Mac's Shell and the Future of Constructive Termination

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Suppose you have been afflicted with a serious illness. After several weeks at home in bed, you receive a visit from the county coroner, who advises you that you are now dead. Somewhat puzzled, you ask how that could be since you fancy yourself very much still alive and have no plans of expiring anytime soon. "You see," he responds, "although you are not actually dead, the illness had such a material effect on your health that we decided to pronounce you effectively dead. You are, in the eyes of the law, 'constructively deceased.'"

A similar theory was formerly commonplace in the petroleum franchise industry. For years, service station dealers would claim that their franchises had been unlawfully "terminated" even though they continued to operate their stations. The U.S. Supreme Court finally interred that theory in *Mac's Shell Service, Inc. v. Shell Oil Products Co.*,[1] holding that a dealer cannot sue for termination if it continues to operate.

The Court's decision has broad ramifications. State franchise statutes in a wide array of industries regulate grounds and procedures for termination of a franchise, just like the federal statute in *Mac's Shell*. The Court's decision is bound to influence how other courts interpret those statutes. Moreover, *Mac's Shell* raises significant questions about whether "constructive termination" remains a viable theory at all. These issues are sure to present fertile ground for litigation in the coming years.

CONSTRUCTIVE TERMINATION UNDER THE PMPA

Congress enacted the Petroleum Marketing Practices Act (PMPA)[2] in the late 1970s to protect service station franchisees from arbitrary terminations and nonrenewals. The PMPA regulates the circumstances in which a refiner can terminate a franchise during its stated term or fail to renew the franchise relationship at the end of that term. The act prohibits termination or nonrenewal except on specified grounds following specified procedures.[3]

Although the PMPA by its terms applies only where a franchisor "terminate[s]" or "fail[s] to renew" a dealer,[4] some courts interpreted the statute more broadly. In one case, *Barnes v. Gulf Oil Corp.*,[5] a service station dealer complained that her franchisor had prevented her from purchasing fuel at the contractually agreed-upon price by assigning the franchise to a third party that charged more. The Fourth Circuit held that this amounted to a constructive termination even though the plaintiff continued to operate her station. In another case, *Pro Sales, Inc. v. Texaco, U.S.A.*,[6] a dealer objected to terms in a renewal agreement but signed the contract anyway, albeit under protest. The Ninth Circuit allowed the dealer to bring what amounted to a constructive nonrenewal claim.

Constructive claims are not entirely foreign to the law. If a supervisor makes working conditions so oppressive that an employee is forced to quit, the employee may have a claim for constructive discharge. Likewise, if a landlord allows premises to become so difficult to inhabit that the tenant is forced to move out, the tenant may have a claim for constructive eviction. In either case, however, the termination is constructive only in the sense that the plaintiff quits or moves out because of intolerable conditions rather than being expressly fired or evicted. The employment or tenancy still ends. The novelty of *Barnes* and *Pro Sales* was that courts allowed dealers to sue for constructive termination or nonrenewal even though they continued to operate their franchises and had signed renewal agreements.

Other courts took a narrower view of constructive claims under the PMPA. Two courts of appeals held, contrary to *Barnes*, that a dealer could not claim constructive termination if it continued to operate.[7] And three courts of appeals held, contrary to *Pro Sales*, that a dealer could not claim constructive nonrenewal if it signed a renewal agreement.[8] That conflict among the lower courts set the stage for the U.S. Supreme Court's decision in *Mac's Shell*.

MAC'S SHELL

For years, Shell offered a program that allowed its service station dealers to reduce their rent based on how much gasoline they sold. Such arrangements were common in the industry at one time. But as service stations shifted from just selling gasoline to offering other amenities such as snacks and lottery tickets, those arrangements lost favor and were replaced with rents based solely on the value of the station's real estate assets.

In 1998, Shell and Texaco combined their operations in the eastern United States to form a new entity called Motiva. Unlike Shell, Texaco had already abandoned its volume-based rent program and shifted to asset-based rents. As a result, Motiva inherited dealers with inconsistent contract

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terms. Motiva decided to unify those terms by ending the volume-based rent program and moving all of its dealers to asset-based rents. The written program terms allowed Motiva to do that: they expressly authorized discontinuance of the program at any time on thirty days' notice. Despite those written terms, however, some dealers claimed that Shell sales representatives had orally assured them that the program would continue in perpetuity.

Several New England dealers sued Shell and Motiva over the rent changes. They claimed that discontinuation of the rent program was a breach of contract under state law because the sales representatives had orally modified the written program terms. The dealers also alleged two claims under the PMPA. Even though the dealers continued to operate their stations after the rent changes, they claimed that Shell had constructively terminated their franchises by eliminating the rent subsidy. And even though the dealers signed renewal agreements with Motiva, they claimed that the rent terms under the new contracts constituted constructive nonrenewals.

Under *Mac's Shell*, a dealer cannot claim constructive termination unless the defendant's actions drove it out of business.

The district court allowed those claims to proceed to trial, instructing the jury, among other things, that a rent increase could amount to a constructive termination if it was "such a material change that it effectively ended the lease, even though the plaintiffs continue to operate the business."[9] The jury found for plaintiffs across the board and awarded several million dollars in damages. The First Circuit affirmed in part and reversed in part.[10] Relying heavily on the Fourth Circuit's decision in *Barnes*, the court ruled that a dealer could claim constructive termination despite continuing to operate.[11] "To require an actual abandonment of years of work and investment before we recognize a right of action under the PMPA," the court opined, "would be unreasonable."[12] On the other hand, the court held that a dealer could not claim constructive nonrenewal if it signed a renewal agreement.[13] Although the Ninth Circuit had permitted such a claim in *Pro Sales*, the court observed that *Pro Sales* had been "rejected by the other circuits to consider the issue."[14]

Both sides sought Supreme Court review, and the Court agreed to hear the case. On the merits, the parties disagreed not only over whether constructive termination and nonrenewal claims require an end to the relationship but also over whether constructive claims should be allowed under the PMPA at all. The government, participating as amicus curiae, took the middle ground and argued that the Court should permit constructive claims, but only if the dealer was forced to abandon its franchise or to reject a renewal agreement.

THE SUPREME COURT'S DECISION

In a unanimous opinion authored by Justice Alito, the Court ruled in Shell and Motiva's favor on both the constructive termination and constructive nonrenewal claims. The Court first held that a dealer cannot claim constructive termination unless the defendant's actions forced it out of business. "[A] necessary element of any constructive termination claim under the PMPA," the Court concluded, "is that the complained-of conduct forced an end to the franchisee's use of the franchisor's trademark, purchase of the franchisor's fuel, or occupation of the franchisor's service station."[15]

The Court gave several reasons for that conclusion. The ordinary meaning of the word *terminate*, it observed, was to "put an end to" something.[16] That definition was inconsistent with the dealers' theory that a mere breach of contract, even a serious one, could amount to a termination where the dealer continued to operate. The Court also noted that the word *terminate* has an established meaning under the Uniform Commercial Code, which likewise requires an actual end.[17] The requirements for constructive claims in employment and landlord-tenant law offered further support.[18]

When Congress enacted the PMPA, moreover, the states extensively regulated petroleum franchise agreements.[19] Congress did not seek to federalize all petroleum franchise regulation but homed in on two issues, termination and nonrenewal, while leaving other matters to state law.[20] Finally, the Court cited practical considerations. The dealers' position would require courts to articulate a standard for deciding when a mere breach of contract was so serious that it "effectively" ended the franchise even though the dealer continued to operate. Such a standard, the Court concluded, "simply evades coherent formulation."[21]

Turning to constructive nonrenewal, the Court held that "a franchisee that chooses to accept a renewal agreement cannot thereafter assert a claim for unlawful nonrenewal under the Act."[22] The Court relied heavily on the statutory text, which prohibits only "fail[ures] to renew," not renewals on terms the dealer finds objectionable but nevertheless accepts.[23] Allowing dealers to claim nonrenewal despite having signed a renewal agreement would also upset the act's careful remedial structure.[24]

Having concluded that a dealer could not claim constructive termination or nonrenewal if it continued to operate or signed a renewal agreement, the Court did not reach Shell and Motiva's alternative argument that the PMPA does not permit constructive claims at all. The Court "le[ft] th[at] question for another day."[25]

THE IMPACT OF *MAC'S SHELL* ON OTHER INDUSTRIES

Mac's Shell most immediately affects service station franchises, but its consequences will not be limited to that industry. There are some 900,000 franchised establishments across the country.[26] Many of those franchises are subject to state

or federal laws that, like the PMPA, restrict the grounds and regulate the procedures for termination or nonrenewal. A number of states have general franchise statutes that regulate termination or nonrenewal across industries.[27] Other statutes cover franchises in specific sectors.[28] Federal law regulates franchise relations in at least one other area: the Automobile Dealers' Day in Court Act[29] limits termination or nonrenewal of car dealerships as well as other franchisor conduct.

Plaintiffs routinely allege claims for constructive termination or nonrenewal under those other statutes. Before *Mac's Shell*, courts had divided into three camps. Some did not permit such claims at all.[30] Others allowed them but only if the plaintiff had been forced to abandon the franchise.[31] Still others allowed them even if the plaintiff continued to operate.[32]

Although the Supreme Court's decision in *Mac's Shell* is binding only with respect to the PMPA, it seems bound to influence how courts will interpret other franchise statutes. The continuing vitality of some earlier decisions is open to serious doubt. A prime example is the Second Circuit's 1995 decision in *Petereit v. S.B. Thomas, Inc.*[33] In that case, several Connecticut distributors of Thomas' English Muffins claimed that a realignment of their sales territories amounted to a constructive termination under Connecticut's franchise termination statute. The Second Circuit accepted that theory. "A franchisor," the court opined, "may take action that results in less than the complete destruction of a franchisee's business, but yet so greatly reduces the value of the franchise as to epitomize the very abuse of disparity in economic power that the Act seeks to prevent."[34] All that was necessary to establish a constructive termination, according to the court, was "a *substantial decline* in franchisee net income."[35]

The Supreme Court's decision in *Mac's Shell* is likely to have effects beyond the PMPA and influence how courts interpret other statutes.

Will the Second Circuit adhere to that view after *Mac's Shell*? Don't bet on it. The divergence between the two courts' approaches is striking. While the Supreme Court focused on the statutory text and its limitation to franchise terminations, the Second Circuit downplayed text in favor of what it perceived to be the legislature's broader purposes. The Supreme Court stressed the importance of clear and coherent rules, but the Second Circuit's "substantial decline in franchisee net income" test seems like precisely the sort of amorphous standard that the Supreme Court rejected.

One could try to distinguish state statutes of the sort at issue in *Petereit* from the federal statute at issue in *Mac's Shell*. One of the Supreme Court's rationales was that federal statutes should not be construed too broadly if doing so would displace traditional state authority.[36] State statutes implicate no such concerns. But federalism principles were only one of several grounds for the Supreme Court's decision, and they do not justify a different result. At its core, *Mac's Shell* rested on the simple notion that *terminate* means "terminate," not "continue under undesirable conditions." Or, as Yogi Berra might put it: "It ain't over 'til it's over."[37] That common sense proposition is no less applicable to state franchise termination statutes than to the PMPA.

WHAT THE SUPREME COURT DID NOT DECIDE

What the Supreme Court did not decide in *Mac's Shell* is just as important as what it did decide. Having ruled that a dealer could not claim constructive termination or nonrenewal while continuing to operate or signing a renewal agreement, the Court did not reach Shell and Motiva's primary argument that the PMPA does not permit constructive claims at all. So intent was the Court on "leav[ing] the question for another day" that it reserved judgment on the issue four different times.[38]

Lower courts have already chimed in. The Seventh Circuit, in an opinion by Judge Posner, ruled against a Chicago service station in a dispute with BP.[39] The court had little difficulty rejecting the station's constructive termination claim under *Mac's Shell* because none of the challenged actions forced an end to the franchise.[40] But in dicta, Judge Posner noted that *Mac's Shell* had "refused to say whether constructive termination is a proper ground for a violation of the Petroleum Marketing Practices Act, and expressed skepticism that it is."[41] He added, "We don't know *why* the Court is skeptical; without a doctrine of constructive termination, there would be . . . a big loophole in the Petroleum Marketing Practices Act."[42]

Is that true? The argument has some superficial appeal. If the PMPA prohibits only actual terminations, the theory goes, franchisors that wanted to get rid of their dealers could evade the act simply by raising fuel prices to $1,000 per gallon and driving the dealers out of business. But that argument ignores the fact that the PMPA is not a dealer's sole remedy. A franchisor that raised fuel prices to $1,000 per gallon may have succeeded in evading the PMPA, but only at the expense of handing the plaintiff a slam-dunk breach of contract claim. Even where a supply contract contains an open price term, as is typical in fuel supply agreements, the Uniform Commercial Code limits a seller's ability to increase prices arbitrarily.[43] Those other remedies are also potent deterrents.

Experience undermines the claim that limiting the PMPA to actual terminations or nonrenewals would result in widespread evasion of the statute by encouraging franchisors to drive their dealers out of business rather than comply with the statutory termination restrictions. As explained above, many courts have interpreted state franchise statutes not to permit constructive termination claims. Even under the PMPA, courts have refused to permit constructive termination claims outside the narrow context of franchise assignments.[44] Yet in neither context, as far as the author is aware, has there been any deluge of misconduct designed to force dealers out of business. That experience confirms

that traditional remedies are sufficient to deter franchisor misconduct short of actual termination, thereby refuting the notion that constructive termination claims are necessary to avoid creating a "big loophole" in the PMPA.

Ultimately, what matters is Congress's intent, and there are strong reasons to believe that Congress never contemplated constructive claims when it enacted the PMPA. The act provides that "no franchisor . . . may . . . terminate any franchise" except pursuant to the grounds and procedures set forth in the act.[45] By its terms, therefore, the act applies only where the franchisor terminates the franchise, not where the dealer terminates the franchise in response to intolerable conditions.[46] Although courts have recognized constructive claims in employment and landlord-tenant law, such claims are hardly a necessary or inevitable corollary of any statute regulating terminations. In the Title VII context, for example, the Supreme Court allowed constructive discharge claims only because the doctrine's long pedigree in employment law made it reasonable to presume that Congress intended to incorporate the doctrine when the statute was enacted.[47] Here, by contrast, there was no long-standing tradition of constructive claims in the contexts Congress deemed relevant when it passed the PMPA. Congress was focused on the state statutes that already regulated franchise termination and nonrenewal,[48] and it also drew from the Uniform Commercial Code.[49] Claims for constructive termination were essentially unheard of in either context when the PMPA was enacted in 1978.[50]

Many of the practical problems that the Supreme Court identified with plaintiffs' expansive constructive termination theory in *Mac's Shell* are also implicated by constructive termination claims in general. Because countless factors affect a dealer's viability, for example, constructive claims inevitably embroil courts and juries in speculation. Juries must decide not only why a dealer failed but also whether a typical dealer would have failed under similar circumstances, and what a typical dealer even is.[51] Contrary to Judge Posner's intuition, therefore, the Supreme Court had good reasons to be skeptical of constructive claims under the PMPA.[52]

THE UNCERTAIN FUTURE OF CONSTRUCTIVE TERMINATION

Although *Mac's Shell* answered one question, others remain. State and federal courts will have to decide whether to apply the holding of *Mac's Shell* to other franchise statutes. And they will have to address the question *Mac's Shell* left open, i.e., whether constructive claims are valid at all, under both those other statutes and the PMPA itself.

In answering both questions, courts would do well to remember that franchise termination statutes are only one component of a broader array of legal protections that franchisees enjoy. Traditional contract remedies, in particular, are fully capable of deterring the sorts of misconduct that some courts stretch franchise termination statutes to reach. In *Mac's Shell* itself, plaintiffs recovered almost $1.3 million in damages on their contract claims, judgments that the Supreme Court's decision did not disturb. Constructive termination claims, much less expansive versions of those claims, simply are not necessary to protect dealers from overbearing conduct by their contractual counterparts.

Ordinary contract remedies may be less favorable to dealers than constructive termination claims. Under the PMPA, for example, plaintiffs can obtain punitive damages,[53] they are entitled to their attorneys' fees and expert witness fees whenever they recover more than nominal damages,[54] and they can obtain injunctive relief under a relaxed standard.[55] State franchise termination statutes likewise may offer more favorable relief.

But the important point for courts to remember as they consider constructive termination claims in the wake of *Mac's Shell* is that the denial of relief under a franchise termination statute is not the same as a denial of relief altogether. Artificially expanding those statutes to cover situations that they were never designed to address is neither necessary to protect franchisees nor faithful to legislative intent.

ENDNOTES

1. 130 S. Ct. 1251 (2010).
2. 15 U.S.C. §§ 2801 et seq.
3. *Id.* §§ 2802, 2804.
4. *Id.* § 2802(a).
5. 795 F.2d 358 (4th Cir. 1986).
6. 792 F.2d 1394 (9th Cir. 1986).
7. *See* Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal., 153 F.3d 938, 948 (9th Cir. 1998); Clark v. BP Oil Co., 137 F.3d 386, 392 (6th Cir. 1998).
8. *See* Dersch Energies, Inc. v. Shell Oil Co., 314 F.3d 846, 859-67 (7th Cir. 2002); Abrams Shell v. Shell Oil Co., 343 F.3d 482, 488–89 & n.16 (5th Cir. 2003); *Clark*, 137 F.3d at 394–95.
9. Transcript of Jury Trial, Day 14, at 99–100, Marcoux v. Shell Oil Prods. Co., No. 01-11300-RWZ (D. Mass. Dec. 7, 2004) (Docket Entry No. 339).
10. Marcoux v. Shell Oil Prods. Co., 524 F.3d 33 (1st Cir. 2008).
11. *See id.* at 44–47.
12. *Id.* at 46.
13. *See id.* at 47–49.
14. *Id.* at 48.
15. Mac's Shell Serv., Inc. v. Shell Oil Prods. Co., 130 S. Ct. 1251, 1261–62 (2010). Under the PMPA, the trademark rights, fuel supply agreement, and lease of the premises are three distinct components of the petroleum franchise; termination of any one suffices to implicate the statute. 15 U.S.C. § 2801(1)(B).
16. *Mac's Shell*, 130 S. Ct. at 1257–58.
17. *Id.* at 1258 & n.5 (citing U.C.C. § 2-106(3)).
18. *Id.* at 1258–59.
19. *Id.* at 1259.
20. *Id.* at 1259–60.
21. *Id.* at 1260.
22. *Id.* at 1262.
23. *Id.* at 1262–63.
24. *Id.* at 1263–64.
25. *Id.* at 1257 n.4; *see also id.* at 1260 n.8, 1261 n.9, 1262 n.11.

26. *See* PRICEWATERHOUSECOOPERS, 2010 FRANCHISE BUSINESS ECONOMIC OUTLOOK 2–3 (Dec. 21, 2009); INT'L FRANCHISE ASS'N, FRANCHISE OPPORTUNITIES, www.franchise.org/franchisecategories.aspx.

27. *See* ARK. CODE ANN. § 4-72-204; CAL. BUS. & PROF. CODE § 20020; CONN. GEN. STAT. § 42-133f; DEL. CODE ANN. tit. 6, § 2552; HAW. REV. STAT. § 482E-6(2)(H); 815 ILL. COMP. STAT. 705/19–20; IND. CODE § 23-2-2.7-1(7)–(8); IOWA CODE §§ 523H.7, 523H.8; MD. CODE ANN., COM. LAW §§ 11-1302.1, 11-1303; MICH. COMP. LAWS § 445.1527(c)–(d); MINN. STAT. § 80C.14(3)–(4); MISS. CODE ANN. § 75-24-53; MO. REV. STAT. § 407.405; NEB. REV. STAT. § 87-404; N.J. STAT. ANN. § 56:10-5; R.I. GEN. LAWS § 6-50-4; TENN. CODE ANN. § 47-25-1503(a); VA. CODE ANN. § 13.1-564; WASH. REV. CODE § 19.100.180(2)(i)–(j); WIS. STAT. § 135.03.

28. *See, e.g.*, ALA. CODE § 8-21A-3(4) (farm equipment); CAL. VEH. CODE § 3060 (motor vehicles); MINN. STAT. § 325B.04 (alcoholic beverages); ABA SECTION OF ANTITRUST LAW, THE FRANCHISE AND DEALERSHIP TERMINATION HANDBOOK apps. B-C, at 239–52 (2004) (collecting examples).

29. 15 U.S.C. §§ 1221 et seq.

30. *See* Coast to Coast Stores, Inc. v. Gruschus, 667 P.2d 619, 623 (Wash. 1983), Fuller Ford, Inc. v. Ford Motor Co., No. CIV. 00-530-B, 2001 WL 920035, at *13 (D.N.H. Aug. 6, 2001); Morgan Assocs., Inc. v. Midw. Mut. Ins. Co., 519 N.W.2d 499, 502 (Minn. Ct. App. 1994); Dave Greytak Enters. v. Mazda Motors of Am., Inc., 622 A.2d 14, 19–21 (Del. Ch. 1992), *aff'd mem.*, 609 A.2d 668 (Del. 1992); Zeno Buick-GMC, Inc. v. GMC Truck & Coach, 844 F. Supp. 1340, 1351 (E.D. Ark. 1992), *aff'd mem.*, 9 F.3d 115 (8th Cir. 1993); Adolph Coors Co. v. Rodriguez, 780 S.W.2d 477, 480 (Tex. App. 1989); Carlock v. Pillsbury Co., 719 F. Supp. 791, 852 (D. Minn. 1989); Speed Auto Sales, Inc. v. Am. Motors Corp., 477 F. Supp. 1193, 1199 (E.D.N.Y. 1979); *cf.* Capital Equip., Inc. v. CNH Am., LLC, 471 F. Supp. 2d 951, 959–61 (E.D. Ark. 2006) (declining to resolve issue).

31. *See* Taylor Equip., Inc. v. John Deere Co., 98 F.3d 1028, 1035 & n.8 (8th Cir. 1996); Remus v. Amoco Oil Co., 794 F.2d 1238, 1240–41 (7th Cir. 1986); Barney Holland Oil Co. v. Fleet-Cor Techs., Inc., 275 F. App'x 351, 358–59 (5th Cir. 2008); E. Bay Running Store, Inc. v. NIKE, Inc., 890 F.2d 996, 1000 n.6 (7th Cir. 1989); Bright Bay GMC Truck, Inc. v. Gen. Motors Corp., 593 F. Supp. 2d 495, 497 (E.D.N.Y. 2009); Lazar's Auto Sales, Inc. v. Chrysler Fin. Corp., 83 F. Supp. 2d 384, 389–90 (S.D.N.Y. 2000); Healy v. Carlson Travel Network Assocs., Inc., 227 F. Supp. 2d 1080, 1090 (D. Minn. 2002); *cf.* JPM, Inc. v. John Deere Indus. Equip. Co., 94 F.3d 270, 271–72 (7th Cir. 1996) ("assum[ing]" viability of claim where franchisor coerced dealer to sell business); Am. Bus. Interiors, Inc. v. Haworth, Inc., 798 F.2d 1135, 1141 (8th Cir. 1986) (allowing claim where franchisor refused to do business with franchisee).

32. *See* Petereit v. S.B. Thomas, Inc., 63 F.3d 1169, 1181–83 (2d Cir. 1995); Carlos v. Philips Bus. Sys., Inc., 556 F. Supp. 769, 775–77 (E.D.N.Y.1983), *aff'd mem.*, 742 F.2d 1432 (2d Cir. 1983); Maintainco, Inc. v. Mitsubishi Caterpillar Forklift Am., Inc., 975 A.2d 510, 518–22 (N.J. Super. Ct. App. Div. 2009); *cf.* Robert Basil Motors, Inc. v. Gen. Motors Corp., No. 03-CV-315A, 2004 WL 1125164, at *2–5 (W.D.N.Y. Apr. 17, 2004) (discontinuance of vehicle line).

33. 63 F.3d 1169 (2d Cir. 1995).

34. *Id.* at 1182.

35. *Id.* at 1183.

36. Mac's Shell Serv., Inc. v. Shell Oil Prods. Co., 130 S. Ct. 1251, 1259–60 (2010).

37. YOGI BERRA, YOGI-ISMS, www.yogiberra.com/yogi-isms.html.

38. *Mac's Shell*, 130 S. Ct. at 1257 n.4, 1260 n.8, 1261 n.9, 1262 n.11.

39. Al's Serv. Ctr. v. BP Prods. N. Am., Inc., 599 F.3d 720 (7th Cir. 2010).

40. *Id.* at 724–27.

41. *Id.* at 726.

42. *Id.*

43. *See* U.C.C. § 2-305(2).

44. *See* Atl. Autocare, Inc. v. Shell Oil Prods. Co., 605 F. Supp. 2d 463, 468–70 (S.D.N.Y. 2009) (summarizing the case law on this limitation).

45. 15 U.S.C. § 2802(a)(1).

46. *See* Moro v. Shell Oil Co., 91 F.3d 872, 875 (7th Cir. 1996).

47. *See* Pa. State Police v. Suders, 542 U.S. 129, 141–42 (2004).

48. *See* S. REP. No. 95-731, at 19 (1978).

49. *See Mac's Shell*, 130 S. Ct. at 1258 & n.5.

50. The earliest reported case in which a franchisee alleged a claim for constructive termination in those terms under any state or federal franchise statute was a PMPA case decided in 1979. *See* Sexe v. Husky Oil Co., 475 F. Supp. 135, 137 (D. Mont. 1979) (rejecting the claim that a reduction of the dealer's fuel allocation amounted to a "'constructive' termination"). Claims for constructive termination under the Uniform Commercial Code remain unheard of even today.

51. Although juries must make analogous findings in constructive discharge and constructive eviction cases, such determinations are far more complex in the franchise context. It is relatively straightforward to decide, for example, whether a supervisor's boorish behavior would have left a reasonable employee no choice but to resign or whether a landlord's neglect to fix a leaky roof would have left a reasonable tenant no choice but to move out. Given the sheer number of economic and other forces that affect a typical franchisee's business, however, it is far more difficult and speculative for a jury to assess whether a franchisor's conduct would have left a typical franchisee no choice but to abandon the franchise.

52. Judge Posner did not have the benefit of full briefing on this issue. The case before him was briefed before *Mac's Shell* was decided, and the dealer did not even argue that BP's conduct amounted to a constructive termination until its reply, after BP had filed its brief. *See* Reply Brief of Plaintiffs-Appellants at 2–5, 15–16 & n.5 (7th Cir. filed Feb. 1, 2010) (No. 09-3006).

53. 15 U.S.C. § 2805(d)(1)(B).

54. *Id.* § 2805(d)(1)(C).

55. *Id.* § 2805(b)(2).