

STUDY GUIDE FOR AUCTIONEER EXAMINATION

TABLE OF CONTENTS

REFERENCE 1

COMPTROLLER OF PUBLIC ACCOUNTS

Section 3.311. Auctioneers; Letter of Waiver
(TEX.TAX.-GEN.ANN. sections 151.008, 151.024

Rule 3.286. Seller's and Purchaser's Responsibilities.

Section 1. Subchapter H, Chapter 151, Tax Code Sec. 151.321.

UNIVERSITY AND COLLEGE STUDENT ORGANIZATIONS.

SECTION 151.310.RELIGIOUS, EDUCATIONAL, AND PUBLIC SERVICE ORGANIZATIONS

REFERENCE 2

REAL ESTATE LICENSE ACT, Article 6573a

Section 3. EXEMPTIONS

REFERENCE 3

TEXAS MANUFACTURED HOUSING STANDARDS ACT, Article 5221f

Section 3(19)

Section 3(4)

Section 3(10)

Section 3(11)

Section 6(d)

Section 13(a)

Chapter 80, Administrative Rules 80.135 Manufactured Housing Auctions

REFERENCE 4

BUSINESS AND COMMERCE CODE

Chapter 2 - Subchapter C - Sales Section 2.328. Sale by Auction

REFERENCE 5

U.C.C. - "NOTICE FILING" - SECURED TRANSACTIONS

REFERENCE 6

DECEPTIVE ADVERTISING

Chapter 17 - Title 2 - Deceptive Trade Practices Section 17.12.

Chapter 17 - Subchapter E - Deceptive Trade Practices and Consumer Protection Act

Section 17.45 DEFINITIONS

Section 17.46. DECEPTIVE TRADE PRACTICES UNLAWFUL

Section 17.50. RELIEF FOR CONSUMERS

REFERENCE 7

ARTICLE 5069 CONSUMER CREDIT

Imposition of Surcharge for Use of Credit Card

REFERENCE 8

SELLING GUNS AT AUCTION

REFERENCE 9

FOOD, DRUG, DEVICE, AND COSMETIC SALVAGE ACT

Health and Safety Code, Chapter 432

432.001

432.002

432.003

432.004

REFERENCE 10

PARKS AND WILDLIFE CODE Section 62.021

Sale or Purchase of Certain Game

Section 62.023 Sale by Taxidermist

REFERENCE 11

RESELLING USED AUTOMOBILES

Texas Administrative Code Title 16, Texas Dealer Rules

111.3. General Distinguishing Number.

REFERENCE 12

SELLING ALCOHOLIC BEVERAGES

REFERENCE 13

CONTRACTS

After you have passed your examination and are licensed, this study guide should be kept as a reference and guide to conducting an auction business.

REFERENCE 1
COMPTROLLER OF PUBLIC ACCOUNTS

For assistance in obtaining a Limited Sales Tax Permit call toll free 1-800-252-5555, or (512) 463-4528 if in Austin. Limited Sales, Excise and Use Tax Rules

Section 3.311. Auctioneers; Letter of Waiver TEX.TAX.-GEN.ANN. sections 151.008, 151.024

(a)Definitions.

(1) Auction or auctioning - The sale by an auctioneer of tangible personal property by competitive bid.

(2) Auctioneer - A person who owns tangible personal property or to whom tangible personal property has been consigned and who offers the tangible personal property for sale at auction.

(b)Responsibility of an auctioneer.

(1) Sales tax is due from the purchaser on the sales price of taxable items sold at auction.

(2) An auctioneer is responsible for collecting and remitting to the Comptroller any tax due on the sale of taxable items sold at auction by the auctioneer.

(3) An auctioneer who does not receive payment for the item sold, does not issue a bill of sale or invoice to the purchaser of the item, and who does not issue a check or other remittance to the owner of the item sold by the auctioneer is not considered a seller responsible for the collection of the tax. In this instance, it is the owner's responsibility to collect and remit the tax.

(4) An auctioneer should not collect tax on the sale of items, which are exempt from sales tax such as motor vehicles, real property or livestock.

(5) Sales tax is not due on a sale of taxable items when the owner of the item subsequently reclaims the property at the auction.

(c)Licensing of auctioneers.

(1) Auctioneers are required to obtain a license from the Texas Department of Licensing and Regulation.

(2) A person seeking an auctioneer's license must:

(a) Hold a sales tax permit, or

(b) Obtain a letter of waiver from the Comptroller's Department.

(I) A person may request a letter of waiver from the Comptroller as proof no sales tax permit is required. Such a request must be in writing and must detail the basis or reason no sales tax permit is required.

(II) If the items being auctioned are exempt from sales tax or if the auctioneer is not considered a seller, a letter of waiver will be issued.

(III) A letter of waiver is valid only so long as there is no change in the fact situation as originally presented to the comptroller.

Rule 3.286. Seller's and Purchaser's Responsibilities.

(a) Definitions.

(1) Engaged in business. A retailer is engaged in business in Texas if the retailer is:

(A) maintaining, occupying, or using, permanently or temporarily, directly, or indirectly, or through an agent, by whatever name called, an office, place of distribution, sales or sample room, warehouse or storage place or other place of business;

(B) having any representative, agent, salesperson, canvasser, or solicitor operating in this state under the authority of the seller for the purpose of selling, delivering, or taking orders for any taxable items;

(C) promoting a flea market, trade day, or other event involving the sales of taxable items;

(D) utilizing independent salespersons in direct sales of taxable items;

(E) deriving receipts from a lease of tangible personal property located in this state;

(F) allowing a franchisee or licensee to operate under its trade name if the franchisee or licensee is required to collect Texas sales or use tax; or

(G) conducting business in this state through employees, agents, or independent contractors.

(2) Place of business of the seller - For tax permit requirement purposes means an established outlet, office or location operated by the seller, his agent, or employee for the purpose of receiving orders for taxable items. A warehouse, storage yard, or manufacturing plant may not be considered a "place of business of the seller" for tax permit requirement purposes unless three or more orders are received by the seller in a calendar year at the warehouse, storage yard, or manufacturing plant.

(3) Seller - Every retailer, wholesaler, distributor, manufacturer or any other person who sells, leases, rents or transfers ownership of taxable items for a consideration. A promoter of a flea market, trade day or other event involving the sales of taxable items is a seller and is responsible for the collection and remittance of the sales tax collected by dealers, salespersons, or individuals at such events unless the participants hold active sales tax permits issued by the comptroller. A direct sales organization engaged in business as defined in paragraph (1)(D) of this subsection is a seller and is responsible for the collection and remittance of the sales tax collected by the independent salespersons selling the organization's product. Pawnbrokers, storagemen, mechanics, artisans, or others selling property to enforce a lien are also sellers. An auctioneer who does

not receive payment for the item sold, does not issue a bill of sale or invoice to the purchaser of the item, and who does not issue a check or other remittance to the owner of the item sold by the auctioneer is not considered a seller responsible for the collection of the tax. In this instance, it is the owner's responsibility to collect and remit the tax. Auctioneers should refer to sec. 3.311 of this title.

(4) Special purpose district - A district or other local taxing jurisdiction funded by a sales tax that is governed by the County Sales and Use Tax Act, Chapter 323.

(b)Permits required.

(1) Every seller must apply to the comptroller for a tax permit for each place of business.

(2) Every out-of-state seller engaged in business in this state must apply to the comptroller for a tax permit. An out-of-state seller that has been engaged in business in Texas continues to be responsible for collecting Texas use tax on sales made into Texas for 12 months after the seller ceases to be engaged in business in Texas.

(3) Independent salespersons of direct sales organizations will not be required to hold sales tax permits. It is the responsibility of the direct sales organizations to hold Texas permits and to collect Texas tax.

(c)Obtaining a permit.

(1) An application will be furnished by the comptroller and must be filled out completely. After the application is filled out and returned to the comptroller, together with whatever bond or other security is required by Rule 3.327 concerning Taxpayer's Bond or Other Security; a separate permit under the same account will be issued to the applicant for each place of business. The permit is issued without charge.

(2) Each legal entity (corporation, partnership, sole proprietor, etc.) must apply for its own permit. The permit cannot be transferred from one owner to another. It is valid only for the person to whom it was issued and for the transaction of business only at the address shown on the permit. If a person operates two or more types of business under the same roof, only one permit is needed.

(3) The permit must be conspicuously displayed at the place of business for which it is issued. However, a person who has traveling salesmen operating from one central office needs only one permit, which must be displayed at the central office.

(4) All permits of the seller will have the same taxpayer number; however, each business location will have a different outlet number. The outlet numbers assigned may not necessarily correspond to the number of business locations owned by a taxpayer.

(d)Collection and remittance of the tax.

(1) Each seller must collect the tax on each separate retail sale in accordance with the statutory bracket system in the Tax Code, Section 151.053. Copies of the bracket system should be displayed in each place of business so both the seller and the customers may easily use them. The tax is a debt of the purchaser to the seller until collected.

(2) The sales tax applies to each total sale, not to each item of each sale. For example, if two items are purchased, each costing \$.07, the seller must collect the tax on the total selling price of \$.14. Tax must be reported and remitted to the comptroller as provided by the Tax Code, Section 151.410. When tax is collected properly under the bracket system, any over-collection need not be remitted by the seller. Conversely, when the tax collected under the bracket system is less than the tax due on the total receipts, the seller is responsible for remitting tax on total receipts even though not collected from customers.

(3) The amount of the sales tax must be separately stated on the bill, contract or invoice to the customer or there must be a written statement to the customer that the stated price includes sales or use taxes. Contracts, bills, or invoices merely stating that "all taxes" are included are not specific enough to relieve either party of the transaction of its sales and use tax responsibilities. The total amount shown on such documents will be presumed to be the taxable items sales price, without tax included. The seller or customer may overcome the presumption by using the seller's records to show that tax was included in the sales price. Out-of-state sellers must identify the tax as Texas tax.

(4) It is unlawful for any seller to advertise or hold out to the public that the seller will assume, absorb, or refund any portion of the tax, or that the seller will not add the tax to the selling price of the taxable items being sold.

(5) The practice of rounding off the amount of tax due on the sale of a taxable item is prohibited. Tax must be added to the sales price according to the statutory bracket system.

(e)Payment of the tax.

(1) Each seller or purchaser owing tax not collected by a seller must remit tax on all receipts from the sales or purchases of taxable items less any applicable deductions. On or before the 20th day of the month following each reporting period, each person subject to the tax shall file a consolidated return together with the tax payment for all businesses operating under the same taxpayer number. Reports and payments due to be submitted on due dates occurring on Saturdays, Sundays, or legal holidays may be submitted the next business day.

(2) The returns must be signed by the person required to file the report or by the person's duly authorized agent, but need not be verified by oath.

(3) The returns will be filed on forms prescribed by the comptroller. The fact that the seller or purchaser does not receive the form or does not receive the correct forms from the comptroller for the filing of the return does not relieve the

seller or purchaser of the responsibility of filing a return and payment of the required tax.

(f) Reporting period.

(1) Sellers and purchasers owing tax not collected by sellers who have less than \$1,500 in state tax per quarter to report may file returns quarterly. The quarterly reporting periods end on March 31st, June 30th, September 30th, and December 31st. The returns are to be filed on or before the 20th day of the month following the period ending date.

(2) Sellers and purchasers owing tax not collected by sellers having less than \$1,000 state tax to report during a calendar year and with authorization from the comptroller's office may file yearly returns.

A. Authorization to file returns on a yearly basis will be conditioned on the correct filing of prior returns.

B. Authorization to file returns on a yearly basis will be denied if a taxpayer's liability exceeded \$1,000 in the prior calendar year.

C. Taxpayers filing on a yearly basis without authorization will be liable for applicable penalty and interest on any previously unreported quarter.

D. Authority to file on a yearly basis is automatically revoked if a taxpayer's state sales and use tax liability is greater than \$1,000 during a calendar year. The taxpayer must file a return for that month or quarter, depending on the amount, in which the liability is greater than \$1,000. On that report, the taxpayer must report all accrued liability for the year and must file monthly or quarterly, as appropriate, as long as the yearly tax liability is greater than \$1,000.

E. Once each year all accounts will be reviewed to confirm yearly filing status and to authorize permit holders who meet the filing requirements to begin filing yearly returns.

F. Yearly filers must report on a calendar year basis. The return and payment are due on or before January 20th of the next calendar year.

(3) Sellers and purchasers owing tax not collected by sellers who have \$1,500 or more in state tax per quarter to report must file monthly returns unless a seller prepays the tax.

(4) Every taxpayer required to file city, county, and Metropolitan Transit Authority/City Transit Department (MTA/CTD) sales and use tax returns must file them at the same time the state sales and use tax returns are filed.

(5) State agencies. State agencies that deposit taxes directly with the comptroller's office according to Accounting Policy Statement Number 12 are not required to file a separate tax return. A fully completed deposit request voucher is deemed to be the return filed by these agencies. Subsection (f) (1)-(3) of this section does not apply to these state agencies. Taxes must be deposited with the comptroller's office within the time period otherwise specified by law for deposit of state funds.

(g) Filing the return; prepaying the tax; discounts; penalties.

(1) The comptroller will make forms available to all persons required to file returns. The failure of the taxpayer to obtain the forms will not relieve that taxpayer from the requirement to file and remit the tax timely. Each taxpayer may claim a discount for timely filing and payment as reimbursement for the expense of collecting the tax. The discount is equal to 0.5% of the amount of tax due.

(2) The return for each reporting period must reflect the total sales, taxable sales, and taxable purchases for each outlet. The 0.5% discount for timely filing and payment may be claimed on the return for each reporting period and computed on the amount timely reported and paid with that return.

(3) Prepayments may be made by taxpayers who file monthly or quarterly returns. The amount of the prepayment should be a reasonable estimate of the state and local tax liability for the entire reporting period. "Reasonable estimate" means at least 90% of the total amount due or an amount equal to the actual net tax liability due and paid for the same reporting period of the immediately preceding year.

(A) A taxpayer who makes a prepayment based upon an estimate of tax liability may retain an additional discount of 1.25% of the amount due.

(B) The monthly prepayment is due on or before the 15th day of the month for which the prepayment is made.

(C) The quarterly prepayment is due on or before the 15th day of the second month of the quarter for which the tax is due.

(D) On or before the 20th day of the month following the quarter or month for which a prepayment was made, the taxpayer must file a return showing the actual liability and remit any amount due in excess of the prepayment. If there is an additional amount due, the taxpayer may retain the 0.5% reimbursement provided that both the return and the additional amount due are timely filed. If the prepayment exceeded the actual liability, the taxpayer will be mailed an overpayment notice or refund warrant.

(4) Remittances which are less than a reasonable estimate as required by paragraph (3) of this subsection will not be regarded as a prepayment. The 1.25% discount will not be allowed. If the taxpayer owes more than \$1,500 in a calendar quarter, the taxpayer will be regarded as a monthly filer. All monthly reports not filed because of the invalid prepayment will be subject to late filing penalty and interest.

(5) If a taxpayer does not file a quarterly or monthly return together with payment on or before the due date, the taxpayer forfeits all discounts and incurs a mandatory 5.0% penalty. After the first 30 days delinquency, an additional mandatory penalty 5.0% is assessed against the taxpayer, and after the first 60 days delinquency, interest begins to accrue at the rate of 12%.

(6) Permit holders are required to file sales and use tax returns monthly, quarterly, or yearly as set out in subsection (f) of this section. The sales and use

tax returns must be filed even if there is no tax to report for the reporting period. A person who has failed to file timely reports on two or more previous occasions must pay an additional penalty of \$50 for each subsequent report that is not filed timely. The penalty is due regardless of whether the person subsequently files the report or whether not taxes are due for the reporting period.

(h) Records required.

(1) Records must be kept for four years, unless the comptroller authorizes in writing a shorter retention period. Exemption and resale certificates must be kept for four years following the completion of the last sale covered by the certificate. See section 3.281 of this title concerning Records Required and section 3.282 of this title concerning Auditing Taxpayer Records.

(2) The comptroller or an authorized representative has the right to examine any records or equipment of any person liable for the tax in order to verify the accuracy of any return made or to determine the tax liability in the event no return is filed.

(i) Resale and exemption certificates.

(1) Any person selling taxable items in this state must collect a tax on the taxable items so sold unless a valid and properly completed resale, exemption, direct payment exemption certificate, or maquiladora exemption certificate is received from the purchaser. Simply having permit numbers on file without properly completed certificates does not relieve the seller from the responsibility for collecting tax.

(2) A seller may accept a resale certificate only from a purchaser who is in the business of reselling the taxable items within the geographical limits of the United States of America, its territories and possessions, or in the United Mexican States. See Section 3.285 concerning Resale Certificate; Sales for Resale. To be valid, the resale certificate must show the 11-digit number from the purchaser's Texas tax permit or the out-of-state registration number of the out-of-state purchaser.

(3) A seller may accept an exemption certificate in lieu of the tax on sales of items that will be used in an exempt manner or on sales to exempt entities. See section 3.287 concerning Exemption Certificates. There is no exemption number. An exemption certificate does not require a number to be valid.

(4) The purchaser claiming an exemption from the tax must issue to the seller a properly completed resale or exemption certificate. The seller must act in good faith when accepting the resale or exemption certificate. If a seller has actual knowledge that the exemption claimed is invalid the seller must collect the tax. A person who intentionally or knowingly makes, presents, uses, or alters a resale or exemption certificate for the purpose of evading sales or use tax is guilty of a criminal offense:

(A) if the tax evaded by the invalid certificate is less than \$20, the offense is a Class C misdemeanor;

(B) if the tax evaded by the invalid certificates \$20 or more but less than \$200, the offense is a Class B misdemeanor;

(C) if the tax evaded by the invalid certificate is \$200 or more but less than \$750, the offense is a Class A misdemeanor;

(D) if the tax evaded by the invalid certificate is \$750 or more but less than \$20,000, the offense is a felony of the third degree;

(E) if the tax evaded by the invalid certificate is \$20,000 or more, the offense is a felony of the second degree.

(6) Direct payment holders are entitled to issue an exemption certificate when purchasing all taxable items, other than those purchased for resale. The direct payment exemption certificate must show the purchaser's direct payment permit number. See section 3.288 concerning Direct Payment Procedures and Qualifications.

(7) Maquiladora export permit holders are entitled to issue a maquiladora exemption certificate when purchasing all taxable items, other than those purchased for resale. Maquiladora export permit holders should refer to section 3.358 concerning Maquiladoras.

(8) The seller should obtain the properly executed resale or exemption certificates at the time a taxable transaction occurs. All certificates obtained on or after the date the auditor actually begins work on the audit at the seller's place of business or on the seller's records are subject to verification. All incomplete certificates will be disallowed regardless of when they were obtained. The seller has 60 days from the date written notice is received by the seller from the comptroller in which to deliver certificates to the comptroller. For the purposes of this section, written notice given by mail is presumed to have been received by the seller within three business days from the date of deposit in the custody of the United States Postal Service. The seller may overcome this presumption by submitting proof from the United States Postal Service or by other competent evidence showing a later delivery date. Any certificates delivered to the comptroller during the 60-day period will be subject to verification by the comptroller before any deductions will be allowed. Certificates delivered to the comptroller after the 60-day period will not be accepted and the deduction will not be granted. See section 3.285 concerning Resale Certificate; Sales for Resale, section 3.287 concerning Exemption Certificates, Rule 3.288 concerning Direct Payment Procedures and Qualifications and section 3.282 concerning Auditing Taxpayer Records.

(j) Suspension of permit.

(1) If a person fails to comply with any provision of the Tax Code, Title 2, or with the rules issued by the comptroller under those statutes, the comptroller may suspend the person's permit or permits.

(2) Before a seller's permit is suspended, the seller is entitled to a hearing before the comptroller to show cause why the permit or permits should not be suspended. The comptroller shall give the seller at least 20 days' notice, which shall be in accordance with the requirements of section 1.14 concerning Notice of Setting.

(3) After a permit has been suspended, a new permit will not be issued to the same seller until the seller has posted sufficient security and satisfied the comptroller that the seller will comply with both the provisions of the law and the comptroller's rules and regulations.

(k) Refusal to issue permit. The comptroller is required by the Tax Code, Section 111.0046, to refuse to issue any permit to a person who:

(1) is not permitted or licensed as required by law for a different tax or activity administered by the comptroller; or

(2) is currently delinquent in the payment of any tax collected by the comptroller.

(l) Cancellation of sales tax permits with no reported business activity.

(1) Permit cancellation due to abandonment. Any holder of a sales tax permit who reported no business activity in the previous calendar year is hereby deemed to have abandoned the permit, and the permit is hereby canceled by the comptroller. "No Business Activity" means zero total sales, zero taxable sales, and zero taxable purchases.

(2) Re-application. Nothing herein shall prohibit any applicant from receiving a new sales tax permit upon request provided the issuance is not prohibited by subsection (k)(1) or (2) of this section, or by the Tax Code, section 111.0046.

(m) Direct payment. Yearly and quarterly filing requirements, prepayment procedures and discounts for timely filing do not apply to holders of direct payment permits. See section 3.288 of this title (relating to Direct Payment Procedures and Qualifications). Direct payment returns and remittances are due monthly on or before the 20th day of the month following the end of the calendar month for which payment is made.

Section 1. Subchapter H, Chapter 151, Tax Code Sec. 151.321. UNIVERSITY AND COLLEGE STUDENT ORGANIZATIONS.

(a) A taxable item sold by a qualified student organization and for which the sales price is \$5,000 or less is exempted from the taxes imposed by Subchapter C if the student organization:

(1) sells the items at a sale that may last for one day only the primary purpose of which is to raise funds for the organization; and

(2) holds not more than one sale described by Subdivision (1) each month for which the exemption is claimed for an item sold.

(b) A student organization qualifies for the exemption under Subsection (a) if the student organization:

(1) is affiliated with an institution of higher education as defined by Section 61.003, Education Code, or a private or independent college or university that is located in this state and that is accredited by a recognized accrediting agency under Section 61.003, Education Code;

(2) has as its primary purpose a purpose other than engaging in business or performing an activity designed to make a profit; and

(3) files a certification with the comptroller as required by Subsection (c).

(c) A student organization must file with the comptroller a certification issued by the institution, college, or university described in Subsection (b)(1) showing that the organization is affiliated with the institution, college, or university.

(d) The storage, use, or consumption of a taxable item acquired tax-free under this section is exempted from the use tax imposed by Subchapter D until the item is resold or subsequently transferred.

SECTION 151.310. RELIGIOUS, EDUCATIONAL, AND PUBLIC SERVICE ORGANIZATIONS

(a) A taxable item sold, leased, or rented to, or stored, used, or consumed by, any of the following organizations is exempted from the taxes imposed by this chapter:

(1) an organization created for religious, educational, or charitable purposes if no part of the net earnings of the organization benefits a private shareholder or individual and the items purchased, leased, or rented are related to the purpose of the organization;

(2) an organization qualifying for an exemption from federal income taxes under Section 501 (c)(3),(4),(8),(10), or (19), Internal Revenue Code, of the item sold, leased, rented, stored, used, or consumed relates to the purpose of the exempted organization and the item is not used for the personal benefit of a private stockholder or individual;

(b) An organization that qualifies for an exemption under Subsection (a)(1) or (a)(2) of this section, and each bona fide chapter of the organization, may hold two tax-free sales or auctions under this subsection during a calendar year and each tax-free sale or auction may continue for one day only. The sale of a taxable item the sales price of which is \$5,000 or less by a qualified organization or chapter of the organization at a tax-free sale or auction is exempted from the sales tax imposed by Subchapter C of this chapter. The storage, use, or

consumption of a taxable item that is acquired from a qualified organization or chapter of the organization at a tax-free sale or auction and that is exempted under this subsection from the taxes imposed by Subchapter C of this chapter is exempted from the use tax imposed by Subchapter D of this chapter until the item is resold or subsequently transferred.

(c) If two or more organizations jointly hold a tax-free sale or auction, neither organization may hold another tax-free sale or auction during the calendar year. The employment of and payment of a reasonable fee to an auctioneer to conduct a tax-free auction does not disqualify an otherwise qualified organization from receiving the exemption provided by Subsection (c) of this section.

REFERENCE 2

REAL ESTATE LICENSE ACT, Chapter 1101 Texas Occupations Code

Sec. 1101.005. APPLICABILITY OF CHAPTER.

This chapter does not apply to:

(4) an auctioneer licensed under Chapter 1802 while conducting the sale of real estate by auction if the auctioneer does not perform another act of a broker or salesperson;

In effect, a licensed auctioneer may only act as a bid caller if he does not also have a license issued by the Texas Real Estate Commission.

*** Real Estate Licensing information is available through the TEXAS REAL ESTATE COMMISSION, P.O. Box 12188, Austin, Texas 78711-2188, (512) 459-6544.

REFERENCE 3

TEXAS MANUFACTURED HOUSING STANDARDS ACT, Article 5221f

Section 3(19) - "Retailer" means a person engaged in the business of buying for resale, selling, or exchanging manufactured homes or offering such for sale, exchange, or lease-purchase to consumers. A person is not considered a retailer unless the person is engaged in the sale, exchange, or lease-purchase of two or more manufactured homes to consumers in any consecutive 12- month period.

Section 3(4) - "Broker" means a person engaged by one or more other persons to negotiate or offer to negotiate bargains or contracts for the sale, exchange, or lease-purchase of a manufactured home to which a certificate or document of title has been issued and is outstanding. A broker may or may not be an agent of any party involved in the transaction. A person who maintains a location for the display of manufactured homes is not a broker but is a retailer. The term shall not apply if the manufactured home is affixed to a permanent foundation, the manufacturer's certificate or the document of title is canceled, and the home is offered as real estate; however, the provisions of The Real Estate License Act (Chapter 1101 Occupations Code) shall apply.

Section 3(10) - "Installation," when used in reference to manufactured housing, means the construction of the foundation systems, whether temporary or permanent, and the placement and erection of a manufactured home or manufactured home components on the foundation system and includes supporting, blocking, leveling, securing, anchoring, and proper connection of multiple or expandable sections or components, and minor adjustments.

Section 3(11) - "Installer" means any person, including a retailer or manufacturer, that contracts to perform or performs installation functions on manufactured housing.

Section 6(d)-It is unlawful for any retailer, broker, or salesperson to sell, exchange, or lease-purchase or offer to sell, exchange, or lease-purchase any manufactured home to a consumer in the state for use as a residence or dwelling, unless the manufactured home has affixed to it the appropriate seal, or label.

Section 13(a)- The department may not issue or renew a license unless a surety bond or other security in the form prescribed by the director if filed with the department as provided by this section.

NOTE: Effective September 9, 1998, regulation of manufactured housing is administered by the Texas Department of Housing and Community Affairs. This is the "department" referred to in the law and following portions of TAC Chapter 80.

Chapter 80, Administrative Rules 80.135 Manufactured Housing Auctions

(a) Auction of Manufactured Housing to Texas Consumers.

(1) The person(s) selling more than one home through an auction in a twelve (12) month period must be licensed as a retailer with this department and the specific location at which the auction is to be held must be bonded in accordance with the Standards Act.

(2) The auctioneer must be licensed as a manufactured housing salesperson with the Texas Department of Housing and Community Affairs and licensed as an auctioneer, pursuant to the Texas Auctioneer Act, Article 8700.

(3) The retailer must notify this department in writing at least thirty (30) calendar days prior to the auction with such notice to contain the date, time, and physical address and location of the proposed auction.

(4) The retailer must keep and maintain a file copy of all notices, circulars, or advertisements of any kind relating to the auction of manufactured housing.

(5) A manufactured home that has been salvaged or is not habitable may not be sold, conveyed, or transferred to a consumer as a manufactured home for dwelling purposes. The seller must surrender the title and HUD label or Texas Seal, or a statement that there was no label or seal, to the department along with the required fee and an application to cancel the title to business use, before the home is auctioned.

(6) The retailer must give notice to each person attending the auction, and the notice shall contain the following:

(A) a statement that the homes offered for sale are habitable pursuant to the Standards Act, Section 8(b);

(B) a statement that any home purchased at the auction must be installed by a installer licensed with this department;

(C) the appropriate warning concerning formaldehyde as required by the Standards Act, 20; and

(D) the appropriate notice regarding home construction and Wind Zone standards as outlined in the Standards Act.

(7) The retailer shall retain sales records as required by 80.121 of this title (relating to Retailer's Responsibilities) if the home is sold to a consumer.

(b) Auction of Manufactured Housing to Licensed Retailers.

(1) No license with the department is required of a lender whose repossessed manufactured homes are being auctioned, if the lender is selling to a retailer who is licensed with the department. The auctioneer must be licensed only pursuant to the Texas Revised Civil Statutes, Texas Auctioneer Act, Article 8700.

(2) The auctioneer must notify the Texas Department of Housing and Community Affairs at least thirty (30) calendar days prior to the auction. Such notice must contain the date, time, and physical address and location of the proposed auction.

(3) The auctioneer must keep and maintain a file copy of all notices, circulars, or advertisements of any kind relating to the auction of manufactured housing.

(4) The auctioneer must keep and maintain an accurate register of all persons attending the auction. This register should show the name of the individual, the manufactured housing retailer business name, the address of the retailer, and the current license number of the manufactured housing retailer.

(5) The auctioneer must keep and forward to the Texas Department of Housing and Community Affairs immediately following the auction, a complete list of all manufactured homes sold at such auction including the name of manufacturer, model, serial and HUD numbers, along with the name, address, and license number of the retailer purchasing the home.

(6) In lieu of the auctioneer maintaining and filing the information in paragraphs (1)-(5) of this subsection with the department, the consignor of the manufactured homes may contract with the auctioneer to file the information with the department.

REFERENCE 4

VERNON'S TEXAS CODES ANNOTATED BUSINESS AND COMMERCE CODE

Chapter 2 - Subchapter C - Sales Section 2.328. Sale by Auction

(a) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

(b) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion re-open the bidding or declare the goods sold under the bid on which the hammer was falling.

(c) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case, a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(d) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

Uniform Commercial Code Comment:

1. The auctioneer may in his discretion either re-open the bidding or close the sale on the bid on which the hammer was falling when a bid is made at that moment. The recognition of a bid of this kind by the auctioneer in his discretion does not mean a closing in favor of such a bidder, but only that the bid has been accepted as a continuation of the bidding. If recognized, such a bid discharges the bid on which the hammer was falling when it was made.

2. An auction "with reserve" is the normal procedure. The crucial point, however, for determining the nature of an auction is the "putting up" of the goods. This Article accepts the view that the goods may be withdrawn before they are actually "put up" regardless of whether the auction is advertised as one without reserve, without liability on the part of the auction announcer to persons who are present. This is subject to any peculiar facts, which might bring the case within the "firm offer" principle of this Article, but an offer to persons generally would require unmistakable language in order to fall within that section. The prior

announcement of the nature of the auction either as with reserve or without reserve will, however, enter as an "explicit term" in the "putting up" of the goods and conduct thereafter must be governed accordingly. The present section continues the prior rule permitting withdrawal of bids in auctions both with and without reserve; and the rule is made explicit that the retraction of a bid does not revive a prior bid.

FORM 1 - Conditions on Sale of Goods by Auction

1. Highest bidder to be purchaser. The buyer is the highest bidder for each lot, and in case of a dispute concerning the bidding (or between two or more bidders) the lot disputed shall be immediately put up again (at the last undisputed bid) and resold.

2. Auctioneer may refuse bid. The auctioneer may refuse any bid without giving a reason for refusal.

3. Biddings. No lot will be offered at a less sum than (amount). No bidder may advance less than (amount) more than the preceding bid; or, if above (amount), less than (amount) more than the preceding bid, and so on in proportion.

4. Sellers may bid. The sellers may bid for any lot either personally or through the auctioneer or through any other person.

5. Names and deposit. Each buyer shall give his name and address, if required, and shall pay down (number) per cent of the purchase money as earnest and in part payment. If the sale is complete but the buyer refuses to deposit the part payment, the auctioneer may resell the goods at the auction and the buyer is responsible for the difference in price.

6. Buyer's risk. Payment and removal. Each lot (is at the buyer's risk from the fall of the hammer and) shall be paid for and taken away by the buyer within (number) days from the end of the sale, and with all faults and errors of description.

7. Faults and misdescription. No warranty is given with any lot, and no sale is invalid or voidable by reason of any fault in any lot or by reason of any lot being incorrectly described (in the catalogue or otherwise), and no compensation may be paid for any such fault or error of description.

8. Failure to comply with conditions. If the buyer defaults in any of the above conditions, the money deposited by him in part payment is forfeited. If the buyer does not complete payment and take the goods away within the time stated in

Condition No. 6, the seller may resell the goods either by public auction or private sale, and the buyer is liable for the deficiency arising upon resale, together with the expenses of the sale.

9. Sale is with reserve. Each sale by auction is with reserve. This means that the auctioneer may withdraw the goods at any time until he announces completion of the sale. (or) Sale is without reserve. Each sale by auction is without reserve. This means after the auctioneer calls for bids on an article or lot, the article or lot cannot be withdrawn unless no bid is made with a reasonable time.

10. Retraction of bids. Each bidder may retract his bid until the auctioneer announces the completion of a sale. However if a bidder does retract his bid, the previous bid is not revived and no sale is complete. The auctioneer may, in his judgement, then refuse to put up again the item for sale.

Comments from "Texas Jurisprudence"

An auction sale is a public sale to the highest bidder. Its object is to achieve a fair price for the property auctioned by means of competitive bidding. Although the term ordinarily implies a sale made on the acceptance of an oral bid, the mere fact that the successful bid was written does not prevent the transaction from constituting an auction.

The auctioneer primarily acts as an agent of the seller, but, for many purposes, he is the agent of both parties. The purchaser who bids and announces his bid to the auctioneer gives the auctioneer authority as his agent, which does not need to be in writing. However, the auctioneer must make some memorandum or entry in writing of the name of the purchaser and the terms of the sale to save the contract, as to the purchaser, from the operation of the statute of frauds. If the auctioneer signed the purchaser's name but makes no memorandum of sale the contract is not obligatory on the purchaser and the purchaser cannot be later compelled to accept a conveyance and pay the purchase price. If an auctioneer sells property that he has no authority to sell, the owner of the property is entitled to recover the property in an action against the purchaser.

An auctioneer in possession of personal property who sells and delivers property without disclosing the name of his principal is liable on an implied warranty of title. The owner who sustains a loss in such circumstances must look to the auctioneer for redress. Even if the auctioneer has disclosed the name of his principal, if the auctioneer has signed a written contract wholly in his own name he will be personally bound.

The term puffing is generally defined as the presence at an auction sale of persons who bid for the sole purpose of inflating the price of the subject property

on behalf of persons interested in the sale; such bidders are referred to as puffers or by-bidders and, in the strict meaning of the word, are persons who, without any intention to purchase, are employed by the seller to increase the price by means of fictitious bids, while the puffer is protected from liability on his bids by a secret agreement with the seller that he shall not be bound thereby.

An auctioneer who advertises a policy of not releasing goods sold until any check given therefor has clearly set a standard of care for himself and the auction company with which he must comply, and where an owner received a bad check for goods sold due to the negligence of the auctioneer who had made such representations, the auctioneer was liable to the owner for a tortious breach of their agreement.

In the event a sale by public auction is advertised to be on specific and restricted terms, any bid not in strict conformity with the terms advertised, is no bid at all, and the auctioneer is not bound to notice it. If a bid be made in total ignorance of what was being sold, or the terms of the sale, the bidder and the auctioneer are not bound. In the event that property left in the possession of the auctioneer is damaged, the auctioneer is liable as a bailee.

An auctioneer is prohibited from selling at auction any horse, mule, or ox without first obtaining a written statement from the person for whom the sale is made as to the manner in which, and the person from whom, the animal was acquired. Such statement must be recorded with the clerk of the county court, together with a description of the animal and the name and residence of the seller and purchaser.

REFERENCE 5

U.C.C. - "NOTICE FILING" - SECURED TRANSACTIONS

The Uniform Commercial Code Section (UCC) is the central filing office for certain financing statements and other documents provided for under the Uniform Commercial Code since 1966.

Excerpt from the Uniform Commercial Code:

The Uniform Commercial Code adopts the "notice filing" approach, under which an abbreviated notice is filed with the appropriate filing officer evidencing that a debtor and secured party intend to engage in a secured transaction using specified collateral as security. The actual security agreement may even be executed later. The Code became effective at midnight on June 30, 1966, and applies to transactions entered into and events occurring after that date.

In plain language, the Uniform Commercial Code allows a creditor to notify other creditors about a debtor's assets used as collateral for a secured transaction by filing a public notice (financing statement) with a particular filing office. The place of filing is either

- 1) a state of organization if the organization is registered with a state;

- 2) state of the chief executive office if the organization is unregistered and has more than one place of business; or

- 3) state where an individual resides in the case of an individual or sole proprietor. Filing with the Office of the Secretary of State is required to perfect a security interest or agricultural lien except where a filing is required with the county clerk or other office designated for the filing or recording of a mortgage on the related real property; if:
 1. the collateral is as-extracted collateral or timber to be cut; or
 2. the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures.

In most cases, financing statements are filed at the close of a secured transaction. However, it is advisable to file financing statements and perform a search on the debtor to discover existing filings by other creditors before the loan closing. Documents filed in the central filing office relate to the following:

- Financing Statements pursuant to Chapter 9 of the Texas Business and Commerce Code (UCC);
- Utility Security Instruments pursuant to Chapter 35 of the Texas Business and Commerce Code;
- Federal liens pursuant to Chapter 14 of the Texas Property Code (Uniform Federal Lien Registration Act);

- Restitution Liens pursuant to Article 42 of the Texas Code of Criminal Procedure;
- Agricultural Liens pursuant to Chapter 128 and Chapter 188 of the Texas Agriculture Code;
- Judicial Finding of Fact pursuant to Subchapter J, Sections 51.901-51.905 of the Texas Government Code; and
- Transition Property Notice pursuant to Chapter 405, Section 39 of the Texas Utilities Code.

The UCC Section's main objective is to review all documents for statutory compliance, then accept or reject the documents as soon as possible. All accepted documents are processed in a timely manner, recorded, filed, and made available to the public upon request.

REFERENCE 6

Chapter 17 - Title 2 - Deceptive Trade Practices Section 17.12.

DECEPTIVE ADVERTISING

(a) No person may disseminate a statement he knows materially misrepresents the cost or character of tangible personal property, a security, service, or anything he may offer for the purpose of

(1) selling, contracting to sell, otherwise disposing of, or contracting to dispose of the tangible personal property, security, service, or anything he may offer; or

(2) inducing a person to contract with regard to the tangible personal property, security, service, or anything he may offer.

(b) No person may solicit advertising in the name of a club, association, or organization without the written permission of such club, association, or organization or distribute any publication purporting to represent officially a club, association, or organization without the written authority of or a contract with such club, association, or organization and without listing in such publication the complete name and address of the club, association, or organization endorsing it.

(c) A person's proprietary mark appearing on or in a statement described in Subsection (a) of this section is prima facie evidence that the person disseminated the statement

(d) A person who violates a provision of Subsection (a) or (b) of this Section is guilty of a misdemeanor and upon conviction is punishable by a fine of not less than \$10 nor more than \$200.

Chapter 17 - Subchapter E - Deceptive Trade Practices and Consumer Protection Act

Section 17.45 - DEFINITIONS

As used in this Subchapter:

(1) "Goods" means tangible chattels or real property purchased or leased for use.

(2) "Services" means work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.

(3) "Person" means an individual, partnership, corporation, association, or other group, however organized.

(4) "Consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer

that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more.

(5) "Unconscionable action or course of action" means an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.

(6) "Trade" and "commerce" mean the advertising, offering for sale, sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this state.

(7) "Documentary material" includes the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situated.

(8) "Consumer protection division" means the antitrust and consumer protection division of the attorney general's office.

(9) "Knowingly" means actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim or, in an action brought under Subdivision (2) of Subsection (a) of Section 17.50, actual awareness of the act, practice, condition, defect, or failure constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(10) "Business consumer" means an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use. The term does not include this state or a subdivision or agency of this state.

(11) "Economic damages" means compensatory damages for pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.

(12) "Residence" means a building:

(A) that is a single-family house, duplex, triplex, or quadruplex or a unit in a multiunit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system; and

(B) that is occupied or to be occupied as the consumer's residence.

Section 17.46. DECEPTIVE TRADE PRACTICES UNLAWFUL

(a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division under Sections 17.47, 17.58, 17.60, and 17.61 of this code.

(b) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:

- (1) passing off goods or services as those of another;
- (2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (4) using deceptive representations or designations of geographic origin in connection with goods or services;
- (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;
- (6) representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;
- (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- (8) disparaging the goods, services, or business of another by false or misleading representation of facts;
- (9) advertising goods or services with intent not to sell them as advertised;
- (10) advertising goods or services with intent not to supply a reasonable expectable public demand, unless the advertisements disclosed a limitation of quantity;
- (11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;
- (12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
- (13) knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;
- (14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;
- (15) basing a charge for the repair of any item in whole or in part on a guaranty or warranty instead of on the value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the warranty or guaranty, if any;

(16) disconnecting, turning back, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge;

(17) advertising of any sale by fraudulently representing that a person is going out of business;

(18) using or employing a chain referral sales plan in connection with the sale or offer to sell of goods, merchandise, or anything of value, which uses the sales technique, plan, arrangement, or agreement in which the buyer or prospective buyer is offered the opportunity to purchase merchandise or goods and in connection with the purchase receives the seller's promise or representation that the buyer shall have the right to receive compensation or consideration in any form for furnishing to the seller the names of other prospective buyers if receipt of the compensation or consideration is contingent upon the occurrence of an event subsequent to the time the buyer purchases the merchandise or goods;

(19) representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve, provided, however, that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 and Sections 2A.212 through 2A.216 of the Business & Commerce Code to involve obligations in excess of those which are appropriate to the goods;

(20) promoting a pyramid promotional scheme, as defined by Section 17.461;

(21) representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced;

(22) filing suit founded upon a written contractual obligation of and signed by the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use in any county other than in the county in which the defendant resides at the time of the commencement of the action or in the county in which the defendant in fact signed the contract; provided, however, that a violation of this subsection shall not occur where it is shown by the person filing such suit he neither knew or had reason to know that the county in which such suit was filed was neither the county in which the defendant resides at the commencement of the suit nor the county in which the defendant in fact signed the contract;

(23) the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;

(24) using the term "corporation," "incorporated," or an abbreviation of either of those terms in the name of a business entity that is not incorporated under the laws of this state or another jurisdiction; or

(25) taking advantage of a disaster declared by the governor under Chapter 418, Government Code, by:

(A) selling or leasing fuel, food, medicine, or another necessity at an exorbitant or excessive price; or

(B) demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity.

(c) (1) It is the intent of the legislature that in construing Subsection (a) of this section in suits brought under Section 17.47 of this subchapter the courts to the extent possible will be guided by Subsection (b) of this section and the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. § 45(a)(1)].

(2) In construing this subchapter the court shall not be prohibited from considering relevant and pertinent decisions of courts in other jurisdictions.

(d) For the purposes of the relief authorized in Subdivision (1) of Subsection (a) of Section 17.50 of this subchapter, the term "false, misleading, or deceptive acts or practices" is limited to the acts enumerated in specific subdivisions of Subsection (b) of this section

Section 17.50. RELIEF FOR CONSUMERS

(a) A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish:

(1) the use or employment by any person of a false, misleading, or deceptive act or practice that is:

(A) specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; and

(B) relied on by a consumer to the consumer's detriment;

(2) breach of an express or implied warranty;

(3) any unconscionable action or course of action by any person; or

(4) the use or employment by any person of an act or practice in violation of Article 21.21, Insurance Code.

(b) In a suit filed under this section, each consumer who prevails may obtain:

(1) the amount of economic damages found by the trier of fact. If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of economic damages; or if the trier of fact finds the conduct was committed intentionally, the consumer may recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages;

(2) an order enjoining such acts or failure to act;

(3) orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter; and

(4) any other relief which the court deems proper, including the appointment of a receiver or the revocation of a license or certificate authorizing a person to engage in business in this state if the judgment has not been satisfied within three months of the date of the final judgment. The court may not revoke or suspend a license to do business in this state or appoint a receiver to take over the affairs of a person who has failed to satisfy a judgment if the person is a licensee of or regulated by a state agency which has statutory authority to revoke or suspend a license or to appoint a receiver or trustee. Costs and fees of such receivership or other relief shall be assessed against the defendant.

(c) On a finding by the court that an action under this section was groundless in fact or law or brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs.

(d) Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees.

(e) In computing additional damages under Subsection (b), attorneys' fees, costs, and prejudgment interest may not be considered.

(f) A court may not award prejudgment interest applicable to:

- (1) damages for future loss under this subchapter; or
- (2) additional damages under Subsection (b).

(g) Chapter 41, Civil Practice and Remedies Code, does not apply to a cause of action brought under this subchapter.

(h) Notwithstanding any other provision of this subchapter, if a claimant is granted the right to bring a cause of action under this subchapter by another law, the claimant is not limited to recovery of economic damages only, but may recover any actual damages incurred by the claimant, without regard to whether the conduct of the defendant was committed intentionally. For the purpose of the recovery of damages for a cause of action described by this subsection only, a reference in this subchapter to economic damages means actual damages. In applying Subsection (b)(1) to an award of damages under this subsection, the trier of fact is authorized to award a total of not more than three times actual damages, in accordance with that subsection.

REFERENCE 7

ARTICLE 5069 CONSUMER CREDIT

Imposition of Surcharge for Use of Credit Card

- a. In a sale of goods or services, a seller may not impose a surcharge on a buyer who uses a credit card for an extension of credit instead of cash, a check, or similar means of payment.
- b. This article does not apply to a state agency, county, local governmental entity, or other governmental entity that accepts a credit card for the payment of fees, taxes, or other charges.

REFERENCE 8

SELLING GUNS AT AUCTION

Generally speaking, there are two types of auctions: estate-type auctions and consignment auctions. In estate-type auctions, the articles to be auctioned (including firearms) are being sold by the executor of the estate of an individual. In these cases the firearms belong to and are possessed by the executor. The auctioneer is acting as an agent of the executor and assisting the executor in finding buyers for the firearms. The firearms are controlled by the estate, and the sales of firearms are being made by the estate. In these cases, the auctioneer does not meet the definition of engaging in business as a dealer in firearms and would not need a license. An auctioneer who has a license may perform this function away from his or her licensed premises.

In consignment-type auctions, an auctioneer often takes possession of firearms in advance of the auction. These firearms are generally inventoried, evaluated, and tagged for identification. The firearms belong to individuals who have entered into a consignment agreement with the auctioneer giving that auctioneer authority to sell the firearms. The auctioneer has possession and control of the firearms. **Under these circumstances, an auctioneer would generally need a license. An auctioneer who buys firearms for purposes of resale will also need a license.**

Are there certain persons who cannot legally receive or possess firearms and/or ammunition?

Yes, a person who –

- (1) Has been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year;
- (2) Is a fugitive from justice;
- (3) Is an unlawful user of or addicted to any controlled substance;
- (4) Has been adjudicated as a mental defective or has been committed to a mental institution;
- (5) Is an alien illegally or unlawfully in the United states or an alien admitted to

the United states under a nonimmigrant visa;

(6) Has been discharged from the Armed Forces under dishonorable conditions;

(7) Having been a citizen of the United states, has renounced his or her citizenship;

(8) Is subject to a court order that restrains the person from harassing, stalking, or threatening an intimate partner or child of such intimate partner; or

(9) Has been convicted of a misdemeanor crime of domestic violence cannot lawfully receive, possess, ship, or transport a firearm. A person who is under indictment or information for a crime punishable by imprisonment for a term exceeding 1 year cannot lawfully receive a firearm. Such person may continue to lawfully possess firearms obtained prior to the indictment or information. [18 U. S. C. 922(g) and (n), 27 CFR 178.32(a) and (b)]

The auctioneer may act as the agent for an estate. In this case, the Bureau of Alcohol, Tobacco and Firearms asks the auctioneer or seller to get the buyer's driver's license number or some other form of ID, and keep it on file with the record of sale of guns. If a buyer of a gun at auction is from out-of-state, he must follow the rules stated below:

(1) If the auctioneer had a Federal firearms license, an out-of-state resident could purchase and take with him a long gun (rifle or shotgun) provided the sale was legal in the buyer's state of residence.

(2) If the out-of-state buyer wanted to buy a handgun, the auctioneer would have to ship it to a licensed dealer in the buyer's state of residence and the buyer would have to pick it up from that dealer.

(3) If the auctioneer did not have a Federal firearms license, all guns sold to out-of-state buyers would have to be shipped by the auctioneer to a licensed dealer in the buyer's state of residence and the buyer would have to pick his gun up from that dealer. An unlicensed person (or auctioneer) can ship a gun out-of-state but only if the recipient is a federally licensed gun dealer.

Guns manufactured before 1898 are considered antique.

Further information on this subject can be obtained from the Bureau of Alcohol, Tobacco and Firearms, 8610 Broadway, Suite 410, San Antonio, Texas 78217, (210) 805-2777.

REFERENCE 9

FOOD, DRUG, DEVICE, AND COSMETIC SALVAGE ACT

Health and Safety Code, Chapter 432

432.001. Short Title

This chapter may be cited as the Texas Food, Drug, Device, and Cosmetic Salvage Act.

432.002. Purpose

The purpose of this chapter is to protect the health of the people of this state by preventing the sale or distribution of adulterated or misbranded food, drugs, devices, or cosmetics. _

432.003. Definitions

(1) "Board" means the Texas Board of Health.

(2) "Commissioner" means the commissioner of health.

(3) "Cosmetic" means an article or a substance, or a component of an article or substance, that is intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body for cleansing, beautifying, promoting attractiveness, or altering the appearance. The term does not include soap.

(4) "Department" means the Texas Department of Health.

(5) "Device" means an instrument, apparatus, or contrivance, or a component, part, or accessory of an instrument, apparatus, or contrivance, that is designed or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or other animals, or that is designed or intended to affect the structure or any function of the body of a human or other animal.

(6) "Distressed merchandise" means any food, drug, device, or cosmetic that:

(A) has lost its label or is otherwise unidentified;

(B) has been subjected to prolonged or improper storage;

(C) has been subjected for any reason to abnormal environmental conditions, including temperature extremes, humidity, smoke, water, fumes, pressure, or radiation; or

(D) may have been rendered unsafe or unsuitable for human consumption or use for any reason other than those specified by this subdivision.

(7) "Drug" means an article or substance, other than a device, that is:

(A) recognized in the official United States Pharmacopoeia, the official Homeopathic Pharmacopoeia of the United States, the official National Formulary, or a supplement to any of those publications;

(B) designed or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or other animals;

(C) intended to affect the structure or any function of the body of a human or other animal, excluding food; or

(D) intended for use as a component of an article or substance specified by this subdivision.

(8) "Food" means an article or a component of an article of human food or drink, and includes chewing gum.

(9) "Manufacture" means the combining, purifying, processing, packing, or repacking of food, drugs, devices, or cosmetics for wholesale or retail sale.

(10) "Manufacturer" includes a person who represents himself as responsible for the purity and proper labeling of a food, drug, device, or cosmetic.

(11) "Nonprofit organization" means an organization that has received an exemption from federal taxation under 26 U.S.C. Section 501 and is described by Subsection (c)(3) of that section.

(12) "Reconditioning" means any appropriate process or procedure by which distressed merchandise can be brought into compliance with departmental standards for the consumption or use of that merchandise by the public.

(13) "Sale or distribution" means the act of selling or distributing, whether or not for compensation. The term includes delivery, holding or offering for sale, transfer, auction, storage, or any other means of handling or trafficking.

(14) "Salvage broker" means a person who engages in the business of selling, distributing, or otherwise trafficking in distressed or salvaged merchandise, but who does not operate a salvage establishment.

(15) "Salvage establishment" means a place of business that is engaged in reconditioning or otherwise salvaging distressed merchandise, or that buys, sells, or distributes salvaged merchandise for human use.

(16) "Salvage operator" means a person who is engaged in the business of operating a salvage establishment.

(17) "Salvage warehouse" means a separate storage facility used by a salvage broker or salvage establishment to hold distressed or salvaged merchandise.

(18) "Salvaged merchandise" means distressed merchandise that has been reconditioned.

432.004. Exemptions

(a) This chapter does not apply to:

(1) a manufacturer, distributor, or processor of a food, drug, device, or cosmetic who, in the normal course of business, reconditions the items manufactured, distributed, or processed by or for that person and not purchased by that person solely for the purpose of reconditioning and sale;

(2) a common carrier, or the common carrier's agent, who disposes of or otherwise transfers undamaged or distressed food, drugs, devices, or cosmetics to a person who is exempt under this section or to a licensed salvage broker or salvage operator;

(3) a person who transfers distressed merchandise to a licensed salvage broker or salvage operator; or

(4) a nonprofit organization that distributes food to the needy under Chapter 76, Civil Practice and Remedies Code (Good Faith Donor Act), but that does not recondition the food.

(b) In this chapter, a pharmacist licensed under the law of this state is not considered a manufacturer when the pharmacist fills a prescription from a licensed practitioner or when the pharmacist compounds or mixes drugs or medicine in the pharmacist's professional capacity.

NOTE: This Act and these Administrative Rules apply to auctioneers if they either purchase for resale at auction any food, drug, cosmetic, or device, as described above, or if they contract to auction any of these things for a client. The auctioneer does not need to be licensed to conduct a sale for an owner of the goods, but he is required to sell only to persons holding the proper license. The auctioneer who purchases these items to resell at auction himself must comply with licensing requirements of the Department of Health. For more information, contact the Division of Food and Drugs, Texas Dept. of Health, 512-458-7111.

REFERENCE 10

PARKS AND WILDLIFE CODE Section 62.021

Sale or Purchase of Certain Game

(a) Except as provided by Subsection (c), no person may sell, offer for sale, purchase, offer to purchase, or possess after purchase a wild bird, game bird, or game animal, dead or alive, or part of the bird or animal.

(b) This section applies only to a bird or animal protected by this code without regard to whether the bird or animal is taken or killed in this state.

(c) This section does not prohibit the sale of:

1. a live game animal, a dead or live game bird, or the feathers of a game bird if the sale is conducted under authority of a license or permit issued under this code; or

2. an inedible part, including the hide, antlers, bones, hooves, or sinew of a deer.

Game animals in Texas are mule deer; white-tailed deer; pronghorn antelope; desert bighorn sheep; gray or cat squirrel; fox squirrel or red squirrel and collared peccary or javelina.

Section 62.023 Sale by Taxidermist

a. If the owner of heads or hides that have been mounted or tanned has not claimed them within 90 days After notification by a taxidermist or tanner, the taxidermist or tanner may sell the head or hides for the amount due for labor performed.

b. Heads or hides sold under this section must have attached the original transportation affidavit required under this subchapter.

c. A taxidermist or tanner selling heads or hides under this section shall report immediately the sale to the sale to the department. The report must include the name of the person purchasing the head or hides and a copy of the transportation affidavit regarding the manner in which the head or hides were obtained.

Sale of Live Wildlife in Texas

No person may possess or sell any live game animal, game bird, fur-bearing animal, alligator, endangered species, or cougar unless they possess or sell these species under the authority of the proper license.

Except as provided by Section 65.174 (relating to Permit Required), Section 65.175 of (relating to Permit Exceptions), and Section 65.176 (relating to Rule Exception), no person may take, possess, transport, export, sell or offer for sale, or

ship any species of fish or wildlife within this state listed as threatened; or possess, transport, export, sell, or offer for sale goods made from the fish and wildlife of this state listed as threatened.

No person may take, possess, or transport fish or wildlife classified as endangered species and named in Section 65.183 of this title (relating to Closed Seasons) for zoological gardens or scientific purposes, or take or transport fish or wildlife classified as endangered species from the wild or from their natural habitat, for propagation for commercial purposes, unless he has obtained a valid permit from the department as required by the Texas Parks and Wildlife Code, Sections 43.021-43.030.

NOTE: If an auctioneer is requested to sell species that might be threatened or endangered, the auctioneer should contact Parks and Wildlife for a list of threatened species and information on permits and exceptions.

Sale of Mounted Fish

Fish mounted by a taxidermist may be sold by any person.

Sale of Mounted Fur-Bearing Animals and Bobcats; Their Pelts or Other Parts

Animals defined as a fur-bearing animal in Texas include: badger, beaver, civet cat, fox, mink, muskrat, nutria, opossum, otter, raccoon, ring-tailed cat and skunk. Any person may sell the tanned pelt of a fur-bearing animal, including a specimen mounted or preserved by a taxidermist or tanner, without a license. The sale of "green" or untanned pelts is regulated and licenses are required. The bobcat is not defined by law as a fur-bearing animal, but bobcat pelts, whether they are tanned, untanned, or mounted, may not be sold, traded or exported unless the bobcat pelt has a valid bobcat pelt tag attached.

Possession and Sale of Nongame Wildlife

No person in this state may possess nongame wildlife for commercial purposes, or possess more than 10 specimens of a single subspecies of nongame wildlife or more than 25 specimens of nongame wildlife in the aggregate (dead or alive), unless that person possesses a valid commercial nongame dealer permit issued by the department.

Sale of Non-Living Alligators

All alligators possessed, sold, purchased, exported or imported shall be accompanied by evidence of lawful take. Evidence of lawful take shall consist of:
a. a license or permit number issued by the state or country of origin, which shall be firmly attached to an alligator hide;

b. a document (tag or label) for each alligator part, except for the hide, that specifies the place or origin, name and address of seller, license or permit number, importation permit number, and date of shipment, and a document (tag or label) affixed to the outside of any package or container of alligators, specifying the contents and any applicable license or permit number.

A person possessing a valid retail dealer permit may sell legally obtained and documented processed or manufactured alligator parts only to consumers. A retailer dealer permit is not required of a person selling processed or manufactured products so long as alligator hide is the only alligator part used in the manufactured product, or restaurant that sells alligator ready for immediate consumption in individual portion servings. You may obtain current and updated information on this subject by calling the Texas Parks and Wildlife Department at 1-800-792-1112 or (512) 389-4854.

REFERENCE 11

RESELLING USED AUTOMOBILES

Texas Administrative Code Title 16, Texas Dealer Rules

111.3. General Distinguishing Number.

a. No person may engage in business as a dealer unless that person has a currently valid general distinguishing number assigned by the Board for each location from which the person engages in business. If a dealer consigns more than five vehicles in a calendar year for sale from a location other than the location for which the dealer holds a general distinguishing number, the dealer must also hold a general distinguishing number for the consignment location.

b. The provisions of subsection (a) of this section do not apply to: A licensed auctioneer who, as a bid caller, sells or offers to sell property to the highest bidder at a bona fide auction if neither legal nor equitable title passes to the auctioneer and if the auction is not held for the purpose of avoiding another provision of the Transportation Code, 503.001, et seq., and sections under this chapter; and provided that if an auction is conducted of vehicles owned, legally or equitably by a person who holds a general distinguishing number, the auction may be conducted only at a location for which a general distinguishing number has been issued to that person or at a location approved by the Board as provided in 111.5 of this title (relating to More Than One Location);. For further information call Texas Department of Transportation, Motor Vehicle Division, 512-416-4800.

REFERENCE 12

SELLING ALCOHOLIC BEVERAGES

An auctioneer can sell the inventory of a retail liquor business only in a lump sum, or single lot, manner to a single retailer. This applies to the inventory of alcoholic beverages, but not to fixtures and other assets of the business.

An auctioneer can sell beer and wine at auction for charitable purposes if a special permit is obtained from the Texas Alcoholic Beverage Commission.

Sale of distilled spirits are regulated by Federal law, and an auctioneer is not allowed to sell them with the one exception of an inventory liquidation in which the single lot is sold to a single retailer.

An auctioneer cannot sell the private wine collection of an individual. All wines sold in Texas must be on the Texas Alcoholic Beverage Commission list of approved wines, and it is impossible, for all practical purposes, to find a collection containing only approved wines.

Alcoholic beverages subjected to fire damage or otherwise tainted may not be sold, or resold, in Texas. Such damaged goods may be sold only to a buyer in a state that allows resale of tainted alcoholic beverages.

REFERENCE 13

CONTRACTS

The following is a limited discussion of contracts to give basic information necessary to any person who intends to enter into contracts as a part of their trade or profession. Any questions on specific situations, contracts, or problems should be referred to an attorney.

A contract is a legally binding agreement between two or more persons or parties. A good understanding by all the parties of the proper use of contracts will help prevent disputes.

An effective contract must contain all the terms and conditions of an agreement.

A contract requires three things: an offer, a acceptance, and consideration. When these three things exist a binding contract is formed.

Offer - One party must make an offer. An offer is a clear and specific statement of the terms of the agreement, such as the price, description of services or goods, schedule and type of delivery or performance, time and type of payment(s). If all elements are not included, it is a negotiation, not a bid. The difference between a true offer and negotiation is that an offer clearly states the intent to enter into a contract if the other party agrees to the terms of that contract.

For example, if an auctioneer states, "I will hold an auction to sell your property no later than December 31, 1995. The auction will be with reserve, and you will set the minimum bids. I will handle set-up, advertising and charge them against the proceeds of the auction. My commission will be 25% of the total proceeds before sales taxes." this is an offer.

If an auctioneer says, "I will hold an auction to sell your property, and I'll give you a good deal on my commission." this is a negotiation. If a party makes an offer, and the other party accepts it, both parties are bound by the agreement. Therefore, it is necessary to be very clear and specific when negotiating or making an offer.

If the intention is to negotiate, rather than to make an offer, it should be stated. Time periods to which an offer is limited and requests for written acceptances should be stated.

Acceptance - Once an offer has been made, it can be accepted. The acceptance cannot change any of the terms of the offer. This would be considered a counter offer, to which the other party would have to agree in order for a contract to exist.

An acceptance can be a simple statement that the offer is accepted, but an acceptance is usually made in the same form as the offer. If the offer was written, the acceptance should be written. At that point, the contract is binding on both parties.

Consideration - Consideration means that both (or all) parties must receive something of value. For instance, an auctioneer making the offer in the example above receives his 25% commission, while the owner of the property to be auctioned receives the services of the auctioneer plus the remainder of the proceeds after taxes, set-up, advertising and commissions have been paid.

Written/Oral - Some contracts, such as transfers of real property are required to be written. Oral Contracts are binding however written contracts are preferable because a written contract is evidence of the agreement. An oral contract can be interpreted differently by each party.

A written contract should contain specific terms for every aspect of the agreement that may apply. For instance, if a consignor wants advertising to include listing a specific item, or wants it to appear in a specific publication, this should be stated in the contract. If the auctioneer wants the consignor to be responsible for guaranteeing the condition of certain equipment, this should be written into the contract. Even if items are discussed and "understood" by all parties, they should be written into the contract.

Generally speaking, if a dispute arises over a contract and the dispute goes to court, oral modifications or agreements to a written contract cannot be used to contradict a written contract. Every item left out of a contract leaves room for disagreement.

It is fairly common for changes to be made in a contract after the contract is signed, but it is necessary to have written documentation of any change if a dispute arises. For example, if a consignor has agreed to an auction with minimum bids specified, a contract has been signed, and then the consignor wants to sell one large item with no minimum in order to be certain it sells, it is vital that the auctioneer have this change in writing in order to be able to prove authority to change the original agreement for this one item.

Form - Contracts are not required to be in any particular form. Contract forms may be useful, but a letter stating all the terms and conditions and signed by both parties is just as binding.

Content - Each party to a contract is presumed by law to know and understand everything that is in a contract he or she has signed. Claims that a party did

know such a provision was in the contract is not a defense. Uncertainties or disagreements must be understood before signing.

Other Aspects of Contracts

The purpose, of a contract must be legal. If the purpose is not legal, the contract is void and not binding.

For example, knowingly if an auctioneer contracts to sell stolen goods, the contract is void, and unenforceable due to illegality.

All parties to a contract must have capacity, or the ability to make binding contracts. This means that a person must be mentally competent and at least eighteen years old of age. An auctioneer should not contract to sell property owned by a party under eighteen; the contract must be signed by a parent, legal guardian, or trustee of the owner's property.

All parties must also have authority to act. If an auctioneer organizes his auction company as a corporation, only officers designated with authority to sign for the corporation can sign contracts for the auction company. Consignors or buyers for companies or corporations contracting with auctioneers must have authority to sign for their respective companies or corporations. All parties should request proof of authority before signing a contract.

Interpretation - If words have a special meaning in the trade or profession to which a contract pertains, that special meaning will normally be given. Sometimes it is necessary to determine the meaning of a provision by its context, or by looking at the contract as a whole. If the meaning of a contract cannot be clarified, there is a general rule that the contract will be interpreted against the person who wrote the contract. If an auctioneer provided the wording in a contract or used a standard contract form and the meaning of a term or provision is ambiguous, the ruling will generally be against the auctioneer.

Breach of Contract - Breaching a contract means breaking the agreement. If you do not perform under the forms of the agreement you have breached the contract. Any person contemplating breaching a contract, or who believes another party has breached a contract should contact an attorney.

We suggest the following be announced before beginning a sale:

1. Ask if each buyer has registered and received a bid number.
2. Terms of payment - i.e. cash, letter of credit, check with prior approval
3. Conditions - Are there any guarantees or is the sale "as is", "where is", with "no guarantees".

4. Are there minimums or reserves, or is it a no minimum, no reserve absolute sale?
5. When and where merchandise may be picked up and when it must be removed.
6. What the auctioneer will do in case of a tie bid.
7. If the seller or any of his representatives will be bidding on merchandise.

After you have passed your examination and are licensed, this study guide should be kept as a reference and guide to conducting an auction business.