

Seller Beware

BY LAWRENCE SAVELL

Readers of this column are familiar with the application in the car collecting context of the cautionary phrase *Caveat Emptor*—"Let the Buyer Beware." Despite the specificity of that maxim, however, caution should likewise be exercised by the *seller* of a collector car.

The potential liability of or risk to the seller of an old car can arise in many ways. For example, the seller's very ownership of the car (and thus right to sell it) may be challenged. The buyer may take possession and then not pay any money due. Or, someone other than the buyer may claim that the seller had previously promised to sell the car to him or her. This latter situation was presented in *Simeone v. First Bank National Association*, decided on January 3, 1996 by the United States Court of Appeals for the Eighth Circuit, which also provided an extensive discussion on how damages for breach of a sales contract may be calculated.

According to the Court, First Bank repossessed from a defaulting loan customer several vehicles: a "one-of-a-kind" 1929 Mercedes-Benz SS roadster, two 1930-era Mercedes-Benz roadsters (of which a total of only 114 were manufactured), and a 1928 Mercedes-Benz SSK (one of only 39 manufactured) which had been owned by the son of Sir Arthur Conan-Doyle, the creator of Sherlock Holmes. The bank additionally repossessed thousands of loose parts, including shock absorbers, fenders, seat cushions, and wheels, which were no longer manufactured and which were themselves extraordinarily rare.

On October 26, 1985, after receiving inquiries from several other potential purchasers, First Bank entered into an agreement to sell the repossessed automobiles and parts for \$450,000 to Frederick Simeone, a collector of vintage automobiles. Simeone paid ten percent of the contract price as a down payment.

On November 4, 1985, the date set for the conveyance of title to Simeone, First Bank's debtor (which had already filed a \$13,000,000 lawsuit against the bank and its officers) obtained a temporary restraining order ("TRO") to prevent the sale of the collateral. Thereafter, First Bank refused Simeone's attempt to pay the balance of the purchase price. Eventually, First Bank, which believed that it no longer had an obligation to sell the property to Simeone because of a condition in the agreement, sold the automobiles and parts to a corporation created by the debtor's neighbor in exchange for the debtor's dropping his suit and a price slightly higher than Simeone's. That corporation later sold all of the cars and parts for \$1,114,960, including \$470,000 that Simeone himself paid to purchase the 1929 roadster. There was evidence that, because of their rarity, by late 1987 or early 1988 the vehicles and parts were worth over \$3,000,000.

First Bank returned Simeone's down payment with interest. Simeone sued First Bank for breach of contract and fraud. The case went through the court system twice. In its first go-round, the district court granted summary judgment in favor of First Bank. Simeone appealed. The Eighth Circuit disagreed with the trial court, ruling that First Bank had breached the contract by failing to convey the property to Simeone. It sent the case back ("remanded") to the district court for rulings on the other claims raised by Simeone, as well as an assessment of damages owed to him.

At trial, the district court ruled that the Bank's conduct did not constitute fraud. However, the jury awarded Simeone \$2,405,000 for breach of contract, including (1) \$585,000 in "compensatory" damages; (2) \$225,000 in "incidental" damages; and (3) \$1,595,000 in "consequential" damages; as well as (4) "prejudgment interest."

Definition of these terms may be helpful. "Compensatory" damages is that amount which will compensate the injured party for the harm sustained, and nothing more. If I take your five-dollar bill, your compensatory damages would be five dollars. (By contrast, "punitive" or "exemplary" damages, designed to punish and/or deter, by definition go beyond compensatory damages.)

"Incidental" damages, as set forth in the Uniform Commercial Code, are damages that result from a seller's breach of contract, such as reasonable expenses triggered by the breach. These damages may include expenses for obtaining a substitute for the item that was sought to be purchased (for example, travel expenses in locating a comparable car, if such exists).

"Consequential" damages are those that indirectly flow from a breach of contract, such as reasonably anticipated losses arising from the inability to use the item that was sought to be purchased (for example, lost revenue from admission fees to view a particularly-valuable car).

"Prejudgment interest," which is not usually provided, adds the time value of the money awarded from the time of the wrong to the time the award is made.

The district court denied First Bank's motion for a new trial or, in the alternative, reduction of the awarded amount. First Bank appealed. In next month's column, we will explore how the Eighth Circuit ruled on First Bank's challenges to each element of the damages award.

Lawrence Savell is Counsel at the law firm Chadbourne & Parke LLP in New York City. This column provides general information and cannot substitute for consultation with an attorney. Additional background on this and prior "Old Cars in Law" articles can be found on-line at <http://www.carcollector.com>