

Is it a New Or Used Vehicle? The Answer May Surprise You!

Keith Whann

When it comes to selling a car, nothing seems easier than determining whether it is new or used. In reality, nothing is further from the truth. There is a maze of Federal and State Laws that impact whether a motor vehicle is characterized as new or used, including the Automobile Information Disclosure Act (The Maroney Law) and the Federal Trade Commission's (FTC) Used Car Rule, Federal and State Taxation Laws, State Unfair and Deceptive Acts and Practices (UDAP) Statutes, and State Titling and Advertising Laws. As strange as it may sound, there may even be times when a motor vehicle is appropriately characterized as both new and used.

The logical starting point in determining whether a vehicle is new or used is the definition of a new motor vehicle under the Automobile Information Disclosure Act. This Act defines a "new automobile" as "an automobile the equitable or legal title to which has never been transferred by a manufacturer, distributor or dealer to an ultimate purchaser." Many State Titling Laws use a similar standard, differentiating between new and used motor vehicles on the basis of whether a vehicle has been titled in the name of an ultimate purchaser or end-user. While these standards seem straight forward, the analysis becomes more complicated when mileage is put on a vehicle before it is sold to an ultimate purchaser.

Consider this set of facts from a case that came before the Florida New Motor Vehicle Dealer Administration Board. In *Germain v. General Motors Corporation*, the manufacturer argued that a vehicle returned by the consumer pursuant to Florida's Lemon Law was not covered under the Lemon Law because it was not a new or demonstrator vehicle. The vehicle was used by an employee of the manufacturer as a "company car" for approximately one year before it was sold at retail to the consumer. At the time of sale, the Purchase Agreement, the Used Vehicle Buyer's Guide affixed to the window of the vehicle, and the application for title submitted by the selling dealership all identified the vehicle as "used," which was the correct disclosure under the FTC's Used Car Rule. The FTC defines a "used vehicle" as "any vehicle which has been driven more than the limited use necessary in moving or road testing a new vehicle prior to delivery to a consumer..." However, after considering Florida's definition of a used motor vehicle, the prior use of the vehicle, and the fact that neither the manufacturer nor the dealer had transferred title or possession of the vehicle to an ultimate purchaser prior to its acquisition by the consumer, the Board declared that it was "new" for purposes of Florida's Lemon Law.

Federal and State Taxation Laws and State Advertising Laws may produce yet a different result. For example, Federal Revenue Procedure 2001-23, which provides an alternative last-in, first-out (LIFO) inventory computation method for taxpayers that sell used vehicles, clarifies that the term "used vehicle" for purposes of the Used Vehicle LIFO Method refers to previously titled vehicles and does not include demonstrator vehicles. State Advertising Laws will typically include another set of definitions for "new" and "used" vehicles and "demonstrator," "factory official," and "executive" vehicles as well. While one State may include demonstrator, factory official and executive vehicles in the definition of "new" for purposes of advertising disclosures, others may require dealers to advertise such vehicles as "used."

Keep in mind that most State UDAP Statutes and Advertising Rules require that any material statements be reduced to writing and integrated into the Retail Purchase Agreement for the transaction. If a Maroney Sticker is posted in the vehicle's window together with a Buyer's Guide and the Retail Purchase Agreement identifies it as a new demonstrator vehicle, the dealer is well advised to explain in writing whether the vehicle is new or used and under which standards. The disclosure may impact a number of other disclosures made in connection with the sale, such as the warranty statement (i.e. whether or not the vehicle may be sold "As-Is" under State Law), state inspection disclosures, and the sales tax calculation. As usual, something that appears simple at first blush can be pretty complicated given the maze of regulatory and legal issues that must be considered. Having an up-to-date Retail Purchase Agreement and related sales documents is the first step. Understanding the issues raised in this article and the accompanying thought process will help to ensure that you complete them appropriately.

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