

**LETTER OPINION
2005-L-40**

November 4, 2005

Tony Clark, President
Susan Wefald, Commissioner
Kevin Cramer, Commissioner
Public Service Commission
600 E Boulevard Ave Dept 408
Bismarck, ND 58505-0480

Dear Commissioners:

Thank you for requesting my opinion regarding the need for an auctioneer's or auction clerk's license to sell items through an Internet auction service. It is my opinion that sales similar to those conducted by eBay are not auctions within the contemplation of the statute. Because eBay does not conduct actual auctions, it is not an auctioneer, so eBay does not need an auctioneer's license, regardless of its domicile. Likewise, persons or businesses that assist sellers in placing items for sale on eBay are not conducting an auction or acting as auctioneers. Further, because the statute anticipates that an auction clerk works in conjunction with an auctioneer at a public auction, persons or businesses that assist sellers in placing items for sale on eBay are not required to obtain a clerk's license. There are various other businesses that offer items for sale via the Internet in a manner that more closely resembles traditional or conventional auctions. Whether those entities are required to obtain an auctioneer's or clerk's license depends on the facts of each case.

ANALYSIS

You first ask whether an Internet auction service domiciled either inside or outside of North Dakota is required to obtain an auctioneer's license in North Dakota. Chapter 51-05.1, N.D.C.C., regulates licensure for auctioneers. Section 51-05.1-04(1), N.D.C.C., defines an auctioneer as "a person, who for a compensation or valuable consideration, sells or offers for sale either real or personal property at public auction as a whole or partial vocation."

There are a number of different types of "Internet auction" services. Certainly the most widely known service is that offered by the Internet company "eBay, Inc." ("eBay"), which provides a site where sellers can list their items, and potential buyers can bid on those items or otherwise offer to purchase them from the sellers. Other Internet sites transmit live audio-video feeds of auctions, and allow potential bidders to place real-time bids online during the course of those auctions.¹ While the vast number of different types of these services prevents me from opining on all of them, I can specifically address the eBay model, and I will provide guidance for addressing other models.

Based on the statutory definition of "auctioneer," it is necessary to determine if a service is: 1) a person; 2) who, for compensation; 3) sells or offers for sale real or personal property; 4) at public auction; 5) as a whole or partial vocation.² Chapter 51-05.1, N.D.C.C., does not define "person." Section 1-01-49(8), N.D.C.C., contains a definition of "person" that is to be used unless the context requires otherwise. Under that definition, "person" includes an "organization."³ An "organization" includes "a foreign or domestic association, business trust, corporation, enterprise, estate, joint venture, limited liability company, limited liability partnership, limited partnership, partnership, trust, or any legal or commercial entity."⁴

The context in which "person" is used in N.D.C.C. ch. 51-05.1, however, indicates that the Legislative Assembly intended a different meaning. The definition of "auctioneer" uses the single term "person," while the definition of "clerk" in the same section expands the list of eligible entities beyond "person" to include "any person, firm, partnership, copartnership, association, corporation, or limited liability company." The inclusion of other non-individual entities to the definition of "clerk" while excluding them from the definition of "auctioneer" indicates the Legislative Assembly did not intend those additional entities that are not individuals to come within the definition of "auctioneer."

In addition, whether a person is an "auctioneer" depends on whether the person's "whole or partial vocation" is being an auctioneer.⁵ The North Dakota Century Code does not define "vocation," and so we must use the plain meaning of that word.⁶ A dictionary definition of "vocation" is a "regular occupation or profession, esp. one for which a person

¹ For example, see the Ritchie Bros. Auctioneers website:
<http://www.rbauction.com/index.jsp>.

² N.D.C.C. § 54-05.1-04(1).

³ N.D.C.C. § 1-01-49(8).

⁴ N.D.C.C. § 1-01-49(5).

⁵ N.D.C.C. § 54-05.1-04(1).

⁶ N.D.C.C. § 1-02-02.

is specially suited or qualified.”⁷ Whether being an auctioneer is a person’s “whole or partial vocation”⁸ is fact-specific and to be determined on a case-by-case basis.

But the fact that auctioneering must be a “vocation” appears to preclude the licensure of businesses as auctioneers. Businesses do not have “vocations,” but rather provide services or sell goods. Employees of businesses, including online auction services, may have auctioneering vocations, and may therefore be required to obtain an auctioneer license, but the businesses themselves do not. Accordingly, as used in N.D.C.C. § 54-05.1-04, “person” only means a single individual, rather than the broader definition of “person” in N.D.C.C. § 1-01-49(8). Applying that definition, eBay does not meet the definition of a “person” because it is a corporation rather than an individual.⁹ Whether that conclusion would apply to other auction sites depends on the facts of each situation.

Recognizing the changing landscape produced by the advent of the Internet, the Legislature enacted specific legislation to regulate one type of Internet auction business. Chapter 36-05.1, N.D.C.C., prohibits “internet livestock auctions” from transacting business in North Dakota unless licensed under chapter 36-05.1. “Internet livestock auction” means a place or establishment conducted or operated for compensation or profit as a public market where livestock located in this state is sold or offered for sale at a facility or web site within or outside the state through the use of the internet.”¹⁰ Thus, although business entities cannot be licensed under N.D.C.C. ch. 51-05.1, an internet livestock auction is required to be licensed under N.D.C.C. ch. 36-05.1. Whether other types of businesses that offer similar Internet sales ought to be regulated is an issue the Legislature may need to address.

The second test is whether compensation is paid.¹¹ eBay offers its services to members only. There is no fee to become a member, but a registration process is required.¹² While eBay does not charge its members to buy an item through the eBay system, eBay does charge those members who place items for sale on eBay. The seller is required to pay an “insertion fee” for placing the item for sale and, if the item is sold, the seller is required to pay a “final value fee.” The insertion fee is a flat, nonrefundable fee based on the seller’s

⁷ The American Heritage Dictionary 1353 (2d coll. ed. 1991).

⁸ N.D.C.C. § 54-05.1-04(1).

⁹ See Earth Flag Ltd. v. Alamo Flag Co., 153 F.Supp.2d 349, 351 (S.D.N.Y.,2001). (“eBay is a Delaware corporation, with its principal place of business in San Jose, California.”).

¹⁰ N.D.C.C. § 36-05.1-01(2).

¹¹ N.D.C.C. § 54-05.1-04(1).

¹² eBay Registration Form (2005), *available at*

https://scgi.ebay.com/ws/eBayISAPI.dll?RegisterEnterInfo&siteid=0&co_partnerid=2&usag e=0&ru=default&raflid=0&encRaflid=default.

initial offering price and ranges from \$0.25 to \$4.80.¹³ The “final value fee” is a percentage of the selling price.¹⁴ Because eBay receives compensation, it meets the second prong of the statute. Again, whether another entity receives compensation is fact-specific.

The third prong requires that the person “sells or offers for sale real or personal property.”¹⁵ eBay’s “User Agreement” states, in part:

3.1 eBay is not an Auctioneer. Although we are commonly referred to as an online auction web site, it is important to realize that we are not a traditional "auctioneer." Instead, the Site acts as a venue to allow anyone to offer, sell, and buy just about anything, at anytime, from anywhere, in a variety of pricing formats, including a fixed price format and an auction-style format commonly referred to as "online auctions" or "auctions." We are not involved in the actual transaction between buyers and sellers. As a result, we have no control over the quality, safety or legality of the items advertised, the truth or accuracy of the listings, the ability of sellers to sell items or the ability of buyers to pay for items. We cannot ensure that a buyer or seller will actually complete a transaction.¹⁶

The United States District Court for the Southern District of California has summarized the eBay process as follows:

eBay provides an Internet website service where over 25 million buyers and sellers of consumer goods and services have come together to buy and sell items through either an auction or a fixed-price format. Pursuant to their agreement with eBay, users set up user IDs or "screen names" to conduct business on eBay's website in a semi-anonymous fashion. Buyers and sellers reveal their real identities to each other in private communications to complete sales transactions.

eBay's website allows sellers to post "listings" (or advertisements) containing descriptions of items they wish to offer for sale; and it allows buyers to bid for items they wish to buy. People looking to buy items can either browse through eBay's 4,700 categories of goods and services or search for items

¹³ eBay.com fees (2005), available at <http://pages.ebay.com/help/sell/fees.html>.

¹⁴ *Id.*

¹⁵ N.D.C.C. § 54-05.1-04(1).

¹⁶ eBay User Agreement (2005), available at

https://scgi.ebay.com/ws/eBayISAPI.dll?RegisterEnterInfo&siteid=0&co_partnerid=2&usag e=0&ru=http%3A%2F%2Fpages.ebay.com%2Fhelp%2Fpolicies%2Fuser%2520agreeme nt.html%3FssPageName%3Df%3Af%3AUS&raflid=0&encRaflid=default.

by typing words into eBay's search engine. Every day, eBay users place on average over one million new listings on eBay's website. At any given time, there are over six million listings on the website.¹⁷

eBay's User Agreement and the court's summary clearly show that eBay itself is not offering to "sell" anything;¹⁸ the offer for sale is made by the member who places the goods for sale. Because eBay does not "sell or offer for sale real or personal property," the third prong of the test also fails and eBay cannot be considered an "auctioneer" as defined in North Dakota law. It is therefore my opinion that since eBay is not an auctioneer it does not need an auctioneer's license, regardless of its domicile. Whether another entity is actually selling real or personal property depends on the circumstances of each case.

The fourth prong is whether the sale is at "public auction."¹⁹ "Cases interpreting [the phrase 'pubic auction'] generally, and as used in the Uniform Commercial Code, have held that several conditions, such as publicity, competitive bidding and invitation to the public must be met before a sale can be classified as a public sale."²⁰ This is, of course, a fact-specific determination to be made in each case.

You also ask whether an auctioneer or clerk's license is required for what you call an "Internet auction trader/listing service provider" ("listing service provider"). You indicate that listing service providers act as agents for individuals who would like to sell merchandise through Internet auction services. They may take consignments of merchandise, arrange to have that merchandise offered for sale through Internet auction services, deliver the merchandise and collect and disperse the proceeds from any sale.

Whether a listing service provider is an "auctioneer" depends on the resolution of several factual issues as applied to the five criteria provided in N.D.C.C. § 51-05.1-04(1). But at least as far as a listing service provider who assists a seller in selling items on eBay is concerned, for the reasons mentioned, such a provider is not an auctioneer.

¹⁷ Hendrickson v. eBay, Inc., 165 F.Supp.2d 1082, 1084 (C.D. Cal. 2001) (footnotes omitted).

¹⁸ See also 86 Ops. Cal. Atty. Gen. 48, Opin. No. 02-111 (Apr. 10, 2003) ("We have little doubt that eBay does not sell or offer to sell or buy or offer to buy, on behalf of another or others"); Gentry v. eBay, 99 Cal. App. 4th 816, 827 (2002) ("eBay is not in the business of selling or offering to sell the collectables at issue; rather, it is the individual defendants who sold the items to plaintiff, using eBay as a venue.")

¹⁹ N.D.C.C. § 54-05.1-04(1).

²⁰ Liberty National Bank of Fremont v. Greiner, 405 N.E.2d 317, 321 (Ohio 1978).

A “clerk,” on the other hand, is

any person, firm, partnership, copartnership, association, corporation, or limited liability company, who for a compensation or valuable consideration, is employed either directly or indirectly by an owner while the sale is in progress to record each item offered for sale, its selling price, the buyer's name or number, to collect all proceeds of said sale, to pay all expenses connected with the sale, to prepare a full closing statement of all receipts and disbursements, and make settlement thereon to parties properly entitled thereto within a reasonable length of time.²¹

Whether an entity is a “clerk” also depends on the facts of each case, so I cannot issue a general opinion on the question. One thing to note when considering the question is that when the term “clerk” is used within the chapter as a whole, it is always used in the context of an “auction.”²² The rules of interpretation state that “[t]he entire statute is intended to be effective”²³ and that “a just and reasonable result is intended.”²⁴ Therefore, the term “clerk” cannot be looked at in isolation, but must be viewed in context with the entire chapter, including the term’s association with an “auction.”

State law does not define the term “auction,” but the plain meaning,²⁵ dictionary definition of “auction” is a “sale of property to the highest bidder.”²⁶

In the eBay case, the sale does not always go to the highest bidder. If an item is offered for sale in a fixed price format, then the first member willing to pay that price will acquire that item, even if another member is willing to pay a higher price. If an item is offered in an auction format, the item still may not go to the member willing to pay the highest price, but rather to the member who offers the highest price within the time limit set by the seller. Once the time limit has expired, the item is sold even if other members are willing to pay a higher price.

Therefore, if an auction is defined as a sale of property “to the highest bidder,” an Internet auction service like eBay would not meet the definition of “auction.” It follows that if the Internet auction service’s activities do not meet the definition of an auction, then the actions of a listing service provider are not that of a traditional “auction clerk” and no clerk’s

²¹ N.D.C.C. § 54-05.1-03.1(2). Notably, unlike an auctioneer a clerk may be a business or an individual.

²² See e.g., N.D.C.C. §§ 51-05.1-01.1(1), 51-05.1-03(1)(b), (c), (f), (g).

²³ N.D.C.C. § 1-02-38(3).

²⁴ N.D.C.C. § 1-02-38(4).

²⁵ N.D.C.C. § 1-02-02.

²⁶ Blacks Law Dictionary 125 (7th ed. 1999).

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license is required. Correspondingly, if a listing service provider is providing services at an actual "auction," as is the case in some Internet sales websites, that listing service provider may need to obtain a clerk's license in order to provide that service in North Dakota if its activities fall within the statutory definition of "clerk."

Sincerely,

Wayne Stenehjem
Attorney General

njl/sam/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).