



State of West Virginia
Office of the Attorney General

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Attorney General

March 2, 2015

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The Honorable Walt Helmick
Commissioner
West Virginia Department of Agriculture
1900 Kanawha Blvd. E.
Charleston, WV 25305

Dear Commissioner Helmick:

You have asked for an Opinion of the Attorney General regarding whether a West Virginia auctioneer license is required under certain specific circumstances. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General “shall give written opinions and advice upon questions of law . . . whenever required to do so, in writing, by . . . the commissioner of agriculture.” To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Attorney General’s Office.

In your letter, you ask whether an auctioneer license is required under the law in two circumstances. The first situation is when an individual or business (in- or out-of-state) contracts with a West Virginia resident to sell that resident’s real or personal property in an online auction. You explain that this “most frequently comes up when a person contracts with an out-of-state business to sell the entire contents of an estate located in” West Virginia. These online auctions are “akin to a silent auction—with bids being taken over the internet and the highest responsible bidder winning.” The company “doing the listing, price setting[,] and selling is not the individual/entity that owns the property.” The second situation is when the owner of a rented storage unit sells at an auction the contents of that storage unit to recoup unpaid rent. These individuals “frequently advertise the sale as an auction, call out bids using a typical auctioneer’s cadence (ie: describe the item, start/set a bid price, work the bid price up, and decide when to end the bidding) and recoup more than the unpaid rent.”

Your letter thus raises two legal questions, each addressed in turn below:

(1) Is a West Virginia auctioneer license required to sell the real and personal property of a West Virginia estate through an online auction? (2) Is a West Virginia auctioneer’s license required to sell the contents of a storage unit at a live auction to recoup unpaid rent owed on the unit?

Question One: Is a West Virginia Auctioneer License Required To Sell the Real and Personal Property of a West Virginia Estate Through an Online Auction?

The West Virginia Code sets forth specific requirements for conducting an “auction” as “an auctioneer” “in this State.” Specifically, Section 19-2C-2 prohibits a person from conducting “an auction as an auctioneer in this State” without a license issued by the West Virginia Department of Agriculture. The statute defines “auctioneer” as “a person who sells goods or real estate at public auction for another on commission or for other compensation.” W. Va. Code § 19-2C-1(a). In turn, a “public auction” is defined as “any public sale of real or personal property when offers or bids are made by prospective purchasers and the property sold to the highest bidder.” *Id.* § 19-2C-1(e). To our knowledge, the West Virginia Supreme Court of Appeals has never interpreted these provisions of law.

We conclude that the best reading of the law does not require an individual to obtain an auctioneer’s license to sell the property, real or personal, of a West Virginia estate through an online auction. Various parts of the law suggest that the Legislature intended for the licensing requirement to apply to auctions that physically take place in West Virginia. *See Smith v. State Workmen’s Comp. Comm’r*, 159 W. Va. 108, 115, 219 S.E.2d 361, 365 (1975) (“In ascertaining the legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation”). Most important, a license is only required for persons conducting an auction “in this State.” W. Va. Code § 19-2C-2. In addition, the law mandates that an auctioneer “[p]romptly *produce for inspection* his or her license at all sales conducted by or participated in by the licensee when requested to do so by any person.” *Id.* § 19-2C-5 (emphasis added). This “inspection” requirement suggests that the Legislature had in-person auctions in mind; after all, an auctioneer could not permit his *actual* license to be promptly inspected if he were conducting an auction online. Finally, the law’s advertising restrictions mandate that any “advertis[ement] [of] an auction sale by a licensed auctioneer” include “prominently” the “principal auctioneer or auctioneers who *physically conduct* the sale.” *Id.* § 19-2C-10 (emphasis added). Taken together with the other provisions, this requirement is further evidence that the Legislature contemplated that live auctions would be subject to the licensing requirement.

This reading of the statute is supported by the fact that the Legislature has, in other areas of law, expressly provided for the inclusion of Internet or website-based businesses that interact with West Virginia consumers, while it has not done so in this area of the law. For instance, a company may not engage in currency exchange “*in this state*” without obtaining a license. W. Va. Code § 32A-2-2 (emphasis added). The statute then goes on to clarify that “a person is considered to be engaging in those businesses *in this state* if he or she makes available, from a location inside or outside this state, an internet website West Virginia citizens may access in order to enter into those transactions by electronic means.” *Id.* (emphasis added). Similarly, in the context of the State’s use tax, the phrase “[r]etailer engaging in business *in this state*” is defined specifically to include “the service of operating a website or Internet-based business from a location within the state.” W. Va. Code § 11-15A-1(8) (emphasis added). Here, in

contrast, auctioneering licenses are required for auctions “in this State,” and the Legislature has not made specific reference to online auctions, even though it has amended the relevant statutory provisions as recently as last year. *See* 2014 West Virginia Laws Ch. 16 (H.B. 4410) (removing “other security agreements” from the exception for property sold pursuant to a deed of trust, defining “escrow account,” updating requirements for license renewals, and authorizing rulemaking by the Commissioner of the Department of Agriculture).

In addition, other state attorneys general have determined not to apply similar auctioneering license statutes in certain online contexts. Most recently, the Minnesota Attorney General has concluded that Minnesota law—which requires a license “to conduct the business of an auctioneer in the state”—did not mandate “the issuance of an auctioneer’s license by a county for the sale of property physically located within that county through an online auction website such as eBay.” Minn. Op. Att’y Gen. 16-B, 2014 WL 5343573, at *1 (Oct. 17, 2014); Minn. Stat. Ann. § 330.01(a). The North Dakota Attorney General has opined that “sales similar to those conducted by eBay are not auctions within the contemplation” of North Dakota’s auctioneering statute, which 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.” N.D. Op. Att’y Gen. 2005-L-40, 2005 WL 3015979, at *1 (Nov. 4, 2005); N.D. Cent. Code Ann. § 51-05.1-04. The Tennessee Attorney General has determined that “Internet drop-off stores, which assist individuals in selling items through Internet sites such as eBay, do not fit the statutory definition of ‘auction’ or ‘auctioneer.’” Tenn. Op. Att’y Gen. 06-053, 2006 WL 1197446, at *1 (Mar. 27, 2006). While these opinions each involved differently worded statutes and different questions than that specifically presented here, they reflect a general approach to reading auctioneering license statutes “carefully” so as to “leave the decision of whether or not to regulate Internet auction-type sites to the considered judgment of the [state legislatures].” *Id.*, 2006 WL 1197446, at *4.

Finally, this reading of the statute is supported by the fundamental legal principle that the law must give fair notice as to what conduct is prohibited, especially where criminal sanctions may be imposed, as is the case here. *See* W. Va. Code § 19-2C-8(a). This principle vindicates two components of due process: (1) fair notice so that prohibited conduct can be avoided; and (2) prevention of arbitrary law enforcement. *See State ex rel. Whitman v. Fox*, 1160 W. Va. 633, 638-39, 236 S.E.2d 565, 569-70 (1977). A corollary to this legal principle is the rule of lenity, which provides “that in construing an ambiguous criminal statute,” a court will strictly construe the statute in favor of the defendant. *State v. Stone*, 229 W. Va. 271, 277, 728 S.E.2d 155, 161 (2012) (quotations and alteration omitted); *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 263, 465 S.E.2d 257, 263 (1995). Given the absence of a clear indication that the Legislature intended for this licensing regime and its criminal sanctions to apply to the conduct in question, we believe these longstanding principles further require the statutes to be interpreted to exclude such conduct.

We recognize that the statutory provisions could plausibly be construed to require an individual to obtain an auctioneer’s license to sell the property of a West Virginia Estate through an online auction. But for the many reasons above, we believe that the better reading of the law

is not to require a license in those circumstances and, in general, to leave to the Legislature the option to expressly articulate whether and in what circumstances a license would be required for conducting an online auction. We note that a number of States have chosen to enact provisions expressly addressing the issue of auctioneering licenses for online auctions. *See, e.g.*, N.D. Cent. Code Ann. § 51-05.1-04(5) (“A person conducting, or employed by a person conducting, an internet auction is not an auctioneer or clerk within the meaning of this chapter.”); 225 Ill. Comp. Stat. Ann. 407/10-27(b) (requiring registration for online auctions when the entity providing the listing service, the property to be sold, the prospective seller, or the prospective buyer is located in Illinois); 63 Pa. Cons. Stat. Ann. § 734.2 (“The term ‘auction’ or ‘sale at auction’ excludes any sale conducted through an online Internet bidding platform.”).

Question Two: Is a West Virginia Auctioneer’s License Required To Sell the Contents of a Storage Unit at a Live Auction To Recoup Unpaid Rent Owed on the Unit?

We conclude that a West Virginia auctioneer’s license is required for a storage company to sell at auction in West Virginia the contents of a storage facility, unless the storage company becomes the owner of the property to be sold or obtains a judicial order providing for the sale. As noted above, an auctioneer’s license is required to conduct “in this State” “for another” for compensation “any public sale of real or personal property when offers or bids are made by prospective purchasers and the property sold to the highest bidder.” W. Va. Code § 19-2C-1; *id.* § 19-2C-2. There are two exceptions that might apply here: auctioneers do not include (1) “[p]ersons conducting sales at auctions conducted by or under the direction of any public authority or pursuant to any judicial order or direction,” and (2) “[t]he owner of any real or personal property when personally sold at auction by the owner and the owner has not personally conducted an auction within the previous twelve-month period.” *Id.* at § 19-2C-1(a).

The analysis is necessarily case-by-case. As you have described it, these sales do appear to qualify as auctions, since they are conducted in-person and the individuals “frequently advertise the sale as an auction [and] call out bids using a typical auctioneer’s cadence (ie: describe the item, start/set a bid price, work the bid price up, and decide when to end the bidding).” Moreover, the owner of the storage unit does not own the property being sold, but rather is selling it on behalf of the property owner to satisfy the property owner’s debt, and is retaining the proceeds of the sale as compensation.

In some cases, however, one of the two exceptions to licensing may apply. Under West Virginia law, the owner of a storage unit has a lien on the personal property in the storage unit and may retain possession of the contents as security for the debt owed. W. Va. Code § 38-11-3. How this lien is satisfied will vary from case to case and may affect the need for an auctioneer’s license. For example, the parties may expressly provide in the rental agreement that ownership of the property will automatically transfer under certain conditions, *see id.* § 38-11-14, after which time the owner of the storage unit (and now owner of the property) could sell the property at auction under the exception permitting a property owner a limited right to auction his or her own property. Absent a specific contractual provision, however, the owner must follow the procedures outlined in West Virginia Code § 38-11-14 for enforcement of the lien, including

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notifying the renter, demanding payment on the claim, and bringing suit on the debt. If the storage facility obtains a favorable judgment, it might then sell the property at auction without a license either as the owner of the property or pursuant to a judicial order.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick Morrissey". The signature is written in a cursive, somewhat stylized font.

Patrick Morrissey
Attorney General

Elbert Lin
Solicitor General