

He Won the Bid, Not the BMW

If you've been tracking the legal analysis, you probably think the buyer is going to get the BMW. Sorry, you're mistaken about that

BMW's new M3 sport sedan offers very impressive performance in an appealing package. At an MSRP of approximately \$70,000, they fly out of dealers' showrooms, and there have been reports of dealers selling them at \$30,000 over MSRP. So a BMW dealer apparently tried to cut a fat hog by offering a heavily optioned new M3 on eBay on a so-called "no-reserve basis" with a \$60,000 starting bid. Of course, a sale isn't truly "no reserve" if an opening bid is set, as was the case here. However, the seller made it clear that the first bid of \$60,000 or above would be enough to own the car.

Our bidder figured he couldn't go wrong, so he bid \$61,000, and eBay dutifully recorded his \$60,000 opening bid. A week later, he ended up as surprised as anyone that his was the only bid in the auction.

About 15 minutes after the end of the auction, the bidder claims the dealer called about the "mistake," and apologized that the "deal" was not going to be honored. The bidder's suggestion that litigation might ensue was reportedly met with laughter. After all, how could this guy hope to battle a multi-billion dollar company?

Gotta love the Internet

You might expect our bidder to get legal representation at this point, but that would cost money. Instead, he posts to an M3 web site asking all of the "experts" to chime in with their advice. The blog even added a reader poll, asking readers who they thought would win.

"Legal Files" couldn't resist, and cast its vote in order to see the results. Only 9% of the voters thought the buyer would lose. A whopping 56% thought there was no doubt the buyer would win. A relatively meager 35% were astute enough to think the result would "depend," and that perhaps the buyer ought to get a lawyer.

What is wrong with 65% of these people? There is absolutely no doubt the correct answer is "it depends," as all we have is the buyer's side of the story. Who knows what the dealer's version of the story is going to be? And given that the dealer has already laughed at the threat of litigation, who in their right mind would think this buyer is actually going to buy this car for \$60,000 without a lawyer's help?

Contract Law 101

Under the law, a contract results when a party makes an offer that is accepted by the other party. Listing this car on eBay constitutes the offer. In a "no reserve" format, the seller has committed to sell the car for the highest bid, no matter how low it might be. The offer is accepted simply by making the highest bid at the close of the auction.

This seller's listing was very extensive. It gave enormous detail about the car and contained 50 photographs of the M3. An offeror is legally entitled to impose conditions on the offer, which this one did:



"We're sellin' to the highest bidder... sorta"

- They would not sell the car to someone who intended to export it.
- Since the car was in their inventory, they reserved the right to cancel the auction if the car was sold locally.
- They reserved the right to cancel any bid at any time for any reason.

Neither of the first two conditions came up here. Analyzing the third is a little trickier. In the listing, it was included in the paragraph that dealt with the "no export" restriction, which would very likely limit its meaning to situations dealing with the "no export" statement. Also, the dealer did not sell the car to someone else, nor did they "cancel" the bid in time. So once the auction closed, the bid became a contract, and it became too late to cancel the bid.

eBay rules

Several posts to the web site suggested the dealer was in violation of eBay rules and filing a complaint with eBay should resolve the problem. But just what can eBay do here? They can't force the seller to deliver the car, and canceling the seller's eBay rights may not be much of a penalty, especially when a new account can be created under another name quite easily.

Nonetheless, the eBay rules do serve a useful purpose. Since the seller agreed to them when he registered as an eBay user, they do act as a portion of the contract between the seller and the buyer. That adds teeth to the buyer's legal claims, as it appears fairly clear the seller violated these rules, at least if the buyer's version of the facts is correct.

Tough to claim "mistake"

The seller will likely have a very tough time with its claim that there was a "mistake." Under the law, either party to a contract can rescind it if there was a mutual mistake as to a material term of the contract. Say, for example, the buyer thought it was U.S. dollars, the seller Canadian—clear grounds to rescind the contract. But rescission is generally not available where there is a unilateral (one party only) mistake—for example, the buyer believes that delivery is included in the deal when the listing doesn't say anything about it—unless one actually knows that the other is acting by mistake.

But in this case, what would the "mistake" have been? Assuming that someone

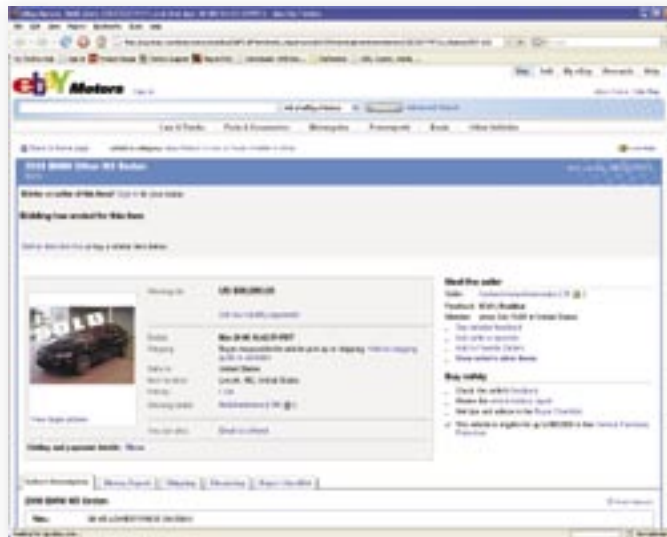
would bid more? Listing the car for auction in the first place? Looking back, both of those decisions sure turned out to be mistakes, but those aren't the kind of mistakes that would allow the seller to back out of the deal.

So who gets the car?

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Based on the buyer's version of the story, it seems pretty certain that he would win a lawsuit, and the dealer would be found to have breached the auction contract. But there are two ways the court could select the most appropriate remedy—force the dealer to sell this particular car to the buyer at the bid price, which the law refers to as specific performance, or simply award money damages to the buyer.

Specific performance is generally awarded only when money damages are inadequate to remedy the breach. That usually comes up when the subject of the contract is unique and there is no equivalent substitute. For example, real estate is always considered to be unique because each property has its own individual



Sure looked right on eBay

characteristics and location, and it's near impossible to find another one that is exactly the same.

But no matter how hard it might be to find a new M3, it is just another production car, and the factory can easily build another one exactly like this one. Consequently, it is highly unlikely that any court would order the dealer to sell this particular M3 to this particular buyer.

Rather, the buyer will have to go find another equivalent M3 and buy it. The buyer can then recover damages equal to what the other M3 costs him less the \$60,000 bid. For example, if he has to pay the \$70,000 MSRP, he could recover \$10,000. But if he finds another one for \$61,000, then his damages are only \$1,000.

And, once again, legal fees will be an important component here. Unless applicable state law provides for the recovery of attorney fees in such a case, which would be unusual, the buyer will be out of pocket for his attorney fees, win or lose. That could make a relatively slam-dunk case into an uneconomical pastime for the buyer. ♦

JOHN DRANEAS is an attorney in Oregon. His comments are general in nature and are not intended to substitute for consultation with an attorney.

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