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Unconscionability at the Gas Station

Ellen R. Jordan

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Section 2-302 of the Uniform Commercial Code permits courts to relieve parties of contracts that are judicially determined to be "unconscionable."[1] Although the section has been attacked as unintelligible and without "reality referent,"[2] it has also been defended as a standard whose intentional imprecision encourages self-restraint and promotes justice in commercial matters.[3] But whether the imprecision is a result of poor drafting or is intentional, judicial interpretation is essential to flesh out the doctrine and make it more than a ritual incantation. Like any abstraction, the term "unconscionability" must be defined by the process of judicial inclusion and exclusion of concrete examples.

This Article examines judicial efforts to define the parameters of unconscionability in one particular commercial setting: retail distribution of gasoline by oil companies. In so doing, this Article seeks to determine, first, whether the doctrine of unconscionability, as applied, is operating appropriately, and, second, whether the benefits thus far achieved through application of the doctrine in the name of public policy have been worth the costs resulting from limiting freedom of contract.

I. THE CONTOURS OF UNCONSCIONABILITY

A court applying the doctrine of unconscionability must reconcile the goal of enforcing freely made bargains with the notion that a court of justice should not hold a party to a grossly unfair term, which he could not exclude from the contract or of which he was justifiably ignorant.[4] Long before the Uniform Commercial Code gave courts

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1. U.C.C. § 2-302 provides,

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
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> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

2. Leff, *Unconscionability and the Code—The Emperor's New Clause,* 115 U. PA. L. REV. 485, 558 (1967).

3. *See* Ellinghaus, *In Defense of Unconscionability,* 78 YALE L.J. 757 (1969).

4. There are a number of excellent commentaries on unconscionability. *See, e.g.,*

authority to excise unconscionable terms or to refuse enforcement of the contract altogether, the principle was established that a court of equity would not grant specific enforcement of a contract that "no man in his senses and not under delusion would make on the one hand, and . . . no honest and fair man would accept on the other."[5] When the case is not so extreme, however, the problem becomes much more difficult.

Troublesome questions have arisen, particularly in modern contracting, where a bargain is often struck with respect to only the critical variables of price, quantity, delivery date, and specific features of the product or service. One question arises when parties having superior market power are able to extract highly favorable terms from those who seek to deal with them. To what extent does the Code scheme contemplate limitations on the use of that power? A second question concerns the treatment that should be given terms appearing on forms that were signed but unread. The considerations on both sides of this latter question center on reliance. Ought the drafting party, who is often economically dominant, be entitled to rely on the other's manifestation of assent and plan its affairs accordingly? Or ought the signer be able to rely on the legal system to ensure that his legitimate expectations, most often in the areas of product quality and remedies, are not whittled away by artful drafting? In short, given the realities of commerce, whose reliance is more deserving of protection?

The drafters of the Code did not attempt a definition of unconscionability, assuming perhaps that, like obscenity,[6] it is more easily recognized than defined. The official comments to section 2-302, however, indicate that the principle underlying the doctrine of unconscionability is the "prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power."[7] Of the two evils at which the doctrine is directed,

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Ellinghaus, *supra* note 3; Leff, *supra* note 2; Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969); Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969). There are three replies to the Murray article. Braucher, *The Unconscionable Contract or Term*, 31 U. PITT. L. REV. 337 (1970); Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970); Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970). *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 112-33 (1972).

5. Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (Ch. 1751).

6. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

7. U.C.C. § 2-302, Comment 1. Professor Leff has suggested that unconscionability problems may result from either "procedural" or "substantive" abuses. Procedural unconscionability refers to imperfections in the process of obtaining assent; substantive unconscionability refers to the effect of the term or contract on the disfavored party. *See* Leff, *supra* note 2, at 487. Unfair surprise is clearly a procedural

unfair surprise has proved the easier to recognize and condemn; it results from failure sufficiently to disclose important terms at the time the contract is formed. This type of abuse is closely akin to fraud, which the common law agreed would vitiate any assent.

The other evil, oppression, has proved more difficult to identify, since courts and commentators have used the term in two different ways. It is used to refer to a procedural abuse, refusal to bargain over terms, which has been characterized as a lack of "meaningful choice"[8] or "quasi-duress."[9] But "oppression" is also used to refer to a result that is substantively unconscionable regardless of how free the bargaining.[10] Under this result-oriented definition of oppression, certain terms are voidable without regard to assent because they are simply too harsh to enforce or, as common law courts would say, are void as against public policy.[11]

While eschewing any explicit definition of unconscionability, the Code drafters were quite specific about the appropriate procedure for making the determination. In addition to the Code's general emphasis on the importance of course of dealing and usage of trade as aids in the interpretation of contractual terms,[12] it directs special attention to the commercial setting when charges of unconscionability are

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abuse. *See id.* at 499-500. Oppression, on the other hand, has been treated as having both procedural and substantive components. *See* text accompanying notes 8-10 *infra.*

8. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

9. Leff, *supra* note 2, at 488, 499.

10. *See* Spanogle, *supra* note 4, at 948.

11. The more narrow procedural approach to oppression would insulate the terms of a fully negotiated agreement from judicial rewriting on the ground that section 2-302 is designed to prevent unfair bargaining, not unfair bargains. Such a reading comports with the disclaimer in the comments of any intention to meddle with the results of superior bargaining power. *See* U.C.C. § 2-302, Comment 1.

Despite uncertainty about the thrust of the doctrine, however, the emerging consensus seems to be that unconscionability is not directed at bargaining per se: terms written on the head of a pin about which no bargaining is possible will be enforceable if they are reasonable and in line with ordinary expectations. Unless the terms produce hardship, the bargaining process need not be scrutinized. *See* Murray, *supra* note 4, at 24-25. Thus, some measure of substantive unconscionability, or harshness, will always be part of the agreement. The more difficult question is whether a harsh term, though procedurally impeccable—fully explained and disclosed—may be beyond the bounds of "conscience" and legal enforcement. To this question, there is no clear answer. Cases striking down extremely high prices as unconscionable are reviewed in Spanogle, *supra* note 4, at 964-67. If the buyers in these cases in fact clearly understood the prices, it may be that, at least in consumer transactions, even a procedurally impeccable contract may be struck down on substantive grounds. But given that the total price in these cases included credit terms that may not have been sufficiently disclosed, *see, e.g.,* American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964), perhaps the bargaining process with respect to price was not procedurally adequate.

12. *See* U.C.C. § 1-205.

raised. Section 2-302(2) provides that a court may decide a question of unconscionability only after affording all parties a reasonable opportunity to present evidence as to the commercial setting, purpose, and effect of the challenged contract or term.[13] Moreover, the test to be applied is "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[14] Thus, it is clear that courts are to determine whether a given term constitutes bad faith or overreaching by reference to accepted commercial standards. In this way, the Code seeks to ensure that the legitimate expectations and needs of business will be considered before a contract is modified or abrogated in the name of public policy.

Courts have thus far proceeded with caution in upsetting commercial arrangements as unconscionable. Some have hesitated to undertake the wide-ranging inquiry into commercial practice and needs mandated by the Code, suggesting that the task is more properly one for the legislature.[15] Courts have also stressed the danger of second-guessing knowledgeable commercial negotiators whose assessment of the fairness of the forms they sign is probably as accurate as that of even the most conscientious jurist, who has struggled to understand the commercial context.[16] Hence, except in the consumer setting, where practices clearly bordering on fraud or true duress create special problems,[17] courts have generally permitted businessmen to enforce even form contracts.[18] Indeed, in those rare cases in which unconscionability has been found in merchant-to-merchant transactions,[19] commentators have not hesitated to criticize the results as economically dysfunctional and unwise.[20]

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13. The text of section 2-302(2) appears at note 1 *supra*.

14. U.C.C. § 2-302, Comment 1.

15. *See, e.g.*, Division of Triple T Serv., Inc. v. Mobil Oil Corp., 60 Misc. 2d 720, 723, 304 N.Y.S.2d 191, 204 (Sup. Ct. 1969), *aff'd mem.*, 34 App. Div. 2d 618, 311 N.Y.S.2d 961 (1970); William C. Cornitius, Inc. v. Wheeler, 276 Or. 747, 556 P.2d 666, 669-70 (1976).

16. *See, e.g.*, *In re* Elkins-Dell Mfg. Co., 253 F. Supp. 864, 871 (E.D. Pa. 1966) ("To hold these contracts unenforceable on their face would probably be to impose a judicially invented but economically dysfunctional morality upon knowledgeable contracting parties.").

17. *See* Wright, *The Courts Have Failed the Poor*, N.Y. Times, Mar. 9, 1969, § 6 (Magazine), at 26.

18. *See* J. WHITE & R. SUMMERS, *supra* note 4, at 114 & n.11.

19. *See, e.g.*, Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd., 29 App. Div. 2d 303, 287 N.Y.S.2d 765 (1968), *rev'd on other grounds*, 25 N.Y.2d 451, 255 N.E.2d 168, 306 N.Y.S.2d 934 (1969); Fairfield Lease Corp. v. Umberto, 7 U.C.C. Rep. 1181 (N.Y. Civ. Ct. 1970).

20. *See, e.g.*, Comment, *Unconscionable Business Contracts: A Doctrine Gone Awry*, 70 YALE L.J. 453 (1961) (criticizing Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955) (admiralty decision voiding a contractual term as against public policy)).

A general assessment of unconscionability in the context of purely commercial transactions is beyond the scope of this Article. Instead, the Article focuses on the emergence of one commercial litigant who has successfully claimed protection against an unconscionable contract or term—the service station operator. Rejecting the presumption that businessmen can take care of their own interests, four courts have seen parallels between the plight of the consumer faced with take-it-or-leave-it form contracts and that of these particular entrepreneurs. These courts did not hesitate to reform the contracts in question, characterizing terms in various service station lease arrangements as "oppressive," "contrary to public policy," or "unfair." This Article examines the conclusions reached in these cases to determine whether they were warranted by the language of the Code.

II. INSTITUTIONAL BACKGROUND

The major integrated oil companies have relied heavily on the independent dealer to distribute gasoline to the motoring public.[21] Although the companies avoid the "franchise" label,[22] their dealer arrangements fit within the accepted broad definition of franchising. In general terms a franchise is a contractual arrangement between a company with an established trademark, product, or service (or all three) and an independently managed outlet. The individually owned or leased business is operated as though it were part of a large chain, with standardized services, products, trademarks, uniforms, equipment, and design.[23]

While fitting within this broad description, gasoline marketing differs significantly from other franchise operations.[24] For example, unlike the operator of a McDonald's restaurant outlet, the operator of a gas station may have less interest in selling the franchised products than does the supplying company. The company sees the station as its means of selling petroleum products, with price competition and high volume as keys to profit. The dealer, in contrast, often sees the station primarily as *his* repair and maintenance operation. Since the bulk of his income tends to come from automotive services that he, not the oil company, provides, he is less concerned than the com-

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21. For a history of the dealer concept in petroleum distribution, see F. ALLVINE & J. PATTERSON, COMPETITION, LTD.: THE MARKETING OF GASOLINE 26-28 (1972).

22. FEDERAL TRADE COMMISSION AD HOC COMMITTEE ON FRANCHISING, REPORT 7 (1969) [hereinafter cited as FTC REPORT], *reprinted in* PRACTICING LAW INSTITUTE, FRANCHISING 185 (Commercial Law and Practice Course Handbook Series No. 33, 1970).

23. *See* E. SCHWARTZ, BUSINESS EXPANSION THROUGH FRANCHISING 8 (1973).

24. *See generally* Oxenfeldt & Thompson, *Franchising in Perspective*, J. RETAILING, Winter 1968-1969, at 3-13.

pany about increasing sales of the relatively low-profit gasoline.[25] Moreover, though some agreements do specify a maximum rent, rental rates are often based on a percentage of gasoline sales,[26] in effect giving the dealer a *negative* incentive. This disparity between the interests of the company and the operator simply does not exist where both are exclusively interested in selling the same product and splitting the profits.

Another factor distinguishing these arrangements from other franchise operations, and potentially giving significance to the difference in emphases between the operators and the oil companies, is the retention by the oil company of control over the station properties.[27] To avoid the problems of supervision, payroll, and exposure to maximum tort liability for a far-flung distribution network,[28] as well as to avoid some local taxes,[29] oil companies lease stations to dealers rather than operate them directly. Until recently, industry practice was to keep dealers on short-term leases, usually terminable by the company on short notice and without showing cause.[30] Unlike other franchising arrangements, no elaborate franchise agreement sets out reciprocal rights and duties,[31] and the resulting precariousness of the dealer's position is the root of many dealer complaints. In addition, dealers charge that the ever-present threat of termination, which would mean destruction of their entire business, enables the oil companies to exert undue control over the way gasoline and other petroleum products are sold to the public.[32]

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25. *See* Ulman, *Service Stations Give Oil Firms Tough Fight over Gas-Only Outlets,* Wall St. J., June 16, 1977, at 1, col. 6.

26. *See* Brown, *Franchising—A Fiduciary Relationship,* 49 TEX. L. REV. 650, 656 (1971).

27. This Article focuses on that segment of the industry composed of dealers who lease their business from a major oil company. These dealers comprise roughly thirty percent of all service station operators. W. JOHNSON, R. MESSICK, S. VAN VACTOR, & F. WYANT, COMPETITION IN THE OIL INDUSTRY 11 (1976).

28. *See* Comment, *Dealer Franchising in the Gasoline Industry: Current Developments,* 4 U.S.F. L. Rev. 65, 66 (1969).

29. *See* F. ALLVINE & J. PATTERSON, HIGHWAY ROBBERY: AN ANALYSIS OF THE GASOLINE CRISIS 25 (1974).

30. *See, e.g., FTC Industry Conference on Marketing of Automotive Gasoline: Hearings Pursuant to H. Res. 13 Before Subcomm. No. 4 on Distribution Problems of the House Select Comm. on Small Business,* 89th Cong., 1st Sess. 332 (1965) [hereinafter cited as *FTC Industry Conference*]. In some states dealers are now protected by statute. *See* note 86 *infra* and accompanying text. In addition, the oil companies themselves have offered longer leases, perhaps discovering that the better dealers insist on more security before investing time and energy in a station operation. *See FTC Industry Conference, supra* at 561.

31. *See* FTC REPORT, *supra* note 22, at 7.

32. *Hearings on S. 2507 & S. 2321 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess. 51 (1967).

Given these conditions, two sharply divergent views of the relationship between the oil companies and their dealers are advanced. Organized dealers[33] and their advocate, the Federal Trade Commission,[34] portray the dealer as an economic serf, under the thumb of his lessor-supplier and afraid to step out of line in the pricing or purchasing of recommended brands of tires, batteries, and accessories because of the ever-present threat of termination. Based upon that view, the Supreme Court held an agreement between Texaco and Goodrich, whereby Goodrich paid Texaco a commission on Goodrich tires, batteries, and accessories bought by Texaco dealers, to be anticompetitive, although there was no evidence of overt coercion on the part of Texaco.[35] The Court found that the power imbalance in the relationship between Texaco and its dealers was enough to make this sales-commission system "inherently coercive":[36] " 'A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord.' "[37]

Complementary to this view is the theory that oil companies have traditionally used the vast profits derived from control of crude oil production to subsidize their "downstream" operations.[38] As a result, the companies could afford to terminate even a good dealer if he proved uncooperative. According to this view, the individual dealer was expendable and could be ruthlessly cut off to stamp out any pricing or purchasing independence on his part.[39] The squeeze on oil company profits caused by the end of the oil depletion allowance and rising prices for foreign oil, far from making dealerships more valuable and more secure, has only intensified oil company pressure on the individual stations to pay their own way and has aggravated the conflict between dealers and the companies.[40]

The oil companies paint quite a different picture. They note that a major oil company dealership is often an attractive prospect for the person who wants his own business. The oil companies have already invested in the land and equipment,[41] and are willing to finance a

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33. *See, e.g., FTC Industry Conference, supra* note 30, at 228.

34. *See* FEDERAL TRADE COMMISSION, REPORT ON ANTICOMPETITIVE PRACTICES IN THE MARKETING OF GASOLINE (1967).

35. *See* FTC v. Texaco, Inc., 393 U.S. 223 (1968).

36. *Id.* at 229.

37. *Id.* at 227 (quoting Shell Oil Co. v. FTC, 360 F.2d 470, 487 (5th Cir. 1966) (Wisdom, J.), *cert. denied,* 385 U.S. 1002 (1967)).

38. *See* F. ALLVINE & J. PATTERSON, *supra* note 29, at 79. *But see* W. JOHNSON, R. MESSICK, S. VAN VACTOR, & F. WYANT, *supra* note 27, at 41-48.

39. *See FTC Industry Conference, supra* note 30, at 228-29.

40. *See* Roche, *Major Oil Firms Seek Earnings on Gasoline, Long a "Loss Leader,"* Wall St. J., Mar. 28, 1977, at 1, col. 6.

41. "A metropolitan or interstate location today represents a minimum average investment of $225,000 in land, buildings and equipment. This amount increases sig-

large part of the new dealer's initial investment.[42] That investment itself is relatively modest, compared to the sums necessary to obtain other automotive service franchises[43] or a fast-food franchise.[44] The dealer gets extensive training,[45] and takes over a fully equipped station with an established brand, a credit card system that costs the dealer nothing,[46] and rental terms that are far below the fair market value of the site.[47]

The companies also stress that they are in business to maximize profits and thus they challenge the theory that they are willing to lose money at the retail end.[48] They point out that a struggling, inefficient dealer, who is identified by the public with the company, gives the entire operation a "black eye."[49] More serious, he is usually a collection problem and a drain on overall profitability.[50] A good dealer who builds his business is therefore very valuable to the company, which makes every effort to assist and support him. The companies point out that many of their dealers have had long, harmonious relationships with the same company[51] and also assert that competent dealers are at a premium, often being enticed away by competing suppliers.[52] Thus, the companies deny that the dealer is a fungible serf. Rather,

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nificantly depending on the value of the real estate." Letter from Keith E. Parks, Attorney for The Gulf Companies, to author (Aug. 19, 1977) (on file at MINNESOTA LAW REVIEW).

42. Today the initial investment averages between $13,000 and $14,000. In addition, "presently, banks are eager to make loans to dealers because of the ability of dealers to make substantial profits in today's market." Although in the past Gulf offered start-up accommodation loans to as many as fifty percent of its new dealers, currently only five percent request such assistance. *Id.*

43. For example, to obtain an Aamco Transmission franchise, a franchisee must invest at least $26,000. *See* 1977 DIRECTORY OF FRANCHISING ORGANIZATIONS 7. To become a Midas Muffler dealer requires $85,000. *See id.* at 10.

44. A McDonald's restaurant franchise requires an initial investment of $190,000. *See id.* at 32.

45. For example, a new Humble Oil dealer gets a six-week training program paid for by the company. *See FTC Industry Conference, supra* note 30, at 559 (testimony of W.W. Bryan, Humble Oil & Refining Co.).

46. To participate in bank chargecard plans, a merchant must pay a fee of three to six percent of the retail price of merchandise purchased with the card.

47. Interview with Keith E. Parks, Attorney for The Gulf Companies, in Atlanta, Georgia (July 20, 1977).

48. Their question is a simple one: if retail sales are eating up the profits from exploration and production, why not concentrate exclusively on the profit-making end and get out of retailing?

49. *See* Gregor, *Who Wants a Black Eye?*, in PETROLEUM MARKETING AND TRANSPORTATION 161 (1964).

50. Interview with J.D. Moon, Division Attorney for Tenneco Oil Company, in Atlanta, Georgia (July 19, 1977).

51. *See, e.g., FTC Industry Conference, supra* note 30, at 546.

52. *See id.* at 561.

they claim that the success of each dealer is an important marketing goal and that only after a dealer has fallen hopelessly behind in his payments or become the source of customer complaints does termination result.

Regardless of which picture is closer to reality, there is no doubt that dealers, both individually and as a group, are challenging oil company contracting policies.[53] On paper, the dealers appear to have a number of powerful weapons.[54] Terminated dealers have gotten some relief by alleging that the termination is part of an anticompetitive program on the part of the supplier. If, in fact, the dealer has been terminated because he asserts independence from his supplier in pricing, or because he refuses to purchase recommended brands of accessories, the oil company's exercise of its termination rights may be a violation of the antitrust laws.[55]

In reality, however, the dealer resisting termination probably wishes to use the threat of an antitrust action as a bargaining chip in his negotiations with the company. His real interest is to continue the relationship, not to have it declared illegal. The value of that chip is diminished, however, because antitrust litigation is complex, costly, and lengthy, presenting difficult questions of proof. For the dealer whose lease has been terminated, the antitrust remedy may be remote or unobtainable and at best a poor substitute for the business he has worked long and hard to build. Recognizing this reality, some courts have granted injunctive relief to prevent termination during the trial of dealer antitrust claims,[56] thus easing the dealer's immedi-

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53. *See* Ulman, *supra* note 25.

54. One weapon that has not proven particularly effective is the use of traditional contract law remedies. Although the equities may be compelling for the dealer who seeks to challenge his supplier's use of its reserved power to terminate its lease-sales arrangement, the dealer did freely enter into the agreement and thus is left with the problem of convincing a court that he should be permitted to complain that the contract he signed voluntarily is too harsh. Even the Uniform Commercial Code, with its emphasis on good faith and fair dealing, recognizes the parties' right to reserve termination rights in a sales contract by agreement, although the Code does require notification to avoid unconscionability. *See* U.C.C. § 2-309(2)-(3). For a thorough analysis of the inapplicability of traditional contract remedies to the termination question, see Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465.

55. *See, e.g.*, FTC v. Texaco, Inc., 393 U.S. 223 (1968). Although a detailed discussion of the various antitrust theories is beyond the scope of this Article, it bears noting that potential treble damage liability makes the antitrust weapon a potent one for the dealer. An overview of antitrust and its relationship to petroleum marketing, although now somewhat out-of-date, is provided in Emmerglick, *Legislative Restrictions on Marketing*, in PETROLEUM MARKETING AND TRANSPORTATION 85 (1964). For a more current assessment of antitrust and its relationship to franchise terminations generally, see Bohling, *Franchise Terminations Under the Sherman Act: Populism and Relational Power*, 53 TEX. L. REV. 1180 (1975).

56. *See, e.g.*, Phillips v. Crown Cent. Petroleum Corp., 376 F. Supp. 1250 (D.

ate problem of how to survive economically until his claim is heard. But if the dealer is really seeking to stay in business, he may be disappointed to find that courts often characterize the generous antitrust remedies as adequate and are reluctant to decree that the oil company *must* deal with him.[57]

Additionally, if efforts to negotiate about a termination fail and the dealer finds himself the defendant in a state court action brought to enforce the lease, he may find it difficult, if not impossible, to use his antitrust claim defensively. Federal courts have exclusive jurisdiction over cases brought under the federal antitrust statutes,[58] thus making it impossible for the dealer to assert in state court an antitrust counterclaim based on federal law.[59] Furthermore, removal of the entire controversy to federal court is not an option under present law,[60] and federal courts are reluctant to interfere with any pending state action, even if the two suits deal with the same transaction and the parties may be subjected to inconsistent determinations.[61]

The antitrust bargaining chip is more likely to be effective if dealers can assert their claims collectively. Modern procedural rules provide a very potent weapon for the individually powerless dealers: the class action.[62] The spectre of awesome damage recoveries encour-

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Md. 1973); Pickerign v. Pasco Marketing, Inc., 303 Minn. 442, 228 N.W.2d 562 (1975); Amerada Hess Corp. v. Quinn, 143 N.J. Super. 237, 362 A.2d 1258 (Law Div. 1976).

57. The issue is a lively one, as the history of the litigation between Mobil Oil Corporation and Paul Rubenfeld illustrates. When Mobil tried to end its relationship with Rubenfeld at the expiration of his lease, Rubenfeld refused to vacate the premises. Mobil sought to recover possession, but the trial court found Mobil guilty of anticompetitive practices and refused to enforce Mobil's property rights. *See* Mobil Oil Corp. v. Rubenfeld, 72 Misc. 2d 392, 339 N.Y.S.2d 623 (Civ. Ct. 1972), *aff'd per curiam,* 77 Misc. 2d 962, 357 N.Y.S.2d 589 (App. Term 1974) (one judge dissenting), *rev'd,* 48 App. Div. 2d 428, 370 N.Y.S.2d 943 (1975) (one judge dissenting), *aff'd mem.,* 40 N.Y.2d 936, 358 N.E.2d 882, 390 N.Y.S.2d 57 (1976) (one judge dissenting) (Mobil should recover its property, regardless of possible violations of the antitrust laws).

58. *See* 15 U.S.C. § 15 (1976); 28 U.S.C. § 1337 (1976). These sections have been interpreted to give federal courts exclusive jurisdiction over antitrust claims. *See* Cream Top Creamery v. Dean Milk Co., 383 F.2d 358 (6th Cir. 1967).

59. *See, e.g.,* Reed Enterprises, Inc. v. Books, Inc., 110 R.I. 179, 183, 291 A.2d 261, 263 (1972).

60. *See, e.g.,* Potter v. Carvel Stores of N.Y., Inc., 203 F. Supp. 462 (D. Md. 1962), *aff'd per curiam,* 314 F.2d 45 (4th Cir. 1963).

61. *See, e.g.,* Response of Carolina v. Leasco Response, Inc., 498 F.2d 314 (5th Cir.), *cert. denied,* 419 U.S. 1050 (1974); Red Rock Cola Co. v. Red Rock Bottlers, Inc., 195 F.2d 406 (5th Cir. 1952).

62. In Milonas v. Amerada Hess Corp., [1976] 2 Trade Cas. (CCH) ¶ 61,069 (S.D.N.Y. 1976), class certification was granted to all present and former Hess lessee-dealers, and in Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977), *cert. denied,* 98 S. Ct. 1280 (1978), the Third Circuit held that certification should not have been denied to a class composed of all present and former lessee-dealers of fifteen major oil

ages the companies to negotiate and offer out-of-court settlements. If an oil company argues that class action treatment is inappropriate, and loses, the dealers gain the upper hand. In a class action suit against Clark Oil and Refining Corporation, for example, the dealers were able to force a complete restructuring of their business relationship. Counsel for the dealers made clear that the one-sided lease agreement had been their primary target from the beginning, and the settlement agreed to by Clark vastly increased dealer protection against termination.[63] But such class actions have often foundered on the preliminary procedural shoals of achieving class certification,[64] making them an inadequate answer to dealer grievances.

Dealers have recently opened a new front in the battle against termination, basing their attack on federal legislation designed to manage the shortage of petroleum products triggered by the Arab oil embargo.[65] They pointed out that one of the stated purposes of the legislation is "to preserve the competitive viability of . . . branded independent marketers,"[66] defined to include those "independents" engaged in distribution and marketing who are tied to a refiner by a real estate lease, trademark use agreement, or supply contract.[67]

Basically, the federal scheme contemplates that each supplier allocate available petroleum products among those customers it was serving during the statutory base period,[68] provided those customers are conducting an on-going business.[69] In order to guard against circumvention of this objective by less obvious means, the regulations prohibit modification of normal business practices[70]—such as suddenly cutting off credit to a purchaser the supplier would prefer to drop—as well as retaliation against a purchaser for claiming an allocation.[71]

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companies, despite the fact that such a class would include between one hundred thousand and two million plaintiffs. *See generally* Herrmann v. Atlantic Richfield Co., 65 F.R.D. 585, 589-93 (1974), *motion to decertify class denied*, 72 F.R.D. 182, 184-85 (W.D. Pa. 1976).

63. *See In re* Clark Oil & Ref. Corp. Antitrust Litigation, 422 F. Supp. 503, 505 (E.D. Wis. 1976). In state court the dealers had unsuccessfully raised their claims as defenses to summary repossession proceedings. *See* Clark Oil Corp. v. Leistikow, 69 Wis. 2d 226, 230 N.W.2d 736 (1975).

64. *See, e.g.*, Peltier v. Exxon Corp., 527 F.2d 757, 760 (9th Cir. 1975); Shaw v. Mobil Oil Corp., 60 F.R.D. 566, 570-71 (D.N.H. 1973); Lah v. Shell Oil Co., 50 F.R.D. 198 (S.D. Ohio 1970).

65. *See* 15 U.S.C. §§ 751-756 (1976).

66. *Id.* § 753(b)(1)(D).

67. *See id.* § 752(1).

68. *See* 10 C.F.R. § 211.9(a) (1977).

69. *See id.* § 211.11(a).

70. *See id.* § 210.62(a).

71. *See id.* § 210.61.

Dealers have invoked the protection of these provisions to resist termination, but thus far have not had much success.[72] In deciding such cases, courts have relied heavily on the fact that although dealer protection provisions that would have prohibited termination except for good cause were included in the Senate version of the bill,[73] these provisions were eventually deleted.[74] Therefore, dealers attempting to use the allocation legislation to block termination are faced with the fact that the full Congress declined to regulate lease terminations directly.[75] The burden of proof on the issues of retaliation and departure from normal business practices has been placed on the dealer,[76] and few have successfully met it. In fact, the reported cases typically involve dealers whose payments for gasoline or rent are in arrears,[77] and who have been given support and encouragement by their suppliers for considerable periods of time before the relationship is severed.

Because their individual economic weakness puts them at such a disadvantage in dealing with or litigating against the oil companies, the dealers have followed a pattern described in a classic study of the relationship between automobile manufacturers and their franchised dealers.[78] Initially, dealers organized into associations that interceded with oil companies on their behalf.[79] When such collective private action failed to provide the necessary protection the dealers began to take their case to government, seeking both administrative and legislative help. Although they have little economic strength, their numbers and wide geographic dispersal give them impressive political strength both to influence legislation and to enlist the aid of an administrative agency.[80] The Federal Trade Commission has long been

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72. *See* Vold v. Marathon Oil Co., 407 F. Supp. 1011 (W.D. Ky. 1975); Burk v. Gulf Oil Corp., 397 F. Supp. 421 (D. Mont. 1975); Russell v. Shell Oil Co., 382 F. Supp. 395 (E.D. Mich.), *aff'd mem.*, 497 F.2d 924 (6th Cir. 1974); Guyer v. Cities Serv. Co., 381 F. Supp. 7 (E.D. Wis. 1974). *But see* Call Carl, Inc. v. BP Oil Corp., No. 74-1819 (4th Cir., Apr. 1, 1975) (affirming grant of preliminary injunction restraining terminations pending outcome of litigation).

73. *See* H.R. REP. No. 628, 93d Cong., 1st Sess. 31, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2688, 2707.

74. The legislative history was thoroughly reviewed in Guyer v. Cities Serv. Co., 381 F. Supp. 7, 10-11 (E.D. Wis. 1974).

75. "[T]he deletion of the 'dealer protection' provisions of the Senate bill compels this Court to conclude that Congress was not attempting to regulate lease terminations by passing the Act." *Id.* at 11.

76. *See id.* at 13.

77. In Burk v. Gulf Oil Co., 397 F. Supp. 421, 422 (D. Mont. 1975), for example, Gulf claimed that the dealer owed $8,370.50 for merchandise and had refused to surrender Gulf equipment valued at $4,277.00.

78. *See* S. MACAULAY, LAW AND THE BALANCE OF POWER (1966).

79. *See FTC Industry Conference, supra* note 30, at 232.

80. *See* Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 83-84 (1969).

interested in their problems.[81] Charging that short leaseholds are sometimes used to impose tie-ins, price-fixing, and other anticompetitive practices on the dealers, the Commission has taken vigorous action against the oil companies.[82] In fact, Phillips Petroleum Company and Standard Oil Company (Ohio) have consented to decrees proposed by the Federal Trade Commission that provide substantial dealer protection from unreasonably short leaseholds and arbitrary terminations.[83]

Organized dealers have also lobbied for "good cause" statutes that would limit the franchisor's power to terminate by setting objective standards. Although Congress repeatedly refused to afford dealers protection of this sort,[84] the dealers have had some success in the states.[85] Congress has recently responded to the dealers' demands with the promise of a day in court under the newly passed Petroleum Marketing Practices Act.[86] Such political success may, in turn, have contributed to the recent judicial willingness to regulate contracts between dealers and oil companies on public policy grounds.

This impressive array of remedies may seem more than adequate to deal with dealer complaints. But antitrust litigation is complicated by the need to struggle with the intricacies of market definition and esoteric arguments drawn from economic theory, and many dealer

81. *See generally* FTC REPORT, *supra* note 22.

82. For example, the FTC brought suit against a number of oil companies and tire manufacturers because of agreements whereby gasoline dealers were encouraged to carry a particular brand of tire. *See* FTC v. Texaco, Inc., 393 U.S. 223 (1968); Atlantic Ref. Co. v. FTC, 381 U.S. 357 (1965).

83. *See* Phillips Petroleum Co., 84 F.T.C. 1666 (1974); Wall St. J., July 15, 1977, at 22, col. 4.

84. *See* S. 1694, 93d Cong., 2d Sess., 120 CONG. REC. 27082 (1974). That bill passed the Senate, but Congress took no further action on the issue. On June 20, 1975, the Senate passed an act for fair marketing of petroleum products. *See* S. 323, 94th Cong., 1st Sess., 121 CONG. REC. 20012-16 (1975).

85. *See, e.g.*, GA. CODE ANN. §§ 106-1101 to -1112 (Supp. 1977); N.Y. GEN. BUS. LAW §§ 199-a to -j (McKinney Supp. 1978). In other states, more general regulation of franchises also protects gasoline dealers. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 42-133e to -133g (West Supp. 1978); DEL. CODE ANN. tit. 6, §§ 2551-2556 (1974); N.J. STAT. ANN. §§ 56:10-1 to -12 (West Supp. 1977). In 1977, the Georgia Association of Petroleum Retailers, Inc. obtained passage of an amendment to the Georgia Gasoline Marketing Practices Act, GA. CODE ANN. §§ 106-1101 to -1112 (Supp. 1977), that provided, *inter alia*, that dealers could refuse to remain open more than six days a week or twelve hours a day without breaching their agreements. It also provided for equitable relief. *See* H.B. 78, 1977 Ga. Gen. Assem. Governor Busbee vetoed the bill, citing the adverse effect on public convenience and also constitutional questions of impairment of existing contracts. *See* Message Accompanying Veto No. 2 (Mar. 31, 1977) (on file at MINNESOTA LAW REVIEW).

86. Pub. L. No. 95-297, 92 Stat. 322 (1978). Section 105(b)(1) of the act authorizes equitable relief to compel continuation or renewal of the contract. *See* S. REP. No. 731, 95th Cong., 2d Sess. 40-41 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 1651, 1677; H. REP. No. 161, 95th Cong., 2d Sess. 16 (1977). The new legislation may, however, merely have federalized the unconscionability problem between dealers and suppliers. *See* note 206 *infra*.

problems are too immediate to await governmental action. Thus, dealers have seized upon the doctrine of unconscionability as a basis for challenging burdensome contract terms. Building upon precedents set by cases involving consumers, they have stressed the vulnerability of dealers and their need for protection against the giant oil companies. They have also impressed upon the courts the similarity of service station operators to consumers in terms of marginal education, legal naïveté, and lack of business acumen.

As mentioned previously, the Uniform Commercial Code stipulates that, in determining unconscionability, courts are to consider the commercial realities of the market and the reasonable commercial expectations of *both* parties. This provides one basis on which the oil companies might justify the terms of their dealer contracts. Perhaps underestimating the appeal of the dealer/consumer analogy, however, the oil companies thus far seem to have failed to argue this position effectively, attempting to rely on their carefully drafted documents instead of arguing the realities of commerce.

III. RESERVED TERMINATION RIGHTS MODIFIED

The Supreme Court of New Jersey, source of the landmark opinion in *Henningsen v. Bloomfield Motors, Inc.*,[87] was receptive to claims of unconscionability in the service station setting as well. Continuing its scrutiny of contracts signed on a "take-it-or-leave-it" basis, in *Shell Oil Co. v. Marinello*,[88] the New Jersey court sided with a dealer protesting the oil company-lessor's attempt to terminate the relationship.

The dealer, Frank Marinello, had been operating a Shell station in Fort Lee, New Jersey, for thirteen years. The most recent agreement between the parties consisted of a three-year lease of the premises, renewable yearly thereafter. The lease was subject to termination by the operator at any time on at least ninety days' notice, and by Shell at the end of any term by giving at least thirty days' notice. In addition, a dealer agreement committed Shell to supply its products to the dealer for resale. The dealer agreement could be terminated by Shell at any time on ten days' notice.

Six weeks before the end of the three-year term, Shell gave written notice that neither the lease nor the dealer agreement would be renewed. Thereupon, Marinello filed suit to enjoin Shell from terminating and to reform the contract to provide that the relationship continue unless Shell could show that it had good cause to end it. After the lease expired, Shell filed a summary dispossess complaint

87. 32 N.J. 358, 161 A.2d 69 (1960).
88. 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974).

to evict Marinello. The two cases were consolidated and tried together.[89]

At the outset, the trial court faced the issue of the applicability of the state's newly enacted Franchise Practices Act.[90] That statute prohibits a franchisor from terminating or failing to renew a franchise without good cause, which is defined as "failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise."[91] Based on the legislative history, the trial court found that the statute was not intended to apply to this agreement, which had been executed before the effective date of the Act.[92] But, based on the dealings between the parties, Shell's own practice, and considerations of public policy, the trial court found an implied covenant not to terminate without good cause and reformed the instrument to make that covenant explicit.[93]

One basic question confronting the court was whether to limit the inquiry to reading and enforcing the very explicit written document or to look beyond the document to determine the parties' true agreement—the basic issue that underlies the parol evidence rule. The court must have resolved this issue in favor of the nondrafting party, allowing him to challenge the writing's completeness.

Although the trial court did not cite the Uniform Commercial Code, perhaps viewing its decision as involving property law, its method of determining the parties' agreement would have been approved by the Code drafters. In deciding whether to reform the written instruments, the court considered the history of the relationship between the parties, which the Code labels "course of dealing."[94] The court pointed to the representations made by Shell at the outset that Marinello's future was with Shell if he "built up" the station.[95] Both

89. The facts are more fully reported in the trial court opinion. *See* Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 294 A.2d 253 (Law Div. 1972), *modified*, 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974).

90. N.J. STAT. ANN. §§ 56:10-1 to -12 (West Supp. 1977).

91. *Id.* § 56:10-5.

92. *See* 120 N.J. Super. at 370, 294 A.2d at 260. Aside from the legislative intention, any attempt to apply the statute retroactively would have raised serious constitutional questions. Attempts to legislate good cause requirements retroactively have been held to contravene the federal constitutional prohibition against passage of any "Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1; *see* Note, *Constitutional Obstacles to State "Good Cause" Restrictions on Franchise Terminations*, 74 COLUM. L. REV. 1487 (1974). Closely related are due process objections. *See* Fornaris v. Ridge Tool Co., 423 F.2d 563 (1st Cir.), *rev'd per curiam*, 400 U.S. 41 (1970) (on abstention grounds); Globe Liquor Co. v. Four Roses Distillers Co., 281 A.2d 19 (Del.), *cert. denied*, 404 U.S. 873 (1971).

93. *See* 120 N.J. Super. at 377, 294 A.2d at 264.

94. U.C.C. § 1-205(1).

95. *See* 120 N.J. Super. at 373, 294 A.2d at 262.

Shell's announced policy of no terminations except for good cause and Shell's previous conduct in renewing leases with Marinello and others colored the agreement between the two parties. The court thus followed the drafters' admonition that "the meaning of the agreement of the parties is to be determined by the language used by them *and* by their action, read and interpreted in the light of commercial practices and other surrounding circumstances."[96] Given this "course of dealing," the trial court found that the instrument did not reflect the shared understanding of the parties.[97]

Moreover, the court was hesitant to enforce an agreement in which Shell's superior bargaining position had allowed the company to dictate the written terms of the arrangement, giving the dealer little choice, especially when the legislature had so recently declared a strong public interest in the fairness of gasoline distribution arrangements. The public policy considerations expressed in the recently enacted statute, in addition to the long-standing course of dealing between the parties, allowed the trial court to remake the agreement in conformity with the true understanding of the parties, an understanding that coincided with general notions of fairness. Turning to whether Shell had demonstrated good cause to terminate, the trial court found that Marinello had substantially complied with his obligations, both written and implied. Hence, Shell had no cause to terminate.[98]

The Supreme Court of New Jersey, while agreeing with the result, went one step further. That court found that public policy alone provided sufficient grounds to modify the parties' written agreement. Regardless of company policy or practice, an implied limitation on termination—that no such arrangement be terminated without good cause—would be read into the agreement, placed there not by the legislature or the parties, but by the court acting in the public interest.[99]

While the supreme court's approach is commendably candid in that it revealed the true basis for its action, the trial court's more particularized inquiry is less of a break with the traditional emphasis on freedom of contract. The trial court did not purport to change *every* gasoline station lease, but only the one *sub judice,* and did so based on the voluntary statements and actions of the parties thereto. Under this approach, subsequent dealers seeking to modify contractual terms would, like Marinello, first have to show that the written

96. U.C.C. § 1-205, Comment 1 (emphasis added).

97. *See* 120 N.J. Super. at 371-78, 294 A.2d at 260-64.

98. *See id.* at 378-85, 294 A.2d at 264-68.

99. *See* Shell Oil Co. v. Marinello, 63 N.J. 402, 410-11, 307 A.2d 598, 603 (1973), *cert. denied,* 415 U.S. 920 (1974).

agreement did not accurately reflect their total agreement. To the extent that dealers could demonstrate that the actual agreement differed from the written contract, they might be able to counteract the dominant oil company's control of the written terms. At the same time, the trial court left basically undisturbed the right of contracting parties to shape their relationship without governmental direction as to individual terms. Under the trial court's approach, considerations of public policy would be relevant only if the initial inquiry revealed that the written agreement did not reflect what the parties in fact intended and the court determined that, in order to protect the reasonable expectations of both parties without imposing undue hardship on either, it must reform the contract.[100]

One crucial step was omitted, however, in the trial court's reasoning: although the parties may well have intended that their relationship would continue absent good cause to end it, the court did not directly address the parties' expectations about how a dispute concerning good cause would be resolved. Based on prevailing commercial practices at the time the agreement was entered into, a plausible argument can be made that both parties assumed that Shell would determine what constituted good cause. Presumably, Marinello assumed that Shell would be anxious to retain a good dealer as an effective salesman of its products; thus, his success as a station operator would protect him against termination. At the time Marinello became a Shell dealer, however, abuse of short-term leaseholds to keep dealers in line was already well known and had been the subject of dealer complaints to the Federal Trade Commission.[101] Moreover, it is unlikely that Shell would knowingly volunteer to submit its business judgment to judicial review. Thus, it might be argued that Marinello, by accepting a limited leasehold notwithstanding the potential for abuse, knowingly assumed two risks: that he and Shell might disagree about whether he was a good dealer, and that if a dispute arose Shell would be free to substitute another dealer that it felt could do better.

In treating the good cause limitation and the nonrenewal clause as judicially enforceable, the trial court made the existence of good cause a question to be decided by the trier of fact. Since this position seems contrary to the shared expectations of the parties at the time the agreement was consummated, the trial court went beyond mere interpretation of the parties' agreement in reaching its result and instead entered the realm of judicial regulation of contractual relationships in the name of public policy.

Under article 1 of the Uniform Commercial Code, a duty of good

100. *See* 120 N.J. Super. at 377-78, 294 A.2d at 264.

101. *See* notes 30-32 *supra* and accompanying text.

faith is read into every commercial transaction.[102] In the case of a merchant, good faith incorporates the standards of fairness observed in his trade,[103] providing an objective yardstick against which to measure conduct. Because all contractual rights must be exercised in good faith, some judicial review of discretion is always available.[104] But the good faith obligation traditionally has not carried a terminated dealer very far in challenging his termination.[105] Indeed, the Code itself seems to consider the obligation of good faith satisfied if reasonable notification of a decision to end a relationship is given.[106] Marinello was told in February that his lease would not be renewed five months later and received formal written notice six weeks prior to the expiration of the lease. It appears that Shell asserted an honest and reasonable belief that it would make more money with another dealer, and thus it satisfied its obligation to treat Marinello with good faith.

Both the trial court and the New Jersey Supreme Court, however, determined that more than a traditional good faith requirement should be imposed on the contracting parties. The trial court found that by its established practices Shell had *modified* its written absolute right to end the relationship upon adequate notice and had agreed to a judicially enforceable good cause limitation.[107] Going one step further, the supreme court imposed this modification of reserved termination rights as a matter of public policy, without regard to the actual expectations of the parties.

Under the good cause limitation imposed by the supreme court in *Marinello,* a franchising oil company wishing to sever its relationship with a dealer would have to allege and prove that the lessee was not in substantial compliance with the terms of the agreement. In so holding, the supreme court in effect adopted the legislative judgment reflected in the Franchise Practices Act that all oil company lessees are in need of protection from arbitrary terminations or nonrenewals by their lessors. Nevertheless, by declaring the newly enacted Franchise Practices statute to be merely an expression of the preexisting public policy of the state, the court was free to apply it without running afoul of the constitutional interdiction against *legislative* interference with contracts already in existence.[108]

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102. *See* U.C.C. § 1-203.

103. *See id.* § 2-103(1)(b).

104. *See id.* § 1-203.

105. *See* Gellhorn, *supra* note 54, at 495-505.

106. *See* U.C.C. § 2-309 & Comment 8.

107. Modification by agreement needs no consideration to be binding. *See id.* § 2-209(1).

108. *See* note 92 *supra.*

In concluding that service station operators needed protection against lease terminations, the New Jersey Supreme Court relied on two earlier decisions, *Henningsen v. Bloomfield Motors, Inc.*[109] and *Ellsworth Dobbs, Inc. v. Johnson,*[110] in which it had declared that enforcement of grossly unfair contractual terms between parties of grossly unequal bargaining strength would violate the public policy of New Jersey. But in relying on *Henningsen* and *Ellsworth Dobbs,* the court in *Marinello* overlooked important factual distinctions between the plaintiffs in the earlier cases and the position of service station operators. The earlier decisions brought the judicial power to bear on behalf of a consumer faced with nearly incomprehensible "legalese" drafted by professionals and buried in fine print. In both cases, the consumer was relieved of his obligation to read and understand the fine print terms, in part because even had he understood the clauses in question, he had no realistic opportunity to bargain to exclude them.

Marinello, on the other hand, was an experienced Shell dealer who was well aware of the terms of his lease. He took the initiative to arrange a meeting to complain about the rent provisions, and, at that meeting, the term of the lease was increased from one year to three years. The only hint of any lack of assent is that Shell, the property owner, insisted that it would lease its station and license its trademark only on its own terms,[111] although it was prepared to discuss those terms with the lessee. Shell's ability to control the terms of the deal flowed naturally from its superior bargaining position as a property owner dealing with a prospective tenant. The official comments to section 2-302 of the Code make clear the drafters' intent to leave undisturbed the allocation of risks resulting solely from the superior bargaining power of one party, absent evidence of oppression or unfair surprise.[112] There is no evidence of either in *Marinello.* Whereas the car buyer in *Henningsen* and the seller of real property in *Ellsworth Dobbs* had no other way to obtain the goods or services they needed, Marinello had, before investing thirteen years in his station, many other options that would have enabled him to avoid being placed in so vulnerable a position. Moreover, in contrast to the situation in *Henningsen,* Marinello entered into his relationship with Shell by choice, with his eyes open, judging that the deal as offered

109. 32 N.J. 358, 161 A.2d 69 (1960).

110. 50 N.J. 528, 236 A.2d 843 (1967) (invalidating a clause in a contract between a home owner and a real estate broker that obligated the owner to pay a commission if the broker found a buyer, even if the sale was never completed).

111. The change in the term of Marinello's lease was apparently the result of a change in Shell's policy rather than any persuasion by Marinello. *See* 120 N.J. Super. at 365, 294 A.2d at 257.

112. *See* U.C.C. § 2-302, Comment 1.

would be advantageous to him. To be sure, the deal, as the trial court found and the Code recognizes, has to be viewed in its totality and is more than the papers actually signed. Thus, the trial court found that both parties assumed that their relationship would continue unless Marinello gave Shell cause to replace him. But it seems fair to say that Marinello assumed the risk that Shell's good cause might simply be a conviction that another dealer could do a better job.

Notwithstanding the shared expectations of the contracting parties in this regard, the New Jersey Supreme Court, by its decision, reversed the relation of the parties to each other. According to the agreement they had made, Shell could decide whether to extend Marinello's dealership. According to the supreme court's decision, so long as Marinello was in substantial compliance with the lease, only he could decide to end the relationship.[113] Thus, even a good faith decision to operate the station directly would expose Shell to potential liability for breach of contract.

The Supreme Court of New Jersey relied on the concept of unconscionability and its power to redraft contracts to reverse the positions of landlord and tenant, giving the tenant a perpetual lease, so long as he substantially complied with his agreement. But, in its attempt to prevent oppression of service station dealers, the New Jersey Supreme Court may itself have created unfair surprise in the contract terms as applied to the oil company. Had Shell realized at the outset that, in entering into an agreement with Marinello, it would lose any right to lease its station to another franchisee or even to take possession and operate it directly, it might well have thought again about how to distribute its gasoline. The same criticism cannot be leveled at the legislature's action in passing the Franchise Practices Act: the prospective effect of the statute at least gives the oil companies fair warning and thus permits more careful screening of prospective lessees, as well as more explicit provisions in the lease setting out the essential terms of the relationship.

The *Marinello* holding was asserted in *Ashland Oil, Inc. v. Donahue*[114] by a service station operator facing a much more acute problem, termination on ten days' notice. According to the facts set out in the opinion by the West Virginia Supreme Court of Appeals, Donahue challenged the oil company's right to terminate his dealership on ten days' notice, despite a provision in the lease permitting such action. His contention that an implied good cause limitation on termination was part of the agreement closely tracked Marinello's argument. But Donahue went one step further and asserted that the

113. *See* 63 N.J. at 411, 307 A.2d at 603.

114. 223 S.E.2d 433 (W. Va. 1976).

termination provision should be declared void as against public policy.[115] The trial court granted Ashland's motion to strike the defenses, granted immediate possession to Ashland, and, on its own motion, certified the question of the legal sufficiency of Donahue's defenses to the supreme court of appeals.[116]

Thus, a pure question of law was presented: one party wanted its written lease agreement enforced; the other argued that such enforcement would be unconscionable. Although the dealership agreement set out some standards relating to quality control and destruction of good will, it expressly provided that the oil company determine whether to terminate, and the separate lease agreement gave both parties an absolute right of cancellation on ten days' notice. The oil company asserted that it had given the requisite notice and should have been entitled to recover its property.

The supreme court of appeals rejected Ashland's claim that this was purely a question of property law. Instead, recognizing that the lease and the dealer agreement were inseparable, it construed them as forming an integrated business relationship.[117] Since this relationship involved a "transaction in goods,"[118] article 2 of the Uniform Commercial Code was directly applicable. Turning to Donahue's unconscionability argument, the court decided that the termination provision of the dealer contract was unconscionable on its face. The termination clauses in the lease and the corresponding supply contract did not coincide. Although either party could terminate the lease in the middle of a term, only Ashland could terminate the dealer contract in the middle of a term. The court hypothesized a situation where the dealer might be forced to buy gasoline after termination of his lease, since he could not terminate his supply contract, and then found this result to be so harsh as to make the two documents, taken together, unconscionable as written.[119]

The court remanded the case for the taking of evidence and consideration of Donahue's defenses in order to permit the court to decide what to do about the unconscionable term, that is, whether to excise it from the agreement or limit it so as to avoid an unconscionable result.[120] In response to Ashland's objections to the consideration of parol evidence, the court pointed out that since the agreements were unconscionable as written, they were ambiguous enough to make parol evidence admissible. The lower court was directed to

115. *See id.* at 437.
116. *See id.* at 435.
117. *See id.* at 437-38.
118. U.C.C. § 2-102.
119. *See* 223 S.E.2d at 438, 440.
120. *See id.* at 440-41.

take evidence to determine the commercial setting, purpose, and effect of the transaction, and any other evidence on course of dealing, course of performance, and usage of trade that may have been part of this long-standing relationship.[121]

The West Virginia court pointedly did *not* base its decision on a mere assessment of inequality of bargaining power.[122] No defect in the bargaining process was even claimed by Donahue, except that the lease he signed was "grossly unfair." One basis for the claim of unfairness was that the lease allegedly did not reflect the understanding of the parties—that it was incomplete. The Code's parol evidence rule[123] is designed to deal with such claims, making evidence of commercial understandings as part of the agreement admissible to explain or supplement even an integrated written document.[124] No finding of ambiguity is a prerequisite.[125] The Code very clearly gives less weight to the writing than did the common law courts and affords litigants a much greater opportunity to be sure that their legitimate expectations are before the trier of fact. Hence, no ambiguity need be manufactured by calling a written term unconscionable. If the real complaint is that the writing is an inaccurate memorial of the agreement, courts are empowered to weigh that claim on its merits without resorting to an unconscionability rationale.

In sum, once the court decided that the situation with which it was dealing was covered by article 2, a conclusion that seems eminently defensible, the Code's liberal parol evidence rule would have provided a perfectly straightforward means for considering Donahue's claims. The court's effort to demonstrate the facial unconscionability of the termination clause rings false in what is otherwise an excellent opinion. Ashland was *not* attempting to force Donahue to remain in business against his will by holding him to half of his agreement. Thus, any injustice the court perceived was clearly hypothetical.[126] In general, the judicial process works best when confined

121. *See id.* at 440.

122. [W]e do not find it necessary to base our holding upon a disparity in bargaining power between Ashland and Donahue. In most commercial transactions it may be assumed that there is some inequality of bargaining power, and this Court cannot undertake to write a special rule of such general application as to remove bargaining advantages or disadvantages in the commercial area, nor do we think it necessary that we undertake to do so.

Id.

123. U.C.C. § 2-202.

124. *See id.* § 2-202(a) & Comment 2.

125. *See id.* § 2-202, Comment 1(c).

126. The court's supposition also overlooks the fact that, despite provisions setting out certain limits on what Donahue could or had to buy, the contract between Ashland and Donahue was essentially a requirements contract, regulated by section 2-306 of the Code. So long as Donahue had acted in good faith in closing his business,

to the concrete situation that occasioned the complaint. It seems unnecessary and unwise to speculate about all possible contingencies. Moreover, and more serious, the court fell into a trap that the Code specifically seeks to sidestep: defining unconscionability from the ivory tower. By holding the clause unconscionable on its face, the court made its determination without the benefit of the justification, if any, that the drafting party has the *right* to offer.[127]

This case amply illustrates the danger of reading a contract out of context.[128] Although the hypothetical envisioned by the court appears harsh and heavy-handed when considered in the abstract, the terms contained in the dealer contract can be explained in a commercial context as an innocent attempt by the oil company to work within federal allocation regulations.[129] To preserve the competitive structure existing in the petroleum industry at the time of the "energy crisis" and to ensure an equitable sharing of shortages so that independent marketers would not be squeezed out of business, federal regulations require suppliers to continue to supply those who were their customers during the statutory base period.[130] The regulatory scheme focuses on the dealer, allocating a share of available supply to the marketer,[131] and not to the marketing location. Moreover, although "going out of business" ends a marketer's right to an allocation,[132] the regulations clearly provide that if a marketer relocates within a reasonable time and serves substantially the same customers or market as formerly, he has not "gone out of business" and is entitled to demand that his supplier continue to sell him gasoline.[133] Hence, it makes perfect sense from the oil company's perspective to keep a dealer's supply contract in effect, even after his lease has been

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the Code would have absolved him from liability to Ashland. *See id.* § 2-306, Comment 2.

127. U.C.C. § 2-302(2) provides, "When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties *shall* be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect." (emphasis added).

128. Ashland apparently wished to confine the court's inquiry to the simple question of right to possession of the property. In Wisconsin, such a strategy proved successful, for any claim arising out of such collateral arrangements as franchising agreements was held to be severable from the issue of right to possession and more properly treated in separate nonsummary proceedings. *See* Rossow Oil Co. v. Heiman, 72 Wis. 2d 696, 704-05, 242 N.W.2d 176, 181-82 (1976). Given the developments in the law of unconscionability outlined in this Article, the wisest strategy would apparently be to attempt this procedural short-circuit, and also to advance any valid justification for the challenged clause, so as to shorten the litigation.

129. *See* 10 C.F.R. § 211 (1977).

130. *See id.* § 211.9(a)(1).

131. *See id.* § 211.11(a).

132. *Id.* § 211.11(c).

133. *See id.* § 211.106(c)(1).

terminated in order to define the terms on which the dealer will be supplied if he reestablishes his business at a nearby location. The discrepancy between the two termination clauses, then, can be commercially justified and should not by itself have rendered the agreement unconscionable and unenforceable.[134]

Nonetheless, having determined that the written agreement was unconscionable, the court indicated that the task of the legal system was to ensure that the relationship between the parties was consistent with the obligation of good faith imposed on both by law. It is clear from the court's opinion that it was not prepared to hold Donahue to the naked terms of the original lease agreement. At the same time, however, it was not about to lock the dealer and the oil company into an arrangement terminable only by the lessee. Instead, it insisted that the agreement should reflect commercial reality, both in general and as between the two parties. Thus, unlike the New Jersey court, the West Virginia court made no attempt to impose its own standard as to what would constitute grounds for termination on parties whose assumptions about control over the duration of their relationship might have been very different from the court's. Rather, enforceable rights and duties would be tailor-made to take account of the peculiar needs and reasonable expectations of *these* parties.

The West Virginia court's heavy emphasis on enforcing the agreement makes *Donahue* a much less radical decision than *Marinello,* and the decision seems to strike a better balance between the legitimate concerns of the gas station operator and the oil company. To be sure, the court did review a decision the oil company

134. This finding would not have put an end to judicial scrutiny of the agreement, however. Particularly in this case, where Ashland's own documents set out the grounds for abrupt terminations, *see* 223 S.E.2d at 436, and hence invited review, a good cause requirement was ready-made and supplied by Ashland itself.

Curiously, neither the court nor defendant's counsel mentioned U.C.C. § 2-309 (3), which applies specifically to terminations and is clearly aimed at merchant-to-merchant transactions. This oversight is particularly puzzling since the section is one of very few in the Code that refers to unconscionability and provides a specific example: "[A]n agreement dispensing with reasonable notification [of termination] is invalid if its operation would be unconscionable." *Id.* Unlike the more general section, which is concerned with unfairness at the time of contracting, section 2-309(3) requires an assessment of whether operation of the clause will produce an unacceptable result. If Donahue's complaint was, at least in part, the short notice, the West Virginia court overlooked another statutory peg on which to hang its unconscionability decision.

Of course, the omission of reference to section 2-309(3) may have been deliberate, since Donahue hoped to achieve much more than longer notice. Donahue sought to challenge the arbitrary nature of Ashland's reserved right to terminate, not merely the ten-day notice provision; he sought reformation of the agreement to include a good cause requirement for termination. Under those circumstances, he may have chosen to focus his attack on the lack of standards for decisionmaking, rather than on the much narrower issue of notice.

would have preferred to keep internal and hence inexpensive. On the other hand, the decision simply recognizes that fairness to all litigants, large or small, with or without bargaining clout, demands that agreements affecting important legal rights be considered in their entirety and not as artificially circumscribed by the party drafting the form.

The opinions of both the New Jersey trial court and the West Virginia Supreme Court of Appeals recognized that the writing is only part of a commercial agreement. Viewed as a simple parol evidence question and given the specific facts of these cases, expanding the contract to include a good cause qualification of the lessor's reserved power to control his property may have been justified.[135] But neither court expressly addressed the issue of whether, in commercial reality, the owner of a trademark might be unwilling to license others to use it unless he could terminate the license quickly and easily. To permit the lessee-dealer to claim a dispute resolution mechanism that goes far beyond the parties' shared expectations could skew the relationship to the disadvantage of the oil company.

Even before the *Marinello* decision, franchisors were required to walk a fine line between exercising too much control over their franchisees, thus exposing themselves to antitrust liability,[136] and exercising too little control, thus risking loss of all rights to their trademark by abandonment.[137] If the law, whether legislative or judge-made, now begins redrafting agreements that were carefully designed to balance on that line, more attention should be given to whether the dilemma for franchisors will become intolerable.

The dilemma arises because of the conflicting policies underlying the antitrust and trademark laws. The antitrust laws are designed to ensure free competition. Too much control over the operation of independent marketing units undermines this goal and, accordingly, exposes the franchisor to the threat of both criminal penalties and civil damages.[138]

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135. Not every court hearing that argument, even from a gasoline service station operator, has been persuaded. The Oregon Supreme Court reviewed a long course of dealing governed entirely by short-term leases and concluded that the dealer had no legitimate expectation that he was entitled to a renewal of his lease. *See* William C. Cornitius, Inc. v. Wheeler, 276 Or. 747, 556 P.2d 666 (1976). In a case involving termination of an alcoholic beverage distributorship, the Ninth Circuit reversed a lower court finding of an implied good cause requirement for termination as "clearly erroneous." *See* Alpha Distrib. Co. v. Jack Daniel Distillery, 454 F.2d 442, 448 (9th Cir. 1972).

136. *See generally* McCarthy, *Trademark Franchising and Antitrust: The Trouble with Tie-ins*, 58 CALIF. L. REV. 1085 (1970).

137. *See* Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358 (2d Cir. 1959); 15 U.S.C. § 1127 (1976).

138. A hotly debated question is what effect antitrust violations should have on

By contrast, in the area of franchising, the law of trademarks pulls in the opposite direction. A trademark is valuable property, protected by federal[139] and state[140] laws against infringement by those who seek to profit by using another's goodwill. But since this protection is given in part to protect the public, which associates the trademark with some uniform level of quality,[141] quality control must be part of the trademark owner's responsibility. If no quality standards exist, or if they exist only on paper, the trademark loses all meaning and is deemed to be abandoned,[142] thus making it available for use by others. Hence, if he wishes to retain his trademark rights, the trademark holder must set and enforce quality standards.[143] Since essentially franchising is allowing others to use a trademark, every franchisor must be permitted some control over his franchisees in order to ensure consistent quality and the economic success of the entire franchise system.[144]

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the ability to enforce contractual rights. Some courts have denied enforcement when the contract right is being used to effectuate anticompetitive practices. *See, e.g.*, Milsen Co. v. Southland Corp., 454 F.2d 363 (7th Cir. 1971); Semmes Motors v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970). Other courts have stressed that the treble damage remedy, not a defense of illegality, is intended to be the exclusive means of enforcement of the antitrust laws. *See, e.g.*, Kelly v. Kosuga, 358 U.S. 516 (1959); Mobil Oil Corp. v. Rubenfeld, 48 App. Div. 2d 428, 370 N.Y.S.2d 943 (1975), *aff'd mem.*, 40 N.Y.2d 936, 358 N.E.2d 882, 390 N.Y.S.2d 57 (1976).

139. *See* 15 U.S.C. §§ 1051-1127 (1976).

140. *See, e.g.*, MINN. STAT. §§ 333.01-.52 (1976), *as amended by* Act of Mar. 28, 1978, ch. 698, 1978 Minn. Laws 602. *See generally* J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION (1973).

141. The purpose underlying any trade-mark statute is twofold. One is to protect the public so it may be confident that. . . it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats.

S. REP. No. 1333, 79th Cong., 2d Sess. 3, *reprinted in* [1946] U.S. CODE CONG. SERV. 1274.

142. *See* 15 U.S.C. § 1127 (1976); J. MCCARTHY, *supra* note 140, § 18:15.

143. *See, e.g.*, Robinson Co. v. Plastics Research & Dev. Corp., 264 F. Supp. 852 (W.D. Ark. 1967); Midwest Fur Producers Ass'n v. Mutation Mink Breeders Ass'n, 127 F. Supp. 217 (W.D. Wis. 1955).

144. In a case involving another Shell dealer, Frank Marinello's brother, a federal district court found impermissible conflict between federal registration and regulation of trademarks and the state court's imposition of a good cause limitation on the trademark owner's ability "to grant a license of that mark for a specific, definite term." Mariniello v. Shell Oil Co., 368 F. Supp. 1401, 1405-07 (D.N.J. 1974), *rev'd.*, 511 F.2d 853 (3d Cir. 1975). On appeal, however, the Third Circuit reversed the decision, finding that state and federal law could coexist harmoniously. The court reasoned that Congress had not expressly intended to preempt the entire field of trademark law and that there was no incongruity between the state law announced in Marinello v. Shell Oil Co., 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied,* 415 U.S. 920 (1974), and the purposes of the federal law. *See* Mariniello v. Shell Oil Co., 511 F.2d 853, 857-59 (3d

There are other legitimate reasons, inherent in the structure of a franchised operation, for a franchisor to reserve termination rights. As Richard Epstein has pointed out, a substandard franchisee can hurt the goodwill of the entire system.[145] Since all outlets are perceived to be alike, an unpleasant experience at one station may cause consumers to avoid the entire chain. Therefore, both the franchisor and other franchisees will be hurt if the system cannot quickly purge those who destroy the trademark's drawing power. A simple "terminable on adequate notice" clause, then, may serve the interests both of those franchisees who do meet the standards and of the franchisor. Such net gain to the system may outweigh the risk of a mistaken judgment to terminate and may actually serve every franchisee's self-interest by ensuring maximum quality control at minimum cost.

In short, one need not impute sinister motives to a lessor-franchisor to explain the absence of a good cause standard in the written agreements. If the lessor who includes such a provision must document and prove the correctness of his determination every time he exercises his power to terminate or to fail to renew a lease, any such exercise, no matter how justified, becomes potential grounds for litigation.[146] Even clear cases must be carefully documented to survive possible court challenge, adding to the expense of monitoring lessee compliance. Moreover, the possibility that a factfinder may find even valid reasons unpersuasive makes any termination more difficult.[147] In sum, since adding a good cause requirement would

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Cir. 1975). The logic of this holding suggests that any conduct of the franchisee that requires action by the franchisor to protect his trademark under federal law must also constitute good cause to terminate under state law; otherwise, the two bodies of law would pull in opposite directions, a result forbidden by the supremacy clause. *See* U.S. CONST. art. VI, cl. 2.

145. *See* Epstein, *Unconscionability: A Critical Reappraisal,* 18 J.L. & ECON. 293, 314-15 (1975). The problem is compounded in the service station context, where customers do not distinguish between the oil company's products and the service given by the particular dealer over which the company has little control. Of 1234 customer complaints received by The Gulf Oil Companies' southeastern office in the six months ending June 30, 1977, 1054 referred to the service side of the operation, which is the dealer's responsibility. In the customer's mind, the dealer and his supplier are identical. Parks Interview, *supra* note 47.

146. The problem is graphically illustrated by Amerada Hess Corp. v. Quinn, 143 N.J. Super. 237, 362 A.2d 1258 (Law. Div. 1976). In that case, the dealer was overcharging, a violation of both federal price controls and his lease. Despite a clear showing of injury, the franchisor-oil company was enjoined from terminating its relationship with Quinn from December 19, 1974, until the court vacated the injunction on May 7, 1976.

147. Shell representatives claimed that Marinello had not met their standards for cleanliness and that the volume of his gasoline sales was inadequate. The trial court found against Shell on both counts. *See* Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 380-85, 294 A.2d 253, 265-68 (Law Div. 1972), *modified,* 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied,* 415 U.S. 920 (1974).

compel the franchisor to submit his reasons for termination or nonrenewal to impartial review, it increases the risks of entrusting his trademark to a franchisee. Viewed in this light, the termination provisions typically contained in dealer contracts may not appear oppressive after all.

From the franchisee's point of view, weakening the franchisor's power to protect the system against substandard operators may have greater consequences than the loss of customers. The fear frequently expressed is that if franchised distribution becomes too costly or requires too much loss of control over valuable system-wide goodwill, franchisors will simply "integrate forward" and operate retail outlets directly.[148] Indeed, in gasoline marketing this possibility is becoming a reality. Tenneco Oil Company, for example, has already converted virtually all its dealer outlets in the southeastern section of the United States to company-owned operations.[149] In addition, BP Oil Corporation is attempting to replace its dealer network with high-volume stations owned and controlled by the company.[150] Further evidence of forward integration is provided by a pending antitrust suit in which independent dealers have charged their supplier with attempting to monopolize the market for its brand of gasoline by underpricing them at company-owned outlets.[151]

Paradoxically, then, franchisees who want to be made secure against termination may find that the demand for this security means the end of the system within which they operate. Reacting to this very real possibility, dealers and their political allies are pressing for legislation to prohibit oil companies from engaging in retail operations and to require them to divest themselves of station properties. In Maryland, such a "divorcement" law is in effect and has survived a major constitutional challenge mounted by the oil companies.[152] Forward integration is also challenged by provisions of the newly enacted Federal Petroleum Marketing Practices Act, which declares that a decision to replace a franchised operation with an employee-run station is not good cause to terminate or fail to renew a franchise.[153] Unless oil company integration of retail functions is universally prohibited, however, dissatisfied dealers will continue to seek

148. *See* Standard Oil Co. (California) v. United States, 337 U.S. 293, 320-21 (1949) (Douglas, J., separate opinion).

149. Moon Interview, *supra* note 50.

150. *See* Call Carl, Inc. v. BP Oil Corp., 391 F. Supp. 367 (D. Md. 1975).

151. Castoe v. Amerada Hess Corp., [1976] 2 Trade Cas. (CCH) ¶ 61,054 (S.D.N.Y. 1976).

152. *See* Exxon Corp. v. Governor of Md., 98 S. Ct. 2207 (1978) (upholding MD. ANN. CODE art. 56, § 157E (1976 Cum. Supp.)).

153. *See* Petroleum Marketing Practices Act, Pub. L. No. 95-297, §§ 102(b)(2)(E)(ii), (b)(3)(D)(ii), 92 Stat. 322 (1978); note 206 *infra*. *See also The Oil Majors Retreat from the Gasoline Pump*, BUS. WEEK, Aug. 7, 1978, at 50.

judicial protection from the situation in which they find themselves when their leases are not renewed or are cancelled.

Both the *Marinello*[154] and *Donahue*[155] courts responded favorably to dealer complaints, but the decisions represent widely differing judicial attitudes toward an on-going problem whose resolution has important economic and political implications. The *Donahue* court's emphasis on protecting the reasonable expectations of a lessee seems a legitimate exercise of the judicial power to facilitate private law-making. By contrast, the effect of the *Marinello* court's decision was far more drastic, for in protecting the interests of the lessee, the court effectively destroyed the rights of a property owner who had offered his property on limited terms only, which terms were apparently attractive enough to the lessee to induce agreement to them.

As it has become evident that gasoline and other petroleum products are vital and limited resources, oil companies have been subjected to increased public scrutiny and regulation. That government can regulate private rights in the public interest is beyond question; what is subject to question, however, is whether the court system, designed for dispute resolution, should undertake a complete restructuring of commercial relationships freely entered into and bargained for in good faith. If the effect of an unconscionability decision is to lock the parties into a lifelong relationship quite contrary to original expectations, then a strong argument can be made that in attempting to prevent oppression and unfair surprise, the law has itself become oppressive.

IV. FINE PRINT TERMS IN THE SERVICE STATION CONTEXT

Although both Marinello and Donahue claimed that they understood their leaseholds to be perpetual unless they gave their lessors cause to terminate the relationship, surely they understood at the time they signed their agreements that control over the duration of the relationship was reserved by the lessor. Even if the term in question may have been misunderstood, it was certainly no surprise to either of them that the oil company asserted the right to reclaim its property. By contrast, service station operators in two other cases asserted that, at the time of contracting, they did not understand a crucial fine-print contractual term because they had not read the forms. They sought excuse from their agreements because of unfair surprise.

This problem was dramatically presented in *Weaver v. American*

154. Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974).

155. Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433 (W. Va. 1976).

Oil Co.[156] In 1956, Howard Weaver entered into a lease with an American Oil Company representative without reading it, making any attempt to read it, or asking any questions about it. Each succeeding year, the ritual of "blind" lease-signing was repeated. As part of the fine print, American Oil Company had included an exculpatory/indemnity clause, providing that the oil company would be free from liability for any injuries caused by the oil company's own negligence. In addition, the lessee was to indemnify the oil company for all claims or actions that might arise.

While operating under this lease, Weaver and one of his employees were injured when an oil company employee, in the course of repairs, negligently sprayed them with gasoline, which in turn ignited. Both Weaver and his assistant filed suit against the oil company and the negligent employee.

Here, posed in the starkest terms, was the dilemma: should Weaver, a man with nine years of formal education and limited business experience, whose profits from the station amounted to only $5,000 to $6,000 per year, absorb his own and his assistant's losses because of a clause he neither saw nor understood?

In deciding this issue, the trial court employed a conventional form of contract analysis. Because it is impossible to know the subjective state of mind of a party at the time he enters into an agreement, courts have traditionally used a reasonable person standard to ascertain whether the contracting parties possessed the requisite intent to be bound. Since no reasonable person would sign a document having legal consequences without understanding it, a party's signature on a contract is presumed to be a manifestation of assent to the terms contained therein. This presumption, in turn, has been distilled into a duty to read, under which "one having the capacity to understand a written document who reads [and signs] it, or, without reading it or having it read to him, signs it, is bound by the signature."[157] Applying this rule to the facts of the case before it, the trial court held Weaver responsible for having understood the terms of the contract he signed.[158]

The approach adopted by the trial court is consistent with the principle that the law need not protect one who is willing to risk signing an agreement he does not fully understand, so long as the

156. 257 Ind. 458, 276 N.E.2d 144 (1971).

157. Rossi v. Douglas, 203 Md. 190, 199, 100 A.2d 3, 7 (1953).

158. This approach has been followed elsewhere. In a decision rendered only eight months earlier on very similar facts, the New York Court of Appeals rejected an unconscionability argument, pointing out that the dealer was not obliged to enter into the transaction and hence was bound by his assent. *See* Levine v. Shell Oil Co., 28 N.Y.2d 205, 213, 269 N.E.2d 799, 803, 321 N.Y.S.2d 81, 86-87 (1971).

other party to the contract neither actively misleads him nor prevents him from seeking independent advice. Parties are thus entirely free to decide how much time, effort, and money to invest in exploring the possible consequences of their contractual obligations. To encourage private vigilance in contract negotiation[159] and to safeguard the integrity of written documents generally, the law treats a party's signature as evidence of binding assent to all written terms.

When Weaver's lease was negotiated, he had to decide whether he wanted to be an American Oil dealer on the terms offered. Presumably in making this decision he consciously attempted to judge whether he would make a profit, given the contract terms. The possibility that he might be mistaken and lose his investment should have been clear. Having decided to sign the lease, Weaver was bound to its terms. And since freedom to make advantageous contracts must carry with it the obligation to carry out losing ones as well, Weaver could not expect the state or the courts to intervene on his behalf if the bargain proved unprofitable.

As Professor Leff has noted, however, the situation becomes more complicated when "failure of self-protection . . . might have serious and irreversible consequences."[160] For example, when death or personal injury might be uncompensated as a result of an improvident bargain, government is more likely to intervene. Howard Weaver was thinking about the possibility of a profit, not a calamitous accident, when he entered into his relationship with American. It may be that incentives and self-interest can be relied upon to produce a contract that is fair to both parties only so long as the contract concerns risks of which both parties are aware. Thus, when life or health is affected in ways that a contracting party may never have considered, the impetus for government to intervene grows stronger.[161]

At least with respect to his own injuries, Weaver's plight presented a particularly strong case. First, the financial burden of a serious injury was facing a person who had not been aware that he had to bear that burden; second, that injury was caused by the party claiming exculpation and indemnity. Courts traditionally have been angered by attempts to avoid liability for one's own negligence, which is seen as encouraging carelessness and irresponsibility.[162] On appeal, given the facts of this case, neither the intermediate appellate court

159. Duncan Kennedy has characterized this stance as the "individualist" mode. *See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). He points to the assumption that rules, rather than case-by-case standards, will alert potential victims to danger. *See id.* at 1696.

160. Leff, *supra* note 4, at 353 n.19.

161. The same point is made in Note, *The Significance of Comparative Bargaining Power in the Law of Exculpation*, 37 COLUM. L. REV. 248, 268 (1937).

162. *See* Annot., 49 A.L.R.3d 321, 327 (1973).

nor the Indiana Supreme Court was prepared to apply to duty-to-read rule to Weaver. Instead, given the harshness of the terms sought to be enforced, the appellate courts contended that a duty to disclose should be imposed on the party claiming the benefit of the type of clause in question.[163]

The two courts parted company, however, with respect to the weight each would accord Weaver's imputed understanding of the agreement, as gleaned from the commercial context in which he operated. In determining whether Weaver was subjected to unfair surprise with respect to the provisions contained in the lease agreement, the intermediate appellate court distinguished between the exculpatory clause, which allocated to the operator the risk of the oil company's negligence affecting him, and the indemnity clause, which obliged the operator to take the risk of oil company negligence affecting third parties.[164] In the view of that court, the indemnity clause imposed no unusual burden on Weaver because standard liability insurance policies, widely available and generally carried by dealers in Weaver's position, offer protection against third party claims. As long as the indemnifying dealer carries appropriate liability insurance, damages suffered by third parties because of the negligence of either the dealer or the oil company are paid by the dealer's insurance carrier. Thus, regardless of whether Weaver ever saw the indemnity clause, general commercial practice cushioned him against the risks imposed under the clause and made those risks manageable and not unfair.

The intermediate court's analysis also suggests another basis for finding that the indemnity clause did not constitute unfair surprise. The widespread use of liability insurance by dealers in Weaver's position indicates a general understanding within the business community of how the risks of handling volatile and dangerous substances, such as gasoline, are to be shared. As a businessman, then, regardless of whether he had actually read the specific clause in question, Weaver should have expected that his agreement with American conformed to commercially accepted business practices.[165] Thus, the

163. "The party seeking to enforce such a contract has the burden of showing that the provisions were explained to the other party and *came to his knowledge* and there was in fact a *real and voluntary meeting of the minds and not merely an objective meeting.*" 257 Ind. at 462, 276 N.E.2d at 148 (emphasis in original).

164. *See* Weaver v. American Oil Co., 261 N.E.2d 99, *modified on rehearing,* 262 N.E.2d 663 (Ind. App. 1970), *superseded,* 257 Ind. 458, 276 N.E.2d 144 (1971).

165. In addition to the generally imposed duty to read, other considerations bear upon contracts between professionals in any trade or business, those whom the Code calls "merchants." *See* U.C.C. § 2-104(1). They must act not only as reasonable men, but also as reasonable merchants. Imputed to them is knowledge of the customs and practices that are the unwritten elements of their trade or business. *See id.* § 2-104, Comment 2. The Code fixes the reasonable merchant standard in two different ways.

indemnity arrangement should have come as no surprise.

As for the exculpatory clause, the court found gross unfairness in permitting American to shift, by draftsmanship alone, the risk for Weaver's own injuries, which would not be covered by standard liability insurance. Reasoning by analogy from section 2-302,[166] the intermediate court looked at the economic disparity between Weaver and American, at Weaver's lack of education, and at the complexity of the form he signed. Once it had determined that the exculpatory clause represented the shift of an unusual and considerable burden, which Weaver had no reason to expect, the court refused to enforce the clause unless American could show that Weaver was aware of and understood its implications.[167]

The Supreme Court of Indiana approved this reasoning, but went one step further, finding no distinction between the exculpatory and indemnity portions of the clause.[168] The majority found something fundamentally unfair about a bargaining process in the course of which the dominant party had drawn up a form designed to give itself maximum protection and then had not even explained to the other, weaker party the risks that party was to assume. What the supreme court found particularly unfair was that Weaver had unwittingly manifested assent to enormous potential liability in exchange for relatively meager profits.[169] Hence, not only were the consequences serious and of social as well as personal concern, but the court found that Weaver had not properly understood his risks and might not have agreed to the transaction if he had. Based on an assessment of Weaver's education and experience, it rejected the argument that, as a gasoline dealer, Weaver ought to have understood the ramifications of the type of commercial agreement he had signed even if he had not read the contract itself. Further, the court saw no reason to distinguish between those risks that Weaver did not in fact bear alone, because of the use of insurance in the industry, and those that he did. Serving notice that henceforth it would insist that *both* parties

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It provides generally that merchants are bound by customs and usages of their trade of which they "are or *should be* aware." *Id.* § 1-205(3) (emphasis added). In addition, certain very specific usages of trade are incorporated into the Code itself to govern transactions between merchants. *See, e.g., id.* §§ 2-201(2), -207(2) (imposing special duties to read in transactions between merchants).

166. In Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433 (W. Va. 1976), the court determined that gasoline marketing by lease and sales agreement constituted a transaction in goods within the scope of article 2 of the Code, thus making section 2-302 directly applicable.

167. *See* Weaver v. American Oil Co., 261 N.E.2d 99, *modified on rehearing,* 262 N.E.2d 663 (Ind. App. 1970), *superseded,* 257 Ind. 458, 276 N.E.2d 144 (1971).

168. *See* 257 Ind. at 460, 276 N.E.2d at 145.

169. *See id.* at 465, 276 N.E.2d at 148.

be aware, before signing a contract, of the full import of the type of exculpatory clause contained in Weaver's lease, the court denied American the benefit of a conclusive presumption of assent. Instead, it placed the burden of proving actual, subjective, informed assent on the party seeking enforcement of the clause. Since American had not met that burden, the court directed that judgment be entered for Weaver, relieving him of *all* liability under his lease.

As important as what the Indiana Supreme Court decided in *Weaver* may be what it explicitly declined to decide. The court went to some lengths to stress that its decision was not intended to preclude the individual participants in a commercial venture, each of which derives profit, from deciding among themselves which link in the distributive chain can best or most cheaply be responsible for the costs of injury in order to make the entire enterprise more profitable. An insurer, for example, might well be willing to give a more favorable rate to the service station operator, who exercises day-to-day control and can better take precautions to prevent accidents, than to the more remote, though deeper-pocketed, supplier. Hence, the cost of insuring the supplier might be greater than the sum of all the operators' individual insurance premiums. Because such cost allocation is a legitimate and vital part of business planning, the supreme court refused to invalidate clauses such as that employed in *Weaver* on a per se basis.[170] Instead, pointing out that insurance contracts are specifically designed for just such purposes, the court stressed that its concern in *Weaver* centered on the fact that the dealer was not made *aware* of the risk that he was assuming.[171]

In *Weaver,* the problem of serious personal injury caused by the negligence of the very party that had arranged for self-exculpation made the case too difficult for courts to ignore. But, as has often been remarked, hard cases make bad law.[172] The subsequent decision of a federal district court in a Michigan case, *Johnson v. Mobil Oil Co.,*[173] illustrates the absurd results that may occur when judges are too quick to protect a party against what they perceive to be unfair surprise.

The contractual term at issue in *Johnson* was a clause precluding recovery by a dealer of consequential damages caused by his supplier's breach. The clause was called into question when commercial

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170. *See id.* An identical clause was upheld as compatible with public policy in Loper v. Standard Oil Co., 138 Ind. App. 84, 211 N.E.2d 797 (1965).

171. *See* 257 Ind. at 465, 276 N.E.2d at 148.

172. *See, e.g.,* Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

173. 415 F. Supp. 264 (E.D. Mich. 1976).

loss to the dealer's property followed an explosion and fire allegedly caused by the delivery of gasoline containing water. In response to the dealer's suit, Mobil moved for partial summary judgment, arguing that since consequential damages were barred by the lease agreement, its liability, if any, was limited to the difference in value between the goods as warranted and the goods as delivered.[174]

Mobil doubtless considered that it had a very strong case. The clause in question is specifically sanctioned by the Code as not prima facie unconscionable, since only commercial loss, not personal injuries, had occurred.[175] Furthermore, although the plaintiff had difficulty reading, he was able to testify in an understandable manner, thus rebutting any inference that Mobil's representative should have realized that he was dealing with a person of reduced capacity. Under questioning by both Mobil and the court, Johnson admitted that he had not told Mobil that he was nearly illiterate, nor had he asked for any information or explanation. Indeed, the court specifically agreed with Mobil that "'[t]here is no basis . . . for a finding that any Mobil representative was guilty of unfair or oppressive conduct, fraud, overreaching, misrepresentation or sharp practice.'"[176] Nonetheless, the court denied the motion for partial summary judgment, thus affording the plaintiff an opportunity to prove consequential damages despite the clause.

Perhaps because Mobil thought the unconscionability argument was so weak, no effort was apparently made to determine what Johnson understood about the agreement apart from the writing. If the fine print, read or unread, coincided with Johnson's reasonable expectations, he would have had difficulty, under the Code, in arguing either surprise or oppression.[177] Myopic attention to the written document without considering the surrounding circumstances ignores the Code draftsmen's emphasis on the "bargain of the parties in fact."[178] As dealers themselves have argued in challenging the exercise by suppliers of reserved termination rights, the written documents should not be the end of the inquiry; other evidence, drawn from commercial practices, is needed to ascertain the enforceable bargain.[179]

174. *See id.* at 266.

175. *See* U.C.C. § 2-719(3).

176. 415 F. Supp. at 269 (quoting defendant's supplemental brief).

177. *See* Murray, *supra* note 4, at 15.

178. *See* U.C.C. § 1-201(3).

179. *See* text accompanying notes 87-155 *supra*. By contrast, and not surprisingly, when dealers have sought to avoid exculpatory or loss-limiting clauses, they have attempted to confine the court's attention to whether they had in fact been made aware of the terms on the piece of paper. In sum, the dealers seek to refer to their more general understanding when it is advantageous to do so, but to focus exclusively on the writing

The *Johnson* case demonstrates the fallacy of looking only at the writing. Johnson was himself a seller of goods, dealing in gasoline, tires, batteries, and other automotive accessories. As such, he fell within the Code's definition of a merchant[180] and thus was chargeable under the Code with knowledge of the practices involved in the transaction of his business. Indeed, in this instance, the Code's imputation of knowledge makes good sense. It appears reasonable to assume that even a semiliterate seller would agree with Justice Holmes that in entering into bargains with buyers, he never intended to become a guarantor against all the possible consequences of a breach of warranty or of a promise to deliver.[181] As a seller himself, then, Johnson most likely understood Mobil's position fully whether or not he had ever read the forms. Thus, he should not have been shocked by Mobil's attempt to rely on the limitation of liability. In short, this clause was hardly surprising.

Assuming arguendo that Johnson was surprised to find this standard seller protection clause, however, the question remains whether the surprise was unfair. What seemed to disturb the federal district court in this regard was the inequality of bargaining power between the parties to the contract. As the court saw it, Mobil held "immense bargaining power"[182] vis-à-vis a poorly educated layman and imposed its terms on him with no real opportunity for him to question or even understand them. The facts of the case, however, do not support this characterization.

Johnson had been a successful Gulf dealer for three years when Mobil's representative approached him to urge him to take on a Mobil dealership. The record shows that the Mobil representative returned more than once to try to persuade Johnson to join the Mobil organization. If anything, it seems that Johnson's skill and initiative,

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when that serves their purposes. Fairness and common sense are offended if the dealers can have it both ways.

180. *See* U.C.C. § 2-104(1).

181. *See* Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540, 543-47 (1903) (Holmes, J.); O. HOLMES, THE COMMON LAW 236-37 (M. Howe ed. 1963).

Perhaps the duty to handle carefully a substance that is so obviously dangerous fits better under the rubric of tort or strict liability, where breach of a duty of care has traditionally carried with it responsibility for foreseeable consequences. In other words, perhaps it is not so much a promise that was breached (to deliver 100% gasoline) but a duty imposed by law (to be careful to avoid explosions). As Professor Gilmore has brilliantly demonstrated, however, perhaps in truth it no longer matters which pigeonhole one chooses: "We may take the fact that damages in contract have become indistinguishable from damages in tort as obscurely reflecting an instinctive, almost unconscious realization that the two fields, which had been artifically set apart, are gradually merging and becoming one." G. GILMORE, THE DEATH OF CONTRACT 88 (1974).

182. 415 F. Supp. at 269.

desired by Mobil, gave *him* the superior bargaining position,[183] which he apparently used to set the only term about which he was directly concerned: the rent.[184] Signing took place while Johnson was busy operating his station, and it appears that he would not have wanted, nor even tolerated, any lengthy explanations of all the fine print at that time. Nonetheless, adopting the *Weaver* court's solution to the question of commercial unconscionability, the court ruled that Johnson could not be bound by the form language unless Mobil could show that it had obtained his "voluntary, knowing assent."[185]

Because the case was a diversity action, the federal court applied Michigan law, as the law of the place of contracting. In so doing, it relied heavily on *Allen v. Michigan Bell Telephone Co.,*[186] in which the Michigan Court of Appeals reversed a grant of summary judgment against a would-be advertiser whose copy was negligently omitted from the Yellow Pages, holding that the telephone company's contractual term limiting liability to refund of the agreed price was unconscionable. The majority in *Allen* noted the advertiser's lack of realistic alternatives for attempting to reach the same audience at reasonable cost and the unwillingness of the telephone company to offer space in its directory on any other terms. Because of the importance of the service to a subscriber and the company's monopoly position, the contractual provision limiting liability for negligence was seen as substantively unreasonable and void as against public policy. The *Allen* case was therefore remanded for a trial on the merits.

The *Johnson* court's heavy reliance on *Allen* appears ill-founded. First, the *Allen* decision spawned a number of lawsuits in other states, all of which rejected the Michigan court's finding of unconscionability.[187] Second, even in Michigan the precedential value of *Allen* is somewhat uncertain. Three years after the trial, the telephone company appealed an award of damages to Allen. The court of appeals, which had previously denied a motion for rehearing, declined to reconsider the telephone company's position on the validity

183. *See generally FTC Industry Conference, supra* note 30, at 561 (testimony of W.W. Bryan, Humble Oil & Refining Co., indicating that competition for good dealers is intense and it is common for good dealers to be enticed to take over a competitor's station).

184. *See* 415 F. Supp. 268.

185. *Id.* at 269.

186. 18 Mich. App. 632, 171 N.W.2d 689 (1969), *leave to appeal denied,* 383 Mich. 804 (1970).

187. *See* University Hills Beauty Academy, Inc. v. Mountain States Tel. & Tel. Co., 554 P.2d 723 (Colo. App. 1976); Willie v. Southwestern Bell Tel. Co., 219 Kan. 755, 549 P.2d 903 (1976); Gas House, Inc. v. Southern Bell Tel. & Tel. Co., 289 N.C. 175, 221 S.E.2d 499 (1976). *See generally* Robinson Ins. & Real Estate, Inc. v. Southwestern Bell Tel. Co., 366 F. Supp. 307 (W.D. Ark. 1973).

of the disputed language.[188] Despite its decision not to reconsider the law of the case, the court's opinion cast substantial doubt on the precedential value of the first holding. The judge writing for the court indicated that he himself might have decided the issue in the previous appeal differently,[189] and also pointedly noted that although the Michigan Supreme Court had denied leave to appeal, that court had taken pains to stress that its action was " 'not to be taken as tacit or other agreement with all the reasoning of the majority opinion below.' "[190] Moreover, in *Allen,* even though the clause was struck down as unconscionable, the telephone company ultimately prevailed, since the court found that the plaintiff had failed to prove his damages with requisite certainty.[191]

Although the *Allen* opinion has been criticized,[192] it is no doubt still entitled to some respect since it has never been expressly overruled. Nevertheless, the circumstances in *Allen* are easily distinguishable from the facts in *Johnson.* Mobil did not have the monopoly position enjoyed by the telephone company. Alternatives to signing the Mobil lease were available to Johnson, the most obvious being to continue with Gulf. By contrast, the *Allen* court's majority found that, realistically, Allen had no other options. Thus, Mobil was not in as dominant a bargaining position because the Mobil lease was simply not as vital to Johnson as the advertising was to Allen.

Although the result in *Johnson* was compelled by neither the facts nor Michigan law, Johnson was excused by the court from the limitation to which he had manifested assent. This was not a case where the plaintiff needed special protection from the unforeseen consequences of his own improvidence. Johnson faced a loss of money, the most universally recognized risk involved in any contract. Moreover, extrapolation from the *Weaver* situation was inappropriate, since the strong societal interest in protection from and compensation for personal injury was absent.

In essence, *Johnson* builds on the preceding service station cases to create a special class of commercial plaintiffs: the semiliterate service station operator. To get out from under a burdensome lease arrangement, an individual within this class need only show that he did not read the proffered form and could not have understood the

188. Allen v. Michigan Bell Tel. Co., 61 Mich. App. 62, 232 N.W.2d 302 (1975).

189. *See id.* at 66, 232 N.W.2d at 304.

190. *Id.* (quoting Allen v. Michigan Bell Tel. Co., 383 Mich. 804 (1970)).

191. *See id.* at 67, 232 N.W.2d at 305. The judge who had dissented from the original opinion reiterated his disagreement with it in a concurring opinion, stating that he did not feel bound by the earlier decision. *See id.* at 70, 232 N.W.2d at 306.

192. *See* notes 187-191 *supra* and accompanying text.

language at issue if he had read it. He need show nothing about the actual bargaining position of the parties; he need not allege any objectionable conduct on the part of his lessor; he need not even show that he did not understand the import of the language. Under the *Johnson* court's analysis, large business entities wishing to contract with members of this protected class must assume the burden of being sure these individuals understand their agreements, regardless of whether such assistance is requested or even desired.

In holding as it did, the *Johnson* court seems to have expanded the class of individuals to whom contractual incapacity traditionally extends to include those who sign forms without being able to understand them unaided. Now, like infants,[193] they may disaffirm contracts binding on the other party, yet retain the benefits. To avoid this result, the other party must take affirmative action to give advice and be sure that the advice is understood. The model of arms'-length bargaining, with each side only obliged not to mislead, is rejected in favor of quasi-fiduciary responsibility.[194] The drafting party must not only isolate those provisions that might be especially important to the other, but he also bears the burden of explaining them and obtaining actual assent. It is not enough that the crucial provisions are set forth in the printed contract; the courts in *Johnson* and *Weaver* expressly rejected that approach. In these cases, even conspicuous[195] placement of the term in question would probably not have constituted sufficient notice, since neither Weaver nor Johnson had made any effort to read any of the contract language. What these courts appear to have in mind is an oral explanation, pitched on a level that the individual dealer will clearly comprehend.

Unless there is a compelling reason to intervene in the bargaining process, such a negotiation model seems ill-advised. Although it ensures that parties to contracts will enter them with their eyes open, it may not reach that result efficiently. To satisfy the Supreme Court of Indiana, every oil company representative will need a short course on the legal implications of the form lease. A checklist of points will have to be prepared, phrased so that the least educated member of the community will have no difficulty understanding it. The most remote and horrible possibilities will have to be discussed so that the assumption of risk will be informed and complete. In short, the oil

193. *See* RESTATEMENT OF CONTRACTS § 431, Comment b (1932).

194. Harold Brown has argued that the franchise relationship should be recognized as imposing fiduciary duties on the dominant franchisor. *See* Brown, *supra* note 26. At least one court has agreed, although that result was later reversed on appeal. *See* Mobil Oil Corp. v. Rubenfeld, 72 Misc. 2d 392, 339 N.Y.S.2d 623 (Civ. Ct. 1972), *aff'd*, 77 Misc. 2d 962, 357 N.Y.S.2d 589 (App. Term 1974), *rev'd*, 48 App. Div. 2d 428, 370 N.Y.S.2d 943 (1975), *aff'd mem.*, 40 N.Y.2d 936, 358 N.E.2d 882, 390 N.Y.S.2d 57 (1976).

195. *See* U.C.C. § 1-201(10).

company will be forced to offer not only the document itself, but an exhaustive explanation and explication of it.

Information of this sort is not costless. Any oil company that redesigns its leasing practices as these courts envision will have to build into its rental schedule the increased training and negotiation time its representatives will require. Rather than allowing the lessee or prospective lessee to decide how much time and money he wishes to devote to an exploration of the possible consequences of his agreement, all lessees will be required to pay for a standard explanation, aimed at the lowest common denominator.

More serious than the economic effects of such a rule are the practical ones. If the oil companies must prove actual, subjective assent, by what method, short of truth serum, hypnosis, or lie detector tests, can they pry an admission of that assent out of a dealer who finds it convenient to say "I didn't understand"? Surely, some objective component will have to be recognized. Perhaps if a *Miranda*-type warning is read to and initialed by every prospective lessee and is phrased in language simple enough for a semiliterate to understand, even these courts will find that the lessee has understood his lease.[196] But even assuming that the oil companies are successful in explaining exculpatory or loss-limiting language, and somehow obtain informed consent, the *Marinello*[197] precedent stands as a warning that the assent of the dealer, once obtained, may be suspect. Thus, if courts continue to view dealers as helpless captives, even complete disclosure may not insulate the companies from charges of unconscionability.

Before imposing new costs and burdens of disclosure on the suppliers, courts should take care to define the societal interest at stake and should demand special disclosure of only those clauses that directly impinge upon an interest that is compelling. Surely those terms that allocate financial responsibility for personal injury will merit the most careful judicial scrutiny, as the Code drafters recognized.[198] If such clauses do have legitimate business justification, the logical step would be to demand a special effort to ensure that they are understood, placing the responsibility on the party who can most efficiently discharge it, which in most cases will be the drafting party. But mandatory conspicuousness must be reserved for especially im-

196. Such procedures are not unprecedented. Anyone who has contracted for an interstate move has received a booklet and an explanation of the mover's limited liability, courtesy of the Interstate Commerce Commission. *See* 49 C.F.R. § 1056.7 (1977) (requiring motor common carriers engaged in transportation of household goods to disclose specified information to prospective shippers).

197. Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974).

198. *See* U.C.C. § 2-719(3).

portant terms, since if everything must be conspicuous, nothing will stand out.

Furthermore, assuming that maximum freedom of contract is desirable, regulation ought to be no broader than the perceived public interest demands. In the *Weaver* situation, for example, even the Indiana Supreme Court endorsed exculpatory and indemnity provisions as useful and legitimate, so long as their implications are understood. One way to state the public interest at issue in *Weaver* is to insist that if private parties are going to shift the financial burden of accidental personal injury, the party who bears the risk must be ready for it. If that is the nature of the public interest, rather than some abstract notion of fairness, then the approach of the intermediate Indiana appellate court has much to commend it.

The intermediate court examined the commercial setting, looking at the transaction not in isolation but in context, as the Code would mandate. Finding that the party to whom the risk of third party injury had been assigned would not have stood unprepared for the burden to be imposed if he had followed the standard commercial practice of buying insurance, the court declared the public interest satisfied. In other words, since the business community had provided for insurance coverage that dovetailed with the contractual risk allocation, the dealer was protected, whether or not he ever read his forms. In unconscionability terms, therefore, any surprise was immaterial and not unfair. By contrast, the court found the risk of personal injury to the dealer resulting from the supplier's negligence, which the dealer had assumed under the contract, to be serious and unusual, since one would not routinely insure against it. Private arrangements had failed to provide the protection against uncompensated personal injury to the dealer himself that the public interest demands. Accordingly, the duty to read, which no longer fits the perceived reality of standard form contracting, was supplanted by a duty to disclose, imposed on the more knowledgeable party who arranged the risk allocations in the first place.

In *Weaver*, both the intermediate and supreme courts found the contractual arrangement under consideration to be so unfair to one of the contracting parties as to be unconscionable. In general, however, courts should be wary of regulating the terms of bargains, unless there is good reason to do so, in order to leave individuals the widest possible latitude to make their own value judgments in contractual matters. As a start, it might be prudent to follow the lead of the Code and separate those situations that involve personal injury from those where only commercial loss occurs;[199] *Johnson* would thus be treated

199. *See id.*

as a case very different from *Weaver*. Perhaps, where only money is at stake, the legal system can safely rely on the prospective lessee's self-interest, combined with the self-interest of the insurance companies that stand to gain by informing him about his risks, to safeguard individual dealers against unfair risk allocation.

The costs of indiscriminately expanding the "incapacity" of the legally unsophisticated are obvious. Imposing on oil company suppliers the duty of overcoming, through full and complete disclosure, the dealer's perceived lack of sophistication shifts the burden of recognizing legal problems to the oil company, relieves the would-be dealer of any responsibility to safeguard his own interests by consulting independent counsel, and drives up the cost of doing business for everyone. These costs seem especially burdensome if what is really behind decisions such as *Weaver* and *Johnson* is not a fundamental objection to the failure to disclose in the bargaining process but rather a deep-seated judicial distaste for exculpatory clauses.

It may be that the courts feel, as a matter of public policy, that those who reap the greatest profits from the sale of gasoline, a dangerous commodity, ought to be held strictly liable for *all* losses that result.[200] Decisions like *Weaver*[201] and *Johnson*,[202] however, obfuscate that policy choice by introducing considerations of how much and what kind of bargaining went on regarding exculpatory or loss-limiting clauses. If the loss should be placed on the oil company-supplier because of risk-spreading considerations, it would make more sense to pursue this objective directly and overtly, rather than appearing to validate liability-shifting clauses provided true assent is somehow achieved. If the courts' real objection is to the harshness inherent in exculpatory clauses of the type at issue in *Weaver*, then even if the oil company were to obtain knowing assent by the dealer, that assent would surely be attacked as illusory because the signer had only two options: to sign or to forgo being a gasoline dealer.[203] In other words, if not surprising, the term would almost certainly be found to be oppressive. That being the case, and if allocation of losses to the deepest pocket is the operative social policy, it would make more sense and cause less confusion regarding

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200. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 77, at 505 (4th ed. 1971).

201. Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971).

202. Johnson v. Mobil Oil Corp., 415 F. Supp. 264 (E.D. Mich. 1976).

203. Clearly, Frank Marinello was not surprised to discover he had signed a three-year lease, but the New Jersey court decreed that his lessor could not reserve the right to recover its property without sufficient reason to convince a court that it had cause to end its relationship with Marinello. *See* notes 87-113 *supra* and accompanying text.

the status of all standard form contracts if the courts were candid about the basis for their decisions.

V. CONCLUSION

The major criticism of the courts that have faced unconscionability claims by service station operators is that they have failed to consider them in full context. Fault probably lies with the oil companies, which have not effectively presented their side of the story, preferring to narrow the issue as much as possible. But courts operating in the atmosphere fostered by the Code are obliged to immerse themselves in the commercial setting before passing judgment on contract terms. If the charge is oppression, more care should be devoted to an assessment of the reasons for a clause: in the franchise situation, ability to protect system-wide goodwill by terminating substandard dealers is critical. Perhaps commercial necessity, not oppression, requires that dealers bear the risk of a mistaken judgment to terminate in order to protect the common interest of both dealers and supplier in eliminating substandard franchisees.

Essential as the context is when oppression is alleged, that context is no less important when the claim is fine-print unfair surprise. More effort is needed to identify the agreement in fact to be sure that the challenged term is truly unexpected.[204] Even if it is, other commercial arrangements may have taken the sting out of it, removing the harshness or unfairness that should be a prerequisite for governmental intervention.[205] Where the effect is both harsh and unexpected, more thought ought to be given to whether a duty to disclose is workable, provable, and worth the extra costs it would require. Perhaps more candor is required for forbid the risk allocation outright; the duty-to-disclose approach may merely encourage litigation over whether binding assent has been achieved.

These four cases show that some gasoline retailers have enlisted new allies in their long-running battle with their lessor-suppliers, the oil companies. Judges, armed with the power to refuse enforcement of unconscionable terms, have entered the lists on the side of the lessees. Thus far, it appears that the oil companies have not been eager to expand litigation involving delinquent dealers into a full-blown defense of their marketing and leasing practices, and their reluctance is certainly understandable. But, faced with the fact that resourceful dealers can now point to cases already decided as precedent, the oil companies may soon be forced to present their counter-arguments.

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204. *See* Murray, *supra* note 4, at 15.
205. *See id.* at 24-25.

In presenting their case, the oil companies will have to overcome the sympathy accorded to David taking on Goliath. But they should remind courts that bigness in and of itself is not proof of overwhelming bargaining power. Before presuming that oil companies can extract unconscionable agreements from defenseless operators, or can operate in bad faith with impunity, the courts ought to look closely at the realities of the marketplace, which may demonstrate that particular dealers are indeed sought after and enjoy considerable bargaining power in their own right. Furthermore, unlike consumers, gasoline station operators are not an atomized group, but are already well-organized and politically active. Other branches of government, responsive to political pressure, may be and have been moved to extend protection.[206] Judges assessing the relative bargaining position of operators and their lessors need to be reminded that the dealers' political clout represents potential, if not actual, bargaining power that consumers do not have.[207] Thus, an unthinking extension to this group of the special judicial protection traditionally afforded helpless consumers is not only unwarranted but undesirable.

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206. In fact, in June 1978, Congress gave dealers a "day in court" on questions of termination. The Federal Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322 (1978), prohibits a franchisor from terminating or failing to renew a franchise unless there is "cause" as specified in the statute. *See id.* § 102.

The act, however, may not yield a significant change from prior law. For instance, it provides that termination is lawful if the franchisor can show "a failure by the franchisee to comply with any provision of the franchise." *Id.* § 102(b)(2)(A). Although it is too early to predict the effect the legislation will have, it does seem fair to say that an unconscionability analysis will have to be undertaken to separate "reasonable" from "unreasonable" contract terms.

207. As a case in point, the four decisions examined in this Article demonstrate the success of gasoline dealers and their organizations in improving their position vis-à-vis their suppliers. The dealers' arguments have been most warmly received in New Jersey, where the legislature has enacted a "Franchise Practices Act." *See* N.J. STAT. ANN. §§ 56:10-1 to -12 (West Supp. 1976). The New Jersey legislative success has been magnified by the favorable court decision in *Marinello*, which has been cited in other jurisdictions. If the dealers can continue to build on these precedents, they may, along with "the poor naive consumer confronted with high-pressure sales tactics," Spanogle, *supra* note 4, at 955, join "unsophisticated farmer[s], careless sailors, the naive young, the easily defrauded oil, and the unfortunate physically disabled," *id.* at 955 n.120, as a new class of persons to whom the courts will grant special protection. Given the dealers' recent political successes, however, this may be one group that is able to take care of itself.