2010's Top Twenty Legal Trends for Automobile Dealers

By Eric L. Chase

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Other important trends, Not in the Top 20:

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NOTE: 2009 rankings are in parentheses; NR (Not Rated in 2009).

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During late 2008 and much of 2009, countless dealers lamented, "I never thought I'd see anything as bad as this." On every financial and economic front and at every level – local, state, national and international – disaster struck. On Wall Street, with taxpayers' money, the U.S. government rescued venerable financial institutions from certain demise; others went bankrupt. Corporate and individual wealth plummeted with the stock market. As 2009 ended, unemployment hovered around 10% -- a figure that is likely understated, because it excludes those who have stopped looking for work. Auto sales cratered; dealers went deep into the red and many closed their doors; available credit disappeared; two of the Detroit Three went through Chapter 11 bankruptcy.

Thus, without a doubt, 2010's #1 Legal Trend for Dealers flows from the historical financial fallout that affects nearly every dealer. The dual 2009 bankruptcies of GM and Chrysler established the low water mark of an entire automotive industry. Despite earlier denials and dire warnings of what havoc bankruptcy would wreak, both Chrysler and GM are now bankruptcy veterans, as they shed hundreds of franchised dealers like lice – and showed them commensurate respect, i.e., none. Even the imports endured precipitous sales downturns. Toyota's president, for example, apologized in the Fall of 2009 for his company's poor performance. Across the country, annual new vehicle sales fell by 40%. The economy tanked; unemployment soared. Dealers reeled. And the carnage didn't end when 2009 came to a close.

Government intervention (some say meddling) enabled the "New GM" and the "New Chrysler" to emerge from their 2009 bankruptcies with, they told us, streamlined assets, dissolved liabilities, a cooperative UAW and what they portrayed as a more realistic vision. At the same time, hundreds of dealers were given pink slips by their bankrupt franchisors, approved by the bankruptcy court in New York. Now, belatedly, it appears that the rejected dealers – about 2,000 between GM and Chrysler – may have a chance to be reinstated through arbitration, under new federal legislation that endeavors to make the proceedings fair.

The legacies of the two historical auto manufacturer bankruptcies keep this trend in first place for 2010, even though the landscape has profoundly changed. Last year, we were handicapping the odds of a *possible* bankruptcy for Chrysler, GM and Ford. Now, we are looking at the emergence from bankruptcy of *two* of the Detroit Three, at a time of continuing economic fragility and uncertainty. Even with the injection of billions of taxpayer dollars, the return to solvency and profitability by GM or Chrysler – especially Chrysler – is far from certain. Whatever happens, the legal fallout and consequences of the bankruptcies and other economic woes of 2009 will reverberate through 2010 *and beyond*.

In my opinion, Chrysler faces an uphill battle for survival. Taken alone, its promises to help dealers financially ($500 million over five years) and to coerce Chrysler/Dodge/Jeep/Ram combos by 2011 won't pop any champagne corks. GM's position is better than Chrysler's, but its "success" – however defined – is hardly assured. By comparison, Ford, the domestic automaker holdout which avoided government help, spurned both bailout monies and bankruptcy; Ford looks like a winner, at least for now.

Perhaps the most controversial piece of the bankruptcy "cures" was the rejection (read termination) of hundreds of franchised dealerships' sales and service agreements, rubber stamped by the bankruptcy judges. The disdain for (and myths about) dealers, spread by GM, Chrysler, the Obama administration, and the popular press were shameful and immoral. The reasons for those dealer destructions in a bankruptcy setting were never satisfactorily explained. The oft-cited concept, including GM and Chrysler testimony in bankruptcy proceedings, that retail store closings would save money for the automakers was – and is – both inexplicable and untrue. See, e.g., "It's Time for GM to Admit, Finally, Its $2 Billion Lie," *Automotive News* (November 9, 2009 Opinion). Of course, the bankruptcy shield meant that the rejected dealers had no practical legal recourse through their protective state franchise laws. Following well-established law, the two bankruptcy judges who presided over GM's and Chrysler's warp-speed proceedings gave no meaningful relief to dealers. It was a massacre. It remains to be seen how the opportunity of rejected dealers to seek reinstatement by arbitrating under a newly fashioned federal law may ameliorate some of this carnage.

The multifaceted roles of the federal government in trying to "save" an American industry and in incentivizing purchases (including "cash for clunkers") were extremely controversial. Even now, many observers opine that federal intervention with taxpayer largesse was a bad idea, trading momentary gain for long-term pain. But the Obama administration also has plenty of defenders.

The most obvious reality of 2010 for the dealer marketplace is that it will be smaller. In one fell swoop, about

3,000 dealerships and several brands were carried off the field (although the "wind down" of many rejected GM dealers will continue into 2010). The reductions in the ranks stem mostly from the GM and Chrysler actions, but other brands, too, lost and/or consolidated dealerships outside the purview of bankruptcy proceedings.

And, of course, brands other than GM and Chrysler were hardly immune from the national and worldwide recession. Virtually every dealer in America was adversely affected to a lesser or greater extent.

With so much attention on the economy, finances and the franchisor bankruptcies, it is nevertheless important to be mindful of other pressing legal challenges and to stay vigilant on many fronts, especially during a pivotal election year. Although the bankruptcy and overall economic fallout is dominant in this year's *Trends* ranking, there are still *nineteen* other important trends to discuss. These include many repeat appearances, such as franchise termination, workforce issues, privacy/identity theft, and warranty reimbursement. The Top Trends list identifies issues that continue to affect most, if not all, dealers. On all these fronts, prudent dealers must be especially cautious in 2010.

> *The ranking of the top twenty legal issues/trends is based on three factors: 1) the likely number of dealers affected; 2) the probability of change from the current situation; and 3) the seriousness of a trend/issue's impact on the lives of dealers.*

1. The Impact on Dealers and the Legacy of the GM and Chrysler Bankruptcies, and the Fallout of the Economic Downturn. The Federally Mandated Opportunity for Rejected Dealers to Seek Reinstatement Through Arbitration. (1)

The federal pre-bankruptcy and post-bankruptcy "rescue" of GM and Chrysler was (and is) an historical phenomenon that will reverberate in the U.S. economy for years, maybe decades. The nation is now littered with the remnants of dealerships no longer representing GM or Chrysler brands. While the direct economic impact of the bankruptcies was and remains profound, the long-term psychological effects may be even more telling. Consumers, dealers and investors now see the American auto industry in an entirely new light.

Post-bankruptcy, the federal government now holds enormous equity stakes in both GM and Chrysler; its deals with UAW and others helped shape an impression (for many observers) of both political gamesmanship and reckless economic risk. The theatrics also punished dealers for no valid reason, and the two affected automakers are having serious blowback from their surviving dealers who – surprise! – have lost trust in their franchisors.

Thanks to political pressure and congressional action, the dealers rejected in bankruptcy proceedings may seek reinstatement in binding arbitration. "With respect to Chrysler, the [law] covers the 789 dealerships that were not assumed and assigned. With respect to GM, the [law] covers any dealer that received a wind-down letter…and the small number of rejected GM dealers who did not sign either a participation or wind-down letter…. [T]he [law] does not provide any right of arbitration for franchises that were closed due to brand elimination." "Status and Summary of the Revised LaTourette Amendment," December 9, 2009. *See* the author's separately published guide to this new law.

During 2010, we should witness signs of whether one or both "new" post-bankruptcy automakers can survive in the years ahead. Chrysler, in particular, has not yet shown much promise for the long term. Announced in November 2009, Chrysler's 5-year plan features plenty of hope and enthusiasm, but little in the way of solid product entries and concrete and definable business goals. Its commitment to invest $500 million in the dealer network is surely helpful, but hardly a panacea. The reliance on the Fiat lineup seems particularly speculative, and the aim to consolidate the brands at all stores ("brand salons") has been tried without success before. Anecdotally, Chrysler dealers are very worried; they remember Jim Press's vigorous exhortations to "trust me" and buy more product in the months leading up to bankruptcy; many Chrysler dealers cannot establish or maintain vital lending relationships. Then, *in* bankruptcy, the dealers were unfairly demonized, and many were undeservedly terminated. As of the end of 2009, Chrysler's sales performance has remained poor, and, for its brands, there is nothing yet to suggest there will be a 2010 turnaround.

GM's prospects appear more justifiably optimistic than Chrysler's, but it will struggle for market share and profitability. The key to success seems seductively simple: Make, market and sell cars that people will buy at retail from the smaller dealer networks. GM is starting to repay taxpayer monies. That's a positive, but purely symbolic step. It's a drop in the bucket, and many doubt that anything approaching full repayment will ever happen. Unfortunately, there is no easy path to GM's simply-articulated cure. Of the Detroit Three, only Ford dodged bankruptcy, and its prospects for the near term seem good as its recent ascendance to profitability attests. But watch out for a return of turbulence that could threaten even Ford's relatively rosy outlook.

Under Special Federal Legislation, will any of the rejected dealers be reinstated? The extraordinary and unexplained inequities that befell the rejected Chrysler and GM dealers became a major political football. Now, there may yet be some meaningful relief for at least some of those dealers. Post-bankruptcy, there has been considerable direct negotiation

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The numbers of "lost" dealerships cannot be determined with precision. Officially, there were about 789 Chrysler and about 1,350 GM dealers rejected in bankruptcy. But those numbers do not account for (1) dealers who terminated anyway, because they could not obtain credit, or for other reasons; (2) the small number of reinstated dealers; or (3) dealers of terminated **brands.**

and a parallel effort in the Congress to address some of the injustices heaped on rejected dealers. Federal legislation provides for third-party arbitration for the rejected GM and Chrysler dealers. The law opens the door to possible reinstatements of dealers if they can show that the rejections were not justified. The detailed standards of proof provide for fair consideration of evidence by the arbitrator to determine whether a dealer should be reinstated. The sole remedy for a dealer who prevails is reinstatement, not monetary compensation (although negotiations for compensation instead of reinstatement are not precluded). The NADA, the Committee to Restore Dealer Rights, and members of Congress all praised the legislation. *In my opinion,* some of the rejected dealers, *as a practical matter,* will have an uphill battle to prevail, not because they don't deserve to win, but because their circumstances have changed. Many are in no position to return to business, even if they win. Their facilities, employees and customers have generally not been awaiting the return of dealers who have either terminated or are winding down. Nevertheless, the action by the Congress would be an historically important step in an effort to redress some of the egregious injustices done to dealers.

If you are a rejected dealer *and you are in a realistic position to benefit by reinstatement,* the law gives you a fair shot. In that situation, go for it! *See* the author's separate article detailing the law.

Are there possible mega-trends and issues that remain uncertain? Definitely! In November 2009, President Obama himself conceded that the soaring national debt could sink America into a "double-dip recession." The most successful dealers remind me that their philosophy has been anchored by planning for the worst case scenario, while always hoping for the best. If, for example, a dealer is induced to invest $5 million in a new facility, and the debt service requires operational revenues that depend on a flourishing economy, then what happens if the economy tanks? As we have witnessed in recent years, the American economy is sensitive to any number of possible reversals – increased international tension, war, natural disaster, terrorism, inflation, oil price spikes. The nuclearization of Iran could turn the financial world upside down. Hyper-inflation is a foreseeable possibility on the horizon. We now see the annual deficit on steroids, with tax increases on the way. At the end of 2010, the Bush tax cuts evaporate. Among the many reasons for the downturn, we saw an enormous spike in oil prices that virtually froze the economy; there is no guaranty that gas prices will be stable in 2010, and beyond. If unemployment stays high, new car sales will be affected. We are also seeing signs that an almost incredibly obtuse Congress may be leading the charge to repeat or worsen some of the financial mistakes of the past, including pressuring institutions to provide easy credit to the non-credit worthy. Passage of health care "reform" and cap and trade legislation could prolong an underperforming economy in 2010.

Did the bankruptcies tarnish brand values and customer appeal? Yes. Surveys show that, at least for now, consumer distrust could keep as many as 30-40% of potential retail customers away from even considering the bankruptcy-tarnished brands. With GM, the abandonment altogether of the Saturn, Pontiac, Saab and Hummer brands effectively puts *all* those dealers out of the new car business, and consumer reactions have been generally negative. Even Saab, which seemed to have a life preserver with an acquirer that would continue with most dealers, was jilted. Surveys suggest that "orphaned" customers of the terminated brands will not readily shift to the remaining "family" brands. Moreover, the "orphaned" customers of continuing brands who lost "their" dealers are not pleased.

Does the ongoing government financial stake positively or negatively impact a potential GM or Chrysler turnaround? The answer is almost certainly negative. The composition of the prepackaged bankruptcies included UAW Faustian bargains that ill-serve any possible return to competitiveness in a free market. In other words, *this* observer does not believe for a minute that union policies and practices will improve GM's or Chrysler's competitive edge. Nor does a government-mandated "greening" of products bode well for GM's or Chrysler's competitive position. The heavy hand of government policy considerations could sink GM and Chrysler in the marketplace. GM's initiative to repay its government largesse is, at least, a positive sign.

What should GM/Chrysler dealers do/not do? Don't be anxious to make capital investments. You may be asked to improve or relocate facilities; de-dual; invest more capital; stock more inventory. *See,* for example, GM's "Essential Brand Elements," the title of a comprehensive program which incentivizes dealer compliance. Nor, on the face of it, does Chrysler's five-year plan offer sufficient tangible support for dealer investment. Further, *be cautious* about any opportunity, offered by GM or Chrysler to establish a new store. The temptation will be great; you *want* to be a dealer. But your initial investment of millions of dollars could be at risk.

Dealers need to follow their own counsel, and be prudent. This is *not* to say that dealers should adopt a negative posture. For some, perhaps most of them, factory aspirations may be consistent with dealers' interests. But don't *overextend* under factory pressure. Dealers must remind themselves: If *their* financial stability erodes, neither their government nor their franchisor will bail *them* out. The investment process should be deliberative and well researched, not pressured. Remember, post-bankruptcy, your state franchise laws are back in force, and can be deployed for legal protection against franchisor overreaching.

Among the Detroit 3, Is Ford in the driver's seat? Thanks to its foresight in 2007-2008, when it cemented its position with lenders, Ford now enjoys a huge advantage among the Detroit Three. During the 2009 melee, it quickly achieved the improbable: profitability. Its product line continues to be well reviewed, its customers stayed loyal, and new buyers shifted to its lineup. Ford dealers, nevertheless, need to be careful in confronting factory demands for, among other things, de-dualing, consolidation and/or facility enhancements. While Ford enjoys a favorable model lineup and an enhanced reputation, dealers' memories should stay fixed on how close *Ford* came to insolvency.

GM is taking a bold and optimistic approach, and so it should. It will not succeed without a positive outlook. Yet the uncertainties are many, and government meddling is a predictable handicap.

How might imports be affected? Toyota's president apologized in September 2009 for his company's dismal performance. Toyota! Yet Toyota, as well as other import brands, are already pressuring dealers for sales goals and facility improvements. In the fight for market share in an industry that has seen a catering of overall unit sales, imports will have the edge, especially Honda, Toyota, Nissan and BMW. At the same time, Ford, Hyundai and Kia may continue a surge.

Should dealers plan for the eventuality of a franchisor bankruptcy? Yes. Or, maybe not "plan" exactly. Rather, be vigilant regarding your franchisor's financial stability. Not long ago, the thought of a major automaker bankruptcy was laughable. No one is laughing now. Today, for this and other reasons, I recommend that dealers keep their individual (unrelated) franchises in separate companies.

How does the overall economy impact the recovery for auto dealers? There is plenty of optimism out there with many looking for a better 2010. But the Obama Administration's ambitious agenda (health care, cap and trade) contemplates unprecedented growth in the national debt. Without restraint, with higher taxes and anti-business policies, the government could push the country into continuing non-growth, hyper-debt, high unemployment and another recession. Industry analysts, including J.D. Power, forecast a resurgence of unit sales – maybe 11 to 12 million in 2010. That's a hope, though, more than a scientific estimate.

Outlook. 2010 will be a year of opportunity for certain risk-takers who make the right predictions. If GM starts to break through in the way that it has predicted, then its brands, particularly Chevrolet and Cadillac, stand to benefit. Chrysler, however, is a long shot. Senator John McCain told The Detroit News in November 2009, "And anybody who believes that Chrysler is going to survive – I'd like to meet them." Chrysler-branded dealers need to be *very* careful in their investments into and operations of their dealerships. By contrast, Ford is on track to continue its profitability trend. Among the imports, Honda should be a steady profitability machine, Toyota will likely make a healthy surge upward from its lows, and both Hyundai and Kia (especially Hyundai) should continue their growth patterns. For BMW and Mercedes dealers, look for a slight comeback from 2009. *Dealers, be careful out there.*

As for the rejected Chrysler and GM dealers eligible for arbitration, this opportunity for reinstatement appears to be genuine. Hopefully, many of the wrongly rejected dealers will prevail and be back in business in 2010, or if not, perhaps some or many can be compensated in lieu of reinstatement.

2. Credit Chaos: Floorplans and Other Credit Stress Points for Dealers (2)

A hefty number of "assumed" dealers selected by Chrysler and GM for survival went dark anyway. They were unable to obtain or maintain a credit source. Lenders in general, and particularly GMAC and Chrysler Financial, have viewed auto dealers as disposable prey. The standards, as well as the means and methods of "negotiating" with dealers, have generated innumerable instances of gross over-reaching and inequities.

For decades, the U.S. economy hummed along, with bumps, to be sure, but with a tenacity rivaled nowhere else in the world. A major pillar supporting economic health and growth has been the credit/lending foundation, present in spades at every level, from individual consumers, to businesses, to local, state and federal government agencies. For the auto dealer, ongoing and stable credit is lifeblood. The virtual shutdown of new credit lines for dealers has been a heavy impediment that may be alleviated in 2010.

This problem spills into the consumer side of transactions as well, because retail buyers are more and more reluctant – or unable – to take on more debt. Moreover, the public is becoming more risk averse, and as consumer savings go up, there is less to spend at retail. This aspect of the problem decreases the demand for new units.

Dealers need to keep in mind that their credit relationships are tenuous and fragile. Don't do things that jeopardize an existing relationship; many lenders are looking for an excuse. *Dealers should never go out of trust.* This admonition was always valid, and today, it's imperative. To do otherwise is to invite the loss of the floorplan and business failure.

Outlook. The return of reasonably available credit is far off. Instead, look for gradual easing over time. In 2010, dealers will need to accept credit terms that are skewed sharply in favor of their lenders.

3. Franchisor Strategies and Pressures on Dealers: Imaging; Renovation; Relocation; Sales; CSI. Can They Do That? (5)

Despite the historical downturn, auto franchisors – some with subtlety, some not – continue to squeeze dealers to perform, stock up and invest. That sounds reasonable at first blush. But these days, dealers are not as compliant as in the past about risk-taking on what may be factory whims. As one poignant example, any Chrysler brand dealership is well advised to consider that the franchisor's future is uncertain, and that large capital investments could be lost.

As the new car sales numbers rise out of the valleys of 2009, brand managers, especially for the import brands, will be pushing hard to cajole dealers into what they (factories) view as pro-competitive efforts. These will be especially evident in coercion to upgrade or relocate facilities, go exclusive, buy inventory, and increase CSI scores.

Although GM and Chrysler were bankrupt in 2009, their professed optimism is now paired with "plans" that include dealer cooperation.

Outlook. 2010 will see growing pressures on dealers to invest, especially in their facilities, but also in higher inventories. Prudently, many dealers will resist making large near-term expenditures. Wait-and-see is a pretty good strategy for 2010.

4. Involuntary Franchise Terminations, Termination "Threats," Brand "Withdrawals," "Pressured" Buyouts, Financially Driven Resignations, Consolidations, and Rights of First Refusal (4)

During 2010, auto franchisors will not be shy about termination threats and similar communications with dealers they view as expendable. Apparently, based upon anecdotal evidence during 2009, neither the overall auto sales downturn nor the two major bankruptcies did anything to cause the franchisors to draw back from such aggressive behavior.

Dealers need to take seriously any hint of franchisor adverse action. Threats of termination should trigger a principled response. A common automaker tactic is to try to coerce dealers to sign on to facility commitments under threat of termination. Often, such threats are empty, because there is no *current* obligation by the dealer to invest. But if a dealer signs a modified dealer agreement with conditions, that *new commitment* may require compliance. A seasoned attorney should be consulted if a dealer is being pressured in this manner.

Outlook. The blood-letting of dealer terminations did not end with the GM and Chrysler bankruptcy massacres in 2009. To be sure, 2010 won't be anywhere close to the numbers of closures of 2009, but there will still be many dealers faced with that possibility.

5. Responding to Automakers' Assaults on Dealer Rights and Autonomy: Dealers and Their State Associations Need to Strengthen State Laws; Federal Meddling (2)

The states have been moving at warp speed to address dealer issues arising out of economic woes in general, and the Chrysler and GM bankruptcies in particular.

2009 was a year of exceptional state legislative activity. Some of this trend was very positive and targeted in ways to ameliorate future economy-driven assaults on dealer rights and property. Some, however, probably will not have much practical impact. For example, efforts to invade the primacy of federal law in the bankruptcy code will not have any legal impact.

At the same time, numerous provisions across the country are designed to further assure that dealers are treated fairly in their franchise relationships.

Outlook. As in the past, the state associations' great work in persuading lawmakers to level the playing field with new provisions will be evident in 2010.

6. Workforce Issues: Employee Rights and Benefits (12), and the Prospect of Unionization and Health Care Legislation.

On certain issues, 2010 will be a *very* significant political year. The entire House of Representatives stands for re-election every two years, as does about one-third of the Senate. As in the cases of a "public option" in health care and the public reaction to "stimulus" initiatives, the Obama Administration's original pro-union agenda has been slightly watered down, at least for the moment.

As this article goes to press, Democrats' giddiness over 2008 election results has subsided due to a sobering does of reality from the November 2009 governor's races in New Jersey and Virginia, and Gallup polls show that House races may be very competitive in November 2010. This phenomenon could put the brakes on any aggressive legislative agenda for costly health care "reform" and unionization.

At the same time, the Obama administration wants to press forward with the "card check" and mandatory arbitration aspects of the laughingly-titled proposed labor law legislation, the Employee Free Choice Act (EFCA). While there is some good news in that there is growing resistance to the card check provisions, the other provisions (*e.g.,* mandatory arbitration) are arguably worse for employers. Dealers should monitor this legislation and be certain to register their views with their representatives in the Congress.

Outlook. Whereas Democrats were wildly enthusiastic about the re-unionization of America after they swept to power in 2008, they now realize that their political control is in doubt. In 2010, any pro-union legislation will have to be scaled back. The future of government-directed health care is likewise up in the air with disunity among Democrats and polls showing a majority of Americans in opposition to pending initiatives in Congress. In 2010, *in my opinion,* dealers should not expect much to change in terms of any federal mandate on health care.

7. Buying and Selling Dealerships (7)

One of my colleagues likes to remark, "buying and selling dealerships ain't what it used to be." He goes on to explain that there will be fewer buy-sells for some period of time, because the market is not favorable for sellers, and because there are fewer existing dealerships – thanks mainly to the disappearance of so many Chrysler- and GM-branded stores.

2010 will be a slow transactional year, because the marketplace is so depressed, and credit is so tight. Most would-be sellers are awaiting a resurgence of value which, *in my opinion,* is at least two or three years away.

Outlook. 2010 will see less buy/sell action than in the heady years of the past. But, for some bargain hunters, and aggressive public company and mega-acquirers, there will be some excellent buying opportunities.

8. The Storms of Legal Issues and Concerns: The Evolving Legal Landscape Brings Abundant Challenges to Dealers; How to Cope Using Best Practices and the Legal Audit Checklist (3)

Unfortunately, the downturn did nothing to stem the tide of legal details and issues with which every dealer must cope. Moreover, franchisor instability prompted many states to consider legislation that, even a year earlier, would have been unimaginable.

My 2010 revised checklist for dealers has proven to be a convenient and quick way for dealers to evaluate their legal issues. It's available for free.

Outlook. Every dealer should go through a legal self-audit in 2010. It takes only a few minutes. Dealers facing legal challenges should go through the checklist each quarter.

9. Privacy Concerns and Identity Theft (6)

This continues to be a trend that spans every facet of American life. Along with an era of "computerized everything" come the myriad dangers of privacy invasion and identification theft. New laws and regulations, along with Herculean detection, prevention and enforcement measures, seem to struggle against a tide of criminality.

Outlook. This one is here to stay. Dealers *must* protect their businesses, customers, and employees from the onslaught of cyber attackers seeking to steal identities and valuable information. Every dealership needs a responsible employee to stay abreast of these complex areas, and to train all employees.

10. Taxes (NR)

If the Obama administration and a Democratic Congress have their way, higher taxes for most American income earners is a certainty. The Bush era tax cuts will expire. In a wounded economy, this philosophy is counterproductive. Some, with less inhibition, say it's insane, because higher taxes on small businesses will prolong the high percentage of unemployment and under-employment. Higher taxes, accompanied a stalled economy, or one that slips back into recession would return the auto industry – and dealers – to another period of survival-of-the-lucky. The runaway expenses and higher taxes will be fodder for the 2010 elections in which all House seats and a third of the Senate seats are at stake.

Outlook. It's a virtual certainty that the Bush era tax cuts will be allowed to expire at the end of 2010. In addition, look for "stealth" taxes by other names under the Obama administration, and raids on taxpayers by state legislatures in several beleaguered states. A higher gasoline tax, for example, would take discretionary money out of the pockets of consumers. Also, tax incentives for "green" legislation would do little or nothing to help car sales at retail.

11. Audits of Incentive or Warranty Claims: Dealer Beware. (9)

Auto franchisors develop intricate requirements for dealers to follow in perfecting their claims for warranty reimbursement and payments for periodic incentives. Every dealer should be meticulous in ensuring that appropriate staff personnel are trained to abide by such requirements. For starters, honesty is not merely the "best" policy; it is and must be the *only* policy.

Outlook. Franchisors have been aggressive in policing their payments to dealers. Audits will continue to be a major annoyance for dealers in 2010.

12. Customer Satisfaction: CSI vs. Reality (10)

The myth that CSI is a genuine measure of real world customer satisfaction continues. Every brand disciplines its dealer body with survey scores and averages that have little or no verified statistical meaning. A dealer applying for a new franchise may have to prove that his scores have been mostly above average over a period of time (usually three years).

Outlook. Despite the questionable validity of CSI, the franchisors will continue to use that device as a gold standard.

13. Alternate Dispute Resolution (ADR) (8)

In many kinds of disputes, ADR is encouraged – by legislatures, courts, and businesses. At the same time, backlash has developed, especially with consumers who object to mandatory arbitration.

Outlook. Dealers should try to contractually commit consumers to ADR, in the event of a dispute. This is becoming more difficult, and ADR provisions need careful drafting to ensure fairness. Your local attorney can advise you regarding the enforceability of consumer ADR provisions in your state.

14. Consumerism: Targeting Dealers for Consumer Litigation and State/Local Regulatory Enforcement; Preventive Medicine; Adopting Best Practices (11)

Plaintiffs' lawyers who prospect for technical infractions by car dealers are, as a group, among the most objectionable representatives of the legal profession. The class action phenomenon has lessened somewhat, but still lurks as a threat. Dealers need to be proactive to avoid actions by consumers and regulatory action by local government enforcement agencies.

Outlook. If only because sales are down, 2010 may see fewer actions against dealers on behalf of consumers. As ever, dealers must be vigilant in their operations to avoid practices that give rise to such complaints.

15. Living with the Threat of Terror...and Natural Disasters, Too: Doing Business In

An Era of Constant Vigilance (16)

Prior to September 11, 2001, the American marketplace was relatively serene, some say innocent. There were no "security lines" at airports, nor were there identification verifications in major office buildings in major cities. Now, however, the "new normal" is constant vigilance and a measured "threat level." Car dealerships may be vulnerable, because they are large facilities, with open invitations to the public.

Outlook. This is, and will remain, a matter of concern for Americans. We've enjoyed years of terror-free existence (not counting Fort Hood) since 9/11. The less aggressive approach of the Obama administration gives cause for concern.

16. Reimbursement for Warranty Work and Parts (12)

Nearly all the controversy in warranty reimbursement relates to parts. Some manufacturers insist upon a uniform mark-up, usually set at cost plus 40% for most parts. This is certainly an issue that will not go away.

Outlook. Litigation in New Jersey (Ford) continues. More dealers will likely seek the reimbursement they merit under their state laws.

17. Encroachment (Protest Laws) (13)

For the near term, filed protests in America will be fewer. This reality reflects the large decrease in the dealer population. Under state laws, challengeable (note that GM has purported to substantially limit protest rights of its continuing dealers) relocations and new establishments will be both fewer overall, and less threatening to same-line dealers.

Outlook. 2010 will see relatively few protests.

18. Minority and Female Representation (20)

The deep recession hit minority dealers disproportionately. This is because they generally were newer dealers, frequently in geographical locations with greater vulnerability to economic downturns.

Outlook. In 2010, look for some blowback by minority advocates who object to the disproportionate impact.

19. Environmental Pressures (NR)

"Cap and trade" dominates this trend. It would be higher in the rankings, but I believe that the concept is so meritless and the economic fallout so draconian that this legislative initiative is unlikely to occur in 2010.

Outlook. The weak economy and political realities will defeat cap and trade.

20. Internet Marketing, the Technology Revolution and the Remarkable Changes to "Business as Usual" (17)

This trend has now become a kind of "norm" in that virtually every dealer has a website, linked to the brand website. Online shopping for cars is now a fact of life. Seventy (70%) percent of car buyers browse on the internet before visiting any dealership.

Outlook. The internet and electronically stored information have changed dramatically the way Americans do business. In 2010, there will be additional challenges to safeguard data and personal information, while taking advantage of the efficiencies that new technologies provide.

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