



2015's Top Twenty Legal Trends for Automobile Dealers

By Eric L. Chase
Bressler, Amery & Ross, P.C.

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NOTE: 2014 rankings are in parentheses; NR (Not Rated in 2014).

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2015's Top Twenty Legal Trends for Automobile Dealers

Feature Article

By Eric L. Chase
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INTRODUCTION

The good news: The year ahead will likely be a profitable one – very profitable – for most of America's franchised auto dealers! Building on the strength of a soaring 2014 marketplace, there is every sign that new retail auto sales may turn 2015 into a record year. The downer part: At the same time, legal minefields and issues need close attention, and for too many dealers, one or two of the year's trends could be all-consuming.

For 2015 the regulatory storm for car dealers (as well as for other businesses) will continue unchecked, as the stunning 2014 mid-term Republican wins will offer negligible, if any, headwinds against this runaway trend. The vast sweep and universal applicability of regulatory growth and overreach keep this trend in first place.

The retail automotive market's booming sales have happened in spite of the bureaucratic maelstrom – great news for dealers. It would be even better for bottom lines, and more sustainable, however, if government impediments could be reversed or lessened. Even though many Republicans, and some Democrats as well, vow to make genuine headway, the outcomes of 2014 mid-term federal elections are not likely, anytime soon, to translate to any discernable relaxation of the regulatory explosion of dealer obligations and associated costs. State regulatory activity will also not abate. Sadly, this trend is bipartisan.

In May 2014 the Center for Automotive Research ("CAR") completed its study for NADA – "The Impact of Federal Regulations on Franchised Automobile Dealerships." In a nutshell, the findings are not pretty. Data from 2012 showed that "the average federal regulatory compliance annual expenditure was \$182,754 per rooftop." That number helped trigger a total loss of "\$441,332 per rooftop," a cost of "\$245 for every new and used vehicle sold, or nearly \$8,035 for every dealership employee." Nationwide, the auto dealer loss was \$10.5 billion to the U.S. economy and "76,000 fewer jobs across all sectors." And these numbers do not include the negative cost impact of state and local regulations.

Anecdotal evidence from individual dealers strongly suggests that costs have risen each year since 2012 and that 2015 will continue the upward trend. In some years for some dealers, wasteful and unnecessary bureaucratic compliance can spell the difference between profitability and loss.

No one contends, of course, that U.S. dealers or businesses generally should be free of all regulations. Some regulations are necessary and

good. No one, for example, advocates dirty air or water, unchecked consumer scams, unsafe vehicles, racial discrimination, or sexual harassment. The growing alarm, however, is that a virtual sea of over-regulation, ideological pressure, and mini-enforcement is drowning and stifling small businesses and start-ups generally, and franchised dealers particularly. Unnecessary paper drills, redundancies, time devoted to a host of silly tasks, and the retention of compliance professionals have become commonplace. The CAR study focused only upon federal regulatory costs. But like all U.S. businesses, dealers must comply with state and local laws and rules as well.

The year's #2 trend is the ongoing and growing body of challenges to the formidable state laws that enforce fairness in the automotive franchise system, premised conceptually upon branded networks of independent dealers, tethered to franchisors who manufacture and wholesale products to dealers. Enter Tesla with direct retail sales and no independent franchised dealers. The Tesla phenomenon is on something of a roll, with lots of public and government support. The traditional franchisors are also starting to test the possibilities of direct sales.

There is a lot to digest in this year's twenty trends. All dealers should take care to address the specific trends that affect them.

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. The Regulatory Tsunami Continues (1)

No one – literally no one – applauds the U.S. regulatory explosion. A comprehensive search shows unanimity in bipartisan political rhetoric decrying the waste and cost of over-regulation. It was a regular topic in 2014's mid-term campaign.

To be sure, there is a lot of finger-pointing, and plenty of blame to go around. But there are some obvious culprits in the over-regulation monster for 2015. It has been many years in the making. Dodd-Frank, now five years old, is especially vulnerable to criticism, with the CFPB leading the charge. *See, e.g.,* Wallington, Peter J. "Four Years of Dodd-Frank Damage." *The Wall Street Journal* July 20, 2014. Other super-sized regulation generators include The Affordable Care Act ("Obamacare"), the EPA, the FTC, and a host of privacy protection mandates. In addition, despite the supposed immunity of franchised

car dealers from CFPB regulatory reach, watch for its imposition of arbitration rules, lending mandates (pushing flat fees for dealers on loan work), and other possible reaches.

The CFPB, in my opinion, has turned out to be more of an anti-business ideological force than a neutral regulatory body faithfully carrying out its duties. It hides its methodologies and announces conclusions without rationale. This observation is especially insidious in the CFPB obsession to assert the presence of racial discrimination in lending practices, with conclusions of “disparate impact” on minorities. *But see American Insurance Association v. HUD*, Civil Case No. 13-00966 (D.D.C. Nov. 3, 2014) (The government exceeded its delegated authority in recognizing disparate impact claims).

One noted scholar sees the regulatory mess as part of a larger systemic trend that will be hard to cure. Fukuyama, Francis. “America in Decay: The Sources of Political Dysfunction.” *Foreign Affairs* October 2014.

For over half a century, George P. Shultz has been one of the most astute observers of the American economy (as well as having been Secretary of Labor, Treasury and State, and Director of the Office of Management and Budget). Criticizing unwarranted regulatory burdens, Shultz commented in his August 9, 2014 *Wall Street Journal* article “How to Get America Moving Again”:

We all know that the maze and uncertainty of the regulatory octopus is stifling the economy. Regulations are needed, but they can be made simpler and designed to work better. Overhaul the current complexity so that even small businesses can see how to comply without having to hire compliance advocates they can’t afford.

Although the Shultz recipe for economic improvement covers multiple ways to heal an underperforming economy, the regulatory burdens loom especially large for car dealers. That is because the business of car retailing implicates so many discrete areas of federal, state, and local governance. Moreover, dealers are popular targets for officials who want to be perceived as protectors of public welfare. *See Trend #5 (Consumerism)*. Unfortunately, the regulatory albatross is here to stay – irrespective of 2014’s election results.

In the post-midterm phase of political promises, Republican congressional leaders have targeted “excessive regulations” as one of several early priorities. Boehner, John and Mitch McConnell. “Now We Can Get Congress Going.” *Wall Street Journal* Nov. 6, 2014. We will see. Despite all good intentions, this kind of promise is among the most difficult to fulfill, because an embedded bureaucracy holds critical trump cards.

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Dealers should avail themselves of the excellent annual NADA publication, *The Regulatory Maze*, which keeps current a list of major federal laws and regulations as they apply to dealerships – overall and also on a department-by-department basis.

Dealer advertising and sales practices are now targeted by a regulatory blizzard of competing mandates and standards – including federal, state, and local laws, ordinances, and regulations. A helpful guide to federal ad regulations will soon be available from the NADA. Advertising is an area of particular concern, as it attracts much of the state and local enforcement against car dealers.

For a frame of reference, consider this glimpse at just one aspect of my own business: My law firm consists of about 130 attorneys in four offices in as many states. In the main kitchen of our New Jersey office, there is a bulletin board with fourteen required federal or state posters – all to inform/remind employees of their vast array of rights and protections vis-à-vis their employer. Not only do these posters enumerate a catalogue of rights; but also they refer to a host of record-keeping and other affirmative obligations of employers.

As every franchised dealer knows, workplace requirements such as these posters and the obligations published in them, are but the tip of an iceberg. The redundancies in workplace requirement publications are mindboggling, confusing, and at times, seemingly contradictory.

Yet this example is just one of many in the regulatory arena. There are now so many agencies, public officials, and lawmakers with so many overlapping, redundant, and competing agendas that “regulatory creep” is really more accurately described as a regulatory avalanche.

Of course, friends on the franchisor side sometimes express a sense of irony in dealers’ success in lobbying for decades to normalize the franchise relationship with laws and regulations that benefit franchised dealers. We plead guilty to this effort. But the comparison to dealer initiatives underscores the difference between gratuitous, redundant, competing, and wasteful laws and regulations and those that have an express salutary purpose to promote fairness. Because of historical overreaches, it was necessary, for example, for state laws to protect costly franchised businesses from arbitrary franchise terminations or nonrenewals. Such laws are focused and available in singular legislation or regulation. By contrast, the infinite busywork required to satisfy regulatory whims across numerous agencies cannot begin to establish meaningful justification for the waste and costs involved. See “The Regulatory Maze,” *supra*.

Bottom line: The regulatory train wreck will not stop, or even slow down, anytime soon, despite the growing outcry and political pledges. Too many federal, state, and local bureaucrats believe their impositions on business and the economy serve noble ends, and they think that a

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grateful public applauds the invasion. The CFPB, in particular, will continue to aggressively overreach to impact dealers, especially on lending issues. However, the pushback against CFPB overreach is growing. In November 2014, a report commissioned by the American Financial Services Association (“Implications for the Indirect Auto Finance Market”) found that the CFPB’s methodology and conclusions were “conceptually flawed in their application and subject to significant bias and estimation error.”) The CFPB’s blatant ideological slant has been exposed, but it remains to be seen whether it can or will be reined in anytime soon. *See* “Study Rips CFPB’s Anti-Bias Probes as Biased.” *Investor’s Business Daily Editorial* Dec. 17, 2014.

The Affordable Care Act, aka Obamacare, continues to be unpopular, according to national polls. A case pending before the U.S. Supreme Court has the potential in 2015 of throwing that law into chaos. The challenge is to subsidies paid in states opting not to have exchanges. Watch for a decision by June.

2. Challenges to the Fundamentals of State Franchise Laws: Tesla; the Alliance of Automobile Manufacturers (6)

For years, there has been a simmering debate over the efficiency and fairness of state franchise laws that mainly arose out of an intent to “level the playing field” for automotive franchisees. All fifty states now have laws protecting franchised auto dealers from arbitrary franchisor conduct. Every year amendments are enacted in many states.

The Alliance of Automobile Manufacturers, comprised of twelve major auto franchisors, contends that the power disparity no longer applies and that state franchise laws are inequitable anachronisms. The Alliance points to, for example, publicly held dealer companies and mega-dealers to illustrate the growth of dealers’ economic power. But the Alliance protests too much. Most dealers are relatively small – certainly, when compared with the major franchisor behemoths. Without reasonably protective laws, dealers and the consuming public would foreseeably suffer in a variety of ways, including arbitrary terminations and overly aggressive sales requirements.

For the most part, attacks by the Alliance and others on franchise laws have been overwhelmed by successful state legislative efforts, led by state associations and buttressed by the backing of the National Automobile Dealers Association. Recently, however, the challenges by Tesla Motors to overcome state laws banning direct retail sales by automakers have seen much success. But Tesla’s success may also signal a backdoor channel to challenge franchise laws generally. *See*, for example, Kerr, John. “Tesla Breaks the Auto Dealer Cartel.” *Wall Street Journal* Sept. 16, 2014; “Rick Snyder Drives Off the Road.” *Wall Street Journal* Oct. 24, 2014, an especially partisan editorial rant against Michigan Governor Rick Snyder for signing legislation prohibiting direct Tesla sales. (Despite the hit piece, Mr. Snyder handily won his reelection bid on November 4, 2014.)

Of course, Tesla accurately points out a major difference between it and the venerable franchised dealer networks of domestic and import

brands. All of Tesla’s retail operations are company-owned. There are no Tesla franchisees at all. Therefore, company-owned Tesla sales outlets cannot, by definition, unfairly compete with franchised Tesla dealers – of which there are zero.

Will the Tesla phenomenon be the catalyst that opens the door to direct sales by franchisors with existing franchised dealer networks? The question is being raised, and opinion writers across the country seem to favor the Tesla approach by huge margins. Simplistically, they assume that “competition” from the factories would be good for consumers and good for the economy. Such commentators ignore the arguments by many in the business that the franchise system spawns numerous well-established consumer protections in the retail automotive industry and intra-brand competition among same-brand dealers.

Tesla’s relative success in the direct-sales arena has no doubt encouraged traditional franchisors to try to follow suit. GM is pushing its “Shop-Click-Drive” initiative and is overtly seeking approval of direct sales in Tesla fashion in some states.

There is also the Alliance’s larger question as it lobbies across the country and nationally for rollbacks of state relationship laws that it argues unfairly favor dealers and restrain trade and basic contract rights.

Bottom line: For now, the Tesla phenomenon will continue its (mostly) winning streak. At some point, I predict there will be Tesla franchises, and



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the “competition” controversy will fade away. In the meantime, expect more of the one-sided, and frankly mindless, Tesla cheerleading from editorial pages. It seems unlikely that the direct sales invasion will spill into other kinds of franchise protection areas.

That is, the Alliance’s broader attack on laws that protect dealers against unreasonable demands or requirements, or arbitrary terminations, from their franchisors will not gain any traction.

Dealers, through state associations and the NADA, are reacting with comprehensive and well presented public campaigns to demonstrate the high consumer value of the franchise system. The fight is surely on, but dealers, I believe, have the winning argument.

3. The Phenomenon of Clearly Unreasonable Factory Demands, Standards, and Practices

Many dealers have recently seen an uptick of threats and demands about retail sales. The most aggressive carmakers these days appear to be Nissan, Kia, and VW, but others, too, send unfriendly put-downs to dealers who, by factory measuring standards, fall below “average” sales penetration, when compared to a factory-selected benchmark. These franchisors label “below-average” or below-benchmark sales penetration as a breach of the dealer agreement.

A statistical sales comparison methodology to discipline, punish, or even terminate franchised dealers is remarkably flawed. In any dealer network, using any measurement criteria, there will always be those who rank high or first, and there will always be those that rank low or last. A legitimate franchise network, however, needs to accommodate the entirety of that network, so long as the dealers are properly running their dealerships and carrying out their responsibilities.

The statistical certainty that there will always be a dealer ranked “last” in any numerical measurement system does not automatically mean that the dealer at the bottom of that statistical ranking is a “bad” dealer. Rather, the legitimate interests of franchisors can and should be furthered only by assessments of how the dealer is operating, the competence, and sufficiency of staffs, training rigor, and describable professionalism. Franchisors should reject the purely statistical approach, and if they do not, courts, commissions and boards should do it for them.

Fair and realistic assessments of dealers are difficult and time-consuming efforts. It is much easier for an automaker to establish a statistical benchmark. Never mind that it is inherently unfair and arbitrary.

Bottom line: The “above average” (or above benchmark) standard will continue to be a key battle line. On this one, franchisors have a losing case, but the battle may continue past 2015. In other areas, auto franchisors will continue their creativity as they try to ride hard on their dealers.

4. Buy-Sell Activity in a Bull Market for Dealerships; Rights of First Refusal (8)

For many car brands in the turnaround years since the Great Recession of 2007-09, it is now profitable – often very profitable – to be a dealer.

This trend translates to higher multiples with surging blue sky values and a boom in buy-sells, at transactional prices that now are, in some instances, above pre-recession records.

When there is more transactional activity, there is also the greater prospect of factory exercises of the right of first refusal (ROFR). A few franchisors have tried in recent times to “cherry pick” their franchises in complex deals, so that they do not have to buy other branded operations, even when the buy-sell agreement unifies a single transaction with multiple brands. Some have put cherry picking rights into the ROFR language of dealer agreements. This is wrong, because the exercise of an ROFR should require the exerciser to step 100% into the shoes of the contract buyer.

Bottom line: 2015 will see lots of buy-sells with still growing transactional values. The end of the growth stream is not yet in sight. There may be an uptick in exercises of the factory ROFR. Watch out for franchisors who try to “cherry pick.”

5. Consumerism (3)

This old chestnut keeps a lot of people busy. It is a field that brings out the kind of political correctness that frequently tramples fairness and accuracy. These days, “consumers” are sacrosanct, whereas businesses are marginalized, even vilified. Auto dealers, especially,

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are prime targets. State AG offices, consumer affairs divisions, and federal regulators prospect for dealer abuses of consumers. To be sure, there are abuses that no honest person would support. All dealers should implement stringent standards of honesty, fairness, and compliance with laws. The problems for dealers, as I see them, come when regulators creatively invent overreaching “violations” that cannot withstand scrutiny. For example, detailed font size requirements or statistically unsupported “disparate impact” discrimination assertions (CFPB) tend to discourage and frustrate honest dealers. More subtle – and worse – is the public animosity displayed by both regulators and elected officials.

Bottom line: Dealers need to acknowledge the old axiom that “the customer is always right” or at least recognize that dealers are underdogs in disputes with customers or with agencies with “consumer” in their names. Every dealer should have no-nonsense, zero tolerance policies to ensure store integrity.

6. Involuntary Termination (5)

These days, the arena of involuntary termination notices is dominated by factory assessments of poor sales performance. Almost exclusively, such assessments are purely based on statistics/numerical measurements and comparisons to benchmarks of what the franchisor deems to be the minimal acceptable market penetration percentage.

Bottom line: Over the next few years, dealers (and, perhaps, courts) will push back on the inherent wrong of using “average” sales performance (based solely on market penetration comparisons) as a hammer first, to threaten termination, and, second, to issue termination notices. A few judges in a few cases have caught on, and they have supported dealers against purely statistical rationales for termination.

7. Warranty Reimbursement (12)

Thanks to the steadfast stamina of many state dealer associations, the NADA, and stalwart dealers, reimbursement at retail to dealers for warranty labor and parts may be heading toward a successful end game. The Alliance of Automobile Manufacturers, composed of twelve major automotive franchisors, has for years led the factory fight against proper warranty reimbursement at retail (mainly for parts), but legal results in the states of Maine, Connecticut, and Florida have rocked the Alliance’s efforts. At this writing, the Alliance is continuing to appeal an adverse decision in Connecticut, and if the dealers’ victory there holds up, there will be even more cause for considerable optimism in this long-contested area.

In Maine, the Alliance lost its battle years ago, and it gave up in Florida in 2014, after the court there remained steadfast in requiring reasonable discovery from automakers about their costs.

Bottom line: The battles over reasonable reimbursement for warranty parts and labor are narrowing. More and more franchisors are surrendering. The Alliance is in retreat. Dealers should see less factory resistance in 2015 and beyond.

8. Privacy and Identity Theft (13)

This trend has jumped up five spots in a year, in part because some franchisors want to invade dealer files where private customer information is stored. Such demands conflict with statutory privacy laws and rules (federal and/or state) imposed upon dealer record holders. *See, e.g.,* Graham, Leach, Bliley; Safeguards and Privacy Rules. Dealers and their associations need to continue to push back against such unwarranted factory efforts.

There are about two hundred federal agency regulations that regulate issues pertaining to consumer data and privacy! As one lawyer in the field says, “There is no clear solution.” So-called “data aggregators” are in the business of obtaining electronically stored information, and dealer controls, including password secrecy, are sometimes not adequate to prevent third party access to customer information.

Bottom line: This field becomes more complex as time passes because internet thievery and hacking attract sophisticated criminals. However, the ability to combat such invasions also grows over time. Dealers must stay vigilant and up-to-date in protecting consumer data and records. Privacy and data concerns have become a major focus of political office holders at the highest level. (Think Sony.)

9. Recalls: What the Heck Is Going On? Is the Current Storm an Aberration? (NR)

Recalls in 2014 reached all-time annual highs. They were for lots of different reasons, across many brands. Some were clearly due to defects that were dangerous to drivers, occupants, and the public. The numbers of units involved, and attendant publicity, drew significant governmental and public attention.

Recalls can dramatically affect dealers – in diminished sales and perception of the particular brand and in the need to repair/correct the defects for the franchisor. Dealers can be the focus of consumer ire – because of the defect itself and because of parts delays or inadequate cures. Then there is the complication of older models on dealer lots and used cars generally. Dealers should routinely use the NHTSA VIN look-up when taking in trades or otherwise acquiring used inventory. With new inventory, a dealer has the right to demand factory repurchase or get paid for the cure.

In the fall of 2014, I watched a presentation by two of my esteemed colleagues; the session was titled, “Recall Madness.” Indeed, there seems to be an ongoing “hair trigger” to initiate the recall process in response to defects, large and small.

Bottom line: This one is hard to predict, but the recall numbers should go down from the record highs. For carmakers and dealers, the reality and perceptions of safety are key to this retail-based industry. In my opinion, dealers should sell no vehicles under recall, but not yet fixed. If it is a safety issue, that is a no-brainer.

10. Workforce Issues and Unionization (18)

The Obama administration vigorously promotes itself as an advocate for labor, especially unionized labor. This puts the government thumb heavily on the scale in a way that is antagonistic to businesses and their owners.

Other workforce issues continue but seemingly in smaller numbers. Dealers have become smartly sensitized to wage issues and discrimination claims.

For the last half of President Obama's second term, the pro-union campaign will almost certainly abate somewhat. That will happen because of the Republican majorities in both Houses of Congress, but the administration will still try to do whatever it can to foster unionization. In 2014 the NLRB's general counsel determined that a number of complaints against McDonald's could go forward with the contention that certain franchised businesses could be "joint employers" of the employees working in restaurants, and in December complaints were filed in thirteen NLRB regions. On the face of the facts that are public, the proposition seems absurd. But the goal of unionizing and increasing wages apparently trumps any reasonable analysis of the facts. See Trend #16 for more details.

For dealers, this is probably now close to a moot issue. *Automotive News* called me about the prospects of auto dealers being deemed joint employers with their franchisors, and I responded that it was an unlikely avenue. The election makes it even more unlikely.

Bottom line: In the lame duck period of the Obama administration (2015-16), the pro-union, pro-labor efforts are apt to abate somewhat. On other workforce issues, there will be claims, of course, but, hopefully fewer.

The activist NLRB may continue to try to uneven the playing field as between unionized and un-unionized businesses. But, for now, it appears that dramatic changes through labor laws are unlikely, and that is good news for dealers.

11. Alternate Dispute Resolution (9)

The CFPB and other regulators are antagonistic to any process perceived as limiting the avenues for consumer ascendancy – especially in retail vehicle sales. This includes mandatory arbitration generally, and especially arbitration clauses that prohibit class or mass actions.

Bottom line: As long as it remains viable, an arbitration clause in contracts with consumers with a class/mass action prohibition makes sense for dealers. Caution: Make sure state laws and/or decisions in your jurisdiction are complied with.

12. Environmental Regulation Explosion (14)

Anyone who thinks that environmental oversight has slacked off over time has not watched the continuing development of requirements under the Clean Air Act, the Clean Water Act, Hazardous Materials Handling Procedures, CAFE Rules, and related state regulations and enforcement actions. As mentioned elsewhere, the NADA's annual publication of "The Regulatory Maze" is a useful reference for dealers,

and the relevant federal environmental laws and regulations are referenced there.

Bottom line: Every dealer should have well established procedures and methods for full compliance with all applicable federal and state environmental requirements. Moreover, the wise dealer will keep track of developments in the law that even conceivably come into play.

13. The Factory-Dealer Question on a Fiduciary Relationship (4)

Is a manufacturer a fiduciary vis-à-vis its franchisees? Although the weight of case law indicates that courts mostly hold that the franchise relationship does not establish fiduciary status, there is much in the carmakers' enforced control that weighs in favor of it.

Bottom line: It remains unclear whether courts will properly acknowledge the fiduciary relationship that should be applied to at least some aspects of the franchisor's extraordinary control over its dealers. Without doubt, the issue will continue to be raised as long as there is no definitive answer.

14. Terror, Unrest, and National Disasters (17)

The prospect of the huge, unpredictable, and horrific event is, ironically, foreseeable. We humans know we are vulnerable to natural disasters (like earthquakes and hurricanes), and since 9/11/01, we have been especially wary of human actors intent on delivering havoc and destruction. These realities make it necessary for Americans to prepare

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for the worst case, and dealers should have in place plans to cope with a sudden disaster.

Bottom line: Sadly, businesses must plan for horrific events. Every dealer should have a frequently updated emergency plan. Such plans should include emergency supplies at the dealership, calling sequences for employees, emergency drills at least once a year, and more. Dealers should consider insurance policies that may cover some of these contingencies. Business interruption insurance is prudent for most.

15. Credit Landscape: What's the CFPB Up to? (20)

Dealers are in the cross hairs of the CFPB in the consumer lending arena. The darling of this agency is so-called “disparate impact,” whereby the CFPB looks at data to see whether its metrics show that minorities pay higher rates. See Trend #16. The trouble is that the data and methodology lack factual and scientific underpinning, as the NADA and others have proven.

Bottom line: Hopefully, 2015 will bring a reality check to the CFPB on its improper concept of “disparate impact” and on other issues. My opinion: the CFPB is out of control and on an ideological mission.

16. Is There a “Joint Employer” Issue Coming? (NR)

In July 2014 the NLRB upended the franchise world by blessing a few dozen complaints to proceed against McDonald's on wage/hour issues at the stores of franchisees.

On December 19, 2014, the NLRB followed up by issuing thirteen formal consolidated complaints in thirteen NLRB regions. More investigations remain pending.

The theory of “joint employer” is not new, but the fact-driven circumstances are discerning and difficult. The reaction has been swift and definitive. As a general rule, franchisors do not share employment responsibility with their franchisee networks of franchised businesses. The McDonald's foray seems to be an obvious ruse to bolster prospects of unionizing franchisees.

In these filings, the NLRB pushes the new standard, saying that McDonald's, “through its franchise relationship and its use of tools, resources and technology, [it] engages in sufficient control over its franchisees' operations.” In the past, rather than a “sufficient control” standard, the NLRB applied a “significant control” standard. This word change signals a much more aggressive approach by the NLRB, an approach that fools no one in the industry. This extraordinarily aggressive approach is designed to foster the growth and power of unions.

Bottom line: The NLRB effort will not work. This is an abuse that crosses all reasonable lines, and automotive franchisors – and dealers – have little or nothing to worry about on this one.

17. Factory Audits (16)

The “factory audit” is a much-feared tool deployed by factory representatives to investigate the bona fides of payments to dealers for various kinds of dealer claims (e.g., factory incentive payments; warranty reimbursement). Such audits frequently result in chargebacks when auditors find overpayments and/or improprieties in claims. Sometimes chargebacks can be high – in the six or even seven figures. Dealers complain that the chargebacks are often accomplished on an immediate basis, whereby the factory directly takes payment from a dealer account.

Bottom line: Franchisors have the right to audit. Do not interfere. If you perceive there is harassment going on – say with repetitive or onerous audits – discuss with counsel.

18. Encroachment (Protest Laws) (19)

This old perennial remains an issue for dealers, because brand managers are always seeking to refine their networks with dealer relocations or new points.

Bottom line: This trend will remain steady for 2015.

19. Taxes (11)

We are solidly into “lame duck” territory with President Obama. With Republican majorities in both houses of Congress, federal tax hikes are unlikely across the board.

Bottom line: Despite the importance of tax policy to every aspect of the economy, 2015 will not be a year of major change.

20. Minority Dealer Representation (NR)

Auto franchisors are always on the lookout for qualified candidates to own and operate franchised dealerships. The good news is that there are now many well established minority owned and run stores. The more difficult news is that many minority operations are the most vulnerable to economic downturns.

Newly minted minority dealers suffered the downturn in the Great Recession disproportionately. This was because their new organizations were less competitively prepared to deal with massive losses in sales and service business. Today, minority representation remains an issue, but franchisor recruitment and societal shifts have served to bring more minorities into the fold.

Bottom line: In 2015 there will continue to be franchisor emphasis on adding minority dealers to franchise networks. Assuming the economy remains strong, minority representation will be less of an issue for 2015 and beyond. ■

ERIC L. CHASE is a partner in the law firm of Bressler, Amery & Ross, P.C. in its Florham Park, New Jersey office (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., 2001). His biography appears in [Who's Who in American Law](#), [Who's Who in America](#) and other similar publications.

President's Message



Oren Tasini
Haile, Shaw & Pfaffenberger, P.A.
NADC President

In November we put out a call for presentations to the entire membership for the 11th Annual Member Conference. The response was overwhelming! The planning committee had the difficult task of reading through the many qualified proposals and choosing 10 sessions for the Conference. I am pleased to report that a manufacturer representative will be our guest luncheon speaker and provide us the perspective from the other side (*i.e.*, the dark side).

If you submitted a proposal that was not chosen, we invite you to write an article for the *Defender* or present a webinar in 2015 on your topic. The wide variety of proposals reflects the diversity of practice areas of our members. Let's continue to educate our membership and learn from one another.

We hope to see you all at the Annual NADC Member Conference being held April 26-28, 2015 at the Montage Resort in Laguna Beach, CA. The conference will be a two day program designed to provide you with updates, best practices, lessons learned and other beneficial information. We will be hearing speakers present on the following topics:

- Top Legal Issues for Dealers in 2015
- Legal Issues Relating to Dealer Fees
- Manufacturer Manipulation of Dealership Market Areas – Its Financial Impact
- Semi-Annual NADA Update

- The Art of the Deal: Current Acquisition Market and How to Avoid Surprises at the Closing Table
- A Dealer's Guide to Going Paperless
- Used Car Information: To Disclose or Not To Disclose
- Trademarks, Trade Dress, and Licensing Issues for Dealers
- Labor and Employment

Please note that session topics are subject to change. Watch your email for more information and updates.

Please be on the lookout for the 2015 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. After all, that is why we started NADC – there is strength in numbers.

I look forward to seeing you in Laguna Beach. Until then, wishing you all a happy, healthy and successful 2015! ■

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Please watch your email for a list of topics and more details!

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For hotel reservations, please call The Montage at 1-866-271-6953 and reference the group name "National Association of Dealer Counsel (NADC)" to receive the group rate of \$315 per night plus applicable taxes.

When reservations are made, the hotel requires a deposit equal to the room rate and tax for the first and last night of each reservation. An individual's deposit is refundable if the Resort receives notice of cancellation at least 7 days prior to schedule arrival.

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You can also book online at:

[NADC 2015 Annual Members Conference.](#)

Travel Plans

Please arrange your travel to join NADC at the opening cocktail reception on Sunday, April 26th from 6:00 – 7:30 pm. The conference will conclude on Tuesday, April 28th at 3:00 pm. Only a select number of rooms are available pre and post the meeting dates. Please make your reservations today to secure additional dates if available.

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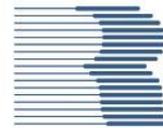
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