

## Contract Challenges With Selling 'Dualed' Auto Dealerships

By Sara Decatur Judge

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A recent case in Virginia involved the novel question of what assets are encompassed in a statutory and contractual right of first refusal (ROFR) held by an automotive manufacturer when the dealership being sold has multiple franchises operating out of the same dealership location. The motor vehicle dealer argued that if the manufacturer wanted to exercise its ROFR, it would have to meet the terms of the entire sale, which included the sale of assets related to the dealership's other franchises. The manufacturer disagreed and claimed that the dealer was required to "carve out" from the sale the assets which were related to the manufacturer's franchise agreement with the dealer. The resulting decision highlights how a factory ROFR can directly impede the sale of dealerships that have multiple franchises operating from the same dealership location.



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There was a time when it was not uncommon for a dealership to sell vehicles from multiple manufacturers in the same showroom. These so-called "dualed" dealerships could display a Honda next to a Chevrolet vehicle, without any trouble from the manufacturer. Today, the landscape for dualed dealers has changed significantly. Most manufacturers now try to prohibit new dealers from dualing, and they offer factory facilities incentive programs to dealers who are willing to invest in single-line stores. The vast majority of dualed dealerships in existence today are allowed to continue to dual because they are grandfathered as dual dealers and now protected by various state statutes. Despite such protections, dualed dealers may face additional complications when trying to sell their stores to a third-party buyer.

This problem played out for one dealership group in Virginia when the court in *Volvo Group North America LLC v. Truck Enterprises Inc.* (W.D. Va., March 31, 2017) held that the dealer, Truck Enterprises Inc. (TEI), was required to "carve out" from its buy-sell stock purchase agreement the portions of its business that were related to Volvo, so that Volvo could exercise its right of first refusal over TEI's Volvo franchises. This created difficulties for TEI, which had dualed Volvo with its Kenworth trucks franchise under the same roof.

### "Dualing" Stories Presented to Court

TEI owns and operates multiple commercial truck dealerships located in Virginia, West Virginia and Maryland. TEI is an authorized dealer for Volvo, Kenworth and Isuzu trucks pursuant to separate dealer agreements with each of these three manufacturers. Three of TEI's dealerships are dualed and sell both

Volvo trucks and Kenworth trucks in the same store.

In 2015, TEI's principal entered into a stock purchase agreement with a third-party buyer, Transport Equipment Company Inc. (TEC). That purchase agreement contemplated that TEC would purchase all of the stock in TEI, as well as its various subsidiaries which operate the dualed Volvo/Kenworth stores. The purchase agreement provided a purchase price for all shares of TEI's stock, with no separate valuation of the individual Volvo, Kenworth or Isuzu portions of TEI. In response to the proposed sale, Volvo informed TEI that it wished to decide whether to exercise its contractual ROFR, but it could not because the transaction did not separately value the Volvo-related portions of TEI. TEI refused to provide a purchase price for just the Volvo-related business on the grounds that the transaction would not be viable if the Volvo portions of TEI were severed. TEI argued that its buyer was looking to purchase the entire dealership group, which included the Volvo franchises that were dualed with Kenworth. TEI took the position that Volvo had to match TEC's offer, stating that Volvo could either exercise its ROFR to purchase all of the stock (which had been priced to include non-Volvo related assets) or Volvo could waive its ROFR.

Volvo sued TEI seeking declaratory judgment. Volvo also claimed that TEI breached its dealer agreement by entering into the stock purchase agreement which deprived Volvo of its contractual ROFR. The court analyzed the manufacturer's contractual ROFR, as well as the statutory ROFR provided to manufacturers under Virginia's dealer protection statute. The court held in favor of Volvo, holding that the manufacturer's ROFR encumbers only portions of a dealership related to the given manufacturer, not those portions of the sale that are related to other manufacturers. The court concluded that a manufacturer wishing to exercise its ROFR as to the sale of a dualed dealership "may simply purchase the assets related to the manufacturer for the same or greater consideration as the dealer could have received for the transfer of those assets specifically." To hold otherwise, the court concluded, would be to nullify the ROFR by allowing dealers to bundle multiple manufacturers into a single sale for the purposes of avoiding the ROFR. The court also expressed concerns that the bundling would potentially deprive other manufacturers of their respective ROFRs, particularly if both manufacturers for a dual dealership had competing ROFRs over the same assets or stock.

### **A Body of Case Law Builds**

The District Court for the Western District of Virginia is not the only court to interpret a ROFR for the benefit of the manufacturer. In *Mercedes-Benz, USA LLC v. Star Auto Co.* (M.D. Ga., June 3, 2011), the court was asked to look at a similar issue involving Mercedes-Benz and dealer Star Auto. In addition to holding a Mercedes-Benz franchise, Star Auto also had franchise agreements with Nissan and Volkswagen. In that case, Mercedes-Benz was seeking to enjoin the proposed sale of Star Auto to a third-party buyer so that it could exercise its ROFR over just the Mercedes-Benz-related assets. The proposed transaction was structured as a bundled sale of all three dealerships for a single purchase price. In evaluating the merits of the preliminary injunction, the court held that Mercedes-Benz had contractual and statutory ROFR over the sale of Star Auto and had a strong likelihood of success on its claims. The Middle District of Georgia held that the bundling of the three dealerships together into one transaction likely violated Mercedes-Benz's right to exercise its ROFR.

Courts have made it clear that when a manufacturer has a valid ROFR, it will function for the benefit of the manufacturer. Dealers looking to sell multiple stores or dualed dealerships should retain experienced automotive counsel to advise them of their rights under both the dealer agreement and state law. While some states have laws preventing the manufacturer from unilaterally imposing a ROFR upon a dealer without separate consideration, dealers without such statutory protections may find

themselves limited in how they should structure their buy-sell transaction.

### **Know Your Rights Under State Dealer Statutes**

Most state dealer statutes prohibit manufacturers from imposing unreasonable restrictions upon the sale or transfer of their dealerships. Any dealer looking to sell a dealership should first ascertain whether the ROFR contained in the manufacturer's form agreement is actually enforceable against the dealer and whether any statutory ROFR exists. If there is an enforceable ROFR, a dealer will have a difficult time trying to avoid the ROFR by combining multiple dealerships or styling the transaction as a combined stock sale for multiple stores.

Likewise, dealers looking to purchase a dealership should also become familiar with their rights under the state dealer statute. Many states require the manufacturer to reimburse a third-party buyer's reasonable legal expenses in negotiating the transaction if the manufacturer exercises a ROFR. These statutory protections aim to help prevent the "chilling" of bona fide offers from third-party buyers.

The Volvo case demonstrates the difficulties that dual dealers face when trying to sell their stores. The value of a dealership may be due in large part to value of having both lines represented in the same location. A manufacturer's ROFR could impact the dual dealer's ability to sell its multiple franchises in one transaction.

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