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BILL LOCKYER
Attorney General

OPINION	:	No. 02-111
	:	
of	:	April 10, 2003
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BILL LOCKYER	:	
Attorney General	:	
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THOMAS S. LAZAR	:	
Deputy Attorney General	:	
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THE DEPARTMENT OF BOATING AND WATERWAYS has requested an opinion on the following question:

Do the activities of eBay, Inc. in connection with the purchase and sale of previously owned yachts require it to be licensed as a yacht broker under the provisions of the Yacht and Ship Brokers Act?

CONCLUSION

The activities of eBay, Inc. in connection with the purchase and sale of previously owned yachts do not require it to be licensed as a yacht broker under the provisions of the Yacht and Ship Brokers Act.

ANALYSIS

The licensing and regulation of yacht brokers in California are governed by the Yacht and Ship Brokers Act (Harb. & Nav. Code, §§ 700-740; “Act”).¹ Section 708 prohibits any person from engaging in the business of a yacht broker without first obtaining a license from Department of Boating and Waterways (“Department”). Section 701 defines a “broker” in part as follows:

“(a) ‘Broker’ means a person who, except as otherwise excluded by Section 710, for compensation or in expectation of compensation, does, or negotiates to do, one or more of the following acts for another or others:

“(1) Sells or offers to sell, buys or offers to buy, solicits or obtains listings of, or negotiates the purchase, sale, or exchange of yachts, and who does not own those yachts.”²

The question presented for resolution concerns whether the business activities of eBay, Inc. (“eBay”) in connection with the purchase and sale of previously owned yachts require it to be licensed as a yacht broker under the Act. We conclude that as described herein, eBay’s business activities do not require it to be licensed as a yacht broker.

eBay operates an Internet auction website. (See *Gentry v. eBay* (2002) 99 Cal.App.4th 816, 820-821; *Hendrickson v. eBay* (C.D.Cal. 2001) 165 F.Supp.2d 1082, 1084; *eBay v. Bidder’s Edge, Inc.* (N.D.Cal. 2000) 100 F.Supp.2d 1058, 1060.)³ In order to sell or buy items on eBay’s website, persons must complete a detailed registration form. “Pursuant to their agreement with eBay, users set up user IDs or ‘screen names’ to conduct business on eBay’s website in a semi-anonymous fashion.” (*Hendrickson v. eBay, supra*, 165 F.Supp.2d at p. 1084.) eBay’s “User Agreement” states in part:

¹ All further statutory references are to the Harbors and Navigation Code.

² “‘Person’ means any person, firm, association, organization, partnership, limited liability company, business trust, corporation, or company.” (§ 19.) Section 710 exempts yacht owners when selling their own yachts and certain other persons and activities that are beyond scope of this opinion. A “yacht” is “any vessel 16 feet or more in length and under 300 gross tons used for navigating in water and designed to be propelled by machinery or sail.” (§ 701, subd. (c).)

³ eBay is a Delaware corporation headquartered in San Jose, California. (*Earth Flag Ltd. v. Alamo Flag Co.* (S.D.N.Y. 2001) 153 F.Supp.2d 349, 351.) For purposes of this opinion, we may assume that all activities of eBay take place within California for purposes of the Act.

“We are not involved in the actual transaction between buyers and sellers. As a result, we have no control over the quality, safety or legality of the items advertised, the truth or accuracy of the listings, the ability of sellers to sell items or the ability of buyers to buy items. We cannot ensure that a buyer or seller will actually complete a transaction.”

Sellers create their own listing of items to be sold by describing each item, its category, selling format (i.e., by auction or fixed price), as well as payment methods and shipping terms. If an item is to be sold by auction, the seller sets the item’s minimum bid price, if any, as well as the number of days the auction will run.

While eBay does not charge buyers to browse, bid on or buy items listed on its website, sellers pay a non-refundable listing fee for each item. Additional fees are charged when sellers choose one of the optional features, such as having the listing featured on eBay’s homepage. eBay also charges sellers a sales fee based on the item’s final sales price if a winning bidder is declared or a fixed price item is sold. For the sale of previously owned yachts, the listing fee is \$40 and the sales fee is \$40.

Returning to the language of section 701, we find that without question, eBay provides its online auction services “for compensation or in expectation of compensation.” As for the remainder of the statutory requirements, we must resolve whether eBay does or negotiates to do for another or others one or more of the following acts: (1) “sells or offers to sell,” (2) “buys or offers to buy,” (3) “solicits or obtains listings of,” or (4) “negotiates the purchase, sale, or exchange of” previously owned yachts. (§ 701, subd. (a)(1).) The performance of any one of these acts in connection with a transaction involving a previously owned yacht would be sufficient to bring eBay’s activities under the terms of section 701, thus requiring a broker’s license.

We have little doubt that eBay does not sell or offer to sell or buy or offer to buy, on behalf of another or others, any of the items, including pre-owned yachts, listed on its website. Rather, sellers and buyers, not eBay, initiate and directly control the selling and buying process. eBay does not select or describe any of the items offered for sale on its website and does not set or determine any of the payment, shipping or delivery terms that may be required by the seller. (Cf. *Gentry v. eBay* (2002) 99 Cal.App.4th 816, 827 [“eBay is not in the business of selling or offering to sell the collectibles at issue; rather, it is the individual defendants who sold the items to plaintiff, using eBay as a venue”].) Nor does eBay decide the price a buyer may be willing to pay for an item or see, inspect, examine, possess, place into inventory, purchase or take title to any listed item at any time.

We also believe that eBay’s activities do not establish that it “solicits or obtains listings of” the previously owned yachts offered for sale on its website. In section 7601 of title 14 of the California Code of Regulations, the Department has defined the term “listings” as follows:

“(a) An ‘exclusive listing’ is a written agreement between the owner of a vessel and a broker which provides that the commission is due the broker named in the contract if the boat is sold, traded, or exchanged within the time limit which must be specified in the contract by the said broker, by any other broker, or by the owner.

“(b) An ‘open listing’ is a written agreement between the owner of a vessel and a broker which authorizes the broker to negotiate the sale, trade, or exchange of the vessel, but reserves to the owner the right, without incurring a liability for the payment of a commission to said broker, to negotiate the sale, trade, or exchange of said vessel himself, or to enter into open listing agreements with other brokers respecting said vessel.

“.....”⁴

The yacht descriptions prepared and submitted by sellers, which are then posted on eBay’s website in an effort to induce potential buyers to purchase the yachts directly from the sellers, cannot reasonably be considered “listings” as that term has been administratively construed in the Department’s regulation.

We have previously examined a similar situation involving a referral business in which the operator solicited and received listings of yachts and ships for sale. (Cal. Atty. Gen., Indexed Letter, No. IL 70-62 (Mar. 31, 1970).) The listings were supplied to brokers and published in boating publications. The identity of the listing broker or owner was coded, thus requiring the referral of all inquiries to the operator who, in turn, supplied the information to the inquiring broker or prospective buyer. A fee was payable by the listing broker or owner on the sale of any listed vessel. The operator’s activities were limited to the listing service. We concluded that the operator’s activities did not require him to be licensed as a “broker” under the terms of the Act:

⁴ “Unless unreasonable, or clearly contrary to the statutory language or purpose, the consistent construction of a statute by an agency charged with responsibility for its implementation is entitled to great deference.” (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 460; see *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 309; 83 Ops.Cal.Atty.Gen. 40, 44 (2000), 80 Ops.Cal.Atty.Gen. 322, 326-327 (1997).)

“[W]e are of the opinion that the described operation does not fall within the above-quoted statute defining operations required to be licensed under the Act. Although the operator clearly solicits advertising for purchase and sale of vessels, it appears, after careful review, that the operator is not attempting to obtain prospective purchasers or sellers, but is merely providing an advertising medium. Nor is such advertisement a ‘listing’ within the Act. The regulations of the department define listing as either ‘exclusive listing’ or ‘open listing,’ constituting a written agreement between the owner of the vessel and the broker authorizing the broker to negotiate the sale, trade, or exchange of the vessel. Tit. 14, Cal. Adm. Code § 7601.

“In the present matter, the operator does not purport to operate under any such authorization, written or otherwise, nor does he engage in any negotiations or effect any sales on behalf of the owner as a broker, salesman, agent, or otherwise. See 8 Ops.Cal.Atty.Gen. 262 (1946) -- out of state broker advertising sale of vessels in this state does not come under former Business and Professions Code section 8902. Such advertisement solicitation or advertisement does not differ in controlling respects from the activities of newspapers or similar advertising medium which include classified ads offering to sell yachts and ships.” (*Id.* at p. 2.)

Our final and most difficult determination under section 701’s definition of a “broker” is whether eBay “negotiates the purchase, sale, or exchange of” previously owned yachts for another or others. The eBay service that arguably may constitute such negotiations is its “proxy bidding system” that it makes available to buyers. When buyers decide to utilize this service, they enter the maximum amount they are willing to pay for an item. That amount is kept confidential from other bidders as well as from the seller. eBay’s computer system automatically places a bid on behalf of the buyer to maintain the buyer’s high bid position up to the buyer’s maximum amount.

We do not believe that eBay’s proxy bidding system constitutes “negotiating” for the purchase of a previously owned yachts. First, eBay does not act as an “agent” for either the seller or buyer during the auction bidding process. (See Civ. Code, § 2295 [“An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.”]; *Channel Lumber Co. v. Porter Simon* (2000) 78 Cal.App.4th 1222, 1227-1228; cf. 7 Ops.Cal.Atty.Gen. 369, 371 (1946).) Second, the term “negotiate” commonly is defined as “to communicate or confer with another so as to arrive at the settlement of some matter.” (Webster’s 3d New Internat. Dict. (1971) at p. 1514; see also *Mason v. Mazel* (1947) 82 Cal.App.2d 769, 772.) Here, the only person “negotiating” is the buyer who has instructed eBay’s computer system to submit increasing bids to the seller in accordance with a pre-determined bid schedule. Use of eBay’s proxy bidding system is, for

all practical purposes, no different from the buyer electing to manually submit higher bids in response to those submitted by other bidders. In neither situation is eBay “negotiating” on behalf of the buyer as that word is normally understood. We believe that by use of the proxy bidding system, the buyer, not eBay, is negotiating the purchase price, with eBay simply acting as the venue. (Cf. *Gentry v. eBay*, *supra*, 99 Cal.App.4th at pp. 826-827.)

It is evident that the primary purpose of the Act is to provide protection for consumers through the licensing and regulation of yacht brokers. (See §§ 709, 719, 720, 721, 730, 731, 732, 733, 734, 735, 735.1.) Here, with respect to the activities of eBay, a yacht buyer does not rely on the honesty or truthfulness of any statement made by eBay (see § 709) or upon eBay’s knowledge or understanding of the principles of the yacht brokerage profession (see §§ 719, subd. (a)(3), 721, subd. (a)(2)), in selecting, bidding on, purchasing or completing a sales transaction. Requiring eBay’s licensure as a “broker” would thus not further the primary purpose of the Act to provide protection to the public. We construe the language of section 701 “so as to effectuate the purpose of the statute.” (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.)

Accordingly, we conclude that the activities of eBay in connection with the purchase and sale of previously owned yachts do not require it to be licensed as a yacht broker under the provisions of the Act.
