

WITHOUT THE PROPER PRECAUTIONS "AS IS" MAY NOT BE LEGALLY ENFORCEABLE

BEWARE: Selling Vehicles "As Is" Can Be Tricky Business

MOST CAR DEALERS WANT TO BE ABLE TO SELL CERTAIN USED VEHICLES "AS IS," BUT DEALERS BEWARE: without the proper precautions and forms, an "as is" sale term may not be legally enforceable.

Before selling a vehicle "as is," it's important for dealers to be aware of required forms, as well as rules regarding disclosure of prior repairs or damage. In addition, dealers must remember statements made at the time of an "as is" transaction – as with any vehicle sale – can create an implied promise which could be used against them in a legal proceeding.

The Used Car Lemon Law

The Used Car Lemon Law (UCLL) covers the sale by licensed dealers of passenger vehicles no more than seven model years old and with less than 100,000 miles on the odometer. The law requires dealers to provide warranties for engines, transmissions and front/rear wheel drives; the length of warranty required depends on the age and mileage of a vehicle. The UCLL also allows dealers to sell vehicles "as is," provided the vehicles have more than 60,000 miles and the retail customer knowingly waives the dealer's obligation to provide a warranty.

For the "as is" waiver to be effective, the New Jersey Administrative Code (NJAC) requires dealers to use two separate forms published by the New Jersey Department of Law and Public Safety, Division of Consumer Affairs.

Unfortunately, the Motor Vehicle Commission doesn't inform dealers of this obligation and doesn't make the forms available on its website, even though it does provide all other necessary forms pertaining to licensed car dealers.

Nevertheless, all licensees should be using the appropriate forms when selling a vehicle "as is," since failure to use the appropriate forms is a violation of the New Jersey Consumer Fraud Act (CFA) and the statutory warranty. Like all violations of the CFA, it creates liability not only for compensatory damages, but punitive damages (up to three times compensatory damages) and legal fees. In fact, in the event of a technical violation of the CFA (i.e. failure to use

the appropriate "as is" forms) a dealer can be held responsible for attorney's fees incurred by a retail consumer that brings suit against the dealer – even if there are no ascertainable or identifiable losses on the part of the consumer.

Body Damage Disclosures

When advertising a vehicle for sale, the CFA requires dealers to disclose whether it was previously damaged or had substantial repair or body work performed (when such prior repair or body work is, or should have been, known by the advertiser or dealer).

When in doubt, dealers are best served by disclosing as much as possible. Making body damage or repair disclosures visible may slightly reduce the sale price for any given vehicle, but in the end it could limit liability and overall expenses, as well as the possible negative publicity of defending a lawsuit.



The NJAC defines "substantial repair or body work" as having a retail value of at least \$1,000. Since minor fender benders can easily cost \$1,000 or more to repair, it's often prudent simply to disclose all known prior repairs or body work.

For the purposes of advertising

disclosures, the requirement applies to ads that offer a vehicle for sale on a retail basis and appear in "any newspaper, periodical, pamphlet, circular, other publication, paper, sign, radio, television broadcast, electronic medium or delivered to or through any computer." Some cases even suggest that a window sticker on a vehicle can be considered an advertisement when it comes to the requirement to disclose body damage or repair. When in doubt, dealers are best served by disclosing as much as possible. Making body damage or repair disclosures visible may slightly reduce the sale price for any given vehicle, but in the end it could limit liability and overall expenses, as well as the possible negative publicity of defending a lawsuit.

Sales Talk or Fraud

Our office was involved in the only reported decision interpreting an "as is" sale term in New Jersey: *Bonvie Stables, Inc. v. Irving*. In the case, an appellate court found, among other things, that a written and signed acknowledgement by the buyer of an "as is" purchase of a horse did not bar the buyer from bringing suit for allegedly fraudulent statements made by the seller about the horse's background. The court did, however, distinguish the statements about the horse's past from "sales talk" about its future performance, which it deemed non-actionable. The court ultimately found it would be best left to a jury to decide whether the buyer relied on the seller's allegedly false statements and could recover damages. Even though the seller – who was represented by our firm – ultimately won the case, it serves as an important lesson for dealers: in order to reduce legal exposure for "as is" sales, it's important to perform due diligence – such as reviewing CARFAX reports – and not to overstate a vehicle's history.

While there may be a bit of work involved in selling an "as is" vehicle the right way, it's worth it in the long run. By ensuring use of the correct forms, making all necessary disclosures about body damage or repairs, and accurately stating a vehicle's history, a dealership can greatly reduce its risk of dissatisfied customers, negative publicity and potential legal liability. 🚗

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