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Constant vigilance of both parties' obligations can ensure a timely dealership closing

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By **Joseph S. Aboyoun, Esquire**

As an experienced physician knows all too well, a successful operation is only the beginning of a patient's recovery. The delicate post-op process is critical to that success. The same concept applies in dealership acquisitions. The successful conclusion of negotiations and the execution of the buy-sell agreement is only the start of the deal. All focus and energies must remain intact, but shift to the fruitful conclusion of the transaction (i.e., closing).

This is not something that happens automatically and should not be taken for granted. An important component in the buy-sell is to closely monitor a party's obligations under the contract to ensure that all is proceeding well toward a closing.

Of course, the bulk of the performance requirements fall in the buyer's lap, which we will address below. However, the seller has performance obligations well, which we will also explore.

Buyer's Performance

In order to accomplish an effective and efficient buy-sell, it is imperative for the seller, both directly and through its professional representatives, to monitor the buyer's performance from day one of the deal.

- **Contingencies.** The principal focus here are the contingencies stated in the buy-sell agreement. These typically include the following:
 - Franchise approval
 - Financing approval
 - Facility inspections, including environmental and engineering
 - Financial due diligence

These are the buyer's "backdoors" out of a deal. While it would be legitimate for a buyer to terminate or, at minimum, stall a buy-sell closing if one or more contingencies fail, it is the seller's goal to ensure that the buyer has pursued these matters in good faith and due diligence.

We have seen too many deals falter because of an alleged failure of a contingency where the buyer was, at minimum, neglectful and, in some instances, acting in bad faith so that it can walk from a deal that it decided not to pursue upon reflection. This leaves a seller with a disrupted dealership and substantial legal and accounting fees.

The key to avoiding this unfortunate result is constant vigilance. From the outset, the seller and its representatives must implement a process to carefully monitor the buyer's performance and its pursuit of the successful conclusion of all contingencies. This requires a detailed evaluation of what the buyer is obligated to accomplish during the contingency period(s) and constant inquiries regarding each aspect. The following are examples of these:

- Has the buyer received its franchise application from the manufacturer?
- Has the application been properly completed and timely submitted?
- Has the manufacturer acknowledged receipt and completeness?
- Has the manufacturer raised any issues regarding approvability?
- All the same applies to financing and the lender.

- Has the buyer arranged timely inspections?
- Where are the inspection reports?
- What environmental issues have been raised?
- Has the buyer provided a due diligence checklist?
- Have the parties' accountants coordinated the due diligence effort?

These questions and more should all be embodied in a post-contract docket and in a structured process that entails a constant follow-up on each aspect. A day should not go by without checking on the buyer's efforts.

Seller's Performance

It is incumbent on the buyer to monitor the seller's performance as well. A buy-sell agreement customarily imposes certain obligations on the seller that must be satisfied prior to closing. The most significant of these is the obligation to operate the dealership in the ordinary course of business. The dealership may become less favorable and not worthy of the agreed price in the event that the seller does not continue normalized operations.

Inventory levels (new vehicles, pre-owned, and parts) must be maintained at traditional levels. Personnel must be retained. Advertising must continue unabated. Third-party relationships such as leases, IT contracts, collective bargaining agreements and the like, must remain in place. A disruption in any of these could significantly impact the revenues and ultimately, the value of a store. If the seller fails in this regard, the buyer may choose to withdraw from the deal ((if the buy-sell agreement so permits) or to pursue claim against the seller after the closing.

Additional areas of seller performance include the following:

- The obligation to remove liens against the dealership assets
- The obligation to negotiate third-party consents, such as a landlord's consent to the assignment of the dealership lease to the buyer.

The buyer must remain as vigilant as the seller regarding such matters in order to avoid a disruption or, worse, a termination of the deal.

The seamless transaction does not happen by accident. It is the result of hard work and constant monitoring by each party to the transaction.

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