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When Raising Money For Investment Purposes From Any Source, BEWARE

Raising money or obtaining other property for investment purposes from whatever source in Virginia, including from family and friends, implicates state and federal law.

Some may have read about the recent action for fraud filed by Andrew Cuomo, the Attorney General of the State of New York, against Ernst & Young, LLP, one of the largest accounting firms in the United States.

What is important for those in the Commonwealth of Virginia attempting to raise money or obtain other property for investment purposes is that Virginia has similar securities laws. Virginia's Securities Act differs from, and is more extensive than, that of the federal securities acts.

Thus, when attempting to raise money or obtain other property for investment purposes from whatever source in Virginia, including from family and friends, one should be thinking "security" and "securities legislation," state and federal.

A "security" includes a great deal more than you might think. Under both federal and state securities laws, the definition of a "security" includes "investment contracts," in addition to those types of investment vehicles generally thought to be "securities," such as stocks and bonds.

Virginia's Securities Act defines a security, in pertinent part, as "any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; pre-organization certificate of subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; oil, gas or other mineral lease, right or royalty, or any interest therein; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

An investment contract is a contract, transaction, or scheme whereby a person [1] invests his money [2] in a common enterprise and [3] is led to expect profits [4] solely [or mostly] from the efforts of the promoter or a third party.

As such, investments deemed to have been securities have included investments in scotch whiskey, self-improvement courses, condominiums, cosmetics, earthworms, beavers, muskrats, rabbits, chinchillas, fishing boats, vacuum cleaners, cemetery lots, cattle embryos, recording contracts, animal feeding programs, pooled funds and fruit trees, among others.

The "take-away" from the foregoing is that anyone raising money or obtaining other property for an investment of any kind from whatever source, perhaps especially from "family and friends," should take care to obtain competent legal advice from an attorney well versed in securities law.

* Excerpted from our blog.

Litigation over Real Estate Commissions

We wrote a couple blog pieces over litigation regarding real estate commissions. Clearly, when the real estate market is slow and prices depressed, sellers look to squeeze every cent from the sale. Here is a summary of the cases we discussed at www.blog.tarleyrobinson.com.

1. Listing Agreements may be enforceable, even when they are not signed. Generally speaking a party can enforce an oral agreement. However, courts will not enforce certain contracts unless they are in writing. A listing agreement for a real estate broker is one of those contracts required to be in writing. Most real estate agents and brokers understand the importance of having written listing agreements with their sellers. However, a recent decision of the Supreme Court of Virginia points out that even in the absence of a written listing agreement, an oral listing contract may be enforceable if there is sufficient documentation to remove it from the bar to enforcement of the Statute of Frauds. The Virginia Supreme Court, in the case of C. Porter Vaughan, Inc., Realtors v. Most Reverend Francis X. DiLorenzo, Bishop of The Catholic Diocese of Richmond, better defined what is meant by "sufficient documentation."

In Vaughn, a Richmond broker sued a seller with whom the broker alleged an oral contract to employ the broker to sell certain property. The Supreme Court reversed the Circuit Court and remanded the case for a trial to determine the precise terms of the oral contract. The Court held that a writing is sufficient to remove the bar of the statute of frauds if it "contains the essential terms of the agreement."

It is always better to have your written agreements because the terms are defined and definite. Furthermore, certain contracts must be in writing. However, when in doubt, contact an attorney experienced in real estate litigation to answer your questions.

2. Listing Agreements are "contracts" and courts will interpret those contracts to determine each party's rights and obligations. In a recent New Kent County case, the judge reviewed the terms of the listing agreement to determine whether a real estate broker could recover a commission. In Ware Creek Real Estate v. J & R Enterprises, the parties agreed that they entered into a listing agreement dated October 16, 2007, and which expired on May 1, 2008. The parties agreed that the prospective purchaser signed a contract on June 2, 2008, within 90-days from the expiration of the listing agreement. The sale closed on August 17, 2009.

The real estate agent claimed it was entitled to a commission from the sale. The seller argued in its demurrer that the listing agreement required payment of the commission only if the property is sold within the period of time of the listing agreement.

The judge looked at the four corners of the listing agreement to determine the contract's definition of "sold." As the judge pointed out, just a couple sentences later, the listing agreement provided that the seller owes the broker a commission "if, for example, the owner receives an offer during the initial period of time but accepts it thereafter. If this occurs 'the Owner shall pay Broker the Fee as if the Property had been sold during the initial period of time ...' Settlement is not required for the broker" to earn the commission. If acceptance of an offer is sufficient to earn the broker his fee in this circumstance it is unlikely the parties intended 'sold' to have a different meaning in the first two sentences of the same paragraph." The Court overruled the demurrer and the case will continue to trial or other resolution.

As always, written agreements are preferred because the parties' rights and obligations are clearly stated. Laws continue to change and judges make decisions. Have an experienced real estate attorney, with litigation experience, review your documents before you sign.

NOTES FROM OUR BLOG

Susan was named to the Virginia Legislative Action Committee to monitor legislation relating to Virginia community associations. The committee provides insight to legislators on proposed legislation affecting the more than 500,000 Virginia homeowners living in common interest communities.

Check out our blog's daily updates, the 2-Minute Drill. Did you know that Billy the Kid was recently denied a pardon? Did you know he was up for one?

Check out our blog at
www.blog.tarleyrobinson.com