

# 2020's Top Twenty-Five Legal Trends for Automobile Dealers

By Eric L. Chase<sup>©</sup>

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*NOTE: 2019 Rankings are in parentheses; NR (Not Rated in 2019).*

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## Introduction

No one contests this simple, annual truth about dealers and the law: Each year, American dealers cope with a few entirely new legal challenges, and they always face new variations of old ones. For the first time, however, this year's number one trend raises an existential question of recent origin. That question is whether the decades-long era of independent franchised automotive dealers in America may be coming to an end, to be replaced by different kinds of automobile retailers.

Given today's commercial landscape across America, with thousands of franchised dealer operations in multimillion dollar facilities with hundreds of thousands of employees and associated vendors, not to mention literally tens of millions of customers and many billions of dollars in cash flow, it is hard to fathom such a sea change. Yet there are industry observers who tell us they see it coming – maybe on or over the horizon, maybe sooner.

They see, for example, such aspirants as Walmart and Amazon seeking – soon – to displace franchised auto dealers, or at least become their major retail competitors. I conclude that although

the concern is likely overblown, it is nevertheless worthy of both serious discussion and action to thwart the possible loss of dealer networks. If it were actually to happen, it would gravely harm not just the vanishing dealers, but would also disserve consumers and the public interest.

The 2020 election cycle lands in second place this year for its impact on dealers and the automobile industry. As of December 17, 2019, President Donald J. Trump stands as America's third impeached commander-in-chief. Thus, if Speaker Nancy Pelosi refers the impeachment to the Senate (not a certainty as of the time of publication), that proceeding would dominate political news in early 2020. The effect on the 2020 elections remains to be seen.

But that's hardly all. Politics and election battles will impact most businesses mightily, and dealers need to understand what could affect them, and how. Election outcomes at federal, state and local levels will drive both immediate and long term directions for dealers in and especially after 2020. Elected officials shape tax policies, environmental actions, health care coverages and mandates, consumer protection issues and a host of other subjects that impact all U.S. businesses,

and especially influence the bottom lines of car dealers who are sensitive financially and operationally to legislative changes in these areas. As this year's Top 25 article goes to press, political warfare – especially in the Senate's adjudication of presidential removal – dominates the political landscape. Competing candidates promise contrary financial outcomes for American businesses and the public. The retail auto industry is acutely sensitive to governmental policies that focus on small businesses generally and vehicles specifically. Thus the fallout of 2020 elections may be more profound for dealers than any of the other quadrennial elections of the past century.

Today's deep and sharp political divides are especially hostile – and personal – at the presidential level. But there are also obvious divides in many, if not most, contests in federal, state and local spheres. As recent polls indicate, even the capitalist economy sees challenges by a growing preference for some version of socialism, with some Democrat candidates pressing for government to control ever-larger segments of the economy.

In third place for 2020 comes the venerable issue of factory control over dealers, and the methods they use to harness dealer networks. The #4 trend addresses the phenomenon of autonomous vehicles, including

whether the near-term explosion of such vehicles on the roads has been over hyped. Number 5 is the #MeToo phenomenon which, in just a few years, has inspired a noteworthy shift in attitude and behavior in nearly all aspects of American life, including in dealerships. The Trade Wars with China and others remains in sixth place, but developments at the end of 2019 suggest that a happy ending may be near, and that the “wars” could be over soon. Most China watchers, however, warn that the U.S. must retain a healthy skepticism about China keeping its word on any deal.

To be sure, all of the Top 25 are important to the lives of dealers, their employees and consumers. Indeed, I considered doing a Top 30 this year, but that development awaits at least another year.

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*The ranking of the top twenty-five 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.*

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## 1. The Future of Franchised Auto Dealers in the United States (NR)

According to a growing number of industry observers, including the highly respected Bob Lutz, America's auto dealers could soon face a looming existential threat. Although I profoundly disagree with prophets of doom for the franchised dealership era, I concede the legitimacy and the reasonableness of the concerns, which have been prominently reported in *Automotive News* and other industry publications. Would-be retail competition for new car sales in the U.S. comes potentially from many of the world's biggest retail giants – Walmart, Amazon and Google, to name a few. In addition, auto manufacturers themselves continue to yearn for a day when they can become behemoths of retail vehicle sales and leasing in America.

U.S. economic history reveals examples of remarkably fast industrial changes, perhaps the most prominent and obvious one of the last century being the replacement of horses as the “engines” of everyday transportation in the early 20th century. Today's tens of millions of privately and governmentally owned automobiles and trucks, retailed almost entirely by dealers, saturate the nation's roads and highways.

The likely multiple impacts of a receding dealer body on the national economy would be monumental. That is not to say that the GDP or

even vehicle sales would necessarily decline. As contemplated by a bevy of futurists, this retail shift from franchised dealers to other varieties of outlets and sellers could actually see increases in the economic vitality of the auto industry, and no decrease in private auto acquisitions. But that hypothetical boom in the marketplace would come from new or reorganized retail entrants and differences in modes of travel.

A few major retail dealer groups have already abandoned their businesses, and *Automotive News* has sounded an early alarm suggesting the possible onset of a trend. *See, e.g.*, three articles in the August 19, 2019 edition: David Muller, “Moreno Retail in the rearview: Why a 15-store dealer took exit ramp;” Melissa Burden, “Told to adapt, some dealers opt out;” Melissa Burden, “A FRESH RESTART: Family selling its dealerships on helping other stores navigate changing business.” Some see these stories as harbingers of Bob Lutz's disappearing dealer landscape. But maybe not, and I say not.

Accompanying this marketplace turbulence are technological and other changes in the everyday vehicles that Americans operate. Electric vehicles (EVs) are already here in ever increasing numbers, and autonomous vehicles (AVs) may not be far behind as companies have already sunk tens of billions of dollars into development, with no end in sight. The

contemplated ride-share phenomenon generally may motivate ever more Americans to abandon their privately owned rides. Uber and Lyft are among the aspirants to seize control of that part of the marketplace. Some cities and towns have taken legal action in legislation and ordinances to make private driving more expensive, less convenient and socially objectionable. Some advocates for “green” transportation even tout the morality of limiting the numbers of privately owned motor vehicles. Among other things, they believe that automobiles contribute mightily to climate change which they see as the greatest threat to humanity and the environment. So where does all this leave the beleaguered franchised American car dealer?

In my opinion, traditional franchised dealers will continue as the dominant motor vehicle retailers for the foreseeable future. Retailing automobiles is a far cry from picking out new dishes from a shelf in Walmart. Inherent in auto sales and service are the tasks that go with professionally caring for complex machines that can maim, injure and kill human beings. Even in the initial purchase phase, competent car sales professionals give critical counsel to shoppers. Cars require regular maintenance and periodic repairs, and dealers generally do phenomenal work in keeping autos safe and reliable. While this article will not itemize the important and

valuable tasks of a franchised dealership, organizations such as the National Automobile Dealers Association can and do inform the public.

*Bottom line: Although 2020 and beyond will see lots of changes in what dealers sell and how they do that, the “dealer era” is far from over. For one thing, dealers and their organizations will not sit silently or idly by as new kinds of competition try to elbow them away. Instead, they will respond to any competition and continue to make persuasive cases that dealerships, with highly experienced and knowledgeable staffs. Their work for and counseling of consumers save both money and lives. As a group, dealers are consumer oriented, highly skilled, convenient and in the public interest. They, not newcomers to the retail auto business, will oversee the shifts in technology and environmental advances in marketing to America’s consumers. I will bet on the dealers. Despite political turbulence, I see 2020 as another good year for dealers.*

## **2. The Extraordinary Significance of the 2020 Election Cycle to America’s Dealers. National and Local Politics Still Threaten America’s Dealers (5)**

The 2020 election cycle will predictably be the most bitterly fought in living memory, launched by a possible presidential removal trial. If the impeachment does go to the Senate for final determination, the Upper Chamber would consider President Trump’s removal with virtually

every observer predicting Senate acquittal. As of the date of this publication, however, Speaker Nancy Pelosi has indicated that she might delay or even scrub the impeachment referral. The relevance of the President's impeachment to the 2020 elections is inescapable, but the actual impact remains uncertain.

Election results will start to shape business operations in 2020 and go into full swing the following year. Directly and indirectly, election outcomes and the ensuing government actions will impact how dealers operate, what they sell, and how much profit they earn. That's because candidates' economic visions are so different, and they demand quick action, even though, of course some candidates' promises never come to fruition, once in office. Suppose, for example, that new legislation requires what amounts to a punitive federal sales taxation or surcharge, based upon MPG or price. There are also issues of taxes on businesses, workforce rights, local traffic prohibition and regulation, the environment, and so on. Of course, actual legislative changes would not occur until offices turn over in 2021, but the campaigns will impact what people do with their money during 2020.

*Bottom line: To a growing segment of American activists, profitability and business growth are unfair aspects of a "rigged" system. Democratic debates in 2019 reflected this*

*philosophy, a philosophy that implies significantly more government control over businesses and the economy at large. The likelihood, however, is that President Trump will be in office as the Republican candidate, and that the 2020 elections will not cause drastic changes from the incentives that drive economic growth. Although new officeholders in 2021 may implement policies that either spur or stagnate dealer profitability and growth, the November 2020 elections should take place during another very good economic time for dealers, and may signal continuing good times thereafter.*

### **3. Factory Sales Performance Standards For Dealers Under Siege: Some Positive Legal Development Toward Rationality (1)**

It seems a long time ago that factory methodologies and standards for measuring dealer sales performance went virtually unchallenged. Despite demonstrable flaws, factory calculations of "expected" retail sales by a particular dealer were once viewed as sacrosanct standards by the factories, and dealers generally took the factories' measurements at face value. Even courts usually rubber-stamped factory numbers. No longer.

As set forth in previous annual editions of Top Legal Trends, factory standards for and measurements of dealer sales performance have been fully exposed as scientific voodoo, and the factories still fail to provide any rational defense



for their continuation of what amounts to a scandalous scam that sometimes gravely injures economically affected dealers. Since at least 2016, courts have often rejected franchisor calculations of “expected” sales, and they have skewered “average” as a minimum sales benchmark for dealers.

*Bottom line: The manufacturers’ quest for control over their franchised dealers through unfair sales metrics will continue with the usual vigor. At the same time, dealers will challenge unreasonable standards, with more frequent success than ever. Dealers must continue to challenge “average” as a minimum sales standard.*

#### **4. The Autonomous Vehicle Phenomenon Rolls Along: Where We Are, Where We Are Going and How Soon Might AVs Be Commonplace (2)**

Despite eye popping advances in modern technology, and notwithstanding collective boatloads of tens of billions of dollars in research and development, an era of autonomous vehicles on the highways has not yet arrived. Despite the growing presence of some self-driving vehicles now on the roads, the earlier forecasts of an onslaught by 2020 were mistaken. See, e.g., Andy Kessler, “Self-Driving Cars Roll Up Slowly,” *Wall Street Journal*, Dec. 16, 2019.

Among other things, the mechanics of autonomous cars are tricky. Human reactions to

emergent events, for instance, are difficult to replicate in machines, resulting in safety hazards. Several accidents have caused setbacks and delays in the early going. It is not a simple software function to “teach” an autonomous vehicle to respond to an erratic driver approaching from the wrong direction on a one-way street. Nevertheless, there is an expectation that, within a year or two or three or four or five, the phenomenon of self-driving machines will be a reality in large numbers. That expectation will probably not be met.

Furthermore, autonomous vehicles are not likely to replace human operated machines. Instead, at most, there will be lots of variety on the roads, with many consumers opting to own or lease both kinds of vehicles. Also, many of the perceived benefits of autonomous vehicles now exist in new, self-operated vehicles. But it may be a decade or more before Level 5 autonomy is commonplace.

*Bottom line: 2020 will not see a significant uptick in the percentage of autonomous vehicles on the roads, at least not at a high level of autonomy. Nor will 2021. Polls continue to show strong consumer preference for human control, but with technical advances that make the human drivers’ tasks simpler and their cars safer.*

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

The #MeToo era changes profoundly the way Americans interact when it comes to male-female relationships in the workplace. Dealerships have seen their share of #MeToo legal action, but most dealers have corrected the problem appreciably. Boorish behavior by men on a salesroom floor is not merely offensive; it can be unlawful as well. Legal consequences can be severe to the actor and his employer. Today women are less likely than ever to quietly tolerate gender-related misconduct.

*Bottom line: Women – men, too, but mostly women – will not stand for sexual exploitation or discrimination in the workplace. Every dealer should develop and publish policies in an employee manual that expresses zero tolerance of violative behavior. Dealers must emphasize such policies in staff meetings. Employees must know the details of the dealership's confidential reporting system. Dealers have to emphasize clear follow-up and enforcement procedures. Without them, sensible policies degenerate into empty platitudes. It is not only sound policy to have zero tolerance for sexual harassment and discrimination, but it also keeps the dealership and its workforce out of the legal perils that often follow such offensive behavior.*

*Good news: The #MeToo trespasses recede each year, and 2020 will be even better. Almost all dealers are taking positive action.*

## 6. Are Trade Wars Ending? If So, America's Dealers Could See Significant Benefits (6)

In December 2019, at least three major developments unfolded to impact U.S. trade for the better. Each of them could help dealers generate higher retail sales numbers and more profits, if they all play out in foreseeable ways. These are the three:

- A "Phase I" deal with China. See Lingling Wei, Bob Davis, William Mauldin, and Josh Zumbun, "U.S. Agrees to Limited China Trade Deal," *Wall Street Journal*, Dec. 13, 2019;
- House approval of United States-Mexico-Canada Agreement ("USMCA"); and
- Boris Johnson's landslide electoral win in the United Kingdom.

First, the China "Phase I" deal could spur more auto trade and lower inventory and retail prices. Not only is the impact favorable for vehicle sales, but the flow of lower priced parts made in China would be enormous. Supposedly, the parties expect to implement two more phases in 2020. Soon, we will see expert economic analyses indicating the likely upturn for dealers. But CAUTION: China is notorious for bending or breaking its promises, and everyone is wise to be wary. Nevertheless, if the Chinese deal holds, and



two more phases succeed, American businesses and especially dealers can celebrate.

Second, USMCA is hardly a perfect deal among the U.S., Mexico and Canada, but it appreciably improves the outdated NAFTA provisions, and it will likely pass the Senate in early 2020. Of course, it eliminates the painful standoff of 2019. As with China, USMCA will spark more sales and profits for U.S. dealers. Mexico's belated objections to labor inspections now seem resolved as of late December 2019.

Third, the stunning Johnson win in the UK will almost certainly foster the growth of an even more powerful set of trade alliances with the U.S. Product availability and pricing will benefit dealers across the board. This, too, can only benefit dealers.

In addition to these three signal events, look for other nations to follow suit in cooperative arrangements with the U.S. I predict that new deals with the European Union, which includes powerhouses Germany and France, are now more likely than ever. Asia (especially Japan which has already been working with the Trump administration) and Latin America, too, could add to the trade largesse, spurring, directly and indirectly, benefit for dealers in the U.S.

***Bottom line:** While all this is great news for American dealers, international trade is subject to vicissitudes that sometimes pop out of nowhere –*

*most obviously with China. But let us not rain on the parade. U.S. trade relationships will be fairer than ever, and dealers will capitalize on product availability and pricing. The December 2019 international trade events should launch positive returns for America's new car dealers in 2020 and beyond. Import branded franchisees will see the most benefit, but all brands will reap rewards. Consumers are also obvious beneficiaries, because wholesale and retail prices will drop.*

#### **7. The Stubborn Persistence of Regulatory Overreach, Despite Encouraging Actions and Signs (4)**

One of President Trump's core promises during his 2016 campaign was the reduction of unnecessary and wasteful regulations. The administration's record since 2019 deserves at least a B+ on regulatory reduction, but as any dealer can explain, many regulatory overreaches still plague them and other businesses across America.

***Bottom line:** One of the most common dealer complaints – for decades – has been the proliferation and intrusion of unnecessary and/or redundant regulatory requirements. The Administration will continue to reduce unnecessary regulations. That is a good thing, but not yet enough.*

## **8. The Brave New Cyber World: Security and Opportunity. The Data, Internet, Social Media, Identity Theft, and Privacy Minefield (7)**

The cyber arena offers both limitless opportunities in the most positive sense, and also a parade of horrors for those susceptible to an ever-more ingenious crop of defrauders and scammers. In today's world, every dealership must have a website, updated constantly, and more and more, the ability to generate direct cyber sales.

*Bottom line: Every dealer must have a cyber guru to stay current with fast moving technology developments. Dealerships stand to profit mightily from well-versed and skilled use of the cyber world, but it also must be vigilant in its measures to combat cyber fraud, thievery, identity theft and the like.*

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

Several kinds of threats to franchised auto dealers loom – either on the horizon or right on the doorstep. See Trend #1 which discusses the threats to overall dealer viability. It is nothing new to see attacks on franchise laws that exist in all 50 states. But now, especially with the Tesla challenges, consumers and state legislatures in some states listen to those who challenge the

reach of those laws. Dealers and their many organizations will battle these challenges.

*Bottom line: NADA, state and other dealer associations must continue to be the front lines in assuring legal fairness for franchised dealers, and for the consuming public. The good news for dealers on this point is that these associations are highly experienced, skilled and motivated. Their work for dealers continues to be both effective and indispensable. Thus, dealers have a clear advantage in accurately portraying the many benefits of franchise networks to the public in experienced sales and service operations.*

## **10. Elusive CSI: What Does CSI Mean and Is It A Valid Indicator of Real World Customer Satisfaction? (9)**

Everyone in any kind of business aspires to satisfy customers. But do automakers' Customer Satisfaction Indexes (CSI) really reflect true satisfaction measurements? The emphatic answer is: No, they do not. CSI surveys themselves expose the weaknesses of CSI. They all call for subjective responses and statistical controls are non-existent. Factories contend that "loyalty" rankings solve the subjectivity problems. But they do not as they derive from subjective responses as well.

*Bottom line: No matter how flawed, some iteration of CSI for all brands is here to stay, and methodologies will continue to be ever-changing,*

*moving targets. That said, dealers should be on the alert for scores and rankings that can generate an unfair impact. If that happens, remedies under state laws are available.*

### **11. Marketing and Advertising in an Age of the Internet, Website Marketing and Social Media: Be Careful Out There (10)**

Once upon a time, reaching out to attract potential customers was a reasonably simple and straightforward proposition. In years and decades past, retailing new vehicles occurred almost exclusively at dealership locations. Advertising was mostly local – in print, over the airwaves, on billboards, and in the mail. Now, there are dealers who retail most of their inventory online, and reach consumers everywhere.

A recent appellate case in New Jersey helps to illustrate legal disputes that can arise when retail transactions between dealers and customers are conducted over the internet. See *Joseph Jardim v. Michael Edward Overly*, Superior Court of New Jersey, Appellate Division (Nov. 14, 2019). In this case, “defendant Michael Edward Overly placed a ‘listing’ on the website of Hemmings.com advertising for sale of his 1960 Buick Invicta, a vintage automobile, ‘to whomever was willing to purchase it wherever they may be.’” The buyer, a New Jersey used car operator, purchased the car and encountered what he

perceived to be significant problems, and brought suit in state court in New Jersey for breach of warranty, unjust enrichment, common law fraud, and violations of the New Jersey Consumer Fraud Act. To make this discussion brief, the end result was that the matter was decided in favor of the defendant in the trial court, and the Appellate Division affirmed. It found that there was insufficient “purposeful availment” that would allow the court to find personal jurisdiction in the courts of New Jersey. The broader point here, however, is to dealers: watch out for what you may face when you sell via the internet.

In today’s litigious and technological environment, texting, emailing, robot calls and other types of communication can be an entrepreneurial minefield. Even dealership websites have spawned expensive litigation and settlements for non-compliance with the Americans with Disabilities Act. See Lindsay Vanhulle, “ADA lawsuits prompt dealerships to make websites more accessible,” *Automotive News*, Nov. 9, 2019.

*Bottom line: In policy manuals dealers must say clearly what is and is not appropriate when dealership employees communicate through social media. Stay vigilant in assuring legal compliance with all applicable laws and regulations governing advertising and sales practices.*

## 12. Recalls (11)

On any given day in America, millions of new vehicles sit idle, under factory recall. It is not that today's vehicles have more defects than before, or that manufacturing is less competent – not at all. Factories pump out safer and better products than ever before. Product liability drives factory risk avoidance, and manufacturers prefer to take their products off the streets if there is even a slight risk of malfunction, especially if safety is involved.

For dealers, cars on the lot under recall generate a logistical and financial headache, not to mention the irritations of customers. Dealers should seek appropriate compensation from their franchisors. It is they who are solely responsible for defects that caused the recalls.

*Bottom line:* Dealers need to be diligent in daily updating their inventory information so as to know currently what may be subject to recall. For sure, you need to check online with SafeCar.gov, run by the National Highway Traffic Safety Administration or other comparable resource, but neither that agency nor its useful website is a panacea. For a practical, operational guide, see Mark Paul's Safety Recalls which provides a thorough primer for dealers.

## 13. “Subscription” and Other Initiatives by Franchisors to Trespass on Retail Sales and Seize More Profits for Themselves – at Dealers’ Expense. Is this Trend on Life Support? (13)

In another year, the “subscription” phenomenon may be dead. Franchisors tried to market vehicles in ways that would allow consumers to exchange their cars for new ones at regular intervals. Dealers suspected – correctly – that factories deceptively intended to make inroads into direct marketing and sales.

For lots of reasons, however, the subscription phenomenon fizzled. *See, e.g.,* Michael Martinez, “Ford agrees to sell Canvas to Fair, bowing out of vehicle subscriptions,” *Automotive News*, Sept. 12, 2019. Here is an understatement: “While Ford no longer has a subscription platform, the automaker said it remained open to working with its dealers on new, innovative programs.”

*Bottom line:* The latest research suggests that recent attempts by American franchisors to insert themselves into retail sales through subscriptions and otherwise have faded. One hopes.

#### **14. Legacy and Succession: Don't Let Your Dealership Legacy Become a Legal Nightmare (14)**

A dealer owner who fails to plan for succession invites costly consequences. Too often, the lack of any clearly defined and understood line of dealership succession causes heirs to feud, litigate and waste dealership resources. While this is a problem with all family owned businesses, it is especially acute in the new car arena where, among other things, a franchisor is directly involved.

*Bottom line:* Every dealer should have a well-conceived succession plan, not prone to reasonable dispute after the owner's death, disability or retirement. Make sure heirs know what to expect.

#### **15. Involuntary Termination: Threats, Realities and Dealer Responses (16)**

Franchise termination is the proverbial "death penalty" for a franchised auto dealer. Often, franchisor letters threaten the possibility of a subsequent termination letter, and try to extract concessions from their threatened dealers.

*Bottom line:* Expect only a few franchise termination notices to be delivered across the country in 2020. When a termination notice does arrive, get an experienced automotive franchise litigator – immediately!

#### **16. Buy-Sell Activity (17)**

For 2020, the likely buy-sell activity will continue to flourish, with high values and multiples for "hot" brands. Buying dealers now create a demand that far exceeds the supply available from selling dealers.

*Bottom line:* 2020 will again be a good time to sell dealerships with values, especially of high line brands, continuing to grow. The Haig and Kerrigan brokerage organizations both periodically provide useful information in their publications about buy-sell trends. Dealers considering buying or selling should obtain those publications.

#### **17. Rights of First Refusal ("ROFRs") (18)**

For about 30 years, I have spoken out against the use of Rights of First Refusal (ROFRs) by auto franchisors. Virtually all dealer agreements contain such provisions. Five states prohibit ROFRs by statute or case authority. In my opinion, they discourage competition, and artificially lower dealership values.

*Bottom line:* I oppose the legality of factory ROFRs. For many reasons, they should be prohibited in all states, not just the five that currently outlaw them.

## 18. Alternate Dispute Resolution (“ADR”): Some Progress in Arbitration (19)

Nearly everyone is aware that American court systems – federal, state and local – are backlogged and slow. Rapid justice in courtrooms is a rarity. During the last couple of decades, therefore, various kinds of alternative dispute resolution alternatives have proliferated in dealer agreements. Retail sales agreements often include the possibilities of face-to-face negotiations, mediations and/or arbitrations. Under federal law, dealer agreements cannot mandate binding arbitration between factories and dealers. 15 U.S.C. § 1226.

*Bottom line:* ADR – mostly in the form of arbitration with consumers – continues to be a legal moving target. I advocate sales agreements with customers that would preclude mass or class actions against the dealer. But be alert to cases that impact the viability of such provisions in your state. Be certain that the customer can reject any arbitration clause.

## 19. Dealer Associations and Legal Standing; Should They Have It? (20)

I am for dealer association legal standing. That said, such associations should affirmatively use standing only rarely for exceptional reasons.

*Bottom line:* Although there is considerable disagreement among dealer counsel on this question, I contend that there is no downside for

associations to have legal standing, as long as they are discerning in exercising the right.

## 20. Workforce Issues (21)

For years, I have urged dealers to adopt, implement and disseminate comprehensive employee manuals. Today, no dealership should be without one. Moreover, the manual should be crafted by experienced counsel, so as to reasonably cover all the anticipated workforce issues in clear, simple and enforceable language.

*Bottom line:* Workforce law and policy questions fill both books and courtrooms. The subject requires constant vigilance by dealership leaders, along with regular training. If you do not yet have a dealer manual, get one. And update it every year as needed.

## 21. Warranty Reimbursement (22)

The long fight for dealers to receive appropriate compensation for warranty work – both for labor and parts – is not over. Yet, there has been so much progress that, this year, warranty reimbursement comes in only at #21 of 2020's Top 25.

*Bottom line:* For decades auto franchisors consistently forced underpayments to dealers for their captive warranty labor and parts replacement. For dealers, it was an unfair and losing proposition to subsidize their brand's warranty. Thankfully, this unfairness, wrought by



*one-sided factory bargaining power, is close to an end thanks to nationwide legal and legislative efforts, along with the perseverance of many state associations.*

## **22. Natural Disasters, Terrorism and Unrest (23)**

Unfortunately, natural disasters, terrorism and unrest pose foreseeable dangers to Americans and to the economy. Dealerships, their inventory and their employees are more vulnerable than most, as they often operate in enormous, open facilities. As some dealers attest, the cost of one major catastrophe can be ruinous, and some kinds of insurance are difficult to acquire, if available at all.

*Bottom line: The key to this one is to develop well-conceived emergency information, and to publish it as an addendum to the dealer manual. If reasonable catastrophic insurance is available, get it.*

## **23. Encroachment and Franchise Modification (24)**

Legal actions by competitive, same line dealers to challenge the establishment or relocation of a same line competitor within a defined, nearby geographical area have apparently tapered off, and will probably continue to do so.

*Bottom line: Because markets are more settled than in the immediate aftermath of the Great Recession (and two major auto industry bankruptcies), protest actions will not be frequent in 2020. When they do happen, however, the stakes for the affected dealers are nearly always high.*

## **24. Factory Audits (25)**

Some dealers receive notice of a factory audit with more trepidation than it merits. This concern is way overblown as most audits are routine, even if annoying and inconvenient.

*Bottom line: If your franchisor decides to audit any aspect of your business, cooperate. For any number of reasons, factories have clear contractual rights to audit in most situations, such as for warranty and incentive claims. Make sure your operations are clean and your records current, and you will not need to worry about what may lurk in your warranty and incentive records, and the like.*

## **25. Minority and Female Dealer Representation (NR)**

No doubt about it: Minorities and women remain proportionately underrepresented as dealership owners. Franchisors do make efforts to reduce the disparities, but it is a difficult road. Many such efforts in the past have failed, some because minority appointees were inadequately capitalized or trained.

***Bottom line:** Minorities and women aspiring to be dealer owners should develop the best resumes possible, and seek assistance through factory personnel assigned to recruit minority dealers.*

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