



2007-101

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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June 6, 2007

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Honorable Keith Warren
Executive Director
State Board of Auctioneers
610 South McDonough Street
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TO THE EXTENT THERE IS A CONFLICT, THIS OPINION HAS BEEN MODIFIED BY THE OPINION ISSUED TO FRANK McDANIEL, MEMBER, HOUSE OF REPRESENTATIVES, DATED 7-16-08, A.G. NO. 2008-109.

Auctioneers, Board of - Auctions
and Auctioneers - Internet -
Licenses and Permits

The Auctioneers License Act confers the Board of Auctioneers with jurisdiction to regulate the activities of Internet consignment shops within the state of Alabama if the Board determines that these entities are engaging in the auction business.

Dear Mr. Warren:

This opinion of the Attorney General is issued in response to your request.

QUESTION

Does the Auctioneers License Act confer jurisdiction on the Board of Auctioneers to regulate the activities of Internet auction listing service providers and consignment shops within the state of Alabama?

FACTS AND ANALYSIS

In your letter of request, you informed this Office that the Alabama Board of Auctioneers ("Board") has received several complaints regarding the actions of Internet auction listing service providers and consignment shops within the state. You stated the following, in pertinent part, within your request:

Internet auction listing service providers permit users of Internet websites or other interactive computer services to offer personal property or services for sale to a prospective buyer through an on-line bid submission process using that website or interactive computer process. The Internet auction listing service provider does not set the price or prepare the description of the personal property to be offered or in any way utilize the services of an individual as an auctioneer. The service provider does not customarily act as the agent of the users selling items on its web site, but acts only as a venue for the user's transactions. The property to be sold, the prospective bidders and sellers, and/or the Internet auction listing service provider may be located in the state of Alabama. Frequently, only one of them is located within the state. Internet auction consignment shops engage in all of these activities and take physical possession of the goods offered for auction sale until the completion of the bidding process, at which time they package, ship, and deliver the goods to the winning bidder. These entities often include the word "auction" in their business names and/or in their advertising for these services.

The Auctioneers License Act ("Act") is codified in sections 34-4-1 through 34-4-54 of the Code of Alabama. (2002 & Supp. 2006). The Board is charged with the protection of the public and the enforcement of the provisions of the Act. More particularly, section 34-4-20 of the Code prohibits a person that is not licensed from advertising that he or she is in the auction business or doing anything to leave any impression upon the public that he or she is an auctioneer or is so engaged. ALA. CODE § 34-4-20 (2002). Section 34-4-20 states as follows:

It shall be unlawful for any person, partnership, association or corporation in any county of this state to act as an auctioneer or apprentice auctioneer, or directly or indirectly to engage or assume to engage in the auction business and act as either without first obtaining a license issued by the State Board of Auctioneers, under the provisions of this chapter.

It shall be unlawful for any person not licensed under the provisions of this chapter to advertise that he is in the auction business or to do anything to leave any impression upon the public that he is an auctioneer or is so engaged.

ALA. CODE § 34-4-20 (2002).

The essence of the issue you have raised contemplates whether the Board may exercise authority over persons located within the state that apparently hold themselves out as auctioneers, but have not become licensed as auctioneers.

Alabama law defines "auction business," or the "business of auctioneering," as "the performing of any of the acts of an auctioneer or apprentice auctioneer." ALA. CODE § 34-4-2(6) (2002). An "auctioneer" is defined as follows:

Any person who . . . for a fee, commission or any other valuable consideration, or with the intention of receiving the same, by means of or process of an auction or sale at auction, offers, negotiates or attempts to negotiate a listing contract, sale, purchase or exchange of goods, chattels, merchandise, real or personal property or of any other commodity which may lawfully be kept or offered for sale by or at public auction.

ALA. CODE § 34-4-2(1) (2002). The "term" person includes the officers, directors, and employees of a corporation, an individual, association, partnership, or corporation. ALA. CODE § 34-4-2(5) (2002).

Internet auction listing service providers sell a service that gives subscribers the ability to list goods to be sold using the description of the goods that the seller has provided. This description is then posted on the Internet and made available to prospective buyers. The Internet service provider does not take possession of the item to be sold. Based on the facts presented, it is the opinion of this Office that the acts of an Internet service provider do not fit within the current definition of auction business. Instead, the Internet auction service provider is offering little more than the opportunity for a seller to list his auction item on a particular web address. The definitions used in section 34-4-2 of the Code were developed and codified in 1973 and do not fully address the technological services that are available for the public today.

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Conversely, Internet auction consignment shops are located locally within the state, take physical possession of the goods from the sellers, are responsible for listing the items with the Internet service provider, either use the term auction in its name or hold itself out as selling items with an Internet auction service provider, and deliver the items to the buyers. Based on these facts, Internet auction consignment shops are, therefore, engaging in the auction business because these facilities, "for a fee or commission, by means of an auction or sale at auction, they offer, negotiate, or attempt to negotiate a listing contract of goods, chattels, merchandise, real or personal property, or any other commodity that can lawfully be kept or offered for sale by or at public auction." ALA. CODE § 34-4-2(1), (6) (2002).

Pursuant to section 34-4-29, the Board is authorized to discipline applicants, licensees, and persons that hold themselves out as auctioneers. Specifically, this section reads, in pertinent part, as follows:

(b) The board may, upon its own motion, and shall, upon the verified complaint in writing of any person containing evidence, documentary or otherwise, that makes out a prima facie case, investigate the actions of any auctioneer, apprentice auctioneer, *or any person who assumes to act in either capacity, and hold a hearing on the complaint.*

ALA. CODE § 34-4-29(b) (2002).

Section 34-4-29(e) sets forth a form of discipline that may be dispensed by the Board. This section states that "the board may levy and collect administrative fines for serious violations of this chapter or the rules and regulations of the board of not less than \$200.00 or more than \$500.00 for each violation." ALA. CODE § 34-4-29(e); *see also* ALA. ADMIN. CODE r. 150-x-1-.12 (2003). Whether a particular person has acted in the capacity of an auctioneer and is then subject to an administrative fine would be a contested matter in which the Alabama Administrative Procedures Act requires either a hearing or an amenable resolution by the parties. ALA. CODE § 41-22-12(a) & (f).

Because the Board is authorized to investigate and hold a hearing for any person who assumes to act in the capacity of either an auctioneer or apprentice auctioneer, the Board may, upon finding the person guilty,

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impose an administrative fine against unlicensed persons engaging in the auction business. ALA. CODE §§ 34-4-29(d) (2002), 41-22-12 (2000).

CONCLUSION

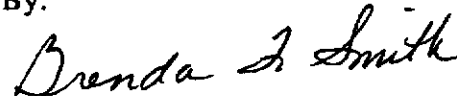
The Auctioneers License Act confers the Board of Auctioneers with jurisdiction to regulate the activities of Internet consignment shops within the state of Alabama if the Board determines that these entities are engaging in the auction business.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

TROY KING
Attorney General

By:



BRENDA F. SMITH
Chief, Opinions Division

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