Horse-Tradin': The Legal Implications of Livestock Auction Bidding Practices

Part 1 of 2

by

Drew L. Kershen

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Drew L. Kershen *

Auctions have several advantages as a market mechanism. Auctions involve a minimum of governmental interference. Auctioneers may be required to meet certain licensing requirements[1] and may have to meet certain financial responsibility requirements[2] in order to engage in the business of conducting auctions. Auction houses may also be required to comply with certain veterinary and health requirements.[3] Aside from these requirements, the auction as a market mechanism is left to private negotiations between willing sellers and eager buyers who have been brought together at the auction house or by the auctioneer in order to determine a price at which the items for sale will be sold. As a method for determining price, auctions are easy, accurate, and fair.

Auctions set fair and accurate market prices for crops and livestock which can then be used as the pricing device for non-auction sales. For example, if feeder steers sell at the Kansas City live cattle market for $66 per hundredweight (cwt.), the local stockman in the Kansas City region can use that price when he takes several head of cattle to the local packer for a private sale. The Kansas City price serves as the base price upon which the local stockman and the local packer negotiate their own private price. Hence, auction prices are important not only for a particular auction, but also for setting the price or the market for numerous other crop and livestock transactions that take place face to face

* Professor of Law, University of Oklahoma; B.A. Notre Dame; J.D. Univ. of Texas. LL.M. Harvard.

1 *E.g.*, OKLA. STAT. tit. 2, §§ 9-132, 9-133 (1981).

2 *E.g.*, 7 U.S.C. § 204 (1982); OKLA. STAT. tit. 2, § 9-132 (1981).

3 *E.g.*, OKLA. BD. AGRIC. REG. 60707(c) adopted in accordance with authority granted in OKLA. STAT. tit. 2, § 9-137 (1981). This regulation requires that every licensed livestock auction market employ an approved veterinarian.

between farm and ranch sellers and farm and ranch buyers.[4]

This discussion presupposes that the auctions have in fact been fair, open competitive markets. At this point, the bucolic image of auctions collides head-on with the reality of the word "horsetrading." Horsetrading is defined as "negotiation accompanied by shrewd bargaining and reciprocal concessions."[5] The more common understanding of horsetrading, however, carries a connotation of sharp practices which often are, or appear to be, in conflict with fairness and openness in business deals.

Two general types of bidding practices will be discussed in this article: puffing and conduct which stifles competition. These practices will be discussed through hypotheticals so as to illustrate the circumstances in which these practices are permissible and the circumstances in which these practices are illegal. By means of this discussion, the legal implications of these two bidding practices will be illuminated and the legal boundaries of "horsetrading" defined.

I. PUFFING AND CONDUCT STIFLING COMPETITION DESCRIBED

Puffing[6] is the practice of having the seller, or the seller's agent (such as a friend or employee), bid on an item which the seller has himself put up for sale. Sellers bid on their own property for two reasons. First, they desire to obtain the highest price possible for the property being sold. Puffing is a means of enhancing the ultimate price paid for the item being auctioned. Second, they desire that the property not be sold at a bargain or "sacrifice" price. Puffing is a means of protecting themselves against a "sacrifice" sale. Although these two reasons are distinct, they are not mutually exclusive.[7]

4. For an overview of marketing alternatives for farmers and ranchers, including open market auctions, see Rhodes, *Pricing Systems—Old, New and Options for the Future* 1971 BARGAINING IN AGRICULTURE 8 and Rhodes, *Policies Affecting Access to Markets*, 1972 WHO WILL CONTROL U.S. AGRICULTURE? 37.

5. WEBSTER'S NEW COLLEGIATE DICTIONARY 402 (7th ed. 1963).

6. Puffing is also called by-bidding. The person who does the puffing is called a puffer, by-bidder, decoy duck, or white bonnet.

7. The practice of puffing at auctions is apparently quite common. *See* Woes-

The seller at an auction sale is not necessarily the owner of the item being auctioned. Ownership interests in the item being auctioned may be divided among several persons, each of whom must agree to the sale. For example, cotenants of property each have individual ownership interests, but it is the group which constitutes the seller at the auction, not the co-tenants in their individual capacities.[8] Similarly, a creditor may have an ownership interest in an item being sold at auction by a judicial assignee of the debtor, but it is the judicial assignee, not the creditor, who is the seller at the auction.[9]

The distinction between the seller at the auction and those persons having ownership interests in the item being auctioned is important when the question is whether puffing has occurred. Persons having ownership interests in the item being auctioned can bid in their individual capacities without being puffers so long as the seller can hold that person responsible for the full amount of the bid.[10] If the person bidding is fully or partially immunized by the seller from being held responsible for the full amount of the bid, then puffing has occurred. It is the promise of protection from accountability for the bid, provided by the seller to the person bidding, which constitutes puffing.[11]

Nor is the auctioneer at an auction sale the seller. The auctioneer is the agent of the seller and, as agent, merely has the authority to sell the item being auctioned.[12] Thus, though the auctioneer may hold the seller accountable for

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tendiek, *By-bidding . . . Secret Trick of the Thoroughbred Trade*, Lexington Herald-Leader, May 6, 1981, at A-1, col. 1. *See generally*, DuBoff, *Auction problems: Going, Going, Gone*, 26 CLEV. ST. L. REV. 499 (1977) [hereinafter cited as DuBoff].

8. *See* Manuel v. Haselden, 206 Ky. 796, 268 S.W. 554 (1925); Berg v. Hogan, 311 N.W.2d 200 (N.D. 1981).

9. *See* Rowley v. D'Arcy, 184 Mass. 550, 69 N.E. 325 (1904).

10. East v. Wood, 62 Ala. 313 (1878); McMillan v. Harris, 110 Ga. 72, 35 S.E. 334 (1900); Manuel v. Haselden, 206 Ky. 796, 268 S.W. 554 (1925); Rowley v. D'Arcy, 184 Mass. 550, 69 N.E. 325 (1904); Kenyon v. Kenyon, 81 R.I. 223, 101 A.2d 477 (1953). *See* Berg v. Hogan, 311 N.W.2d 200 (N.D. 1981). *See generally* 6 A. CORBIN, CORBIN ON CONTRACTS § 1469, at 577 (1963) [hereinafter cited as CORBIN].

11. *See* Peck v. List, 23 W. Va. 338, 375, 396-402 (1883). *See generally* Comment, *Agreements for Fictitious Bids at Auctions*, 31 YALE L.J. 431 (1921); 20 MICH. L. REV. 355 (1921). *Cf.* Jennings v. Jennings, 182 N.C. 26, 108 S.E. 340 (1921).

12. 1 RESTATEMENT (SECOND) OF AGENCY §§ 1, 14 (1958). The agency rela-

the commission on a sale,[13] or hold the bidder responsible for the sales price,[14] puffing still exists in that sale if the seller promised to protect the bidder from responsibility for the full amount of the bid. It is the relationship between the seller and the bidder which creates puffing, regardless of any legal responsibilities that exist between the auctioneer and the seller, or between the auctioneer and the bidder.[15]

Conduct stifling competition at an auction can take several forms: agreements between prospective bidders not to bid, words or actions which are meant to influence other bidders in such a way as to discourage their bidding, or bidding techniques which diminish the price ultimately paid for the item being auctioned. Buyers engage in these practices for the purpose of dampening competition for an item being sold at auction. The motive is to purchase the item for less than the amount it would have brought in an auction uninfluenced by such conduct.[16]

Puffing and conduct stifling competition are, threfore, opposite sides of the same coin. Through the practice of puffing, it is the seller who intervenes in the auction to influence the price in a way favorable to the interests of the seller. Buyers then complain that the puffing has prevented the auction from being fair and open. In contrast, the buyer attempts to influence the auction price in a manner favorable

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tionship between the auctioneer and the seller at an auction is more fully explored in *infra* Hypothetical 10 and accompanying discussion.

13. Hayes v. Hannah, 61 Ga. App. 86, 5 S.E.2d 782 (1939).

14. *Id.*; Peck v. List, 23 W. Va. 338 (1883).

15. In repurchase bid situations, i.e. situations in which the puffer has been declared to have made the high bid so that in effect the seller through the puffer has "repurchased" his own horse, it is the standard practice, according to horse people to whom the author has spoken, for the seller to pay the auctioneer a commission as if a sale had in fact occurred. In the advertisement by the Keys Sales Company of the Sale of the Great Northwest to be held in October 1983, the consignors are informed "$350.00 Entry Fee/ 5% Commission (1% Commission on Repurchases)." SPEEDHORSE, June 1983, at 57. *Cf* Woestendiek, *By-bidding . . . Secret Trick of the Thoroughbred Trade*, Lexington Herald-Leader, May 6, 1981, at A-1, col. 1 (seller pays auctioneer a commission if the horse does not sell because bids fail to reach the reserve price established by the seller)

16. The practice of buyers engaging in conduct stifling competition is also apparently fairly common. *See generally* DuBoff, *supra* note 7, at 507-509; Smith, *Auction Rings*, 1981 CRIM. L. REV. 86.

to the buyer's interests through the practice of conduct stifling competition. Sellers complain that the buyer's conduct has prevented the auction from being fair and open. In those instances when the complaints are found justifiable, the courts consider the practice of puffing to be a fraud on the buyers and the practice of conduct stifling competition to be a fraud on the sellers. The practices are considered fraudulent because they undermine the fairness, openness, and competitive determination of price which are meant to be the distinguishing characteristics of auctions as market mechanisms.[17]

II. WITH RESERVE AUCTIONS AND WITHOUT RESERVE AUCTIONS

Auctions are of two types: with reserve and without reserve. Once the distinctions between thse two types of auctions are understood, the legality or illegality of puffing and conduct stifling competition can be sensibly evaluated.

In with reserve auctions, the auctioneer's announcements urging people to attend the auction and the auctioneer's actions of putting up a particular item for sale are, for purposes of contract law, simply expressions of a willingness on the part of the auctioneer to consider offers to purchase the item being auctioned. When a bidder then makes a bid, the bid itself becomes the offer under contract law. The offer is accepted and a contract formed when the auctioneer, acting as agent for the seller, announces "sold," whether verbally, through the fall of a hammer, or through other customary signal. The requirements of contract law for offer (the bid) and acceptance (the fall of the hammer) are thereby satisfied so that a bilateral contract is formed between a buyer and seller (bidder and auctioneer as agent for seller).

In light of the sequence through which a contract is formed in a with reserve auction, it is clear that at any time prior to the formation of the contract either party can decide

17. For a general discussion of the bidding practices of puffing and conduct stifling competition, *see* 6A CORBIN, *supra* note 10, §§ 1468-1469; 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 1648A-1648B (3d ed. 1972) [hereinafter cited as WILLISTON 3d].

that he or she does not desire to enter into a contract. Thus the bidder can withdraw his bid whenever the bidder desires just so long as the fall of the hammer has not yet occurred. Likewise, the seller can withdraw the property from the auction even after a bid has been made since the seller is under no obligation to accept any particular offer. But once the bid has been made and accepted through the fall of the hammer, neither party can repudiate the sale without breaching the contract.[18]

By contrast, the sequence through which a contract is formed in a without reserve auction differs significantly from the sequence described above. In a without reserve auction, the auctioneer's advertisements are, as in with reserve auctions, simply expressions of a willingness to sell. However, at a without reserve auction, the auctioneer's act of putting an article up for sale is construed, according to contract law, as a definite offer. A bid is the acceptance of the offer, which acceptance is binding on the auctioneer (and seller as the auctioneer's principal), subject only to the condition subsequent that no higher bid be made.[19]

In light of the sequence for contract formation described for without reserve auctions, it is clear that the auctioneer can revoke his offer by withdrawing the item from sale at any time prior to the entry of a bid which accepts the offer and forms a completed contract.[20] Once a bid is en-

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18. *See generally* 1 CORBIN, *supra* note 10, §§ 24, 108; L. VOLD, HANDBOOK OF THE LAW OF SALES §§ 67-69 (1931); 1 S. WILLISTON & G. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS §§ 29-30 (rev. ed. 1936) [hereinafter cited as WILLISTON & THOMPSON]. *See also* U.C.C. § 2-328 (1962); RESTATEMENT (SECOND) OF CONTRACTS § 28 (1981); RESTATEMENT OF CONTRACTS § 27 (1932). These last three citations—to the Uniform Commercial Code and the Restatements of Contracts—put into codified form the case law which is discussed in the treatise that are cited.

19. The general principles of contract formation at a without reserve auction are discussed in the authorities cited in the preceding footnote. In addition, *see generally* 2 S. WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT §§ 296-297a (rev. ed. 1948) [hereinafter cited as WILLISTON SALES (rev.)].

20. In England, if an auction is advertised to be without reserve, the English courts have held that a collateral contract is created between the auctioneer and those who attend the sale relying on that advertisement which collateral contract allows those attending the sale to gain damages against the auctioneer if the auctioneer fails to conduct the auction as advertised. Those attending the auction apparently do not

tered at a without reserve auction, however, the auctioneer can no longer withdraw the item. The item is now under a contract to sell. Similarly, if the model of a bilateral contract were used, it would be clear that the bidder by entering a bid

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have a contract for the purchase of the items that were advertised as for sale without reserve, but those attending do have a contract cause of action for damages for having been brought to the auction on an advertisement that was then not followed. 2 WILLISTON SALES (rev.), *supra* note 19, § 297. *See also*, 1 S. WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 297 (2d ed. 1924) [hereinafter cited as WILLISTON SALES 2d); S. WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 297 (1909) [hereinafter cited as WILLISTON SALES].

In the United States, if an auction is advertised to be without reserve, the auctioneer can change the auction to a with reserve auction simply by making an announcement of the change at the beginning of the auction. The auctioneer incurs no contract liability to those who come to the sale in reliance upon the advertisement because the advertisement is considered simply an expression of the willingness to sell at auction. The advertisement is not considered an offer in any sense and, in the United States, therefore, the advertisement of an auction as without reserve does not create a collateral contract between the auctioneer and those attending the auction. W. ANSON, LAW OF CONTRACTS § 54 (Turck rev. ed. 1929); 1 WILLISTON & THOMPSON, *supra* note 18, § 30; 2 WILLISTON SALES (rev.), *supra* note 19, §§ 297-297a; U.C.C. § 2-328 comment 2 (1962). In the United States, it is possible for an advertisement to become so specific that the advertisement becomes a firm offer. But advertisements that are firm offers require "unmistakable" language and are not common in American auction contract law. In the United States, when an advertisement is so specific that a firm offer is created, the contract formed relates to the sale of the item advertised. The contract is not a collateral contract for damages for having relied on the "firm offer" advertisement as is apparently the holding of the English cases discussed in the preceding paragraph. U.C.C. § 2-328 comment 2 (1962). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 28 comment c, illustration 1 (1981); RESTATEMENT OF CONTRACTS § 27 illustration 3 (1932).

While persons who attend an auction advertised to be without reserve have no contract claim against the auctioneer under American law, when the auctioneer (despite the advertisement) decides to change the auction to a with reserve auction, these persons may well have a claim under deceptive trade practices statutes that exist in American jurisdictions. *E.g.*, ARK. STAT. ANN. § 70-906 (Repl. 1979) (other deceptive trade practices prohibited—Enumeration—. . . (c) advertising goods or services with intent not to sell them as advertised), § 70-911 (Repl. 1979) (Civil enforcement, remedies, power of court—Costs—Penalties) (Replacement 1979); TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon Cum. Supp. 1982-83) (Deceptive Trade Practices Unlawful . . . (b)(9) advertising goods or services with intent not to sell them as advertised), § 17.50 (Vernon Cum. Supp. 1982-83) (authorizing double and treble damages to prevailing consumer along with court costs and reasonable attorney expenses). These deceptive trade practices statutes apparently provide a remedy in America which is analogous to the collateral contract between the auctioneer and those attending the auction created by English courts.

Read *infra* note 23 for a clarification of the seller's contract obligations at a without reserve auction.

has accepted the offer, created a contract, and thereby precluded himself from withdrawing the bid. Withdrawal of the bid, which is equivalent to refusing to perform the contract, should subject the bidder to a lawsuit for breach of contract.[21]

American law does not, however, use a bilateral contract model for analyzing the obligations of a bidder at a without reserve auction. Even after the bidder has entered a bid which binds the auctioneer, the bidder is permitted to withdraw his bid without suffering any contract penalty for doing so.[22] Thus, in a without reserve auction, the seller has

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21. Hoshour, *Bids as Acceptances in Auctions "Without Reserve,"* 15 MINN. L. REV. 375 (1931); Note, *Auction Sale—Without Reserve*, 21 NOTRE DAME LAW. 327 (1946).

Section 2-328(3) of the Uniform Commercial Code as originally drafted in 1952 adopted the bilateral model of contract formation in without reserve auctions so that the bidder's bid was an acceptance which could not be withdrawn without liability of the bidder for contract damages to the seller. The last sentence of subsection 3 of the 1952 version reads: "In an auction without reserve the goods cannot be withdrawn nor a bid retracted." U.C.C. § 2-328(3) comment 2 (1952).

22. Hoshour, *Bids as Acceptances in Auctions "Without Reserve,"* 15 MINN. L. REV. 375 (1931); Note, *Auction Sale—Without Reserve*, 21 NOTRE DAME LAW. 327 (1946). Both the Hoshour article and the Notre Dame note present the argument that the American case law which allows the bidder at a without reserve auction to withdraw the bid should be abandoned. Both pieces take this position on the basis that contract law should be a bilateral obligation and that a bilateral obligation can be achieved in without reserve auctions if the "putting up for sale" is considered the firm offer *and the bid is the final acceptance* which completes the contract *and binds both parties*. Because the American law in without reserve auctions allowed the bidder to withdraw the bid even though the bid was considered an acceptance of the "putting up" offer, American law was creating a unilateral obligation binding only on the seller at the without reserve auction. Both Hoshour and the author of the Notre Dame note were opposed to unilateral contracts and wrote to urge that a bilateral contract analysis be adopted instead.

By contrast, two American courts, which were just as concerned as Hoshour and the Notre Dame note writer that mutuality of obligation exist in contracts, achieved a bilateral contract through a different path. These courts took auctions which easily could have been construed to be "without reserve" auctions because the auctions were announced to be sales to the "highest and best" bidder and held that the high bidder did not have a right to insist upon a contract for sale when the high bid was in fact rejected by the auctioneer. These courts reached this result because all the case precedent was in agreement that the bidder could withdraw his bid, and the courts felt, therefore, that it would be inappropriate to prohibit the auctioneer from withdrawing the item from sale. These courts held, therefore, that until the auctioneer let the hammer fall on the bidder's bid no sale contract had been formed. In effect, these courts took a fact situation which easily could have been construed to be a without reserve

a unilateral obligation: once the auctioneer has put the item up to sale and a bid has been made, the seller is bound by a sales contract and still must continue to offer the item for sale while waiting to learn if a higher bid will be made. The bidder has no corresponding obligation to continue his bid as the acceptance while waiting to learn if a higher bid will be made.[23] The seller is bound by contract law, but the bidder is not.

Possibly because American law and lawyers have preferred bilateral contracts, all auctions are presumed to be with reserve auctions unless the auctioneer explicitly makes the auction without reserve.[24] Case law is clear that if the auctioneer announces at the time the auction is begun, or at the time a particular item is put up for sale, that the auction or sale is "without reserve," then the auction is without reserve. In such case, the unilateral model of contract law will apply.[25] Courts use a case-by-case factual approach to determine whether language other than the specific words "with-

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auction and impliedly turned the auction into a with reserve auction for purposes of contract formation analysis. Neither court explicitly addressed the issue of whether the auction should be considered a with reserve or a without reserve auction. Anderson v. Wisconsin Cent. Ry. Co., 107 Minn. 296, 120 N.W. 39 (1909); McPherson Bros. Co. v. Okanogan County, 45 Wash. 285, 88 P. 199 (1907). *Cf.* W. ANSON, LAW OF CONTRACTS § 54 (Turck rev. ed. 1929).

As indicated in the preceding footnote, the 1952 version of § 328(3) of the Uniform Commercial Code adopted a bilateral contract analysis of without reserve auctions by prohibiting a bidder from withdrawing a bid. But at the suggestion of the New York Law Revision Commission, the American Law Institute in 1956 reversed the 1952 decision and returned to a unilateral contract analysis of without reserve auctions. Section 2-328(3) was amended in 1956 to read: "In either case (with or without reserve auctions) a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid." A.L.I., 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE § 2-328 (1957). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 28(1)(c) (1981); RESTATEMENT OF CONTRACTS § 27 (1932).

23. U.C.C. § 2-328 comment 2 (1962). *Cf.* WILLISTON SALES (rev.), *supra* note 19, § 297; 2 WILLISTON SALES 2d, *supra* note 20, § 297.

24. U.C.C. § 2-328(3) (1962).

25. *E.g.*, Zuhak v. Rose, 264 Wis. 286, 58 N.W.2d 693 (1953); Pitchfork Ranch Co. v. Bar TL, 615 P.2d 541 (Wyo. 1980). The case law has been codified into the Uniform Commercial Code and the Restatements. U.C.C. § 2-328 comment 2 (1962); RESTATEMENT (SECOND) OF CONTRACTS § 28 comment d (1981), 1 RESTATEMENT OF CONTRACTS § 27 comment b and illustration 4 (1932).

out reserve" creates a without reserve auction.[26] Moreover, the presumption that all auctions are with reserve auctions does not apply to an auction that has been advertised as a without reserve auction. While the auctioneer is permitted to announce at the beginning of the auction that the terms of the auction have been changed to a with reserve auction, if no such change is announced, the auction is a without reserve auction once an item is up for sale and a bid is made.[27]

Now that the basic contract rules applicable to with reserve and without reserve auctions have been stated, one additional piece of information is needed before turning to a discussion of bidding practices as presented through hypotheticals. The most important statutory provision relevant to auction sales is § 2-328 of the Uniform Commercial Code. The language is so important to a clear understanding of the remainder of the article that it is worthwhile to quote the section in the text in full.

SECTION 2-328. SALE BY AUCTION.

(1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer

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26. *Compare* Short v. Sun Newspapers, Inc., 300 N.W.2d 781 (Minn. 1980) (sale to the "highest bid" received by a certain date held to be equivalent to a without reserve auction) *with* Anderson v. Wisconsin Cent. Ry., 107 Minn. 296, 120 N.W. 39 (1909) *and* McPherson Bros. Co. v. Okanogan County, 45 Wash. 285, 88 P. 199 (1907) (sales advertised to be by auction to the "highest bidder" held impliedly to be with reserve auctions in both cases). *See also* Curtis v. Aspinwall, 114 Mass. 187 (1873) (sale advertised as a "positive sale" held to be equivalent to a without reserve sale); Pillsbury v. McNabb, 37 Pa. D. & C.2d 283 (1965) (sale advertised as an "absolute sale" could not be determined to be a with or without reserve sale through a demurrer because pleadings alone are insufficient to develop the factual context in which the words were used); 10 Op. Att'y Gen. 884 (Tenn. 1981) (term "absolute auction" construed to mean a without reserve auction). *Cf.* Jones v. Hackensack Auto Wreckers, Inc., 124 N.J.L. 289, 11 A.2d 595 (1940) (sale advertised to be "absolute auction without limit or reserve").

27. U.C.C. § 2-328 comment 2 (1962); RESTATEMENT (SECOND) OF CONTRACTS § 28(2) comment d (1981). *But cf.* 2 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2.328:03 (1982) (argues that the "preferable solution" is to treat an auction advertised as "without reserve" to be a without reserve auction when the auctioneer does not change the terms of the auction at the time the auction commences, but that it is "not absolutely clear" that the "preferable solution" is the solution mandated by the Code language of § 2-328(3) in light of the clear preference stated for with reserve auctions in the wording of § 2-328(3).

so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.[28]

HYPOTEHTICAL 1: WITHOUT RESERVE AUCTION—SELLER REPURCHASE

As Sam Auctioneer puts up a mare, Beauty Bright Eyes, for sale, he announces that the mare will be sold without reserve. Sam Auctioneer then calls for bids. Susan Byers bids $8,000 for the mare. For a moment no other bid is made, then Virginia Sellars, the seller of the mare, bids $8,500 for the mare. When no other bids are

28. The § 2-328 quoted in the text is the 1962 version of the section. Section 2-328 has been adopted in fifty-one American jurisdictions (with the State of Louisiana and the Commonwealth of Puerto Rico being absent). Only the State of Georgia has a non-uniform or local variation, but even this variation is only tangentially relevant to the issues discussed in this article. R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-328:2 (3d 1983).

> forthcoming Sam Auctioneer lets the hammer fall and announces the horse sold to Virginia Sellars.
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> Several weeks later, Susan Byers learns that Virginia Sellars was herself the seller of the mare. Susan Byers talks with Virginia Sellars and demands that the horse be conveyed to her on the basis of her bid of $8,000.

In accordance with the basic principles of contract law applicable to without reserve auctions, it is clear that if Virginia Sellars had announced that she was withdrawing the mare from the auction sale instead of bidding $8,500, the announcement would have been ineffective. The contract was formed when Susan Byers bid $8,000, subject only to a higher bid being made.[29]

These basic principles of contract law are impliedly adopted by § 2-328(3): "In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time."[30] In Hypothetical 1, a bid was entered within a reasonable time when Susan Byers bid $8,000. After that point, the language quoted from § 2-328(3) makes it clear that the seller is not permitted to withdraw the item from sale.

The fact that in Hypothetical 1 Virginia Sellars actually entered a "higher bid" of $8,500 should not change the result. While contract principles hold that a bid forms the

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29. Jones v. Hackensack Auto Wreckers, Inc., 124 N.J.L. 289, 11 A.2d 595 (1940); Zuhak v. Rose, 264 Wis. 286, 58 N.W.2d 693 (1953). *See generally* Note, *Contracts—Commencement of Bidding at Auction "Without Reserve" Precludes Withdrawal of Property*, 3 DE PAUL L. REV. 280 (1954).

At this point in the article, the relevant issue is whether a valid contract has been formed for which a lawsuit for breach of contract exists. The question as to what remedy (i.e. damages or specific performance) may be sought as a result of the breach of contract is not presently relevant. The precise remedies which may be sought in this situation (and similar situations) are explored more fully in later portions of the article.

30. That the language quoted in the text from § 2-328(3) should be interpreted to prohibit withdrawal of the item from the auction is made clear by the commentary accompanying § 28 *Auctions* of the RESTATEMENT (SECOND) OF CONTRACTS. RESTATEMENT (SECOND) OF CONTRACTS § 28(1) comment d, illustration 5 (1981). Illustration 5 of the Restatement presents facts basically identical to those presented in the first paragraph under Hypothetical 1.

contract subject to a higher bid being made, it is clear that Virginia Sellars' "higher bid" does not qualify. To allow her bid to qualify would in fact allow her to withdraw the property. Hence, the contract principles need to be slightly clarified to state that at a without reserve auction, a bid forms the contract subject to a higher *good faith* bid being entered. Virginia Sellars' bid is not a higher good faith bid because Virginia Sellars cannot enter into a contract with herself. Moreover, the same contract principles should be control if Virginia Sellars had used an agent (such as a friend or neighbor) to enter the bid, rather than having entered the bid herself. When Virginia Sellars opted to use a without reserve auction, she chose to bind herself to a sale to the highest good faith bidder.[31]

While § 2-328(3) does not directly address the situation of a seller repurchase at a without reserve auction, it does establish that the seller cannot withdraw the property once a bid has been received. The section should be interpreted to prohibit seller repurchases at without reserve auctions, and to embody the principle that a higher bid means a higher *good faith* bid. A seller would thus be prevented from undermining the contract principles which are applicable to without reserve auctions.[32]

Principles other than contract law are also relevant. "Good faith" carries connotations related to common law fraud. Moreover, § 2-328(4) of the Uniform Commercial Code controls auctions via language carrying overtones of the legal principles of fraud. To begin to develop these interrelated strands of contract and fraud, let us turn to Hypothetical 2.[33]

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31. *See* Forbes v. Wells Beach Casino, Inc., 307 A.2d 210 (Me. 1973); Pillsbury v. McNabb, 37 Pa. D. & C.2d 283 (1964).

32. That the interpretation proposed in the text for § 2-328(3) is the correct interpretation is made clear by reference to the contract principles as applicable to auctions which are set forth in the First and Second Restatements. RESTATEMENT (SECOND) OF CONTRACTS § 28, illustration 5 (1981); RESTATEMENT OF CONTRACTS § 27 illustration 4 (1932). Illustrations 5 and 4, respectively, discuss fact patterns which are basically identical to the facts of Hypothetical 1.

33. Professor Williston in discussing the bidding practice of puffing at auctions evidenced a recognition that this practice presented interrelated issues of contract and fraud. With each new edition of his treatise on sales, Professor Williston articulated

HYPOTHETICAL 2: WITHOUT RESERVE AUCTION—SELLER SELF-BIDDING

> Speedy Talker puts up a stallion, Bit Player, for sale with the announcement that the stallion will be sold without reserve. Tom Vendee bids $6,000 on the stallion which bid is topped by a bid of $6,500 from Ness Nabors. Vendee bids $6,900; Nabors bids $7,200; Vendee bids $7,500. No further bids are entered and Speedy Talker lets the hammer fall declaring Tom Vendee the buyer of the stallion.
>
> Two weeks later, Tom Vendee learns that Ness Nabors was bidding as the agent of Betty Slims, the seller of the stallion. Tom Vendee feels that he has been "suckered" and decides to seek redress.

It is possible to analyze Hypothetical 2 solely through contract principles. Under contract law applicable to without reserve auctions, it could be argued that Tom Vendee had a valid contract when he bid $6,000, which bid (as the acceptance under contract law) was subject to rejection only if topped by a higher good faith bid. Because the higher bid by Ness Nabors of $6,500 was not a good faith bid, the $6,500 bid should not qualify as a valid rejection of the $6,000 bid. The language of § 2-328(3) relating to without reserve auctions should be interpreted to mean that the contract was formed when Tom Vendee bid $6,000. Betty Slims should not be allowed to undermine the contract through the "higher" bid she herself submitted via her agent, Ness Nabors. Contract principles drawn solely from § 2-328(3) can thus be used to reach a result identical to that proposed for the solution to Hypothetical 1.[34] Under this analysis, the additional bids by Tom Vendee are simply irrelevant to the

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ever more clearly that the bidding practice of puffing could be analyzed both from a contract perspective and from a fraud perspective. *Compare* WILLISTON SALES, *supra note 20, § 298 with* WILLISTON SALES 2d, *supra* note 20, § 298 *and* 2 WILLISTON SALES (rev.), *supra* note 19, § 298.

34. See RESTATEMENT (SECOND) OF CONTRACTS § 28 illustration 5 (1981); RESTATEMENT OF CONTRACTS § 27 illustration 4 (1932). Illustrations 5 and 4, respectively, discuss fact patterns which are strongly analogous to the facts of Hypothetical 2.

resolution of the question of when the contract was formed. Tom Vendee has an enforceable contract at the $6,000 bid.

Still, Betty Slims could argue that nobody twisted Vendee's arm to make him enter the bids of $6,900 and $7,500. Slims could argue that these additional bids should be considered valid, voluntary acceptances, and that the contract principles applicable to without reserve auctions should be interpreted to mean that the acceptance is the last voluntary high bid. The last voluntary high bid in Hypothetical 2 was Tom Vendee's bid of $7,500.[35]

The response is that Vendee would not have made the two higher bids if Slims had not used a puffer to bid against him. This response is based on a feeling of fraud which seems to have three facets. First, Vendee's bid was not really "voluntary" because it was induced by the false impression, created by Slims, that competition was greater than it actually was. Second, Vendee had to pay more than he needed to pay because Slims used a puffer to enhance the price of the stallion. Third, Slims used a secret means to bid as seller on the stallion.[36]

The feeling of fraud that arises when a puffer is used in a situation like Hypothetical 2 has been codified by the Uniform Commercial Code in § 2-328(4). Without regard to the

35. This article began as a speech to a Continuing Legal Education seminar entitled "The Law of Horses: Contracts Used in the Horse Business," presented on March 18, 1983. The author stated to the audience that Tom Vendee's bid of $6000 completed the contract and that it was the only bid which courts should consider legally relevant in determining when the contract was formed. In immediate response to the author's statements, several persons in the audience presented the argument related in the text that Tom Vendee's higher bids of $6900 and $7200 were voluntary bids and as voluntary bids ought to be considered valid acceptances under contract law. These audience comments are the genesis of the overall analysis developed in the text for understanding Hypothetical 2.

36. The first facet of the feeling of fraud is a concern about lying; the second facet, a concern about being cheated; and the third facet, a suspicion that something is wrong when a person uses a devious means to accomplish a goal rather than use the same means in an openly acknowledged fashion. These three facets of fraud in the practice of puffing at auction sales have been listed by courts again and again in their discussion of the legal implications of puffing. *E.g.*, Veazie v. Williams, 49 U.S. (8 How.) 134, 153-58 (1850); Springer v. Kleinsorge, 83 Mo. 152 (1884); Bowman v. McClenahan, 20 A.D. 346, 46 N.Y.S. 945 (1897); Peck v. List, 23 W. Va. 338, 375-97 (1883).

contract analysis presented on behalf of Tom Vendee and Betty Slims, the language of the Code makes it clear that the use of a puffer under the facts of Hypothetical 2 is impermissible.[37] Pre-Code case decisions held that in such situations the use of a puffer constitutes fraud.[38] The language of the Code should similarly be interpreted to impose a finding of conclusive fraud when a puffer is used.[39] Contract analysis aside, Tom Vendee is entitled under § 2-328(4) to legal redress against Betty Slims. In fact, subsection 4 allows Tom Vendee, as buyer, an option between rescission or taking the "goods at the price of the last good faith bid prior to the completion of the sale."

Rescission is a fairly straight-forward remedy on behalf of a buyer. The buyer is not required to elect rescission the moment he learns of the puffing at the auction sale. He will be given the chance to evaluate which of the two remedies offered by Subsection 4 puts him, as the buyer, in the best position. The buyer may rescind because the purchase now looks to be a "bad deal," regardless of price. The buyer's motive is irrelevant to the remedy allowed by subsection 4.[40] On the other hand, the buyer has to exercise rescission

37. Subsection 4 of § 2-328 reads:

> If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

It should be noted that the language makes clear that the buyer is entitled to the alternative remedies when the "seller makes or procures" a puffed bid and this is true regardless of the knowledge or lack of knowledge by the auctioneer of the seller's fraudulent actions.

38. *E.g.*, Veazie v. Williams, 49 U.S. (8 How.) 134 (1850); McMillan v. Harris, 110 Ga. 72, 35 S.E. 334 (1900); Springer v. Kleinsorge, 83 Mo. 152 (1884), Towle v. Leavitt, 23 N.H. 360 (1851); National Bank of the Metropolis v. Sprague, 20 N.J. Eq. 159 (1869); Bowman v. McClenahan, 20 A.D. 346, 46 N.Y.S. 945 (1897); McDowell v. Simms, 41 N.C. 202 (1849); Peck v. List, 23 W. Va. 338 (1883). *See generally* 6A CORBIN, *supra* note 10, § 1469; 14 WILLISTON 3d, *supra* note 17, § 1648B.

39. *See* Wade v. Ingram, 528 F. Supp. 495 (E.D. Ark. 1981); Feaster Trucking Service, Inc. v. Parks-Davis Auctioneers, Inc., 211 Kan. 78, 505 P.2d 612 (1973); Berg v. Hogan, 311 N.W.2d 200 (N.D. 1981). *See generally* R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-328:25 (3d. 1983); 2 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-328:04, at 562 (1982).

40. Berg v. Hogan, 311 N.W.2d 200, 203 (N.D. 1981).

within a reasonable time after learning of the facts of puffing which give rise to use of the legal remedies. The buyer may not use the goods while waiting to see what the future holds.[41]

The alternate remedy of taking the "goods at the price of the last good faith bid prior to the completion of the sale" is more difficult to interpret and apply to puffing situations. The specific wording of § 2-328(4)'s alternate remedy refers to "last good faith bid prior to the *completion* of the sale." "Completion" is a word which seems to call for a contract analysis of the puffing situation under § 2-328(3). Let us take a look at this alternate remedy from both a contract and a fraud perspective.

It has been argued above that § 2-328(3) should be interpreted to mean that, in a situation like Hypothetical 2, the contract was completed when Tom Vendee bid $6,000 because that bid was never topped by a higher good faith bid. If that contract analysis is adopted for without reserve auctions, then the "last good faith bid prior to the completion of the sale" would be the $6,000 bid because all later bids were either bad faith bids directly from the seller or bids induced by seller's bad faith bids. Hence, the alternate remedy of § 2-328(4) would allow Tom Vendee to keep the horse while paying $6,000.

The fraud analysis under subsection 4 of § 2-328 reaches the same result. As has been indicated previously, the use of a puffer is conclusive fraud under subsection 4 of § 2-328. The buyer need only prove that puffing occurred in order to be entitled under the Code language to a choice be-

41. McDowell v. Simms, 41 N.C. 202, 205 (1849); Berg v. Hogan, 311 N.W.2d 200, 204 (N.D. 1981). *Cf.* Osborn v. Apperson Lodge, 213 Ky. 533, 281 S.W 500 (1926).

Oklahoma has a statute which sets limits on a party's ability to rescind. The Oklahoma statute reads: "Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: 1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and, 2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable, or positively refuses to do so." OKLA. STAT. tit. 15, § 235 (1981).

tween two remedies. This strong condemnation of puffing as fraud is a clear indication that the alternate remedy of allowing the buyer to keep the property was adopted for the purpose of depriving the seller of all advantages which the seller tried to gain by using a puffer. Thus, sellers will be deterred from using puffers. This interpretation protects the openness, fairness, and competitive determination of prices which are meant to be the distinguishing characteristics of auction sales.[42] Applying the fraud analysis of subsection 4 to Hypothetical 2 leads to the conclusion that Tom Vendee is entitled to the stallion for $6,000. To select any other bid of Vendee as the "last good faith bid" would reward a seller for using a puffer.[43]

Contract and fraud analyses of the alternate remedy also reinforce one another if the facts of Hypothetical 2 are changed slightly to introduce a third party bidder. For example, let the facts of Hypothetical 2 remain the same except that a third party bidder enters a bid of $6,700 between the seller's bid of $6,500 and Vendee's bid of $6,900. Under these new facts, the conclusion that Tom Vendee gets the stallion for $6,000 should still be the correct conclusion.

Under the contract analysis for without reserve auc-

42. 1 NEW YORK LAW REVISION COMM'N, STUDY OF THE U.C.C. § 2-328, at 444 (1955); DuBoff, *supra* note 7, at 506.

In Veazie v. Williams, 49 U.S. (8 How.) 134 (1850), one of the earliest United States cases to discuss puffing, the Supreme Court used its equitable powers to devise a remedy which allowed the buyer at auction to take the property for the last bid made prior to bids being entered on behalf of the seller. The Court explicitly used this remedy because it deprived the seller of all economic benefits the seller had hoped to gain by using a puffer. As a result of this remedy devised by the Supreme Court, the buyer was able to recover approximately $20,000 from the seller. *Id.* at 158-59.

More recently, the Supreme Court of North Dakota in the case of Verg v. Hogan, 311 N.W.2d 200 (N.D. 1981) expressed the attitude that the remedies provided under § 2-328(4) ought to be liberally construed to benefit the buyer because the seller by engaging in puffing had created the situation which necessitated the buyer seeking the legal relief granted by subsection 4. Hence, the Supreme Court of North Dakota would apparently find it appropriate to use the remedies of subsection 4 to deprive the seller of all advantages the seller had hoped to gain through use of a puffer. *Id.* at 203.

43. 2 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-328:04, at 563 (1982); 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.13040501, at 40 (1964).

tions, Vendee's $6,000 bid completed the contract; all later bids were either made in bad faith by the seller or were induced by seller's bad faith bids. The third party's bid cannot be considered a "good faith bid" because if the sale had stopped at the $6,700 bid of the third party, the third party could properly repudiate that bid on the ground that it was induced by the seller's bad faith bid of $6,500. A kind of analysis by regression leads back to the $6,000 bid as the only good faith bid.[44]

Under the fraud analysis, Vendee's bid of $6,000 also remains the only bid which totally deprives the seller of all advantages from using a puffer. If the courts were to recognize the third party's bid of $6,700 as the "last good faith bid" for purposes of the alternate remedy of § 2-328(4), the seller would have gained an economic advantage of $700 through the use of the puffer.[45] Such an interpretation of the

44. The crucial point in any pattern of bids entered at an auction is the point at which the seller intervenes in the auction to submit a puffed bid. Beginning with the seller's puffed bid, that bid and all later bids, even those from good faith bidders, should be considered bad faith bids because the bid is either the seller's fictitious bid or a bid induced by seller's fictitious bid. Hence, after the seller has entered a puffed bid, it is legally irrelevant as to the number of good faith bidders who continue to bid or the order in which further bids from the puffer and/or good faith bidders are submitted. The task of the court in these puffing situations is to identify the last good faith bid and none of the later bids should quality as good faith bids.

A contrary view was expressed by the New Jersey Chancellor in the case of National Bank of the Metroplis v. Sprague, 20 N.J. Eq. 159 (1869). The Chancellor stated that he was inclined to the view that if a third party good faith bidder submitted a bid between the bid of the puffer and the bid of the good faith purchaser whose bid was accepted by the auctioneer, then the intervening bid of the third party good faith bidder vitiated the fraud of the puffed bid. *Id.* at 165. If the fraud of the puffed bid were vitiated, then the good faith purchaser whose bid was accepted would lose the remedy of rescission which he would otherwise have had due to the puffed bid. The New Jersey Chancellor's view has been expressly rejected by the Missouri Supreme Court and by Professor Williston. Springer v. Kleinsorge, 83 Mo. 152, 165 (1884); 2 WILLISTON SALES (rev.), *supra* note 19, § 298, at 208 n.12; WILLISTON SALES, *supra* note 20, § 298, at 450 n.15. No other court since 1869 has argued for the position expressed by the New Jersey Chancellor.

45. Other bidding patterns can be imagined in which the economic advantage to a seller would even be greater if a bid from a third party good faith bidder were declared to be the "last good faith bid." For example, the third party good faith bidder might not have made a bid in Hypothetical 2 until bidding $7800 on Bit Player. Then Tom Vendee bids $8000 and the hammer falls. If the third party good faith bidder's bid of $7800 is declared to be the "last good faith bid", the seller has now gained an economic advantage of $1800 through the use of the puffer. While the

phrase "last good faith" bid would, in effect, permit the alternate remedy to undermine the conclusive presumption of fraud which subsection 4 of § 2-328 prescribed as the appropriate response to the use of a puffer by a seller. The alternate remedy which allows the buyer to take at the "last good faith bid" was added by the drafters of the Uniform Commercial Code as a remedy to strengthen the buyer's position in these situations and to deter sellers from using puffers.[46] No conflict between the alternate remedy and its conclusive presumption of fraud exists if the "last good faith" bid is interpreted to mean the last good faith bid prior to any bids by the seller himself.[47]

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size of the economic advantage gained by the seller because of his puffing makes the egregiousness of his conduct clearer, the basic fact remains the same: the seller's use of a puffed bid at $6500 is fraudulent and ought not work to the seller's economic advantage period, whether that economic advantage be small or large.

46. At the common law, the only remedy available to a purchaser at a puffed auction was the contract remedy of rescission. Drew v. John Deere Co. of Syracuse, Inc., 19 A.D.2d 308, 241 N.Y.S.2d 267 (1963), Feeman v. Poole, 37 R.I. 489, 93 A. 786 (1915), *reh'g denied*, 94 A. 152 (1915); 14 WILLISTON 3d, *supra* note 17, § 1648B. Rescission was allowed to the person declared to be the purchaser at the auction because the use of a puffer at the auction was considered conclusive fraud. See citations set forth *supra* note 38.

The alternate remedy to allow the buyer to "take at the price of the last good faith bid" is a fraud remedy created by the drafters of the Uniform Commercial Code U.C.C. § 2-328(4) (1952); 14 WILLISTON 3d, *supra* note 17, § 1648B.

47. In his 1964 treatise, Professor Hawkland argued that in situations like that being discussed in the text—where the buyer bids, the seller enters a puffed bid, a third party bidder bids, and then finally the buyer enters the bid upon which the hammer falls—that the third party bidder has entered the "last good faith bid" because the third party bidder, rather than the buyer whose bid was ultimately accepted, is the party who is entitled to use the alternate remedy under § 2-328(4) to gain a contract for the item that had been sold at auction. S. HAWKLAND, A TRANSACTIONAL GUIDE TO THE U.C.C. § 1.13040501, at 40 (1964). *Accord* Cuahy, *The Sales Contract—Formation*, 49 MARQ. L. REV. 108, 120 (1965).

Several reasons exist for rejecting the argument Professor Hawkland presented in 1964. First, as argued in the text, to use the third party bidder's bid as the "last good faith bid" allows the seller to profit from having engaged in puffing. Second, if the third party learns about the puffed bid of the seller, the third party can repudiate his bid. Once the third party has repudiated his bid, the "last good faith bid," through a kind of regression analysis, turns out to be the bid entered by the buyer. The "last good faith bid" is indeed the last bid by a good faith bidder prior to any bid being entered on behalf of the seller. Third, the language of § 2-328(4) refers to "buyer" with a clear, though only implied, implication that the buyer is the person whose bid was accepted to close the auction. In other words, Professor Hawkland's concern for the third party bidder seems to be misplaced because the language of the Code section

Whether contract analysis and fraud analysis under the Code will always lead to the same conclusion in factual patterns occurring at auctions is a question which requires that we turn our attention to Hypothetical 3.

HYPOTHETICAL 3: WITH RESERVE AUCTION—SELLER REPURCHASE

Nimble Crier, the auctioneer, puts up Gone For Good, a yearling filly, for sale at a with reserve auction. Gone For Good is being sold by Lloyd Unsure. No announcement is made at the time that the filly is put up for sale that Lloyd Unsure is reserving the right to bid.

Beth Wants bids $22,000 for the filly. George Brown tops that bid with a bid for $25,000 which bid in turn is topped by a bid of $28,000 submitted by Best Friend. Unbeknownst to Wants and Brown, Best Friend is bidding at the request of the seller, Lloyd Unsure.

Wants bids $30,000; Friend bids $32,000; Wants bids $34,000; and Friend bids $35,000. When Crier hears no further bids from either Brown or Wants, Crier gavels the auction to a close with a sale of the filly to Best Friend.

After the auction is over, Friend immediately re-

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seems purposefully drafted to favor the buyer—i.e. the last person to bid whose bid was accepted to close the auction—rather than any third party bidder. While the Code commentary gives no explicit reason for favoring the buyer, a good reason for favoring the buyer is that the buyer is the one likely to have the immediate personal interest and adequate information to evaluate the auction for puffing and, if puffing is found to pursue a legal remedy for the puffing. By contrast, the third party bidder, who did not stay the course to enter the bid that was accepted, is more likely just to be happy that he did not make the purchase and probably more willing just to forget the whole incident rather than to pursue a legal remedy. For these reasons, it is submitted that the buyer rather than the third party bidder is entitled to enforce the alternate remedy of § 2-328(4).

Two other authors, who have discussed this issue of whether § 2-328(4) protects the buyer or the third party bidder, have also concluded, contrary to Professor Hawkland's 1964 treatise, that the buyer is the proper party to exercise the alternate remedy of § 2-328(4). DuBoff, *supra* note 7, at 506; 1 NEW YORK LAW REVISION COMM'N, STUDY OF THE U.C.C. § 2-328, at 444 (1955). By 1982, in his second treatise on the U.C.C., Professor Hawkland had changed his mind. For reasons which are similar to those presented by this author in the preceding paragraph, Professor Hawkland is now of the opinion that § 2-328(4) is meant to provide the alternate remedy to the buyer, rather than the third party bidder. 2 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-328:04, at 565 (1982).

> turns the horse to Unsure. An agreement had existed all along between Unsure and Friend that Friend would not be responsible for any bid or purchase if, while bidding on Gone For Good, Friend were declared the purchaser of the horse.
>
> Two weeks later, Beth Wants learns that Lloyd Unsure still has the filly, Gone For Good. Upon further inquiry, Beth Wants learns about the agreement that had existed all along between Unsure and Friend. Beth Wants feels that she has been cheated from buying the filly and that she is entitled to the filly.[48]

To untangle the contract and fraud analyses applicable to Hypothetical 3, we must begin by considering another scenario. Suppose that Lloyd Unsure had not used Best Friend as a puffer; suppose that the bidding reached $34,000 on a Beth Wants bid; suppose that Lloyd Unsure considered $34,000 to be too little for the filly, and that at that point in the auction sale Lloyd Unsure announced that he was withdrawing Gone For Good from the sale and taking the filly home to his ranch. Contract principles applicable to with reserve auctions clearly indicate that withdrawing the filly from the sale is a perfectly legal and legitimate action by Unsure. The bid of $34,000 by Beth Wants under these conditions is simply an offer to purchase which does not form any binding contract until accepted by the auctioneer by the announcement that the filly has been sold. Lloyd Unsure has no obligation to accept any offer made to him. He can do precisely as the suppositions indicate: he can decide to withdraw the filly and so refuse to accept any offer made at the auction.[49]

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48. When a puffer winds up being declared the high bidder at an auction, the seller, according to the terminology used in the horse industry, is said to have "repurchased" his own horse. The high bid entered by the puffer is called the repurchase bid.

49. The contract principles applicable to with reserve auctions, and the differences from contract principles applicable to without reserve auctions, are more fully explained and discussed in the *supra* text accompanying notes 18-28.

The legal right of Lloyd Unsure to withdraw the filly, Gone for Good, from the with reserve auction should be contrasted with the legal impermissibility of withdrawing a horse from a without reserve auction. This latter situation is discussed in conjunction with Hypothetical 1 in the *supra* text accompanying notes 29 & 30.

Of course, Hypothetical 3 differs from the suppositions set forth in the preceding paragraph because Lloyd Unsure did not announce that he was withdrawing the filly from the sale. Rather, Lloyd Unsure allowed his agent, Best Friend, to make the high bid and be declared the purchaser. Thus, the issue for discussion is whether the repurchase through an agent is equivalent to a withdrawal of the property from the auction.

Contract analysis of situations like Hypothetical 3 indicates that a repurchase (i.e., the use of an agent to submit the high bid) is equivalent to a withdrawal. Since no offer has been accepted, no binding contract exists in either instance between the person claiming to be the buyer and the seller at the with reserve auction sale. Hence, contract analysis of Hypothetical 3 leads to the conclusion that Beth Wants has no contract which she can bring before the court for enforcement.

Two cases, *Freeman v. Poole*[50] and *Drew v. John Deere Company of Syracuse, Inc.*,[51] use a contract analysis of fact situations very similar to Hypothetical 3. In both instances, the courts concluded that no contract existed. These courts concluded that repurchases were equivalent to withdrawals and that repurchases were legally permissible auction bidding practices.[52] While these two cases were decided prior to

50. Freeman v. Poole, 37 R.I. 489, 93 A. 786 (1915), *reh'g denied*, 94 A. 152 (1915).

51. Drew v. John Deere Co. of Syracuse, Inc., 19 A.D.2d 308, 241 N.Y.S.2d 267 (1963). *Cf.* Toy v. Griffith Oldsmobile Co., 342 Mich. 533, 70 N.W.2d 726 (1955).

52. The conclusion that repurchase bids are equivalent to withdrawals and therefore legally permissible has been approved by several commentators. R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-328:25 (3d 1983) (approving *Drew v. John Deere*); L. VOLD, HANDBOOK OF THE LAW OF SALES § 67, at 178 n.88 (1931) (approving *Freeman v. Poole*).

Three other cases seemingly support the conclusion of *Freeman* and *Drew* that seller repurchase bids are equivalent to withdrawal and are therefore legally permissible. Hayes v. Hannah, 61 Ga. App. 86, 5 S.E.2d 782 (1939); Puckett v. Dunn, 529 S.W.2d 358 (Ky. 1975); Becker v. Crabb, 223 Ky. 549, 4 S.W.2d 370 (1928). But when the factual patterns of these three cases are examined closely, the rulings of the courts are seen not to be directly on point.

In *Puckett v. Dunn*, the plaintiff attempted to enforce a contract against the seller on the claim that the plaintiff entered the high bid at the auction. The case was argued to the Kentucky high court on the issue of whether bids are offers or acceptances

the Uniform Commercial Code, the contract analysis used by these courts is appropriate in interpreting the language of § 2-328(3).[53]

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under contract law. The Kentucky court ruled that the plaintiff's bid was an offer and that no contract was formed because as an offer it was never accepted. But because the court was concentrating on whether the bid was an offer or acceptance, the Kentucky court failed to explain why the plaintiff's bid was not accepted. If the reason plaintiff's bid was not accepted was because the seller publicly withdrew the item from the sale, then the Kentucky decision simply reaffirmed contract principles long applicable to with reserve auctions. Of course, if the seller publicly withdrew the item from sale in *Puckett v. Dunn*, the case would be significantly different factually from the repurchase bid situations of *Freeman* and *Drew*. On the other hand, if the reason plaintiff's bid was not accepted was because the seller entered a repurchase bid, then *Puckett v. Dunn* would be directly on point and directly supportive of the conclusion of *Freeman* and *Drew*. However, because the opinion of the Kentucky court did not give the reason why the plaintiff's bid was not accepted, the decision in *Puckett v. Dunn* cannot be used either to support or to refute the decisions of *Freeman v. Poole* and *Drew v. John Deere*.

The other two cases, *Hayes v. Hannah* and *Becker v. Crabb*, did clearly involve seller repurchase bids. The plaintiff in both these cases, however, was the auctioneer who was suing to obtain a commission on the repurchase sale from the seller who had entered the repurchase bid. In both cases, the courts ruled that the plaintiff-auctioneer was entitled to recover commissions for repurchase sales. But the fact that the auctioneer was allowed to recover a commission from a seller in a repurchase situation should not be precedent for holding that the repurchase bid is a legally permissible bid as against a good faith bidder whose bid was rejected through the repurchase technique. How these two courts would rule when a good faith bidder is the plaintiff who is seeking to enforce a contract against a seller who used a repurchase bid to reject the plaintiff's bid is simply a situation that the courts of Georgia and Kentucky have not faced. Hence, the decisions of *Hayes v. Hannah* and *Becker v. Crabb* should not be interpreted to lend support to the decisions of *Freeman v. Poole* and *Drew v. John Deere*.

As a matter of industry practice, it is apparently common for auctioneers to be paid a commission by the seller in a seller repurchase situation. Read note 15 *supra*.

53. *Freeman v. Poole* was decided in 1915 long before the Uniform Commercial Code but at a time when Rhode Island had adopted § 21 of the Uniform Sales Act Section 21 reads as follows:

> In the case of a sale by auction—
>
> (1) Where goods are put up for sale by auction in lots, each lots is the subject of a separate contract of sale.
>
> (2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid; and the auctioneer may withdraw the goods from the sale unless the auction has been announced to be without reserve.
>
> (3) A right to bid may be reserved expressly by or on behalf of the seller.
>
> (4) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf,

If contract analysis were the only available approach to Hypothetical 3, Beth Wants would apparently have no claim against Lloyd Unsure. Her claim is greatly strengthened, however, by the fraud analysis of § 2-328(4).

Under § 2-328(4), a seller at auction must give notice that liberty for bids on behalf of the seller has been reserved. If such notice is not given and the seller bids, then the buyer is automatically entitled under subsection 4 to either rescind the sale or to take the property at the last good faith bid prior to the completion of the sale. This language of subsection 4 makes it clear that the seller is prohibited from self-bidding[54] and that a violation of the prohibition is fraud by

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or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

The Supreme Court of Rhode Island discussed subsection (2) of the Uniform Sales Act in its *Freeman* opinion. Subsection (2) presents a contract analysis of auctions. The Supreme Court did not mention subsection (4) of the Act at all. Subsection (4) presents a fraud analysis of auctions. The opinion of the Rhode Island Supreme Court focused exclusively on issues of when and how a contract is formed at auctions. Freeman v. Poole, 37 R.I. 489, 93 A. 786 (1915), *reh'g denied*, 94 A. 152 (1915). The similarity between § 21 of the Uniform Sales Act and § 2-328 of the Uniform Commercial Code is obvious.

Drew v. John Deere was decided in 1963. By that date, the New York legislature had passed the Uniform Commercial Code, but the Code did not go into effect until September 1964. Hence, the opinion of the court in *Drew* is based on law prior to § 2-328, but the opinion specifically makes reference to § 2-328 and implies that the same decision would be reached if § 2-328 were already in effect in New York. Drew v. John Deere Company of Syracuse, Inc., 19 A.D.2d 308, 241 N.Y.S.2d 267 (1963). The references to § 2-328 in the *Drew* opinion are references to subsections 2 and 3 which set forth a contract analysis of auctions. The New York court makes no reference in *Drew* to subsection 4 of § 2-328 which presents a fraud analysis of auctions. The entire emphasis of the opinion in *Drew* is on when and how the contract is formed at auctions.

54. In the original version of § 2-328(4) issued in 1952, the subsection read as follows:

> If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, except at a forced sale or where notice has been given that liberty for such bids is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last prior good faith bid.

U.C.C. § 2-328(4) (1952).

In 1956, subsection 4 was rewritten into the language which has been the official version ever since. The changes in subsection 4 were made specifically "to clarify the prohibition on seller bidding." A.L.I., 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE § 2-328, at 49 (1957).

the seller at the auction sale.[55] Once it is understood that seller's own bidding in Hypothetical 3 is fraud, the question becomes what remedy is available to correct the fraud.

At common law, the only remedy available to a bidder who learned that the auction had involved puffing was rescission.[56] If rescission were the only legal remedy available to Beth Wants, a plausible argument would exist that it makes no sense to confirm the contract, only to have the contract then rescinded because of puffing involved in the auction sale. It would be easier simply to treat the agent's repurchase bid as having negated the prior good faith bid, so that no contract was created. No contract is no contract regardless of how a court gets there.[57]

Section 2-328(4) makes it clear, however, that the remedy of rescission is no longer the only remedy available to auction buyers who bid at auctions where sellers also bid without having given notice that self-bidding was reserved. Subsection 4 allows the alternate remedy of taking the goods at "the price of the last good faith bid prior to the comple-

55. The language of § 2-328(4) does not make it as clear that seller self-bidding (except under limited circumstances discussed *infra* in the text accompanying notes 74-87) is *per se* fraud as did the language of § 21 of the Uniform Sales Act. The last sentence of § 21(4) read: "Any sale contravening his rule (against seller self-bidding) may be treated as fraudulent by the buyer." But the case law interpreting § 2-328(4) clearly holds that seller self-bidding is conclusive fraud. See authorities cited *supra* in notes 39 & 54.

As indicated *supra* in note 53, the courts in the cases of Freeman v. Poole and Drew v. John Deere completely ignored the fraud analysis of § 21(4) and § 2-328(4) respectively. Hence, the decisions of these two courts does not provide any guidance for what the meaning of conclusive fraud from seller self-bidding is for a repurchase situation at with reserve auctions.

56. *See* the authorities cited *supra* in note 46.

57. In the decisions of Freeman v. Poole and Drew v. John Deere, both the Supreme Court of Rhode Island and the New York appellate court, respectively, relied upon the fact that rescission was the only available remedy for rectifying puffing situations as a reason for concluding that a repurchase bid was equivalent to a withdrawal. Although neither court seemed very sympathetic to the plaintiff good faith bidder's prayer that a contract be enforced on behalf of the good faith bidder against the repurchasing seller, the courts also seemed to express the attitude that the law provided no method, no remedy, whereby the request of the plaintiff could be satisfied even if the court were sympathetic to the plaintiff good faith bidder's claim. Freeman v. Poole, 37 R.I. 489, 93 A. 786 (1915) *reh'g denied*, 94 A. 152 (1915); Drew v. John Deere Company of Syracuse, Inc., 19 A.D.2d 308, 241 N.Y.S.2d 267 (1963).

tion of the sale."[58] Thus, subsection 4 could be interpreted to mean that, for purposes of remedying the fraud of the last bid being a seller's repurchase bid, the buyer should be entitled to the confirmation of a contract by the court at the last good faith bid.[59] Applying this interpretation of § 2-328(4) to Hypothetical 3 would mean that Beth Wants would be entitled to have the court create a contract;[60] the only ques-

58. The language of § 2-328(4) itself makes clear that the Uniform Commercial Code is introducing an alternate remedy for it reads: "the buyer may *at his option* avoid the sale or take the goods at the price of the last good faith bid." U.C.C. § 2-328(4) (1962) (emphasis added). *Accord* 14 WILLISTON 3d, *supra* note 17, at § 1648B.

This author has been unable to find, however, in any commentary accompanying the various versions of the Uniform Commercial Code, as the Code progressed from draft proposals to final form, a reason stated as to why the drafters decided to introduce this option. Section 2-328, although completely rewritten, is obviously based on § 21 of the Uniform Sales Act. But the Uniform Sales Act did not contain an alternate remedy, or even the hint of an alternate remedy, which would allow the buyer to "take the goods at the price of the last good faith bid."

Of course, an easily discernable reason as to why the drafters of the Code would introduce this alternate remedy is to relieve the buyer at an auction where puffing had occurred from the dilemma which the buyer faced at the common law. At the common law, the buyer of an item whose price was puffed faced the dilemma of either rescinding the sale, and thereby losing the item, or of keeping the item but thereby being required to pay the price affected by the puffing which was the final bid accepted by the fall of the hammer. This all or nothing remedy seems unfair to the good faith buyer.

As for where the drafters of the Code got the idea for the alternate remedy, the Code commentary is again silent. But a likely source for the idea is the equitable remedy which the Supreme Court of the United States devised for the buyer at a puffed auction in Veazie v. Williams, 49 U.S. (8 How.) 134 (1850). See *supra* note 42 for a fuller discussion of the equitable remedy created by the Supreme Court in the *Veazie* case. As far as this author knows, no other court since *Veazie* and prior to the advent of § 2-328(4) had used any remedy aside from rescission as a method of providing relief to a buyer at a puffed auction. Indeed, one court, the Supreme Court of Rhode Island, had expressly rejected the equitable remedy approach of the Supreme Court of the United States when requested to use it on behalf of a good faith bidder in a seller repurchase situation. Freeman v. Poole, 37 R.I. 489, 502-03, 93 A. 789, 791 (1915), *reh'g denied*, 94 A. 152 (1915). Hence, the alternate remedy of § 2-328(4) is a new and unique remedy introduced by the Code to deal with situations of raud created through seller self-bidding.

59. Professor DuBoff in his article on auction bidding practices agrees that subsection 4 of § 2-328 should be interpreted to provide a remedy to the good faith bidder in seller repurchase situations. But Professor DuBoff hesitates in his conclusion because he more confidently concludes that the Code drafters apparently never thought of the repurchase bid situation and therefore did not draft Code language specifically to address this seller bidding practice. DuBoff, *supra* note 7, at 508-09.

60. The conclusion reached by the author in the text as to the correct interpretation of § 2-328(4) in repurchase bid situations has also been reached by two other

tion left unresolved would be the purchase price.

But why should § 2-328(4) be interpreted to allow a court to confirm a sale between a buyer and a seller at the last good faith bid? And more significantly, why should the fraud analysis under subsection 4 of § 2-328 be preferred over the contract analysis under subsection 3 of § 2-328? Before addressing these two questions directly, it should be stated again that § 2-328(4) makes it a fraud for a seller to bid on property that the seller has himself put up for sale.[61] Hence, the question about Hypothetical 3 is not whether the actions of Lloyd Unsure are fraudulent. Rather, the question is what the courts should do about the fraud.

Section 2-328(4) should be interpreted to allow a buyer in a seller secret repurchase situation to have a contract confirmed between the buyer and the seller at the last good faith bid, and the fraud analysis under subsection 4 should be preferred over the contract analysis of subsection 3 of § 2-328. The reasons are, first, that secret bidding by the seller on his own property in and of itself creates a "bad taste." Full disclosure that the seller will be bidding seems fairer to all concerned, because everyone is put on notice that the bidding competition generated at the auction will not be competition based solely on bids from willing buyers. Second, if secret repurchase bids were deemed equivalent to withdrawal at with reserve auctions, courts would be implicitly endorsing secret puffing. The seller's final repurchase bid is very likely not the first bid the seller has submitted at the auction. Sellers in most secret repurchase situations actually desire to sell the property. They have simply been caught with the high bid when no legitimate bidder topped the seller's final bid. Of course, if courts take no "punitive" action against sellers in this situation, sellers will not be discouraged from engaging in such conduct.[62] Third, allowing secret repurchase bids

persons—a judge and a student note author. Forbes v. Wells Beach Casino, Inc., 307 A.2d 210, 219 (Me. 1973) (dictum); Note, *Auctions and Auctioneers in New England*, 40 B.U.L. REV. 91, 100 (1960).

61. *See supra* 54-55 and accompanying text.

62. If secret repurchase bids were allowed as equivalent to withdrawal in a with reserve auction, while secret seller bids are otherwise treated as fraudulent puffing, a seller who fears that his puffing bids have been discovered (and that he will be made

to stand as the high bid at an auction sale distorts the general "market price" created by auctions. Legitimate bidders use the prices paid at auction to assist in making judgments about the "worth" of similar auction goods. Secret repurchases mislead others in the market place as to what they should pay for similar items being sold through auction.[63] Finally, besides distorting the market in general, secret repurchases distort the market in privately negotiated sales between the seller who repurchased and those who buy from that seller. The secret repurchase seller can claim that his animals, for instance, sold for an average of "so much" at the recent auction. Buyers who are unaware that the claim includes secret repurchase sales prices will accept the average auction price as someindication of the "worth" of the seller's herd of animals. Thus, the repurchase seller receives a direct economic benefit from having engaged in fraudulent self-bidding.[64]

The preceding paragraph has presented four "negative" reasons as to why secret repurchase bids should not be treated as legitimate. Refusal to consider secret repurchase

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to sell his property being auctioned at the last good faith bid in accordance with § 2-328(4)) will know that he can avoid this consequence simply by continuing to bid until his puffed bid ends up being the last bid—which makes it a repurchase bid, which carries no adverse consequence for the seller.

63. Professor DuBoff has similarly commented upon the general market distortion which results from repurchase bids in art auctions. DuBoff, *supra* note 7, at 510-12.

In the horse industry, if the repurchase price of yearlings is included in the determination of the average price paid for yearlings sold at the most important yearling auctions, the average price is usually higher than when the average price is determined with repurchase prices excluded from the calculations. While the amount by which the repurchase prices have increased the average price is generally small, in 1982 at the Ruidoso Super Select Yearling Sale, the average price paid for yearlings at the sale was $38,245 when repurchases were included and $31,419 per yearling when repurchases were excluded. This is a distortion of the general market for top quality quarterhorse yearlings of almost $7000 per animal. *1982 Yearling Sale Results*, SPEEDHORSE, Nov. 1982, at 125.

64. Some horse ranchers advertise the average price of yearlings sold at auction with an explicit statement in the advertisement that the average prices do not include repurchases. These ranchers apparently advertise in this manner because they consider an advertisement pointing out that repurchases are not included to be a more accurate advertisement. *See, e.g., Phillips Ranch Advertisement*, SPEEDHORSE, Nov. 1982, at back cover.

bids as equivalent to withdrawals at with reserve auctions can also be stated in a positive manner. By refusing to approve secret repurchase bids, courts would be make it clear that self-bidding, clearly declared to be fraudulent by § 2-328(4), will not be tolerated. Moreover, by refusing to approve secret repurchase bids, the courts would be protecting the integrity of auctions as a market mechanism. Courts would be making it clear to bidders who come to auction sales that they need not fear that they will go away from the auction having been cheated out of purchasing an item to which they felt entitled. Courts would be making it clear to buyers in general that the market information generated by auction sales has in fact been generated in a fair, open, and competitive manner. Trust in auctions as a market mechanism will thus be preserved.

Sellers in situations like Lloyd Unsure in Hypothetical 3 cannot claim that secret repurchases are necessary so that sellers can prevent "sacrifice" sales of their property. At with reserve auctions, four distinct methods exist by which sellers can lawfully protect against a "sacrifice" sale of their property.[65]

As was indicated earlier, contract analysis of with reserve auctions allows the seller publicly to withdraw the item from the auction. Sellers can take this action for whatever reason they desire.[66] This contract analysis of with reserve auctions is given explicit legal approval in the second sentence of § 2-328(3): "In an auction with reserve the auctioneer may withdraw the goods at any time until he announces

65. The debate about whether secret repurchase bids in with reserve auctions should be deemed equivalent to puffed bids or to public withdrawals of the item from the sale is analogous to the debate which existed in the late nineteenth century as to whether puffing should be declared fraudulent in all instances or whether puffing should be allowed when the motive for the puffing was to prevent a sacrifice sale of the property. American courts decided that puffing should be declared fraudulent in all instances. Springer v. Kleinsorge, 83 Mo. 152 (1884); Towle v. Leavitt, 23 N.H. 360 (1851); Peck v. List, 23 W. Va. 338 (1883). The negative and positive reasons in the text for why secret repurchase bids should be considered puffed bids are similar to the reasons why the courts in the nineteenth century decided that all puffed bids should be deemed fraudulent no matter the seller's motive for entering the puffed bid.

66. *See supra* notes 48 & 49 and accompanying text.

completion of the sale."[67] Moreover, public withdrawal is not in conflict with the fraud analysis of with reserve auctions. Publicly withdrawing the item from the auction does not defraud anyone in attendance because all persons attending hear the seller make the withdrawal. Concurrently, publicly withdrawing the item does not distort market prices because the market itself does not register the withdrawal. As far as the market is concerned, the incompleted bidding is simply ignored.

Auctions are conducted in accordance with the conditions and terms announced at the beginning of the auction. These are binding on the buyers who attend the auction whether or not the buyers have actually heard the announcement setting forth the terms and conditions.[68] This power to

67. At an auction, the auctioneer is the agent for the seller and the auctioneer's withdrawal is, therefore, the withdrawal of the seller. The seller, as principal, can also utilize § 2-328(3) publicly to withdraw the property from the auction sale himself.

Because a seller can publicly withdraw an item from a with reserve auction for any reason whatsoever, a secret reserve price is a lawful auction tactic so long as the secret reserve price is protected solely through public withdrawal. A secret reserve price exists when the seller has privately informed the auctioneer that the seller will not sell the item until a certain price is reached. Debate has existed as to whether it should be mandatory that reserve prices be announced. Those who favor such an announcement argue that not announcing the existence of a reserve price creates a mock auction—i.e. an auction in which bids are being accepted but in which no sale will occur because the bids are below the reserve price. Those who oppose such an announcement argue that to announce the reserve price creates a psychological barrier to bidding and hinders the auctioneer in creating an exciting atomosphere of bidding which generates higher prices for the item being sold.

Secret reserve prices which are protected through public withdrawal should be clearly differentiated from secret reserve prices which are protected through the entry of bids on the seller's behalf. The entry of bids on a seller's behalf to protect a secret reserve price is puffing and, therefore, impermissible fraudulent conduct.

For a discussion of the debate about secret reserves in art auctions, *see* DuBoff, *supra* note 7, at 508-512.

68. Kendall v. Boyer, 144 Iowa 303, 122 N.W. 941 (1909). Purchaser failed to comply with terms of sale relating to removal of the property being auctioned. The removal terms were announced as the auction was beginning. Seller resold the property after purchaser failed to remove the property. Purchaser sued seller for breach of contract. Judgement for seller affirmed.

Case law is clear that the terms and conditions governing an auction are the terms and conditions announced at the beginning of the auction. Case law is also clear that the terms and conditions announced at the beginning of the auction can supercede previously advertised terms and conditions. The case law is divided, however, as to whether the terms and conditions as announced at the beginning of the auction are binding on a particular bidder who failed to hear, or arrived too late to

decree the terms and conditions for the auction provides the second method through which sellers can protect their interest against a "sacrifice" sale at a with reserve auction. Sellers can announce as a term or condition of the auction that the bid accepted by the auctioneer is subject to confirmation by the seller.[69] Such a term or condition is commonly called a "no sale" condition. For purposes of contract analysis, the "no sale" condition is a limitation on the authority of the auctioneer as agent of the seller to effect a final sale of the item. Although the auctioneer has the authority, at an auction at which a "no sale" condition has been announced, to accept a bid which tentatively establishes a contract, the seller reserves the right to confirm the acceptance and not until the acceptance has been confirmed is a contract conclusively established.[70] So long as the "no sale" condition is publicly announced, the fraud analysis of with reserve auctions raises no objection to "no sale" conditions. For purposes of fraud analysis, a "no sale" condition, when properly announced and exercised,[71] is equivalent to a public withdrawal of the item from the with reserve auction sale.

The third method by which sellers can protect against a "sacrifice" sale of their property at with reserve auctions is also provided by the power of the seller to set the terms and

hear, the announcement which changed the terms and conditions from those previously advertised with which the particular bidder was familiar. *See generally* Annot., 28 A.L.R. 991 (1924).

69. Dulman v. Martin Fein & Co. Inc., 66 A.D.2d 809, 411 N.Y.S.2d 358 (1978); R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-328:16 (3d ed. 1983).

70. Clemens v. United States, 295 F. Supp. 1339 (D. Ore. 1968); Eugene Stud & Veneer, Inc. v. State Bd. of Forestry, 3 Or. App. 20, 469 P.2d 635 (1970). *See also* Bradshaw v. Thompson, 454 F.2d 75 (6th Cir. 1972).

In the context of judicial sales where an auction is used to dispose of the property, the acceptance of a bid by the auctioneer binds the bidder but no contract is conclusively established until confirmation of the auction sale by the court. WILLISTON SALES 2d, *supra* note 20, § 296. In effect, the confirming court is exercising a "no sale" condition of a judicial sale auction.

71. The provisions of the "no sale" condition must be followed by the seller if the seller desires the "no sale" condition to be effective against the bidder whose bid was accepted by the auctioneer. Thus, in a sale of a horse where the "no sale" condition stated that the seller could "no sale" after the bid was accepted by *before* the horse left the auction ring, the seller was not entitled to exercise the "no sale" condition *after* the horse had left the auction ring. Bradshaw v. Thompson, 454 F.2d 75 (6th Cir. 1972).

conditions of the auction sale. If the seller is concerned that a particular item being put up for sale might not bring what the seller considers the item to be worth, the seller can publicly announce that a minimum price exists for that item. By announcing a minimum price, the seller has informed the auction audience that no lesser bid will be accepted; and because no lesser bid will be accepted, no contract for sale will be formed unless that minimum price condition of the auction is satisfied. In addition, bidders cannot claim that they were misled about the auction or that others had valuable information about the auction which they did not possess. Thus, by having the auctioneer publicly announce a minimum price for a particular item, the seller protects his interest against a "sacrifice sale" without violating either the contract or the fraud analysis of with reserve auctions.[72]

Case law has long granted the seller the option, at with reserve auctions, to give notice that the seller has reserved the right to bid on the seller's own property. Courts have granted this option to sellers for the explicit purpose of allowing sellers to have a bidding practice whereby the seller can protect his interest against a "sacrifice" sale.[73] Section 2-328(4) codifies this case law with explicit language which states that the buyer's remedies are available only when "notice has *not* been given that liberty for such bidding (seller self-bidding) is reserved." Hence, the fourth method by which the seller can protect against a "sacrifice" sale is giving notice that the seller reserves the right to bid on his own behalf.

Allowing the seller to bid, so long as notice has been properly given, does not transgress either the contract or the

72. Two cases in which sellers set minimum prices for their property are Hatfield v. Rouse & Sons Northwest, 100 Idaho 840, 606 P.2d 944 (1980) and Osborn v. Apperson Lodge, 213 Ky. 533, 281 S.W. 500 (1926).

Minimum prices and secret reserve prices are functionally equivalent techniques whereby the seller can protect against the sale of his property for a price which the seller considers too low. Sellers often desire to use the secret reserve price technique, rather than the minimum price, because of concern about the psychological impact of announcement of a minimum price has upon the assembled bidders. Read, *supra* note 67 for fuller discussion of secret reserve prices.

73. *E.g.*, Springer v. Kleinsorge, 83 Mo. 152, 162 (1884); Towle v. Leavitt, 23 N.H. 360, 371 (1851).

fraud analysis of with reserve auctions. When a bidder makes a bid at a with reserve auction, the seller is allowed to accept or to ignore the offer. No contract exists when the bid is entered until the seller makes an affirmative acceptance. Hence, the act of the seller in bidding for himself is, in fact, a refusal to accept the bid offer. This is the contract analysis previously presented in the discussion of the repurchase bid entered on behalf of Lloyd Unsure in Hypothetical 3.[74] This contract analysis was rejected earlier, however, in favor of a fraud analysis. The fraud analysis of seller self-bidding, however, was grounded upon the fact that the repurchase bid was a *secret* repurchase bid. It was from the fact of secrecy that misrepresentations to other bidders and market distortions occurred.[75] Section 2-328(4) removes the objection to seller repurchase bids based on fraud by requiring the seller to give notice that such bids will or might be made. Once notice is properly given, bidders at the auction itself can make informed judgments as to whether and how to bid and persons pondering the market prices will have valuable information about how those prices were set. Thus, if Lloyd Unsure, in Hypothetical 3, had properly given notice that he intended to bid, Beth Wants would have no legal basis upon which to seek redress.

Sellers in situations like Hypothetical 3 are tempted not to give such notice because it has an obvious dampening effect on the enthusiasm of the bidding. Bona fide bidders at auctions are quite willing to bid against other bona fide bidders, but they are very reluctant to engage in a bidding contest with the seller himself.[76] When sellers do desire to give notice in accordance with the Uniform Commercial Code, a

74. *See supra* notes 49-53 and accompanying text.

75. *See supra* discussion presented in text accompanying notes 54-65.

76. National Bank of the Metropolis v. Sprague, 20 N.J. Eq. 159, 165 (1869) (comments of the Chancellor about the likely impact upon bidding if the seller were to announce that he reserved the right to bid).

Sellers can reserve the right to bid in several different forms. In some instances, the seller gives notice that he reserves the right to bid only one time. Such reservation is likely to be used by the seller to enter a bid which guarantees the minimum price for which the seller is willing to part with the property being auctioned. In other instances, the seller gives notice that he reserves the right to bid generally. A general reservation of the right to bid allows the seller to bid as many times as the seller

crucial question as to what constitutes "notice" must be addressed.

Section 1-201(26) of the Uniform Commercial Code states: "A person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it." The focus of this definition is on whether or not the actions taken by sellers "reasonably . . . inform" buyers that the seller may engage in self-bidding. Several types of actions by sellers need to be evaluated.

Sellers can give a general "notification" that they reserve the right to self-bid. Such notifications have been set forth in sales catalogs at two recent horse auctions. In one sale catalog the language read: "The right to bid is reserved by all consignors."[77] In the other catalog, the statement read: "The right to bid is reserved for all sellers in this sale unless otherwise announced."[78] This general "notification" does not inform the potential bidders as to the identify of the seller. Identity of the seller is essential information if the bidders are to evaluate properly the competition and the meaning of specific bids.[79] Without this information, the

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desires and to use the right to bid as a means of enhancing the price which the seller receives for the property being auctioned.

77. Sale catalog for the Heritage Place Spring Mixed Sale held June 19-20, 1982, in Oklahoma City, Oklahoma.

78. Sale catalog for the Hopes & Dreams Futurity Yearling Sale and Clayton Keys Fall Sale held September 12-13, 1981, in Tulsa, Oklahoma.

79. No case has been found which directly addresses the issue of whether a general "notification" is effective when no specific identification of the seller is made for the other bidders at the auction. The case which comes the closest to such discussion is Berg v. Hogan, 311 N.W.2d 200 (N.D. 1981).

In *Berg*, the auctioneer sued the buyer for breach of contract when the buyer refused to pay for the items purchased at an auction. The buyer defended by presenting evidence that, without any notice being given whatsoever, one of the bidders at the auction was a partner in the partnership which owned the items sold and that fact constituted sufficient proof that illegal puffing had occurred at the auction in violation of § 2-328(4). The trial court ruled that the buyer did not have an adequate defense because the buyer did not prove that the partner-bidder was bidding as an agent of the partnership rather than as an individual buyer.

On appeal by the buyer, the Supreme Court of North Dakota held: "We believe that Section (2-328(4)) should be construed liberally to require that a seller give notice to a buyer when he bids at his own sale. In this situation it is not unfair to require

bidders are likely to be misled into thinking that the other bidder is a bona fide bidder. Concern for protecting open and fair competition and accurate market information is the primary facet of the fraud analysis of with reserve auctions. Hence, a general "notification" alone should not be held sufficient to "reasonably . . . inform" buyers and therefore satisfy the "notice" requirement of § 2-328(4).

Also, if such general "notification" statements were allowed to cover agents bidding on behalf of sellers, bidders would be put at risk to realize that the word "consignor" or "seller" has a "technical" meaning which connotes a consignor or seller through a representative capacity. Bidders

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that a partner in the partnership, which is the seller at an auction, state for whom he is bidding. Because Monroe (the partner-bidder) admitted that he bid at the auction and Hogan (the buyer) proved that the other requirements of the statute were present, the trial court should have found, under these circumstances, sufficient proof to invoke Section (2-328(4))." *Id.* at 202.

Two other cases are also relevant though the facts are less similar to the issue being discussed in the text than the facts of the *Berg* case.

In Coleman v. Duncan, 540 S.W.2d 935 (Mo. Ct. App. 1976), the buyer at an auction sued the seller to obtain a tractor for which the buyer had been declared the high bidder. The seller defended on the basis that at the beginning of the auction it had been announced that a few of the numerous items being sold were subject to a "no sale" condition and that the tractor was one of those items. The court ruled that a general "notification" about the "no sale" condition was ineffective because the buyer had no way of knowing which specific items were subject to the condition. In an auction where most items were sold when the hammer fell, the court ruled that a "no sale" condition could be effective only if the specific items subject to the "no sale" condition were identified as such when the particular item was put up for sale. Hence, the court gave judgement for the buyer. *Id.* at 939.

In Wohlers v. Peterson, 195 Iowa 853, 192 N.W. 837 (1923), the buyer bid on a crib full of corn after the auctioneer announced that the buyer would have to pay for 400 bushels of corn with a refund if the amount of corn turned out to be less than 400 bushels once the corn was weighed. The seller then tried to make the buyer also pay for the bushels contained in a corn crib located one-half mile away. The corn in the first crib where the auction occurred weighed 151 bushels; the corn in the distant second crib was spoiled. The court ruled that the corn in the distant crib had not been adequately identified as the subject matter of the auction sale that occurred at the first crib. Hence, the corn in the distant crib would be a separate lot subject to a distinct, separate sale at the auction. The court ruled, therefore, that the buyer only had to pay for the 151 bushels in the crib located where the auction took place. *Id.* at 854, 192 N.W. at 838.

These three cases, *Berg*, *Coleman*, and *Wohlers*, indicate that specific identification is important if bidders are to have adequate information to make proper judgements as they bid at auctions. These three cases also make clear that specific identification is often required as a matter of law.

should not be required to have this sophistication when the "sophistication" demand is in reality a cover for sharp bidding practices on the part of sellers.[80] Nor should the general "notification" statement be deemed sufficient if it were amended to read as follows: "The right to bid is reserved for all sellers, bidding themselves or through their agents, unless otherwise announced."[81] This would do nothing to provide the bidders with the identity of the seller or the seller's agents. Bidders would be forced to adopt an attitude of unyielding "suspicion" about every bidder and every bid at every auction sale at which this "notification" were given. The requirement of notice under § 2-328(4) and the definition to reasonably inform of § 1-201(26) were meant to foster trust and confidence in commercial dealings. Courts should not approve language as giving adequate notice when the effect of that language is to promote suspicion.

Courts should interpret the § 1-201(26) requirement to reasonably inform and the § 2-328(4) notice requirement to be satisfied only when the identity of the seller and seller's agents are adequately conveyed to the bidders at the auction. Adequate communication of identity most obviously occurs

80. As a practical matter, if a general "notification" statement, such as "The right to bid is reserved by all consignors," is held to permit bidding by an agent on behalf of the seller, then a bona fide bidder at auction is forced to assume that all other people bidding against him are "agents" of the seller. The bona fide bidder can not trust anyone else as also being a bona fide bidder. But such forced assumption means that all auctions are presumed to be rigged sales in which only the dumb and unwary are trapped.

Possibly the feeling about auctions is that if you are "dumb" enough to bid,you are dumb enough to suffer the rigged consequences because there exists no better way to learn than through bad experience. Such a feeling is simply another way of saying that these unsavory auction practices ought be tolerated because "everybody" knows that the "customs and usages" of auctions involves unsavory practices. But courts should not tolerate fraud just because it is common and widespread; and, in the past when courts were presented this argument as a reason for permitting puffing, the courts rejected this argument. The courts stood firm for the principle that auctions should be fair, open, competitive determination of price. *E.g.*, Flannery v. Jones, 180 Pa. 338, 341, 36 A. 856, 859 (1897); Peck v. List, 23 W. Va. 338, 376 (1883); Bexwell v. Christie, 1 Cowp. 395, 396 (1776).

81. To my knowledge, no auction sale catalogs have used this linguistic formulation to give the notice required by § 2-328(4). This formulation of the required notice has been suggested to me by several attorneys who have worried about adequate notice being given under § 2-328(4).

when the seller and the seller's agents are introduced to the auction audience.[82]

Many sales catalogs show pictures of the particular items to be auctioned. If on those same pages the name and photograph of the seller and the seller's agents were published and if the sales catalog also contained the amended general "notification" statement set forth above, the sales catalog itself should be an adequate substitute for actual introductions. The names, pictures, and statement that self-bidding is reserved for the seller or his agents would be terms and conditions of the auction. Bidders who failed to read the catalog would have been reasonably informed even though the bidder did not actually come to know of the contents of the catalog. If the catalog were simply to list the names of the sellers and the seller's agents, without photographs, this would probably not adequately communicate the identity of the seller or the seller's agents to the auction audience. In the excited, swift-paced, jostling, crowded conditions that often accompany auction sales, bona fide bidders may not be able to make a meaningful inquiry which would connect the name in the catalogue to the face of the person bidding at the auction. Due to the fact that a sales catalog with photographs is an easily available option, courts should not interpret §§ 1-201(26) and 2-328(4) to be satisfied by a "names alone" catalog.

1. Protecting Against "Sacrifice" Sales in Without Reserve Auctions—A Digression

It should be apparent from the last several pages that secret repurchase bids should not be granted legal recognition at with reserve auctions because sellers have four alternative ways to protect their goods from being sold at a "sacrifice" price. It is now appropriate to discuss whether those four methods of protecting against a "sacrifice" sale are available to a seller who puts his goods up for sale at a without reserve auction.

82. 2 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-328:04, at 562 (1982).

The first two methods—publicly withdrawing the item from the sale and attaching a "no sale" condition—can be disposed of quickly. As indicated in the discussion accompanying Hypothetical 1, a seller is not permitted to withdraw an item from sale at a without reserve auction once the item has been put up for sale and a bid has been entered. At that point, a valid contract has been formed.[83] Analysis of the "no sale" method presented previously indicated that a "no sale" condition is, for legal purposes, equivalent to publicly withdrawing the item from the sale. A "no sale" condition allows the seller as principal, rather than the auctioneer as principal's agent, to make the final acceptance.[84] To the contrary, the seller is making a firm offer. To allow a seller to use a "no sale" condition at a without reserve auction would undermine this contract analysis of without reserve auction transactions. The seller chose to be the offering party when he decided to use the without reserve auction format. He should not then be allowed, through a "no sale" condition, to become the accepting party. These first two methods of protecting against a "sacrifice" sale are therefore not available to sellers at without reserve auctions.

Courts have often stated that sellers at without reserve auctions are not permitted to set "upset prices" for the goods being auctioned.[85] Courts seem to have included within the words "upset price" two types of practices which should be kept distinct: secret reserve prices and publicly announced minimum prices.

Secret reserve prices are indeed in conflict with the contract and fraud analyses of without reserve auctions. Once a seller puts an item up for sale at a without reserve auction, the seller has committed to a sale to the highest bid from a bona fide bidder. Once that highest bid is made, a binding contract exists between the bidder and the seller. Thus, if a seller at a without reserve auction secretly informs the auc-

83. Read, *supra* text accompanying notes 29 & 30.

84. Read, *supra* text accompanying notes 68-71.

85. *E.g.*, Feaster Trucking Service, Inc. v. Parks-Davis Auctioneers, Inc., 211 Kan. 78, 83, 505 P.2d 612, 617 (1973); R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-328:18 (3d ed. 1983).

tioneer that the auctioneer should take action to retrieve the item from the sale if the price does not reach a certain amount, the seller is attempting to undermine a valid contract. The seller has set an "upset" price. Concurrently, the seller's action is a fraud on the bidders. By putting the item up for sale at a without reserve auction, the seller has announced the primary condition under which the sale will be conducted: a sale to the highest bona fide bidder. A secret reserve price contradicts that announced condition and is a purposeful attempt to mislead the bidders.[86] Courts should not give legitimacy to actions of the seller which destroy valid contracts and perpetrate fraud.

Minimum prices which are publicly announced prior to the sale do not, however, conflict with contract and fraud analyses of without reserve auctions. If the auctioneer announces that a minimum price is the initial firm offer of the seller, but that once that bid is entered, then the auction is without reserve for all later bids, the minimum price condition does not undermine any valid contract. Moreover, because the minimum price has been publicly announced, no bidder can complain that he has been misled or deprived of information available to other bidders. Thus, courts should allow publicly announced minimum prices as a method whereby sellers can protect against a "sacrifice" sale even at without reserve auctions.[87]

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86. For discussion of secret reserve prices and minimum prices at with reserve auctions, read, *supra* text accompanying notes 67 & 72.

87. The terms and conditions which govern an auction are the terms and conditions which are announced at the beginning of the auction. So long as an announced term or condition does not undermine the contract analysis of the type auction involved and does not offend the fraud analysis of the type auction involved, the courts ought to accept that announced term or condition as legally permissible. Thus, for example, at a without reserve auction, if the seller were to announce that bids will be considered higher bids which accept the seller's offer only if the bids are a minimum specified increment over the previous bid, the courts should accept this condition as legally permissible. A minimum increment condition for the without reserve auction does not undermine any contract created by a bid and does not perpetrate a fraud because all bidders are properly informed. A minimum increment condition only sets the requirement for when a contract and how a contract can be formed by the bidder's acceptance through bidding.

A different issue is raised when the minimum increment condition at a without reserve auction is imposed by the auctioneer without the consent of the seller. The

Under § 2-328(4), sellers are allowed to give notice that the option for self-bidding is reserved. The language of the section makes no distinction between with reserve and without reserve auctions. It could, therefore, be concluded that sellers at without reserve auctions are able to protect against "sacrifice" sales of property by giving appropriate notice of self-bidding.[88] Notice of self-bidding at without reserve auctions should not be allowed, however, because it runs counter to both the contract and the fraud analyses of without reserve auctions. With respect to contract analysis, the seller has already committed himself to sell to the highest good faith bidder. Once a bona fide bid is entered, a contract exists between the seller and the bidder, subject only to a higher good faith bid being entered. If the seller were allowed to enter a bid because notice of self-bidding has been given, the seller would thereby be allowed to undermine a valid contract which has been created by the high bid of the bona fide bidder. In effect, allowing a seller to bid at without reserve auctions by giving notice of self-bidding would be to permit the seller during the auction itself to switch from a without reserve auction to a with reserve auction. A seller should be required to abide by his original choice.[89]

With respect to the fraud analysis, while giving proper public notice of self-bidding negates the fraud of secret bidding, public notice does not eliminate the potential for fraud

auctioneer may well have exceeded his authority by setting this condition on the without reserve auction without having obtained the express consent of the auction seller. *See* Pitchfork Ranch Company v. Bar TL, 615 P.2d 541 (Wyo. 1980).

88. Read, *supra* text accompanying notes 73-82 for discussion of the notice requirement of § 2-328(4) when considered in the context of with reserve auctions.

89. Sellers might choose to use a without reserve auction, rather than a with reserve auction, because without reserve auctions are thought generally to attract more bidders than with reserve auctions. More bidders are thought to attend without reserve auctions because bidders know that the seller must sell once the first bid is made and therefore an extraordinarily good bargain might be obtained by the bidders. At the same time, more bidders at an auction also means that greater competition for the items being sold is likely to exist and as a result of the greater competition higher prices will be generated. In return for the possibility of attracting more bidders, the seller by choosing the without reserve auction gives up, of course, the ability to protect his property from a "sacrifice" sale, which ability the seller has at with reserve auctions. 2 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-328:04, at 564 (1982).

that would exist because the auction is a without reserve auction at which a sale to the highest bona fide bidder *must* take place. If sellers are allowed to self-bid after giving proper notice, the auction might end with the seller having entered the high "repurchase" bid. But because the auction is without reserve, the prior bona fide bidder would actually be entitled to purchase the item. The prior good faith bidder may not, however, realize that he is entitled to complete the sale. The auctioneer and the seller certainly have no incentive to inform the prior good faith bidder that the prior bidder is the actual purchaser, because by the repurchase bid the seller has clearly indicated a desire that the item bring more than the amount of the prior good faith bid.[90] Because giving notice of self-bidding at without reserve auctions undermines already validly created contracts and risks the fraudulent completion of the sale to the seller himself in violation of the type auction being conducted, courts should not interpret the notice language of § 2-328(4) as applying to without reserve auctions.

2. A Return to Discussion of Hypothetical 3

Lloyd Unsure is not legally permitted to enter a secret repurchase bid, although Unsure would have been entitled to use four other methods to protect against a "sacrifice" sale. As a result, Beth Wants is entitled to the formation of a contract and to ownership of the filly, Gone For Good. Only one question remains unresolved: what purchase price does Beth Wants have to pay to Lloyd Unsure for the filly? To answer this question, let us examine Hypothetical 4.

HYPOTHETICAL 4: WITH RESERVE AUCTION— SELLER SELF-BIDDING

> David Caller, the auctioneer, puts up Fast Go, a yearling colt for sale at a with reserve auction. James Stockman bids $11,000 for the colt. Debbie Agent bids

90. As has previously been discussed in relation to Hypothetical 1, a without reserve auction, the seller is not entitled to withdraw the item from sale once the first bid has been entered or to use a secret repurchase bid as a surreptitious method of withdrawing the item from sale. Read, *supra* text accompanying notes 29-33.

> $12,000. Monica Goodman bids $13,000. Stockman bids $14,000; Agents bids $15,000; Stockman bids $16,000. No further bids are made. Caller knocks down the hammer declaring Stockman the purchaser at $16,000.
>
> Several days after the auction, James Stockman learns that Debbie Agent was actually employed by Thomas Trader, the seller of Fast Go, to bid on the horse. Stockman feels that he was forced to bid higher for the colt than he would otherwise have had to bid because of the puffing of Debbie Agent. James Stockman decides to seek legal redress against Thomas Trader.

By using a with reserve auction to sell his colt, Thomas Trader has preserved his legal right to withdraw the colt from the sale once bids are entered. But the words "with reserve" do not carry the additional legal connotation that he has reserved the right to bid in his own behalf.[91] Thomas Trader's use of Debbie Agent is puffing and puffing is *per se* fraudulent. Regardless of Trader's motivation, the conduct is illegal and gives rise to legal remedies for Stockman.[92]

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91. Professor DuBoff has pointed out that the exact meaning of the words "with reserve" has been the subject of some confusion. Everyone agrees that when an auction is designated as with reserve that means that the seller can legally withdraw the items put up for sale from the auction even after bids have been entered by bidders. Some, including Professor Corbin in his treatise on contracts, imply that the words "with reserve" mean that the seller also automatically has the right to bid at the auction. DuBoff, *supra* note 7, at 510. Professor DuBoff argues, correctly in my opinion, that a with reserve auction does not mean that the seller automatically has the right to bid at the auction. To be able to bid, a seller must give the proper notice under § 2-328(4). *Id.*

The confusion about the meaning of the words "with reserve" seems to be a result of a lack of clarity on the part of the drafters of the Uniform Commercial Code. Section 21 of the Uniform Sales Act does not have this ambiguity about the meaning of the words "with reserve." Section 21(2) gives the seller the power to withdraw items from a with reserve auction until the hammer falls completing the sale. Then, § 21(3) addresses the seller's right to bid and says: "A right to bid may be reserved expressly by or on behalf of the seller." Section 2-328 of the code should also be interpreted to require the seller expressly to reserve the right to bid before such right is determined to exist for a seller in a with reserve auction.

92. American cases which hold that puffing is *per se* fraudulent: Veazie v. Williams, 49 U.S. (8 How.) 134 (1850); Miller v. Baynard, 7 Del. (2 Houst.) 559 (1863); McMillan v. Harris, 110 Ga. 72, 35 S.E. 334 (1900); Springer v. Kleinsorge, 83 Mo. 152 (1884); Towle v. Leavitt, 23 N.H. 360 (1851); Bowman v. McClenahan, 20 A.D. 346, 46 N.Y.S. 945 (1897); Flannery v. Jones, 180 Pa. 338, 36 A. 856 (1897); Peck v. List, 23 W. Va. 338 (1883). Only two modern American cases might be construed to

Those remedies are set forth in § 2-328(4). If Stockman is dissatisfied with having been declared the buyer at an auction sale in which puffing has taken place, he may rescind. Rescission puts the buyer (Stockman) and the seller (Trader) in the same position as if no auction had occurred.[93] If James Stockman, like Beth Wants in Hypothetical 3, desires to have the sale confirmed, but with the effects of the puffing removed, it is then necessary to determine "the price of the last good faith bid prior to the completion of the sale."

Under the facts of Hypothetical 4, the fall of the hammer marking acceptance did not occur until after James Stockman had bid $16,000. Moreover, Stockman entered the $16,000 bid in good faith. Hence, to apply the alternate remedy literally to this fact situation would mean that Stockman could confirm the contract only at the $16,000 bid. Such literal application of the alternate remedy is undesireable because Thomas Trader would suffer no adverse consequences for having illegally employed a puffer at the sale.[94] Applying the alternate remedy would have the effect, therefore, of returning to the common law, at which rescission was the only remedy available.[95]

The alternate remedy was adopted by the drafters of the Code for the purpose of strengthening the alternatives avail-

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the contrary: Hayes v. Hannah, 61 Ga. App. 86, 5 S.E.2d 782 (1939); Beasley v. Burton, 32 Ga. App 727, 124 S.E. 368 (1924).

Treatise writers agree that puffing is *per se* fraudulent. J. BATEMAN, LAW OF AUCTIONS 155-166 (1st ed. Am. 1883); 6A CORBIN, *supra* note 10, § 1469; M. HANCOCK, LAW OF HORSES §§ 123-127 (1872); 14 WILLISTON 3d, *supra* note 17, § 1648B; 2 WILLISTON SALES (rev.), *supra* note 19, § 298. *Contra* T. PARSONS, THE LAW OF CONTRACTS 532-33 (9th ed. 1904).

Puffing as *per se* fraudulent has been codified into both the Uniform Sales Act § 21(4) and the Uniform Commercial Code § 2-328(4). *But see* FLA. STAT. ANN. § 839.021 (1976). The statute prohibits puffing at auctions but then contains the following proviso which reads: "the provisions of this section shall not apply to auctions of livestock and agricultural products."

93. Recission as a remedy works identically in either type auction—with reserve or without reserve. For discussion of the rescission remedy in without reserve auctions, Read, *supra* text accompanying notes 40-41.

94. 2 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-328:04, at 563 (1982).

95. For discussion of rescission as the only remedy available at common law in cases of puffing, Read, *supra* text and citations set forth in notes 46, 57 & 58.

able to buyers in situations where puffing is used by sellers. It was meant to permit buyers to keep the goods without rewarding the seller for having engaged in fraudulent bidding practices. When the alternate remedy is interpreted so as to deny all benefits from having used a puffer, the "last good faith bid" in Hypothetical 4 must be Stockman's $11,000 bid. All other bids came after Debbie Agent had entered the bidding as Trader's puffer. All other bids were, therefore, influenced and induced by the puffer's bid and should not be treated as legitimate.[96] If any bid other than the $11,000 bid were determined to be the "last good faith bid," sellers would have an economic incentive to engage in puffing.

The interpretation given to the alternate remedy language of § 2-328(4) in the preceding paragraph is the same interpretation suggested under Hypothetical 2.[97] The difference is that the contract analysis and the fraud analysis reinforced one another in the without reserve auction situation of Hypothetical 2. In the with reserve auction situation of Hypothetical 4, the contract analysis proves inadequate in interpreting the alternate remedy. For with reserve auction situations, the fraud analysis is the sole basis of an adequate interpretation of the alternate remedy.

If the alternate remedy language "last good faith bid" is interpreted to mean the last bid by a bona fide bidder prior to the entry of any puffed bids, one other bidding pattern needs to be addressed. Assume that Hypothetical 4 remains the same except that the very first bid entered was a bid by Debbie Agent at $10,000. Because no bid by a bona fide

96. Now that the alternate remedy of § 2-328(4) has been explicated for Hypothetical 4, the solution to the auction situation in Hypothetical 3 can also be given and understood.

In Hypothetical 3, Beth Wants is entitled to the filly, Gone for Good, because a secret repurchase bid is not a permissible bidding practice by sellers at with reserve auctions. All this has been explained in the discussion accompanying Hypothetical 3. The price at which Beth Wants is entitled to the filly is $25,000– the last bid entered by a good faith bidder prior to any unannounced bid being entered on the seller's behalf. This result has been explained by the discussion of the alternate remedy under Hypothetical 4.

As to why Beth Wants gains the filly, Gone or Good, rather than the third party bidder, George Brown, read *supra* text and citations set forth in note 47.

97 Read *supra* text accompanying notes 44-47.

bidder was entered prior to a puffed bid, how do the remedies of § 2-328(4) apply to this changed situation of Hypothetical 4? James Stockman, whose $16,000 bid has been gaveled as the high bid, could easily seek rescission and thereby void the entire auction. But if Stockman desires the colt, Fast Go, he should have the option to adopt the puffed bid of $10,000 as "the last good faith bid."[98] Allowing bidders to adopt the puffed bid as the "last good faith bid" does not reward sellers who puff because if the puffed price is undesirable, the bidder can simply use the remedy of rescission. Moreover, the option to adopt the puffed bid as the "last good faith bid" allows the bidder to obtain the goods without involving the courts in taking evidence as to what the first bid might have been if a bona fide bid, rather than a puffed bid, had first been entered. If courts were to take such evidence, they would be involved in a very speculative endeavor that could be unfair to the seller. A simple solution is for the courts to stay away from such a speculative endeavor and to allow the bidder either to rescind or to adopt the puffed first bid as the "last good faith bid."[99]

98. In a case decided prior to the adoption of the Uniform Commercial Code, a purchaser was allowed to gain specific performance of an auction sale even though the seller defended against the sale on the basis that puffing had occurred. The court remarked that the puffing might well have provided a basis for complaint by the purchaser if the purchaser had wanted to void the sale, but so long as the purchaser wanted to enforce the sale, the seller should not be allowed to take advantage of seller's own puffing to thwart the purchaser's desire. Gorman v. Berg, 49 R.I. 125, 140 A. 779 (1925). In effect, the court in the *Gorman* case allowed the purchaser the option to ignore that puffing had occurred if the purchaser considered such action to be in the purchaser's own best interest. Analogously, in the text, it is being argued that James Stockman should be allowed to ignore the fact that the $10,000 bid of Debbie Agent is a puffed bid so long as this allows Stockman to purchase the colt at a price that Stockman is willing to pay.

99. The discussion in the text allowing James Stockman to adopt the puffer's bid which started the auction as the "last good faith bid" is presented in the context of a with reserve auction. It is submitted that if the same bidding pattern, i.e. a puffed bid as the first bid entered at the auction, were to occur at a without reserve auction, the same solution of allowing the purchaser the option of adopting the puffed bid as the "last good faith bid" should be used. Differences between with and without reserve auctions are not relevant, in my opinion, in determining how the alternate remedy of § 2-328(4) applies to this bidding pattern.

Professor Hawkland disagrees with the analysis presented in the text and this footnote. He would have the court take evidence as to what the buyer would have bid

The first four hypotheticals have given rise to discussion of the more common types of bidding practices involving seller self-bidding, either through repurchase bids or puffed bids, at with reserve and without reserve auctions. Other types of bidding practices which raise significant legal problems involving seller self-bidding also exist. The following two hypotheticals and accompanying discussion are meant to illuminate the legal issues involving these other seller self-bidding practices.

HYPOTHETICAL 5: SELLER REBATE BIDDING AGREEMENTS

> Crystal Clear, the auctioneer, puts up Back Track, a mare, for sale. Ann Purchaser begins the bidding at $3,500. Ruth Deal bids $4,000; Purchaser bids $4,300; Deal bids $4,700; Purchaser bids $4,900; Deal bids $5,200. When no further bids are forthcoming, Clear knocks down the mare as sold to Ruth Deal.
>
> Unbeknownst to Ann Purchaser, Ruth Deal and the seller of the mare, Nick Consignor, had an agreement that no matter the final bid made by Deal, Deal would have to pay no more than $4,000 to Consignor for the horse. Three weeks after the sale, Purchaser learns of the rebate agreement between Consignor and Deal. Purchaser feels cheated and decides to seek redress against Consignor and Deal.

Upon reading this hypothetical, one might wonder why Nick Consignor would use an agreement of this sort. If Consignor was willing to sell the mare, Back Track, for $4,000 (and does in fact sell the mare for $4,000) to Ruth Deal, why did Consignor not simply make a "private treaty" sale directly? Why would Consignor use an auction, probably incurring the auctioneer's commission,[100] to mask what is

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as the first bid if the puffer had not intervened instead. 2 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-328:04, at 564 (1982).

100. In repurchase bid situations, such as discussed in Hypotheticals 1 and 3, it is apparently the common practice for the seller to pay the auctioneer a commission even though no sale has actually occurred. Read *supra* notes 15 & 52.

If sellers pay a commission to the auctioneer in repurchase bid and reserve price situations, it is very likely that sellers would also pay a commission to the auctioneer

essentially a private sale? The answer lies in the impact the auction price has upon "market value." Consignor can use the sale of Back Track at $5,200" as "evidence" of what his other horses are worth in the market place. Through the rebate agreement, Consignor hopes to mislead other purchasers of his horses into thinking his horses are selling for higher prices. Based on this misapprehension, purchasers are likely to pay more than they would otherwise have paid. As a result, Consignor is gaining an economic benefit from using the rebate agreement.[101]

While Consignor's rebate agreement is clearly an attempt to manipulate the auction market to his own economic advantage, several courts have been reluctant to rule that persons like Ruth Deal are puffers.[102] Such rebate bidders are persons who will in fact be held accountable for some price within the range of bids entered at the auction. Hence, rebate bidders are not "technically" puffers because puffers are those persons who enter completely fictitious bids for which they are not at all accountable.[103]

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in a rebate agreement situation in which the horse actually has been "sold" through the auction ring, although at a price different than that established by the bidding.

101. Another variation on the rebate agreement situation is as follows: Seller agrees with Rebate Bidder that Rebate Bidder can purchase the horse for a 25% reduction of the final bid, if entered by Rebate Bidder, so long as the final bid is above a certain amount. Thus, if Seller set $1,000 as the amount beyond which the bids must go, and then Rebate Bidder bids $2000 as the final bid, Rebate Bidder actually pays Seller only $1500 for the horse.

For purposes of analysis as to the legality of rebate bidding practices, the example presented in this footnote does not require a different legal analysis or legal result than that for the rebate agreement set forth in Hypothetical 5. The difference between the rebate agreement in Hypothetical 5 and the rebate agreement presented in this footnote relates to the different behavior which will be induced in the rebate bidder. With the rebate agreement set forth in Hypothetical 5, the rebate bidder can continue to bid as long as necessary because no matter how high the bids go, the rebate bidder has a guaranteed lower price for which the item can be bought. By contrast, the rebate bidder who only has an agreement for a percentage reduction cannot continue to bid forever because even with the percentage reduction, the bidding may get beyond the means of the rebate bidder to pay for the item.

102. Robenson v. Yann, 224 Ky. 56, 5 S.W.2d 271 (1928); Osborn v. Apperson Lodge, 213 Ky. 533, 281 S.W. 500 (1926); Jennings v. Jennings, 182 N.C. 26, 108 S.E. 340 (1921).

103. The Kentucky Court of Appeals actually stated that the rebate bidder was "not technically a by-bidder." Osborn v. Apperson Lodge, 213 Ky. 533, 535, 281 S.W. 500, 502 (1926). However, the Kentucky Court of Appeals in *Osborn* and the

However, these cases involve fact situations in which the courts were not directly faced with a lawsuit between a good faith bidder, such as Ann Purchaser, and a seller who had used a rebate agreement at the auction.[104] In the fact situation presented in Hypothetical 5, it is clear that for any bid entered by Ruth Deal above the $4,000 rebate price, Ruth Deal is a puffer. Ruth Deal's bids of $4,700 and $5,200 are bids for which she will not be held accountable. Ann Purchaser has been misled by these fictitious bids into thinking that the competition and market price for the mare, Back Track, are greater than they are in reality. Because the distortions in auction sales caused by bids entered in accordance with a rebate agreement are identical to the distortions

North Carolina Supreme Court in Jennings v. Jennings, 182 N.C. 26, 108 S.E. 340 (1921) used language which strongly intimated that the courts disapproved of rebate agreements at auctions.

104. Robenson v. Yann, 224 Ky. 56, 5 S.W.2d 271 (1928). Rebate bidder had agreement with auctioneer about the rebate purchase price. Rebate bidder sued the seller for specific performance for the lots purchased by the rebate bidder at the auction. Court refused to order specific performance against the seller who knew nothing of the agreement between the rebate bidder and auctioneer. Moreover, the court refused to make the seller return the down payment which the rebate bidder had already paid.

Osborn v. Apperson Lodge, 213 Ky. 533, 281 S.W. 500 (1926). Purchasers of land at auction seek rescission of the contracts on the basis of puffing through the use of rebate bidders. Court expresses disapproval of rebate agreements but rules that the purchasers had no cause of action because the specific auction sales in which they had purchased had not been influenced through the use of rebate bidding practices. The court implied that the purchasers would have had a cause of action if the sales in which they purchased had been influenced by rebate bidding practices.

Jennings v. Jennings, 182 N.C. 26, 108 S.E. 340 (1921). Rebate bidder sued the seller to collect the compensation promised to the rebate bidder by seller if the bids were raised above a certain level due to rebate bidder's bidding. Court states that the rebate agreement is "close akin" to use of a puffer but say that that issue need not be decided because no good faith bidder is a complainant in the lawsuit. Court then decides the case between the rebate bidder and the seller on other grounds unrelated to puffing issues.

Cf. Clark v. Stanhope, 109 Ky. 521, 59 S.W. 856 (1900). Guardian of a minor agreed to sell the minor's land to rebate bidder at a set price. Because land belonged to minor, however, the land could only be sold through a court supervised auction. At the auction, another good faith bidder out bid the rebate bidder. Rebate bidder sued the guardian for damages for failing to sell the land to the rebate bidder in accordance with the rebate agreement. Court ruled that to allow the rebate agreement to stand would be to sanction a fraudulent agreement which had as its effect depriving the minor of the best price available for the minor's land. Court denied relief to the rebate bidder.

caused by puffed bids, persons who enter rebate bids on behalf of sellers should similarly be identified as puffers. Bids entered in accordance with rebate agreements, like other fictitious bids, should be considered fraudulent *per se*.[105]

In regard to § 2-328(4), Ruth Deal's bids of $4,700 and $5,200 are bids that have been entered on behalf of the seller without proper notice.[106] Ann Purchaser is therefore entitled to rescind or to take the mare at the price of the last good faith bid. The next question is what these legal remedies mean when applied to the factual situation of Hypothetical 5.

On the facts of Hypothetical 5, Ann Purchaser has no need to seek rescission because she was not declared to be the high bidder when the hammer fell. But if Ruth Deal had not entered the bid of $5,200, then Ann Purchaser would have been declared the high bidder with the $4,900 bid. Of course, the $4,900 bid was induced by Deal's fictitious bid of

105 In 1924, Professor Williston wrote: "It is therefore, the secrecy of puffing which renders it a fraud upon bidders, and it seems that one who bids with the intention of buying, but who has a secret agreement with the seller that a portion of the price which he bids shall be restored to him is as obnoxious to the rule prohibiting puffers as if his bid were intended to be purely fictitious." WILLISTON SALES 2d, *supra* note 20, § 298, at 689. This still remains the stance of the Williston treatises. 14 WILLISTON 3d, *supra* note 17, § 1648A.

Two student authors who discussed Jennings v. Jennings (described in the previous note) argued that the North Carolina court should have decided the case on the basis that the rebate agreement that the plaintiff was trying to enforce was a puffing agreement. As a puffing agreement, the student authors concluded that the agreement was *per se* fraudulent and therefore unenforceable. Comment, *Agreements for Fictitious Bids at Auctions*, 31 YALE L.J. 431 (1921), 20 MICH. L. REV. 355 (1922).

Three courts have commented unfavorably on rebate agreements at auctions although the comments have been clearly dicta because the facts of the cases did not involve rebate agreements. McMillian v. Harris, 110 Ga. 72, 74, 35 S.E. 334, 336 (1900); Peck v. List, 23 W. Va. 338, 376 (1883); Bexwell v. Christie, 1 Cowp. 395, 397 (1776).

106. Hypothetical 5 is a with reserve auction because no express declaration is made that the auction is a without reserve auction. As a with reserve auction, the seller can, by proper notice, reserve the right to bid. For discussion as to what is proper notice, read *supra* text accompanying notes 73-82.

If the auction in Hypothetical 5 had been announced to be without reserve, then sellers are not permitted to engage in self-bidding. In a without reserve auction, secret self-bidding is fraudulent and notice of intent to bid by sellers is ineffective. For a full explanation of why seller self-bidding is not allowed at without reserve auctions, read *supra* the discussion accompanying Hypotheticals 1 and 2 and the text accompanying notes 88-90.