Gasoline Dealers' Remedies Against Dealership Termination

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be established.[56] The trend is certainly in that direction.[57] The language of precedent written when medical knowledge was far more limited should not petrify the law.[58] Rather, the courts should recognize that they already have the tools to separate fact from fraud.[59]

Unfortunately, the Florida Supreme Court apparently never considered either the advancing frontiers of science or the trend in other jurisdictions. Instead, the court decided, without explanation, not to shift to the tortfeasor some of the price of living in an urban society that is often placed on the injured person.

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GASOLINE DEALERS' REMEDIES AGAINST DEALERSHIP TERMINATION

Marinello entered into a lease and dealer agreement with appellant Shell Oil Company. The contracts were executed simultaneously, to run for identical three year primary periods and were renewable thereafter from year to year. The lease was terminable by Marinello at any time upon 90 days notice, at the end of the primary period or at the end of the subsequent year. Either party could terminate the dealer contract at any time by giving ten days notice. Shell Oil Company gave notice of termination and brought suit for possession of the premises. The suit was consolidated with Marinello's action seeking injunctive relief and reformation of the agreements. The trial court granted reformation,[1] to include an implied covenant by appellant to renew the agreements so long as respondent substantially performed his obligations thereunder.[2] On direct certification, the Supreme Court of New Jersey, *held*, modified and af-

56. *Id.* at §§ 20.2, 52.
57. *Id.* at § 20.53.
58. *See* Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970). *See also* J. FRANK, LAW AND THE MODERN MIND 148-59 (1930).
59. Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970).

1. Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 294 A.2d 253 (Ch. Div. 1972).
2. Marinello's principal obligations under the lease (prepared by Shell Oil Co.) were: (1) to pay rent; (2) to furnish a security deposit; (3) to keep the station open twenty-four hours a day, subject to local ordinance; (4) to keep the station clean and in good repair; and (5) to use the premises only for the operation of a service station. Shell agreed to sell Shell gasoline and products, and to license respondent to use Shell's trademarks, brandnames and identifications. Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 358, 294 A.2d 253, 257-58 (Ch. Div. 1972).

In the trial court, Shell contended that Marinello had failed to perform obligations three and four. Marinello's evidence indicated knowledge and acquiescence by Shell in his deviations from the specified business hours. He also produced evidence that the station was clean and well run. The supreme court upheld the trial court's finding that respondent had substantially complied with his obligations. *Id.* at 378-82, 307 A.2d at 603.

firmed: A clause in a lease and dealer agreement between an oil company and a service station operator which provides for termination by either party without good cause is void as violative of public policy, and, hereafter, a showing that the terminated party failed to substantially perform his contractual obligations will be required. *Marinello v. Shell Oil Co.*, 63 N.J. 402, 307 A.2d 598 (1973).

Marinello is the first case to provide gasoline dealers with a broadly-applicable remedy against termination by the oil companies. In giving literal effect to termination clauses, the courts have historically treated them as unseemly but legitimate offspring of the parties' freedom to contract.[3] The available avenues of relief have generally required proof of wrongful conduct by the terminating party, such as anti-trust violations,[4] or independent torts.[5]

In *Division of Triple T. Services v. Mobil Oil Co.*,[6] the court explored the remedial potential of Uniform Commercial Code section 2-302,[7] the unconscionability clause, as addressed to facts similar to those in *Marinello.* Although section 2-302 was "assumed" to be applicable to the dealer contract,[8] the termination clause was held not unconscionable.[9] Thus, from the dealer's standpoint, the Code, by focusing inquiry upon the bargaining relationship of the parties, effected a diagnosis, but not a cure.

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3. Bushwick-Decatur Motors, Inc., v. Ford Motor Co., 116 F.2d 675 (2d Cir. 1940); Sharpe v. Great Lakes Steel Corp., 9 F.R.D. 691 (S.D.N.Y. 1950); In All States Service Station v. Standard Oil Co., 120 F.2d 714 (D.C. Cir. 1941), the oil company sought to terminate upon ten days notice, as provided in the contract. In affirming the lower court's judgment that the notice was sufficient, the court stated: "The contract set the period that the notice must run. The Service Station agreed by contract that ten days' notice sufficiently protected its position." *Id.* at 715. *But see* Clausen and Sons, Inc. v. Theodore Hamms Brewing Co., 395 F.2d 388 (8th Cir. 1968), holding that an exclusive franchise dealer who was terminated before he could recoup his investment has a breach of contract claim against his franchisor. The basis of the claim was an implied term of reasonable duration.

4. Anti-trust remedies are discussed in Wade, *Some Anti-Trust Problems in Terminating Franchises*, 44 ST. JOHNS L. REV. 23 (1969), and Horton, *Legal Remedies of a Distributor Terminated Pursuant to a Contractual Provision of Termination Upon Due Notice*, 3 CREIGHTON L. REV. 88 (1969). *See also Mobil Oil Co. v. Rubenfeld*, 72 Misc. 2d 392, 339 N.Y.S.2d 623 (Civ. Ct. 1972), which held Mobil's coercion of the dealer to engage in anti-trust violations to be a breach of the fiduciary relationship between producer and dealer.

5. *See* Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465, 483-85.

6. 60 Misc. 2d 720, 304 N.Y.S.2d 191 (Sup. Ct. 1969).

7. N.J. STAT. ANN. § 12A: 2-302 (1962).

8. Citing UNIFORM COMMERCIAL CODE § 1-102, Comment 1, the court reasoned that the U.C.C. was designed to facilitate development of the law in light of changing commercial practices. Also cited were several cases applying the Code to analogous circumstances: *e.g.*, Sinkoff Beverage Co. v. Joseph Schlitz Brewing Co., 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. Spec. T. 1966) (beer distributorship); Hertz Commercial Leas. Corp. v. Transport Credit House, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (Civ. Ct. 1969) (equipment leasing contract).

9. The reasons cited were: (1) the clause was not so one-sided as to oppress or surprise; (2) the dealer claimed no oppression, surprise or lack of mutual benefit; (3) U.C.C. § 2-309 allows termination upon reasonable notice. Division of Triple-T. Services v. Mobil Oil Co., 60 Misc. 2d 720, 730, 304 N.Y.S.2d 191, 201-2 (Sup. Ct. 1969).

The fact that the *Marinello* decision grants a remedy against termination without regard to independent wrongful conduct[10] makes it distinctive; that it declares a principle broadly applicable to other gasoline dealers makes it unique. The rationale derives, not from a strained interpretation of the particular facts, but from a public policy evaluation of the oil company-dealer relationship. Due to the overwhelming bargaining superiority of the oil companies, this relationship is essentially the same, regardless of particular company or locale.[11] The uniformity of the relationship begets the potential impact of the remedy.

Two celebrated New Jersey Supreme Court opinions provide authority for the remedy: *Henningsen v. Bloomfield Motors, Inc.*,[12] and its progeny, *Ellsworth Dobbs, Inc. v. Johnson.*[13] These cases set forth a three-part test for declaring contractual clauses void as against public policy: (1) a disparity in bargaining power must exist; (2) the disparity must engender "grossly unfair" contractual provisions; (3) the provisions must tend to injure the public in some way.[14] *Marinello* signals an expansion of the *Henningsen* principle by applying it to a contract between two commercial parties.

A consideration of the first part of the test—disparity in bargaining power—illustrates the expansion. In *Henningsen*, the relevant bargaining relationship was that of automobile manufacturer and individual purchaser. The parties in *Dobbs* were a real estate broker and private homeowner. Both cases thus involved a commercial party and a non-commercial consumer of that party's goods or services. *Shell's* relationship with *Marinello*, a businessman with ten years experience as a Shell dealer at the time he signed the contracts, should be examined in this light.

There is authority for distinguishing commercial and non-commer-

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10. In the trial court, Marinello asserted the defense of unclean hands to Shell's dispossessory action. He contended that his refusal to buy tires, batteries and accessories (TBA) in the quantities solicited, and to sell gasoline at Shell's recommended price, were the actual reasons for termination. It was further asserted that Shell had discriminated against Marinello in tank-wagon gasoline prices. The trial court sustained the defense, Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 392-93, 294 A.2d 253, 272 (Ch. Div. 1972) but the Supreme Court expressly refrained from reviewing the finding. 63 N.J. at 407, 307 A.2d at 601.

11. Atlantic Refining Co. v. F.T.C., 381 U.S. 357 (1962); Shell Oil Co. v. F.T.C., 360 F.2d 470 (5th Cir. 1966). Note also that Texaco, Inc. v. Appleget, 63 N.J. 411, 307 A.2d 603 (1973), was decided the same day as *Marinello*. Citing *Marinello*, the per curiam opinion in that case applied the same principle to a Texaco dealership.

12. 32 N.J. 358, 161 A.2d 69 (1960) [hereinafter referred to as *Henningsen*]. In *Henningsen*, the court held invalid a clause in the American Automobile Manufacturers standard warranty. The clause purported to disclaim all non-enumerated warranties, express or implied. The plaintiff in that case was a consumer seeking damages for injuries to his wife, resulting from a defect in the car.

13. 50 N.J. 528, 236 A.2d 843 (1967) [hereinafter referred to as *Dobbs*]. This case involved a broker's suit to collect a commission. In holding for the client, the court expressed sensitivity for the plight of members of the public who must deal with those who, through experience, licensure, size or membership in associations, have acquired an overwhelming bargaining advantage.

14. 63 N.J. at 408, 307 A.2d at 601-02 *citing* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

cial parties. In *Moreira Construction Co. v. Moretrench Corp.*,[15] an exculpatory clause in an equipment lease was held valid although the lessor was the world's largest supplier of that equipment. The court reasoned that, because the lessee was experienced in business, the size difference alone did not render the clause invalid.

The holding in *Marinello*, however, tacitly rejected this approach. The relative bargaining positions of oil company and dealer were found to be so disproportionate that "[f]or all practical purposes Shell [could] dictate its own terms."[16] In effect, then, the policy of invalidating oppressive clauses engendered by coercive relationships is not confined to consumer transactions, nor is it necessarily vitiated by the business experience of the parties.[17]

The second part of the test requires that the clause be "grossly unfair."[18] As written, both the lease and dealer contract give each party a comparable right to terminate.[19] But, as the opinion explains:

> It is a fallacy to state that the right of termination is bilateral. The oil company can always get another person to operate the station. It is the incumbent dealer who has everything to lose since, even if he had another location to go to, the going business and trade he built up would remain with the old station.[20]

The third part of the test requires that the "grossly unfair" provision must tend to injure the public in some way. It is the protection of this large class of persons, who, although not parties to the agreement are indirectly affected by its provisions, which justifies voiding the unambiguous terms of the contract. In applying this rationale, *Marinello* goes beyond *Henningsen* and *Dobbs*. The protected parties in those cases were consumers, while Marinello was a retail businessman. The impact of termination upon the dealer, no matter how oppressive, is pertinent from a policy standpoint only insofar as it produces injury to his customers.

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15. 97 N.J. Super. 391, 235 A.2d 211 (App. Div. 1967).

16. 63 N.J. at 408, 307 A.2d at 601. This type of situation was vividly described by Judge Wisdom of the 5th Circuit:

> The relationship of a major oil company to its service station dealer goes beyond the bigness-littleness antithesis that exists in innumerable contract negotiations and in the operation of a modern, large business. The inherent leverage a major oil company has over its dealers results from the market structure of the industry and the special dependence on the company of the service station dealer (who is usually also a lessee). . . . A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord.

Shell Oil Co. v. F.T.C., 360 F.2d 470, 487 (5th Cir. 1966). *But see* Weaver v. American Oil Co., 276 N.E.2d 144, 153 (Ind. 1971) (dissenting opinion), asserting that, because the dealer entered into the contracts with economic benefit as a motive, there was no coercion, and thus nothing to indicate a lack of "substantial equality" in his bargaining power.

17. In fact, Marinello's status may have increased the disparity. His investment of time and labor made him less likely to risk confrontation with the oil company. 63 N.J. at 409, 307 A.2d at 601.

18. See text following note 11, *supra*.

19. The termination provisions are described in the text preceding note 1 *supra*.

20. 63 N.J. at 409, 307 A.2d at 602.

There is no paucity of commentators seeking to describe the nature and extent of this injury.[21] It is said to result from the coercion inherent in the power to terminate virtually at will. This leverage, effective without resort to statutorily prohibited practices,[22] reduces the local dealer's independence as a retailer. He is thereby constrained to purchase tires, batteries and accessories from a particular oil company rather than bargain for more favorable terms from another supplier. The additional costs resulting from this inefficient method of purchasing are passed on to the consumer in the form of higher prices. In place of examining this theory, however, the court simply cited the New Jersey Unfair Motor Fuels Practices Act.[23] In the Legislative Declaration of Policy, this Act deems the distribution of motor fuels to be a matter of "public interest."

In addition to the case law discussed above, the court cited the newly-enacted New Jersey Franchise Practice Act[24] in support of its reformation of the contract in favor of Marinello. The court recognized that, had this Act been effective at the last renewal of the contracts, it would have directly controlled the relationship, which was found to be "basically that of franchise."[25] The existence of this Act, as an authoritative declaration of New Jersey public policy, might be utilized to distinguish the *Marinello* holding in jurisdictions without analogous statutes. However, the opinion expressly states that the Act "merely put into statutory form the extant public policy of the state."[26] In essence, this policy recognizes certain economic consequences of abuses in the marketing of such a vital commodity as gasoline. The task facing terminated dealers or franchisees in other jurisdictions is to bring forth similar expressions of policy.

As a statement of judicial policy, then, *Marinello* combines the "basic doctrine that courts will not permit themselves to be instruments of inequity and injustice"[27] with the belief that one-sided commercial contracts can harm the public. Its utility to gasoline dealers as a remedy against termination depends upon the readiness of other jurisdictions to employ these principles in the absence of specific statutory provisions.

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21. *See* Comment, *Dealer Franchising in the Gasoline Industry: Current Developments*, 4 U.S.F.L. REV. 65 (1969).

22. See note 4 *supra*.

23. N.J. STAT. ANN. § 56:6-17 (1964).

24. N.J. STAT. ANN. § 56:10-1, *et. seq.* (Supp. 1973). The Act prohibits a franchisor from terminating, cancelling or failing to renew a franchise without good cause, which is defined as the failure by the franchisee to substantially comply with the requirements imposed on him by the franchise. N.J. STAT. ANN. § 56:10-5 (Supp. 1973).

25. 63 N.J. at 409, 307 A.2d at 602.

26. *Id.*

27. United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942).