

Seven Years Hence: Constructive Termination Since *Mac's Shell*

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Constructive termination is a legal theory, first developed in the context of employment law, under which a plaintiff is permitted to pursue a claim that the defendant has “constructively terminated” the employee by making working conditions so intolerable that continued performance of the job is extremely difficult or impossible. A key legal question under this theory is whether plaintiffs are required as an essential element of the claim to show that they had ended the contractual or employment relationship, or alternatively whether it was sufficient to demonstrate something short of an actual end to the relationship, such as intolerable working conditions or severe hindrance to continued contractual performance.

In *Mac's Shell Service, Inc. v. Shell Oil Products Co.*,¹ the U.S. Supreme Court held that a franchisee of a petroleum marketing franchise could not state a claim under the Petroleum Marketing Practices Act (PMPA) for constructive termination unless and until it went out of business or was denied the right to use the franchisor's trademarks, buy its fuel, or occupy station premises it owned. The decision reversed a First Circuit opinion that had affirmed a jury verdict on a PMPA claim in favor of Shell franchisees that had objected to the termination of a rent subsidy program. The franchisees continued to operate their stations, but asserted claims for constructive termination and constructive nonrenewal based on Shell's unilateral termination of the rent subsidy.² The decision overruled lower federal court decisions that allowed



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1. 559 U.S. 175 (2010).

2. *Marcoux v. Shell Oil Prods. Co.*, 524 F.3d 33 (1st Cir. 2008).

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petroleum franchisees to bring constructive termination or constructive non-renewal claims under the PMPA even when they continued to operate their franchises.³

This article examines the impact that *Mac's Shell* has had on constructive termination claims in franchise litigation. Part I begins by examining cases brought under the PMPA that have asserted constructive termination claims after *Mac's Shell* was decided and finds no surprises in the lower federal courts' decisions enforcing the Supreme Court's strict interpretation of a claim for constructive termination. In Part II, the article discusses franchise cases that apply *Mac's Shell* outside the context of PMPA litigation, finding some decisions under state statutes and common law that have enforced the *Mac's Shell* requirement that a constructive termination plaintiff must cease doing business in order to bring a claim, but noting that many cases interpreting state law constructive termination claims in franchising do not mention *Mac's Shell* at all. Finally, Part III of this article discusses possible future issues dealing with the decision, including the possibility of the Supreme Court deciding whether the PMPA permits constructive termination claims at all and provides a suggested analytical framework to guide resolution of that issue.

I. Constructive Termination Claims Under the Petroleum Marketing Practices Act After *Mac's Shell*

The Supreme Court has not addressed the issue left unresolved in *Mac's Shell*: whether constructive termination is a proper ground for a violation of the PMPA. Despite this, the Court did express skepticism as to whether Congress intended to authorize such a claim. Relying on the "well-recognized" doctrine of constructive discharge in employment discrimination law, the Seventh Circuit, in an opinion written by Judge Richard Posner, challenged that skepticism in *Al's Service Center v. BP Products North America, Inc.*, suggesting that "without a doctrine of constructive termination, there would be . . . a big loophole in the Petroleum Marketing Practices Act."⁴ Nevertheless, the Seventh Circuit acknowledged in one of the first decisions after *Mac's Shell* that it could not "ignore the Court's ruling that 'a necessary element of any constructive termination claim under the Act is that the franchisor's 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.'"⁵ Concluding that none of those things occurred, the Seventh Circuit had little trouble disposing of the plaintiff's claim.

3. *E.g.*, *Barnes v. Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986); *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394 (9th Cir. 1986).

4. 599 F.3d 720, 726 (7th Cir. 2010).

5. *Id.* at 726–27 (emphasis added).

Few courts seem willing to flout the Supreme Court's conclusion in *Mac's Shell* "that a necessary element of any constructive termination claim under the Act is that the franchisor's conduct forced an end to the use of the franchisor's trademark, purchase of the franchisor's fuel, or occupation of the franchisor's service station."⁶ In *Duncan Services, Inc. v. ExxonMobil Oil Corporation*, for example, the U.S. District Court for the District of Maryland examined the claims of sixty-five ExxonMobil franchisees that challenged the franchisor's assignment of their franchise agreements to a third-party distributor, which in turn sold the agreements to third-party GTY MD Leasing (Getty).⁷ Finding that the assignment did not violate the PMPA, the court in *Duncan Services* explained that *Mac's Shell* compelled the conclusion that a franchisee seeking protection under the statute must allege a "violation of a statutory element of a franchise" in order to state a claim.⁸ In lockstep with the Supreme Court's conclusion, the court affirmed that "[c]onduct that does not force an end to the franchise . . . is not prohibited by the Act's plain terms."⁹ For this reason, the franchisees subjected to the assignment could not assert a claim for actual or constructive termination under the PMPA.¹⁰

Similarly, in *Poquez v. Suncor Holdings-COPII, LLC*, the U.S. District Court for the Northern District of California refused to extend the PMPA to protect a gas station owner from various actions that the franchisee claimed amounted to a termination under the statute.¹¹ The case involved a company that had rights to purchase the property housing the gas station, which was being leased by the franchisee as part of its relationship with Suncor.¹² Specifically, the plaintiff claimed that the defendants violated the PMPA by:

(1) failing to provide Plaintiff with forty-five days to exercise her right of first refusal to purchase the property; (2) denying Plaintiff's alleged right of first refusal to purchase the property and selling it to [third-party] Forest City; (3) issuing Plaintiff a sham three-year lease; and (4) selling the property to Forest City, allegedly knowing that the developer [would] terminate the underlying lease and evict the Plaintiff.¹³

Clearly cognizant of *Mac's Shell's* admonitions against extending the PMPA beyond its plain meaning, the franchisee argued that its case was not one for constructive termination or non-renewal but rather "an actual severance of the relevant legal relationship."¹⁴ But none of this mattered to the district court in disposing of the PMPA claim. In a straightforward application of *Mac's Shell*, the court in *Poquez* concluded that the plaintiff's

6. *Mac's Shell*, 559 U.S. at 182 (emphasis added).

7. 722 F. Supp. 2d 640, 644 (D. Md. July 12, 2010).

8. *Id.*

9. *Id.* at 645 (quoting *Mac's Shell*, 559 U.S. at 175).

10. *Id.* at 645.

11. No. 11-00328 SC, 2011 WL 4351612 (N.D. Cal. Sept. 15, 2011).

12. *Id.* at *1.

13. *Id.* at *2.

14. *Id.* at *4.

failure to allege “any facts showing that the franchise agreement has been terminated or that Defendants have in any way interfered with Plaintiff’s use of the Union 76 trademark, purchase of fuel, or occupation of the subject property” doomed the claim under the PMPA.¹⁵ In so deciding, the district court ruled it wholly irrelevant what the defendants *intended* in relation to the lease transaction; what counted was whether the defendants “*actually* terminated or failed to renew the franchise.”¹⁶ In short, the trend after *Mac’s Shell* is to strictly apply its holding in PMPA cases, likely explaining the limited number of decisions published after *Mac’s Shell* was decided. After all, a franchisee is not likely to assert a claim under the PMPA if the claim does not meet the Supreme Court’s construction of the statute.

Although some may consider the *Mac’s Shell* decision too restrictive and unnecessarily narrow (see Judge Posner’s musings in *Al’s Service Center*, for example), all is not lost for those seeking protection under the statute. For example, in *GTO Investments, Inc. v. Buchanan Energy*, the U.S. District Court for the Northern District of Illinois granted a preliminary injunction to a franchisee seeking protection under the PMPA when faced with what it deemed a “take it or leave it” lease renewal proposal from the franchisor.¹⁷ GTO operated an ExxonMobil franchise and, by all accounts, was in compliance with its obligations under the lease agreement that ExxonMobil assigned to defendant Buchanan, which assumed ExxonMobil’s rights under the agreement.¹⁸ When its franchise agreement was up for renewal, GTO refused to sign Buchanan’s proposed new lease because of various terms pertaining to rent, gasoline pricing, and other aspects of the franchisor-franchisee relationship.¹⁹ Buchanan responded to the refusal harshly: it chose not to renew the franchise relationship “because GTO refused to sign the Proposed Lease.”²⁰

The district court took issue with Buchanan’s refusal to renew and concluded that GTO had a reasonable likelihood of succeeding on the merits of its claim that the defendants had violated the PMPA.²¹ Judge Gottschall was particularly troubled by the absence of “rent amounts” in the second and third years of the proposed lease (they were left entirely blank and for future determination) as well as the “discriminatory gasoline pricing” contained in the contract submitted to GTO.²² On these facts, the court determined that Buchanan was likely acting in bad faith under the PMPA by subjecting all of its franchisees to the oppressive lease while at the same time exempting those

15. *Id.* at *4–5.

16. *Id.* at *4 (emphasis added).

17. No. 11 C 4135, 2012 WL 714802 (N.D. Ill. Mar. 5, 2012).

18. *Id.* at *1.

19. *Id.*

20. *Id.* at *2.

21. *Id.* at *6.

22. *Id.* at *3–4.

ExxonMobil gas stations run by Buchanan itself.²³ GTO was not the only franchisee affected.

Critical to understanding how the district court reached this decision is its analysis of Buchanan's arguments against the PMPA claim. Buchanan, the franchisor, argued that GTO's claim under the PMPA should fail because it resembled the contract claims asserted by the plaintiff in *Mac's Shell*, and the Supreme Court, in that case, had refused to turn state law contract claims into a violation of the PMPA in the absence of an actual termination, abandonment, or non-renewal.²⁴ It also asserted that it could not be bad faith under the statute to impose the new lease on GTO because Buchanan had rolled out the new lease to all franchisees (even though it had reserved distinct rights for its own corporate stores).²⁵ The district court rejected this argument, relying on *Mac's Shell* itself:

[The Supreme Court] understood that inquiries into reasonableness of contractual provisions would sometimes be necessary under the PMPA. As the Court stated, "Under the balance struck by the plain text of the [PMPA], a franchisee faced with objectionable new terms must decide whether challenging those terms is worth risking nonrenewal of the franchise relationship; if the franchisee rejects the terms and the franchisor seeks nonrenewal, the franchisee runs the risk that a court will ultimately determine that the proposed terms were lawful under the PMPA." (Citations omitted.) Here, GTO has chosen to take that risk, believing that Buchanan has "impos[ed] [] arbitrary and unreasonable new terms . . . that are designed to force an end to the petroleum franchise relationship. (Citation omitted.) As discussed above, some of these terms may give rise to a viable PMPA claim. If GTO loses its PMPA claim, however, it will also lose its franchise."²⁶

GTO is a good example of how to structure successful constructive termination claims under the PMPA after *Mac's Shell*. The district court suggests that not all claims looking like "constructive termination" are dead on arrival. Rather, the case demonstrates that franchisees must choose their path carefully and be willing to take the risk of a course of action that, if not validated by a court at the preliminary injunction stage, will result in the loss of their franchise. If the franchisee does what some of the plaintiffs in *Mac's Shell* did—sign the renewal papers and then assert that it was constructively non-renewed by the franchisor—its claim under the PMPA will fail. If, on the other hand, the franchisee holds out and accepts the possible consequences of not signing the renewal agreements, the franchisee will earn the right to a determination of whether the franchisor's actions violated the PMPA. As seen throughout decisions made since the Supreme Court's ruling in *Mac's Shell*, at the core of this analysis remains the idea that if a franchisee

23. *Id.*

24. *Id.* at *4–5.

25. *Id.*

26. *Id.* at *4.

cannot establish that the fundamental elements of its franchise are under attack from the franchisor, there is no PMPA claim under *Mac's Shell*.²⁷

II. Constructive Termination Claims Under State Common Law and Dealer Protection Statutes: The Impact of *Mac's Shell* Outside the Context of PMPA Claims

Shortly after *Mac's Shell* was decided, some commentators posited that the decision would have a broad impact outside of claims under the PMPA and would be used by franchisors and courts to limit claims under state franchise and dealer protection statutes.²⁸ It was even suggested that *Mac's Shell* would constrain state franchise and dealer protection statute claims to only those situations in which a franchisor's conduct forced an end to the franchise.²⁹ Overall, this has not been the case. Below we highlight some of the main constructive termination cases brought outside the context of the PMPA, which were decided after the Supreme Court's decision in *Mac's Shell* and that relied on *Mac's Shell* as authority. We also summarize the numerous cases that have resolved constructive termination claims without invoking *Mac's Shell* at all.

A little over two years after *Mac's Shell* was decided, a court extended its reach to the non-PMPA distribution context. The U.S. District Court for the Northern District of Illinois in *Bell v. Bimbo Foods Bakeries Distribution, Inc.*³⁰ held that, if there exists a claim for constructive termination under the Illinois Franchise Disclosure Act, to state a claim, one must allege "that his [or her] distributorship or franchise has *actually terminated*."³¹ Bell was a distributor for Bimbo Foods Bakeries Distribution Inc. who had purchased the right to deliver and stock Bimbo products at bakeries in a certain geographic area.³² When Bimbo purchased Sara Lee Corporation, it began selling and distributing these "competing" products in Bell's distribution area.³³ Bell brought a claim for wrongful termination under the Illinois

27. See e.g., *Metroil, Inc. v. ExxonMobil, Inc.*, 724 F. Supp. 2d 70 (D.D.C. July 20, 2010) (denying constructive termination claim under the PMPA based on mere assignment of franchise agreement); *MacWilliams v. BP Prods. N. Am., Inc.*, No. 09-1884 (RBK/AMD), 2010 WL 4860629 (D.N.J. Nov. 23, 2010) (franchisee conceded constructive termination claim due to ruling in *Mac's Shell* and absence of required criteria); *Eshak v. Marathon Petroleum Co., LLC*, No. 2:11 CV 101 PPS, 2012 WL 405672 (N.D. Ind. Feb. 8, 2012) (parties entered into agreement ending franchise and franchisee cannot later assert wrongful non-renewal under the PMPA); *Diamond v. BP Prods. N. Am., Inc.*, No. 10 C 471, 2010 WL 4704452 (N.D. Ill. Nov. 9, 2010) (franchisee failed to create triable issue of fact on issue of non-renewal and fact that franchisor's conduct may lead to the foreseeable effect of causing non-renewal under the PMPA).

28. See Robert K. Kry, *Mac's Shell and the Future of Constructive Termination*, 30 *FRANCHISE L.J.* 67, 69 (2010).

29. *Id.*

30. No. 11 C 03343, 2012 WL 2565849, at *4 (N.D. Ill. July 2, 2012) (emphasis added).

31. *Id.*

32. *Id.* at *1.

33. *Id.*

Franchise Disclosure Act³⁴ because Bimbo's actions "seriously and materially and directly undermine[d] his franchise agreement and 'abrogate[d] the sine qua non of the 'Distributor Agreement[],' thus 'effectively terminat[ing] the franchise agreement' without good cause."³⁵

The court was not persuaded. Without deciding whether claims for constructive termination were cognizable at all under the Act, it determined that Bell had failed to adequately allege one. Relying on *Mac's Shell* as analogous case law, it explained:

the Supreme Court noted in *Mac's Shell*, "a plaintiff must actually sever a particular legal relationship to maintain a claim for constructive termination." 130 S. Ct. at 1258. To recover for constructive discharge in the employment context, an employee generally is required to quit his or her job; to claim constructive eviction in the landlord-tenant context, the "general rule . . . is that a tenant must actually move out."³⁶

Because Bell continued operating his distributorship and did not allege that Bimbo Foods had "effectively forced him out" of business, the court concluded that he had failed to state a claim and dismissed his cause of action.³⁷

A little less than two years later, the U.S. District Court for the District of New Jersey cited the *Bell* decision and made a similar ruling under the New Jersey Franchise Practices Act (NJFPA).³⁸ In *Pai v. DRX Urgent Care, LLC*,³⁹ the court acknowledged that a claim for constructive termination exists under the NJFPA,⁴⁰ but interpreted the contours of such a claim according to those outlined in *Mac's Shell*: "The Supreme Court recently has made clear that a claim for constructive termination by a franchisee requires that a franchisee no longer be in operation."⁴¹ The *Pai* court explained:

The [*Mac's Shell*] Court reasoned that requiring franchisees to abandon their franchise before claiming constructive termination was consistent with the general understanding of the doctrine of constructive termination, where "a plaintiff must actually sever a particular legal relationship" to state a claim. (Citation omitted.) After all, termination is considered "constructive" not because there is no end to the relationship, but because it is the plaintiff who formally puts an end to the legal relationship, as opposed to the defendant.⁴²

34. 815 ILL. COMP. STAT. 705/19.

35. *Bell*, 2012 WL 2565849, at *3.

36. *Id.*

37. *Id.*

38. N.J. STAT. ANN. 56:10-1.

39. No. CIV.A. 13-3558 JAP, 2014 WL 837158, at *7 (D.N.J. Mar. 4, 2014), *aff'd sub nom. on other grounds by Fabbro v. DRX Urgent Care, LLC*, 616 F. App'x 485 (3d Cir. 2015).

40. *Id.* at *8. The court pointed out that a claim for constructive termination had been recognized by the New Jersey Superior Court in *Maintainco, Inc. v. Mitsubishi Caterpillar Forklift America, Inc.*, 975 A.2d 510, 518 (N.J. App. Div. 2009). Permitting claims for constructive termination had been "necessary under the NJFPA because any other conclusion 'would undercut the remedial purposes of the Act by allowing a franchisor to engage in such blatant attempts to 'ditch,' or constructively terminate, a franchisee, but escape liability under the Act because it did not entirely succeed.'" *Id.* at *8.

41. *Id.* at *7.

42. *Id.*

Because the plaintiffs were still operating their franchises and “continu[ed] to generate revenue” using defendants’ marks, the court dismissed their claim with prejudice.⁴³

The plaintiffs in *Pai* argued that *Mac’s Shell* was inapplicable because it involved the interpretation of a federal statute.⁴⁴ The court did not agree: “Plaintiffs have asserted no reason why the statutes should be interpreted or applied differently, particularly where both statutes share the same purpose of protecting franchisees from termination without cause.”⁴⁵ Additionally, the court cited *Bell* for the proposition that “at least one other federal court has held that the reasoning of *Mac’s Shell* applies to a state statute, almost identical to the NJFPA, aiming to protect franchisees.”⁴⁶ Thus, because the plaintiffs were still operating their franchises, they could not state a claim for constructive termination under the NJFPA. The Third Circuit affirmed on other grounds in *Fabbro v. DRX Urgent Care, LLC*⁴⁷ and noted that “the Supreme Court’s decision regarding the federal Petroleum Marketing Practices Act (PMPA) in *Mac’s Shell* . . . is not controlling authority for interpreting the New Jersey Franchise Practices Act.”

New Jersey has proven to be a fertile ground for litigation of this issue. Shortly after *Pai* was decided, but before the Third Circuit’s decision in *Fabbro*, the U.S. District Court for the District of New Jersey was again confronted with a constructive termination claim under the NJFPA. In *Naik v. 7-Eleven, Inc.*, the court “agree[d] with the reasoning set forth [by the New Jersey District Court] in *Pai*,” which had largely adopted the reasoning of the court in *Mac’s Shell*.⁴⁸ The *Naik* court dismissed the constructive termination claim “[b]ecause the Plaintiffs [we]re still operating their franchises and [we]re still gaining a profit from their stores (albeit a profit they allege[d] ha[d] been diminished through Defendant’s conduct[]).”⁴⁹ Therefore, without an actual “termination,” they could not state a claim.⁵⁰

In the context of common law claims for constructive termination as opposed to statutory claims, both courts and litigants have also relied on *Mac’s Shell*. In *Bedford Nissan, Inc. v. Nissan North America, Inc.*, the defendant manufacturer cited *Mac’s Shell* in support of a motion to dismiss a common law state breach of contract claim.⁵¹ Although ultimately not mentioned by the court in its decision, the U.S. District Court for the Northern District of

43. *Id.* at *7, *9.

44. *Id.* at *8.

45. *Id.*

46. *Id.*

47. 616 F. App’x 485, 489 (3d Cir. 2015).

48. No. CIV. 13-4578 RMB/JS, 2014 WL 3844792, at *13 (D.N.J. Aug. 5, 2014).

49. *Id.*

50. *See id.*

51. No. 1:16 CV 423, 2016 WL 6395799, at *10 (N.D. Ohio Oct. 28, 2016). Notably, the plaintiffs did not allege constructive termination under the Ohio Motor Vehicle Franchise Act, which prohibits termination without good cause. It provides, in relevant part: “Notwithstanding the terms, provisions, or conditions of an existing franchise, no franchisor shall terminate, cancel, or fail to continue or renew a franchise except for good cause. This section governs

Ohio employed reasoning similar to that of the court in *Mac's Shell*.⁵² The plaintiffs, owners of several Nissan dealerships, asserted that defendant Nissan North America breached the parties' dealers sale and service agreement by constructively terminating them in a manner not authorized by the agreement's termination provision.⁵³ Despite claiming their agreements had been constructively terminated, the plaintiffs' dealerships remained in business.⁵⁴

Nissan NA referenced *Mac's Shell* and argued that "[a] valid claim for constructive termination requires that Plaintiffs' Dealerships and their Dealer Agreements have, in fact, been terminated, and Plaintiffs do not (and cannot in good faith) allege Nissan [NA] has actually or effectively done so."⁵⁵ The district court agreed.⁵⁶ Although essentially relying on the same principle espoused in *Mac's Shell*—that constructive termination requires an actual termination of the agreement—the court did not cite the case, instead relying on two district court cases cited in Nissan NA's brief, which supported the proposition.⁵⁷

Similarly, *Mac's Shell* was referenced in the context of a common law application of the doctrine of constructive termination in *Tilstra v. Bou-Matic, LLC*.⁵⁸ Plaintiffs Sid Tilstra and Tilstra Dairy Equipment, Ltd. alleged that Defendant Bou-Matic breached their dealership agreement by constructively terminating it without ninety days' notice and good cause, which were required by the terms of the agreement itself.⁵⁹ Bou-Matic had informed Tilstra that it "was going to remove their entire trade territory if they did not

any action or intent to terminate, cancel, discontinue, or not renew a franchise. . . ." OHIO REV. CODE ANN. § 4517.54.

52. See *Bedford Nissan*, 2016 WL 6395799, at *10.

53. *Id.* Essentially, the plaintiffs claimed that Nissan NA had selected a preferred dealer in Northeast Ohio, entered into secret agreements under which he was given "secret cash and quarterly incentive payments," *id.* at *1, with the intent of "eliminat[ing] intrabrand competition among its dealers in Northeast Ohio, reconfigur[ing] its dealer network in Northeast Ohio, and 'drown[ing] the Plaintiffs,' thus causing the constructive or actual termination of Plaintiffs' franchise," *id.* at *10.

54. *Id.*

55. *Id.*

56. *Id.* "Because Nissan NA has not terminated the franchise agreement, and Plaintiffs continue to operate their dealerships, the Court rejects Plaintiffs contention that Nissan NA has breached the DSSA by constructively terminating Plaintiffs dealerships." *Id.*

57. *Id.* (citing *Bright Bay GMC Truck, Inc. v. Gen. Motors Corp.*, 593 F. Supp. 2d 495 (E.D. N.Y. 2009); *L & B Truck Servs., Inc. v. Daimler Trucks NA LLC*, No. 1:09-cv-74, 2009 WL 3584346 (D. Vt. Oct. 26, 2009)).

In another Ohio auto dealership case, *Enterprises v. Volvo Cars of North America*, No. 2:14-CV-360, 2016 WL 4480343, at *8 (S.D. Ohio Aug. 25, 2016), a manufacturer also argued that a dealer could not claim constructive termination when it "continu[ed] to accept the benefits of the franchise agreement" and remained in operation (quoting Defendant Volvo's Motion for Summary Judgment, Doc #35 at 14-15). In this case, the plaintiffs brought their claim for constructive termination under the Ohio Motor Vehicle Franchise Act, in particular, OHIO REV. CODE § 4517.54(A). Despite the argument's support in the text of *Mac's Shell*, interestingly Volvo failed to cite the Supreme Court's decision. The court noted Volvo's argument in a brief sentence, yet ultimately granted summary judgment to Volvo on other grounds, i.e., lack of causation. *Enterprises*, 2016 WL 4480343, at *8.

58. 1 F. Supp. 3d 900, 913 (W.D. Wis. 2014).

59. *Id.* at 910.

agree to sell their assets and dealership to [a neighboring competing dealer]” by a date certain.⁶⁰ When Sid Tilstra failed to execute the sale within the required time frame, Bou-Matic sent him a letter saying that its decision to reassign Tilstra’s territory was final and that Bou-Matic would “proceed with or without [their] cooperation.”⁶¹ Fearing that his dealership would soon be rendered worthless without his territory if he did not complete the sale, Tilstra sold to the competing dealer at a fire sale price.⁶²

Tilstra was located in Canada and thus not entitled to the protections of the Wisconsin Fair Dealership Law.⁶³ However, Tilstra alleged that the contract had been constructively terminated under common law contract principles.⁶⁴ The U.S. District Court for the Western District of Wisconsin cited *Mac’s Shell* for an explanation of the doctrine in the context of employment law and noted that “a termination is deemed ‘constructive’ because it is the plaintiff rather than the defendant that formally puts an end to the particular legal relationship, not because there has been no actual end to the relationship.”⁶⁵ In this case, Tilstra had effectively ended the relationship by executing the sale. The court concluded that Tilstra’s claim survived summary judgment,⁶⁶ and ultimately, the jury ruled in Tilstra’s favor, finding that Bou-Matic had breached the covenant of good faith and fair dealing implied in the contract by constructively terminating the agreement.⁶⁷

The contours of constructive termination claims outside the PMPA—and whether they exist at all in certain cases—are still being determined. More interesting, this process appears to be relatively unaffected by *Mac’s Shell*. Some courts have left the question still unanswered as to whether these claims may be recognized at all.⁶⁸ Other courts have refused to entertain

60. *Id.* at 909–10.

61. *Id.* at 908.

62. *Id.* at 906–07.

63. *Id.* at 914.

64. *Id.*

65. *Id.* (citing *Mac’s Shell*, 559 U.S. at 185).

66. *Id.* at 914.

67. *Tilstra v. Bou-Matic, LLC*, No. 12-CV-827-SLC, 2014 WL 4662483, at *1 (W.D. Wis. Sept. 19, 2014), *aff’d sub nom. Tilstra v. BouMatic LLC*, 791 F.3d 749 (7th Cir. 2015).

68. For example, in *Estes Automotive Group, Inc. v. Hyundai Motor America*, No. 8:10-CV-00287-JST, 2011 WL 1153371, at *4 (C.D. Cal. Mar. 25, 2011), the court left open the question of whether a claim for constructive termination is recognized under the Automobile Dealers Day in Court Act (ADDCA), 15 U.S.C. §§ 1221–25, which provides a cause of action “for the failure of [an] automobile manufacturer to act in good faith in performing or complying with any of the terms of provisions of the franchise or in terminating, canceling, or not renewing the dealer’s franchise.” (quoting *Autohaus Brugger, Inc. v. Saab Motors, Inc.*, 567 F.2d 901, 910 (9th Cir. 1978)). The court noted that “[t]he Ninth Circuit ha[d] not [yet] addressed whether constructive termination is actionable under the ADDCA,” but pointed out that even if such a claim was permitted, the plaintiffs’ allegations were insufficient. *Estes*, 2011 WL 1153371 at *4.

In *Grimes Buick-GMC, Inc. v. GMAC, LLC*, No. CV 12-73-H-CCL, 2013 WL 5348103, at *5 (D. Mont. Sept. 23, 2013), the U.S. District Court for the District of Montana addressed a claim for constructive termination under the Montana Motor Vehicle Dealer Act, which mandates that “a franchisor may not cancel, terminate or refuse to continue a franchise unless the franchisor has cause for termination or noncontinuance.” MONT. CODE ANN. §§ 61-4-205. Noting that

constructive termination claims under state franchise statutes in the absence of a specific legislative pronouncement that such claims are cognizable under the statute at issue.⁶⁹ Post-*Mac's Shell*, use of the doctrine continues under various statutes⁷⁰ and the common law of contracts.⁷¹

The large majority of cases show that the doctrine of constructive termination in the franchise context is alive and well, untouched by the holding in *Mac's Shell*. Indeed, *Mac's Shell* is not cited as authority by courts (or parties,

there was no case law as yet addressing whether constructive termination claims were permissible under the Montana act, the court engaged in the following analysis:

Constructive termination claims might, perhaps, be viewed merely as one type of proof of termination or refusal to continue a franchise. Because it appears that one of the purposes of the MMVDA is to protect the dealer in a circumstance where the manufacturer might be viewed as taking an unfair advantage of its economic leverage, it seems reasonable to believe that the legislature intended that MMVDA dealer protections would extend to indirect terminations.

Id. at *5. The court declined to dismiss the claim at the pleadings stage. *See also* *Kezjar Motors, Inc. v. Kubota Tractor Corp.*, 334 S.W.3d 351, 356 (Tex. App. 2011) (assuming without deciding that a claim for constructive termination existed under the Texas Business Opportunities and Agreements Act, which prohibits the termination of a dealer agreement without good cause, and finding that plaintiff had failed to state a claim); *Hopkins Pontiac GMC, Inc. v. Ally Fin. Inc.*, 60 F. Supp. 3d 1252, 1259 (N.D. Fla. 2014) (noting that the court “need not decide . . . whether FMDVA [Florida Motor Vehicle Dealer Act] § 320.64 prohibits constructive termination of franchise agreements, because even if such a rule applied, [plaintiff] ha[d] failed to allege” sufficient facts to state a claim for constructive termination).

69. In *Casco Inc. v. John Deere Construction Co. and Forestry Co.*, the U.S. District Court for the District of Puerto Rico noted that “[t]he issue of whether Law 75 [Puerto Rico Dealers Act] affords relief for constructive termination is . . . an undeveloped question of Puerto Rico law”; as a federal court sitting in diversity, it declined to “[r]ead[] constructive termination into Law 75’s potential causes of action.” No. CIV. 13-1325 GAG, 2014 WL 4233241, at *3 n.2 (D.P.R. Aug. 26, 2014). However, in a subsequent ruling by a different judge, the district court characterized the earlier ruling as deciding that claims were not recognized under the statute: “the court previously ruled that constructive termination is not actionable under Law 75.” *Casco, Inc. v. John Deere Const. & Forestry Co.*, No. CIV. 13-1325 PAD, 2015 WL 4132278, at *4 (D.P.R. July 8, 2015) (citing *Casco*, 2014 WL 4233241, at *3 n.2 (No. Civ. 13-1325 GAG, Doc. 117, at p. 6)). Neither opinion cited the Supreme Court’s ruling in *Mac’s Shell*.

70. For example, in *Jay Automotive Group, Inc. v. American Suzuki Motor Corporation*, No. 4:11-CV-129 CDL, 2012 WL 425984, at *7 (M.D. Ga. Feb. 9, 2012), the U.S. District Court for the Middle District of Georgia ruled that constructive termination is actionable under the Georgia Motor Vehicle Franchise Practices Act. The plaintiff in *Jay* alleged that it had been constructively terminated in violation of both GA. CODE ANN. §§ 10-1-631 (2010) (Motor Vehicle Dealer’s Day in Court Act) and 10-1-651 (2010) (Motor Vehicle Franchise Continuation and Succession Act), which require “good faith in ‘termination’ of a franchise” and notice and good cause for termination, respectively. *Id.* at *6-7. It is unclear, however, under the court’s ruling whether the limitation in *Mac’s Shell*—that the franchise actually have terminated—will be applied to claims under the Act. The defendant argued that the plaintiff’s claim could not succeed in part “because the Franchise continue[d] to operate.” *Id.* at *6. However, the court underscored that the plaintiff had in fact alleged that the franchise had stopped operating “due to [the defendant’s] actions.” *Id.*

71. *See* *HRCC, Ltd. v. Hard Rock Cafe Int’l (USA), Inc.*, No. 6:14-CV-2004-ORL-40, 2015 WL 3498610, at *9 (M.D. Fla. June 2, 2015) (stating, in response to “Defendants[’] claim that a cause of action for constructive termination require[d] an express or implied mandate via legislation which governs the relevant franchise relationship,” that *de facto* or constructive termination “‘applies where one party unilaterally modifies the terms’ of a contractual relationship in a manner that ‘substantially interferes with the other party’s ability to obtain the benefits of the contract’”) (citations omitted).

as far as we call tell after reviewing publicly available briefs) in most decisions interpreting constructive termination claims under dealer protection and franchise statutes.⁷² Despite *Mac's Shell's* limitation on PMPA claims, courts have continued to embrace franchisees' use of constructive termination under state franchise statutes and the common law as a key way to equalize the power imbalance that exists between franchisors and franchisees and manufacturers and dealers—the very purpose of much state and federal franchise legislation in the first place.⁷³

III. Where We've Been and Where We (Should) Go from Here: The Past and Future of *Mac's Shell*

The Supreme Court issued its decision in *Mac's Shell* on March 2, 2010, so the decision is now more than seven years old. During that seven-year period, three principal topics of interest have emerged in the decision's wake.

First, courts faced with constructive termination claims under the PMPA have not hesitated to apply *Mac's Shell* and bar claims by franchisees that fail to allege they have gone out of business or been deprived of the right to use the franchisor's trademarks, buy its fuel, or use its business premises. This is, on the most basic level, unsurprising because the lower federal courts are not ordinarily known for open defiance of U.S. Supreme Court decisions. Over and above this basic truth, the lower courts have resisted franchisee efforts to

72. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 646 F.3d 983, 990 (7th Cir. 2011), *aff'g in part and rev'g in part* *Girl Scouts of Manitou Council Inc. v. Girl Scouts of U.S. of Am. Inc.*, 700 F. Supp. 2d 1055, 1079 (E.D. Wis. 2010) (noting that the U.S. District Court for the Eastern District of Wisconsin had accurately “described the transfer [of a local Girl Scout council's northern territory to another council] as amounting to “constructive termination” of [that council's dealership]”; *Budget Blinds Inc. v. LeClair*, No. SACV 12-1101 DOC, 2013 WL 183935, at *3 (C.D. Cal. Jan. 16, 2013) (upholding arbitrator's finding that Budget Blinds constructively terminated the franchise agreement because under the Wisconsin Fair Dealership Law, constructive termination “can occur when the grantor takes actions that amount to an ‘effective end to the commercially meaningful aspects of the [dealership] relationship,’ regardless of whether the formal contractual relationship between the parties continues in force”); *Kaeser Compressors, Inc. v. Compressor & Pump Repair Servs., Inc.*, 781 F. Supp. 2d 819, 827 (E.D. Wis. 2011) (manufacturer's proposal of dealership agreement with new, less favorable terms was not yet enough to amount to a constructive termination); *Sandhu v. 7-Eleven, Inc.*, 45 F. Supp. 3d 426, 430 (D. Del. 2014) (plaintiff not entitled to preliminary injunction under Delaware Franchise Security Law because she had failed to show “that it [wa]s more likely so than not that 7-Eleven [wa]s constructively terminating the franchise in bad faith”); *Kejzar Motors*, 334 S.W.3d at 356 (denying preliminary injunction under Texas Business Opportunities and Agreements Act because of conflicting evidence offered regarding dealer's probable performance after new dealer allowed to open in territory).

73. See e.g., *Grimes Buick*, 2013 WL 5348103, at *5 (noting that one of the purposes of the Montana Motor Vehicle Dealer Act “is to protect the dealer in a circumstance where the manufacturer might be viewed as taking an unfair advantage of its economic leverage”); *Sandhu*, 45 F. Supp. 3d at 430 (noting that the “general purpose” of the Delaware Franchise Security Law “is to remedy the imbalance of power in the franchise relationship by adding a few statutory pounds to the franchisee's side of the scales” (citations omitted)); *Girl Scouts of Manitou*, 700 F. Supp. 2d at 1073 (explaining that “the Wisconsin legislature enacted the WFDL [Wisconsin Fair Dealership Law] in order ‘to protect dealers against unfair treatment by grantors’”) (quoting *Eisencorp, Inc. v. Rocky Mountain Radar, Inc.*, 398 F.3d 962, 965 (7th Cir. 2005)).

recharacterize their PMPA-based claims as something other than a constructive termination. For example, in *Poquez*,⁷⁴ the franchisee disclaimed it was relying on a constructive termination theory and instead asserted that the franchisor's alleged failure to grant the franchisee its right of first refusal and the franchisor's subsequent sale of the station's underlying real estate to the developer effected a "severance" of the legal relationship. The franchisee's PMPA claim, however, was still dismissed.⁷⁵

Second, the Supreme Court has declined to address the question it left open in *Mac's Shell*, namely, whether constructive termination claims invoking the PMPA are valid at all. Despite the Court's apparent skepticism about such claims, there is good reason to recognize a constructive termination theory for PMPA claims—and, by extension, under other franchisee-protection statutes—when the franchisor does not formally force an end to a petroleum franchise, stemming from Judge Posner's dictum that without a constructive termination claim, there would be "a big loophole" in the Act.⁷⁶

Because this analysis has been criticized, however,⁷⁷ we next look at the Seventh Circuit's analysis using concepts from that court's decisions interpreting the Wisconsin Fair Dealership Law (WFDL).⁷⁸ The WFDL covers a wider range of business relationships than most franchisee-protection statutes, and courts have often had to decide whether a plaintiff met the WFDL's requirement that a party seeking protected "dealer" status shared a "community of interest" with the manufacturer or putative "grantor."⁷⁹ After having been confronted with the question many times over the first few decades of the WFDL's existence, and under the influence of the law-and-economics approach brought to the court by Judge Posner and Judge Frank Easterbrook, the Seventh Circuit began viewing the "community of interest" issue through the lens of the economic concept of opportunistic behavior. This approach came to light for the first time in a case against Radio Shack in 1987:

Suppose that, as is common in franchise arrangements, Moore had been authorized or required to invest his own money in modifying the store premises to Radio Shack's specifications, and had done so; and suppose that the premises would not be suitable for any other use without additional modifications that would be expensive. Then Moore would be at Radio Shack's mercy, for if Radio Shack terminated the franchise, Moore would lose the investment he had made in modifying the premises to Radio Shack's specifications. This would be a concrete example of "taking unfair advantage of the relative economic weakness of the franchisee." . . . Moore could protect himself in advance against such opportunistic behavior on Radio Shack's part by negotiating for a long-term dealership contract; in effect (and this is the irreducibly protectionist aspect of the statute) the

74. *Poquez v. Suncor Holdings*, 11-00328 SC, 2011 WL 4351612 (N.D. Cal. Sept. 15, 2011).

75. *Id.* at *4–5.

76. *Al's Serv. Ctr.*, 599 F.3d at 726.

77. See, e.g., Kry, *supra* note 28, at 69–70.

78. WIS. STAT. §§ 135.01 et seq.

79. See WIS. STAT. §§ 135.02(1)–(3).

Wisconsin Fair Dealership Law forces on the parties the equivalent of such a contract, in the form of a nonwaivable prohibition against the franchisor's terminating the dealership without cause.⁸⁰

In a later case, the Seventh Circuit succinctly explained its reasoning: "We have deduced from the structure and history of the statute a central function: preventing suppliers from behaving opportunistically once franchisees or other dealers have sunk substantial resources into tailoring their business around, and promoting, a brand."⁸¹

Of course, protection of the party with less economic power, the party that is effectively "over a barrel"⁸² because of its unrecoverable financial commitments to a supplier's brand and products, is the "central function" of all franchisee-protection statutes, including the PMPA. One way for a petroleum franchisor to behave opportunistically in its dealings with a franchisee would be to impose conditions or requirements on the franchisee that fell short of the PMPA's limited allowed reasons for termination and that induced the franchisee to give up the franchise voluntarily by making it too burdensome or expensive to continue. If the franchisor could accomplish this without formally taking action to terminate the franchisee's status, it would be accomplishing indirectly what the PMPA forbade it from doing directly—exactly the "loophole" referenced by the Seventh Circuit in *Al's Service Center* discussed above. And if it is legitimate for Congress to attack franchisors' opportunistic behavior by enacting the PMPA's prohibitions forbidding direct terminations for reasons not specified in the statute, there is no logical reason for courts to allow franchisors to run around those prohibitions by creatively devising ways to make the franchisee's continued existence so intolerable that it gives up the business without receiving formal notice of termination.

Third, it is noteworthy that *Mac's Shell* appears to have had a limited impact outside the context of PMPA litigation. The decision received extensive attention and discussion from the franchise bar when it was issued, and counsel for franchisees and franchisors alike expressed the belief that future litigants and courts would use the reasoning of *Mac's Shell* to try to limit the scope of constructive termination claims.⁸³ Although a number of non-PMPA decisions have applied *Mac's Shell*, more cases proceed with their analysis of constructive termination claims in franchising without ever mentioning the decision. It is probably safe to say that if the reasoning of *Mac's Shell* has not taken over the field of constructive termination claims in franchising outside the context of the PMPA in the seven years since the decision was handed down, the day when *Mac's Shell* universally governs non-PMPA claims is unlikely to arrive at all.

80. *Moore v. Tandy Corp.*, 819 F.2d 820, 822 (7th Cir. 1987).

81. *Kenosha Liquor Co. v. Heublein, Inc.*, 895 F.2d 418, 419 (7th Cir. 1990).

82. *Home Protective Servs., Inc. v. ADT Sec. Servs., Inc.*, 438 F.3d 716, 720 (7th Cir. 2006).

83. Kry, *supra* note 28, at 69; Carmen D. Caruso, *Franchisee Claims for Constructive Termination Under the PMPA After Mac's Shell*, 30 FRANCHISE L.J. 139, 143 (2011).

IV. Conclusion

Because the U.S. Supreme Court has the last word on matters of federal law, it is not surprising that the lower federal courts have fallen into step with the decision in *Mac's Shell* and dismissed constructive termination claims under the PMPA when the plaintiff has not actually stopped operating the franchise. And because the Supreme Court will often allow legal issues to develop in the district courts and courts of appeals before granting certiorari and resolving the issue, it is also not surprising that even seven years after the *Mac's Shell* decision, the Court has yet to resolve whether the PMPA allows a claim for constructive termination in the first instance. The most surprising fact in the wake of *Mac's Shell* may be the limited relevance its reasoning has had in the resolution of claims for constructive termination asserted by franchisees under common law and state relationship statutes. Although a few cases have relied on the reasoning of *Mac's Shell*, many more such claims have been resolved without even a reference to the opinion. As a result, it is likely that the full impact of *Mac's Shell* on franchise litigation has already been absorbed.

