

Absolute Auctions by the Rules
Donna Brinker Potter, Ohio Department of Agriculture

Absolute auctions are a popular choice when the property being sold is expected to attract strong buyer interest. Properly handled, an absolute auction can work well for the seller, for the buyer, and for the auctioneer. Unfortunately, absolute auctions can also be a source of headaches, and even enforcement actions, if the auctioneer is not careful to follow the rules from start to finish. Let's review the most important principles to keep in mind when you contract for, advertise, and conduct an absolute auction for your client.

The first step is to make sure that you have a proper written contract with the seller. Under both R.C. 4707.20 and O.A.C. 901:8-2-06, your contract must specifically state whether the auction will be absolute or with reserve. In addition, if you are contracting to do an absolute auction, your contract must also include the definition of an absolute auction in R.C. 4707.01(E); it must include a statement affirming that the seller has a bona fide intention to transfer ownership to the highest bidder; and it must prohibit the seller (or anyone acting on the seller's behalf) from participating in the bidding. These rules are intended to make sure that the seller understands exactly what an absolute auction is and how it will be handled, and will go a long way toward avoiding misunderstandings down the road if the results of the auction are disappointing.

Just as your contract must be in strict compliance with the law, your advertisements must also be carefully drafted and reviewed to make sure that they are correct. Under R.C. 4707.22, an advertisement for an absolute auction must "unequivocally state" that the auction will be absolute. While it is true that, under R.C. 1302.41, an auction is assumed to be with reserve unless explicitly stated otherwise, please remember that phrases such as "Everything Sells to the Highest Bidder" are inconsistent with a reserve auction and have been found by the courts to be an advertisement for an absolute auction. If you are going to use such a phrase in your ad, you must also state explicitly that the advertisement is for an absolute auction; otherwise, your ad will not comply with R.C. 4707.22. Remember -- as the licensee, you are responsible for making sure that your ads are correct. If your employee or the media outlet makes a mistake, you need to catch and correct the error before the advertisement runs. Proofreading is critical.

When the day of sale arrives, please be aware of the rules that apply to the actual conduct of absolute auctions. The most important point to keep in mind is that the auction must be conducted as advertised. It is not permissible to change the terms of an auction at the last minute (through announcements on the day of sale), as this is considered an improper "bait and switch" tactic that harms the interest of the auction attendees. If a seller unexpectedly refuses to go through with the absolute auction on the day of sale, the auctioneer's only recourse is to cancel the auction. It is not legal to either change the auction to a "reserve auction" at the last minute or force the seller to proceed with the absolute auction against his/her will. (Of course, the seller might be in breach of the auction contract in that case, but that is a civil issue for you and your client to address with your respective legal counsel.)

Please be aware, however, that there may be certain conditions you put in the advertising that still may not be done, despite the fact that the condition is mentioned in the advertising. For instance, an auction cannot be advertised as absolute if there is a minimum required to be brought to the auction just to register to bid. In other words, you cannot advertise a piece of property as being sold at absolute auction and require prospective bidders to bring a check for \$20,000 with them in order to register. Even though a winning bid may come in under the \$20,000 threshold, what you are doing by demanding

\$20,000 just to enter bids is to set a de facto minimum bid, as bidders will see that as the minimum bid and bid accordingly. That, however, contradicts the definition of an absolute auction.

Of course, in an absolute auction, the property must be sold to the highest bidder once the bidding begins, even if the bid is disappointing. This means that minimum bids and mandatory bidding increments are not permissible in absolute auctions because they improperly exclude what may otherwise be the highest bona fide bid. Finally, be aware that while sellers and their agents cannot participate in the bidding, an auctioneer is permitted to bid on his/her own behalf at an absolute auction, but only if full disclosure is first made to both the seller and the auction attendees.

The information provided in this article is general in nature; it serves to highlight specific sections of the Ohio Auction Law and is not intended to serve as legal advice. The author is not an attorney, and it is recommended that you consult legal counsel regarding any specific questions or concerns that you may have on this topic or regarding compliance with Chapter 4707 of the Ohio Revised Code or any Chapter of the Ohio Revised Code.