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# Right of First Refusal and the Package Deal

## **Cover Page Footnote**

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# RIGHTS OF FIRST REFUSAL AND THE PACKAGE DEAL

## Introduction

A right of first refusal has burdened everything from film direction<sup>1</sup> and natural gas pipelines<sup>2</sup> to securities<sup>3</sup> and real property.<sup>4</sup> Though it is often merely an ancillary provision within more complex agreements,<sup>5</sup> it is a valuable interest in its own right.<sup>6</sup>

In the simplest terms, a right of first refusal is a privilege to preempt a contract's execution by matching the price and terms of a

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1. See, e.g., *Burzynski v. Travers*, 636 F. Supp. 109 (E.D.N.Y. 1986).

2. See, e.g., *W. Tex. Transmission, L.P. v. Enron Corp.*, 907 F.2d 1554 (5th Cir. 1990), *cert. denied*, 499 U.S. 906 (1991).

3. See, e.g., *Pincus v. Pabst Brewing Co.*, 893 F.2d 1544, 1546 (7th Cir. 1990); *Continental Cablevision of N.E., Inc. v. United Broadcasting Co.*, 932 F.2d 333, 334 (4th Cir. 1991); *Radio Webs, Inc. v. Tele-Media Corp.*, 292 S.E.2d 712, 713 (Ga. 1982); *Pritchard v. Wick*, 178 A.2d 725, 726 (Pa. 1962).

4. A majority of cases addressing contracts containing a right of first refusal concern real property. See, e.g., *Abdallah v. Abdallah*, 359 F.2d 170, 172 (3rd Cir. 1966); *Manella v. Brown*, 537 F. Supp. 1226, 1227 (D. Mass. 1982); *Myers v. Lovetinsky*, 189 N.W.2d 571, 573 (Iowa 1971); *Aden v. Estate of Hathaway*, 427 P.2d 333 (Colo. 1967); *First Nat'l Exch. Bank v. Roanoke Oil Co., Inc.*, 192 S.E. 764, 765-66 (Va. 1937); *Tarallo v. Norstar*, 534 N.Y.S.2d 485, 486 (N.Y. App. Div. 1988). See also *Burzynski*, 636 F. Supp. at 112 (noting that rights of first refusal frequently appear in contracts, "particularly those pertaining to real estate").

5. See, e.g., *Radio Webs, Inc.*, 292 S.E.2d at 713 (purchase agreement for shares of broadcasting company contained right of first refusal to purchase cable television station); *Gyurkey v. Babler*, 651 P.2d 928, 929-30 (Idaho 1982) (real estate purchase agreement contained right of first refusal to purchase adjacent lot); *Anderson v. Armour & Co.*, 473 P.2d 84, 86 (Kan. 1970) (lease agreement contained right of first refusal to purchase demised premises). On occasion, a right of first refusal has been the essence of an agreement. See, e.g., *Pincus*, 893 F.2d at 1546 (right of first refusal to purchase PMP Fermentation Products, Inc. was consideration for stepping down as president of PL Biochemical, Inc. and assisting in negotiations for its sale); *Continental Cablevision of N.E., Inc. v. United Broadcasting Co.*, 873 F.2d 717, 718 (4th Cir. 1989) (right of first refusal to purchase cable company and \$135,000 was consideration for terminating litigation and conceding ownership of disputed franchises).

6. *Pincus*, 893 F.2d at 1549 ("As this case demonstrates, a binding right of first refusal can be a powerful instrument."); *Boyd & Mahoney v. Chevron*, 614 A.2d 1191, 1194 (Pa. Super. Ct. 1992) ("The right of first refusal is a valuable property right."); *American Broadcast Companies, Inc. v. Wolf*, 430 N.Y.S.2d 275, 281 (N.Y. App. Div. 1980) ("The contractual right of first refusal . . . is a valuable right which has enjoyed the protection of the courts."); 11 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS, § 1441A at 949 (3d ed. 1968 & Supp. 1994) ("The right of first refusal . . . is a valuable prerogative."); 1A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 261 at 472 (1963 & Supp. 1993) ("The Right of First Refusal . . . is a valuable right.").

third party's acceptable offer.<sup>7</sup> Such rights have enjoyed a long history of generally consistent treatment in the common law.<sup>8</sup> In one important context, however, the law is in disarray.<sup>9</sup> This disarray occurs when an owner sells or attempts to sell property burdened by a right of first refusal as part of a larger package of properties.<sup>10</sup> Ordinarily, the privilege afforded by a right of first refusal is contingent on the owner's willingness to accept a third party's offer for the burdened property.<sup>11</sup> When the owner is only prepared to sell the burdened property as part of a larger package of properties, uncertainty arises. Does the proposed transaction trigger the right of first refusal, and if so, to what extent? Must the rightholder purchase all the properties in the package to exercise her privilege, or just the burdened portion alone? And if the proposed sale of the burdened property as part of a package deal does not activate the right of first refusal at all, what becomes of the rightholder's valuable prerogative?

The predicament presented by package deals has a long history of its own.<sup>12</sup> Despite persistent litigation, however, courts have been unable to arrive at a uniform approach to the problem.<sup>13</sup> Moreover, the recurrence of litigation concerning preemptive rights within package deals suggests that practitioners are either overlooking the possibility of such circumstances or are unaware of the uncertainty the package deal poses.

The goal of this Note is to draw attention to the scope of the problem and the uncertainty of the law when property burdened

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7. *Burzynski*, 636 F. Supp. at 112 ("A right of first refusal is generally defined as the right to meet any other offer . . . . The holder of such a right is usually deemed to be entitled to match any acceptable *bona fide* third party offer received by the tendering party.") (citations omitted); *Bennett Veneer Factors, Inc. v. Brewer*, 441 P.2d 128, 134 (Wash. 1968) ("The phrase 'first refusal right' and terms of similar import have a well understood meaning in the business world which is that the owner of such a contract right is entitled to the opportunity to buy the subject property on the same terms contained in a *bona fide* offer."); BLACK'S LAW DICTIONARY 1325 (6th ed. 1990). A right of first refusal may affect all sorts of contracts, including purchase, lease and employment agreements. See generally, CORBIN, *supra* note 6, at 468 (describing different types of rights of first refusal). See also *infra* note 15. This Note, however, is concerned with the most common type, the "first right to purchase."

8. Early cases involving a right of first refusal include *Reed v. Campbell*, 4 A. 433 (N.J. 1886) and *DePeyster v. Michael*, 6 N.Y. 467 (1852).

9. See *infra* Part II.

10. See *infra* notes 40-41 and accompanying text.

11. See *infra* note 27 and accompanying text.

12. *New Atl. Garden v. Atlantic Garden Realty Corp.*, 194 N.Y.S. 34 (N.Y. App. Div. 1922), *aff'd* 143 N.E. 734 (N.Y. 1923) is the first reported case to address this problem.

13. See *infra* Part II.

by a right of first refusal is offered for sale as part of a package of properties.<sup>14</sup> An additional goal of this Note is to propose a fair and efficient rule to be applied uniformly when parties fail to provide an express provision in their right-of-first-refusal agreement to account for this contingency. To these ends, Part I describes the nature and operation of a right of first refusal and the problem of the package deal. Part II explains the disparate and unpredictable relief granted by the courts in litigation arising from the package deal, as well as the factors used by the courts in adopting and rejecting their divergent solutions. Part III proposes a default rule that would allow the owner to accept a third-party offer for a package deal, but also permit the rightholder to preempt the sale of that portion of the package deal that is burdened by the right of first refusal. This Note concludes that a default rule that would provide the rightholder with an opportunity to purchase the burdened property at a reasonable price before the owner may execute the sale of the burdened property as part of a package deal is consistent with the purpose of rights of first refusal, promotes efficient right-of-first-refusal agreements and leads to fairness in the disposition of the problems posed by package deals.

### I. The Nature and Operation of the Right of First Refusal

The right of first refusal comes in many forms and guises.<sup>15</sup> It has been termed a "right of preemption,"<sup>16</sup> a "privilege of first refusal"<sup>17</sup> and a "preferential right to purchase."<sup>18</sup> It has also been

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14. The combination of the inability of courts to provide certainty in the law by affording consistent relief in the event of a package deal and the failure of practitioners to account for its possibility urges reflection on the matter. Nevertheless, commentary on the uncertainty posed by the package deal has been sparse and incomplete. See, e.g., CORBIN, *supra* note 6, at 480-81 (giving cursory treatment to the package deal); Ronald B. Brown, *An Examination of Real Estate Purchase Options*, 12 NOVA L. REV. 147, 174-75 (1987) (cursory treatment of the package deal); Weldon B. Stutzman & David E. Day, *Protecting The Preemptor: Real Property Rights of First Refusal in Light of Gyurkey v. Babler*, 19 IDAHO L. REV. 277 (1983) (discussing treatment of package deal in Idaho).

15. While most rights of first refusal are "first rights to purchase," they also materialize as "first rights to services," which give employers the right to match a third party's offer for an employee's services, and "first rights to a job," which give an employee the right to accept a job an employer is willing to offer a third party. See, e.g., *American Broadcasting Companies, Inc.*, 430 N.Y.S.2d 275 (television network with first right to employ popular sportscaster Warner Wolf) and *Burzynski*, 636 F. Supp. 109 (television director with "first refusal to direct" a film). See generally, CORBIN, *supra* note 6, at 468 (describing different types of rights of first refusal).

16. *Barling v. Horn*, 296 S.W.2d 94, 97 (Mo. 1956).

17. *Wellmore Builders v. Wannier*, 140 A.2d 422, 426 (N.J. Super. Ct. App. Div. 1958).

termed a "first-refusal-to-purchase option,"<sup>19</sup> an "option of first refusal"<sup>20</sup> and a "first option to buy."<sup>21</sup> The first set of terms suggest that the right of first refusal is merely a privilege or prerogative. The second set suggests that it is more; it implies that the right of first refusal is a variety of option contract.<sup>22</sup>

In some respects, the right of first refusal differs markedly from the option.<sup>23</sup> The option contains an operative offer at a specified sum.<sup>24</sup> It provides its holder with the power to compel the owner to sell the option-encumbered property without regard for the owner's willingness to relinquish ownership.<sup>25</sup> The holder of a right of first refusal, on the other hand, cannot compel an unwilling owner to sell.<sup>26</sup> In fact, the rightholder's ability to exercise her privilege is contingent upon the owner's intention to accept a third party's offer to buy the burdened property.<sup>27</sup> The right of first re-

18. *Myers*, 189 N.W.2d at 576.

19. *Smith v. Traxler*, 90 S.E.2d 482, 483 (S.C. 1955); *Atlantic Refining Co. v. Wyo. Nat'l Bank of Wilkes-Barre*, 51 A.2d 719, 721 (Pa. 1947).

20. *Guaclides v. Kruse*, 170 A.2d 488, 490 (N.J. Super. Ct. App. Div.), *cert. denied*, 174 A.2d 658 (1961).

21. *Wallach v. Toll*, 113 A.2d 258, 259 (Pa. 1955); *Tarallo*, 534 N.Y.S.2d at 486.

22. Some courts have expressly stated that a right of first refusal is a breed of option. *Continental Cablevision of N.E.*, 873 F.2d at 722 (4th Cir. 1989) ("Initially, it is clear that a right of first refusal is a type of option.") (Mass. law); *Ferrero Constr. Co. v. Dennis Rourke Corp.*, 536 A.2d 1137, 1140 (Md. 1988) ("A right of first refusal is a type of option."); *Park-Lake Car Wash, Inc. v. Springer*, 352 N.W.2d 409, 411 (Minn. 1984) (stating that a right of first refusal is an option contract, except that it requires the fulfillment of a condition precedent); *Myers*, 189 N.W.2d at 576 ("A . . . preferential right to purchase is a species of option . . .").

23. *Duke v. Whatley*, 580 So.2d 1267, 1272 (Miss. 1991); *Morrison v. Piper*, 566 N.E.2d 643, 645 (N.Y. 1990); *Landa v. Century 21 Simmons & Co.*, 377 S.E.2d 416, 419 (Va. 1989); *Ollie v. Rainbolt*, 669 P.2d 275, 279 (Okla. 1983); *Hartnett v. Jones*, 629 P.2d 1357, 1362 n.1 (Wyo. 1981); *Wellmore Builders*, 140 A.2d at 426; 6 AMERICAN LAW OF PROPERTY § 26.64, at 507 (1952).

24. See *John D. Stump & Assoc., Inc. v. Cunningham Memorial Park, Inc.*, 419 S.E.2d 699, 704 (W.Va. 1992); *Duke*, 580 So.2d at 1272; *Morrison*, 566 N.E.2d at 645; *Landa*, 377 S.E.2d at 420; *Ollie*, 669 P.2d at 279; *Hartnett*, 629 P.2d at 1362 n.1; 1A CORBIN, *supra* note 6, § 261A.

25. *Pincus*, 893 F.2d at 1549; *Duke*, 580 So.2d at 1272; *Metro. Transp. Auth. v. Bruken Realty Corp.*, 492 N.E.2d 379, 382 (N.Y. 1986); *Ollie*, 669 P.2d at 279; *Shiver v. Benton*, 304 S.E.2d 903, 905 (Ga. 1983); *Wellmore Builders*, 140 A.2d at 426; 6 AMERICAN LAW OF PROPERTY § 26.64, at 507 (1952).

26. *W. Tex. Transmission, L.P.*, 907 F.2d at 1562; *Pincus*, 893 F.2d at 1549; *John D. Stump & Assoc., Inc.*, 419 S.E.2d at 704; *Duke*, 580 So.2d at 1272; *Metro. Transp. Auth.*, 492 N.E.2d at 382; *Landa*, 377 S.E.2d at 419; *Ollie*, 669 P.2d at 279; *Wellmore Builders*, 140 A.2d at 426; 6 AMERICAN LAW OF PROPERTY § 26.64, at 507 (1952); *Brown*, *supra* note 14, at 173.

27. *Pincus*, 893 F.2d at 1549; *Hunter v. Union State Bank*, 505 N.W.2d 172, 177 (Iowa 1993); *John D. Stump & Assoc., Inc.*, 419 S.E.2d at 704; *Duke*, 580 So.2d at 1272; *Metro. Transp. Auth.*, 492 N.E.2d at 382; *Hartnett*, 629 P.2d at 1362 n.1; 11 WIL-

fusal merely provides that the rightholder will be given opportunity to purchase the burdened property if and when the owner is prepared to sell it to another.<sup>28</sup> Moreover, if the rightholder chooses to exercise her privilege, she will ordinarily be required to match the price and terms specified in the third-party offer.<sup>29</sup> As a result,

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LISTON, *supra* note 6; Brown, *supra* note 14, at 172-73; Stutzman & Day, *supra* note 14, at 278.

The precise condition that will activate the right of first refusal depends on the wording of the agreement creating that right. *Pincus*, 893 F.2d at 1550; 6 CORBIN, *supra* note 6, 1993 Supp., Part 3, at 134-35. *But cf. infra* note 115 (explaining that a right of first refusal conditioned on the burdened property's impending sale is perhaps treated the same as a right of first refusal conditioned on the owner's "willingness" or "intention" to sell the burdened property).

28. *W. Tex. Transmission, L.P.*, 907 F.2d at 1562; *John D. Stump & Assoc., Inc.*, 419 S.E.2d at 704; *Landa*, 377 S.E.2d at 419; *Metro. Transp. Auth.*, 492 N.E.2d at 382; *Ollie*, 669 P.2d at 279; *Shiver*, 304 S.E.2d at 905; *Wellmore Builders*, 140 A.2d at 426; 6 AMERICAN LAW OF PROPERTY § 26.64, at 507 (1952).

29. *John D. Stump & Assoc., Inc.*, 419 S.E.2d at 704; *Metro. Transp. Auth.*, 492 N.E.2d at 382; *Ollie*, 669 P.2d at 279; *Hartnett*, 629 P.2d at 1362 n.1; 1A CORBIN, *supra* note 6, at 470.

Some right-of-first-refusal agreements specify a price at which the owner must offer the property to the rightholder when she decides to sell. *See, e.g.*, *Old Mission Peninsula School Dist. v. French*, 107 N.W.2d 758, 758-59 (Mich. 1961); *Kershner v. Hurlburt*, 277 S.W.2d 619 (Mo. 1955); *see generally Ferrero Constr. Co.*, 536 A.2d at 1143-44 (describing three types of rights of first refusal, distinguished from each other by the method employed to determine the price rightholder will pay to exercise her right). However, most right-of-first-refusal agreements establish the price and other terms upon the acceptable third party offer. *W. Tex. Transmission, L.P.*, 907 F.2d at 1562 ("Although some [right-of-first-refusal] contracts specify the price at which the owner must sell the property, most contracts base the sale price and other terms of the rightholder's purchase contract on the *bona fide* offer made by a third party."); *e.g.*, *Pincus*, 893 F.2d at 1546; *Smith v. Hevro Realty Corp.*, 507 A.2d 980, 981 (Conn. 1986); *Park-Lake Car Wash, Inc.*, 352 N.W.2d at 410; *Myers*, 189 N.W.2d at 573. Moreover, many courts hold that where no price, or mechanism for determining the price, is stated in the right-of-first-refusal agreement, the third-party offer will set the price and terms by which the rightholder must accept to exercise her right. *Radio Webs, Inc.*, 292 S.E.2d at 713 fn.2 ("Where no price is stated when the right is granted, the offer of the third party supplies the terms under which the right of first refusal may be exercised."); *Brownies Creek Collieries, Inc. v. Asher Coal Mining Co.*, 417 S.W.2d 249, 252 (Ky. 1967) ("A contract provision giving simply the 'right of first refusal' . . . without qualifying terms means . . . that the holder has the right to elect to take the property at the same price and on the same terms and conditions as those of an offer by a third person that the owner is willing to accept."); 1A CORBIN, *supra* note 6, at 477-48 ("In most cases it can be shown by evidence of accompanying facts that the intention and understanding of both [the owner] and [the rightholder] was that before selling to any third party [the owner] would make an offer to [the rightholder] on the very same terms as those of any actually proposed sale."); 6 AMERICAN LAW OF PROPERTY § 26.65 at 507 (1952) ("If no price is specified in the [right of first refusal] provision, the natural interpretation is that the offeror's price must be paid upon exercise of the pre-emption."); *see also Weintz v. Bumgarner*, 434 P.2d 712, 716 (Mont. 1967); *Brenner v. Duncan*, 27 N.W.2d 320, 322 (Mich. 1947) (holding that third-party offer establishes price rightholder will pay to exercise privi-

the rightholder bears the risk that the owner may only be prepared to sell the burdened property for unique consideration or under unconventional conditions.<sup>30</sup> For example, the owner only may be willing to accept a property exchange rather than a cash payment.<sup>31</sup> Or, she may be prepared to sell solely for an interest in a commercial partnership.<sup>32</sup> So long as the conditions of the sale are commercially reasonable, imposed in good faith and not specifically designed to defeat the right of first refusal, the rightholder will be obliged to match the offer if she wishes to exercise her first refusal privilege.<sup>33</sup> The right of first refusal's essential characteristics and the mechanics of its application—its nature and operation—then, are unlike those of the option. Nevertheless, both the option and the right of first refusal are created for the benefit of the holder.<sup>34</sup> The right of first refusal is employed for two reasons: one, to discourage the sale of the burdened property to a purchaser who may use it in a fashion that is undesirable to the rightholder,<sup>35</sup> and two, to afford the rightholder the opportunity to purchase the burdened property should the owner ever decide to sell it.<sup>36</sup> Moreover, many

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lege where right-of-first-refusal agreement expressly leaves price to future agreement). *Contra Duke*, 580 So.2d at 1274-75 (affirming trial court's refusal to grant specific performance on right of first refusal that failed to state, or provide method for determining, rightholder's purchase price); *Hood v. Hawkins*, 478 A.2d 181, 186-87 (R.I. 1984); *Roles v. Mason*, 119 S.E.2d 238, 242 (Va. 1961).

30. See *Brown*, *supra* note 14, at 176 and n.144 ("Considering all the variable terms, besides the price, involved in a contract, the right holder is taking a great risk of being faced with the choice of an onerous contract or losing the land.").

31. *Matson v. Emory*, 676 P.2d 1029, 1033 (Wash. App. 1983).

32. *Prince v. Elm Investment Co., Inc.*, 649 P.2d 820, 825 (Utah 1982).

33. *W. Tex. Transmission, L.P.*, 907 F.2d at 1563 ("[T]he owner of property subject to a right of first refusal remains master of the conditions under which he will relinquish his interest, as long as those conditions are commercially reasonable, imposed in good faith, and not specifically designed to defeat the preemptive rights."); *Weber Meadow-View Corp. v. Wilde*, 575 P.2d 1053, 1055 (Utah 1978) ("[T]he decision as to both the time and the terms upon which the [owner] would sell her property remains her exclusive prerogative so long as she acts in good faith and without any ulterior purpose to defeat the right of the [rightholder].").

34. *Landa*, 377 S.E.2d at 419 ("We noted . . . that a right of first refusal is inserted in a contract for the benefit of the person who is given the right and that it must, therefore, be interpreted with that purpose in mind."). See also *Ollie*, 669 P.2d at 279 ("A right of first refusal has been described as closely related in purpose to options."); 1A CORBIN, *supra* note 6, at 468 ("[Rights of first refusal and options] are closely related with respect to the purpose for which they are made.").

35. See *LIN Broadcasting Corp. v. Metromedia, Inc.*, 542 N.E.2d 629, 633-34 (N.Y. 1989) (implying that the primary purpose of right of first refusal is to inhibit the sale of the burdened property); *Brown*, *supra* note 14, at 172.

36. *Brown*, *supra* note 14, at 172 ("[Rights of first refusal] occur where the owner was unwilling to sell certain property or rights at the moment, but for a price, or as an enticement, is willing to give this person the first chance if he should ever change his



courts agree that when the owner notifies the rightholder of an acceptable third party offer, the right of first refusal "ripens" into an option contract.<sup>37</sup>

To illustrate the operation of an ordinary right of first refusal,<sup>38</sup> suppose the owner of contiguous tracts #1, #2, #3 and #4, sells tract #4 and gives the buyer a right of first refusal to purchase tract #3. So long as the owner is unwilling to sell tract #3, the rightholder cannot compel the owner to sell it to her. Once the owner is prepared to accept a third party's offer for the sale of tract #3, however, the owner must give the rightholder an opportunity to preempt the sale by notifying the rightholder of the proposed

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mind."); see also LEWIS M. SIMES & ALLAN F. SMITH, *THE LAW ON FUTURE INTERESTS* § 1554, at 60-61 (1956) ("The similarity of the pre-emption provision . . . to the ordinary . . . option . . . at once suggests itself. [An option's] primary purpose is to enable a particular person to buy.").

37. Stutzman & Day, *supra* note 14, at 278 ("[M]any courts have held that once an owner manifests a willingness to accept a good faith offer, the right of first refusal 'ripens' into an option and contract law applicable to options applies."). See, e.g., *W. Tex. Transmission, L.P.*, 907 F.2d at 1565 ("When the preemptive rightholder receives notice that the property owner intends to sell his property to a third party, the rightholder's right of first refusal matures into an option."); *John D. Stump & Assoc., Inc.*, 419 S.E.2d at 705 ("[A] right of first refusal becomes an option once the holder of such right is notified by the property owner of the terms of a third-party offer to purchase the property."); *Chapman v. Mutual Life Ins. Co. of N.Y.*, 800 P.2d 1147, 1150 (Wyo. 1990) ("We agree with the view that when the condition precedent of the owner's intention to sell is met the right of first refusal 'ripens' into an option and contract law pertaining to options applies."); *Morrison*, 566 N.E.2d at 645 ("[T]he right of first refusal effectively ripens into an option upon the happening of a contingency: the decision of the obligated party to accept a third-party's offer for the property."); *Hevro Realty Corp.*, 507 A.2d at 983 ("Once [owner] notified [rightholder] of the receipt of [third party's] offer . . . [rightholder's] right of first refusal ripened into an option."); *Coastal Bay Golf Club, Inc. v. Holbein*, 231 So.2d 854, 857 (Fla. Dist. Ct. App. 1970) ([A] right of first refusal ripens into an option once an owner manifests a willingness to accept a good faith offer."); see also 3 *AMERICAN LAW OF REAL PROPERTY* § 21.02[1]; 1A *CORBIN*, *supra* note 6, at 469 ("If B pays a consideration O shall make him an offer that will give him an Option to Purchase."); *Brown*, *supra* note 14, at 172-73. But see *LIN Broadcasting Corp.*, 542 N.E.2d at 633 (expressly rejecting contention that a right of first refusal "is transformed into a binding option" when the right of first refusal is triggered").

38. The phrase "ordinary right of first refusal" is used in this Note to underscore that the problems posed by the package deal affect the most common form of the privilege. Though the language used to create a right of first refusal varies from agreement to agreement, the most common form of the privilege share the following characteristics: (1) They are first rights to purchase; (2) they are contingent upon the owner's intention to sell the burdened property to a third party; (3) they establish the price the rightholder will pay to exercise her privilege in accordance with the third party's offer; and (4) they fail to expressly supply a provision addressing the rights of the parties in the event the owner intends to sell the burdened property as part of a package deal. See *supra* notes 27-28 and accompanying text.

transaction. The owner's notification is an operative offer. In order to accept the owner's offer and exercise her privilege, the rightholder must agree to purchase tract #3 herself, for the precise price, terms and conditions contained in the third-party offer.<sup>39</sup>

The questions presented by the package deal arise in two similar but distinct circumstances. The first is when the owner, from the illustration above, remains unwilling to accept a third party's offer for tract #3, but is prepared to accept an offer on tracts #1, #2 and #3. In this scenario, it may be said that the owner's package deal consists of a number of properties, one of which is burdened by a right of first refusal. The second circumstance arises when the owner sells the rightholder tract #4 and gives her a right of first refusal on lot #3a, which makes up only a portion of tract #3. When the owner is later willing to sell the entire tract #3—but not lot #3a individually—it may be said that the owner's package deal consists of a larger property, a portion of which is burdened.<sup>40</sup> Both circumstances are usually unaddressed in agreements creating a right of first refusal.<sup>41</sup> When these circumstances arise and lead

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39. The rightholder must match the third party's offer precisely. Any material variation from the price, terms or conditions of the third party's offer will be deemed a counter-offer, and consequently, a rejection, thereby terminating the right of first refusal. *John D. Stump & Assoc. Inc.*, 419 S.E.2d at 705; *Ollie*, 669 P.2d at 281 (“[I]n order to accept the offer, the [rightholder] must fully meet the terms and conditions of the offer in [her] acceptance.”); *Brown*, *supra* note 14, at 175-76 (“Ordinarily, a right of first refusal will bind the [rightholder] to purchase according to the exact terms of the offer which he has preempted and, absent agreements to the contrary, that is the way a right would be construed.”). *See, e.g., Matson*, 676 P.2d at 1033 (rightholder may not exercise right of first refusal with all-cash offer where owner is prepared to accept property exchange).

40. The same distinction can be made with regard to securities. Suppose O sells RH controlling stock in company #4 and gives her a right of first refusal to purchase the controlling stock of a separate company, #3. When O becomes willing to sell the controlling stock of company #1, #2 and #3, the package deal is made up of a number of securities, a portion of which is burdened by a right of first refusal. *See e.g., Ollie*, 669 P.2d at 280 (third party offer was for a “package unit” of stock that included burdened stock “as well as other stock . . . not comprised within the option right”). However, suppose O is unwilling to sell the controlling stock of company #3 at all, but is willing to sell the controlling stock of company #2, which happens to be the parent company of company #3. This transfer will bring about an indirect transfer of the controlling stock of the child-company, #3. In this circumstance, O's “package” does not include additional securities; rather, it consists of securities that indirectly transfer the burdened securities. This circumstance is analogous to the sale of a parcel of land, of which only a portion is burdened by a right of first refusal. *See, e.g., Continental Cablevision of N.E., Inc.*, 873 F.2d 717 (third party offer only for grandparent company of company burdened by right of first refusal).

41. In determining the rights of the parties, courts make no distinction between a package deal consisting of a number of properties, one of which is burdened and a package deal consisting of a larger property, a portion of which is burdened. Conse-

to litigation, courts are left with the job of determining what, if anything, is to become of the rightholder's valuable interest.

## II. The Disparate Treatment of the Package Deal

In arriving at a solution to the questions posed by the package deal, courts have looked to the four-corners of the instrument creating the right.<sup>42</sup> Frequently, however, provisions creating rights of first refusal are short on language.<sup>43</sup> They neither state the intent of the parties expressly nor implicitly. As a result, courts have often relied on generally accepted principles regarding the nature and operation of rights of first refusal in determining the effect of the owner's package deal upon the rightholder's privilege.<sup>44</sup> Unfortunately, these approaches have led different courts, sometimes within the same jurisdiction, to reach divergent results in the event of a package deal.<sup>45</sup>

Courts have chosen from among five different forms of relief in resolving the problem posed by a proposed sale of a package of properties, a portion of which is burdened by a right of first refusal. Two of these forms are based on a determination that an owner's intention to sell the burdened property as part of a package deal *does not* activate the right of first refusal. At least one court adopting this view takes a harsh line on the matter. This court concludes that the rightholder's failure to enter into a contract specifically addressing the possibility of a package deal leaves her without any

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quently, this Note uses the terms "package deal", "a larger property, a portion of which is burdened" and "a number of properties, one of which is burdened" interchangeably. The distinction between a larger property, a portion of which is burdened and a number of properties, one of which is burdened is only mentioned to assist practitioners, concerned with drafting for the possibility of a package deal, in recognizing how the contingency may manifest itself.

42. See e.g., *Crow-Spieker #23 v. Helms Constr. and Dev. Co.*, 731 P.2d 348, 350 (Nev. 1987); *Ollie*, 669 P.2d at 279; *Anderson*, 473 P.2d at 88; *Atlantic Refining Co.*, 51 A.2d at 723; *Riley v. Campeau Homes, Inc.*, 808 S.W.2d 184, 189 (Tex. Ct. App. 1991).

43. See, e.g., *Chapman*, 800 P.2d at 1150; *Thomas & Son Transfer Line, Inc. v. Kenyon*, 574 P.2d 107, 109 (Colo. 1977), *aff'd sub nom. Cohen v. Thomas & Son Transfer Line, Inc.*, 586 P.2d 39 (1978); *Brenner*, 27 N.W.2d at 321.

44. See, e.g., *Chapman*, 800 P.2d at 1151; *Ollie*, 669 P.2d at 281; *Straley v. Osborne*, 278 A.2d 64, 69 (Md. 1971).

45. Compare *Aden v. Estate of Hathaway*, 427 P.2d 333, 334 (Colo. 1967) (denying specific performance) with *Thomas & Son Transfer Line, Inc. v. Kenyon, Inc.*, 574 P.2d 107, 111-12 (Colo. Ct. App. 1977) (distinguishing *Aden* and awarding specific performance on the burdened property), *aff'd sub nom. Cohen v. Thomas & Son Transfer Line, Inc. v. Kenyon, Inc.*, 586 P.2d 39, 41 (1978); compare also *Garmo v. Clanton*, 551 P.2d 1332, 1336 (Idaho 1976) (affirming grant of specific performance) with *Gyurkey v. Babler*, 651 P.2d 928, 933-34 (Idaho 1982) (denying specific performance and awarding injunctive relief).

remedy at all.<sup>46</sup> Other courts that conclude the package deal does not activate the right of first refusal nevertheless hold that the owner should not be allowed to undermine the rightholder's valuable privilege by entering into such an agreement.<sup>47</sup> These courts provide the rightholder with injunctive relief. They enjoin the sale of the burdened property as part of a package deal or, where the package has already been sold, order the reconveyance of the burdened property to the owner. Courts adopting this solution preclude the owner from ever selling the burdened property to a third party until she receives a *bona fide* offer for the burdened property alone and gives the rightholder an opportunity to match that offer.

Three other forms of relief awarded by courts in the event of a package deal are based on a determination that an owner's intention to sell the burdened property as part of a package deal *does* activate the right of first refusal. Most of these courts award the rightholder specific performance on the burdened property alone.<sup>48</sup> If the owner is prepared to sell the burdened property as part of a package of properties, these courts compel the owner to provide the rightholder with an opportunity to purchase the burdened portion of the package deal. Under this approach, the owner is not precluded from ever selling the burdened property as part of a package deal. The owner, however, will only be allowed to do so if she gives the rightholder an opportunity to purchase the burdened property first and the rightholder decides not to exercise her privilege. In addition, at least one court adopting the view that the package deal activates the right of first refusal has held that where the owner sold the burdened property as part of a package deal, the rightholder is entitled to contract damages.<sup>49</sup> Finally, at least one court has held that in the event of the package deal the rightholder is entitled to specific performance on the entire package.<sup>50</sup> If the owner sells the burdened property as part of a package of properties, this court compels the owner to provide the rightholder with an opportunity to exercise her privilege and preempt the sale of the entire package. Under this approach, an owner who is prepared to sell property burdened by a right of first refusal as part of a package deal must offer the *entire* package to the rightholder at the price and upon the terms that she is willing to

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46. *See infra* Part IIA.

47. *See infra* Part IIB.

48. *See infra* Part IIC.

49. *See infra* Part IID.

50. *See infra* Part IIE.

accept from the third party. The rightholder, in turn, will only be able to preserve her privilege if she is willing and able to match the third party's offer for the entire package of properties.

Each of these solutions has been adopted by at least one court.<sup>51</sup> Four have been adopted by the highest court of at least four different states.<sup>52</sup> In addition, at least four courts have criticized and expressly rejected each of these solutions.<sup>53</sup> Using a representative case for each of these solutions, the following sections explain how courts justify and criticize the disparate remedies awarded in the event of the package deal.

### A. A Case For No Relief

A majority of courts that have addressed the problems posed by the package deal hold that such transactions do not activate an ordinary right of first refusal.<sup>54</sup> Nevertheless, most of these courts

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51. See, e.g., *Chapman v. Mutual Life Insurance Co. of N.Y.*, 800 P.2d 1147, 1152 (Wyo. 1990) (enjoining the owner from selling the burdened property as part of a package deal); *Crow-Spieker #23 v. Helms Constr. and Dev. Co.*, 731 P.2d 348, 350 (Nev. 1987) (permitting the owner to sell the burdened property as part of a package deal while denying the rightholder any relief); *Anderson v. Armour & Co.*, 473 P.2d 84, 89 (Kan. 1970) (awarding rightholder contract damages where owner sold burdened property as part of a package deal); *Brenner v. Duncan*, 27 N.W.2d 320, 322 (Mich. 1947) (awarding the rightholder specific performance on the burdened property alone where owner sold burdened property as part of a package deal); *Capalongo v. Giles*, 425 N.Y.S.2d 225, 229 (N.Y. Sup. Ct. 1980) (awarding the rightholder specific performance on the entire package where the owner sold burdened property as part of a package deal), *rev'd on other grounds sub nom. Capalongo v. Desch*, 438 N.Y.S.2d 638 (N.Y. App. Div. 1981), *aff'd*, 443 N.E.2d 491 (1982).

52. *Chapman*, 800 P.2d at 1152 (enjoining the owner from selling the burdened property as part of a package deal) (Wyo.); *Crow-Spieker #23*, 731 P.2d at 350 (permitting the owner to sell the burdened property as part of a package deal while denying the rightholder any relief) (Nev.); *Anderson*, 473 P.2d at 89 (awarding rightholder contract damages where owner sold burdened property as part of a package deal) (Kan.); *Brenner*, 27 N.W.2d at 322 (awarding the rightholder specific performance on the burdened property alone where owner sold burdened property as part of a package deal) (Mich.).

53. See, e.g., *Pantry Pride Enter., Inc. v. Stop & Shop Companies, Inc.*, 806 F.2d 1227, 1229 (4th Cir. 1986) (arguing against specific performance on the entire package); *Chapman*, 800 P.2d at 1151-52 (arguing against allowing the owner to enter into package deals without providing the rightholder with a remedy and contending monetary damages are not necessary where injunctive relief returns the parties to their former positions without suffering irreparable harm); *Myers v. Lovetinsky*, 189 N.W.2d 571, 576 (Iowa 1971) (arguing against specific performance on the burdened property alone); *Giles*, 425 N.Y.S.2d at 228 (arguing against injunctive relief in the event of a package deal), *rev'd on other grounds sub nom. Capalongo v. Desch*, 438 N.Y.S.2d 638 (N.Y. App. Div. 1981), *aff'd*, 443 N.E.2d 491 (1982).

54. See, e.g., *Chapman v. Mutual Life Ins. Co. of N.Y.*, 800 P.2d 1147, 1151 (Wyo. 1990); *Crow-Spieker #23 v. Helms Constr. & Dev. Co.*, 731 P.2d 348, 350 (Nev. 1987); *Ollie v. Rainbolt*, 669 P.2d 275, 281 (Okla. 1983); *Gyurkey v. Babler*, 651 P.2d 928, 932

would enjoin the owner from entering into such agreements because they would, in effect, render the right of first refusal a nullity.<sup>55</sup> There is, however, one exception.<sup>56</sup>

Judicial authority for permitting the owner to sell the burdened property as part of a package deal while denying a rightholder any relief is limited to a decision by the Supreme Court of Nevada in *Crow-Spieker #23 v. Helms Construction and Development Company*.<sup>57</sup> In that case, John Robinson, the owner of a considerable

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(Idaho 1982); *Myers v. Lovetinsky*, 189 N.W.2d 571, 576 (Iowa 1971); *Straley v. Osborne*, 278 A.2d 64, 70 (Md. 1971); *New Atl. Garden v. Garden Realty Corp.*, 194 N.Y.S. 34, 40 (N.Y. App. Div. 1922), *aff'd*, 143 N.E. 734 (1923); *Guaclides v. Kruse*, 170 A.2d 488, 494 (N.J. Super. Ct. App. Div.), *cert. denied*, 174 A.2d 658 (1961).

55. See, e.g., *Manella*, 537 F. Supp. at 1229; *Chapman*, 800 P.2d at 1152; *Ollie*, 669 P.2d at 281; *Gyurkey*, 651 P.2d at 934; *Straley*, 278 A.2d at 70; *Atlantic Refining Co.*, 51 A.2d at 725; *New Atl. Garden*, 194 N.Y.S. at 40; *Guaclides*, 170 A.2d at 495.

56. *Crow-Spieker #23 v. Helms Constr. and Dev. Co.*, 731 P.2d 348 (Nev. 1987).

57. 731 P.2d 348 (Nev. 1987). *Crow-Spieker #23* was the first reported case to clearly find that the rightholder is not entitled to any relief when the owner sells burdened property as part of a package deal. An earlier case, *Satchels v. Conklin*, 150 N.Y.S.2d 356, 358 (N.Y. App. Div. 1956), *aff'd*, 141 N.E.2d 916 (1957), which concerned a package deal consisting of an entire lot, a portion of which was burdened, appears to reach the same conclusion. However, its holding was distinguished in subsequent decisions by the Appellate Division Second Department. In *Satchels*, the rightholder sought specific performance on his right of first refusal to purchase the burdened portion of a larger lot sold to a third party. 150 N.Y.S.2d at 357. The court upheld the trial court's dismissal of the complaint on the grounds that the package sale did not evince an intention to sell the burdened portion so as to activate the right of first refusal. *Id.* at 358. As in *Crow-Spieker #23*, the rightholder in *Satchels* was left without a remedy. Subsequently, in *Costello v. Hoffman*, 291 N.Y.S.2d 116, 118 (N.Y. App. Div. 1968), the Second Department explained that it did not provide the rightholder in *Satchels* any remedy—though he was entitled to injunctive relief—because the rightholder only asked for specific performance, a remedy which he was not entitled to. This explanation is dubious. If the *Satchels* court believed that the rightholder was entitled to some other relief it would have been more appropriate to dismiss the case without prejudice to replead. See, e.g., *K.S. & S. Restaurant Corp. v. Yarbough*, 479 N.Y.S.2d 235, 237 (N.Y. App. Div. 1984) (Second Department case dismissing complaint without prejudice to replead where rightholder only asked for specific performance of right of first refusal to purchase burdened property that had been sold as part of package deal). To bolster its explanation of *Satchels*, the *Costello* court noted that the court in *Satchels* did not use language indicating that it was "overruling" *New Atl. Garden*, 194 N.Y.S. 34, an earlier case which held that the rightholder is entitled to injunctive relief, preventing the sale of the burdened portion as part of a larger package, or where the package has already been sold, reconveyance to the owner of the burdened portion. *Costello*, 291 N.Y.S.2d at 118. This argument is unconvincing. *New Atl. Garden* was a First Department case; the Second Department was not bound by its holding. Moreover, two justices in *Satchels* dissented separately, citing *New Atl. Garden* for the proposition that reconveyance of the burdened portion is the appropriate remedy. These dissents suggest that the majority in *Satchels* was, in fact, not following the holding in *New Atl. Garden*. See also *Aden*, 427 P.2d at 334 (affirming dismissal of complaint in which only specific performance was sought).

amount of realty, sold Crow-Spieker #23, a co-partnership, a tract of land and granted it a right of first refusal to purchase an adjacent tract.<sup>58</sup> Subsequently, Robinson sought to sell the burdened tract, consisting of approximately 50 acres, as part of a 198-acre package to a third party for more than two million dollars. Crow-Spieker was given the opportunity to match the offer for the entire package, but instead attempted to exercise its right of first refusal on the burdened tract alone.<sup>59</sup> Robinson responded by selling the entire package to the third party; Crow-Spieker sued.<sup>60</sup>

The trial court held that the sale of the package deal breached Crow-Spieker's right of first refusal and awarded it damages.<sup>61</sup> The Supreme Court of Nevada reversed, holding there was no breach of the contractual right of first refusal and that Crow-Spieker was not entitled to any relief.<sup>62</sup> The rationale employed by the court was that the "terms of the right of first refusal . . . applied only to offers to purchase [the burdened property] alone."<sup>63</sup> A third party's offer to purchase a package of properties was simply a different transaction from the one contemplated by the right-of-first-refusal agreement.<sup>64</sup> The Supreme Court of Nevada reasoned that so long as the owner, in good faith, is only willing to sell the burdened tract as part of a larger parcel, the right of first refusal is "totally inapplicable."<sup>65</sup> It is not clear whether the Nevada Supreme Court meant the right of first refusal was inapplicable and therefore extinguished or inapplicable but still potentially effective if the package-deal purchaser should ever decide to accept an offer

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58. *Id.* at 349. The right of first refusal was set forth in a letter accompanying the proposed sale agreement and read:

[I]f and when we decide to sell the parcel of land south of parcel A . . . you shall have the first opportunity to purchase the same for the price, and subject to the terms under, which we are willing to sell the same; or if we receive a *bona fide* offer for said parcel which is acceptable to us, from another party, you shall have the first opportunity to purchase the same for the price offered by the other party and subject to the same terms as contained in such offer . . . .

*Id.* Though there is no uniformity in the drafting of rights of first refusal, the substance of the quoted provision mirrors typical right of first refusal agreements.

59. *Id.*

60. *Crow-Spieker #23*, 731 P.2d at 350.

61. *Id.*

62. *Id.*

63. The court reached this determination *sua sponte*. *Id.* at 350 n.2.

64. *See also Chapman*, 800 P.2d at 1151 ("The condition precedent triggering exercise or waiver of the [rightholder's] right did not occur because no price was ever set for that property by third party negotiation and, as a result, there was no offer for the [rightholder] to match.").

65. *Crow-Spieker #23*, 731 P.2d at 350.

for the burdened property alone.<sup>66</sup> The distinction, however, is academic. If the first owner could by-pass the privilege by selling the burdened property as part of a package deal, so could each successive owner. Whether the owner may destroy the right entirely or simply by-pass doesn't change the fact that. In either case, the owner has the ability to render the right of first refusal entirely ineffectual.

In denying relief in these situations, the Nevada court interpreted the right-of-first-refusal agreement literally. This literal compliance with the language, however, permits every right of first refusal to be rendered a nullity. Every owner could eviscerate the effect of a right of first refusal by attaching additional property to the burdened plot and offering the resulting package for sale.<sup>67</sup> Under elementary rules of contract interpretation, however, every agreement contains an implied covenant that neither party will cause the destruction of the other party's rights.<sup>68</sup> If the right of

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66. Compare *Brown*, *supra* note 14, at 175 and n.137 (citing *Crow-Spieker* #23 for the proposition that "under certain circumstances, the right holder may lose [her] right") (emphasis added) with 3 AMERICAN LAW OF REAL PROPERTY § 21.02[3] and n.14 (citing *Crow-Spieker* #23 for the proposition that "a sale of a larger tract of land which includes the [burdened] parcel may not activate the right, but the right will continue to be binding upon the purchaser of the larger tract and may be exercised upon the sale of the [burdened] parcel").

67. Many courts expressly reject the Nevada approach precisely because it would permit owners to void rights of first refusal by attaching additional land to the burdened property. *Chapman*, 800 P.2d at 1151 (also noting that *Crow-Spieker* #23 is against majority view); *Straley*, 278 A.2d at 70; *Guaclides*, 170 A.2d at 495 ("To allow the owner of the whole to by-pass the optionee merely by attaching additional land to the part under option would render nugatory a substantial right which the optionee had bargained for and obtained."); *C & B Wholesale Stationary v. S. De Bella Dresses, Inc.*, 349 N.Y.S.2d 751, 753 (N.Y. App. Div. 1973) ("The [owner's] sale of the [burdened property] as part of the larger parcel violated the first refusal clause."). See also *Radio Webs, Inc.*, 292 S.E.2d at 715 ("We find the [cases concluding that sale of burdened property as part of larger package breaches right of first refusal agreement] applicable to sales of businesses; to find otherwise would facilitate defeat of contractual rights of first refusal by inclusion of extraneous matters."). Most courts addressing the package deal have taken it for granted that offering the burdened property for sale as part of a larger package is a breach of the right of first refusal agreement. See *Gyurkey*, 651 P.2d at 932; *Myers*, 189 N.W.2d at 575.

68. See *Antony's Pier Four, Inc. v. HBC Assocs.*, 583 N.E.2d 806, 820-22 (Mass. 1991); *Burk v. K-Mart Corp.*, 770 P.2d 24, 26 (Okla. 1989); *W.V. Pangborne & Co. v. New Jersey DOT*, 562 A.2d 222, 230 (N.J. 1989); *Gallagher v. Lambert*, 549 N.E.2d 136, 141 (N.Y. 1989); *Kendall v. Ernest Pestana, Inc.*, 709 P.2d 837, 844 (Cal. 1985); *Perkins v. Standard Oil Co.*, 383 P.2d 107, 111 (Or. 1963); *Sellers v. Head*, 73 So.2d 747, 751 (Ala. 1954); 3 CORBIN, *supra* note 6, § 278 ("In every contract there is an implied covenant that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."). See also 1A CORBIN, *supra* note 6, at 474 ("It is a violation of duty for [the owner] to make a contract to sell [the burdened property] on any terms, even though the con-



first refusal is rendered inapplicable by a package deal, entering into such transactions would be contrary to the owner's implied covenant not to destroy the rightholder's right of first refusal. The Nevada approach is, therefore, untenable.<sup>69</sup>

## B. A Case For Enjoining Package Sales

Most courts that hold the package deal does not activate the ordinary right of first refusal nevertheless enjoin the sale of the burdened property as part of a package deal.<sup>70</sup> If the properties have already been conveyed, these courts order the reconveyance of the burdened property to the owner.<sup>71</sup> In either case, the owner is barred from selling the burdened property until she receives an offer for the burdened property alone and provides the rightholder with an opportunity to match that offer.<sup>72</sup> Courts taking this approach recognize that the owner breaches the right-of-first-refusal agreement by attempting to sell the burdened property as part of a package deal.<sup>73</sup>

The most recent reported case prescribing injunctive relief is *Chapman v. Mutual Life Insurance Company of New York*.<sup>74</sup> In *Chapman*, the Mutual Life Insurance Company of New York (MONY) received an offer for the sale of 273 acres of land for \$75,000. Frank and Sharon Chapman possessed a right of first refusal on 22.6 of these acres.<sup>75</sup> On the chance that the proposed sale activated the Chapmans' right of first refusal, MONY notified the

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tract is expressly made 'subject to' the right of [the rightholder]. If courts should hold otherwise, they would thereby extract most of the 'teeth' of [the rightholder's] right.").

69. See *Boyd & Mahoney*, 614 A.2d at 1194 ("Common sense . . . require[s] us to hold that a right of first refusal as to the conveyance of property cannot be defeated by including that property in a multi-property or multi-asset transaction.").

70. See, e.g., *Manella*, 537 F. Supp. at 1229; *Chapman*, 800 P.2d at 1152; *Ollie*, 669 P.2d at 281; *Gyurkey*, 651 P.2d at 934; *Straley*, 278 A.2d at 70; *Atlantic Refining Co.*, 51 A.2d at 725; *New Atl. Garden*, 194 N.Y.S. at 40; *Guaclides*, 170 A.2d at 495.

71. See, e.g., *Wallach*, 113 A.2d at 261; *Tarallo*, 534 N.Y.S.2d at 487; *C & B Wholesale Stationary*, 349 N.Y.S.2d at 754; cf. *Saab Enters., Inc. v. Wladislaw Wunderbar*, 554 N.Y.S.2d 657, 658 (affirming trial court's order for reconveyance of entire package deal).

72. *Chapman*, 800 P.2d at 1152; *Wallach*, 113 A.2d at 261; *Atlantic Refining Co.*, 51 A.2d at 725; *New Atl. Garden*, 194 N.Y.S. at 41; *Guaclides*, 170 A.2d at 495; *Tarallo*, 534 N.Y.S.2d at 487.

73. *Chapman*, 800 P.2d at 1151; *Gyurkey*, 651 P.2d at 932; *Myers*, 189 N.W.2d at 575; *Straley*, 278 A.2d at 70; *Guaclides*, 170 A.2d at 495. See also *Radio Webs, Inc.*, 292 S.E.2d at 715.

74. 800 P.2d 1147 (Wyo. 1990).

75. *Id.* at 1148-49. The right-of-first-refusal provision read as follows: "As part of this agreement, and for the consideration received herewith, Seller will give Buyers

rightholders of the proposed sale and gave them an opportunity to purchase the burdened tract for \$15,731.18. This price was based on the value the third party ascribed to the burdened tract.<sup>76</sup> The Chapmans, however, asserted that the third party's offer (\$75,000/273 acres) was equivalent to \$265.00 per acre and, consequently, sought to exercise their privilege at \$5,992.58 (22.6 x \$265.00). MONY refused their offer and the Chapmans subsequently brought suit to compel specific performance of their right of first refusal at \$265.00 per acre. The trial court dismissed the complaint. It held that by refusing to accept MONY's offer the Chapmans failed to exercise their right of first refusal, and in effect, lost their privilege.<sup>77</sup> On appeal, the Supreme Court of Wyoming ruled that the third party's offer for the larger parcel did not activate the Chapmans' right of first refusal.<sup>78</sup> Consequently, the Chapmans could not have waived their privilege by refusing to accept MONY's offer.<sup>79</sup> The court concluded that the proper remedy under the circumstances was to enjoin MONY from selling the 22.6 acres except in response to a *bona fide* offer for the burdened property, and only after giving the Chapmans an opportunity to exercise their right of first refusal.<sup>80</sup>

The Wyoming Supreme Court employed two lines of reasoning in concluding the package deal does not activate a right of first refusal. First, a right of first refusal merely gives its holder the right to match a third party offer for the burdened property.<sup>81</sup> So long as no acceptable offer has been made for the burdened property alone, the rightholder is incapable of exercising her privilege because there is no offer for her to match.<sup>82</sup> In addition, the right of

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the first option to buyer [sic] and first right of refusal to match any future offers on the [burdened property]." *Id.* at 1150.

76. At MONY's request, the third party disclosed her method of arriving at her \$75,000 offer. The third party claimed that her purchase price was arrived at by valuing the package deal's dry land at \$105.00 per acre and its irrigated land, including the burdened property, at \$696.07 per acre. *Id.* at 1149.

77. *Id.* at 1149.

78. *Chapman*, 800 P.2d at 1151 (Wyo. 1990).

79. *Id.* at 1150.

80. *Id.* at 1152.

81. *See supra* note 29 and accompanying text.

82. *Chapman*, 800 P.2d at 1151 ("The condition precedent triggering [the] right did not occur because no price was ever set for that property by third party negotiation and, as a result, there was no offer for [the burdened property] for the Chapmans to match."). *See also Gyurkey*, 651 P.2d at 932 ("In [the event of a package deal], it is simply impossible for a preemptive rightholder to verify the precise price, not to mention other terms and conditions, at which she is entitled to purchase the property in order to obtain the same bargain on the lot that the third party offeror is to receive.").

first refusal is not activated by a package deal because the owner's intention to sell a package of properties is not tantamount to an intention to sell the burdened property.<sup>83</sup> By the terms of the right-of-first-refusal agreement, the owner is to remain in control of the price she is to receive for the burdened property.<sup>84</sup> A right of first refusal merely gives a rightholder the privilege of purchasing the burdened property *at a price the owner finds acceptable*.<sup>85</sup> Unless the owner is prepared to accept an offer for the burdened property alone, the price the owner finds acceptable for that particular property remains unknown. Any method employed by the courts to establish the price the rightholder would pay to exercise her privilege would deprive the owner of her right to remain in control of the price she is willing to accept.<sup>86</sup>

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83. *Chapman*, 800 P.2d at 1151. See also *Ollie*, 669 P.2d at 280 ("An attempt to sell larger tract is not to be taken as a manifestation of an intention on the part of the owner to sell the smaller (option-encumbered) portion separately."); *Straley*, 278 A.2d at 69 ("[T]he contemplation (or even the acceptance) by the [owner] of an offer for the larger tract is no manifestation of an intention on his part to sell the smaller ([burdened]) portion separately."); *New Atl. Garden*, 194 N.Y.S. at 40 ("[T]he fact that [the owner] attempted to sell the whole should not be taken . . . as a manifestation . . . of an intention or desire to sell the [burdened property] so as to give the [rightholder] the right to exercise the option to purchase the same."); *Guaclides*, 170 A.2d at 494 ("[T]he attempted sale of the whole tract for a single price is no indication of an intention or desire to sell the [burdened] portion alone.").

84. See *W. Tex. Transmission, L.P.*, 907 F.2d at 1563 ("[T]he owner of property subject to a right of first refusal remains master of the conditions under which he will relinquish his interest."); *Weber Meadow-View Corp.*, 575 P.2d at 1055 ("[T]he decision as to both the time and the terms upon which the [owner] would sell her property remains her exclusive prerogative.").

85. *Gyurkey*, 651 P.2d at 932 ("By possessing the right to purchase on the same terms and conditions, [the rightholder] had in essence the right to obtain precisely the same 'bargain' on [the burdened property] as the seller was willing to grant to a third party offeror.").

86. *Chapman*, 800 P.2d at 1151 ("The general rule that an attempt to sell the whole may not be taken as a manifestation of an intention or desire on the part of the owner to sell the smaller [burdened] part . . . protects the owner from making a sale he did not desire."); *Ollie*, 669 P.2d at 281 ("An owner should not be compelled to sell property on terms and conditions to which he has not agreed or which he has not intended to accept."); *Gyurkey*, 651 P.2d at 933 ("[T]he owner . . . should not be compelled to sell the particular property when he has never received an offer, or intended to sell the property on the terms and conditions asserted by the preemptor."); see also *Gyurkey*, 651 P.2d at 933 ("[C]ourts should not compel an owner to sell property on terms and conditions upon which he has not agreed or which he has not intended to accept."); *Straley*, 90 S.E.2d at 488 ("However equitable it may seem [to allow the rightholder to purchase the burdened property at a proportionate value of the package], it has no legal foundation. The [owner] may or may not have regarded the lots of equal value and it was for him to decide."); *Guaclides*, 170 A.2d at 494 ("In order to apportion [the value of the burdened property to the package deal] a court would . . . have to remake the parties' agreement . . .").

While the Supreme Court of Wyoming held that the owner's attempt to sell the burdened property as part of a package of properties does not activate the right of first refusal, it also held that it would be improper to allow the owner to circumvent the right of first refusal by entering into such agreements.<sup>87</sup> Following a majority of courts,<sup>88</sup> the Wyoming court held that the appropriate remedy was to enjoin the owner from selling the burdened property until she received an offer for the burdened tract alone and gave the rightholder an opportunity to match that offer.<sup>89</sup>

The value of injunctive relief is that by returning the parties to the positions they maintained prior to the attempted sale of the package deal, the rightholder's valuable privilege is not rendered a nullity. In addition, the privilege is afforded an opportunity to be triggered as contemplated by the right-of-first-refusal agreement: the owner's intention to sell the burdened property at a price deemed acceptable through negotiations with a third party.<sup>90</sup> The rationale for awarding injunctive relief in the event of a package deal is persuasive; however, this solution is in some respects contrary to the operation of the right of first refusal and against the expectations of the owner. Under the terms of an ordinary right of first refusal, the owner expects to remain in control of the price as well as the manner in which her property is disposed.<sup>91</sup> Enjoining package sales deprives the owner of a legitimate means of marketing her burdened property. Moreover, it may affect her ability to market other property that is unburdened, but whose value and use

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87. *Chapman*, 800 P.2d at 1151.

88. See, e.g., *Manella*, 537 F. Supp. at 1229; *Ollie*, 669 P.2d at 281; *Gyurkey*, 651 P.2d at 934; *Straley*, 278 A.2d at 70; *Atlantic Refining Co.*, 51 A.2d at 725; *New Atl. Garden*, 194 N.Y.S. at 40; *Guaclides*, 170 A.2d at 495.

89. *Id.* at 1152. Two courts awarding this relief have expressly held that the third party offer for the burdened property must be unrelated to any other property. See *Ollie*, 669 P.2d at 281 ("The remedy properly afforded in this case calls on the court to enjoin the [owners] from transferring their ownership in the preemption-encumbered stock until they have received a bona fide offer that is unrelated to any other stock and given the [rightholders] appropriate notice with the opportunity to meet that offer . . .") (emphasis added); *Gyurkey*, 651 P.2d at 934 ("The proper remedy in this case is to enjoin the owners from selling [the burdened property] until they receive an acceptable offer for [the burdened property] unrelated to the sale of any other property . . .") (emphasis added).

90. *Chapman*, 800 P.2d at 1152 ("Returning the parties to the positions they occupied before the attempted sale of the [package deal] recognizes their agreement and provides the opportunity for its performance without judicial intrusion into establishment of the price term of any desired sale.")

91. See *supra* notes 28-33 and accompanying text.

is contingent, at least to some extent, on the burdened property.<sup>92</sup> This is especially true in those jurisdictions that prevent an owner from entering into an agreement to sell the burdened property unless the agreement is entirely unrelated to an agreement for the sale of any other property.<sup>93</sup> Consequently, allowing the right of first refusal to proscribe the manner in which the burdened property is to be disposed of and permitting it to affect adversely the marketability of property not covered by the privilege is contrary to both the owner's expectations and the privilege's operation. In addition, injunctive relief is contrary to the rightholder's expectations. One reason rights of first refusal are employed is to provide the rightholder an opportunity to buy the burdened property when the owner decides to sell it.<sup>94</sup> By limiting the rightholder to injunctive relief, an owner willing to sell the burdened property is permitted to rely on a condition she herself created to deny the rightholder an opportunity to purchase the burdened property.<sup>95</sup> From the rightholder's perspective, the owner's attempt to sell the burdened property as part of a package deal is no different from the owner's attempt to sell the burdened property alone.<sup>96</sup> In either case, ownership of the burdened property is to be transferred, and the reasons the rightholder entered into the right-of-first-refusal agreement would be implicated.<sup>97</sup>

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92. *Capalongo v. Giles*, 425 N.Y.S.2d 225, 228 (N.Y. Sup. Ct. 1980) (arguing that if the owner is prohibited from selling the burdened property except in response to an offer for the burdened property alone, the owner "might have to hold on to [the burdened property] forever, and perhaps also to the larger parcel if, as may very well be the case here, it was not suitable for development without including the [burdened property]"), *rev'd on other grounds sub nom. Capalongo v. Desch*, 438 N.Y.S.2d 638 (N.Y. App. Div. 1981), *aff'd*, 443 N.E.2d 491 (1982). See generally *Stutzman & Day*, *supra* note 14, at 292-93 (explaining that from among the possible solutions to the package deal, injunctive relief places the heaviest restraint on alienation).

93. See *supra* note 89.

94. See *supra* note 36 and accompanying text.

95. *Brenner*, 27 N.W.2d at 322; *Maron v. Howard*, 66 Cal. Rptr. 70, 78 (Cal. Ct. App. 1968).

96. See *Continental Cablevision of N.E., Inc.*, 873 F.2d at 719 (Right of first refusal implicated by sale of grandparent company because right of first refusal's objectives "were as much affected by [sale of] stock in [the grandparent company] . . . as by [a sale of] stock in [the burdened company] itself."); *Anderson*, 473 P.2d at 89 ("[A]s far as the [rightholders] were concerned, the [burdened property was] effectively 'sold' and placed beyond their reach, regardless of the details of the [package deal] transaction between the [owner] and [the third party].").

97. See *supra* notes 34-36 and accompanying text.

### C. A Case For Specific Performance On The Burdened Property Alone

A small but significant number of courts addressing the package deal have concluded that such transactions activate the right of first refusal.<sup>98</sup> Even among these courts, however, there is a disparity in the relief awarded. At least one court has awarded contract damages,<sup>99</sup> another has awarded specific performance on the entire package.<sup>100</sup> Nevertheless, among the courts that conclude the right of first refusal is activated by a package deal, most hold that the rightholder is entitled to specific performance on the burdened property alone.<sup>101</sup>

*Brenner v. Duncan*<sup>102</sup> is one of the first cases to award specific performance solely on the burdened property at the occurrence of a package deal.<sup>103</sup> In *Brenner*, the rightholders leased the west 75 feet of a 100-foot wide parcel of land.<sup>104</sup> The lease agreement con-

98. See, e.g., *Pantry Pride Enters., Inc. v. Stop & Shop Companies, Inc.*, 630 F. Supp. 637, 640 (E.D.Va.), *aff'd*, 806 F.2d 1227 (1986); *Berry-Iverson Co. of N.D., Inc., v. Johnson*, 242 N.W.2d 126, 134 (N.D. 1976); *Anderson*, 473 P.2d at 89; *Denco v. Belk*, 97 So.2d 261, 265 (Fla. 1957); *Brenner*, 27 N.W.2d at 322; *Riley*, 808 S.W.2d at 189; *Capalongo v. Giles*, 425 N.Y.S.2d 225, 228 (N.Y. Sup. Ct. 1980), *rev'd on other grounds sub nom. Capalongo v. Desch*, 438 N.Y.S.2d 638 (N.Y. App. Div. 1981), *aff'd*, 443 N.E.2d 491 (1982).

99. *Anderson*, 473 P.2d at 89.

100. *Giles*, 425 N.Y.S.2d at 228.

101. See, e.g., *Pantry Pride Enters., Inc.*, 630 F. Supp. at 640; *Berry-Iverson*, 242 N.W.2d at 134; *Denco*, 97 So.2d at 265; *Brenner*, 27 N.W.2d at 322; *Riley*, 808 S.W.2d at 189.

102. 27 N.W.2d 320 (Mich. 1947).

103. Other courts to adopt this solution include *Pantry Pride Enter., Inc. v. Stop & Shop Companies, Inc.*, 630 F. Supp. 637, 640 (E.D. Va.) (granting rightholder opportunity to purchase burdened portion of package deal), *modified on other grounds*, 806 F.2d 1227 (4th Cir. 1986) (modification concerned the amount rightholder must pay to exercise right); *Berry-Iverson*, 242 N.W.2d at 134 (affirming trial court's grant of specific performance on burdened portion of package deal); *Denco*, 97 So.2d at 265 (adopting *Brenner*-rule); *Wilson v. Brown*, 55 P.2d 485, 488 (Cal. 1936) (affirming trial court's judgment, permitting rightholder to purchase burdened portion of package deal); *Riley v. Campeau Homes*, 808 S.W.2d 184, 189 (Tex. Ct. App. 1991) (burdened property need not be sold alone to activate right of first refusal). See also *Thomas & Son Transfer Line, Inc. v. Kenyon, Inc.*, 574 P.2d 107, 112 (Colo. 1977) (distinguishing *Aden v. Estate of Hathaway*, 427 P.2d 333, 334 (Colo. 1967) (rejecting specific performance on the burdened portion and granting injunctive relief) and awarding rightholder opportunity to purchase burdened portion of package deal), *aff'd sub nom. Cohen v. Thomas & Son Transfer Line, Inc.*, 586 P.2d 39 (1978); *Garmo v. Clanton*, 551 P.2d 1332, 1336 (Idaho 1976) (affirming grant of specific performance of right of first refusal on burdened portion of package deal). *Garmo* was later distinguished in *Gyurkey v. Babler*, 651 P.2d 928, 933 n.1 (Idaho 1982), where the court refused to grant specific performance on the burdened portion of the package and merely enjoined the sale of burdened property as part of package deal. *Id.* at 933-34.

104. *Brenner*, 27 N.W.2d at 320.

tained the following provision: "That in the event the land is to be sold, the tenant will be given first preference and allowed to purchase said land if the parties can agree on the price."<sup>105</sup> The owner later sold the entire 100-foot property to a third party for \$15,000, and the rightholders filed suit for specific performance. The trial court held that the right-of-first-refusal agreement was unenforceable for vagueness because it left the purchase price for future agreement. Additionally, the court held that the condition that was to activate the right of first refusal—the owner's willingness to sell the burdened property—never occurred. The court dismissed the complaint, asserting that the owner's sale of the entire 100-foot parcel merely evinced a desire to sell the larger parcel; it did not indicate a willingness to sell the west 75-foot portion alone.<sup>106</sup> The Supreme Court of Michigan reversed.<sup>107</sup>

Addressing the contention that the right of first refusal was indefinite, the Supreme Court of Michigan held that where the price for the property subject to the right of first refusal is left for future agreement, the price becomes fixed by the amount at which the owner later agrees to sell the property.<sup>108</sup> In addition, the court rejected the argument that the right of first refusal was not activated by the package sale. The court stated simply, "the condition of the option 'in the event the land is to be sold' did occur."<sup>109</sup> Consequently, the court reasoned that the right of first refusal required the owner to notify the rightholders of the impending sale and to give them the opportunity to purchase the burdened property at some fraction of the price the owner was willing to accept for the entire package.<sup>110</sup> Without such notification a rightholder may not exercise her privilege.<sup>111</sup> Under elementary principles of contract law, however, a party who prevents the fulfillment of a condition of their own obligation cannot rely on the non-occurrence of the condition to defeat his or her liability.<sup>112</sup> In such circumstances, the non-occurrence of the condition is excused, and performance of the contract is required. In the *Brenner* case, this meant the owner could not rely on her failure to fulfill her contrac-

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105. *Id.*

106. *Id.* at 321-22.

107. *Id.* at 322.

108. *Id.* See *supra* note 29.

109. *Brenner*, 27 N.W.2d at 321-22.

110. See *supra* note 28 and accompanying text.

111. See *supra* note 37 and accompanying text.

112. RESTATEMENT (SECOND) OF CONTRACTS § 245 cmt. a (1981); 3A CORBIN, *supra* note 6, § 770 at 557; 5 WILLISTON, *supra* note 6, § 677 at 224-25.

tual obligation—notifying the rightholders of the price she would find acceptable for the burdened property—to prevent the rightholders from exercising their privilege.<sup>113</sup> Since the owner failed to establish the price she would accept, the Supreme Court of Michigan ruled that the rightholders were entitled to purchase the burdened property for the value the owner would have assigned it, as determined by a court.<sup>114</sup>

The Supreme Court of Michigan,<sup>115</sup> along with a significant minority of courts, award specific performance on the burdened prop-

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113. This concept was communicated succinctly in *Maron v. Howard*, 66 Cal. Rptr. 70, 78 (Cal. Ct. App. 1968) (“By making the appraisal impossible, defendant prevented the determination of the purchase price by the method contemplated by the contract . . . . A party who prevents fulfillment of a condition of his own obligation commits a breach of contract and cannot rely on such condition to defeat his liability.” (citation omitted)).

114. *Brenner*, 27 N.W.2d at 322. The court established the mechanism for determining the purchase price at such fraction of \$15,000 (the package-deal price) that corresponded to the ratio of the burdened portion’s value to the unburdened portion’s value. In other words, if the burdened portion of the package deal was worth five-eighths the value of the unburdened portion, the rightholder would only pay \$9,375 ( $\$15,000 \times \frac{5}{8}$ ) to exercise their right, regardless of the property’s independent market value. Other courts that have granted specific performance on the burdened portion of a package deal give the rightholder an opportunity to purchase the burdened property at its fair market value. See, e.g., *Pantry Pride Enter.*, 806 F.2d at 1231 (remanding to district court for determination of rightholder’s purchase price at burdened property’s fair market value); *Wilson*, 55 P.2d at 486, 488 (affirming trial court’s judgment, permitting rightholder to purchase burdened portion of package deal at its “reasonable value”). See also *Berry-Iverson*, 242 N.W.2d at 135 (“In general, we would agree with the courts which have concluded that a pro rata apportionment of the purchase price to the smaller tract which a [rightholder] seeks to purchase is not a proper measure of the purchase price of the smaller tract.”).

115. The *Brenner* decision is terse, and does not expressly assert that the owner’s intention to sell the burdened property as part of a package deal is a manifestation of her intention to sell the burdened property for the purpose of triggering the privilege. It is plausible to argue that the *Brenner* decision based its holding on the peculiar language of the right-of-first-refusal agreement in this case, which conditioned the privilege’s activation on the fact that the burdened property was to be sold rather than on the owner’s “intention” to sell it. See *supra* note 105 and accompanying text. The basis for the court’s conclusion, however, is not clearly expressed in these terms either. In addition, other courts that have addressed the package deal and right-of-first-refusal agreements similar to the one in *Brenner* make no such distinction. For example, in *Guaclides v. Kruse*, the provision creating the right of first refusal read as follows: “[I]n the event of a sale of the [burdened property] by the owners thereof, . . . the [rightholder] shall have the option to purchase the said premises for the same price as may be offered by a *bona fide* purchaser thereof.” 170 A.2d at 492. The *Guaclides* court went on to reject “the Michigan rule” on the grounds that “the attempted sale of the whole tract for a single price is no indication of an intention or desire to sell the [burdened] portion alone.” *Id.* at 494. Moreover, a number of courts have relied on *Brenner* in awarding specific performance on the burdened property in the event of a package deal where the right of first refusal was expressly contingent upon the owner’s *intention* to sell. See, e.g., *Berry-Iverson Co. of N.D.*,



erty on the theory that the owner's intention to sell the burdened property as part of a package deal is a manifestation of the owner's intention to sell the burdened property for the purpose of triggering the privilege.<sup>116</sup> The *Brenner* decision provides the rationale for this conclusion: even if the owner is only willing to accept an offer for a number of properties sold together in one package, the fact remains that the burdened property would be sold in such a transaction. Certainly, as far as the rightholder is concerned, it makes no difference if the burdened property is to be sold alone or as part of a package deal.<sup>117</sup> In either case, the rightholder would expect to receive an opportunity to purchase the burdened property. In addition, the *Brenner* decision notes that by accepting a third party's offer for a package deal, the owner, herself, is responsible for making it impossible to determine the price she would be willing to accept for the burdened property alone.<sup>118</sup> Consequently, the owner should not be allowed to prevent the rightholder from exercising her privilege by arguing the price the rightholder is to pay is undetermined; nor should the owner be heard to complain that awarding specific performance denies her the control she was to have in establishing that price.

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Inc. v. Johnson, 242 N.W.2d 126, 128, 133 (N.D. 1976) (relying on *Brenner* as authority for granting specific performance on the burdened property where the right of first refusal was to be activated "at any time the owners desire to and are willing and able to sell" the burdened property); Maron v. Howard, 66 Cal. Rptr. 70, 71, 79 (Cal. Ct. App. 1968) (citing *Brenner* as support for award of specific performance on the burdened property where owner sought to sell burdened property as part of a package deal and right of first refusal's activation was conditioned on owner's "desire" to sell burdened property).

116. See, e.g., *Pantry Pride Enter. Inc.*, 630 F. Supp. at 640 ("We similarly conclude that the intention to sell the leasehold interest and equipment where [only] the leasehold interest is protected by a right of first refusal, can be taken as the intention to sell the leasehold interest.") (emphasis added); *Berry-Iverson Co. of N.D., Inc.*, 242 N.W.2d at 134 ("[W]e conclude that an intention to sell the a larger parcel of land, including [the burdened property], is evidence of an intention to sell the [burdened property]."); *Riley*, 808 S.W.2d at 189 ("[U]nder the facts of this case, the trial court erred in holding that a transfer of multiple condominiums, that includes the burdened property, does not evince an intent to transfer the burdened condominium alone.").

117. See *Continental Cablevision of N.E., Inc.*, 873 F.2d at 719 (Right of first refusal implicated by sale of grandparent company because right of first refusal's objectives "were as much affected by [sale of] stock in [the grandparent company] . . . as by [a sale of] stock in [the burdened company] itself"); *Anderson*, 473 P.2d at 89 ("[A]s far as the [rightholders] were concerned, the [burdened property was] effectively 'sold' and placed beyond their reach, regardless of the details of the [package deal] transaction between the [owner] and [the third party].").

118. See *supra* notes 111-13 and accompanying text.

A majority of courts disagree with the bases of the *Brenner* decision.<sup>119</sup> Beyond the fundamental disagreement over the inference to be drawn from the owner's willingness to accept a third party's offer for a package deal, these courts contend that awarding specific performance on the burdened portion is contrary to the right of first refusal's operation.<sup>120</sup> In addition, it requires courts to engage in the inconvenient and inappropriate process of determining the amount the rightholder must pay to exercise her privilege.<sup>121</sup>

#### D. A Case For Monetary Relief

While rights of first refusal are thought to be enforceable through both legal and equitable remedies,<sup>122</sup> only the Supreme Court of Kansas, in *Anderson v. Armour & Company*,<sup>123</sup> has upheld an award of monetary damages where the burdened property

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119. *Ollie*, 669 P.2d at 279-80 ("The majority view . . . denies to the [rightholder] specific performance for only the option-encumbered part of the whole property."); *Gyurkey*, 651 P.2d at 933 ("[T]he majority rule . . . denies the preemptive rightholder the right to seek specific performance which would require the offering of the encumbered property to himself by the owner."); *Myers*, 189 N.W.2d at 576 ("[A] majority of the courts which have considered the problem [of the package deal] have held that the tenant cannot obtain specific performance in these situations.").

120. *Myers*, 189 N.W.2d at 576 ("We think that to grant specific performance of the demised premises for their market value is to rewrite the [rightholder's] preferential right. That right requires the [owners] . . . to sell to the [rightholder] at the same price and for which the [owner] would be willing to sell to any other person, not at the market value.") (internal quotations omitted); see also *Chapman*, 800 P.2d at 1151 ("To require specific performance on the [burdened property] for [the proportionate value of the package] would . . . require judicial reconstruction of the parties' contract."); *Guaclides*, 170 A.2d at 494 ("In order to apportion [the value of the burdened property to the package deal] a court would . . . have to remake the parties' agreement . . .").

121. *Chapman*, 800 P.2d at 1151 ("[Refusing to give specific performance] protects . . . from problems and potential inequities which may result from deriving a value for the smaller burdened tract by allocation, either proportionally . . . or by some sort of judicial determination of market value."); *Traxler*, 90 S.E.2d at 488 ("It is not for the courts to undertake to apportion the fair value of the [burdened] lot to the amount at which [the owner] proposed to sell both lots."); *Guaclides*, 170 A.2d at 494 ("In order to apportion, a court would . . . be forced either to indulge in the unwarranted assumption that every acre of the parcel was of equal value, or to engage in the cumbersome and invariably unsatisfactory task of weighing expert testimony on the comparative values of the two parcels."). *Contra Maron*, 66 Cal. Rptr. at 79 ("Determination of the value of the property is a common task of courts in condemnation, partition, and other proceedings. If equitable considerations support the position of one who seeks specific performance, particularly if he has previously changed his position in reliance on the contractual right that he seeks to enforce, courts of equity will assume the task of ascertaining the consideration if it has become impossible of ascertainment by the method provided in the contract.").

122. See 1A CORBIN *supra* note 6, at 471.

123. 473 P.2d 84 (Kan. 1970).

was sold as part of a package deal.<sup>124</sup> In 1963, Armour purchased a 30-acre portion of a 40-acre tract of land and leased the west 13.75 acres to K.T., Russ and Robert Anderson for a term of five years. The Andersons, having previously leased the property from the preceding owner, had been long-time tenants of the land, which they used for their large-scale cattle-feeding operation. Consequently, the property Armour purchased contained improvements and equipment owned and placed by the Andersons at their expense. Among other provisions, the Armour-Anderson lease agreement contained the following:

In the event the Lessor desires to sell the premises, the Lessor agrees to notify the Lessee in writing of such intention and of the purchase price and shall allow Lessee fifteen (15) days from day of mailing such notice within which to attempt to negotiate a purchase and sale contract for the premises with the Lessor.<sup>125</sup>

On November 29, 1967, Armour conveyed all 30 acres to Iowa Beef Packers, Inc. in a transaction that included an exchange of properties. The Andersons, however, were not notified of the conveyance until four months later when Armour informed them that its lease had been assigned to Iowa Beef. Subsequently, the Andersons filed suit against Armour for monetary damages. Specifically, the Andersons claimed that Armour's failure to provide them with an opportunity to purchase the burdened property constituted a breach of the lease agreement which caused them damages totalling \$75,000. A jury trial resulted in a verdict against Armour in the amount of \$25,000.<sup>126</sup> Upon review, the Supreme Court of Kansas upheld the award.<sup>127</sup> It found that the quoted lease provision gave the Andersons "a pre-emptive right to purchase" that "ripened into an enforceable contract right" when Armour decided to sell.<sup>128</sup> In addition, the Supreme Court held that if the preemptive right was intended to be inapplicable in the event of the package deal, it was dependent upon the owners, who prepared the agreement, to state so expressly.<sup>129</sup> Furthermore, the fact that the conveyance to the third party involved an exchange of properties did not frustrate the right's application because "as far as the Andersons were concerned the 13.75 acres were effectively

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124. *Id.* at 89.

125. *Id.* at 86.

126. *Id.* at 86-87 and 123.

127. *Id.* at 89.

128. *Anderson*, 473 P.2d at 88.

129. *Id.* at 89.

'sold' and placed beyond their reach regardless of the details of the transaction between Armour and Iowa [Beef]."<sup>130</sup> Finally, the court held that had the rightholders been given an opportunity to buy the burdened property, they could have purchased the land at its fair market value without the improvements which they already owned. Consequently, the damages awarded by the jury, which were determined by deducting the value of the tract without improvements from the value of the tract with improvements, were entirely appropriate.<sup>131</sup>

The *Anderson* decision is conspicuously void of discussion concerning the approach other courts have taken in the event of a package deal. Nevertheless, from the rationale employed in the *Anderson* decision,<sup>132</sup> it is clear that Kansas rejects the view taken by a majority of jurisdictions, namely that the sale of the burdened property as part of a larger package of properties does not activate the right of first refusal.<sup>133</sup> In addition, there is nothing in the *Anderson* decision to suggest that the Supreme Court of Kansas thought that only monetary damages are available. Instead, it is apparent that the Supreme Court of Kansas aligns itself with those jurisdictions that contend the package deal does activate the right of first refusal, so as to require an owner who is contemplating such a transaction to offer the burdened portion alone to the rightholder at its fair market value.<sup>134</sup> Consequently, it would be repetitive to discuss the arguments for and against the result reached by the Kansas Supreme Court, as these arguments have already been made above in the discussion of the *Brenner* decision.<sup>135</sup> Presumably, the only reason the rightholders in *Anderson* did not receive relief in the form of specific performance on the burdened property alone is that they only asked for monetary damages.<sup>136</sup> There

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130. *Id.*

131. *Id.* This calculation yields standard expectation damages. The owner of course cannot argue that there is no proof that the rightholders would have exercised their privilege. That factor is unknown only because of the owner's own failure to comply with the preemption agreement. *See supra* notes 111-13 and accompanying text.

132. *See supra* notes 128-30 and accompanying text.

133. *See, e.g., Chapman*, 800 P.2d at 1151; *Crow-Spieker #23*, 731 P.2d at 350; *Ollie*, 669 P.2d at 281; *Gyurkey*, 651 P.2d at 932; *Myers*, 189 N.W.2d at 576; *Straley*, 278 A.2d at 70; *New Atl. Garden*, 194 N.Y.S. at 40; *Guaclides*, 170 A.2d at 494.

134. *See supra* Part IIC and note 114.

135. *See supra* notes 115-21 and accompanying text.

136. *Anderson*, 473 P.2d at 89. *Cf. Thomas & Son Transfer Line, Inc.*, 574 P.2d at 111 (asserting monetary damages are inadequate substitute for specific performance on the burdened property where burdened property was essential to operation of rightholder's business).

is nothing in the *Anderson* decision to suggest that specific performance on the burdened property would not have been an equally appropriate remedy had the rightholder only asked for it. In fact, in many cases where the rightholder is not leasing the burdened property and is, therefore, unlikely to make improvements to it, monetary damages would not be easily determinable, and such relief would not be sought.<sup>137</sup> Ultimately, if the package deal entitles the rightholder to specific performance,<sup>138</sup> the rightholder would be entitled to monetary damages as an alternative as well.<sup>139</sup>

### E. A Case For Specific Performance On The Entire Package

Among the courts that hold that the package deal triggers the right of first refusal, most agree that the privilege is activated with respect to the burdened portion of the package alone.<sup>140</sup> Another view is that when a right of first refusal is activated by the owner's intention to accept a third party's offer for a package deal, the rightholder's privilege embraces the entire package. In other words, if the owner is prepared to accept a third party's offer for the burdened property as part of a package deal, the rightholder's privilege entitles her to preempt the entire sale. If the owner fails to provide the rightholder with an opportunity to purchase the entire package before selling to the third party, the rightholder may seek specific performance of her privilege, requiring the owner to provide her with an opportunity to purchase the entire package at the same price and upon the same terms as the owner is willing to accept from the third party.

Such specific performance on the entire package was adopted by the New York State Supreme Court in Tompkins County in *Capalongo v. Giles*.<sup>141</sup> In that case, Sydney and Doris Giles gave

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137. See, e.g., *Edmonds v. Galey*, 458 P.2d 650 (Wyo. 1969); *Anasae Realty Corp. v. Firestone*, 478 N.Y.S.2d 8, 9 (N.Y. App. Div. 1984).

138. See generally, EDWARD YORIO, *CONTRACT ENFORCEMENT* § 10.2.1 at 264-65 and § 12.2.1 at 312-13 (1989) (discussing tendency to award specific performance of rights of first refusal burdening real estate and securities).

139. *Id.* § 1.3 ("[T]he normal remedy for breach of contract . . . [is] monetary damages."); Anthony J. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 354 (1978).

140. See, e.g., *Pantry Pride Enters., Inc.*, 630 F. Supp. at 640; *Berry-Iverson*, 242 N.W.2d at 134; *Anderson*, 473 P.2d at 89; *Denco*, 97 So.2d at 265; *Brenner*, 27 N.W.2d at 322; *Riley*, 808 S.W.2d at 189.

141. 425 N.Y.S.2d 225, 228 (N.Y. Sup. Ct. 1980), *rev'd on other grounds sub nom. Capalongo v. Desch*, 438 N.Y.S.2d 638 (N.Y. App. Div. 1981), *aff'd*, 443 N.E.2d 491 (1982).

The same interpretation of the effect of a package deal upon a right of first refusal appears to have been reached by the Supreme Court of Appeals of Virginia in *First*

Peter and Sandra Capalongo a right of first refusal on a triangular plot of land that lay adjacent to the Capalongos' property.<sup>142</sup> Nearly eight years later, a third party offered to purchase a 123-acre parcel of land from the Capalongos, a portion of which included the burdened plot.<sup>143</sup> The Gileses offered the Capalongos an opportunity to purchase the entire package on the same terms as specified in the third-party offer. Before the Capalongos accepted, however, the owners executed a contract with the third party.<sup>144</sup> The Capalongos filed suit, seeking rescission of the sale to

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*Nat'l Exch. Bank v. Roanoke Oil Co., Inc.* 192 S.E. 764 (Va. 1937). In that case, the Virginia Supreme Court affirmed a trial court's order compelling an owner who sought to sell burdened property as part of a larger parcel to convey the entire parcel to the rightholder. *Id.* at 772, 776. Subsequent courts addressing the issue of the package deal, however, contend the Virginia decision never addressed the effect of the package deal upon the rightholder's privilege. For example, in *Atlantic Refining Co.*, 51 A.2d at 724, the Supreme Court of Pennsylvania explained that the *First Nat'l Exch. Bank* decision rested on the grounds that the owner in fact offered the larger parcel to the rightholder and the rightholder accepted that offer. A similar—but inverted—explanation was provided in *Guaclides*, 170 A.2d at 496. In *Guaclides*, the court explained that the Supreme Court of Appeals of Virginia's affirmance was based on the fact that the rightholder offered to purchase the entire parcel and the owner accepted that offer. These explanations are insupportable. The trial court in *First Nat'l Exch. Bank* had expressly ruled that the right of first refusal required the owner to give the rightholder the opportunity to match any acceptable offer affecting the burdened property. 192 S.E. at 769. In affirming, the Supreme Court of Appeals stated:

The interpretation of the contract [creating the right of first refusal] by the trial court, under the evidence and the circumstances in this case, is fair and reasonable. Out of the conflict of the evidence there is sufficient to support that interpretation, which also seems to be in harmony with the original understanding of the parties as expressed by their own actions.

*Id.* at 771 (emphasis added). At best, it could be said that the *First Nat'l Exch. Bank* court merely held that if the rightholder wishes to exercise her right of first refusal on the entire parcel, she may do so, but that the court did not reach the question of whether the rightholder loses her right completely if she fails to do so. *Pantry Pride Enter., Inc. v. Stop & Shop Companies, Inc.*, 630 F. Supp. 637, 639 (E.D. Va.), modified, 806 F.2d 1227 (4th Cir. 1986).

142. The provisions creating the privilege read as follows:

[I]n the event the [owners] decide to sell the parcel, the [owners] do hereby agree to first offer to sell said parcel to the [rightholders], before any and all others.

That in the event any third party offers to purchase said parcel from the [owners], the [owners] do agree to then give the [rightholders] a chance to match said offer within ten days after notifying the [rightholders] of said offer, and the [rightholders], if they notify the [owners] in writing of their willingness to match said offer, shall complete the purchase of same within thirty days thereafter.

*Capalongo v. Desch*, 438 N.Y.S. 638, 639 (N.Y. App. Div. 1981), *aff'd*, 443 N.E.2d 491 (1982).

143. *Giles*, 425 N.Y.S.2d at 226.

144. *Id.*

the third party and an order that the entire property be conveyed to them or, if the Gileses could not give them a marketable title, monetary damages.<sup>145</sup>

At the outset, the Tompkins County court explained that at the time the owners accepted the third party's offer, the third party was aware of the rightholder's privilege on the burdened plot.<sup>146</sup> The court reasoned that the third party was not a *bona fide* purchaser because the right of first refusal required the owner, "as a matter of law," to give the rightholders an opportunity to purchase the entire 123-acre parcel.<sup>147</sup>

The Tompkins County court discussed a series of New York Appellate Division cases addressing the package deal and reaching incongruous results. The court then stated:

[A] better analysis of the situation presented here and in similar situations is that where an owner does have an offer from a third party to purchase a piece on which he has given a first refusal option, but on terms which specify inclusion of the piece in a larger parcel, that he thereupon has a duty to offer the whole parcel to the [rightholder] on the same terms.<sup>148</sup>

The Tompkins County Court touted its solution as giving the rightholder "as much protection as in all fairness he has a right to expect" and "impos[ing] no burden or hardship on the owner as, whoever becomes the ultimate purchaser, he receives the same compensation."<sup>149</sup> This language suggests that the court's rationale is premised on a view of the package deal simply as a condition to the sale of the burdened property. The nature of a right of first refusal is such that it merely provides the rightholder with the opportunity to purchase the burdened property on the same terms and conditions as a third party is willing to offer for it.<sup>150</sup> Therefore, requiring a rightholder, who wishes to exercise her right of first refusal on the burdened portion, to purchase the entire package is consistent with the rightholder's expectations. It is not any different from other unconventional terms such as requiring the rightholder to exercise her privilege by entering into a partnership agreement or exchanging parcels of land rather than paying cash.<sup>151</sup> The *Giles* court's rationale is that by entering into an agreement

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145. *Id.*

146. *Id.* at 227.

147. *Id.* (emphasis added).

148. *Giles*, 425 N.Y.S.2d at 228.

149. *Id.*

150. See *supra* notes 29-33 and accompanying text.

151. See *supra* notes 31-32 and accompanying text.

that allows a third party's offer to set the price and conditions for the sale of the burdened property, the rightholder assumes the risk of receiving a condition of sale that is unconventional or unique.<sup>152</sup> In the instance of the package deal, the unconventional condition happens to be the purchase of additional property. So long as that condition is commercially reasonable, made in good faith and not specifically designed to defeat the right of first refusal, the rightholder should be required to match the condition if she wishes to exercise her prerogative.<sup>153</sup> Under this analysis, specific performance on the entire package comports with the nature and operation of ordinary right-of-first-refusal agreements and the expectations of the parties.

Specific performance on the entire package as a solution to the package deal has been expressly rejected by other courts either (i) because its practical effect is to allow the owner to destroy every right of first refusal by including the burdened property in a package deal<sup>154</sup> or, (ii) because it gives the rightholder more than she bargained for.<sup>155</sup> The former views specific performance on the entire package as unfair to the rightholder. The latter views this solution as unfair to the owner.

The potential for harm to the rightholder is obvious. If the owner could include the burdened property as part of a package and force the rightholder to accept the entire package or forfeit her privilege, then the owner could simply nullify every right of first refusal by combining the burdened property with items that the rightholder may not want or cannot afford.<sup>156</sup> This criticism recognizes that the condition contemplated, and the risk undertaken, by entering into a right-of-first-refusal agreement relates specifically to the type of consideration to be paid (cash, securities, property or a particular finger ring)<sup>157</sup> and the method of its payment (one lump sum or in installments over time).<sup>158</sup> While it is true that entering into an ordinary right-of-first-refusal agreement means ac-

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152. Brown, *supra* note 14, at 176 and n.144 ("Considering all the variable terms, besides the price, involved in a contract, the right holder is taking a great risk of being faced with the choice of an onerous contract or losing the land.").

153. See *supra* note 33 and accompanying text.

154. See, e.g., *Pantry Pride Enter., Inc.*, 806 F.2d at 1229; *Radio Webs, Inc.*, 292 S.E.2d at 715

155. See, e.g., *Atlantic Refining Co.*, 51 A.2d 719, at 723; *New Atl. Garden, Inc.*, 194 N.Y.S. at 39-40; *Guaclides*, 170 A.2d at 493.

156. *Pantry Pride Enter., Inc.*, 806 F.2d at 1229.

157. See *Prince*, 649 P.2d at 824.

158. See *Radio Webs, Inc.*, 292 S.E.2d at 714 (asserting that terms and conditions contemplated by right of first refusal pertains to possibility of "deferred payments and



cepting the risk of an unconventional or unique condition to exercising the right, the rightholder contemplates a condition that will relate to the value of the property and not a collateral agreement that is wholly unrelated to the burdened property.<sup>159</sup> Therefore, awarding specific performance on the entire package does not comport with the right of first refusal's operation. And permitting the right of first refusal to be rendered a nullity by the addition of items the rightholder may not want or cannot afford does not provide the rightholder with as much protection as she has a right to expect.

Specific performance on the entire package in the event of a package deal poses problems of unfairness to the owner as well. As the cases expressly rejecting specific performance on the entire package reveal, often it is the owner, rather than the rightholder, who argues against such relief.<sup>160</sup> From the owner's perspective, an expansion of the right of first refusal's reach is detrimental because property burdened by such rights suffers from a deflated value and inferior marketability.<sup>161</sup> Entitling the rightholder to specific performance on the entire package permits the right of first refusal's influence to reach beyond its bargained-for parameters, imposing a significant burden on the owner. Consequently, most courts that reject specific performance on the entire package do so because

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security for those payments," not terms and conditions, such as a package deal, that are "wholly unrelated to the purchase of [the burdened company]").

159. *Ollie*, 669 P.2d at 281 (characterizing the "addition of terms and conditions" such as those contained in a package deal as "wholly unrelated" to the burdened property); *Radio Webs, Inc.*, 292 S.E.2d at 714 ("The parties agreed that the price and other terms and conditions, such as possible deferred payments and security for those payments, were to be supplied by the offer of a third party . . . . To now add 'terms and conditions' such as [a package deal] does not satisfy [rightholder's] right of first refusal and is not a *bona fide* offer within the meaning of the agreement.").

160. See, e.g., *Atlantic Refining Co.*, 51 A.2d at 723; *New Atl. Garden, Inc.*, 194 N.Y.S. at 39-40; *Guaclides*, 170 A.2d at 493.

161. *Ferrero Constr. Co.*, 536 A.2d at 1144 ("[M]any prospective purchasers, recognizing that a matching offer from the [rightholder] will defeat their bids, simply will not bid on the property. This in turn will depress the property's value and discourage the owner from attempting to sell."). See also *Winter v. Skoglund*, 404 N.W.2d 786, 791 (Minn. 1987) ("[A]s a practical matter, a right of first refusal imposes a significant burden on the marketability of corporate shares."); Stanley Rosenberg and Sanford J. Schlesinger, *The Benefits of Family Limited Partnerships in Estate Planning*, N.Y. Sr. B.J., Nov. 1994, at 25-26 (characterizing rights of first refusal as "negative factors" that permit discounts for lack of marketability in valuing limited partnership interest for gift tax purposes).

such relief provides the rightholder with an undeserved windfall, not because it is unfair to the rightholder.<sup>162</sup>

### III. The Package Deal Default Rule

As the preceding material indicates, when an owner is prepared to sell a number of properties, one of which is burdened by a right of first refusal, courts rely on a variety of factors in determining the relief to which a rightholder is entitled. Because right-of-first-refusal agreements tend neither to provide for this contingency expressly, nor to use language from which to deduce the intention of the parties,<sup>163</sup> courts primarily base their holdings on generally accepted rules related to the nature and operation of rights of first refusal.<sup>164</sup> Unfortunately, these approaches have led courts to choose from among five different forms of relief with little consistency<sup>165</sup> and even less uniformity.<sup>166</sup> As a result, parties to right-of-first-refusal agreements cannot be certain of the legal consequences of the package deal unless they anticipate and expressly provide for this disruptive contingency. Further, so long as parties to right-of-first-refusal agreements continue to omit terms that would account for a package deal, the need for a uniform judicial approach to the package deal will persist.<sup>167</sup>

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162. See, e.g., *Atlantic Refining Co.*, 51 A.2d at 723 (“[Rightholder’s] privilege of purchasing [burdened property] in specified circumstances cannot reasonably be stretched into an enforceable right to purchase a plot of increased size not described in the option.”); *New Atl. Garden, Inc.*, 194 N.Y.S. at 39-40 (“By no possible interpretation could the parties be said to have contemplated by [the right of first refusal] provision any other premises than those [specified] to the [rightholder] under said [agreement].”); *Guaclides*, 170 A.2d at 493 (“As the trial court here properly pointed out, a preemptive right to purchase a part only of the whole does not give a preemptive right to purchase the whole. To rule otherwise would be a judicial remolding of the contract without legal authority.”).

163. See, e.g., *Chapman*, 800 P.2d at 1150; *Thomas & Son Transfer Line, Inc.*, 574 P.2d at 109; *Brenner*, 27 N.W.2d at 321.

164. See, e.g., *supra* notes 81-86, 116-18, 150-53 and their accompanying text.

165. See *supra* note 45.

166. Compare *Berry-Iverson Co., of N.D., Inc.*, 242 N.W.2d at 134 (awarding specific performance on the burdened property) with *Ollie*, 669 P.2d at 281 (preventing the owner from entering into a package deal); compare also *Crow-Spieker #23*, 731 P.2d at 350 (denying any relief) with *Giles*, 425 N.Y.S.2d at 229 (awarding specific performance on the entire package), *rev'd on other grounds sub nom. Capalongo v. Desch*, 438 N.Y.S.2d 638 (N.Y. App. Div. 1981), *aff'd*, 443 N.E.2d 491 (1982).

167. More recent case law reveals two examples of attempts to contract for the package deal (one successful; one not). In *Sawyer v. Firestone*, a potential buyer obtained a contract to purchase containing an ordinary right-of-first-refusal clause. 513 A.2d 36, 37 (R.I. 1986). However, before closing, the owner altered the right of first refusal agreement so that it was contingent upon the sale of the burdened property “as a separate parcel.” *Id.* at 37. This alteration was held to be a breach of contract,

In order to attain a uniform solution to the problems posed by the package deal, the process used until now by the courts in determining the effect of the package deal on the rightholder's privilege must be abandoned. Courts currently rely on the process of contract interpretation,<sup>168</sup> extrapolating a solution from the language used to create the privilege or from generally accepted rules relating to the privilege's nature and operation.<sup>169</sup> A uniform solution is possible only if courts recognize that the package deal is neither contemplated by the language of ordinary right-of-first refusal agreements, nor the generally applicable rules regarding such privileges. Consequently, a judicially-supplied term—fashioned from the principles of fairness and efficiency—is necessary to determine the effect of the package deal upon the rightholder's privilege.<sup>170</sup> The process by which a court supplies a term for a missing contingency is distinct from the process of contract interpretation.<sup>171</sup> By submitting to this process, a single solution to the questions posed by the package deal becomes apparent.<sup>172</sup>

An impressive nomenclature has developed for judicially and legislatively supplied terms.<sup>173</sup> In the current fashion, however, they are termed "default rules."<sup>174</sup> Such rules dictate the rights of the parties unless the parties, by express provision, manifest a con-

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entitling the potential purchaser to rescission. *Id.* at 40. A more successful attempt to contract for the package deal appears in *Continental Cablevision of N.E., Inc.*, where the right of first refusal was made contingent upon transfer of stock made "either directly or indirectly." 873 F.2d at 718 n.3. Sale of the burdened company's grandparent stock was held to activate the right of first refusal. *Id.* at 719.

168. See generally 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.7 (1990) (describing process of contract interpretation).

169. See *supra* notes 81-86, 116-18, 150-53 and their accompanying text.

170. See generally 2 FARNSWORTH, *supra* note 168, § 7.16 (describing process by which courts supply contract terms).

171. 2 FARNSWORTH, *supra* note 168, § 7.16.

172. Judicially-created default rules are found throughout the law of Contracts. See, e.g., Beth A. Eisler, *Default Rules for Contract Formation By Promise and the Need for Revision of the Mailbox Rule*, 79 KY. L.J. 557 (1991).

173. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (Supplied terms "have alternatively been termed background, backstop, enabling, fallback, gap-filling, off-the-rack, opt-in, opt-out, preformulated, preset, presumptive, standby, standard-form and supplementary rules.").

174. Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 826 (1992) ("The rhetoric of default rules is in the process of becoming the terminology of choice for contract theorists."); Ayres & Gertner, *supra* note 173, at n.24. See, e.g., Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); Jules L. Coleman, et. al., *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*, 12 HARV. J. LAW & PUB. POL'Y 639 (1989);

trary intention.<sup>175</sup> Commentators recognize three sources of contractual incompleteness that give rise to the application of default rules. First, some contingencies are not addressed because the parties fail to foresee them.<sup>176</sup> Second, other contingencies are omitted for pragmatic reasons: These are usually foreseeable (and foreseen) contingencies that are either unlikely to occur or too delicate to risk negotiating over.<sup>177</sup> In such situations, the parties may simply conclude that the cost of contracting for such a contingency outweighs its benefits.<sup>178</sup> Three, omissions may be the result of one or more parties' purposeful concealment of information for strategic reasons.<sup>179</sup>

To some extent, the appropriate default rule in any given situation is dependent upon the reason the parties failed to contract for the missing term themselves.<sup>180</sup> In broad terms, default rules either (1) allocate risks upon the party better able to insure against

175. Barnett, *supra* note 174, at 825 (“[D]efault rules are binding in the absence of manifested assent to the contrary . . .”); Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703, 1706 n.11 (1989); Ayres & Gertner, *supra* note 173, at 87; Alex Y. Seita, *Uncertainty and Contract Law*, 46 U. PITT. L. REV. 75, 122-23 (1984); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1090 (1981).

176. Parties may simply fail to perceive the need to supply the term out of haste, inadvertence, or because the term concerns a contingency too remote for them to have contemplated. 2 FARNSWORTH, *supra* note 168, § 7.15, at 301; Barnett, *supra* note 174, at 822; *see generally* Goetz & Scott *supra* note 175 (discussing the special problems of identifying future conditions in relational contracts).

177. 2 FARNSWORTH, *supra* note 168, § 7.15 at 300; Ayres and Gertner, *supra* note 173, at 92.

178. 2 FARNSWORTH, *supra* note 168, § 7.15 at 300; Barnett, *supra* note 174, at 822 (“Many foreseeable contingencies, given their low probability, are better left unnegotiated *ex ante* in the hopes that they will not materialize or will be handled cooperatively *ex post* if they do.”); Ayres and Gertner, *supra* note 173, at 92; Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466, 477 (1980) (“[I]f the probability of a contingency (or class of contingencies—an event) is low, then it may be less costly in the expected sense for the parties to resolve difficulties only on the chance that they arise than to bear with certainty the costs of providing for the contingency in the contract.”). Professors Ayres and Gertner provide a terse but comprehensive list of possible transaction costs that may persuade parties from explicitly contracting for a given contingency. The list of transaction costs include: “[i] legal fees, [(ii)] negotiation costs, [(iii)] drafting and printing costs, [and (iv)] the costs of researching the effects and probability of a contingency.” Ayres & Gertner, *supra* note 173 at 92-93.

179. A party may withhold information to increase her share of the contract's expected benefits. Barnett, *supra* note 174, at 822. *See generally* Jason S. Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990) (detailed analysis of strategic omissions); Ayres & Gertner, *supra* note 173 (introducing strategic considerations as a source of contractual incompleteness).

180. *See* Ayres & Gertner, *supra* note 173, at 127.

them,<sup>181</sup>(2) provide for what the parties generally would have agreed to,<sup>182</sup> or (3) compel parties to reveal information.<sup>183</sup> Except where strategic considerations are the source of contractual incompleteness,<sup>184</sup> the central goal of any default rule is to reduce the cost of contract negotiations by supplying a term that the parties would have agreed to themselves; or more accurately stated, one which they would not be likely to have circumvented with an express provision to the contrary.<sup>185</sup> By providing a rule that the parties are not likely to contract around, the court allows the parties to continue to rely on the pragmatic considerations that led them to omit the missing term in the first place.

There is nothing to indicate that the regular omission of a term addressing the package deal from right-of-first-refusal agreements is the result of strategic considerations. Nor is the package deal contingency so unlikely as to be entirely unforeseeable. In all likelihood, the reason parties to right-of-first-refusal agreements continue to omit a provision addressing the possibility of a package deal is because the time and money needed to research the effect and probability of a package deal and to negotiate and draft a special provision for its occurrence outweighs the benefits of having such a provision. At the time the parties are drafting the right-of-first-refusal agreement, the possibility of a package deal, or at least a dispute arising from one, is likely to seem improbable. Moreover, because right-of-first-refusal agreements are often merely ancillary provisions within more complex agreements,<sup>186</sup> only a small portion of the transaction resources—the time and money needed

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181. See generally Goetz & Scott, *supra* note 175 (describing implied terms as “standard or common risk allocations”); Richard A. Posner and Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977) (explaining the doctrines of “impossibility”, “impracticability”, and “frustration” in terms of risk allocation).

182. Ayres & Gertner, *supra* note 173, at 89-90 (listing commentators that “have championed the ‘would have wanted’ theory” for default rules); see also 2 FARNSWORTH, *supra* note 168, § 7.16 at 305-08.

183. Ayres & Gertner, *supra* note 173, at 97-100 (arguing that in some situations “penalty defaults” should be employed to encourage parties to contract around the default rule).

184. See generally Ayres & Gertner, *supra* note 173 (arguing that “penalty defaults,” compelling parties to contract around the default, should be utilized where strategic considerations are the source of contractual incompleteness).

185. See 2 FARNSWORTH, *supra* note 168, § 7.16 at 307-08; Ayres & Gertner, *supra* note 173, at 93; Goetz & Scott, *supra* note 175, at 270; Posner & Rosenfield, *supra* note 180, at 88; see also Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contract*, 7 J. LEGAL STUD. 1, 5-6 (1978).

186. See *supra* note 5 and accompanying text.

to research the effect and probability of a contingency and to negotiate and draft for it—will ordinarily be allocated to such secondary provisions. Even in circumstances where sufficient transaction resources are allocated to draft a package-deal contingency, the parties may be reluctant to negotiate and draft such a provision for fear that the negotiating and drafting process will either delay the execution of the primary agreement or, worse, lead to an impasse that will undo the primary agreement entirely.<sup>187</sup> Pragmatic considerations, then, are the most probable cause for the continued omission of a provision addressing the possibility of a package deal in right-of-first-refusal agreements.<sup>188</sup> As the material in Part II reveals, where parties to a right-of-first-refusal agreement fail to provide for the possibility of a package deal, there is no solution to the questions posed by the owner's willingness to enter into such a transaction that will comport with the parties' expectations completely. In choosing a default rule, however, it is only necessary to determine which of the possible solutions satisfies enough of the parties' expectations to dissuade them from incurring the inefficient transaction costs that are necessary to provide expressly for a package-deal contingency.<sup>189</sup>

The different solutions to the package deal that have already been adopted by various courts under a contract-interpretation analysis make the possibilities for a package-deal default rule evident. One possible default rule, reflecting the holdings of *Chapman*<sup>190</sup> and a majority of courts under a contract-interpretation analysis,<sup>191</sup> is that the owner may not enter into an agreement to sell the burdened property as part of a package deal at all. Under this rule, the rightholder would be entitled to an injunction, barring the owner from attempting to sell the burdened property as part of a package deal. Further, if the owner executed the sale of the burdened property as part of a package deal, the rightholder would be entitled to an order requiring the third party to reconvey the burdened property to the owner and enjoining the owner from selling

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187. See 2 FARNSWORTH, *supra* note 168, § 7.16 at 305. See, e.g., *Sawyer v. Firestone*, 513 A.2d 36, 37 (R.I. 1986) (seller's attempt to include a package-deal provision in contract to purchase real estate led to the buyer's rescission of the entire contract).

188. See *Shavell*, *supra* note 178 at 468 (“[B]ecause of the costs involved in enumerating and bargaining over contractual obligations under the full range of relevant contingencies, it is normally impractical to make contracts which approach completeness.”).

189. See *supra* note 86 and accompanying text.

190. 800 P.2d 1147 (Wyo. 1992).

191. For discussion see *supra* Part IIB.

the burdened property except in response to an offer for the burdened property alone.

A second possible default rule, mirroring the holdings of *Brenner*<sup>192</sup> and a significant minority of courts,<sup>193</sup> is to allow the owner to enter into an agreement to sell the burdened property as part of a package deal, but to require her to give the rightholder an opportunity to purchase the burdened portion of the package at a reasonable price before she may execute the sale to the third party. If the owner sells the burdened property as part of a package deal without providing the rightholder an opportunity to purchase the burdened portion, the rightholder would be entitled to specific performance of her privilege or, where assessable, monetary damages.

A third possible rule, modeled upon the *Giles* decision,<sup>194</sup> is to allow the owner to enter into an agreement to sell the burdened property as part of a package deal, but to require her to give the rightholder an opportunity to purchase *all* of the properties in the package deal before executing the sale to the third party. The rightholder, in turn, will only be able to exercise her privilege and prevent the sale of the package to the third party if she agrees to purchase the entire package for the price and under the terms contained in the third-party offer. If the owner sells the burdened property as part of a package deal without providing the rightholder an opportunity to purchase the entire package, the rightholder would be entitled to specific performance of her privilege or, where assessable, monetary damages.<sup>195</sup>

Finally, a possible default rule, reflecting the holding in *Crow-Spieker #23*,<sup>196</sup> is to permit the owner to sell the burdened property as part of a package deal and leave the rightholder without any remedy at all.

Of all these solutions, the one most likely to keep the parties to a right-of-first-refusal agreement from incurring the transaction costs necessary to provide for the package-deal contingency expressly is the second *Brenner*-like rule. This solution would allow the owner

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192. 27 N.W.2d 320 (Mich. 1947).

193. For discussion see *supra* Part IIC.

194. 425 N.Y.S.2d 225 (N.Y. Sup. Ct. 1980), *rev'd on other grounds sub nom. Capalongo v. Desch*, 438 N.Y.S.2d 638 (N.Y. App. Div. 1981), *aff'd*, 443 N.E.2d 491 (1982). For discussion see *supra* Part IIE.

195. Other solutions, mirroring the second and the third possible default rules but limiting the rightholder to monetary damages alone, are not considered because monetary damages for a breach of a right-of-first-refusal agreement are often not readily assessable.

196. 731 P.2d 348 (Nev. 1987). For discussion see *supra* Part IIA.

to enter into an agreement to sell the burdened property as part of a package deal, but to require her to give the rightholder an opportunity to purchase the burdened portion of the package deal before executing the sale. If the owner sold the burdened property as part of a package deal without first providing the rightholder an opportunity to purchase the burdened portion, the rightholder would be entitled to specific performance of her privilege or, where assessable, monetary damages.

This approach would significantly satisfy the expectations of the owner and the rightholder. It would serve both purposes for which rights of first refusal are created: (i) discouraging the sale of the burdened property and (ii) affording the rightholder the opportunity to purchase the burdened property should the owner ever decide to sell it.<sup>197</sup> The rule discourages the sale of the burdened property by permitting a third party's contract for a package deal to be preempted in part.<sup>198</sup> Negotiations to purchase property carry expense and effort that a third party will be less willing to expend where there is a potential for frustration by preemption.<sup>199</sup> This rule also serves the privilege's purpose of enabling the rightholder to buy the burdened property by providing the rightholder with such an opportunity even if the owner is only able to obtain an offer for a package deal.<sup>200</sup> In addition, this rule gives the owner the freedom to market her property in the manner she sees fit, including as part of a package of properties.

Concededly, neither party will be entirely satisfied with the effects of the proposed default rule. The owner will be dissatisfied with the rule because the requirement that she offer the burdened property to the rightholder before selling it as part of a package deal means that the owner stands to lose the opportunity to sell her property in the same manner she saw fit to market it. The rightholder will be dissatisfied with the default rule because permitting the owner to establish the price the rightholder is pay to exercise her privilege denies the rightholder of the benefit of having a third party establish that price.<sup>201</sup> A third-party offer for the burdened property, taking the risk of preemption into account,

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197. See *supra* notes 34-36 and accompanying text.

198. See *supra* note 35 and accompanying text.

199. See *Ferrero Constr. Co.*, 536 A.2d at 1144 ("[M]any prospective purchasers, recognizing that a matching offer from the [rightholder] will defeat their bids, simply will not bid on the property.").

200. See *supra* note 36 and accompanying text.

201. Even these concessions may be within the parameters of the parties expectations. See generally *Stutzman & Day*, *supra* note 14 at 293-94 (arguing that requiring



would likely be less than the reasonable price the owner will request. Nevertheless, as the following paragraph indicates, these concessions are minor in comparison to the consequences under any of the other possible package-deal default rules. It is worth reiterating that the appropriate default rule need not conform to the parties' expectations completely; it simply must provide the least incentive for the parties to right-of-first-refusal agreements to contract for the missing contingency expressly. Provisions addressing the package deal are omitted because it is impractical and inefficient to negotiate and draft for such a contingency.<sup>202</sup> Therefore, a default rule that allows the parties to rely on the practical reasons that led them to omit the term and does not induce them to incur the risks and costs of negotiating and drafting for the possibility of a package deal is the most economically efficient rule.

Denying the rightholder any relief in the event of a package deal is an untenable default rule. If the rightholder failed to contract around this rule, the owner would have the ability to render the privilege meaningless simply by attaching unburdened items to the burdened property and offering the resulting package for sale.<sup>203</sup> Under this rule, the rightholder's failure to account for the possibility of a package deal would lead to the evisceration of her privilege. Consequently, the rightholder would have a powerful incentive to contract around the rule and provide for the package-deal contingency expressly. The same is true, even if to a lesser extent, of a default rule that would require an owner to give the rightholder an opportunity to purchase the *entire* package. Such a rule only permits the rightholder to exercise her privilege if she is capable of purchasing the entire package for the price and under the terms contained in the third-party offer. The result is that the owner could render the rightholder's privilege meaningless simply by combining the burdened property with a cluster of items the rightholder may not want or cannot afford.<sup>204</sup> On the other hand, if a default rule prohibiting the owner from ever selling the burdened property as part of a package deal were adopted, the owner would have a strong incentive to provide for the possibility of a package deal expressly. The owner's failure to obtain a provision allowing her to seek offers for a package deal may prevent her

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the owner to offer the burdened property to the rightholder at a reasonable price before selling as part of a package deal satisfies the expectations of the parties).

202. See *supra* notes 186-88 and accompanying text.

203. See *supra* notes 63-67 and accompanying text.

204. See *supra* note 147 and accompanying text.

from ever selling the burdened property.<sup>205</sup> This is especially true where the value or usefulness of the property is or becomes inextricably tied to other properties. In addition, this rule limits the rightholder's opportunities for purchasing the burdened property;<sup>206</sup> such an opportunity is one of the reasons rights of first refusal are created.<sup>207</sup>

The adoption of a judicially-created default rule allowing the owner to sell the burdened property as part of a package deal only after providing the rightholder with an opportunity to purchase the burdened portion of the package deal, would be beneficial because it will put future parties to right-of-first-refusal agreements on notice of the effect a package deal would have on their rights.<sup>208</sup> This default rule would also remove the potential for arbitrary decisions, by establishing a single result in all instances where a property burdened by a right of first refusal is sold as part of a larger package of properties.<sup>209</sup> Moreover, though the proposed default rule does not remove every incentive to contract for the possibility of the package deal expressly, it does alleviate the more significant reasons for doing so. This default rule would serve every purpose for which the rights of first refusal are created,<sup>210</sup> without denying the owner the possibility of selling the burdened property as part of a package deal. In addition, it would not provide the owner with a mechanism with which to render the rightholder's privilege meaningless. The incentive for drafting around this default rule is minimal. Any incentive that remains, is exceedingly less than the incentives supplied by the other possible default rules.

### Conclusion

A persistent problem in right-of-first-refusal jurisprudence has been the effect of an acceptable third-party offer for a package of properties, a portion of which is burdened. In determining the effect of such package deals, courts have primarily relied on principles related to the nature and operation of rights of first refusal. Unfortunately, this approach has led different courts to reach disparate and inconsistent results.

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205. See *supra* notes 86-87 and accompanying text.

206. See *supra* notes 95-97 and accompanying text.

207. See *supra* note 36 and accompanying text.

208. See Seita, *supra* note 175, at 123.

209. *Id.*

210. See *supra* notes 35-36 and accompanying text.

The problems posed by the package deal, of course, could be remedied by the parties themselves through a provision addressing the effect of such a transaction on the rightholder's privilege. The provision would answer whether the package deal is to trigger the right of first refusal, and if so, whether the rightholder would be allowed to exercise her privilege on the burdened portion alone or on the entire package. There is, however, every indication that in many circumstances, the costs of agreeing to a provision addressing the somewhat remote possibility of a dispute arising out of a package deal will outweigh its benefits. As a result, parties to right-of-first-refusal agreements will continue to omit a provision addressing the possibility of a package deal. Therefore, a consistent and uniform judicial treatment of the package deal is desirable. The most appropriate solution is for the courts to adopt a default rule that would apply to all instances of the package deal, unless the parties to a right-of-first-refusal agreement contracted around the rule explicitly. In terms of fairness and efficiency, the most appropriate default rule is to require an owner who receives an acceptable offer for a package deal to provide the rightholder with an opportunity to purchase the burdened portion of the package at a reasonable price. If the owner fails to do so, the rightholder should be entitled to enforce her privilege by purchasing the burdened property at a price determined by the court to be fair and reasonable.

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