TRADE REGULATION—THE "BONA FIDE OFFER" OF SALE REQUIREMENT IN THE PETROLEUM MARKETING PRACTICES ACT: SLATKY v. AMOCO OIL CO.

Janet H. Pumphrey

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INTRODUCTION

In 1978, Congress enacted the Petroleum Marketing Practices Act (PMPA), which regulates terminations and nonrenewals of gasoline station franchises. The PMPA was passed following extensive congressional inquiry into complaints by franchisees of unfair terminations and nonrenewals of their franchises by the major oil companies. Title I of the PMPA, by delineating the specific grounds and preconditions necessary for the termination or nonrenewal of a franchise, imposes statutory protections upon the franchise relationship for the sale of gasoline. The PMPA further requires that, in the case of nonrenewal, the franchisor make a "bona fide offer" to sell his interest in the leased premises to the franchisee.

This note discusses the PMPA and cases in which the "bona fide offer" of sale requirement imposed by the PMPA has been interpreted. Section I presents the historical background of the PMPA and sets out its provisions. Section II discusses the conflicting case law interpreting the term "bona fide offer." Some courts have used an objective stan-

2. See infra text accompanying notes 9-28. The term "nonrenewal" is defined in the PMPA as:
   a failure to reinstate, continue, or extend the franchise relationship-
   (A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;
   (B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or
   (C) following a termination (on or after June 19, 1978) of the relevant franchise which was entered into prior to June 19, 1978, and has not been renewed after such date.
standard in defining "bona fide," while others have employed a subjective standard. Section III provides an analysis of the term "bona fide," both in a literal sense and within various statutory contexts. Finally, this note proposes that an objective standard of interpretation of "bona fide" is compelled both by the literal meaning of the statute and by its legislative history.

I. BACKGROUND

Franchising has been called the "last frontier of the independent businessman." It presents the small-time entrepreneur with the opportunity to invest his or her savings, time, and energy into the establishment and formation of a business, while the franchisor benefits by expanding its industry and avoiding large capital investments. Ideally, franchising represents a compromise between big business and the small, independent businessman, with the franchisor "assuming the economic functions of big business and the franchisee contributing entrepreneurship[ ] by making a capital investment and becoming an owner-manager."

The petroleum marketing industry is one of the oldest franchising industries in this country, originating before World War II. Typically, the strategy of the major oil companies has been to acquire suitable property, construct a gasoline station, and lease premises to a franchisee who agrees to market the products and to use the trademark of the major oil company. In the petroleum franchise relationship, the franchisor is landlord, supplier, and grantor of the trademark license to the franchisee; the franchisee is tenant and distributor.

The relationship between petroleum franchisor and franchisee is

4. See infra notes 43-74 and accompanying text.
5. See infra notes 75-96 and accompanying text.
7. Id. at 3.
8. Id.
complex and historically has been fraught with competing interests.\textsuperscript{12} Abuses within the franchise relationship have been numerous: unreasonable conditions imposed by the franchisor; inequality of bargaining power between the parties, resulting in a relationship dictated by the franchisor; arbitrary and discriminatory terminations of the franchise; and threats of potential termination in order to compel compliance with the franchisor's policies.\textsuperscript{13} Harold Brown, a leading scholar in the field of franchising law, noted that "[i]t is generally conceded that the gasoline station situation is almost hopeless and offers a prime example of the worst abuses in franchising."\textsuperscript{14}

Prior to the enactment of the PMPA, courts interpreted the franchise relationship in the petroleum marketing industry based on the tenets of contract law.\textsuperscript{15} However, courts enforcing franchise contracts failed to take into account the gross disparity of bargaining power between major oil companies and small-time franchisees.\textsuperscript{16} The legislative history of the PMPA reflects the problem of inequality of bargaining power between the franchisor and franchisee:

Central to the problems faced by franchisees in this regard is the disparity of bargaining power which exists between the franchisor and the franchisee. This disparity results in franchise agreements

\textsuperscript{12} Id. The Senate Report described the competing interests which characterize the petroleum market franchise relationship in the following passage:

The franchise relationship in the petroleum industry is unusual, in fact perhaps unique, in that the franchisor commonly not only grants a trademark license but often controls, and leases to the franchisee, the real estate premises used by the franchisee. In addition the franchisor almost always is the primary, even exclusive, supplier of the franchisee's principal sale item: motor fuel.


\textsuperscript{14} Brown, Franchising—A Fiduciary Relationship, 49 TEX. L. REV. 650, 657 (1971) [hereinafter Brown, Franchising—A Fiduciary Relationship].

\textsuperscript{15} See, e.g., Goldinger v. Boron Oil Co., 375 F. Supp. 400 (W.D. Pa. 1974) (terminable at will clause held valid because parties had freedom to contract), aff'd 511 F.2d 1393 (3d Cir. 1975); Hollander v. American Oil Co., 329 F. Supp. 1300 (W.D. Pa. 1971) (there is no right to renew a lease unless the contract covenant is clear and unequivocal).

\textsuperscript{16} See, e.g., Russell v. Shell Oil Co., 382 F. Supp. 395 (E.D. Mich. 1974) (even if the practice of the oil company in the past had been to establish a right to automatic renewal unless "good cause" was found not to renew, such a policy does not imply a "good cause" term into the contract agreement between the parties), aff'd, 497 F.2d 924 (6th Cir. 1974); Mobil Oil Corp. v. Rubenfeld, 48 A.D.2d 428, 370 N.Y.S.2d 943 (1975) (holding for the franchisor that, in the absence of a statute, it is not compelled to renew a lease beyond the contract term even though the franchisee invested capital and energy in the expectation of renewal); but see Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973) (termination clause was voided as against public policy because of the grossly disproportionate bargaining power between the parties), cert. denied, 415 U.S. 920 (1974).
which some franchisees have argued amount to contracts of adhesion. The provisions of the contracts between the franchisor and the franchisee and the permeating influence of these contracts over nearly every major aspect of the franchisee's business may translate the original disparity of bargaining power into continuing vulnerability of the franchisee to the demands and actions of the franchisor.

Since the relations between the two parties are essentially contractual, remedies for contract violations or changes in circumstances often included termination of the franchise agreement. Because of the time, money, and commitment he or she has invested in the business, the expectation of the franchisee is that the franchise be a continuing one. A remedy of termination is in direct conflict with the expectations of the franchisee. The Senate Report, which describes the Senate Committee's discussion of the PMPA prior to its passage, states that termination of the franchise is essentially punitive and extreme.

Likewise, the prospect of nonrenewal permeates the franchise relationship and manifests itself as a threat by which the franchisor may compel the franchisee to comply with its marketing practice. Harold Brown describes the pre-PMPA situation as one in which the major oil firms, the nation's second largest industry, have their gasoline-station dealers "in virtual bondage, hinged on the constant threat that their short-term contracts will not be renewed unless they submit to burdensome franchisor-imposed practices."

The 1973-74 Arab oil embargo and resulting energy crisis


There is a marked, intentional, and constantly emphasized disparity in the positions of the parties—the franchisor combining the roles of father, teacher, and drill sergeant, with the franchisee, relegated to those of son, pupil, and buck-private, respectively. At the core of the franchise relationship is the contractual control exercised by the franchisor over every aspect of the franchisee's business.

H. Brown, Franchising, supra note 6, at 41.

18. The Senate Report noted that "[t]he disparity of bargaining power which disadvantages the franchisee in negotiations leading to execution of the franchise agreement manifests itself in the contractually provided remedies for contract violations or changes in circumstances . . . . [T]ermination of franchise agreements during the term as a remedy for contract violations has been repeatedly utilized." S. Rep., supra note 11, at 17, reprinted in 1978 U.S. Code Cong. & Admin. News at 876.

19. The Senate Report stated: "Termination is an extreme remedy. It is fundamentally punitive and not compensatory in nature, i.e., the franchisor is not compensated for any financial injury experienced by reason of the franchisee's contractual violations. Instead the franchisee is punished through contract termination." Id.

20. Id. at 18, reprinted in U.S. Code Cong. & Admin. News at 877.

changed the nature of petroleum marketing. Due to the increase in the price of gasoline, the consumer became more interested in price than in the brand of gasoline which he or she purchased. Moreover, due to the general tightening of the supply of oil as well as increased supply costs, the major oil companies looked for more economical distribution methods. They found that, by terminating franchises and boosting the number of salaried (i.e., company-owned and operated) retail outlets, they could operate more economically. The Department of Energy received numerous complaints that franchisors were terminating or not renewing franchises for "arbitrary and even discriminatory" reasons. Terminations were based upon hypertechnical, insignificant, or unreasonable provisions of the franchise agreement. Thus, the franchisee, with the expectation that the franchise relationship would be a continuing one, was in the position of having invested money and time into building his or her business and clientele only to have it terminated or not renewed by the oil company.

The PMPA was passed in 1978 in an attempt to equalize the bargaining positions of franchisees and franchisors in the petroleum industry. Congress intended that "[a]n essential requirement of Federal legislation is that the grounds for termination and nonrenewal . . . not be so broad as to deny franchisees meaningful protections from arbitrary or discriminatory terminations and non-renewals or to prevent fulfillment of the reasonable renewal expectations of franchis-
ees.\textsuperscript{29} Congress also remained aware of the needs of the franchisor, recognizing that certain actions of the franchisee, such as failure to comply with contractual obligations or certain changes in circumstances,\textsuperscript{30} would evoke the franchisor's legitimate need to terminate the franchise relationship.\textsuperscript{31}

The PMPA provides that a franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may not terminate\textsuperscript{32} or fail to renew\textsuperscript{33} the franchise agreement, except as specifically

\begin{itemize}
  \item \textsuperscript{29} Id.
  \item \textsuperscript{30} The PMPA specifies examples of "events" which would render the franchisor's termination of the franchise relationship reasonable: fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises, bankruptcy or insolvency of the franchisee, severe physical or mental disability of the franchisee, loss of the franchisor's right to possession of the premises through the expiration of an underlying lease, condemnation of the premises, loss of the franchisor's right to the trademark, destruction of all or of a substantial part of the premises, failure of the franchisee to pay the franchisor sums due to him in a timely manner, failure of the franchisee to operate the premises for an unreasonable period of time, willful trademark violation by the franchisee, knowing violation by the franchisee of laws or regulations regarding the franchise, or conviction of the franchisee of a felony involving moral turpitude. 15 U.S.C. § 2802(c) (1982).
  \item \textsuperscript{31} S. REP., supra note 11, at 18, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 877.
  \item \textsuperscript{32} Section 2802(b)(2) of the PMPA sets forth the following preconditions and grounds for termination or nonrenewal of a franchise relationship:
  \begin{itemize}
    \item (A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure ... .
    \item (B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise . . . .
    \item (C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence . . . .
    \item (D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship . . . .
    \item (E) [A determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if
      \begin{itemize}
        \item (i) such determination—
          \begin{itemize}
            \item (I) was made after the date such franchise was entered into or renewed, and
            \item (II) was based upon the occurrence of changes in relevant facts and circumstances after such date;
          \end{itemize}
        \item (ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account . . . .
      \end{itemize}
  \end{itemize}
\end{itemize}
\end{itemize}
provided by the PMPA or the franchise agreement. One reason which the PMPA allows for nonrenewal is economic infeasibility.\textsuperscript{34} If a de-

\textsuperscript{33} Section 2802(b)(3) of the PMPA sets forth the following grounds for the nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise . . . .

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises . . . .

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner . . . .

(D) \[A\] determination made by the franchisor in good faith and in the normal course of business, if—

(i) such determination is

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor . . . . either—

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.


\textsuperscript{34} 15 U.S.C. § 2802(b)(3)(D)(i)(IV) (1982). The legislative history is copious on this point. The statutory test regarding nonrenewal based on economic infeasibility is whether the renewal of the franchise relationship is likely to be uneconomical, as distinguished from unprofitable. S. REP., supra note 11, at 36, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 895. Thus, profitability can be considered in a broad economic sense. The Senate Report illustrated the distinction with the following example:

[A] franchise relationship which would return a net profit of $1.00 per year to the franchisor might be profitable in an absolute sense. Nevertheless, considering the investment of the franchisor in the facility, renewal of the franchise relationship might not be economically justified. In addition, any evaluation of the economics of renewal must be made in view of changes in the terms or conditions of the franchise agreement which may be acceptable to the franchisee. Thus, the franchisor may not claim that costs have soared, thereby rendering renewal of the franchise relationship uneconomic, and ignore the willingness of the franchisee to agree to increase payments which would offset those increased costs.

\textsuperscript{Id.}

Moreover, the evaluations of the economics of renewal may not be influenced by the fact that operation of the premises would be more economical by employees of the franchisor following a nonrenewal. \textsuperscript{Id.} The Senate Report stressed that the good faith
termination is made by the franchisor in good faith and in the normal
course of business that the renewal of the franchise relationship is
likely to be uneconomical to him, the franchisor may decide not to
renew the franchise.\(^{35}\) However, the franchisor must make a bona fide
offer to sell, transfer, or assign his interest in the leased premises to the
franchisee.\(^{36}\)

The "bona fide offer" of sale requirement imposed by the PMPA
is not discussed in the legislative history of the statute. However, by
including such a provision, it seems that Congress intended to benefit
the franchisee by affording him or her the opportunity to purchase the
business which he or she has worked to build. However, courts have
had difficulty in interpreting the requirement that the offer of sale be
"bona fide." The extent to which the offer must approach an objective
standard, such as the fair market value of the property, or to which it
can be considered "bona fide" based upon the subjective intent of the
offeror represent the contrasting interpretations courts have taken on
this issue. Section II discusses the cases which represent these con­
flicting interpretations of the "bona fide offer" requirement.

II. CONFLICTING CASE LAW ON THE INTERPRETATION OF
"BONA FIDE OFFER"

This section presents the conflicting interpretations of the "bona
fide offer" requirement in section 2802 of the PMPA. In \textit{Slatky v. Amoco Oil Co.},\(^{37}\) the court applied an objective standard to the term

requirement: the section applies if the franchise was entered into prior to June 19, 1978
(the date of passage of the Act) and the unexpired term on that date is three years or
longer; or, alternatively, if the franchise was entered into or renewed on or after June 19,
1978, and the term is three years or longer or the franchisee was offered a term of three

fered a right of first refusal of at least 45-days duration on an offer made by another to
purchase the franchisor's interest in the premises. 15 U.S.C. § 2802(b)(3)(D)(iii)(II)
(1982). See supra note 33 for the statutory text.

In addition, there are strict notification requirements in § 2804 of the PMPA which
must be met prior to termination. The franchisor must give notice to the franchisee, by
certified mail or personal delivery, of his intention, the reasons for his action, and the date
on which termination or nonrenewal will take effect as well as a copy of the summary

If a franchisor does not follow the statutory guidelines, § 2805 of the PMPA allows
the franchisee to bring a civil action in a federal district court. 15 U.S.C. § 2805(a) (1982).

\[^{37}\] 830 F.2d 476 (3d Cir. 1987).
“bona fide.” In that case, the court held that, for an offer of sale to be “bona fide” within the meaning of the PMPA, the offer must approach fair market value. However, in two district court cases, Brownstein v. Arco Petroleum Products Co. and Kessler v. Amoco Oil Co., the courts applied a subjective standard based on the franchisor’s subjective belief in the fair market value of the property. In these cases, the courts interpreted “bona fide” offer to be an offer made in conformity with the franchisor’s general practice of selling property and an offer which the franchisor subjectively believed represented fair market value. In Kim v. Mobil Oil Corp., the court devised an intermediate approach which shifts the burden of proof to the franchisor to justify the high price when the offer price is shown to be higher than the fair market value.

A. Slatky v. Amoco Oil Co.

In Slatky, the franchisee leased a gasoline station for several years from Amoco Oil Company (Amoco). As a result of Slatky’s declining sales revenues, Amoco decided not to renew his franchise agreement. Amoco gave Slatky the requisite notice and, based on the PMPA, made an offer of $306,300.00 to sell Slatky the service station, with-

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38. Id. at 485.
41. The district court in Slatky followed the Brownstein court’s reasoning. See supra notes 50-51 and accompanying text.
43. 830 F.2d 476 (3d Cir. 1987).
44. Section 2802(b)(3)(D)(i)(IV) of the PMPA provides a ground for nonrenewal of a franchise relationship. If the franchisor makes a determination in good faith and in the normal course of business that the renewal is likely to be uneconomical to him, despite any reasonable changes to the provisions of the franchise which may be acceptable to the franchisee, the PMPA allows such a ground for nonrenewal. 15 U.S.C. § 2802 (b)(3)(D)(i)(IV) (1982).
45. Amoco arrived at the $306,300.00 sale price through the following procedure. Amoco’s capital investment representative evaluated the land and appraised its value, without tanks, pumps, and improvements, at $155,000.00. Following the land appraisal, Amoco’s project engineer performed an appraisal of the property improvements and estimated the replacement cost of the improvements, including the tanks and lines, to be $121,300.00. Slatky, 830 F.2d at 479-80.

Based on these two estimates, Amoco’s real estate manager recommended a sales price of $276,300.00 to the district manager. The district manager replied that “costs as they are today and the improvements that we have on the property, I would believe the appraisal would be more reasonable at $350,000, less tanks and lines.” Id. at 480. Thus, while not disagreeing with the procedures followed to arrive at the appraisal, the district manager requested a review of the figure. A second appraisal was made of the property, and this time the value was determined to be $185,000.00, a figure $30,000.00 higher than the first estimate. Amoco offered to sell Slatky the service station for $306,300.00, which included
out the underground tanks and pumps.  

Slatky made a counter-offer of $158,200.00, including the tanks and dispensers. Slatky had two appraisals performed, one of which valued the property at $158,200.00, including the pumps and tanks, and the other at $145,000.00, but not including the pumps and tanks. Amoco rejected Slatky's counter-offer.

Slatky filed a complaint seeking damages and an injunction ordering Amoco to sell the property to him at fair market value. Although Slatky did not challenge the grounds for nonrenewal, he claimed that Amoco's offer of $306,300.00 was not a "bona fide offer" within the meaning of the PMPA because it was not based on the fair market value of the property. An independent appraisal was commissioned by Amoco for the litigation, and it valued the property at $221,000.00, not including the pumps and tanks.

The District Court for the Middle District of Pennsylvania held that Amoco's offer was bona fide. Because the offer was made in the ordinary course of business, employing procedures normally used for evaluating property, and because Amoco offered the property at what it believed was fair market value, the court held that the "bona fide offer" requirement of the PMPA was met. However, the Court of Appeals for the Third Circuit reversed the district court's finding and held that Amoco's offer to sell was not bona fide because it was not objectively reasonable.

$185,000.00 for the land plus $121,300.00 for the improvements, but not including the tanks and pumps. Id.

46. Id. at 479. Courts have interpreted the "bona fide offer" requirement not to have been met when the franchisor offered to sell only the real property of the marketing premises, without the underground tanks and pumps. See Roberts v. Amoco Oil Co., 740 F.2d 602 (8th Cir. 1984); Greco v. Mobil Oil Corp., 597 F. Supp. 468 (N.D. Ill. 1984). See infra notes 178-182. But see Tobias v. Shell Oil Co., 782 F.2d 1172 (4th Cir. 1986). See infra note 182.

47. Slatky, 830 F.2d at 480.

48. In a letter dated August 26, 1985, after Slatky filed his complaint, Amoco stated that the exclusion of the tanks and pumps was mistaken and offered Slatky the property for $306,300.00—$256,300.00 plus $50,000.00 for the tanks and pumps, or $306,300.00 total. Id.

49. Id.


51. Id. at 1227. The district court's reasoning was based on the contention that, if Congress intended for sales to be made at fair market value, it would have used the words "fair market value," rather than "bona fide" in the language of the PMPA. Id. Moreover, the court concluded that Slatky was properly in possession of the premises based upon the stipulation agreement, so Amoco was not entitled to damages. Further, the court noted that an award of damages would be inconsistent with the PMPA. Id.

52. Slatky, 830 F.2d at 486.
On appeal, Amoco's principle contention was that the term "bona fide" should be interpreted to require only that a franchisor's offer be made in subjective good faith. Amoco analogized the "bona fide" requirement of the offer price to the statutory requirement imposed by the PMPA that a franchisor's determination not to renew a franchise because of a business reason be made in "good faith and in the normal course of business." Amoco contended that the legislative history of the PMPA suggests that Congress sought to avoid judicial scrutiny of a business decision. Therefore, the offer price, like the determination not to renew, was a business decision, which should not be second-guessed by a court.

The court of appeals rejected Amoco's analogy. The court disagreed with the basic analogy that a business decision not to renew is similar to an offer for sale. The court reasoned that the purpose of the good faith standard as applied to nonrenewal is to allow franchisors flexibility to respond to changing market conditions. In contrast, because the offer price is circumscribed by the PMPA, its determination is not an autonomous "business decision." The court stated that the determination of the offer price "is not a decision that the distributor decides on its own to make. Rather, the distributor sets a bona fide price only because the statute requires it to do so." The court characterized such a decision as a "compliance judgment" or a "judgment about how best to protect the company's interests while complying with the statute. Congress did not instruct the courts to

53. Id. at 480.
54. Id. at 480-81.
55. The Senate Report stated:
These tests provide adequate protection of franchisees from arbitrary or discriminatory termination or non-renewal, yet avoid judicial scrutiny of the business judgment itself. Thus, it is not necessary for the court to determine whether a particular marketing strategy, such as a market withdrawal, or the conversion of leased marketing premises to a use other than the sale or distribution of motor fuel, is a wise business decision.
S. REP., supra note 11, at 37, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 896.
56. Slatky, 830 F.2d at 481.
57. Id. The court further suggested that to allow the analogy between the nonrenewal decision and the offer price decision would confuse procedural restrictions with substantive ones. The "good faith and normal course of business" requirement imposed by the statute on the decision not to renew is a procedural direction for the court to use in determining whether the franchisor abided by the substantive provisions of the Act. To apply this procedural direction to a determination of offer price turns it into a substantive restriction on the franchisor's behavior. Id. at 482.
58. Id. at 481.
59. Id.
defer to such decisions."  

The court suggested a hypothetical situation in which the franchisor fails to renew the franchisee's contract because it plans to convert the property to a different use or to alter the premises. If the franchisor were required to sell the property to the franchisee, the franchisor's own plans for the property would be defeated. In such a situation, the franchisor's interest in retaining the property would best be served by setting an unreasonably high sale price for the premises which the franchisee could not meet. The court concluded that the PMPA should not be read to allow deference both to the business merits of the franchisor's judgment and to its own sense of fairness of its offer price.

Having rejected Amoco's subjective "bona fide offer" standard, the court of appeals devised a two-step approach to determine whether a franchisor has met the "bona fide offer" requirement of the PMPA. First, a court must determine if a franchisor subjectively believed its offer represented the fair market value. Secondly, a court must determine whether the offer was objectively reasonable, that is, whether the offer did, in fact, approach fair market value. The court defined "fair market value" as "the highest price a willing buyer would pay." The court contended that the PMPA requires the franchisor to make an offer as if it "actually" wanted to sell the property, "not necessarily to the franchisee but to someone."

While the first part of Slatky's two-part test relied on the subjective intent of the franchisor, the court reasoned that this step was necessary. There may be relevant factors other than sincere belief and objective reasonableness as essential elements in the determination of the bona fides of an offer. For example, an offer approaching fair market value might include additional unreasonable conditions of sale. The second part of the test lays out an objective standard: whether the offer approached the fair market value of the property. In most cases, the second part of the test would effectively subsume the first and would probably result in a single-tier objective standard.

In arriving at its two-step approach, the court concluded that the
purpose of the PMPA was to protect the franchisee’s reasonable ex­
pectation of a continuing franchise relationship.68 The “bona fide of­
fer” provision prevents the franchisor from setting a high price to
compensate it for the loss of its future business plans with the premises
and further prevents the franchisor from setting an even higher price if
it thought the franchisee would pay it because of the commitment he
or she has made to the property. The court stated:

The special desire of a franchisee to maintain the property with
which he has worked is exactly what produces the distributor’s gen­
eral bargaining advantage. Either price, a price reflecting the dis­
tributor’s desire to pursue its business plans or a price reflecting the
franchisor’s special commitment to the property, might fail to com­
pensate the franchisee for the loss of his reasonable expectation of
renewal.69

Thus, the court posited that its two-step approach would protect the
franchisee’s reasonable expectations that the franchise relationship
would be a continuing one.70

Because the district court had only determined that the property
was offered to the franchisee at what the franchisor believed to be fair
market value, the court of appeals remanded the case for further fact
findings to determine that the offer price was objectively reasonable.71
The court noted that Slatky had presented substantial evidence of in­
dependent appraisals demonstrating that Amoco’s estimate was con­
siderably high.72 Further, the court stated that the mere following of

68. Id. at 484.
69. Id.
70. In Slatky, the dissent stated that the PMPA puts the good faith of the franchisor
at issue, not the fair market value of the property. For this reason, an independent ap­
praisal can hardly be required as part of the franchisor’s evidentiary burden in such a case.
The dissent, noting the balance which Congress strove to achieve with the PMPA, pointed
to the fact that the franchisor bears the burden of going forward with evidence that he has
complied with the statute. What the majority effectively requires is that the franchisor
introduce evidence that it relied upon the opinion of an independent appraiser. Slatky, 830
F.2d at 486 (Mansmann, J., dissenting).

Further, the dissent contended that market value is merely a matter of opinion until
the subject property actually does change hands. The PMPA requires, at minimum, that
the franchisor follow its general practice for selling property. The dissent reviewed the
procedure by which Amoco arrived at its offer price and determined that, because Amoco’s
usual appraisal procedures were followed, the franchisor subjectively believed the offer
price to be fair. The franchisor may demonstrate its good faith by procuring an independ­
ent appraisal, but nothing in the PMPA or its legislative history demands such a require­
ment. Id. at 490-91.
71. Id. at 486.
72. Id.
reasonable procedures does not guarantee a reasonable estimate.\textsuperscript{73} The specific facts used by the appraisers in determining the value of the property and the inferences drawn from these facts must be evaluated by the court on remand in order to determine an objectively reasonable offer price.\textsuperscript{74}

B. \textit{A Subjective Interpretation of "Bona Fide"}

Two federal district court cases interpreted the "bona fide offer" requirement in the PMPA to reflect the franchisor's \textit{subjective} belief in the value of the property as long as the determination of the price was made in the normal course of business. This approach, adhered to by the district court in \textit{Slatky} was rejected on appeal by the Third Circuit in \textit{Slatky v. Amoco}.\textsuperscript{75}

1. \textit{Brownstein v. Arco Petroleum Products Co.}\textsuperscript{76}

The Eastern District of Pennsylvania interpreted the "bona fide offer" requirement a year before \textit{Slatky} in a factually similar case. In \textit{Brownstein}, Arco Petroleum Products Co. (Arco) made an offer to sell the service station to the franchisee, Brownstein, at a price that was 16\% over that estimated by the franchisee's appraisers.\textsuperscript{77} The franchisee's two appraisal figures were $190,000.00 and $192,000.00 respectively.\textsuperscript{78} Arco hired an appraiser who appraised the property at $250,000.00, and Arco set the offer price at $290,000.00.\textsuperscript{79} An internal Arco worksheet noted that the asking price was well over fair market value.\textsuperscript{80} Arco argued that nothing in its policy required it to offer the property at fair market value, nor did the PMPA compel that the

\textsuperscript{73} \textit{Id.} at 485.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} 830 F.2d 476 (3d Cir. 1987).
\textsuperscript{76} 604 F. Supp. 312 (E.D. Pa. 1985). The decision by the court of appeals in \textit{Slatky} effectively overruled \textit{Brownstein}. However, it is included here because it first established the subjective standard which was relied upon by the district court decisions in Slatky v. Amoco Oil Co., 626 F. Supp. 1223 (M.D. Pa. 1986); Kessler v. Amoco Oil Co., 670 F. Supp. 853 (E.D. Mo. 1987); and Tobias v. Shell Oil Co., 782 F.2d 1172 (4th Cir. 1986).
\textsuperscript{77} \textit{Brownstein}, 604 F. Supp. at 316.
\textsuperscript{78} \textit{Id.} at 313. Brownstein's first appraiser used a market approach in which he compared the premises to eight other service stations in northeast Pennsylvania that were sold in the preceding nineteen months. \textit{Id.} Brownstein's second appraiser used the cost approach, whereby he estimated the value of the land by comparing it to five unimproved parcels that had been sold in recent months, adding to that figure the depreciated reproduction costs of the building, the equipment, and the site improvements. \textit{Id.}
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.}
offer price be the fair market value of the property. \(^{81}\)

In *Brownstein*, the court devised a two-fold test to determine whether an offer is "bona fide" within the meaning of the PMPA. First, the franchisor must demonstrate that the offer was made in conformity with its general practice of selling property. \(^{82}\) Second, even if the franchisor is able to demonstrate that the offer was made in conformity with its general practices, the offer must also "meet or very nearly approach what the offeror believes to be the fair market value of the property." \(^{83}\)

In this case, the court determined that Arco had not satisfied even the first hurdle: a demonstration "at the very least that the offer was made in conformity with the offeror's general practice for selling property." \(^{84}\) The court found that Arco had not demonstrated how or why it had adjusted the figure submitted by its appraiser or how such an adjustment was consistent with Arco's general practices. \(^{85}\) The court, thus, could not conclude that the offer was bona fide. The court reasoned that, in passing the PMPA, Congress had not intended that a franchisor be able to bypass the PMPA's elaborate mechanism by simply setting a price substantially in excess of what it believed to be the fair market value. \(^{86}\)


The same two-fold subjective standard was set out in *Kessler v. Amoco Oil Co.* \(^{87}\) (Amoco), but, because it is factually different, the court granted summary judgment in favor of the defendant oil company. In *Kessler*, a franchisee brought an action against Amoco when it elected not to renew the service station lease. The franchisee contended that Amoco's offer to sell was not "bona fide" because the offer price differed from the fair market value. \(^{88}\)

As evidence of the fair market value of the premises, Kessler presented an offer price made to Amoco by a third party, Gilco Con-

\(^{81}\) *Id.* at 313-14.

\(^{82}\) *Id.* at 315.

\(^{83}\) *Id.* (emphasis added).

\(^{84}\) *Id.*

\(^{85}\) *Id.* at 316.

\(^{86}\) *Id.* at 315-16.


\(^{88}\) *Id.* at 860. The franchisee also claimed that Amoco violated the PMPA on two other grounds. Kessler challenged the nonrenewal of the franchise because he claimed that the notice was deficient and that the decision not to renew was lacking in good faith. *Id.* at 856. On both of these grounds, the court held that the franchisor had fulfilled the requisite PMPA precepts. *Id.* at 856-58.
struction Company (Gilco). The offer by Gilco was for $750,000.00, with an option to take only the land or the land and improvements. Based on Gilco's offer, the Amoco representative recommended that the fair market value of the land alone was $750,000.00, to which the improvements’ value should be added. Amoco made an offer to Kessler, as required by the PMPA, for $951,157.00. Gilco then increased its offer to $1,050,000.00.

Kessler argued that Gilco's initial offer of $750,000.00 and the appraisal by Amoco's representative, which indicated that the fair market value of the land alone was $750,000.00, were both evidence that the fair market value of the property was, in fact, $750,000.00. He further argued that Amoco's offer to him of $951,157.00 was not bona fide within the meaning of the PMPA because it was in excess of the fair market value.

In granting Amoco's motion for summary judgment, the court interpreted the phrase “bona fide” in the PMPA to mean that the franchisor determine the value of the property within the normal course of business and that the offer price reflect the franchisor's subjective belief as to the value of the property. The court reasoned that an objective standard "would make a court the arbiter between different appraisal figures and methods, would require an open ended inquiry by the court into the business practices of franchisors in assessing the value of property they wish to sell," and would upset the delicate balance sought by Congress between the protection of franchisees and the interests of franchisors. The court concluded that Kessler's assumptions that Amoco would have accepted Gilco's initial offer of $750,000.00 and that Gilco would have opted to take the improvements were not shown to be true. Differences of opinion as to the value of property alone, reckoned the court, are "insufficient to raise a triable issue of fact, because they do not serve to controvert

89. Id. at 855. If Gilco purchased only the land, Amoco would be responsible for removing the improvements. But, in either case, Amoco was to pay a $75,000.00 commission on the sale, if completed. Id.
90. Id.
91. Id. at 856.
92. Id.
94. Kessler at 860. The court in Kessler relied heavily on the district court's holding in Slatky. The Kessler court stated that "Slatky holds that 'the offer must approach what the offeror believes is the fair market value. It does not follow, however, that defendant's offer must approach the fair market value as determined by plaintiff's appraisers.'" Id. (quoting Slatky, 626 F. Supp. at 1227).
95. Id.
Amoco's affidavits demonstrating its subjective interpretation of the Gilco offer."96

Thus, Brownstein and Kessler apply a similar subjective standard for determining the bona fides of an offer price. However, one federal district court case, Kim v. Mobil Oil Corp.,97 reflects an intermediate position between the Slatky objective standard and the Brownstein and Kessler subjective standard.

C. Kim v. Mobil Oil Corp.98

In Kim, Mobil offered to sell the leased gasoline station to franchisee, Kim, at a price of $717,922.00 for the real property and $17,422.00 for the personal property.99 Mobil's senior real estate representative, who submitted this figure, testified that he believed at the time that the fair market value of the property was actually $750,000.00.100 However, a second appraisal made by Mobil valued the property at $420,000.00,101 and an appraisal obtained by the franchisee determined the fair market value of the station to be $525,000.00.102 Mobil justified its high offer price figure based on the following factors: the appreciation of the property since the original appraisal, discussions with three local real estate brokers, the quality of the comparable properties, the quality of the subject matter property, scarcity of similar properties, and the current value trend in this area.103

In Kim, the court determined that when a franchisee makes a prima facie case that the offer was not bona fide by showing that the offer price was above the fair market value as assessed by appraisers, whether hired by the franchisee or franchisor, the burden of proving the bona fides of the offer shifts to the franchisor.104 The franchisor must describe its procedures for arriving at its offer price, list the criteria it used, demonstrate that those procedures and criteria were ap-

96. Id. at 861.
98. Id.
99. Id. at 9.
100. Id. at 13-14 (emphasis added).
101. Id.
102. Id. at 18.
103. Id. at 16-17.
104. Id. at 34. The burden of producing evidence on an issue, in general, is born by the first party who has pled the existence of the fact. Usually the plaintiff bears the burden of producing evidence on an issue because it is he/she who seeks to change the present state of affairs and who should be expected to bear the risk of failure of proof. E. CLEARY, McCormick on Evidence § 336, at 947, § 337, at 950-51 (1984).
plied in the instant case, and, moreover, articulate its reasons for raising the offer price above fair market value. The burden then shifts back to the plaintiff to raise a triable issue of fact that the franchisor did not follow its usual procedure or that its stated reasons for raising the offer price were pretextual or otherwise not legitimate.

In this case, the court found that the franchisee, Kim, had produced evidence that Mobil's offer price was higher than the fair market value assessed by Kim's appraisers as well as appraisers hired by Mobil. However, in response, Mobil produced evidence that the offer price was determined through its regular procedures and that its regular criteria were used regarding the leased property. Furthermore, Mobil had thoroughly articulated the reasons why the offer price was higher than the appraised values. The court, therefore, concluded that the price it offered franchisee, Kim, was "bona fide" under the PMPA.

III. ANALYSIS OF "BONA FIDE OFFER" IN THE PMPA

In Slatky, the Court of Appeals for the Third Circuit interpreted "bona fide" to require that an offer be objectively reasonable. The court correctly founded its analysis on both the contextual meaning of the words of the statute and on the legislative intent. Section A analyzes the meaning of the term "bona fide," in terms of its plain meaning and within various contexts. The court in Brownstein, in devising its subjective standard, looked only to the plain meaning of "bona fide." The court in Kessler and the district court in Slatky followed the subjective standard set out in Brownstein. However, the court of appeals in Slatky examined the contextual meaning of "bona fide" as well. Section B analyzes the legislative intent of the statute. In passing the PMPA, Congress sought both to protect the franchisee's ex-

105. Kim, No. CV 85-4689 at 34.
106. Id. The law of corporations employs a procedure of shifting the burden of proof in cases similar to the franchise cases presented here. In a conflict of interest transaction, if the plaintiff can prove that an interested director entered into a transaction which proved to be unfair to the corporation, the court shifts the burden of proof to the defendant director to show the intrinsic fairness of the transaction. See Fliegler v. Lawrence, 361 A.2d 218 (Del. 1976). While these franchise cases do not involve interested directors, they are similar to the conflict of interest cases involving directors of corporations. These cases represent an interested party, i.e., the franchisor who may wish to retain the property, and who, it is argued, is in a fiduciary relationship with the franchisee. Thus, the Kim court's shifting the burden of proof to the interested party has precedent in the law of corporations.
107. Kim, No. CV 85-4689 at 35.
108. Id.
pectations that the franchise be on-going and to equalize the disparate bargaining power between the franchisee and franchisor. In both analyses, it is urged that the term “bona fide” be determined by a court based on objective criteria, the standard established by the court of appeals in Slatky.

A. Literal Interpretation

1. The Plain Meaning Rule

Statutory interpretation has traditionally looked first to the plain meaning of the words of the statute in seeking to find a clear and unambiguous meaning.109 The leading treatise on statutory interpretation notes that “courts are bound to give effect to the literal meaning without consulting other indicia of intent or meaning when the meaning of the statutory text itself is ‘plain’ or ‘clear and unambiguous.’”110 However, “whether . . . the words of a statute are clear is itself not always clear,”111 and “[t]he fact that a statute has been interpreted differently by different courts has been cited as evidence that the statute is ambiguous and unclear.”112 In interpreting the term “bona fide” within the meaning of the PMPA, the fact that courts have devised three conflicting interpretations indicates that the literal words of the statute taken alone are unclear and that the plain meaning rule is inadequate in deducing the proper interpretation of “bona fide.”

In its determination that a “bona fide” offer “must meet or very nearly approach what the offeror believes to be the fair market value of the property,”113 the district court in Brownstein relied only on the literal, plain meaning of “bona fide.”114 The court in Brownstein quoted the following definition of “bona fide” from Black’s Law Dictionary: “In or with good faith; honestly, openly, and sincerely; without deceit or fraud . . . . Real, actual, genuine, and not feigned.”115

109. Caminetti v. U.S., 242 U.S. 470 (1917). In the seminal case on what has come to be known as the “plain meaning rule,” Justice Day declared that “[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.” Id. at 485.


111. Id. (quoting Barbe v. United States, 392 F.2d 532, 535 n.4 (5th Cir. 1968)).

112. Id. at 86.


114. Id. Likewise, the district court in Kessler and the district court in Slatky present similar arguments. Kessler, 670 F. Supp. at 860; Slatky, 626 F. Supp. at 1226.

115. Id. (citing Black's Law Dictionary 160-61 (5th ed. 1979) (emphasis added)).
Literally, "bona fide" is a Latin ablative meaning "in good faith."\textsuperscript{116}

The meaning of the term "bona fide" cannot be ascertained by a canvass of its definitions alone, as the court in \textit{Brownstein} attempted.\textsuperscript{117} While an element of subjective motivation and intent of the actor is implied within these literal dictionary definitions, single words have little meaning when taken out of the context in which they are used. Hart and Sacks in "Statutory Interpretation" urge that "[i]n deciding whether words will bear a particular meaning, a court needs to be linguistically wise and not naive. It needs to understand, especially, that meaning depends upon context."\textsuperscript{118} The court in \textit{Brownstein}, which relied solely on the dictionary definition of "bona fide,"\textsuperscript{119} failed to make this necessary step from the plain meaning of the term "bona fide" to an inquiry into its contextual meaning. While the term "bona fide" defined alone may imply an element of subjectivity, the context within which it is used is generally more supportive of an interpretation based on objective criteria.

In attempting to ascertain a subjective or objective approach to the term "bona fide," the plain meaning alone is inadequate and further investigations into the contextual meaning of "bona fide" are necessary. The next section explores various statutory contexts in which "bona fide" is used, and it examines judicial interpretations which have consistently rendered an objective interpretation.

2. Contextual Analysis of "Bona Fide"

In many different contexts, an objective standard is used as an interpretive yardstick to measure the bona fides of the noun qualified as "bona fide."\textsuperscript{120} The courts in \textit{Brownstein}, \textit{Kessler}, and \textit{Kim} failed to

\begin{itemize}
  \item 116. H.W. Fowler, A Dictionary Of Modern English Usage 61 (1965). The district court in Slatky and the court in Kim based their analyses upon the plain meaning approach enunciated in Brownstein. The court in Kessler based its reasoning upon the district court in Slatky and on Kim.
  \item 117. Brownstein, 604 F. Supp. at 315.
  \item 119. Brownstein, 604 F. Supp. at 315.
  \item 120. Perhaps the most common legal usage of "bona fide" is in the context of bona fide purchaser in the common law of property. A bona fide purchaser is one who has purchased property for valuable consideration without any notice of a defect in the title of the seller. Before assigning the legally-protected status of bona fide purchaser, the law requires a subjective inquiry into the state of mind of the purchaser and the objective standards of constructive and real notice. R. Cunningham, The Law Of Property § 11.10 (1984).
  
  Notice can be acquired in any of three ways. First, there can be actual notice of the seller's defective title, in which case an inquiry is made into the subjective state of the purchaser's mind. If the purchaser knew of a defect in the seller's title, he is denied status as a bona fide purchaser under the law, and title to the property remains with the other
\end{itemize}
make this inquiry into the contextual meaning of "bona fide."

In *Slatky*, the Court of Appeals for the Third Circuit inquired into the contextual meaning of the term. The court found that, while the purposes and intentions of the actor may be relevant, to determine the bona fides of each noun, objectively verifiable characteristics must be examined.121 The *Slatky* court listed several statutory categories required to be "bona fide": "'bona fide student,'"122 a "‘bona fide parent-child relationship,'"123 a "‘bona fide member of the crew'"124 of a vessel, and employees of a "‘bona fide United States incorporated nonprofit organization.'"125 All of these statutory categories are determined by courts based on objective criteria.126

Three statutory contexts are presented below in which the term "good faith" is analyzed. The term "good faith" has the same literal definition as "bona fide."127 In each context, courts have used objective criteria as a standard to determine the status of each category. In interpreting the "bona fide offer" requirement of the PMPA, courts should be guided by these comparable statutory contexts.

First, similar to the PMPA is the Automobile Dealers Day in Court Act.128 The Automobile Dealers Day in Court Act was passed by Congress to protect automobile franchisees by imposing statutory requirements of good faith upon their relationship with the automobile manufacturers. The Automobile Dealers Day in Court Act defines "good faith" as a duty to "act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party. Second, notice can be constructive and, thus, imputed to the purchaser—if a visual inspection of the property or interrogation of those in possession of the property indicate that the seller has defective title. Third, information found in public records is always imputed to the purchaser as constructive notice. *Id.*

The second and third ways in which notice can be acquired are based on objective standards. If there are objective, external realities to indicate that the seller of the property does not have good title, the law imposes a duty to inquire upon the bona fide purchaser. If he fails to make this inquiry, he is deemed to have had constructive notice, and he loses his bona fide purchaser status. *Id.*

121. *Slatky*, 830 F.2d at 483.
123. *Id.* (quoting 8 U.S.C. § 1101(b)(1)(D) (1982)).
124. *Id.* (quoting 8 U.S.C. § 1287 (1982)).
125. *Id.* (quoting 8 U.S.C. § 1430(c) (1982)).
126. *Id.*
127. "Bona fide" is the Latin translation of "good faith," which is defined as "in accordance with standards of honesty, trust, sincerity." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 822 (S. Flexner, ed. 1987).
party.”129 This “good faith” requirement is determined by courts within the context of coercion or intimidation of the franchisee by the motor company.130 Courts analyze objective criteria—evidence of coercion or intimidation—in making the determination of “good faith,”131 considering even the propriety or reasonableness of the contract itself.132

A similar “good faith” requirement is imposed in Chapter 13 of the Bankruptcy Code.133 In determining whether a debtor’s plan of less than full repayment to unsecured creditors should be confirmed,134 several courts hold that the debtor’s situation and other circumstances should be considered by the court,135 and several hold that the determination should be made based solely on the amount of the repayment.136 In either case, objective criteria—the debtor’s circumstances or the factual amount of repayment—are used in the determination.

Finally, “the term ‘good faith’ is specifically set forth in approximately 50 of the 400 sections of the Uniform Commercial Code

129. 15 U.S.C. § 1221(e) (1982). Moreover, the Automobile Dealers Day in Court Act notes that “recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.” Id.


131. See, e.g., Zebelman v. Chrysler Corp., 299 F. Supp. 653, 658 (E.D. Mo. 1968) (holding that the “good faith” requirement imposed by the Act on the termination of the franchise agreement be actually based on evidence of poor performance rather than on some ulterior motive of the manufacturer).


134. Section 1325(a) states, “The court shall confirm a plan if— . . . (3) the plan has been proposed in good faith and not by any means forbidden by law.” Id.

135. See Deans v. O’Donnell, 692 F.2d 968 (4th Cir. 1982). In Deans, the court enumerated the following factors relevant in the determination of good faith: the percentage of the proposed repayment to unsecured creditors; the debtor’s financial situation; the period of time payment will be made; the debtor’s employment history and prospects; the nature and amount of unsecured claims; the debtor’s past bankruptcy failings; and any unusual or exceptional problems facing the particular debtor. The only subjective factor a court should consider is the debtor’s honesty in representing facts. Id. at 972. Therefore, the court in Deans used almost exclusively objective criteria in its interpretation of “good faith.” See also In Re Estus, 695 F.2d 311 (8th Cir. 1982); In Re Goeb, 675 F.2d 1386 (9th Cir. 1982); In Re Rimgale, 669 F.2d 426 (7th Cir. 1982).

The Official Comment to section 2-209 of the U.C.C. provides that when merchants are seeking a modification of their contract agreement, the test of "good faith" includes "observance of reasonable commercial standards of fair dealing in the trade... and may in some situations require an objectively demonstrable reason for seeking a modification." Ernest Gellhorn notes that this sense of the term "good faith" has nothing to do with the state of mind of the actor, but relates to the fairness or reasonableness of the performance.

Thus, in the statutory contexts of the Automobile Dealers Day in Court Act, the Bankruptcy Code, and the Uniform Commercial Code courts have interpreted "good faith" based exclusively upon objective criteria. Courts' interpretation of the "bona fide offer" requirement of the PMPA can be guided by these similar contextual analyses. "Bona fide" is also used in a different section of the PMPA in the context of the receipt of "bona fide customer complaints" as a ground for the nonrenewal of a franchise relationship. An analysis of the judicial interpretations of this section of the PMPA is instructive in defining a contextual interpretation of "bona fide."

In Robertson v. Mobil, the Court of Appeals for the Third Cir-

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139. Gellhorn, supra note 137, at 470 n.17. The concept of "good faith" in the U.C.C. has traditionally been interpreted as lacking "positive meaning" or as "the absence of bad faith." This "excluder analysis" has been emphatically rejected by other scholars. All excluder terms are parasitic upon other terms for their existence. However, in this case, both "good faith" and "bad faith" are parasitic or "substantive-hungry." Thus, the "excluder analysis" fails because "there must be some concept (a substantive) upon which good faith is parasitic." Patterson, Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine, 137 U. PA. L. REV. 335, 346-49 (1989).
140. Section 2802(b)(3) of the PMPA provides:

[f]or purposes of this sub-section, the following are grounds for nonrenewal of a franchise relationship: ... (B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if—(i) the franchisee was promptly appraised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and (ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

141. Sutherland notes that "[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.05, at 90 (4th ed. 1984).
142. 778 F.2d 1005 (3d Cir. 1985).
cuit interpreted "bona fide customer complaints" based on an objective standard.\(^{143}\) In *Robertson*, the franchisee provided both a "mini-serve" gasoline island and a "full-serve" gasoline island at his Pennsylvania station.\(^{144}\) Because a "mini-serve" island usually operates at little or no profit, dealers often increase the prices of gasoline at their "full-serve" islands in order to offset their losses.\(^{145}\) However, Robertson raised the price at the "full-serve" island substantially.\(^{146}\) Moreover, he advertised the price of the "mini-serve" gasoline with a large sign, and he did not advertise the high price of the "full-serve" island gasoline.\(^{147}\) Mobil, the franchisor, received 126 customer complaints about the substantially higher "full-serve" price and misleading advertising technique used by Robertson.\(^{148}\)

The PMPA provides that one of the grounds upon which a franchisor may base a decision not to renew a franchise relationship is the receipt of "numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises."\(^{149}\) In *Robertson*, the court interpreted "bona fide," when used to describe customer complaints, as "sincere and having a reasonable basis in fact."\(^{150}\) The "reasonable basis in fact" requirement, an objective determination, means that the circumstance does actually exist and that the franchisee can be held reasonably accountable for the circumstance.\(^{151}\)

The court of appeals in *Slatky* relied on *Robertson*’s "reasonable basis in fact" analysis. The objective criteria in *Robertson* were the actual customer complaints. The court in *Robertson* stipulated only that the complaints be true and pertain to matters about which the franchisee is culpable. Similarly, the *Slatky* court applied the "reasonable basis in fact" requirement to the offer price and found that it refers to "a range of prices with reasonable claims to being fair market

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\(^{143}\) *Id.*. Justice Becker of the Court of Appeals for the Third Circuit wrote both the *Slatky* and *Robertson* opinions.

\(^{144}\) *Id.* at 1006.

\(^{145}\) *Id.*

\(^{146}\) *Id.*

\(^{147}\) *Id.*

\(^{148}\) *Id.*


\(^{150}\) *Robertson*, 778 F.2d at 1008.

\(^{151}\) *Id.* The court reasoned that the receipt of numerous sincere complaints is not a basis "for nonrenewal if the complaints are false or if they pertain to matters about which the franchisee is not culpable." *Id.* In this case, however, the complaints were true, and the franchisee was culpable. *Id.*
value."152 The Slatky court urged courts to scrutinize the distributor's offer in a manner similar to that set out in Robertson. The court reasoned:

a standard of scrutiny that simply focused on whether the distributor believed its offer to represent fair market value would leave the franchisee open to injury through sloppiness or mere error. Such a focus might also prove difficult to apply, for intentions are always difficult to discern, especially when we deal not with the intentions of individuals but of organizations.153

The courts in Brownstein, Kessler, and the district court in Slatky, however, held that if an appraisal was made employing procedures used in the normal course of business and if the franchisor offered the property at what it subjectively believed to be the fair market price, then the offer was bona fide within the meaning of the PMPA. The court of appeals in Slatky regarded this two-pronged test as inadequate. The court stated that "the mere following of reasonable procedures . . . does not necessarily result in a reasonable estimate."154 Slatky had presented evidence that the land appraisal by Amoco was out-of-date, that the property had been compared to other sites which were inappropriate in order to determine its value, and "that the improvements appraisal did not represent local costs."155 A court must focus on specific facts presented by appraisers and on the inferences drawn from those facts.156 What is necessary in the determination of the bona fides of the offer is not evidence of the franchisor's usual procedures, which may be misleading, or even deceptive, but rather evidence of the standard of fair market value range which the property commands.157 The court in Slatky stated that a range of prices with reasonable claims to being the fair market value is the appropriate standard in determining the bona fides of the franchisor's offer.158

152. Slatky, 830 F.2d at 485.
153. Id.
154. Id. at 485-86.
155. Id.
156. Id. at 485-86.
157. While fair market value is often an elusive term, it has generally been taken to mean "the amount at which a property would change hands between a willing buyer and a willing seller, neither being under compulsion to buy or sell and both being aware of all relevant facts." Kim v. Mobil Oil Corp., No. CV 85-4689 (C.D. Cal. July 16, 1986) (WESTLAW, DCT DATABASE) at 33.
158. The court maintained that if it were "to mandate that courts determine whether the distributor's offer actually was at fair market value, distributors could rarely rest comfortably that their offer would eventually be determined by the court to be fair market value." Slatky, 830 F.2d at 485.
The court in *Kessler* feared that an objective standard based on a range of fair market value would make the court an arbiter between different appraisal methods and figures and would require an extensive inquiry by the court into the business practices of the franchisor.159 While the *Slatky* standard would require scrutiny of appraisals to ascertain a range of fair market values, the standard used in *Kessler* would similarly result in an extensive judicial inquiry. The court would be called upon to evaluate the franchisor's method of valuation of the property as determined through the franchisor's normal course of its business. Not only is the "normal course of business" internal to the franchisor, and, thus, subject to abuse by the interested party, but as the *Slatky* court noted, "[t]he mere following of reasonable procedures . . . does not necessarily result in a reasonable estimate."160

Thus, the term "bona fide" can only be fully understood through a contextual analysis. The court of appeals in *Slatky*, in determining the meaning of "bona fide" within section 2802 of the PMPA, performed such a contextual analysis and arrived at an objective interpretation of "bona fide." The approach of *Brownstein*, followed by *Kessler* and the district court in *Slatky*, focuses only upon the dictionary definition of "bona fide." The subjective standard which the *Brownstein* court lays out is an inadequate, short-sighted interpretation which fails to reflect a linguistically comprehensive construction. Even if the literal interpretation of the words "bona fide" themselves do not compel an objective definition, the legislative intent of the PMPA, explored in the next section, mandates that the words be given such a reading.

B. Legislative Intent

The specific PMPA provision which requires that the offer for sale be "bona fide" was not discussed in the legislative history of the PMPA. However, an objective interpretation of "bona fide" as set out in *Slatky* best comports with the overriding purposes of the Act. By requiring that the offer price reflect a range of fair market values, the court guarantees to the franchisee an offer price based upon the realities of the marketplace. The subjective "bona fide offer" standard set out in *Brownstein* and *Kessler* could result in an offer price based upon the franchisor's alternative business plans or its desire to reap a huge profit because of the franchisee's special attachment to the property. These possibilities do not afford the franchisee the protections which

160. *Slatky*, 830 F.2d at 485.
Congress contemplated by the passage of the PMPA. Furthermore, in *Brach v. Amoco Oil Co.*, the Seventh Circuit Court of Appeals urged that the PMPA "must be given a liberal construction consistent with its overriding purpose to protect franchisees." The intended beneficiary of the Act's remedial provisions is the small-time petroleum marketing franchisee. The Senate Report begins with the statement:

Title I establishes protection for franchisees from arbitrary or discriminatory termination or nonrenewal of their franchises. The title prohibits a franchisor from terminating a franchise during the term of the franchise agreement and from failing to renew the relationship at the expiration of the franchise term, unless the termination or nonrenewal is based upon a ground specified or described in the legislation and is executed in accordance with the notice requirements of the legislation.

The PMPA was passed as a result of the major oil companies pursuing a policy of termination and nonrenewal, thwarting the expectations of the franchisee that the franchise relationship was to be a continuing one.

An objective reading of "bona fide" best comports with Congress' stated goals of protecting the franchisee's reasonable expectation of continuing the franchise relationship. Congress intended the words "bona fide" to qualify the offer price in order to protect the franchisee from an unreasonably high offer price which would preclude his purchasing the business. The court in *Slatky* suggested that a franchisor who wished to retain the premises to further its own busi-

161. 677 F.2d 1213 (7th Cir. 1982). In *Brach*, the court held that, in reviewing a franchisor's business decision not to renew a franchise relationship, the PMPA first requires that the decision be made in "good faith" and, second, that the determination be made "in the normal course of business." *Id.* at 1222.

It was this business decision not to renew the franchise which the *Slatky* court distinguished from the determination of the offer price, characterized by the *Slatky* court as a "compliance judgment." *Slatky*, 830 F.2d at 481. See supra notes 53-61 and accompanying text.

162. *Brach*, 677 F.2d at 1221.
163. See supra Section I.
165. The Senate Report stated that "[i]t is also important to note that often the reasonable expectations of the parties to a motor fuel franchise are that the relationship will be a continuing one. This expectation by the franchisee, in particular, is often the result of, and fostered by, statements and actions of the franchisor." *Id.* at 18, reprinted in 1978 U.S. Code Cong. & Admin. News at 876.
166. *Id.*
ness plans would set an offer price out of reach of the franchisee. 167 A franchisor may wish to alter the premises, replace the premises, or use it for a different purpose. If the "bona fide offer" requirement were based on the subjective standard set out in Brownstein and Kessler, a franchisor could, to further its own business plans, set an exorbitant offer price and thwart the franchisee's expectation that his business continue. The "bona fide" offer which is made to the franchisee must be based on a range of fair market values in order to advance the congressional goal of protecting the franchisee's expectation of a continuing franchise relationship.

In addition, Congress' intent to equalize the disparity of bargaining power between franchisor and franchisee 168 is furthered by an interpretation of "bona fide offer" based on objective criteria. The court in Slatky suggested that "[t]he special desire of a franchisee to maintain the property with which he has worked is exactly what produces the distributor's general bargaining advantage." 169 The franchisee is unlike other potential buyers of the property because he or she has a strong personal commitment to the property based upon the effort he or she has put into the business in the past. This commitment places him or her at a disadvantage in terms of his bargaining position at the time of sale. The Brownstein/Kessler subjective interpretation of "bona fide offer" would allow a franchisor to set an especially high offer price if it thought the franchisee would pay it because of his or her personal commitment to the business and to this particular property. However, if "bona fide" is given an objective meaning, the franchisor is constrained by an appraisal based on a range of fair market values. The bargaining positions between the franchisor and franchisee are equalized because the offer price reflects the reality of the marketplace, rather than resulting from the unique relationship between franchisor and franchisee. Thus, in determining whether "bona fide" should be given a subjective or objective meaning, an objective interpretation is much more promotive of Congress' specified intent of equalizing the disparity of bargaining power between franchisor and franchisee.

While the "bona fide offer" provision of the PMPA was not specifically addressed in the congressional history, the term "in good faith," which the PMPA imposes upon the economic decision by the

167. Slatky, 830 F.2d at 484.
169. Slatky, 830 F.2d at 484.
franchisor not to renew,\textsuperscript{170} was discussed. When a franchisor determines that the renewal of a franchise relationship is likely to be uneconomical to it, the franchisor is allowed not to renew the franchise, if such a determination was made "in good faith and in the normal course of business."\textsuperscript{171}

The legislative history reveals that with the "in good faith" requirement, Congress sought "to preclude sham determinations from being used as an artifice for termination or nonrenewal."\textsuperscript{172} Congress presumed that the tests of "in good faith" and "in the normal course of business" provided:

\begin{quote}
adequate protection of franchisees from arbitrary or discriminatory termination or nonrenewal, yet avoid judicial scrutiny of the business judgment itself. Thus, it is not necessary for the courts to determine whether a particular marketing strategy, such as a market withdrawal, or the conversion of leased marketing premises to a use other than the sale or distribution of motor fuel, is a wise business decision.\textsuperscript{173}
\end{quote}

The court in \textit{Slatky} suggested that a subjective interpretation of "bona fide" would permit judicial deference both to the business judgment not to renew and to the franchisor's sense of the fairness of its offer price.\textsuperscript{174} Franchisors would, thus, be allowed "to 'eat their cake and have it too.'"\textsuperscript{175} The court contended that such an interpretation misreads the legislative history.\textsuperscript{176}

One court of appeals case and one district court case have interpreted the "bona fide offer" provision of section 2802 when the offer has included only the real property and not the gasoline storage tanks. These cases differ from the line of cases discussing the bona fides of the offer price because they deal with what property must be included in the offer for the offer to be "bona fide" rather than the bona fides of the particular price. These cases are presented because they attest to the courts' concern with effectuating Congress' goals of equalizing the disparity of bargaining power between the franchisee and franchisor.\textsuperscript{177} Moreover, these cases typify the courts' liberal interpre-

\textsuperscript{171} \textit{Id.}
\textsuperscript{172} S. REP., \textit{supra} note 11, at 37, \textit{reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS} at 896.
\textsuperscript{173} \textit{Id.}
\textsuperscript{174} \textit{Slatky}, 830 F.2d at 481. \textit{See supra} notes 53-62 and accompanying text.
\textsuperscript{175} \textit{Id.} at 482.
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} S. REP., \textit{supra} note 11, at 18, \textit{reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS} at 877.
tation of the PMPA in favor of protecting the franchisee.

In *Roberts v. Amoco Oil Co.*, the court looked to the broader dual purposes of the PMPA in remedying the disparity of bargaining power between franchisor and franchisee and in preserving the competitive influence of the independent franchisee in the marketplace. These ends would be defeated if the franchisor were allowed to exclude from its offer of sale to the franchisee the equipment necessary for the continuation of the business. Similarly, in *Greco v. Mobil Oil Corp.*, the court noted that when reviewing a question under the PMPA, a court should be guided by the principle that remedial legislation, such as this, should be given a liberal construction with its purpose to protect franchisees.

The holdings in *Roberts* and *Greco* indicate a resolve on the part of the courts to effectuate the congressional intent of the PMPA to protect the franchisee. Similarly, in the interpretation of the "bona

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178. 740 F.2d 602 (8th Cir. 1984). In *Roberts*, a franchisee brought suit against Amoco contending that Amoco's offer to sell its service station—excluding the gasoline pumps, dispensers, storage tanks, piping and other equipment—was not a "bona fide" offer under the PMPA. The Court of Appeals for the Eighth Circuit held that "a 'bona fide' offer to sell leased marketing premises under the PMPA must include ... the equipment used in distributing motor fuel." *Id.* at 607.

179. *Id.* at 606.

180. *Id.*

181. 597 F. Supp. 468 (N.D. Ill. 1984). In *Greco*, a Mobil franchisee brought suit seeking an injunction of Mobil's termination of the franchise. *Id.* Mobil had offered Greco a right of first refusal of a third party's contract, but, because the contract between Mobil and the third party was only for the sale of the land and not the personal property of the station, the right of first refusal made to Greco was only for the land. *Id.* at 470. Because Mobil violated the PMPA by not making Greco a proper offer to purchase, the court held that the franchisee was entitled to a preliminary injunction prohibiting termination of the franchise. *Id.* at 474.

182. *Id.* at 471 (citing Brach v. Amoco Oil Co., 677 F.2d 1213 (7th Cir. 1982)). In a third case, *Tobias v. Shell Oil Co.*, 782 F.2d 1172 (4th Cir. 1986), a franchisee brought a similar suit under the PMPA claiming that Shell's offer of sale was not "bona fide" because Shell did not include the underground gasoline storage tanks in its offer. These steel tanks (three of which had been in use for twenty years, one for seventeen years, and one for thirteen years) were not included in the offer because of their age and the risk of leaking. *Id.* at 1173. Shell introduced evidence of its program of systematically replacing its steel underground tanks with fiberglass ones, having already made such replacements in five-sixths of the stations in Tobias' region. Essentially deciding the issue on environmental grounds, the Court of Appeals for the Fourth Circuit held that Shell did fulfill its obligation to make a "bona fide" offer even though the offer did not include the faulty storage tanks. *Id.* at 1174.

*Tobias* can be easily distinguished from *Roberts* and *Greco* because the court's reasoning was essentially based on environmental issues rather than on the PMPA. The court in *Tobias* held that, because Shell formulated its offer through its regular corporate procedures and because Tobias was not singled out for unfair treatment regarding the tanks, Shell had satisfied its obligations under the PMPA. *Id.* at 1174.
fide offer” provision, an objective guideline, such as a range of fair market values, is necessary to protect the franchisee. The court in *Slatky* stated that requiring only that the franchisor make a subjective good faith offer would enable franchisors “to pursue their own, unfettered self-interest, [and] the statute does not generally guarantee distributors that right.”

Thus, an objective standard better effectuates the dual congressional goals of protection of the franchisee and equalizing the bargaining positions between the parties. Both *Slatky* and *Kim* present judicial solutions based on the objective standards of fair market value. However, the approach advanced by the Court of Appeals for the Third Circuit in *Slatky* better protects the interests of the franchisee than does the procedure set out in *Kim*.

Like the range of fair market value standard set by the *Slatky* court, the district court in *Kim* based its standard on objective criteria, i.e., the fair market value of the property. However, the court in *Kim* held that, when a franchisee makes a prima facie case that the offer price was above fair market value as assessed by appraisers, the burden of proof shifts to the franchisor to articulate its reasons for raising the price. The *Kim* standard requires that the franchisor “describe its procedures for arriving at offer prices to franchisees; listing the criteria it uses; demonstrating that those procedures and criteria were applied in the instant case; and articulating its reasons for raising the offering price above the fair market value as determined by appraisers.”

In *Kim*, the court held that the franchisor had satisfied its burden of proof because the property had appreciated at a rate of approximately 1% per month since the initial appraisal and the franchisor successfully proved that the offer price reflected this general increase in value.

However, the *Slatky* resolution is more protective of the interests of the franchisee because both parties would present appraisals representing a range of fair market values. An offer of sale based upon the fair market value of the property guarantees to the franchisee that the offer price is based on the economic realities of the marketplace. The offer is made to the franchisee as though the franchisee were any other buyer of the property and as though the franchisor and franchisee were in equal bargaining positions. In *Kim*, once the burden of proof

183. *Slatky*, 830 F.2d at 483.
184. *See supra* notes 97-108 and accompanying text.
185. *Kim*, No. CV 85-4689 at 34.
186. *Id.* at 16-17.
is shifted, the standard falls prey to the same defects found in the
Brownstein and Kessler subjective standard: the factors and tests em­
ployed are internal and subject both to abuse and to error. As the
court of appeals in Slatky stated, "[t]he mere following of reasonable
procedures, however, does not necessarily result in a reasonable esti­
mate." 187

The court in Kim actually does little more for the franchisee than
did Brownstein and Kessler. Once the threshold of fair market value is
passed, the standard is essentially the same as the subjective standard.
If a franchisee is to be guaranteed equal bargaining power with the
franchisor in the sale of the business, as mandated by the provisions of
the PMPA, he or she must be made an offer that is within a range of
fair market values. It is only by such an objective standard that bona
fides can be guaranteed.

IV. Conclusion

Title I of the Petroleum Marketing Practices Act has succeeded
in eliminating arbitrary and discriminatory terminations and
nonrenewals of petroleum marketing franchise relationships. 188 How­
ever, the congressional goals of equalizing the disparity of bargaining
power between franchisor and franchisee and of protecting the fran­
chisee's expectation of a continuing relationship will not be fully real­
ized until the franchisee is given a realistic opportunity to continue
operating the business he or she has struggled to build. By requiring
that the franchisor's offer of sale upon its nonrenewal decision be
"bona fide," Congress sought to protect the franchisee from an offer
price beyond his or her reach.

Statutory interpretation based solely upon the literal, plain mean­
ing of a text, the approach taken by the court in Brownstein, is often
inadequate in determining the meaning of a statute. 189 The fact that a
statute has been interpreted differently by different courts is evidence
that its meaning is ambiguous and unclear and that further inquiry is
required.

The court of appeals in Slatky examined the contextual meaning
of "bona fide" and found that, in many different statutory contexts,
courts employ an objective standard to determine "bona fide." 190 The
requirement in the PMPA that the franchisor's offer of sale upon its

187. Slatky, 830 F.2d at 485.
188. Kleeger, supra note 13, at 316.
189. See supra text accompanying notes 109-119.
190. See supra text accompanying notes 120-160.
nonrenewal decision be "bona fide" must be read in reference to objective guidelines, such as a range of fair market values, if the provision of the Act is to have any meaningful significance. Shifting the burden of proof to the franchisor to prove why the offer price exceeds the fair market value, the position espoused by the district court in Kim, does initially rely on objective criteria. However, once the burden of proof is shifted in Kim, the offer price is susceptible to internal manipulation or mistake, just as it was in the Brownstein/Kessler subjective standard.

Thus, an analysis of the ambiguous plain meaning of the term "bona fide," the contextual interpretation, and the legislative history of the PMPA indicate that judicial interpretation of the "bona fide offer" of sale requirement of the PMPA be based upon objective criteria such as a range of fair market values. The approach taken by the Third Circuit Court of Appeals in Slatky sets such a standard.

Janet Hetherwick Pumphrey