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**USING AUCTIONS TO SELL AND  
MARKET REAL ESTATE  
THE BID-NESS OF AUCTIONS**

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# **USING AUCTIONS TO SELL AND MARKET REAL ESTATE**

## **THE BID-NESS OF AUCTIONS**

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# USING AUCTIONS TO SELL AND MARKET REAL ESTATE

## THE BID-NESS OF AUCTIONS

### 1. BACKGROUND OF COMMERCIAL AUCTIONS

There are innumerable ways to provide auctions, such as in-person live open outcry auctions, online live auctions, telephone auctions, sealed bid auctions, and timed online auctions.

Categories of auctions include:

- **English auctions**  
"Open ascending price auctions" or open bids with each bid higher than the prior bid.
- **Dutch auctions**  
"Open descending price auctions" pursuant to which the auctioneer announces an asking price and the price is lowered until a bidder agrees to the auctioneer's price, named after Dutch tulip auctions.
- **First-price sealed-bid auctions or blind auctions**  
Simultaneous sealed bids, to the high bidder.
- **Second-price sealed-bid second-price auctions**  
Winning bidder pays second-highest bid.<sup>1</sup>

The types of auctions based on escalating bidding include:

- **Absolute auctions (or auctions without reserve)**  
"The property is sold to the highest bidder, regardless of the price...."<sup>2</sup>
- **Minimum bid auctions**  
"The auctioneer will accept bids at or above a published minimum price. This minimum price is always stated in the brochure and advertisements and is announced at the auction...."<sup>3</sup>
- **Reserve auctions (auctions subject to confirmation)**  
"... [T]he high bid is reduced, in effect to an offer not a sale. A minimum bid is not published, and the seller reserves the right to accept or reject the highest bid within a specified time - anywhere from immediately following the auction up to 72 hours after the auction concludes."<sup>4</sup>  
"Although the general rule in a reserve auction is that seller may withdraw property up until hammerfall, an exception to that rule is where the seller specifically reserves right to approve or reject the high bid at later time; in such case, the hammerfall signals end of bidding, rather than consummation of the sale. When a seller explicitly reserves the right to reject any bid made, the auctioneer is left without authority to accept for the seller; the fall of the hammer merely ends the bidding, and no contract is formed until the seller actually accepts the high bid."<sup>5</sup>

A sealed bid auction is a sealed bidding procedure that allows competitive increases or decreases of bids after the opening of sealed bids.<sup>6</sup> A sharp bid is a process by which an unknown bidder submits a bid relative to the highest bid, such as \$2,000 higher, but a sharp bid is against public policy in a sealed bidding procedure.<sup>7</sup>

There is a general presumption that auctions are made with reserve unless a contrary intent is manifested. Unless different intent is shown, an auction bid will be made subject to the terms shown by advertising, posting, and other publication that bidders are or should be aware of, as the terms are modified by any announcement of the

<sup>1</sup> "Auction." *Wikipedia: The Free Encyclopedia*. 30 Jul. 2016. Web. 25 Aug. 2016. <http://en.wikipedia.org/wiki/Auction>; "Auction theory." *Wikipedia: The Free Encyclopedia*. 24 May 2016. Web. 25 Aug. 2016. [http://en.wikipedia.org/wiki/Auction\\_theory](http://en.wikipedia.org/wiki/Auction_theory); Leslie R. Fine, "Auctions." *The Concise Encyclopedia of Economics*. 2008. Library of Economics and Liberty. 25 Aug. 2016. <http://www.econlib.org/library/Enc/Auctions.html>.

<sup>2</sup> "Types of Auctions." *National Association of REALTORS*®. <http://www.realtor.org/auction/types-of-auctions>.

<sup>3</sup> "Types of Auctions." *National Association of REALTORS*®. <http://www.realtor.org/auction/types-of-auctions>.

<sup>4</sup> "Types of Auctions." *National Association of REALTORS*®. <http://www.realtor.org/auction/types-of-auctions>.

<sup>5</sup> 7 Am. Jur. 2d Auctions & Auctioneers § 34.

<sup>6</sup> Tex. Occ. Code § 1802.001.

<sup>7</sup> 7 Am. Jur. 2d Auctions & Auctioneers § 24.

auctioneer at the time of the auction. The offer made by the auctioneer is revocable and the sale is not complete until the fall of the hammer, and the property may be withdrawn unless the auction is announced as made without reserve.

**The *Restatement Second of Contracts*, section 28, sets it up this way: at an auction, unless a contrary intention is manifested, the auctioneer invites offers from bidders, which he may accept or reject; when goods are put up without reserve, the auctioneer offers to sell to the highest bidder, regardless of the amount of the bid and the goods cannot be withdrawn unless no bid is made within a reasonable time. Paragraph (2) states: “Unless a contrary intention is manifested, bids at an auction embody terms made known by advertisement, posting or other publication of which bidders are or should be aware, as modified by any announcement made by the auctioneer when the goods are put up.” Witkin cites this section, as well as early California cases and two text writers (Corbin and Williston) for the following rule: “An auctioneer normally solicits or calls for offers, and the bidders are the offerors. Such an offer is revocable, no sale is complete until the fall of his hammer, and the auctioneer may withdraw the goods unless the auction is announced to be *without reserve*.” (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 134, p. 158.)<sup>8</sup>**

If an auction is advertised and made as a “no reserve auction” or “absolute auction,” the land cannot be withdrawn after bidding commences, and an oral agreement between the owner and auctioneer to use a “shill” or false bidder, unknown to sincere bidders, to raise the price is void and unenforceable as contrary to public policy.

**Unquestionably, the most famous illegal purpose contract case is the legendary and perhaps supposititious “highwayman’s case,” that generations of law students have trained on. There, one criminal unsuccessfully attempted to invoke equity to sue another for a share of their ill-gotten booty. Our Court in 1956 discussed this case, quoting from Pothier on Obligations, in a fashion that cannot be improved upon, as follows:**

**“There is a tradition that a suit was instituted by a highwayman against his companion to account for his share of the plunder, and a copy of the proceedings has been published as found amongst the papers of a deceased attorney. It was a bill in the Exchequer, which avoided stating in direct terms the criminality of the engagement, and is founded upon a supposed dealing as copartners in rings, watches, et cetera, but the mode of dealing may be manifestly inferred. The tradition receives some degree of authenticity, by the order of the court being such as would in all probability ensue from such an attempt. The order was, that the bill should be dismissed with costs for impertinence, and the solicitor fined 50£. The printed account is accompanied by a memorandum which states the particular times and places where the plaintiff and defendant were afterwards executed.” [*Manning v Bishop of Marquette*, 345 Mich. 130, 133; 76 N.W.2d 75-134 (1956), quoting 2 Evans’, Pothier on Obligations (3d Am ed), pp 2, 3.]**

**Fortunately for the present parties, Michigan law tends to be far less harsh than the early common law in England.**

**...**

**In sum, the clean hands doctrine bars the present claims. No person capable of understanding the advertising that Mr. Rose [the owner] caused to be published, as Mr. Rose certainly was, could have felt that the use of a shill bidder was ethically acceptable conduct. Thus, application of the clean hands doctrine is justified because the claims in question are inextricably tied to Mr. Rose’s agreement to a fraudulent shill bidder scheme, and Mr. Rose will not be heard to claim he had a right to rely on advice that he and NAG [the auction company] could get together to swindle the very individuals they had advertised to attract. In the trenchant and stinging words of Justice Smith in *Manning v Bishop of Marquette*, 345 Mich. 130, 131, 76 N.W.2d 75 (1956), “A rogue does not appeal to our conscience.”<sup>9</sup>**

The auctioneer has broad flexibility in the bid process if the reserve price has not been exceeded. “To the extent that Gall [the auctioneer] found bids from the ether, the terms of an open outcry auction permit the auctioneer to bid in amounts below the reserve price on behalf of the seller. Actions by an auctioneer to encourage a bidding

<sup>8</sup> Lim v. The TV Corp. Internat., 99 Cal. App. 4th 684, 121 Cal. Rptr. 2d 333, 338 (Cal. App. 2d Dist. 2002).

<sup>9</sup> Rose v. Nat’l Auction Group, 466 Mich. 453, 463, 467, 646 N.W.2d 455, 461, 463 (Mich. 2002).

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