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THE PIB REPORT

SEC Provides Additional Insight, and Increased Focus, on Initial Coin Offerings

The Securities and Exchange Commission ("SEC") continues to review initial coin offerings ("ICOs"). ICOs are offerings in which a sponsor offers a block-chain based crypto-currency to investors. These offerings are often made prior to the issuance or "minting" of the currency, and often at a discount. On December 11, 2017, the SEC imposed a cease-and-desist order regarding one such ICO. The order, *In the Matter of Munchee, Inc.*, provides valuable insight on the SEC's thinking on the legality of these offerings.

In November and December of 2017, Munchee – a company based in San Francisco that offers an iPhone app allowing users to review restaurants – offered investors utility tokens that represent a prepayment for services called "MUN." The MUN tokens were to be issued on the Ethereum blockchain. Munchee marketed its offering through several websites and the publication of a "whitepaper" that described the MUN tokens, the process of the offering, and the actions that Munchee would take to increase the value of the MUN tokens. Munchee wanted to raise $15 million to improve the iPhone app and to build the "ecosystem" where the MUN tokens could be used.

Importantly, the materials published by Munchee highlighted the efforts that Munchee was to employ to increase the value of the MUN tokens. Prior to minting of the MUN tokens, Munchee was going to use the proceeds of the offering to improve the Munchee app and bring in more customers. After the MUN tokens were issued, Munchee was going to ensure that the MUN tokens were traded on secondary markets – and Munchee was willing to "burn" MUN tokens, taking them out of circulation permanently, to support their value.

The SEC, applying the test detailed in *SEC v. W.J. Howey*, 328 U.S. 293 (1946), found that Munchee's offering on the MUN tokens was an offering of investment contracts, and thus subject to the registration requirements of the Securities Act of 1933. It is true that a pure prepayment for services (*e.g.*, a gift certificate) is not considered a security under the Securities Act. The SEC found, however, that even though the MUN tokens were utility tokens, investors were going to rely on the efforts of Munchee for any increase in the value of their investment – which is an important factor in the *Howey* test. The SEC determined that the MUN tokens were securities after minting, due to the efforts promised investors by Munchee. Many market participants have taken the position that, once minted, utility token are not securities for the purpose of the Securities Act. The SEC, however, noted in *Munchey* that merely calling a crypto-currency a "utility token" is not determinative. Rather, each issuance must be evaluated on a case-by-case basis.

SEC Chairman Jay Clayton released a statement the same day the *Munchee* order was issued, noting that while ICOs can be an effective way to raise funding for innovative projects, the securities laws continue to apply to these offerings and market participants need to be wary. ■

For more information on ICOs, or for a copy of the Munchee order, please contact Christopher Pesch at christopher.pesch@piblaw.com or Anthony Santoriello at anthony.santoriello@piblaw.com.

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VIEWS FROM THE BENCH: WHAT JUDGES OWE TO LITIGANTS AND LAWYERS

Judge Cohen – who has been Of Counsel to PIB Law since 2013 – had a long and distinguished career on the bench. He was first appointed to serve in the Juvenile and Domestic Relations Court in 1981. In 1984, he became a Judge of the Superior Court, Law Division. In 1998 he was assigned to the Chancery Division, General Equity and Probate Part and was designated the Presiding Judge by the Chief Justice in 2000. In his tenure on the bench, Judge Cohen oversaw hundreds of family matters, criminal jury trials, and complex general equity and probate litigation. Judge Cohen retired from the bench in 2004. He served as a recall Judge until 2006, and then entered private practice. At PIB Law, Judge Cohen concentrates on mediation and arbitration and consults on commercial litigation and regulatory matters. Judge Cohen also serves as a mentor to the Firm's litigators. Last month Judge Cohen authored an article on what Judges expect from the attorneys when appearing in Court. This month Judge Cohen has addressed the opposite perspective – what Judges owe to litigants and lawyers appearing before them.

At my first Judicial College when I became a judge in 1981, I listened to the words of then-Chief Justice Wilentz when he addressed all of the judges in our state. He asked a question: What is the one and only essential quality without which a judge cannot be a good judge? Is it:

• Wisdom?
• Experience
• Patience?
• Being a good listener?
• Knowledge of the law?
• Scholarliness?
• Being a good writer?

While all of these qualities, and many others, are important and valuable, none of them are alone essential to being a good judge. The only quality that is absolutely essential is that a good judge must be fair. There is no justice without fairness. Every litigant must be treated decently, respectfully and fairly by the Court, because for the attorneys and litigants appearing in Court, their case is the most important case. This is their day in Court.

A JUDGE SHOULD:

• Treat every litigant, every attorney, every witness, every juror, every staff member (and everyone else) with respect, dignity and courtesy, whether they deserve it or not. The judge must set the example.
• When an attorney is less than diligent, is obnoxious, difficult, or inept, resist the temptation to make that attorney's client pay for the sins of the attorney. Deal with the attorney privately, in chambers or at sidebar. Never embarrass an attorney in front of his or her client.
• Insist that all members of the judicial staff treat everyone as the judge would treat them. Staff members represent the Judge and leadership comes from the top.
• Never take the bench unprepared to deal with and rule upon matters in the case. In the rare cases when time does not permit a ruling or when something comes up unexpectedly, reserve decision and issue a ruling as soon as possible thereafter. The longer you wait, the harder it gets to decide the matter.
• Listen attentively to the arguments of counsel, and ask questions to clarify an issue or counsel's position. Ask counsel to provide authority, such as case law, statutory authority, a court rule, or a rule of evidence to support the position he or she is advocating. Do not argue with counsel on the record, because if you do, you will have three lawyers arguing instead of two. When the attorneys are done presenting their arguments, including rebuttals, rule from the bench and give reasons and authority to support the ruling.
• Always give reasons and authority for your rulings, either orally on the record, or in writing. Many, if not most, cases that are reversed on appeal are reversed because the Appellate Court could not determine from the record the reasons why the Trial Court ruled the way it did, not because the trial judge made an error.
• Always remember that a record is being made of all proceedings in the courtroom and that that record may be reviewed someday by a higher court. Speak clearly, logically and in complete sentences. Always be careful to avoid saying anything intemperate, inappropriate or in anger. Do not use sarcasm, and use humor sparingly. Whenever you feel your blood beginning to boil on the bench, take a short recess until you calm down.
• Always treat jurors with the utmost respect and courtesy. Remember that they are the "Judges of the Facts," and in jury trials they, and not the judge, will be making all of the most important decisions. Jurors assess the credibility of the witnesses, and determine the ultimate questions such as guilt in a criminal case, liability in a civil case and the quantum of damages.

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• When conducting voir dire and excusing jurors for cause, if you sense that a juror really does not want to serve, consider whether you believe the juror will make thoughtful and reasoned decisions that will affect the lives of the litigants and victims in a criminal case and potentially the freedom of an accused defendants. Many judges are reluctant to excuse jurors without a "valid" reason. Consider whether you want to force a reluctant juror to sit on a trial as a "Judge of the Facts" when that juror might be angry or distracted by personal matters and might not be able to decide the case solely on the facts and under the law.

• Recognize that cases are not about the attorneys, not about the Judge, not about public opinion or the press. The cases are about the litigants, the facts and the law.

A court of law in the United States of America is the greatest bastion of freedom and equality that the world has ever known. It is a privilege and an honor to practice in such a system. As judges and attorneys, we should all keep that in mind every day. ■

For more information, contact Hon. R. Benjamin Cohen at benjamin.cohen@piblaw.com.

Recent Amendments to Federal Rules of Bankruptcy Procedure

This article highlights the most significant changes made to the Federal Rules of Bankruptcy Procedure, which became effective December 1, 2017. Rules 1001, 1006, 1015, 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009 were amended, and a new rule – 3015.1 – was promulgated.

The most significant change was to the rules and forms involving Chapter 13 Plans. Debtors are now required to use an official model form of a Chapter 13 Plan, unless a local form has been adopted by the local Bankruptcy Court. *See* Fed. R. Bankr. P. 3015; 9009. Under the amendments, the Chapter 13 Plan must be served on all creditors and the U.S. Trustee, either at the time the Plan is filed with the Court or with the notice of hearing of plan confirmation under Rule 2002. *See* Fed. R. Bankr. P. 3015(d). Any objections to confirmation must be served at least seven days before the confirmation hearing. *See* Fed. R. Bankr. P. 3015(f). Under Rule 3015(g), upon a confirmed plan, the amount of a secured claim is determined via the confirmation and this determination overrides any contrary proof of claim and the debtor's schedule and the confirmed plan grants the debtor's request, if any, for termination of the stay.

In the event the local judicial district adopts a local Chapter 13 Plan form, the form must contain the requirements set forth in Rule 3015: (1) notice that the plan contains a nonstandard provision, limits the amount of a secured claim based on the collateral's valuation, or avoids a lien; (2) notice pertaining to the cure and maintenance of home mortgages, payment of domestic support obligations, and treatment of those secured claims falling within Section 1325(a), and surrendering of the property; (3) notice regarding any nonstandard provisions, with the express statement that any nonstandard provisions listed elsewhere in the plan are void; and (4) the debtor's or debtor's attorney's certification that other than those listed, there are no other nonstandard provisions in the plan.

Below are additional amendments to the Rules:

• **Rules 1001 and 1015(b):** Language changes were made to Rule 1001 (inclusion of the word "administered") and Rule 1015(B)(substitution of "spouse" for "husband and wife").

• **Rule 1006(b):** Under amended Rule 1006(b), the Court is required to accept a bankruptcy petition for filing, which is accompanied by an application to pay filing fees in installments but is missing the initial installment.

• **Rules 2002(a)(9) and 2002(b)(3):** Notice provisions were amended in Rule 2002, which now requires 21 days' notice for filing objections to confirmation of a Chapter 13 plan, and 28 days' notice of the date of the confirmation hearing.

• **Rules 3002(a) and (c):** The deadline for filing proofs of claims in Chapter 7, 12, and 13 cases was changed to 70 days from the filing date of the petition or conversion. Where a mortgage is secured by the debtor's principal residence is involved, the proof of claim is a two-step process: (1) the poof of claim is due filed during the 70-day period, and (2) any attachments and supplemental attachments are due 120 days after the filing date of the petition or conversion. If the matter

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is an involuntary Chapter 7 case, the filing deadline is 90 days from the date of the order of relief.

• **Rule 3007:** Service of objections to claims and notice of objections must be: (1) completed by first class mail on the debtor, debtor in possession, claimant, and US Trustee; (2) in accordance with Rule 7004(b)(4) or (5) if the claimant is the United States or any of its officers or agencies; or (3) in accordance with Rule 7004(h), if the claimant is an insured depository institution.

• **Rules 3012 and 7001:** The Court is permitted to determine the amounts of secured and/or priority claims. A request for determination may be made by motion or by claim objections.

• **Rule 4003(d):** The debtor may request avoidance of a lien or other transfer of exempt property by motion or through a Chapter 12 or 13 plan.

• **Rule 5009:** The debtor may request a specific order from the Court declaring a secured claim satisfied and the lien released as part of a confirmed plan.

• **Rule 7001:** An adversary action is not required for determining the amount of a secured claim under Rule 3012, but is required for lien avoidance not governed by Rule 4003(d).

With these procedural and form changes, bankruptcy practitioners are urged to check with their local judicial districts for any adoptions of local Chapter 13 Plans, and to update their form files accordingly. ■

For more information regarding the changes to the Bankruptcy Rules, contact Anita Murray at anita.murray@piblaw.com or Fred Hoensch at fred.hoensch@piblaw.com.