest CBD yields being generated by unpollinated flowers.[59] Any diversion of energy to seed production due to pollination must be avoided at all costs, necessitating the purchase of "feminized" seeds that only produce female plants and vigilant oversight of the fields and surrounding areas for male or monecious plants.[60] Pollination can lead to drastic reductions in CBD production, eroding the value of a crop to break-even levels.[61]

52. *Id.*

53. HEMP 58-59 (Pierre Bouloc et al. eds., 2013).

54. *See* Suman Kaushal, *Impact of Physical and Chemical Mutagens on Sex Expression in* Cannabis Sativa, INDIAN J. FUNDAMENTAL & APPLIED SCI., Oct.-Dec. 2012, at 97, 102.

55. *Id.*

56. Bennett, *supra* note 49.

57. HEMP, *supra* note 53, at 105.

58. Bennett, *supra* note 49.

59. *Id.*

60. *Id.*

61. *Id.*

Inaccurately sexed seeds are a fertile ground for dispute in hemp seed transactions. Determining the sex of a seed is impossible prior to germination,[62] so producers cannot verify if they have been sold properly sexed seeds before planting those seeds. After germination, producers must check their fields to determine if the correct sexes are present. Seed dealers who sell feminized seeds might find themselves in litigation with a producer over the presence of male plants in their fields. Seed dealers protected by valid warranty disclaimers would be shielded from liability for lost profits due to the presence of male plants, but those dealers who operate in states which do not uphold warranty disclaimers and exclusive remedies could face astronomically high damages for reduced CBD yield. Alternatively, hemp producers who have purchased batches of improperly sexed seeds will only recover their purchase price from a seed dealer if the warranty disclaimers and exclusive remedy provisions are upheld.

The short history of modern industrial hemp farming in North America also means there is a lack of certified seed varieties on the market. "Certified seed" is seed given official recognition by a state seed certifying agency, denoting the certified seed variety has the requisite genetic purity, distinctness, and level of quality.[63] In order to be certified, the agency will test the seed in a variety of growing conditions and verify the seed passes field inspections.[64] Only one state, Colorado, has government certified hemp varieties.[65] Hemp producers are not required to purchase certified seeds, but typically must use varieties from an approved list.[66] Producers can seek permission from their regulatory agency to use an unapproved variety, but must demonstrate that the variety has been tested by another state's pilot program and returned results at or less than 0.3% THC.[67] Producers using varieties unsuited for their growing conditions may experience THC spikes or unpredictable production.

62. *Can You Tell The Sex Of Cannabis Seeds From Their Appearance*, MSNL (Aug. 16, 2018), https://perma.cc/QBD7-Q3G6.

63. NAT. RES. CONSERVATION SERV., PLANT MATERIAL TECHNICAL NOTE NO. 10: UNDERSTANDING SEED CERTIFICATION AND SEED LABELS 1 (July 2009), https://perma.cc/LXC3-XHQE.

64. *See* IND. CROP IMPROVEMENT ASS'N, GENERAL SEED CERTIFICATION STANDARDS 6, 7, 11, https://perma.cc/2AQS-PSJD (archived Aug. 28, 2019).

65. Kristen Nichols, *Colorado certifies more hempseeds, boosting approved cultivars to seven*, HEMP INDUS. DAILY (Dec. 12, 2017), https://perma.cc/6JXM-FQ69.

66. *See* Dep't of Agric., Trade & Consumer Prot., *Industrial Hemp Seed and Transplant Sources Licensed to Sell in Wisconsin*, WISCONSIN.GOV, https://perma.cc/9UD2-DL4H (archived Aug. 28, 2019).

67. Dep't of Agric., Trade & Consumer Prot., *Hemp Seeds and Transplants*, WISCONSIN.GOV, https://perma.cc/K9KB-CSGS (archived Jan. 9, 2020).

The inherent characteristics of hemp production provide for many points where production can go sour and lead to disputes between producers and seed dealers. Improperly sexed hemp seeds can lead to very low CBD yields, and poor genetics can lead to high THC levels—cutting or eliminating producer profits. Growing conditions and practices can lead to producer-caused profit erosion.[68] Because there may be no clear reason for the THC spikes or failure to meet expected production levels, disputes may need to be taken to court when the warranty disclaimers and remedy limitations come to the fore. If the warranty disclaimers and exclusive remedies are upheld, damages will be limited as provided for in the contract. If they are not upheld, seed dealers can face significantly high damage claims.

C. The Calculation of Damages in Defective Seed Cases Is Straightforward

If warranty disclaimers and exclusive purchase price remedies are not found to be valid, seed dealers can be on the hook for substantial damages. Before damages can be addressed, the defectiveness of the seed must be established by the introduction of "sufficient evidence, direct or circumstantial, to permit the inference that seed was defective when it left [the] sellers' possession or control."[69] Evidence presented can include expert testimony, witness testimony, data about growing conditions, and seed test results.[70] In other analogous crop cases for breach of warranty, courts have used the difference between the crop's expected market value and the actual realized value, less costs and expenses that were saved due to the crop's underperformance to determine the amount of damages.[71] Damages are not required to be measured with absolute exactness, but must be calculated with reasonable certainty.[72]

D. Defective Hemp Seed Cases Have Potentially Very High Damages Compared to Conventional Crop Seeds

A discussion of the requisite proof for inferring that hemp seed was defective when it left the seller's control is beyond the scope of this paper. As discussed above, there are many inflection points where hemp production could shift from profitable to unprofitable due to growing conditions or defective seeds. For the sake of this discussion the hypothetical analysis of Farmer Bob—laid out in the beginning of this article and embellished below—will be used to explore the issue

68. *See id.*
69. Schmaltz v. Nissen, 431 N.W.2d 657, 663 (S.D. 1988).
70. *See id.* at 663-64.
71. Swenson v. Chevron Chem. Co., 234 N.W.2d 38, 44 (S.D. 1975).
72. *See Schmaltz*, 431 N.W.2d at 664.

of damages, assuming the defectiveness of seed was sufficiently demonstrable to the court.

Consider again Farmer Bob's case. He purchased 13,610 seeds at a dollar each to grow on five acres of land.[73] He planted each plant at four-foot intervals to maximize the amount of CBD he could harvest. Each acre was expected to produce around 2,000 pounds of hemp flower with a CBD content of 13%. At the time of writing, prices for a pound of high CBD hemp flower, intended for CBD extraction, range from $3.50-$4.25 per percentage point of CBD content.[74] Assuming Farmer Bob could receive $3.50 per percentage point of CBD content, his expected revenue per pound of 13% CBD hemp flower was $45.50.[75] If each of the five acres produced the expected 2,000 pounds, Farmer Bob would have earned $455,000 for the 10,000 pounds of flower.[76] Farmer Bob's expected revenue would be $455,000. His realized value, due to the complete destruction of his crop for high THC levels, was $0. A court calculating his damages, after invalidating the warranty disclaimers and exclusive remedy provision, would compare the two values and subtract whatever costs were saved by not having to harvest and process the crop.[77] These savings most likely are not above $11,000 per acre,[78] so we can expect damages to be north of $400,000. Fast Budz, who sold the seed for $13,610, is now liable for nearly half a million dollars in damages.

This hypothetical is not preposterous. In fact, this damages estimate is in line with what a group of hemp producers in Oregon currently claim they are owed after their seed dealer sold them allegedly "defective" seed.[79] The producers assert they were sold non-feminized, low CBD seed after bargaining for the opposite.[80] One grower, who spent $86,000 on supposedly feminized, high CBD seeds, reported losses of $11.9 million due to decreased yields.[81] Contrast these potential damages with those that might be available to a corn producer, Farmer Joe, who

73. *See Catalog*, OR. CBD, https://perma.cc/P3PF-P44M (archived Apr. 2, 2019) (showing a dollar per seed is a common price for high CBD seeds).

74. *CBD Spot Prices – Feb 2019*, KUSH.COM, https://perma.cc/3UHR-E5V4 (archived Aug. 28, 2019).

75. $3.50 x 13% = $45.50.

76. $45.50 x 10,000 = $455,000.

77. *See Schmaltz*, 431 N.W.2d at 664.

78. *See* OR. CBD, INDUSTRIAL HEMP CULTIVATION GUIDE 13 (2019), https://perma.cc/5EBS-U9YW (showing per acre costs to be under $6,000, depending on drying and final preparation costs).

79. *Oregon hempseed dispute leads to $21 million lawsuit*, HEMP INDUS. DAILY (Oct. 30, 2018), https://perma.cc/BLT4-8VAM.

80. *Id.*

81. *Id.*

purchased defective seed. In 2018, the average yield for grain corn was 176.4 bushels per acre.[82] At an average price of $3.70 per bushel,[83] Farmer Joe is looking at expected revenue of $652.68 per acre of corn.[84] Assuming a farm size of 200 acres and total crop failure, Farmer Joe's damages amount to $130,536.[85] Farmer Joe's seed dealer, assuming the seed was sold at an average price of $117 per acre,[86] netted $23,400 from the sale.[87] The difference in potential liability is striking; hemp seed dealers are exposed to significantly more risk in an individual sale than conventional corn seed dealers. The disparity between the purchase price and potential damages should give hemp seed dealers pause when considering their contracting practices. As a result they must not rely on long-term conventional seed industry use of warranty disclaimers and limited remedies to protect them in seed disputes.

V. UNCONSCIONABILITY AND FAILURE OF ESSENTIAL PURPOSE

Seed dealers have attempted to limit their exposure to liability by using warranty disclaimers and limiting buyers to purchase price remedies. However, courts around the country have often been reluctant to limit producers in claims for breach of warranties to the exclusive remedy contained in the agreement. In refusing to countenance the exclusive purchase price remedy, courts are divided between finding the remedies unconscionable for public policy reasons, or invalid for failing in their essential purpose. Unconscionability has been heralded by some as a strong judicial check on unfair contracts,[88] but it has also been criticized for being too indefinite and unpredictable to alter contracting practices.[89]

82. NAT. AGRIC. STATISTICS SERV., IOWA AG NEWS – 2018 CROP PRODUCTION 2 (Feb. 2019), https://perma.cc/ARM6-H5YY.

83. Kent Thiesse, *Very Few Counties to Receive 2018 ARC-Co Payments*, MINNSTAR BANK (Apr. 22, 2019), https://perma.cc/3ARW-JNPW (discussing $3.79 per bushel of corn as the 2018 ACR-Co benchmark price).

84. 176.4 x $3.70 = $652.68.

85. $652.68 x 200 = $130,536.

86. Gary Schnitkey, *2018 Crop Budgets: More of the Same*, FARMDOC DAILY, July 25, 2017, at 1, 3.

87. $117 x 200 = $23,400.

88. Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usuray Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 296 (1995).

89. Hazel Glenn Beh, *Curing the Infirmities of the Unconscionability Doctrine*, 66 HASTINGS L.J. 1011, 1014 (2015).

A. Unconscionability: Substantive and Procedural

Damage limitations and exclusive remedies, though part of a valid contract, may be struck from a contract if they are unconscionable.[90] The Wisconsin Supreme Court stated, "Unconscionability is an amorphous concept that evades precise definition."[91] The concept is wielded to strike down unreasonably favorable provisions in contracts that are only present because of the absence of meaningful choice and unequal bargaining power during the creation of the contract.[92] Finding a provision unconscionable allows courts to prevent "oppression or unfair surprise."[93]

Critics have lamented the unconscionability doctrine's myriad "infirmities."[94] Judges striking down clauses for unconscionability in individual contracts is a powerful but limited response to unfair business practices. This response is limited because contracting parties are typically not poring over decisions unless they have already entered litigation, and legislatures are similarly not tuned into how courts are receiving certain types of contract clauses. This lack of "normative influence" prevents unconscionability from having a broader impact on contracting practices within a court's jurisdiction.[95]

Courts analyze unconscionability in two ways: procedurally and substantively. The increased presence of one type of unconscionability lessens the need to show that the other is present. A determination of procedural unconscionability relies on exploring the circumstances surrounding the formation of a contract such as: the relative bargaining power of the parties, party characteristics like intelligence, age, sophistication, whether the contract was alterable through negotiation, and options for the parties to deal with alternative suppliers of the goods and services in question.[96] Substantive unconscionability is analyzed on a case-by-case basis, examining the fairness and reasonableness of the provision in question.[97] This is done by considering the commercial reasonableness

90. WIS. STAT. § 402.719(3) (2019); U.C.C. § 2-719 (AM. LAW INST. & UNIF. LAW COMM'N 1951).

91. Wis. Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155, 164 (Wis. 2006).

92. *Id.* at 165.

93. *Id.* at 165 (citing U.C.C. § 2-302 cmt. 1 (AM. LAW. INST. & UNIF. LAW COMM'N 1951)).

94. Beh, *supra* note 89.

95. *Id.* at 1021-23.

96. *Wis. Auto Title Loans, Inc.*, 714 N.W.2d at 165-66.

97. *Id.*

of the provision and examining how unreasonably favorable it is to the party with more bargaining power.[98]

In seed transactions, substantive and procedural unconscionability can arise in various ways. If a farmer has a low level of sophistication and experience, procedural unconscionability may be present when warranty disclaimers and exclusive remedy provisions are only made known to the inexperienced farmer after the purchase and receipt of the seeds.[99] Because so many hemp seed farmers are first-time growers due to only recent legalization, their inexperience enhances the likelihood of procedural unconscionability being present in hemp seed transactions—especially if contract terms are not delivered to the producer until after the sale is completed.[100] Substantive unconscionability in seed transactions can be present when the terms are so one-sided they leave the farmer with remedies "grossly disproportionate" to the loss suffered.[101] As illustrated above, the difference between the loss suffered by hemp producers and purchase price remedies are incredibly disproportionate—increasing the presence of substantive unconscionability.[102]

B. Remedy Failure in Its Essential Purpose

Scholars have criticized the failure of an essential purpose for being too murky and too similar to unconscionability.[103] The analysis required to find a remedy fails in its essential purpose often looks similar to the analysis for unconscionability, in that it examines fairness and reasonableness, a separate concept is often applied in conjunction with unconscionability analysis.[104] Like unconscionability, failure of essential purpose is explicitly mentioned in Section 2-719 of the U.C.C.[105] If an exclusive remedy is found to "fail of its essential purpose," parties may turn to other remedies provided in the U.C.C.[106]

98. *Id.* at 166.

99. *See* Helena Chem. Co. v. Williamson, No. 14-0192, 2015 WL 1298435, at *6 (W.D. La. Mar. 23, 2015) (finding procedural unconscionability because farmer was a first-year farmer with a 10th grade education).

100. *See id.*

101. Majors v. Kalo Labs., Inc., 407 F. Supp. 20, 23 (M.D. Ala. 1975).

102. *See supra* Section IV(D).

103. *See, e.g.*, Karl S. Yohe, *The Inherent Ambiguity of Uniform Commercial Code Section 2-719: "Failure of Essential Purpose" v. "Unconscionability"*, 1987 U. ILL. L. REV. 523.

104. *See id.*

105. U.C.C. § 2-719(2) (AM. LAW INST. & UNIF. LAW COMM'N 1951).

106. *Id.*

Courts will compare the amount of harm with the relief provided by the remedy to determine if a remedy fails in its essential purpose.[107] A remedy will be found to have failed in its essential purpose if it "deprives the buyer of the benefit of the bargain"[108] and cannot "make the injured party whole."[109] To determine if a buyer has been so deprived, the court will explore the circumstances surrounding the warranties, breach, and remedy.[110] Courts will consider the goods at issue, the nature of the business, potential mismatch between the remedy and the harm from the breach, and the consequential effects of the breach.[111] Courts have not found failure in cases where the remedy is a replacement or repair of a defective appliance or spare part and where such replacement was promptly delivered to the seller, as the remedy met its essential purpose of making the buyer whole.[112] However, in instances where repairs, replacements, or undue delays have caused losses to the buyer above the cost of the faulty equipment, courts have found exclusive repair and replacement remedies to have failed in their essential purpose.[113] Similarly, courts have been reluctant to uphold exclusive purchase price refund remedies in cases where the buyer's damages far exceed the purchase price.[114]

As later discussed, in some courts[115] purchase price remedies fail in their essential purpose in seed transactions when the difference between the amount of the remedy and loss suffered by the producer is too great to consider the producer made whole by the refund. Because farmers must invest significant amounts of time, labor, and capital into generating value from seeds, a refund only for the cost

107. Waukesha Foundry, Inc. v. Indus. Eng'g, Inc., 91 F.3d 1002, 1010 (7th Cir. 1996).

108. *Id.*

109. Phillips Petroleum Co. v. Bucyrus-Erie Co., 388 N.W.2d 584, 592 (Wis. 1986).

110. *Id.*

111. *See id.* (showing damages caused by the breach were so extensive that limiting remedy to repair of defective part caused remedy to fail to make buyer whole); *see also* S. Fin. Grp., LLC v. McFarland State Bank, 763 F.3d 735, 743 (7th Cir. 2014) (finding no failure of essential purpose where sophisticated buyer profited from transaction it sought to rescind).

112. *See* Riegel Power Corp. v. Voith Hydro, 888 F.2d 1043, 1046 (4th Cir. 1989) (showing a repair remedy did not fail in its essential purpose because manufacturer promptly repaired turbine); *see also* Intrastate Piping & Controls, Inc. v. Robert-James Sales, Inc. 733 N.E.2d 718, 725 (Ill. App. Ct. 2000) (finding no failure of essential purpose because seller repaired all defective pipe).

113. *See* Soo Line R.R. Co. v. Fruehauf Corp., 547 F.2d 1365, 1371 (8th Cir. 1977) (finding manufacturer's delay in repair made remedy fail in its essential purpose); *see also* Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 707-08 (9th Cir. 1990) ("A contractual provision limiting the remedy to repair or replacement of defective parts fails of its essential purpose . . . if the breaching manufacturer or seller is unable to make the repairs within a reasonable time period.").

114. *See* Lutz Farms v. Asgrow Seed Co., 948 F.2d 638, 646 (10th Cir. 1991).

115. *See infra* Section VI(A).

of seed after such efforts and costs fails to make the farmer whole. Similar to substantive unconscionability, the large gap between the cost of hemp seed and the expenditures and expected profits increases the probability that an exclusive purchase price remedy will fail in its essential purpose.

Due to the murkiness of failure of essential purpose, courts have taken various approaches to determine how failure of essential purpose affects separate provisions that limit potential damages, such as consequential damages.[116] Some have held that a remedy's failure for essential purpose opens the door to all damages provided for in the U.C.C., even if the contract contains a separate clause limiting potential damages.[117] Other courts have held that although the remedy fails in its essential purpose, consequential damages limitation clauses are still valid unless unconscionable.[118] Yet another set of courts have declined to make a firm rule either way on separate limitation clauses, and have instead proceeded on a case-by-case basis. These courts look at the circumstances surrounding the creation of the contract in an attempt to determine if the remedy limitation clause and damages limitation clause were intended to be read together or independently.[119] A discussion of this division in approaches is beyond the scope of this paper, but an important factor to consider when crafting seed contracts.

VI. COURTS ARE SPLIT ON FINDING UNCONSCIONABILITY AND FAILURE OF ESSENTIAL PURPOSE IN SEED TRANSACTIONS

The circumstantial dependency of unconscionability and failure of essential purposes analyses have led to varying results when those concepts are applied to seed transactions. Two main approaches have developed. A blending of the two analyses has occurred in the first set of courts—where purchase price remedies are unconscionable because they fail in their essential purpose.[120] Other courts in the first group have held these provisions are unconscionable due to procedural and substantive unconscionability.[121] Courts in the second group have decided purchase price remedy clauses were appropriately bargained for and therefore enforceable.[122]

116. Yohe, *supra* note 103, at 524.

117. *See* Tokyo Ohka Kogyo Am., Inc. v. Huntsman Propylene Oxide LLC, 35 F. Supp. 3d 1316, 1331 (D. Or. 2014).

118. *See id.*

119. Yohe, *supra* note 103, at 537.

120. *See* Looney, *supra* note 17, at 1154.

121. *See id.* at 1145.

122. *See id.*

A. One Group of Courts Has Found That Warranty Disclaimers and Purchase Price Remedies are Unconscionable or Fail in Their Essential Purpose

State and federal courts from around the country have refused to uphold warranty disclaimers and purchase price remedy clauses in contracts for seed.[123] Their holdings hinge on the procedural unconscionability of warranty disclaimers and remedy limitations being thrust upon producers late in the transaction and the relative bargaining power of the parties.[124] Several courts have also found limiting a producer to only recovering the purchase price of the seed caused the remedy to fail in its essential purpose because producers bought the seed for the productive potential.[125] Limiting a producer to a refund does not make them whole due to the loss of investments made in attempting to realize that potential.[126]

In *Lutz Farms v. Asgrow Seed Co.*, the Tenth Circuit upheld a ruling against an onion seed dealer.[127] The onion seeds purchased from the appellant failed to produce salable onions, resulting in much of the crop being destroyed and consequential damages through the loss of business.[128] The producer was awarded $343,000[129] for breach of warranty on a seed sale worth $12,000.[130] The court found a warranty disclaimer was not conspicuous enough to meet the requirements of Colorado law.[131] The disclaimer was printed on the invoice and seed pails, but these were only sent to the producer after the sale was made.[132] The court rejected the argument that the producer should have known of the disclaimer because of past dealings with the seed dealer.[133] The court cited testimony that the seed dealer had paid the producer consequential damages after a past mix-up, without litigation, ignoring the language in its own disclaimer.[134] The court upheld the district court's holding that the exclusive purchase price remedy failed in its

123. *See, e.g.*, Martin v. Joseph Harris Co., 767 F.2d 296 (6th Cir. 1985); Harris Moran Seed Co. v. Phillips, 949 So. 2d 916 (Ala. Civ. App. 2006); Mullis v. Speight Seed Farms, Inc., 505 S.E. 2d 818 (Ga. Ct. App. 1998).

124. Looney, *supra* note 17, at 1145.

125. *See id.* at 1141-43.

126. *See id.* at 1154.

127. Lutz Farms v. Asgrow Seed Co., 948 F.2d 638, 648 (10th Cir. 1991).

128. *Id.* at 648.

129. *Id.* at 641.

130. *Id.* at 647.

131. *Id.* at 644.

132. *Id.*

133. *Id.* at 646.

134. *Id.*

essential purpose and the exclusion of consequential damages was unconscionable without delving into the lower court's reasoning.[135]

The Georgia Court of Appeals in *Mullis v. Speight Seed Farms, Inc.*, reversed a judgment in favor of a tobacco seed dealer and found warranty disclaimers and damage limitations were unconscionable for both procedural and substantive reasons.[136] Disclaimers and remedy limits were not discussed between the seed dealer and producer during two separate seed orders for the same growing season—effectively surprising the producer who was "not a professional seed merchant" but a farmer.[137] This procedural unconscionability was combined with substantive unconscionability. The court reasoned seed dealers are better at bearing the risk of defective seeds because they are in a position to test the seed prior to sale.[138] In addition, the farmer had to fumigate, plant, weed, fertilize, and irrigate the seeds before the defect could be discovered.[139] Replacing the defective seed with a new batch, or refunding the purchase price of the seed would not adequately compensate the farmer for his efforts.[140] The court distinguished seed from appliances or equipment, pointing out that for those goods, the value lies in the product themselves, not from the potential they carry.[141] The court cited a long string of cases from South Dakota[142] and Michigan.[143] Limiting the farmer to the exclusive purchase price remedy was unconscionable due to the combination of procedural and substantive reasons.

Courts in Florida, Louisiana, and Arizona have followed the *Mullis* line of reasoning in recent cases. The Arizona District Court relied on *Mullis* to hold a seed dealer liable for selling tomato seeds that were not resistant to a specific

135. *Id.*

136. Mullis v. Speight Seed Farms, Inc., 505 S.E.2d 818, 821-22 (Ga. Ct. App. 1998).

137. *Id.* at 821.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 820.

142. *Id.* at 821 (citing Hanson v. Funk Seeds Int'l, 373 N.W.2d 30 (S.D. 1985) (finding provisions which limited farmer to exclusive purchase price remedy unconscionable); Schmaltz v. Nissen, 431 N.W.2d 657 (S.D. 1988) (holding sole remedy of refund unconscionable)).

143. *Mullis*, 505 S.E.2d at 821 (citing Martin v. Joseph Harris Co., 767 F.2d 296 (6th Cir. 1985) (finding warranty disclaimer and limited remedy clause unconscionable due to unequal bargaining positions); Mallory v. Conida Warehouses, Inc., 350 N.W.2d 825, 827-28 (Mich. Ct. App. 1984) (finding the exclusive purchase price refund unconscionable)).

disease after advertising that the seeds were resistant.[144] The court found the warranties were improperly disclaimed, and even if the warranty disclaimer was operable, the exclusive purchase price remedy was unconscionable and failed in its essential purpose.[145] The unequal bargaining power of the parties, the "surprise" of the warranty disclaimer, and the fact "[t]he true value of the seeds only comes from the crop yielded"[146] led the court to find the remedy was substantively and procedurally unconscionable. The court used the "true value" factor to find the remedy failed in its essential purpose.[147] The Western District Court of Louisiana also found purchase price remedies left unsophisticated farmers with no effective recourse against large seed dealers for defective seed and were thus unconscionable and failed in their essential purpose.[148] The Northern District Court of Florida also found *Mullis* persuasive and found the exclusive purchase price remedy unconscionable in a case where a batch of purportedly seedless watermelon seeds turned out to produce watermelons with seeds.[149]

These pro-producer decisions should put seed dealers operating in these jurisdictions on notice they cannot hide behind their standard disclaimers and exclusive remedy provisions if they sell defective seed, especially when the defect is undiscoverable upon reasonable inspection, like the sex of seeds and genetic potential for high THC production.[150] Seed dealers must exercise caution when contracting with producers in these states to ensure the product they sell will not expose them to liability.[151] Producers in states invalidating these provisions are placed in powerful pre-contracting and pre-litigation negotiation positions.[152] Producers can negotiate for remedies beyond refunds and stronger warranties in exchange for a cap on potential damages. Before litigation, in light of a seed dealer having no protection from warranty disclaimers or exclusive remedy provisions, producers could negotiate for a settlement covering costs and lost profits. Seed

144. Nomo Agroindustrial SA DE CV v. Enza Zaden N. Am., Inc., 492 F. Supp. 2d 1175, 1181-84 (D. Ariz. 2007).

145. *Id.* at 1183-84.

146. *Id.* at 1181.

147. *Id.* at 1181-82.

148. Helena Chem. Co. v. Williamson, No. 14-0192, 2015 WL 1298435, at *17-18 (W.D. La. Mar. 23, 2015).

149. TRA Farms, Inc. v. Syngenta Seeds, Inc., No. 5:12-cv-378-MW/EMT, 2014 WL 3844823, at *7 (N.D. Fla. Apr. 4, 2014).

150. *See* Cox v. Lewiston Grain Growers, Inc., 936 P.2d 1191, 1198 (Wash. Ct. App. 1997) (holding remedy limitation provision failed in its essential purpose because the seed defect was "non-discoverable upon reasonable inspection").

151. *See id.*

152. *See id.*

dealers must enhance their warranty disclaimers and exclusive remedies if they wish to avoid large damage awards in the above courts.

B. Another Group of Courts Has Upheld Warranty Disclaimers and Exclusive Purchase Price Remedies

Despite the relative uniformity of unconscionability[153] and failure of essential purpose[154] analyses, courts in various jurisdictions have recently declined to find exclusive remedies to be unconscionable or failing in their essential purpose. These courts have reasoned that the bargained for risk allocation to the producer is not unconscionable because farming is inherently risky and this lack of substantive unconscionability prevents striking damages limitations from contracts.[155]

In *Everkrisp Vegetables, Inc. v. Tobiason Potato Co.*, the Southeastern Division of the United States District Court for North Dakota found warranty disclaimers and exclusive remedy provisions on seed bags and invoices were in accord with North Dakota's law concerning conspicuousness.[156] Complicating this case is a North Dakota law explicitly disclaiming warranties of potato seed producers.[157] The court proceeded with an unconscionability analysis to examine the liability limitation.[158]The court held there was no procedural unconscionability as the two parties had worked together for "several decades" and because there was no bargaining power disparity between them.[159] Everkrisp was free to bargain for a better remedy if it objected to the exclusive purchase price remedy.[160] Moving to substantive unconscionability, the court cited cases from Alabama, Minnesota,

153. 8 PHILIP J. BRUNER & PATRCIK J. O'CONNOR, JR., BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 21:142 (2016 ed. Supp. 2019).

154. *See generally* 2 WILLIAM D. HAWKLAND ET AL., HAWKLAND'S UNIFORM COMMERCIAL CODE SERIES § 2-719:3 (2014 Supp. 2019).

155. *See* Billings v. Joseph Harris Co., 220 S.E.2d 361, 368 (N.C. Ct. App. 1975), *aff'd*, 226 S.E.2d 321 (N.C. 1976) (holding that limiting seed dealer liability to purchase price was not unconscionable).

156. Everkrisp Vegetables, Inc. v. Tobiason Potato Co., 870 F. Supp. 2d 745, 747 (D.N.D. 2012). In a later proceeding, the court disapproved of holdings unrelated to disclaimers and unconscionability. Everkrisp Vegetables, Inc. v. Tobiason Potato Co., 941 F. Supp. 2d 1132 (D.N.D. 2013).

157. *Id.* at 754 (citing Section 4-10-04 of the North Dakota Century Code which was repealed in 2013); *see* N.D. CENT. CODE § 4.1-55-12 (2019) (stating a warranty of any kind is not made by any certified seed potato producer as to the quantity or quality of the crop produced from the certified seed potatoes).

158. *Id.* at 755-56.

159. *Id.* at 755.

160. *Id.* at 756.

Texas, Ohio, and New York supporting the finding that the liability limitation was not unconscionable.[161] The court opined seed prices would be much higher if seed dealers were to effectively be insurers of their customer's crops.[162] The court did not address the failure of essential purpose.

In 2014, the United States District Court for the Southern District of California found warranty disclaimers on bags of seed were valid and the liability limitations were not unconscionable.[163] The court found no procedural unconscionability due to the sophisticated nature of the producer and because of their prior exposure to warranty disclaimers and liability limitations from the same seed dealer.[164] In addition, the court found no substantive unconscionability because the purchase price remedy did not "shock the conscience" or appear "unreasonably one-sided."[165] The court noted that while producers make "significant investment[s]" in their crops, allowing the reallocation of risk from the seller to the buyer is warranted because the buyer has more control over crop production.[166] Additionally, the court did not address failure for essential purpose, even though the warranty in this case stated "[u]ser agrees that HM's refund of the price paid for the Seed will not cause this agreement to fail of its essential purpose."[167]

161. *Id.* (citing Moorer v. Hartz Seed Co., 120 F. Supp. 2d 1283, 1296-97 (M.D. Ala. 2000) (finding damage limitation is not unconscionable, but it is possible a jury could find the remedy failed in its essential purpose); Bienek v. Garst Seed Co., No. 4-93-545, 1994 WL 760576, at *3 (D. Minn. Nov. 2, 1994) (finding limitation of liability was not unconscionable, nor did it fail for essential purpose in seed transaction); Jones v. Asgrow Seed Co., 749 F. Supp. 836, 840 (N.D. Ohio 1990) (showing plaintiffs are limited to recovering purchase price of seed as liability limitation was not unconscionable); Estate of Arena v. Abbott & Cobb, Inc., 551 N.Y.S.2d 715, 716 (N.Y. App. Div. 1990) (holding the lower court erred in finding liability limitation unconscionable and judgment reversed in favor of seed dealer); Helena Chem. Co. v. Wilkins, 47 S.W.2d 486 (Tex. 2001) (finding liability limitations applied to breach of warranty claims in seed transactions, but not in claims for misrepresentation and unconscionability under the Texas Deceptive Trade Practices-Consumer Protection Act)).

162. *Id.* at 757.

163. Agricola Baja Best v. Harris Moran Seed Co., 44 F. Supp. 3d 974, 991 (S.D. Cal. 2014).

164. *Id.*

165. *Id.* at 992 (quoting Sonic-Calabasas A Inc. v. Moreno, 311 P.3d 184, 212-13 (Cal. 2013) ("unconscionability requires a substantial degree of unfairness beyond a simple old-fashioned bad bargain")).

166. *Id.*

167. *Id.*

Finally in 2015, the Southern District of Iowa held a warranty disclaimer and liability limitation provision were not unconscionable under Iowa law.[168] The court did not address the substantive unconscionability of the liability limitation, but quoted itself: "A bargain is unconscionable if it is 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.'"[169] Here the producer was a sophisticated farmer, who had purchased seed from the dealer for many years, and both the disclaimer and warranty limitations were conspicuous.[170] The producer's repeated dealings with the seed dealer substantially reduced the weight of his claims of procedural unconscionability.[171] This court did not address failure of essential purpose.[172]

While the above courts were swayed by theories concerning the efficient allocation of risk and the idea that sophisticated parties are free to bargain over such risks, they did not address the failure of essential purpose of liability limitations. These oversights by the courts or failures of plaintiffs' counsel to argue the issue should caution seed dealers to not rely too heavily on their contracts to protect them from high damages being awarded against them.

Pro-seed dealer decisions illustrate why hemp producers must be wary when selecting a seed dealer. Producers in the above jurisdiction have little pre-contracting leverage to win better contracting terms from seed dealers, and no pre-litigation leverage for reaching a settlement for anything greater than a refund. Producers are limited to receiving only a refund from their seed dealer if litigation is successful. Absent competition with dealers offering better terms, seed dealers have few incentives to alter their contracting practices. Seed dealers in these states, barring a shift in focus from unconscionability to failure of essential purpose, do not have to worry about facing massive damages awards for selling defective seed, and thus have no legal incentive to enhance their quality control practices.

VII. CONTRACTING PRACTICE RECOMMENDATIONS FOR HEMP SEED DEALERS AND HEMP PRODUCERS

The high potential costs associated with a failed hemp production season, for both the seed dealer and producer, demonstrate the necessity of careful contracting during a seed transaction. In pro—producer jurisdictions, seed dealers will want to limit any semblance of procedural unconscionability during the making of the

168. NuTech Seed, LLC v. Roup, 212 F. Supp. 3d 783, 794 (S.D. Iowa 2015).
169. *Id.* (quoting Bruce v. ICI Ams., Inc., 933 F. Supp. 781, 792 (S.D. Iowa 1996)).
170. *Id.*
171. *Id.* at 793-94.
172. *See id.*

agreement and find ways to soften the perceived substantive unconscionability of warranty disclaimers. They also will want to ensure that the exclusive remedy provided in the contract cannot be found to fail in its essential purpose. For producers in pro-seed dealer jurisdictions, options are more limited due to lack of leverage.

A. Seed Dealer Strategies for Creating Valid Warranty Disclaimers and Strong Exclusive Remedy Provisions Are Varied

The proliferation of hemp acreage around the country and the small number of established seed dealers, may mean seed dealers are selling to producers in states with courts that recognize warranty disclaimers and purchase price remedies as valid, while also to producers in states with courts that would strike down the same provisions. This split between courts around the country exposes seed dealers to the risk of having their contract provisions found valid by one court, but unconscionable in another. Seed dealers must exercise heightened precaution in contracting for seed sales, and revise their contracts accordingly if selling seed in states that have struck down warranty disclaimers and exclusive purchase price remedies. These strategies are not recommended merely as a means of protection for unscrupulous seed dealers from shirking liability for defective seeds, but to provide contractual cover for legitimate seed dealers who seek to limit their exposure to liability in unpredictable courts.

First, seed dealers will need to limit procedural unconscionability as much as possible. The risk of procedural unconscionability is higher in hemp transactions than in other crop transactions at the moment. Most conventional crop producers have years of experience in the industry, while the bulk of hemp producers have very limited experience due to the recent legalization of hemp. This lack of sophistication increases the likelihood of procedural unconscionability. Similarly, if hemp seed dealers mimic conventional seed dealer practices, such as only disclosing warranty disclaimers and limited remedies via invoices, bills of lading, and seed labels after a bargain has been reached, procedural unconscionability is more likely to be found.[173]

To avoid the creation of procedural unconscionability, hemp seed dealers should strive to expose buyers to their terms and conditions of contracting well before a sale is completed. This can be done by providing copies of blank contracts on their website or including disclaimers on their promotional materials. Though hemp seed dealers can do nothing to increase the level of sophistication of their buyers, they can work to highlight the risks inherent in agricultural production and

173. *See supra* Section VI(A).

the importance of accepting the contract only after looking over its terms and conditions. Seed dealers could also refuse to do business with producers that strike them as unsophisticated and inexperienced. They may also advise potential buyers, if they seem unclear what the terms and conditions mean, to consult with an attorney.

Second, to avoid substantive unconscionability, hemp seed dealers will need to have commercially reasonable terms accounting for unequal bargaining power between parties. This will be hard to do in jurisdictions which believe any warranty disclaimer is unconscionable, but thoughtful approaches to contracting terms can limit the amount of unconscionability. One strategy is to highlight the inherent variability in hemp seed production in the disclaimer itself, rather than flatly stating that no express or implied warranties beyond those made by the label exist. Key to Life, a hemp seed dealer in Colorado, states in its "Sales Confirmation" attached to its contracts, that it:

> makes no warranty due to variables in genotypic & phenotypic expression based on environmental influence, fertility traits, soil and water quality and inputs, farming practices, and many other factors, [Key to Life] does not guarantee any positive or desired outcomes or results from planting the seeds sold under this agreement.[174]

The agreement goes on to state phenotypic differences can result from many different factors, and for this reason they do not make any guarantees.[175] This language might limit the probability of substantive unconscionability being found because it clearly spells out why limiting warranties on hemp is reasonable from the seller's standpoint while alerting the buyer to the factors they must consider before making the decision to produce hemp.

Alternatively, seed dealers could choose to guarantee seed performance—provided certain growing conditions are met. They might guarantee the seed will perform if it is between certain elevations, has so many light hours per day, and does not suffer from excessive heat or drought stress. These guarantees might be conditioned upon the producer tracking the necessary statistics and using third-party testing to monitor THC levels before a regulatory agency inspects the field prior to harvest. They could use these guarantees as a marketing tool, juxtaposing their relatively expansive guarantees with the blanket warranty disclaimers of other seed dealers. Giving a guarantee that is stronger than the description on the label would lessen the substantive unconscionability present in seed transactions.

174. Green Life, Inc. /dba Key To Life, Preliminary Contract and Contract for Sale of Seed at 4 (on file with author).

175. *Id.*

Third, seed dealers will either need to find a way to make exclusive purchase price remedies more palatable or get rid of the "refund only" remedy in favor of a remedy accounting for the expected returns from seed and costs associated with production. The courts which have invalidated exclusive purchase price remedies have been struck by the unfairness of limiting a producer to a mere refund after they have invested time and funds into raising a failed crop.[176] Because a refund does not make a crop producer whole, like a refund for a defective computer or washing machine might, the refund remedy fails in its essential purpose.[177] Seed dealers would be wise to take into account these factors when determining what kind of remedy they will make available to their purchasers. A purchase price refund and compensation for a set proportion of producer costs would help the producer get closer to "whole" and limit the risk of unconscionability and failure for essential purpose.

Lastly, seed dealers could refuse to do business with producers in jurisdictions where warranty disclaimers and exclusive purchase price remedies are not upheld. This would remove the necessity of crafting contractual provisions with an eye for unconscionability and failure of essential purpose and dispel the potential risk for exceedingly high damage awards.[178] This strategy limits revenue growth, but it mitigates the need for seed dealers to attempt to account for the large disparity between potential damages and purchase price and to invest in quality control measures above and beyond what is minimally required by state law.[179]

B. Hemp Producer Strategies for Improving the Outcomes from Seed Transactions Are More Limited in Pro-Producer Jurisdictions

Hemp producers have limited strategies to extract more protection from their seed dealers in states which uphold warranty disclaimers and exclusive remedy provisions. They cannot artificially increase procedural unconscionability by avoiding contractual terms and conditions or remaining unsophisticated. Because hemp seed is in such high demand, seed dealers have more negotiating leverage and do not need to make concessions to buyers in order to get their sale. Seed deals rarely involve an exchange of forms, limiting the entry points for buyer conditions. The terms and conditions of sale are presented on a take it or leave it basis, requiring the buyer to adhere to those terms or find another seller to do business with.

176. *See supra* Section VI(A).

177. *See* Nomo Agroindustrial SA DE CV v. Enza Zaden N. Am., Inc., 492 F. Supp. 2d 1175, 1183-84 (D. Ariz. 2007).

178. *See id.* at 1181.

179. *See id.* at 1182.

Because buyers most likely cannot modify the terms of sale, unless they are purchasing on such a scale that a seller is willing to make concessions, they need to take pre-contracting and post-contracting approaches to protect themselves. This can be done by working with other hemp producers to identify reputable seed dealers and reliable seed varieties. Buyers can also educate themselves on the breeding process and inquire into the nature of the seed dealer's experience with hemp breeding and seed dealing. Does the dealer breed the seeds or are they a middle-man for a seed breeder? Do they have third-party Certificates of Analysis to support their claims about seed sex and THC content? Buyers can also use regulatory agency lists of approved varieties to limit their exposure to new, untested cultivars that could prove unreliable.[180] Buyers should also take care to carefully document growing conditions and plant performance after planting to provide an evidentiary basis for showing the seeds were defective. A finding of defectiveness may be supported by demonstrating that despite taking the utmost care in raising the crop and favorable weather conditions during the growing season the seeds still failed to perform. Additionally, having this information on hand would help with pre-litigation negotiations. A seed dealer, in the interest of keeping a customer, may be willing to work with the producer to reach a settlement that is above and beyond a mere refund.

VIII. CONCLUSION

Seed dealers must take into account numerous factors prior to entering into a bargain with a producer. Learning more about their potential customer will help to determine if there are increased risks to the occurrence of producer errors, potentially exposing them to increased risk of allegations of defective seeds. They must consider the producer's experience with growing hemp, the environment the producer intends to use, and the likelihood of the producer having neighbors who are growing hemp. Seed dealers must also determine if the producer's state would uphold warranty disclaimers and limited remedies, or if those provisions would be found invalid. If there is a risk, and the producer's state would not uphold the provisions, the seed dealer must limit procedural unconscionability as much as possible. Repeatedly exposing the potential customer to the disclaimers and exclusive remedy provisions help meet this end. Additionally, the seed dealer should also ensure the customer is aware of the risks inherent in hemp production. Seed dealers working with customers in states that regularly strike down exclusive remedy provisions, must also enhance the strength of the limited remedies to ensure they are not found to fail in their essential purpose.

180. *See supra* Section IV(B).

Hemp producers like Farmer Bob also must take precautionary steps before entering into an agreement for the purchase of hemp seeds. They must learn more about their seed dealer before purchasing the seed to determine the dealer's reliability, and they should also review the contract language before agreeing to it. If the producer knows they are in a state where warranty disclaimers and exclusive remedy provisions would be upheld, they should attempt to negotiate with the seed dealer to get greater protections than a refund remedy. However, their bargaining power may be limited due to the dearth of seed dealers, high demand for seed, and validity of the contract's terms. If the producer is operating in a state where these provisions are struck down, they should make the dealer aware of this fact. A seed dealer who knows the producer is not protected by the language of their standard contract may work with the producer to craft provisions that are more favorable to the producer, while still offering the dealer protection from damage awards based on lost profits.

The substantial increase in hemp acreage under the supervision of inexperienced producers in the United States, lack of reliable seed and seed dealers, the lack of regulations thereof, and intrinsic characteristics of hemp production create a ripe environment for legal disputes regarding underperforming and defective seed. The contractual provisions relied on by seed dealers may or may not protect them from high damages. Producers are left similarly exposed to large losses they cannot be compensated for or potentially entitled to massive damages awards. This uncertainty requires parties on either side of the transaction to proceed with careful deliberation during the search for seed and customers, in crafting and reading the contract, and during the growing season.