



In this Issue:

Feature Articles	1, 3
President's Message.....	2
New Members.....	10
Advertising Opportunity.....	12
Board of Directors.....	13

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2013's Top Twenty Legal Trends For Automobile Dealers

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

1. Dealer Legal Strategies in a Year of Remarkable Turbulence, Uncertainty, Political Rancor and, Perhaps, Opportunity or Turnaround (NR)
2. Coping with Franchisor Strategies: Revving up on Facilities, Pressures, and Incentives; The Two-Tiered Pricing Challenge (1)
3. A Key Developing Area to Watch: The "Fiduciary Relationship" (NR)
4. Economic and Regulatory Trends and Domestic Political Uncertainties That Impact the Legal Rights, Strategies, and Decision-Making of Auto Dealers in America. What a Dealer Needs to Consider in Strategic Planning During a Time of Uncertainty; Consumerism. (1)
5. Involuntary Franchise Terminations, Termination "Threats," Brand "Withdrawals," "Pressured" Buyouts, Financially-Driven Resignations, Consolidations, and Rights of First Refusal (4)
6. Coping with Daily Challenges of the Law: The Legal Audit Checklist (5)
7. Alternate Dispute Resolution (ADR) (12)
8. Taxes (6)
9. Privacy Concerns and Identity Theft (7)
10. Environmental Regulation Explosion (19)
11. Internet Marketing (8)
12. Buying and Selling Dealerships: Factory "Stealth" Conditions; Right of First Refusal: The Threat (9)
13. Living with the Threat of Terror, Unrest, and Natural Disasters: Doing Business in an Era of Constant Vigilance (10)
14. Credit Chaos: Floorplans and Other Credit Stress Points for Dealers: GM, Chrysler. Where Are the Non-Captive Lenders? (11)
15. Workforce Issues: Employee Rights and Benefits, an Activist NLRB, the Prospect of Unionization (Card Check and Mandatory Arbitration), and Health Care Legislation (13)
16. Audits of Incentive or Warranty Claims: Dealer Beware (14)
17. Customer Satisfaction: CSI vs. Reality (15)
18. Retail Reimbursement for Warranty Work and Parts (16)
19. Encroachment (Protest Laws) (17)
20. Minority and Female Representation (18)

NOTE: 2012 rankings are in parentheses; NR (Not Rated in 2012).

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President's Message



Patricia E.M. Covington
Hudson Cook, LLP
NADC President

When you attend our meetings or follow the latest postings on our list-serve, are you ever impressed with the wide range of matters that dealer counsel handle on behalf of their dealer clients? That thought came to mind as I was attending sessions at the recent meeting of the American Bar Association's Business Law Section's Consumer Financial Services Committee.

The CFS Committee is the ABA's meeting spot for all of us consumer credit lawyers. The Committee meetings draw a couple of hundred lawyers, including consumer advocates, academics, in-house lawyers, outside lawyers and regulators, so in one sense the audience is diverse.

The presentation contents seem diverse, as well, covering federal disclosure laws, anti-discrimination laws, privacy, e-commerce, social networking, arbitration and state law developments. All types of credit are covered, including mortgages, credit cards, payday lending, auto finance and leasing.

But if you are a car credit lawyer, just about all of the other car credit folks in attendance do pretty much what you do. And what the car credit folks do is very often fairly closely related to what the lawyers involved in the other sorts of credit do. We pretty much all speak the same language.

That was the thought I had when I considered the breadth of the practice of NADC members. We have people who do the F&I compliance practice, that is my area, but we also have franchise lawyers, tax lawyers, estate planners, employment and labor lawyers, environmental lawyers, M&A lawyers, class action litigators and a number of other specialists. The practices are so diverse that often there isn't a common language or common related thread binding them all together.

Except for the fact that all of us represent dealers.

That's the glue that holds the diverse specialty areas together. And one of the most valuable things about the NADC, in my experience, has been the opportunity to attend our conferences and listen to knowledgeable lawyers discuss problems and legal issues that are removed, and sometimes far removed, from my daily practice.

The experience has left me with an appreciation of the extent of the regulatory and legal burden that our clients face. I wonder whether state and federal regulators and legislators have any appreciation of the costs to dealers in money and time dealing with all of the rules they face.

But I digress. I hope that you have found the NADC to be as rewarding as I have, and I hope to see you at our upcoming conference, April 28th to 30th in Laguna Beach, California. We have a varied agenda with panels that mirror the diversity of our association. We'll be hearing speakers present on the following topics (*and we'll also hear spirited questions and discussions*):

- Federal Mandates Impacting Service, Body, and Parts Operations
- Selecting the Right Jury for a Dealer Case
- Vehicle History Reports
- Federal Law and Regulatory Update on Tax Legislation and Obama Care
- Perennial (actually semi-annual) NADA Update
- Manufacturer Performance Standards
- Manufacturer Facility Agreements
- Attorney General and CFPB Investigations
- Ethics
- Labor & Employment

This may sound corny – but I feel blessed to have the opportunity to serve as the President of this fine organization. I hope that I have contributed to its continued success and leave it just a little bit better than when I stepped into my role as President. Most importantly, I hope I haven't "messed up" anything so badly that the next President can't fix it!

All the best to my colleagues and Happy New Year! ■

Reminder!!!

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Laguna Beach, CA**

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- Federal Mandates Impacting Service, Body, and Parts Operations
- Selecting the Right Jury for a Dealer Case
- Vehicle History Reports
- Federal Law and Regulatory Update on Tax Legislation and Obama Care
- Perennial (actually semi-annual) NADA Update
- Manufacturer Performance Standards
- Manufacturer Facility Agreements
- Attorney General and CFPB Investigations
- Ethics
- Labor & Employment

Registration can be found at:

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The room block deadline for hotel reservations is April 5, 2013. Please make your reservation early to avoid the room block selling out.

The deposit is refundable if the Montage receives notice of cancellation at least three days prior to the scheduled arrival.

Travel Plans:

Please arrange your travel to join NADC at the opening cocktail reception on Sunday, April 28th from 6:00 – 7:30 pm. The conference will conclude on Tuesday, April 30th at 3:00 pm. If you plan on spending some extra time in Laguna Beach please note that the group rate will be made available three days pre (April 25, 2013) and post (May 3, 2013) based upon hotel availability.



2013's Top Twenty Legal Trends For Automobile Dealers

Feature Article

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

Introduction

On January 1, 2013, the U.S. House of Representatives averted the so-called "fiscal cliff" by approving the tax and spending bill that had been overwhelmingly passed by the Senate. Basically, this legislation means that the Bush-era tax rates have been preserved for all but the highest 1 to 2% of earners, and there will not be the huge tax increases that a lack of legislative action would have triggered. This political solution was followed by reports that 2012 marked the third straight year of over ten percent growth in annual U.S. new car sales. An NBC News headline on January 3 heralded optimism for dealers: "Fiscal Cliff" Resolution Good News for Auto Industry." An R.L. Polk study forecasts 15.3 million new vehicle registrations this year, and its lead analyst for forecasting in North America sees "the 16 million range by 2015."

Wow! Reasons for dealers to celebrate? Maybe..., but maybe caution makes better sense. The "cliff" deal included virtually nothing on the runaway spending by the federal government, and prompted predictions of more divisive politics. Nor did it address defense "sequestration" or the debt limit. Hard questions remain for the economy at large, and for dealers.

In 2013, car dealers (and American businesses generally) face daunting challenges of multiple major uncertainties hanging over America's economic fragility, marketplace uncertainty, growing and unsustainable debt, repeated "debt ceilings" to be fought over, more "fiscal cliff(s)," increased compliance costs, regulatory growth and complexity, high unemployment, and volatile political standoffs. This all may sound familiar, but the magnitude of the unknowns takes 2013 (and probably beyond) into uncharted territory.

At the end of 2012 (prior to the fiscal cliff nail-biter), the Wall Street Journal put it this way: "Washington's budget gridlock is unsettling consumers and businesses, raising the risk that economic growth would be hurt next year [2013] no matter what Congress does in the coming days." The New York Times' David Brooks was far from optimistic: So except for a few rabid debt-deniers, almost everybody agrees we have to do something fundamental to preserve [entitlements]. The problem is that politicians have never found a politically possible way to begin. Every time they tried to reduce debt, they ended up borrowing more and making everything worse.

Some commentators and economists do not share visions of doom or gloom. To illustrate the extremities of differing forecasts, consider that some forecasters still predict a likely return to recession in 2013,

while a few see the Dow Jones Industrial Average going to 17,000 or higher by year's end. Recent energy exploration innovations and discoveries have prompted predictions of U.S. energy independence in the next decade, and some see this development as a panacea, with both short-term and long-term boosts to the economy – freedom at last from OPEC threats. Others say that, no matter what we do now, it will take at least 15 years of serious and targeted corrections to fix the debt-related issues, which have not yet been addressed by President Obama. Perversely, a poll of major law firms indicated a high level of optimism for lawyers in 2013; it's perverse because many might observe that good news for lawyers inherently heralds bad news for everyone else. For dealers, this year's unprecedented construct calls for especially discerning analysis and planning. This is because dealership sales (as well as service business) will be tied tightly to the overall economy.

The other side of this wariness is opportunity and a prospect of continuing positive turnaround for small businesses. But, in my opinion, a broad and full recovery across the economy will take longer than a single year, even in a best case scenario. Regardless of how the general economy goes, though, there is almost always a well-conceived upside for some or many, and there is a growing sense of optimism voiced by some auto industry observers. "Automakers... reported their strongest sales year since 2007, ... and promising more growth in 2013." Bill Vlasic, "Automakers End 2012 With Sales at 5-Year High" (New York Times, Jan. 3, 2013). It is certainly possible that this optimism for the new car business in 2013 will be substantiated. The trick is to avoid foreseeable pitfalls, yet capitalize on the upside of a tentative, lackluster, or volatile marketplace. Easier said than done, you say. And you are right.

In unsettled economic cycles, dealers should be especially wary of factory pressures and persuasion to commit to costly investments. Instead, stay with solid business judgment. A straightforward analysis of the volatile mix of politics, economics, and legal/regulatory issues unveils the nature and depth of both opportunities and risks. As of the end of 2012, car sales were on an upward trend of over 10% on an annualized basis for the third consecutive year, and projections of more than 15,000,000 new auto sales can now be found in multiple forecasts for 2013. GM and Chrysler – both bankrupt in 2009 – have been touted as success stories, with glowing forecasts for 2013, along with most other carmakers.

But sunny predictions depend, to some degree, on a worldwide turnaround. "Globalism" has proven to be a resilient reality in the 21st

Century. International trade and financial markets are so intertwined that major economic events across the planet influence sales here, and vice versa. And globalism has taken a decidedly negative economic turn: the worrisome condition of the European Union and its debt-ridden members – Greece, Italy, Portugal, and Spain – not to mention the uncertainties in Asia and elsewhere, confound, confuse and stunt the U.S. domestic marketplace. We hear the daily warning: “We don’t want to become another Greece.” There is also the powder keg environment of the Middle East, not to mention the unknowns of China, Russia, and even North Korea. These mega-considerations are not just for the Fortune 500; they impact even local U.S. businesses, and retail car sales and services are particularly vulnerable to broad economic trends. We saw a long-term downward spiral, starting in 2008, and we know how dealers took a hit, especially in the GM and Chrysler bankruptcies of 2009. Dealers are well-advised to ponder their daily and strategic decisions with these variables in mind.

Thus, for the first time ever, a Top 20 legal trend – and it’s #1 – identifies multiple uncertainties and risks, while also pointing out the kinds of opportunities that may be on the rise. Positive turnaround is possible, even though skeptics still seem to be in the majority. The U.S. is in profound and unprecedented debt, and spending is on a trajectory that could bring that national debt to \$21 trillion or more by 2016. Yet many smart people in America are trying to resolve the entrenched problems, and, for dealers, there’s still headline positive news about car sales. For the dealer, it is a classic Risk-versus-Benefit analysis, but it’s an analysis on steroids. America remains the world’s economic powerhouse economy; its resurgence from difficult times has been a recurring phenomenon since World War II. 2013 might see such a resurgence with continued growth in sales, and, hopefully, a rise in employment numbers. But such happy days are hardly a certainty for the year.

The continuing and growing list of factory initiatives, imposed or urged upon American dealers and dealer networks, earns a strong second position among legal trends for dealers. Since the nominal end of the “Great Recession” in 2009, dealers have witnessed an escalation of aggressive brand programs of varying cost and inconvenience to them. These range from facility imaging to site control to implied (or even explicit) sales mandates. A few franchisors are making both veiled and overt threats. Most provide tantalizing incentives to those who heed factory cajoling. Inevitably, there has been considerable debate about factory tactics, as well as reluctant dealer compliance, and some resistance. State franchise laws continue to be amended to counter perceived abuses, and 2013 will see lots of activity in this enduring trend.

At the same time, a relatively new application of a long-standing concept has given dealers cause for some optimism in the ever-vigorous battle to ease some of the franchisors’ overwhelming advantages of economic power. The question raised by Trend #3 is whether a fiduciary relationship between dealers and their franchisors will be

established in the courts. A few courts have now allowed dealer claims of fiduciary breaches by auto franchisors to proceed. This could be a game-changing development. Fiduciary obligations are both fastidious and powerful. If fiduciary causes of action against auto franchisors become standard in appropriate cases, and courts hold that auto franchisors stand as fiduciaries with their dealers, the duties owed by automakers to dealers will be greatly enhanced across the board, beyond even some of the most formidable protections of state statutes. For reasons set forth in this article, I submit that the overwhelming detailed control and power of franchisors over their dealers should establish a fiduciary relationship.

With the momentous elections of 2012 now receding in the rear-view mirror, the practical consequences for 2013 and beyond will impact several of the important issues for dealers. From a purely economic vantage point, there is actually cause for dealers to be optimistic. An economic upturn in 2013 would also have legal repercussions, both positive and negative.

For example, when indicators suggest that there could be significant upward spikes in retail auto sales – as appears to be the case now – automotive franchisors prospect for ways through their dealer networks to hone their interbrand competitive edge. This usually

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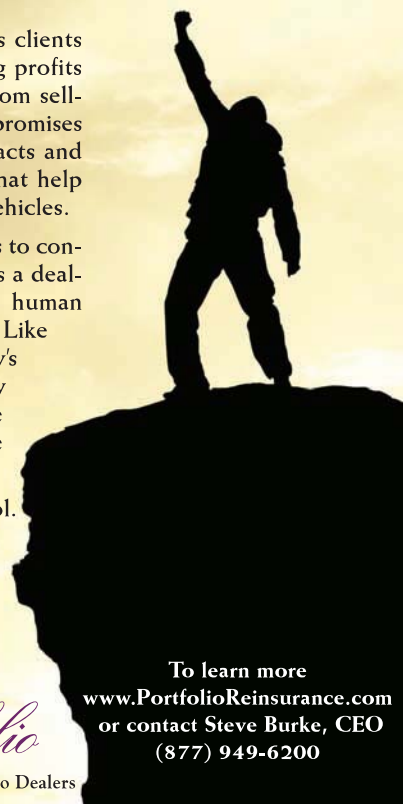
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translates into “programs” or “initiatives” that these franchisors perceive as ways to enhance brand value and spur retail sales. For the dealer, this kind of emphasis might (or might not) boost sales and generate new business, but it also means more factory attention to dealership facilities, CSI, and sales performance.

While the leading trends get a disproportionate share of emphasis, all 2013’s Top 20 deserve your attention.

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. Dealer Legal Strategies in a Year of Remarkable Turbulence, Uncertainty, Political Rancor and, Perhaps, Opportunity or Turnaround.

“I’m really getting pushed by visiting factory reps to sign a facilities’ renovation commitment. It will cost me over a million dollars, maybe double that. They also want me to sign on to other commitments, including over a decade of factory site control and promises about performance, sales and CSI. I’m really torn – and perplexed. In return for my commitments, they are pledging both better allocations and incentive monies. I don’t know what to do.”

The above quotation is an edited version of the kind of dilemma experienced by many dealers across many brands. GM, for example, is offering dealers generous cash payments if they commit to facilities upgrades and site control (among other things). Others too, offer tempting cash payments and incentive eligibility in a variety of initiatives and programs. Yet, for dealers, some programs – tempting as they are – may turn out to be Faustian bargains, in a year that looks turbulent and unpredictable.

For example, dealership buy-sell activity and goodwill valuations are linked to the overall economy. In late 2012, such transactions were up in both numbers of deals and prices. “[B]ut experts say a failure to resolve the ‘fiscal cliff’ impasse in Washington could mean a rocky start to 2013.” Bruce G. Hoffman, *The Detroit News* (Dec. 27, 2012). Now that the end-of-year fiscal cliff is “resolved,” more, even greater, obstacles to economic stability loom ahead.

Important (expensive) business decisions will be especially difficult for dealers, because, for 2013, so many factors to consider in making investments are simply not in the dealer’s control. Nor are economic outcomes easy to predict, as illustrated by the stark differences of views expressed by respected economists. And, in this unique year, the trajectory of the economy may be impacted both profoundly and directly by actions or non-actions of politicians, especially, but not entirely, at the federal level.

For example, will there be “tax reform”? And, if so, what will that reform entail? The “Bush tax cut” debate is over, but profound long-term policy questions remain. Will there be a bipartisan effort to rein in deficit spending and positively impact the national debt (now approaching \$17 trillion)? (Answer: there will be a battle royal.) Will there be battles over the debt limit? (Yes.) Has the “fiscal cliff” been resolved? (Yes, but with more cliffs looming.) How will funding issues about Medicare, Social Security, and Obamacare be addressed? (With political rancor.) Where will interest rates and inflation be in the coming months? (Probably low.) Will political promises to simplify and reduce the regulatory maze be fulfilled? (Never.) Will new and better-paying jobs be available so that more Americans can buy new vehicles in 2013? (Maybe.)

Let’s look at some of the “good” signs for dealers in the economy, as well as some of the bad. Not surprisingly, some of these signs have both positive and negative aspects.

Positive Signs:

- “Bipartisan” congressional and presidential comments about fixing the economy;
- The “Bush tax cut” debate was resolved (sort of);
- Attention to deficits and the debt;
- Recovery signs in employment;
- Consumer confidence uptick;
- Foreclosures bottoming out;
- “Pent-up” demand for new cars;
-

Negative Signs:

- Continuing political rancor;
- High deficits for years and growth of the debt;
- Reductions in federal spending and cures for entitlement nowhere in sight;
- Unfunded and unsustainable government commitments;
- Long-term tax reform not likely soon;
- High unemployment;
- Polls indicating that consumers think we are headed in the wrong economic direction;
- Proliferation of new regulations applicable to the auto industry and small businesses;
- High national debt, and continuing trillion-dollar-plus deficits.

Almost daily, I discuss the practicalities of near-term and long-term decisions with dealer clients and friends. In years past, megatrends in the economy were always less important to most dealers than “direct” dealings such as monthly allocations from the franchisor, or qualifications for factory incentives, or a hot product. This year, the conversation has to be longer and broader. For example, the Obama-vs-Boehner “fiscal cliff” negotiations showed how adversarial, how heated and how emotional the process of lawmaking will continue to be. Experience instructs most small businesses to conserve resources in such circumstances.

How does the prudent and careful dealer strategize in the context of so many seemingly ambiguous or even contradictory indicators? The analysis has to be fact-driven, taking into account both the big picture of the economy and the specifics of a brand, local conditions, and the individual dealer's financial circumstances.

For example, the potential acquisition of a BMW or Mercedes dealership near a major city will generate significantly different questions than the possible purchase of a Buick-GMC store. But that kind of consideration has always been present. What is different now? Among many other things, part of the answer is that luxury purchases tend to withstand national and regional economic downturns much better than brands with lower retail price and lower grosses. I've been an industry observer for over three decades, and this year, the American dealer must be more attentive than ever to the legal, political, and economic/financial environment.

Whether the pending decisions involve a buy-sell, facility renovation, inventory increases, or hiring, the mega-economic factors are the elephants in the room. The bottom line is that dealers should commit to heavy or long-term investments only when and if the business case is solidly grounded in facts and prudent assumptions. In my consultations with dealers, we carefully enumerate not only the obvious costs and benefits of the project under consideration, but now also the many big-picture risks that hang over the economy.

OUTLOOK:

Choppy seas for 2013, with lots of unknowns at the macro level. Not a year for extravagant risk-taking, but rather, for focused and well-planned specific strategies. For buy-sells, some acquiring dealers will take advantage of relative bargains. Laws and regulations that affect business practices will interfere, more and more, with the daily conduct of dealership activity.

2. Coping with Franchisor Strategies: Revving up on Facilities, Pressures, and Incentives; The Two-Tiered Pricing Challenge.

For 2013, virtually all car brands will continue with, and accelerate, initiatives and programs to influence dealer operations. These will include brand imaging, facility renovations, increased space requirements, exclusivity standards, de-dualling, site control, and coercive incentives related to retail sales and CSI. Dealers will endure combinations of rewards, threats, and persuasions from their franchisors. Although the risks and expenses of such initiatives are mostly borne by dealers, there is often no clear expectation that dealers will see a meaningful return on their investments. The NADA has sponsored studies that, so far, seem to confirm the lack of economic justification for (often) heavy dealer investments. Yet we have witnessed the growth of explicit threats – including franchise termination – as well as incentive-based coercion.

Moreover, the “two-tiered pricing” phenomenon is back in full flower. It takes many forms, but fundamentally, “two-tiered pricing” envisions rewards or incentives to dealers who satisfy certain benchmark

standards in retail sales. In effect, those dealers who fail to achieve (or opt out of) the required sales benchmark pay more per vehicle for their inventory than those who qualify for the payments. Thus, two-tiered wholesale pricing arguably puts non-qualifying dealers at a competitive disadvantage. It is also controversial, because of the inherent appearance – or reality – of discriminatory wholesale pricing by auto franchisors.

We are witnessing a flurry of franchisor initiatives that, arguably, contain blatantly unlawful provisions. For example, some programs demand that dealers waive in advance significant legal rights. There have been instances of pre-signed resignations; and coerced promises to perform at above-average levels. For most dealers, it makes no sense to sign “agreements” that confess to current “deficiencies.”

OUTLOOK:

Dealers will have to be especially watchful and cautious as auto franchisors push for written commitments across a broad spectrum. Look for legal disputes where dealers challenge a host of franchisors' initiatives, including brand exclusivity, imaging, two-tiered pricing, allocations, site control, sales objectives and other issues. “Agreements” containing clauses with dealers admitting deficiencies and/or promising “above average” sales and CSI performance will be pushed by many brands.



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3. A Key Developing Area to Watch: The “Fiduciary Relationship.”

In a potentially promising development for America’s dealers, a few relatively recent cases stand for the proposition that automotive sales and service agreements, together with the exercise of power and control over dealers, may establish a *fiduciary relationship* between the auto franchisors and its dealers. This would be an especially meaningful legal determination for dealers, because fiduciary status in the relationship with auto franchisors would compel the factory to adhere to especially discerning requirements when it considers actions and policies that may harm particular dealers. A fiduciary is bound to act in the best interest of the beneficiary of that duty. Today, dealers in all 50 states rely primarily upon formidable and often detailed protections contained in state statutes, and those laws should continue to be critical arsenals for dealers. Such laws remain critical factors in efforts to tame the automakers’ one-sided bargaining power. And yet, for reasons set forth here, if the dealer’s factory relationship is deemed, as a standard legal precept, a fiduciary one, the result could be almost as far-reaching as the existing state law protections.

What is a fiduciary relationship? The concept of a “fiduciary” has a long and well-established history. Basically, there are four elements required to form a fiduciary relationship: (1) the vulnerability of one party to the other which (2) results in the empowerment of the stronger party by the weaker which (3) empowerment has been solicited or accepted by the stronger party, and (4) prevents the weaker party from effectively protecting itself. This status can be critically important for both the party to whom the fiduciary obligation is owed, and the party owing that obligation. The duty of a fiduciary to act for the benefit of the other party is extremely high as is the corollary duty not to act in a way that causes harm. For example, a guardian holding the monetary assets of an infant, or a banker entrusted with escrow monies, would be common examples of well-established fiduciary relationships.

Arm’s-length transactions – and franchise relationships in general – taken alone, are insufficient to demonstrate the existence of a fiduciary relationship. Numerous franchise cases hold that a franchise relationship is insufficient to make the fiduciary connection. Unless fiduciary status is created by statute, the circumstances must be “exceptional” for the fiduciary relationship to exist. If one party holds what amounts to a “life or death” level of power over the other, along with the other’s dependency, the factors will weigh heavily in determining whether the relationship may be a fiduciary one.

What would it mean to dealers if their franchisors are deemed to be fiduciaries? In a word, the consequences could be dramatic. There are legions of cases, reported over many years, in which courts have consistently held that a franchise relationship does not establish a fiduciary relationship.

Do auto franchisors hold the kind of power over dealers that may establish fiduciary relationship? In the opinion of the author, and as buttressed by a small number of recent cases in which car manufacturers’ dismissal motions were denied, the answer is a resounding yes. In a recent case on behalf of a Chevrolet dealer, our client pleaded “fourteen separate and distinct factors which demonstrate that [the manufacturer] has significant economic power over it.” These points are illustrative of the franchise relationships for all car brands. In that case, as pleaded in the complaint, those factors included the following:

- (1) GM is the sole supplier of new Chevrolet car inventory and GM parts to [the dealer] without which [it] could not operate and would not exist;
- (2) GM characterizes the Sales and Service Agreement as a “Personal Services Agreement”;
- (3) GM licensed [this dealer], and all of its dealers, to use the Chevrolet name and trademark and approved the use of the brand’s identification in [the dealer’s] trade name;
- (4) GM imposes a non-negotiable standard form of Dealer Agreement... which effectively governs and regulates virtually every aspect of the dealership’s retail business;
- (5) GM’s direct supervision over [the dealer’s] operations requires, *inter alia*, the dealership’s submission of monthly detailed reports on all financial aspects of its daily business – *e.g.*, new and used car sales, inventory in stock, parts sales, and sensitive, confidential, detailed, financial information;
- (6) GM defines and controls [the dealer’s] APR, and those of other Chevrolet dealers;
- (7) [The dealer] is obligated to perform warranty work on GM’s behalf for eligible car owners and lessees;
- (8) GM requires... specific acreage and facility layouts, including square footage of offices, showroom, parking, service area, and the like;
- (9) GM requires specific training and technical capability;
- (10) GM’s Dealer Agreement obligates [the dealer] to seek GM’s approval for such basic business decisions as, *inter alia*, the hiring of managers and the selling and relocation of the business;
- (11) GM’s approval is needed for a sale of the business;
- (12) GM enumerates a lengthy list of potential causes for franchise termination;
- (13) [The dealer] is without negotiating power to compromise any of GM’s requirements; and
- (14) GM’s Dealer Agreement effectively grants GM “the authority to exercise near life and death economic power over [the dealer].” See *Manhattan Motor Cars v. Automobili Lamborghini*, 244 F.R.D. 204, 220 (S.D.N.Y. 2007).

Thus, the determination of whether the factory-dealer relationship is a fiduciary one is driven by relevant facts that establish the degree

of control the franchisor wields, as well as a corollary lack of effective bargaining power of the franchisee. In summary, the enormous “life and death” control wielded by auto franchisors over their dealers should firmly establish the fiduciary relationship.

OUTLOOK:

In 2013 and years to follow, we will see a significant uptick in fiduciary-based claims by dealers. To date, no court has made a final determination that an auto dealer's relationship with a franchisor is fiduciary. The outcomes of these matters could have a significant impact on factory-dealer relationships.

4. Economic and Regulatory Trends and Domestic Political Uncertainties That Impact the Legal Rights, Strategies, and Decision-making of Auto Dealers in America. What a Dealer Needs to Consider in Strategic Planning During a Time of Uncertainty; Consumerism.

Dealers are hardly alone on this one. Onerous, repetitive, and expensive requirements by both federal and state government agencies have become the bane of small businesses. And they proliferate by the thousands each year, notwithstanding politicians' pledges to reverse the regulatory inundation. This trend is most apparent at the federal level, but states and local governments also oversee innumerable and detailed regulations that always seem to grow in scope and coverage. See the NADA's terrific publication, “The Regulatory Maze.”

The list of regulatory subjects seems endless. Major areas of developing regulatory interest to dealers include:

- Health care coverage, especially the 2010 Patient Protection and Affordable Care Act a/k/a “Obamacare”;
- Environmental requirements (*see* Trend #10);
- Workplace rules;
- Consumer Protections in general (including sales practices, lending, and privacy);
- The Dodd Frank Wall Street Reform and Consumer Protection Act;
- Privacy/identity theft.

Although the central thrust of Obamacare implementation and liabilities will shift into high gear in 2014, the impact on employers is already substantial. Dodd Frank has already spawned numerous regulations, and more are in the regulatory pipeline. (The impact of the Consumer Financial Protection Bureau on dealers is still open to question and interpretation.)

In a second Obama term, the prospect of regulatory growth, especially in the consumer protection arena, is causing understandable consternation. Too often, today's regulators at all levels of government view businesses as villains that prey upon consumer victims. Thus, the attitude of governance is one of detailed control and enforcement via minutiae.

OUTLOOK:

Literally, thousands of new regulations will pour out of Washington in 2013, and state and local governments will follow suit. More and more dealerships will employ dedicated personnel to manage and comply with regulatory requirements, old and new. Many of these obligations will be wasteful and unnecessary, and they will be a further drag on the economy as whole, as well as the businesses of car dealers.

Notwithstanding some relief in the class action arena, consumer protection agencies, consumers, and plaintiffs' lawyers remain on the prowl for dealers as targets for windfalls.

5. Involuntary Franchise Terminations, Termination “Threats,” Brand “Withdrawals,” “Pressured” Buyouts, Financially Driven Resignations, Consolidations, and Rights of First Refusal.

The ultimate threat from the factory to the franchised dealer is involuntary termination. It's the worst of worlds for the dealer who faces, literally, a business death penalty.

OUTLOOK:

Actual termination notices will remain rare and exceptional. Threats of termination however, in conjunction with franchisor initiatives, will rise. As always, every dealer who gets such a threat, should respond – promptly, civilly and accurately, and in writing. As always, dealers enjoy formidable protections against termination and nonrenewal in specific laws in all 50 states.

6. Coping with Daily Challenges of the Law: The Legal Audit Checklist.

More than ever, today's dealer must comply with an alphabet soup of legal and regulatory requirements. Many dealers – and most megadealers – retain legal professionals or on-site personnel to cope with what has become a complex web of recurring duties, not to mention the many standards and obligations that apply to the American workplace and consumer practices and relationships.

OUTLOOK:

Every dealer needs to self-audit legal requirements on a regular basis. My checklist, available at no cost, is a useful tool in carrying out that task.

7. Alternate Dispute Resolution (ADR).

In the burgeoning ADR field, questions about the use of arbitration clauses that preclude or inhibit class actions are, again, front and center. Pro-consumer courts (*e.g.*, California) and legislators prospect for ways to get around *AT&T Mobility v. Concepcion*, which held that the Federal Arbitration Act preempted California courts' ability to strike consumer arbitration agreements waiving class actions.

OUTLOOK:

Activist courts, agencies, legislators, and litigants will continue with efforts to nullify consumer arbitration clauses, including waivers of resorts to class treatment.

8. Taxes

For the overall economy, the still pending questions about federal “tax reform” loom large. Avoiding the “fiscal cliff” on January 1 hardly ended this ongoing debate. Will there be further adjustments to marginal tax rates? Will “loopholes” and deductions be fully addressed?

OUTLOOK:

The “tax reform” battle will be politically divisive and nasty in 2013 – and probably in 2014, 2015 and 2016 as well.

9. Privacy Concerns and Identity Theft.

This one is definitely here to stay. Even as the wonders of telecommunications and other technology advance every year, the harms and risks seem to be unlimited. Laws and regulations to stem the tide of criminality now abound.

OUTLOOK:

Dealers must ensure compliance with the growing body of privacy protections and safeguards against identity theft.

10. Environmental Regulation Explosion.

2013 is apt to see a further uptick in environmental initiatives at the federal level, some of which will impact profoundly the auto industry. The administration’s “greening” priority will be seen in innumerable regulatory and enforcement actions. “Cap and trade” and other significant initiatives to tame man’s perceived influence on climate change will be high federal priorities.

OUTLOOK:

A second Obama term has left little doubt that the administration will continue its growing practices of EPA exercise of power over businesses. This will add layers of delay to and impairment of business growth. Costs to consumers for their automobiles will rise, and it remains to be seen how much the costs will affect new car sales.

11. Internet Marketing.

Each year provides more American resort to the internet for business – in both advertisements and transactions. This phenomenon brings with it the prospect of scams and other abuses, as well as a growing body of regulations at all levels of government.

OUTLOOK:

The maturity of internet marketing and consumer shopping/buying habits is now at the point that all dealers must and do interact with their customers online. 2013 will see even more consumer protection efforts and dealers need to closely monitor these developments for compliance purposes.

12. Buying and Selling Dealerships: Factory “Stealth” Conditions; Right of First Refusal: The Threat.

For 2013, if retail car sales predictions come true, there will be a corresponding uptick in the buy-sell market and goodwill values.

OUTLOOK:

It’s cloudy out there. Much depends on the outcomes of the numerous uncertainties discussed with Trend #1. Watch for more exercises of the franchisor’s right of first refusal.

13. Living with the Threat of Terror, Unrest, and Natural Disasters: Doing Business in an Era of Constant Vigilance.

9/11/01 was 12 years ago. Today, it is hard to recall how differently we went about our business, not only in airports, but in shopping centers and commercial buildings in major cities. Hopefully, our government and people will be both vigilant and lucky in fighting terror.

Hurricane Sandy was described by some as a “Millennial Storm” – a confluence of weather systems that obliterated large spans of properties and businesses along the eastern seaboard in October 2012. The Japanese tsunami directly impacted the automotive supply chain, worldwide. Regardless of how one feels about the bona fides of climate change, horrific weather events can impact an overall economy and specific businesses in draconian ways.

OUTLOOK:

It is inevitable that we will see our share of natural phenomena (hurricanes, tornados, tsunamis, earthquakes), and all dealers should have in place emergency plans that are well rehearsed. Terror and violence are impossible to predict, but we know that bad people are ever planning to do their worst.

14. Credit Issues: Floorplans and Other Credit Stress Points for Dealers. Consumer Problems.

Despite historically low Federal rates that have continued for years (with no end in sight until 2015), the lending industry has often been far from helpful in stoking up business. For 2013, all issues point to some more loosening of credit, while maintaining rational standards for credit-worthiness.

OUTLOOK:

With government pressure building, it is likely that, in 2013, both commercial and consumer lending practices will help generate more business for dealers. (Unless, of course, other problems in the economy render lending loosening moot.)

15. Workforce Issues: Employee Rights and Benefits, an Activist NLRB, the Prospect of Unionization, Health Care while the country continues to abandon private sector unions the Administration continues to try to bolster unionization.

The workplace in dealerships is far, far different from a generation ago. It is regulated in detail, and employees’ rights are substantial. Prudent attention by dealers to applicable laws has decreased the threats of individual cases alleging discrimination and sexual harassment.

But the unionization bias of the administration remains a problem for all businesses.

OUTLOOK:

Look for government-backed unionization efforts. Workforce lawsuits by dealership employees will stay low, because dealers are now so attentive to their requirements and training.

16. Audits of Incentive or Warranty Claims: Dealer Beware.

Dealers need to acknowledge that their franchisors have many well-settled rights, mainly confirmed in standard dealer agreements, to intrude into the working and records of the franchised dealer body. The factory audit, especially for incentives and warranty claims, is a foreseeable occurrence. Auto franchisors have a right to assure the integrity of its programs, and dealers have an obligation to cooperate.

OUTLOOK:

Audits will be a regular occurrence at a small percentage of dealerships in 2013. Obey the rules, and avoid the predictable chargebacks (or worse).

17. Customer Satisfaction: CSI vs. Reality.

Although CSI is now a cornerstone of factory performance measurements (and often a gateway for applicants seeking approval for the acquisition of dealership), it has been a relatively quiet aspect of franchisor supervision over dealers.

OUTLOOK:

CSI is not going away, but it will continue to be much less important than sales issues in the eye of the franchisors. However, for dealers seeking to acquire dealerships, CSI histories will continue to be a major part of the application process.

18. Retail Reimbursement for Warranty Work and Parts.

The retail reimbursement contest continues – the many state laws notwithstanding. A U.S. appellate court allowed Ford's "surcharge" mechanism under New Jersey law, but dealers are apt to revisit the matter in new legislation. Maine's retail law works and is being emulated elsewhere.

OUTLOOK:

Some day, maybe or maybe not 2013, all factories will have to face the reality and wisdom of reimbursing their dealers at retail for warranty parts and labor.

19. Encroachment (Protest Laws).

Since the GM and Chrysler bankruptcies (and the struggling economy), there have been few protests, because there have been fewer eligible opportunities. If R.L. Polk and others are correct, however, protests could be back in higher numbers.

OUTLOOK:

Look for a discernible rise in protest actions in 2013.

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20. Minority and Female Representation.

Post-recession, it appears that there is a resurgence of emphasis to recruit and place minority principals for franchised auto dealerships as they become available.

OUTLOOK:

In 2013, expect that minority representation will be back in play as a significant goal for auto franchisors. ■

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