

2007's Top Twenty Legal Trends for Automobile Dealers

By Eric L. Chase

-
1. Ford, GM and the Chrysler Group In Peril: Dealers Walk the Line (2)
 2. Factory Strategies: Pushing the Envelope with New Agreements, Initiatives on Facilities, Exclusivity and CSI; the Insatiable Appetite for Incentives (4)
 3. 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 (1)
 4. Privacy Concerns and Identity Theft (8)
 5. Involuntary Franchise Terminations, Brand "Withdrawals," "Pressured" Buyouts, Consolidations, and Rights of First Refusal (7)
 6. Alternate Dispute Resolution (3)
 7. The Factory Incentive or Warranty Audit: When is it Not Legitimate? (NR)
 8. Buying and Selling Dealerships (16)
 9. Customer Satisfaction: CSI vs. Reality (6)
 10. Consumerism: Targeting Dealers for Consumer Litigation. Preventive Medicine: Adopting Best Practices (5)
 11. Reimbursement for Warranty Work and Parts (12)
 12. Encroachment (Protest Laws) (19)
 13. Dealer Succession (20)
 14. Bankruptcy (9)
 15. Living with the Threat of Terror... and Natural Disasters, too: The New Way of Life and Doing Business (11)
 16. Internet Marketing, the Technology Revolution and the Remarkable Changes to "Business As Usual" (10)
 17. Crimes Against/by Dealerships (13)
 18. Financial Workouts (14)
 19. Employee Rights and Benefits (15)
 20. Minority and Female Representation (17)
- Not rated in the Top 20, but still important: Environmental Laws, Rules, Regulations and Policies (NR); Taxes (18)

NOTE: 2006 rankings are in parentheses; NR (Not Rated in 2006).

©Eric L. Chase, 2007. This document is not to be reproduced, in whole or in part, without the author's written permission.

2007's Top Twenty Legal Trends for Automobile Dealers

By Eric L. Chase

The venerable “Big Three” – General Motors, Ford and the Chrysler Group of DaimlerChrysler, bedrocks of American manufacturing for most of the Twentieth Century – now face their most formidable challenges ever. So may their dealers, especially with ongoing strategies to reduce the numbers of dealers and the erosion of the Big Three’s market shares. The potential for legal consequences to dealers who represent American brands is so profound that the precarious state of U.S. automakers drives this year’s top trend.

Factory strategies to improve their images and increase/stabilize their market shares impact all dealers, and this trend has edged up to No. 2. Every day, dealers confront privacy concerns, consumer rights and workforce issues. To some extent, nearly all dealers will need to address many of the top 20 trends. Most will surely see an increase in law-related activity directly with their franchisors. Thus, for 2007 an abundant variety of legal concerns for dealers continues unabated. A new one, never in previous trends, relates to the growing dealer concern with factory audits (No. 7).

The legal landscape is also replete with a host of other important dealer considerations that have been in the Top Trends before, such as alternate dispute resolution, dealer succession, encroachment, warranty reimbursement and crime, to name a few. Dealers who hoped for a relaxation of the impact of legal trends upon their daily business lives will not see it in 2007. The cumulative impact of numerous issues remains a trend (No. 3) in and of itself.

One major event that will *not* noticeably impact 2007’s trends for dealers was the mid-term elections. While politically important, the Democratic sweep of the House and Senate will yield a stalemate in many controversial areas, making it almost certain that there will be no new legislation that is likely to alter the legal landscape for dealers. For example, don’t look for meaningful changes in federal taxes and environmental regulation. These issues – especially tax policy – could become hot items for 2008, 2009 and 2010 (when current federal tax rates sunset), but they should remain quiescent in 2007.

The good news is that even the large and growing array of legal issues is manageable for most dealers. Thus, all dealers should take the necessary steps to understand and control those issues.

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. Ford, GM and the Chrysler Group In Peril: Dealers Walk the Line (2)

“For years I thought what was good for General Motors was good for the country and vice versa.”

Charles Edwin Wilson President, General Motors Corporation (Testifying in support of his appointment by President Eisenhower to be Secretary of Defense in 1953)

A generation ago, the financial standing, prestige and reputations of General Motors and Ford were such that their executives were commonly perceived as the best and the brightest. Their products and profits were the envy of the Free World.¹ In 1953, newly-elected President Dwight D. Eisenhower tapped GM’s President, Charles Edwin Wilson, to be Secretary of Defense. Eight years later, President John F. Kennedy appointed Robert S. McNamara – Ford’s President – for that same exalted position. After being fired by Ford, Lee Iacocca turned a failing Chrysler Corporation around, and he became one of the most respected executive icons in America, until his retirement in 1992 (not counting his return briefly as an on-camera spokesman in 2005 for DaimlerChrysler).

How far the mighty have fallen! In today’s marketplace, industry watchers analyze and bemoan the extraordinary run of problems for GM and Ford in all areas: product quality (compared with, say, Toyota and its star brand, Lexus), leadership in the executive offices, marketing, labor relations, dealer relations and consumer confidence. Many now say that Buick and Pontiac dealers are especially vulnerable, as they recall the recent fates of Oldsmobile and Plymouth.

In the years following the 1998 DaimlerChrysler marriage, it seemed as if the Chrysler Group would be a success story. But in the second half of 2006, the Chrysler Group’s financial performance and prospects plummeted as well. Today, the unthinkable has become a steady Wall Street negative rumor mill for all three; almost every day there is a pessimistic story in the financial pages of major newspapers. Their free-falling market shares and dollar losses in the U.S. have

driven repetitious “bold new strategies” that were soon replaced by “even bolder new strategies.” In the summer of 2006, Ford hired Boeing’s miracle man, Alan Mulally, to take over from William Clay Ford as CEO. Then, among many bold announcements, Ford declared that it would buy out its unionized work force, and strive to eliminate 600 dealers in the U.S.; later, we were informed that the estimate of 600 was too low. And so it goes.

The downward spiral of the once unassailable Big Three is neither new nor sudden. The reasons are many, and there is no scarcity of industry experts to “explain” the many failings. “Complacency,” “arrogance,” “lack of imagination” are among the descriptions. Many captive dealers use words that cannot be repeated here. The failure to stay competitive with imports such as Toyota and Honda also reflects both the quality of Japanese brands, and an inability in Detroit’s executive suites to acknowledge the strength of the competition, even though the gap has grown over many years.

Today, the Chrysler Group – what remains of the third of the Big Three – is the less lucrative partner in a DaimlerChrysler blend. (American Motors had been acquired by Chrysler in 1987.) While the Chrysler Group suffers from its own recent financial disappointments and losses, it has not yet received regular epitaphs from the Wall Street Journal or others. (Note, however, that Dieter Zetsche’s short-lived personal television ads did not stimulate the hoped-for profitability for Chrysler brands.) GM and Ford have been on a precipitous and continuing downward trend. The speculation about strategy has percolated for more than a year: bankruptcy, acquisition, merger, “going private” (as to Ford), even a GM-Ford “partnership” and other concepts have been floated on all major financial pages. Layoffs and plant closings, along with reduced wages and benefits, have already been part of the Detroit strategy for several years. Nissan’s Carlos Ghosn courted GM in 2006, and there were later indications of a possible Ford-Nissan pairing. The Wall Street Journal polled its readers for their opinion of which automotive partners would be best for GM. (“None-of-the-above” was the winning answer.)

For dealers with Ford and GM nameplates, the short-term future will dictate whether there is a long-term, and if so, what brands may either blend/merge or, in a worst case, disappear. With Oldsmobile and Plymouth now in our rear-view mirrors, industry-watchers know that once-venerable brands can become vulnerable, to the point of extinction. It’s a fickle and fast-moving marketplace. As a prominent dealer put it to me, “Brand loyalty ain’t what it used to be.” Among established linemakers, those seemingly most vulnerable right now are: Buick, Pontiac, Mercury and Lincoln. With good reason, dealers no longer trust the

promises and reassurances of their franchisors, which flow like cheap wine (i.e., they give you a headache).

In these perilous circumstances of unrelenting interbrand competition, you – the dealer – would logically think that Ford-GM-Chrysler franchisors would extend themselves by being especially reasonable and accommodating in dealing with their dealers. You would be wrong. In fact, a flurry of anecdotal evidence suggests that these beleaguered American brands are, if anything, more aggressive, belligerent and aloof than ever in their relationships with the very retailers who are *their* customers and who connect them directly with the consuming public.

So, what’s a dealer to do? Or not do? Let’s look at a few hypotheticals:²

- Suppose you are a single-line Buick dealer. Contrary to general trends, your store is profitable, and new unit sales steady. However, the facility is significantly under guide, and the place is in desperate need of both renovation and expansion. Factory reps constantly push you to upgrade, and they say that, “some day,” maybe you can align with the nearby Pontiac and GMC franchises operating a mile away.
- You are a successful multi-franchise dealer. You have been looking for an opportunity to acquire a dealership for your daughter and son-in-law, and there is a Lincoln-Mercury store available within the nearby dealer row. Relying principally upon the NADA guide, a reliable appraiser has valued the ongoing operation at 5 to 10 percent above the asking price.
- Your Pontiac-Buick-GMC store is in a lousy location. Your visiting reps constantly harangue you about relocating. It turns out that there is an available 7-acre site that has just come on the market, but your calculations indicate a big jump in the rent factor at that location.
- You want to relocate your GM-brand store, or dual it, because local market share is diminishing. GM says no to both ideas.
- You have a Chevrolet store, and you have been told that, because of over-dealering, your store is not in the brand’s long term plans.
- Your Saturn reps demand that you finish the development of your assigned market with a new retail outlet – or *else*, they say. But you know that Saturn sales generally are stagnant, or worse.

There are no “school” solutions to these scenarios, nor should dealers of some brands outside the direct Ford and GM families take too much comfort. GM has fought with dealers who have proposed relocations or duals. The broader Ford “family” could also see some rough seas ahead (e.g., Jaguar), and the future of Saturn remains uncertain.

In addition, the Chrysler/Jeep/Dodge brands of Daimler-Chrysler will have their share of challenges as well.

This much is clear: Large capital infusions into GM/Ford/Chrysler brand franchises and purchasers of those franchised stores should trigger much more due diligence than in the past. The same can be said about relocations and brand alignments. Here are a few cautionary thoughts for dealers who represent or seek to represent these brands:

- Make sure that any promise or assurance from a factory rep on the subject of anything significant is in writing. As a practical matter, you cannot expect a letter from your franchisor confirming verbal representations, and, therefore, on anything of real importance to you, you should confirm what was said in your own letter to the person involved.
- If you are requested to undual a competitive line, don't agree to do so unless and until you have thoroughly researched the business case, and you are convinced that the case is valid.
- The same goes for acquisitions of aligned brands and relocations.
- Be cautious and inquisitive about demands of factory reps to buy vehicle and parts inventories. DaimlerChrysler dealers are still reeling from their acquiescence in such demands.
- If you sense from discussions, written warnings or direct intimidation that you may be "targeted" for termination by any means, it's probably time to consult with an attorney experienced in franchise relationship disputes.
- Remember that GM and Ford have informal dispute resolution procedures (see Trend No. 6).
- When factories target one dealer, there may be a trend that affects many others. Make discreet inquiries to your state association president, or have your counsel inquire, regarding the possibility and propriety of cooperative action. You have strength in your numbers.
- If you are facing a worst-case scenario, and circumstances compel you to consider a voluntary termination, you should plan in advance to try to obtain more than the termination rights in the sales and service agreement (and state law). Usually, those rights are limited to buy-backs of current year models, and similar treatment for new parts in inventory in unopened containers. (Some states, where applicable, may require payment for the fair market rental value of the realty for up to a year.) Under such circumstances, discuss a strategy with your lawyer, and work toward a negotiated solution with your franchisor.

2. Factory Strategies for Dealers: New Agreements, Initiatives on Facilities, Exclusivity and CSI; the Insatiable Appetite for Incentives (4)

Even some of the best-performing dealers complain that their franchisors have become more heavy-handed in their demands. Every brand manager, it seems, thinks the future of the product is tied to consistently (and expensively) "imaged" facilities. Nor do visiting representatives ever shy from pressuring dealers to buy more vehicle inventory and parts.

There's a theme in all this: factory programs and policies nearly always derive from a single-minded philosophy to serve *the brand's* short-term goals – *not*, to be sure, to foster and promote what is good for dealers or consumers, or even for the brand in the long run. (One example of this is the spate of incentive and rebate programs.) Factory representatives and executives are no smarter or savvy than dealers, yet they hardly ever take kindly to those dealers who challenge their wisdom, or even make a constructive suggestion.

Watch out for new agreements or stealth "additions" to existing agreements. One of the most draconian trends in automotive franchise relationships is the unilateral factory imposition of a "requirement" that a dealer perform, as a *minimum*, at average or above average regional sales penetration and/or CSI. Of course, when such a provision is implemented, the implication is that all the "below average" dealers are unsatisfactory. By definition, approximately half the dealers at all times will score "below average" and thus be unsatisfactory. No matter how well the brand does, the quest for satisfactory by an entire dealer body is literally impossible under such a standard. Usually, this self-contradictory "standard" is directed at an allegedly "underperforming" dealer.

Another growing problem may arise when the factory perceives that a dealer's *approved* facility is *no longer* adequate. Be careful about committing to the provision of a new or larger or imaged facility. Franchisors have used such new commitments as a basis for a termination notice, if there is not timely compliance. Some even purport to "require" enhanced facilities, regardless of the dealer's objections that the facility *is* in compliance with the guidelines that existed at the time of signing. In other words, some brands are aggressively trying to *force* dealers to comply with new, unilateral demands.

As legions of dealers have explained to me during years of ever-escalating and imaginative factory programs and incentives, dealers most often find themselves in a dilemma. That is, to participate in certain programs, the qualifying terms sometimes require considerable expense and risk. The alternative – to opt out of participation – can cause worse competitive harm

than the risks in participation (not to mention ill-will from the franchisor). The notorious failure of Ford's Blue Oval program is a prime example of this kind of Catch-22.

The creativity of auto franchisors in imposing new and difficult criteria means that, each year, we will experience new and different initiatives.

3. 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. (1)

Last year's Number One Trend will be with us for a long time. Today's automotive dealers confront a "tsunami" of legal issues.

Since last year's number 1 topic – and checklist – appeared in this publication, I have heard from dozens of dealers around the country who confirm the resilience of a problem that's not going away soon, if ever. Thus, the checklist, revised and updated, is available for free.

I strongly urge dealers to regularly – once a quarter – take an inventory of legal matters by using the checklist. In most situations, a quick survey will take less than an hour. Then, at least once a year, a more comprehensive survey, again using the checklist should be taken, incorporating face-to-face reviews with all department heads.

4. Privacy Concerns and Identity Theft (8)

The dealership's files, particularly deal jackets, are repositories of customers' most vital – and vulnerable – financial histories and information. For clever, greedy and conscience-deprived thieves, this is where the action lies, and dealerships can be vulnerable targets.

Each year there are more and more publications, conferences and seminars to assist dealers in their efforts to comply with the growing mountain of requirements in the privacy/identity theft arena. Unfortunately, the constant changes can make your understanding obsolete from one year to the next. It is highly recommended that dealerships assign a manager-level person to stay current with developments in this growing area. For example, the Fair Credit Reporting Act (FCRA), Equal Credit Opportunity Act (ECOA), and adverse action notices can be highly technical in terms of understanding and compliance.

Moreover, rules, regulations and decisions are in flux. It is a good idea for the dealership maven on privacy and identity theft to (a) attend a reputable seminar on these subjects annually; (b) keep a collection of up-to-date publications on these critical subjects; and (c) enforce internal protective procedures.

Fair Warning. Some dealers have already been sued over a variety of privacy/identity claims. Your adherence to the burgeoning requirements in this regulatory minefield will go a long way toward avoiding expensive legal fights.

5. Involuntary Franchise Terminations, Brand "Withdrawals," "Pressured" Buyouts, Consolidations, and Rights of First Refusal (7)

Too many dealers. On this point, factory executives, industry analysts and dealers are in general agreement that the dealer population is too high. This applies to many brands, including at least those of GM, Ford and Nissan. "We just have too many," Ford CEO Alan Mulally said to an *Automotive News* panel in November 2006, as he echoed what has become, for years in this industry, conventional wisdom regarding Ford. The cure, however, is neither clear nor near. A number of franchisors have taken public aim at their dealers: especially Ford, GM, and Nissan. If state franchise laws did not exist, *hundreds* of dealers across America would be receiving pink slips in 2007.

For the targeted dealer, this short synopsis cannot cover the details of a meaningful strategy. Nevertheless, the basics are fairly simple. Any dealer sensing that his franchise is under termination scrutiny should develop a detailed file, maintaining all correspondence, and being sure to respond promptly and substantively to any threatening factory correspondence. This is also a situation in which lawyer consultation is a must.

Over the last several years, there have been a number of line make withdrawals: e.g., Eagle, Oldsmobile and Plymouth. There should be compensation that is reasonable for dealers who lose valuable franchises. Regarding the Plymouth brand, the author successfully represented five former Plymouth franchisees, who prevailed on the issue of liability under the specific provisions of New Jersey's franchise law. See Stadium Chrysler Jeep v. DaimlerChrysler, 324 F. Supp. 2d 587 (D.N.J. 2004). (The remaining damages issue was subsequently confidentially settled.) This should be a fertile area for dealer associations, if not the National Automobile Dealers Association. Where state statutes are silent, vague or ambiguous, they should be revised to allow for fair market value compensation to franchised dealers who see their brands disappear.

Franchisors looking to shrink their dealer networks are creatively employing a number of techniques, including "pressured" buy-outs, "encouraged" consolidations and threats of exercising rights of first refusal that can diminish the value of an existing franchise.

6. Alternate Dispute Resolution (3)

For about two decades now, the formulation of alternatives to courtroom battles has been the darling of legal

reformers. However, the once-highly touted alternative, especially in the form of mandatory arbitration isn't quite as healthy anymore, especially for dealers with their consumers. In mind-boggling ignorance of both the real world and long-standing legal principles, the New Jersey Supreme Court, in a 2006 decision, struck down arbitration provisions with consumers, designed to avoid class actions.

A number of standard sales and service agreements include or incorporate some form of alternate dispute resolution. By law, automotive franchisors cannot establish a general obligation to resolve disputes by mandatory arbitration, but there is no legal impediment to other kinds of dispute resolution obligations as a *pre-requisite* to going to court (or to a commission or board). See 15 U.S.C.A. § 1226 which, in 2002, in an amendment to the Dealer's Day in Court Act, established protection under federal law for automobile dealers from across-the-board mandatory arbitration requirements.

GM now has a mandatory *mediation* requirement incorporated in its sales and service agreement, which provides that, before initiating any legal action, the aggrieved party must first attempt to resolve the dispute by resort to mediation. (Mediation is a process by which the disputing parties try to work out their differences voluntarily with the assistance of a third-party mediator. No remedy can be imposed by the mediator who merely tries to assist the parties in reaching an agreement.) In recent times, GM's mandatory mediation program has been subject to some criticism. First, the process can be expensive, and, second, there is anecdotal evidence that GM is frequently not receptive to any change in a decision that led to the mediation in the first place.

The long-time gold standard in the industry for alternate dispute resolution – the Ford Dealer Policy Board – has undergone some serious change. It has suffered from the turnover of board members, and there is a growing perception that Ford officials have influenced a negative trend by the Board against dealers who appeal. The author has not (yet) experienced directly this perceived anti-dealer bias, but the anecdotal evidence is mounting.

Other brands, including Nissan, have less known and less used alternate dispute procedures. In most cases in which the stakes are very high – such as termination – I believe that it is worthwhile for the dealer to access whatever pre-litigation dispute resolution process may be available. It is certainly true that erroneous decisions *have* been reversed, and if the injustice in your case is particularly obvious, you might just save yourself a long and expensive legal war. At a minimum, you are likely to learn in more detail how and why your franchisor justifies its position.

With respect to dealer contracts with consumers, I maintain that all such contracts should have arbitration provisions. Recently, anti-class (and mass) action terms in these contracts have been under attack, and the courts will eventually weigh the legality of class prohibitions in auto dealer arbitration clauses. The New Jersey Supreme Court, for example, struck down as unconscionable such provisions in consumer contracts that did not involve dealers. I remain intensely critical of this sort of legislation-from-the-bench, but it's a modern fact of life.

7. The Factory Incentive or Warranty Audit: When is it Not Legitimate? (NR)

I know, I know. Lot's of dealers would rephrase the question in this trend: they would ask instead, "Is the factory audit *ever* legitimate?" These skeptical dealers have a point. Anecdotal, it too often happens that a warranty or incentive audit is scheduled just as the dealer is negotiating, complaining or litigating about unrelated matters. Nevertheless, it cannot be denied that automotive franchisors have a clear contractual right to conduct audits of dealers with respect to the monies paid or benefits provided with reference to warranty reimbursement, incentive or other payments and sales thresholds that trigger bonus payments. It also seems to be a truism that virtually every audit yields chargebacks to the dealer – sometimes in substantial or crippling amounts.

Dealers often want to know whether they should permit auditors to go forward with their work. In most situations, a dealer is well-advised to allow an audit to proceed, but if there are genuine concerns about the motivation behind the audit, or the right to conduct one, the dealer can and should put the objections in writing – as early as possible – and demand a written explanation/justification.

8. Buying and Selling Dealerships (16)

Like the issue of succession, buying or selling a dealership isn't what it used to be. All auto franchisors now look at the buy-sell transaction as an opportunity for *them*, and the unwary seller or buyer can encounter a number of obstacles that were rare until a couple of years ago. For example, a franchisor is now apt to place requirements upon the acquiring dealer as conditions of approval. Examples abound, and include these possibilities: relocation, new/renovated imaged facility; minimum sales requirements (at least regional average); minimum CSI (at least average).

9. Customer Satisfaction: CSI vs. Reality (6)

Every brand touts its ability to measure "true" customer satisfaction. Don't believe it! The Customer Satisfaction Index ("CSI") is not a scientifically sound

measurement of anything – for any brand, and it never has been. In the past I have published in detail my objections to the lack of reliability of *any* automaker's CSI, and that article is available (for free) on request.

In 2006, I represented a dealership in receipt of a notice of termination based upon – among other reasons – consistently low CSI (compared with “regional average”). The franchisor presented an expert to support the validity of its CSI system, but the “defense” unraveled in every conceivable way. In short, there was no statistically reliable CSI methodology, and the CSI part of the case was abandoned voluntarily by the franchisor after the dealer filed a dispositive motion.

But don't expect a sea change in franchisors' reliance on pseudo-scientific CSI statistics. The practical reality is that we are stuck with “voodoo CSI” for the foreseeable future – both as a performance measurement and a “gateway” (i.e., barrier to entry) for those seeking new franchise acquisitions. When dealers are threatened with sanctions (including termination) for “low CSI,” they should consider the possibility of challenging the legitimacy of CSI methodology and reliability. In my opinion, “low CSI” has no evidentiary validity, and should not be used as a basis for termination.

10. Consumerism: Targeting Dealers for Consumer Litigation. Preventive Medicine: Adopting Best Practices. (5)

Between state regulators, class action vultures... (ah hem, I mean lawyers), and even prosecutors, car dealers remain in the proverbial cross hairs. The antidote is the careful application of Best Practices in every aspect of the dealership operation. Details have been discussed in previous articles.

In short, there must be a written and enforced policy of zero tolerance for dishonesty or unethical practices. Dealers should now consider videotaping transactions in the F&I office. (Detailed adherence to proper methodology in the videotaping is, of course, critical.) Mostly, with regard to consumerism, the exercise of good common sense offers the best immunity.

11. Reimbursement for Warranty Work and Parts (12)

Most states have laws that obligate auto franchisors to reimburse dealers for warranty work at their retail hourly labor rates. Many states also require reimbursement for warranty parts at each dealer's retail mark-up. In the parts arena, several franchisors have steadfastly resisted what the law requires, but dealers in two states (Maine and New Jersey) have thus far been successful in leading the way in seeking final legal recourse, consistent with state laws. In 2007, there may well be breakthroughs (one way or the other) in pending cases that will provide additional nationwide guidance in this long-simmering area.

12. Encroachment (Protest Laws) (19)

There is still plenty of action in the dealer protest arena. These laws enacted in most states, generally permit an existing dealer to challenge the establishment or relocation of a same-line-make dealership within the potential dealer's market area (defined differently in different states).

With the anticipated dealer network activity, this could be a lively protest year. Of course, with expected dealer *reductions*, encroachment cases may actually become more rare in most localities, with the action mainly in crowded, heavily populated areas.

13. Dealer Succession (20)

Succession issues seem to be getting a bit more complicated these days. Specifically, franchisors review with greater care the qualifications and experience of the nominated successor. Nevertheless, the process should be undertaken, because successorship problems often have the potential for severe business disruption, litigation and family antagonisms.

14. Bankruptcy (9)

With the rise of interest rates, a slow-down in the housing market, and certain brand-specific sales slumps, 2007 will see a jump in bankruptcy filings generally. With certain brand-specific stores, bankruptcy numbers for car dealers will almost certainly rise. If a major franchisor winds up in bankruptcy, there will be major industry – and dealer – impact. This possibility now seems unlikely for 2007. *See* Trend No. 1.

15. Living with the Threat of Terror...and Natural Disasters, too: The New Way of Life and Doing Business (11)

This trend continues to be the elephant in the living room that everyone would prefer to ignore. Make no mistake: A significant terror event in the U.S. has the potential of making all other issues in this list seem small.

16. Internet Marketing, the Technology Revolution and the Remarkable Changes to “Business As Usual” (10)

America now has a young adult generation that never had to rely on snail mail, immobile telephones or library research. 2007 will continue with the growth of heavy reliance on IT, and there will be a concurrent growth in associated legal issues.

17. Crimes Against/by Dealerships (13)

Dealerships are particularly vulnerable to crimes such as theft, because their spaces tend to be open and accessible. But clever criminals have greatly upped the

stakes in recent years and we have witnessed an abundance of imaginative car thefts, as well as white collar economic crimes. Dishonest employees have been prosecuted in apparently growing numbers, and even dealer owners have succumbed on occasion to criminal temptations.

18. Financial Workouts (14)

The cost of money has finally climbed its way back to near pre-9/11/01 levels. That's tough news for consumers, and the impact on dealers, over time, could be dramatic. The key to a successful workout is speedy disclosure to, and consistent honesty with, your lenders.

19. Employee Rights and Benefits (15)

There was once a time when employment at an American car manufacturer was the envy of the work force: good hours; career employment; generous pension; lifetime health care. Not so any longer. These days, dealerships offer more real opportunity than the factories, especially when federal and state mandated benefits and rights are considered.

20. Minority and Female Representation (17)

This issue is on low simmer for now, largely because more and more minorities and women own and operate dealerships each year.

However, there may be serious issues as the Ford and GM networks downsize and consolidate. Minority dealers have said that they are likely to be disproportionately impacted.

ERIC L. CHASE is a partner in the law firm of Bressler, Amery & Ross, P.C. in Florham Park, New Jersey (973-514-1200). A large part of his practice is devoted to the representation of automobile dealers nationwide, and he writes and speaks frequently on matters of importance to them. He is the author of Automobile Dealers & The Law: The Businessman's Desk Manual for Survival (WD&S Publishing, 7th Ed., 2000). He is listed in Who's Who in American Law, Who's Who in America and other similar publications. In 2005 and 2006, Mr. Chase was selected by his peers as a New Jersey Super Lawyer.

1 Even as of 1970, the U.S. automakers combined for 86% of the American car market. By contrast, at that time Japan had only 3% and Europe 8%. American prominence in *light trucks* was only slightly less. By 2005, Big Three dominance of the domestic market was cut in half from 35 years earlier; the respective 2005 shares were 42% (U.S.), 40% (Japan) and 11% (Europe). 2006 was a killer year for the once-incomparable Big Three. With further future inroads anticipated from Korea and China, and perhaps others, the sinking of U.S. market shares for the once sky-high Big Three could continue for years. (Ironically, China may provide a lucrative market for U.S. vehicles but such a possible phenomenon is beyond the scope of this article.)

2 Each of these is based on recent actual situations, but disguised so as to protect the innocent.

2007's Top Twenty Legal Trends for Automobile Dealers is published annually as a bonus supplement to *DealersEdge* by WD&S Publishing, P.O. Box D, Cranbury, NJ 08512 • www.dealersedge.com.

Editorial: 800-321-5312 • Fax: 800-314-4770
Subscriptions: 800-321-5312
DealersEdge Car Dealer Insider subscription rate: \$399 yearly (24 issues); \$699 two years; \$919 three years

© Copyright 2007 by WD&S Publishing. All rights reserved. Questions or comments can be directed to the publisher at the above address and phone number.

2007's Top Twenty Legal Trends for Automobile Dealers may not be reprinted in any form without the written permission of the publisher.

Jim Muntz
Publisher/CEO

Mike Bowers
Editor

Jay Lander
Art Director

Editorial Advisory Board

Eric L. Chase, Esq.
Bressler, Amery & Ross
Florham Park, NJ

This publication is designed to provide accurate and authoritative information about its subject. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting or other professional services. If legal advice or other expertise is needed, services of a competent professional should be sought.

Implementing Best Practices: Eric Chase's Legal Audit Checklist for Auto Dealers®

This checklist is a suggested guide for all automotive dealers (1) to use in their ongoing efforts to assure their files and operations are current in matters of legal importance; (2) to provide reminders for ongoing and periodic legal requirements; (3) to have a simple, handy way of auditing their legal "health;" and (4) to trigger action(s) that might otherwise be overlooked. The checklist does not constitute legal advice.

Annual/Quarterly Internal Legal Audit

Done by: _____

Date: _____

STATUS*
OK Follow up N/A

I. Franchise Relationship Files

- | | | | |
|---|--------------------------|--------------------------|--------------------------|
| A. Current Sales and Service Agreement, with all amendments and modifications | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| i. Should be up-to-date in every dealership | | | |
| ii. Keep in a nearby, easy-to-access file drawer | | | |
| iii. Alternate Dispute Resolution (ADR) provisions, if any. Be sure to read and know when you have alternatives to the courtroom. | | | |
| B. Factory Bulletins, Announcements | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| i. Watch for "zingers" in otherwise routine correspondence (sometimes references to these show up in termination notices) | | | |
| C. Possible or Actual Disputes or Disagreements: correspondence, memos, notes and other documents regarding actual or potential controversy, or other communications addressing items that are specifically applicable to your dealership. (Keep copies of all correspondence that's addressed directly to you on all these subjects.) | | | |
| i. Sales | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| ii. Allocations | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| iii. Service | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| iv. Warranty | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| v. Facilities | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| vi. Location of Dealership | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| vii. Dualling/Undualling | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| viii. New agreements/amendments | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| ix. Availability of (desirable) product | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| x. Incentive Programs and Compliance with Terms/Conditions | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| xi. Floorplan | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

* OK (i.e., no action required)
Follow-Up (should specify *what* you need to do and *when*)
N/A (not applicable to dealer at this time)

- D. Franchise Termination File, if applicable.** Threats regarding possible termination/nonrenewal. On this one, if you are getting threatening or coercive comments – keep a separate file, and *responsibly respond to all such mail* from your franchisor. On this one, if a termination threat is even hinted, talk to an experienced lawyer.
- E. “Required” Business Plans**
- i. Some, but by no means all, brands require periodic (usually annual) business plans.
 - ii. Be careful on these. If you puff your plans, the factory may argue that you made compromises. If your franchisor has already pre-printed your plans or “promises,” don’t sign on to those that are not fair or realistic. Watch for “zingers” that might set you up for termination.
- F. Financial Statements and Related Documents**
- i. Monthly financial statements: keep at least a full set of monthly financial statements as reported to the franchisor for three years.
 - ii. Keep end-of-year cumulative factory statements for seven years.
 - iii. Keep copies of all state, federal and local tax filings for seven years.
 - iv. Other financial statements, audits, reviews.
 - v. Related financial correspondence.
 - vi. Procedures to protect confidentiality of and limited access to all financial documents.

II. Legal Advisor/State Legal Issues

- A. Your Legal Advisor**
- i. Every dealer should have one: an attorney you can talk to with confidence.
 - ii. Make sure your lawyer has experience in franchise/auto.
 - iii. Don’t be shy. If you’re looking for a lawyer, interview more than one.
- B. State Legal Questions**
- i. Keep mailouts from your association that address legal topics.
 - ii. Call your association with questions.
 - iii. Keep a copy of state franchise laws and regulations that affect dealers: *Read them!*

III. Business Structure Records; Minutes

- A. Structure: Corp.; LLC, etc.
- B. Basic Documents: Articles of Incorporation; S-election; LLC.
- C. Minutes
- D. Licenses

IV. Real Estate

- A. Ownership
- B. Lease

V. Financial Records/Business Insurance

- A. Monthly Statements, submitted to factory, and all accounting tax files.
- B. Tax related files

 - i. What kind of an entity is your dealership and why? LLC? C-Corp? S-Corp?
 - ii. LIFO
 - iii. Assurance of timely sales tax payments
 - iv. Withholding for employees

- C. File Destruction Policy: Make it clear, and in writing

D. Insurance	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i. Periodic audit/update with agent			
ii. Coverage adequacy			
(1) Check coverage for consumer disputes			
(2) Business interruption			
VI. Loan Documents/Bank Relationships	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i. Mortgages, credit lines, cap loans, but, especially, floor plan(s)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
ii. Bank account files and statements	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
iii. Bank/Lender correspondence	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
VII. Consumer Relations/Sales Practices			
A. Complaints from your customers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i. Written procedures to follow	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
ii. Follow-up	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
B. Litigation/Arbitration Records	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
C. Required Recordkeeping/Customer Privacy/Identity Theft/Loan Actions and Notices (Excellent publications available from NADA)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i. Security measures/limiting access	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
ii. Safeguarding Customer Information/Deal Jackets	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
iii. Consideration in referrals of credit applications of the requirements of the Equal Credit Opportunity Act (ECOA) and the Fair Credit Reporting Act (FCRA): ~ Does dealership policy/practice avoid necessity of sending adverse action notices?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
iv. Staff Employee Trained in Privacy/Safeguard Rules	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
D. Assignment of Responsible Employee to (a) Monitor Consumer Relations at the Dealership, (b) and respond to inquiries/complaints	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
E. Clear and Consistent F&I Practices and Policies	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
F. Consistency and Legality of RO Itemization (Do you have a documentary fee issue?)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
G. Arbitration Clause in all Consumer Contracts (Language for possible clause available from author without charge)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i. Must be fair and mutual	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
ii. Should bar multiple claimants and class claims	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
VIII. Promotions/Advertising			
A. Know and Monitor State Laws and Regulations on advertising.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
B. Have a "Duty Expert" to Assure Compliance in All Print and Broadcast Advertising.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
C. If you use an agency, assurance of compliance is a must, because you may be liable for their mistakes.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
D. Compliance with Do-Not-Call Rules and Faxing Regulations			
IX. Work Force/Employment			
A. Posting of All Required State and Federal Notices.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i. Equal Opportunity (EEOC)			
ii. Wages			
iii. Family Leave (FMLA)			
B. Compliance: ADA, FMLA, COBRA, Immigration Law	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
C. Plans/Policies/Correspondence regarding benefits:			
i. e.g., health, dental, 401(k), profit sharing, vacation, etc.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
D. Individual Personnel Folders (Ensure Privacy!)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
E. Dealership Employee Policy Manual, including clear policies on sexual harassment and discrimination	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

F. Training Programs

- i. In-house: Periodically provide guidance on: sales practices, discrimination, sexual harassment, integrity. ~ Keep files on all training.
- ii. Factory: Tech Training

X. Succession

A. Estate Planning

- i. Do you have a will that reflects your current situation and what you want?

B. Successor Addendum to Sales and Service Agreement

- i. If you haven't done this, you should do it now!

XI. Co-Ownership Issues (if applicable)

A. Shareholder (or Member) Agreement(s)

B. Employment Agreements

C. Buyout and Valuation Provisions

XII. Environmental

A. State Requirements

B. Federal Requirements (EPA)

C. Any ongoing issues: e.g., underground storage tanks, spills, Hazardous waste disposal

D. Periodic Environmental Audit

XIII. Safety/Emergency Procedures

A. Compliance with All Applicable Statutes, Regulations and Ordinances

B. Posted Procedures for Employees

C. Emergency Call List

D. Fire Drill/Alarm and Sprinkler Inspection

E. Special Circumstances (E.g., Hurricane or Earthquake Vulnerability)

XIV. Miscellaneous Legal Matters (This would include law-related items not covered by I-XI, such as contracts or disputes with vendors or outside service suppliers)