

RIGHTS OF FIRST REFUSAL, RIGHTS OF FIRST OFFER AND OPTIONS

RESOURCES compiled by Beat U. Steiner February 2016

ARTICLES

“Exercise Of Option As Affecting Rights Intervening Between Giving And Exercise Of Option,” 50 A.L.R. 1314 (1927).

“Instrument For Purchase Of Land As A Contract Or An Option,” 3 A.L.R. 576 (Originally published in 1919) and Supp. at 87 A.L.R. 563.

“Right To Damages Or Compensation Upon Condemnation Of Property, Of Holder Of Unexercised Option To Purchase,” 85 A.L.R.2d 588 (1962).

“Right To Proceeds Of Insurance, As Between Holder Of Title To Real Estate And One Having Option To Purchase It,” 65 A.L.R.2d 989 (1959).

Allen, Kathryn E., *Beware The Horse You Rode In On – “Preferential” Is Her Name And Mischief Is Her Game (A litigator’s perspective on preferential purchase provisions)*, ACREL Papers, Spring 2016, San Diego Meeting.

Annot., *Insurable Interest in Property of Lessee with Option to Purchase Property*, 74 A.L.R.4th at 883 (1989).

Anziska, Danile N., Bain, Sonia Kaur, Mak, Clara W. and Wallace, Kevin P. *Negotiating and Exercising Rights of first Refusal*, http://www.martindale.com/real-estate-law/article_Troutman-Sanders-LLP_1577880.htm.

Baltuch, *Groundbreakers Options and Rights of First Refusal*, The Practical Real Estate Lawyer, (July 2010).

Chaban, Matt A. V., *In the Hamptons, a Fight Over Land Is Also One Over Water*, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/2014/11/25/nyregion/in-the-hamptons-a-fight-over-land-is-also-one-over-water.html?_r=0.

Circo, Carl J., *Purchase Options, ROFR’s and ROFO’s: Theory and Practice*, ACREL Papers, Spring 2016, San Diego Meeting (an outstanding presentation of real property principles, a summary of economic theories. and an analysis of cases from which many lessons maybe learned).

Cohen, *When the Lease Is Only the Beginning: Negotiating Ancillary Documents*, 5 Prac. Real Est. Law. at 75 (Mar. 1989)(includes practical tips for drafting ROFR’s and options).

Currie, Andrew and Burgers, Kristen, *Bankruptcy Issues Affecting Joint Ventures*, XXIX American Bankruptcy Institute Journal No. 9 (November 2010)(Buyout options and ROFR's discussed among a number of topics).

Daskal, Bernard, *Right of First Refusal and the Package Deal*, 22 Fordham Urban Law Journal, Article 10 (1994)(a scholarly analysis of the case law addressing a ROFR Holder's rights when presented with an offer that includes more than the Subject Property).

Doyle, Martin, *Case Illustrates Twists and Turns in Dealing With Rights of First Refusal*, The Legal Intelligencer (October 19, 2009).

Fellows, *Testing Perpetuities Reforms: A Study of Perpetuities Cases 1984-89*," Real Prop. Prob. & Trust J. at 665 (Winter 1991). See cases collected in here.

Fries, Joseph M., *Tenant Purchase Options in Lease Transactions*, ACREL Papers October, 2007 (contains forms – "Simple" Right of First Refusal Provisions; ."Simple" Right of First Opportunity; Tenant's Right of First Refusal where Tenant leases the entire building; Tenant's Right of First Opportunity where Tenant leases only a portion of building; Purchase Option Settlement Terms and Conditions; Right of First Offer Agreement (granted to Seller if Buyer wants to sell the Subject Property prior to commencing construction of improvements)

Gluck & Gliner, *Negotiating Expansion Rights in Multi-Tenant Projects*, Real Est. Fin. at 59 (Spring 1994).

Goldman, *Drafting a Fair Right of First Offer Lease Option (with Form)*, 11 Prac. Real Est. Law. at 79 (Jan. 1995).

Goldman, *How to Draft a Fair Office Downsizing Option*, 10 Prac. Real Est. Law. at 47 (July 1994).

Gosfield, Gregory G. and Stern, Eric L., *Options and Rights of First Refusal and Rights of First Offer*, 2005 Real Estate Institute, www.klehr.com.

Grosskopf, Brit and Roth, Alvin E., *If you are offered the Right of First Refusal Should you accept? An Investigation in Contract Design*, <https://dash.harvard.edu/handle/1/4261988> (2009).

Halpern, Sheldon A., *Being Gun-Shy: Difficulties Surrounding the Trigger of Right of First Refusal and Right of First Offer*, Commercial Leasing Law and Strategy (July 2, 2005).

Herz, Andrew L., Reid, Susan M. and Segal, Earl L., *A Tenant Perspective on Expansion Rights*, ACRELShares March, 2003

Hopkins & Thomas, *Alligators in Commercial Leases: Transfers and Rights of First Refusal (with Sample Clauses)*, Prac. Real Est. Law. at 43 (March 2000)(practical comments on ROFR's and rights of first negotiation in commercial leases with form clauses for each).

Hua, Xinyu, *The Right of First Offer*, 30 *The International Journal of Industrial Organization* 389 (2012).

Kahan, Marcel, Shmuel Leshem, & Rangarajan K. Sundaram, *First-Purchase Rights: Right of First Refusal and Rights of First Offer*, 14 *American Law and Economics Review* 331 (2012)(an analysis of ROFO's and ROFR's in multiple-buyer sequential bargaining settings using game theory and mathematical models).

Kimball, Curtis R., *Bankruptcy Court Addresses Challenges to a Right of First Offer in a Revised Plan*, *Judicial Insights*, Summer 2014 (www.willamette.com).

Koenders, *Risk of Loss by Casualty Proceeding Contract for Conveyance of Real Property – Modern Cases*, 85 *A.L.R.4th* 233 (2001)(discusses the risk of loss in option contracts).

Knightlinger, Wilhelmina F., *To Insure or not to Insure, that is the Question - Title Insurance Considerations for Options, Rights of First Refusal, and other Similar Rights*, *ACREL Papers*, Spring 2016, San Diego Meeting.

Krause, Michele L. & Jennifer L. Jackson, *Filling the Purchase Option 'Gap': Preservation (or Suspension) of Rental Income and Other Lease Rights After Exercising the Option and Prior to Closing*, *Real Est. Fin. J.* at 50 (Winter 2005).

Mitchell, Thomas W., *Reforming Property Law to Address Devastating Land Loss*, 66 *Alabama Law Review* 1 (2014)(discusses the Uniform Partition of Heirs Property Act, including its provisions for the buyout of co-tenants in a partition action).

Murray, John C., *Contractual Deadline for the Exercise of Options: Do they Mean What They Say?* 25 *ACREL News* 14 (2007).

Murray, John C., *Options and Related Rights with Respect to Real Estate* (First American Title Insurance 2010) <http://www.firstam.com/title/resources/reference-information/jack-murray-law-library/options-and-related-rights-with-respect-to-real-estate.html>

Note, *Gulf Oil Corp. v. Chiodo: Interpreting Dual Option Leases Again*, *Fourth Circuit Review*, 45 *Wash. & Lee L. Rev.* at 819 (1988)(discussion of the interplay of a ROFR and an option granted to the same Holder).

Palomar, Joyce D., *Title Insurance Law*, Sec. 6:38 (2015 Edition).

Rapkin, Eric D., *Right of First Refusal to Purchase: Convenience Store's Exercise Was anything But Convenient*, 28 *Shopping Center Legal Update*, Issue 2 (Summer 2008)(analysis of *7-Eleven, Inc. v. Stin*, 961 So.A.2d 977 (Fla. Ct. App. 2007)).

Senn, Mark A., "Options – Generally," §4.18 of *Commercial Real Estate Leases: Preparation, Negotiation and Forms. 5th Edition*, (Wolters Kluwer 2015 Supplement)(a practical analysis and a review of leading cases, together with drafting suggestions and numerous forms).

Shepherd, Kevin L., *Rights of First Refusal/Poison Pills and Bad Faith*, Probate & Property 52 (May/June 2007) (excellent analysis of the good faith requirement in ROFR's).

Stein, Joshua, *It Seemed Like a Good Idea at the Time: Rights of First Offer and First Refusal*, 42 N.Y. Real Property Law Journal (2014) (a practical look at the problems with ROFO's and ROFR's).

Stein, Joshua, *Why Rights of First Offer and Rights of First Refusal Don't Work*, Commercial Observer (November 26, 2013) (a practical look at the problems with ROFO's and ROFR's).

Stein, Joshua, *Model Right of First Offer*, 42 New York Real Property Law Journal 20 (Fall 2014)(tenant's right of first offer to purchase annotated and discussed).

Stern, Elliott M., *Condominiums and the Right of First Refusal*, 48 St. John's Law Review 1146 (2012)(a look at ROFR's from the New York perspective, where such rights are commonly used to control who gets to occupy condominiums and cooperatives, including and analysis of the Rule Against Perpetuities issues).

Walker, David I. *Rethinking Rights of First Refusal*, Harvard Law School, The Center for Law, Economics, and Business, Discussion Paper No. 261 ISSN 1045-6333(August, 1999),

Weller, Phillip, *Determining Prevailing Market Conditions and Fair Market Value Forms*, ACRELSHares 1994

Wheat, R. David, *Clarifying the Nature of Louisiana's Right of First Refusal in the Transfer of Immovables*, 47 Louisiana Law Review (1987)

Winikka, Daniel P., *When Do Rights of First Refusal Constitute an Unenforceable Restriction on Assignments in Bankruptcy?*, Journal of the Association of Insolvency & Restructuring Advisors (October/November 2007)

Wise, Robert K. , Szygenda, Andrew J. and Lillard, Thomas F., *First-Refusal Rights Under Texas Law*, 62 Baylor Law Review 433 (2010)(an 89-page comprehensive analysis of ROFR's based on Texas case law).

SIGNIFICANT OR INTERESTING CASES¹

1014 Fifth Ave. Realty Corp. v. Manhattan Realty Co., 67 N.Y.2d 718, 490 N.E.2d 855 (1968)(whether late payments of rent, taxes, and insurance, as well as failure to maintain the premises are trivial or technical breaches or breaches that nullify tenant's purchase option).

¹ This list includes the cases cited in Senn, Mark A., "Options – Generally," §4.18 of *Commercial Real Estate Leases: Preparation, Negotiation and Forms. 5th Edition*, (Wolters Kluwer 2015 Supplement).

1464-Eight, Ltd. v. Joppich, 154 S.W.3d 101, 109-10 (Tex. 2004).

17090 Parkway, Ltd. v. McDavid, 80 S.W.3d 252, 255 (Tex. App. - Dallas 2002, pet. denied).

1440825 Ontario Inc. v Lenco Investment Ltd., 1 2014 ONCA 903 (Ontario Appeals Court (2014) (interplay of a tenant's ROFR and the landlord's termination rights).

7-Eleven, Inc. v Stin, 961 So.A.2d 977 (Fla. Ct. App. 2007)(third-party offer was ultimately accepted even though ROFR holder's acceptance terms did not match third-party offer the first time it responded).

Abraham Inv. Co. v. Payne Ranch, Inc., 968 S.W.2d 518, 527 (Tex. App. - Amarillo 1998, pet. denied). Under pre-West Texas Transmission law, equitable relief is available when the offeree failed to accept the offer within an option agreement if such failure resulted from fraud, surprise, accident, or mistake. Estoppel principles may apply if the offeror's conduct prevented the offeree from properly making his acceptance.

Advanced Recycling Sys., LLC v. Se. Properties Ltd. P'ship, 787 N.W.2d 778 (S.D. 2010).

Amerada Hess Corp. v. Garabedian, 416 Mass. 149, 617 N.E.2d 630 (1993).

Amoco Oil Co. v. Snyder, 302 Pa. Super. 472, 448 A.2d 1139, *order aff'd*, 505 Pa. 214, 478 A.2d 795 (1984).

Anasae Realty Corp. v. Firestone, 103 A.D.2d 707 (NY App. Div. 1st Dept. 1984) (applying rule to a right of first refusal).

Anderson v. Armour & Co., 205 Kan. 801, 473 P.2d 84 (1970).

Anderson v. Parker, 351 S.W.3d 827, 831 (Mo. Ct. App. 2011) (discussing the distinctions between an option and a ROFR)

Andrews v. Blake, 69 P.3d 7, 400 Ariz. Adv. Rep. 25 (2003).

Arden Group, Inc. v. Burk, 45 Cal. App. 4th 1409, 53 Cal. Rptr. 2d 492 (Cal. App. 1996).

Ardmore, Inc. v. Rex Group, Inc., 377 S.W.3d 45, 54 (Tex. App.-Houston [1st Dist.] 2012, pet. denied); Tex. Bus. & Com. Code § 26.01(a), (b)(4) (Vernon 2009).

Artful Dodger Pub, Inc. v. Koch, 230 Ill. App. 3d 806, 172 Ill. Dec. 760, 596 N.E.2d 39 (Ill. Appl. Ct. 1992).

Atlantic Richfield Co. v. Whiting Oil and Gas Corp., 320 P.2d 1179, 1184 (Colo. 2014).

Bortolotti v. Hayden, 449 Mass. 193, 866 N.E.2d 882, 889 (Mass. 2007).

Bateman v. 317 Rehoboth Avenue, 889 A.2d 283, 2005 Del. LEXIS 516 (2005).

Bayer v. Showmotion, Inc., 292 Conn. 381, 407-08, 973 A.2d 1229, 126 (2009) (explaining the distinction between an option and a ROFR and holding that once the grantor notified the holder of an acceptable third-party offer the ROFR ripened into an option to purchase).

Beclar Corp. v. Young, 7 Haw. App. 183, 750 P.2d 934 (1988) (residential lease with purchase option).

Bergman v. Commerce Trust Co., N.A., 129 P.3d 624 (Kan. Ct. App. 2006): a transfer pursuant to a settlement agreement reached in connection with a will contest did not trigger the ROFR.

Bidache, Inc. v. Martin, 899 P.2d 872 (Wyo. 1995).

Bill Signs Trucking, LLC v. Signs Family Ltd. P'ship, 157 Cal. App. 4th 1515, 2007 Cal. App. LEXIS 2047.

Blaschke v. Wiede, 649 S.W.2d 749 (Tex. App. 1983), *error refused n.r.e.* (Oct. 5, 1983), *reh'g of writ overruled* (Nov. 9, 1983).

Boyd & Mahoney v. Chevron U.S.A., 419 Pa. Super. 24, 614 A.2d 1191 (1992).

Bramble v. Thomas, 914 A.2d 136 (Mich. 2007).

Briggs v. Sylvestri, 49 Conn. App. 297, 714 A.2d 56 (Conn. App. 1998).

Brown v. Gutierrez, 2004 WL 2086308 (Tenn. Ct. App. 2004).

Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 864 A.2d 387 (2005).

Brush Grocery Kart, Inc., v. Sure Fine Mkt., Inc., 47 P.3d 680 (Colo. 2002) (equitable conversion did not apply because the tenant was not in possession).

Buck v. Banks, 668 N.E.2d 1259, 1261 (Ind.Ct.App.1996).

Buffalo Seminary v. McCarthy, 86 A.D.2d 435, 451 (NY App. Div., 4th Dept. 1982), *aff'd in part in* 447 N.E.2d 76, 460 N.Y.S.2d 528 (1983)(holding that an option violated the rule because granting language indicated parties intention that the option was for an indefinite period of time).

Burns v. Clutter, 15 So. 3d 251 (La. Ct. App. 2009), *writ denied sub nom. Succession of Burns v. Clutter*, 28 So. 3d 1025 (La. 2010): because a bond for deed (installment sale contract) triggered the ROFR, the limitations period on the holder's cause of action for breach of contract began to run at that time.

Carter v. Smith, 184 S.W. 244, 245 (Tex.Civ.App. - Dallas 1916, writ refused).

Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship, 158 Wash. App. 203, 217, 242 P.3d 1, 9 (2010).

Casey v. Nat'l Info. Servs., Inc., 906 So. 2d 710, 719 (La. Ct. App. 2005) writ denied, 925 So. 2d 1235 (2006).

Castle Properties, Inc. v. Wasilla Lake Church of the Nazarene, 347 P.3d 990 (Alaska 2015): where a city's third-party offer was to swap land that the grantor had a special interest in acquiring, the holder had the right under the ROFR to make a commercially equivalent offer. The evidence was sufficient, however, to support a finding that the grantor's rejection of the cash offer, as not being comparable to the city's offer, was commercially reasonable. The court also held that the holder received adequate notice of the third-party offer by obtaining a copy of the city ordinance authorizing the proposed transaction even though the grantor failed to provide notice and refused to furnish a copy of the proposed agreement with the city.

Centech, LLC v. Yippie Holdings, LLC, 2015 NY Slip Op 30815(U) (Supreme Court, New York County)(sale of the property following a judicial foreclosure did not trigger ROFR).

Central Nat'l Bank v. Fleetwood Realty Corp., 110 Ill. App. 3d 169, 65 Ill. Dec. 730, 441 N.E.2d 1244 (Ill. App. Ct. 1982).

Central Paper Distrib. Servs. v. International Records Storage & Retrieval Serv., 325 N.J. Super. 225, 738 A.2d 962 (N.J. Super. 1999), cert. denied, 163 N.J. 74, 747 A.2d 283 (2000).

Chapman v. Mutual Life Ins. Co., 800 P.2d 1147 (Wyo. 1990).

Cherokee Water Co. v. Forderhause, 641 S.W.2d 522 (Tex. 1982).

Christian v. Edelin, 843 N.E.2d 1112 (Mass. App. Ct. 2006): the holder's offer that included a financing condition was not substantially the same as the third-party's cash offer.

Christmas v. Turkin, 148 Ariz. 602, 716 P.2d 59 (Ariz. Ct. App. 1986) (option requiring payment of the balance of the purchase price "as might be agreed upon" made the option too vague for enforcement).

Cipriano v. Glen Cove Lodge #1458, B.P.O.E., 1 N.Y.3d 53, 59 (2003)(exercise of a ROFR creates a binding contract).

Citgo Petroleum Corp. v. Hopper, 245 Va. 363, 429 S.E.2d 6 (1993).

City of Peerlesspark v. Dennis, 42 S.W.3d 814, 2001 Mo. App. LEXIS 310 (Mo. Ct. App. 2001) (right of an option holder to a share of condemnation proceeds).

Clark v. Shelton, 584 P.2d 875, 877 (Utah 1978).

Coldwell Banker Phyllis Rubin Real Estate v. Romano, 422 Pa. Super. 319, 619 A.2d 376 (Pa. Super. 1992).

Comeaux v. Suderman, 93 S.W.3d 215 (Tex. App. Houston 14th Dist. 2002).

Coomler v. Shell Oil Co., 108 Ore. App. 233, 814 P.2d 184 (1991), *rev. denied*, 312 Or. 589, 824 P.2d 418 (1992).

Corriveau v. 3005 Inv. Corp., 697 S.W.2d 766 (Tex. App. 1985), *error refused n.r.e.* (Jan. 15, 1986).

Cottonwood Hill, Inc. v. Ansay, 709 P.2d 62 (Colo. App. 1985).

County of San Diego v. Miller, 13 Cal. 3d 684, 119 Cal. Rptr. 491, 532 P.2d 139 (1975)(right of the holder of an option to share in condemnation proceeds).

Creely v. Hosemann, 910 So. 2d 512, 520 (Miss. 2005).

CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Grp., 283 Ga. App. 686, 689, 642 S.E.2d 393, 397 (2007) *aff'd sub nom. CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Grp., Inc.*, 283 Ga. 426, 659 S.E.2d 359 (2008): the ROFR was unenforceable under the Delaware RAP, which controlled because the parties chose Delaware law to govern their settlement agreement that included the ROFR. The Georgia Supreme Court affirmed, with the only issue before it being whether there was a basis to reform the agreement for mutual mistake of law in not selecting Georgia law, under which the ROFR presumably would have been valid. In this regard, the Georgia Supreme Court held: “a choice of Georgia law may have had its own undesirable implications for the multiple entities and properties involved in the settlement agreement. It is not possible to conclude that the parties clearly and unequivocally intended the choice-of-law provision to fall whenever it would invalidate any provision of the contract. To assume that the parties intended for the right of first refusal to be effective instead of their choice of law is not any more justifiable than the converse assumption.” *CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Grp., Inc.*, 283 Ga. 426, 429, 659 S.E.2d 359, 362 (2008).

Cyr v. McGovran, 206 Cal. App. 4th 645, 648, 142 Cal. Rptr. 3d 34, 36 (2012).

Danyluk v. Jonathan L. Glashow, M.D., 2 Misc. 3d 1005A, 2004 N.Y. Misc. LEXIS 217, at *9-10, 21-22 (Civ. Ct. N.Y. Cty. 2004)(exercise of a ROFR created a binding contract)

Del. River Pres. Co., Inc. v. Miskin, 923 A.2d 1177, 1182 (Pa. Super. Ct. 2007): the holder failed to exercise the ROFR effectively by not agreeing to a restriction included in the third-party offer to prohibit development of the property. “The changes Appellant made to the terms of the initial third-party offer, whether material or non-material, did not constitute an unequivocal acceptance of the third-party offer.” This statement notwithstanding, it seems that the restrictive covenant was material under the circumstances, because after the holder purported to exercise the right without agreeing to the use restriction, the third-party offered to increase the purchase price it was willing to pay by more than one-third in exchange for omitting the restriction.

DePetrillo v. Belo Holdings, Inc., 45 A.3d 485, 493 (R.I. 2012) (citations omitted): the court confirmed the holdings of earlier cases in which a grantor wished to sell a larger tract that included the parcel subject to the ROFR, and approved an alternative course of action for the holder. The opinion states that: “a seller may not defeat a right of first refusal by selling the property subject to the right as part of a larger tract’ and that, ‘while the holder of such a right may not force a separate sale of the land, s/he may enjoin the proposed sale of a larger tract of land that includes the parcel subject to the right of first refusal.’ Thus, as holder of the right of first refusal, Citadel was in the following quandary: it was unable to compel the separate sale of the tower and transmission site, yet it had the power to block the sale of the thirty-acre parcel. Opting for the arguably more efficient and practical approach, in exercising its right of first refusal, Citadel instead chose to match DePetrillo’s [plaintiff-third party buyer’s] offer to purchase the thirty-acre parcel. This approach enabled Belo [the grantor] to achieve its objective of selling the entire parcel, while still honoring Citadel’s right of first refusal. Belo was completely within its authority to execute such a sale, as the plaintiff’s rights to the property had terminated upon Citadel’s failure to waive its right of first refusal.” The court’s pronouncement that the holder would have the right to enjoin the sale of the larger parcel is arguably the majority view of courts across the country, but this case goes the further step of recognizing an alternative for the holder, with the approval of the grantor, in effect to preempt the third-party offer for the entire tract.² The result seems logical because if the grantor is unable to accept the third-party offer that includes the property subject to a ROFR that the holder will not waive, there is no reason to prevent the holder and the grantor from agreeing to a sale of the larger tract on the same terms as the third-party deal.

Dittman v. Cerone, 2013 WL 5970356 at *8 (Tex. App. - Corpus Christi-Edinburg 2013, no pet.) (The trial court’s findings of facts are replete with instances where the parties exchanged communications regarding offers and counteroffers about the Stable Property via e-mail messages).

Drost v. Hill, 639 So. 2d 105 (Fla. Dist. Ct. App. 1994).

Echols v. Bloom, 485 S.W.2d 798, 800 (Tex.Civ.App.—Houston [14th Dist.] 1972, writ ref’d n.r.e.).

El Dorado Land Co., L.P. v. City of McKinney, 395 S.W.3d 798, 801 (Tex. 2013), for a discussion of nonpossessory property interests recognized in Texas.

Elderkin v. Carroll, 403 Md. 343, 348, 941 A.2d 1127, 1130 (2008) (option agreement called for a “standard contract”).

Eliminator, Inc. v. 4700 Holly Corp., 681 P.2d 536 (Colo. Ct. App. 1984).

Enea v. Coldwell Banker/Del Monte Realty, 225 B.R. 715, 2 Cal. Bankr. Ct. Rep. 61 (N.D. Cal. 1998)(rights of listing broker and selling broker to a commission when tenant exercises ROFR).

² See Murray, *supra* note 2, at 80-86.

ERCOT v. Met Center Partners - 4, Ltd., 2005 WL 2312710 at *8 (Tex App. - Austin 2005, no pet.).

Eskridge v. Macklevy, Inc., 468 So. 2d 337 (Fla. Dist. Ct. App.), *review denied*, 478 So. 2d 54 (Fla. 1985)(ten-year-old defaults prevented the tenant from exercising its purchase option).

Evans v. S.C. Southfield 12 Assocs., LLC, 208 Fed. App. 403 (6th Cir. 2006).

Exxon Corp. v. Pollman, 712 S.W.2d 230 (Tex. Ct. App. 1986), *opinion superseded*, 729 S.W.2d 302 (Tex. App. 1986), *writ granted*, *Pollman v. Exxon Corp.*, 30 Tex. Sup. Ct. J. 173 (Tex. 1987).

F&S Pharm., Inc. v. Dandra Realty Corp., 754 N.Y.S.2d 256 (N.Y. App. Div. 1st Dept. 2003) (vagueness about the means of paying the purchase price did not prevent exercise of a purchase option).

Ferrero Constr. Co. v. Dennis Rourke Corp., 536 A.2d 1137, 1139 (Md. 1988)(applying rule to right of first refusal).

Fienberg v. Hassan, 928 N.E.2d 356 (Mass. App. Ct. 2010)(a holder who failed to match the third-party offer's closing date did not validly exercise the ROFR).

First Nat'l Exch. Bank of Roanoke v. Roanoke Oil Co., 169 Va. 99, 192 S.E. 764 (1937).

Fischer v. CTMI, L.L.C., ---- S.W.3d ----, 2016 WL 83477 (Tex. 2016).

Foster v. Bullard, 554 S.W.2d 66, 67 (Tex.Civ.App.-Austin 1977, writ ref'd n.r.e.).

Foster v. Hanni, 841 P.2d 164 (Alas. 1992).

Foye v. Parker, 15 A.D.3d 907, 907, 790 N.Y.S.2d 787, 788 (2005).

FWT, Inc. v. Haskin Wallace Mason Prop. Mgmt., L.L.P., 301 S.W.3d 787 (Tex. App. - Ft. Worth 2009).

Franklin v. Austin Inner City Redevelopment - Phase I, Ltd., 2015 WL 1534534 (W.D. Tex. 2015).

Gange v. Hayes, 237 P.2d 196 (OR 1951)(applying the rule to an option to repurchase contained in a deed although the same court previously held that an option does not pass an interest in the land).

Garza v. Sun Oil Co., 727 S.W.2d 115 (Tex. App. 1986).

Gehlbach v. Harkins, 654 N.E.2d 877 (Ind. Ct. App. 1995).

Gilmore v. Jordan, 132 A.D.3d 1379, 17 N.Y.S.3d 545 (2015): the ROFR contained in a contract merged into the deed delivered pursuant to the contract and was extinguished upon the grantor's death because the deed, in contrast to the contract, did not purport to bind the grantor's heirs and assigns.

Goodwest Rubber Corp. v. Munoz, 170 Cal. App. 3d 919, 216 Cal. Rptr. 604 (1985)(tenant's rent is relevant in determining the fair market value of the premises).

Gore v. Beren, 867 P.2d 330, 338 (Kan. 1994)(finding that options and preemptive rights constitute property interests).

Great Bay Sch. & Training Ctr. v. Simplex Wire & Cable Co., 559 A.2d 1329, 1331 (N.H. 1989) (stating that the rule does not apply to all preemptive rights, just those that "pose a substantial restraint on alienation").

Gulf Oil Corp. v. Chiodo, 804 F.2d 284 (4th Cir. W. Va. 1986).

Gulf Prod. Co. v. Cont'l Oil Co., 164 S.W.2d 488, 491 (Tex. 1942) (strict performance of a contract which is required to be in writing may be waived, or its terms extended, by oral agreement).

Halyak v. A. Frost, Inc., 664 A.2d 545 (Pa. Super. 1995)(agreement of third-party to not use the property for gravel mining used as a "poison pill" to avoid exercise of a ROFR by the existing tenant who conducted gravel mining on the property).

Hawthorne's, Inc. v. Warrenton Realty, Inc., 414 Mass. 200, 606 N.E.2d 908 (1993)(tenant who held both a ROFR and an option but interfered with a third-party offeror resulting in a withdrawal of the offer was denied the right to exercise its option based on its conduct).

Hartnett v. Jones, 629 P.2d 1357, 1360 (Wyo. 1981).

Hartzheim v. Valley Land & Cattle Co., 153 Cal. App. 4th 383 (2007).

Haskin Wallace, 301 S.W.3d 787.

Hasty v. Health Serv. Ctrs., Inc., 258 Ga. 625, 373 S.E.2d 356 (1988).

Hein Enterprises, Ltd. v. San Francisco Real Estate Investors, 720 P.2d 975 (Colo. Ct. App. 1985).

Hensley-O'Neal v. Metro. Nat. Bank, 297 S.W.3d 610 (Mo. Ct. App. 2009): where no duration was specified for exercise and the ROFR agreement expressly provided that it was binding on heirs and assigns, the ROFR was unenforceable because it violated the RAP.

Herndon v. Armstrong, 38 P.2d 44 (OR 1934) but an option coupled with a lease is a covenant running with the land.

Hewatt v. Leppert, 259 Ga. 112, 376 S.E.2d 883 (1989).

Hicks v. Castille, 313 S.W.3d 874, 883 (Tex. App. - Amarillo 2010, pet. denied).

Hinds v. Madison, 424 S.W.2d 61, 64 (Tex. Civ. App. - Ft. Worth 1967, writ ref'd n.r.e.).

Hitchcock Prop., Inc. v. Levering, 776 S.W.2d 236, 238 (Tex. App. - Houston [1st Dist.] 1989, writ denied).

Hott v. Percy/Christon, Inc., 663 S.W.2d 851, 853 (Tex. App. - Dallas 1983, writ ref'd n.r.e.).

Housing Auth. v. Monterey Senior Citizen Park, 164 Cal. App. 3d 348, 210 Cal. Rptr. 497 (Cal. App. 1985).

Howard-Arnold, Inc. v. T.N.T. Realty, Inc., 315 Conn. 596, 109 A.3d 473 (2015).

HSL Linda Gardens Properties, Ltd. v. Seymour, 788 P.2d 129, 130 (Ariz. Ct. App. 1990)(applying rule to right of first refusal which the court held was a covenant running with the land).

Huntington National Bank v. Cornelius, 80 A.D.3d 245, 914 N.Y.S.2d 327 (2010)

IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp., 938 S.W.2d 440, 444 (Tex. 1997).

Industrial Steel Constr. v. Mooncotch, 1994 Ill. App. LEXIS 1052 (Ill. App. Ct. 1994).

In re: Plant Insulation Company, No. 09-31347 TEC U.S. Bankruptcy Court for the Northern District of California, Memorandum following Remand, filed February 24, 2014 (creative use of a ROFO in Chapter 11 plan).

Jarvis v. Peltier, 400 S.W.3d 644, 651 (Tex. App. - Tyler, pet. denied) (A purchaser from a seller who has given a right of first refusal to buy takes the property subject to that right.).

Jeremy's Ale House Also v. the Joselyn Luchnick Irrevocable Trust, 22 A.D.3d 6, 798 N.Y.S.2d 416 (2005) (ability to use the holder of a ROFR as a stalking horse)

Jewish Ctr. for Aged v. BSPM Trustees, Inc., 295 S.W.3d 513 (Mo. Ct. App. 2009): a case with a delightful twist. A ground lease between the fee owner, as landlord, and its affiliate, as tenant, contemplated that the tenant would enter into a leasehold deed of trust under a HUD loan program. The lease provided that the landlord would have a "first right to acquire" the leasehold interest at its fair market value if the tenant defaulted under the leasehold deed of trust and the beneficiary determined to pursue any action that could affect possession. The parties and the court characterized the right as a ROFR, and I include the case in this section on that basis even though the lease granted a purchase option conditioned on default under the deed of trust and the prospect of a foreclosure sale rather than a right trigger by a proposed voluntary sale of the

property as in a typical ROFR. An addendum to the ground lease added provisions required by HUD, but the addendum left the ROFR in place. A recorded memorandum of lease inaccurately described the ROFR, but the error was subsequently corrected of record, and it was uncontested that the assignee of the deed of trust knew of the ROFR before acquiring the deed of trust. The court held that the ROFR, which included a requirement for the ground lessor to receive notice of the triggering event—a notice that presumably could be given only by or at the direction of the holder of the deed of trust—was a covenant running with the land and was superior to the lien of the deed of trust. The net result, at a minimum, was to buy time for the ground lessor because the foreclosure proceedings could not yet commence as proper notice had not been given under the terms of the ROFR.

Jones v. Riley, 471 S.W.2d 650, 658-9 (Tex. Civ. App. - Fort Worth 1971, writ ref'd n.r.e.).

Jones v. Stahr, 746 N.W.2d 394 (Neb. Ct. App. 2008): the addition of a clause reserving a right to assign was not a fatal deviation from the terms of the third-party offer.

Karns v. Jalapeno Tree Holdings, L.L.C., 459 S.W.3d 683 (Tex. App. - El Paso 2015, pet. denied).

King v. Gatlinburg Sportsman's Club, 2004 Tenn. App. LEXIS 476 (2004).

Kings Antiques Corp. v. Varsity Properties, Inc., 121 A.D.2d 885, 503 N.Y.S.2d 575 (N.Y. App. Div. 1986), *appeal granted*, 69 N.Y.2d 603, 512 N.Y.S.2d 1026, 504 N.E.2d 396 (N.Y. 1987), *appeal dismissed*, 70 N.Y.2d 641, 518 N.Y.S.2d 1031, 512 N.E.2d 557 (N.Y. 1987).

Knerr v. Federal Land Bank, 1991 U.S. App. LEXIS 2964 (9th Cir. Feb. 25, 1991).

Kutkowski v. Princeville Prince Golf Course, LLC, 129 Hawai'i 350, 300 P.3d 1009 (2013).

Lake of the Woods Ass'n v. McHugh, 380 S.E.2d 872, 874 (Va. 1989).

LaRoche v. Nehama, 979 So. 2d 1021, 1022 (Fla. Dist. Ct. App. 2008).

LaRose Mkt. v. Sylvan Ctr., 209 Mich. App. 201, 530 N.W.2d 505 (1995).

LDC-728 Milwaukee, LLC v. Raettig, 2006 WI App. 258; 297 Wis.2d 794; 727 N.W.2d 82, 2006 Wis. App. LEXIS 1085 (2006).

LEG Investments v. Boxler, 183 Cal. App. 4th 484, 107 Cal. Rptr. 3d 519, 2010 Cal. App. LEXIS 442 (April 1, 2010)(ROFR was not a waiver of the right of a co-tenant to "partition by sale").

Lehn's Court Mgmt. v. My Mouna, 2003 Pa. Super. 439, 837 A.2d 504, 2003 Pa. Super. LEXIS 4090 (2003).

Lenco Investments Ltd. v. 1440825 Ontario Inc., 2014 ONCA 903, 2014 CarswellOnt 17545: in this Canadian case involving a ROFR in a commercial lease, the ROFR provision ended with the statement that the right would terminate if either the landlord or the tenant terminated the lease as

permitted under other provisions of the lease, including a provision permitting the landlord to terminate the lease in connection with a sale of the premises. Predictably, when the landlord received a third-party offer that it wished to accept, the landlord entered into that contract and promptly gave a lease termination notice to the tenant. The Ontario Court of Appeal sided with the tenant, holding that the ROFR and the lease termination provisions should be read together such that the landlord could only terminate the lease after receiving a third-party purchase offer if the tenant declined to exercise the ROFR.

Levetz v. Sutton, 404 S.W.3d 798, 805 (Tex. App. - Dallas 2013, pet. denied). Specific performance is an equitable remedy for breach of contract by which the court has discretion to order the parties to consummate the transaction in accordance with the contract. In legalese, specific performance is “the remedy of requiring exact performance of a contract in the specific form in which it was made.”

LIN Broadcasting v. Metromedia, 74 N.Y.2d 54, 62-65 (1989)(offer must remain open for a certain amount of time).

Linden Boulevard, L.P. v. Elota Realty Co., 196 A.D.2d 808, 601 N.Y.S.2d 949 (1993).

Low v. Spellman, 629 A.2d 57, 58 (Me.1993).

Lucia v. Ross, 274 S.W. 3d 140 (Tex. App. 2008) (holder of an option to purchase could exercise the option even though it previously defaulted on an exercise of the option because the lease said the tenant could exercise the option “anytime”).

M7 Capital LLC v. Miller, 312 S.W.3d 214, 221 (Tex. App. - Houston [14th Dist.] 2010, pet. denied), holding that the *Joppich* court did not adopt the Restatement’s “writing” requirement.

Malone v. Flatter, 797 N.W.2d 624 (Iowa Ct. App.(2011), *aff’d* Iowa Sup. Ct. by an evenly divided court)(a ROFR is not assignable absent an express right to assign).

Manhattan Square Shopping Ctr. v. Roque, 663 So. 2d 854 (La. App. 5 Cir. Oct. 31, 1995) (ability of a defaulting tenant to exercise a ROFR).

Markert v. Williams, 874 S.W.2d 353 (Tex. App. 1994), *writ denied* (Oct. 6, 1994), *reh’g of writ overruled* (Nov. 22, 1994).

Marshall v. Summers, 934 S.W.2d 647 (Tenn. Ct. App. 1996) (tenant with a ROFR need only to match the price and did not need to agree to terminate its lease to accept a third-party offer).

Martin v. Prairie Rod & Gun Club, 348 N.E.2d 306, 309 (Ill. 1976).

Mazzeo v. Kartman, 560 A.2d 733, 737 (NJ App.Div.1989).

McCalla v. Baker's Campground, Inc., 416 S.W.3d 416, 418 (Tex. 2013).

McKay v. Tally, 220 S.W. 167, 171 (Tex. Civ. App. - Amarillo 1920, no writ) (the revocation of an offer is not effectual, unless it is communicated to the person to whom the offer was made).

McMillan v. Dooley, 133 S.W.3d 159, 178 (Tex. App. - Eastland 2004, pet. denied).

McPeady & Co. v. Chestnut Street Properties Inc., 179 A.D.2d 915, 578 N.Y.S.2d 711 (N.Y. App. Div. 1992), *aff'd*, 81 N.Y.2d 936, 613 N.E.2d 567 (1993)(the intention to create a continuing right was not expressed).

Melcher v. Camp, 1967 OK 239, 435 P.2d 107, 112 (1967) (applying the rule against perpetuities to an option even though under Oklahoma law an option conveys no interest in the real property and finding that an option creates and transfers an interest in the real property sufficient to invoke the rule against perpetuities).

Metro. Transp. Auth., 492 N.E.2d at 385.

Metropolitan Trans. Authority v. Bruken Realty Corp., 479 N.Y.S.2d 646, 655-656 (SCT, New York County 1984) (finding that “option” granted to railroad was a right of first refusal since it was subject to a condition precedent that the option or first determine that it did not need the property for transportation purposes).

Mitchell v. Exhibition Foods, Inc., 184 Cal. App. 3d 1033, 229 Cal. Rptr. 535 (Cal. App. 1986).

Moon v. Haeussler, 153 A.D.2d 1002, 545 N.Y.S.2d 623 (N.Y. App. Div. 1989); *appeal dismissed without opinion*, 76 N.Y.2d 890, 561 N.Y.S.2d 551, 562 N.E.2d 876 (1990).

Moore v. Kirgan, 250 S.W.2d 759, 762-3 (Tex. Civ. App. - El Paso 1952).

Moore & McCaleb, Inc. v. Gaines, 489 So. 2d 491 (Miss. 1986)(a tenant who pledges its lease as its security for a loan and thereafter loses its lease in foreclosure also loses the purchase option in the lease).

Moss & Raley v. Wren, 120 S.W.2d (Tex. 1909). Neither means “valid.”

MPH Prod. Co. v. Smith, 2012 WL 1813467, at *5 (Tex. App. - Texarkana 2012, no pet.) and cases cited therein. See also “Affirmative Covenants As Running With Land,” 118 A.L.R. 982 (1939).

MS Real Estate Holdings LLC v. Donald P. Fox Family Trust, 2015 WI 49 (Wisconsin 2015)(ROFR’s can be indefinite and terminable if they restrain the sale of property, but are not when (1) the contract holder can purchase on the same terms and conditions as another offer, (2) the contract provides a clear procedure for doing so, and (3) “provides a reasonable time for exercising the right.”).

National City Bank v. Welch, 2010-Ohio-2981, 188 Ohio App. 3d 641, 648, 936 N.E.2d 539 (where the deed establishing the right at issue provided that the holder could force a sale of the property at the specified price after the death of the surviving grantee under the deed).

Nature Conservancy of Wisconsin, Inc. v. Altnau, 2008 WI App 115, 313 Wis.2d 382, 756 N.W.2d 641.

Navasota Res., L.P. v. First Source Texas, Inc., 249 S.W.3d 526, 542 (Tex. App. - Waco - 2008, pet. denied).

NETCO, Inc. v. Montemayor, 352 S.W.3d 733, 738 (Tex. App. - Houston [1st Dist.] 2011, no pet.).

Neustadt v. Pearce, 143 A.2d 437, 438 (Conn. 1958); *Gore*, 867 P.2d at 338 (Kan. 1994) (applying rule to right of first refusal).

Newton v. Dickson, Moore & Smith, 116 S.W. 143, 144 (Tex. Civ. App. 1909).

Northfield Telcoms v. Itron, Inc., 310 F.3d 608 (8th Cir. 2002) (Minn.).

Ocean Petroleum Co. Inc. v. Yanek, 5 A.3d 683 (Md. 2010).

Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc., 986 So.2d 1279 (Fla. 2008).

Overton v. Bengel, 139 S.W.3d 754, 757 (Tex. App. - Texarkana 2004) (document titled "Right of First Refusal" granted Overton a right to purchase property for a fixed price within a set time period of thirty days. "This is the very nature of an option contract.").

Pace v. Culpepper, 347 So.2d 1313, 1317 (Miss.1977).

Pack 2000, Inc. v. Cushman, 311 Conn. 662, 674, 89 A.3d 869, 878 (2014).

Pardee v. Jolly, 163 Wash. 2d 558, 567, 182 P.3d 967, 972 (2008).

Park Station L.P. v. Bosse, 2003 WL 22671594 (Md. 2003).

Parker v. Booker, 33 A.D.3d 602, 822 N.Y.S.2d 156 (2006).

Pellandini v. Valadao, 113 Cal. App. 4th 1315, 7 Cal. Rptr. 3d 413 (Cal. App. 3d Dist. 2003).

Peter-Michael v. Sea Shell Assocs., 709 A.2d 558 (Conn. 1998).

Peters v. Smolian, 49 Misc. 3d 408, 411, 12 N.Y.S.3d 824, 829 (N.Y. Sup. Ct. 2015), 2015 NY Slip Op 25215 Decided on June 25, 2015 Supreme Court, Suffolk County(the grant of a right of first refusal is not subject to the "stranger to the deed" rule).

Petrohawk Properties, L.P. v. Jones, 455 S.W.3d 753 (Tex. App. - Texarkana 2015, pet. dism'd).

Petula Assocs. v. Dolco Packaging Corp., 240 F.3d 499 (5th Cir. 2001), *aff'd*, 70 Fed. Appx. 165 (2003)(role of the existing lease in valuing the property for an option).

Pew et al. v Saylor et al., 2015 ME 120 (a perpetual ROFR that will not necessarily be exercised within the period of the rule against perpetuities is void).

Pitkin Seafood v. Pitrock Realty, 146 A.D.2d 618, 619 (2d Dept. 1989) (imperfections in holder's exercise of option to purchase disregarded where tenant had made improvements to the property and landlord was not prejudiced).

Power Gas Mktg. & Transmission, Inc. v. Cabot Oil & Gas Corp., 948 A.2d 807 (Pa. 2008) (holding that a right of first refusal in an oil and gas lease agreement is not subject to the rule against perpetuities; stating "we also question whether, in the first instance, rights of first refusal ... ever concern propertied estates such that they should be brought within the rule against perpetuities").

Prescott v. Shell Oil, 393 U.S. 1017, 89 S. Ct. 621, 21 L. Ed.2d 562, 1969 U.S. LEXIS 2909 (1969).

Probus Prop. v. Kirby, 200 S.W.3d 258 (Tex. App. - Dallas 2006, pet. denied).

Quigley v. Capolongo, 53 A.D.2d 714, 383 N.Y.S.2d 935 (N.Y. App. Div. 1976), *aff'd without opinion*, 43 N.Y.2d 748, 401 N.Y.S.2d 1009, 372 N.E.2d 797 (N.Y. 1977).

Randolph v. Reisig, 727 N.W.2d 388, 392 (Mich. App. 2006) *appeal denied* 725 N.W.2d 352 (Mich. 2007).

Rappaport v. Estate of Banfield ex rel. Hogue, 924 A.2d 72 (Vt. 2007): the Statute of Frauds prevented the holder from claiming that the ROFR extended to more property than the written agreement covered.

Raymond v. Stoen, 882 P.2d 852 (Wyo. 1994).

Reeder v. Curry, 294 S.W.3d 851, 860-61 (Tex. App. - Dallas 2009, pet. denied) (Reeder's 2004 suit for specific performance and damages stemming from Curry's failure to close under the earnest money contract accrued by July 30, 1996; because Reeder did not bring suit within four years of the accrual, his suit for breach of the earnest money contract was barred by limitations)

Reiland v. Patrick Thomas Properties, Inc. 213 S.W.3d 431, 436-7 (Tex. App. - Houston [1st Dist.] 2006, no pet.).

Richmond v. EBI, Inc., 53 So. 3d 859, 865 (Miss. Ct. App. 2011): “adamant refusal to meet the offered purchase price and protracted attempts to secure a significantly lower purchase price amount to Brian's failure to exercise his rights according to the terms of the right of first refusal.”

Riley v. Campeau Homes, Inc., 808 S.W.2d 184 (Tex. App. 1991), *writ dismiss'd* (Oct. 16, 1991).

Robroy Land Co. v. Prather, 622 P.2d 367, 369 (Wash. 1980) (applying both the rule against perpetuities and unreasonable restraints on alienation to right of first refusal).

Rodriguez v. Baker, 182 A.D.2d 751, 582 N.Y.S.2d 754 (N.Y. App. Div. 1992)(imperfections in the exercise of an option excused where the notice was sufficient to advise the grantor of the exercise).

Roeland v. Trucano, 214 P.3d 343, 351 (Alaska 2009): transfer to LLC that resulted in same parties retaining control of the property did not trigger ROFR because the transfer was a “mere matter of form.”

Roy v. George W. Greene, Inc., 404 Mass. 67, 533 N.E.2d 1323 (1989), *appeal after remand*, 408 Mass. 721, 563 N.E.2d 215 (1990) (landlord required to get acceptable written offer and give tenant opportunity to make the same offer).

Rucker Properties, L.L.C. v. Friday, 41 Kan. App. 2d 664, 665, 204 P.3d 671, 673 (2009): “the transfer in question was a quitclaim deed executed as a gift by family members in favor of specific members of that family. As no sale existed, it did not trigger the right of first refusal.”

Sandel v. ATP Oil & Gas Corp., 243 S.W.3d 749, 752 (Tex. App. - Houston [14th Dist.] 2007, no pet.) is a post-*Joppich* case involving consideration. The issues were whether the option agreement was required to be in writing (the court concluded the Restatement requires a writing) and what is required to “recite” the consideration (the court held it must be detailed or enumerated in the offer).

Scarborough v. Ward, 220 S.W. 274, 276 (Tex. Civ. App. - El Paso 1920), *aff'd Ward v. Scarborough*, 236 S.W. 434 (Tex. Comm'n App. 1922).

Schafer v. Deszcz, 698 N.E.2d 60, 62 (Ohio App. 3d 1997)(finding a right of first refusal to be an interest in real property and applying the rule).

Schroeder v. Duenke, 265 S.W.3d 843, 2008 Westlaw 3844741 (Mo. App. Aug 19, 2008).

Seelbach v. Clubb, 7 S.W.3d 749, 755 (Tex. App. - Texarkana 1999, pet. denied).

Sinclair Ref. Co. v. Allbritton, 218 S.W.2d 185, 187 (Tex. 1949).

SKI, Ltd. v. Mountainside Properties, Inc., 2015 VT 33, 114 A.3d 1169 (2015).

Slaughter Cattle Co. v. Potter County, 235 S.W. 295, 302 (Tex. Civ. App. - Amarillo 1921), *aff'd Potter County v. C.C. Slaughter Cattle Co.*, 254 S.W. 775 (Tex. Comm. App. 1923).

Smith v. Bertram, 603 N.W.2d 568 (Iowa 1999).

Smith v. Hevro Realty Corp., 199 Conn. 330, 507 A.2d 980 (1986).

Smith v. Hues, 540 S.W.2d 485, 489-90 (Tex. Civ. App. - Houston [14th Dist.]1976, writ ref'd n.r.e.). This essentially procedural rule can be outcome determinative. In *Smith*, for example, the appellate court was bound by the trial court's findings that appellant had waived the contractual time limitation, and therefore appellee's performance was timely, even though time was of the essence in this contract and the late performance would have been ineffectual as a matter of law.

South Tower Residential Bd. of Mgrs. of Time Warner Ctr. Condominium v Ann Holdings, LLC, 2015 NY Slip Op 03050 Decided on April 9, 2015 Appellate Division, First Department (condominium Board may assign its ROFR to a third party).

St. George's Dragons L.P. v. Newport Real Estate Group, 971 A.2d 1087 (N.J. Super Ct. App. Div. 2009)(illustrates problems that may arise over brokerage commissions when a ROFR is exercised).

Starr v. Wilson, 11 So. 3d 846 (Ala. Civ. App. 2008): where an agreement providing for the sale of one parcel also granted the buyer a ROFR on a second parcel, no separate consideration beyond the purchase price for the first parcel was required to support the ROFR, and delivery of the deed to the first parcel did not extinguish the ROFR under the merger by deed doctrine.

Startex First Equipment, Ltd. v. Aelina Enters., Inc., 208 S.W. 3d 596 (Tex. Ct. App. 2006), *rehearing of petition for review denied* (Dec. 1, 2006)(survival of tenant's ROFR after sale of the property).

State v. Clevenger, 384 S.W.2d 207 (Tex. Civ. App. - Houston 1964, writ ref'd n.r.e.).

Steiner v. Thexton, 48 Cal. 4th 411, 418, 226 P.3d 359, 364 (2010).

Stephens v. Trust for Pub. Land, 479 F. Supp. 2d 1341, 1347 (N.D. Ga. 2007).

Stuart v. D'Ascenz, 22 P.3d 540 (Colo. Ct. App. 2000), *reh'g denied*, 2000 Colo. App. LEXIS 1945, *cert. denied*, 2001 Colo. LEXIS 384 (Colo. May 14, 2001) (A right of first refusal at a stated price does not create an option).

Stuart Kingston v. Robinson, 596 A.2d 1378, 1383-1384 (Del. 1991) (applying rule to preemptive rights which are contract rights and not direct interests in property).

Sun Refining & Marketing Co. v. Spelman, 1992 Ohio App. LEXIS 6421 (Ohio Ct. App. 1992)(interplay of ROFR and purchase option).

Symphony Space, Inc. v. Pergola Properties, Inc., 631 N.Y.S.2d 136, 214 A.D.2d 66 (N.Y. App. Div. 1995), *aff'd*, 88 N.Y.2d 466, 646 N.Y.S.2d 641, 669 N.E.2d 799, 1996 WL 326106 (N.Y. 1996)(sale-leaseback transaction with a purchase option).

Systems Engineering Associates, Investigation Div., Inc. v. Peachtree Corners, Inc., 179 Ga. App. 48, 345 S.E.2d 136 (1986).

Tachdjian v. Phillips, 568 S.E.2d 64 (Ga. App. Ct. 2002) (ruling that language in contract granting a “right of first refusal” for a fixed amount for a certain period of time and a negotiated amount thereafter was ambiguous and remanding the case to determine the parties intent).

Tenneco, Inc. v. Enter. Prods. Co., 925 S.W.2d 640 (Tex. 1996).

Texaco, Inc. v. Golart, 206 Conn. 454, 538 A.2d 1017 (1988) (landlord’s unsuccessful claim that fixed price purchase option was unconscionable).

Texas Co. v. Butler, 256 P.2d 259 (OR 1953).

Tracy v. Albany Exch. Co., 7 N.Y. 472 (1852).(option is independent of a tenant’s performance under the lease).

Trecker v. Langel, 298 N.W.2d 289, 291 (Iowa 1980).

Tumino v. Waite, Flagella et. al., 915 CA 13-00228, (N.Y., Ct. App 4th Dept.), 110 A.D.3d 1456, 972 N.Y.S.2d 775 (2013) (commencement of a partition action did not trigger the right of first refusal).

United States v. Bethlehem Steel Co., 215 F. Supp. 62 (D. Md. 1962), *aff'd*, 323 F.2d 655.

Van Carr Enters., Inc. v Hamco, Inc., 2006 WL 649985 (Ark. Mar. 16, 2006).

Village of Pinehurst v. Reg’l Inv. of Moore, Inc., 412 S.E.2d 645, 646 (N.C. 1992).

Vincent v. Doebert, 183 Ill. App. 3d 1081, 539 N.E.2d 856 (Ill. App. 1989).

Wachovia Bank v. Lifetime Indus., Inc., 145 Cal. App. 4th 1039, 1042, 52 Cal. Rptr. 3d 168, 169-70 (2006).

Walji v. Met Center NTCTEX, Ltd., 2002 WL 1727624 *3 (Tex. App. - Austin 2002, pet. denied) and cases cited therein. *Walji* involved an earnest money contract that provided the seller could terminate the contract and retain the “Deposit” if the buyer failed to reimburse engineering and other expenses as therein provided. The court held the contract was an option, discussing in the process a number of the other cases in which that question was presented.

Waste Connections of Kansas, Inc. v. Ritchie Corp., 296 Kan. 943, 298 P.3d 250 (2013): the third-party contract provided for a package deal that included the ROFR property and other property at a total purchase price of \$4,950,000, with \$2,000,000 allocated to the ROFR property if the package deal closed, but if the holder exercised the ROFR, the third party would pay only \$3,500,000 for the balance of the package. In other words, the net price the seller would receive if the holder exercised the ROFR would be \$5,500,000, but if the third-party buyer purchased all of the property, the net would be only \$4,950,000. The evidence showed that the third-party buyer did not care how the contract purchase price was allocated as long as it could acquire at least the portion of the land not covered by the ROFR and pay \$3,500,000 for that portion. The holder tendered the full \$2,000,000 under a reservation of rights to seek a judicial determination of the true price owed pursuant to the ROFR. The trial court and the Kansas Court of Appeals had conflicting views on which party was entitled to summary judgment, but the Kansas Supreme Court sent the case back for trial. On one aspect of the case, the court commented: “we emphasize that the fact question of the existence of good or bad faith is peculiarly inappropriate for summary judgment.” 296 Kan. at 974, 298 P.3d at 271.

Webb v. Reames, 485 S.E.2d 384, 385 (SC Ct.App.1997).

Weber v. Texas Co., 83 F.2d 807, 808 (5th Cir.1936) (“The option under consideration is within neither the purpose nor the reason for the rule.”).

Weber-Meadow Corp. v. Wilde, 575 P.2d 1053 (Utah 1978) (involving an offer that included a house that the optionee did not – and could not – own).

Webster Trust v. Roly, 261 Conn. 278, 802 A.2d 795 (2002).

Weisser v. Wal-Mart Real Estate Bus. Trust, 2005 U.S. Dist. LEXIS 11185 (2005).

Wells Fargo Bank, N.A. v. Michael, 2013-Ohio-2545, ¶ 46, 993 N.E.2d 786, 794 appeal not allowed, 2013-Ohio-4861, ¶ 46, 136 Ohio St. 3d 1559, 996 N.E.2d 986 (emphasis in original): “Although we hold that, in this case, foreclosure was not a triggering event for this *right of first refusal*, our decision does not stand for the proposition that foreclosure can never be a triggering event for a *right of first refusal*. The covenant could be drafted in a manner that renders foreclosure a triggering event for the *right of first refusal*.” The court distinguished a previous Ohio case, *National City Bank v. Welch*, 2010-Ohio-2981, ¶ 21, 188 Ohio App. 3d 641, 648, 936 N.E.2d 539, 545, which held that (1) the holder of a preferential right could purchase property that was subject to a mortgage that was in foreclosure at the time the holder sought to enforce the right because the mortgagor’s death triggered the right (which the court characterized as a ROFR, although it might more accurately have characterized the right as an option), but (2) the mortgage lien would survive if the holder exercised the right. (The net result of the *Welch* case apparently was that the holder could acquire the property from the decedent’s estate for the fixed price established by the terms of the agreement granting the preferential right, but would take title subject to a mortgage securing what may have been a much larger sum, although the amount of the outstanding balance on the mortgage loan was not stated in the opinion.)

West Texas Transmission, 907 F.2d at 1563.

White v. Miller, 518 S.W.2d 383, 385 (Tex. App. - Tyler, writ dismiss'd) discussed below.

Williams v. Williams, 347 N.W.2d 893 (S.D. 1984).

Wilson v. Fisher, 188 S.W.2d 150, 152 (Tex. 1945).

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