HAS THE RIGHT OF FIRST REFUSAL BEEN THROWN TO THE WOLVES? *AMERICAN BROADCASTING CO. v. WOLF*

I. INTRODUCTION

The New York Court of Appeals' decision in *American Broadcasting Co. v. Warner Wolf*[1] raises serious doubts as to the effectiveness and enforceability of first refusal provisions in personal service contracts. The holding in this case not only sanctions a course of action which circumvents the first refusal clause, but also indicates that even in the case of a blatant breach of this provision a plaintiff will be denied injunctive relief. As a result, *Wolf* creates persuasive reasons for employers to abandon the first refusal clause in favor of more restrictive covenants. The implications of this decision are particularly significant because this is the first time a court has ruled on an alleged breach of a first refusal provision in a contract for personal services.

The first refusal clause is a provision commonly used in employment agreements in the broadcasting industry.[2] It provides for a period of time during which a performer may not accept an offer of employment in broadcasting from a third party unless he first affords his current employer the opportunity to rehire him on terms substantially similar to the outside offer.[3]

The first refusal period usually begins at the expiration of the term of employment.[4] If at this time the parties have not agreed on terms for renewal, the first refusal clause requires that the employee

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[1] 52 N.Y.2d 394, 420 N.E.2d 363, 438 N.Y.S.2d 482 (1981).

[2] American Broadcasting Co. v. Wolf, 76 A.D.2d 162, 169, 430 N.Y.S.2d 275, 280 (1980) (in varying forms, the right of first refusal is used throughout the radio and television industry), *aff'd*, 52 N.Y.2d 394, 420 N.E.2d 363, 438 N.Y.S.2d 482 (1981); *see also* Brief of Plaintiff-Appellant at 26-27, American Broadcasting Co. v. Wolf, 52 N.Y.2d 394, 420 N.E.2d 363, 438 N.Y.S.2d 482 (1981) (broadcasters use first refusal clauses in all their contracts with on-air personalities to afford some protection for their investment).

[3] The first refusal clause in the Wolf/ABC contract provides, in part:

> In the event we are unable to reach an agreement for an extension by the expiration of the extended term hereof, you agree that you will not accept, in any market for a period of three (3) months following expiration of the extended terms of this agreement, any offer of employment as a sportscaster, sports news reporter, commentator, program host, or analyst in broadcasting (including television, cable television, pay television, and radio) without first giving us, in writing, an opportunity to employ you on substantially similar terms and you agree to enter into an agreement with us on such terms.

Wolf, 76 A.D.2d at 164, 430 N.Y.S.2d at 277.

[4] In the Wolf/ABC contract, for example, the period began at the expiration of the employment term and lasted for three months. *Id.*

choose one of three options: (1) to reach an agreement with his current employer; (2) to submit to his employer an offer from a third party which he wishes to accept; or (3) to wait out the first refusal period, unemployed, before accepting another offer of employment in the broadcasting industry.

The employer may exercise his right of first refusal only when the employee chooses to submit a third party's offer. If the employer matches the submitted offer, the employee is bound to continue working for him under the terms of the matched offer. If the employer declines to match the offer, then the employee is free to accept it at any time.[5] In effect, the first refusal clause transforms the submitted offer of a third party into an offer by the employee to work for his former employer under the specified terms. If the employer accepts the offer, then there is a binding contract.

The first refusal provision represents an attempt to reconcile the conflicting interests of the contracting parties—the desire of the performer to benefit from any increase in his popularity as soon as possible, and the desire of the broadcaster[6] to invest in the promotion of its employee without the fear that at the end of a successful contractual tenure the employee will be lost to a competitor.[7]

A broadcaster faces two major risks when hiring a performer. If the broadcaster agrees to a long term contract, it runs the risk that, if the performer is not a success, the cost of buying out of the contract will be very high. On the other hand, if the broadcaster agrees to a short term contract, it runs the risk that after making a considerable investment,[8] the performer who has achieved star status[9] may be lured away by a competitor. The inclusion of a first refusal provision

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[5] The first refusal provision in the Wolf/ABC contract provided in part: "We [the employer] shall have five (5) business days following receipt [of the offer by a third party] in which to accept such offer . . . . " *Id.* *See infra* note 134.

[6] The term "broadcaster" is used throughout this Comment to designate an organization for broadcasting television or radio programs, e.g., ABC. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 280 (1976).

[7] *Wolf*, 76 A.D.2d at 169, 430 N.Y.S.2d at 280; *see also* Brief of Plaintiff-Appellant at 26-27 (the first refusal provision strikes a balance between the broadcaster's interest in retaining top talent and the talent's desire to benefit from increased popularity).

[8] "The 'investment' in major talent made by a broadcaster includes not only substantial sums of money spent in advertising and promoting the individual, but also the enormous amount of exposure to the viewing public given the individual over the broadcaster's facilities." Brief of Plaintiff-Appellant at 26.

[9] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2226 (1976) defines star as "a highly publicized performer whose appearance in a play or motion picture is a major guarantee of its success." Applying this definition to the broadcasting industry, a star is a performer who attracts a greater percentage of the viewing audience than his counterparts on competing programs.

in the employment agreement reduces both of these risks. The first refusal provision creates the likelihood that a broadcaster, if it so chooses, will ultimately be able to retain the popular performer.[10] Therefore, the first refusal provision will generally enable a broadcaster to safely enter into a short-term contract.

The first refusal clause is also beneficial to the performer. As noted, without this clause in the contract a cautious employer will want the security of a long-term contract or a unilateral option to renew.[11] The security provided by a first refusal clause will make an employer more amenable to a short-term contract which does not contain a unilateral option to renew. Such a contract has two advantages to the employee: (1) it allows him to benefit from an increase in his popularity, after only a short term, by compelling his employer to match a competitor's offer in order to retain him; and (2) it permits him to decide not to renew, regardless of the terms offered.[12]

By not finding a breach of the first refusal clause in *Wolf*, the court of appeals has mortally wounded a desirable contractual device. The purpose of this Comment is to suggest an approach to the legal issues raised in *Wolf* which would preserve the efficacy of the first refusal provision. The first part of this Comment demonstrates that the facts of *Wolf* support a conclusion that the first refusal provision was breached. The second part explores the policies favoring injunctive relief and concludes that equitable remedies exist which not only avoid the court's objections, but also afford a large measure of compensation to a plaintiff. The final part discusses the practical measures that broadcasters are likely to take in response to the *Wolf* decision.

II. The Facts

Warner Wolf is a colorful sportscaster presently employed by WCBS-TV, New York.[13] In March 1976, after a successful tenure as a sportscaster for a Washington, D.C. television station, Wolf accepted an offer to work for ABC (American Broadcasting Company, Inc.) in New York. In February 1978, Wolf negotiated a new agreement with ABC which, by virtue of ABC's subsequent exercise of a renewal option, had a termination date of March 5, 1980.[14]

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[10] *See infra* text accompanying notes 75-77.

[11] A unilateral option to renew is a provision in which the performer agrees that the employer shall have the right to renew the contract on stipulated terms.

[12] Brief of Plaintiff-Appellant at 27 n.**.

[13] *Wolf*, 76 A.D.2d at 169, 430 N.Y.S.2d at 280.

[14] *Id.* at 164, 430 N.Y.S.2d at 277.

Wolf's 1978 agreement with ABC contained a first negotiation/first refusal clause which provided that the last ninety days of the contract term were to be a good faith negotiation period, the first forty-five days of which Wolf was to negotiate exclusively with ABC.[15] In the event that the parties were unable to reach an agreement during the ninety days, Wolf agreed not to accept any offer of employment as a sportscaster in any market for three months following the expiration of the contract without first allowing ABC the opportunity to employ him on substantially similar terms.[16] If ABC decided not to match the third party's offer, Wolf was free to accept it at any time.[17] In other words, Wolf was required to afford ABC the right of first refusal for three months subsequent to the expiration of the term of employment. If Wolf refrained from accepting another offer during this three month period, he would thereafter be free to accept any offer he chose without obligation to ABC.[18]

Wolf and ABC began negotiating a renewal contract in September 1979, two months before they were required to do so under the 1978 contract.[19] No agreement was reached at this time or at a subsequent meeting on October 12, 1979.[20] Unbeknownst to ABC, Wolf had met with representatives of CBS (Columbia Broadcasting System) on two separate occasions in October 1979.[21] At these meetings, Wolf informed CBS of his contractual demands, as well as the details of his contract with ABC.[22]

On January 17, 1980, two days before the end of the exclusive negotiation period, Wolf met again with ABC.[23] Although ABC

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[15] The good faith negotiation clause begins the paragraph in which the first refusal clause is also found:

> You agree, if we so elect, during the last ninety (90) days prior to the expiration of the extended term of this agreement, to enter into good faith negotiations with us for the extension of this agreement on mutually agreeable terms. You further agree that for the first forty-five (45) days of this negotiation period, you will not negotiate for your services with any other person or company other than WABC-TV or ABC.

Id.

[16] *Id.; see supra* note 2.

[17] "If ABC failed to offer him a similar contract within five business days after receipt of such written offer, Wolf was free to accept the other offer at any time." *Wolf*, 76 A.D.2d at 164, 430 N.Y.S.2d at 277.

[18] *Wolf*, 52 N.Y.2d at 398, 420 N.E.2d at 364, 438 N.Y.S.2d at 483.

[19] *Wolf*, 76 A.D.2d at 165, 430 N.Y.S.2d at 278.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

acceded to many of Wolf's demands,[24] he rejected their offer, citing as his reasons ABC's delay in getting back to him and the imminent expiration of the exclusive negotiation period.[25]

On February 1, 1980, Wolf and CBS orally agreed on the terms of Wolf's employment with CBS.[26] Three days later, Wolf signed two contracts with CBS, one a producer's agreement[27] to take effect on March 6, and the other an option contract holding open CBS' offer of employment as a sportscaster until the expiration of ABC's right of first refusal.[28]

On February 6, two days after he had signed the contracts with CBS, Wolf made it clear to ABC that he felt he had no future with ABC Sports and would leave at the expiration of his contract.[29] ABC responded with various offers, but Wolf refused by saying that it was too late; he had already made a "gentlemen's agreement" and a "moral commitment."[30]

On February 22, Wolf entered into another contract with ABC in which he agreed to work for them during the three-month first refusal

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[24] Wolf originally requested a two-year contract at a salary of $400,000 for the first year and $450,000 for the second year. He also wanted the opportunity to do sixteen half-hour football specials. At the January 17 meeting, ABC offered Wolf a three-year contract at a salary of $400,000 for the first year, $450,000 for the second year and $500,000 for the third year. ABC also agreed to the football specials, subject to the approval of the Board of Directors. *Id.*

[25] *Id.* at 165-66, 430 N.Y.S.2d at 278. CBS claimed that the nature of Wolf's relations with ABC were strained for the following reasons: (1) Wolf was not given the network assignments which he had been promised; (2) ABC had chosen not to exercise its option for a second year under the 1978 agreement; (3) ABC criticized and downgraded Wolf during talks for a new contract; and (4) ABC kept Wolf "dangling, for months, with no explanation." Brief of Defendants-Respondents at 24, American Broadcasting Co. v. Wolf, 52 N.Y.2d 394, 420 N.E.2d 363, 438 N.Y.S.2d 482 (1981).

[26] *Wolf*, 76 A.D.2d at 166, 430 N.Y.S.2d at 278.

[27] The language of the first refusal clause prohibited Wolf from accepting employment as a "sportscaster, sports news reporter, commentator, program host, or analyst in broadcasting. . . ." *Id.* at 164, 430 N.Y.S.2d at 277; *see supra* note 2. This is apparently the reason why CBS decided that a *producer's* agreement would pass judicial muster. This agreement contained the following exclusivity clause:

> Artist's services shall be completely exclusive to CBS during the term of this Agreement, *and during such term Artist will not perform services of any nature for*, or permit the use of Artist's name, likeness, voice or endorsement by, *any person, firm or corporation*, or on Artist's own account, without station's prior approval, which approval shall not be unreasonably withheld.

Wolf, 76 A.D.2d at 166-67, 430 N.Y.S.2d at 279 (emphasis added).

[28] *Id.* at 166, 430 N.Y.S.2d at 278-79. By using an option agreement, Wolf would technically not be accepting the sportscaster agreement until after the first refusal period.

[29] *Id.* at 167, 430 N.Y.S.2d at 279.

[30] *Id.*

period. This new contract expressly preserved ABC's rights under the February 1978 contract.[31]

ABC did not commence this action until May 6, 1980.[32] By this time, Wolf's anticipated switch to CBS was a matter of public knowledge.[33]

In its complaint, ABC requested an order enjoining Wolf from working for WCBS-TV. In addition, ABC sought specific performance of its right of first refusal by also requesting an order directing Wolf to submit CBS' offer of employment to ABC to be matched.[34] ABC did not make any claim for damages.[35]

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[31] The February 22 agreement provided in part: "[I]t is further understood and agreed that this agreement shall in no way affect our mutual rights and obligations pursuant to the agreement between us dated February 1, 1978." *Id.* at 168, 430 N.Y.S.2d at 280. CBS argued that this agreement prevented ABC's right of first refusal from coming into being. They based their argument on the following language in the first refusal provision:

> *In the event we are unable to reach an agreement for an extension by the expiration of the extended term hereof,* you agree that you will not accept in any market for a period of three (3) months following expiration [of the employment period] any offer of employment as a sportscaster. . . .

Brief of Defendants-Respondents at 34; *see also Wolf*, 76 A.D.2d at 165, 430 N.Y.S.2d at 278.

CBS maintained that the February 22 contract was an "agreement for an extension" entered into before the expiration of the employment period and thus the first refusal right never came into being. *Id.* at 34-35. The appellate division implicitly rejected this argument. The court found that the language of the February 22 agreement clearly preserved the right of first refusal. *Wolf*, 76 A.D.2d at 171-72, 430 N.Y.S.2d at 282.

[32] ABC claimed that even after the February 5 letter of resignation and the subsequent meetings with Wolf, the top executives were under the impression that Wolf had not yet signed an agreement with CBS. Brief of Plaintiff-Appellant at 17-19.

[33] Wolf had publicly admitted that he had made a deal with CBS. *Let's Go to the Videotape*, N.Y. MAG., Apr. 28, 1980, at 19 (interview with Warner Wolf).

[34] *Wolf*, 76 A.D.2d at 168-69, 430 N.Y.S.2d at 280.

[35] By not claiming damages, ABC was emphasizing the inadequacy of damages from their standpoint. In denying relief, both the appellate division and the court of appeals did not bar a further action for damages. By denying equitable relief, the courts were in effect ruling that a remedy at law would be adequate compensation. Terrace v. Thompson, 263 U.S. 197, 214 (1923).

This Comment proceeds under the assumption that damages in the breach of personal service contracts cannot be estimated with any accuracy when the services to be performed are unique. Neither the courts nor CBS disputed the contention that Wolf's services were unique. In Shubert Theatrical Co. v. Rath, 271 F. 827 (2d Cir. 1923), an action by an employer against an entertainer, the court observed:

> Damages for breach of such contracts cannot be estimated with any certainty. . . . The injury in such cases is irreparable. Damages which can be estimated in cases of this class only by conjecture, and not by any accurate standard, constitute such an irreparable injury as courts of equity will restrain by injunction.

Id. at 831.

In Lemat Corp. v. Barry, 271 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969), plaintiff, a basketball team owner, went to great lengths to prove damages by including a detailed account of financial losses alleged to be a direct result of defendant's breach. The defendant was a star player. The court held, however, that in a situation of this kind damages were speculative, uncertain and practically impossible to ascertain.

The trial court issued a preliminary injunction, enjoining CBS from employing Wolf as a sportscaster.[36] On June 9, after trial, a justice of the Supreme Court of the State of New York dismissed ABC's complaint, but continued the injunction for two days.[37] A justice of the appellate division refused to continue the injunction past June 11, but granted ABC's application for an expedited appeal.[38] By the time this case reached the court of appeals, Wolf had been working for CBS for nearly one year.[39]

III. The Holding

Both the appellate division and the court of appeals agreed that once Wolf signed the producer's agreement with CBS on February 4, he had breached the good faith negotiation provision of his contract with ABC.[40] The two courts diverged, however, in their analysis and treatment of the signing of the option contract.

A. *The Appellate Division*

The appellate division, citing *Quigley v. Capolongo*,[41] maintained that there was an obligation to deal in good faith implicit in the first refusal provision. The court found that Wolf, by signing the two contracts with CBS, had violated this obligation and thereby had breached the first refusal provision.

In *Quigley*, the plaintiff had a five-year option to match any bid to purchase a certain property owned by the defendant. During this five-year period the defendant leased the property to a third party and sold, to this same party, an option to purchase which extended until the end of the first refusal period. The court voided the combination

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Similarly, in *Wolf*, financial losses attributed to Wolf's defection are impossible to prove. It is impossible to ascertain the extent to which ABC has been deprived of a return on its promotional investment in Wolf. It is equally impossible to prove that any loss in rating points is directly attributable to the loss of Wolf. Skyland Broadcasting Corp. v. Hamby, 2 Ohio Op. 2d 426, 429, 141 N.E.2d 783, 786 (C.P. 1957). *See generally* Kronman, *Specific Performance*, 45 U. Chi. L. Rev. 351, 355-65 (1978).

[36] *Wolf*, 76 A.D.2d at 169, 430 N.Y.S.2d at 280.

[37] *Id.*

[38] *Id.*

[39] The case was argued before the court of appeals on March 18, 1981. *Wolf*, 52 N.Y.2d at 394, 420 N.E.2d at 363, 438 N.Y.S.2d at 482. Wolf began working for CBS on June 12, 1980. *Wolf*, 76 A.D.2d at 169, 430 N.Y.S.2d at 280.

[40] *Wolf*, 52 N.Y.2d at 400, 420 N.E.2d at 365, 438 N.Y.S.2d at 484; *Wolf*, 76 A.D.2d at 171, 430 N.Y.S.2d at 281.

[41] 53 A.D.2d 714, 383 N.Y.S.2d 935 (1976), *aff'd*, 43 N.Y.2d 748, 372 N.E.2d 797, 401 N.Y.S.2d 1009 (1977).

of lease and option as an attempt to circumvent the plaintiff's first refusal rights. The defendant's present intention of selling the property, reasoned the court, was embodied in a contract under which the actual transfer of title was merely postponed. This conduct was held to be a violation of the good faith obligation implicit in every agreement.[42]

In Wolf, the producer's agreement between Wolf and CBS contained an exclusivity provision which precluded Wolf from rendering services of *any* nature for anyone other than CBS for the duration of the two-year contract.[43] The appellate division reasoned that, in view of this exclusivity provision, it was almost certain that Wolf would exercise his option to accept the sportscasting position at CBS when ABC's right of first refusal expired. Relying upon the rationale of *Quigley*, the court found the combination of producer's agreement and option contract to be "a contrived bifurcation of the sportscaster's agreement, already orally reached on February 1."[44] The court concluded that this bifurcated agreement violated ABC's right of first refusal.[45]

Despite their finding of a breach, the court denied ABC's request for an order specifically enforcing its right of first refusal because "as a general rule equity will not enforce specific performance of contracts for personal services."[46]

The appellate division also denied ABC's request for a negative injunction. The court recognized that Wolf's agreement not to accept an offer of employment, without first permitting ABC the opportunity to match it, was a negative convenant which was "an integral part of the first refusal provision."[47] ABC argued that a negative

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[42] *Quigley*, 53 A.D.2d at 715, 383 N.Y.S.2d at 937. "Even though a grantee's right of first refusal may never ripen into a right absolute, the grantor of such right owes the grantee 'the obligation of dealing in good faith.'" *Wolf*, 76 A.D.2d at 170, 430 N.Y.S.2d at 281 (quoting *Quigley*, 53 A.D.2d at 715, 383 N.Y.S.2d at 936).

[43] *Wolf*, 76 A.D.2d at 170, 430 N.Y.S.2d at 281.

[44] *Id.*

[45] In concluding that the execution of the producer's agreement and the simultaneous grant of an irrevocable option to Wolf to enter into a sportscaster's contract on June 4, 1980 did not violate ABC's right under the first refusal clause because Wolf had not, on February 4, formally accepted CBS' offer of employment as a sportscaster, Trial Term lauded form over substance and ignored compelling evidence that Wolf and CBS had structured the February 4 agreement so as to circumvent ABC's right of first refusal.

Id. at 171, 430 N.Y.S.2d at 281.

[46] *Id.* at 174, 430 N.Y.S.2d at 283. "[T]he grant of equitable relief, the effect of which is to force Wolf to continue a strained relationship with ABC, would be highly inappropriate." *Id.* at 176, 430 N.Y.S.2d at 285.

[47] *Id.* at 176, 430 N.Y.S.2d at 285.

convenant, such as the one contained in the first refusal clause, has traditionally been held to afford an acceptable basis for issuing a negative injunction.[48] The appellate division, however, refused to grant ABC a negative injunction on the grounds that, under the circumstances,[49] the "public policy favoring competition and the personal freedom to pursue the career of one's choice"[50] dictated that damages were the more appropriate remedy.[51]

B. *The Court of Appeals*

The court of appeals rejected the appellate division's finding that the first refusal provision had been breached. The court maintained that the first refusal period, by its own terms, did not apply to offers accepted by Wolf prior to March 5, the beginning of the first refusal period.[52] Based on the fact that Wolf's option contract with CBS had been entered into prior to the beginning of the first refusal period,[53] the court concluded that the first refusal provision had not been breached. However, the signing of the producer's agreement was held to be a breach of the good faith negotiation clause.[54]

In affirming the denial of ABC's request for injunctive relief, the court of appeals relied upon the policy that, after the expiration of a contract for personal services, such relief may be granted only to prevent unfair competition or similar tortious behavior, or to enforce an express and valid anticompetitive covenant.[55] The court held that since there was neither an existing contract between the parties, nor

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[48] Brief of Plaintiff-Appellant at 43-54. *See, e.g.*, Shubert Theatrical Co. v. Rath, 271 F. 827 (2d Cir. 1923); Karpinski v. Ingrasci, 28 N.Y.2d 45, 268 N.E.2d 751, 320 N.Y.S.2d 1 (1971); Shubert Theatrical Co. v. Gallagher, 206 A.D. 514, 201 N.Y.S. 577 (1923); Lumley v. Wagner, 64 Eng. Rep. 1209 (1852).

[49] The circumstances to which the appellate division is referring are Wolf's stated reluctance to continue to work at ABC and the allegedly strained relations between Wolf and management. *Wolf*, 76 A.D.2d at 174, 176, 430 N.Y.S.2d at 283, 285.

[50] *Id.* at 175, 430 N.Y.S.2d at 284.

[51] *Id.* at 176, 430 N.Y.S.2d at 285.

[52] *Wolf*, 52 N.Y.2d at 400-01, 420 N.E.2d at 366, 438 N.Y.S.2d at 484.

[53] *Id.* The court of appeals did not consider the producer's agreement to have been a breach of the first refusal clause. The court did not even discuss the possibility that this agreement may have been a breach.

The exclusivity clause in the producer's agreement precludes the possibility of Wolf working for ABC in any capacity. This agreement, by rendering the first refusal clause superfluous, is against the spirit, if not the letter, of the contract. Even without the option contract, it is possible to construe the producer's agreement as a breach of the good faith obligation implicit in any contract. *See Wolf*, 76 A.D.2d at 170, 430 N.Y.S.2d at 279.

[54] *Wolf*, 52 N.Y.2d at 400, 420 N.E.2d at 366, 438 N.Y.S.2d at 484.

[55] *Id.* at 404-05, 420 N.E.2d at 368, 438 N.Y.S.2d at 487.

an express anticompetitive covenant,[56] the negative injunction that might have been appropriate during the term of the contract was unwarranted here.[57] Moreover, the court concluded that a breach of a good faith negotiation clause would not, by itself, justify granting equitable relief once a contract has terminated.[58] "To grant an injunction in [this] situation would be to unduly interfere with an individual's livelihood and to inhibit free competition where there is no corresponding injury to the employer other than the loss of a competitive edge."[59] The court affirmed the denial of equitable relief without prejudice to ABC's right to pursue its legal remedies.

IV. Analysis of the Holding

The court of appeals' determination that Wolf did not breach the first refusal clause reflects a very narrow interpretation of the concept of good faith. This determination suggests that the good faith requirement implicit in every contract is met by simply abiding by the letter of an agreement. Such a restrictive view of good faith is at odds with a formidable body of law on the subject.[60]

In the landmark case of *Wood v. Lucy, Lady Duff-Gordon*,[61] Judge Cardozo laid the foundation for a much broader view of good faith: "A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed."[62] Recent commentators have built on this concept: "*Good faith performance . . . of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations* of the other party. . . . ";[63] "*Subterfuges and evasions violate the obligation of good faith in performance* even though the actor believes his conduct to be justified."[64]

The court's anomalous interpretation of good faith would have allowed Wolf to have accepted a sportscaster's agreement at any time

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[56] Finding only a breach of the negotiation clause, the court did not reach the issue of whether or not the first refusal clause contained an express, valid anticompetitive covenant.

[57] *Wolf*, 52 N.Y.2d at 405, 420 N.E.2d at 368, 438 N.Y.S.2d at 487.

[58] *Id.*

[59] *Id.*

[60] *See, e.g.*, Restatement (Second) of Contracts § 205 (1981); Daitch Crystal Dairies, Inc. v. Neisloss, 8 A.D.2d 965, 190 N.Y.S.2d 737 (1959), *aff'd mem.*, 8 N.Y.2d 723, 167 N.E.2d 643, 201 N.Y.S.2d 101 (1960); *see generally* Corbin on Contracts, pt. 1, §§ 654A-I, at 455-74 (Supp. 1980).

[61] 222 N.Y. 88, 118 N.E. 214 (1917).

[62] *Id.* at 91, 118 N.E. at 214 (footnote omitted) (quoting Scott, J., in McCall Co. v. Wright, 133 A.D. 62, 117 N.Y.S. 775 (1909), and Moran v. Standard Oil Co., 211 N.Y. 187, 198, 105 N.E. 217 (1914)).

[63] Restatement (Second) of Contracts § 205 comment a (1981) (emphasis added).

[64] *Id.* comment d (emphasis added).

during his term of employment with ABC. This result is puzzling since it is highly unlikely that ABC would have contemplated such an effortless destruction of its valuable right of first refusal. Indeed, it appears that CBS' legal staff carefully drafted an option contract with a conscious effort to avoid breaching the first refusal rights of ABC.[65] The court's opinion made this elegant subterfuge unnecessary.

It is the accepted province of a court sitting in equity to go beyond the letter of an agreement in construing a contract.[66] Equity should "never suffer the mere appearance and external form to cancel the true purposes, objects and consequences of a transaction."[67] The court's construction of Wolf's contractual obligations was a departure from this established maxim.

As indicated by the authorities quoted above, the initial task of a court in a contract dispute is to determine the true purpose of the contract as it was understood by the parties when they entered into it.[68] Once this is established, the actions of the defendant must be measured against the justified expectations of the plaintiff in order to determine whether or not there has been a breach of good faith.[69] In *Wolf*, therefore, the threshold inquiry should have involved an attempt to discern the purpose of the first refusal provision as it was understood by the parties.

In Wolf's contract with ABC, the good faith negotiation and first refusal provisions are found within the same paragraph.[70] The appellate division classified this paragraph as a "first negotiation/first refusal clause"[71] and the court of appeals referred to it as a "good faith negotiation and first-refusal provision."[72] These designations are sig-

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[65] CBS claimed in their brief that the reason for having two contracts was that such an arrangement conformed to WCBS' internal organization; "the producer's agreement was to be administered by the broadcasting department, while the sportscasting agreement was to be administered by the news department." Brief of Defendants-Respondents at 28. The appellate division characterized this arrangement as a "contrived bifurcation" designed to circumvent ABC's right of first refusal. *Wolf*, 76 A.D.2d at 170-71, 430 N.Y.S.2d at 281.

[66] Sargent v. Halsey, 75 Misc. 2d 624, 348 N.Y.S.2d 661, *aff'd*, 42 A.D.2d 375, 348 N.Y.S.2d 160 (1973); In Re Moran's Will, 136 Misc. 615, 241 N.Y.S. 648 (1930); Zeiser v. Cohn, 207 N.Y. 407, 101 N.E. 184 (1913); *see generally* 20 N.Y. JUR. *Equity* § 83 (1976).

[67] Sargent v. Halsey, 75 Misc. 2d at 627, 348 N.Y.S.2d at 664.

[68] RESTATEMENT (SECOND) OF CONTRACTS § 205 comments a-d (1981).

"In order to prevent the disappointment of expectations that the transaction aroused in one party, as the other had reason to know, the courts find and enforce promises that were not put into words, by interpretation when they can and by implication and construction when they must." 3 CORBIN ON CONTRACTS § 541, at 97 (1960).

[69] *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 comment a (1981).

[70] *See Wolf*, 76 A.D.2d at 164, 430 N.Y.S.2d at 277; *supra* note 15.

[71] *Wolf*, 76 A.D.2d at 164, 430 N.Y.S.2d at 277.

[72] *Wolf*, 52 N.Y.2d at 397, 420 N.E.2d at 364, 438 N.Y.S.2d at 483.

nificant because they correctly imply a dependent relationship between the good faith negotiation and first refusal clauses.

A good faith negotiation clause and a right of first refusal are intended to foster a renewal agreement. The two provisions are meant to work together to create an effective bargaining tool.[73] The existence of the first refusal clause increases the likelihood of reaching an accord during the negotiating period; the good faith requirement of the negotiation period operates to insure the integrity of the first refusal period.

In the absence of a first refusal provision, a good faith negotiation clause is not a strong impetus to come to terms. Both parties can be adamant, intractable, and hostile, yet be negotiating in good faith.[74] However, when a first refusal clause looms at the end of the negotiation period, both parties are likely to be more conciliatory.

The first refusal provision increases the likelihood that the parties will reach an agreement during good faith negotiations. This clause, with its threat of a period of forced unemployment, is a two-edged sword; both parties stand to be hurt financially if a popular performer chooses to go "on the beach."[75] Thus, there is a strong incentive for each party to make an earnest effort to come to terms during the negotiation period.

The good faith negotiation period, in turn, preserves the efficacy of the first refusal provision. Proper observance of his good faith obligation during the negotiation period precludes the performer from contracting with a third party.[76] Since the first refusal period begins when the negotiation period ends, the performer should enter the first refusal period without having signed a contract with a competitor. If a performer is permitted to contract with a third party before the

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[73] Brief of Plaintiff-Appellant at 27-28; *see Wolf*, 76 A.D.2d at 176, 430 N.Y.S.2d at 285.

[74] *E.g.*, National Labor Relations Act, 29 U.S.C. § 158d (1976) ("[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in *good faith . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession* . . . . ").

[75] "On the beach" is a euphemism for "unemployed." *Wolf*, 76 A.D.2d at 172, 430 N.Y.S.2d at 282. When an employee goes "on the beach" it is possible that he will be harmed more seriously than his employer. An employer is generally able to weather financial loss with relative ease compared to the employee. After the exclusive negotiation period, the first refusal clause may actually militate against quickly reaching an agreement: a present employer may prefer to refrain from engaging in a bidding war during the nonexclusive negotiation period and instead elect to match the *one* offer the employee may choose to submit during the first refusal period. However, this course of action entails the risk that the employee may choose to remain unemployed for the entire first refusal period and then accept another offer which the employer no longer has the right to match.

[76] *Wolf*, 52 N.Y.2d at 400-01, 420 N.E.2d at 366, 438 N.Y.S.2d at 485.

commencement of the first refusal period, the right to match the offer is rendered useless.

The first refusal clause, in tandem with the good faith negotiation period, is an ingenious refinement of the bargaining process in the broadcasting industry. Where the failure to come to terms during negotiations is simply a good faith inability to agree on the performer's economic value, the first refusal provision's right to match supplements the bargaining process by bringing into play the persuasive effect of free market forces. For instance, the fact that the performer has received a firm offer from a competitor, which is similar to or more generous than that which he had demanded from his former employer, may convince the latter that the performer is indeed worth what he had asked. On the other hand, the performer's failure to receive a better offer from another broadcaster may persuade him to come to terms with his former employer. In order for the first refusal provision to have this intended effect, it is essential that the performer act in good faith by not entering into another employment contract before the beginning of the first refusal period.

As noted above, the good faith requirement is designed to protect justified expectations based on the commonly understood purpose of a contract.[77] The court of appeals recognized that, by signing a contract with CBS, Wolf frustrated the purpose of the good faith negotiation clause and thereby breached this provision. However, the same breach also frustrated the purpose of the first refusal provision. By failing to find a breach of the good faith requirement of the first refusal clause, the court ignored the interdependency of these two provisions. These two provisions must be construed as a single unit in order to give them proper effect.

If the court had properly appreciated the interaction of these two provisions, it would have concluded that ABC was justified in its expectation that Wolf would enter the first refusal period unfettered by *any* commitment which would stand in the way of an agreement. By signing the CBS contract, Wolf frustrated this justified expectation and thereby breached the good faith obligation implicit in the entire first negotiation/first refusal provision.

In contrast to the court of appeals, the appellate division implicitly recognized the interdependence of the two provisions. This is reflected in the court's holding that the machinations of Wolf and CBS breached both the good faith negotiation period and ABC's right of first refusal.[78] As in *Quigley*, Wolf's option contract was a reduc-

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[77] RESTATEMENT (SECOND) OF CONTRACTS § 205 comment a (1981).

[78] *Wolf*, 76 A.D.2d at 169-72, 430 N.Y.S.2d at 280-82.

tion of his present intention of accepting the offer of employment as a sportscaster to a contract in which the actual acceptance would be postponed.[79] While technically Wolf could have decided not to accept the offer, under the circumstances,[80] and in light of Wolf's testimony,[81] it is clear that the option contract was a subterfuge. This calculated evasion of ABC's contractual rights[82] not only undermined the specific purpose of the first refusal clause, but also thwarted the general purpose of the first negotiation/first refusal clause.

By not finding a breach of the first refusal provision, the court of appeals was able to avoid deciding what relief would be appropriate for such a breach. The court did, however, discuss the general policy considerations that would be involved in deciding whether or not to grant specific performance as a remedy for the breach of a personal service contract.[83] The court pointed out that in addition to the

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[79] *Wolf*, 76 A.D.2d at 170, 430 N.Y.S.2d at 281. On February 1, 1980, during the good faith negotiation period with ABC, Wolf agreed with CBS on the terms of his employment as a WCBS sportscaster, and the option agreement, holding the sportscasting offer open, was signed three days later. *Id.*

[80] The producer's agreement that Wolf signed with CBS contained an exclusivity clause. *See supra* note 25.

[81] "Wolf's own testimony made clear that he never considered the possibility of working for CBS only as a producer, and not as an on-air sportscaster." *Wolf*, 76 A.D.2d at 171, 430 N.Y.S.2d at 281.

[82] The appellate division noted: "By so arranging the February 4, 1980 agreements, with knowledge of ABC's right of first refusal, CBS induced Wolf's breach of his 1978 contract with ABC." *Id.* Although this is the only treatment of the issue in either appellate court, this observation implies that CBS may be liable in tort to ABC for intentional interference with contract.

The elements of a cause of action predicated on interference with contract are: (a) a valid existing contract; (b) defendant's knowledge of the contract and inducement of its breach; (c) breach of contract by defendant; (d) breach caused by defendant's unjustified or wrongful conduct; and (e) plaintiff suffered damages. Dryden v. Tri-Valley Growers, 65 Cal. App. 3d 990, 995, 135 Cal. Rptr. 720, 723 (1977); Israel v. Wood Dolson Co., 1 N.Y.2d 116, 120, 134 N.E.2d 97, 99, 151 N.Y.S.2d 1, 5 (1956). ABC may have a prima facie case against CBS in tort. The advantage to this cause of action would be the availability of punitive damages. The tort issue, however, is outside the scope of this Comment.

[83] *Wolf*, 52 N.Y.2d at 401-05, 420 N.E.2d at 366-68, 438 N.Y.S.2d at 485-87. The court here was considering the merits of a claim for specific performance as a remedy for a breach of good faith with regard to the negotiation clause. While this Comment is primarily concerned with the impact of *Wolf* on the first refusal right, the effect of this case on the integrity of the good faith negotiation clause is also important.

Breach of a good faith clause would seem to be the paradigmatic instance in which damages would be impossible to ascertain with accuracy. Although a court can order the parties to bargain in good faith, when the contract has expired and the employee is employed elsewhere, enforcing good faith negotiations is likely to be disruptive and futile.

The only practical response by employers who wish to utilize a good faith negotiation clause would be to include a liquidated damages provision to be activated by a breach of good faith. To enforce the liquidated damages clause would probably require litigation because the parties are not likely to agree on what constitutes good faith. For the courts to uphold a liquidated damages

difficulties of "supervising the performance of uniquely personal efforts,"[84] it has been strongly suggested that judicial compulsion of personal services would violate the thirteenth amendment's prohibition of involuntary servitude.[85] "For practical, policy and constitutional reasons, therefore, courts continue to decline to affirmatively enforce employment contracts."[86]

In a footnote with ominous implications for the fate of the first refusal clause the court noted:

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provision it must appear that the prescribed amount is reasonable in terms of the loss anticipated at the time of making the contract. "The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty, the easier it is to show the amount fixed is reasonable." RESTATEMENT (SECOND) OF CONTRACTS § 356 comment b (1981).

[84] *Wolf*, 52 N.Y.2d at 401, 420 N.E.2d at 366, 438 N.Y.S.2d at 485.

[85] *Id.* at 402, 420 N.E.2d at 366, 438 N.Y.S.2d at 485.

[86] *Id.*

Except in rare cases, the courts have eschewed ordering specific performance in personal service contracts. Professor Schwartz argues in his article, *The Case For Specific Performance*, 89 YALE L.J. 271 (1980), that specific performance should be granted in many more cases than is the current practice. His article points out that in most instances specific performance is the most efficient form of compensation, in an economic sense. *Id.* at 305. He concludes: "If the law is committed to putting disappointed promisees in as good a position as they would have been had their promisors performed, specific performance should be available as a matter of course to those promisees who request it." *Id.* at 306.

While Professor Schwartz explicitly avoids dealing with specific performance in a personal service setting, he does suggest that objections which are based on personal liberty should not always prevail over requests for specific performance: "It must be . . . shown that protection of the liberty interest . . . is more important than the goals that specific performance is thought to serve. Until this showing is made, liberty motivated exceptions to a rule of specific performance on promisee request should not be created." *Id.* at 298.

Although Professor Schwartz's article is concerned with goods and corporate services, his thesis could also be used to challenge the absolute refusal of courts to grant specific performance in personal service contracts. In *Wolf*, for instance, enforcement of the first refusal clause may ultimately be more consonant with policies which stress personal liberty than refusing to enforce it, since the latter may result in more stringent restrictions in future contracts. *See infra* text accompanying notes 145-47.

According to this extrapolation of Schwartz's thesis, for the court in *Wolf* to have granted specific performance, it would have had to have found that the requirement that ABC meet all material terms of the CBS contract sufficiently mitigated the economic hardship to Wolf. The policy which favors enforcement of the first refusal clause could then have been held to outweigh Wolf's liberty objections.

Professor Kronman, in his article, *Specific Performance*, 45 CHI. L. REV. 351 (1978), supports this application of Schwartz's thesis. Kronman suggests that specific performance in the employee/employer context is, in most circumstances, not as analogous to involuntary servitude as most authorities maintain.

> [T]here are many relations of domination recognized and protected by law so long as they are voluntarily established and maintained. The relation created by a contract of employment is an important example of legally protected domination . . . . Slavery is objectionable largely because it involves near-total control. By contrast the domination an employer exercises is partial and limited—the employer only controls certain aspects of his employee's life.

Id. at 372.

> Outside the personal service area, the usual equitable remedy for breach of a first-refusal clause is to order the breaching party to perform the contract with the person possessing the first-refusal right . . . . When personal services are involved, this would result in an affirmative injunction ordering the employee to perform services for the plaintiff. Such relief, as discussed, cannot be granted.[87]

Since the court did not find a breach of the first refusal clause, this statement is *gratis dictum*. This dictum does, however, accurately point to the dilemma presented by a breach of a first refusal clause: since damages are typically an inappropriate remedy where there has been a breach of a contract for personal services,[88] and since specific performance is eschewed by the courts, can a plaintiff in the position of ABC be adequately compensated?

In light of the dictum quoted above, it is reasonable to assume that the court of appeals would deny equitable relief where there has been a breach of a first refusal clause, since, in their view, the traditional method of enforcing this clause, an affirmative injunction, would result in the compulsion of personal services.

The court's view with respect to the propriety of granting injunctive relief is unnecessarily constrained. A court sitting in equity should be sensitive to equity's tradition of flexibility;[89] it should apply all its ingenuity to fashion a remedy appropriate to the particular case before it.[90] Yet the position taken by the court of appeals ignores not only the fact that an affirmative injunction would not necessarily have compelled Wolf to work for ABC against his will,[91] but also the fact that equity's arsenal of remedies includes negative injunctions.[92] Fur-

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[87] *Wolf*, 52 N.Y.2d at 405 n.7, 420 N.E.2d at 368 n.7, 438 N.Y.S.2d at 487 n.7. The right of first refusal has enjoyed the court's protection in cases involving real property. *See* Costello v. Hoffman, 20 A.D.2d 530, 921 N.Y.S.2d 116 (1968); New Atlantic Garden Inc. v. Atlantic Garden Realty Corp., 201 A.D. 404, 194 N.Y.S. 34 (1922), *aff'd*, 237 N.Y. 540, 143 N.E. 734 (1923); Quigley v. Capolongo, 53 A.D.2d 714, 383 N.Y.S.2d 935 (1976), *aff'd*, 43 N.Y.2d 748, 372 N.E.2d 797, 401 N.Y.S.2d 1009 (1977).

This provision has also enjoyed the court's protection in cases involving personal property. *See* Allen v. Biltmore Tissue Corp., 1 A.D.2d 599, 153 N.Y.S.2d 779 (1956), *rev'd*, 2 N.Y.2d 534, 141 N.E.2d 812, 161 N.Y.S.2d 418 (1957); Kaminsky v. Kahn, 23 A.D.2d 231, 259 N.Y.S.2d 716 (1965).

[88] *See supra* note 35.

[89] "Precedent is useful only in so far as it shows the way in which principles have been applied; it is a guide, not a bar." 20 N.Y. JUR. *Equity* § 84 (1976). "In the administration of justice, a court of equity should never hesitate to adapt itself in the application of old principles to new situations." *Id.* § 83.

[90] "[I]t is the distinguishing feature of equity jurisdiction that it will apply settled rules to unusual conditions, and mold its decrees so as to do equity between the parties." *Id.*

[91] *See infra* text accompanying notes 136-41.

[92] *See infra* text accompanying notes 109-14.

thermore, the court's peremptory refusal to issue any type of affirmative injunction, combined with its failure to consider the possibility of granting a negative injunction, is a dramatic departure from the accepted notion that the purpose of contract remedies is to place a disappointed promisee in as good a position as he would have been had the promisor performed.[93]

Proper recognition of ABC's right of first refusal would have required, at the very least, that Wolf be ordered to make the choice dictated by the terms of his agreement. If Wolf had performed his part of the bargain with ABC, he would have had either to allow ABC the right to match the CBS offer, or to wait until the end of the first refusal period to accept the offer. This constraint on Wolf's options was bargained for by ABC when the contract was formed.[94] Requiring Wolf to live up to his side of the bargain would not have risen to the level of involuntary servitude eschewed by the court.[95]

By not finding a breach of the first refusal clause where the plaintiff's bargained-for rights were clearly frustrated, the court of appeals has virtually sent a message throughout the broadcasting industry that a first negotiation/first refusal provision will not be enforced.[96] Accordingly, this case, which is one of first impression,[97] has severely impaired the usefulness of the first refusal provision.

In view of the importance of the first refusal clause to both broadcasters and performers,[98] it behooves the court to enforce this provision in a meaningful way.[99]

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[93] RESTATEMENT OF CONTRACTS § 329 comment a (1932).

[94] Brief of Plaintiff-Appellant at 27 n.**.

[95] *See supra* note 88; *see generally,* Kronman, *supra* note 35, at 365, 372.

[96] By the time the court of appeals heard this case, Wolf had been working for CBS for almost a year. This may have been a silent factor in the court of appeals' decision to deny equitable relief. A decision to enjoin Wolf from working for CBS after he had been successfully working there for nearly a year would have been a great deal more harsh on Wolf than if the injunction had been issued before Wolf started working there.

The court of appeals should have used the *Wolf* case to delineate the factors which constitute a breach of the first refusal clause. It should then have described the appropriate injunctive remedy it would have ordered but for the fact that Wolf had already been working for CBS for nearly a year. This approach would have preserved the integrity of the first refusal period. Thereafter, courts of first instance would be free to issue negative injunctions as a matter of course, and expedited review would insure that no undue hardship would be suffered by a defendant while waiting for appellate review.

[97] "ABC asks this court to exercise its ingenuity to find the resolution which is most just even though no precedent on the precise question is ascertainable." *Wolf,* 76 A.D.2d at 172-73, 430 N.Y.S.2d at 282-83 (citations omitted).

[98] *See supra* text accompanying notes 6-12.

[99] A court of equity is . . .'a court of conscience, which within the scope of its powers is governed by its own rules' and it manifests its value in the administration of justice in

V. Suggested Remedies

The New York State Court of Appeals has noted that once an employment contract has terminated, equitable relief is "potentially available only to . . . enforce an *express* and *valid* anticompetitive covenant."[100] As the dissent in *Wolf* recognized, the first refusal clause in the Wolf/ABC contract is "an *express* three-month negative convenant."[101] Moreover, New York courts have repeatedly found this type of anticompetitive covenant to be *valid*,[102] when reasonable in scope.[103]

> no more effective way than in constantly making clear that it will not tolerate deliberate and unconscionable breaches of contract.

Shubert Theatrical Co. v. Gallagher, 206 A.D. 514, 518, 201 N.Y.S. 577, 580 (1923) (quoting Winter Garden Co. v. Smith, 282 F. 166, 171 (2d Cir. 1922)).

[100] *Wolf*, 52 N.Y.2d at 404, 420 N.E.2d at 368, 438 N.Y.S.2d at 487 (emphasis added). *See, e.g.*, Reed, Roberts Assoc. v. Strauman, 40 N.Y.2d 303, 353 N.E.2d 590, 386 N.Y.S.2d 677 (1976) (injunctive relief available to enforce anticompetitive covenant where the covenant is reasonable); Lumley v. Wagner, 64 Eng. Rep. 368 (1852) (proposition that a court may issue a negative injunction to enforce an *express* negative covenant when a breach occurs during the contract term); Butterick Pub. Co. v. Frederick Loeser & Co., 232 N.Y. 86, 133 N.E. 361 (1921) (promise not to sell any other make of patterns); Shubert Theatrical Co. v. Rath, 271 F. 827 (2d Cir. 1923) (promise by actors not to perform for any other management during the period named).

"Later cases permitted injunctive relief where the circumstances justified implication of a negative covenant." *Wolf*, 52 N.Y.2d at 402, 420 N.E.2d at 367, 438 N.Y.S.2d at 486. *See also* Harry Rogers Theatrical Enterprises, Inc. v. Comstock, 225 A.D. 34, 232 N.Y.S. 1 (1928) (negative covenant not to perform elsewhere during period of contract was implied and enforced). *See generally*, 5A Corbin on Contracts § 1205, at 405-07 (1964) (injunction available for enforcement of implied as well as express negative promise if clearly established).

The first refusal period falls within a penumbral region between pretermination and posttermination of the contract. While Wolf's contractual obligations toward ABC completely ceased only upon the expiration of the first refusal period, his services as an employee ended three months earlier.

The court of appeals did not find a breach of the first refusal clause, so naturally it did not reach the issue of whether or not the breach of the provision's negative covenant was a breach that occurred during the term of the contract. The court does, however, use the word "postemployment" as synonymous with posttermination. *Wolf*, 52 N.Y.2d at 406, 420 N.E.2d at 364, 438 N.Y.S.2d at 488. It can be logically inferred from this usage that the court would have categorized the first refusal period as a posttermination agreement. Supporting this inference is the dissent's conclusion that the negative covenant governed the "90-day posttermination period." *Id.* at 407, 420 N.E.2d at 369, 438 N.Y.S.2d at 488 (Fuchsberg, J., dissenting).

[101] *Wolf*, 52 N.Y.2d at 408, 420 N.E.2d at 370, 438 N.Y.S.2d at 489 (Fuchsberg, J., dissenting) (emphasis added).

[102] Karpinski v. Ingrasci, 28 N.Y.2d 45, 268 N.E.2d 751, 320 N.Y.S.2d 1 (1971); Horne v. Radiological Health Serv., 83 Misc. 2d 446, 371 N.Y.S.2d 948 (Sup. Ct. 1975), *aff'd*, 51 A.D.2d 544, 379 N.Y.S.2d 374 (1976); Service Systems Corp. v. Harris, 41 A.D.2d 20, 341 N.Y.S.2d 702 (1973); Career Placement of White Plains, Inc. v. Vaus, 77 Misc. 2d 788, 354 N.Y.S.2d 764 (Sup. Ct. 1974); *see also*, Purchasing Assoc. Inc. v. Weitz, 13 N.Y.2d 267, 196 N.E.2d 245, 246 N.Y.S.2d 600 (1963); Reed, Roberts Assoc. v. Strauman, 40 N.Y.2d 303, 353 N.E.2d 590, 386 N.Y.S.2d 677 (1976).

[103] "Generally negative covenants restricting competition are enforceable only to the extent that they satisfy the overriding requirement of reasonableness." Reed, Roberts Assoc. v. Strauman, 40 N.Y.2d at 307, 353 N.E.2d at 592, 386 N.Y.S.2d at 679. "Basic to the consider-

The first refusal provision expressly provided that for a three-month period Wolf would not accept a position as a sportscaster unless he first afforded ABC the opportunity to engage him on like terms.[104] The total effect of this agreement was "that of an express conditional covenant under which Wolf could be restricted from appearing on the air other than for ABC for the 90-day posttermination period."[105] Clearly, the promise not to accept an offer from a *competitor* is subsumed within the promise not to accept *any* offer. The first refusal clause, therefore, contains an *express* anticompetitive covenant.

New York courts have consistently recognized that "an employer's interest in retaining its customers is sufficient to support a covenant not to compete where there is a risk that a former employee may be able to divert part of the business."[106] In the television industry, "the viewing audience is the station's most valuable asset; yet the audience's loyalty is not to the station itself as much as to the on-air personalities who, for example, make up that station's news programs."[107] It is therefore reasonable to assume that the loss of a popular performer to a rival's competing program will be accompanied by a significant loss of viewers for a particular program.[108] For the commercial broadcaster, a decrease in the percentage of the viewing audience translates into a loss of advertising revenue.[109] In view of the direct relationship between the loss of a major talent to a rival and the loss of business income, a reasonably narrow covenant[110] not to work for a competitor should be upheld as a *valid* anticompetitive

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ation of [whether or not a negative covenant is reasonable] are five factors: (1) the restriction must be necessary for the employer's protection; (2) the time must be reasonable; (3) the geographical area must be reasonable; (4) the burden of the employee must not be unreasonable; and (5) the general public must not be harmed." Service Systems Corp. v. Harris, 41 A.D.2d at 23, 341 N.Y.S.2d at 705. "If, however, the employee's services are deemed 'special unique or extraordinary,' the covenant may be enforced by injunctive relief, if reasonable, even though the employment did not involve the possession of trade secrets or confidential customer lists." Purchasing Assoc. v. Weitz, 13 N.Y.2d at 272, 196 N.E.2d at 248, 246 N.Y.S.2d at 604 (citations omitted).

[104] *Wolf*, 52 N.Y.2d at 407, 420 N.E.2d at 369, 438 N.Y.S.2d at 488 (Fuchsberg, J., dissenting).

[105] *Id.*

[106] Horne v. Radiological Health Serv., 83 Misc. 2d 446, 452, 371 N.Y.S.2d 948, 958 (Sup. Ct. 1975).

[107] Brief of Plaintiff-Appellant at 50; *see also Wolf*, 52 N.Y.2d at 407, 420 N.E.2d at 369, 438 N.Y.S.2d at 488 (Fuchsburg, J., dissenting).

[108] *Wolf*, 52 N.Y.2d at 408, 420 N.E.2d at 370, 438 N.Y.S.2d at 489 (Fuchsberg, J., dissenting).

[109] "The earnings of broadcasting companies are directly related to the 'ratings' they receive. This, in turn, is at least in part dependent on the popularity of personalities like Wolf." *Wolf*, 52 N.Y.2d at 407, 420 N.E.2d at 369-70, 438 N.Y.S.2d at 488-89 (Fuchsberg, J., dissenting).

[110] *See supra* note 103.

covenant necessary "for the protection of the business and listening audience of the plaintiff."[111]

As the above discussion demonstrates, the negative covenant embodied in the first refusal clause is both express and valid. The court in *Wolf* recognized,[112] that where an employer is exposed to special harm due to the unique nature of the employee's services,[113] such a covenant is enforceable by injunction.[114] Therefore, the anticompetitive covenant in the ABC/Wolf contract provided a justifiable basis for a negative injunction for the length of the first refusal period. Moreover, the granting of such an injunction by the court of appeals in *Wolf* would have been entirely consistent with existing New York law.[115]

In cases which involve the breach of a first refusal provision by a popular entertainer, the minimum relief that a plaintiff should receive from a court is an order enjoining the performer from working for a competitor for the length of time remaining in the first refusal period at the time of the breach. Unfortunately, such an injunction will probably prove to be severely inadequate compensation when measured against the true objective of the first refusal clause—the retention of major talent.[116]

There is an alternative approach to compensation that would afford a court much more freedom in deciding the appropriate length of time for a negative injunction. In the real and personal property contexts courts have traditionally enforced the first refusal provision by ordering "the breaching party to perform the contract with the person possessing the first-refusal right . . . ."[117] In these cases the courts have, in effect, affirmatively enforced the plaintiff's right to

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[111] Skyland Broadcasting Corp. v. Hamby, 2 Ohio Op. 2d at 427, 141 N.E.2d at 784 (C.P. 1957) (disc jockey's contract included eight-month posttermination anticompetitive covenant which was upheld as valid).

[112] *Wolf*, 52 N.Y.2d at 403, 420 N.E.2d at 367, 438 N.Y.S.2d at 486.

[113] The trial court found that Wolf's services were unique. Brief of Plaintiff-Appellant at 35. The appellate division took judicial notice of Wolf's uniqueness. *Wolf*, 76 A.D.2d at 169, 430 N.Y.S.2d at 280.

[114] *Wolf*, 52 N.Y.2d at 403, 420 N.E.2d at 367, 438 N.Y.S.2d at 486; Reed, Roberts Assoc. v. Strauman, 40 N.Y.2d at 308, 353 N.E.2d at 593, 386 N.Y.S.2d at 680.

> [I]n recognition of the harm that a unique performer can cause an employer by working for a rival in breach of his contract, our courts have restrained newspaper columnists, athletes, actors, singers and other performers from working for the new employer for periods ranging from one to three years or seasons.

Wolf, 76 A.D.2d at 175, 430 N.Y.S.2d at 284 (citations omitted).

[115] *See supra* note 102.

[116] *Wolf*, 76 A.D.2d at 169, 430 N.Y.S.2d at 280.

[117] *Wolf*, 52 N.Y.2d at 405 n.7, 420 N.E.2d at 368 n.7, 438 N.Y.S.2d at 487 n.7.

match the improperly accepted offer, thereby creating a contract between the parties which was enforceable by specific performance.

This traditional approach to enforcing the right of first refusal is not entirely applicable in the personal service context where the courts have been unwilling to specifically enforce contracts.[118] However, involuntary servitude objections should not prevent courts from following the traditional approach to the extent that it calls for the affirmative enforcement of the plaintiff's right to match. Such enforcement will not amount to coercing the defendant to work for the plaintiff.[119]

Accordingly, this Comment proposes that the courts adapt the traditional approach to the personal service context by affirmatively enforcing the plaintiff's right to match the improperly accepted offer, but not going so far as to specifically enforce the resulting contract. Once the court makes this extrapolation, the way is clear for the granting of a *negative* injunction for any amount of time up to the term of the improperly accepted offer.

When the plaintiff matches the offer, this creates a contract which can then be enforced by a negative injunction. It is important to note that the term of the matched offer is the maximum time limit for the injunction; the court is always free to pare down the injunction within that limit as it deems equitable.[120]

Enjoining Wolf from working for a competitor for the length of the first refusal period[121] would have enabled ABC to promote a replacement without competition from Wolf. While such relief would have at least provided ABC with some degree of compensation, this remedy ignores the fact that Wolf's breach vitiated the primary function of the first negotiation/first refusal clause which is to maximize the likelihood that a popular performer will be retained. The Wolf/CBS contract not only cheated ABC out of a three-month restrictive covenant, it also, and more significantly, deprived ABC of an extremely valuable final opportunity to persuade Wolf to renew his contract.

While it is impossible to determine whether or not Wolf could have been persuaded to renew his contract with ABC, it is clear that the CBS contract deprived ABC of a meaningful opportunity to persuade Wolf to change his mind. Moreover, the facts indicate that,

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[118] *See, e.g., id.* at 401-02, 420 N.E.2d at 366, 438 N.Y.S.2d at 485.

[119] *See infra* text accompanying notes 135-43.

[120] *See infra* note 143 and accompanying text.

[121] At the time of the breach the first refusal period had not yet begun, therefore a negative injunction might be for the entire three-month period.

absent another agreement, the first negotiation/first refusal provision would have created an atmosphere highly conducive to renewal.

Wolf conceded at trial that, in his view, "the nature of the broadcasting industry is such that offers made one day are sometimes withdrawn the next"[122] and that he feared that this would happen with the CBS offer.[123] If he had felt this insecurity when he entered the February 6 meeting with the upper echelon of ABC executives, the outcome of that meeting may very well have been a new contract. Wolf's salary demands had already been met by ABC,[124] and at this meeting the top executives offered him various other opportunities, including network exposure.[125] Instead, Wolf responded to ABC's promises by stating that it was "too late"; he had made a "gentlemen's agreement" and would leave ABC on March 5.[126] Indeed, it was too late, for in reality this "gentlemen's agreement" was a signed contract and, therefore, no matter how attractive ABC's offer was, Wolf was no longer free to accept.[127]

At the time Wolf's contract with ABC expired, he was the premier sportscaster in New York City,[128] so it is highly likely that during the three-month first refusal period ABC would have done its utmost to retain Wolf. By signing a contract with CBS, Wolf created precisely the type of insuperable obstacle in the path towards renewal that the first negotiation/first refusal provision was designed to prevent. Compensation for this breach should therefore be responsive to ABC's loss of its last opportunity to "turn around" an unhappy employee.[129]

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[122] Brief of Plaintiff-Appellant at 29.

[123] *Id.*

[124] The two-year contract that Wolf signed with CBS provided for a first-year salary of $400,000 and a $450,000 salary for the second year. *Wolf*, 76 A.D.2d at 165, 430 N.Y.S.2d at 278. There was also a guarantee of sixteen half-hour football specials. *Id.* At the January 17 meeting, ABC offered Wolf a three-year contract with a compensation of $400,000, $450,000, $500,000 each year, respectively, plus a commitment for the sixteen half-hour football specials, subject to approval by ABC's Board of Directors. *Id.*

[125] *Wolf*, 76 A.D.2d at 167, 430 N.Y.S.2d at 279.

[126] *Id.*

[127] Even after learning of Wolf's intention to leave, but still without knowledge of the CBS contract, ABC agreed to let Wolf work during the first refusal period. *See supra* note 33.

The decision to employ Wolf during this period was a mutually beneficial agreement. Wolf was allowed to work and "ABC had the use of Wolf's services during the 'May sweeps,' an important rating period in the television industry." *Wolf*, 76 A.D.2d at 172, 430 N.Y.S.2d at 282. However, it is likely that ABC was also influenced by the desire to increase the probability of retaining Wolf by choosing not to exercise its option of forcing him "on the beach." *Id.*

[128] "Wolf . . . is New York's number-one sportscaster. The ratings say so. His paycheck makes the same argument." *Lets Go to the Videotape*, N.Y. MAG., Apr. 28, 1980, at 19 (interview with Warner Wolf).

[129] Brief of Plaintiff-Appellant at 28.

If Wolf had abided by his contract there would have been a substantial probability that he and ABC would have come to terms, despite the fact that there had been important differences between them.[130] In an industry where the drop of even a single ratings point may result in the loss of $1.5 million in advertising revenue,[131] a three-month injunction is insufficient compensation for the destruction of a valuable opportunity to retain a star performer. In order for ABC to have been sufficiently compensated, it would have been necessary for the court to have granted an injunction longer than the first refusal period.

An order granting a negative injunction for the length of the improperly accepted offer would have gone much further in compensating ABC than an injunction for merely the length of the first refusal period. This remedy would have afforded ABC the substantial benefit of being free from competition from Wolf for two years. Moreover, such a remedy would have been a strong deterrent to future breaches of this type.

An affirmative injunction enforcing ABC's right to match the CBS offer would have provided the basis for issuing a negative injunction for the length of that offer. In *Schubert Theatrical Co. v. Gallagher*,[132] a manager entered into a contract with several actors for the 1921-22 performance season. The contract contained a renewal option to re-engage the actors for two more years. The actors breached their contract, almost immediately, by working for a rival production company. At the appropriate time, the manager exercised his renewal option. Although the original contract had expired by the time suit was brought, the court enjoined the actors from performing for any other production company for the length of the renewed contract.[133]

In the instant case, Wolf was required by his contract to submit the CBS offer to ABC before accepting it. Had he done so, the right to match would have operated in the same way as an option to renew since ABC would then have had the option to rehire Wolf on the terms in the submitted offer. Once an offer is submitted, the only difference between a right to match and an option to renew is that in the latter the terms of renewal are dictated by the original contract, whereas in the former the terms of renewal are provided by the submitted offer.

By secretly entering into a contract before the first refusal period, Wolf unfairly deprived ABC of exercising its option to renew. If ABC

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[130] *See* Brief of Defendants-Respondents at 24; *supra* note 26.

[131] Brief of Plaintiff-Appellant at 30.

[132] 206 A.D. 514, 201 N.Y.S. 577 (1923).

[133] *Id.* at 518-20, 201 N.Y.S. at 580-82.

had been allowed to match the offer, the holding of *Gallagher* would have served as precedent for a court order enjoining Wolf from working for any competitor during the term of the improperly accepted contract.[134] A negative injunction for the period covered by the CBS contract would have been a strong deterrent to breaches similar to the one in *Wolf*.

In an industry where enormous amounts of revenue are linked to popular performers, the possibility of an injunction merely for the length of the first refusal period is not likely to be a sufficient disincentive for broadcasters and performers to avoid breaching the first refusal clause.

In *Wolf*, for example, CBS may have been concerned that if Wolf was not contractually bound to them, he might have been persuaded to renew with ABC. The threat of a three-month injunction would probably not have dissuaded CBS from inducing a breach when millions of dollars in revenue were at stake. Moreover, during the three-month injunction, it is likely that no other competitor of CBS would have the benefit of Wolf's services, thereby further reducing the economic costs of a breach. On the other hand, the possibility of a two-year injunction would have presented a persuasive reason in favor of respecting ABC's contractual rights.

It can be argued, however, that this solution goes too far. It has been suggested that a prohibitory injunction of this type unconstitutionally enforces involuntary servitude because it is intended to coerce an individual to return to work.[135] "[I]t follows that since equity can not, should not and will not specifically enforce a contract of personal service, it ought not attempt to enforce such a contract indirectly by the use of the injunction."[136] Accordingly, a court should not enjoin Wolf from working for any competitor of ABC in the New York market if it viewed such an injunction as so severe a limitation on Wolf's ability to earn a living that it would be tantamount to forcing him to work for ABC against his will.[137]

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[134] A different analysis of the operation of the first refusal clause also provides grounds for a negative injunction for the length of the CBS offer. A submitted competitor's offer becomes, in effect, an offer by Wolf to ABC to work for ABC under the terms of the submitted offer. Brief of Plaintiff-Appellant at 53. Once ABC accepts that offer there is a binding contract between the parties. 1 CORBIN ON CONTRACTS § 11, at 24 n.18 (1963) ("An *offer* is an act on the part of one person whereby he gives to another the legal power of creating the obligation called contract.").

By specifically enforcing ABC's right to match, the court would be upholding ABC's right to accept the CBS offer thereby creating a contract whose length would be the proper measure of a negative injunction.

[135] Stevens, *Involuntary Servitude by Injunction*, 6 CORNELL L. Q. 235 (1921).

[136] *Id.* at 261.

[137] RESTATEMENT (SECOND) OF CONTRACTS § 367 comment c (1979); *accord Wolf*, 52 N.Y.2d at 403-04, 420 N.E.2d at 367-68, 438 N.Y.S.2d at 486-87.

As a practical matter, a person may find the financial and emotional costs of a move to another area prohibitive. A performer who has breached the first refusal clause may have compelling personal reasons for wanting to remain in the same market. In addition, the area in which he has been enjoined from working may have a unique quality. For example, in the broadcasting industry, a job in the New York metropolitan area represents the pinnacle of success.[138] It is likely that the performer had important personal reasons, unrelated to contract terms, for wanting to leave his former job. Therefore, it is possible that a negative injunction will impose an unpleasant choice upon a performer: either to return to an unwanted job or to leave a desired market.

The fact that an injunction may present an employee with a difficult choice, however, should not automatically defeat a request for injunctive relief. Presenting a performer with unpleasant options does not necessarily amount to coercing him to return to his former job. In fact, the very reason courts have often used the negative injunction as a remedy for a breach of a personal service contract is because it has been found to be a remedy that is consistent with the policy against enforcing involuntary servitude.[139] According to the Restatement (Second) of Contracts, "It is not the purpose in granting the injunction to enforce the duty to render the service and, to justify granting it, *it should appear that the employee is not being forced to perform the contract as the only reasonable means of making a living.*"[140]

The decision to grant a negative injunction, therefore, turns on the issue of how reasonable is the alternative of working in another area. This is a question of fact for the court.[141] Accordingly, the court of appeals was not necessarily accurate in its prediction that enforcement of ABC's right of first refusal by affirmative injunction would have forced Wolf to work for ABC.[142]

It is important to note that a court has the power to limit the temporal and geographical restrictions of the negative injunction as it deems consistent with equity.[143] For example, although the ABC

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[138] Brief of Plaintiff-Appellant at 47.

[139] Lumley v. Wagner, 64 Eng. Rep. 1209 (1852). *See, e.g.* Shubert Theatrical Co. v. Rath, 271 F. 827 (2d Cir. 1923); Shubert Theatrical Co. v. Gallagher, 206 A.D. 514, 201 N.Y.S. 577 (1923).

[140] RESTATEMENT (SECOND) OF CONTRACTS § 367 comment c (1979) (emphasis added).

[141] *See* Service Systems Corp. v. Harris, 41 A.D.2d at 23, 341 N.Y.S.2d at 705.

[142] *Wolf*, 52 N.Y.2d at 405 n.7, 420 N.E.2d at 368 n.7, 438 N.Y.S.2d at 487 n.7.

[143] *See* Karpinsky v. Ingrasci, 28 N.Y.2d 45, 51-52, 268 N.E.2d 751, 754-55, 320 N.Y.S.2d 1, 5-7 (1975) (covenant not to practice dentistry and/or oral surgery enforced only as to latter). "If in balancing the equities the court decides that [the employee's] activity would fall within the scope of a reasonable prohibition, it is apt to make use of the tool of severance, paring an

contract prohibited Wolf from accepting *any* offer, the court could have modified that restriction so that it only applied to offers to work in the New York City area. A negative injunction barring Wolf from working in the New York area[144] for a reasonable amount of time would not have forced Wolf to work for ABC. It merely would have compelled him to make the choice between working for ABC or working outside the New York area.

VI. The Ramifications of the Decision

The *Wolf* case raised many questions concerning the enforceability of the first refusal clause. The court of appeals' decision leaves these questions unanswered. As a result, the fate of this clause is problematical. What is certain, though, is that a first refusal clause of the type found in the Wolf/ABC contract is no longer a reliable safeguard for a broadcaster's interests. Accordingly, one possible response to this development will be an attempt by broadcasters to tailor the first refusal provision so that it avoids the pitfalls that were illuminated by the *Wolf* decision.

This could be accomplished by making the first refusal period run concurrently with the entire contract, in addition to extending it beyond the expiration of the contract for a length of time considerably longer than three months. A necessary complement to this alteration would be to expressly proscribe the signing of any type of agreement with a third party, including an option contract, during the term of the existing contract. These measures would not only prevent any contract from being entered into before the first refusal period, but would also render a negative injunction for the length of the first refusal period more compensatory than it would have been in *Wolf*.

Before modifying the first refusal clause, however, a cautious employer should be aware that the court of appeals' opinion leaves in

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unreasonable restraint down to appropriate size and enforcing it." Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 674-75 (1960).

[144] In fact, ABC requested only an injunction preventing Wolf from working for CBS. In their brief they point out that granting this request would not prevent Wolf from working for WNBC or any other New York station. This position was probably taken in anticipation of the traditional reluctance of courts to grant injunctive relief in the personal service context. However, it is the thesis of this Comment that permitting Wolf to work anywhere in the New York City area is inconsistent with an injunction preventing him from working for CBS. According to the argument that audiences are more loyal to performers than they are to particular stations, if Wolf had worked for any other competitor in New York, ABC would have been damaged to the same extent as it is now damaged by his working at CBS.

The fact that the New York City area is the most prestigious in the country for a sportscaster supports the reasonability of such a restriction. Certainly the number one sportscaster in New York would be able to work in any market he chooses.

doubt whether it will ever issue a negative injunction to enforce the anticompetitive covenant in a first refusal clause. Because of this uncertainty, a wise response to this holding and its dicta would be to abandon the first refusal clause in favor of either long-term contracts or short-term contracts with unilateral, automatic renewal options.[145]

The long term contracts will probably provide for smaller salaries, relative to those offered in first refusal short-term contracts, in order to reduce the cost of buying out of the contract if the performer does not apeal to the mass palate. The short-term contracts will have unilateral renewal clauses which will deny the performer the freedom to decide whether or not to renew.[146] These longer terms and automatic renewal options will be used to replace the first refusal clause as the employer's security for his investment.[147] In such contracts the performer will only be able to take advantage of an increase in his popularity at the end of what will likely be a long contractual tenure. In a first refusal contract, on the other hand, the performer can ask for a short-term contract in return for granting the employer the right to match.

VII. Conclusion

This Comment suggests two methods for enforcing the first refusal clause through injunctive relief. Both methods avoid the involuntary servitude objections voiced by the courts.

Two important policies are furthered by enforcing the first refusal clause through a negative injunction. Firstly, since damages are generally impossible to ascertain in the case of unique personal services,[148] an injunction is the only appropriate remedy available for a plaintiff in the position of ABC. A negative injunction for the length of the improperly accepted offer will afford the highest degree of compensation consistent with the principles of equity.[149] An alternative remedy, though less compensatory, is a negative injunction for the length of time remaining in the first refusal period at the time of the breach. This remedy would at least allow an employer a short time in which to establish a replacement performer without competition from the star.

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[145] For an example of the use of a unilateral option to renew, see *supra* text accompanying notes 132-33.

[146] *Id.; see supra* note 11.

[147] *See supra* text accompanying notes 11-12.

[148] *See supra* note 35.

[149] *See supra* note 103.

Secondly, defendants such as Wolf should not be permitted to benefit from the deliberate breach of the first refusal clause simply because a court is reluctant to grant an injunction in the personal service area.[150] An injunction would be a sanction against this type of willful breach and would serve as a deterrent to future breaches of this sort.

The widespread use of this provision in the broadcasting industry reflects a consensus that some measure of security is needed for the investment in major talent. The *Wolf* decision, by undermining the efficacy of the first refusal clause, is a persuasive reason for employers to abandon first refusal contracts in favor of the more restrictive renewal option contracts. Ironically, this decision, which was based on the court's desire not to "inhibit free competition,"[151] will probably result in increasing the contractual constraints on the employee's discretion to decide for whom and for how long he wishes to work.[152]

David F. Silver

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[150] "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong . . . ." Riggs v. Palmer, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889) (beneficiary who murdered testator not entitled to inheritance).

[151] *Wolf*, 52 N.Y.2d at 405, 420 N.E.2d at 368, 438 N.Y.S.2d at 487.

[152] If Warner Wolf had been a legal commentator, his likely response to this case would have been, "C'mon Court of Appeals! Gimme a break!"