

# An Ounce of Prevention

## GIVEN HOW THEY ARE OFTEN

portrayed in movies and on television, one might think lawyers are always embroiled in dramatic courtroom battles and other high-profile exploits. But the reality is that much of what many lawyers do is the less-glitzy and less-visible provision of legal advice to clients. Such counseling helps clients reduce the risk of expensive litigation, and increase the chance of a successful outcome if litigation does occur.

Some of this advice can be boiled down to common-sense principles we've all heard. "Get It In Writing" stresses the importance of making sure there is a document, preferably signed by the parties, reflecting your understanding of the terms of an agreement. Such a record will help prove those terms to a third party (such as a court) if the other side later takes a different view of what happened. The flip side is "Don't Sign Anything Before Reading It"—make sure you understand and are okay with what is being put in writing, as the other side could later try to use the document against you.

To a degree, such concepts and considerations were reflected in the recent classic car case of Marshal Castle v. Barrett-Jackson Auction Company, LLC, decided on May 10, 2012, by the Arizona Court of Appeals.

According to the Court of Appeals, Bill Tyson, doing business as Auto X Press ("Tyson"), sought to sell an E-code 1957 Thunderbird convertible. Tyson contacted Barrett-Jackson, which conducts auctions of vehicles belonging to consignors, who pay Barrett-Jackson a commission. On January 22, 2010, Barrett-Jackson offered the T-Bird at auction. Marshal Castle was the highest bidder.

Castle later sued Barrett-Jackson and Tyson. Castle alleged the auction paperwork contained misrepresentations, and claimed Barrett-Jackson violated Arizona's Consumer Fraud Act.

Barrett-Jackson made a motion asking the court to dismiss the claims against it. Among other things, it argued that it had not made any representations about the T-Bird. Barrett-Jackson submitted to the court copies of its bidder agreement with Castle, the window sticker for the vehicle (known as a Car Card), and the event

program for the auction. In each document, Barrett-Jackson disclaimed (denied) that it had made any representations concerning any auction vehicle and declared that each vehicle description was the responsibility of the consignor.

Castle opposed the motion. Among other things, he argued that Barrett-Jackson's documents and disclaimers did not relieve it from liability for alleged consumer fraud.

The Arizona Superior Court granted Barrett-Jackson's motion to dismiss. Castle appealed these and other rulings to the Court of Appeals, which affirmed the lower court's ruling in favor of the auction company.



In its decision, the Court of Appeals quoted the pertinent provision of the Arizona Consumer Fraud Act: "The act, use or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice."

Castle argued on appeal that Barrett-Jackson had violated the Act by allegedly falsely representing on the Car Card that the T-Bird had undergone a "professional off-body" restoration and was in drivable condition.

The Court of Appeals noted, however, that "Castle agreed and acknowledged prior to the auction that Barrett-Jackson had not made any representations concerning the [T-Bird]. The bidder agreement, which Castle signed, disclaimed any representations by Barrett-Jackson concerning any vehicle sold at auction. In particular, it

stated the seller provided all descriptions and information and Barrett-Jackson did not verify that information. The Car Card contained a description of the [T-Bird], but it stated that a buyer should not rely on the description as a representation of fact and should 'conduct any inspections and examination necessary to satisfy himself of all material facts before making any bid.' The event program reiterated that each vehicle description was provided by the consignor and further stated: 'Barrett-Jackson makes no express or implied warranty or representation of any kind or nature with respect to particular items sold at auction. In no way shall Barrett-Jackson be responsible for correctness of, or be deemed to have made any representations or warranty of merchantability, fitness for use, description, size, genuineness, attribution, provenance or condition concerning vehicles and/or other memorabilia.'"

The Court of Appeals concluded that "[t]hese documents, on which Castle's claim is based, make clear that the representations at issue were made by the seller, not Barrett-Jackson." For these and other reasons, the Court of Appeals ruled that the trial court had properly granted Barrett-Jackson's motion to dismiss.

The court also affirmed the trial court's award of attorneys' fees to be paid by Castle to Barrett-Jackson, based on language in the bidder agreement providing for them in circumstances such as those presented in the case.

Castle filed with the Arizona Supreme Court a request for appeal of the Court of Appeals' decision, and Barrett-Jackson filed a response to that petition. As of this writing, the Arizona Supreme Court had not decided whether it would review the case.

### Barrett-Jackson replies:

"If decided differently by the trial or appellate court, the case could have had far-reaching effects for auction companies across all industries. If auction companies were held responsible for all statements made by individuals consigning items for sale at auction, it would have a chilling effect on the ability of auction houses to conduct business in an efficient manner and would require an extraordinary level of independent research and investigation that could cripple the business model altogether."

— Barrett-Jackson