SMITH HAUGHEY
RICE & ROEGGE
ATTORNEYS AT LAW

BUSINESS & REAL ESTATE LAW

JULY 2013

THE JOBS ACT AND PRIVATE OFFERINGS:
Connecting Companies with Capital

BY: JONATHAN J. SIEBERS, ATTORNEY

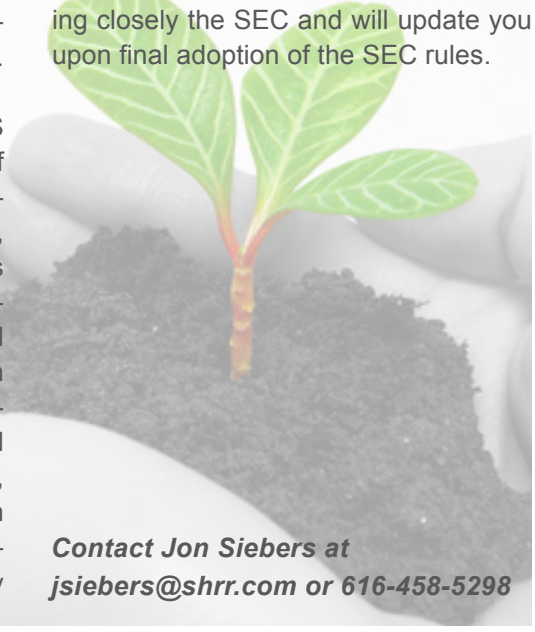
To issue and sell its securities (typically stock in a corporation or membership interests in an LLC), a company must register with the SEC or the securities must fall within a registration exemption. Sales of securities that are exempt from registration requirements are referred to as private offerings or private placements. Last year, Congress and President Obama passed the JOBS Act (Jumpstart Our Business Startups Act), which removes limitations in certain existing private offering tools and introduces new private offering tools. The goal of the JOBS Act is to make it easier for capital-seeking companies to connect with investors.

Historically, the most popular type of private offering has been the Rule 506 offering, which allows a company to raise an unlimited amount of money by selling its securities to "accredited investors." Accredited investors are investors that meet certain annual income and/or net worth requirements. While Rule 506 offerings have been and remain popular today, certain prohibitions within Rule 506 make it challenging for companies requiring capital to connect with investors that have capital to offer. Specifically, Rule 506 prohibits securities issuers from general advertising and general solicitation in connection with the sale of securities.

One key component of the JOBS Act is a mandate that the SEC remove from Rule 506 the prohibitions against general advertising and general solicitation. This will allow securities issuers to use all forms of media, including internet, radio, television, print, etc., to reach potential investors. Most industry experts agree that this will change the face of private placements and provide private companies with far greater access to investors.

Another key component of the JOBS Act is the creation of a new category of private offerings: crowdfunding. Crowdfunding, as created by the JOBS Act, allows companies to sell their securities through a funding portal, which is a special website that is registered with and regulated by the SEC. A company can raise up to $1,000,000 on a funding portal by selling securities to accredited and non-accredited investors alike. However, there are annual income and net worth limits that restrict how much each individual investor can invest in a company through a funding portal.

Although the JOBS Act passed last year, the provisions discussed above require SEC rules in order to take effect. Until the rules have been finalized and adopted, questions remain about exactly how these revised and newly adopted private offering tools will work in practice. Thus far, the SEC has published proposed rules, but the rules have not yet been finalized and adopted. We are monitoring closely the SEC and will update you upon final adoption of the SEC rules.



Contact Jon Siebers at jsiebers@shrr.com or 616-458-5298

Inside This Issue

Condominium Reconfiguration and Its Effect on Incomplete Condo Developments

BY: ROBERT W. PARKER & KATE E. FLEWELLING, ATTORNEYS

In 2001 the Michigan legislature attempted to solve a problem plaguing condominium associations – incomplete condominium projects – by adopting Section 67(3) of the Condominium Act.

IMPETUS FOR ACTION

Incomplete condominium projects, i.e. projects with common elements, buildings, units or other structures that a Developer indicated on a site plan might be built but were never constructed, create a variety of issues for owners and potential owners within a condominium. The most obvious issue is that lenders are reluctant to finance or refinance properties in developments that are incomplete. Lenders fear that incomplete projects mean under-funded reserves which in turn mean lack of maintenance and repair for general common elements. In a traditional condominium project, where the general common elements consist of roofs, siding, windows, elevators, internal stairwells etc., deteriorating general common elements spell declining values. As a result, Lenders either will not provide financing at all, or will not do so on the best terms available in the market. Other more subjective issues arise from incomplete condominium projects such as a chilling effect on buyers who do not know what the condominium might look like in a few years and the inefficient use of land and other resources that affects everyone in the association.

FILLING THE GAPS

To address the issue of incomplete condominium projects, the Legislature adopted Section 67(3) which creates a deadline for "need not be built" structures to be completed. If a structure is not built by the applicable deadline, the area at issue converts to a general common element of the condominium association. The deadline for a given condominium association is either six or ten years, depending on whether the condominium bylaws contain certain features, such as expandability, and run from different points in time based on the specific circumstances. For example, if a condominium was initially constructed in 2002 and, based on the statute, had a ten year Section 67(3) deadline, any "need not be built" structure that was not built by 2012 has automatically, without any action necessary by the association, been converted to a general common element.

STAKEHOLDERS

When it was adopted in 2001 most practitioners gave Section 67(3) little notice. However, with the melt-down of the real estate industry in 2008, which was acutely felt in the second home market, many projects still in development seized up. With that, Section 67(3) has drawn new attention. Given that the statutory periods established by Section 67(3) are now starting to expire, we anticipate the courts will be forced to start grappling with how to interpret this complicated section of the Condominium Act. The plain language of Section 67(3) suggests that anyone other than a condominium association with an interest in applicable property – whether that be a bank with a mortgage, a developer or an owner – may have their property interest erased automatically simply by the passage of time, a result which is sure to send some of these stakeholders running to the courthouse.

Contact Robert Parker at rparker@shrr.com or 231-486-4504

Contact Kate Flewelling at kflewelling@shrr.com or 231-486-4543

Negotiation: There's a Right Way and a Wrong Way

BY: CHARLES B. JUDSON, ATTORNEY

"There's a right way and a wrong way to read the Bible" declared my Minister on a recent Sunday morning. I'm certain his point is true, and I'm equally confident all of us have had a parent, teacher, or mentor make that same point, albeit on a more secular topic. When it comes to doing anything, it seems a common point of reference to point out the "right way," and acknowledge "the wrong way."

During that sermon, my thoughts drifted to a recent mediation where I observed contrasting styles of negotiation, which illustrated the right and wrong. Practicing law is defined as an "adversarial profession," a lawyer's job is to advocate (zealously) on behalf of a client. Advocacy has a predictable outcome when a fact finder (a Judge) declares a result and the trial is over. More often, however, litigation is defined by a settlement.

As a mediator, I have learned to trust that settlements offer more in resolution than basic adjudication. For one, the clients actively participate, which often leads to a better understanding of the components and rationale for the terms negotiated. Often, that better understanding also creates more satisfaction with the outcome.

An additional benefit is flexibility. Problems are often complex, with multiple issues and layers involved. While a decision based upon law will create finality, it may be insufficient to address all outstanding issues which exist. Negotiated settlements have far less risk for post judgment remedies than adjudicated outcomes.

All of which takes me back to the original theme: there's a "right" way to negotiate, and there's a "wrong way" as well. For decades, American lawyers have subscribed to a pattern of advocacy which could be described as winning through intimidation. Although my evidence is anecdotal, I believe that throughout the last several decades of the 20th century, many lawyers focused advocacy by marshalling only those facts supporting their client's position, and arguing merit to this position without regard to opposing positions. The approach seems to support a belief that it's up to the court to figure out where the other side was coming from, and that success will follow if the court can be persuaded to the lawyer's stated position.

Statistically speaking, unyielding advocacy for a singular position seems to be a losing proposition. In 2011, over 230,000 circuit court lawsuits were filed, and less than 2% were ever tried. The point I draw from the above is that more than 98% of the time, a legal issue will be resolved through negotiation of a settlement. It's safe to presume that in 100% of those settlement negotiations, another attorney and client provided an opposing position with equal dedication to victory. If both lawyers support unyielding advocacy in a negotiation, then it seems improbable that unyielding advocacy will normally achieve resolution, at least efficiently and in a predictable course of dealing.

So how do we navigate advocacy in such an environment? As the old saying goes..."very carefully." Black's law dictionary defines negotiation as a "... process of submission and consideration of offers until an acceptable offer is made and accepted..."

As a mediator with over twenty years of experience helping litigants and attorneys reach settlement, I believe "the right way" to negotiate requires a clear identification of a client's goals and objectives. Generalized criterion does not meet this standard. For instance, if a client says, "I want as much money as I can get," how do you form an understanding of what he/she wants? More importantly, the opposing party's position is likely to focus on paying "as little money as possible," so without some parameters about the value related to those positions, little meaningful negotiation is likely to happen.

The process for effective negotiation is simple to state, but can be challenging to put into practice. I describe the path of effective negotiation in five basic

...continued page 4

Smith Haughey Rice & Roegge

100 Monroe Ctr., NW
Grand Rapids, MI 49503

This newsletter is published by:

Smith Haughey Rice & Roegge

Offices in Grand Rapids, Traverse City, and Ann Arbor

1-877-833-7477
www.shrr.com
info@shrr.com

...CONTINUED FROM PAGE 3

steps:

1. Analyze your preferred outcome to determine whether it's realistic.

2. Assess the opposing party.
   - try to determine what they want... or likely will need/require to be satisfied;

   - try to determine what they stand to gain or lose if a settlement does not occur.

3. Establish a plan that clearly identifies your objective for the opposing party, and also takes into account things you have assessed the other party needs for a reasonable outcome (i.e., tailor your objective with an understanding that a settlement can only occur if the other side agrees to settle).

4. Listen carefully to the opposing response. The key to meeting your objective is making certain that the needs expressed by the other side are at least addressed.

5. Keep working toward meeting your objective without getting fixed on specific terms of a proposal (for instance, if you are seeking an amount of money to pay for damage to your car, be open to discussing the need for your car to be repaired, which might be met in an unforeseen manner).

I have learned that successful negotiation requires purposeful identification of your objective. The ultimate outcome for both parties is a resolution of the dispute. Preparation for negotiation requires a realistic assessment of your stated objectives, and an equally realistic assessment of the objectives of your opponent. Settlement oriented advocacy is challenging because the focus of your persuasive efforts is not a Judge poised to direct an outcome in your favor. Rather, successful negotiation requires that you direct persuasive technique at your adversary across the table. Instead of tailoring arguments to persuade a Judge to award as much as you want, your arguments will only be effective if your opponent understands why you are entitled to the sum requested. Such effectiveness will be measured on your preparation to review how your goals can be measured objectively, as well as your ability to assess your opponent's desires and risks. Ultimately, settlement occurs when you find a responding proposal within the range that is, in your assessment, better than other alternatives available. Hopefully, some of these tools can help you to negotiate "the right way."

Contact Charles Judson
at cjudson@shrr.com
or 231-929-4878