

Internet Auction Issues in North Carolina

A Written Summary

**Provided to the Federal Trade Commission's Public Workshop
"Possible Anticompetitive Efforts to Restrict Competition on the Internet"**

by

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Introduction

The North Carolina Auctioneers Law, Chapter 85B of the General Statutes, became effective July 1, 1973. The Law stipulates that there shall be a five-member Commission, known as the Auctioneer Licensing Board, having the powers and responsibilities set out in this Chapter. Members are appointed by the Governor. By law, three members are from nominations submitted by the Auctioneers Association of North Carolina; at least three members must be licensed auctioneers; one member is appointed to represent the public at large, and cannot be licensed.

The Auctioneer Licensing Board operates in accordance with the Executive Budget Act, within an approved budget, with operational activities of the Board and its staff supported totally by license fees collected from those in the auction profession.

Purpose of the Auctioneer Licensing Board

The Auctioneer Licensing Board is responsible for the administration and enforcement of the Auctioneers Law, which establishes specific standards of conduct that serve to protect the public; affords a means of redress of grievances of any person suffering damage by reason of misconduct relating to sales at auction, and provides a means of monetary restitution for loss suffered.

Licensing auctioneers and auction businesses by the Board increases public confidence in the profession by providing a means of determining the ability, general knowledge, integrity, and good character of those permitted to practice, and a means of deterring fraudulent or dishonest dealings and unethical conduct.

It is the responsibility of the Auctioneer Licensing Board to assure that the qualifications and activities of those engaged in auctioneering are in accord with the law and in the best interest of the public; to receive and act upon license applications; issue, suspend or revoke licenses; adopt rules and regulations, and take such other actions as may be necessary to enforce the provisions of the Auctioneers Law. The Licensing Board is not a

board of arbitration and has no jurisdiction to settle disputes between parties concerning the rate or division of commissions, pay of assistants, and similar matters of contract.

The Board holds monthly public meetings; sponsors and underwrites educational seminars and other forms of educational projects having to do with the advancement of auction profession in North Carolina; administers auctioneer examinations; investigates complaints, and holds administrative hearings as needed.

History of Internet Auctions in North Carolina

In October 1998, an article titled, *IT'S THE LAW - Non-Traditional Auctions Continue to Cause a Stir*, was printed in *The North Carolina Auctioneer* magazine which is published by the Auctioneers Association of North Carolina, Inc. This article was written by Jeffrey P. Gray, Legal Counsel to the North Carolina Auctioneer Licensing Board and W. Wayne Woodard, the former Executive Director of the North Carolina Auctioneer Licensing Board. A copy follows this written summary and is attachment "A".

This article in short form is an opinion of at least the Board's attorney and executive director, if not also the Board itself, that if you conducted Internet auctions in the State of North Carolina and you were not exempt as defined from the Auctioneer Law, then you were required to obtain an auctioneer or auction firm license.

At their October 1999 regular monthly meeting, after the Board hired a new executive director, the executive director requested the Board's policy as it related to Internet auctions. The Board determined that the law and rules applied to Internet auctions in the same manner as any other type of auction in that: the term "exchanges" means all types of exchanges to include electronic, that the bid must be solicited in North Carolina, and the bid must be accepted in North Carolina.

During the November 1999 regular monthly Board meeting, unlicensed Internet auctioneers and Internet auctions were discussed. A brochure was distributed to the Board to review, it defined "auctions" and the requirement of an auctioneer license or auction firm license. A copy follows this written summary and is attachment "B". The Board instructed the executive director to obtain a list of the newspapers in North Carolina and determine the cost of advertising in each and to present an outline at the next meeting detailing how to educate the public by advertising. The Board also unanimously approved a policy concerning Internet auctions which was: If an individual or business is located in North Carolina and 1. they solicit auctions; 2. contract for auctions; 3. accept consignments for auctions; 4. advertise for auctions; 5. offer items for sale at auctions; 6. accept payment and/or disburse monies for items sold at auction; 7. accept bids for items that are not their own goods; and , 8. buy goods for resale at auction over the Internet, the minimum requirement for those individuals or businesses is to hold a current auctioneer license or if no live exchanges occurred, then hold an auction firm license.

Shortly after the November meeting the Board's executive director provided a review session on the Auctioneer Law and Rules at an in-state accredited auction school. A copy of above brochure was provided to the students, to assist them to understand the Internet auction issues. One of the students electronically scanned the document and distributed it over the Internet without a qualified explanation. Not only could the student not provide accurate answers to questions asked by Internet auction enthusiasts, but when he scanned the brochure, he did it in four parts and did not paste the parts in the correct order. This changed the intent and meaning of the brochure.

In less than a week, the North Carolina Auctioneer Licensing Board's office was deluged with telephone calls from as far away as Japan in reference to the Board's "new law." The public, the local newspapers, the AP wire service, and CNN were requesting information about the "new law, rules and regulations changes." The misconception was that the State's Legislature had written an amendment to the Law requiring the need for an auctioneer or auction firm license to conduct Internet auctions, or the Board had changed its rules or regulations to oversee this area of the Internet. The Law that defines what an auction is and who needs a license was written in 1973. The Board had not changed its interpretation, but had merely restated it. The Board realized that both the buying public and the selling public were not aware of the Board's interpretation of the Law and was attempting to rectify the situation by advertising the information first in a brochure to educate the public.

At the December 15, 1999, regular monthly Board meeting, two formal requests were presented to the Board for consideration. James B. Black, Speaker of the North Carolina House of Representatives and Eric Reeves, Senator from the 14th District - North Carolina General Assembly each requested that the North Carolina Auctioneer Licensing Board defer action on the licensing of Internet auctioneers and auction firms so as to allow the Joint Select Committee on Information Technology to study the issue. The Board considered the requests and unanimously voted to defer action and to also request a formal Attorney General's opinion.

The following was published and provided in memo form to the general public on December 16, 1999:

At the North Carolina Auctioneer Licensing Board's regular meeting on December 15, 1999, the Board considered and deliberated the issues relating to Internet auctions and the relationship of the Board's duties to regulate Internet auctions.

The Board unanimously voted to request an Attorney General's formal opinion on the question of what constitutes an "exchange" for purposes of the definition of an auction as it relates to Internet auctions.

The Board also unanimously voted to temporarily defer any further action on the licensing of Internet auctioneers and firms for the Joint Select Committee on Information Technology to have the opportunity to debate the issue.

In layman's terms, the North Carolina Auctioneer Licensing Board will temporarily stop regulating Internet auctions.

A formal request for an opinion was submitted to the State's Attorney General's office. Three of the following questions were presented:

1. Does the posting of an item on an Internet auction web site for sale, and allowing it to remain while bids are placed by potential buyers, constitute "a series of invitations for offers made by the auctioneer" pursuant to N.C.G.S. § 85B-1(a);
2. Does the posting of an item on an Internet auction web site, inviting users to place bids, accepting or rejecting the highest bid after the expiration of a certain time and with the capability of e-mail communication between the buyer and seller, constitute "exchanges between the auctioneer and members of an audience" pursuant to N.C.G.S. § 85B-1(1); and
3. If the Board lacks the authority to regulate persons engaged in these activities, is it a violation of the Board's law and rules to advertise these sales as "auctions" in North Carolina.

This request for an attorney general's opinion was subsequently withdrawn by the North Carolina Auctioneer Licensing Board prior to any official opinion being rendered.

The Joint Select Committee on Information Technology is studying the larger issue of E-commerce, consequently it has not finalized any recommendations dealing with any specific aspects that involve Internet auctions.

Current Figures and Trends in North Carolina

The figures below were supplied by the National Fraud Information Center for the time period of December 1999 to September 2002. These Internet auction complaint figures are an approximation and are used to compare traditional "brick and mortar" auction with Internet or electronic auction complaint figures. These complaints allege that an individual or company that originates from North Carolina has not provided an item(s) which was sold, has not provided an item(s) as advertised, or has not provided a refund.

National Fraud Information Center Figures For North Carolina	
Total number of complaints	499
Total complaints for non-shipment/not received items	456
Total complaints for items not being as advertised	40
Total dollar loss reported	\$149,755
Lowest amount of loss reported	\$1
Highest amount of loss reported	\$6,000

The total number of formal complaints against traditional "brick and mortar" auctions from December 1999 to September 2002 is 63. There were almost eight times as many Internet auction complaints submitted to the National Fraud Information Center as there were traditional auction complaints submitted to the North Carolina Auctioneer Licensing Board.

The staff and legal counsel to the Board are currently reviewing the recent legislation in the State of Illinois as it relates to Internet auctions.

Attachment A

IT'S THE LAW

NON-TRADITIONAL AUCTIONS CONTINUE TO CAUSE A STIR
Jeffrey P. Gray, Legal Counsel to the North Carolina Auctioneer Licensing Board
and
W. Wayne Woodard, Executive Director

How would you like to advertise an auction and have over a million people from all over the world stop by to see what you have for sale. It happens every day on the Internet. The number of on-line auction sites grows every week. The Auction Universe Network (www.auctionuniverse.com), a site affiliated with the Home Shopping Network (www.firstauction.com), Hagggle Online (www.hagggle.com), and the largest and most widely talked about site, eBay (www.ebay.com). Each of these sites - as well as many others - offer a wide variety of items from collectibles and jewelry to antiques and books and magazines. Other sites specialize in just one type of item or product, such as computer equipment (www.onsale.com), (www.auctionwarehouse.com), (www.uBid.com), comic books (www.milehighcomic.com), sports trading cards (www.curranscards.com) wine (www.winebid.com) and travel (www.travelbids.com). Also, two well-known and nationally respected traditional auction houses - Mansions International (antiques, militaria, and collectibles) and Kruse (collectible automobiles and motorcycles) are now on-line. Articles in the October, 1997 and May and June, 1998 editions of *The Auctioneer*, the magazine of the National Auctioneer Association, advocated the ease at which any auctioneer could go on-line.

The popularity of on-line auctions among buyers has exploded. With this explosion has come a serious concern from buyers, consumer protection groups, traditional auctioneers, auction marketeers, and licensing and regulatory boards. At the 1998 NAA Convention in Oklahoma City, G. Patton Hughes, one of the nation's foremost authorities on on-line auctions spoke on this topic. Regulatory boards and licensing boards especially have been debating the issue of on-line auctions, and NALLOA (the National Auctioneer License Law Officials Association) has gotten into the act. North Carolina's Licensing Board is no different. However, for North Carolina, the issue is not that complex - at least not yet.

Much of what seems to bother so many auctioneers about on-line auctions is the non-traditional nature of these auctions. As for the Auctioneer Licensing Board, it is a little more; it is the protection of the buying public, and in turn the profession, through regulation. However, non-traditional auctions have been around for a long time in our state, have operated successfully, and have had few, if any, complaints. In many ways, especially from a regulatory standpoint, that upstart, the "Internet Auction", is no different than older, non-traditional auctions.

What is meant by "traditional auctions"? In the minds of most people - auctioneers and the general public alike - it means the live, on-site auction with both the auctioneer and the buyer appearing in-the-flesh (or maybe the buyer is on the other end of a telephone line talking to an "in-the-flesh" bidder). This view of auctions was most likely what was

envisioned when the North Carolina Auctioneer Law was written. **North Carolina General Statutes § 85B-1(1) defines "auction" as**

sale of goods or real estate by means of exchanges between an auctioneer and members of an audience, the exchanges consisting of a series of invitations for offers made by the auctioneer, offers by members of the audience, and the acceptance by the auctioneer of the highest or most favorable offer.

Subsection (2) of the same statute defines an "auctioneer" as any person who conducts an auction. It has long been the Board's policy that the "exchange" between the auctioneer and the buyers includes live, remote (whether by mail or electronics), or any other means. As it relates to on-line auctions, quite simply, there is no difference between a bid received over the telephone and relayed to the auctioneer by a live person and an e-mail bid received over the Internet and relayed to the "auctioneer". The same is true for bids sent through the U.S. Mail (or FedEx, etc.).

North Carolina is, and has been, home to a number of very successful non-traditional auctions. For example, R.L. Roberts, NCAL #5023, has been operating Dixie Sporting Collectibles in Charlotte since November, 1993. He has conducted over 25 catalogue only auctions of hunting, fishing and other sporting collectibles. Bids are accepted by mail, telephone, fax, or Internet (www.sportsauc.com), and his last auction generated 31,000 bids on 2,800 items. A staff of six were taking bids in the final days before the auction, and the vast majority of the bids were by mail, fax or telephone. Other non-traditional auctions based in North Carolina include a non-profit association that represents Seagrove potters (Southern Fold Pottery Collector's Society, NCAL #5902), and Bill A. Retskin, NCAL #5965, of Asheville who deals in the niche of collectible matchbook covers. There are no "live" exchanges at the auctions conducted by these North Carolina based licensed auctioneers.

These auctions are conducted in North Carolina; the bids are solicited from our state, received (i.e., opened, if sent U.S. Mail) in our state, and the highest bid is awarded in our state. A North Carolina auctioneer or auction firm license is, therefore, required. The licensee is subject to the Board's law and rules, and buyers are protected by the Board's law and rules, as well as the Recovery Fund. The key, therefore, is "location, location, location." If the exchange set forth in North Carolina General Statutes 85B-1(1) takes place in North Carolina, it is a "North Carolina auction", even if all else occurs in Cyberspace.

Internet auctions, therefore, are no different than any other non-traditional auction. If the bids are solicited, received, or awarded in North Carolina, a North Carolina license is required. Period. The biggest problem the North Carolina Auctioneer Licensing Board -- as well as all other boards, commissions, or regulatory agencies in other states that license auctioneers -- is having is with the question of Internet auctions like eBay. As many of you are aware, on eBay, individual sellers are selling their personal property at auction over the Internet. eBay, as an entity, is the "middleman"; eBay just collects the bids and passes them on electronically. Technically, a buyer is in an exchange with the actual seller, not an "auctioneer." On its face, it is easy to say that no auctioneer license is

required, even if the seller is located in North Carolina. North Carolina General Statutes § 85B-2(a)(1) exempts from the licensing requirements of the Auctioneer Law "sales at auction conducted by the owner of all of the goods or real estate being offered..." However, this exemption is limited. If a person acquired the goods for the purpose of resale at auction and engages in the sale of goods at auction in the regular course of business, a license is required. As one can imagine, the majority of the sellers on eBay and similar on-line auction sites have purchased the goods for sale at auction and are doing so in the regular course of business. Without question, any person so engaged in auctioneering would be required to have a North Carolina license if based in this state. As a practical matter, enforcement would be next to impossible. The F.B.I. and state and local law enforcement agencies have found it is a very difficult and complicated task to track down pornographers on the Internet. How can the Board's staff of two investigators be expected to even consider the task of tracking down thousands of sellers on Internet auction sites and determining if any one of them has solicited, received, or awarded a bid in North Carolina.

Without a question, Internet auctions need to be regulated. The questions that remain to be answered are who and how? (A discussion of this issue can be found in a July/August 1998 article in *The Auctioneer*). Of greatest concern is the protection of the buying public that comes with regulation, and in turn, the protection of the auction profession. For some cases, Internet fraud can be reported to the National Fraud Information Center (www.fraud.org) and the Federal Trade Commission (FTC) has issued a Consumer Alert, *Online Auctions: Going, Going, Gone*, available free from the FTC to help alert consumers (202)326-2222 or www.ftc.gov). It should come as no surprise that fraud in Internet auctions was number one of the top ten subjects for the National Consumers League's 1997 Internet Fraud Watch. For other cases, especially if no fraud is involved, little can be done. A few states have gotten involved, for example Indiana's attorney general sued an Internet auctioneer over failure to send items purchased by buyers. But again, the problem with tracking the violator, as well as jurisdiction, hampers many investigations by individual states. Absent these few sources, there is little that a state licensing or regulatory board can do.

Internet auctions do have a twist that opens up a whole new area of questions. However, as a general rule, the North Carolina Auctioneer Licensing Board views them like any other auction for purposes of regulation. Even the non-traditional auctions in North Carolina, like Dixie Sporting Collectibles, use the Internet to receive bids, but the key is that they are licensed. It is not the fact that Internet auctions are non-traditional that should cause a stir, it is the inability to regulate the sellers for the protection of the public and the profession. When properly licensed, the public and the profession can be assured that they are being protected.

Attachment B

North Carolina Auctioneer Licensing Board

Internet Auctions

Are you located in North Carolina and:

1. Solicit auctions?
2. Contract for auctions?
3. Accept consignments for auctions?
4. Advertise for auction?
5. Offer items for sale at auction?
6. Accept payment and/or disburse monies for items sold at auction?
7. Accept bids for items that are not your own goods?
8. Buy goods for resale at auction over the Internet?

If the answer to any one of these eight questions is “yes”, then you are required by law to have a North Carolina auctioneer or auction firm license.

Definitions you need to know:

North Carolina General Statute §85B-1(1) defines “auction” as:

The sale of goods or real estate by means of exchanges between an auctioneer and members of an audience, the exchanges consisting of a series of invitations for offers made by the auctioneer, the offers by members of the audience, and the acceptance by the auctioneer of the highest of the most favorable offer.

North Carolina General Statute §85B-1(2) defines an “auctioneer” as any person who conducts an auction. It has long been the Board’s policy that the “exchange” between the auctioneer and the buyers includes live, remote (whether by mail or electronics), or any other means. As it relates to on-line auctions, there is no difference between a bid received over the telephone and relayed to the auctioneer by a live person and an e-mail bid received over the Internet and relayed to the “auctioneer”.

The definitional section of the administrative rules governing auctions and auctioneers in North Carolina, 21NCAC 4B.0103(2), provides that:

“Auctioneering” or “conduct of auction” or “conduct of business” shall mean, in addition to the actual calling of bids, any of the following:

- (a) contracting for an auction or auctions,
- (b) accepting consignments of items for sale at auction,
- (c) advertising an auction,
- (d) offering items for sale at auction,
- (e) accepting payment and disbursing monies for items sold at auction, or
- (f) otherwise arranging, sponsoring, or managing an auction or auctions.

North Carolina Auctioneer Licensing Board



What does this mean to you:

An auction is conducted in North Carolina if the bids are solicited from our state, received (i.e., opened, if sent by U.S. Mail or by e-mail) in our state, or the highest bid is awarded in our state. Internet auctions are not exempt from North Carolina's law.

If you are conducting Internet auctions, a North Carolina auctioneer or auction firm license is required. A licensee is subject to the Board's law and rules, and buyers are protected by the Board's law and rules, as well as by a Recovery Fund.

The key, therefore, is "location, location, location." If the exchange set forth in North Carolina General Statute §85B-1(1) takes place in North Carolina, it is a "North Carolina auction", even if all else occurs in Cyberspace.

The only exemption is found in the North Carolina General Statute §85B-2(a)(1), which exempts from the licensing requirements of the auctioneer law "sales at auction conducted by the owner of all of the goods or real estate being offered..." However, this exemption is limited. If a person acquired the goods for the purpose of resale at auction and engages in the sale of goods at auction in the regular course of business, a license is required.



What do you need to do:

North Carolina General Statute §85B-4 (a) states that:

No person who is not exempt under G.S. 85B-2, shall sell, or offer to sell, goods or real estate at auction in this State or perform any act for which an auction firm license is required unless the person holds a currently valid license issued under this Chapter.

Apprentice auctioneer, auctioneer or auction firm license applicants must be 18 years of age or older, must be a high school graduate or equivalent, must not have within the preceding five years pleaded guilty to, entered a plea of nolo contendere or been convicted of any felony, or committed or been convicted of

any act involving fraud or moral turpitude, must not have had an auctioneer or apprentice auctioneer or auction firm license revoked, or have, within the preceding five years, committed any act that constitutes grounds for license suspension or revocation under General Statute §85B or a Board rule.

The minimum requirement to perform Internet auctions exclusively is an Auction Firm License. Auction firm applicants must pay the appropriate fees and successfully complete an examination approved by the Board.

The minimum requirement to perform both traditional and Internet auctions is an Auctioneer License. Auctioneer applicants must base their applications upon either successfully completing an approved school of auctioneering or successfully completing a two year apprenticeship and successfully completing an examination approved by the Board.

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