

February 6, 2020 Publication

Related People

Stanton P. Beck
becks@lanepowell.com

Angie R. Nolet
noleta@lanepowell.com

Related Practices & Industries

Transportation

Seller Beware: The Perils of Selling Collector Cars Online

Transportation Legal Update

To sell or not to sell? That is the question.

As the rigmarole of buying and selling collector cars has modernized, so too have the ensuing disputes. Where, once upon a time, in-person sales relegated buyers to “what you see is what you get,” online sales have paved the way for keystroke-purchasers to avail themselves of plausible deniability.

Purchasers often latch onto every word—including the unsaid—and, reasonably or not, expect to buy a near-perfect car. And the cantankerous buyer who lawyers up is an economic headache for sellers. Often, buyers sue for “diminished value”—*i.e.* the car has a defect they “knew nothing of.” For sellers, winning these lawsuits can be Pyrrhic because attorney fees can dwarf the benefits.

What follows are our suggestions to avoid this legal backfire when selling a collector car online.

Sell “As-Is.” To hedge against future lawsuits, sellers ought to sell their collector cars “as-is.” That is, “with all faults.” But, while selling a car “as-is” can protect against lawsuits stemming from the physical condition of the car, it’s no get-out-of-jail-free card. After all, if your Chevelle turns out to be an Aveo in a tuxedo, you’ll have a legal issue.

The importance of inspections. Professional inspections can shield against future lawsuits. Sellers should insist that the buyer have the car professionally inspected to assess its authenticity and condition—especially if the buyer lives elsewhere. If the buyer resists, reconsider

selling. All too often, woebegone buyers who eschewed inspection will claim the seller lured them in.

The best bet? Opt for the ultra-conservative approach. If the buyer balks at an inspection, or something else seems amiss, walk. Ask yourself: is the buyer expecting the impossible? And will they sue if you don't deliver?

Equally important: a good contract. Ironclad expectations can lessen the likelihood of litigation. This is where a well-drafted contract can help. These are always prudent and best executed by a collector-car attorney. An exacting contract lays out what is promised—and, more importantly, what is not.

And, lest the buyer cry ignorance later, contracts can establish that the buyer is not relying on anything about the car other than what the contract says. Sellers benefit from the buyer's acknowledgement that they do not rely on any warranties or representations about the functionality or fitness of the car other than clear title and the seller's authority to transfer. And, contracts can confine the buyer's reliance—and reduce their expectations—to the aspects of paramount importance: authenticity and clear title.

Consider the following language, modified to suit your particular sale:

Buyer acknowledges and recognizes that the auto is sold as-is, where-is, FOB, and that no warranties or representations, whether written or oral, express or implied, nor functionality, condition or fitness for a particular use, attach to the auto or this sale and transaction, save for clear title and the authority to transfer specified herein. Buyer acknowledges that he has inspected, or had the opportunity to inspect, the auto and any and all documentation related thereto, including without limitation, documentation affecting or relating to the condition, originality, authenticity and provenance of the auto, and accepts the auto and documentation as-is and assumes all risks inherent in such acceptance. Buyer unconditionally releases and agrees to indemnify and hold seller harmless from any and all aspects related to this sale and transaction, save for transfer of clear title and payment of proceeds. This agreement incorporates and supersedes any and all prior understandings or

representations, whether oral or written, between buyer and seller and contains the entire agreement between buyer and seller.

Sellers' disclosure duties. As a general rule, a private seller has no duty to disclose defects about a car, unless the defects are safety-related. Vestiges of “buyer beware” are alive and well—from a sterile legal perspective.

And yet, where defects exist, silence is not a safe strategy. The mantra “disclose, disclose, disclose” serves sellers well. The bottom line is that many buyers have astronomical expectations and blame the seller when the car fails to meet them. So, when selling online, go the extra mile. Disclose every significant issue. Make the car available for inspection before the auction ends—and insist the buyer inspect.

A seller's disclosure duties extend only to known defects. But, a grey area exists for defects the seller should have known about. For example, shouldn't the seller who sees a puddle under their car suspect a fluid leak, even if they don't “actually know” about it? When in doubt, disclose. Negating intentional fraud by curating ignorance does not absolve the seller of negligence.

Yes, this approach may make the selling process more arduous. And, disclosing imperfections may foreclose fetching a higher price. But, it can also avoid racking up exorbitant attorney fees litigating a nuisance-level, diminished-value claim when the car is less-than-perfect—as most are.

Closing the deal: how to get the money. Before rubber meets the road, beware the nefarious buyer. Any middling crook can falsify a cashier's check. So, purge these from your financial repertoire. Wires are a far safer choice. In a seller's ideal world, before releasing title, one could verify that (1) the funds have been received and (2) the wire cannot be recalled. But, in that case, the seller will simultaneously have the money, title, and car—a buyer's nightmare.

For a universally palatable option, consider an escrow closing via a company or attorney. In this case, the seller furnishes the escrow company or attorney with the title and bill of sale. Meanwhile, the buyer wires the funds into the escrow account or attorney's client trust account. When—and only when—the escrow company or attorney verifies that all funds have been received, is the title released to the buyer. Funds are

contemporaneously released to the seller. This option protects all parties' interests. And, if anything goes awry, the escrow company or attorney is on the hook.