SECURITIES LAW — INVESTMENT CONTRACTS — THE TEST IS WHETHER THE SCHEME INVOLVES AN INVESTMENT OF MONEY IN A COMMON ENTERPRISE WITH PROFITS TO COME FROM THE EFFORTS OF THOSE OTHER THAN THE INVESTOR WHICH ARE THE UNDENIABLY SIGNIFICANT ONES OR ESSENTIAL MANAGERIAL EFFORTS WHICH AFFECT THE FAILURE OR SUCCESS OF THE ENTERPRISE -- *Securities & Exchange Commission v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973).

The activities of Dare to Be Great, Inc., and Koscot Interplanetary, Inc., two wholly owned subsidiaries of Glenn W. Turner Enterprises, Inc., are the subject of seventeen actions in ten districts seeking recovery for alleged fraud and deceit and violations of the state and federal securities laws.[1]

The Securities and Exchange Commission (Commission) instituted an action in the United States District Court for the District of Oregon to enjoin Dare to Be Great from offering and selling certain plans and adventures[2] and also to enjoin them from withdrawing funds from the assets of the corporation other than in the regular course of business.

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1. In re Glenn W. Turner Enterprises Litigation, No. 109, Judicial Panel on Multidistrict Litigation (D. Pa., Jan. 30, 1973).

2. Adventure I costs $300. The purchaser receives one portable tape recorder, twelve tape-recorded lessons and certain written material in notebooks. He is entitled to attend a 12-16 hour group session.

Adventure II includes Adventure I and cost $700. The purchaser receives twelve more tape-recorded lessons. He is offered approximately 80 hours of group sessions.

Adventure III includes Adventures I and II and costs $2,000. The purchaser receives six more tape recordings, one notebook of written material called "The Fun of Selling," and a limited amount of written instructions and material as well as thirty more hours of group sessions. The purchaser also receives a different sort of benefit. After fulfilling a few nominal requirements he becomes an "independent sales trainee," empowered to sell the Adventures. He receives $100 for each Adventure I, $300 for each Adventure II, and $900 for each Adventure III that he sells.

Adventure IV costs $5,000 and includes Adventures I, II and III. The purchaser receives six more tapes, the opportunity to attend two other week-long courses in Florida, at his own expense, and he may or may not receive a movie projector with six cartridge-type films. He is also empowered to sell all of the Adventures to others. For selling Adventure IV he gets $2,500.

Adventure V is the $1000 Plan. For this sum the purchaser receives the tape cassettes sold in Adventure II, but not the accompanying written material. He also receives some additional sales instructions and may be entitled to a 24-hour group session. He may also sell the Plan, if he brings two individuals to the person who sold him the Plan, and if these two also purchase the Plan from the first seller. If that occurs he may sell the Plan on his own, receiving $400 for each additional sale that he makes. If one brings three people into the scheme, he may sell the $1000 Plan without buying it himself and would earn the same $400 commission for each additional sale that he makes.

Of the five plans offered by Dare to Be Great, the district court found Adventures III and IV and the $1000 Plan to be securities within the meaning of the federal securities laws[3] and granted a preliminary injunction from which the defendants appealed.

Following the district court's order granting the preliminary injunction, each of the seventeen actions in the various district courts around the nation were consolidated by the Judicial Panel on Multidistrict Litigation and transferred to the Western District of Pennsylvania pursuant to 28 U.S.C. § 1407.[4] The Commission resisted transfer of the instant action. After concluding that this case was obviously far advanced and that transfer would not serve the convenience of the parties nor the just and efficient conduct of any of the other actions, the panel granted the Commission's motion.[5] The district court held that the plans in question fell into three categories listed in the definition of security in the 1933 and 1934 Acts which were "investment contract," "certificates of interest or participation in any profit sharing agreement," and any "instrument commonly known as a 'security'."[6] On appeal the United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court by holding the Plans to be strictly investment contracts.[7]

INTRODUCTION

The 1933 and 1934 Securities and Exchange Acts were flung into existence on the coattails of the 1929 stock market crash. The tragedy of the post-World War I investment boom was clearly brought to light by the House Report for the 73rd Congress which stated:

> During the post war decade some 50 billion dollars worth of new securities were floated in the United States. Fully half or 25 billion dollars worth of securities floated during this period have proven to be worthless. These cold figures spell tragedy in the lives of thousands of individuals who invested their life savings, accumulated after years of effort, in these worthless securities .... Alluring promises of easy wealth were freely made with little or no attempt to bring to the investors' attention those facts essential to estimating the worth of any security.[8]

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3. Securities Act of 1933, 15 U.S.C. §77 (1970); Securities Exchange Act of 1934, 15 U.S.C. §78 (1970).
4. In re Glenn W. Turner Enterprises Litigation No. 109, Judicial Panel on Multidistrict Litigation (W. D. Pa., Jan. 30, 1973).
5. *Id.* at 5.
6. SEC v. Glenn W. Turner Enterprises, Inc., 348 F. Supp. 766 (D. Ore. 1972).
7. SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir. 1973).
8. H.R. REP. No. 85, 73rd Cong., 1st Sess. 11 (1933).

A full disclosure policy was adopted by Congress as the best means of protecting the investor and eradicating the evils that permeated the 1920 era. In his message to Congress in 1933 President Franklin Roosevelt expanded on this philosophy:

> There is, however, an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public.[9]

Having thus decided that full disclosure was the best possible answer, Congress set about drafting legislation which would eventually evolve into the Securities Act of 1933 and the Securities Exchange Act of 1934.[10] The essential purpose of both acts was to provide the public with full and fair disclosure of all relevant information concerning securities which were placed on the market. The specific concern of the Securities Act of 1933 was with the initial distribution of securities rather than subsequent trading.[11] The Securities Exchange Act of 1934 had four specific concerns: to afford a measure of disclosure to people who buy and sell securities, to prevent and afford remedies for fraud in securities markets and to control the amount of the Nation's credit which goes into those markets.[12] The Act is founded upon the principle that full disclosure of all pertinent financial and other material information should be made to the prospective investor in order that he be able to make a sound investment decision, but it must be remembered that the Commission has no authority to evaluate any proposed offering nor to prevent the sale of any security which has met the statutory registration and disclosure requirements.[13] Congress did not take away from the citizen his inalienable right to make a fool of himself.[14] It simply attempted to prevent others from making a fool of him.[15] The economic justification for disclosure as the key stone of investment protection lies in the belief that material corporate and financial information disseminated to prospective investors provides a rational basis to evaluate securities — a necessary precondition to efficient markets.[16]

Thus far the terms "security" and "securities" have been used as if most are assured of their definite meanings. Such is not the

9. S. REP. NO. 47, 73rd Cong., 1st Sess. 6-7; M. R. REP. NO. 85, 73rd Cong., 1st Sess. 1-2 (1933).
10. Landis, *The Legislative History Of The Security Act Of 1933*, 28 GEO. WASH. L. Rev. 29 (1959).
11. 1 L. Loss, SECURITIES REGULATION 130 (2d ed. 1961); Reader v. Hirsch & Co., 197 F. Supp. 111 (D.C. N.Y. 1961).
12. 1 L. Loss, *supra note* 11, at 130.
13. Levenson, *The Role Of SEC As a Consumer Protection Agency*, 27 BUS. LAW. 61 (1971).
14. 1 L. Loss, *supra* note 11, at 128.
15. *Id.*
16. Levenson, *supra* note 13, at 62.

case, however. Security has been defined as evidences of obligations to pay money or of rights to participate in earnings and distribution of corporate, trust or other property.[17] However, the term itself has four broad meanings: in one sense it connotes certainty, safety and protection, or a state of being secure; secondly, it is said to be an instrument of protection or the thing which creates a condition of safety or protection; thirdly, it is a person who becomes a surety for another's obligation or performance; lastly, it is a term which is used to describe commercial assets in a single word. It is in the context of this last category that the term relates to investment. Investing is that process whereby an individual places money in the hands of another to be used in a profit-making scheme or enterprise in return for a specific share of the profits. The investor is then said to possess a "security" evidencing a right to share in the profits. "Security" may then be defined as meaning an instrument which creates a present right to a present or a future participation in either the income, profits or assets of a business carried on for profit.[18] This definition is by no means all inclusive since the words "security" and "securities" have no exactly defined legal definition,[19] but it can be said that it does contain the essential idea or core of the term "security."[20]

Since the courts have refused to create a hard and fast rule as to what constitutes a security, many instruments and schemes have been held to be securities such as certificates of stock,[21] bonds,[22] debentures,[23] bills of exchange[24] and promissory notes[25] (if they are not used to facilitate dealings in commodities), mortgages,[26] liens,[27] trust deeds,[28] and certificates of interest in oil, gas, or mining leases.[29] These are but a few of the investment interests and instruments to which the term "security" has been applied.

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17. BLACK'S LAW DICTIONARY 1522 (4th ed. 1951).
18. SEC v. Timetrust, Inc., 28 F. Supp. 34, 39 (D.C. Cal. 1939).
19. United States v. American Trust & Banking Co., 125 F.2d 113, 115 (6th Cir. 1942); United States v. Royal Loan Co., 61 F. Supp. 436, 438 (E.D. Mo. 1945); Holloway v. Thompson, 112 Ind. App. 229, ———, 42 N.E.2d 421, 425 (1942).
20. Brown v. Cummins Distilleries Corp., 53 F. Supp. 659, 663 (W.D. Ky. 1944).
21. Hunt v. Eddy, 150 Kan. 1, ———, 90 P.2d 747, 754 (1939); City Bank Farmers Trust Co. v. Lewis, 122 Conn. 384, ———, 189 A. 178, 180 (1937).
22. Commissioner v. Tyng, 106 F.2d 55, 59 (2d Cir. 1939); Farleigh v. Fidelity Nat'l Bank & Trust Co., 335 Mo. 360, ———, 73 S.W.2d 248, 252 (1934).
23. Commissioner v. Neustadt's Trust, 131 F.2d 528, 529 (2d Cir. 1942).
24. Blanchard v. Blanchard, 116 N. J. Eq. 435, ———, 174 A. 431, 434 (1934).
25. *Id.*
26. Equitable Trust Co. v. Marshall, 25 Del. Ch. 238, ———, 17 A.2d 13, 15 (1940).
27. McClintock v. Bathurst, 23 Cal. App.2d 647, ——— Cal. Rptr. ———, 73 P.2d 1237 (1938).
28. Renton v. Gibson, 148 Cal. 650, ———, ——— Cal. Rptr. ———, ———, 84 P. 186, 188 (1906).
29. State v. Allen, 216 N.C. 621, ———, 5 S.E.2d 844, 845 (1939); People v. Craven, 219 Cal. 522, ———, ——— Cal. Rptr. ———, ———, 27 P.2d 906, 907 (1933).

Before the passage of the Securities Act of 1933 and the Securities Exchange Act of 1934, all state blue sky laws had definitions of security containing the usual stocks, bonds, and debentures.[30] They also contained vague definitions such as investment contract or certificate of interest or participation in any profit-sharing agreement to cover any unusual type of security which might in the future crop up.[31] Congress, in drafting its securities laws, borrowed these phrases from state blue sky laws and incorporated them into the present legislative definition of security.[32] It was the express intention of Congress to define the term security in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of a security.[33]

HISTORY

The test for determining whether a particular arrangement is an investment contract and thus an interest commonly known as security was first pronounced by the United States Supreme Court in 1943 in *SEC v. C. M. Joiner Leasing Corporation*.[34] The defendants in that case were selling real estate which the purchasers were led to believe would appreciate. The sales literature distributed by the defendants emphasized the investment aspect of the purchase and also the participation in an enterprise. The Court stated:

> In applying acts of this general purpose, the courts have not been guided by the nature of the assets back of a particular document or offering. The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect.[35]

It may be inferred from this language, then, that if a promoter represents an offering to the public as an investment through promotional literature, etc., then there is a strong possibility that such an offering will be judged exactly as it is represented to be. If that be the case, it would be extremely unwise for a promoter to present an offering to the public with the admonition that it is for investment purposes only when the promoter is attempting to exclude his offering from the definition of security.

SEC v. W. J. Howey Company[36] arose three years after *Joiner*. The case involved an offering of citrus groves coupled with a con-

30. *See, e.g.*, NEB. REV. STAT. §8-1101 (Reissue 1970).
31. *Id.*
32. 1 L. Loss, *supra* note 11, at 31, 15 U.S.C. §77 (b)(1) (1970); 15 U.S.C. §78 C (A)(10) (1970).
33. H. R. REP. No. 85, 73rd Cong., 1st Sess. 11 (1933).
34. 320 U.S. 344 (1943).
35. *Id.* at 352-53.
36. 328 U.S. 293 (1946).

tract for the promoters to cultivate, market and remit the proceeds to the investor. In determining whether the offering made by the promoter was an investment contract, the Court noted that the term investment contract was undefined under federal securities law and proceeded to expound on state blue sky laws by stating:

> An investment contract thus came to mean a contract or scheme for "the placing of capital or laying out of money in a way intended to secure income or profit from its employment."[37]

The quoted language was taken by the Court from the Minnesota supreme court decision of *State v. Gopher Tire & Rubber Co.*[38] The Court, after citing numerous state court decisions which had used the *Gopher* definition of an investment contract, expanded the definition by stating:

> The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.[39]

This definition may be divided into three basic components: (1) investment of money (2) in a common enterprise (3) with profits to come solely from the efforts of others.

The first requirement that there be an investment of money is rather straightforward and has presented no problem for the courts; hence it has received little if any attention. The second requirement of a common enterprise has stirred a negligible amount of controversy and the majority of courts have accepted it to mean that the promoter and investor must share in the operations of a single legal business unit or organization.[40]

But the "solely" requirement became a stickler for future courts to overcome to keep pace with the ever-increasing number of schemes designed specifically to take advantage of this loophole. Although the *Howey* test has almost been universally adhered to,[41] a seventh circuit court[42] recently took the definition cited in *Gopher* as the holding in *Howey* and thereby avoided the "solely" requirement. The "solely" requirement has also been severely criticized. An example is found in *State of Hawaii v. Hawaii Market Center.*[43] The court stated:

> The primary weakness of the *Howey* formula is that it has led courts to analyze investment projects mechanically, based

37. *Id.* at 298.
38. 146 Minn. 56, ——, 177 N.W. 937, 938 (1920).
39. SEC v. W. J. Howey Co., 328 U.S. 293, 301 (1946).
40. Belhumeur v. Dawson, 229 F. Supp. 78 (D. Mont. 1964).
41. Roe v. United States, 287 F.2d 435 (5th Cir. 1961); Los Angeles Trust Deed & Mortgage Exch. v. SEC, 285 F.2d 162 (9th Cir. 1960); Blackwell v. Bentsen, 203 F.2d 690 (5th Cir. 1953), *cert. denied*, 347 U.S. 925 (1954); Darwin v. Jess Hickey Oil Corp., 153 F. Supp. 667 (N.D. Tex. 1957).
42. Sanders v. John Nuveen & Co., 463 F.2d 1075 (7th Cir. 1972).
43. —— Hawaii ——, 485 P.2d 105 (1971).

> on a narrow concept of investor participation (citations omitted). Thus courts become entrapped in polemics over the meaning of the word "solely" and fail to consider the more fundamental question whether the statutory policy of affording broad protection to investors should be applied even to those situations where an investor is not inactive, but participates to a limited degree in the operation of the business.[44]

In *Georgia Market Centers, Inc. v. Fortson*,[45] the court stated:

> It is our opinion that the definition of an investment contract given by the Supreme Court of the United States is a workable formula to use in testing whether a contract of the type under consideration here is subject to regulation by the Commissioner of Securities of Georgia. However, we would not mean to infer that this definition should be adhered to with such strictness that a mere token participation in an enterprise by the person investing capital would prevent the contract from being classed as a security.[46]

In the Seventh Circuit decision mentioned earlier, the defendants were engaged in selling short term notes with a maturity of less than nine months. These are specifically excluded from the definition of "security" under the Securities and Exchange Act. The notes, however, were represented by the defendants as open market paper. Although leaving the final determination to the trial court based upon the facts to be developed, the court of appeals said it was likely that the arrangements between Nuveen and the plaintiff constituted "the placing of capital or laying out of money in a way intended to secure income or profits from its employment" and were therefore investment contracts.[47] In the light of these recent decisions and also recent rulings of the Commission,[48] the "solely" requirement is either dead or dying.

In conjunction with the judicial tests for determining the existence of a security, there are numerous articles and treatises devoted to the task of establishing a uniform rule for securities identification. One notable writer[49] has contended that

> risk to initial investment, though not determinative, is the single most important economic characteristic which distinguishes a security from the universe of other transactions.[50]

A plethora of schemes have been held to be investment contracts, and therefore securities, through one form of legal reasoning or the other, but there seems to be no certain test to be applied to all factual situations.

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44. *Id.* at _____, 485 P.2d at 108.
45. _____ Ga. _____, 171 S.E.2d 620 (1969).
46. *Id.* at _____, 171 S.E.2d at 623.
47. Sanders v. John Nuveen & Co., 463 F.2d 1075, 1080 (7th Cir. 1972).
48. 3 BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW §2.04, at 2-8.
49. Coffey, *The Economic Realities of a "Security": Is There a More Meaningful Formula?*, 18 W. RES. L. REV. 367 (1967).
50. *Id.* at 375.

GLENN TURNER

The defendant corporation (Glenn W. Turner Enterprise, Inc.) is composed of two subsidiaries (Koscot Interplanetary, Inc., and Dare to Be Great, Inc.) which ostensibly market cosmetics and self-motivation courses respectively. The entire enterprise was built on the controversial principle of multilevel selling. This principle has also been branded a "pyramid" or a "chain letter" operation. Under this system an individual purchases a distributorship for $5000 which theoretically sets him up in business to sell cosmetics or self-motivation courses. But he also earns the right to sign up subdistributors for $2000 and he receives $700 commission for each subdistributor he signs. It should be noted that a distributor can make more money faster selling distributorships than he could selling cosmetics or self-motivation courses.

The "product" involved is basically meaningless, because that is not what is being sold. The problem with pyramid sales is that eventually there will be no one left to buy a distributorship and thus the last buyer will be left holding the bag.

In *SEC v. Glenn Turner Enterprises*,[51] the court of appeals was called upon to rule on the validity of the defendants' pyramid franchise promotion scheme in light of the 1933 Securities Act and the 1934 Securities Exchange Act. The program of Dare to Be Great is basically a five-tiered operation in which a person may purchase any one of the plans in the five tiers.[52] Of the five plans, Adventure III, Adventure IV and the $1000 plan are the most significant since they empower the franchisee or purchaser to sell the plans to others. As the court noted, the purchasers were really buying the possibility of deriving money from the sale of the plans by Dare to Be Great. All that was essentially required of the franchisee was to induce prospective buyers to attend the so-called Adventure Meetings or Golden Opportunity Meetings. Held in local halls around the country, these rousing sessions, led by flashily dressed men waving fat checks, raise tantalizing visions of big money and easy living for the frequently gullible audience.[53] The format for these revival-type meetings is carefully prepared beforehand, and although the speakers display great oral spontaneity they must strictly adhere to a written script. Members are instructed to display an aura of success to new prospects by the employment of expensive cars, flashy clothes and plenty of cash. The prospect is led to believe that every member of the organization is rolling in the six-figure income bracket, which in reality may be true only of those members at the top of the pyramid. Most of the recruiters are nearly

51. SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir. 1973).
52. These plans were detailed earlier in note 2.
53. *Fast Buck Gospel*, TIME MAGAZINE, Nov. 29, 1971, at 76.

destitute due to their expensive fronts.[54] For anyone still not convinced to immediately buy after this blinding display of opulence, there is the final tactic: a free trip to Florida where the prospect is given the grand tour of the company's "headquarters," shown a film on the life story of the founder, Mr. Glenn Turner,[55] wined and dined and also continually badgered into buying a franchise.

Before concluding that Adventures III and IV and the $1000 plan were securities as defined by the Securities Act of 1933 and the Securities Exchange Act of 1934, Judge Duniway first applied the now familiar test of an investment contract as set out in *Howey*.[56]

The plans met the first two requirements: (1) there had been an investment of money in the initial purchase of the plan, and (2) there was a common enterprise since the fortunes of the investor were interwoven and dependent upon the efforts and success of those seeking the investment of third parties.[57] The stumbling block, however, was the third element of the test which required that the profits come solely from the efforts of those other than the investor. In light of the purpose for which Congress defined "security," a definition in sufficiently broad and general terms so as to include the many types of instruments that would ordinarily fall into the concept of a security[58] and the admonishment of the Supreme Court to avoid crystallizing a definition of security,[59] the court of appeals disregarded form for substance and concentrated on economic reality.[60] As the court stated:

> (T)he word "solely" should not be read as strict or literal limitation on the definition of an investment contract, but rather must be construed realistically, so as to include within the definition those schemes which involve in substance, if not form, securities.[61]

Although it is true that the investor in this case had to find new prospects entirely through his own efforts, the court concluded that without the Adventure Meetings and the selling efforts on the part of Dare to Be Great, there would no probability of success in the

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54. *Id.*

55. For an interesting account of Glenn W. Turner, the man, see *Dare to Be Great*, LIFE MAGAZINE, May 28, 1971, at 73, where he is described as:

> that American classic — superhuckster. He looks like the man you bought your last used car from, or the fellow who knocked at your door with that fantastic encyclopedia offer. He is part carnival barker, part fundamentalist faith healer with all the raw sexual force of an Elmer Gantry, part snake oil salesman.

56. SEC v. W. J. Howey Co., 328 U.S. 293, 299 (1946).

57. SEC v. Glenn W. Turner Enterprise, Inc., 474 F.2d 476 (9th Cir. 1973).

58. H. R. REP. No. 85, 73rd Cong., 1st Sess. 11 (1933).

59. SEC v. W. J. Howey Co., 328 U.S. 293, 299 (1946).

60. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

61. SEC v Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir. 1973). (opinion of the court at 8).

scheme. Thus the success or failure of the program was virtually in the hands of Dare to Be Great's proficient salesmen at the Adventure Meetings. With such a realistic approach, the court promulgated a new test centered on those essential managerial efforts that affected the success or failure of the enterprise. The court stated:

> Rather we adopt a more realistic test, whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.[62]

Thus, absence of control by the investor over the success or failure of the enterprise is sufficient to establish that an instrument is an investment contract.

As the court suggests, this holding does not represent a major attempt to redefine the essential nature of a security, or depart from the Supreme Court's definition of an investment contract as set out in *Howey*,[63] but it does represent a step in the right direction concerning a more flexible approach in defining a security which will keep in step with the ever-increasing variety of promotional schemes which are designed specifically to evade the purview of the federal securities law. Any rigid test is highly impractical if not obsolete, if the individual investor is to be protected from fraudulent schemes.

If the reasoning in *Glenn Turner* is followed, then it would appear that absence of control on the investor's part is functionally equivalent to presence of control on the part of others. This theory has been adopted by at least two courts, and this certainly is the effect of recent positions taken by the Commission. In *SEC v. Dill Investment Company*,[64] which arose in the District of Nebraska, the defendants were engaged in selling first mortgages on real estate. Once the sale had been made, the defendants were no longer in the picture, further dealings being between the assignee-mortgagor and the mortgagee. The Commission nevertheless brought suit taking the position that the interests sold were securities.[65]

In another recent determination,[66] the Longines Symphonette Society was engaged in the business of selling commemorative medallions with the guarantee that they would be purchased in 1976 at 10% more than the offering price. Counsel for Longine argued that the arrangement lacked two essential elements of an investment contract — a common enterprise and a lack of continuing

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62. *Id.* at 9.

63. Compare Landis, *Attempt to Return Investment Contract to the Mainstream of Security Regulation*, 24 3 & 2 OKLA. L. REV. 135 (1971).

64. SEC. v. Dell Inv. Co., Civil No. CV-72-L-121 (D. Neb., filed June 19, 1972); see CCH FED. SEC. L. REP. ¶ 93,638 for a summary of the complaint and the order.

65. *Id.*, defendants agreed to a consent decree.

66. Longines Symphonette Society, CCH FED. SEC. L. REP. ¶ 77,151 (Nov. 10, 1972).

management by a party other than an investor.[67] The Commission, however, rejected these arguments, ruling that Longines should (1) eliminate the guaranteed profit provisions from its plan, and (2) eliminate all references to the investment aspect of the medallions from its sales literature or register the sales under the Securities Act.[68]

Earlier this year, the Commission again cautioned that recent interpretations have indicated that the expected return need not be derived solely from the efforts of others. An investment contract may be present, the Commission stated, in a situation where an investor is not wholly inactive, but even participates to a limited degree in the operations of the business.[69]

There is a common thread which seems to run through all areas of security law which is the ability of the investor to fend for himself.[70] It most frequently crops up in the private offering area, where it must be established that the investors are persons of exceptional business experience and skill. It also arises in the retail brokerage field where securities dealers are not to make recommendations to investors to purchase investments which would not be suitable for them.[71] This element is also present in the area of investment contracts. In *Howey*, for example, the court found that the purchasers of the investment contracts were predominantly business and professional people who lacked the knowledge and skill to operate the income-producing properties which they purchased and were therefore dependent upon the promoters or others.[72] The same line of reasoning is found in the *Turner* case.[73]

CONCLUSION

In the years preceding the passage of the Securities Acts, courts had little trouble with the garden variety types of security such as stocks, bonds and debentures, but atrophied in defining "investment contract" or "certificate of interest" or "participation in any profit-sharing agreement" to mean an investment of money in a common enterprise with profits to come solely from the efforts of others.[74] This test laid out in *Howey* loomed large and impregnable until recently, despite the court's warning that the concept of an investment contract embodied a flexible rather than a static principle.[75] The concept is capable of modification to meet the countless

67. *Id.*
68. *Id.*
69. SEC. ACT REL. No. 5347 (1973).
70. Garfield v. Strain, 320 F.2d 116, 119 (10th Cir. 1963).
71. SEC. EXCH. ACT REL. No. 8135 (1967).
72. SEC v. W. J. Howey Co., 328 U.S. 293, 299-300 (1946).
73. SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir. 1973).
74. SEC v. W. J. Howey Co., 328 U.S. 293, 299 (1946).
75. SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943).

and variable schemes devised by those who seek to use the money of others on the promise of profits.[76]

The court in *Turner* applied this flexible principle and based its decision on the economic realities of the situation and disregarded form for substance to find the defendant's scheme to be an investment contract. In so doing the rigid formula of *Howey* was flexed in such a way as to prevent ingenious promoters from devising schemes to circumvent the "solely" requirement. The decision in *Turner* thus reflects an increasing inclination on the part of the courts to take a broader view of the specific arrangement involved with particular attention focused upon the representations made by the promoter through its sales literature and the relative efforts of both the investor and the promoter.[77] By continuing to implement this philosophy, the courts should keep pace with the ever-changing variety of promotional schemes and therefore align themselves with the main interests of Congress and the buying public.

John J. Gallagher — '73

76. SEC v. W. J. Howey Co., 328 U.S. 293, 299 (1946).
77. SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir., 1973) State of Hawaii v. Hawaii Mkt. Center, _____ Hawaii _____, 485 P. 2d 105 (1971).