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Continuing Confusion In The Definition Of A Security: The Sale Of Business Doctrine, Discretionary Trading Accounts, And Oil, Gas And Mineral Interests

CONTINUING CONFUSION IN THE DEFINITION OF A SECURITY: THE SALE OF BUSINESS DOCTRINE, DISCRETIONARY TRADING ACCOUNTS, AND OIL, GAS AND MINERAL INTERESTS

For decades courts and commentators have labored to interpret the definition of a security under federal securities laws.[1] Although the Securities Act of 1933[2] ('33 Act) and the Securities Exchange Act of 1934[3] ('34 Act) define a security, courts often have vacillated in determining

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[1] *See, e.g.*, Marine Bank v. Weaver, 455 U.S. 551, 555-61, 560 n.11 (1982) (federal statutes' broad definition of security requires courts to analyze and evaluate each transaction and instrument alleged a security); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943) (courts may find that both commonplace and novel instruments and devices constitute securities); SEC v. Aqua-Sonic Products Corp., 687 F.2d 577, 584-85 (2d Cir.) (courts interpreting definition of security must look past legal terminology and must consider totality of circumstances surrounding transaction), *cert. denied*, 103 S. Ct. 568 (1982); SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 482-83 (9th Cir.) (modifying earlier interpretations of definition of security) *cert. denied*, 414 U.S. 821 (1973); Newton, *What Is A Security: A Critical Analysis*, 48 MISS. L.J. 167, 167 (1977) (definition of security harbors ambiguity); Note, *When Is A Security Not A Security? Promissory Notes, Loan Participants, and Stock In Close Corporations*, 39 WASH. & LEE L. REV. 1123, 1123-24, 1124 nn.3-4 (1982) (discussion of Supreme Court decisions and commentators expressing uncertainty involved in defining a security) [hereinafter cited as *When Is A Security Not A Security*]; *see also infra* text accompanying notes 19-80, 84-177 (varying Supreme Court and lower court analyses for defining a security).

[2] 15 U.S.C. §§ 77a-77bbbb (1976). The Securities Act of 1933 ('33 Act) defines a security as follows:

> When used in this subchapter, unless the context otherwise requires—
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> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable, share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate or interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warranty or right to subscribe to or purchase, any of the foregoing.

Id. at § 77b(1).

[3] 15 U.S.C. §§ 78a-78kk (1976). The Securities Exchange Act of 1934 ('34 Act) defines a security as follows:

> When used in this chapter, unless the context otherwise requires—
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> The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include

the scope of enumerated terms and general interests[4] within the Acts' definition[5] of a security.[6] Definitional certainty is important for issuers of and traders in an instrument that could constitute a security because failure to register a security, absent a registration exemption,[7] and failure

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currency or any note, draft bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

Id. at § 78c(10).

[4] *See* 15 U.S.C. § 77b(1) (1976) ('33 Act definition of security); *id.* § 78c(10) ('34 Act definition of a security). Both the '33 Act and the '34 Act divide the definition of a security into two parts. *Id.* §§ 77b(1), 78c(10). Enumerated terms such as notes, stocks, bonds, and debentures, comprise the first part of the definition. *Id.* §§ 77b(1), 78c(10). The definition's second part includes general instruments or interests, such as investment contracts, certificates of interest, transferable shares, interests, participations, or rights in any item that commonly constitutes a "security." *Id.* §§ 77b(1), 78c(10).

The Supreme Court has categorized the enumerated terms of the Acts' definition of a security as terms falling within "the ordinary concept of a security." *See* Marine Bank v. Weaver, 455 U.S. 551, 555-61 (1982) (citing precedents categorizing specific terms as instruments ordinarily and commonly considered securities). Conversely, the Court has described the general instruments and interests in the Acts' definition of a security as unusual instruments constituting securities. *See id.* at 559-60 (unique agreement may constitute security if agreement contains characteristics common to security); *see also infra* text accompanying notes 20-91 (Supreme Court's differing analyses to determine whether an instrument is a security under the Acts' enumerated terms or general instruments and interests). Commentators have adopted varying descriptive names for the terms and interests of the Acts' definition of a security. *See, e.g.*, Dillport, *Restoring Balance to the Definition of a Security*, 10 SEC. REG. L.J. 99, 102-03 (1982) (Acts' definition of a security contains enumerated terms, catchall phases, and interests or participation in interests); FitzGibbon, *What Is A Security?—A Redefinition Based Upon Eligibility To Participate In The Financial Markets*, 64 MINN. L. REV. 893, 896-98 (1980) (Acts contain both categories of securities and "elastic" clauses which may constitute securities "unless context otherwise requires"); *When Is A Security Not A Security?*, *supra* note 1, at 1125, 1131 (Acts include both enumerated instruments and generic terms commonly considered securities).

[5] *See* United Hous. Found. v. Forman, 421 U.S. 837, 847 n.12 (1975) ('33 Act and '34 Act provide virtually identical definitions of a security); S. REP. No. 792, 73d Cong., 2d Sess. 14 (1934) ('33 Act and '34 Act definitions substantially identical), *reprinted in* 5 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, at 14 (1973); *see also supra* notes 2 & 3 (Acts' definition of security).

[6] *See* Ivan Allen Co. v. United States, 422 U.S. 617, 642-43 (1975) (Powell, J., dissenting) (Supreme Court's ambiguous use of term "security" creates uncertainty); Carney & Fraser, *Defining A "Security": Georgia's Struggle With The "Risk Capital" Test*, 30 EMORY L.J. 73, 73-76 (1981) (federal courts' failure to define a security presents insufficient guidance for future analysis of items that may constitute a security); *supra* note 1 (federal courts' use of differing analyses creates definitional uncertainty); *see also infra* text accompanying notes 20-91 (discussion of differing analyses for determining whether specific terms and various interests fall within definition of security).

[7] *See* 15 U.S.C. §§ 77f-77j (1976) (registration regulations); *id.* §§ 77c(a), 77d (exempt transactions). The '33 Act requires registration with the Securities and Exchange Commission (SEC) of the original offering of a security, unless an exemption is available. *See id.* §§ 77c(a), 77d (listing exempted securities and transactions); *see also* § 78c(12) ('34 Act exemption from compliance with regulations once security issued).

to follow specific regulations for issuing[8] and trading[9] may result in civil and criminal sanctions.[10] An examination of cases considering the enumerated term "stock"[11], however, reveals definitional uncertainty among courts examining the security status of stock transferred during the sale of a business.[12] An examination of cases considering whether a discretionary trading account[13] constitutes a security reveals varying interpretations of the scope of general interests[14] within the Acts' definition of a security.[15] Similar definitional uncertainty occurs among cases considering whether fractional oil, gas, and other mineral interests[16] con-

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[8] *See* 15 U.S.C. § 77b(4) (1976) ('33 Act definition of issuer); *id.* § 78c(8) ('34 Act definition of issuer); *id.* §§ 77f-77j (registration regulations). The '34 Act states that the issuer of a security, as well as persons involved with the security's continuous management, may be subject to reporting, proxy, tender offer, and insider trading regulations unless an exemption is available. *See id.* § 78l (registration requirements); *id.* § 78m (periodic reports); *id.* § 78n (proxy requirements); *id.* § 78q (record and report requirements); *id.* § 78r (responsibility for misleading statements); *see also id.* § 78c(12) (defining exempted security).

[9] *See id.* §§ 78c(a)(4)-(5) (defining broker and dealer). Brokers, dealers, and others trading in securities may be subject to regulation under the '34 Act. *Id.* § 78f (requirements for membership in national securities exchanges); *id.* § 78g (margin requirements); *id.* § 78h (borrowing and lending restrictions); *id.* §§ 78i-78j (1976) (manipulation restrictions); *id.* § 78k (trading restrictions); *id.* § 78o(1)-(4) (broker and dealer registration and regulations).

[10] *Id.* §§ 77a-77bbbb ('33 Act); *id.* §§ 78a-78kk (1976) ('34 Act). The '33 Act sanctions every person preparing, certifying, signing, or having any connection with a registration statement, prospectus, or other communication involving a security. *See id.* § 77k (civil liabilities resulting from false registration statement). The '33 Act also sanctions any person who offers or sells a security by any means that misstates or omits a material fact necessary to make certain that statements about the security are not misleading. *Id.* § 77l (civil liabilities for prospectus and communications irregularities); *see also id.* § 77o (liability of persons controlling those persons who are liable under §§ 77k & 77l).

Both the '33 and '34 Acts contain antifraud provisions. *Id.* § 78q(a) (fraudulent interstate transactions); *id.* §§ 78j(b), 78n(e), 78o(c)(1) ('34 Act antifraud provisions prohibiting manipulative practices, untrue statements, and omissions). The '34 Act imposes criminal penalties for willful violations of the Acts. *See id.* § 78ff(a)-(c) ('34 Act criminal sanctions).

[11] *See id.* § 77b(1) ('33 Act definition of security includes the term "stock"); *id.* § 78c(10) ('34 Act definition of security specifically lists the term "stock"); *see also supra* note 4 (Acts divided into enumerated terms and general interests).

[12] *See infra* notes 157-77 and accompanying text (definition and discussion of sale of business doctrine).

[13] *See infra* text accompanying notes 126-56 (defining discretionary trading account).

[14] *See* 15 U.S.C. § 77b(1) (1976) ('33 Act definition of security lists general interests); *id.* § 78c(10) ('34 Act definition of security includes general interests); *see also supra* note 4 (Acts divide definition of security into enumerated terms and general interests).

[15] *See infra* notes 127-28 and accompanying text (defining discretionary trading account); *infra* notes 130-31 and accompanying text (horizontal commonality approach for determining whether discretionary trading account constitutes security); *infra* notes 132-33 and accompanying text (vertical commonality approach for determining whether discretionary trading account constitutes security).

[16] *See infra* note 92 and accompanying text ('33 Act and '34 Act definitions include oil, gas, and mineral interests); *see also supra* notes 2 & 3 ('33 and '34 Acts, definitions of security).

stitute a security within either the specific terms or general interests of the definition of a security.[17]

Definitional confusion has resulted from courts' use of several analyses to determine the scope of terms and interests within the Acts' definition of a security.[18] Although a few courts have found that an instrument or interest constitutes a security simply because the instrument or interest is listed by the Acts,[19] the Supreme Court has rejected a literal interpretation of the definition of a security.[20] Instead, the Court has followed a functional approach that analyzes the "economic realities" of an instrument or interest.[21]

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[17] *See infra* notes 92-125 and accompanying text (defining and discussing oil, gas, and mineral interests); *see also supra* notes 2 & 3 ('33 and '34 Acts' definitions of security include both oil, gas, and other mineral interests and investment contract).

[18] *See infra* notes 20-91 and accompanying text (Supreme Court analyses for determining whether instrument or interest constitutes security); *infra* notes 93-125 and accompanying text (courts generally apply two different analyses to determine whether oil, gas, or other mineral interest constitutes security); *infra* notes 129-33, 140-44 and accompanying text (discretionary trading account case analysis varies among courts); *infra* notes 157-77 and accompanying text (differing analyses followed by courts considering sale of business doctrine). Commentators have noted that the varying interpretations of the definition of a security may lead to confusion for courts considering the security status of an instrument or interest in the future. *See* Dillport, *supra* note 4, at 119-20 (court interpretations of statutory definition of a security undermine certainty); FitzGibbon, *supra* note 4, at 895 (lack of clear standards for determining what is a security leaves courts, commentators, businessmen, and government agencies in doubt about definitional parameters).

[19] *See* Seagrave Corp. v. Vista Resources, Inc., 696 F.2d 227, 230 (2d Cir. 1982) (literal approach followed to find stock a security unless instrument lacks ordinarily accepted attributes of stock); Golden v. Garafalo, 678 F.2d 1139, 1143-45 (2d Cir. 1982) (conventional stock is a security on its face, regardless of underlying transaction); Coffin v. Polishing Machines, Inc., 596 F.2d 1202, 1204 (4th Cir.) (court does not have to analyze the substance of ordinary corporate stock unless the stock does not have significant characteristics typically associated with the term "stock"), *cert. denied*, 444 U.S. 868 (1979); Exchange Nat'l Bank v. Touche Ross & Co., 544 F.2d 1126, 1137-38 (2d Cir. 1976) (establishing new literalism and finding that unsecured subordinated notes constituted securities under language of the Acts). *But see, e.g.*, Union Planters Nat'l Bank v. Commercial Credit Business Loans, Inc., 651 F.2d 1174, 1180 & n.7 (6th Cir. 1981) (literal inclusion of participation within Acts' definition of security is not dispositive of loan participation's security status), *cert. denied*, 454 U.S. 1124 (1981); Williamson v. Tucker, 645 F.2d 404, 426 (5th Cir. 1981) (rejecting literal reliance upon wording of Acts for functional approach to determine that promissory notes financing sale of property did not constitute securities), *cert. denied*, 454 U.S. 897 (1981); Great Western Bank & Trust v. Kotz, 532 F.2d 1252, 1256 (9th Cir. 1976) (courts should not interpret statutory definitions literally); *infra* notes 20-91 and accompanying text (Supreme Court rejects literal approach for more functional economic realities approach).

[20] *See* United Hous. Found. v. Forman, 421 U.S. 837, 848 (1975) (rejecting idea that all stock must be a security because the term "stock" appears in the statutory definition of a security); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (courts considering meaning and scope of "security" should disregard form and look to substance of a particular instrument or interest); *accord* SEC v. W.J. Howey Co., 328 U.S. 293, 298, 301 (1946) (broad definition of security embodies flexible standard emphasizing economic realities instead of form).

[21] *See* Marine Bank v. Weaver, 455 U.S. 551, 556-60 (1982) (applying functional economic

DEVELOPMENTS IN THE ECONOMIC REALITIES TEST

The Supreme Court established the foundation for the economic realities test in *SEC v. C.M. Joiner Leasing Corp.*[22] The *Joiner* Court noted that courts considering the scope of the Acts' definition of a security should construe the definition to conform with the Acts' general purpose.[23] The Court further noted that courts should read the Acts' text according to the context of each case,[24] and interpret the Acts' words to carry out legislative policy.[25] The *Joiner* Court added that the term "security" can

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realities approach to determine that certificate of deposit and unique loan guaranty were not securities); International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 558 (1979) (applying flexible economic realities approach to determine that compulsory, noncontributory pension plan was not an investment contract); United Hous. Found. v. Forman, 421 U.S. 837, 847-49, 851-52 (1975) (disregarding form of stock to determine that economic realities of underlying transaction did not exhibit security characteristics of either stock or investment contract); Tcherepnin v. Knight, 389 U.S. 332, 336-45 (1967) (withdrawable capital share in savings and loan association is security because in substance, share exhibited security characteristics of investment contract and of stock); SEC v. United Benefit Life Ins. Co., 387 U.S. 202, 211 (1967) (accumulation provisions of flexible annuity constitute investment contract because of fund's character in commerce); SEC v. W.J. Howey Co., 328 U.S. 293, 299-301 (1946) (establishing flexible investment contract test to uncover economic realities of citrus grove development offer); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 352-53 (1943) (considering oil lease's character in commerce to determine security status).

[22] 320 U.S. 344 (1943). In *Joiner*, the Supreme Court considered whether assignments of oil leases constituted securities under the '33 Act. *Id.* at 345, 350-54.

[23] *Id.* at 350-51. The *Joiner* Court stated that Congress intended the securities laws to end the evils of fraud inherent in speculative trading of instruments constituting securities. *Id.* at 349; *see infra* note 25 (considerations behind legislative purposes for securities laws).

[24] 320 U.S. at 351. In *Joiner*, promoters of an oil lease assignment sales campaign advertised the purchase of a lease as an investment. *Id.* at 346-47. The *Joiner* Court considered the oil lease assignments under the context of the sales campaign literature and held that the leases were securities because the promoters represented the leases as speculative investments. *Id.* at 349, 352-53, 355; *see infra* notes 121-25 (discussing *Joiner* as foundation for defining fractional oil and gas interests as securities).

[25] 320 U.S. at 350-51. The *Joiner* Court concluded that the legislative policy underlying the Acts was to reach any instrument or interest that becomes the subject of speculation, no matter how unusual or unlike a security an instrument or interest seems to be. *See id.* at 351-52 & n.10. The Court stressed in a later case that the legislative policy underlying the securities laws was to afford broad protection to an investor. SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946). Both Congress and President Franklin D. Roosevelt recognized severe public harm caused by individuals and corporations engaging in unscrupulous securities schemes during the 1920 post-war decade. *See* STAFF OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 73D CONG., 1ST SESS., REPORT ON SECURITIES ACT OF 1933, *reprinted in* 4 B. Schwartz, THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY: A LEGISLATIVE HISTORY OF U.S. REGULATORY AGENCIES, at 2573-76 (1973) [hereinafter cited as STAFF REPORT]; President's Message to Congress Recommending Federal Supervision of Interstate Securities Traffic (March 29, 1933), *reprinted in* STAFF REPORT, *supra*, at 2573-74. Both the President and Congress stressed that individuals and corporations bear an obligation to the buying public to disclose fully every essentially important element attending the issue of a new security. STAFF REPORT, *supra* at 2574-75; *see also* FitzGibbon, *supra* note 4, at 912-18 (Acts adopted to restore investors' confidence in financial markets).

envelope both instruments commonly considered securities[26] and novel, uncommon, or irregular instruments or interests.[27]

The economic realities test requires a court to analyze an interest's or an instrument's character in commerce by looking to the terms of the offer, the plan of distribution, and the economic inducements held out to a prospect.[28] If the interest's or instrument's character in commerce falls within "the ordinary concept of a security,"[29] the instrument or interest constitutes a security.[30] The Supreme Court has applied the economic realities test to interpret both enumerated terms and general interests included in the definition of a security.[31] The Court considered whether an instrument bearing the label of the enumerated term "stock" constituted a security in *United Housing Foundation, Inc. v. Forman*.[32]

In *Forman*, the Court considered whether shares of stock in a nonprofit, government-subsidized housing project constituted a security under the enumerated terms of the '33 and '34 Acts.[33] The housing project stock

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[26] 320 U.S. at 351. The *Joiner* Court stated that instruments such as bonds, stocks, and notes were fairly standardized terms with well-settled meanings. *Id.*; *see supra* notes 2 & 3 ('33 and '34 Act definitions of a security).

[27] 320 U.S. at 351, 352 n.10. The *Joiner* Court emphasized that an instrument or interest that ordinarily does not exhibit the characteristics of an investment, may later become a security if the instrument or interest becomes the subject of speculation. *Id.* at 352 n.10. Subjection of an instrument or interest to investment speculation is only one of the many characteristics which fall within the ordinary concept of a security. *See* SEC v. W.J. Howey Co., 328 U.S. 293, 300-01 (1946) (although speculative nature of agreement may be a characteristic of a security, an agreement's speculative or nonspeculative nature becomes immaterial once agreement satisfies *Howey* investment contract test); *infra* notes 54-56 (defining *Howey* test).

[28] *Joiner*, 320 U.S. at 352-53; *see* Marine Bank v. Weaver, 455 U.S. 551, 556 (1982) (reaffirming the *Joiner* Court's factors for analyzing an instrument's or interest's character in commerce); United Hous. Found. v. Forman, 421 U.S. 837, 847-51 (1975) (economic realities test requires court to disregard instrument's form and to scrutinize instrument's substance); SEC v. W.J. Howey, 328 U.S. 293, 298-99 (1946) (applying economic realities test to investment contract).

[29] 421 U.S. at 849-50. The "ordinary concept of a security" has become a term of art including many types of instruments in the commercial world. *See* Marine Bank v. Weaver, 455 U.S. 551, 556 (1982) (quoting H.R. REP. No. 85, 73d Cong., 1st Sess. 11 (1933)). The broad statutory definition of a security excludes only currency and notes with a maturity of less than nine months. 455 U.S. at 556; *see supra* notes 2 & 3 ('33 and '34 Act definitions of a security).

[30] 320 U.S. at 351.

[31] *See, e.g.*, Marine Bank v. Weaver, 455 U.S. 551, 556-59 (1982) (interpreting the enumerated term "certificate of deposit" and the general interest "investment contract" under the economic realities test); International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 559-62 (1979) (considering whether a compulsory, noncontributory pension plan constitutes an investment contract under the economic realities test); United Hous. Found. v. Forman, 421 U.S. 837, 847-51 (1975) (applying economic realities test to instruments labeled "stock"); *see supra* text accompanying notes 28-30 (defining economic realities test).

[32] 421 U.S. 837 (1975).

[33] *Id.* at 848-50. In *Forman*, the United Housing Foundation (UHF), a nonprofit membership corporation, initiated and sponsored Co-op City, a government-subsidized housing pro-

shares were not negotiable, conferred no voting rights, and could not appreciate in value.[34] The *Forman* housing project shares were not available to the general public, but only to qualified low-income applicants.[35] The purchasers in *Forman* bought the stock to obtain low-cost personal housing, not to invest for profit.[36] Refusing to let the form of the term "stock" override the substance of the shares' particular characteristics, the *Forman* Court emphasized that courts must examine the economic realities underlying the named instrument for characteristics falling within the ordinary concept of a security.[37] Although the *Forman* Court did not cite *Joiner*, the Court applied the *Joiner* factors[38] to ascertain the *Forman* shares' character in commerce.[39] The Court held that the housing project stock shares, regardless of their labeling, did not constitute a security under the Acts because the *Forman* shares did not possess significant characteristics typically associated with stock.[40]

In 1982, the Supreme Court again applied the *Joiner* economic realities factors to determine whether an instrument labeled certificate of deposit was a security under the Acts' enumerated term "certificate of deposit."[41]

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ject for low-income persons. *Id.* at 841. To acquire an apartment in Co-op City, eligible persons had to purchase shares of stock which represented rooms of an apartment. *Id.* at 841-42. The shares were nontransferable because each share explicitly was connected with a particular apartment. *Id.* at 842. UHF required a tenant moving out of Co-op City to sell back the shares of stock corresponding to the tenant's apartment. *Id.* at 842.

[34] *Id.* at 851.

[35] *Id.* at 842.

[36] *Id.* at 851.

[37] *Id.*

[38] *See supra* text accompanying notes 28-29 (*Joiner* factors).

[39] 421 U.S. at 851. Although the *Forman* Court did not cite to *Joiner*, the Court actually applied the *Joiner* factors for ascertaining whether an instrument's or interest's character in commerce falls within the ordinary concept of a security. *See id.; supra* notes 28-29 (*Joiner* factors). The *Forman* shares of stock did not have the common characteristics of stock under the terms of offer, the plan of distribution, and the plan of inducement offered to prospects. 421 U.S. at 851; *see* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 352-53 (1943) (factors for ascertaining instrument's character in commerce). First, the *Forman* shares' terms of offer designated that the tenants could not negotiate, transfer, vote, pledge as security, or mortgage the shares. 421 U.S. at 842-44, 851. Second, UHF's distribution plan for the shares did not allow for public trading or for trading of the shares at all. *Id.* at 842. Only eligible low-income persons could buy Co-op City shares. *Id.* A tenant moving out could sell the shares only to the agent for the project or to an eligible prospective tenant, and only for the original cost of each share. *Id.* at 842-43. Finally, the only economic inducement represented by Co-op City shares was low-cost housing. *Id.* The shares carried no investment or profit potential. *Id.* UHF did not advertise Co-op City as an investment opportunity. *Id.* at 841-42.

[40] 421 U.S. at 841-42; *see supra* notes 34-36, 39 and accompanying text (Co-op City shares lack stock characteristics).

[41] *See* Marine Bank v. Weaver, 455 U.S. 551, 556-59 (1982) (bank certificate of deposit lacks security characteristics); *supra* notes 2 & 3 ('33 Act and '34 Act definition of security); *infra* notes 43-49, 67-80 and accompanying text (*Weaver* Court considered not only whether certificate of deposit constituted security, but also whether loan guaranty agreement constituted investment contract).

In *Marine Bank v. Weaver*,[42] Mr. and Mrs. Weaver purchased a certificate of deposit from Marine Bank and later pledged the certificate to the bank to guaranty a loan for Columbus Packing Company.[43] The *Weaver* Court stated that in the Acts' definition of a security the term "certificate of deposit, for a security" referred to instruments issued by protective committees during corporate organization.[44] Unlike the long-term debt characteristics of corporate certificates of deposit,[45] the *Weaver* certificate of deposit guaranteed payment in full[46] and the holders of the certificate received protection under the federal banking laws.[47] The Court reiterated the *Joiner* Court's instruction that courts construe the Acts to conform with congressional purposes, considering the context of an instrument's offering and legislative policy.[48] The *Weaver* Court held that the *Joiner* factors comprise the test for ascertaining whether an instrument's character in commerce falls within the ordinary concept of a security.[49]

The Supreme Court has stated that courts must consider the significant characteristics of a security not only for common instruments, such as stock or certificates of deposit, but also for uncommon instruments or interests.[50] The Court generally determines the security status of an uncommon instrument or interest by considering whether the instrument or interest constitutes an investment contract under the general interests listed by the Acts' definition of a security.[51] The Court addressed whether a novel, uncommon instrument was an investment contract in *SEC v. W.J. Howey Co.*[52] In *Howey*, the Court held that the sale of land in a citrus grove, coupled with contracts for management and development of the

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[42] 455 U.S. 551 (1982).

[43] *Id.* at 552-53; *see infra* notes 69, 74-76 and accompanying text (terms of loan guaranty agreement between Weavers and Columbus Packing).

[44] 455 U.S. at 557 & n.5; *see supra* notes 2 & 3 (definition of security under the Acts).

[45] 455 U.S. at 556-58, 557 n.6. The *Weaver* Court listed the characteristics of long-term debt obligation certificates of deposit as affording profit potential based upon varying interest rates and granting voting rights. *Id.* at 557-58.

[46] *Id.* The *Weaver* Court stressed that the Federal Deposit Insurance Corporation insured payment of the bank certificate of deposit. *Id.*

[47] *Id.* The *Weaver* Court stated that federal banking laws regulate and protect deposits through reserve, reporting, and inspection requirements. *Id.*

[48] *Id.* at 556; *see supra* notes 23-25 and accompanying text (Supreme Court instructions for courts interpreting definition of a security).

[49] 455 U.S. at 556; *see supra* text accompanying notes 28-30 (*Joiner* factors of economic realities test).

[50] *See* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351-53 (1943) (unusual instrument's characteristics may fall within the ordinary concept of a security).

[51] *See, e.g.*, Marine Bank v. Weaver, 455 U.S. 551, 559-60 (1982) (investment contract interpreted as excluding unique loan guaranty agreement from scope of security definition); International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 559-62 (1979) (compulsory noncontributary pension plan does not constitute investment contract); SEC v. United Benefit Life Ins. Co., 387 U.S. 202, 211 (1967) (accumulation provision of flexible annuity fund constitutes investment contract).

[52] 328 U.S. 293 (1946).

property, constituted investment contracts under the Acts' definition of a security.[53] The *Howey* Court defined an investment contract as requiring an investment of money,[54] a common enterprise,[55] and an expectation of profits to come solely from the efforts of others.[56] Courts generally consider the *Howey* investment contract test when determining whether any interest or unusual instrument constitutes an investment contract.[57]

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[53] *Id.* at 299-301. The *Howey* Court only considered the general term "investment contract" within the '33 Act definition of a security. *Id.* at 297; *see supra* note 2 ('33 Act definition of a security). The Supreme Court later recognized, however, that the *Howey* test embodied the necessary characteristics of all the Court's decisions defining a security. *See* United Hous. Found. v. Forman, 421 U.S. 837, 852 (1975) (recognizing no distinction between test necessary to determine investment contract and other varying instruments or interests commonly known as securities). *But see* International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 558-62 (1979) (investment contract characteristics must be predominant for instrument to be security).

[54] *See* 328 U.S. at 298-99, 301 (first element of *Howey* investment contract test). The *Howey* Court found that the W.J. Howey Company (Howey Company) and the Howey-in-the-Hills Service, Inc., (Howey-in-the-Hills) offered investors an opportunity to invest money and share in the profits derived from a large citrus fruit enterprise. *Id.* at 294-99. The Court determined that the investors provided capital for the enterprise to cultivate, harvest, and market citrus products. *Id.* at 295, 299-300. Thus, the Court held that the *Howey* investors had invested money and met the first element necessary to find an investment contract. *Id.* at 300.

[55] *See id.* at 299, 301 (second element of *Howey* investment contract test). The *Howey* Court found that the Howey Company and Howey-in-the-Hills offered an opportunity for persons lacking equipment and experience in a citrus operation to invest and share in profits from the citrus enterprise while the Howey Company and Howey-in-the-Hills managed and retained part ownership in the enterprise. *Id.* at 299-300. The Court found that investors engaged in a common enterprise with the two companies because the investors helped finance the companies' development and management of the citrus enterprise. *Id.* at 295, 299-300. Thus, the Court held that the common citrus enterprise met the second element of the investment contract test. *Id.* at 300.

[56] *See id.* at 299, 301 (third element of *Howey* investment contract test). In *Howey*, most investors lacked the experience and equipment necessary to develop and maintain a citrus grove operation. *Id.* at 299-300. The Howey Company encouraged investors purchasing a land sales contract to make service arrangements with Howey-in-the-Hills. *Id.* at 295. Once investors entered into a service contract with Howey-in-the-Hills, the Howey Company had full discretion and authority for cultivating, harvesting, and marketing the crops. *Id.* at 296. The Court held that the investors' profits were dependent upon the common enterprise managed by the two companies. *Id.* at 300. Therefore, the Court held that the citrus grove sales contracts, warranty deeds, and service contracts met the third element of the investment contract test, profits derived solely from the efforts of others. *Id.* at 300-01.

[57] *See* International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 558-62 (1979) (*Howey* investment contract test applied to pension plan); United Hous. Found. v. Forman, 421 U.S. 837, 851-57 (1975) (whether shares of stock in nonprofit housing project constituted investment contract under *Howey*); Tcherepnin v. Knight, 389 U.S. 332, 338-39 (1967) (*Howey* test applied to withdrawable capital shares in savings and loan association).

Circuit courts, lower federal courts, and commentators generally recognize the *Howey* test as the predominant test for determining an instrument's status as an investment contract security. *See, e.g.*, Mordaunt v. Incomco, 686 F.2d 815, 816-17 (9th Cir. 1982) (application of *Howey* test to discretionary trading account); Coward v. Colgate-Palmolive Co., [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,784, at 94,020, 94,024-25 (7th Cir., Aug. 16, 1982)

Although the *Howey* test has become the predominant approach followed by courts considering whether an interest or unusual instrument is an investment contract security,[58] the Supreme Court has considered whether an interest or unusual instrument is an investment contract without applying the *Howey* test.[59] In *SEC v. United Benefit Life Insurance Co.*,[60] the Court applied *Joiner* to find that the accumulation provision of a flexible annuity fund was an investment contract.[61] The *United Benefit* Court found that the annuity fund's character in commerce was the character of an investment contract because promoters offered the fund to the general public as a professionally managed investment with growth potential.[62] The Court also found that the promoters offered the fund to compete with offerings of mutual funds.[63] The *United Benefit* Court held

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(applying *Howey* test to non-compulsory, contributory pension plan); Morrison v. Pelican Landing Development Co. [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,863, at 94,480-81 (N.D. Ill., Aug. 20, 1982) (application of *Howey* test to land development general partnership interests); Dillport, *supra* note 4, at 103 (*Howey* test is predominant test for determining whether an instrument falls within general interest phrases of definition of security); Fitz-Gibbon, *supra* note 4, at 898-901 (*Howey* test represents Supreme Court's leading effort to develop guidelines for determining definition of security); *see also supra* notes 54-56 and accompanying text (discussion of *Howey* test). *Cf.* Ballard & Cordell Corp. v. Zoller & Danneberg Exploration Ltd., 544 F.2d 1059, 1065-66 (10th Cir. 1976) (applying *Howey* test to working interest in oil and gas lease but adding risk capital analysis for "efforts of others" element), *cert. denied*, 431 U.S. 965 (1977).

[58] *See supra* note 57 (*Howey* test generally recognized as predominant test for courts determining investment contract security status). *But see* Marine Bank v. Weaver, 455 U.S. 551, 559-60 (1982) (partial application of *Howey* test); SEC v. United Benefit Life Ins. Co., 387 U.S. 202, 211 (1967) (finding investment contract without applying *Howey* test); *infra* notes 59-63 and accompanying text (*United Benefit* Court's investment contract analysis); *infra* notes 65-80 and accompanying text (*Weaver* Court's investment contract analysis); *infra* notes 86-88 (modification of *Howey* test).

[59] *See* SEC v. United Benefit Life Ins. Co., 387 U.S. 202, 211 (1967) (applying *Joiner* factors to determine investment contract characteristics).

[60] *Id.*

[61] *Id.* at 208-12. In *United Benefit*, the United Benefit Life Insurance Co. (United) publicly offered an optional annuity plan known as the "Flexible Fund." *Id.* at 204. United invested purchasers' premiums in common stocks to produce capital gains return as well as interest return on the aggregate funds. *Id.* at 205-07. The purchasers' contracts contained a conventional fixed dollar annuity clause. *Id.* at 205. Each contract alternatively guaranteed before or at the annuity's maturity a minimum cash value ranging from fifty percent of the first year's net premiums to one hundred percent after 10 years. *Id.* The Securities and Exchange Commission contended that the pre-maturity phase of the contract constituted a security. *Id.* at 206. The *United Benefit* Court separated the pre-maturity period from the post-maturity period to determine whether the pre-maturity period constituted an investment contract security. *Id.* at 207-09.

[62] *Id.* at 208-11. The *United Benefit* Court found that the terms of the "Flexible Fund" annuity contract offered United's services as an investment agency, allowing policyholders to share in United's investment experience. *Id.* at 208; *see* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 352-53 (1943) (first step for ascertaining instrument's security character in commerce is to consider terms of the instrument's offer).

[63] 387 U.S. at 211-12. The *United Benefit* Court stated that because United offered Flexible Fund contracts as an investment alternative to mutual funds, Flexible Fund pur-

that by offering the fund as an investment opportunity alternative to mutual fund investment opportunities, United shaped the fund's character as an investment contract.[64]

Although the Court in *United Benefit* definitely disregarded *Howey* and followed *Joiner* to find an investment contract,[65] the Court in *Marine Bank v. Weaver*[66] used both *Howey* and *Joiner* to distinguish an unusual loan guaranty agreement from an investment contract.[67] In *Weaver*, the Weavers pledged a certificate of deposit[68] to the bank to guaranty a loan for Columbus Packing Company.[69] The Court found that the loan guaranty agreement did not fall within the ordinary concept of a security because the private agreement in *Weaver* did not have the characteristics of an investment contract.[70] Following the *Joiner* Court's analysis, the *Weaver* Court noted that offerings to a number of potential investors accompanied plans to sell citrus grove interests in *Howey*[71] and oil leases in *Joiner*.[72]

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chasers should receive the same advantages of disclosure that inure to a mutual fund purchaser under the '33 Act. *Id.* at 211.

[64] *Id.* at 211-12. The *United Benefit* Court stressed the *Joiner* Court's premise that courts should look to promoters' public representations of an offering as evidence of an investment's character in commerce. *Id.* at 211. The Court noted that mutual funds are investment contracts featuring growth through professionally managed investment. *Id.* Because United represented the Flexible Fund as an investment alternative to mutual funds, the Court determined that the fund exhibited the investment contract characteristics of a mutual fund. *Id.*

[65] *See* SEC v. United Benefits Life Ins. Co., 387 U.S. 202, 211-12 (1967) (optional annuity fund's character in commerce ascertained by looking to terms of offer and promoters' public representations of the offer); *supra* text accompanying notes 60-64 (*United Benefit* Court's investment contract analysis).

[66] 455 U.S. 551 (1982).

[67] *Id.* at 559-60; *see supra* text accompanying notes 22-30 (*Joiner* establishes instructions and factors for courts considering security status of instrument or interest under economic realities test); *supra* text accompanying notes 54-56 (*Howey* test for determining whether instrument or interest constitutes investment contract).

[68] 455 U.S. at 553; *see supra* notes 41-49 and accompanying text (applying economic realities test to *Weaver* certificate of deposit).

[69] 455 U.S. at 553. Although Marine Bank officers told the Weavers that the $65,000 loan for Columbus Packing was for working capital, the bank kept over $2,000 to satisfy Columbus' overdue obligations. *Id.* The remaining funds went to pay taxes and other creditors. *Id.* The bank then refused Columbus any credit on the company's checking account and Columbus declared bankruptcy four months later. *Id.* The bank acknowledged an intention to claim the Weavers' pledged certificate of deposit to satisfy part of the Columbus loan. *Id.* The Weavers alleged that the bank solicited the couple to guaranty the Columbus loan without disclosing Columbus' financial condition. *Id.*

[70] *Id.* at 559-60; *see supra* note 69 (terms of loan guaranty between Weavers and Columbus Packing); *infra* notes 73-76 and accompanying text (loan guaranty terms agreed to by Weavers and Columbus Packing).

[71] *See* SEC v. W.J. Howey Co., 328 U.S. 293, 294-95, 299-300 (1946) (citrus grove sale and service offer exhibiting investment contract security characteristics); *see supra* notes 52-56 and accompanying text (establishing *Howey* test for determining whether instrument or interest constitutes investment contract).

[72] *See* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 345-52 (1943) (assignment of

The *Weaver* Court found that unlike the instruments in *Howey* and *Joiner*, the Weavers' loan guaranty agreement had no equivalent value for public trading.[73] Although Columbus Packing was to pay the Weavers fifty percent of the company's net profits,[74] the Court held that a share of the profits was an insufficient economic inducement to make the loan guaranty agreement a security.[75] Additionally, the *Weaver* Court held that because the Weavers could veto future loans to Columbus Packing, the couple retained a measure of control over the agreement that was uncharacteristic of a security.[76] Having found that the *Weaver* loan guaranty was not an investment contract, the Court reaffirmed a commitment to a functional, economic realities approach for analyzing the definition of a security.[77] The Court stated that courts must analyze and evaluate each transaction upon the basis of the content of the instrument,[78] the purposes of the Acts,[79] and the factual setting of the case.[80]

After *Weaver*, the economic realities approach encompasses a wide range of factors that courts may consider in determining an instrument's or interest's security status.[81] Courts must consider the substance, rather than the form, of an instrument or interest to determine whether the instrument or interest exhibits the characteristics of a security.[82] Courts, however, may consider some or all of the factors listed in *Joiner* and *Howey*

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oil leases on undertaking to drill well falls within ordinary concept of security); *see supra* notes 22-30 and accompanying text (*Joiner* Court's instructions and factors to consider for determining whether instrument or interest exhibits characteristics of security under economic realities test).

[73] 455 U.S. at 559.

[74] *Id.* at 553, 560. In addition to guarantying the Weavers a portion of Columbus' profits, the loan guaranty agreement between the Weavers and Columbus Packing gave the Weavers the right to use Columbus' barn and pasture. *Id.* at 553, 560.

[75] *Id.* at 560. Although the Court held that the Weavers' share of the packing company's profits was an insufficient economic inducment to confer security status upon the agreement between the couple and the packing company, the Court did not elaborate upon the sufficiency of profits necessary to find an investment contract. *Id.*

[76] *Id.* The *Weaver* Court did not elaborate upon the permissible level of control an investor may retain in an investment contract. *Id.*; *see infra* notes 91-115 (courts' differing opinions about measure of control investors may retain in investment contract).

[77] 455 U.S. at 560 n.11.

[78] *Id.* at 556, 560 n.11; *see supra* notes 26-30 and accompanying text (*Joiner* test for determining instrument's character in commerce by scrutinizing the instrument's context).

[79] 455 U.S. 551, 560 n.11; *see supra* note 23 (purpose of Acts).

[80] 455 U.S. 551, 560 n.11; *see supra* note 24 (*Joiner* emphasis that courts must consider context of transaction); *supra* notes 37-40 and accompanying text (*Forman* emphasis that courts consider economic realities of instrument's substance rather than form of instrument).

[81] *See infra* text accompanying notes 82-91 (combined *Joiner* and *Howey* factors provide wide range for courts following economic realities approach for interpreting definition of security).

[82] *See* United Hous. Found. v. Forman, 421 U.S. 837, 849-50 (1975) (emphasizing economic realities); *supra* notes 37-40 and accompanying text (*Forman* Court's emphasis that courts should consider substance, rather than form, to determine instrument's or interest's security status).

to ascertain an instrument's or interest's character in commerce.[83] Courts applying the *Joiner* test to an instrument or interest look to the terms of offer,[84] plan of distribution,[85] and economic inducements offered to the public.[86] Courts applying the *Howey* test to an instrument or interest look for an investment of money, goods, or services,[87] for a common enter-

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[83] *See* Marine Bank v. Weaver, 455 U.S. 551, 555-56 (1982) (definition of security includes instruments or interests bearing characteristics of a security under either the *Howey* investment contract test or the *Joiner* test); SEC v. W.J. Howey Co., 328 U.S. 293, 298-99, 301 (1946) (*Howey* investment contract test requires that instrument or interest involves investment in common enterprise with profits derived solely from efforts of others); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350-53 (1943) (*Joiner* test for ascertaining instrument's or interest's character in commerce focuses upon terms of offer, plan of distribution, and economic inducements offered to the public).

[84] *See* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 352-53 (1943) (first factor for determining whether instrument's character in commerce falls within ordinary concept of security); *supra* text accompanying notes 28-30 (*Joiner* factors for ascertaining instrument's or interest's character in commerce); *see also* Marine Bank v. Weaver, 455 U.S. 551, 553 (1982) (terms of offer between Weavers and Columbus Packing Company); *supra* notes 68-69, 74-76 and accompanying text (terms of *Weaver* certificate of deposit and loan guaranty agreement).

[85] *See* 320 U.S. at 352-53 (*Joiner*'s second factor for determining whether instrument exhibits characteristics of a security); *supra* text accompanying notes 28-30 (*Joiner* factors for determining instrument's or interest's character in commerce); *see also* Marine Bank v. Weaver, 455 U.S. 551, 560 (1982) (*Weaver* agreement not for public distribution); *supra* text accompanying note 73 (*Weaver* agreement did not display characteristics of security because agreement did not involve public offering).

[86] *See* 320 U.S. at 352-53 (*Joiner*'s third factor ascertaining whether instrument's or interest's character in commerce falls within ordinary concept of security); *supra* text accompanying notes 28-30 (*Joiner* factors for determining instrument's or interest's character in commerce); *see also* Marine Bank v. Weaver, 455 U.S. 551, 560 (1982) (economic inducements for *Weaver* agreement were not characteristic of a security); *supra* notes 74-75 and accompanying text (*Weaver* agreement's economic inducements were a share of packing company profits and use of barn and pastures).

[87] *See* SEC v. W.J. Howey Co., 328 U.S. 293, 298-99, 301 (1946) (first element of investment contract test); *supra* text accompanying notes 54-56 (*Howey* test for determining whether instrument or interest constitutes investment contract). After the *Howey* Court stated that the definition of an investment contract required an investment of money, the Supreme Court later extended the money requirement to an investment of goods or services. *See* International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 560 n.12 (1979) (dicta) (investment does not have to take form of cash only).

Some courts have developed a "commercial-investment" test to evaluate the context of an investment. *See* Sanders v. John Nuveen & Co., 463 F.2d 1075, 1078-79 (7th Cir.) (formulation of commercial-investment test), *cert. denied*, 409 U.S. 1009 (1972); *see also* National Bank of Commerce v. All Am. Assurance Co., 583 F.2d 1295, 1296-97, 1301 (5th Cir. 1978) (promissory note pledging securities as collateral not security under commercial-investment test). Under the commercial-investment test, if a transaction's context is commercial, rather than investment, courts find that the transaction does not involve a security. *See, e.g.*, Sutter v. Groen, 687 F.2d 197, 200-04 (7th Cir. 1982) (rebuttable presumption that purchase of 50% or more of corporation's stock is commercial venture, not investment venture); National Bank of Commerce v. All Am. Assurance Co., 583 F.2d at 1296-97, 1301 (promissory note pledging securities as collateral is commercial, not investment, transaction); Cocklereece v. Moran, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,482, at 92,814-18 (N.D. Ga. Jan.

prise,[88] and for profits derived from the efforts of others.[89] Along with the factors listed in *Joiner* and *Howey,* courts also may consider the *Weaver* Court's emphasis upon the purposes of the federal securities statutes.[90] Additionally, *Weaver* suggests that courts interpreting the *Howey* test's "efforts of others" requirement may consider the measure of control retained by an investor in an investment contract.[91]

OIL, GAS, AND OTHER MINERAL INTERESTS

One area of security definition cases in which an investor's measure

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27, 1982) (use of loan to acquire stock is commercial, not investment transaction).

Although not specifically following the *Howey* test, the "risk capital" test interprets whether purchasers made an investment in a security according to the degree of risk involved. *See* Amfac Mortgage Corp. v. Arizona Mall of Tempe, 583 F.2d 426, 431-32 (9th Cir. 1978) (application of risk capital test to promissory note); Great W. Bank & Trust v. Kotz, 532 F.2d 1252, 1257 (9th Cir. 1976) (establishing risk capital test); *see also* American Bank and Trust Co. v. Wallace, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,118, at 95,358-62 (6th Cir., Mar. 10, 1983) (applying risk capital test and *Howey* test to promissory note); Carney & Fraser, *supra* note 6, at 520-45 (comparing risk capital test to *Howey* test).

[88] *See* SEC v. W.J. Howey Co., 328 U.S. 293, 299, 301 (1946) (second element of *Howey* test); *supra* text accompanying notes 54-56 (*Howey* investment contract test). The Supreme Court has not clarified further the *Howey* test's common enterprise element. Dillport, *supra* note 4, at 105, 105 n.20. Lower federal courts have adopted either a horizontal commonality test or a vertical commonality test to determine whether a common enterprise exists. *Id.* at 105 n.20; *see infra* notes 130-33 and accompanying text (defining horizontal and vertical commonality tests).

[89] *See* SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946) (third element of *Howey* test); *supra* text accompanying notes 54-56 (*Howey* investment contract test). The Supreme Court considered the *Howey* test's "efforts of others" element in *United Housing Foundation v. Forman,* 421 U.S. 837, 852, 852 n.16 (1975). The *Forman* Court noted that profits from an investment contract do not have to result solely from the efforts of others, but realistically also may include profits from other schemes that involve securities in substance. *Id.* at 852 n.16.

Also eschewing a strict interpretation of "solely," the Ninth Circuit stresses whether the efforts made by those other than the investor are undeniably significant efforts, essential to the success or failure of the enterprise. *See* SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 482 (9th Cir.) (although investment efforts need not be "solely" the efforts of others, efforts of others must be significant to comply with *Howey* test), *cert. denied,* 414 U.S. 821 (1973); *see also* Kim v. Cochenour, 687 F.2d 210, 213 n.7 (7th Cir. 1982) (rejecting strict interpretation of *Howey*'s solely requirement); Martin v. T.V. Tempo, Inc., 628 F.2d 887, 889 (5th Cir. 1980) (adopting Ninth Circuit's interpretation of "solely" requirement); Crowley v. Montgomery Ward & Co., 570 F.2d 875, 877 (10th Cir. 1975) (following *Glenn v. Turner* interpretation of "solely" requirement); *cf. infra* notes 91, 110-15 and accompanying text (*Weaver* opens opportunity for courts interpreting *Howey* Court's "efforts of others" requirement to examine efforts of investors).

[90] *See* Marine Bank v. Weaver, 455 U.S. 551, 555-56, 560 n.11 (1982) (Congress did not intend for federal securities laws to act as broad federal remedy for all fraud, but only for fraud involving securities law violations); *supra* note 23 (purpose of the '33 and '34 Acts).

[91] *See* Marine Bank v. Weaver, 455 U.S. 551, 560 (1982) (investor's measure of control over investment may affect security status); *see also infra* notes 93-115 and accompanying text (effect of investor's efforts upon security status of interests in oil, gas, and other mineral rights).

of control may have an impact is in oil, gas, and mineral interest cases.[92] Courts have reached differing results when considering whether an investor's retention or exercise of control precludes an oil, gas, or other mineral interest from constituting an investment contract.[93] Before *Weaver*, the Tenth Circuit refused to find an investment contract because of rights retained by a purchaser of oil and gas leases.[94] In *Ballard & Cordell Corp. v. Zoller & Danneberg Exploration, Ltd.*,[95] the Tenth Circuit considered whether an operating agreement between a purchaser of an oil and gas interest and an independent operator created an investment contract.[96] The *Ballard & Cordell* court determined that the purchaser did not rely solely upon the efforts of others because the purchaser was heavily involved in the drilling operation, was an informed purchaser, and was

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[92] *See infra* text accompanying notes 93-115 (measure of control retained or exercised by investor may effect creation of security); *see also* 15 U.S.C. § 77b(1) (1976) ('33 Act definition of security includes fractional undivided interest in oil, gas, or mineral rights). A fractional undivided interest is a fractional part of an entire interest that is undivided because the holders of the interest are tenants in common, rather than joint tenants. *See* Woodward v. Wright, 266 F.2d 108, 114-15 (10th Cir. 1959) (explaining fractional undivided interest). *supra* note 3 ('34 Act definition of security includes oil, gas, and other mineral interests).

[93] *Compare* Ballard & Cordell Corp. v. Zoller & Danneburg Exploration, Ltd., 544 F.2d 1059, 1065 (10th Cir. 1976) (purchaser's involvement in managerial decisions and retention of right to withhold consent for new drilling and remedial work precluded oil and gas lease operating agreement from constituting investment contract because purchaser did not rely solely upon the efforts of drilling operator), *cert. denied*, 431 U.S. 965 (1977) *with* Parvin v. Davis Oil Co., 524 F.2d 112, 115-16, 116 n.2 (9th Cir. 1975) (oil and gas drilling venture constituted investment contract because investor did not have essential managerial rights, although investor made some operational decisions) *and* Johnsen v. Rogers, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,072, at 95,085-86 (C.D. Cal., Nov. 1, 1982) (although investors retained right to determine preliminary drilling decisions, drilling operator made significant managerial decisions effecting success or failure of oil and gas investment contract). *But cf.* Nor-Tex Agencies v. Jones, 482 F.2d 1093, 1097-99 (5th Cir. 1973) (investment contract exists even if investors retain right to make major managerial decisions, but instead passively rely upon efforts of only one investor among the group to manage oil and gas interests), *cert. denied*, 415 U.S. 977 (1974).

[94] *See* Ballard & Cordell Corp. v. Zoller & Danneberg Exploration, Ltd., 544 F.2d 1059, 1065 (10th Cir. 1976) (rights retained by purchaser may preclude investment contract status for oil and gas lease operating agreement), *cert. denied*, 431 U.S. 965 (1977).

[95] *Id.*

[96] *Id.* In *Ballard & Cordell*, Ballard & Cordell Corporation (Ballard & Cordell) contracted with Zoller & Danneberg Investments (ZDI) to sell a 50% working interest in two oil and gas lease units in Oklahoma. *Id.* at 1061; *see* Lynn v. Caraway, 252 F. Supp. 858, 860-61 (W.D. La. 1966) (defining working interest) *aff'd*, 379 F.2d 943, 944-45 (5th Cir. 1967), *cert. denied*, 393 U.S. 951 (1968). Generally in an oil and gas lease, a lessor-landowner retains a 1/8th interest in the leased property and a lessee retains a 7/8th interest, which is termed the "working interest." 252 F. Supp. at 861. A working interest and an "interest in an oil and gas lease" are substantially synonymous terms in oil and gas transaction cases. 379 F.2d at 944 n.1. Under the contract in *Ballard & Cordell*, ZDI negotiated an operating agreement with Ballard & Cordell. 544 F.2d at 1061-62. Although Ballard & Cordell had assigned a 50% working interest to ZDI, ZDI later refused to purchase the interests in the two oil and lease units. *Id.* Ballard & Cordell brought suit for breach of contract and ZDI brought a counterclaim for securities violations. *Id.* at 1060-62.

familiar with oil and gas lease operations.[97] The court held that the transfer of interest[98] did not constitute an investment contract under the *Howey* test because the purchaser retained the right to withhold consent for incurring expenses for drilling new wells or for performing remedial work on existing wells.[99]

Although not strictly applying the *Howey* test, the Ninth Circuit has found that rights retained by an investor in oil and gas drilling ventures may not prevent the creation of an investment contract.[100] In *Parvin v. Davis Oil Co.*,[101] the Ninth Circuit determined that an investor retained operational rights, but did not retain the right to make major managerial decisions.[102] Although the investor had some previous experience in oil and gas ventures, others involved in the *Parvin* venture selected the leases for proposed investment, the sites for drilling, when to commence drilling, and the exploration operations for each site.[103] The *Parvin* court con-

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[97] 544 F.2d at 1061-62, 1065. In *Ballard & Cordell*, the Tenth Circuit noted that during negotiations between Ballard & Cordell and ZDI, ZDI received information about the oil and gas leases from Ballard & Cordell. *Id.* at 1061-62. Although ZDI did not request additional information from Ballard & Cordell, ZDI obtained further information about the leases from an outside consultant. *Id.* at 1062. The Tenth Circuit also noted that ZDI was experienced in oil and gas lease operations and drilling. *Id.* at 1061, 1065.

[98] *Id.* at 1063-65. In addition to considering whether the *Ballard & Cordell* working interest in two oil and gas leases was an investment contract, the Tenth Circuit considered whether the interest constituted a security as a fractional undivided interest. *Id.* at 1063-64; *see supra* notes 2 & 3 ('33 Act and '34 Act definitions of security include fractional undivided interests in oil, gas, or other mineral rights). The court determined that although the 50% working interest was a fractional part of a entire lease interest, Ballard & Cordell offered the 50% working interest to ZDI as a whole interest, not as a fractional interest. 544 F.2d at 1063-64. Therefore, the Tenth Circuit concluded that the 50% working interest was not a security because the interest was not split into fractional units for speculative offering. *Id.; see* text accompanying notes 116-25 (discussing fractional, undivided interest in oil, gas, or other minerals).

[99] 544 F.2d at 1065. In addition to determining that the *Ballard & Cordell* operating agreement did not meet the "efforts of others" requirement of the *Howey* test, the Tenth Circuit also determined that the agreement lacked the *Howey* test's "common enterprise" element. *Id.; see* SEC v. W.J. Howey Co., 328 U.S. 293, 299-301 (1946) (establishing *Howey* test to determine whether interest or instrument constitutes an investment contract and is therefore a security); *supra* text accompanying notes 54-56 (listing elements of *Howey* test). The *Ballard & Cordell* court stated that the agreement merely transferred leasehold rights from Ballard & Cordell to ZDI and did not create a common enterprise between the two companies. 544 F.2d at 1065.

[100] *See* Parvin v. Davis Oil Co., 524 F.2d 112, 115-16, 116 n.2 (9th Cir. 1975) (oil and gas leases coupled with exploration operation constituted investment contract even though investor retained right to make some operational decisions).

[101] *Id.*

[102] *Id.* at 116. In *Parvin*, Davis Oil Company (Davis) and Parvin, an investor in oil and gas properties, entered into three drilling ventures. *Id.* at 114-15. Although Parvin could refrain from joining in any of the ventures, could determine the extent of his own investment in a venture, and could question the details of each venture, Davis made the major operational decisions for each venture. *Id.* at 115-16; *see infra* text accompanying note 103 (major decisions made by Davis).

[103] 524 F.2d at 116.

cluded that the oil and gas drilling venture agreement was an investment contract because the investor was dependent upon others to make decisions that affected the success or failure of the venture.[104] In 1982, the District Court for the Central District of California similarly concluded that an oil and gas turnkey drilling contract[105] constituted an investment contract even though investors retained the right to decide when to drill and who should do the drilling.[106] In *Johnsen v. Rogers*,[107] the district court found that the turnkey drilling contract constituted an investment contract because the drilling contractors had the exclusive management, development, and operation of the leasehold.[108] The *Johnsen* court held that the drilling contractor, not the investors, made undeniably significant efforts affecting the profits derived from the leasehold.[109] Although

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[104] *Id.* The *Parvin* court followed the Ninth Circuit's test for an investment contract established in *SEC v. Glenn W. Turner Enterprises*. *Id.* at 115-16; *see* SEC v. Glenn W. Turner Enter., 474 F.2d 476, 482 (9th Cir.) (interpreting investment contract test as stressing significance of efforts by persons other than the investor), *cert. denied*, 414 U.S. 821 (1973). In *Glenn W. Turner*, the Ninth Circuit held that a strict interpretation of the world "solely" in the *Howey* investment contract test could allow promoters to circumvent federal securities laws by requiring investors to contribute nominal efforts to derive profits. 474 F.2d at 482; *see* SEC v. W.J. Howey Co., 328 U.S. 293, 299-301 (1946) (*Howey* investment contract test); *supra* text accompanying notes 54-56 (listing elements of *Howey* test). The *Glenn W. Turner* court concluded that an investment contract determination rests upon whether the efforts by persons other than the investors are the significant managerial duties which affect the success or failure of the enterprise. 474 F.2d at 482. The *Parvin* court determined that Davis made the essential managerial decisions affecting the success or failure of the Parvin-Davis ventures because Davis selected leases, sites, drilling times, and exploration activities for each venture. 524 F.2d at 116 & n.2.

[105] *See* BLACK'S LAW DICTIONARY 1359 (5th ed. 1979). A turnkey contract in the oil drilling industry occurs when a driller of an oil well undertakes to furnish everything, does all work required, places the well on production, and turns the well over ready to turn the key and start oil running into tanks. *Id.*

[106] *See* Johnsen v. Rogers, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,072, at 95,085-86 (C.D. Cal., Nov. 1, 1982) (investment contract status not precluded by investors' retention of right to make initial determinations of oil and gas leaseholds and drilling and operation contracts).

[107] [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,072 (C.D. Cal., Nov. 1, 1982).

[108] *Id.* at 95,086. In *Johnsen*, Oil-Gas Equipment Company, Inc. (Oil-Gas Equipment) and the company's president Jerry Rogers sold fractional interests in oil and gas leaseholds to investors Gordon Johnsen, Lewis Phan, and School Land Oil Company (School Land). *Id.* at 95,081. Western Oil Resources, Ltd. (Western Oil) and its president James Douglas entered into turnkey drilling and operating contracts with School Land to drill and operate oil and gas wells on the School Land leaseholds. *Id.* at 95,084. Rogers and Douglas were partners in several oil and gas wells located near the School Land leaseholds. *Id.* at 95,084 n.12. School Land later brought suit alleging that Oil-Gas Equipment, Rogers, Western Oil, and Douglas misrepresented and concealed facts about the potential productivity of the leaseholds. *Id.* at 95,081.

[109] *Id.* at 95,085-86. The *Johnsen* court relied upon both the *Howey* test and the *Glenn W. Turner* court's interpretation of *Howey* to find that the turnkey drilling contract was an investment contract. *Id.*; *see* SEC v. W.J. Howey Co., 328 U.S. 293, 299-301 (1946) (*Howey* test determining whether instrument or interest constitutes an investment contract); SEC v. Glenn W. Turner Enter., 474 F.2d 476, 482 (9th Cir.) (interpreting *Howey* investment

the Supreme Court has not considered specifically the measure of control an investor may remain and still derive investment profits from the efforts of others, the Fifth Circuit addressed the issue in *Williamson v. Tucker*.[110]

The *Williamson* court considered whether powers retained by investors in a joint venture were so significant, regardless of the degree exercised, that the investors could not have premised their investments on a reasonable expectation of profits from others' management.[111] The Fifth Circuit reasoned that if the investors had access to information about the investment, the investors received adequate protection against dependence upon others and thus, the investors retained more than nominal control.[112] Accordingly, the *Williamson* court concluded that the investors' retention of more than nominal control precluded security status for the joint venture because the investors could not expect profits primarily from the efforts of others.[113] Other circuits refuse to find securities when in-

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contract test as requiring significant efforts by person other than investor), *cert. denied*, 414 U.S. 821 (1973); *supra* text accompanying notes 54-56 (listing elements of *Howey* test); *supra* note 104 (*Glenn W. Turner* court's interpretation of *Howey* test). The *Johnsen* court pointed out that the investors merely chose Western Oil and Douglas to drill on and operate the School Land leaseholds. [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,072, at 95,086. The court determined that under both *Howey* and *Glenn W. Turner*, the *Johnsen* investors relied upon the significant efforts of Western Oil and Douglas to derive any profits from School Land's investment contract with Western Oil. *Id.*

[110] 645 F.2d 404 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981).

[111] *Id.* at 419. In *Williamson v. Tucker*, a group of investors engaged in several different joint ventures to purchase and develop real estate near the proposed Dallas/Fort Worth Regional Airport. *Id.* at 407-09. Each joint venture agreement required unanimous consent of the venturers to accomplish certain acts, such as making a mortgage, borrowing money for the venture, or using the venture property as collateral. *Id.* at 408-09. The Fifth Circuit stated that the extent to which the venturers actually exercised their powers was unclear. *Id.* at 409.

Before *Williamson*, the Fifth Circuit had held that an investment contract may exist where investors in oil and gas interests have the right to make managerial decisions, but remain passive and depend upon the efforts and expertise of a single investor to manage the venture. *See* Nor-Tex Agencies v. Jones, 482 F.2d 1093, 1097-99 (5th Cir. 1973) (investment contract created by sale of oil and gas interests because other investors depended upon efforts of single investor to develop and manage drilling operations), *cert. denied*, 415 U.S. 977 (1974).

[112] 645 F.2d at 422-24. The Fifth Circuit stressed in *Williamson* that investors unable to obtain sufficient information about an investment were inadequately protected from dependence upon the efforts of others to manage the investment. *Id.* at 422. In addition to inadequate access to information, the *Williamson* court listed other ways that an investor could be dependent upon the efforts of others. *Id.* at 422-24. Other means of dependence include an irrevocable delegation of powers to a manager or promoter, dependence upon a promoter's expertise, and investors' lack of business expertise. *Id.* at 422-23; *see* Nor-Tex Agencies v. Jones, 482 F.2d 1093, 1099 (5th Cir. 1973) (investor's general business sophistication did not preclude protection by federal securities statutes when investor had limited knowledge about oil and gas ventures), *cert. denied*, 415 U.S. 977 (1974).

[113] 645 F.2d at 425.

vestors retain a real power that they are capable of exercising.[114] In the future, an investor's retention of power may be a determining factor for courts considering whether an oil, gas, or other mineral interest constitutes an investment contract.[115]

In addition to investment contract considerations, courts may determine whether an interest is fractional and undivided[116] to find a security in oil, gas, and other mineral interest cases.[117] The Securities and Exchange

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[114] *See* Schultz v. Dain Corp., 568 F.2d 612, 614-16 (8th Cir. 1978) (purchaser's negotiation of apartment management contract and delegation of powers to manager precluded the arrangement from being a security); Ballard & Cordell Corp. v. Zoller & Danneberg Exploration, Ltd., 544 F.2d 1059, 1063-65 (10th Cir. 1976) (investors' power over operation of working interest in oil wells and leases foreclosed security status), *cert. denied*, 431 U.S. 965 (1977); Mr. Steak, Inc. v. River City Steak, Inc., 460 F.2d 666, 669 (10th Cir. 1972) (even though franchisee did not exercise control, retention of control precluded franchise from security status).

[115] *See* Marine Bank v. Weaver, 455 U.S. 551, 560 (1982) (*Weaver* Court's indication that investors' control may foreclose security status for loan guaranty agreement); Johnsen v. Rogers, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,072, at 95,085-86 (C.D. Cal., Nov. 1, 1982) (investors' retention of right to determine when to drill and who should drill did not preclude oil and gas turnkey drilling contract from constituting security because drilling contractor made undeniably significant managerial decisions); *see also supra* notes 95-106, 111-14 and accompanying text (cases decided before *Weaver* considering whether investor's retention or exercise of power to make managerial decisions affects an instrument's or interest's security status).

[116] *See supra* notes 2 & 3 ('33 and '34 Act definitions of a security). Under the varying interests of the '33 Act, a fractional undivided interest in oil, gas, or other mineral rights may be a security. *See* 15 U.S.C. § 77b(1) (1976) ('33 Act definition of security); *supra* note 2 ('33 Act). Under the varying interests of the '34 Act, a certificate of interest or participation in any oil, gas, or other mineral royalty or lease may be a security. *See* 15 U.S.C. § 78c(10) (1976) ('34 Act definition of a security); *supra* note 3 ('34 Act). An oil and gas interest also may be a security as an investment contract under both Acts. *See* 15 U.S.C. §§ 77b(1), 78c(10) (investment contract is security under both Acts).

[117] *See* Ballard & Cordell Corp. v. Zoller & Danneberg Exploration, Ltd., 544 F.2d 1059, 1063-64 (10th Cir. 1976) (contract for sale of 50% working interest in oil and gas properties did not create security as sale of fractional undivided interest), *cert. denied*, 431 U.S. 965 (1977); Parvin v. Davis Oil Co., 524 F.2d 112, 115-16, 116 n.2 (9th Cir. 1975) (fractional interest in oil and gas leases coupled with exploration operation constituted security); Nor-Tex Agencies v. Jones, 482 F.2d 1093, 1098 (5th Cir. 1973) (transfer of 75% working interest in oil and gas leases coupled with drilling operation by promoter who retained 25% working interest constituted fractional undivided oil and gas interests), *cert. denied*, 415 U.S. 977 (1974); Gilbert v. Nixon, 429 F.2d 348, 354 (10th Cir. 1970) (purchase of fractional interests in oil and gas leases created securities); Lynn v. Caraway, 379 F.2d 943, 944 (5th Cir. 1967) (sale of entire interest in oil and gas lease does not create fractional undivided interest, even though interest sold may be fraction of larger interest); *cert. denied*, 393 U.S. 951 (1968); Graham v. Clark, 332 F.2d 155, 156 & n.1 (6th Cir. 1964) (sale of all of seller's rights in oil and gas leases did not constitute fractional undivided interest, even though seller retained ¼ working interest as consideration for sale); Moses v. Michael, 292 F.2d 614, 617-19 (5th Cir. 1961) (assignment of fractional undivided working interests in oil and gas rights created security); Roe v. United States, 287 F.2d 435, 436-37 (5th Cir.) (sale of entire 7/8 of mineral lease did not constitute fractional undivided interest), *cert. denied*, 368 U.S. 824 (1961); Woodward v. Wright, 266 F.2d 108, 112, 114 (10th Cir. 1959) (contract

Commission (SEC) has stated that the transfer of a fractional undivided oil and gas interest is not a security when the owner transfers his entire interest to a single person.[118] Federal courts, however, have reached conflicting results in determining when a fractional undivided interest exists under federal securities laws.[119] Most courts considering the transfer of interests in oil and gas rights have offered little analysis for determining whether a transaction involved a fractional undivided interest.[120] Under the fractional undivided interest designation, courts may follow *Joiner*, the only Supreme Court case considering the security status of oil and gas interests.[121] The *Joiner* Court held that the sale and assignment of

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for sale of entire oil and gas lease was security because contract contemplated sale of fractional interests); Johnsen v. Rogers, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,072, at 95,085 (C.D. Cal., Nov. 1, 1982) (sale of fractional leasehold interests coupled with exploration contract considered fractional undivided interest in oil and gas rights); Dupler v. Simmons, 163 F. Supp. 535, 540-41 (D. Wyo. 1958) (sale of fractional undivided interest in oil and gas lease to finance drilling operation constituted security); Creswell-Keith, Inc. v. Willingham, 160 F. Supp. 735, 739 (W.D. Ark. 1958) (sale of entire undivided interest constituted security because interest sold was fractional part of larger interest), *rev'd on other grounds*, 264 F.2d 76, 82 (8th Cir. 1959); Darwin v. Jess Hickey Oil Corp., 153 F. Supp. 667, 671 (N.D. Tex. 1957) (sale of entire oil and gas leasehold interest did not create security); SEC v. McBride, 143 F. Supp. 562, 563 (M.D. Tenn. 1956) (sale of fractional undivided interests in oil, gas, and other mineral rights constituted security); Wall v. Wagner, 125 F. Supp. 854, 857 (D. Neb. 1954) (purchase of working interest in oil leases constituted fractional undivided interest), *aff'd sub nom.* Whittaker v. Wall, 226 F.2d 868, 871-72 (8th Cir. 1955).

[118] SEC Securities Act Release No. 185, 11 C.F.R. 1095 (June 30, 1943), *reprinted in* FED. SEC. L. REP. (CCH) ¶ 1031 at 2057-58.

[119] *Compare* Ballard & Cordell Corp. v. Zoller & Danneberg Exploration, Ltd., 544 F.2d 1059, 1063-65 (10th Cir. 1976) (contract for sale of entire 50% working interest in oil and gas leases did not constitute security even though contract contemplated sale of fractional interests), *cert. denied*, 431 U.S. 965 (1977) *and* Graham v. Clark, 332 F.2d 155, 156 (6th Cir. 1964) (sale of two oil leases did not constitute security even though seller retained ¼ working interest) *with* Nor-Tex Agencies, Inc. v. Jones, 482 F.2d 1093, 1095-98 (5th Cir. 1973) (transfer of entire 75% working interest in oil and gas properties constituted security because investors induced to speculate in fractional undivided interests), *cert. denied*, 415 U.S. 977 (1974) *and* Woodward v. Wright, 266 F.2d 108, 112, 114 (10th Cir. 1959) (sale of entire oil and gas lease constituted security because accompanying contract contemplated creation of fractional interests).

[120] *See* Gilbert v. Nixon, 429 F.2d 348, 354 (10th Cir. 1970) (purchase of fractional interests in thirteen oil and gas leases constituted securities); Moses v. Michael, 292 F.2d 614, 617-18 (5th Cir. 1961) (transfer of fractional undivided working interests in oil and gas rights created security); Johnsen v. Rogers, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,072 at 95,085 (C.D. Cal., Nov. 1, 1982) (sale of oil and gas lease coupled with drilling operation considered fractional undivided interest); Dupler v. Simmons, 163 F. Supp. 535, 540-41 (D. Wyo. 1958) (fractional interest sold to finance oil drilling constituted security); Wall v. Wagner, 125 F. Supp. 854, 857 (D. Neb. 1954) (purchase of working interest in oil and gas lease created fractional undivided interest), *aff'd sub nom.* Whittaker v. Wall 226 F.2d 868, 871-72 (8th Cir. 1955).

[121] *See* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 352 (1943) (fractional undivided interest in oil, gas, and other mineral rights considered method of mineral rights apportionment most used for speculative purposes); *see also* Nor-Tex Agencies v. Jones, 482 F.2d 1093, 1098 (5th Cir. 1973) (sale of 75% working interest in oil and gas leases constituted

oil leasehold subdivisions by parcels constituted securities.[122] The Court held that although Congress specifically included the fractional undividied interest clause in the '33 Act because speculators most often used the fractional undivided interest, *Joiner* did not preclude courts from resorting to an investment contract or other approach to ascertain the security status of oil and gas interests.[123] Many courts consider both a fractional undivided interest approach and an investment contract approach in oil, gas, and other mineral interest cases.[124] Accordingly, courts may follow both the *Joiner* and *Howey* tests in oil, gas, and mineral interest cases.[125]

DISCRETIONARY TRADING ACCOUNTS

Although both *Joiner* and *Howey* supply considerations for courts determining the security status of instruments or interests in oil, gas,

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security under *Joiner* because investors induced to speculate in fractional undivided interests), *cert. denied*, 415 U.S. 977 (1974); Moses v. Michael, 292 F.2d 614, 618-19 (5th Cir. 1961) (assignment of fractional undivided working interest in oil and gas rights created security under *Joiner*); Roe v. United States, 287 F.2d 435, 437-38, 438 n.2 (5th Cir.) (sale of entire 7/8 interest in mineral lease did not constitute fractional undivided interest even though circumstances indicated speculative venture under *Joiner*), *cert. denied*, 368 U.S. 824 (1961); Woodward v. Wright, 266 F.2d 108, 112, 114 (10th Cir. 1959) (contract for sale of entire oil and gas lease was fractional undivided interest because contract contemplated fractionalizing interests for speculative purposes under *Joiner*); Johnsen v. Rogers, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,072, at 95,085 (C.D. Cal., Nov. 1, 1982) (citing *Joiner* as support that initial assignment of fractional oil and gas lease coupled with exploration operation constitutes fractional undivided interest).

[122] 320 U.S. 344, 352 (1943).

[123] *Id.*

[125] *See, e.g.*, Ballard & Cordell Corp. v. Zoller & Danneberg Exploration, Ltd., 544 F.2d 1059, 1063-65 (10th Cir. 1976) (transfer of entire leasehold right does not create security as fractional undivided interest or as investment contract), *cert. denied*, 431 U.S. 965 (1977); Parvin v. Davis Oil Co., 524 F.2d 112, 115-16, 116 n.2 (9th Cir. 1975) (fractional interests in oil and gas leases coupled with exploration operation constitutes fractional undivided interest and investment contract); Roe v. United States, 287 F.2d 435, 438 (5th Cir.) (sale of entire oil lease constituted investment contract, but not fractional undivided interest), *cert. denied*, 368 U.S. 824 (1961); Johnsen v. Rogers, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,072, at 95,085-86 (C.D. Cal., Nov. 1, 1982) (assignment of fractional interest in oil and gas lease and contemporaneous drilling agreement may constitute both fractional undivided interest and investment contract).

[125] *See, e.g.*, Ballard & Cordell Corp. v. Zoller & Danneberg Exploration, Ltd., 544 F.2d 1059, 1065 (10th Cir. 1976) (following principles of *Howey* and *Joiner* to find lack of fractional undivided interest and investment contract characteristics in contract for sale of 50% working interest), *cert. denied*, 431 U.S. 965 (1977); Johns Hopkins Univ. v. Hutton, 422 F.2d 1124, 1128 (4th Cir. 1970) (oil and gas production payment is unique instrument constituting security under *Howey* and *Joiner*), *cert. denied*, 416 U.S. 916 (1974); Johnsen v. Rogers, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,072, at 95,085-86 (C.D. Cal., Nov. 1, 1982) (*Joiner* and *Howey* support proposition that sale of leasehold coupled with drilling agreement can be both fractional undivided interest and investment contract); Darwin v. Jess Hickey Oil Corp., 153 F. Supp. 667, 669-72 (N.D. Tex. 1957) (distinguishing sale of stock shares and assignment of oil and gas leases from investment contract under *Howey* and *Joiner*).

and other mineral cases, *Howey* provides the major focus for courts considering whether discretionary trading accounts constitute securities.[126] A discretionary trading account is an arrangement in which an investor deposits funds with a broker, authorizing the broker to exercise full discretion over investment decisions in commodities.[127] Courts considering whether a discretionary trading account constitutes a security have focused upon the investment contract interest of the '33 and '34 Acts' definition of a security.[128]

Relying upon the *Howey* test to determine whether a discretionary trading account is a security, courts have developed two different views of the *Howey* test's common enterprise element.[129] Under the "horizontal commonality" approach, courts focus upon investors' relationship and pooling of funds.[130] Because the horizontal commonality approach is a restrictive approach, courts using the approach generally find that a discretionary trading account has insufficient commonality to be an investment contract security.[131] Under the "vertical commonality" approach, courts focus upon

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[126] *See infra* notes 127-43 (discretionary trading account cases).

[127] *See* Curran v. Merrill Lynch, Pierce, Fenner & Smith, 622 F.2d 216, 220-21 (6th Cir. 1980) (discretionary commodity account gives broker authority to buy or sell at his discretion, without consulting customer) *aff'd* 102 S. Ct. 182 (1982); Note, *Discretionary Trading Accounts As Securities*: Howey *Revisited*, 16 TULSA L.J. 334, 334 (1980) (defining discretionary trading account) [hereinafter cited as Howey *Revisited*]; Note, *Discretionary Commodity Accounts as "Securities": Applying the* Howey *Investment Contract Test to a New Investment Medium*, 67 GEO. L.J. 269, 269 (1978) (defining discretionary trading account as an investment vehicle for trading in commodities futures contracts); *cf.* Gamble v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,046 at 94,987-89 (S.D.N.Y., Dec. 10, 1982) (commodities futures trading account maintained by national brokerage firm but managed by unassociated independent agent is not discretionary account).

[128] *See supra* notes 2 & 3 ('33 and '34 Acts' definition of security); *infra* notes 129-43 and accompanying text (courts considering whether discretionary trading account constitutes investment contract security); *see also* Howey *Revisited*, *supra* note 127, at 337-41 (discussion of horizontal and vertical commonality tests used to determine common enterprise element of *Howey* test).

[129] *Compare* Kirk Agri-Research Council, Inc., 561 F.2d 96, 101 (7th Cir. 1977) ("horizontal commonality" pooling of investments required for *Howey* "common enterprise" element) *with* SEC v. Continental Commodities Corp., 497 F.2d 516, 522 ("vertical commonality" between investor and broker satisfies *Howey* "common enterprise" element).

[130] *See* Curran v. Merrill Lynch, Pierce, Fenner & Smith, 622 F.2d 216, 221-25 (6th Cir. 1980) (horizontal common enterprise element exists if fortune of each discretionary trading account investor is tied to success of overall venture) *aff'd* 102 S. Ct. 182 (1982); Commercial Iron & Metal Co. v. Bache & Co., 478 F.2d 39, 41-43 (10th Cir. 1973) (futures contract to purchase copper not security because of lack of common enterprise between dealer and investor), *cert. denied*, 99 S. Ct. 1229 (1981); Wasnovic v. Chicago Bd. of Trade, 352 F. Supp. 1066, 1069-70 (M.D. Pa. 1972) (individual discretionary trading account lacked horizontal commonality that would be present if account funds originally had been commingled among several customers), *aff'd mem.*, 491 F.2d 752 (3d Cir. 1973).

[131] *See* Kirk v. Agri-Research Council, Inc., 561 F.2d 96, 101 (7th Cir. 1977) (lack of pooling of funds in discretionary trading account does not satisfy *Howey*); Milnarik v. M-S Commodities, Inc., 457 F.2d 274, 276-79 (7th Cir.) (investor granting discretionary authority to

the relationship between an investor and a promoter.[132] Although the vertical commonality approach is a flexible approach, courts using the approach have not found that a discretionary trading account has sufficient commonality to be an investment contract security.[133]

The *Weaver* Court's use of *Joiner*, instead of *Howey*, in an investment contract analysis has not affected courts considering whether discretionary trading accounts constitute investment contracts.[134] In 1982, the Third and Ninth Circuits held that discretionary commodities trading accounts were not securities under the *Howey* investment contract test.[135] In *Mordaunt v. Incomco*,[136] the Ninth Circuit noted that a common enterprise generally is absent from commodities futures trading accounts because the success of a brokerage house does not correlate with the profit and loss of individual investors.[137] The *Mordaunt* court also noted that the mere furnishing of investment counsel to an investor for a commission does not provide a common enterprise, even when the advice is connected with a discretionary commodities account.[138] The Ninth Circuit additionally has

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broker does not join broker's other customers in common enterprise), *cert. denied*, 409 U.S. 887 (1972); *supra* note 130 (cases using horizontal commonality approach).

[132] *See* SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 482-83 (9th Cir.) (establishing vertical commonality approach), *cert. denied*, 414 U.S. 82 (1973); *see also* Hector v. Weins, 533 F.2d 429, 432-34 (9th Cir. 1976) (vertical commonality necessary to satisfy common enterprise element of investment contract); SEC v. Continental Commodity Corp., 497 F.2d 516, 521-23 (5th Cir. 1974) (vertical commonality created by investor's reliance upon investment counselor when success of trading enterprise is dependent upon counselor's advice); *see also* Holtzman v. Proctor, Cook & Co., Inc. [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,421 at 92,522-23 (D.C. Mass., Dec. 20, 1981) (no common enterprise element under either vertical or horizontal commonality approach).

[133] *See* Mordaunt v. Incomco, 686 F.2d 815, 817 (9th Cir. 1982) (discretionary trading accounts do not constitute security because investors' success or failure not directly related to promoter's success or failure in common enterprise); Meyer v. Thomson & McKinnon Auchincloss Kohlmeyer, Inc., 686 F.2d 818, 818-19 (9th Cir. 1982) (security "common enterprise" requirement not satisfied when promoter continues to profit from commissions even when discretionary trading account loses money); Brodt v. Bache & Co., 595 F.2d 459, 460-61 (9th Cir. 1978) (vertical commonality approach to common enterprise not satisfied when no direct relation between success or failure of promoter and investor).

[134] *See infra* notes 135-43 and accompanying text (courts considering whether discretionary trading accounts constitute investment contracts after *Weaver*).

[135] *See* Mordaunt v. Incomco, 686 F.2d 817 (9th Cir. 1982) (discretionary commodities trading account is not investment contract under *Howey*); Meyer v. Thomson & McKinnon Auchincloss Kohlmeyer, Inc., 686 F.2d 815, 818-19 (9th Cir. 1982) (discretionary trading account does not meet *Howey* test's common enterprise requirement); Salcer v. Merrill Lynch, Pierce, Fenner & Smith, Inc. [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,752, at 93,827-28 (3rd Cir., July 19, 1982) (discretionary commodities account does not meet *Howey* test's requirement of common enterprise or pooled group of funds).

[136] 686 F.2d 815 (9th Cir. 1982).

[137] *Id.* at 817. After concluding that no direct relation existed between the success of a brokerage house and the success of an investor, the Ninth Circuit noted that the broker in *Mordaunt* earned over $20,000 in commissions on the investor's account during a period in which the investor lost over $27,000. *Id.*

[138] *Id.*

noted that a brokerage firm's practice of basing a broker's commissions upon the percentage of assets managed for an investor does not create the common enterprise necessary for an investment contract.[139]

The Southern District of New York disregarded investment contract considerations to hold that a commodities account, whether discretionary or not, does not constitute a security under the federal securities laws.[140] In *Gonzalez v. Paine, Webber, Jackson & Curtis, Inc.*,[141] the District Court for the Southern District of New York stated that the federal securities laws have no application to commodities futures trading accounts because the Commodity Exchange Act[142] governs futures regulation.[143] Steps begun by Congress during 1982, however, might lead to changes in the securities laws which would bring the regulation of discretionary commodities trading accounts within the province of the SEC.[144] Absent a clear-cut indication from Congress, courts may have the option of considering whether discretionary trading accounts are outside the realm of federal securities laws,[145] of ascertaining whether discretionary trading accounts can constitute in-

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[139] *See* Meyer v. Thomson & McKinnon Auchincloss Kohlmeyer, Inc., 686 F.2d 815, 818-19 (9th Cir. 1982) (common enterprise element for investment contract does not result from broker's receipt of commissions based upon percentage of investor's assets managed by broker).

[140] *See* Gonzalez v. Paine, Webber, Jackson & Curtis, Inc., [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,867, at 94,512-16 (S.D.N.Y., Nov. 4, 1982) (securities laws do not encompass regulation of commodities trading account).

[141] *Id.* at 94,513-14.

[142] *See* 7 U.S.C. §§ 1-24 (1976 & Supp. V 1981) (Commodity Exchange Act of 1936). Congress amended the Commodity Exchange Act in the Commodity Futures Trading Act of 1974. *See* 7 U.S.C. §§ 1-22 (1976 & Supp. V 1981) (1974 Act); *see also* Note, *The Element of Scienter in Antifraud Provisions of the Commodity Exchange Act*, 39 WASH. & LEE L. REV. 1175, 1175 n.1 (1982) (explaining concept of commodity futures trading under the Commodity Exchange Act).

[143] FED. SEC. L. REP. ¶ 98,867 at 94,513-14. In *Gonzalez*, the Southern District of New York held that the federal securities laws do not apply to claims alleging a broker's mishandling of a commodities futures trading account. *Id.* at 94,514.

[144] *See* HOUSE COMM. ON ENERGY AND COMMERCE, H.R. REP. NO. 626, 97TH CONG., 2D SESS. 1, 6-9, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2792, 2796-2800 (contemplating amendment to '33 Act and '34 Act to include options on securities in statutory definition of a security). The House Committee on Energy and Commerce noted a long-standing Congressional intent that the SEC has the sole authority to regulate options on all securities. H.R. REP. No. 626 at 8-9. Traditionally, the SEC regulates markets and instruments with an underlying investment purpose and the Commodity Futures Trade Commission (CFTC) regulates markets and instruments that serve hedging and price discovery functions. *See* HOUSE COMM. ON AGRICULTURE, H.R. REP. No. 626, 97TH CONG., 2d Sess. 3, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS, 2792, 2793-94 (clarifying jurisdiction of the SEC and the definition of security). Although the CFTC governs activities of commodities pools operations and accounts involving futures, the SEC has taken the position that the federal securities laws govern the activities of commodities pools as companies and securities issued by commodities pools. *See* Letter from John S. Shad, Chairman of SEC, to Congressman Thomas P. O'Neill, Jr., Speaker of the House (Feb. 24, 1982) *reprinted in* HOUSE COMM. ON AGRICULTURE, H.R. REP. No. 626, 97th Cong., 2d Sess. at 14-15.

[145] *See supra* notes 140-44 and accompanying text (security status of discretionary commodities trading accounts may be outside the regulatory province of federal securities laws).

vestment contracts under *Howey*,[146] or of considering whether discretionary trading accounts present the characteristics of a security under the *Joiner* factors.[147]

The *Weaver* Court's use of the *Joiner* factors might alleviate courts from having to make a vertical or horizontal commonality distinction in future discretionary trading account cases.[148] Under a *Joiner* investment contract analysis, courts determining whether a discretionary trading account is a security would consider whether the particular discretionary trading account falls within the ordinary concept of a security.[149] One factor courts would consider is the terms of offering participation in the account.[150] Conceivably, more than one investor could be involved in a particular discretionary trading account, thereby circumventing the *Weaver* Court's determination that a one-on-one agreement may not be a security.[151] The *Weaver* Court's "common trading" element, however, might present an obstacle for finding that a discretionary trading account is an investment contract.[152] The *Weaver* Court stressed that securities should have equivalent values to most persons and should be available for public trading or participation.[153] Although a discretionary trading account is not a publicly traded instrument or interest, the account does provide a way for investors to participate in the public trading of instruments or interests.[154] For a court to conclude that a discretionary trading account constituted a security under *Joiner*, the court would have to find that use of the account exhibited speculative purposes characteristic of a security.[155] The jump from finding that an interest or instrument is the subject of speculation to finding that a discretionary trading account is the subject of speculation, however, may be too long a leap for courts to take, regardless of *Weaver*.[156]

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[146] *See supra* text accompanying notes 128-139 (courts considering whether discretionary trading account constitutes security under *Howey* investment contract test).

[147] *See infra* text accompanying notes 148-56 (considering whether discretionary trading account may constitute security under *Joiner* factors).

[148] *See infra* text accompanying notes 149-56 (discussing discretionary trading accounts under a *Weaver* investment contract analysis applying *Joiner*'s factors).

[149] 455 U.S. at 556, 560.

[150] *Id.* at 560.

[151] *See id.* (unique one-to-one agreement forecloses security status).

[152] *See id.* (no common trading in Weaver's loan guaranty agreement).

[153] *Id.*

[154] *See supra* note 127 (defining discretionary trading account as providing way for investors to trade in commodities futures through aid of broker).

[155] *See* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351-52, 352 n.10 (1943) (once instruments or interests become subject of speculative transactions, the instruments or interests become securities); *see also supra* note 144 (regulatory province of SEC covers markets and instruments with an underlying investment purpose).

[156] *See* Mordaunt v. Incomco, 686 F.2d 815, 817 (9th Cir. 1982) (merely furnishing investment advice to investor for commission does not create common enterprise element necessary for discretionary trading account arrangement between broker and investor to constitute investment contract security).

THE SALE OF BUSINESS DOCTRINE

Difficulty in determining *Weaver*'s effect upon an investment contract analysis has occurred in cases considering whether stock transferred during the sale of a business constitutes a security.[157] Courts considering whether stock in a closely-held business corporation is a security reached differing results before the Supreme Court's *Weaver* decision.[158] If a transfer of stock occurred during the "sale of a business," some courts refused to consider the stock a security.[159] Courts following the sale of business approach used the *Howey* test.[160] A number of courts, however, rejected the sale of business doctrine and followed the literal approach for instruments that were securities in the ordinary sense.[161] If an instrument displayed characteristics commonly associated with stock, courts considered the stock a security.[162] Courts following the literal approach applied the *Howey* test only where an instrument contained unique features difficult to classify by ordinary standards.[163]

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[157] *See* Seagrave Corp. v. Vista Resources, 696 F.2d 227, 230-31 (2d Cir. 1982) (following the *Joiner* analysis used by *Weaver*, but citing *Weaver* only for context test); Sutter v. Groen, 687 F.2d 197, 200-04 (7th Cir. 1982) (*Weaver* supports "sale of business" doctrine); Golden v. Garafalo, 678 F.2d 1139, 1140 (2d Cir. 1982) (*Weaver* supports rejection of sale of business doctrine).

[158] *See* Comment, *Securities Regulation—Is Stock A Security?*, 30 KAN. L. REV. 117, 123-29 (1981) (discussing lower federal court decisions considering whether stock is a security); *compare* Frederiksen v. Poloway, 637 F.2d 1147, 1151-54 (7th Cir.) (stock in closely held business corporation is not security), *cert. denied*, 451 U.S. 1017 (1981) *with* Coffin v. Polishing Machines, 596 F.2d 1202, 1204 (4th Cir. 1979) (stock in closely held business corporation is a security), *cert. denied*, 444 U.S. 868 (1980).

[159] *See* Frederiksen v. Poloway, 637 F.2d 1147, 1151-54 (7th Cir.) (stock is not security if sale of stock is to acquire business), *cert. denied*, 451 U.S. 1017 (1981); Chandler v. Kew, Inc., [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,966, at 96,054 (10th Cir. 1977) (stock sold in transfer of business ownership is not security); Bula v. Mansfield, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,964, at 96,051-52 (D. Colo., May 13, 1977) (stock is not security when sold to transfer business ownership).

[160] *See* Frederiksen v. Poloway, 637 F.2d 1147, 1151-54 (7th Cir.), *cert. denied*, 451 U.S. 1017 (1981) (applying *Howey* to stock in sale of business); Chandler v. Kew, Inc., [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,966 at 96,054 (10th Cir. 1977) (applying *Howey* to sale of stock to transfer ownership of business); Bula v. Mansfield, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,964 at 96,051-52 (D. Colo., May 13, 1977) (applying *Howey* under sale of business).

[161] *See* Glick v. Campagna, 613 F.2d 31, 35 (3d Cir. 1979) (sale of business doctrine inapplicable); Coffin v. Polishing Machines, 596 F.2d 1202, 1204 (4th Cir. 1979) (rejecting sale of business doctrine), *cert. denied*, 444 U.S. 868 (1980); Occidental Life Ins. Co. v. Pat Ryan & Assoc., 496 F.2d 1255, 1261-63 (4th Cir.) (stock is security during sale of business), *cert. denied*, 419 U.S. 1024 (1974).

[162] *See* United Hous. Found. v. Forman, 421 U.S. 837, 847-48 (1975) (Congress intended definition of security to be sufficiently broad to cover instruments commercial world commonly considers securities); *supra* note 161 (cases considering stock a security under *Howey* test).

[163] *See supra* note 129 (*Howey* test applied to stock only in unique circumstances); text accompanying notes 28-33 (discussing *Howey*); *see also* Bronstein v. Bronstein, 407 F. Supp. 925, 929 (E.D. Pa. 1976) (sale of stock in family corporation to brother constituted security).

After the *Weaver* decision, the Second Circuit rejected the sale of business doctrine to hold that conventional stock in a business corporation is a security.[164] In *Golden v. Garafalo*,[165] the Second Circuit considered whether corporate stock was a security as a 100 percent purchase of shares in a ticket brokerage business.[166] The *Golden* court first stated that *Howey, Joiner*, and *Weaver* emphasized changes in an investment, rather than changes in a particular transaction involving the instrument.[167] In addition, the *Golden* court noted that *Weaver* supported the conclusion that the *Howey* test should apply only to unique or idiosyncratic instruments.[168] Finally, the *Golden* court determined that the *Joiner* factors, as used in *Weaver*, apply to specific terms falling within the ordinary concept of a security.[169] The Second Circuit concluded that the Goldens' stock was a conventional stock within the ordinary concept of a security.[170] The Second Circuit later reaffirmed the *Golden* approach to stock transferred during the sale of a business.[171] The Fourth and Third Circuits also have found that stock transferred during the sale of a business constitutes a security.[172]

The Seventh Circuit, however, reached a different conclusion for a 100 percent sale of common stock in *Sutter v. Groen*.[173] The *Sutter* court stated that *Weaver* supports the sale of business doctrine by adding the context factor and a congressional intent factor to the ordinary concept of a security test.[174] The *Sutter* court further stated that under the sale of business doctrine whether an instrument is a security will depend upon whether the purchaser is an investor or an entrepreneur.[175] The *Sutter*

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[164] *See* Golden v. Garafalo, 678 F.2d 1139, 1140 (2d Cir. 1982) (rejecting sale of business doctrine considerations for conventional stock).

[165] 678 F.2d 1339 (2d Cir. 1982).

[166] *Id.* at 1140.

[167] *Id.* at 1143; *see* Marine Bank v. Weaver, 455 U.S. 551, 556-59 (1982) (*Weaver* analysis of specific term under the Act); United Hous. Found. v. Forman, 421 U.S. 837, 848-49 (1975) (*Forman* analysis of specific term); SEC v. W.J. Howey Co., 328 U.S. 293, 299-301 (1946) (*Howey* analysis of investment contract or unusual instrument).

[168] 678 F.2d at 1144; *see* Marine Bank v. Weaver, 455 U.S. 551, 556-59 (1982) (analyzing specific term); United Hous. Found. v. Forman, 421 U.S. 837, 848-49 (1975) (specific term analysis); SEC v. W.J. Howey Co., 328 U.S. 293, 299-301 (1946) (investment contract or unusual instrument analysis).

[169] 678 F.2d at 1144; *see* Marine Bank v. Weaver, 455 U.S. 551, 556-59 (1982) (specific term analysis); United Hous. Found. v. Forman, 421 U.S. 837, 848-49 (1975) (specific term analysis).

[170] 678 F.2d at 1144.

[171] *See* Seagrave Corp. v. Vista Resources, 696 F.2d 227, 230-31 (2d Cir. 1982) (reaffirming *Garafalo*'s rejection of sale of business doctrine).

[172] *See* Glick v. Campagna, 613 F.2d 31, 35 (3d Cir. 1980) (sale of 50% of stock constituted sale of security); Coffin v. Polishing Machines, 596 F.2d 1202, 1204 (4th Cir.) (federal securities laws apply to 100% sale of corporate stock), *cert. denied*, 444 U.S. 868 (1979).

[173] 687 F.2d 197, 200-04 (7th Cir. 1982).

[174] *Id.* at 200-01; *see* Marine Bank v. Weaver, 455 U.S. 451, 556 (1982) (context and legislative intent tests).

[175] 687 F.2d at 201-04; *see supra* note 87 (discussing commercial-investment test).

court added that once a purchaser obtains more than fifty percent of a corporation's stock, a rebuttable presumption exists that the purchaser is an entrepreneur who is buying the business for commercial purposes, rather than an investor.[176] The Seventh, Tenth, and Eleventh Circuits follow the *Sutter* court's approach to stock transferred during the sale of a business.[177]

THE ECONOMIC REALITIES TEST AFTER *MARINE BANK v. WEAVER*

Differing opinions about *Weaver*'s effect on the security status of instruments or interests may add to definitional confusion as courts decide to limit *Weaver*[178] or to view *Weaver* as expanding the economic realities approach for interpreting the definition of a security.[179] Courts viewing *Weaver* as a broader approach may find that considering the economic realities surrounding each instrument, interest, or transaction guarantees only uncertain results.[180] A court's willingness to apply all or some of the factors that *Weaver* stresses as available for ascertaining the characteristics of a security[181] well may depend upon whether an instru-

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[176] 687 F.2d at 203-04.

[177] *See* King v. Winkler, 673 F.2d 342, 344-46 (11th Cir. 1982) (rejecting sale of business doctrine); Frederiksen v. Poloway, 637 F.2d 1147, 1151-54 (7th Cir.), *cert. denied*, 451 U.S. 1017 (1981) (sale of stock to acquire business does not constitute security); Chandler v. Kew, Inc., [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,966, at 96,054 (10th Cir., April 19, 1977) (stock not security during sale of business); *see also* Seldin, *When Is Stock Not A Security: The "Sale of Business Doctrine" Under the Federal Securities Laws*, 37 BUS. LAW. 637, 637-50 (1982) (examining diversity of opinions among courts considering the security status of stock transferred during sale of a business).

[178] *See* Seagrave Corp. v. Vista Resources, Inc., 697 F.2d 227, 230 (2d Cir. 1982) (citing *Weaver* for proposition that instrument seemingly within expansive definition of security may not be security if "context otherwise requires"); Golden v. Garafalo, 678 F.2d 1139, 1143-44 (2d Cir. 1982) (*Weaver* treats determination of instrument's security status as a determination that does not vary according to holdings of parties or parties' intentions for particular transaction); *see also* Wolf v. Banco National De Mexico, 14 FED. SEC. & L. REP. (BNA) 1889, 1889-90 (N.D. Cal., Oct. 26, 1982) (*Weaver* limited to domestic certificates of deposit, and does not apply to time deposits in Mexican bank).

[179] *See* A.G. Becker, Inc. v. Bd. of Governors, 693 F.2d 136, 147 (D.C. Cir. 1982) (*Weaver* court's focus is upon potential economic gains and losses of investors who are intended beneficiaries of federal securities regulation); Sutter v. Groen, 687 F.2d 197, 200-01 (7th Cir. 1982) (*Weaver* urges courts to consider economic context of each case with regard to legislative purpose of protecting investor through federal securities laws); *see also supra* notes 20-91 and accompanying text (tracing development of economic realities approach to interpreting definition of security).

[180] *See supra* text accompanying notes 93-125 (varying results for courts considering whether oil, gas, or other mineral interests constitute securities); *supra* text accompanying notes 158-77 (varying results among courts considering whether stock transferred during sale of business constitutes security).

[181] *See supra* text accompanying notes 81-91 (factors that *Weaver* Court stated may be pertinent for courts interpreting definition of security).

ment, interest, or transaction becomes so speculative that denying security status would circumvent the purpose of the federal securities laws.[182]

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[182] *See* Marine Bank v. Weaver, 455 U.S. 551, 556-560, 560 n.11 (1982) (definition of security is broad to facilitate protection of investors as context of each case requires); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351-52, 352 n.10 (1943) (federal securities laws designed to encompass interests that become subject of speculation which may harm public through fraud); Dillport, *supra* note 4, at 137-40 (*Weaver* provides step toward interpreting definition of security to conform with purpose of federal securities laws); *supra* note 23 (detailing presidential and congressional intent for purpose of federal securities laws); *see also supra* text accompanying note 144 (discretionary trading accounts may not fall within purpose or regulatory domain of federal securities laws). *But see*, Arnold, Marine Bank v. Weaver: *New Guidance On What Is Not A Security*, 53 OKLA. B.J. 2199, 2204 (1982) (*Weaver* leaves parties to unusual, negotiated transactions without protection under federal securities laws).