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In this Issue:

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2019's Top Twenty-Five Legal Trends for Automobile Dealers

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1. Factory Sales Performance Standards for Dealers Under Siege: Some Positive Legal Development Towards Rationality (1)
2. The Autonomous Vehicle Phenomenon Rolls Along: Where We Are, Where We Are Going, and How Soon Will AVs Be Commonplace (2)
3. The #MeToo Phenomenon and Related Issues: What Dealers Need to Do (NR)
4. The Stubborn Persistence of Regulatory Overreach Despite Encouraging Actions and Signs (3)
5. Why National Politics Still Threatens America's Dealers (3)
6. What American Dealers Need to Know About "Trade Wars" (NR)
7. The Brave New Cyber world: Security and Opportunity, Data, Internet, Social Media, Identity Theft, and Privacy Minefield (9)
8. Threats to the Auto Dealer Franchise Model – Are Franchise Laws in Jeopardy? Retailing by Non-Dealers, Including the Tesla Phenomenon: The Beat Goes On (8, 4)
9. Elusive CSI: What Does It Mean, and Is It Valid? (NR)
10. Marketing and Advertising in an Age of the Internet and Social Media: Be Careful out There (NR)
11. Recalls (10)
12. Franchisor "Programs" – Factory Control Over Dealers (7)
13. "Subscription" and Other Initiatives by Franchisors to Trespass on Retail Sales and Seize More Profits for Themselves–at Dealers' Expense (NR)
14. Legacy and Succession: Do Not Let Your Dealership Legacy Become a Legal Nightmare (NR)
15. The Continuing Vitality of State Franchise Laws (8)
16. Involuntary Termination: Threats, Realities, and Dealer Responses (14)
17. Buy-Sell Activity (15)
18. Rights of First Refusal ("ROFRs") (15)
19. Alternate Dispute Resolution: Some Progress in Arbitration (11)
20. State Associations and Legal Standing: The Importance of Dealer Associations, from NADC to State and Regional Organizations (NR)
21. Workforce Issues (12)
22. Warranty Reimbursement (19)
23. Natural Disasters, Terrorism, and Unrest (18)
24. Encroachment and Franchise Modification (17)
25. Factory Audits (20)

NOTE: 2018 rankings are in parentheses; NR (Not Rated in 2018).

2019's Top Twenty-Five Legal Trends for Automobile Dealers

Feature Article

By Eric L. Chase
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INTRODUCTION

For the first time, this annual publication ranks twenty-five legal trends that significantly impact dealers. The expanded list for 2019, up from twenty, reflects not only the reality of how, and how deeply, legal, regulatory, and even political considerations have dug into ever more facets of American auto dealerships. The emergence of technological innovations, new products and creative ways of doing business are also among the reasons for additional ranked trends. Thus, relatively recent developments have added to every dealer's legal concerns, and most of the longstanding trends remain. In addition, some "related" aspects of past single trends now need separate consideration as stand-alone trends.

The "mid-term" election cycle of 2018 is over, and the 2019 Congress will see a Senate with a slightly increased Republican majority (53-47) and a Democrat-controlled House. The relationship between the two major parties is more antagonistic than it has been in over a century, with no signs of rapprochement. Just the opposite. The new Democratic House leadership envisions serial investigations into the Trump administration, and these and other political twists and turns will affect America's auto dealers, because even legislation that should be bipartisan is subject to wrangling.

Many potential challengers to Mr. Trump's reelection campaign in 2020 – including as many as three dozen Democrats and even a few Republicans – have signaled early presidential aspirations: 2019 will see lots of campaign rhetoric from the growing tally of Democratic aspirants. This situation presages more of the same *ad hominem* political back-and-forth, and, as a result, more legislative stalemate and gridlock. Optimists opine that this state of affairs–a divided Congress–may actually be good for the economy and for the retail automotive industry. Others fear that legislative stagnation, House investigations, potential impeachment of the President, and resulting uncertainty will slow the economy, erode consumer confidence, reduce GDP and, among other things, stymie auto sales. We shall see.

The trend of flawed factory sales performance methodologies, arbitrary standards, and threats aimed by auto franchisors at their dealers remains at the top of 2019's ranking. It stays there, because America's auto franchisors persist in defending their methodological and statistical myths as if they could properly, accurately, and scientifically: (1) calculate the numbers of new retail sales that dealers *should* be selling; and (2) reasonably discipline dealers that do not achieve that standard – which mainly would require at least <u>average</u> sales performance as the lowest passing grade!

These factory charades of false science and unreasonable/arbitrary minimum performance standards directly affect *every* franchised dealer in America, *every* day. In my own legal practice, dealers call me more about factory coercion to increase retail sales than about any other topic. Of course, dealers whose retail numbers do not satisfy their policing franchisors are much more adversely affected than the dealers whose numbers are at or above the so-called passing grade. But it is high time that all dealers be treated reasonably, fairly, and equally when it comes to sales performance evaluation methodologies, and the consequences flowing from them. The good news on Trend #1 is that the dealers are closer than ever to realizing this aspiration, because courts and state legislatures are responding appropriately.

Unfortunately, federal and state bureaucracies, along with tons of rules and regulations still in the books, continue to plague dealers (and other businesses) with duplicative, time-wasting, costly, and confusing busywork. At the federal level, we have witnessed a welcome reduction in the growth of the "Regulatory Maze," as NADA aptly frames it in a practical annual publication, but there is still too much unnecessary bureaucratese going on (Issue #4).

Some say that the autonomous vehicle obsession is either overblown or far off in the future, but there is a developing reality which includes the tens of billions of dollars already spent by carmakers and others to exploit what they expect to be a gold mine of opportunity. The #MeToo trend (#3) is a new reality that reminds all employers to apply strict workplace rules – or else!

These are but a few of the expanded list of twenty-five legal trends for dealers examined here. NADA estimates 16.8 million retail sales for the year – a strong, but not great, forecast. In the law, here is my forecast which is 100% certain: like all recent years, 2019 will see its share of surprises.

As individual dealers remind me year after year, sometimes the most important issues to them are far down on my list, or, occasionally, not on the list at all. What I try to do, however, is gauge the importance of each trend every year for the largest percentage of dealers across the country.

The ranking of the top twenty legal issues/trends is based on three factors: (1) the likely number of dealers affected; (2) the probability of change from the current situation; and (3) the seriousness of a trend/issue impact on the lives of dealers.

1. Factory Sales Performance Standards for Dealers Under Siege: Some Positive Legal Development Towards Rationality

There is hope! Court decisions have lately reflected an improving judicial understanding of how factory sales performance standards and measuring methodologies are grossly and unfairly flawed and in violation of state laws. Last year's Top 20 publication presented great detail to explain how and why this is so. In addition to the landmark 2016 New York *Beck* decision (*Beck Chevrolet Co., Inc. v. General Motors, LLC*, 27 N.Y.3d 379 (2016) and the federal case at the Second Circuit from which it came), the *Folsom* case in California (*Folsom Chevrolet, Inc. v. General Motors, LLC*, Case No. PR-2483-16, decided Aug. 13, 2018) sets forth a detailed evisceration of GM's standard (which is essentially the same as those of other auto franchisors). Today, most auto factories have become (a little) less antagonistic when addressing retail sales, and dealers should not acquiesce to threatening letters about sales performance. *See* Bottom line, below.

Bottom line: The factory cudgel of sales performance metrics, flawed methodologies, and "average" minimum standards is weakening. Sooner or later, the current unfair system will need to be drastically changed or curtailed, if not eliminated. In the meantime, dealers must be alert to the danger of not responding, in writing, to factory threats based on alleged under-performance in retail sales penetration. Never leave such correspondence unanswered. Always respond civilly and with solid facts. Always put fairness and reasonability in the proper perspective in your letter to your franchisor. Dealers, their counsel, and dealer associations must continue to urge refinement of auto franchise law to make it crystal clear that auto franchises cannot lawfully impose retail sales standards and methodologies unless they can demonstrate scientifically proven accuracy. For 2019 the legal trend is positive for dealers in seeking to overcome the unfair sales performance standards of auto franchisors.

2. The Autonomous Vehicle Phenomenon Rolls Along: Where We Are, Where We Are Going, and How Soon Will AVs Be Commonplace

Judging by the eye-popping magnitude of investments, the autonomous car enthusiasm among carmakers (and others) is unabated. Comparisons between the end of the "horse era" in the early 1900s, and the supposedly lurking demise of private car ownership are plentiful. *See, e.g.,* "VW to spend $50.2 billion on electric, autonomous vehicles by 2023," Reuters, Automotive News, Nov. 16, 2018; Rick Tetzeli, "GM Gets Ready for a Post-Car Future," Fortune, May 23, 2018. *Automotive News* attached an insert to a weekly publication dedicated to futuristic speculators "about how self-driven cars will change the way people will interact with their cars." Sharon Silke Carty, *Shift*, Nov. 2018. Yet, many observers are saying, "Not so fast." The automotive vehicles also will not make operated vehicles obsolete for many years, if ever.

At the same time, the internal combustion engine ("ICE") rolls along with plenty of loyal customers. *See* Richard Truet, "Industry On ICE," Automotive News, Nov. 12, 2018. It seems that technology makes for better, more efficient ICE vehicles than ever before. When/if a self-driving trend arrives in a big way, most likely consumers of self-driving pods will also have their ICE cars.

Bottom line: It will be at least several years before self-driving vehicles will be commonplace. Even when the phenomenon happens, there will still be operator-controlled vehicles everywhere. Today, the consumer preference for ICE vehicles hovers at about 90%. The prediction of the near-term demise of franchised auto dealers (e.g., Bob Lutz) is overwrought and, I believe, far off the mark. At the same time, factories and other researchers/developers will continue to invest many billions to capture what they believe will be a limitless marketplace for self-driving retail products. 2019 will not see a burst of autonomous vehicles available to the public.
State legislatures continue to look at laws that might address the voluminous possible considerations for self-driving vehicles and comprehensive federal legislation seems to be on hold for now.

3. The #MeToo Phenomenon and Related Issues: What Dealers Need to Do

The highly publicized #MeToo trend signals only the early chapters of a lasting development. In today's world, more and more people simply will not stand for workplace excesses or abuses of the past. Dealers must be vigilant in assuring such misbehavior does not occur, and if it happens, they must take fast and decisive action.

Bottom line: At all times, sexual misbehavior, including degrading rhetoric or belittlement, must be clearly, emphatically, and absolutely prohibited by every dealer. Ongoing training, education, and published policies must be communicated to every employee, with recurrent training done each year or more often as warranted. An unambiguous "no-tolerance" policy should prevail at all dealerships. See also, Trend #20: Workforce Issues.

4. The Stubborn Persistence of Regulatory Overreach, Despite Encouraging Actions and Signs

The first two years of the Trump administration were marked by steady inroads into excessive government regulation. All indications are that such action contributed to a vibrant and growing U.S. economy, reduction in unemployment figures, and business and consumer confidence reaching levels not seen in a long time (despite the precipitous drop of 20 percent or more in market indexes in the fall of 2018). Anecdotal evidence suggests that car dealers benefit in higher profits and improved workforce morale when the bureaucratic burden of hyper-regulation eases. The President promises to continue the deregulation policy, to the extent that he is able to do so without congressional cooperation.

Bottom line: This trend is affected mightily by the political rancor among federal and state legislatures. Nevertheless, expect a measure of continuing deregulation–to the benefit of dealers and their employees.

5. Why National Politics <u>Still</u> Threatens America's Dealers

"It didn't used to be this way." I hear this comment constantly from colleagues, friends, and clients, including many dealers. Unfortunately, politics at the federal level affect U.S. dealers, in big ways and small. Ask any dealer who has been subpoenaed by, or worse, sued by the FTC on a "disparate impact" theory. Or, consider the aggressiveness of the CFPB in seeking to overcome statutory bars against its regulating (and hurting) dealers. The Bureau with its new director, Kathy Kraninger, confirmed by the Senate 50-49, will continue the trajectory of less government intrusion into businesses.

Rate-hiking by the Federal Reserve directly impacts auto dealers. Higher rates make mortgages and floor plans more expensive, and they discourage consumers from taking on big loans. The President has been openly critical of the Fed, and its chairman may be backing away from a series of projected rate increases for 2019.

The administration's *laissez-faire* attitude for business enrages some Democrats, especially Senator Elizabeth Warren. The political battles over governance of businesses see no sign of resolution. A few dealers have gone so far as to actively discourage political conversations among employees while on the job and during breaks.

<u>Bottom line</u>: This trend of political sparring will continue through 2019 and the elections of 2020, and perhaps beyond. As this article goes to press, 2020 election rhetoric is <u>already</u> in full swing. In both state and federal arenas, the political battles affecting dealers have no letup in sight.

6. What American Dealers Need to Know About "Trade Wars"

Going into 2019 this new trend is in a kind of limbo, because the impact of any potential "trade war" depends on developments during 2019. If it were to happen in full force, a <u>real</u> trade war among America and Europe, Japan, and China could tumble the U.S. (and world) economy into a deep recession, and would hit America's auto dealers very hard. However, the prognosis here is that the most likely trade adversary China will come to terms with the Trump administration.

As the Trump administration had hoped, December 2018 developments with China are encouraging for prospects in 2019. The back-and-forth turbulence of the rhetoric has been a daily occurrence. *See, e.g.,* Bob Davis, "China Agrees to Reduce Tariffs on U.S. Autos," Wall Street Journal, Dec. 11, 2018 ("China agreed to reduce tariffs on U.S. autos to 15%, down from 40%."). Yet, we are still some distance from an actual specific agreement. We also do not know at this time whether Congress (or just the Senate if treaty ratification is necessary) will need to act to effectuate any trade deals.

In February and March 2018, President Trump laid out possible impositions of new U.S. tariffs upon products imported from countries perceived to have unfair or disproportionate tariff barriers against American products. As always, most affected countries vowed retaliation with higher tariffs of their own. A negative outcry within the U.S. ensued, and press coverage was sharply critical of Mr. Trump. The added cost and, then harm, to dealers and others in the U.S. could have been immense. Predictions of losses to U.S. businesses, especially to car dealers, were plentiful.

To a large extent, however, Mr. Trump's tariff strategy may be on the road to at least partial, and maybe even overall, success. For example, the United States, Mexico, Canada Agreement ("USMCA"), signed in Argentina in November 2018, appears to be an improvement over NAFTA for American Interests, assuming the Senate ratifies it in 2019. *See* Donald J. Lynch and Philip Rucker, "Trump scores political win with signing of new North American trade pact at G-20, but deal still faces a hurdle in Congress," Washington Post, Nov. 30, 2018; Jenny Leonard, "Battle begins over new NAFTA deal," Automotive News, Dec. 6, 2018. From a U.S. perspective, Europe, too, signals its possible accommodation mode, and even the possibility of having <u>no</u> tariffs for autos is on the table with Europe.

The standoff with China is not definitively resolved. The 90-day "moratorium" or "truce" reached at the G-20 conference with China in Buenos Aires generated both optimism and skepticism. *See* David Lawder, "Trump says China to cut tariffs on U.S.-made autos after trade war truce," Reuters, Dec. 3, 2018. Some say Trump has pulled off "the deal of the century." Others counter that Xi and China were merely gaming the U.S. (again), and that the 90-day truce would just make the challenges more entrenched with either no clear resolution or more delay. On December 11, 2018, however, China told U.S. negotiators that it intends to cut its auto tariffs on U.S. cars from 40 percent to 15 percent. Does this overture signal a breakthrough?

On a perhaps related note, GM's 2018 plan to shut down several U.S. manufacturing facilities (but not foreign plants) was both ill-timed (right after Thanksgiving, before Christmas) and ill-advised, as it played against the administration's desire to have more manufacturing brought back to the U.S. We will see how this develops, with President Trump's (and others') vigorous criticism of GM and its CEO Mary Barra. *See* Michael Wayland, "Unlike 2008, GM cutting jobs, plants proactively," Automotive News, Dec. 3, 2018; Keith Laing, "Barra stands firm on GM austerity plans in DC meetings," The Detroit News, Dec. 5, 2018. Moreover, Ford is also looking at layoff announcements at the end of 2018.

Why does all this matter to dealers? The short answer is that if imported and exported automotive products (especially vehicles <u>and</u> parts) were to be heavily tariffed, wholesale price points for U.S. dealer inventories would soar, and retail prices would rise accordingly. Retail sales would decline in: (1) numbers of units sold; and (2) pricing. Tariffs, after all, are taxes. Moreover, consumer model choices would shift to lower tier, less expensive, and pre-owned vehicles.

Low or zero percentage tariffs, on the other hand, would be stimulative, and, presumably, bring the "trade war" to a quick end. As of this writing, the optimists seem to be borne out.

<u>Bottom line</u>: In 2019 look for positive development in, if not full resolution of, the tariff issues, including those with China. If that happens, expect a surge in new car sales. If not – well, buckle up. Factory layoffs would signal a downturn – hurting sales and profitability. Today, the negotiations are headed toward a resolution on all fronts. My bet is that

it is a 60-40 probability for across-the-board tariff agreements with all major trading partners, to be accomplished in early 2019. At the same time, even a "good deal" for the U.S. will not entirely stop China from cheating on trade and stealing intellectual property.

7. The Brave New Cyberworld: Security and Opportunity, Data, Internet, Social Media, Identity Theft, and Privacy Minefield

This topic continues to move at warp speed. Here is a promise: Any new book on cyber, electronic data, security, privacy, and related issues will be materially out of date next year. Dealers who fail to stay abreast of such developments do so at their financial and competitive peril.

Tech innovations are mostly positive developments for consumers and businesses alike. The ability to shop and search from a computer makes modern sales easier and more convenient. Auto dealers must constantly respond to the consumer demand for the conveniences of remote and electronic commerce. At the same time, tech predators grow more and more tech savvy and audacious. How to exploit the positive features and mitigate the risks of today's cyber world is, and will remain, a major challenge for every dealer.

Bottom line: The cyber trend will only grow in relative importance, and it will grow with a rapidity that staggers the imagination. Today, every dealership needs a trained cyber-educated employee to stay current in relevant regulations, technological developments and a growing host of potential pitfalls. The imaginative schemes of miscreants who will steal information and identities know no bounds. Your customers know technology, and they use it. You and your employees need to keep up with your customer base and to protect both customers and your business from would-be attackers. As well, be sure to explore insurance products that cover tech failures and intrusions by wrongdoers.

8. Threats to the Auto Dealer Franchise Model – Are Franchise Laws in Jeopardy? Retailing by Non-Dealers, Including the Tesla Phenomenon: The Beat Goes On

For many observers, the retailing of motor vehicles through networks of franchised dealers is in a transition phase. That is, numerous aspirants are looking at opportunities to jump in as car retailers – in addition to or instead of franchised dealers.

Watch out for Costco, Amazon, Walmart, and a bevy of others. The Tesla retailing phenomenon (and legal battles) may have opened the door wider into what could become a new retailing trend for new car sales. Sure, Tesla is different, because it has no franchised dealers. It is also different, because Elon Musk is a very different billionaire who boasts (seriously, it seems) that he wants to travel to Mars and stay there! *See* "Elon Musk wants to live on Mars, even if it kills him," The Economic Times, Nov. 26, 2018.

Bottom line: For 2019 and the near term thereafter, state dealer laws will remain powerful arsenals for fairness in the factory-v.-dealer arena. The Tesla battle is far from over, and the maneuverings are, if nothing else, entertaining. Note that in December 2018 Tesla lost its appeal from the Connecticut DMV, which held that Tesla's direct sales activities in that state violated state law. Tesla v. Connecticut DMV, Memorandum of Decision, Superior Court, Judicial District of New Britan, Docket No. HHB-cv-176038099, (Dec. 6, 2018). *If Tesla appeals, we could see further developments in Connecticut in 2019. The drumbeat of non-dealer entities seeking to retail new cars in America will continue. But the reality of such non-dealer sales operations is not yet imminent and may not be for a long time, if ever. After all, as NADA and many state associations persuasively contend, the expertise, service availability, and inventory conveniences at dealerships cannot be duplicated by these non-dealer "wannabes."*

9. Elusive CSI: What Does It Mean, and Is It Valid?

In ways similar to the factory measurement of dealer sales performance (*see* Trend #1), the factories' use of a variety of customer satisfaction indexes ("CSI") is plagued by a lack of statistical or scientific foundation. That is, ratings are accomplished through compilations of surveys that yield numerical scoring, but without proven correlation between the measurements and actual "real world" customer satisfaction. Over the years, manufacturers have tried different kinds of benchmarks – straight satisfaction scoring, "top box," and "loyalty," to name a few. The simple truth is that scientifically measuring "satisfaction" or happiness is so subjective that a reliable statistical measure of "real world" satisfaction of customers is inherently out of reach.

The result is that factory CSI assessments and discipline of low scoring dealers are unfair, because they can "punish" dealers in a variety of ways for their "poor CSI." For example, low CSI scores can determine eligibility for certain factory incentives. For dealers looking to acquire new stores, their CSI scores, overall, need to be "above average."

Bottom line: The use of CSI as a cudgel to pressure dealers will not end in 2019, but the inherent unfairness of CSI coercion will be, more and more, exposed for what it is. Dealers should be vigilant in addressing factory threats about CSI, in the same manner as with sales penetration. Do not leave unanswered any factory threat based on CSI performance. If you are looking to acquire more stores, but the majority of your existing holding were below average in CSI over the last three years, your chances of approval by most carmakers will be zero.

10. Marketing and Advertising in an Age of the Internet and Social Media: Be Careful out There

There are lots of minefields in this area, and the consequences of overstepping can be harmful or even financially disastrous. Violations of advertising regulations can spur lawsuits (including class actions) and generate terrible publicity and customer turnoff.

Bottom line: In 2019 dealers need to be more cautious than ever about their marketing efforts across the media spectrum.

11. Recalls

We remain in an era of auto recalls, not because new cars have more or worse defects, but because both government and industry race to take safety precautions at the smallest incidence of safety hazards. Carmakers will always default to the recall+ whenever there is evidence of a defect in any model, especially when safety is a concern.

Bottom line: For 2019 there will be no diminishment of the spate of recalls. Dealers need to stay current on what is required with inventory under recall and to aggressively seek appropriate compensation from their franchisors (who are solely responsible for the defects that generate recalls).

12. Franchisor "Programs" – Factory Control Over Dealers

They never really stop, do they? And we should not be too surprised when we acknowledge that the core aim of factory "programs" is to generate more dealer retail sales. That is their business. The problems arise when "programs" create discriminating or zero-sum-game incentives or bonuses.

During 2018 Hyundai displayed a mind-boggling lack of competence in trying to roll out its Genesis brand as a separate, differentiated line, to be marketed in stand-alone stores. The ham-handed initiative is apt to reverberate through 2019 and beyond.

Bottom line: Each year we see new permutations of factory initiatives that are designed to push more retail sales by dealers, but which also do competitive harm to dealers who cannot "get with the program." 2019 will be different only in the details.

13. "Subscription" and Other Initiatives by Franchisors to Trespass on Retail Sales and Seize More Profits for Themselves–at Dealers' Expense

Subscription? What is it? What does it mean? Since at least 2017, the concept of "subscription" has crept into the automotive lingo and limelight. It comes in several forms (with, no doubt, more to come), but the basic premise is to provide the consumer with an ability to acquire possession of a vehicle that can be periodically exchanged for another one. The subscription consumer is not a traditional car "owner" or "lessee" but has a possessory right to exchangeable vehicles. Late in 2017 *Automotive News* described the phenomenon this way:

> Vehicle subscriptions essentially package car ownership into a monthly fee that includes insurance and requires no long-term commitment. Some services charge thousands of dollars a month for luxury vehicles, while others offer mainstream vehicles for less. Most deliver a vehicle on demand, and allow users to switch vehicles based on their needs.

Michael Wayland, "Vehicle subscription services expand," Automotive News, Nov. 27, 2017. The factory rationale here is to control retail transactions, push more vehicles into commerce, invoke customer loyalty with repeat business, and to overcome the ubiquitous ban against the manufacturer's direct sales to the public in most states.

In California dealers have expressed significant opposition to Volvo's subscription program, Care by Volvo. In a letter to Volvo, the California New Car Dealers Association contends, in the words of Automotive News, "Volvo is 'directly competing' with Volvo dealers through the service." Melissa Burden and Urvaksh Karkaria, "Volvo dealers in California revolt against subscriptions," Automotive News, Dec. 10, 2018; *id.; see also* Trend #24. The Association also claims "that Volvo has illegally modified its franchise agreements with dealers." Without doubt we will see more controversy on the subscription issue throughout 2019.

Bottom line: State associations are moving to block factory "interceptions" of retail sales and leases via a variety of subscription schemes. For at least the time being, however, dealers will remain the direct retailers for new cars throughout America – except for Tesla, which has no dealers, and a few other inconsequential outliers. "Subscription" could catch on in a big way, allowing consumers lots of choices, convenience, and an ability to drive new cars every few months without many of the hassles of ownership. For dealers, it is critical that they continue to be the "retailers" in any form of subscription. Many dealers acknowledge that subscription could benefit them by enticing consumers to return to them for the next car and the one after that.

14. Legacy and Succession: Do Not Let Your Dealership Legacy Become a Legal Nightmare

Succession should be high on the priority list for dealers. The problems of unplanned succession are far too common, and they are self-inflicted. This is about what a dealer owner should do in preparation for retirement, disability, or death.

Bottom line: If you do not have a succession plan, to include an estate plan, then you need to develop and implement one NOW.

15. The Continuing Vitality of State Franchise Laws

Dealers owe much of their legal strength and security vis-à-vis their franchisors to state laws that protect them from the vagaries and whims of the carmakers. In recent years, however, the factories have complained more loudly than ever that such laws are unfairly skewed or are not necessary any longer, and so on.

Bottom line: The good news is that leaders and personnel at state associations are always on the lookout for factory innovations that threaten dealers. Each and every year, twenty or more states amend their laws to address new factory overreach. 2019 will see even more of this good work.

16. Involuntary Termination: Threats, Realities, and Dealer Responses

An actual "business death penalty" in the form of franchise termination carried out by an auto franchisor against a dealer is a rare occurrence. But termination threats are all too common. Anecdotally, I hear from several dealers every month who receive correspondence threatening termination or at least referencing it as a consideration down the road. Whenever the "T-word" is used in a letter by the factory, the dealer is prudent to respond – always in writing.

Bottom line: Dealers: Do not counter-sign factory letters asserting under-performance, that would have you admit material breaches! Do not agree to so-called minimally acceptable performance standards in sales or CSI. Do not agree to relocate, to renovate or to do anything, the failure of which could be deemed a material breach. If you receive a threatening letter, always respond in writing promptly and reasonably.

If you receive a notice of termination, contact an experienced lawyer right away.

17. Buy-Sell Activity

The most active brokerages inform us that 2019 will continue an active marketplace for dealership buy-sells with strong price points for all brands, with exceptionally high values for luxury line-makes.

Bottom line: 2019 will be a banner year (again) for sellers aiming to exploit record high blue sky values. For buyers, it is also a good time to acquire dealerships as the vehicle market continues to ascend. But a need for caution may loom ahead. If the "trade war" situation (Trend #6) and (or) political developments take a toll, there could be at least a short-term downturn in dealership valuations.

18. Rights of First Refusal ("ROFRs")

The previous generation of dealers did not face today's ROFR phenomenon. Today's dealer agreements all have provisions to embody such a factory right when a dealer submits a buy-sell for approval.

Bottom line: I advocate for state laws to prohibit factory ROFRs. The threat, or even the possibility of the exercise of a ROFR, disrupts the buy-sell marketplace in an unfair and unhealthy way.

19. Alternate Dispute Resolution: Some Progress in Arbitration

For years dealers have been tossed and turned by state and federal courts weighing in on whether mandatory arbitration provisions are enforceable as between dealers and consumers in retail contracts.

Bottom line: 2019 will see more court decisions addressing the viability of retail contracts that include provisions for mandatory arbitration and/or provisions that bar consumer class or mass actions. Meanwhile, mediation is used more and more as a way to settle dealer disputes.

Dealers should carefully consider how to structure mandatory arbitration as a dispute resolution mechanism in retail contracts. They should also keep monitoring regulatory and judicial action in this arena.

20. State Associations and Legal Standing: The Importance of Dealer Associations, from NADC to State and Regional Organizations

Should your state association be able to file lawsuits in its capacity as a representative of the state's dealers? I think so (although some knowledgeable colleagues disagree with me).

Bottom line: Reality check: Dealers fear retaliation when they take legal action against their franchisors. That hesitancy drives a desire for associations to take legal action on behalf of dealer members reluctant to "go legal" directly.

Moreover, action by an association packs a wallop that a single dealer, or even a group of named dealers, cannot match.

21. Workforce Issues

Every dealership should have an employee manual that covers employment policies in clear detail. In addition, there should be training sessions at least once a year to highlight and update key provisions.

Of course, a manual is no panacea for workforce issues which are abundant. Wages/hours; discrimination; benefits; hiring practices; workplace conditions–all these and more need owner/manager attention and emphasis.

Bottom line: If you do not have an employee manual, retain an experienced attorney to draft one for you – NOW. At least once or twice a year, dealers need to train all employees about the most common workforce issues – e.g., discrimination, pay, behaviors on the job.

22. Warranty Reimbursement

Each year we seem to be on the edge of a full surrender by auto manufacturers to the reality that they must and/or should reimburse dealers at retail rates for labor and parts.

Bottom line: Warranty reimbursement battles will continue in some states during 2019.

23. Natural Disasters, Terrorism, and Unrest

We are constantly reminded that forces beyond our control can disrupt–or even destroy–a healthy business. Hurricanes, earthquakes, fires, and other natural events hit parts of America with untold fury. The 2018 hurricane season was especially brutal and widespread across several states. Many dealerships endured temporary closings, destruction of inventory, and damage to buildings.

Terrorism and other unrest can also wreak havoc upon carmakers and businesses. For dealers, preparation and anticipation are valuable ways to deal with these possibilities, however unlikely they may be.

Annually, the overall destruction level in America from a variety of disasters is measured in the billions, and the human cost is incalculable. California's wildfires last year wreaked unprecedented havoc, burning thousands of homes and killing many people.

So, what can dealers do to be proactive and avoid or at least minimize the dangers and risks of large scale catastrophes?

Bottom line: In addition to completing a solid checklist of disaster steps, every dealer needs to take a discerning look at insurance products that cover these sort of catastrophes, including business interruption insurance.

24. Encroachment and Franchise Modification

In most states a franchised dealer has a statutory right to legally challenge the auto franchisor's decision to allow the establishment or relocation of a same-line dealer in a specified proximity to the challenging dealer. It appears that such protestable market actions by auto franchisors have diminished in the past few years, but they still do happen.

In a similar vein, state laws permitting dealers to challenge factory "franchise modifications" have proliferated. There will be more modification litigation in 2019.

Bottom line: This trend will continue indefinitely. For dealers facing nearby relocations or establishments of same-line competition, the threat can be ominous. Do not sign away your substantial protest rights. Challenges to factory franchise modifications will increase this year.

25. Factory Audits

Factory audits of dealer records happen often. As a general proposition, all auto franchisors have substantial audit rights per their standard form dealer agreements. Most of the time, dealers do not have a contractual option to say no. An exception may be that some state laws limit the time for a factory to look back at dealer claims for payment.

Yet, dealers can be suspicious of factory motivations, and they frequently guess that someone at the factory may be up to no good in scheduling an audit of, say, warranty or incentive claims. The lesson is clear: DO NOT be tempted to make unsubstantiated claims, because: (1) it is wrong to do so; (2) you will likely be caught; and (3) the consequences can be devastating. Sometimes, audit results include auditor mistakes, and dealers should closely scrutinize any factory chargebacks or findings. Push back if the auditors are wrong and you can prove the errors.

Bottom line: The majority of audits are uneventful, but even those triggered by factory data benchmarks or suspicion are likely permissible, and dealers are well advised to be cooperative. Resulting chargebacks that are erroneous or exaggerated, however, are another matter. If the findings of chargebacks or fraud are wrong, dealers must carefully present their own accurate findings. Successful challenges to audit conclusions happen often. ■

Eric L. Chase is an attorney and a member of Bressler, Amery & Ross, P.C., a law firm with six offices in four states and the District of Columbia. Mr. Chase devotes a significant part of his practice to the representation of franchised automotive dealers nationwide, and he has been lead counsel in numerous landmark decisions. He has authored over 100 published articles in this field and nearly 200 altogether. He is a frequent guest speaker to dealer and professional associations, and other automotive-related audiences. His biography appears in *Who's Who in American Law, Who's Who in America*, and other similar publications. For many years, Mr. Chase has continued to be selected by his peers as a Super Lawyer. He holds a B.A. from Princeton, a J.D., *cum laude*, from the University of Minnesota, and a Graduate Certificate in International Security from Stanford. The views set forth in this article are his own and do not necessarily reflect the views of his firm or any of its clients. Nothing in this article is intended to constitute legal, financial, or tax advice. Each reader should consult with his or her professional advisor regarding any such advice.

Executive Director's Message

Erin H. Murphy
NADC Executive Director

Happy 2019 to all!

This issue marks the first 2019 publication of the *Defender*. We encourage all members to share their knowledge and expertise with the NADC community by submitting an article to be published in the *Defender.* Please contact me at emurphy@dealercounsel.com or Editor Jami Farris at jamifarris@parkerpoe.com for more information.

Another way to keep up with the ever changing landscape of the auto industry is to attend the educational sessions at the NADC Bi-Annual Conferences. Plan now to attend the 15th Annual NADC Member Conference, April 28-30, 2019 at the Monarch Beach Resort in Dana Point, CA.

The planning committee is working hard to put together a program of educational sessions. As usual, CLE credit will be available. Preliminary topics will be released soon. Please watch your email for registration information.

Please make your hotel reservation at the Monarch Beach Resort as soon as possible to avoid the room block selling out. Reservations can be made at https://book.passkey.com/event/49743780/owner/54865/home to receive the group rate of $355 per night. You may also call 1-800-722-1543 to make your room reservation. Rates are subject to availability. Additional fees include 10.315 % taxes and a $3 TBID fee.

A one (1) night room and tax deposit is required at the time of booking. The deposit is refundable if the hotel receives notice of cancellation 7 days prior to arrival. Group rates will be available three (3) days pre and post the event dates based upon hotel availability. **The room block deadline for hotel reservations is April 5, 2019**. Please make your reservation early to avoid the room block selling out.

Additional program information and registration will be available on our website, www.dealercounsel.com, soon.

Please also be on the lookout for the 2019 NADC Membership directory that will be mailed to all members in February. We hope you find this directory to be a useful tool for you to easily reach out to your NADC colleagues.

I look forward to seeing you in Dana Point. Until then, wishing you all a happy, healthy, and successful 2019! ■

NADC Welcomes New Members

Full Members:

Susan Bartkowski
Law Office of Susan F. Bartkowski, P.C.
Saratoga Springs, NY

Nicholas Hart
Young Automotive Group
Layton, UT

Fellow Members:

Paul Dorsey
NADA
Tyson, VA

Gaya Shanmuganatha
Tiffany & Bosco, PA
Phoenix, AZ

Associate Member:

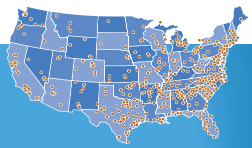
Helion Technologies
Jeff Mason
Timonium, MD

NADC Member Announcements

Do you have an announcement or accomplishment that you would like to share with the NADC community? Please send any news that you would like to share to: emurphy@dealercounsel.com.

Updated Member Contact Information

Please make sure to notify NADC Staff (info@dealercounsel.com) if your contact information has changed so that your records can be updated accordingly. We list updated contact information in *The Defender* so all members can be aware of the change.



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- ☐ February 2019
- ☐ March 2019
- ☐ April 2019
- ☐ May 2019
- ☐ June 2019
- ☐ July/August 2019
- ☐ September 2019
- ☐ October 2019
- ☐ November/December 2019

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BE A CONTRIBUTOR!

We are always looking for submissions to publish in the Defender. Please send your contributions or proposals for articles to: jamifarris@parkerpoe.com

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