

eBay Frauds: Specific Illustrations and Analysis

Bret N. Bogenschneider & Arkadiusz Mironko*

Introduction

The eBay website serves as a marketplace for the sale of goods with the primary means of exchange an online auction process and what is referred to as the “Buy-It-Now” purchase.¹ The goods available for sale on eBay are primarily used tangible items ranging from household items to motor vehicles, antiques, thrift store finds, and even intangible items such as coupons.² New items are also for sale on eBay often with set prices at a significant discount to list price or MSRP. The eBay online auction service is offered for a period of days up to a week to which the listed item is open for bid to persons with a registered eBay account.³ Online auctions can be offered with or without a reserve price. The Buy-It-Now feature is a non-auction service and is a listing of a good with a set price. The offering price on Buy-It-Now is often higher than an auction price with reserve and represents the amount which the seller is ready to sell immediately without an auction process involving competing bids that might otherwise increase the auction sale price. Bidders in online auctions are anonymous and auctions do not have a target price or maximum bid amount unless a Buy-It-Now auction is set to run in parallel with an auction on the same item until a first bid is received.⁴ A history of prior auctions and sale price results is available for both buyers and sellers to research market history on prior auction results on the eBay platform. eBay collects

* Bret N. Bogenschneider, PhD, JD, LL.M., Associate Prof. of Business Law, CNU, Newport News, VA; Arkadiusz Mironko, PhD, Assistant Prof. of Management, IU East, Richmond, IN.

¹ See eBay, Selling with Buy it Now. <https://www.ebay.com/help/selling/listings/selling-buy-now?id=4109>

² See eBay, Item Condition by Category, <https://www.ebay.com/help/selling/listings/creating-managing-listings/item-conditions-category?id=4765>; see also Mary M. Calkins, Alexei Nikitkov and Vernon Richardson, 8 Pittsburgh J. Tech. L. & Pol'y 1 (2007), Mineshafts on Treasure Island: A Relief Map of the eBay Fraud Landscape, 2-3 (“Today eBay is a household name, a widely imitated 5 electronic “supermarket” offering a vast range of goods both used and new, in all price ranges, via both computerized auctions and fixed-price (“Buy it Now”) direct sales, to huge segments of the buying public. At the end of 2005, eBay had over 181 million total user accounts worldwide; during that year, users traded over \$ 44 billion in total value of goods sold. True to its origins, the current version of eBay still features many low-priced items of the sort that one might clean out of a cluttered attic. However, large volumes of new and expensive goods also change hands, including costly collectibles and highend consumer goods such as designer clothing, home electronics, automobiles, and real estate.”).

³ Kanchana Kariyawasam & Scott Guy, The Contractual Legalities of Buying and Selling on eBay: Online Auctions and the Protection of Consumers 42:19 Journal of Law, Information and Science 2008 42 (“Consumer transactions undertaken on eBay constitute an essentially online and dynamic form of ‘auction’ process. In particular, what happens on eBay is that an item is listed for sale with a reserve price and prospective or aspiring purchasers make their respective bids. The item listed for sale is then ‘sold’ to the highest bidder provided the reserve price is met.”).

⁴ Calkins, Nikitkov & Richardson at 6-7 A (“In order to sell on eBay, a seller must first register with eBay under a unique “seller ID” and verify his identity, usually by registering a credit or debit account and bank information with eBay. The seller is then permitted to list items for sale on eBay using various sales models, including an auction of fixed duration or a fixed-price sale using the “Buy it Now” feature, with the item available for purchase during a set time period. Sellers can also use a combination of these two methods”).

various fees for the marketplace service including both a listing fee and percentage of auction or sale price. Both fees are paid by the seller.⁵ eBay often offers promotions which waive the listing fee.

All eBay account holders choose a user name which can be changed at any time.⁶ Each eBay user also receives a numerical rating reflecting feedback from other eBay users assigned to their account.⁷ The numerical rating increases each time feedback is received from other users.⁸ The more a user buys and sells on eBay the higher the feedback rating,⁹ although there are some reasons to doubt the reliability of the feedback ratings.¹⁰ It is also possible to provide written feedback which is viewable by other eBay

⁵ Calkins, Nikitkov & Richardson at 7 (“The seller generally pays one fee to eBay at the time of listing and a second fee if the item sells. Sellers also have the option of paying eBay additional fees to use various promotional features and selling tools.”).

⁶ Albert at 606 (“The identities of all buyers and all sellers should be authenticated at no cost to the parties. This simply should be a cost of doing business for the online auction sites. Online auction sites receive a percentage of the successful bid and should bear some responsibility for cutting off this avenue for fraud. This identity validation can be done through any reputable credit agency. Further, online auction sites should strictly limit the number of user names any one person can have. This may be an inconvenience to some innocent parties who have legitimate reasons for multiple user names, but it also decreases the potential for fraudulent participants to hide behind a cloak of anonymity, which decrease may, in and of itself, increase buyers' confidence in the online auction process.”).

⁷ Mary M. Calkin, *My Reputation Always Had More Fun Than Me: The Failure of eBay's Feedback Model to Effectively Prevent Online Auction Fraud*, 7 Rich. J.L. & Tech. 33 (2001) (“If the feedback rating reaches 4, the user's account is automatically suspended. However, since the rating is calculated as a sum of all comments, more than 4 negatives will be required to reach 4 if the user has one or more positives. Therefore, users with the same rating can have different feedback comments. For example, a rating of +50 can mean 50 positives and no negatives, or 100 positives and 50 negatives. Obviously, a user with a significant number of positive comments would have to get many negative comments before being suspended.”); Calkins, Nikitkov & Richardson at 8 (“[T]he seller's listing displays graphics designed to engender trust in buyers. A “feedback number” appears next to the seller's ID. Feedback is a rating of positive, neutral or negative, accompanied by a one-line comment that can usually be publicly read, given by one's transaction partner after a transaction is complete. A positive feedback increases the feedback score by one point, a neutral feedback does not affect the score, and a negative feedback decreases the score by one point.”).

⁸ Dara Chevin, *Schemes and Scams: Auction Fraud and the Culpability of Host Auction Web Sites*, 18 Loy. Consumer L. Rev. 223, 226-7. (2005) (“However, upon closer examination, consumers may not be as safe as they think. There is little to no screening when signing up for an eBay user name; in fact, eBay users are not even required to divulge their true identities, since the information provided on the registration form is not verified. Once one becomes an eBay user, he or she can post items for sale. Establishing a seller account merely requires a credit card or checking account number.”). See generally Bob Rietjens, *Trust and reputation on eBay: Towards a legal framework for feedback intermediaries*, 15:1 Information & Communications Technology Law.

⁹ Del Duca, *Rule & Rimpfel* at 209 FN14 (“eBay provides information through its Feedback system to facilitate identification of reliable sellers and buyers and keep market participants honest. eBay assigns parties a “star” based on how many positive reviews they have received. The feedback system, like the dispute resolution system, treats buyers and sellers differently. Buyers can leave positive, neutral or negative ratings while sellers can only leave short comments and positive ratings. eBay is very clear that feedback extortion and manipulation is not allowed. Sellers can report buyers in violation of the buying practices policy, especially when successful auction bids are not paid by the buyer. This report can result in a “strike” against the buyer.”).

¹⁰ Albert at 624 (“But if the feedback area is not monitored, query how reliable such feedback actually is. What is there to stop a shill bidder from posting fraudulent feedback under another of his user names, showing himself in a favorable light? eBay expressly forbids shill bidding, but permits users more than one Internet name, making shill bidding less easy to detect by a cursory examination of bidders' user names.”); Calkins, Nikitkov & Richardson at 11-12 (“[T]he buyer and seller also have the option of leaving each other negative eBay feedback, although they may choose not to do so for various reasons, one being that leaving a negative feedback generally results in receiving a

users. The eBay administration uses feedback score to restrict accounts and to occasionally place lower performing members on a probationary status, although it is not clear how the probationary status may be helpful to the prior victims of fraud.¹¹ Abuse of other eBay members is also restricted and subject to penalty and may result in a restriction or ban from the eBay platform.

The existence of frauds on eBay is widely known and has been the subject of several law journal articles.¹² The most notorious eBay fraud was for the sale of a painting implied to be by the American Modernist Diebenkorn which ended at a sale price of over \$135,000.¹³ Although the eBay company claims fraud is rare in mathematical terms,¹⁴ variations of such frauds exist today and is quite common for eBay users to claim to be defrauded.¹⁵ The contribution of this article to the broad literature regarding the eBay

negative feedback in return. The failure to leave deserved negatives can make feedback unreliable as a trust indicator.”).

¹¹ Calkins, Nikitkov & Richardson at 12 (“While feedback might thus prevent future bad transactions, it does nothing to make whole the parties who have already suffered a loss. For actual remedies, the parties' options depend on the details of the transaction at issue.”).

¹² Miriam R. Albert, E-Buyer Beware: Why Online Auction Fraud should be Regulated, 39 Am. Bus. L.J. 575, 578 (2002) (“The increased popularity of the Internet and the huge volume of e-commerce transactions have generated opportunities for cyber crimes and torts, including various forms of Internet fraud.”); Adam Reynolds, E-auctions: Who Will Protect the Consumer? 2002 J. Consumer Law 4 (2002) (“Currently, IFW records about 4-6000 incidents of fraud through e-auction sites each year, with the average loss per person currently running at about \$ US500.”); Chevlin at 229-30 (“Auction fraud may assume various forms. The most common scam involves a situation like the airplane scheme discussed earlier. A seller posts a high-priced item, like an airplane, on a well-known web site, such as eBay. The winning bidder will send his or her money to the seller, but the promised merchandise will never be sent. A variation of this scam involves the payment for a winning item, but instead of never receiving the items, the seller sends counterfeit merchandise. Most consumer fraud victims lose small amounts of money and are unable to get the attention of their local authorities. These consumers are left with no other option, but to protect themselves.”); Kariyawasam & Guy at 44 (“The result of this has been the increasing prevalence of significant fraudulent activities on internet auction sites. In particular, this has been due to the difficulties associated with the anonymity of users and the imbalance of information — ‘information asymmetry’ — whereby some users have greater access to information than do others. The most common offences are, firstly, ones relating to the actual or non-performance of the transactions — vendors, for example, failing to deliver advertised goods as contracted. A related offence relates to the failure to deliver the goods ‘as advertised’, thereby engaging in misrepresentation and false and misleading or deceptive conduct.”).

¹³ See Mark Wojcik, Lawyers Who Lie On-Line: How should the Legal Profession Respond to eBay Ethics? 18 John Marshall J. Computer & Info. L. 875 (2000).

¹⁴ Albert at 615-6 (“The online auction sites affirmatively and explicitly disclaim any responsibility for the risk of fraud on their sites, yet they oppose regulation, leaving the cost of fraud squarely on the victims. In response to questions about the increase in online auction fraud, online auction sites first claim that the problem of fraud on their auction sites is overstated because fraud, as a mathematical matter, occurs in only a “tiny fraction” of their sales.”).

¹⁵ See Albert at 601-2 (“The high numbers of complaints about online auction fraud highlight the absence of any meaningful consumer protection for online auction participants. This dearth of consumer protection stems from the lack of sufficient regulation of online auctions, the lack of any meaningful enforcement of existing regulation, and the lack of sufficient consumer education efforts with respect to online auction fraud.”).

company¹⁶ is to provide specific illustrations of frauds on eBay and to add a new description of fractional shill bidding unique to an eBay auction.¹⁷

eBay operates its own administrative legal system in order to resolve contractual and other disputes between buyers and sellers.¹⁸ eBay's administrative authority to resolve such disputes extends to users of its marketplace and auction services pursuant to the user agreement and potential for continued use of the site.¹⁹ Although eBay's legal system does not formally supplant traditional legal remedies, eBay's resolution of a dispute would often be the final resolution. eBay's legal system thus functions as a type of administrative law where disputes are resolved without formal litigation.²⁰ Yet, the eBay legal system is distinguishable from other areas of administrative law because it is operated by a business and online market provider rather than a government judicial authority, such as a small claims court.²¹ This raises some initial concerns because eBay's version of administrative law might be expected to further the interests of its shareholders rather than to yield an impartial resolution of a legal dispute.²² For example, since eBay often collects a percentage of revenue of completed transactions, eBay's interests might be expected to tilt toward a legal resolution of completion of transactions for which it would collect a percentage of the sale rather than the cancellation. Likewise, eBay might be expected to aggressively

¹⁶ Calkins, Nikitkov & Richardson at 4-5 ("eBay acknowledges in its own annual report that fraud poses significant risks to its business, both by eroding consumer confidence and directly affecting payments made to the company. While still maintaining that it is "not involved in the actual transaction[s]," eBay now performs a number of fraud protection activities, including cooperating with law enforcement to remove illegal items and assist investigations, working with intellectual property rights owners to remove allegedly infringing items; investigating some user complaints, and providing users some limited forms of financial coverage against fraud loss. *see also* Mark A. Lemley, Did eBay Irreparably Injure Trademark Law? 92:4 ND Law Rev. 1796 (2017); Paul R. Michel and John T. Battaglia, eBay, the Right to Exclude, and the Two Classes of Patent Owners. 2020, Patent Law Journal.

¹⁷ *See infra* Section 1.

¹⁸ Del Duca, Rule & Rimpfel at 206-7 ("In the basic eBay resolution system, administered in conjunction with PayPal, eBay provides both buyers and sellers a guided process for resolving disputes over purchases made through its site. In the initial step, eBay asks the buyer to diagnose the specifics of their complaint, and to suggest a preferred resolution. eBay then encourages the buyers and sellers to communicate directly through its messaging platform. If the matter cannot be resolved through negotiation, the dispute then can be escalated to the Resolution Services team within Customer Support. Once at this stage, the Resolution Services team evaluates the buyer's claims and makes a decision about who is right and who is wrong.").

¹⁹ *See* Ethan Katsh Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace, 21:2 International Review of Law, Computers & Technology.

²⁰ Thomas Schultz, Private Legal Systems: What Cyberspace Might Teach Legal Theorists, 10 Yale J. L. & Tech. 151, 154 (2007) ("[T]here exist private systems on the Internet that are much more clearly legal systems than some of the prime examples provided by legal pluralists.").

²¹ Del Duca, Rule & Rimpfel at 206 ("The eBay system can serve as an example of best practices in limiting the types of claims and amount of recovery to place parameters to create a low-value framework to facilitate fast-track, fair, and low-cost ODR.").

²² Albert at 619-20 ("The online auction sites want consumers to bear the risk of fraud, making the self-serving claim that buyers can protect themselves through a variety of completely voluntary tools and programs. The existing safeguards are insufficient, setting up programs that are costly in terms of the participants' time and money, and amount to essentially no protection unless the participants are willing to undertake the effort, and in some cases, the associated costs of the efforts. The increasing number of online auction fraud complaints demonstrate that these safeguards are ultimately ineffective, primarily because the participants are electing not to use them. These safeguards include voluntary user identification, escrowing funds, insurance, vetting offered goods, feedback, and other fraud prevention efforts.").

limit frauds aimed at gaining an improper benefit from the marketplace provider, namely eBay itself.²³ Even if this presumption of economic self-interest were not true and eBay was impartial despite its potential to receive a greater or lesser commission depending on the particular resolution of a dispute,²⁴ eBay in fact does resolve an extraordinary number of contractual disputes irrespective of whether it does so in an impartial manner or not. As online commerce expands in the economy, eBay's quasi legal system may increase in relative importance in respect of its share of legal claims within the broader legal system.²⁵ The available empirical evidence indicates the overall number of disputes addressed in private quasi legal systems might exceed the number of filed contractual lawsuits in the wider economy, although the amount in dispute of such claims would often be much less relative to traditional litigation through the courts.

Since the potential for fraud on an eBay purchase is widely known to prospective users, since at least 2014 eBay has implemented a money back guarantee program.²⁶ The program allows eBay users to access the eBay legal and administrative system in the case of dissatisfaction with an eBay purchase. Therefore, most eBay users will be familiar with the eBay "case" system,²⁷ where users open a case with a seller to initiate a return and then request eBay to step in where the process of dealing with the seller fails resulting in a claim under the money back guarantee program. In order to evaluate the effectiveness of the eBay legal system, the project undertaken here is to gather, collate and describe actual frauds as identified by eBay users and to explain how these are addressed by eBay. In Section 1, a list of eBay frauds is provided along with a summary and documentation of how such frauds are implemented as of May 2021. In Section 2, the eBay administrative legal resolution of each fraud is described, if any. Special emphasis is provided to known frauds *not* addressed by the eBay legal system and the possible reasons for such non-resolution. The eBay administrative legal system is compared with the legal system for resolution of contract disputes, pursuant to the common law of contracts or by application of the Uniform Commercial Code

²³ Calkins, Nikitkov & Richardson at 36 ("Although eBay is working to prevent some forms of fraud, there are other areas where eBay has been less effective or proactive in preventing fraud or offering remedies. Some types of fraud, such as transactions occurring off eBay, may be somewhat beyond eBay's capability to effectively regulate. eBay is also less likely to address forms of fraud where it lacks economic incentives to intervene, or where enforcing a strong anti-fraud policy would conflict with eBay's features or policies designed to increase user trust.").

²⁴ Calkin ("But all of these benefits help the company, not the user.").

²⁵ See *generally* Deepa Varadarajan Trade Secrecy Injunctions, Disclosure Risks, and eBay's Influence, *American Business Law Journal* Volume 56, Issue 4, 879–925, 881 (2019) (suggesting that eBay may influence others in legal matters).

²⁶ Del Duca, Rule & Rimpfel at 205 Since the launch of its original dispute resolution system, which focused only on letting buyers report "fraud alerts," eBay has expanded to support dispute resolution in a variety of other problem types, such as "item not received" and "item not as described" disputes (where the buyer is the complainant), or "unpaid item" disputes (where the seller is the complainant). FN6 eBay Money Back Guarantee, EBAY (APRIL 3, 2014), <http://pages.eBay.com/help/policies/money-backguarantee.html> [hereinafter "eBay Money Back Guarantee Policy"].

²⁷ Del Duca, Rule & Rimpfel at 208 ("Buyers have 30 days from the actual or estimated delivery date to make direct contact with the seller through the eBay platform. If this direct contact does not resolve the problem within three business days of buyer's initial communication to the seller, the buyer can choose to escalate the case to eBay. If the buyer escalates the case to the Resolution Center, eBay will review the case and contact the buyer within 48 hours with a determination of whether the case qualifies for a refund of the full purchase price plus original shipping.").

(UCC).²⁸ Special emphasis is given to matters where the eBay legal system might reach a different result than the formal legal system of contracts on the same facts.²⁹

Section 1

eBay Frauds: Seller and Buyer

A preliminary question for any legal system is how or whether it addresses known frauds. For this purpose, the term “fraud” would entail the intentional taking of an improper benefit at the expense of a third party, such as a counterparty, insurer, or even an auction platform or market-provider, such as eBay itself.³⁰ Accordingly, an important question for the eBay system is how or whether it addresses known fraud through its process of dispute resolution. The eBay system might be considered effective if it were able to detect and address known frauds in a systemic way. If such frauds were known but not addressed by the eBay system this might indicate the quasi legal system was ineffective in practice, resolution of such disputes was impossible or impracticable, or even that eBay did not wish to address known frauds due to an economic conflict of interest or some other reason. However, any finding of flaws in the eBay quasi legal system should be tempered insofar as no legal system could be expected to detect and resolve all types of fraud.

List of Seller Frauds

1. Cancellation of Completed Sale, Re-Sell Item at Higher Price
2. Fractional Shill Bidding
3. Sending of Defective Merchandise, Threatening Buyer Not to Initiate Return
4. Sending of Defective Merchandise, Return Selection Lottery
5. On-Selling or Forwarding of Non-Conforming Goods via Third Party Distributor
6. Setting High Delivery Fee, then Disallowance of Buyer Shipping Refund
7. Sending of Damaged Merchandise after Purchasing Delivery Insurance
8. Upon Non-Delivery of Goods, Request Purchase Price Reimbursement and also Collect Insurance

List of Buyer Frauds

²⁸ Alexander van Voorhees, eBay Sellers and Article 2: Selling a Broader Merchant Concept, 56 Case W. Rsr. L. Rev. 1199, 1201 (2006) (“Every state in the union has adopted the U.C.C., so it now governs virtually all of the transactions on eBay and other internet auction sites. Generally, there are only two limited circumstances in which Article 2 would not apply to sales facilitated by online auctioneers. First, the seller could include a provision in the posting, which is the basis for the auction, specifying that another body of law will govern the transaction. By bidding, the buyer might be agreeing to this term. In most situations, the Code grants to the counterparties the freedom to contract.’ And this might include agreeing that the laws of a foreign jurisdiction should govern the transaction. Second, and perhaps more importantly, Article 2 applies only to transactions in “goods”; while that term is broadly defined in Article 2, section 105(1), it would not include services and other intangibles.”).

²⁹ By Gretchen S. Sween, Ph.D., J.D. *, Who's Your Daddy? A Psychoanalytic Exegesis of the Supreme Court's Recent Patent Jurisprudence, 7 Nw. J. Tech. & Intell. Prop. 204, (Spring, 2009).

³⁰ § 523. Exceptions to discharge, 11 USCS § 523 (Current through Public Law 117-26, approved July 6, 2021, excepting Part V of Subtitle A of Title 10, as added by Public Law 116-283 (effective 1/1/2022) and Public Law 117-2.), available at <https://advance-lexis-com.proxyeast.uits.iu.edu/api/document?collection=statutes-legislation&id=urn:contentItem:8W98-8NP2-8T6X-74P3-00000-00-1&context=1516831>.

9. Threaten to File an eBay Case or Administrative Action
10. Intentionally Damage Goods upon Receipt and request Partial reimbursement
11. Cancel Auction Bid for Invalid Reason, Re-Buy at Lower Price
12. Upon Non-Delivery of Goods, obtain Refund from Seller and also Accept Late-Delivered Item
13. Return with Empty Box
14. Return, then also reverse on Credit Card.

Factual Summary of eBay Seller Frauds

1. Cancellation of Completed Sale, Re-Sell Item at Higher Price

A basic eBay fraud is the entering into of an agreement of sale and then to cancel that agreement to obtain better terms.³¹ The result of the fraud is to deny the benefit of the bargain to the counterparty. Although rare, if the practice became more prevalent on the eBay service it would likely yield a breakdown of most eBay transactions because neither buyers nor sellers could rely on the counterparty to execute the transaction as agreed. The legal treatment by eBay of the fraud might be expected to be severe but generally a seller may cancel a transaction without consequences through eBay.³²

An illustration of how the fraud operates is as follows:

Original Purchase: Order number: 04-06584-84662

PAID Estimated delivery: Wed, Feb 24, 2021

SAIL SHIP Syd Godfrey Copper Sculpture Brigantine "Newsboy" Artist signed

Item price \$89.99

Item number 294015358387

REDACT

I have packed the item and am ready to ship it out. The issue is that it will cost about \$40 to ship which is almost half of what you paid for it. Would you be willing to pay an extra \$20 to help cover shipping? If not I will have to cancel this purchase and refund your money because the shipping cost is just to high to justify selling it at such a low price.

Thank you for understanding,

New message to: REDACT

Joseph, I've opened an eBay case. I will not be paying an additional amount nor agreeing to cancellation of the order.

ReListed Item:

³¹ Albert supra Note XX.

³² Mr Victor Metsch, Arugula, Radicchio Romaine/Attorneys At Law Lettuce Get Your Deposit Back, Mondaq, December 6, 2018 Thursday, available at <https://advance-lexis-com.proxyeast.uits.iu.edu/api/document?collection=news&id=urn:contentItem:5TWX-KWH1-F03R-N05X-0000-00&context=1516831>.

SAIL SHIP Syd Godfrey Copper Sculpture Brigantine "Newsboy" Artist signed

Item price \$149.99 plus Shipping \$19.75

A complaint was filed with eBay on March 2nd, 2021 however no action was reported as taken against the seller and the re-listed item; the re-listed item was not removed and was apparently resold by the seller for an additional profit at the higher price with roughly the same shipping cost as in the original listing.

2. Fractional Shill Bidding

A complex eBay fraud involves the use of a phantom account to bid against other bidders on the eBay platform on an anonymous basis. This is referred to as shill bidding.³³ Competing bidders are effectively anonymous because bidders able to view only the first and last letter of competing bidders' profile and feedback rating. The use of a phantom bidder is also theoretically possible at a live auction but could result in the overbidding of the live bidder and an auction sale to the phantom account. However, the fraud is possible without this risk on the eBay platform because the eBay online auction allows for bidding by anonymous parties in fractional amounts on an anonymous basis.³⁴ The fractional bids make it possible for a phantom bidder to bid up to a live bidder's maximum bid without exceeding it in cases where the live bidder has entered a fractional bid. In any case, because there is both bid cancellation and no barrier to re-listing on the eBay platform, even if a live bidder was outbid by a phantom account in an eBay auction the phantom overbid could be withdrawn after the close of the auction or the item could be re-listed for a repeat auction. This is sometimes referred to as "bid-shielding".³⁵

³³ Reynolds at 8-9 ("(1) There are a number of ways in which fraud may occur. The following are examples: During an e-auction:- the seller (under a different name) or his accomplices lodge dummy bids to drive the e-auction price up ('shilling'); - a buyer lodges a low bid, immediately followed by an accomplice's extremely inflated bid. Immediately prior to the close of the e-auction, the buyer's accomplice withdraws the high bid, and the item is knocked down to the buyer with the artificially low bid. (2) After the e-auction; - a seller takes the buyer's money, but does not deliver the goods (this is clearly criminally fraudulent, regardless of when the intention not to deliver was formed- before placing an item up for auction, while the e-auction was in progress, or after the e-auction was concluded and money had changed hands);- a seller takes the buyer's money, but delivers the goods in an untimely manner (this varies from potentially fraudulent through to merely morally reprehensible);- a seller takes the buyer's money, but the goods are materially different from or inferior to that described (this can range from fraud, through misrepresentation, to innocent misrepresentation);- a purchaser sends goods, but never receives money (again, fraud). As well as causing individual loss, fraud causes a second broader level of detriment. The implication that the internet is not a safe place to carry out financial transactions will erode its usefulness (and commercial viability).").

³⁴ Albert at 589 ("A second form of fraud arising during the bidding process is shill bidding, whereby a party puts in one or more false bids, with no intention of actually purchasing the item. Typically, parties employ different user names to make these fraudulent bids, bidding on either their own or their co-conspirators' offered items. Shill bids are made to drive up the price of the auctioned item or to generate some other benefit to the seller. For example, on some online auction sites, if a particular auction reaches a certain number of bids, the auction will be specially promoted on the site.").

³⁵ Albert at 588 ("During the bidding process, perpetrators can engage in "bid shielding" and "shill bidding." Bid shielding refers to the collusion of bidders to artificially inflate the bids during an auction. One co-conspirator puts in a low bid and then another co-conspirator puts in a bid high enough to discourage outside bidders from entering the auction. Just before the auction closes, the high bid is withdrawn, and the low bidder, by default, is the successful bidder."); Albert at 590-1 ("Nonetheless, experts say that online auction sites can and should do more to prevent shill bidding. Critics claim that online auction sites are slow to take action on complaints about shill bidding. Arguably, online auction sites have a disincentive to eradicate shill bidding, since tolerating shill bidding on their sites

Here is a hypothetical step illustration of how the bid inflation fraud operates:

In Step 1, the Seller sets up a legitimate auction listing for a valuable item of relatively high value.

In Step 2, the Seller uses a related party to set up or designate a phantom eBay account to bid on the auction listing established in Step 1.

In Step 3, an unrelated live Buyer places an out-of-the-money bid of a fractional amount on the item. For example, if the first bid on the item was \$0.99 on an item expected to sell for a much higher amount, the fractional bid entered by the Buyer is \$750.01. The Buyer might be expected to make a fractional bid of \$0.01 above \$750 to \$750.01 in order to win in the event of a competing bid of \$750.

In Step 4, the phantom eBay account is then used to counterbid against the Buyer on the Seller's auction. The bids are entered incrementally so as not to outbid the Buyer. However, this must be accomplished without foreknowledge of the amount of the Buyer's initial bid of \$750. Accordingly, incremental bids would be entered on the eBay auction by repeatedly clicking the "Increase Bid" button of \$5, \$10 and \$25 increments up and until the amount of the bid reflected an incremental amount, of \$750.02. Incremental bids are only entered until a fractional bid becomes visible on the phantom eBay account where the fractional amount indicates that the phantom eBay account would become the high bidder upon the next bid. The phantom eBay bidder then stops bidding at the next lowest increment below the Buyer's highest bid, which in this case would be \$725.

In Step 4, alternately, the phantom eBay account could be used to formally outbid the Buyer. Here to a bid of \$750.02, or more. The phantom eBay account would then withdraw the bids using the standard eBay process of bid withdrawal. At that point, the Buyer's prior bid would again become the high bid of \$0.99. A second phantom eBay account would then bid on the auction to an amount of \$750 or some other amount below the maximum auction bid of the Buyer, yielding a bid amount of \$750 or less. The alternate version of Step 4 is also necessary in the case where the Buyer does not enter a fractional bid, so the incremental bid process results in an inadvertent overbid.

In order to avoid becoming a victim to either version of this eBay fraud, experienced buyers often place bids only in the closing seconds of the eBay auction.³⁶ Last second bidding is also done to prevent competitive bids by persons using the incremental bidding feature on eBay.³⁷ In many eBay auctions the

will drive up the selling prices, and thus ultimately result in greater commissions for the online auction sites because they receive some stated percentage of each online auction transaction.”).

³⁶ Block v. eBay, Inc., 2012 U.S. Dist. LEXIS 63866, 2012 WL 1601471 (United States District Court for the Northern District of California May 7, 2012, Filed), available at <https://advance-lexis-com.proxyeast.uits.iu.edu/api/document?collection=cases&id=urn:contentItem:55KD-YNW1-F04C-T2HC-0000-00&context=1516831>.

³⁷ A laboratory study of auctions with a buy price., Economic Inquiry, April 2013, available at <https://advance-lexis-com.proxyeast.uits.iu.edu/api/document?collection=news&id=urn:contentItem:58WB-9NJ1-DYV1-91VM-0000-00&context=1516831>. Also, A laboratory study of auctions with a buy price., Economic Inquiry, April 2013.

“eBay places a hard deadline on each auction; once the deadline is reached the bidding is closed.” Alvin E. Roth & Axel Ockenfels, Last Minute Bidding and the Rules for Ending Second-Price Auctions: Evidence from eBay and Amazon Auctions on the Internet, 92 Am. Econ. Rev. 1093, 1093 (2002).

[ARTICLE: LAW AND PROXIMITY, 2008 U. Ill. L. Rev. 557, 581](#)

majority of bids including the winning bids are usually entered in the closing seconds of the auction.³⁸ Inexperienced users may find this frustrating because they have the experience of being the winning bidder.³⁹

3. Sending of Defective Merchandise, Threatening Buyer Not to Initiate Return

A rather diabolical eBay fraud involves the use of intimidation to deter a buyer from initiating an otherwise allowable return.⁴⁰ The threats directed against the prospective buyer are intended as a type of intimidation carried out for monetary gain.⁴¹ As explained below, this is a type of criminal act that also functions as an eBay fraud.⁴²

Vintage art metal copper tin sculpture sailing ship galleon nautical decor MCM

Order number: 01-06513-62882

A return on the item was initiated on February 5th, 2021. The item purchased allows for a return with no explanation by the Buyer. The Seller provided the following response reflecting an illustration of the fraud:

REDACT Top Rated Seller (6,124 Green Star)

I've learned how to do this game over 20 years just send it back let's just get on with it I'm all done talking to you and tired of dealing with people like you and I know just exactly what to do and how to do it you're playing games that's all you doing nitpicking and making up extra excuses from your original email which was insulting to me don't bother writing back do what you got to do because I am I guarantee you that... I'm going to report you to eBay fraud division it is obvious from the end of your email that you just didn't like the item the the pictures are fine and clear and the overall measurements are correct when you send it back we will open it and find out are post office manager and document its size and we will return that information to eBay to have you removed from eBay it's people like you that are just bad for eBay... I've dealt with this before and furthermore just so you know and you want to be a smart-ass about it when you send things to different states do the post office for fraudulent purposes it's a felony just send it back I want you to and let me tell you about an opinion on junk that's in the eye of the beholder in an opinion is like an ass everybody's got one it's obvious that you did not read the description accurately or

³⁸ Jump bidding strategies in Internet auctions., *Management Science*, October 2004, available at <https://advance-lexis-com.proxyeast.uits.iu.edu/api/document?collection=news&id=urn:contentItem:4F5X-WYH0-01CT-T209-00000-00&context=1516831>.

³⁹ O'REILLY The savvy user's guide to eBay; O'Reilly releases "eBay Hacks", M2 PRESSWIRE, September 4, 2003, available at <https://advance-lexis-com.proxyeast.uits.iu.edu/api/document?collection=news&id=urn:contentItem:49FP-DCJ0-014W-4110-00000-00&context=1516831>.

⁴⁰ Adam Cohen, *The Perfect Store: Inside eBay* (Back Bay Books 2003) at 133-134.

⁴¹ Resnick, P. and Zeckhauser, R. (2002), "Trust among strangers in internet transactions: Empirical analysis of eBay's reputation system", Baye, M.R. (Ed.) *The Economics of the Internet and E-commerce* (Advances in Applied Microeconomics, Vol. 11), Emerald Group Publishing Limited, Bingley, pp. 127-157. [https://doi.org/10.1016/S0278-0984\(02\)11030-3](https://doi.org/10.1016/S0278-0984(02)11030-3)

⁴² Id.

really look at the pictures it's called buyer's remorse eBay is well familiar with it and doesn't want buyers like you on there we'll see

In the above illustration, the Seller made multiple threats intending to deter the initiation of a return, including (i) "I'm going to report you to eBay fraud division" and (ii) "[W]hen you send things to different states do the post office for fraudulent purposes it's a felony just send it back I want you to". The sale of the particular item allowed for returns without explanation and there was no possibility of fraud in any respect as might be defined by eBay or Federal law.

4. Sending of Defective Merchandise, Return Selection Lottery

Since much of eBay's business relates to the sale of used tangible goods, a significant problem arises for some eBay sellers in what to do with defective merchandise. One solution is to sell items on eBay at full price with knowledge of the defect that would otherwise reduce the value.⁴³ A purchaser of an item on eBay does not have an opportunity to physically inspect the item for damage or defects.⁴⁴ Although pictures are often provided for eBay auctions these may or may not allow the buyer to determine the value of the respective item. The effect is the oldest trick in the book along the lines of using the eBay platform to identify suckers who may be willing to pay full price for defective goods.⁴⁵ In comparison, the purchase of used tangible goods in a thrift shop allows for the buyer to conduct an inspection and determine whether to purchase a defective item at the respective price. From this perspective, eBay often functions as a means of deception to use the eBay platform rules to allow for the sale of defective goods⁴⁶ that would not be saleable in a store that allowed for a physical inspection of the item prior to purchase. A seller can also decide not to accept returns for defective items.⁴⁷

⁴³ Albert at 591 ("A second form of online auction fraud that surfaces after the bidding has closed involves material misrepresentations of the items auctioned. The fraud occurs when a party is induced into a contract by a material misrepresentation, constituting fraudulent inducement. In this scenario, a buyer receives the item, but the item is not as it had been described.").

⁴⁴ Albert at 582 ("Unlike traditional auctions, where the parties or their representatives are in the room with the offered merchandise, online auction sites use the Internet to conduct a virtual auction where the parties never meet and the buyer has no opportunity to examine the offered goods.").

⁴⁵ See Calkin ("But in addition, the long-term nature of the system allows a user to register, commit fraud, and disappear with the profits before bad feedback appears in his file. Another method of committing fraud is to register and perform on a certain number of legitimate transactions in order to acquire good feedback, perhaps by buying or selling low dollar amount items, before committing fraud on big-ticket items. Although some users may refuse to transact with new users having zero or low feedback, it is likely that with 10 million users, some "suckers" will be found.").

⁴⁶ eBay allows listing of defective items in four categories: Business and Industrial, Motors: Parts & Accessories, Cameras & Photo, Cell Phones & Accessories, Computers/Tablets & Networking, Electronics, Home & Garden, Musical Instruments & Gear, Health & Beauty. ("For parts or not working: The item does not function as intended and is not fully operational. This includes items that are defective in ways that render them difficult to use, items that require service or repair, or items missing essential components. See the seller's listing for full details.") <https://www.ebay.com/help/selling/listings/creating-managing-listings/item-conditions-category?id=4765>

⁴⁷ Id. ("See the seller's listing for full details.") Also, Buyer needs to receive Seller's approval to return an item. ("If your item arrives damaged, doesn't match the listing description, or is the wrong item, you can return it for a refund. If you've changed your mind and want to return it, you can ask the seller if they'll accept a return.") <https://www.ebay.com/help/buying/returns-refunds/return-item-refund?id=4041&st=3&pos=2&query=Return%20an%20item%20for%20a%20refund&intent=return&lucenceai=lucenceai&docId=HELP1134>

The term “defect” as it used here includes any description or selling of an item where the buyer does not get what they think they are getting in the purchase. For the purposes of this fraud, we assume that the Seller has knowledge of a defect in the item offered for sale, and does not disclose that the item is not worth full value. This may result from a physical defect in the item, like a chair with a missing leg, but also a variance in the appearance of the item in the description offered for the item on eBay.⁴⁸ The fraudulent deception described here is often carried out by the use of pictures which are not scaled such that the item for sale is smaller than it appears in a photograph.⁴⁹ Most people who have used eBay are tricked at least once by this deception and learn quickly that any purchaser must carefully determine the size of the item for sale and that photographs of the listed item are selected to give the impression of a much larger item than is actually for sale.⁵⁰

In setting up a listing for any item, eBay sellers are able to select whether to accept returns or not.⁵¹ In the first instance of this fraud, we assume that the Buyer receives a “defective” item pursuant to an eBay transaction and then sets up to return the item to the Seller where returns are authorized.⁵² However, in order to carry out the return, the Buyer must run a gauntlet of eBay technical processes, and even where such process are successfully navigated by the Buyer intending to carry out a legitimate return, may still suffer from repeated IT errors on the eBay website. In the experience of the authors, the eBay IT system returns an error on roughly 50% of attempts. Any eBay user attempting to process a return may then be required to restart the return process when the eBay IT system is functioning, typically the next day after a system error. If the eBay user calls eBay on a phone line, in the experience of the authors the IT problem can usually be resolved but the wait for service ranges from 5 to 45 minutes.

The eBay rules for authorized returns also require the selection of a correct return reason that will allow the return to process in the eBay system.⁵³ This means the Buyer must select from a list of roughly 20

⁴⁸ Neto, João Quariguasi Frota, Jacqueline Bloemhof, and Charles Corbett. "Market prices of remanufactured, used and new items: Evidence from eBay." *International Journal of Production Economics* 171 (2016): 371-380.

⁴⁹ Albert at 583-4 (“For example, in the typical online auction, the seller is the only participant with access to the offered item. The buyer relies on the seller's written description, and in some cases, on a digital photograph of the offered item. So, an online auction seller could list an item for sale that differs materially from the description provided, or could list an item for sale that does not even exist. Further, as a practical matter, the large numbers of transactions listed with online auction sites as opposed to traditional auction houses necessitates less attention to each transaction by the online auction house. Also, because online auction sites do not take title to the offered items, and under current law have no liability for fraud occurring on their sites, the online auction sites have little incentive to take steps to prevent fraud on their sites. In fact, the online auction sites consistently disclaim any responsibility for the risk of fraud on their sites.”).

⁵⁰ See João supra at 3 and 8.

⁵¹ Shang, Guangzhi, Pelin Pekgün, Mark Ferguson, and Michael Galbreth. "How much do online consumers really value free product returns? Evidence from eBay." *Journal of Operations Management* 53 (2017): 45-62.

⁵² Laughey, Dan. "User authority through mediated interaction: A case of eBay-in-use." *Journal of Consumer Culture* 10, no. 1 (2010): 105-128.

⁵³ eBay Return an item for a refund policy site: <https://www.ebay.com/help/buying/returns-refunds/return-item-refund?id=4041#section2>; also, Krumwiede, Dennis W., and Chwen Sheu. "A model for reverse logistics entry by third-party providers." *Omega* 30, no. 5 (2002): 325-333.

possible return reasons where some reasons disallow automatically a refund for the return.⁵⁴ Once selected, the Buyer cannot change the selection irrespective of the reason for the error. In addition, the eBay webpage does not allow the selection of many return reasons on a mobile device. If a Buyer is not aware that return reasons cannot be selected except on the full website version, the return will be rejected automatically if processed on the mobile webpage because only the illegitimate return reasons load on the mobile device.

Accordingly, because there are many ways for a return to be disallowed,⁵⁵ an eBay volume seller of defective goods would be able to determine that a significant percentage of eBay users, including especially first-time users or persons accessing the internet with only a mobile device, would fail in attempting to initiate the return.⁵⁶ This is referred to here as the “return selection lottery” meaning the error rate in the processing of returns by buyers in receipt of defective merchandise wishing to process a legitimate return. If we assume that the error rate is roughly 40% on the return of defective goods within the eBay system, a volume seller could then process many successful returns with some administrative and shipping costs, but then in the iteration of re-selling the defective and returned items, eventually sell all (or nearly all) of the defective items solely to persons who erred in selecting the return reason. In addition, many persons might choose not to return the defective item because of the opportunity cost or other difficulty in carrying out the return.

5. On-Selling or Forwarding of Non-Conforming Goods via Third Party Distributor

The fraud described here involves using the eBay name as a shell to forward non-conforming products to eBay purchasers. In the illustration here, relating to Item 184050483783, an eBay seller listed hardcopy books for sale that were apparently held by a third party bookstore.⁵⁷ The item was then sold on eBay without any contact information for the eBay seller, listing the address of the bookstore as the seller. Although the buyer attempted to purchase a technical book for rebuilding a Ford Shelby vehicle, a completely unrelated cultural book entitled “Why I came from Africa” was sent in lieu of the technical book for car rebuilding and repair. The seller initially offered a refund only upon return of the non-conforming book, but eventually agreed to send the book that was actually ordered when it was alleged to be time sensitive.⁵⁸ Notably, since the shipment did not in any way identify it was pursuant to the eBay order, the buyer was effectively forced to guess that the book must have been sent as a mistake and that the bookstore was operating in lieu of the shell eBay storefront.

6. Setting High Delivery Fee, then Disallowance of Buyer Shipping Refund

⁵⁴ Calkins, Mary M. "My reputation always had more fun than me: The failure of ebay's feedback model to effectively prevent online auction fraud." *Richmond Journal of Law & Technology* 7, no. 4 (2001): 33.

⁵⁵ Condition of returned items policy: <https://www.ebay.com/help/policies/member-behavior-policies/condition-returned-items-policy?id=4763#full%20policy> (“If a buyer returns an item, it should be returned in the same condition in which it was received, and it should include all items that were in the original package.

If the returned item is used, damaged, or missing any parts, or is damaged during return shipping because it wasn't packaged correctly, some sellers might provide a partial refund to account for the loss in the item's value.”)

⁵⁶ See 44 *supra*.

⁵⁷ Mimeo.

⁵⁸ *Id.*

An eBay listing is comprised of an item cost plus shipping cost. In the auction format, the shipping cost is added to the item cost for the winning bidder.⁵⁹ The cost of both items combined is the total price. In the creation of the listing, the seller selects the amount of shipping or can select the eBay determined shipping cost based on the item location and the shipping destination of the future buyer.⁶⁰ If that item is selected, the shipping cost will vary depending on the location of the prospective buyer and be displayed as part of the item listing. A puzzle for new eBay users is that in many eBay purchases the shipping cost is equal to or greater than the item cost.⁶¹

In many cases, the eBay seller creates the listing for a damaged or defective item with knowledge that it is very likely the buyer will request to return the item. If the listing is created with a proportionately high shipping cost the seller can make the return un-economical if the shipping cost is not refundable and comprises the majority of the total cost of the item. The eBay money back guarantee ostensibly prevents the disallowance of shipping costs if the seller allows for returns. However, in the processing of any return, the seller affirmatively selects whether the shipping cost will be refunded as part of the return.⁶² This is a rather odd feature of the eBay system because the payment on the item and other features are automatically determined. Unless a buyer has sold an item using the eBay system such buyer may be unaware that the shipping disallowance is not automatically determined by eBay and is something that the seller has determined that may be done with fraudulent intent. The buyer accordingly can avoid an improper or fraudulent disallowance of a shipping refund only by raising the disallowance in the eBay case in which case the seller will be forced to refund the shipping fee in addition to the item cost.

7. Sending of Damaged Merchandise after Purchasing Delivery Insurance

The proportion of items damaged prior to shipment on eBay is unknowable. Yet, a seemingly very high proportionate of items purchased on eBay arrive severely damaged. A type of postal fraud can also occur with the eBay system in the purchase of used tangible goods by mail. In many cases, merchandise may be damaged either prior to sale or in the mail. Since items are delivered to the postal service sealed and ready for shipment, it is not necessarily knowable to the insurer whether the item was damaged during shipment or prior to sale. The postal service seems to have dealt with the problem of insurance fraud by charging an extraordinarily high fee for base insurance (typically \$30) of items purchased with a maximum payout of \$50.⁶³ The cost to insure higher value items requires signature confirmation and is also extremely high based on a fixed percentage of the insured amount. The high proportion of damaged

⁵⁹ In the Shipping section of your listing, select Calculated: Cost varies by buyer location.

<https://www.ebay.com/help/selling/shipping-items/setting-shipping-options/using-shipping-calculator?id=4178>

⁶⁰ *Id.*

⁶¹ Clark, John M., and Sidne G. Ward. "Consumer behavior in online auctions: An examination of partitioned prices on eBay." *Journal of Marketing Theory and Practice* 16, no. 1 (2008): 57-66.

⁶² Calkins, Nikitkov & Richardson at 15-17 ("As eBay strongly encourages transaction partners to work disputes out between themselves and provides means to easily contact the other party to a transaction, a dissatisfied buyer is likely to begin by contacting the seller for a replacement item or refund. Obviously, this method only works if the seller cooperates, which is unlikely where the seller is a fraud.").

⁶³ Priority Mail Express & Priority Mail: ("With some exceptions, Priority Mail Express® may include up to \$100 of insurance and Priority Mail® may include up to \$50 in the price of service. For more valuable shipments, additional coverage is usually available.") <https://www.usps.com/ship/insurance-extra-services.htm>

items purchased on eBay is likely because the postal fraud would be investigated by the postal service in the instance of multiple insurance claims rather than in verification prior to shipment.⁶⁴

8. Upon Non-Delivery of Goods, Request Purchase Price Reimbursement and also Collect Insurance

During the pandemic, delivery of items by the US Postal Service was in many cases delayed and many items were lost entirely.⁶⁵ This led to the filing of a high volume of cases within eBay related to the non-delivery of purchased items.⁶⁶ In the case of non-delivery of an item by the US postal service, the seller would typically be forced to issue a refund for the item to the buyer pursuant to an eBay case resolution under the eBay money back guarantee. eBay sellers in that position were able to receive up to a \$50 refund from the US postal service for the lost item as a type of minimum insurance⁶⁷, or more up to the full value of the item if additional insurance had been purchased. Although it is possible for the seller to create an eBay listing where the buyer would be responsible to purchase the extra insurance⁶⁸ this is rarely selected as an option in most eBay listings.

Because the seller is nearly always responsible for a lost item under eBay rules and is not entitled to payment for the item upon non-delivery,⁶⁹ the non-delivery of items pursuant to the pandemic created a new fraud within the eBay system. An illustration of the new fraud is as follows:

The respective item was purchased in February 5, 2021 and was delivered with a delay of 2 ½ months. An eBay case was opened on April 4, 2021 resulting in a refund to the Buyer for non-delivery.

Rare! Pearl World Globe 13" Tall Gemstone Inlay Brass-tone Frame & Tripod Compass

Order Date: Feb 5, 2021

Delivery date: April 16, 2021

⁶⁴ Calkins, Nikitkov & Richardson at 16 (“A second traditional avenue of recovery is shipping insurance, which is generally available for an additional fee through the U.S. Postal Service or other shipper. 46 Here again, the seller has control over whether to offer insurance, whether to pass the insurance cost on to the buyer (who may refuse to pay the extra cost), whether to actually ship with the agreed-upon insurance, and whether to cooperate with a buyer who wishes to file an insurance claim. Although a buyer who receives a damaged item can generally file a claim on her own, a buyer who never receives an item is dependent upon the seller to provide proof that the insured shipment was actually made. Furthermore, shipping insurance does not cover the situation where the buyer receives an item that was not damaged in shipping, but is otherwise not as described in the seller's listing.”).

⁶⁵ USPS Inspector General “Moving the Mail Through COVID” see <https://www.uspsaig.gov/blog/moving-mail-through-covid>.

⁶⁶ See generally Albert at 591 (“After the bidding has closed, additional opportunities for fraud emerge. The first and most common scenario is simply a failure by one party to perform. This typically occurs when a seller fails to deliver the promised goods after the buyer has paid in full, constituting fraud in the factum.”).

⁶⁷ <https://community.ebay.com/t5/Archive-Shipping>Returns/USPS-Lost-Package-Does-Seller-Accept-the-Loss/td-p/20374638>

⁶⁸ <https://www.ebay.com/help/selling/shipcover/shipping-insurance-shipcover?id=4643>

⁶⁹ Per Get help with an item that hasn't arrived (“If your item hasn't arrived, you're protected by the eBay Money Back Guarantee and can ask the seller for a refund. Some sellers may also be able to send you out a replacement item, if they have one.”) <https://www.ebay.com/help/buying/returns-refunds/reporting-item-didnt-receive?id=4042> Also, <https://www.auctionnudge.com/guides/what-ebay-sellers-should-do-when-an-item-goes-missing/>

Order number: 04-06534-32258

Hi, I see that the globe finally arrived, as I said it would. The storm was really bad and that plus the Covid crisis caused the delays beyond my control. I had no idea that you had not received your item until you opened a case, the tracking number was clearly visible in the records as I put it in a day after you paid for your item. I started a comprehensive search when I found out you hadn't received it and finally now you have received my item. Since I am now out the money for the item, plus shipping and handling, I would ask you to please pay for this item or return the item to me (I will provide a shipping label). Kindly let me know how you would like to proceed. This is a matter of moral correctness and integrity... you received your item and you should either pay for it or return it... \$145 plus the \$75 I paid for the item originally is a big hit and I am devastated. Please do what you feel is the right thing to do.

The idea of the fraud is to obtain an insurance refund from the US postal service and also to obtain a return of purchase price or the respective item from a buyer that is not aware that the item has already been refunded.⁷⁰ Here, the seller used a variety of moral and other claims to try to persuade the buyer to return funds or the item. The goal of the fraud is to receive a re-transfer of funds outside the eBay system of which eBay would not be aware and would not offer any refund if the buyer subsequently identified the fraud and asked for a reversal.

Factual Summary of eBay Buyer Frauds

9. Threaten to File an eBay Case or Administrative Action

The eBay system prioritizes resolution of potential disputes without the involvement of an eBay representative.⁷¹ By operating through technology eBay is likely able to control salary costs for dispute mediation between buyers and sellers.⁷² The total number of cases raised against individual eBay sellers are tracked by the eBay system.⁷³ A significant number of cases filed against an eBay seller will result in a probationary status and potential removal from the eBay platform if cases continue to be filed.⁷⁴ eBay appears to use the number of cases filed against an eBay seller to determine negative administrative actions, and does not appear to use the account feedback rating for any formal administrative purpose.⁷⁵ Accordingly, the buyer has a degree of leverage in the threat to file an eBay case depending on the number

⁷⁰ Calkins, Nikitkov & Richardson at 12 ("Because sellers set the terms of the eBay auctions or sales, they can generally protect themselves well in the transaction. The seller controls the method of shipping and has the option of either paying for insurance or requiring that the buyer pay for it.").

⁷¹ <https://www.ebay.com/help/selling/getting-paid/handling-payment-disputes-managed-payments-seller?id=4799>

⁷² Katsh, Ethan, Janet Rifkin, and Alan Gaitenby. "E-commerce, E-disputes, and E-dispute Resolution: In the Shadow of eBay Law." *Ohio St. J. on Disp. Resol.* 15 (1999): 705. ("when processes can be automated and when successful structures can be replicated at virtually no cost, dispute resolution providers can grow, like any other online business, by copying successes and enjoying economies of scale.") at 727.

⁷³ At supra 39.

⁷⁴ *Id.*

⁷⁵ Seller ratings section of eBay Customer Service agreement: <https://www.ebay.com/help/buying/resolving-issues-sellers/seller-ratings?id=4023>

of cases already filed. By this method, a buyer can then potentially obtain a monetary benefit from a seller by threatening to file a case.⁷⁶

10. Intentionally Damage Goods upon Receipt and request Partial reimbursement

As explained generally in the above fraud, a buyer has some leverage in an eBay transaction by the non-filing an eBay case against a Seller that has already incurred many cases. Many eBay sellers will prefer to avoid the filing of a case for a small dollar amount.⁷⁷ It is possible then for a buyer to operate a reciprocal fraud to the seller who ships a damaged or defective item.⁷⁸ This reciprocal fraud to shipping a defective item is to damage an item upon receipt. Partly because of the high proportion of damaged or defective items on eBay, its presumptively very difficult for eBay to administratively determine whether a buyer has intentionally damaged an item. By damaging the item, the buyer then has the right to return a damaged item for refund under the eBay money back guarantee. With merely a return the buyer would have gained nothing in the damaging of the item. However, the seller has the option of demanding a return or to negotiate with the buyer to avoid a return or the filing of an eBay case. Often, the seller will offer a partial reimbursement in lieu of a return for a damaged item.⁷⁹

11. Cancel Auction Bid for Invalid Reason, Re-Buy at Lower Price

In the eBay auction system a buyer may withdraw a limited number of bids for a valid reason, such as a mistake.⁸⁰ The eBay system then reverses or cancels the previously entered bid and awards the auction to the next highest bidder. The system functions effectively on an honor basis where the buyer unilaterally selects the reason for the bid cancellation and enters it into the eBay system. The seller does not have an opportunity to review or reject the given reason for the bid cancellation even though it will result in a monetary loss in a lower auction price. The bid cancellation nonetheless reveals the high bid of other bidders in the respective auction upon the reversal of the bid because the bidder will see the overbid price

⁷⁶ <https://www.ebay.com/help/selling/resolving-buyer-issues/reporting-issue-buyer?id=4084>

⁷⁷ Louis F. Del Duca, Colin Rule & Kathryn Rimpfel, eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers, 6 Y.B. Arb. & Mediation 204, 205 (2014) ("The Resolution Center was created with the aim of addressing the typical disputes arising out of purchases within eBay's marketplaces, which usually average about \$70100 in value. The eBay platform currently handles over 60 million e-commerce disputes annually through a process that enables parties to resolve their problems amicably through direct communication. The number of disputes being resolved through eBay's online platform is expanding steadily as the transaction volume on the site increases at about 13% per year. More than \$45 billion in merchandise is sold on eBay each year.").

⁷⁸ <https://www.ebay.com/help/policies/ebay-money-back-guarantee-policy/ebay-money-back-guarantee-policy?id=4210>

⁷⁹ Partial refund guidelines where the item is returned used or damaged: ("In most cases, you'll issue a full refund to the buyer, but if an item is returned used or damaged it may be appropriate to issue a partial refund to the buyer") <https://www.ebay.com/help/selling/managing-returns-refunds/handle-return-request-seller?id=4115&st=12&pos=2&query=How%20to%20handle%20a%20return%20request%20as%20a%20seller&intent=the%20seller%20will%20offer%20a%20partial%20reimbursement%20in%20lieu%20of%20a%20return%20for%20a%20damaged%20item.%20%20&docId=HELP1113>

⁸⁰ Invalid bid retraction policy overview: ("Honest mistakes sometimes occur, so there are a few times when you're allowed to retract or cancel a bid if you meet the time restrictions.") <https://www.ebay.com/help/policies/rules-policies-buyers/invalid-bid-retraction-policy?id=4227>

prior to withdrawal.⁸¹ Buyer fraud is accordingly possible in revealing the high bid to other related bidders or to rebid on the same item with a separate account with knowledge of the revealed bid amounts.

12. Upon Non-Delivery of Goods, obtain Refund from Seller and also Accept Late-Delivered Item.

In the course of the pandemic, the non-delivery of eBay items in a normal timeframe by the US postal office became very common.⁸² This created the potential for fraud in that upon non-receipt of the item the buyer could open an eBay case for non-receipt and receive a refund. However, the refund of the item could be processed while the item was still in process and subject to future delivery. This is possible because eBay must establish some limit for the length of time delivery may take and offer a refund if delivery does not happen in the respective timeframe.⁸³ Although it is very difficult for a prospective buyer to anticipate that an eBay item might not be delivered in a timely manner, the filing of an eBay case at the earliest possible time does create the potential to carry out such a fraud.

13. Return with Empty Box.

An eBay buyer can also engage in a type of fraud that would have the effect of defrauding both the seller or the postal service. In initiating a return, under eBay rules the buyer does not take on the risk of non-delivery upon return. A simple fraud is to retain the item and return an empty box.⁸⁴ The US post office does weigh the box so the buyer would need to weight the box roughly equivalent to the weight of the item purchased. Upon receipt of the empty box, the seller could either accept the loss or file a lost item complaint with the US post office. If the seller accused the buyer of fraud the buyer would deny having mailed an empty box.

14. Return, then also reverse on Credit Card.

Many credit cards now allow the reversal of charges that are disputed by the cardholder.⁸⁵ Because eBay operates its own legal system that operates in parallel, a credit card holder has the ability to time a credit card to dispute to potentially obtain a double refund. For example, the buyer of an item could initiate a return by opening a case on the eBay system for a valid reason. By operation of the eBay system the buyer would then be notified that a reversal of the initial charge would be processed through the seller's

⁸¹ Id. ("If someone makes a bid on an auction-style listing, and then retracts that bid, they could gain an unfair advantage – maybe by discovering a reserve price, or where another bidder's maximum bid stands.")

⁸² Quinn Klinefelter. January 22, 2021. 'There's No End In Sight': Mail Delivery Delays Continue Across The Country <https://www.npr.org/2021/01/22/959273022/theres-no-end-in-sight-mail-delivery-delays-continue-across-the-country>

⁸³ See: Help a buyer with an item they didn't receive ('Refund the buyer: The buyer will get a full refund, including the original shipping costs. Choose this option if you don't have tracking details from one of our integrated shipping carriers showing the item was delivered to the address on the order, or showing the package has been in transit without movement for 7 days or more.') <https://www.ebay.com/help/selling/managing-returns-refunds/helping-buyers-items-not-received?id=4116>

⁸⁴ The buyer sent empty box and got full refund. <https://community.ebay.com/t5/Shipping/The-buyer-sent-empty-box-and-got-full-refund/td-p/30748249>

⁸⁵ Calkins, Nikitkov & Richardson at 17 ("The buyer's other protection options are likely to be heavily contingent upon the form of payment used. Credit cards, including credit cards used via Paypal, generally provide the best protection to buyers because the credit card company provides mechanisms (some required by law) for unsatisfied buyers to dispute charges.").

account, often via PayPal.⁸⁶ Immediately before eBay rendered its decision on the case, the buyer would initiate a credit card dispute.⁸⁷ The initiation of the credit card dispute would be for a valid reason and could then be processed by the card issuer. The card issuer would then issue a credit for reversal of the charge on the account. By this method, the buyer would obtain both the reversal of the initial charge plus a credit for the disputed charge.

Section 2

EBay's Administrative Resolution of each Fraud

In this section the eBay administrative legal system is described as to results in respect of each fraud as explained in Section 1. Each fraud is addressed in the manner eBay intends for the fraud to be resolved if the eBay system operated as designed.⁸⁸ The presumption is that eBay is aware of the fraud and the administrative resolution is intended to address it. In respect of some of the frauds a resolution is determined to be practically impossible or that eBay does not wish for fraud to be resolved. The eBay legal result is then compared with the result under the actual legal system. Seller frauds are discussed in detail in the following section. In comparison, nearly all eBay frauds involving the Buyer are banned by eBay administrative rules. The cancellation of a transaction also is rarely authorized by eBay rules. The eBay system heavily favors the seller in terms of the identification and punishment of frauds on the eBay platform.⁸⁹

eBay Administrative Resolution of Seller Frauds

1. Cancellation of Completed Sale, Re-Sell Item at Higher Price

In the factual description of the cancellation and sale above, eBay did not appear to take any administrative action against the Seller for unilateral cancellation of the eBay contract and re-listing of the item at a higher price. A full description of the events including links to the seller emails describing the intention of the seller to defraud the buyer was provided to eBay as an administrative report. Negative feedback was also provided to the seller with a description of the fraud. No response was received from eBay indicating that the fraudulent cancellation had even been identified despite a full legal and factual description provided. The re-listed item remained up with a slightly lower delivery fee. As explained above in Section 1 regarding the illustration of this fraud, the seller had stated that the delivery fee of \$20 was too low as the given reason for cancellation of the initial contract and this amount was actually reduced slightly on the re-listed item so the given reason for cancellation was fraudulent as well.

⁸⁶ Calkins, Nikitkov & Richardson at 5 ("Part of eBay's impetus to become more involved also stems from its operation of the online payments business, PayPal (<http://www.paypal.com>). PayPal is essentially a financial services entity and thus may fall within a more traditional regulatory context than eBay's groundbreaking auction model.").

⁸⁷ *Id.* at 14-15 ("Fraudulent credit card "chargebacks" present the most difficult risk for online sellers. ... The risk of fraudulent credit card chargebacks is somewhat mitigated by Paypal's "Seller Protection Policy," which provides up to \$ 5,000 of coverage for transactions Paypal deems fraudulent, as long as the transaction meets a number of requirements. Credit card companies also sometimes provide sellers forms of protection against fraudulent chargebacks.").

⁸⁸ See, Avoiding seller fraud. <https://www.ebay.com/help/buying/working-sellers/seller-fraud?id=4024>

⁸⁹ Avoiding seller fraud. <https://www.ebay.com/help/buying/working-sellers/seller-fraud?id=4024#origin>

Possible reasons for the inaction by eBay on a unilateral seller cancellation are (i) eBay appears to have obtained a windfall from the seller fraud and stands to receive a double listing fee, plus a slightly higher transaction fees from the re-sale of the item; (ii) the seller did not have a history of fraudulent reports so eBay would have needed to carefully review the facts of the fraud in order to determine that administrative action was required in this case. The eBay legal system thus does not prevent a seller fraud of cancellation of a completed sale and re-listing of the item even with a stated intention to defraud the buyer. As an administrative manner eBay may address instances of repeated seller cancellation of contracts only.⁹⁰

2. Fractional Shill Bidding

Bid inflation by phantom bidding is possible in any auction. The issue may be partly addressed for in-person auctions by simultaneous bid entry in the auction. In theory, a maximum bid could be registered prior to the in-person auction but such is not the general practice. If a maximum bid was communicated to the auction house to be entered only in the event of a competing bid similar to an eBay auction this would create a substantial conflict of interest in the execution of the auction. In-person auctions may also require registration of bidders prior to the auction. The auction house then may conduct a check to prevent bid collusion.

The eBay auction bidding is distinguishable in several respects. First, many eBay auction bids are not entered live because the auction may last several days or up to a week.⁹¹ As a matter of convenience, some eBay users place a maximum bid well in advance of the end of the auction. The entry of a maximum bid early in the auction period could also yield an economic benefit as it may tend to increase the current high bid which could deter other bidders and cause a lower auction amount. Second, eBay users are registered and obtain a feedback rating however the username is chosen by the user and can be changed at any time.⁹² If eBay discovered phantom bidding this would result in a ban.⁹³ However, eBay auction bidders are also effectively anonymous to other bidders on the eBay platform, so it seems relatively unlikely that phantom bidding would be discovered by eBay except in the most egregious circumstances. Notably, eBay also obtains a higher percentage of auction fee⁹⁴ in the case of phantom bidding to increase the gross auction amount.

3. Sending of Defective Merchandise, Threatening Buyer Not to Initiate Return

As explained in Section 1, eBay sellers can be abusive toward buyers in an attempt to prevent a return. The abusive and foul language set forth above led to a reprimand of the seller according to an eBay customer service representative. However, the use of threats to obtain monetary gain was likely not the

⁹⁰ How sellers can cancel an order describes some of the scenarios. <https://www.ebay.com/help/selling/getting-paid/cancelling-transaction?id=4136>

⁹¹ See, Listing durations and timings: <https://www.ebay.com/help/selling/listings/selecting-listing-duration?id=4652>

⁹² Changing your username: <https://www.ebay.com/help/account/changing-account-settings/changing-username?id=4198>

⁹³ Shill bidding policy: <https://www.ebay.com/help/policies/selling-policies/selling-practices-policy/shill-bidding-policy?id=4353>

⁹⁴ Selling fees (when eBay is not managing your payments): (“We charge a final value fee when your item sells. This fee is calculated as a percentage of the total amount of the sale.”) <https://www.ebay.com/help/selling/fees-credits-invoices/selling-fees?id=4364>

reason for the reprimand but rather the foul language directed against the buyer. The criminal and extortion aspect of the fraud was accordingly not addressed by the eBay administrative system.⁹⁵

4. Sending of Defective Merchandise, Return Selection Lottery

The process of executing a return on the eBay website is rather difficult. The item to be returned must be selected, and then the particular reason for return selected which is not necessarily possible on the eBay app. It is not entirely clear what business purpose is served by the administrative difficulty in implementing a return on the eBay app or in some cases the full website. On the return of an item, eBay loses the auction fee, so there is potentially a financial benefit to the eBay in the failure of a return.

5. On-Selling or Forwarding of Non-Conforming Goods via Third Party Distributor

The on-selling or forwarding of goods using the eBay platform depends on the anonymity of the person operating behind the username. Any fraud done anonymously would be discoverable in a formal legal process, however not within the eBay administrative system. Accordingly, the sending of non-conforming goods using the address and details of a legitimate non-internet retailer is a particular challenge for internet commerce going forward, including for the eBay platform.

6. Setting High Delivery Fee, then Disallowance of Buyer Shipping Refund

The eBay website allows significant discretion to sellers to disallow shipping refunds on return. Since the seller selects whether to allow returns in the initial listing it is not clear why the seller should be able to disallow shipping during the return process as nearly all other eBay selection processes are automatic. Nonetheless, the seller can disallow a refund of the original shipping cost subject to the opening of an eBay case by the buyer.⁹⁶ In this fraud, eBay appears to obtain a lesser auction percentage because of the setting of a high delivery fee.

7. Sending of Damaged Merchandise after Purchasing Delivery Insurance

The selling of damaged goods on eBay may serve to increase the relative sales and commission or profits of the eBay company. To some extent the role of eBay auctions in the wider economy is to allow a mechanism for the liquidation of used or damaged items in a national auction rather than in a thrift shop or liquidation storefront. The insurance fraud of shipping damaged items in order to claim postal insurance also does not result in a direct loss to eBay. However, perhaps because the eBay system does not prevent insurance frauds by default the US postal service has established extremely high rates for package insurance.⁹⁷ Legitimate users of the postal service then who do not intend to engage in fraud may be precluded by high prices from purchasing insurance because of the actions of unscrupulous eBay sellers who are enabled by the eBay system.

8. Upon Non-Delivery of Goods, Request Purchase Price Reimbursement and also Collect Insurance

⁹⁵ Resnick, P. and Zeckhauser, R. (2002),supra.

⁹⁶ See 44 and 45 supra

⁹⁷ See 59 and 60 supra

As illustrated in the above factual illustration, a significant problem for eBay is the transfer of funds outside the eBay system. Hence, any request for money outside of eBay is in violation of eBay rules.⁹⁸ Potential buyers are repeatedly warned not to make monetary transfers for goods outside the eBay platform as a type of presumed fraud. Notably, transfers outside of eBay and PayPal are also made without the collection of eBay transactions fees, so the interests of buyers and eBay are in alignment to some degree in the avoidance of outside transfers. In the case where a buyer issued a refund or returned an item and the seller had separately collected insurance for non-delivery of the item,⁹⁹ the eBay administrative legal system would not offer any recourse to the aggrieved buyer.

Comparison of Legal Results

The legal treatment of an eBay transaction is that of a contract or completed contract and would be treated under contract law. The various frauds illustrated and described herein and arising on the eBay site are in breach of contract but unlikely to result in a legal remedy.¹⁰⁰ In rare cases some of the conduct of eBay users is also criminal and could constitute a misdemeanor¹⁰¹ or be in violation of Federal laws for the use of the postal system. The eBay administration system of dispute resolution acknowledges the breach of contract however is focused predominantly on the legal issue of damages.¹⁰² The eBay administrative legal system is an amalgamation of legal and equitable damage claims layered over the need for eBay to maintain its business and prioritization of disputes most relevant to the eBay business of auction and Buy-It-Now purchases. In the case of what eBay considers egregious conduct, such as the use of offensive language or abuse directed against another eBay user, a user may be banned from further use of the eBay site¹⁰³ thus constituting something akin to a criminal law action where the penalty is limited to banishment rather than restitution, fines or incarceration. The banning of a user from the eBay platform is a discretionary matter pursuant to the eBay user agreement that will be determined on a case-by-case basis and to which the eBay customer service agents claim to have authority to determine.¹⁰⁴

Legal Resolution and Comparison of Seller Frauds

Any eBay or live auction result is treated under contract law where a seller that does not delivery goods or a buyer that does not pay for goods would be in breach of contract both to the auction provider, here eBay, and also to the counterparty.¹⁰⁵ Participants in an eBay auction have contractually agreed to follow the terms of the auction and to render payment upon completion of the auction and the failure to do so

⁹⁸ Offering to buy or sell outside of eBay policy: <https://www.ebay.com/help/policies/payment-policies/offers-buy-sell-outside-ebay-policy?id=4272>

⁹⁹ See 63 and 65 supra

¹⁰⁰ Albert at 634-5 ("An aggrieved party using an online auction site, which specifically disclaims responsibility for determining the authenticity of sellers' merchandise, can prevail legally against the seller only in the event that the seller makes materially false statements in describing the auctioned item. This is age-old common law, and remains sound today. But the online auction sites that facilitate the fraudulent transactions simply by providing the forum for the exchange should not have immunity from liability for such fraud. Under current law, a fraud cause of action cannot be sustained against an online auction site. 267 But as technology changes, so too should the law.").

¹⁰¹ Wojcik, Mark E. "Lawyers Who Lie On-line: How Should the Legal Profession Respond to EBAY Ethics." J. Marshall J. Computer & Info. L. 18 (1999): 875.

¹⁰² User Agreement Section 15. Disclaimer of Warranties; Limitation of Liability.

<https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259>

¹⁰³ See 85 supra

¹⁰⁴ Id.

¹⁰⁵ See Jim Hawkins, Protecting Consumers as Sellers, 94 Ind. L.J. 1407, (Fall, 2019).

breaches such contract with eBay.¹⁰⁶ The eBay user agreement thus functions as a contract. In addition, the counterparty to the contract whether buyer or seller also has an actual or implied contract on the completion of the eBay auction or sale.

The applicable law governing eBay contracts varies between the common law of contracts, that would be primarily state law depending on the residence of buyer or seller,¹⁰⁷ and also UCC law for the sale of goods if the eBay item offered for sale constitutes goods within the meaning of the UCC. The sale of new items which are available on the eBay website are covered by the UCC.¹⁰⁸ In some of the frauds described above state criminal statutes could also be applicable, as well as some Federal laws largely dealing with the postal service. The application of postal laws may also depend in part on the delivery method selected by the seller in the listing or after purchase where private delivery services such as UPS or FedEx may have their own rules and regulations for items transported in each logistical system.

1. Cancellation of Completed Sale, Re-Sell Item at Higher Price

The outright cancellation of an agreed purchase on the eBay platform is a straightforward breach of contract. The breach of contract is a relatively clean legal issue that should result in a contractual remedy to the buyer as it is not allowed pursuant to the eBay user agreement. A potential failure of the eBay administrative legal system to address this fraud casts significant doubt on the impartiality or goals of the eBay system to enforce a fair trading system on its site where both buyer and seller are able to rely on the counterparty to carry an agreed transaction for purchase and sale. That is, since eBay operates an online auction service, the failure of a seller to deliver goods as agreed pursuant to a final sale violates the core purpose of a buyer in using the eBay platform or website.¹⁰⁹ A breach of contract by the seller is the sine qua non of behavior that should not be allowed on the eBay system and is arguably more serious than verbal or other abuse by one eBay user directed at another eBay user because an auction site that allows cancellation by the seller without a valid reason is not a viable auction platform.¹¹⁰

¹⁰⁶ User agreement: <https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259>

¹⁰⁷ Id. See section A. Applicable Law: You agree that, except to the extent inconsistent with or preempted by federal law, the laws of the State of Utah, without regard to principles of conflict of laws, will govern this User Agreement and any claim or dispute that has arisen or may arise between you and eBay, except as otherwise stated in this User Agreement.

¹⁰⁸ Van Voorhees, Alexander. "Ebay sellers and article 2: selling a broader merchant concept." Case W. Res. L. Rev. 56 (2005): 1199.

¹⁰⁹ Terms of sale policy. <https://www.ebay.com/help/policies/selling-policies/terms-sale-policy?id=5036>

¹¹⁰ See generally Albert at 618 ("A second line of defense claimed by the online auction sites is that their efforts at self-policing are the most effective way to prevent online fraud. The sites vehemently oppose regulation, claiming that their consumer protection measures are sufficient to safeguard their users' interests and that the online auction sites themselves are in the best position to respond to issues of fraud, deception, and misuse, obviating any need for regulation."); Albert at 617 ("The online auction sites themselves should take small comfort in this mathematical defense. Many of the online auction sites are publicly traded, so even though the actual number of reported fraud cases may seem reasonable in the context of the overall number of transactions, the public relations problems from a perception that an online auction site is a magnet for fraud could be devastating. If the perceived threat of fraud is too great, the users might elect not to participate. If users elect not to participate, the online auction sites will not earn commissions. Thus online auction sites have a financial incentive to make sure that fraud does not rise to that level, and so the sites will do the minimum necessary to keep users participating at a financially viable level to protect their profit margins. Any additional efforts on the part of the online auction sites will need to be financed by the

In the illustration of cancellation described in Section 1, the seller stated that the price he agreed to was too low and that was the given reason for the cancellation of the contract. Such given reason is not a valid justification for cancellation under any circumstance and constitutes a breach of contract under the common law of contracts. The item at issue was for sale of a used item that may constitute a sale of goods under the UCC. A cancellation based on a change in a given shipping price is typically not a basis for re-negotiation of the total price under the UCC. Furthermore, the re-listed item displayed a slightly lower shipping price and was not a plausible explanation for cancellation.¹¹¹

It may also be expected that in many eBay cases the facts are in dispute. The resolution of the matter requires a finding of fact. However, the finding of fact in an eBay dispute may be a time- and labor-intensive endeavor.¹¹² The finding of facts may also include the rejection of certain factual assertions offered by one party at the expense of another that are determined not to be plausible based on the facts and circumstances of the particular case. In the particular case described in Section 1, the proper finding of fact required a rejection of the given reason for cancellation of the contract. eBay did not do so likely because the cancellation involved a substitution of one eBay listing for another eBay listing at a higher price, thus yielding potentially a second listing fee plus a higher percentage of sale fee to eBay and a greater net revenue.

As a matter of contract law, the unfortunate buyer would be entitled under the law at least to the proceeds of sale at the higher amount. If the original contract was for an agreed amount of \$150, the seller cancelled to relist at a higher price of \$225, then the buyer would be entitled to \$75 at minimum representing the lost value in the contract. The damage amount might even be higher from the cancellation if the buyer were able to establish the value was higher than the resale price which the seller obtained through the eBay re-sale.

2. Bid Inflation using Phantom Account

Bid inflation using a phantom account in an online auction is potentially a severe problem for eBay as it relates to and undermines the business model premised on online auctions.¹¹³ In legal terms, the use a phantom account to enter bids on the eBay account is an obvious fraud against another eBay user. A significant legal problem is that even if the eBay company detected the fraud and sought to take remedial action for phantom bidding against one or more of the eBay users involved,¹¹⁴ such activity is a technical

sites from the revenue they earn from transactions on their sites, an option that is less than appealing to the online auction sites.”).

¹¹¹ The Dear Rich Staff, *Why Am I Being Sued After eBay Cancellation?*, Dear Rich: Nolo's Intellectual Property Blog, February 27, 2014 Thursday, available at <https://advance-lexis-com.proxyeast.uits.iu.edu/api/document?collection=news&id=urn:contentItem:5BM5-NW71-JCMN-Y4X4-00000-00&context=1516831>.

¹¹² *Id.* The fact finding can be prohibitive further when buyer and seller are in different states.

¹¹³ See 33 *supra*

¹¹⁴ Albert at 589-90 (“In fairness to the online auction sites, shill bidding can be difficult to detect. Any individual can use multiple user names to participate in online auctions, alone or in concert with other shill bidders. Thus, a cursory examination of the list of bidders may not reveal collusion. Tracing collusive bidding is time-consuming, involving hours of sifting through and matching up myriad bidding histories and user feedback. Because of cost considerations and storage capacity issues, auction records may be expunged from an online auction site after a set number of days. This may affect the viability of any investigation into shill bidding or other forms of collusion, as the bidding record retention period may not be long enough to allow investigators to uncover shill bidders who spread out their fraudulent bids.”).

breach of contract although without any damages to eBay. Therefore, the eBay company would be able to charge an administrative penalty but not necessarily to collect funds from the seller in a legal proceeding. The victim would not be able to easily detect the fraud. Also, because the other eBay user who is the victim of the fraud wins the auction at the end of the day, it is not certain that the victim of the phantom bidding has suffered legally cognizable damages either. However, the victim would still prevail in the auction at a price to which they agreed to pay as a maximum bid and any losses would be simply as to a discount which was not received due to the phantom bid.

The difficulty in establishing damages is because the victim both wins the auction and at a price below which the bid was entered and without proof that another third party might not have bid the price higher even in the absence of the phantom bidding. Any damages would thus be speculative and difficult to prove in a legal proceeding without some definitive evidence that the auction result ultimately caused the auction to overbid and an above market price outcome. Nonetheless, even in the absence of legally cognizable damages, eBay users might be substantially less likely to bid in eBay auctions with knowledge of the lack of potential to win an auction with a low price due to phantom bids.

3. Sending of Defective Merchandise, Threatening Buyer Not to Initiate Return

The sending of a defective product is unethical but certainly not unheard of in business dealings. The eBay administrative legal system provides a solution and allows the buyer to return defective merchandise pursuant to the eBay money back guarantee even where the seller does not allow for returns.¹¹⁵ Alternately, if the seller will not accept a return of the item, eBay may require the seller to refund the purchase price on the sale of defective goods without receiving the item back.¹¹⁶ The fraud described here is intended to avoid those results by deterring the buyer who has received a defective product from initiating a return at all. The fraud is accordingly not a breach of contract arising from the denial of the benefit of the bargain to the buyer who could initiate a return if they were brave enough to do so and is a matter of criminal law. The use of threats or intimidation in order to obtain a monetary benefit,¹¹⁷ including false references to a felony in the mailing of a returned item, is a type of extortion. The method is spectacularly out of bounds in an online marketplace as eBay operates and the administrative system should serve to ban the party from future dealings on the eBay site and to return all funds to the counterparty or recipient of the threat. Insofar as parties are allowed to use threats and extortion to

¹¹⁵ eBay Money Back Guarantee policy (“Sellers are required to deliver the item as it was described in the listing. If the buyer receives the wrong item, or the item arrives broken, damaged, or faulty (and was not clearly described as such), they are entitled to return it for a refund, even if the seller doesn’t offer returns.”) <https://www.ebay.com/help/policies/ebay-money-back-guarantee-policy/ebay-money-back-guarantee-policy?id=4210>

¹¹⁶ How to handle a return request as a seller section of the website: (“If you’re unable to resolve the issue within this time, the buyer may ask us to step in and help. In some cases, if you haven’t responded to the return request, we may issue a refund to the buyer and seek reimbursement from you without requiring the buyer to return the item.”) <https://www.ebay.com/help/selling/managing-returns-refunds/handle-return-request-seller?id=4115>

¹¹⁷ eBay Money Back Guarantee policy: (“As a seller, for transactions where eBay Money Back Guarantee applies: You are responsible for delivering the item that was described in the listing, honoring your stated return policy, and providing a resolution when a buyer reports a problem with an order. If the purchase was completed on eBay.com, you must meet the requirements specified in this policy, including taking action within the required time frames, even if the item was listed on a different eBay site”) <https://www.ebay.com/help/policies/ebay-money-back-guarantee-policy/ebay-money-back-guarantee-policy?id=4210>

obtain a monetary benefit on the eBay site the legal system operated by eBay should be viewed with severe skepticism as to its objectives and effectiveness.

4. Sending of Defective Merchandise, Return Selection Lottery

The eBay platform operates with a relatively high degree of technical difficulty in executing a return and without a means of correction in the event that a wrong return reason is selected, even where on a mobile device and the eBay app it may not be possible to select the appropriate return reason. Some eBay users may therefore not be able to execute a return where they otherwise should have been able to return a defective item.¹¹⁸ In that case, an eBay seller who was aware that a proportion of eBay users might select an ineligible return reason and therefore not be able to execute a return even on a defective item would enjoy a windfall profit in having sold an item that was return eligible, but became non-eligible due to an eBay buyer's error on the eBay site, which seems designed at least in part to encourage errors in that situation.

Yet, this administrative problem is to be tempered in that most repeated errors will learn from the mistake on the first instance and so the extent of the fraud would be limited primarily to first time eBay users. Furthermore, the eBay money back guarantee is a broad protection of eBay buyers in most circumstances.¹¹⁹ A disallowance of return eligibility in the case of selection of a wrong return reason then functions as a limit on broad eligibility as opposed to a narrower category of returns, for example if the reasons for return were limited only to defective products.¹²⁰

5. Setting High Delivery Fee, then Disallowance of Buyer Shipping Refund

The eBay platform is designed to allow the seller to select a disproportionately high delivery fee and to potentially disallow that fee to the buyer upon return. Accordingly, the administrative system is designed to achieve this potential and there is no legal remedy to the buyer in such situation.

6. Sending of Damaged Merchandise after Purchasing Delivery Insurance

In some cases, the eBay platform may be used as a means toward insurance fraud where an item is shipped damaged and it is difficult or impossible to determine whether the damage occurred in transit or

¹¹⁸ eBay community site comments. site won't let me request a return: ("I just tried requesting a return, and after selecting the item and moving to the next page I selected a reason for the return and then wrote a description. But after hitting the next button to move on, I keep getting a page that says, "Access Denied: You don't have permission to access '<http://www.ebay.com/rtn/Return/CreateReturn>' on this server." I have tried several times.") <https://community.ebay.com/t5/Archive-Shipping>Returns-Q-A/site-won-t-let-me-request-a-return/qaq-p/25038511>

¹¹⁹ Del Duca, Rule & Rimpfel at 207 ("The eBay Money Back Guarantee is outlined in a policy found on the eBay website that lists the types of claims that are and are not covered. This policy again confines claims to situations where the item never arrived or the item was not as described in the seller's listing. Then, the policy places certain procedural restrictions on claims, such as: (1) the case being opened no later than 30 days after actual or latest estimated delivery date; (2) the purchase was made with the "Pay Now" option or an eBay invoice; (3) the buyer used one of the five designated payment methods¹¹; and (4) the item was paid for in a single payment. The Money Back Guarantee specifically does not cover certain categories of sales and sales through eBay's affiliate sites, such as half.com. In addition, this guarantee prohibits duplication of claims through other dispute resolution methods, such as the PayPal Purchase Protection programs or requesting a chargeback from the payment provider.").

¹²⁰ See Resnick, P. and Zeckhauser, R. (2002),supra.

prior to shipment.¹²¹ The legal treatment of the matter depends on the finding of fact which cannot easily be determined. Accordingly, eBay does not typically accuse parties of fraud upon the first discovery of damaged items in an eBay case, even where it might suspect that the item was damaged prior to shipment;¹²² rather, an eBay user with a significant number of eBay cases raised for damaged items could be placed on probation or ultimately banned from the site.¹²³ eBay appears to use the feedback score including the total number of transactions to determine the relative number of damaged items in comparison to the total number of items shipped.¹²⁴

The eBay administrative legal system therefore functions more as a statistical presumption of fraud as opposed to a system that sets out to make a finding of fraud in a particular case. Since eBay uses site banishment as a remedy it is not clear a referral would be made to the US postal service for further investigation as eBay would not have anything to gain from the referral.¹²⁵ The use of the feedback rating as a statistical presumption either as an indication that an eBay user has engaged in fraud or not may lead to incorrect results; that is, where a new or first time eBay user with a low feedback rating is reported to have shipped damaged items and thus appears to have engaged in fraud, or where an experienced eBay user with a high feedback rating is reported to have shipped damaged items but has a long history of not doing so and thus appears not to have engaged in fraud.¹²⁶ The statistical determination may not be accurate in a particular case and is certain not to be accurate in some cases. Since eBay is a private business its determination that an eBay user should be banished from the site is a rather mundane legal issue of the right to exclude parties from a business based on conduct. However, the reciprocal determination that an eBay user with a high feedback rating has presumptively not engaged in fraud, when in some cases such users have shipped damaged items as a type of fraud, means that some degree of fraud is present on the eBay site. Many buyers on the eBay site might expect a more diligent investigation than a statistical presumption even against eBay sellers with a high feedback score.¹²⁷

7. Upon Non-Delivery of Goods, Request Purchase Price Reimbursement and also Collect Insurance

The potential for a seller to double-dip so as to collect both a purchase price reimbursement from a buyer and also an insurance settlement is not prohibited by law or contract. The eBay rules do not expressly disallow this strategy and might not be expected to do so. In legal proceedings, such dealings might lead

¹²¹ See 59 and 60 supra.

¹²² United States Courts Opinions: United States District Court Eastern District of Third Circuit: UNITED STATES ex rel. CUSTOMS FRAUD INVESTIGATIONS, LLC., Appellant v. VICTAULIC COMPANY, US Official News, October 11, 2016 Tuesday, available at <https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:5KXG-XGG1-J9XT-POBD-00000-00&context=1516831>.

¹²³ Mary M. Calkins Alexei Nikitkov and Vernon Richardson , ARTICLE: Mineshafts on Treasure Island: A Relief Map of the eBay Fraud Landscape, 8 PGH. J. Tech. L. & Pol'y 1, (Fall, 2007), available at <https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4S0H-31S0-0198-F064-00000-00&context=1516831>.

¹²⁴ Seller Performance Policy <https://export.ebay.com/en/customer-service/seller-level-and-sales/seller-performance-policy/>

¹²⁵ See 62 and 64 supra

¹²⁶ For general description view: Seller performance policy: <https://www.ebay.com/help/policies/selling-policies/seller-performance-policy?id=4347>

¹²⁷ Monitor your service metrics <https://www.ebay.com/help/selling/selling/monitor-service-metrics?id=4785>

to an equitable claim related to a double collection on a delayed or transferred sale however only if a discovery process revealed to the aggrieved buyer that an insurance settlement had also been collected.

Conclusion

As more and more consumers choose on-line commerce there may be more ways that the system can be exploited by dishonest participants.¹²⁸ One may think that the consumers' fear of falling a victim of e-commerce fraud may raise e-commerce platform owners desire to prevent fraudulent activities.¹²⁹ Instead it seem that in the environment where on-line shopping is growing, according to Szde Yu at least,¹³⁰ consumers fear of fraud is in fact not a deterrent to online shopping. They conclude in their study that more fear actually predicts more online shopping. They explain it by pointing out that shoppers trust in the online commerce sites and the e-commerce companies willingness to prevent and mediate financial harm. Such risk-benefit analysis is the actual factor in the online shopping according to the study.¹³¹ As the frauds explained here illustrate, the eBay platform may not reflect a symbiotic relationship in trust between consumers and transaction purveyors.

Frauds on the eBay platform are endemic and known to most users of the eBay site,¹³² some of which have been described in this paper. Most of the prior academic studies on fraud prevention in the cyber space focus on systems, data, and pattern analysis that may be sufficient in detecting financial transaction processing or banking fraud for example.¹³³ For its part, the eBay company has taken reasonable steps to limit types of fraud such as the eBay money back guarantee program.¹³⁴ The money back guarantee seems designed to offer eBay buyers some assurance that there is protection from aggressive frauds or the ability to return an item in the case of dissatisfaction.¹³⁵ However, a countervailing factor that is certainly not lost on eBay management is that returns are expensive for eBay sellers and may lead to dissatisfaction on

¹²⁸ Maurice E. Stucke, *Reconsidering Competition*, 81 Miss. L.J. 107, (2011).

¹²⁹ Szde Yu, Wichita State University, Wichita, Kansas, USA, can be contacted at: szdeyu@gmail.com,, *Does fear of victimization deter online shopping?*, JFC 25(3), 770-783, (1 July 2018), available at <https://advance-lexis-com.proxyeast.uits.iu.edu/api/document?collection=analytical-materials&id=urn:contentItem:5TVC-RSF0-02GS-J1GS-00000-00&context=1516831>.

¹³⁰ Id.

¹³¹ Id.

¹³² Security Center: https://pages.ebay.com/securitycenter/stay_safe.html

¹³³ Global Ecommerce Fraud Prevention Market Growth and Regional Analysis 2026 | ACI Worldwide, Adjust, Automattic (WordPress),,, MENAFN - Press Releases (English), April 10, 2021 Saturday, available at <https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:62DF-5071-F04Y-T4KC-00000-00&context=1516831>.

Online Fraud Detection Market 2020 Global Swot Analysis, Emerging Market Strategies & Industry Overview, Global English (Middle East and North Africa Financial Network), January 22, 2020 Wednesday, available at <https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:5Y1Y-2NM1-JCNX-327G-00000-00&context=1516831>.

¹³⁴ See 24 and 112 supra; Albert at 604-5 ("Appropriate regulation of the online auction industry requires leveling the playing field. The most logical place to start is by holding online auction sites financially liable for fraud occurring on their sites. Because the online auction sites control the procedures in place on their sites and take some percentage of each transaction, the online auction sites are in a good position to prevent fraud and to indemnify defrauded participants for their failure to do so. The online auction sites should not be held to the status of absolute insurers for the validity of transactions. Instead, a comprehensive regulatory scheme superimposed on the online auction industry, setting out the specific steps the online auction sites must follow to prevent fraud, is needed." Failure to adequately comply with these regulations should result in financial liability for the online auction sites.)..

¹³⁵ See 25 supra.

the sell side and overall decrease in listings on the eBay website. eBay has left significant discretion to sellers in the ability to allow returns or not and to determine whether shipping costs will be returned to the buyer depending on the reason for the return.¹³⁶ The eBay website also is not user friendly in that a buyer may not amend a return reason in the processing of a return which may be exploited by eBay sellers in the selling of damaged or defective merchandise.

Many eBay sellers are international entities and individuals and operate eBay storefronts from a variety of foreign countries.¹³⁷ This lower familiarity with the extent of foreign financial fraud subsequently can help explain a low negative impact on American consumers purchasing on e-commerce platforms like eBay. Many of the eBay international sellers are domiciled in countries that do not have free trade agreements with the United States and cross border sales are subject to customs duties.¹³⁸ This creates the potential for application of international standards and treaties on the purchase or sale of items across international borders. Customs duties are thus a frequent source of dispute as between buyers and sellers on eBay where an item may arrive subject to a customs duty.¹³⁹ A dispute may arise then for many reasons relating to whether or not the buyer had agreed to pay customs duty as part of the eBay transactions. Pursuant to recent tax decisions, state sales tax are automatically collected by eBay on standard purchases and then remitted to the US states as required by law. eBay sellers thus enjoy the remission of sales taxes by eBay and avoid the administrative work of remission of sales tax withholding for the operation of eBay storefronts.¹⁴⁰

With the proliferation of internet technology globally e-commerce citizens of many countries with differing cultural inclinations take advantage and participate in the development and global economic integration.¹⁴¹ There are also many challenges coming with growing number of participants in the economic process. Gibbs and Kraemer recognize that one of the most prevalent barriers to e-commerce use is a fear of fraud.¹⁴² They analyzed over 2 thousand companies from ten countries engaged in e-commerce, they also found that US firms had significantly higher scope of use than firms from other

¹³⁶ See 50, 51, and 85 *supra*.

¹³⁷ According to study of financial statement manipulation in ten industries across 23 countries Skousen and Twedt. Skousen, C.J. and Twedt, B.J. (2009), "Fraud score analysis in emerging markets", *Cross Cultural Management: An International Journal*, Vol. 16 No. 3, pp. 301-316. <https://doi.org/10.1108/13527600910977373> determined that not all industries in the high risk countries have a high level of financial manipulation. They also point out that due to the culture bias foreign corporate fraud receives less media attention in the US.

¹³⁸ International trading policy: <https://www.ebay.com/help/policies/prohibited-restricted-items/international-trading-policy?id=4338>

¹³⁹ Income Tax - Sections 9(1)(vii), 115A - India-Switzerland DTAA - Articles 5 (2)(a), 6, 7, 10, 11 - fee for technical services - managerial service - consultancy service - place of management - dependent agent - dependent agent permanent establishment - Whether by providing a platform for doing business through its website, e-bay can be considered a, *Tax India International*, October 23, 2012, available at <https://advance.lexis.com/api/document?collection=news&id=urn:contentitem:56WH-6MH1-J9YY-Y22S-00000-00&context=1516831>.

¹⁴⁰ Tax policy: ("Based on applicable tax laws, eBay will calculate, collect, and remit sales tax on behalf of sellers for items shipped to customers in certain states. For a complete list of states please see our [Taxes and import charges](https://www.ebay.com/help/policies/selling-policies/tax-policy?id=4348) page." <https://www.ebay.com/help/policies/selling-policies/tax-policy?id=4348>

¹⁴¹ Gibbs, J. L., & Kraemer, K. L. (2004). A cross-country investigation of the determinants of scope of e-commerce use: an institutional approach. *Electronic markets*, 14(2), 124-137.

¹⁴² *Id.*

countries.¹⁴³ One challenge in creating a good collective outcome is that international participants are covered under different types of laws via cross border targeting based on the participants country of origin.¹⁴⁴ On the buyer side for international purchases, eBay does not appear to have established a mechanism for Value Added Tax refunds on international purchases from states that operate a VAT rather than a retail sales tax in the rare situation where a good imported into the United States from abroad should not have included a VAT levy as part of the purchase price.¹⁴⁵ Accordingly, if sellers were able to sell products in the US VAT inclusive for which VAT was not applicable and should have been refunded may obtain a windfall profit on retention of the VAT inclusive proceeds or potentially lose out on sales attempted at the higher VAT inclusive price. Likewise, sales tax exempt customers, such as operating businesses or tax-exempt entities, do not appear to have a ready means to request sales tax exemption on the eBay platform and would likely have to petition the respective state for a refund of taxes on eBay purchases.¹⁴⁶

Finally, some frauds may stem from the anonymity that eBay's electronic platform provides¹⁴⁷. This anonymity may facilitate fraud where combined with the international environment of the eBay platform.¹⁴⁸ Cultural aspects of fraud also arise in the international context as they frequently relates to honor, shame, guilt, and innocence,¹⁴⁹ and have previously been examined based on relativity of the circumstances in a given case.¹⁵⁰ According to Beech "All human beings seek to avoid shame, guilt, and fear," on the other hand they seek, at least presumption of honor, innocence, and power,¹⁵¹ we can also add here prosperity. Examination of cultures has shown that the shame/honor, guilt/innocence, and fear/power affective domain pairs are prioritized differently in different cultures." The remote environment offered by eBay may be a great fit for these dichotomies. Furthermore, the development of a fraud free culture in the global e-commerce platform is an ongoing process that requires trust.¹⁵² Without the strong policies and their enforcement participants will exploit the gaps in the system and challenge it potentially diminish trust which is a substantial challenge for the eBay platform going forward.

¹⁴³ *Id.*

¹⁴⁴ *Id.* Section 5.

¹⁴⁵ UK: ECJ, 12 July 2011, Case-324/09, L'Oréal SA et al. v. eBay International AG et al., ECLI:EU: C: 2011:474. Also, Hadzovic, Inda. "European Value Added Tax and Digital Economy: Does the new legal framework make EU VAT system truly fit for the digital economy?." (2019); Maier, Philipp. "An analysis of international price differentials on eBay." *Contemporary Economic Policy* 28, no. 3 (2010): 307-321.

¹⁴⁶ *Id.*

¹⁴⁷ Julia Y. Lee, *Trust and Social Commerce*, 77 *U. Pitt. L. Rev.* 137, (Winter, 2015).

¹⁴⁸ Beech, G. (2018). Shame/Honor, Guilt/Innocence, Fear/Power in Relationship Contexts. *International Bulletin of Mission Research*, 42(4), 338–346. <https://doi.org/10.1177/2396939318783682>

¹⁴⁹ Ross, Ian. *Exposing fraud: Skills, process and practicalities*. John Wiley & Sons, 2015.

¹⁵⁰ Beech, Geoff (2018) at 138 *supra* ("the prioritizations emerge from deeply embedded worldview assumptions pertaining to relationship structures, which are culturally or socially determined.")

¹⁵¹ *Id.*

¹⁵² 33 *Berkeley Tech. L.J.* 487 (2018). *Trust, but Verify: Why the Blockchain Needs the Law*, Werbach, Kevin 487 to 550; Zhang, Yu, Jing Bian, and Weixiang Zhu. "Trust fraud: A crucial challenge for China's e-commerce market." *Electronic Commerce Research and Applications* 12, no. 5 (2013): 299-308.