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## Turning a dealership sale under pressure into an opportunity

Posted By: [Joseph Aboyoun](#) on: September 06, 2017 In: [Contributors](#)  
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By **Joseph S. Aboyoun, Esquire**

Unfortunate circumstances may arise that force an untimely buy-sell transaction. Here are some typical examples:

- A pending or threatened termination of your franchise.
- Serious financial difficulties where your lender threatens to withhold financing or, worse, significant legal action.
- A shareholder dispute – e.g. a managerial deadlock.

When presented with such a scenario, the only logical and practical approach may be the sale of your dealership before it becomes too late. Special challenges are presented when pursuing a buy-sell in these scenarios. An even greater challenge is how to turn this crisis into an opportunity.

**Termination**. To be sure, a termination, whether pending or imminent, must be defended vigorously. If the prospects of prevailing are slim, the sale of the dealership may be the only logical avenue. The threshold question here is whether a franchise can be sold while a termination is pending. The answer is both a function of the statutory protection afforded by your state's franchise law and the particular franchisor's willingness or policy to permit a sale, notwithstanding that the franchise is considered to be in default. Some franchise statutes expressly authorize a sale in spite of a franchise termination notice. Some manufacturers, as a matter of policy, will permit a sale to proceed either automatically or in the context of a negotiated settlement. Some franchise agreements either

explicitly or impliedly permit a sale if the dispute resolution process in the agreement is invoked. All of these must be carefully examined to determine the advisable course of action.

There is also the possibility of seeking court permission to sell. This can involve a lawsuit that seeks a stay or injunction. It can also entail the filing of a Chapter 11 under the federal bankruptcy law. Obviously, one must pull out all stops to avoid the loss of the franchise or the ability to sell it.

**Lender Work-Outs.** A sale in a loan work-out scenario is also not uncommon. In my experience, most lenders will cooperate with the dealership to allow a sale under controlled circumstances. This is customarily referred to as a Forbearance Agreement. After all, the lenders realize that the enforcement of their lender rights (such as a suspension or termination of floor plan financing) can result in the termination of the most significant aspect of the borrower – to wit, it's franchise. As such, most banks will permit the dealer to pursue a sale in an effort to generate optimum value from its collateral.

**Shareholder Dispute.** A dispute among the owners of a dealership can be an extremely frustrating and troubling experience. In this context, unless a resolution is prepared which allows one shareholder to buy out the other, a third-party sale may be the only logical solution. Unless the parties can agree on this approach, it is likely that a court will order the sale and appoint a receiver to handle the transaction.

**Disaster or Opportunity?** Every dealer dreads the onslaught of such a crisis. His or her world can turn upside down over night. How one handles with this situation will have a major impact on the outcome.

It should not be viewed as the end, but rather as another challenge. A strategic plan must be developed to deal with the problem. If continued operations is not a viable option, then the situation must be examined to determine if it can be optimized by a sale. In fact, if properly positioned, the crisis can be turned into an opportunity. As the old saying goes, "victory can be snatched from the jaws of defeat".

For example, one of the clear side effects of a developing crisis is the uncontrollable publicity. This negative situation can actually be turned into a positive. As you know, the key to most buy sells is to maintain confidentiality. Since this "bomb" has already exploded, there is no further reason to avoid it. As such, the availability of your deal can become a major strength in negotiations. As we know, everyone loves a "fire sale". Once the deal becomes well known, there will likely be a plethora of buyers. This can make for very active and fruitful price negotiations.

On a related note, this transparency actually works in favor of maintaining relationships with the dealership's employees. They will no longer be in the dark as is the case with many buy-sells where rumors are afloat. At least, they will know the clear direction of the dealership and the fact that there is a strong possibility that they will remain employed once the store is sold.

It also helps with creditor relations. At least, a creditor can see the plan to ultimately satisfy the outstanding debt. This could avert legal action by the creditor.

Indeed, once the world knows that your deal is on the block, a bidding environment is created. In a bankruptcy scenario, there will be a formal bidding process. What develops from this is yet another positive. Bidding not only has a way of generating strong buyer interest, it can also generate an optimum price. In fact, bidding creates a competitive component to buyer interest and can have the effect of bidders competing with each other in a manner that creates even more value for your deal.

To be sure, no one looks forward to a crisis sale. However, if a dealer is in such a situation, great care must be given to protect your dealership asset during the crisis and how to seize the opportunity to achieve a successful buy-sell transaction.

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