

AUCTIONS, "AS IS" & LIENS

Is arbitration available on an "As Is" sale?

Ask a buyer and a seller to define what an "As Is" sale at an auction means and you're bound to get two very different answers.

A seller may say the sale comes with no guarantees about what works and what doesn't, about the overall condition and fitness of the vehicle or, about the odometer reading. They may even suggest that disclosures, such as past accident damage, don't need to be made. Further, sellers may think that arbitration will not apply on "As Is" sales.

A buyer may answer that there are no guarantees about a vehicle's fitness or mechanical ability, but that the vehicle should still be driveable at the time of sale, unless stated otherwise. A buyer may expect to be told about known defects of any kind and expect to be able to arbitrate the vehicle if defects are not disclosed.

Auction rules may vary somewhat, especially with older and very high kilometre vehicles, but most auctions follow the National Association of Auto Auctions (NAAA) guidelines. Following these guidelines, and of course MVDA disclosure requirements, would mean the buyer's definition would be closer to being right.

"As Is" sales can be subject to arbitration if known defects, that would normally require disclosure, are not made. This can include mechanical issues, such as engine or transmission problems, as well as things like past accident damage. Essentially, normal disclosure rules apply and sellers cannot knowingly misrepresent the vehicle or hide known problems.

While a vehicle may not be in a certifiable condition at the time of sale, it should be driveable, if not otherwise declared. Selling "as is" is not a way to unload "junk" on an unsuspecting buyer.

Arbitration periods may be shorter and there may be other restrictions on a buyer's arbitration rights, but in most circumstances, arbitration will be available, where NAAA or MVDA required disclosures are not made.

What about Liens?

Most dealers who buy at auction assume the vehicle is lien free. They assume the dealer (or, if it is a salvage auction, the insurance company) has done a lien search or ensured the loan got paid out.

Anyway, the assumption continues, the auction does a lien search and so they would know.

Well, it's not necessarily that simple.

We have seen several instances where dealers have learned the hard way that vehicles with active liens can be sold through the auction and ultimately on to the end consumer with devastating results. This can especially be the case after purchasing at a salvage auction, spending thousands of dollars repairing the vehicle and then re-selling it.

We have also heard more than a few sad tales of vehicles being repossessed from an innocent buyer by unsatisfied lien holders, insurance claim payouts held up because of a lien on a vehicle and cases where parties are unable to sell a vehicle due to the lien scaring off potential buyers.

Don't make the mistake of thinking it's easy to have liens paid out after the fact. In truth, it can get very complicated and long delays are common. Insurance sellers may have made their settlement cheque co-payable to their insured and the bank, but the bank never sees the money because the insured is somehow able to deposit the cheque and keep the money.

In other cases, lien payouts are disputed as they don't reflect the vehicle's true value. Add the typical bank and insurance bureaucracy and corporate policies that weigh down the process and what you have is a cluster bomb of hassles.

The best advice we can give you at this point is, ask the auction if it guarantees vehicles to be lien-free. If they don't:

1. Confirm that a lien search has been done by the seller or the auction and get a copy.
2. Otherwise, do a lien search yourself.
3. If there is a lien, do not buy the unit until the lien is paid with confirmation that it has been removed.

Compliance Quiz

1. True or False? In a transaction between dealers, odometer declaration is treated differently on a sale than on a lease.

2. A dealer is selling a vehicle to another dealer, he knows the odometer was replaced, but he does not know when or what the reading might have been back then. How should he declare this on the sale?
 - (a). Leave the space for odometer reading blank.
 - (b). Ask the purchasing dealer to choose a number to write there.
 - (c). Declare TKU in writing on the bill of sale.
 - (d). Declare the true distance is unknown but may be substantially higher than on the odometer.
 - (e). The dealer should write the year of the vehicle in the space provided for the odometer reading.

3. As sometimes happens, a vehicle a dealer had sold two years ago, has come back as a trade-in. When last sold, the odometer had stopped working at 124,396 kms and he had replaced the odometer with one that read 96,796 kms. Now, two years later, the vehicle is back and the odometer now reads 126,757 kms, but it is broken again. How should the dealer declare the distance traveled? (Keep in mind the odometer will have to be fixed or replaced before resale and whatever it displays will be written in the odometer box). Following are the required declarations:
 - (a). 126,757 kms
 - (b). Odometer stopped working at 124,396 kms on (date). It was replaced with an odometer that read 96,796 kms, and which stopped working at 126,757 kms. The total distance travelled is believed to be substantially higher than 126,757 kms.
 - (c). TKU
 - (d). Dealer has no idea what the true distance travelled is, but it's probably a lot.
 - (e). None of the above.

4. Total distance driven means the same thing as odometer reading.

Q. True or False?

5. UCDA wholesale and retail bills of sale include the various odometer declarations on the form.

Q. True or False?

A GOOD APPRAISAL PROCESS WINS THE DAY

Ever had a customer trade-in their vehicle and “forget” to mention it has a significant problem.

Ever wonder, if this happened to you, what rights you might have in court? So do we.

We thought carefully about it when we designed the UCDA Customer Information, Appraisal & Disclosure Form for Trade-in Vehicles, known commonly as the Appraisal Form. Naturally, it was designed to comply with the requirements of the *Motor Vehicle Dealers Act*, to show that the dealer asked and the consumer has answered important questions about their trade-in.

But it was also intended to protect the dealer, and it does.

In a small claims court case a consumer traded-in their Mercedes but neglected to mention a transmission problem. In fact, she completed a trade-in appraisal form and signed-off that there were no mechanical problems.

When the dealer discovered there was a transmission problem and had it diagnosed, the cost to fix it was over \$2,000 and the deal fell apart. She eventually took her Mercedes back, got her deposit refunded and bought another car elsewhere. The dealer did not even ask her to pay the \$500 cost of the diagnosis!

You'd think that would be the end of it, but of course it wasn't. This consumer was just aggressive enough to consider that she was the victim in this little tale. She complained to OMVIC and sued the dealership for the extra costs (around \$10,000) she had to incur buying a more expensive vehicle elsewhere, plus \$5,000 seeking punitive damages.

In dismissing her lawsuit, the judge was greatly influenced by the fact she had signed disclosure forms that clearly misrepresented the true condition of her trade-in vehicle, mentioning that she knew it had a “shifting issue”, based on admissions at trial. The judge wrote:

“I find that the defendants acted in an upright manner. They were fair in their dealings with the plaintiff and acted appropriately throughout.”

A proper appraisal process is always your best defence. Use the forms as they are designed to be used and they will be there to help you when you need them!

Want to read the whole case? Find it here:
<https://tinyurl.com/y66u27hd>

STATUS INDIAN AND NON-STATUS INDIAN BUYERS

As our members know, we have written many times about the rules governing sales to Status Indians and how, following the rules, the buyer/lessee in such cases may enjoy an exemption from all or part of the HST depending on delivery and other factors.

As we also know, folks are willing to go to great lengths to avoid as much as 13% on a vehicle purchase or lease. We have seen an increasing amount of Status Indian buyers coming to dealers to buy vehicles with spouses, family, boyfriends/girlfriends and even just friends hoping to take advantage of the same tax exemptions.

We asked CRA for an opinion about this, as we are concerned that dealers might be audited over such sales in the future and asked to remit all or part of the HST that should have been collected and remitted.

What CRA told us is interesting.

First, the relationship the Status Indian has with the other party doesn't matter. It makes no difference if the other buyer/lessee is a spouse, family member or friend.

Second, it may not be enough that both sign the purchase or lease.

Third, what does matter is that both are "jointly and severally liable to pay for property."

It may not matter whether the co-signer's name is shown on the registration, but it's not enough to simply include the Status Indian as a co-signer on a bill of sale or lease. There needs to be evidence that the Status Indian is jointly and severally liable for payment with the non-Status Indian buyer.

What does "jointly and severally" liable for payment mean? This might be easier to prove on a financed deal with co-signors (where both are responsible for the loan or lease) than it will be on a cash sale.

CRA has not offered much guidance here, but it might help to show that both parties are actually paying for the vehicle in addition to both signing the contract.

For detailed rules please visit <https://tinyurl.com/y6atabwf> or give our Legal Department a call anytime.

Quiz Answers

1. False. The rules are the same for dealers whether the transaction is a sale or a lease.

2. The answer is d.
From the MVDA:

A registered motor vehicle dealer who enters into a contract to sell or lease a motor vehicle to a person who is also a registered motor vehicle dealer shall ensure that the following information is disclosed in the contract:

If the vehicle is a used motor vehicle and the dealer can determine neither the total distance that the vehicle has been driven, nor the distance that the vehicle has been driven as of some past date, a statement that the total distance that the vehicle has been driven is unknown and may be substantially higher than the reading shown on the odometer.

3. The answer is b.
From the MVDA:

A registered motor vehicle dealer who enters into a contract to sell or lease a motor vehicle to a person who is also a registered motor vehicle dealer shall ensure that the following information is disclosed in the contract:

If the vehicle is a used motor vehicle and the dealer cannot determine the total distance that the vehicle has been driven but can determine the distance that the vehicle has been driven as of some past date, a statement of that distance and date, together with a statement that the total distance that the vehicle has been driven is believed to be higher than that distance.

4. False. The odometer reading, even if inaccurate, is what should be recorded on the Safety Certificate and the bill of sale box given for that reading, the declaration is what explains the total distance driven in a case where the odometer is not accurate.

5. True. All UCDA forms are fully compliant with the MVDA.

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UCDA/NAPA Discount and Loyalty Rebate Program is Thriving!

It's March and NAPA and the UCDA are now presenting hundreds of rebate cheques to the 2018 qualifying dealer members!

The 2018 rebates surpassed 2017 with a grand total of \$1.4 million on a wide range of auto parts and paint purchases.

Our UCDA client service representatives make a point of working with our NAPA program participants throughout the year, keeping them updated on their progress.

So, congratulations to the NAPA rebate recipients! It looks like in 2019 we're already well on our way to beating last year's purchases.



L to R: Curtis Elliott (NAPA), Phil Humphrey, Butch Douglas, Becky Gauthier



L to R: Nick Derbyshire, John Benson (NAPA)



L to R: Matt Griffiths (NAPA), Rob Kassinger, Dave Duggan



Steve Wilson, Bargain Tire Auto Centres

39850