

2009's Top Twenty Legal Trends for Automobile Dealers

By Eric L. Chase

1. **GM, Chrysler and Ford: How Bad Is It? What Will the "Rescue" Dollars Achieve? What Should All Dealers Do, and *Not* Do?(1)**
2. **What Dealers Need to Know About Bankruptcy (14), Financial Workouts (15) and Credit Issues**
3. **Involuntary Franchise Terminations, Termination "Threats," Brand "Withdrawals," "Pressured" Buyouts, Financially Driven Resignations, Consolidations, and Rights of First Refusal (4)**
4. **Responding to Automakers' Assaults on Dealer Rights and Autonomy: Dealers and Their State Associations Need to Strengthen State Laws. (2)**
5. **Factory Strategies: Pushing the Envelope with New Agreements, Initiatives on Facilities, Exclusivity and CSI; the Insatiable Appetite for Incentives (5)**
6. **Buying and Selling Dealerships (7)**
7. **The Storms of Legal Issues and Concerns: The Evolving Legal Landscape Brings Abundant Challenges to Dealers; How to Cope Using Best Practices and the Legal Audit Checklist (3)**
8. **Privacy Concerns and Identity Theft (6)**
9. **Alternate Dispute Resolution (ADR) (8)**
10. **Workforce Issues: Employee Rights and Benefits (19), and the Prospect of Unionization**
11. **Audits of Incentive or Warranty Claims: Dealer Beware. (9)**
12. **Customer Satisfaction: CSI vs. Reality (10)**
13. **Consumerism: Targeting Dealers for Consumer Litigation and State/Local Regulatory Enforcement; Preventive Medicine; Adopting Best Practices (11)**
14. **Living with the Threat of Terror...and Natural Disasters, too: The New Way of Life and Doing Business (16)**
15. **Reimbursement for Warranty Work and Parts (12)**
16. **Encroachment (Protest Laws) (13)**
17. **Minority and Female Representation (20)**
18. **Taxes (NR)**
19. **Environmental Pressures (NR)**
20. **Internet Marketing, the Technology Revolution and the Remarkable Changes to "Business As Usual" (17)**

Other important trends, Not in the Top 20:

Dealer Succession (14); Crimes Against/By Dealerships (18)

NOTE: 2008 rankings are in parentheses; NR (Not Rated in 2008).

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In October 2008, I sat on a panel of lawyers speaking with dealers at a state dealer association's annual convention. We talked about the potential consequences for dealers of franchisor bankruptcies and the bleak outlook generally. The emphasis, of course, was on the Detroit Three, but also included the impact on all brands of the general downturn. For the dealers, there was unprecedented bad news to share; a general atmosphere of gloom settled on the room like low-hanging fog. Toward the end of the 90-minute session, a dealer raised his hand, and told the group that the negativity had to be put in perspective. He opined that we need to stay positive despite the downturn, and reminded us that we have always emerged successfully from the worst of times in this vital American industry. He particularly emphasized that, as a group, dealers tend to be strong, independent, smart and resilient. Although this Top Twenty publication discusses problematic trends and predictions during an historically troubled time, I adopt the sentiment of that dealer who admonished everyone not to despair. Indeed, despair is neither a plan nor a solution. As always, this publication is crafted to give dealers a "heads-up" so that they can ease some of their burdens and avoid some, if not all, of the pitfalls. My hope is for my dealer friends to "catch the wave," rebound and thrive. In the difficult year that has passed, and in the difficult one or ones ahead, let's remember that the auto industry and particularly franchised dealers have always bounced back with vitality from the most difficult of challenges. They will do so again.

Despite the Bush administration's year-end commitment of \$17.4 billion to GM and Chrysler, car dealers' difficult ride of 2008 will almost certainly be followed by a 2009 of equal or greater market stress. As of January 20, 2009 (Inauguration Day), President Obama enjoys the allegiance of a new and heavily Democratic Congress. The political landscape does not bode well for dealers on such issues as unionization, taxes and the environment. Dealers won't receive a federal bailout, and a thousand or more will close their doors in 2009.

The tidal economic calamities of 2008 are in the record books: the subprime meltdown; foreclosures in the millions; the Wall Street and bank financial crises; spiking gas prices; exposure of grotesque corporate greed; high unemployment; the stock market roller coaster; and (depending on how you look at it) dramatic or calamitous congressional financial "fixes" that could ultimately expose taxpayers to hits totaling well over a trillion dollars. The profound economic impact of these events on America will

probably not ease in 2009.

Virtually every person who owned a home in 2008, or had an IRA/401(k) or non-retirement stock investments experienced a decline in net worth. Unemployment and underemployment were dispiriting more and more Americans. These facts became the negative drivers, or anchors, of the U.S. economy. They also impact the highest ranked legal trends on the 2009 list. The viability of the Detroit Three is fragile, even more so because of the ongoing nationwide and worldwide financial instability. It is difficult to predict that an alliance, whether it be a merger of GM and Chrysler, or an acquisition by an import giant, would materially improve the marketplace prospects of these franchisors. In the very near term, GM and Chrysler are especially vulnerable, and even the federal "rescue" monies will not take them off life support. Without well-planned turnaround strategies and a revival of the economy, the taxpayer-funded bailouts and loan guaranties would delay, but cannot prevent, bankruptcies in Detroit.

The financial and credit implosions savaged auto franchisors and dealers disproportionately, when compared with other industries. Total U.S. auto sales plunged into the ten million range. In the waning months of 2008, there was a surge of dealership closings, with many more to come in 2009. Will the automotive industry in the U.S., and particularly franchised dealers, start to turn around from these multiple negatives in 2009? Will the U.S. government take even more dramatic steps than in 2008? As the top legal trends for auto dealers in 2009 reflect, unfortunately, there probably won't be a fast economy-wide turnaround.

The U.S. is powerful – formidable – in its economic foundations and strengths. No responsible observer would predict a permanent decline. The same is true for the auto industry. The difficult side of the ledger, however, is almost certainly going to stay put for quite a while longer, probably beyond 2009 for many. Within the weakened Detroit Three, brands like GM's Saturn (a separate corporate entity), Pontiac and Buick, and Ford's Mercury are especially vulnerable. Although it took until late 2008 to determine that, for a year, the U.S. economy as a whole had been in a recession (defined as two consecutive quarters of negative GDP growth), there has been no question that the U.S. auto industry has been recessionary for at least two years.

Going into 2009, there was no reliable prediction of

how long the recession would endure or how deep it could sink. Whatever the answers may be for the larger economy, dealers need to plan for many months of challenge. Many more will be out of business by the end of the year. Driven by skyrocketing gas prices during the spring and summer of 2008, the R&D shift of products from trucks, SUVs and larger luxury vehicles to smaller and greener models is led by Asian imports, not Detroit. The plunge of oil prices in the 4th quarter of 2008 did not and will not affect this sea change. Under President Obama, green is here to stay; he is wedded to the prospect of stricter CAFE standards, and incentives to promote environmental considerations. Financial stress and credit tightening, along with a new aversion to leasing imposed by lenders, bombarded dealers with serial monster hits. These realities impact some of the top legal trends for 2009.

Unfortunately, the three domestic manufacturers have been foremost in initiating many ill-advised pressures on dealers. Try de-dualing and going exclusive, as brand sales dive by 20% or more a year! GM, Ford and Chrysler have undoubtedly exacerbated their continuing market share declines to the point where the “b” word (bankruptcy) is still trumpeted all over, despite the December “rescue” announcement. The legal repercussions on dealers – actual and potential – are profound. Dealer terminations will continue through the year – most “voluntary,” sort of.

Bankruptcy and related issues have appeared in previous rankings, but now they jump to No. 2. Taxes and workforce issues have grabbed a lot of new attention in the economic debates among politicians; they will be big issues in '09, especially with a new president, and an electorate that is not happy with the current downturn. The most successful dealers will confront directly the legal trends of 2009.

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's impact in the lives of dealers.

1. GM, Chrysler and Ford: How Bad Is It? What Will the “Rescue” Dollars Achieve? What Should All Dealers Do, and Not Do?(1)

Soaring oil prices in the spring and summer of 2008 stunned executives and planners at the Detroit Three. There would be no “gradual” decline in sales of immensely popular trucks, SUVs, or sedans with higher MPGs. Years of deepening problems in Detroit dramatically worsened with the tsunami of financial crises in 2008. Even the 4th quarter nosedive of oil and gas prices did not bring customers back. Without doubt, the sub-prime “crisis,” the oil “crisis,” the Wall Street “crisis,” and other “crises” have

combined to alter permanently the landscape of the automotive industry in the United States. Months earlier, the Congress did agree to help the domestic carmakers with a \$25 billion “bailout” or “rescue,” linked to environmental improvements. Beginning in September 2008, however, it became clear that the Detroit Three were in immediate peril. The on-again, off-again prospect of a GM-Chrysler merger re-arose in October 2008, and continues as of January 2009.

In late December 2008, the Congress's eleventh-hour efforts failed to generate any kind of rescue legislation, and the Bush administration ultimately acted alone to make available \$17.4 billion for GM and Chrysler. Ford declined any assistance for now. Congress will likely approve more aid to the Detroit Three in 2009. Yet it remains far from certain that GM and Chrysler (and, at some point, Ford) will avoid bankruptcy even with bulked-up rescue packages. This is because their fundamentals cannot be cured without major overhauls of their core business operations.

The devaluation of U.S. homes, the upward spikes in unemployment and under-employment, and the economy-wide credit crunch, topped by perhaps the most horrific financial crisis since the Great Depression, have made the “Perfect Storm” cliché seem inadequate. In September 2008, American domestic new car sales for a single month dipped below 1,000,000 for the first time in 15 years. Total U.S. new unit sales were spiraling down toward 12 million for the year – way down from the record of about 16.5 million. And the annualized sales rate approached 10.5 million in the fourth quarter of 2008. If this trend continues, there will be too little business for too many dealers. Moreover, the downward tumble is attributable disproportionately to Detroit Three losses.

Bankruptcy in 2009 or 2010 for one or more of the Detroit three is a real and looming possibility, although taxpayer largesse will at least delay that fate for a while. See trend no. 2. Their “legacy” obligations to employees and retirees remain a huge impediment to a revival of competitiveness. The UAW has been, and continues to be, short-sighted and arrogant in its union representation and resistance. Its claims of cooperation ring hollow. Consumers are turned off, and their continuing migration to imports is likely. The stiffening of consumer credit availability has cut deeply into the numbers of potential buyers who can qualify. “Negative equity,” once a rare aberration in which car purchasers owe more on their vehicles than they are worth, is now commonplace, and the phenomenon exacerbates the problem of fewer new car buyers.

So, what is a dealer to do? What are the “smart” strategies for different brands and different locations? What should we plan for in a turnaround?

Dealers: What To Do, and What Not To Do

U.S. automotive dealers and their representative associa-

