

iSeries

Because it's about you!

Legal matters within the auction industry

Presented by The National Auctioneers Association



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On its surface, the auction method of marketing is simple.

An asset is presented. Interested parties bid what they are willing to spend for that asset. The highest bid is awarded the asset. Auction is fast. It is transparent, and it is fair. Because of these qualities, the auction method has played a significant role in commerce and industry for centuries. The only differences over that time are that some of the items offered have changed along with the technology that now helps auction be offered like never before. But, the process remains largely intact as it did long ago.

As processes become sharper, as technology continues to expand its influence into the auction world, and as culturally and sometimes politically charged issues drift across and occasionally drape over the business world, legal issues present themselves now and again for auction professionals.

The National Auctioneers Association has always been at the forefront of providing sound advice for its members in order to help them navigate the sometimes murky waters stirred up by buyers, sellers, and sometimes competitors' emotions and dealings. While the NAA expects its members to abide by a strict code of ethics as a way to help preserve a solid legal standing, there is no substitute for law.

Event days are often loud, hectic and emotionally charged in a competitive environment, which makes it imperative that auction professionals thoroughly understand the rights of all parties (buyers, sellers and themselves) and are able to think clearly and refer to applicable laws as situations may warrant.

While it is impossible to cover all scenarios and laws that have been created over time, this paper contains discussion on wide-reaching points such as:

- Legally, can an Auctioneer bid on an item he or she is selling?
- Can the words used in a bid chant be legally binding?
- Can a seller amend "absolute" stipulations on the day of a sale?
- Does an auction contract serve as a substitute for a Last Will & Testament?
- How long should Auctioneers keep their records?

All of these topics, plus the others that will be discussed here, have the potential to affect every auction professional. Consider each topic's advice carefully, and note that by becoming an NAA member, you will have monthly access to Kurt Bachman's column, in addition to much more in the way of the type of information you need to enhance your auction career.

For now, however, read these 10 questions and their and their answers here, and keep this latest installment from the NAA iSeries handy in the future because it's about you!



Contents

Auctioneers who bid at their own sales invite ethical, legal concerns	4
Can sellers amend ‘absolute’ stipulation on day of sale?	6
Auctioneers considering “extraction programs” should brush up on CAN SPAM	8
Research, expertise essential for auctions of specialized collectibles	9
Auction contract not substitute for last will and testament	11
Real-estate high-bidder won’t sign the purchase agreement. Now what?	12
With records, longer is better.	13
Is a bid chant legally binding?	15
Can Auctioneers be lenders?	16
Does an unpaid judgment mean suspension?	17



REPUTATION

An auction professional's reputation may be the single most important asset he or she holds in a community. Avoid situations that may lead to damaging yours.

Auctioneers who bid at their own sales invite ethical, legal concerns

Question: Most of our real estate auctions, even those advertised as absolute, take place online. Is it lawful or even ethical for one of our agents to bid on his or her listing?

Answer: When an Auctioneer enters into auction contracts, he or she is bound by the terms of the contract and the law of agency. In an auction contract, Auctioneers become agents of the sellers and owe the sellers a fiduciary duty. The agent must exercise the utmost good faith, loyalty and honesty toward his or her principal. An Auctioneer has a duty to sell the property for the highest value and to follow the reasonable instructions of the principal.

An absolute auction (also known as auctions without reserve) is an “auction where the property is sold to the highest qualified bidder with no limiting conditions or amount. The seller may not bid personally or through an agent.” (National Auctioneers Association, Glossary of Auction Terms)

Since Auctioneers are agents of the sellers, Auctioneers are not permitted to bid on behalf of the seller at absolute auctions. Most states prohibit a seller, or an agent of the seller, from bidding at an absolute auction in an effort to artificially inflate the bid.

Check state law

The more difficult question is whether an Auctioneer can submit a bid at an absolute auction he or she is conducting if he or she has a bona fide intent to purchase the property (i.e., not attempting to run up the bid). Some states do permit an Auctioneer to bid on property at an absolute auction he or she is conducting.

For example, Ohio law permits an Auctioneer to “make a bona fide bid on the licensee’s own behalf at an absolute auction and at a reserve auction, provided that the licensee provides full disclosure that the licensee may make a bona fide bid to the seller and at the auction” (Ohio Rev. Code § 4707.023(C)). An Auctioneer should review the law of the state where the auction is to be held

to determine whether he or she can bid on the property before the auction.

On the ethical side, the issue becomes whether an Auctioneer should bid at an absolute auction in those situations? Distinguishing whether an Auctioneer is bidding on behalf of the seller or in his own individual capacity is difficult. While there may not be a legal prohibition against Auctioneers bidding in their own capacity, the practice exposes Auctioneers to potential claims by buyers and the seller. Auctioneer bidding also creates some conflict between the Auctioneer and seller. The seller wants to sell the property for the highest price possible. Buyers, on the other hand, are generally looking for good deals.

At an absolute auction, the Auctioneer steps into the shoes of the seller and makes an offer to sell the property to the highest bidder with no reserve or limiting conditions. The Auctioneer generally should not make an

offer to sell the property and also be the same person accepting the offer to purchase the property. Bidders could challenge the validity of the sale, allege fraud, and raise ethical questions about the sale. Furthermore, if the property sold for less than the seller believes it is worth, the seller could challenge the sale and allege that the Auctioneer breached his or her fiduciary duty.

Damage to reputation

In addition to the ethical and legal issues described above, Auctioneers should consider the potential consequences of attempt-

ing to bid on behalf of the seller at an absolute auction. Even if the practice results in more money for sellers initially, frequent bidders will learn or discover what is happening. Once bidders learn that it is an Auctioneer's practice to advertise a sale as absolute and then bid at the auction, it may have a negative effect on the Auctioneer's reputation. Afterward, bidders may elect not to attend the auction or will only submit limited bids. Ultimately, such conduct will have an effect on the Auctioneer's reputation and negate the effectiveness of advertising the property as being sold at an absolute auction. Consequently, the best practice is to avoid making bids on property at absolute auctions.

Changing the selling venue from a physical site sale to an Internet sale does not alter Auctioneers' duties to their clients. Rather, Auctioneers conducting Internet auctions are generally bound

by the same legal and ethical guidelines as they would be if the auctions were conducted at physical locations. The fiduciary duty of Auctioneers applies equally to

auctions conducted in the physical presence of the seller as well as on the Internet.

Auctioneers submitting their own bids at an absolute auction should exercise caution and be aware of the ethical issues. In my opinion, Auctioneers should avoid making bids on property they are selling at an absolute auction. Bidding at an absolute auction could be a breach of the fiduciary duty owed to a seller. At the very least, it raises some ethical concerns and invites costly litigation. ❖

“Once bidders learn that it is an Auctioneer’s practice to advertise a sale as absolute and then bid at the auction, it may have a negative effect on the Auctioneer’s reputation.”

Can sellers amend ‘absolute’ stipulation on day of sale?

Question: Is it OK to advertise an auction as absolute (without reserve) and then, at the seller’s request, change the terms to add a reserve so long as this is done before the Auctioneer calls for bids?

Answer: It depends upon where the auction will take place. In general, when an auction is advertised, the presumption is that it will be an auction with reserve. The National Auctioneers Association defines “auction with reserve” as “[a]n auction in which the seller or his agent reserves the right to accept or decline any and all bids. A minimum acceptable price may or may not be disclosed, and the seller reserves the right to accept or decline any bid within a specific time” (National Auctioneer Association, Glossary of Auctioneer Terms). The presumption may be altered if the advertising expressly states that the auction will be “without reserve,” an “absolute auction” or other similar language.

The NAA defines the term “absolute auction” as “[a]n auction where the property is sold to the highest qualified bidder with no limiting conditions or amount. The seller may not bid personally or through an agent” (Id).

In a reserve auction, the seller reserves various rights and maintains control over whether the goods will be sold. The seller generally retains the authority to reject bids or withdraw the goods at any time before the Auctioneer announces completion of the sale. In contrast, at an “absolute auction” the seller gives up control over whether to sell the property. In an absolute auction, no conforming bid can be refused, after calling for bids, regardless of how low the bid might be.

Part of the contract

Advertising an auction as “absolute” or “without reserve” means a great deal to the bidding public. At an absolute auction, bidders rely on the advertising and look for some bargains because they believe the seller does not have the right to refuse a bid or withdraw property after the Auctioneer calls for bids. The advertising

material establishes the expectation of the bidders and may be considered part of the auction contract. The material will apprise them of the terms, which will influence their decision to attend and how much they are willing to bid.

Regardless of bidders’ expectations, state law will determine sellers’ rights to withdraw their property from auctions or convert an absolute auction to an auction with reserve. The terms of an auction are contained in several documents that inform the seller as well as the bidders of the terms of the sale. First, the auction contract establishes the type of sale the seller has agreed to have the Auctioneer conduct. One provision of the auction contract should state whether the auction will be a reserve or absolute auction. If the property is to be sold with specific reserves, the seller should specify the reserve amounts. If the property is to be sold without reserve, the Auctioneer must advise the seller of the risk of the sale and make sure he or she understands what it means. Auctioneers should carefully explain these terms and concepts to the seller to avoid any misunderstanding.

Be consistent

Second, the advertising material should contain statements that are consistent with the terms of the auction contract. For instance, if the auction contract indicates that the auction will be without reserve, then the auction advertisements should also state that the auction will be without reserve. Third, state law also adds relevant terms. For example, this could include payment terms or trust requirements. In an auction without reserve, after the Auctioneer calls for bids on a lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time (Uniform Commercial Code § 2-328(3)).

Fourth, the bidder registration agreement should reinforce the terms of the auction contract and the advertisements for the auction. Auctioneers may want to consider inserting a clause that states something similar to the following: “Subject to state law, the seller reserves the right to alter the terms of sale, to withdraw his or her property, or convert the sale from an auction without reserve to an auction with reserve before the commencement

of the sale.” State law, though, will determine whether a seller has the right to withdraw his property or alter the terms of the auction on the day of sale.

Look at state law

In Tennessee, for instance, “even though real property has previously been advertised for sale at absolute auction, the owner ordinarily may withdraw the property from sale or change the terms to add a reserve before the Auctioneer calls for bids” (State of Tennessee, Office of the Attorney General, Opinion No. 05-182).

In Wisconsin, “a sale bill advertising an ‘absolute auction’ is not binding on the prospective seller. Rather, an advertisement that a person will liquidate his property at public auction is a mere declaration of

intention that in no way affects his legal relations” (Milwaukee Steve & Furnace Supply Co. v. Paex Heating & Cooling Inc., 418 N.W.2d 4

(1987)). In fact, in Wisconsin, “the seller may cancel the auction, modify the terms of the auction, or withdraw goods before they are actually put up for sale, regardless of whether the auction is advertised as a sale with or without reserve” (Id).

Although some states may permit a seller to change an absolute auction to an auction with reserve before the Auctioneer calls for bids, Auctioneers should be aware that this practice may not be permitted. While state law in some jurisdictions may allow sellers the flexibility to change an auction that is advertised as absolute to an auction with reserve before calling for bids, there are some risks to both sellers and Auctioneers for this type of practice.

Bait and switch techniques to sell property are not ethical and may result in claims for fraud or deceptive business practices. Some states require in the auction contract, if property is to be sold at an absolute auction, “a statement affirming that the seller of the real or personal property has a bona fide intention to transfer ownership of the property to the highest bidder” (See Ohio Rev. Code § 4707.20). A requirement for the “bona fide in-

tion” seems to indicate that Auctioneers cannot advertise the sale as absolute knowing or intending to later convert the auction to one with reserve on the day of the sale. There are also advertising provisions in several states that require truthful statements.

Abusive practice?

In addition, just because a state’s law permits such conduct does not mean that it is prudent to do so in the ordinary course of business. Instead of converting the sale from an absolute to a reserve auction, the safer route would generally be to cancel the auction or withdraw the property from the sale. Converting the sale from an absolute to a reserve auction will attract attention and may invite costly litigation. If individuals spend significant amounts of money on travel to attend an absolute auction only

to learn that it is being converted to a reserve auction on the date of the sale, the bidders may be frustrated and may consider taking legal action. In addition, if the practice of

converting a sale from an absolute auction to a reserve auction on the day of the sale became too common, state legislatures or licensing authorities may launch an investigation to determine whether this type of practice is abusive.

The general rule is that an auction is with reserve, unless the “goods are in explicit terms put up without reserve.” In order for an Auctioneer to conduct an absolute auction, the Auctioneer will need to take affirmative steps to promote and advertise an auction as “absolute” or “without reserve.” The Auctioneer should advise the seller of the potential risks and consequences of promoting, advertising and conducting an absolute auction. The risk to the seller is that their property could sell for less than he or she expects. Once an Auctioneer begins calling for bids, the seller loses the authority to withdraw her property (unless no bids are received in a reasonable time), cancel the sale, or where permitted by state law, convert it to a reserve auction. Auctioneers are encouraged to obtain advice, from a licensed attorney, on their state’s laws before attempting to convert an absolute auction into an auction with reserve. ❖

“At an absolute auction, bidders rely on the advertising and look for some bargains because they believe the seller does not have the right to refuse a bid . . .”

“By the time Congress enacted the CAN SPAM Act in 2003, over half of all email traffic was fraudulent or deceptive in one or more respect.”

Auctioneers considering “extraction programs” should brush up on CAN SPAM

Question: Is it legal to use software that extracts email addresses or contact information from Internet databases? (Example: www.emailgrabber.net)

Answer: The use of email extracting software is generally legal, but Auctioneers should check the laws of their jurisdictions. Email extracting software can be used for different purposes. Auctioneers should be aware that Congress has enacted legislation that deals with spam emails that may be generated from such software. In 2003, Congress enacted the Controlling the Assault of Non-Solicited Pornography and Marketing Act, referred to as the CAN SPAM Act. The Congressional findings of this Act state, “Many senders of bulk unsolicited commercial electronic mail use computer programs to gather large numbers of electronic mail addresses on an automated basis from Internet websites or online services where users must post their addresses in order to make full use of the website or service.” 15 U.S.C. § 7701(a)(10). Congress enacted the CAN SPAM Act, in order to regulate the use of commercial electronic mail (email).

More specifically, the CAN SPAM Act protects recipients of commercial emails. First, the Act places requirements on senders of commercial email. For instance, commercial emails cannot include misleading statements concerning the source or content of the email. Second, recipients have the right to refuse or decline additional commercial emails from senders.

Fines or jail time

One of the reasons Congress became involved in regulating commercial emails is the growth of commercial emails in the U.S. Congressional findings revealed that in 2001, about 7 percent of all unsolicited emails were fraudulent. By the time Congress enacted the CAN SPAM Act in 2003, over half of all email traffic was fraudulent or deceptive in one or more respect. 15 U.S.C. § 7701(a)(2). The Act states, “It is the sense of Congress that (1) Spam has become the method of choice for those who distribute pornography, perpetrate fraudulent schemes and introduce viruses, worms and Trojan horses into personal and business computer systems; and (2) the Department of Justice should use all existing law enforcement tools to investigate and prosecute

those who send bulk commercial email to facilitate the commission of Federal crimes.” 15 U.S.C. § 7703(c).

It should be noted that the Act does not specifically prohibit the use of software that extracts email addresses. However, the CAN SPAM Act of 2003 regards the activity of harvesting email addresses by using an email extraction program as an aggravated offense which may result in even more serious fines or jail time. If an Auctioneer is going to use this type of software to prepare and distribute bulk emails in order to promote an auction, then he or she should be familiar with the Act.

The Act requires emails to a protected computer, as defined in the Act, to include certain information. The Act states, “It is unlawful for any person to initiate the transmission of any commercial electronic mail message to a protected computer unless the message provides – (i) clear and conspicuous identification that the message is an advertisement or solicitation; (ii) clear and conspicuous notice of the opportunity ... to decline to receive further commercial electronic mail messages from the sender; and (iii) a valid physical postal address of the sender.” 15 U.S.C. § 7704(a)(5). These are not all of the requirements for commercial emails, but they provide a general description for some of the requirements.

Not illegal

The Federal Trade Commission is the administrative agency responsible for enforcing the Act. The Act defines the term “commercial electronic mail message” to mean “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.” 15 U.S.C. § 7702(2). While the email extraction software is not illegal, once an Auctioneer begins developing bulk emails to send as advertisements, these emails may be subject to CAN SPAM. Auctioneers should comply with the specific requirements of the Act or they may have federal criminal charges prosecuted against them by the Department of Justice. Auctioneers who are interested in developing an email marketing strategy should think about consulting with an attorney who is familiar with the CAN SPAM Act. ❖



Because of the subtleties and nuances involved within specific niche markets, it is vital that auction professionals do their research when taking on the sale of specialized collectibles.

Research, expertise is essential for auctions of specialized collectibles

Question: Several clients have expressed an interest in selling their collections of baseball cards, miniatures and other memorabilia. Are there any specific laws that regulate the sale of collectible merchandise?

Answer: Generally, no. Auctions of collectible items such as baseball cards, stamps, and other things are regulated by state law. So for these auctions they are no different from the sale of other items of personal property. Auctioneers who engage in the sale of collectible items are subject to the same licensure laws, generally the same standards of care and the same duties as though they were conducting an auction of other items.

If the collectibles are very specialized, the Auctioneer should be familiar with the market before agreeing to handle the sale. By

agreeing to sell special items at auction, Auctioneers could in some instances be deemed to have accepted a higher standard of care. This is particularly true when an Auctioneer holds himself or herself out as an expert.

There may be issues regarding maintaining and storing the collectibles until the day of the sale. There can also be issues regarding the temperature or humidity where the items are held. In addition, the Auctioneer should carefully consider what type of marketing should be done to attract the best bids and be aware of any obligations relating to advertising in other jurisdictions.

Specific laws

There are a few types of collectibles, though, that do have specific laws that regulate sales. For example, many people collect liquor decanters. While some decanters may contain alcohol, the value

is generally in the decanter and not the alcohol remaining inside. When an Auctioneer sells decanters with an intact seal, he or she is selling the liquor and decanter. The liquor cannot be ignored.

Therefore, an Auctioneer should make sure that he or she is complying with all applicable federal, state and local laws relating to the sale of alcohol.

State and federal law may require that an Auctioneer be licensed, or have a permit, to sell alcohol or liquor. In addition, an Auctioneer selling decanters or bottles of wine would need to have a system in place to verify the age of each purchaser. Selling alcohol to minors is illegal and can potentially expose Auctioneers to criminal liability.

Firearms

If an Auctioneer is asked to sell a collection of firearms, he or she should consult with an attorney licensed in the state where the sale will take place. The sale and ownership of firearms is regulated by federal and state law.

Before agreeing to conduct the auction, the Auctioneer should consider whether he or she will need to obtain a federal firearms dealer license. There may also be complicated issues regarding background checks, the transfer of the firearms, transportation and antique firearms. Therefore, it is important for an Auctioneer considering the sale of firearms to act cautiously and obtain legal advice on how to conduct the sale to avoid civil and criminal liability.

Taxidermy

Many people collect taxidermy or parts of dead animals. The

sale of certain species, even their remains, is regulated by federal law such as the Endangered Species Act. Possession and sale of certain animals, even dead animals, can expose sellers and Auctioneers to certain criminal liability. The list of species contained in the Endangered Species Act is relatively exhaustive, so Auctioneers will want to confer with their state department

of natural resources and the U.S. Fish and Wildlife Service.

These two agencies can assist the Auctioneer in identifying the species and complying with the complex regulatory laws for the sale of these types of collections.

“If the collectibles are very specialized, the Auctioneer should be familiar with the market before agreeing to handle the sale.”

The three examples above are collectibles that are commonly sold at auction with additional regulation and/or possible licensing requirements. There are other items that may have additional regulation or licensing, as well. The sale of baseball cards and several other collectibles, though, generally do not require additional licensing and are not subject to additional regulation. The sales of these types of items are generally regulated by state law in the same manner as other personal property auctions.

Contract considerations

Finally, there are a few specific issues to think about when you are considering selling collectibles. First, the auction contract should be clear and state whether the whole collection is being sold together or sold in pieces. Second, watch for fakes. Several people will try to sell fakes as originals. Third, become familiar with the market. When dealing with collectibles, some items can be very valuable. If an Auctioneer does not recognize the value of an item and the reserve is set too low, he or she could be sued for breach of fiduciary duty. ❖

“In regards to whether a personal service contract survives the death of an individual, it depends upon the applicable state law, which may vary from state to state.”

Auction contract not substitute for last will and testament

Question: I recently met with a man who has terminal cancer. He wants us to come, after he passes, and take some of his personal property back to auction and then send the proceeds to a friend. Since he is doing hospice care at home, he wants to keep these items around until the end. Can a personal services agreement succeed someone's death, and won't this affect probate?

Answer: Auctioneers generally should avoid entering into auction contracts in this type of situation. An auction contract cannot be a substitute for someone's last will and testament. If the individual wants his personal property sold at auction after his death and the proceeds given to a friend, those terms can be included in his last will and testament or a revocable living trust.

Unfortunately, the question does not provide us with some important information. For example, does the individual have a will? If so, would these terms be consistent with it? Is the individual receiving Medicaid? Is he competent to make decisions at this time? Are there creditors who are owed money or have liens on the personal property? What is the estimated value of the personal property? Is the individual married? If there is a spouse, she may be entitled to the property or the proceeds from the sale. These questions are necessary to adequately evaluate the situation.

Probate is the process of proving the validity of someone's will and administering a decedent's estate. The probate procedure varies from state to state. The process is complex and designed to provide notice to creditors and other interested parties. An individual's probate estate generally includes (with some important exceptions) all assets and liabilities of a decedent, including real property, personal property and any other property.

Probate process

Auctioneers can certainly be involved in the probate process. Estate auctions, for example, are fairly common and an effective tool for liquidating property. The executor or executrix, the person appointed to carry out the directions and requests in the will,

would be the person to enter into the auction contract.

In some jurisdictions, including Indiana, there are supervised and unsupervised estates. The distinction between a supervised and unsupervised estate is exactly what the names suggest. A supervised estate is under the supervision of the court while the court does not actively supervise an unsupervised estate. Before an executor in a supervised estate can take certain actions, he must obtain approval from the court.

In a supervised estate, the executor must generally obtain approval from the court before entering into an auction contract to sell real or personal property. Before the court gives approval, the court requires all of the parties to be notified, and they are given an opportunity to object and be heard. After considering the issue, including any objections, the court may allow the property to be sold at auction.

Recent ruling

In regards to whether a personal service contract survives the death of an individual, it depends upon the applicable state law, which may vary from state to state. A recent decision of the Court of Appeals for the First District of Texas explained the following: “Under the principles of contract law, contractual obligations generally survive the death of a party and bind his estate if the contract is capable of being performed by the estate representative. A personal services contract, in contrast, is ‘terminated by death.’ A personal services contract is one that ‘depends on the existence of a particular person, ... on the skill or character of the other party, or ... on a personal confidence between the parties.’” See *Bennett v. Spectrum Construction Inc.*, 2012 WL 5877948 at *3 (Texas Ct. App., Nov. 21, 2012) (citations omitted).

An auction contract cannot be a substitute for an individual's last will and testament. There are several important legal issues to consider in this situation and before an Auctioneer enters into this type of contract, it is important to gather all of the facts and obtain competent legal advice. ❖

Real-estate high-bidder won't sign the purchase agreement. Now what?

Question: In real estate auctions, can the high bidder be held to the bid when he or she later refuses to sign the purchase agreement or close the sale? If so, what remedies are available?

Answer: This question raises a few interesting issues. At real estate auctions, whether the high bidder can be held liable for the breach of contract will depend upon state law and the specific facts of the case. The first issue to consider is the statute of frauds. The statute of frauds is a legal doctrine that requires some transactions to be supported by a written instrument signed by the parties to a transaction. The purpose of the statute of frauds is to protect parties to certain contracts; the goal is to make sure each party is aware of specific terms in a transaction. This doctrine has been adopted in nearly every jurisdiction in the United States.

Applying the doctrine can be complex, especially when selling real estate at auction. The statute of frauds generally requires: (1) a written memorandum (2) that embodies the terms of the contract, (3) an adequate description of the real estate, and (4) the signature of the party who is now disputing the contract. The above requirements are intended to protect the buyer and seller from deceitful conduct by either party.

Some states have concluded that if the statute of frauds is asserted to further less than honest and fair dealings, then a court may closely examine the transaction. In these jurisdictions, attention is given to the circumstances surrounding the transaction in order to ensure that the statute of frauds is not being asserted to perpetuate fraud rather than to prevent fraud. This approach places an emphasis on the intent of the buyer.

By examining the surrounding circumstances, a court can make logical inferences with respect to whether the buyer acted with a fraudulent intent. Other states have held that even when a bidder submits a bid with the intent of never purchasing the property, as long as there is no written contract satisfying the statute of frauds, it will still be a complete defense to the claim. In some jurisdictions, writings other than the purchase agreement may satisfy the statute of frauds. These writings could be, for example, the registration agreement or an acknowledgment of the highest

bid. The law in each jurisdiction with respect to the statute of frauds and the specific facts of the case will determine whether the seller would be able to pursue the bidder for damages.

After passing the statute of frauds hurdle, the seller may be able to assert the claim against the highest bidder. Once the hammer falls and the Auctioneer announces the completion of the sale, there is a binding contract between the buyer and seller. The terms and conditions of the contract include any terms the buyer agreed to in writing when he or she registered to bid and the terms announced prior to the auction. If the bidder refuses to sign the purchase agreement after the sale, he or she can be sued for breach of contract.

The question then becomes what remedies are available to the seller for the high-bidder's breach of contract. Generally, the courts will not force a buyer to complete the purchase of the property. Specific performance is an equitable remedy that is generally used by a buyer when the seller breaches the contract and refuses to convey the property to him or her. Instead, when the buyer breaches the court will most likely award monetary damages for the delay of the sale, costs incurred and other damages. The damages in this type of situation may be difficult to measure, so Auctioneers should consider including liquidated damages clauses in their bidder's registration agreement. In the residential real estate purchase agreement, liquidated damage clauses are fairly common.

The clause can be drafted so that the damages will be a specific percent of the purchase price or the deposit made at registration. The deposit made at registration is not automatically forfeited. It must be clearly set forth in the terms and conditions of the contract. The amount set for liquidated damages must be a reasonable amount. There should be a connection between the amount of actual damages anticipated and the liquidated damages. If the sum sought by a liquidated damages clause is grossly disproportionate to the loss that may result from a breach of contract, the Court will treat the sum as an unenforceable penalty rather than as liquidated damages. In other words, the amount specified as damages in a liquidated damages clause should be close to the anticipated or actual amount of damages. ❖



Though space isn't quite the concern it was once thanks to the advent of digital storage, it is still worth the effort to keep business records for as long as you're able in case they are needed in the future.

With records, longer is better

Question: Over the past decade, I have accumulated documents, including contracts, advertisements and tax returns for my auction company. How long do I need to retain those records?

Answer: This question addresses a common concern most businesses have – what to do with old business records. For Auctioneers, as with most businesses, there is not a simple one size fits all answer. Each state may require documents to be kept for different time periods. Also, when a business has a pension plan or files a federal tax return, the business must maintain records according to federal law. Auctioneers should think about establishing document retention policies to set time-periods for how long specific records must be kept.

While there are statutory requirements regarding Auctioneers retention of records, other considerations may also influence document retention. Issues such as how long someone may be able to

wait and file suit regarding an auction should influence how long the documents are kept. An individual, in some instances, may be able to sue after the required retention period. Consequently, Auctioneers should be aware when such claims are barred and adopt a retention policy consistent with the potential claim periods. As an example, we will explore Indiana law regarding its statutory document retention requirements as well as the period in which an action may be brought against Auctioneers seeking damages.

Indiana state law requires Auctioneers to enter into written auction contracts and to maintain a copy of everyone for period of two (2) years from the date of the auction. Ind. Code § 25-6.1-6-4. Auctioneers must know that the two (2) year period commences on the date the auction and not the date the auction contract was signed by the Auctioneer and seller. So, if the seller signed the contract two months prior to the auction, the Auctioneer would have to keep the document at least twenty six (26) months.

In addition to maintaining a copy of every written contract, Auctioneers must also keep and main for a period of at least two years “complete and correct records and accounts pertaining to that [Auctioneer’s] licensed activity, including the name and address of each owner or consignor of all goods and real estate involved in such activities, a description of such goods and real estate, the terms and conditions of the acceptance and sale of such goods and real estate, and accounts of all monies received and paid out, whether on the [Auctioneer’s] own behalf or as an agent, as a result of such activities.” Ind. Code § 25-6.1-6-3.

The Indiana Auctioneer Commission regulation states that the records and accounts, includes the (1) name, license number, and address of the auction company or house; (2) date of sale; and (3) location of sale.

A summary of receipts and disbursements must be given to the seller in every transaction and maintained. Otherwise, the statutory language indicates the type of documents Auctioneers should keep and maintain. For example, the statute does not expressly include maintaining copies of advertisements. But,, advertisements may be considered part of the complete records concerning the terms and conditions of the acceptance and sale. Consider a bidder challenging the use of a buyer’s premium or someone asserting that an auction was without reserve. By maintaining copies of the advertisements associated with each sale, including the registration agreement, Auctioneers will be in a better position set the record straight.

While the above statutory requirements for Auctioneers to maintain written contracts and complete and accurate records, there may be a better practice. There are different time-periods for filing claims depending upon the type of claim asserted. In Indiana, the statutory time period for asserting a negligence claim, with a few exceptions, is two years from the date of the injury. But, there is a six year time period for asserting fraud claims (Ind. Code §

34-11-2-7) and the seller could potentially assert claims based on the written auction contract 10 years after the auction (Ind. Code § 34-11-2-11). So, Auctioneers may want to consider maintaining copies of their written contracts and records for a period longer than the statutory requirement of two (2) years and possibly even ten (10) years.

With respect to tax returns, federal law generally provides that the IRS may audit a return within three years of the date the return. But, the time-period for conducting an audit extends to six years under some circumstances, generally when the taxpayer omits 25 percent or more of income. In addition, there is no time limit if you never file a return and no time limit on fraud. Some states also require income tax returns to be filed and may have a different time period for taxpayers to retain state returns. Federal law will also govern the retention period for other documents, such as pension records, employment records and/or policies, federal permits, ADA policies and other documents.

Retaining records is important to comply with the applicable statutory requirements and to be able to defend against any claims. Whenever an Auctioneer learns about a claim, he or she is obligated to hold onto the documents and preserve them for the dispute—this obligation generally includes emails and other electronically stored information. The documents or electronically stored information must be maintained until the claim has been fully resolved.

In conclusion, Auctioneers should carefully consider how long to hold onto specific documents and adopt a document retention policy. There is not a one size fits all approach for retaining documents. There is a great variety of documents that Auctioneers create or receive. Auctioneers should seek the advice of a licensed attorney to create a good document retention policy for their business. ❖

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Is a bid chant legally binding?

Question: Do the words used in an Auctioneer's chant matter?

Answer: Possibly, it depends on the words used and the context. The words used in the chant could mean nothing, could be considered puffery, or in some instances could create an express warranty. Before an Auctioneer begins an auction, he or she should briefly consider the words and phrase that will be used in the chant.

Applying the doctrine can be complex, especially when selling. An Auctioneer's chant is made up of several components. First, there is the sound and rhythm of the chant. A chant should have some musical qualities to it. Second, there are the actual words or phrases used. The words and phrases used are generally known as "filler words." Third, there are the numbers which are the most important part of the chant. The numbers indicate what the current bid is and what the Auctioneer wants. The chant has to sound good, be fluid, and entertaining to keep the bidders' attention.

Some filler words that are commonly used include "dollar bid," "now," "will you give me," or "able to bid." A simple chant, for example, is: "One dollar bid, now two, now two, will you give me two? Two dollar bid, now three, now three, will you give me three?" In this example, the words just connect the numbers and are not intended to have any literal meaning. In most chants, filler words are not intended by the Auctioneer to have specific or literal meaning. The words and phrases may be used without any special thought even being given to them by the Auctioneer. But, bidders may not know that the words of the chant should not be taken literally.

As long as the chant is more general and does not specifically relate to the items being sold, it is unlikely an express warranty would be created. The more specific the chant gets, the more it begins to look like an express warranty.

Under section 2-313 of the Uniform Commercial Code, express warranties are created by: "(a) any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise[; or] (b) any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall

conform to the description." To create an express warranty, it is not necessary for the seller or Auctioneer to "use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." U.C.C. § 2-313(2).

Puffing is sales talk and general statements of unverifiable opinion, and not representation of fact at all. The classic example of puffing is the car salesman who says: "Sporty car at a great value price," "sporty car," "great value," "great deal," or other similar phrases. In other words, puffery consists of "empty superlatives on which no reasonable person would rely" or "meaningless sale patter." *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862 (7th Cir. 1999). Learned Hand, a well-known federal judge, said puffery is the "kind[] of talk which no sensible man takes seriously, and if he does he suffers from his credulity." *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853 (2nd Cir. 1918).

Consider an estate auction where some items of jewelry are being sold. When a sapphire ring is being sold the Auctioneer states that the ring is "big bright blue and best for you." Does that create any type of warranty? Or is it merely puffing? It depends on whether the statement is of a verifiable fact. Whether there is a representation of fact generally distinguishes an actionable warranty from non-actionable puffing.

When a diamond ring is being sold and the Auctioneer adds another tongue-twister about the color, clarity, cut and carat, depending on exactly what is said, he or she may have created an express warranty. For example, calling a diesel truck "road ready" is an express affirmation of fact exposing the seller to liability when the engine block cracks two weeks later and renders the truck inoperable. *Wiseman v. Wolfe's Terre Haute Auto Auction, Inc.*, 459 N.E.2d 736 (Ind. Ct. App. 1984). Statements of opinion, not made as a representation of fact, are simply puffing which does not create an express warranty.

Auctioneers should carefully consider the words and phrases used in the chant. The words and phrases are important for the sound and rhythm of it, but are also important because bidders are listening, and the words used could create an express warranty. ❖

"The more specific the chant gets, the more it begins to look like an express warranty."

Can Auctioneers be lenders?

Question: The majority of auctions that I attend and conduct require payment on the date of sale or shortly thereafter. Is there any way that I, as the Auctioneer, can extend credit to bidders to assist in financing their purchase, and shortening the time for me to receive payment?

Answer: Yes, but there are risks associated with Auctioneers becoming lenders. Consequently, Auctioneers need to be aware that extending credit is possible, but it can also prove to be costly and time consuming.

First, the extension of credit is highly regulated requiring multiple disclosures and notices to prospective borrowers. This is particularly true for lending to individual consumers. Commercial entities are generally considered more sophisticated and some of the disclosure requirements do not apply. Offering credit to bidders may require extra personnel and equipment to ensure compliance and to evaluate the credit worthiness of bidders who seek credit.

Bidders seeking credit will be required to complete an application, sign additional lending documents and, in some states, additional licensure may be necessary for the Auctioneer to offer credit. Failure to comply with various state statutes (such as the Uniform Consumer Credit Code) or federal acts (such as the Truth In Lending Act) may result in Auctioneers being assessed fines and even exposing their Auctioneers' license to risk of suspension. Obviously, the more egregious the violation, the greater the fines and other penalties regulators may impose against Auctioneers.

Second, Auctioneers who extend credit are exposed to the risk of non-payment and bad debt. This is a reality that Auctioneers must consider before extending credit to bidders. A bad debt can take months to collect and occupy a great deal of an Auctioneer's time and resources. Auctioneers can generally use their time and resources generating new business opportunities instead of attempting to

collect a debt. In addition, the extension of credit may reduce an Auctioneer's profitability. It depends on the number of individuals who fail to pay the debt and the credit standards used for loaning the money.

Even if Auctioneers require security for repayment, such as security agreements or personal guarantees, these documents do not guarantee repayment of the debt. Rather, these documents provide Auctioneers who extend credit with additional options or remedies to collect. Issues such as insolvency, death and bankruptcy may impair an Auctioneer's ability to collect the amount they loaned to a bidder. These risks are outside of Auctioneers' control. In other words, an Auctioneer may comply with every lending law and the bidder may have genuinely intended to repay the debt, but simply does not have the resources or income necessary to do so.

Third, there may be instances when a bidder is denied credit. While credit may properly be denied for a variety of reasons, there is also potential for bad public relations when this happens to a bidder. A bidder who is denied credit can be disruptive at an auction or cause bad publicity. Denying credit to bidders who do not qualify can be more costly to an Auctioneer's reputation and business than the benefits of extending credit to bidders.

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Complying with state and federal law, the risk of bad debts, and the potential for bad publicity are issues an Auctioneer should consider before extending credit to bidders. The cost of compliance and personnel to ensure compliance can erode profit margins. Add to that the risk of bad debts and the costs of collection. Finally, the loss or reputation can further impact an Auctioneers business and success. Should an Auctioneer decide that extending credit is a good fit with their business practice, they should see a licensed attorney to create compliance and record keeping programs and collection program. There is no right or wrong answer to whether Auctioneers should extend credit. The proper focus is whether the risk is worth the potential reward. ❖

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If an auction professional has an unpaid judgment, it comes down to state regulations whether that person is permitted to continue conducting auctions.

Does an unpaid judgment mean suspension?

Question: I recently learned that an Auctioneer, one of my colleagues, has an outstanding judgment against him. I do not know the facts surrounding the judgment, but I am fairly certain it remains unpaid. Does this unpaid judgment disqualify my colleague from the Auctioneer profession? Can he continue conducting auctions while he has an unpaid judgment?

Answer: It depends on where the individual is licensed and the applicable state and local laws. While most states have enacted Auctioneer licensing laws, some states still have not adopted them. Each state, while there may be similarities, has its own laws. Some states' licensing laws are not as extensive as others. Whether an Auctioneer is permitted to continue conducting auctions will be a fact sensitive question in those states that regulate Auctioneers.

Florida, Indiana, and North Carolina, for example, are states that suspend an Auctioneer's license when the Auctioneer Recovery Fund makes payment to a judgment creditor. In Indiana, the Auctioneer Recovery Fund is set up to pay a third party who obtained a judgment (judgment creditor) against licensed Auctioneers that failed to meet their obligations as licensed Auction-

eers. The Fund is intended to pay claims where the judgment creditor suffered an actual cash loss due to the actions of licensed Auctioneers.

However, under Indiana law, the judgment creditor must exhaust their efforts to collect directly from the Auctioneer and then file a verified application with the Indiana Auctioneer Commission seeking an order for payment of the unsatisfied judgment from the Auctioneer Recovery Fund. An Auctioneer who had a claim paid by the Auctioneer Recovery Fund will have his or her license suspended until he or she repays the Auctioneer Recovery Fund with interest. The unpaid judgment does not cause the Commission to suspend an Auctioneer's license. Rather, the triggering event for an Auctioneer to have his or her license suspended is when the judgment creditor is paid from the Auctioneer Recovery Fund.

In Alabama, however, when a judgment is entered for a person or business injured by the gross negligence, incompetency, fraud, dishonesty or misconduct of a licensed Auctioneer while conducting auction business, then courts in Alabama have the authority to revoke the Auctioneer's license. In that instance, it is

the court revoking the license and not a state licensing board or commission. The license will not be reissued to the Auctioneer unless “upon unanimous vote of all members of the board in favor of such reissuance and only then after the lapse of a period of 90 days from the date of such revocation.” In certain circumstances, courts in Alabama have broad authority with respect to regulating Auctioneers. In other states, the courts and the state licensing authority may not have the authority to suspend an Auctioneer’s license due to an unpaid judgment against the Auctioneer.

Auctioneers who are members of the National Auctioneer Association are subject to the NAA’s Code of Ethics. Specifically, the NAA Code of Ethics provides, “During the period that a Member owes an unpaid and unsatisfied civil, criminal or regulatory cost, damage, fine, judgment, penalty, sanction, or other amount

“Auctioneers should avoid litigation, to the extent possible, and appeal or pay valid judgments entered against them.”

which was awarded, entered, levied, or ordered against the Member by an agency, authority, board, bureau, commission, court, department, or other arm of government shall result in the Member being in violation of the Code of Ethics and subject to discipline determined by the Board of Directors.” (NAA Code of Ethics, Article 13). The NAA does not have any legal authority to suspend an Auctioneer’s license. The NAA can, however, revoke an Auctioneer’s membership or restrict their membership to the NAA.

Whether your colleague’s license will be suspended will depend upon where he or she is licensed and the applicable state and local laws. Auctioneers should avoid litigation, to the extent possible, and appeal or pay valid judgments entered against them. It will protect an Auctioneer’s image and avoid licensing issues. ❖



The legal topics discussed in this paper were written by Kurt Bachman and have appeared in past issues of *Auctioneer*, the official magazine of the National Auctioneers Association. Bachman is an attorney and licensed Auctioneer from LaGrange, Indiana. He can be reached at (260) 463-4949 or krbachman@beersmallers.com.

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