

Franchisor Liability for Franchisee Conduct – *Myers v. Garfield & Johnson Enterprises, Inc.* (E.D.Pa. 2010)

An employee of a franchisee sued the franchisor for sexual harassment arising out of the franchisee's alleged unwelcome sexual remarks and other improper conduct. In denying the franchisor's motion to dismiss, the Court allowed the employee to proceed with its claims against the franchisor under various legal theories, including the franchisor's direct liability as a joint employer, the franchisor's vicarious liability for the franchisee's conduct, and the apparent agency relationship between the franchisor and franchisee. The franchisor's involvement in the employment relationship and direct communications with the employee were factors in the Court's decision.

Constructive Termination – *Mac's Shell Service, Inc. v. Shell Oil Products, Inc.* (U.S. Supreme Court 2010)

Sixty-three franchisees sued Shell Oil claiming constructive termination of their franchise rights due to the elimination of a rent subsidy. A jury found in favor of the franchisees, but Shell Oil appealed the verdict arguing that the franchisees' conduct demonstrated that no constructive termination had occurred. Specifically, Shell Oil noted that: (1) none of the franchisees had actually abandoned their businesses; and, (2) all of the franchisees had executed successor franchise agreements with Shell Oil. The Supreme Court sided with Shell Oil. Analogizing to employment and landlord-tenant law, the Supreme Court held that "constructive" termination can only occur where a franchisee actually ends their relationship with the franchisor. This decision, rendered under the PMPA, is at odds with many state franchise relationship and disclosure laws that provide broader protection to franchisees.

Franchise Relationship and Termination Laws – *S&S Sales, Inc. v. Pancho's Mexican Foods, Inc.* (E.D. Ark. 2010); *New England Surfaces v. E.I. Du Pont De Nemours and Co.* (1st Cir. 2008)

In *S&S Sales*, a franchised distributor sued a manufacturer under Arkansas's franchise relationship and termination law, alleging unlawful termination. The manufacturer moved for summary judgment arguing that the distributor did not maintain a place of business in Arkansas, and therefore did not have standing under the Arkansas statute. The Court denied the manufacturer's motion and held that the parties' conduct demonstrated that they had sufficiently "contemplated" that the franchisee would do business in Arkansas to invoke the protections of the Arkansas statute. The Court of Appeals for the First Circuit reached a similar decision under the Connecticut Franchise Act in *New England Surfaces*.

Lost Future Royalties – *Medicine Shoppe International, Inc. v. TLC Pharmacy, Inc.* (E.D. Mo. 2010)

A federal district court denied Medicine Shoppe's claim against a franchisee for lost future royalties following the franchisee's early termination of the parties' franchise agreement. Applying the standard adopted by several states for recoverability of lost future royalties, the Court noted that a franchisor may recover such royalties only where "the loss is the natural and proximate result of the breach, is ascertainable with reasonable certainty, is not speculative or conjectural, and was within the contemplation of the parties when the contract was made." In reaching its decision, the Court relied heavily on the fact that the franchise agreement did not address the issue of lost future royalties.