

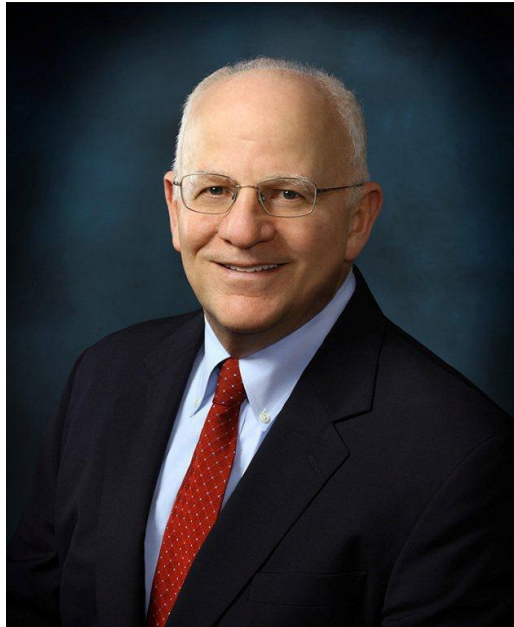
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Top Legal Issues for Dealers for Mid-Year 2019



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ERIC L. CHASE is one of America's leading automotive franchise attorneys. Over many years he has represented hundreds of dealers in their disputes with automobile factories, distributors and importers, as well as in investigations by and disputes with state and federal agencies. As a litigation principal in the New Jersey office of the 180-lawyer firm Bressler, Amery & Ross, P.C., his automotive practice is national in scope. He has served as lead counsel in a variety of landmark cases that are important and enduring legal precedents for dealers.

Mr. Chase has written dozens of articles on automotive subjects which have appeared in *Automotive News*, *Dealer Business (Auto Age)*, *Automotive Executive*, *Dealer Insider*, *Dealers Edge*, *Automotive Dealers Digest* and *NADC's Defender*. He is a frequent speaker at seminars, webinars and workshops for dealers throughout the United States and his advice regarding state franchise legislation is often sought by state associations. He served for six years on the NADC's Board of Directors.

Mr. Chase is a graduate of Princeton University (B.A. 1968) and the University of Minnesota Law School (J.D. *cum laude*, 1974). He holds a graduate certificate in International Security from Stanford University (2016).

Disclaimer

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2019's Top Twenty-Five Legal Trends for Automobile Dealers

By: Eric L. Chase[©]

1. Factory Sales Performance Standards For Dealers Under Siege: Some Positive Legal Development Toward Rationality (1)
2. The Autonomous Vehicle Phenomenon Rolls Along: Where We Are, Where We Are Going and How Soon Will AVs Be Commonplace (2)
3. The #MeToo Phenomenon and Related Issues: What Dealers Need to Do (NR)
4. The Stubborn Persistence of Regulatory Overreach, Despite Encouraging Actions and Signs (3)
5. Why National Politics Still Threatens America's Dealers (3)
6. What American Dealers Need to Know About "Trade Wars" (NR)
7. The Brave New Cyber World: Security and Opportunity, Data, Internet, Social Media, Identity Theft, and Privacy Minefield (9)
8. 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, 4)
9. Elusive CSI: What Does It Mean and Is It Valid? (NR)
10. Marketing and Advertising in an Age of the Internet and Social Media: Be Careful Out There (NR)
11. Recalls (10)

(continued)

12. Franchisor “Programs” – Factory Control Over Dealers (7)
13. “Subscription” and Other Initiatives by Franchisors to Trespass on Retail Sales and Seize More Profits for Themselves – at Dealers’ Expense (NR)
14. Legacy and Succession: Don’t Let Your Dealership Legacy Become a Legal Nightmare (NR)
15. The Continuing Vitality of State Franchise Laws (8)
16. Involuntary Termination: Threats, Realities and Dealer Responses (14)
17. Buy-Sell Activity (15)
18. Rights of First Refusal (“ROFRs”) (15)
19. Alternate Dispute Resolution: Some Progress in Arbitration (11)
20. State Associations and Legal Standing; The Importance of Dealer Associations, From NADC to State and Regional Organizations (NR)
21. Workforce Issues (12)
22. Warranty Reimbursement (19)
23. Natural Disasters, Terrorism and Unrest (18)
24. Encroachment and Franchise Modification (17)
25. Factory Audits (20)

NOTE: 2018 rankings are in parentheses; NR (Not Rated in 2018).

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“You were present on the occasion of the destruction of these trinkets, and, indeed, are the more guilty of the two, in the eye of the law; for the law supposes that your wife acts under your direction.”

“If the law supposes that,” said Mr. Bumble, squeezing his hat emphatically in both hands, “the law is a ass – a idiot.”

Charles Dickens, Oliver Twist

INTRODUCTION

The law may be “a ass – a idiot,” but today its pervasive impact on the lives and businesses of dealers is more intrusive than ever.

Why dealers need to know about the legal trends that affect them?

- Reality: Laws, regulations and other legal obligations permeate every aspect of the American dealership. This year’s ranking of 25 trends reflects this reality.
- Knowledge, understanding and preparation can resolve some legal problems before they even arise, and ameliorate them if they do happen.
- The Moving Target Problem:
 - In this industry, legal and regulatory changes and developments occur every day.
 - Navigating the flow of issues and events takes both awareness and stamina.
 - Legal awareness on an ongoing basis is an indispensable asset for dealers.

Key: Be proactive in anticipating legal events and consequences.

THIS YEAR'S #1 TREND: Factory Sales Performance Standards, and How to Address the Unfairness of Those Standards

- Controversies about factory sales performance standards and measurement methodologies are still with us, even though there have been some encouraging wins for dealers.
- Why this issue is critically important to all dealers: Sales performance grading can be a live-or-die determination.
- How factories use sales performance standards, often to the dealer's detriment.
- The myth of scientific accuracy in assessing performance and in setting standards.
- The concept of calculating "Expected" sales, based on "Opportunity" is really a scam.
- The absurdity of using "average performance" as a minimal passing grade. No franchise system other than auto says that about half the franchisees are in breach at any given time.
- What are dealers to do when they receive threats about sales performance?

The NADA has fully adopted this issue as a critical policy item, and the NADA now officially adopts the position established and advocated by dealer counsel:

*See Peter Welch, “Why Can’t Some OEMs Just Do the Right (and Smart) Thing?” Advertisement, *Automotive News*, December 17, 2018.*

Among other things: The Welch article endorses the NADC positions that seek to end the unfair factory sales standards and measurement methodologies.

This is important: The NADA’s official and public support helps dealers immensely.

What Dealers Need to Know and Do About Factory Sales Performance Standards

- Know that factory performance standards, metrics, assessments and enforcement measures are grounded in inaccuracies and phony science.
- Know the basics: Although the factories pretend that they can scientifically calculate what dealers should retail (“expected”), they cannot.
- Know that dealer legal rights on this issue are both powerful and substantial in virtually every state.
- Know that, even if factory methodologies were statistically valid (which they are not), using “average” as a benchmark for minimally acceptable performance is inherently unfair and unreasonable.
- Know that when threatening factory letters are received referencing sub-standard sales performance numbers, the basis for such numbers is inevitably flawed and unfair.

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- Do read and understand what the factory says in admonishing you for sales performance. Usually, it's only the metric.
- Do respond in writing to such threats in a timely, civil and accurate way.
- Do tell the factory in your letter why the factory's assertions are wrong.
- Know that developments in state laws and in recent cases support dealers' rebuttal to factory claims. *See, e.g., Beck Chevrolet Co., Inc. v. General Motors, LLC*, 27 N.Y.3d 379 (2016).
- Do keep up with legal developments on factory performance standards.
- It's time for a fundamental industry change that contemplates the prospect of all dealers having acceptable performance at the same time.

Performance Threats - Challenges

- **There are critical factors in performance measurement, and measurement is no longer just important in termination because of disqualification for new deals and for incentives**

Sales Effectiveness

- **#1 Allocations – the dealer cannot sell cars it cannot get**
- **#2 PMA – Hard to penetrate markets where the dealer does not have an advantage. A PMA that is too large or with census tracts of residents resistant to buy dealer's vehicles will negatively affect the performance results**
- **#3 Failure to adjust for geographic, demographic, brand or vehicle choice, traffic or work travel issues**

CSI

- **Every factory program is statistically suspect**

Is the Autonomous Vehicle Phenomenon All That It's Cracked Up to Be?

- Factories and others are spending billions on development of AVs and EVs.
- The Artificial Intelligence (AI) connection
- Publicity about the “approaching AV era” has been off the charts.
- “Shared Ride,” Uber and Lyft: Some say the days of “auto cowboys” are numbered.
- Yet the dire predictions of near-term replacement/ displacement of internal combustion engine and self-operated vehicles is greatly exaggerated.
- Likewise, the forecast of the demise of today’s franchised dealer network is overwrought. *E.g.*, Bob Lutz.
- How might all of this affect dealers?



What is Likely to Happen to the Self-Driving Phenomenon in the Near Term?

- Even as some autonomous vehicles hit the road, they will not replace existing self-driving ICE cars or electronic vehicles.
- In the longer term, the probability is that AVs (and EVs) will be in addition to, not instead of, self-driving and ICE vehicles.
- Dealer opportunity? Dealers, legislatures and others should urge legal paths to make sure that existing dealers remain the primary retailers and maintenance/service providers for autonomous vehicles.
- Laws covering safety, operation and other aspects of AVs are ongoing legislative projects, but don't expect a complete body of laws to evolve and mature for some time – *i.e.*, years.

Why Dealers Must Focus on the #MeToo Issue NOW, along with Other Workplace/Workforce Issues

- It's the right thing to do. No one really argues to the contrary.
- What is #MeToo? At its core, the lesson is that employers must treat people with respect. That includes an absolute prohibition of any kind of sexual predation.
- Costs of not addressing the issue.
 - Could be crippling. Money judgments can be severe.
 - Not just employees; #MeToo applies to customers too.
- Not only is assuring appropriate behavior necessary policy, it is a good business practice as well.
- Do establish a zero-tolerance policy.



Prevention of Discrimination and Harassment Claims

Concentrate on Policy and Procedures

- Employee awareness of policy and process
- Train managers to start investigation if they see or learn of a problem
- Teach how to talk to employee accused, potential victim, and witnesses
- No retaliation; limited confidentiality
- Make a decision

The Regulators Are Involved in Areas Historically Enforced by Finance Sources

- FTC – Summer 2018 federal court injunction action for misrepresentation of income and downpayments
- DoJ – Summer 2018 criminal action for falsified downpayments and consent judgment
- Training and oversight of F&I practices must take these into account

Compliance

Accurate Report of Customer Income

- With the prevalence of electronic submission of customer qualifications, dealers are often not getting customer hand written reports of income
- Some employees may see this as a license to use amounts they need to make a deal
- More frequently it gives customers who overstated income an opportunity to say they never provided the income reported.
- A pattern will cause a finance source to insist on customer interviews, slowing down the finance process
- **ALWAYS GET A HANDWRITTEN CREDIT APPLICATION WITH CUSTOMER INCOME IN THE CUSTOMER'S OWN HANDWRITING. SAVE IT IN THE DEAL FILE**

Compliance Downpayments

- Misrepresentations of downpayments are mushrooming throughout the industry
- Misrepresentation of a downpayment is a breach of the representations and warranties accompanying assignment of the RISC or lease.
- If the deal goes bad, this gives the finance source the right to demand the dealership buy back the contract.
- **DOWNPAYMENTS REPORTED TO FINANCE SOURCES MUST BE VALID AND COLLECTED**

Compliance Deal Completion Checklist

- Training on compliance is critical
- How does a dealer **inspect** compliance?
- Use a deal completion checklist!
- It is a roadmap through deals
- It is a basis for auditing deals
- The checklist must list the necessary forms and the actions to be taken

Compliance Tips

- Almost every FTC compliance action includes an advertising element
- Truth in Lending Act (TILA) and Consumer Leasing Act (CLA) – Obligations are clear cut; if FTC has you on this, it has leverage for more esoteric theories
- Bait and Switch – the FTC’s hot button
- Marketing and Advertising on recalls are radioactive – FTC 2018 consent judgment
- New danger area – dealer employees on social media
- Update and emphasize policies and training

The Opportunities, Threats and Challenges of the Cyber World

- This could be the biggest change-maker for dealers (and other businesses) during the 2020s decade.
- What is Artificial Intelligence and why is it important?
- A few quick facts:
 - The cyber world changes constantly
 - Everyone shops online
 - Online advertising and retail selling have soared in the dealer world
 - No dealer should be without a website
 - Cyber predators are everywhere. They are sophisticated and ruthless. Dealers have been victims, sometimes getting scammed for 6-figure losses. Watch out for scams involving wiring money.
- What to do, and not do.
 - Security measures
 - Enforcement of integrity policies and standards
 - Vet the employees who need varying levels of computer access
 - Be attentive to changing rules and standards for cyber sales and advertising
 - Insurance

Recalls

- Why recalls have proliferated, and why they will continue in big numbers.
- Impact of recalls on dealers
- What to do/not do
 - In general, don't sell vehicles under recall
 - When you cannot sell your inventory, seek compensation
 - Get help from your association
 - When a consumer's car is under recall in your possession, be a consumer advocate



What is “Subscription”? Why it Matters.

A working definition?

Vehicle subscriptions essentially package car ownership into a monthly fee that includes insurance and requires no long-term commitment. Some services charge thousands of dollars a month for luxury vehicles, while others offer mainstream vehicles for less. Most deliver a vehicle on demand, and allow users to switch vehicles based on their needs.

Michael Wayland, “Vehicle subscription services expand,”
Automotive News, Nov. 27, 2017.

The Factory Ambition to Cut into Dealer Business

- Subscription is a potential stealthy way for Franchisors to slip into the retail business. What to do.
- Need for legislation to buttress prohibitions against direct sales.

Subscriptions

The Unanswered Questions

- Are they cost effective? How to control costs?.
- How to handle vehicle turn?
- What is the legal status of a subscription? How is the right to drive the vehicle documented?
- How is the customer's interest in the vehicle or fleet taxed?
- How is the subscription advertised?
- How are subscription vehicles distributed?

Succession

- Do you have both a succession plan and the necessary written devices to make them happen? If not, you need them. NOW.
 - For Dealer Owners, this is beyond having a will.
- Why?
 - The sad tales of post-death family fights
 - Preserving value for the family, in a way that the dealer chooses
- What to do:
 - Do develop an estate plan
 - Do make a will
 - Do choose a dealer successor
 - Do have a successor addendum to each dealer agreement (if allowed)
 - Do make sure to the extent possible that the successor is well qualified.
 - In some circumstances, consider a gifting plan; consider trusts
 - Do tell your family members what you are doing
 - Do not ever put yourself (and significant other) at financial risk for your lifetime



Continuing Evolution of State Franchise Laws

- The importance of your state laws to the franchised auto business.
- Why such laws are needed, and why they serve consumers and the public interest.
- Why amendments are enacted so often.
 - Year after year, each year sees amendments to dealer laws in about half the states.

And Don't Forget Licensing Laws!

- Licensing laws enacted to protect the public – misbehave and lose your license!
- Are laws still necessary in a cyber world? More than ever!
 - To ensure the licensee is an actual business
 - To give a consumer a place to go if a problem
- Without licensing, it will be the wild west in cyberspace

Rights of First Refusal

- Factory ROFR rights are outmoded
- A dealer and family spend their lives building an integrated, multi-franchise business
- The value of the whole is greater than the sum of the parts
- ROFR is the means to take it apart
- Legislation is the answer, but expect a fight!
 - Control of franchisees – exists based on approval process
 - Protection of minority programs

2019 LEGAL AUDIT CHECKLIST FOR AUTO DEALERS

- What the Checklist has on it:
 - A list of categories of records/documents that every dealer should have on hand, with easy and ready access
- Purposes:
 - Primary purpose is to facilitate a dealer's simple, easy and fast review to assure that files are complete, and to trigger any perceived need to accomplish a task
- Dealer feedback:
 - Years of responses from dealers confirm that this checklist works. (There have also been some grumblings from attorneys who say that they cannot now charge for such a checklist, because this one is free.)



The End