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Establishing a Balance of Power: The Petroleum Marketing Practices Act and the Franchisor as Landlord

I. INTRODUCTION

The Petroleum Marketing Practices Act (P.M.P.A.)\(^1\) was enacted to strike a new and ostensibly fairer balance of power between franchised retail gasoline distributors and their patron oil companies.\(^2\) Prior to passage of the Act, abuses against franchisees were frequently reported.\(^3\) Due to disparities in bargaining power, some franchisees felt that their contracts with the oil companies amounted to contracts of adhesion.\(^4\) Thus the franchisors could often obtain great flexibility within the contract regarding their rights to end the franchise relationship, and termination became an often used remedy for contract violations. Prior to passage of the P.M.P.A. there was no uniform law from state to state guaranteeing the franchisees that the fruits of their hard labors and their expectations for security would not be destroyed by a single arbitrary decision of the franchisor.\(^5\)

To remedy the perceived problems, Congress undertook to create a more equitable balance of power. This was no easy task, for the franchise agreements were often complex and multidimensional. Nevertheless, Congress persevered in its efforts to correct unfairness in the retail gasoline marketing industry, and after ten


\(^2\) S. REP. No. 731, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & AD. NEWS 873. The legislators stated that:

\[\text{[t]he title prohibits a franchisor from terminating a franchise during the term of the franchise agreement and from failing to renew the relationship at the expiration of the franchise term, unless the termination or non-renewal is based upon a ground specified or described in the legislation and is executed in accordance with the notice requirements of the legislation. These provisions strike a balance between the at times conflicting interests of the parties to the relationship.}\]

\(^3\) Id. at 874. (emphasis added)

\(^4\) Id. at 875-76.

\(^5\) Several states did have legislation protective of the franchisee prior to the P.M.P.A. In addition to the welfare of the franchisee, Congress was concerned that the “patchwork” of laws protecting franchisees which had been instituted in several states might create serious problems in the fuel distribution and marketing systems of the nation. Id. at 877.
years of debate passed the P.M.P.A.

The Act is relatively short, having only six sections, yet it is complexly structured and consequently has generated much confusion among attorneys litigating retail gasoline franchise issues. At this writing, the Act has been in effect for five years. This is an appropriate time to examine how the Act has been interpreted and determine whether the P.M.P.A. has been successful in redefining the balance of power between the parties to a franchise. This comment will be limited to a discussion of this balance of power in one of the most frequently litigated situations presenting highly complex issues under the Act: the extent of the obligation of the franchisor, acting as landlord, to renew the lease underlying the franchise agreement. It will, therefore, focus on cases dealing with franchise nonrenewals arising from a lease dispute between a franchisor/landlord and a franchisee/lessee.

II. THE PETROLEUM MARKETING PRACTICES ACT

Although this comment will restrict itself to a discussion of section 2802 of the Act regarding franchise nonrenewals arising out of a lease dispute between franchisor/landlord and a franchisee/lessee, a general understanding of Title I of the Act as a whole is necessary to a full understanding of its parts. The legislative history of the Act reveals both the congressional purpose in enacting the legislation and its awareness of the competing interests involved in franchise relationships. While the purpose of the Act is to protect franchisees from arbitrary or discriminatory termination or nonrenewal of their franchise agreements, the needs and concerns of both parties are treated in the Act. It is true that, under the Act, franchisees are protected from arbitrary or discriminatory treatment at the hands of the franchisors. But while the Act re-
stricts the franchisor’s use of power, in many ways it supports its
power so long as it acts within the guidelines established by the
Act.\(^8\)

This awareness of competing interests is better evidenced by a
closer examination of the sections of the Act. The first section of
the Act defines those terms which have special relevance to the
Act.\(^9\) The second and third sections outline the substantive provi-
sions of the Act including the necessary grounds for a valid termi-
nation or nonrenewal of a franchise agreement\(^10\) and the require-
ments for a trial franchise which is not restricted by the terms of
the Act.\(^11\) The next two sections respectively provide the require-
ments of notice\(^12\) and the provisions for enforcement of the
P.M.P.A.\(^13\) The last provision of the Act preempts state law in this
subject area.\(^14\)

It is the second section, 15 U.S.C. § 2802, which is the heart of
the Act. Its provisions define the degree of protection afforded the
franchise relationship. This section consists of a general prohibi-
tion subject to the exceptions following it.\(^15\)

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8. See 15 U.S.C. § 2802(b)(1) (1982), infra note 16. In his article, Finch, Judicial In-
terpretation of the Petroleum Marketing Practices Act: Strict Construction of Remedial
Legislation, 37 Bus. LAW. 141 (Nov. 1981), Mr. Finch suggests that the Act was a legislative
compromise which may disappoint both franchisees and franchisors. Id. at 142-43.

9. 15 U.S.C. § 2801 (1982). Many of the definitions given in this section are both cru-
cial to an understanding of the Act and specific to its subject matter. For example, the
definition of franchise given in § 2801(1)(A) limits itself to the motor fuel industry thus
making the act wholly inapplicable to other types of franchise contracts.


11. 15 U.S.C. § 2803 (1982). This section provides that both trial and interim
franchises are outside the scope of the P.M.P.A., and defines and distinguishes the two
franchise types. A trial franchise must begin no sooner than June 19, 1978, and extend for
no more than a year. It must also be contained in a writing which states: that it is a trial
franchise, the duration of the initial franchise term, the circumstances under which the
franchisor may terminate the relationship, and that section 2802 of the P.M.P.A. is inappli-
cable to that franchise. Interim franchises also must begin on or after June 19, 1978, and
may not exceed three years in length. They begin at the end of a prior existing franchise,
and the writing which comprises the agreement must include: that it is an interim franchise,
the duration of the agreement, and that the franchisor may fail to renew if in good faith and
in the normal course of business the franchisor decides to withdraw its motor fuel sales from
the relevant geographic area. It does require that the requirements of section
2802(b)(2)(E)(ii) and (iii) be observed. See infra note 19.


[except as provided in subsection (b) of this section and section 2803 of this title, no
franchisor engaged in the sale, consignment, or distribution of motor fuel in com-
merce may—

(1) terminate any franchise (entered into or renewed on or after June 19, 1978)
While section 2802(a) reveals the remedial intent of the statute toward franchisees in its general disallowance of terminations and nonrenewals, section 2802(b)(1)\textsuperscript{16} exhibits congressional concern for the interests of the franchisors. Following the same pattern, that of a blanket prohibition followed by exceptions, section 2802(b)(1) provides that the franchisor may terminate or fail to renew a franchise so long as it meets the notice and substantive requirements that follow. At first glance it appears that what was given to the franchisee in 2802(a) is then taken away by 2802(b)(1), but, as the statute continues, it becomes evident that the exceptions which follow cause those provisions to be far from absolute. Among the valid grounds for franchise termination or nonrenewal are the failure of the franchisee to comply with reasonable and material provisions of the franchise,\textsuperscript{17} failure of the franchisee to make good faith efforts to carry out the franchise provisions,\textsuperscript{18} the occurrence of an event which makes termination or

prior to the conclusion of the term, or the expiration date, stated in the franchise; or
(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

\textit{Id.}

[a]ny franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if—
(A) the notification requirements of section 2804 of this title are met; and (B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

\textit{Id.}

\textsuperscript{17} 15 U.S.C. § 2802(b)(2)(A) (1982) provides:
[f]or purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:
(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—
(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or (ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

\textit{Id.}

\textsuperscript{18} 15 U.S.C. § 2802(b)(2)(B) (1982) states the next ground for termination or nonrenewal:
[a] failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if—
(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out
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nonrenewal reasonable,19 a written agreement between the parties to terminate or not to renew the franchise,20 or a decision by the franchisor to remove itself from the relevant geographic marketing area.21 Further exceptions applicable only to the prohibition

such provisions; and
(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.

Id.

19. 15 U.S.C. § 2802(b)(2)(C) (1982), provides for termination or non-renewal if it happens that there is:

[t]he 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—
(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or
(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

Id.

20. 15 U.S.C. § 2802(b)(2)(D) (1982), states termination or nonrenewal is permissible where there is:

[a]n agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if—
(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise;
(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 2804(d) of this title; and
(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

Id.

21. 15 U.S.C. § 2802(b)(2)(E) (1982), provides that it is permissible to terminate or fail to renew:

[i]n the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), 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—
(i) such determination—
(I) was made after the date such franchise was entered into or renewed, and
(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;
(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
against nonrenewal include a failure of the parties to agree to new franchise provisions made by the franchisor in good faith and in the normal course of business. The failure must not arise from the franchisor's insistence on them solely to prevent the franchise renewal. Also valid as grounds for nonrenewal are the existence of numerous customer complaints against the franchisee's methods of operation, and the failure of the franchisee to operate the station in a clean, safe, and healthful manner on at least three occasions of which the franchisee has been notified. The final mentioned pro-

agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises—

(I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interest in such premises, or, 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; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then if effect and with respect to which such other person is the franchisor.

Id.

22. 15 U.S.C. § 2802(b)(3)(A) (1982) provides: [f]or purposes of this subsection, the following are grounds for 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, if—

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

Id.


24. 15 U.S.C. § 2802(b)(3)(B) (1982), provides for nonrenewal in the event of: [t]he 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 apprised 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.

Id.

25. 15 U.S.C. § 2802(b)(3)(C) (1982) makes nonrenewal permissible where there is present: "[a] failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures." Id.
vision permitting nonrenewal is quite complex and justifies special attention. With restrictions as to time of original agreement and duration of the franchise, it allows for nonrenewal where the franchisor, in good faith and in the normal course of business, wishes to convert the premises to a use other than the sale of motor fuel, renovate or replace the location, or sell the property, or where the renewal of the franchise is likely to be financially unrewarding despite any reasonable changes which could be made in the agreement. With regard to the purposes of renovation or replacement of the premises, or where the relationship is economically disadvantageous, there are additional requirements which must be met by the franchisor before a nonrenewal will be valid under the Act. The first of these additional requirements is that the franchise must not be allowed to expire just so that the agents of the franchisor may replace the franchisee. The second of these requirements applies only to leased marketing premises. Where such an arrangement exists the franchisor must, during the statu-


[i]n the case of any franchise entered into prior to June 19, 1978, (the unexpired term of which, on such date, is 3 years or longer) and in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), 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.

Id.

(ii) with respect to a determination referred to in subclause (III) 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.

Id.

(iii) in the case of leased marketing premises such franchisor during the 90-day period after notification was given pursuant to section 2804 of this title, 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.

Id.
tory notice period defined in section 2804,29 either offer the franchisee its interest in the property through sale, assignment or transfer, or offer the franchisee a right of first refusal to purchase the franchisor's interest in the premises.30

III. JUDICIAL INTERPRETATION OF THE PETROLEUM MARKETING PRACTICES ACT

There are four possible situations under which the franchisee can come into possession of the service station premises: (1) The franchisee may own the marketing premises; (2) A third party may own the marketing premises and rent directly to the franchisee; (3) The franchisor may own the land and lease to the franchisee; and (4) A third party owner may lease the premises to the franchisor who then sublets to the franchisee. In only the third and fourth situation is the franchisor also in the position of landlord. Consequently, this discussion will be confined to those possibilities.

A. The Franchisor as Owner of the Premises

Examining first the situation where the franchisor owns the marketing premises and leases to the franchisee, the ground most often cited by the nonrenewing franchisors is the failure of the parties to agree to new lease provisions.31 One of the earliest such cases is *Pearman v. Texaco, Inc.*32 From the *Pearman* decision it would appear that although the franchise relationship is afforded some protection under the P.M.P.A., the individual features of the agreement are not protected and can be unilaterally changed by the franchisor at the renewal negotiations.33 The unilateral change made by the franchisor in *Pearman* was the amount of the rent required under the franchise/lease agreement.34 After Mr. Pearman failed to agree to the new rent proposal, Texaco sent plaintiff notice that it intended to cancel plaintiff's lease.35 Subsequently the franchise expired and Mr. Pearman filed suit seeking a preliminary injunction.36 His theory was that Texaco's nonrenewal was not the result of a decision made in good faith and in the normal course of

29. *Id.*
30. *Id.*
33. *Id.* at 768.
34. *Id.* at 768-69.
35. *Id.* at 769.
36. *Id.* at 770.
business, but that Texaco had insisted upon the rental changes so that they might prevent the renewal of the franchise relationship.\textsuperscript{37} The court found that the evidence submitted supported Texaco's assertion that the change in the rental structure was made in the normal course of business and in good faith.\textsuperscript{38} In short, the defendant had met the burden of proving compliance with the Act\textsuperscript{39} and had thus removed itself from the general prohibition against non-renewal contained in the broad provision of section 2802(a)(2).\textsuperscript{40}

The case of \textit{Munno v. Amoco Oil Co.}\textsuperscript{41} also arose as the result of the failure of lease renewal negotiations. Following notice that the lease would expire, the plaintiff refused to move from the leased premises.\textsuperscript{42} As a result, Amoco instituted eviction proceedings against Munno, who then filed a complaint against Amoco alleging that its actions violated the P.M.P.A.\textsuperscript{43} Specifically, Munno alleged that the rental increase demanded was unreasonable and that acceptance of it would force him from his business.\textsuperscript{44}

In reaching its conclusion, the court noted that under the statute\textsuperscript{45} the franchisor is required to show that it has acted in good faith and in the normal course of business, and that the failure did not result from any demands of the franchisor for the purpose of preventing the renewal.\textsuperscript{46}

In \textit{Munno}, the plaintiff asserted that objective good faith was called for and that as a result questions of reasonableness were involved.\textsuperscript{47} The court, however, disagreed with plaintiff's analysis of the good faith requirement and found that it was a matter of subjective intent rather than objective result.\textsuperscript{48} After finding support in the legislative history the court concluded that the reasonableness test was specifically rejected by Congress, and that the interpretation of good faith as a subjective state of mind was what Congress intended when it passed the Act.\textsuperscript{49} It is interesting to note

\textsuperscript{37} Id. at 768.  
\textsuperscript{40} See supra note 15.  
\textsuperscript{41} 488 F. Supp. 1114 (D. Conn. 1980).  
\textsuperscript{42} Id. at 1117.  
\textsuperscript{43} Id.  
\textsuperscript{44} Id.  
\textsuperscript{46} 488 F. Supp. at 1117-18.  
\textsuperscript{47} Id. at 1118.  
\textsuperscript{48} Id. at 1120.  
\textsuperscript{49} Id. at 1118-19.
that although the court stated that objective evidence of the subjective state of mind is appropriate, it did not then consider the plaintiff's allegation of unreasonableness as an indication of the state of mind present in the case before it.51

Rental rates are again the basis for controversy in *Ferriola v. Gulf Oil Corp.*62 After numerous proposals by Gulf and a counter proposal by Ferriola, the parties were unable to agree to a new monthly rent in their lease renewal negotiations.53 The plaintiff filed suit alleging that Gulf was deliberately offering renewal at an unacceptably high monthly rental rate in order to drive him from his business.54 The court, in the face of evidence supporting the plaintiff's assertion, gave controlling weight to the fact that Gulf made its offers pursuant to a rental policy which was not itself invalid.55 Having so found, the court then examined the good faith question in the light of the objective facts of the case. The court relied on the facts that the rental policy was applied no more harshly to Ferriola than to the other franchisees and that Gulf made efforts to maintain the franchise relationship with him.56 As a result of the court's findings, no relief was available to plaintiff for the loss of his franchise. The case made clear that the franchisor's duty to bargain in good faith implied under the statute does not require the franchisor to offer a franchise package acceptable to the individual franchisee.

The notion that reasonableness and good faith are separate concepts, which was introduced in *Munno*, was reinforced by two cases involving the same defendant and the same rental formula.58 The earlier of the two cases was *Tiller v. Amerada Hess*.59 It involved a request for a preliminary injunction to prevent the im-

50. *Id.* at 1121.
51. *Id.* at 1120-21. Mr. Munno did not submit evidence on this point but it is interesting to surmise whether if given proof that an unreasonable result such as financial ruin was inevitable, this court would have considered it as objective evidence of subjective bad faith and come to a decision favorable to the plaintiff.
53. *Id.* at 159-60.
54. *Id.* at 159.
55. *Id.* at 162.
56. *Id.* at 163.
60. To gain a preliminary injunction, the moving party must show a reasonable chance of prevailing on the merits at trial, and also that failure to issue an injunction will cause greater damage to the plaintiff than issuance will cause the defendant. *Id.* at 166.
plementation of a rent increase in the franchises of the several plaintiffs involved. As in Ferriola, the plaintiffs alleged that the proposed rent increase had not been made in good faith, but that it was an excuse to terminate certain franchise agreements. The court considered and rejected reasonableness as a test for the validity of a nonrenewal.

Instead, the court asserted that questions of subjective intent are proper issues for the jury and that they are matters of inference to be derived from all of the objective facts. Although this analysis adds little to the treatment of reasonableness made in Munno, it is an important case in that it is proof that subjective bad faith can be found based upon the same objective facts that would support the assertion of unreasonableness.

In the later decision, Myer v. Amerada Hess, the case involved a plaintiff who had already signed a lease agreement under the new rental formula. Despite the lack of an actual failure to renew the franchise, the court found that it had jurisdiction to decide whether the allegations stated a cause of action on which the court could grant relief. Summary judgment was granted to the defendants on a finding that their rental rates were made and offered to the plaintiff in good faith. It is noteworthy that in this case the court made no express distinction between reasonableness and good faith, and even used the terms interchangeably at one point.

The different results in Tiller and Myer would seem to be due to a difference in the quality of evidence submitted, rather than each court’s treatment of the good faith issue. It is clear that in all the above cases where the franchisor is the owner of the marketing premises, the only duties which the courts will impose under the

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61. Id. at 162.
62. Id. Although the word termination is used in the court’s discussion of reasonableness in its conclusions of law, it is clear that it is nonrenewal which is threatened in this case. Id. at 163, 165.
63. Id. at 165.
64. Id.
66. Id. at 329.
67. Id. at 331.
68. Id. at 330. The court stated that “[i]n the present case the evidence produced by Hess demonstrates that Hess devised the new rental formula in good faith for sound business reasons and in the normal course of its business. The formula has every appearance of being reasonable viewed in the light of Hess’ over-all operations.” Id.
69. It is undeniable that the concept of reasonableness is treated more favorably in Myer. Where Tiller rejects it as a concept not embraced by Congress, Myer implicitly approaches it as an objective indication of subjective good faith.
Act are those which are expressly stated within the Act.

While the components of good faith are never expressly detailed, the Senate Report which accompanied the Act stated that the good faith and normal course of business standard was designed to protect the franchisee from arbitrary or discriminatory termination or nonrenewal.  70 This would seem to indicate that the absence of arbitrary action or discriminatory motives are the essentials of good faith under the Act. Given this narrow interpretation of good faith, together with the courts' reticence to expand protection beyond the specific language of the Act, it becomes evident that there is very little protection afforded the franchisee from the risk of nonrenewal.

The case of Kesselman v. Gulf Oil Co.,71 also involved a dispute over rental structures in the lease between the franchisee and the franchisor. Although this lease was dependent upon an underlying lease between the franchisor and a third party owner,72 the nature of the dispute places it more naturally with the cases involving a franchisor owner. 73 The plaintiff had refused to sign a new lease at the rates offered by Gulf and requested a preliminary injunction which would order Gulf to maintain its relationship with him.74 The court used the good faith standard embodied in section 2802(b)(3)(A)75 of the P.M.P.A. and concluded that the plaintiff had failed to carry the burden of proof that there existed "sufficiently serious questions going to the merits to make such questions a fair ground for litigation."76

The good faith standard used here is the same as that used where the franchisor is the owner of the premises, and rightly so, since in both cases the dispute is over the terms of the renewal

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72. Id. at 801.
73. The disagreement between Kesselman and Gulf concerned the terms of the renewal lease which was offered and, therefore, resolution of the dispute required an interpretation of section 2802(b)(3)(A), supra note 22. This is the same cause for dispute and the same section of the P.M.P.A. which has been discussed above in the cases dealing with direct leases between franchisors and franchisees. The cases which will be discussed below will involve a sublease between franchisor and franchisee just as does Kesselman. However, they will differ in that the grounds for dispute will be the franchisor's failure to renew the underlying lease between itself and a third party. The resolution of these disputes will thus require an interpretation of section 2802(b)(2)(C), supra note 16.
74. 479 F. Supp. at 801.
75. See supra note 22.
76. 479 F. Supp. at 804.
lease which is offered in negotiations to the franchisee hoping to renew his franchise agreement. This case, in light of those examined previously, indicates that it is the nature of the dispute rather than the details of the relationship which indicates application of one section of the P.M.P.A. rather than another.

B. The Franchisee as Sublessee from the Franchisor Lessee

A somewhat more complicated set of problems can arise where the franchisor holds the marketing premises under a lease from a third party and sublets the land to the franchisee. Very often the controversy will arise as the result of the failure of the underlying lease. This situation has been the subject of some very interesting litigation.

It has often been the failure of the franchisor to take affirmative action to renew the underlying lease which has prompted the franchisee to file suit under the P.M.P.A. Such a situation was the focus of litigation in *Gaspar v. Chevron Oil Co.* 77 The underlying lease between the property owner and the franchisor was allowed to expire, and the franchisor did not take action to prevent the expiration by exercising an option which the franchisor held. 78 Although the plaintiff was able to negotiate a direct lease with the property owner, he was able to do so only at a substantial cost to himself which he sought to recover from Chevron. 79 The substance of the franchisee's complaint was that it was wrong for the franchisor to keep its possession of the option a secret from him, and that the franchisor had a duty to exercise the option so that the franchise could continue. 80 The franchisor asserted that it had an affirmative defense under the Act: that an event relevant to the franchise relationship had occurred, and that as a result of that event nonrenewal was reasonable. 81 Definitions under the Act specifically state that failure of the underlying lease constitutes just such an event. 82 This section protects the franchisor's right not to

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78. Id. at 973.
79. Id.
80. Id.
82. 15 U.S.C. § 2802(c)(4) (1982), provides that:
[a]s used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which determination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as—
(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if the franchisee was noti-
renew where the franchisor has lost the right to grant possession of the property because of the expiration of the underlying lease.\textsuperscript{83} The court noted that Congress had foreseen this very circumstance and had expressly condoned the failure to exercise an option which resulted in expiration of the underlying lease.\textsuperscript{84} Using the legislative history as a guide to interpretation, the court could find no duty to disclose the presence of the option, or to exercise it, expressed in the P.M.P.A.\textsuperscript{85} Summary judgment was granted in favor of the franchisor.\textsuperscript{86}

\textit{Ricco v. Shell Oil Co.},\textsuperscript{87} like \textit{Gaspar}, arose from a dispute over the franchisor's failure to exercise an option to renew the underlying lease.\textsuperscript{88} The Superior Court of New Jersey, in summary fashion, concluded that since section 2802\textsuperscript{89} allows nonrenewal of a franchise following the loss of the franchisor's right to grant possession of the marketing premises, there is no affirmative duty defined by the P.M.P.A. which would require the franchisor to negotiate a new lease where the prior lease ends of its own terms.\textsuperscript{90}

A slightly different situation was presented in \textit{Lugar v. Texaco},\textsuperscript{91} with very different results. There the franchisor held an option to buy the premises or to renew the lease.\textsuperscript{92} Prior to the expiration of the underlying lease the franchisee had requested that the option to buy the premises be assigned to him.\textsuperscript{93} Texaco failed to assign or exercise the option.\textsuperscript{94} Following the franchisee's instigation of suit

\begin{itemize}
\item [(A)] of the duration of the underlying lease, and
\item [(B)] of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal).
\end{itemize}

\textit{Id.}

\textsuperscript{83.} \textit{Id.}
\textsuperscript{84.} 490 F. Supp. at 974.
\textsuperscript{86.} 490 F. Supp. at 975.
\textsuperscript{87.} 180 N.J. Super. 399, 434 A.2d 1151 (1981).
\textsuperscript{88.} \textit{Id.} at 402, 434 A.2d at 1154.
\textsuperscript{90.} 180 N.J. Super. at 406, 434 A.2d at 1154.
\textsuperscript{91.} No. 81-2021 (W.D. Pa. Aug. 24, 1982).
\textsuperscript{92.} \textit{Id.} at 1-2.
\textsuperscript{93.} \textit{Id.} at 3.
\textsuperscript{94.} \textit{Id.}
against it under the P.M.P.A., the franchisor attempted to defend its actions, asserting that nonrenewal was justified because the failure of the underlying lease was an event, the occurrence of which made nonrenewal reasonable.\textsuperscript{95}

The court refused to accept this argument, holding that the provisions of the P.M.P.A. did not provide a defense for Texaco because, although at the time the franchisee requested that the option be assigned to him, Texaco had the power to grant possession to Lugar in the form of the option, it had instead triggered a situation where the franchise relationship could not continue.\textsuperscript{96} In addition, the court found that only improper motives could have caused Texaco not to assign the option.\textsuperscript{97} Having found that Texaco failed to renew the franchise without any permissible grounds for nonrenewal under the P.M.P.A., the court entered judgment for the franchisee.\textsuperscript{98}

The basic question of whether franchisors have an affirmative duty to negotiate renewal leases with the landowners so that the subleases of the franchisees can continue has elicited unanimous negative responses from the courts. In \textit{Bernardini v. Exxon},\textsuperscript{99} it was made clear that the loss of the underlying lease, which makes franchise nonrenewal reasonable,\textsuperscript{100} is not limited to involuntary loss, but applies with equal force where the franchisor in his legitimate business judgment decides to allow the lease to lapse.\textsuperscript{101} It was also stated that the provisions of the several sections of the Act are completely separate so that the requirements for nonrenewal stated in one provision cannot be assumed to apply to other sections of the Act.\textsuperscript{102}

The later case of \textit{Brungardt v. Amoco Oil Co.}\textsuperscript{103} echoed the \textit{Bernardini} decision in holding that the expiration of a franchisor's underlying lease may be intentional and still qualify as a loss.\textsuperscript{104} Implied in these decisions is the idea that the underlying reason for the franchisor's decision not to renew the lease does not deter-

\textsuperscript{95} 15 U.S.C. §§ 2802(b)(2)(C) and 2802(e)(4) (1982). See supra notes 21 and 82.
\textsuperscript{96} No. 81-2021, slip op. at 4-5.
\textsuperscript{97} Id. at 5.
\textsuperscript{98} Id. at 6-7.
\textsuperscript{102} Id. at 75,773.
\textsuperscript{103} 530 F. Supp. 744 (D. Kan. 1982).
\textsuperscript{104} Id. at 747.
mine the applicability of sections 2802(b)(2)(C) and 2802(c)(4).\textsuperscript{105}

Even affirmative steps taken to terminate an otherwise self-renewing underlying lease have been found to come within the meaning of loss as it is used in section 2802(c)(4).\textsuperscript{106} The ultimate disappointment to a franchisee in hope of protection under the P.M.P.A. came in Veracka v. Shell Oil Co.\textsuperscript{107} In Veracka the underlying lease agreement between the owner and Shell Oil had an automatic extension provision from year to year which would operate in the absence of any notice of discontinuance from Shell.\textsuperscript{108} Shell did decide to discontinue the lease and wrote to the owner giving notice of its desire to do so.\textsuperscript{109} The franchisee in his suit against Shell stated that although Shell could passively allow the lease to expire, the loss under section 2802(c)(4) would not apply if the franchisor took affirmative steps to end the underlying lease.\textsuperscript{110} The court, however, did not agree and failed to see a significant difference between an affirmative act ending a lease and a passive failure to exercise an option to renew.\textsuperscript{111} Under this reasoning even deliberate action by the franchisor leading inevitably to franchise nonrenewal was held to be allowed under the Act.\textsuperscript{112}

IV. CONCLUSION

An examination of these cases shows that current majority judicial interpretation of the P.M.P.A. has not provided the franchisee any guarantees of lease renewal. Whether the franchisor owns the land and directly leases to the franchisee, or whether the franchisee has a sublease from the franchisor, there must be grounds for nonrenewal present as listed under sections 2802(b)(2)\textsuperscript{113} or 2802(b)(3),\textsuperscript{114} before franchise nonrenewal can occur. The cases

\begin{itemize}
\item \textsuperscript{105} See supra notes 19 and 82. The plaintiff argued that the reason the lease was allowed to expire was that the lease franchise arrangement was unprofitable for the franchisor. As a result, he insisted that the franchisor had an obligation to offer to sell, transfer, or assign its interest in the property under § 2802(b)(3)(D)(i)(IV). See supra note 26. Although the court nowhere disagreed that this was the true reason for the franchisor's failure to renew the underlying lease, the court held that 2802(b)(2)(C) controlled. 530 F. Supp. at 746-47.
\item \textsuperscript{106} Veracka v. Shell Oil Co., 655 F.2d 445, 448 (1st Cir. 1981).
\item \textsuperscript{107} 655 F.2d at 445.
\item \textsuperscript{108} Id. at 446.
\item \textsuperscript{109} Id. at 447.
\item \textsuperscript{110} Id. at 448.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} See supra notes 17-21.
\item \textsuperscript{114} See supra notes 22-28.
\end{itemize}
show that the lease agreement may be just as crucial to the continuation of the franchisee's business as the franchise agreement itself. Indeed the direct lease is afforded the same protection as the franchise agreement since under the definition of section 2801(1)(B)(i) the lease is a part of the franchise agreement.

The courts have afforded no direct protection for an underlying lease agreement between the franchisor and landowner upon which the franchisee's lease and, consequently, franchise agreements depend. The problem with considering the underlying lease to be part of the franchise, as is the direct lease, is that the underlying lease involves a contractual relationship between the franchisor and a third party. Ostensibly this relationship is separate from the franchisee's affiliation with the franchisor. Congressional legislation regulating these activities would most likely violate the constitutional right of freedom to contract.

There are easier and more realistic approaches which could be effected without the creation of more laws. The current broad interpretation of the exceptions permitting nonrenewal are not required either by the language of the statute or by the legislative history. Remedy could be found in a more strict interpretation by the judiciary of section 2804(c)(4) which would interpret "loss" to include only involuntary losses, and passive voluntary losses for which there is a demonstrated good faith reason for the failure to renew. In no instance should the word "loss" be stretched in its meaning to include the active termination of an underlying lease by the franchisor. While the bulk of the cases to date indicate that a mechanical application of the statutes can be expected, still a case such as Lugar is a sign that some courts are willing to look at individual cases in a more analytic and thoughtful manner.

Sublessees could also be afforded greater protection while still staying within the intent of the legislative authors by the application of a good faith standard to all franchise nonrenewals. Congress intended the Act to prevent arbitrary or discriminatory termination or nonrenewal of franchise agreements. As set forth in Munno, Tiller and Myer, good faith is merely the subjective em-

115. Id.
116. 15 U.S.C. § 2802(b)(3)(A) (1982). This is not to suggest that the good faith standard expressly stated in section 2802(b)(3)(A)(i) applies to the entire Act since it is clear that that requirement is a consideration only where the franchisor and franchisee fail to agree to changes or additions to the 2802(b)(3)(A) franchise provisions. See supra note 22.
bodiment of the intent not to be arbitrary or discriminatory.\textsuperscript{118} Therefore it is completely within the legislative intent to impute such a good faith standard to all acts by the franchisor resulting in a nonrenewal of the franchise.

While there are viable political and business philosophies which may object to the imposition of governmental restrictions upon private contractual obligations, the P.M.P.A. is law. As remedial legislation it acknowledges the weight of power enjoyed by the oil companies and attempts to strike a new balance of power. While the P.M.P.A. cannot be construed to put the parties on a par with one another, it should be construed consistent with its intention to put the franchisee into a viable bargaining position. Unfortunately, current judicial interpretation has not done this where underlying leases exist.

\textit{Janet A. Sheehan}