

# The Franchisor's Right of First Refusal: An Automotive Industry Perspective

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The law governing rights of first refusal (ROFR) under automotive<sup>1</sup> franchise agreements is not unlike the law governing ROFRs in other franchise contexts or even in other areas of law, e.g., real estate. However, peculiar nuances in the law concerning automotive ROFRs deserve special attention. This article will explore the various legal issues surrounding the ROFR in the automotive context.

The ROFR was absent from dealer franchise agreements for many years. It did not arrive on the scene until 1980 when General Motors became the first automotive manufacturer to include it in its dealer agreement. Over time, every dealer franchise agreement came to include this feature.<sup>2</sup>

Despite the introduction of the ROFR into the automotive arena, its exercise was uncommon.<sup>3</sup> Exercising a ROFR was rare throughout most of the 1990s and early 2000s, but the last ten years have shown a significant increase in franchisor exercise.<sup>4</sup> Franchisors have included it in virtually every deal in



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1. For purposes of this article, “automotive” refers to the retail motor vehicle dealership business.

2. Chrysler introduced the ROFR concept in its dealer agreements in 1987; Toyota/Lexus in 1989; Mercedes-Benz in 1992; Ford in 1995; Audi/VW in 1996; and Acura/Honda in 2002.

3. As a young automotive franchise attorney in the 1980s, the author was somewhat unfamiliar with ROFRs under dealer (franchise) agreements. This was not just a function of inexperience. The ROFR was absent from many dealer franchise agreements at that time. Another reason for that unfamiliarity was the dearth of transactions where the automotive franchisor actually exercised the ROFR. Indeed, it was not until near the end of that decade that the author encountered ROFR issues in a transaction involving the sale of two high-profile Cadillac dealerships in New Jersey wherein GM decided that the buyer, who had a notorious reputation as a “flamboyant” dealer, was not up to their standards. GM exercised its ROFR to the chagrin of the buyer and assigned one of the stores to an operator of its choice and simply decided to close the other, signaling a change in the landscape of motor vehicle dealership transactions.

4. Aurel Niculescu, *Automakers and Dealers Clash on ROFR*, AUTO. NEWS, Oct. 14, 2014, <http://www.inautonews.com/us-automakers-and-dealers-clash-on-right-of-first-refusal>.

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recent times,<sup>5</sup> and it has become a very significant aspect of motor vehicle dealership transactions today and will be for years to come.<sup>6</sup>

## I. ROFR

ROFR provisions in dealership franchise agreements are not unlike ROFR provisions that appear in most franchise agreements. Essentially, these provisions give to the franchisor the right to step into the shoes of the contract buyer and either (1) acquire the dealership in its own right; (2) assign the right and obligation to purchase to a preferred operator, typically another franchisee of the like line/make in excellent standing with the franchisor; or (3) terminate the franchise for marketing reasons.

The following are some of the typical ROFR provisions:

- (1) *Exercise Period/Deadline.* Most dealer agreements establish a time period within which a franchisor must exercise the ROFR. This typically ranges from fifteen business days to forty-five calendar days.
- (2) *Trigger Event.* One of the more significant aspects concerns the timing of a ROFR exercise is what triggers the right and the running of the prescribed time period. The language in this regard is varied in franchise agreements. The common denominator is the time at which the contract buyer has completed and submitted its franchise application. Of course, the submission of the acquisition agreement is also important. Many automotive franchise agreements are surprisingly vague on this critical aspect.<sup>7</sup>

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5. Many manufacturers now routinely issue a letter to both the franchisor and the transferee (buyer) upon receipt of a transfer notice informing each of its ROFR rights.

6. Halbert B. Rasmussen, *Are Factories Exercising Rights of First Refusal More Frequently Now Than They Did 10 or 15 Years Ago? Dealer Attorneys Asked Say Yes and I Agree—Rights of First Refusal in Multi-Dealership Buy-Sells*, LEXOLOGY, Apr. 7, 2015, <http://www.lexology.com/library/detail.aspx?g=e2d971d58-47a6-edb461dd7248>.

7. For example, the current Ford sales and service agreement requires the exercise of the ROFR within thirty days of its receipt of a “completed proposal for the proposed sale or transaction.” ¶ 24(b)(2). Similarly, under the GM dealer sales and service agreement (standard provisions), the submission of a “proposal for a change of ownership” triggers the ROFR. ¶ 12.3.1. In contrast, in the Acura/Honda automobile dealer sales and service agreement, the ROFR is not triggered unless and until the franchisor has received the “completed documentation and information.” This is expressly specified as follows:

(1) the ownership transfer agreement(s) executed by Dealer (or Dealer Owner(s)) and the prospective buyer(s), including all exhibits, schedules, attachments, applicable real and personal property leases and any relevant “side” agreements relating to the transfer of money, value or other performance in exchange for the Ownership Interest or Assets; (2) the proposed third party purchaser’s application (as defined by American Honda); and (3) if a transfer of ownership of real property is contemplated and all of the preceding has been completed, a real estate appraisal and/or environmental report prepared in connection with or relied upon by the parties to, the proposed ownership transfer.

¶ 19.2. Needless to say, the Acura/Honda agreement leaves very little doubt as to what is required to commence the ROFR exercise period.

- (3) *Reimbursement.* Certain franchise agreements provide for the reimbursement of the buyer's transactional expenses<sup>8</sup> if the ROFR is exercised; however, many franchise agreements do not.<sup>9</sup>
- (4) *Withdrawal Rights.* Some franchise agreements entitle the selling dealer to withdraw a "buy-sell" agreement within a specified time after the ROFR is exercised,<sup>10</sup> although this is not a common provision.
- (5) *Family Transfers.* Many dealer agreements contain exemption provisions that do not allow the exercise of the ROFR in transactions involving family members.

Certain state franchise statutes governing ROFRs override or modify the ROFR terms contained in the franchise documents, as discussed in Part II of this Article.

The ROFR represents a significant tool for the manufacturer. It provides the opportunity to control the sale and the ultimate franchise representation in a particular market. It also averts a possible battle with the existing franchisee (seller) with regard to the qualifications of the contract purchase—avoiding the possibility of protracted and costly litigation when the seller views a rejection of a prospective buyer as a violation of the franchise agreement or of applicable state (franchise) law.<sup>11</sup>

The exercise of a ROFR also brings a significant level of exposure for the franchisor. Upon the exercise of the ROFR, the franchisor often assumes the performance of the buyer's obligations under the acquisition agreement. Depending upon the precise terms of the ROFR provision, as well as the pertinent provision of the state franchise statute, this may also require the purchase or lease of the dealership real estate and the reimbursement of transactional costs.

## II. Statutory Regulation

As the exercise of the ROFR became more frequent, state legislatures responded with statutory restrictions and limitations. This is particularly the

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8. Transactional expenses typically include attorney fees; accountant fees; and due diligence expenses, such as environmental studies and building inspection costs.

9. Even if the franchise agreement does not require reimbursement, several state franchise statutes do. See Part II *infra*.

10. For example, the Chrysler sales and service agreement gives the dealer a specified time frame within which to withdraw the sale transaction. ¶ (Additional Terms and Provisions). The Mercedes-Benz passenger car dealer agreement also gives the selling dealer a ten-day period following MBUSA's exercise of its ROFR to withdraw the deal (Art. IX B.3.). The Audi and VW dealer agreement limited this withdrawal right to transactions involving dealer owner, family members, dealership employees, and successors pre-approved by the franchisor, e.g., Audi Dealer Agreement Standard Provisions, Art. 12(3).

11. Most (if not all) states provide a cause of action to the selling franchisee in the event that the franchisor arbitrarily or unreasonably rejects a qualified buyer, e.g., N.J. STAT. §§ 56:10-6, 56:10-29. See also Phyllis Alden Truby & David A. Beyer, *Fundamentals 201: Transfer and Assignment in Franchising*, ABA 37TH ANNUAL FORUM ON FRANCHISING (Oct. 15–17, 2014), App. C.

case with ROFRs in the automotive industry because many of these statutes apply only to automobile franchises.<sup>12</sup> Other state franchise statutes do not explicitly address ROFRs.<sup>13</sup>

Common features of the statutory provisions governing automotive ROFRs include:

1. The ROFR cannot be used by the franchisor to impair or influence the price to be paid for the franchise.
2. The franchisor must assume all obligations of the contract buyer as stated in the acquisition agreement.
3. The franchisor must reimburse the contract buyer for all transactional costs.
4. The franchisor must also purchase or lease the real estate if that component is part of the acquisition.

Many of the ROFR statutes establish a specific timeframe within which the franchisor must exercise the ROFR, which can be in conflict with the time prescribed under the pertinent franchise agreement. The statute will control the timing in such instances.

It should be noted that at least one state law expressly invalidates automotive ROFRs. Specifically, the Iowa franchise statute provides: "Notwithstanding the terms, provisions or conditions of an agreement or franchise, the sale or transfer, or the proposed sale or transfer of a franchisee's dealership, or the change or proposed change in the executive management of a franchisee's dealership shall not make applicable any right of first refusal of the franchisor."<sup>14</sup> Prior to the enactment of this statute, the Iowa Supreme Court, in *Bob Zimmerman Ford, Inc. v. Midwest Auto I, LLC*,<sup>15</sup> declared BMWNA's exercise of a ROFR to be invalid under the Iowa statutory provision, strictly limiting a franchisor's ability to approve a change in ownership in the franchise.<sup>16</sup>

Other statutes restrict the employment of the ROFR to varying degrees. For example, in Maryland, the ROFR may not be exercised if the proposed transferee meets the manufacturer's reasonable qualifications and is an exist-

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12. ARIZ. REV. STAT. ANN. § 28-4459 (2015); DEL. CODE ANN. tit. 6, § 4910; GA. CODE ANN. § 10-1-663.1 (2015); LA. REV. STAT. § 32:1267(B) (2015); NEV. REV. STAT. ANN. § 482.36419 (2013-2014), N.J. STAT. § 56:10-13.6, 56:10-13.7; OR. REV. STAT. § 650.162, 63; PA. STAT. ANN. § 818.16 (2015); VA. CODE ANN. § 46.2-1569.1 (2015); VT. STAT. ANN. tit. 9, § 4100e (2015); WASH. REV. CODE ANN. § 46.96.200, 220 (2015).

13. See KY. REV. STAT. §§ 190.047, 190.070 (2015); NEB. REV. STAT. §§ 60-1430, 60-1439 (2015); N.Y. VEH. & TRAF. LAW §§ 466, 467 (2015); N.C. GEN. STAT. § 20-305 (2014); OHIO REV. CODE ANN. §§ 4517.541, 4517.542, 4517.56, 4517.6; TEX. OCC. CODE ANN. § 2301.359 (2015).

14. IOWA CODE § 322A.12(2)(2014).

15. 679 N.W.2d. 606, 611 (Iowa 2004).

16. IOWA CODE § 322A.12(1). The language of Iowa's transferability statute is extremely limited. Specifically, it only allows a franchisor to decline to approve the change in franchise if the transferee is denied the right to transfer his license or the proposed transferee is denied the right to obtain a motor vehicle license.

ing dealer in good standing.<sup>17</sup> Similarly, in Washington, the ROFR is restricted if the buyer falls within one of the following categories: transferee pre-approved by the franchisor; family member of a dealership owner; a manager-level employee who is qualified as a dealer-operator under the franchisor's standards; entity controlled by a dealer-owner; or trust established for succession planning by a dealer-owner.<sup>18</sup>

There is another interesting development in this area. At least one legislature, which is proposing to statutorily bar a ROFR exercise, is considering an exception to the bar if the purpose of the ROFR exercise is to assign the dealership to a minority or to a woman. The New Jersey Legislature is considering such an exception "if the motor vehicle franchisor has a formal written program to increase the number of female or minority franchisees."<sup>19</sup>

It is noteworthy that at least one jurisdiction grants motor vehicle franchisors a statutory right of first refusal. The Georgia franchise statute provides: "There shall be a right of first refusal to purchase in favor of the franchisor if the dealer has entered into an agreement to transfer the dealership or its assets."<sup>20</sup>

A comprehensive chart of the ROFR provisions in various state franchise statutes is included in the Appendix.

### III. Judicial Arena

Legal challenges to ROFRs in the automotive context are numerous and have increased in recent years as the existence and exercise of ROFRs have become more common. Interestingly, the challenges have come from several directions. Not surprisingly, the majority of the challenges come from the aggrieved contract buyer that wants to regain its contract rights. Franchisors have also joined in the challenges where the deal is structured in a manner that impairs, if not precludes, the ROFR exercise. Even the existing franchisee has sought judicial protection where the ROFR exercise creates a perceived negative result.

The ROFR issues that have made their way to the judicial arena include the following:

1. *Validity*—Is the automotive ROFR valid under the particular state franchise statute?
2. *Standing*—Who has legal standing to assert the invalidity of the ROFR? Of particular interest here is whether the contract buyer has the right to challenge the ROFR.
3. *Third-party beneficiary*—Can the contract buyer nullify the ROFR exercise as a purported third-party beneficiary of the franchise agreement?

17. MD. TRANSP. CODE ANN. § 15-211 (2015).

18. WASH. REV. CODE ANN. § 46.96.220 (2015).

19. 2016 Bill Text N.J. A.B. 1744.

20. GA. CODE ANN. § 10-1-663.1 (2015).

4. *Tortious interference*—Can the exercise of a ROFR constitute tortious interference?
5. *Time limitation*—When is the ROFR exercise period triggered under the franchise agreement or applicable law? What is the notice requirement? This seemingly simple concept can become complex in certain instances.
6. *Structural issues*—What happens when a sale transaction is structured, whether wittingly or unwittingly, in a manner that effectively averts or frustrates the exercise of the ROFR? A typical example is the sale of several dealerships or a variety of franchises in an integrated transaction.
7. *Covenant of Good Faith and Fair Dealing*—Does the covenant of good faith and fair dealing have a bearing on the exercise of the ROFR? Does the Automobile Dealers Franchise Act (ADFA) play a role?<sup>21</sup>

This article will explore each of these aspects, the resolution of which are largely a function of the precise language of the ROFR, the case law of the particular jurisdiction, and the applicable state statute.

#### A. *Validity*

With a few exceptions, cases governing automotive ROFRs have sanctioned these arrangements, and judicial attacks on their validity have been unsuccessful. In *Bayview Buick-GMC Truck, Inc. v. General Motors Corp.*,<sup>22</sup> the Florida District Court of Appeal deviated significantly from this common viewpoint. The court declared that the ROFR violated a provision of the Florida franchise statute that prohibits (with narrow exceptions), the operation of a motor vehicle dealership by a franchisor.<sup>23</sup> Specifically, the Florida statute allows temporary franchisor operations of a motor vehicle dealership only: (1) to permit a temporary operation (not to exceed one year) during a transition period from one dealer to another; (2) to allow a reasonable period of time for a franchisor to own a dealership in conjunction with certain “qualified persons” (i.e., minorities) to assist a minority owner in the acquisition of full ownership; and (3) where there is “no independent person” available in the community to own and operate the dealership “in a manner consistent with the public interest.”<sup>24</sup> The court stated that General Motors’ right of first refusal “collides with the legislative mandate” contained in the statute.<sup>25</sup> Specifically, the court held as follows: “The right of first refusal clause in the franchise agreement between GM and Ace is therefore void

21. 15 U.S.C. §§ 1221–1225.

22. 597 So. 2d 887, 890 (Fla. Dist. Ct. App. 1992).

23. FLA. STAT. § 320.645(1); *see also* Dege v. Milford, 574 A.2d. 288 (D.C. 1990) (decided under District of Columbia’s Retail Service Station Act of 1976, D.C. CODE §§ 10-201-10-242 (1989)).

24. *Id.*

25. 597 So. 2d 889 (Fla. Dist. Ct. App. 1992).

as against public policy.”<sup>26</sup> Interestingly, many states have similar statutes,<sup>27</sup> although the courts in these states have not ruled in a similar fashion.

As noted earlier, an Iowa court also declared a ROFR invalid.<sup>28</sup> The Iowa Supreme Court interpreted the transferability provision of the Iowa franchise statute, which mandates approval of the transfer of a franchise except for limited circumstances. Although the statute did not expressly address the ROFR, the court broadly interpreted the statute as invalidating the ROFR.<sup>29</sup>

### B. *Standing*

As the parties to the franchise agreement, it is axiomatic that both the franchisor and franchisee have standing to enforce or challenge the exercise of a ROFR. When the challenge comes from the contract buyer, the legal requirement of standing becomes the major obstacle. Barring a specific statutory standing provision, courts have consistently rejected challenges based upon the state's general franchise statute.

The basis for these rulings stems from the broader holding, which is well entrenched in the franchise law, that the franchise statutes are designed to protect the interests of the franchisee, not the proposed transferee, i.e., the contract buyer. In *Tynan v. GM Corp.*,<sup>30</sup> GM rejected the contract purchaser, an experienced owner and operator of a Chevrolet dealership, in its efforts to purchase another GM dealership. The buyer had a less-than-favorable relationship with GM in its former franchise relationship. In rejecting the buyer, GM specifically referred to a “mutually unsatisfactory relationship.”<sup>31</sup> GM's rejection of the transfer likely would not have passed muster under the transfer provision of New Jersey's franchise statute, but the selling dealer chose not to pursue this claim. The New Jersey Supreme Court rejected the buyer's challenge on one simple principle: the New Jersey franchise law statute was not intended to protect a proposed transferee, only the existing franchisee.

Numerous holdings similarly support this principle.<sup>32</sup> For example, in *Roberts v. General Motors*,<sup>33</sup> GM exercised its ROFR in a plan to assign the right to

26. 597 So. 2d 980 (Fla. Dist. Ct. App. 1992).

27. See, e.g., N.J. STAT. ANN. § 56:10-28.

28. *Bob Zimmerman Ford, Inc. v. Midwest Auto.*, 679 N.W.2d 606, 611 (Iowa 2004).

29. See IOWA CODE § 322A.12(2)(2014).

30. 591 A.2d 1024, 1026 (N.J. App. Div. 1991), cert. denied, 606 A.2d 362 (Table) (1991), *rev'd in part on other grounds*, 604 A.2d 99 (N.J. 1992).

31. The soured relationship appeared to be due, in part, to the potential buyer's active role as president in the National Chevrolet Dealer Alliance, an advocacy group that protested GM's policies on behalf of Chevrolet dealers.

32. See *Beard Motors v. Toyota Motor Distribs., Inc.*, 480 N.E.2d 303, 304 (Mass. 1985) (“A prospective purchaser of a motor vehicle dealership does not have standing under G.L.c. 93b, § 12A (1984 ed.), to bring an action against a motor vehicle distributor who unreasonably withholds consent to the transfer of the prospective seller's franchise in violation of G.L.c. 93b, § 4(3)(i) (1984 ed.)”); *Simmons v. Gen. Motors Corp.*, 435 A.2d 1167, 1177 (N.J. App. Div. 1981); see also *Jon S. Swierzewski, Standing in Franchise Disputes: Check the Invitation, Not Every Party Gets Inside*, 26 FRANCHISE L.J. 107 (2006).

33. 643 A.2d 956, 958 (N.H. 1994).

purchase the dealership to a minority dealer. The contract purchaser contested the exercise of the ROFR on several grounds, including a violation of the New Hampshire franchise statute. In rejecting the claim, New Hampshire Supreme Court stated that the franchise statute was “clearly designed not to protect the plaintiff (transferee), but rather to protect existing motor vehicle dealers from oppressive conduct.”<sup>34</sup> The court further stated: “The clear intent of the non-consumer oriented provisions [of the franchise statute] is to protect the investment and property interest of those who are already dealers.”<sup>35</sup> Moreover, the buyer had “no independent right under the statute to be approved as a GMC franchisee, and he cannot stand upon the rights of [the franchisee] in order to gain standing under the statute.”<sup>36</sup>

Similarly, in *Priority Auto Group, Inc. v. Ford Motor Company*,<sup>37</sup> the Fourth Circuit denied the contract buyer’s attempt to assert a claim under the Virginia franchise statute regarding Ford’s exercise of its ROFR. The court stated that the franchise statute “was designed to protect the dealer rather than the prospective buyer.”<sup>38</sup> In *Rosado v. Ford Motor Co.*,<sup>39</sup> the Third Circuit, in applying the Pennsylvania franchise statute, addressed the aggrieved buyer’s argument that the selling dealer did not receive the “same or greater consideration” under the Pennsylvania ROFR statute in the ultimate deal resulting from the ROFR exercise than he would have received under the buyer’s deal. The court ruled that the prospective purchaser lacked the standing to make that claim; only the selling dealer held that right.<sup>40</sup>

The issue of standing becomes clouded if the dispute at hand becomes entangled with an assertion of “deemed approval.” Under many state franchise statutes, if the franchisor does not act within the statutorily prescribed time frame (typically sixty days from receiving a franchise application), the purchaser is “deemed approved.”<sup>41</sup> In a case contesting the ROFR exercise, the question may arise whether a deemed-approved buyer has standing to contest the ROFR because, arguably, it has now stepped into the shoes of franchisee. This concept was addressed in dictum in *Horn v. Mazda Motor of America*.<sup>42</sup> In that case, the New Jersey Superior court acknowledged the validity of this argument, but avoided a decision on that basis by deciding the case on other grounds. Specifically, the court addressed whether plaintiffs and the contract purchaser were denied approval under the New Jersey

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34. *Id.* at 959.

35. *Id.*

36. *Id.*

37. 757 F.3d 137 (4th Cir. 2014).

38. *Id.* at 141.

39. 337 F.3d 291, 293 (3d Cir. 2003).

40. *Id.* at 296; *see also* Crivelli v. GMC, 215 F.3d 386 (3d Cir. 2000); Tacoma Auto Mall, Inc. v. Nissan, 279 P.3d 487, 493 (Wash. Ct. App. 2012), *review denied* by 291 P.3d 253 (2012); Postma v. Jack Brown Buick, 626 N.E.2d 199, 202 (Ill. 1993).

41. ARIZ. REV. STAT. ANN. § 28-4459; FLA. STAT. ANN. (2015) §320.643(1)(a); NEV. REV. STAT. ANN. § 482.36419; N.J. STAT. ANN. § 56:10-6.

42. 625 A.2d 548, 556 (N.J. Super. Ct. App. Div. 1993).



Franchise Act because GM did not reject him within sixty days of the date of his application. The court ultimately decided that the sixty-day clock never started due to the buyer's numerous misrepresentations on his franchise application. The court advised:

Plaintiffs assert that by force of N.J.S.A. 56:10-6, Mazda's approval of Mr. Brady's transfer of his franchise to them must be "deemed granted" because Mazda did not reject their application within sixty days after they had given it statutory notice of the proposed transfer. If that assertion is correct upon expiration of the sixty-day period plaintiffs became, as a matter of law, "person[s] to whom a franchise is offered" and, therefore, "franchisees" within the definition of N.J.S.A. 56:10-3. If they were franchisees, they had standing to challenged Mazda's action as either a wrongful refusal to transfer under the standards of N.J.S.A. 56:10-6 or as the termination of a franchise without good cause within the meaning of N.J.S.A. 56:10-5.<sup>43</sup>

Although stated in dictum, the *Horn* decision appears to open the door for a deemed-approved buyer to contest the ROFR. However, in the absence of a deemed approval, the barrier of standing for a contract purchaser would appear to be insurmountable. The only possible relief is an express standing provision in the relevant franchise statute.<sup>44</sup>

### C. *Third-Party Beneficiary*

Cognizant of the standing hurdle, contract buyers have attempted to shift the bases of their challenges from franchise statutes to common law. The third-party beneficiary doctrine has been employed as an alternative ground to vitiate the ROFR, but the cases asserting this claim have been uniformly rejected.

Courts have required the contract buyer to show that it is more than an incidental beneficiary of the seller's franchise agreement. For example, in *Blair v. General Motors Corp.*, the Kentucky Supreme Court stated:

In this case, the Mullen/GM [Franchise] Agreement specifically provides that third parties have no rights under the contract and that the agreement is not a third party beneficiary contract. Any interpretation of the Mullen/GM Agreement must give weight to this statement. Even if the Mullen/GM Agreement did not specifically say this, it would, nevertheless, be so. The Mullen/GM Agreement is primarily concerned with governing relations between the two parties and to protecting and regulating their valid mutual interests. In no express or implied manner does it convey a special benefit to any specified or unspecified third parties. Absent any proposal by Plaintiff that it could present any evidence that a contract was entered for its direct and primary benefit, the language of the agreement will control, and Plaintiff accordingly may not claim the authority to enforce that contract.<sup>45</sup>

43. *Id.* at 556; *see also* *Rassam v. Shell Oil Co.*, No. 97-1794, 1998 U.S. App. LEXIS 20554 (6th Cir. Aug. 18, 1998) (affirming that sixty-day clock does not start to run until franchisor receives all reasonably requested information).

44. *See, e.g.*, FLA. STAT. ANN. § 320.699 (1) (2015) (A contract buyer is granted standing in an administrative hearing to contest an action by a franchisor in violation of the franchise statute.).

45. 838 F. Supp. 1196, 1200 (W.D. Ky. 1993) (citing *Simpson v. JOC Coal, Inc.*, 677 S.W.2d 305, 307 (Ky. 1984); *United States v. Allstate Ins. Co.*, 754 F.2d 662, 664-65 (6th Cir. 1985); *see also* *Roberts v. Gen. Motors*, 643 A.2d 956, 958 (N.H. 1994) (rejecting contract buyer's effort to nullify ROFR under third-party beneficiary doctrine).

Some automotive franchise agreements contain a third-party beneficiary provision. In this regard, the GM dealer sales and service agreement provides: “17.9 **NO THIRD PARTY BENEFIT INTENDED.** This Agreement is not enforceable by any third parties and is not intended to convey any right or benefit to anyone who is not a party to this Agreement.” Several other franchise agreements have similar provisions.<sup>46</sup> The presence of a third-party beneficiary provision in the GM dealer agreement in the *Blair* case was clearly a factor in its holding. It is less clear whether the absence of such a provision would weigh heavily enough to force a decision in favor of the contract buyer. *Blair*, at least in dicta, says no—a buyer must make a showing that it was intended as a direct beneficiary of the dealer agreement, which is no mean task.

#### D. Tortious Interference

Contract buyers might also challenge a ROFR with a tortious interference claim. Because it is a tort and not reliant on the franchise agreement or franchise approvability statutes, one could argue the issue of standing is obviated. A claim for tortious interference in the context of a franchisor-franchisee relationship has its own burdens.

The law of tortious interference, whether with a contract<sup>47</sup> or with a prospective economic advantage, requires, inter alia, the existence of an improper motive.<sup>48</sup> This element presents a formidable task in the ROFR arena. In *Crivelli v. GMC*,<sup>49</sup> GM exercised its ROFR in an effort to redirect the selling dealer to its original buyer. It even encouraged the original buyer to reconsider the acquisition. Ultimately, the original buyer consummated the deal, and the second buyer sued GM, claiming tortious interference. In rejecting the claim, the Third Circuit cited to similar decisions for the principle that the interference must be improper.<sup>50</sup> It saw nothing improper about GM's exercise of its ROFR. Other courts have recognized the exercise of the ROFR as a legitimate contract right<sup>51</sup> and the franchisor's economic interests in selecting its franchisees.<sup>52</sup> In *Jackson v. Freightliner Corp.*,<sup>53</sup> it appeared that the franchisor arbitrarily rejected the buyer and then exercised its ROFR as an integral part of a settlement agreement reached with the seller. However, the Tenth Circuit upheld the ROFR and rejected the buyer's tor-

46. E.g., Jaguar ¶ 18.3, 19.A § XVI(J); Lexus § XIX(I); Toyota § XXVI(I).

47. RESTATEMENT (SECOND) OF TORTS § 766.

48. RESTATEMENT (SECOND) OF TORTS § 766B.

49. *Crivelli v. GMC*, 215 F.3d 386, 387 (3d Cir. 2000).

50. *Id.* at 395. The cases cited include *Roberts*, 643 A.2d at 960–62; *Tynan v. GM Corp.*, 591 A.2d 1024, 1034 (N.J. App. Div. 1991); and *Morse v. Ted Cadillac, Inc.*, 146 A.D. 2d 756, (N.Y. App. Div. 1989). See also *Priority Auto Grp. v. Ford Motor Co.*, 757 F.3d 137, 143 (4th Cir. 2014).

51. *Blair v. Gen. Motors Corp.*, 838 F. Supp. 1196, 1201 (W.D. Ky. 1993).

52. *Tynan*, 591 A.2d at 1026; *Roberts v. Gen. Motors*, 643 A.2d 956, 962 (N.H. 1994).

53. No. 94-2163, 1996 U.S. App. LEXIS 23307, at \*4 (10th Cir. Sept. 5, 1996).

tious interference claim because the exercise did not entail the utilization of improper means.

At least one court based its decision on the so-called “not-a-stranger principle.” In *Fresno Motors, LLC v. Mercedes-Benz USA, Inc.*, interpreting California law, the Ninth Circuit pointed out that a claim for tortious interference “may only be against ‘strangers’ or interlopers” and “cannot be against a non-party who has a direct economic interest and involvement in the contractual relationship.”<sup>54</sup> In upholding the exercise of a ROFR by Mercedes-Benz USA, LLC, the court recognized the “symbiotic economic relationship” that existed between MBUSA and its franchisee and that MBUSA “had a pre-existing contractual right to interfere with the [acquisition agreement], based upon the right of first refusal provision in the dealer agreements.”<sup>55</sup>

#### *E. The Timing Requirement: The Trigger Event*

Franchise agreements in the retail automotive arena typically contain a specified time frame within which the franchisor may exercise its ROFR; however, several states have established a separate deadline by statute.<sup>56</sup> The disputes surrounding this aspect typically center on the trigger event that starts the running of the specific exercise period. Contract buyers have endeavored to employ this component to invalidate a ROFR exercise.<sup>57</sup> Of course, the starting point in this analysis is to examine the precise ROFR language of the particular franchise agreement and, where applicable, the state statute. The structure and content of these provisions can vary and may be vague.

It should also be noted that the timing requirement and identification of the trigger event bring back into question the issue of standing. For example, in *Jackson*, Freightliner’s ultimate purchase of the subject dealership came after the ROFR deadline had expired.<sup>58</sup> Thus, the Tenth Circuit considered the contract buyer’s claim “irrelevant” under New Mexico law. The court further noted: “Whether Freightliner Corp. breached the contractual duties it owed Freightliner Albuquerque as a result of its decision not to commit

54. 852 F. Supp. 2d 1280, 1300 (E.D. Cal. 2012), *aff’d in part and reversed in part by and remanded by* 771 F.3d 1119, 1126 (9th Cir. 2014), *on remand summary judgment granted in part, summary judgment denied in part on other grounds*, No. 1:11-cv-2000, 2015 U.S. Dist. LEXIS 84236 (E.D. Cal. June 26, 2015).

55. *Id.* For an excellent and a broader discussion of the assertion of tortious interference by aggrieved buyers (i.e., not related to either the automotive arena or limited to the ROFR context), see David A. Beyer & Scott P. Weber, *Perilous Prospect – Part II: Lawsuits to Get into the Franchise System*, 23 FRANCHISE L.J. 34 (2003).

56. See IOWA CODE § 322A.12(2)(2014).

57. For example, a buyer may contend that a mere written notice to the franchisor of the franchisee’s intention to sell its franchise to the buyer is sufficient to trigger the ROFR exercise period. Alternatively, the submission of a letter of intent (whether binding or non-binding) may be asserted as the triggering event. As stated in note 7 *supra*, the success of these arguments will, to a large extent, depend upon the precise language of the ROFR provision in the franchise agreement.

58. *Jackson v. Freightliner Corp.*, No. 94-6163, 1996 U.S. App. LEXIS 23307, at \*11 (10th Cir. Sept. 5, 1996).

to the transfer of the dealership to Mr. Jackson is between Freightliner Corp. and Freightliner Albuquerque.”<sup>59</sup> Without the ability of the buyer to establish standing, the question of whether the franchisor’s exercise of its ROFR is timely is one that only the seller/franchisee may raise.

An establishment of rights under the state franchise statute can overcome this result, as shown in *Bowser Cadillac, LLC v. GMC*.<sup>60</sup> In that case, the buyer was able to establish that GMC did not meet the exercise deadline, as specified in the state franchise statute (sixty days). In rejecting a motion to dismiss, the U.S. District Court for the Western District of Pennsylvania pointed to language in the Pennsylvania statute that entitled a prospective purchaser to the reimbursement of reasonable expenses. The court determined that the buyer had standing to raise the timeliness claim.<sup>61</sup>

Some of these issues were present in *Paccar, Inc. d/b/a Peterbilt Motor Company v. Ernest Wilson Capital Truck, LLC*.<sup>62</sup> There, the seller (franchisee) claimed that Peterbilt untimely exercised its ROFR.<sup>63</sup> The seller claimed that the ROFR was triggered by the submission of a binding “letter agreement,” which followed a “less detailed proposal” sent to and received by Peterbilt. Peterbilt contended that the letter agreement was too vague to rely upon for purposes of exercising its ROFR. However, it appeared that Peterbilt did not endeavor to resolve its understanding of the terms of the deal until discovery in the litigation some three months after the letter agreement was executed and submitted. It did not exercise its ROFR until four months later.<sup>64</sup> The court stated that it was “Peterbilt’s responsibility to clarify any confusion regarding these uncertain terms in reasonable time.”<sup>65</sup> The court held that “Peterbilt was either aware of the essential terms of the deal or failed through diligent inquiry to attempt to clarify the essential terms.”<sup>66</sup> It ruled that the ROFR exercise “was untimely and is invalid as a matter of law.”<sup>67</sup> The court rejected the notion that the notice must be complete or consistent with industry standards: “[T]he standard is instead whether the right holder received sufficient notice of the terms so as to allow it to make a considered choice. If so, the burden shifts to the right holder to

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59. *Id.*

60. No. 07-1149, 2008 U.S. Dist. LEXIS 54906, at \*20 (W.D. Pa. July 18, 2008).

61. Does the submission of an unsigned agreement trigger the ROFR exercise period? How about a non-binding letter of intent? Does a binding letter of intent start the ROFR period or is it deferred until the parties enter into a formal and comprehensive acquisition agreement. These questions become even more challenging when the ROFR language in the franchise agreement is unclear.

62. 923 F. Supp. 2d 745 (D. Md. 2013).

63. The record on appeal is unclear as to why the seller itself was objecting to the ROFR exercise, although footnote 12 in the case indicates that the bulk of the purchase price (over ninety percent) was to be paid over time as a percentage of distributions. *Id.* at 754, n.12. Conceivably, the seller was not comfortable with Peterbilt’s or its assignee’s ability to make such distributions.

64. The Peterbilt franchise agreement included a thirty-day ROFR clock.

65. *Peterbilt*, 923 F. Supp. 2d at 759.

66. *Id.* at 760.

67. *Id.*

make reasonable effort to clarify the deal.”<sup>68</sup> These principles are not limited to automotive dealer cases.<sup>69</sup>

Where the ROFR provision in the automotive franchise agreement or the particular ROFR statute clearly enumerates what is required to trigger the ROFR, the timing issue becomes straightforward. For example, the Acura/Honda franchise agreement includes the requirements of a formal (executed) acquisition agreement, a completed application, and other specific requirements.<sup>70</sup> However, where the franchise agreement is less clear and the statute less helpful, the burden may shift to the franchisor to confirm the trigger date and clarify the terms of the deal in a reasonable fashion.

## F. Structural Issues

### 1. Package Deal

ROFR disputes may arise in transactions structured, whether wittingly or unwittingly, in a way that impairs or precludes the exercise of the ROFR. These structural “failures” are often reflected in transactions that are bundled with several other deals—the so-called “package deals.” For example, in *Mercedes-Benz USA, LLC v. Star Automobile Company*,<sup>71</sup> the dealer entered into an asset purchase agreement with its buyer regarding the sale of its Mercedes dealership as well as its Nissan and Volkswagen dealerships. In both a preliminary injunction hearing and subsequent hearing to remove the injunction, the U.S. District Court for the Middle District of Georgia ruled that the sale violated MBUSA’s right of first refusal under both New Jersey and Georgia law. The court enjoined the sale: “Thus it is likely that the package deal selling the Nissan and Volkswagen dealerships (over which MBUSA had no power) together with the Mercedes dealership violated MBUSA’s contractual right of first refusal.”<sup>72</sup>

There was a similar holding in *Volvo Group, N.A., LLC v. Truck Enterprises, Inc.*,<sup>73</sup> a stock sale transaction attempted to sell both Volvo dealerships and other truck lines (Kenworth and Isuzu) to the purchaser. However, the U.S. District Court for the Western District of Virginia held that the transaction improperly imposed Volvo’s ROFR rights. In this regard, it noted:

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68. *Id.* at 757.

69. See *Koch Indust., Inc. v. Sun Co.*, 918 F.2d 1203, 1212 (5th Cir. 1990); *Dyrdal v. Golden Nuggets, Inc.*, 672 N.W.2d 578, 585 (Minn. Ct. App. 2003), *aff'd* by 689 N.W.2d 779 (Minn. 2004) (unsigned purchase agreement provided reasonable notice and gave the right holder the opportunity to inquire further); *John D. Stump & Assocs. v. Cunningham Mem. Park*, 419 S.E.2d 699, 706 (W. Va. 1992) (the owner has an initial duty to make a reasonable disclosure of the third party offer; the holder has a duty to make a reasonable inquiry for any additional information); *Roeland v. Trucano*, 214 P.3d 343, 348 (Alaska 2009) (holder has a duty to undertake a reasonable investigation of any terms which are unclear).

70. See *supra* note 7.

71. Case No. 3:11-cv-73, 2011 U.S. Dist. LEXIS 59258, at \*4–5 (M.D. Ga. June 3, 2011); Case No. 3:11-cv-73, 2011 U.S. Dist. LEXIS 76648 (M.D. Ga. July 15, 2011).

72. *Id.* at \*5.

73. No. 7:16-CV-00025, 2016 WL 1479687 (W.D. Va. Apr. 14, 2016).

If Dealers are allowed to go through with the proposed sale of the dealerships to TEC at this time, then Volvo will either lose its right of first refusal or be forced to purchase not only the Volvo portion, but also the Kenworth and Isuzu portions, which, as explained above, Volvo does not appear to have any contractual or statutory right to do. Either way, it is likely that Volvo would be irreparably harmed because it would be compelled to accept a dealer with which it has had no relationship (TEC) or to purchase portions of the dealerships (Kenworth and Isuzu) over which it has no right. Assuming that monetary damages could remedy these harms, it is difficult to see how the appropriate figure could be calculated, given that one harm would likely go well into the future (i.e., a continuing relationship with TEC) and the other would likely give rise to a subsequent legal action (i.e., a suit from Kenworth or Isuzu or both).<sup>74</sup>

These rulings are consistent with non-automotive case law that a property owner cannot defeat a ROFR by including the burdened property (i.e., the property subject to the ROFR) in a larger package of properties to be sold to a third party. In such cases, the courts have consistently enjoined the transaction in an effort to preserve the ROFR.<sup>75</sup> Thus, in *Hinson v. Roberts*,<sup>76</sup> the Georgia Supreme Court reversed summary judgment in favor of the property owner who sold the ROFR property together with four other tracts of land. Citing cases from Idaho, New Jersey, and Pennsylvania, the court stated:

We adopt the principles stated in the foregoing opinions. Thus, the rule we announce is that a preemptive right of first refusal may not be defeated by the offer of a third party to purchase the land in question as part of a package transaction, including one or more additional tracts, even if the purchase price is allocated among the several tracts.

Similarly, in *Radio WEBS, Inc. v. Tele-Media Corp.*,<sup>77</sup> the sale to a third party of the ROFR asset (the capital stock of a cable company) was enfolded into a package deal that also included the capital stock of another cable company, an office building, and a personal residence. The Georgia Supreme Court held that the package deal violated the plaintiff's ROFR. In citing numerous cases regarding real property transactions, the court extended the same principle to the sale of a business and held that "to find otherwise would represent defeat of contractual rights of first refusal by inclusion of extraneous assets."<sup>78</sup>

Are there any exceptions to this principle? First, it is noteworthy that the *Star* decision involved a state franchise statute (Georgia) that expressly grants a franchisor right of first refusal. Can a dealer ever be justified in structuring a deal that includes other dealerships and other properties? To be sure, the package deal is not uncommon in today's automobile market. Recent deals

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74. *Id.* at \*5.

75. Bernard Daskal, Note, *Right of First Refusal and the Package Deal*, 22 *FORDHAM URB. L.J.* 461 (1995).

76. 349 S.E.2d 454, 456 (Ga. 1986).

77. 292 S.E.2d 712, 713 (Ga. 1982).

78. *Id.* at 715.

have included the sale by the Van Tuyl Group to Berkshire Hathaway of all of its seventy-five dealerships and several real properties<sup>79</sup> and Lithia Motor's acquisition of DCH Auto Group's twenty-seven dealerships and real properties.<sup>80</sup> Neither of these deals was structured to defeat the franchisor's right of first refusal. Rather, the structure was the natural result of the deals and arguably more market-driven.

Does the concept of good faith play a role in this context? As noted in *Right of First Refusal*,<sup>81</sup> at least one higher court has espoused this view. In *Crow-Spieker #23 v. Helms Construction and Demolition Company*,<sup>82</sup> the Nevada Supreme Court reviewed a trial court ruling that a package real estate deal, including a parcel subject to a ROFR, breached the ROFR. The court ruled that the ROFR is "totally inapplicable" as long as the owner determined in good faith that it is only willing to sell the ROFR parcel as part of a larger transaction.<sup>83</sup> This ruling has been considered a deviation from the many cases supporting the ROFR in packaged deals.<sup>84</sup>

Why the packaged deal case does not explicitly employ the good faith doctrine (with the exception of *Crow-Spieker #23*) is unclear. It would be reasonable, however, to assume that the doctrine of good faith will not be ignored in any case involving the ROFR inasmuch as the implied covenant of good faith and fair dealing is certainly applicable in this arena.

## 2. Poison Pill Transactions

Interestingly, the concept of good faith has been employed in transactions where the contracting parties include additional terms in the acquisition agreement that make the exercise of a ROFR difficult or undesirable. These are sometimes referred to as "poison pills."

For example, in *David A. Bramble, Inc. v. Thomas*,<sup>85</sup> the parties to the sale of a parcel of land subject to the plaintiff's ROFR included a "no mining" provision. The court reversed the trial court's ruling that the ROFR was ineffectual since it omitted the "no mining" provision in the exercise notice. The appellate court remanded the case to determine whether the contractual parties' actions in inserting the objectionable provision were "arbitrary or performed in bad faith" or if there was a "reasonable justification" for the provision.<sup>86</sup>

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79. Jim Henry, *Warren Buffett Jumps into Autos, Buying Van Tuyl Group*, FORBES, Oct. 2, 2014, <http://www.forbes.com/sites/jimhenry/2014/10/02/warren-buffett-jumps-into-autos-buying-van-tuyl-group/>.

80. Jamie LaReau, *Lithia Completes Purchase of DCH Auto Group*, AUTO. NEWS, Oct. 1, 2014, <http://www.autonews.com/article/20141001/RETAIL07/141009962/lithia-completes-purchase-of-dch-auto-group>.

81. Daskal, *supra* note 75, at 472.

82. 731 P.2d 348 (Nev. 1987).

83. *Id.* at 350.

84. The author of *Right of First Refusal* characterized the *Crow-Spieker #23* decision as "untenable." Daskal, *supra* note 75, at 475.

85. 914 A.2d 136, 139 (Md. 2007).

86. *Id.* at 150.

In contrast, in *Roeland v. Trucano*, the sale transaction, which involved a tract of land subject to a ROFR, entitled the seller to an interest in any future souvenir shops on the land.<sup>87</sup> Obviously, this was a difficult term for the ROFR holder to match. The holder sued the contracting parties, in part, because the transaction breached the implied covenant of good faith and fair dealing.<sup>88</sup> The trial court found for the contracting parties and ruled that the deal was negotiated in good faith and was not designed to cut off the ROFR.<sup>89</sup> In relying upon a prior holding in *West Texas Transmission LP v. Fenron Corp.*,<sup>90</sup> the Arizona Supreme Court confirmed that the ROFR holder had the right to “propose comparable terms to the original offer which are possible for him to meet and which would meet the seller’s corresponding interests.”<sup>91</sup> In support of its holding, the court quoted *West Texas Transmission, LP* and ruled as follows:

[T]he owner of property subject to a right of first refusal remains master of the conditions under which he will relinquish his interest, as long as those conditions are commercially reasonable, imposed in good faith, and not specifically designed to defeat the preemptive rights. Therefore, where—as here—the right of first refusal does not specify that the third-party offer must be in cash, we give effect to the owner’s right to sell his property for whatever he wishes. There was no obligation to provide a cash offer. Roeland and Flamee undertook no inquiries or attempts to negotiate a commercially equivalent offer. Accordingly, they failed to exercise their right of first refusal.<sup>92</sup>

This aspect of an automotive ROFR becomes even more uncertain given that there appears to be no published automotive decisions in the “poison pill” context. This area of law continues to develop, especially given the increased frequency of the exercise of automotive ROFRs. For example, if the acquisition agreement includes special terms that, arguably, the franchisor cannot match, will the deal be allowed under judicial scrutiny?<sup>93</sup> Based upon pre-existing (non-automotive) case law, the focus should be whether the special term was included in good faith or simply a ploy to avoid the ROFR exercise. Unless a specific arrangement in the acquisition agreement is challenged by a franchisor and ultimately addressed in court, the question of whether such a deal will avert a ROFR challenge will remain unclear.

### G. *Covenant of Good Faith and Fair Dealing*

The covenant of good faith and fair dealing is a well-established principle in automotive franchise agreements and widely recognized in the common

87. 214 P.3d 343, 349 (Alaska 2009).

88. *Id.* at 347.

89. *Id.* at 351.

90. 907 F.2d 1554 (5th Cir. 1990).

91. *Roeland*, 214 P.3d at 349–50.

92. *Id.* at 350.

93. Examples of these include an equity component for the selling dealer in the buying entity and a purchase price based upon the ultimate number of vehicles sold by the buyer (post-closing).



law.<sup>94</sup> The requirement of good faith is codified in the Automobile Dealers' Franchise Act (ADFA).<sup>95</sup> This Act expressly provides for a cause of action by an automobile dealer against an automobile manufacturer "by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer."<sup>96</sup>

There are no published decisions successfully challenging a franchisor's "bad faith" exercise of a ROFR. The fact pattern would present an interesting dynamic in the ROFR area. How would a court balance the franchisor's clear and well-established preemptive right created by a ROFR provision against the common law and ADFA doctrines of good faith and fair dealing? Until this issue makes its way into a reported decision, the result will remain unclear.

#### IV. Conclusion

The automotive ROFR has become the subject matter of much statutory regulation as well as increased judicial scrutiny. This focus is likely to intensify as the utilization of ROFRs by automotive franchisors increases and the deals become more complex. It is certainly a developing and intriguing area of automotive franchise law. That warrants special attention by franchisors, franchisees, and contract buyers alike.

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94. See generally *Gray v. Toyota Motor Sales, U.S.A.*, 806 F. Supp. 2d 619 (E.D.N.Y. 2011); *Bowser Cadillac, LLC v. GMC*, 2008 WL 2802523 (W.D. Pa. July 18, 2008), No. 07-1149; *Gabe Staino Motors, Inc. v. Volkswagen of Am.*, 2003 WL 25666135 (E.D. Pa. Apr. 29, 2005), No. 99-5034; *Fuller Ford, Inc. v. Ford Motor Co.*, No. 00-530-B, 2001 U.S. Dist. LEXIS 12044 (D.N.H. Aug. 6, 2001).

95. 15 U.S.C. §§ 1221-1225.

96. 15 U.S.C. §§ 1221-1225.

## APPENDIX

## Selected Motor Vehicle Franchise Right of First Refusal Statutes

State	Statute(s)	Notable Features
Arizona	ARIZ. REV. STAT. ANN. § 28-4459 (2016)	<ul style="list-style-type: none"> <li>• Franchisor must notify franchisee in writing of intent to exercise right of first refusal (ROFR) within 60 days of receipt of completed transfer application and related information</li> <li>• Cannot exercise ROFR if proposed transferee is a family member</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises ROFR</li> <li>• Franchisor must reimburse transferee for reasonable expenses, including legal fees</li> </ul>
California	CAL. VEH. CODE § 11713.3(t) (2016); CAL. BUS. & PROF. CODE § 20028(c) (2016)	<ul style="list-style-type: none"> <li>• Franchise agreement must provide ROFR</li> <li>• To exercise ROFR, franchisor must provide written notice no later than 45 days after receipt of all information required by the statute</li> <li>• Sale must relate to all or substantially all of business assets</li> <li>• Cannot exercise ROFR if proposed transferee is a family member</li> <li>• Consideration paid by franchisor is to equal or exceed that to be paid by proposed transferee</li> <li>• Franchisor must reimburse proposed transferee for reasonable expenses, including legal fees</li> </ul>
Colorado	COLO. REV. STAT. § 12-6-127 (2015)	<ul style="list-style-type: none"> <li>• Franchisor must reimburse proposed transferee for reasonable expenses, including legal fees</li> </ul>
Connecticut	CONN. GEN. STAT. § 42-133cc (2016)	<ul style="list-style-type: none"> <li>• Franchisor must notify franchisee in writing of intent to exercise ROFR within 60 days of receipt of proposed transfer and information and documents</li> <li>• Cannot exercise ROFR if transferee is a family member</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal</li> <li>• Franchisor must assume all duties, obligations, and liabilities contained in the agreement between franchisee and proposed transferee</li> </ul>

State	Statute(s)	Notable Features
		<ul style="list-style-type: none"> <li>• Franchisor must reimburse proposed transferee for reasonable expenses, including legal fees</li> </ul>
Delaware	DEL. CODE ANN. tit. 6, § 4910(d)	<ul style="list-style-type: none"> <li>• ROFR allowed if in franchise agreement</li> <li>• Franchisor must notify franchisee in writing of intent to exercise right of first refusal within 60 days of receipt of completed proposal and all related agreements</li> <li>• Cannot exercise ROFR if transferee is a family member</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal</li> <li>• Franchisor must reimburse proposed transferee for reasonable expenses, including legal fees</li> <li>• Cannot use ROFR to influence the consideration or influence person to refrain from acquisition</li> </ul>
Florida	No statute, but see <i>Bayview Buick-GMC Truck, Inc. v. General Motors Corp.</i> , 597 So. 2d 887 (Fla. Dist. Ct. App. 1992)	<ul style="list-style-type: none"> <li>• Franchisor's ROFR held void as against public policy because it violated state bar to manufacturer ownership of dealership.</li> <li>• Also, franchisor failed to deny transfer within time limit and via statutory procedure, including filing of complaint with agency</li> </ul>
Georgia	GA. CODE ANN. § 10-1-663.1 (2016)	<ul style="list-style-type: none"> <li>• Franchisor may exercise ROFR if the proposed sale or transfer is of more than 50 percent of the ownership or assets of the dealership being transferred</li> <li>• Franchisor must notify franchisee in writing of intent to exercise right of first refusal within 60 days of receipt of completed written proposal and information and agreements</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal</li> <li>• Franchisor must reimburse proposed transferee for reasonable expenses, including legal fees</li> </ul>

(Continued)

State	Statute(s)	Notable Features
Illinois	815 ILL. COMP. STAT. ANN. 710/4 (2016)	<ul style="list-style-type: none"> <li>• To exercise ROFR, franchisor must provide notice 60 days from receipt of generally used applications forms and all agreements</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises ROFR</li> <li>• Franchisor must reimburse prospective transferee for reasonable expenses</li> </ul>
Indiana	IND. CODE ANN. § 9-32-13-22(c) (Burns 2016)	<ul style="list-style-type: none"> <li>• Franchisor must notify franchisee in writing of intent to exercise right of first refusal within 60 days of receipt of proposed transfer information</li> <li>• Franchisor must provide same or better consideration to franchisee</li> <li>• Franchisor may exercise ROFR if the proposed sale or transfer is of more than 50 percent of the ownership or assets of the dealership being transferred</li> <li>• Franchisor must reimburse franchisee for reasonable expenses, including legal fees</li> <li>• Cannot exercise ROFR if proposed transfer is to family member or manager</li> </ul>
Iowa	IOWA CODE § 322A.12 pt. 2 (2016)	<ul style="list-style-type: none"> <li>• Notwithstanding terms of franchise agreement, the transfer of the dealership “shall not make applicable any right of first refusal of the franchisor”</li> </ul>
Louisiana	LA. REV. STAT. § 32:1267(B) (2016)	<ul style="list-style-type: none"> <li>• Franchise agreement must have ROFR</li> <li>• Franchisor must notify franchisee in writing of intent to exercise right of first refusal within 60 days of receipt of completed proposal and all agreements</li> <li>• Cannot exercise ROFR if transferee is a family member</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises ROFR</li> <li>• Franchisor must reimburse prospective transferee’s for reasonable expenses, including legal fees</li> <li>• Dealer is not liable to any person as a result of the exercise of the ROFR</li> </ul>

State	Statute(s)	Notable Features
Maine	10 ME. REV. STAT. ANN. tit. 10, § 1174 (2016)	<ul style="list-style-type: none"> <li>• Franchisor can exercise ROFR</li> <li>• Franchisor must assume or acquire lease/real property</li> <li>• Franchisor must assume all obligations of proposal</li> <li>• Franchisor must reimburse prospective transferee's reasonable expenses</li> <li>• Cannot use ROFR in order to influence the consideration or influence person to refrain from acquisition</li> </ul>
Maryland	MD. TRANSP. CODE ANN. § 15-211(h) (2016)	<ul style="list-style-type: none"> <li>• Franchisor may not exercise right of first refusal if the proposed transferee meets manufacturer's reasonable qualifications, is a member of franchisee's family, a qualified manager with at least 2 years management experience, or an existing dealer in good standing</li> <li>• Franchisor must reimburse prospective franchisee for reasonable expenses, including legal fees</li> </ul>
Massachusetts	MASS. GEN. LAWS ch. 93B, § 10 (2016)	<ul style="list-style-type: none"> <li>• Franchisor must notify franchisee in writing of intent to exercise right of first refusal within 45 days of receipt of completed proposal.</li> <li>• Franchisor has 30 days after issuing notice of intent to franchisee to exercise the right of refusal</li> <li>• Cannot exercise ROFR if transferee is a family member</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal</li> <li>• Cannot use ROFR in order to influence the consideration or influence person to refrain from acquisition</li> <li>• Franchisor must reimburse prospective transferee for reasonable costs and expenses</li> </ul>
Michigan	MICH. COMP. LAWS § 445.1527(g) (2016)	<ul style="list-style-type: none"> <li>• Requirement that there must be good cause to deny transfer does not include exercise of ROFR</li> </ul>

*(Continued)*

State	Statute(s)	Notable Features
Minnesota	MINN. ANN. STAT. § 80E.13(j) (2016)	<ul style="list-style-type: none"> <li>• In order to exercise ROFR, franchise agreement must provide for ROFR</li> <li>• Franchisor may exercise right of first refusal if the proposed sale or transfer is of more than 50 percent of the ownership or assets of the dealership being transferred</li> <li>• Franchisor must notify franchisee in writing of intent to exercise right of first refusal within 60 days of receipt of written proposed transfer</li> <li>• Cannot exercise if transferee family member</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal</li> <li>• Franchisor must reimburse proposed transferee for reasonable expenses, including legal fees</li> </ul>
Missouri	MO. REV. STAT. § 407.825(7)(c)	<ul style="list-style-type: none"> <li>• Franchise agreement must allow for ROFR</li> <li>• Cannot exercise ROFR if proposed transferee is a family member</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal</li> <li>• Franchisor must reimburse proposed transferee for reasonable expenses, including legal fees</li> </ul>
New Mexico	N.M. STAT. ANN. § 57-16-5 U (2016)	<ul style="list-style-type: none"> <li>• It is unlawful to enforce a ROFR by a manufacturer or to require dealer to grant a right or option thereto</li> </ul>
Nevada	NEV. REV. STAT. ANN. § 482.36419 (2015)	<ul style="list-style-type: none"> <li>• Franchise agreement must contain ROFR</li> <li>• Franchisor must notify franchisee in writing of intent to exercise right of first refusal and material reasons within 60 days of receipt of completed form and information</li> <li>• A right of first refusal may not be exercised if the proposed sale is to a member of the franchisee's family, a qualified manager, or a trust</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal</li> <li>• Franchisor must reimburse proposed transferee for reasonable expenses, including legal fees</li> <li>• Cannot use ROFR in order to influence the consideration or influence person to refrain from acquisition</li> </ul>

State	Statute(s)	Notable Features
New Jersey	N.J. STAT. ANN. §§ 56:10-13.6, 13.7 (2016)	<ul style="list-style-type: none"> <li>• Requires franchisor to assume or acquire lease or real property of dealership in order to exercise ROFR unless otherwise agreed to by franchisor and franchisee</li> <li>• Cannot use ROFR in order to influence the consideration or influence person to refrain from acquisition</li> <li>• Franchisor must reimburse prospective transferee for reasonable expenses, including legal fees</li> </ul>
Oregon	OR. REV. STAT. § 650.162(5) (2016)	<ul style="list-style-type: none"> <li>• ROFR must be in franchise agreement</li> <li>• Franchisor must notify franchisee via certified mail, return receipt requested, of intent to exercise right of first refusal within 60 days of receipt of proposed transfer</li> <li>• ROFR may not be exercised if the proposed sale is to a member of the franchisee's family, a qualified manager, or a trust</li> <li>• Franchisor may exercise right of first refusal if the proposed sale or transfer is of more than 50 percent of the ownership or assets of the dealership being transferred</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal</li> <li>• Franchisor must reimburse prospective transferee for reasonable expenses, including legal fees</li> </ul>
Pennsylvania	PA. STAT. ANN. tit. 63 § 818.16 (2016)	<ul style="list-style-type: none"> <li>• Franchisor must notify franchisee of intent to exercise right of first refusal within a statutory period of 60 or 75 day time limitations of § 12(b)(5)</li> <li>• Cannot exercise ROFR if transferee is family member</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal</li> <li>• Provides for franchisor to assume lease of dealership and acquire real property unless franchisor and franchisee otherwise agree</li> <li>• Franchisor must assume all duties, obligations, and liabilities contained in the agreement between franchisee and proposed transferee</li> <li>• Franchisor must reimburse franchisee for reasonable expenses, including legal fees</li> </ul>

*(Continued)*

State	Statute(s)	Notable Features
Tennessee	TENN. CODE ANN. § 47-25-1505(2)(A) (2016)	<ul style="list-style-type: none"> <li>• Prohibition against franchisor refusal to renew for purpose of converting dealer's business into operation by franchisor or its agents/employees does not apply to franchisor exercise of ROFR</li> </ul>
Vermont	VT. STAT. ANN. tit. 9, § 4100e (2016)	<ul style="list-style-type: none"> <li>• ROFR must be in franchise agreement</li> <li>• Franchisor must notify franchisee in writing of intent to exercise right of first refusal and material reasons within 60 days</li> <li>• A right of first refusal may not be exercised if the proposed sale is to a member of the franchisee's family, a qualified manager, or a trust</li> <li>• Franchisor must reimburse proposed transferee for reasonable expenses, including legal fees</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal</li> </ul>
Virginia	VA. CODE ANN. § 46.2-1569.1 (2016)	<ul style="list-style-type: none"> <li>• Franchisor must notify franchisee in writing of intent to exercise right of first refusal within 45 days of receipt of completed proposal</li> <li>• Cannot exercise if proposed transfer is to a family member</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal</li> <li>• Franchisor must reimburse prospective transferee for reasonable expenses, including legal fees</li> </ul>



State	Statute(s)	Notable Features
Washington	WASH. REV. CODE ANN. § 46.96.220 (2016)	<ul style="list-style-type: none"> <li>• ROFR must be in franchise agreement</li> <li>• Franchisor must notify franchisee via certified mail, return receipt requested, of intent to exercise right of first refusal within the lesser of 45 days of receipt of proposed transfer or the time period specified in the franchise agreement</li> <li>• Proposed transfer must be at least 50% of the franchise</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal</li> <li>• Franchisor may not exercise right of first refusal if proposed transferee was pre-approved, is a family member, or was a manager continuously employed by franchisee for 3 years and is otherwise qualified</li> <li>• Franchisor must reimburse prospective transferee for reasonable expenses, including legal fees</li> <li>• Requires franchisor to assume lease or acquire real property of dealership</li> <li>• Franchisee is not liable to proposed transferee for damages resulting from franchisor's exercising right of first refusal if disclosed in writing the existence of the ROFR</li> </ul>
Wisconsin	WIS. STAT. ANN. § 218.0134(4)(c) (2015-2016)	<ul style="list-style-type: none"> <li>• Franchisor may exercise ROFR but must be in the franchise agreement</li> <li>• Franchisee must receive equal or greater compensation to the proposed transfer if franchisor exercises right of first refusal</li> <li>• ROFR does not apply if proposed transferee is a family member or a qualified manager for franchisee with 2 years' experience</li> <li>• Franchisor must reimburse franchisee for reasonable expenses, including legal fees</li> </ul>

