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I. What Is A Security?

1978-1979 SECURITIES LAW DEVELOPMENTS

I. WHAT IS A SECURITY?

Recent decisions of the United States Supreme Court[1] have limited access to federal court under the federal securities laws[2] by establishing stringent standards for stating a cause of action.[3] In *International Brotherhood of Teamsters v. Daniel,*[4] the Court recently evidenced its intention to limit further access to federal court by restricting federal subject matter jurisdiction in securities cases. The *Daniel* Court, in interpreting the Securities Acts' definition of "security,"[5] strictly construed the judicial definition of "investment contract"[6] first enunciated in *SEC v. W. J. Howey*

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[1] *See, e.g.,* Sante Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). *See generally* Campbell, *Voluntary Recapitalizations, Fairness and Rule 10b-5: Life Along the Trail of Sante Fe,* 66 KY. L. J. 267, 298 (1978); Lowenfels, *Recent Supreme Court Decisions Under The Federal Securities Laws: The Pendulum Swings,* 65 GEO. L. J. 891, 891-919 (1977) [hereinafter cited as Lowenfels]; Walker, *Restitutionary Relief In The Absence Of Standing To Challenge Violations Of Rule 10b-5 And Section 14(e),* 23 LOY. L. REV. 893, 893-97 (1977).

[2] The Securities Act of 1933, 15 U.S.C. §§ 77a-77bbbb (1976) [hereinafter cited as '33 Act], and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976) [hereinafter cited as '34 Act], provide for the federal regulation of the issuance and sale of securities. The Acts are designed to protect the investing public by mandating the disclosure of material information to prospective investors. 1 FED. SEC. L. REP. (CCH) ¶¶ 109, 161 (1972). The '33 Act requires issuers of securities to effect disclosure by filing registration statements with the Securities and Exchange Commission (SEC) which then makes the statements available for public inspection. *See* 15 U.S.C. § 77e (1976); *1977-78 Securities Law Developments: What Is A Security?,* 35 WASH. & LEE L. REV. 757, 757 n.3 (1978) [hereinafter cited as *1977-78 Developments*]. The '34 Act requires issuers to meet similar registration requirements before the issuers' securities are traded on a national securities exchange. 15 U.S.C. § 78*l* (a), (g) (1976); *see* Heller, *Disclosure Requirements Under Federal Securities Regulation,* 16 BUS. LAW. 300, 301 n.4 (1961).

[3] *See* Lowenfels, *supra* note 1, at 891-92.

[4] 99 S. Ct. 790 (1979).

[5] Both the '33 Act and the '34 Act regulate transactions involving securities. 15 U.S.C. §§ 77e, 78*l* (1976). The Acts define "security" in substantially identical terms. *Compare* 15 U.S.C. § 77b(1) (1976) *with* 15 U.S.C. § 78c(10) (1976). The Supreme Court has recognized the similarity between the Acts in this regard and has treated the respective definitions as coextensive. 99 S. Ct. at 795.

Defendants who challenge an instrument's status as a security contend that the federal court lacks subject matter jurisdiction. *See* Commander's Palace Park Assocs. v. Girard & Pastel Corp., [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,427 (5th Cir. 1978); Hilgeman v. National Ins. Co. of America, 444 F.2d 446, 447 (5th Cir. 1971); Olpin v. Ideal Nat'l Ins. Co., 419 F.2d 1250, 1254-55 (10th Cir. 1969). *See also 1977-78 Developments, supra* note 2, at 761-63.

[6] The Supreme Court first construed the term "security," as defined in the '33 Act, in SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943). *See* 12 GEO. WASH. L. REV. 494 (1944); 17 So. CAL. L. REV. 324 (1944). The Court interpreted the broad definition of

Co.[7] Under the *Howey* test, a transaction constitutes an investment contract when it involves "an investment of money in a common enterprise with profits to come solely from the efforts of others."[8] The *Daniel* Court's restraint contrasts with the Court's prior decisions defining securities,[9] and the trend in lower courts extending the Acts' coverage to transactions having little resemblance to traditional security sales.[10]

Daniel raised the issue of whether a compulsory,[11] noncontributory[12]

"security" in light of the evils that Congress intended the '33 Act to eliminate. 320 U.S. at 354. In order to establish the speculative character of the transaction, the Court analyzed the terms of the seller's offer, the manner in which the contracts were distributed, and the economic inducements held out to prospective buyers. *Id.* at 352-53 & n.10.

In SEC v. W. J. Howey Co., 328 U.S. 293 (1946), the Court applied the principles underlying its decision in *Joiner* and held that interests in a citrus grove constituted securities under the '33 Act. *Id.* at 298-301; *see* 46 COLUM. L. REV. 885 (1946). Some of the buyers also entered into service contracts with the owner under which the owner assumed sole responsibility for the development and cultivation of the buyer's acreage. 328 U.S. at 296. The defendants agreed to pay each buyer a portion of the profits earned from the defendant's sale of the fruit. *Id.* Moreover, since the individual lots were relatively small, management of the tracts on an unconsolidated basis would have been impractical. *Id.* at 300. The *Howey* Court concluded that since the grove owner had led buyers to expect profits from the efforts of others engaged in a common enterprise, the purchase agreements and service contracts together composed investment contracts within the '33 Act's definition of "security." *Id.* at 299-301; *see* 15 U.S.C. § 77b (3) (1976).

The *Howey* definition of "investment contract" was dispositive in Tcherepnin v. Knight, 389 U.S. 332 (1967). *See* 19 CASE W. L. REV. 1123 (1968); 81 HARV. L. REV. 495 (1967). The *Tcherepnin* Court held that certain withdrawable capital shares in a savings and loan association, which entitled holders to fluctuating dividends and a voice in management decisions, were securities under the '34 Act. 389 U.S. at 537-40; *see* text accompanying note 5 *supra.* The shares clearly fell within the ambit of the *Howey* test since the holders had paid for the shares and were entitled to profits in the form of dividends which depended upon the management's ability to lend the funds wisely. *Id.* at 338-39. Noting that shares in building and loan associations were exempt from the registration requirements of the Acts, *id.* at 340-42, the Court assumed that the exemption would not have been necessary unless the shares were otherwise securities. *Id.* Consequently, the antifraud provisions of the Acts applied to transactions involving the capital shares. *Id.* at 341.

The Court held for the first time that a certain economic interest did not constitute a security in United Hous. Found. v. Forman, 421 U.S. 837 (1975). *See Shares in Housing Co-op Are Not "Securities",* 62 A.B.A. J. 114 (1976); *The Supreme Court, 1974 Term,* 89 HARV. L. REV. 254 (1975); *1977-78 Developments, supra* note 2, at 761-63. In *Forman,* shares of stock in a housing cooperative entitled the shareholders to lease rental units in the cooperative. 421 U.S. at 840. Notwithstanding the term used by the parties to describe the interests, the Court held that the shares were not stock within the meaning of the Acts. *Id.* at 847-51; *see* 15 U.S.C. §§ 77e (3), 78(c) (10) (1976); text accompanying notes 82-119 *infra.* Since the plaintiffs had not acquired their shares with an expectation of profits, their interests were not investment contracts under the *Howey* analysis. 421 U.S. at 451-57; *see* text accompanying note 8 *infra.*

[7] 328 U.S. 293 (1946).

[8] *Id.* at 299.

[9] *See* note 6 *supra.*

[10] *See, e.g.,* Miller v. Central Chinchilla Group, Inc., 494 F.2d 414 (8th Cir. 1974); United States v. Herr, 338 F.2d 607 (7th Cir. 1964), *cert. denied,* 382 U.S. 999 (1966).

[11] 99 S. Ct. at 793. A compulsory plan requires qualified employees to participate in the plan. *Id.*

[12] *Id.* Under noncontributory plans, the employers are responsible for providing the funds

pension plan is a security within the meaning of the federal Securities Acts.[13] Collective bargaining between Teamsters Local 705 and Chicago trucking companies first created the plan in 1954.[14] Each employer of Teamsters was required to contribute a fixed dollar amount per employee man-week to a Pension Trust Fund.[15] Employees who had served continuously for twenty years became entitled to a pension drawn from the Fund upon their retirement.[16] The Fund's Board of Trustees established the dollar amount of the pension benefits.[17] The plan's administrator determined that Daniel, a member of Local 705 since 1950, was ineligible for pension benefits upon retirement because of a seven month break in his twenty-three year service period.[18] Daniel's suit[19] followed his unsuccessful efforts to have the Fund's Trustees overrule the administrator's decision.[20]

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from which pensions are drawn. *See* text accompanying notes 15 & 44-46 *infra*. In *Daniel*, employees could not anticipate their pension benefits by receiving directly the employer's contributions before they retired. 99 S. Ct. at 793.

[13] 99 S. Ct. at 793; *see* note 5 *supra*. Daniel alleged that the defendants had perpetrated a fraud in connection with the sale of securities under the Securities Acts and SEC rules. 99 S. Ct. at 794. The plaintiff based his claim on § 17(a) of the '33 Act, 15 U.S.C. § 78j (b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1978). Each of these provisions requires the allegedly fraudulent transaction to involve securities as defined by the Acts.

[14] 99 S. Ct. at 793.

[15] *Id.* at 793-94. The collective bargaining agreement established the amount that the employer was required to contribute to the pension Fund for each man-week of covered employment. *Id.* So long as an individual was employed during a given week, regardless of how many hours he actually worked, the agreement required his employer to contribute to the Fund to the full extent required by the agreement. *Id.* at 793 n.2. If the employee worked overtime, however, the employer's contribution for the week was not increased proportionately. *Id.*

[16] *Id.* at 794. Employees, like Daniel, who had worked for companies covered by the agreement before it became effective in 1954, were credited for their pre-agreement employment in calculating their continuous service time. *Id.*

[17] *Id.* at 793-94. Employers and the employees' union enjoyed equal representation on the pension Fund's Board of Trustees. *Id.* The Board did not set the level of employer contributions to the Fund. *Id.; see* text accompanying note 15 *supra*.

[18] 99 S. Ct. at 794. The break in Daniel's service was involuntary. He was laid off between December, 1960 and April, 1961. Between April, 1961, and July, 1961, his employer's bookkeeper embezzeled the sum intended for the Fund, thereby creating a technical break in Daniel's service. *Id.* n.4. During both periods of his break in service, Daniel could have preserved his eligibility for benefits by contributing to the Fund himself. *Id.* Daniel's failure to contribute, however, probably was involuntary as well since while he was laid off, he may have been financially unable to make payments. Furthermore, during the technical break in his service, he would have had to detect the embezzelment that created the break prior to contributing on his own. *See* text accompanying notes 146-54 *infra*. Continuous service requirements in pension plans presently are regulated by the federal government under the Employee Retirement Income Security Program, 29 U.S.C. §§ 1001-1381 (1976). *See* text accompanying notes 78-81 *infra*.

[19] 99 S. Ct. at 794. Daniel named as defendants one of the Fund's Trustees, the International Brotherhood of Teamsters, and his Teamsters' Local.

[20] *Id.* Daniel appealed the administrator's decision to the Fund Trustees on two theories. He first challenged the administrator's finding that an involuntary break in service could render him ineligible for benefits. *Id.* When the Trustees rejected this argument, Daniel asked

Daniel alleged that the defendants had defrauded himself and other prospective beneficiaries of Teamster pension funds[21] by misrepresenting and withholding the complete facts regarding the circumstances in which employees became entitled to pension benefits.[22] The district court denied the Teamsters' motion to dismiss the Securities Acts claims[23] for failure to state a cause of action under either the '33 Act or the '34 Act.[24] In denying the motion, the court reasoned that Daniel's interest in the Fund was an "investment contract"[25] that had been "sold"[26] to him within the Securi-

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them to waive the continuous service requirement in his case. *Id.* Their refusal precipitated Daniel's suit in federal court. *Id.*

[21] *Id.* The defendants in *Daniel* appealed the district court's denial of their preliminary motion to dismiss. 410 F. Supp. 541 (N.D. Ill. 1976); *see* text accompanying note 23 *infra.* Consequently, although Daniel sought to pursue the suit as a class action, the district court had not decided the classification issue at the time of the appeal. 99 S. Ct. at 794, n.6.

[22] 99 S. Ct. at 794. The Securities Act and SEC Rule 10b-5 prohibit the misstatement or omission of material facts in the sale of purchase of securities. *See* text accompanying note 13 *supra.* In *Daniel,* the allegedly misstated and omitted material facts pertained to the length of the plan's continuous service requirements and the break in service provision. 410 F. Supp. 541, 546 (N.D. Ill. 1976).

[23] 410 F. Supp. 541 (N.D. Ill. 1976); *see* text accompanying note 13 *supra.* In addition to the Securities Acts claims, Daniel alleged that both the International Union and the local had violated § 9(a) of the National Labor Relations Act [NLRA], 99 S. Ct. at 794 n.5; *see* 29 U.S.C. § 159 (a) (1976). Section 9(a) requires unions to represent their members fairly in collective bargaining sessions. 29 U.S.C. § 159 (a) (1976). Moreover, Daniel charged all of the defendants with failing to specify the details of the plan for distributing the Fund's assets in the collective bargaining agreement as required by § 302 (c)(5) of the NLRA. 99 S. Ct. at 794 n.5; *see* 29 U.S.C. § 186 (c)(5)(B) (1976). The district court denied the defendants' motion to dismiss Daniel's claim brought under the NLRA, holding that the allegations were sufficient to state a cause of action and were not barred by applicable statutes of limitation. 410 F. Supp. at 553-56.

Finally, Daniel's complaint charged all of the defendants with common law fraud and deceit. 99 S. Ct. at 794 n.5. The Supreme Court's recent restriction of the scope of the Securities Acts' antifraud provisions had tended to increase the importance of common law fraud as a cause of action in securities cases. *See* Lowenfels, *supra* note 1, at 922; *1976-77 Securities Law Developments: Rule 10b-5,* 34 WASH. & LEE L. REV. 882, 921 (1977). For discussions of the elements of, and remedies for, fraud, in myriad circumstances, see generally Note, *Fraud and Its Remedies,* 4 TEX. L. REV. 510 (1926); *Fraudulent Transactions,* 3 W. ONT. L. REV. 2 (1964). The defendants did not move to dismiss Daniel's common law fraud claim. The court's jurisdiction over the common law claim probably was pendent and dismissal of the Securities Acts and Labor Act claims alone may have precluded federal jurisdiction over the common law fraud claim. *See generally* Note, *Problems of Parallel State and Federal Remedies,* 71 HARV. L. REV. 513, 513 n.1, 517 (1958).

[24] 410 F. Supp. at 545-47; *see* note 2 *supra.* The district court considered its determination that Daniel had purchased a security to be consistent with the remedial purposes of the Securities Acts. *Id.* at 549-52; *see* text accompanying notes 25 & 152 *infra.*

[25] 410 F. Supp. at 549-52. The district court applied the *Howey* test to establish the existence of an investment contract. *Id.* at 550-52; *see* note 8 *supra.* Characterizing the Fund as a common enterprise, 410 F. Supp. at 550-51, the court stated that employer contributions constituted part of the employees' wages and therefore represented indirect employee investments. *Id.* at 551. Since the benefits received by pensioned employees would exceed the total contributions made by their employer on their behalf, the employees acquired an interest in profits. *Id.* The efforts of others produced the profits since the Trustees of the Fund controlled

ties Acts' definitions of "security" and "sale."[27] The Seventh Circuit affirmed the district court's order[28] and the Supreme Court granted the Teamsters' petition for certiorari.[29]

The Supreme Court reversed the Seventh Circuit, basing its decision that Daniel's interest in the Fund was not subject to regulation under the Securities Acts on three grounds. Beginning with an interpretive analysis of the Acts, the Court noted that their definitional sections[30] do not refer specifically to pension plans.[31] Since Daniel contended that his participation in the plan nevertheless was an investment contract,[32] the Court applied the *Howey* test[33] to analyze the nature of his financial interest in the pension Fund. The major obstacle Daniel faced in attempting to prove that he had purchased an investment contract was that because of the noncontributory nature of the plan, Daniel had not invested money directly in the Fund.[34] Nevertheless, Daniel contended that he had invested in the Fund by exchanging his labors for potential pension benefits.[35]

To resolve the issue, the Court reasoned that *Howey*'s investment element requires the exchange of a specific consideration in return for an identifiable financial interest which has the characteristics of a security.[36] The Court stated that Daniel's labor was not a specific consideration be-

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the investment of the Fund's assets. *Id.*

[28] 410 F. Supp. at 552-53. The antifraud provisions of the Securities Acts prohibit only fraud in connection with the sale of securities. *See* note 13 *supra.* The district court held that the employees covered by the plan had purchased their interests in the Fund by giving consideration in the form of their labor and a portion of their wages. 410 F. Supp. at 352; *see* note 25 *supra.*

[27] 410 F. Supp. at 549-50, 552; *see* 15 U.S.C. §§ 77b (1), (3), 78c (10), (14) (1976).

[28] Daniel v. International Bhd. of Teamsters, 561 F.2d 1223 (7th Cir. 1977). The Seventh Circuit agreed with the trial court's determination that Daniel's interest in the Fund was an investment contract under the *Howey* test. *Id.* at 1231-35.

[29] 434 U.S. 1061 (1978).

[30] 99 S. Ct. at 795; *see* note 5 *supra.*

[31] 99 S. Ct. at 795-96.

[32] *Id.* at 796; *see* text accompanying note 8 *supra.* Most of the securities enumerated in the Securities Acts can be characterized as documents traded for speculative or investment purposes. SEC v. W. J. Howey Co., 328 U.S. 293, 297 (1946). Since all investment contracts cannot be so uniformly characterized, courts invoke the flexibility of the Acts' definitional sections in order to effectuate the Acts' remedial purposes. *Id.*

[33] *See* text accompanying note 8 *supra.* The *Daniel* Court stated that the economic realities and substance of transactions determine whether the transactions involve securities. 99 S. Ct. at 796. The terms parties use to describe the interests their dealings create do not necessarily dictate the character of the interests. *Id.; accord,* United Hous. Found. v. Forman, 421 U.S. 837 (1975); *see* note 6 *supra.*

[34] 99 S. Ct. at 796; *see* text accompanying notes 12 & 25 *supra.*

[35] 99 S. Ct. at 796. The district court had held that by accepting an interest in the Fund as part of his compensation, Daniel had invested in the Fund. 410 F. Supp. at 551. The Supreme Court rejected the argument. *See* text accompanying notes 43-46 *infra.*

[36] 99 S. Ct. at 796. In deciding whether the relationship between employees and the Fund constituted an investment under the two part test, the Court purported to characterize the economic interests at issue in light of the entire transaction from which they arose. *See* text accompanying notes 37-40 & 120-45 *infra.*

cause the labor he exchanged for his salary could not be separated from the labor he exchanged for an interest in the Fund.[37] The Court further noted that the benefits constituted a relatively minor part of his total compensation.[38] Moreover, the labor-compensation transaction did not create interests that had the characteristics of a security. While recognizing that Daniel's potential pension benefits may have had the characteristics of a security,[39] the Court analyzed Daniel's total compensation as an indivisible package rather than analyzing each portion of the package independently.[40] Since the greater part of his compensation clearly did not have security characteristics,[41] Daniel failed to meet the "investment of money" criterion of *Howey*.[42]

The Court also refused to adopt the position that employer contributions to the Fund were indirect employee investments. The contributions did not reflect the employer's relative obligations to particular employees.[43] Instead, the plan established the level of contributions according to total employee man-weeks,[44] and provided for "defined benefits"[45] which did not vary according to the number of years eligible retirees had worked.[46] Thus,

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[37] 99 S. Ct. at 797. The *Daniel* Court recognized that an investment may exist where a party exchanges labor, or any other intangible consideration, for an identifiable economic interest with security characteristics. *Id.* n.12; *accord,* Murphy v. Dare to Be Great, Inc., 3 BLUE SKY L. REP. (CCH) ¶ 71,053 (D. C. Super. 1972); Tew & Freedman, *In Support Of SEC v. W. J. Howey Co.: A Critical Analysis Of The Parameters Of The Economic Relationship Between An Issuer Of Securities And The Securities Purchaser,* 27 U. MIAMI L. REV. 407, 412-14 (1973) [hereinafter cited as Tew & Freedman]. The Court reasoned, however, that Daniel had not exchanged his labor for an interest in the Fund since his compensation package was indivisible. 99 S. Ct. at 797; *see* text accompanying note 40 *infra.*

[38] 99 S. Ct. at 797. Although the *Daniel* Court did not specify each element of the employees' compensation package, a cash salary presumably constituted the most economically significant element.

[39] 99 S. Ct. at 797. *But see* text accompanying notes 48-55 *infra.*

[40] 99 S. Ct. at 797. In contrast with its decision in *Daniel,* the Court previously had been willing to treat an integrated contract as creating two separate economic interests independently. *See* SEC v. United Benefit Life Ins. Co., 387 U.S. 202, 207-08 (1967); text accompanying notes 124-34 *infra.* In *United Benefit* the Court focused on the fact that the two economic interests were not interdependent to decide that the interests should be analyzed separately. *See* text accompanying notes 124-33 *infra.* The *Daniel* Court, forsaking detailed analysis, rested its decision that Daniel's compensation package should be analyzed as a whole on its belief that Daniel had perceived the package as an indivisible unit. 99 S. Ct. at 797.

[41] *See* text accompanying note 38 *supra.*

[42] 99 S. Ct. at 797; *see* text accompanying note 36 *supra.*

[43] 99 S. Ct. at 797; *see* note 15 *supra.*

[44] *See* note 15 *supra.*

[45] 99 S. Ct. at 797. Teamster pension benefits were "defined" in that the Trustees established the amount that employees received based on the eligible employee's age at retirement, and not according to how many years he had worked. *Id.* at 793-94 & n.3.

[46] *Id.* at 794 n.3. By holding that the employer contributions did not constitute investments of the employees' money, the Court seems to have ignored the economic realities of the parties' relationship, violating the concepts underlying its previous decisions. *See, e.g.,* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). Since the pension plan in *Daniel* resulted from collective bargaining, employers may have agreed to contribute to the Fund as an

the contributions were not sufficiently linked to individual employees to warrant treating the amounts contributed as employee investments.

Daniel's failure to meet *Howey*'s "investment of money" criterion would have precluded the Securities Acts' applicability to his interest in the Fund.[47] However, the Court also addressed the issue of whether Daniel had acquired his interest with the reasonable expectation of receiving profits from the efforts of others required under *Howey*.[48] The Court first noted that the Fund had two components in which employees acquired interests. Additional employer contributions represented the Fund's most significant component.[49] Since the Fund's managers did not produce these contributions,[50] the Court held that the major part of Daniel's interest would not have been realized from the efforts of the Fund's managers.[51] Moreover, the Court reasoned that an employee's receipt of both components of his pension benefits[52] was contingent primarily upon his ability to meet the plan's eligibility requirements,[53] and not upon the likelihood that investment of the Fund's assets would produce a profit.[54] Consequently, Daniel's interest in the Fund's profit-related component also would not be realized primarily from the efforts of others.[55]

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alternative to submitting to employee demands for higher wages. Daniel v. International Bhd. of Teamsters, 561 F.2d 1223, 1234-35 (7th Cir. 1977). *See also* Inland Steel Co. v. NLRB 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949). Since the contributions would thus be equivalent to increased wages, the Court could have held that the employees, in effect, made the contributions. *See* Note, *Legal Problems of Private Pension Plans*, 70 HARV. L. REV. 490, 494 (1957).

[47] The Court has analyzed all of *Howey*'s elements each time it has determined whether a transaction constitutes an investment contract under the *Howey* test. *See, e.g.*, Tcherepnin v. Knight, 389 U.S. 332, 338-39 (1967). In lower court cases concerning the existence of an investment contract under *Howey*, courts have adopted the view that if any one of *Howey*'s elements is not met, the transaction would not be an invesment contract. *See, e.g.*, Tanuggi v. Grolier, Inc., [Current] *Fed. Sec. L. Rep.* ¶ 96,880 (S.D.N.Y. 1979), Mr. Steak, Inc. v. River City Steak, Inc., 460 F.2d 666, 669-70 (10th Cir. 1972).

[48] 99 S. Ct. at 797-98.

[49] *Id.* at 797. The *Daniel* Court noted that in addition to employer contributions, the pension Fund's assets represented profits from the Trustees' investment of the employer contributions. *Id.* The value of other pension funds which had been merged with the Teamster Fund constituted the remainder of the Fund's assets. *Id.* at 798 n.14. Although these parts of the Fund's assets represented profits produced by the Trustees' efforts, the Court nevertheless reasoned that the employees' primary interests in the Fund were in the employer contributions. *Id.* at 797.

Since the Court purported to apply the *Howey* test, the fact that the Fund's assets were predominantly of a nonprofit nature should have been inapposite. Under the *Howey* test, a purchaser of an investment contract simply must expect profits from the efforts of others in return for his capital outlay. 328 U.S. at 298-99. Instead of focusing on what Daniel and other employees had been led to expect from the plan, the Court's analysis is limited to discerning what they would receive.

[50] *See* text accompanying notes 12-15 *supra*.

[51] 99 S. Ct. at 797.

[52] *See* text accompanying note 49 *supra*.

[53] *See* text accompanying note 16 *supra*.

[54] 99 S. Ct. at 798; *see* text accompanying notes 146-53 *infra*.

[55] 99 S. Ct. at 798; *see* note 144 *supra*.

In addition to holding that Daniel's interest in the pension Fund was not an investment contract, the Court considered whether past congressional actions and Securities and Exchange Commission (SEC) interpretations of the Securities Acts required the application of the Acts' provisions to Daniel's interest in the Fund. In 1934, Congress rejected an amendment to section 4(1) of the '33 Act[56] which would have exempted employee stock investment plans[57] from the Act's registration requirements.[58] The SEC, as amicus curiae in *Daniel,* argued that the defeat of an amendment that would have removed certain extra compensation plans from the Act's purview indicated Congress' intention to subject pension plans to the registration requirements.[59] In rejecting the argument, the Court stated that the purpose of the 1934 proposed amendment was to exempt plans under which the beneficiaries were placing their own money in investment accounts.[60] Such plans would meet the *Howey* investment contract criteria.[61] Therefore, Congress' rejection of the amendment only reflected its view that schemes clearly involving securities sales should not be exempted from the '33 Act's coverage merely because the profits they produce take the form of extra compensation.[62] The amendment would not have exempted all pension plans from registration, so its defeat had no bearing on the characterization of the employee interests at issue in *Daniel.*[63]

In 1970, Congress amended section 3 of the '33 Act[64] to extend its registration exemption to interests in trust funds maintained by banks and issued in connection with certain pension plans.[65] In *Daniel,* the SEC contended that the new registration exemption would have been unnecessary

[56] 15 U.S.C. § 77d (1976). Section 4 of the '33 Act exempts certain transactions from the registration requirements of the Act.

[57] 99 S. Ct. at 798 n.17. In addition to exempting stock investment plans for employees' exclusive benefit from the '33 Act's registration requirements, the amendment would have exempted "bona fide plans for the payment of extra compensation . . . ." 78 CONG. REC. 8708 (1934).

[58] 15 U.S.C. § 77e (1976); *see* note 2 *supra.*

[59] 99 S. Ct. at 798.

[60] *Id.* (citing H. R. REP. No. 1938, 73d Cong., 2d Sess. 41 (1934)).

[61] 99 S. Ct. at 799; *see* text accompanying note 8 *supra.*

[62] 99 S. Ct. at 799.

[63] *Id.* The Court's conclusion that the 1934 proposed amendment did not attempt to categorize all pension plans as securities is logical only if the Court's underlying interpretation of the legislative history of the amendment is accurate. *See* text accompanying note 60 *supra.* The Court interpreted the House Report as indicating that the amendment would have exempted from registration only extra compensation plans that created interests with the characteristics of securities. 99 S. Ct. at 799. The language of the proposed amendment, however, can be read to imply a presumption that all such plans have security characteristics. *See* text accompanying note 57 *supra.* Moreover, the Court never relied on specific language from the House Report to support its position in *Daniel.*

[64] 15 U.S.C. § 77c (1976).

[65] Act of December 14, 1970, Pub. L. 91-547, § 27(b), (c), 84 Stat. 1434, 1498 (1970). The amendment exempted interests issued in connection with pension plans which qualify as tax exempt organizations. *Id.; see* I.R.C. §§ 401, 501.

unless the interests covered by the amendment constituted securities.[66] Therefore, the interests would have been subject to the Act's antifraud provisions notwithstanding the registration exemption.[67] Relying on the amendment's legislative history,[68] the *Daniel* Court interpreted the amendment as exempting only those interests that the covered plans have in the trust funds.[69] Since the amendment neither recognized the existence of prospective beneficiaries' interests in the funds, nor characterized those interests as securities, it was inapposite in the *Daniel* context.[70]

Despite the lack of support that past congressional actions offered for the view Securities Act applied to the pension plan in *Daniel,* the Court could have deferred to any long-standing SEC interpretation of the Acts indicating that the SEC had adopted that position.[71] The Court's review of prior SEC interpretations, however, revealed several occasions on which the SEC itself had conceded that the Acts do not regulate compulsory, noncontributory pension plans.[72] Most notably, the SEC had decided that such plans do not involve a "sale" as required by the Acts.[73] The Court rejected the argument that the plan could be a security notwithstanding the absence of a "sale."[74] Moreover, the Court held that the SEC's "no

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[66] 99 S. Ct. at 799.

[67] *Id.* The Court adhered to the position that securities that are exempt from the Acts' registration requirements nevertheless are subject to the Acts' antifraud provisions. *Id.* n.18; *see* 1 FED. SEC. L. REP. (CCH) ¶ 112 (1979).

[68] 99 S. Ct. at 799 n.19.

[69] *Id.*

[70] 99 S. Ct. at 799. In a brief concurring opinion, Chief Justice Burger stated that the Court's treatment of the 1970 amendment was unnecessary to resolve the issue in *Daniel. Id.* at 802. However, he agreed with the Court's conclusion that the SEC's interpretation of the amendment was unconvincing. *See* text accompanying notes 68-69 *supra.* The Chief Justice contended that even if the SEC's interpretation was correct, and Congress had intended to subject pension plans to the Securities Acts' antifraud provisions in 1970, the original definitional provisions in effect when Daniel acquired his interest in the Fund controlled. 99 S. Ct. at 802 (Burger, C.J., concurring); *accord,* Waterman S. S. Corp. v. United States, 381 U.S. 252, 269 (1965); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 346-49 (1963); United States v. Price, 361 U.S. 304, 313 (1960).

[71] 99 S. Ct. at 799. *See generally* United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 719 (1975); Saxbe v. Bustos, 419 U.S. 65, 74 (1974); Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538 F.2d 532, 538 (3d Cir.), *cert. denied,* 429 U.S. 1010 (1976).

[72] 99 S. Ct. at 800. While recognizing the propriety of according great weight to administrative interpretations of federal statutes, the Court noted that courts also should be constrained by their responsibility to adhere to the plain meaning of the statutes. *Id.* n.20. However, in light of the Court's interpretation of the SEC's past position supporting the applicability of the Securities Acts to compulsory, noncontributory pension plans, Justice Powell did not address the necessity of deferring to administrative practices in deciding *Daniel. See* text accompanying notes 73-75 *infra.*

[73] 99 S. Ct. at 800; *see* 15 U.S.C. § 77e (1976) (unlawful to sell unregistered securities in interstate commerce).

[74] 99 S. Ct. at 800. Any disposition of a security for value, including a contract to sell, is a "sale" under the Securities Acts. 15 U.S.C. §§ 77b (3), 78c (14) (1976). In 1951, the SEC promulgated Rule 133, which stated that mergers, consolidations, sales of assets and reclassifications did not involve "sales." 17 C.F.R. § 230.133(a) (1978) (rescinded Jan. 1, 1973). *But*

sale" position with respect to compulsory, noncontributory pension plans applied equally to the Act's registration and antifraud provisions.[75] Since the SEC had concluded that the plans involved no sale, thereby limiting the registration requirements' applicability, the Court would not adopt the view that a sale was involved for purposes of the antifraud provisions.[76]

Having thus based its conclusion that the Acts do not govern compulsory, noncontributory pension plans on the language of the Acts, the case law interpreting them, and congressional and administrative actions,[77] the Court also stated that the enactment of the Employee Retirement Income Security Act (ERISA)[78] had rendered the extension of the Securities Acts' coverage to such plans unnecessary.[79] By mandating information disclosure[80] and regulating the substantive terms of pension plans, the Court concluded ERISA provided potential plan beneficiaries the same protections that the Securities Acts afforded investors.[81]

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see note 75 *infra*. The *Daniel* Court noted, however, that SEC opinion letters, reports and testimony have not addressed the issue of whether a sale is required for noncontributory pension plans to constitute securities. 99 S. Ct. at 800. Consequently, the facts in *Daniel* did not require the Court to decide whether to defer to administrative interpretations of the Acts concerning this question. *See id.; see also* Hyde, *Employee Stock Plans and the Securities Act of 1933*, 16 W. RES. L. REV. 75, 86 (1964). *See generally*, Sommer, *Mergers, Consolidations, Sales of Assets—Rule 133*, 16 W. RES. L. REV. 11 (1964).

[75] 99 S. Ct. at 800-01. As originally adopted, Rule 133 applied the SEC's "no sale" position regarding mergers only to the '33 Act's registration requirements. 17 C.F.R. § 230.133(a) (1978) (rescinded Jan. 1, 1973); *see* Sommer, *supra* note 74, at 42-43. The SEC, however, subsequently amended its position by promulgating Rule 145 which states that statutory mergers do involve "sales" under the registration and antifraud provisions of the '33 Act. 99 S. Ct. at 801 n.22; *see* 17 C.F.R. § 230.145(a) (1978). The *Daniel* Court noted that the SEC's adoption of Rule 145 undercut the argument that SEC decisions that transactions do not involve sales apply only to the scope of the Acts' registration requirements and not to the Acts' antifraud provisions. 99 S. Ct. at 801 n.22. By holding that employee interests in compulsory, noncontributory pension plans are not securities, the Court avoided the issue of whether a sale of securities is required to invoke all of the Securities Acts' provisions. *Id.*

[76] 99 S. Ct. at 801.

[77] *See* text accompanying notes 30-76 *supra;* note 158 *infra.*

[78] 29 U.S.C. §§ 1001-1381 (1976).

[79] 99 S. Ct. at 801-02.

[80] ERISA requires that the administrators of pension benefit plans furnish covered employees with detailed information regarding the substantive terms and financial status of the plans. 29 U.S.C. § 1021 (1976). Moreover, the same information must be filed with the Secretary of Labor and made public information. *Id.* §§ 1023, 1026. However, the Securities Acts would afford pensioners even greater protection against abuses in the administration of pension plans. Most significantly, ERISA requires only that participants in plans be provided with the disclosed information within 90 days after they join the plan. *Id.* § 1024 (b)(1). The Securities Acts, in contrast, require that prospective purchasers of securities be given an opportunity to inspect disclosed information before acquiring their interests. *See* note 2 *supra. See also* Comment, *Securities Regulation Of Employee Pension Plans: In The Wake Of The Daniel Decision*, 38 U. PITT. L. REV. 697, 714-22 (1977).

[81] 99 S. Ct. at 802. *But see* note 80 *supra.* The Court stated that the purpose of ERISA was to fill a void in the regulation of transactions subject to federal control. 99 S. Ct. at 802. Section 203 of ERISA now establishes the continuous service requirements that pension benefit plans are permitted to contain. 29 U.S.C. § 1053 (a) (1976). Since Daniel retired before the effective date of ERISA, however, its provisions did not protect him. *See id.* § 1381.

Most significantly, the Court's decision in *Daniel* expands the class of cases in which the *Howey* test should be applied while narrowing the definition of a security under the federal securities laws. In *United Housing Foundation v. Forman,*[82] the Court noted that the holding in *Howey*[83] established the basis for all of the Court's decisions defining a security.[84] The *Forman* Court, however, applied the *Howey* test only to determine whether the economic interests in question constituted investment contracts. In deciding whether the interests were "stock" under the Acts, the Court did not rely on the *Howey* test.[85] The *Forman* Court implicitly reasoned that

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[82] 421 U.S. 837 (1975).

[83] *See* text accompanying note 8 *supra.*

[84] 421 U.S. at 852. Most of the Supreme Court decisions defining a security subsequent to *Howey* have contained at least passing specific references to the *Howey* test. *See, e.g.,* United Hous. Found. v. Forman, 421 U.S. 837, 851-57 (1975); Tcherepnin v. Knight, 389 U.S. 332, 338-39 (1967); SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 72 n.13 (1959). *But see* SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967). In *United Benefit,* the Court relied on its analysis in SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943), and did not cite *Howey.* 387 U.S. at 211. The *Joiner* Court held that the character of an economic relationship in commerce determines its status as an investment contract. 320 U.S. at 352-53. The Court noted that in assessing an instrument "the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect," establish its character in commerce. *Id.* In *Howey,* the Court stated that its definition of an investment contract, *see* text accompanying note 8 *supra,* was merely a clarification of the *Joiner* test. 328 U.S. at 299. *Joiner*'s "terms of the offer" element thus can be equated with *Howey*'s requirement of an investment of money in a common enterprise. The *Howey* Court expressed Joiner's "plan of distribution" factor as the requirement that the transaction involve profit sharing. Under the *Howey* test, the "economic inducements held out to the prospect" must lead him to develop a reasonable expectation that the profits will be earned. *Id.* at 299-301. Thus, both tests were designed to facilitate discerning the character an instrument has been given in commerce, the *Joiner* test in general terms and the *Howey* test in more specific terms. Nevertheless, some courts still address the two tests as though they establish different criteria for an investment contract. *See* SEC v. Energy Group of America, Inc., 459 F. Supp. 1234, 1238-40 (S.D.N.Y. 1978).

Courts should not rely solely on the *Joiner* test when the *Howey* test offers more specific guidance for establishing the existence of an investment contract. *See* Tew & Freedman, *supra* note 3, at 410-11, 448. A more general test's greatest attribute is the freedom courts retain to effectuate the remedial purposes of the Securities Acts through novel adaptations of the test. *See* text accompanying note 149 *infra.* Courts applying the *Howey* test, however, have been able to apply it flexibly to meet novel situations calling for federal regulation. *See* SEC v. Glenn W. Turner Enterp., 474 F.2d 476 (9th Cir. 1973); *1977-78 Developments, supra* note 2, at 771-73 (modification of "solely from efforts of others" requirement). In spite of the greater specificity and equal flexibility of the *Howey* test, some courts still rely on the *Joiner* criteria to analyze instruments as investment contracts. *See, e.g.,* Grainger v. State Sec. Life Ins. Co., 547 F.2d 303 (5th Cir. 1977), *cert. denied,* 436 U.S. 932 (1978); Hilgeman v. National Ins. Co. of America, 547 F.2d 298 (5th Cir. 1977).

[85] 421 U.S. at 847-51. In deciding that the shareholder interests in the cooperative were not securities, the *Forman* Court stated that the name given to an interest does not necessarily control its status as a security. *Id.* at 848. The dispositive factor was whether the transaction created interests with the characteristics of traditional stocks, or, alternatively, whether purchasers believed that they were buying interests with such characteristics. *Id.* at 851. The shares in *Forman* were not freely alienable, and they did not entitle the holders to receive dividends contingent upon an apportionment of profits. Each shareholder's voting rights in the cooperative bore no relation to the number of shares respectively held. *Id.* at 842. Further-

if the shares had constituted "stock," the Acts would have applied to the transaction whether or not the *Howey* investment contract criteria had been met. Therefore, Daniel relied on *Forman* to support his contention that if his interest in the Fund was not an investment contract, it was a "certificate of interest in a profit-sharing agreement."[86] The *Daniel* Court's determination that all certificates of interest in profit-sharing agreements constitute investment contracts obviated the need to address Daniel's alternative argument.[87] Thus the Court appears willing to apply the *Howey* test to determine whether an economic interest is regulated by the Securities Acts regardless of what type of security the plaintiff claims to have purchased.[88]

Although commentators have advocated the use of the *Howey* test to determine whether economic interests constitute a type of security other than investment contracts,[89] few courts have done so. In *United Sportfishers v. Buffo,*[90] however, the Ninth Circuit applied *Howey* generically. The plaintiff in *Buffo* alleged fraud under the '34 Act,[91] claiming that promissory notes, which he took in consideration for the sale of two boats, were securities.[92] The Securities Acts' definition of a security includes any note.[93] Applying the *Howey* test in light of the *Forman* decision,[94] the court

more, the shareholders understood from the outset the limited nature of the rights to which their shares entitled them. *Id.* at 851. Therefore, the shares were not "stocks" within the Acts' definitional sections. *Id.*

[86] 99 S. Ct. at 796 n.11. Certificates of interest in profit-sharing agreements are specifically enumerated securities under the '33 and '34 Acts. *See* 15 U.S.C. §§ 77b(1), 78c (a)(10)(1976).

[87] 99 S. Ct. at 796 n.11. The Court stated that Daniel did not posit a broader meaning for "certificates of interest in profit sharing plans" than the *Howey* Court established for "investment contracts." In effect, the Court read "investment contract" in the Securities Acts to be a generic term encompassing at least one of the specific forms of securities enunciated in the Acts. *Id.*

[88] The Court's generic use of the *Howey* test is improper since long term notes, which do not necessarily meet the *Howey* criteria, are securities as defined in the Acts. *See* 15 U.S.C. §§ 77(b)(1), 77c(3), 78c(a)(10) (1976); text accompanying notes 97-101 *infra.*

[89] *See* Newton, *What Is a Security?: A Critical Analysis,* 48 MISS. L. J. 167, 170 n.21 (1977); Tew & Freedman, *supra* note 37 at 408-09.

[90] [1978 Current] FED. SEC. L. REP. (CCH) ¶ 96,708 (9th Cir. 1978).

[91] 15 U.S.C. § 78j (1976); 17 C.F.R. § 240.10b-5 (1978). *See generally 1978-79 Securities Law Developments: Rule 10b-5,* 36 WASH. & LEE L. REV. (1979).

[92] [1978 Current] FED. SEC. L. REP. (CCH) ¶ 96,708 at 94,743.

[93] 15 U.S.C. §§ 77b(1), 78c(a)(10) (1976). Any note that matures in less than nine months is exempt from the '33 and '34 Acts' registration requirements. *Id.* §§ 77c(3), 78c(a)(10). For a discussion of notes as securities see Comment, *Notes as Securities Under the Securities Act of 1933 and the Securities Exchange Act of 1934,* 36 MD. L. REV. 233 (1976) [hereinafter cited as *Notes as Securities*] (suggesting application of the *Howey* test to differentiate between notes that are securities and notes that are not). *But see* text accompanying notes 97-101 *infra.*

[94] [1978 Current] FED. SEC. L. REP. (CCH) ¶ 96,708 at 94,743-44. Relying on *Forman,* the *Buffo* court reasoned that the Acts govern only investment transactions, and not every commercial deal. *Id.* Courts analyzing notes as securities emphasize that the context of the transaction determines the note's character. *Notes as Securities, supra* note 93, at 237-39.

held that the notes did not constitute securities because the plaintiff had not taken the notes with an expectation of realizing profits from the defendants' efforts.[95] Although the *Forman* Court arguably did not hold that the *Howey* test should be used to characterize all transactions,[96] the *Buffo* court, anticipating the *Daniel* decision, read *Forman* broadly and thereby extended *Howey*'s applicability.

Despite the holding in *Buffo,* notes should not be analyzed under the *Howey* test to determine their status as securities. Under the *Howey* test, notes would constitute securities only in the rare circumstance in which the note entitles the holder to share in the profits of the enterprise obtaining credit.[97] The presence of such a provision in an instrument, however, has no bearing on whether the instrument is a note.[98] Moreover, the Acts specifically apply to all notes[99] without regard to their extraneous terms.[100] The *Buffo* court's analysis therefore narrows the Acts' purview by contravening their express language.[101]

In contrast to *Buffo,* the district court in *Titsch Printing, Inc. v. Hastings*[102] read *Forman* narrowly.[103] The plaintiff had purchased all of the

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Notes that courts consider investments generally are labeled securities. In mere commercial note transactions, however, notes do not constitute securities. *Id.* at 242-44.

[95] [1978 Current] FED. SEC. L. REP. (CCH) ¶ 96,708 (9th Cir. 1978).

[96] *See* Exchange Nat'l Bank v. Touche Ross & Co., 544 F.2d 1126, 1136-37 (2d Cir. 1976) (*Howey* test inapplicable in defining notes as securities); text accompanying notes 113-17 *infra.*

[97] *See Notes as Securities, supra* note 93, at 251-53. Assuming that the interest paid on most notes constitutes profit, *Howey*'s "efforts of others" element would not be met. Interest paid on notes rarely depends upon the maker's successful investment of the loaned funds. *Id.* at 252; *see* C.N.S. Enterp. v. G. & G. Enterp., 508 F.2d 1354 (7th Cir. 1975).

[98] A note is a "written unconditional promise to pay another a certain sum of money at a certain time, or at a time which must certainly arrive." Aetna Oil Co. v. Glenn, 53 F. Supp. 961, 965 (W.D. Ky. 1944); *accord,* Commissioner v. Meridian & Thirteenth Realty Co., 132 F.2d 182, 188 n.7 (7th Cir. 1942). The form of payment is irrelevant so long as the instrument meets this definition. 53 F. Supp. at 965.

[99] 15 U.S.C. §§ 77(b)(1), 78c(a)(10) (1976). In addition to notes and other specific types of securities, the Acts apply "generally to any instrument or interest commonly known as a security." *Id.* Since only notes with investment characteristics are regarded in commerce as securities, *see Notes as Securities, supra* note 93, at 237 n.15, the general definitional clause in the Securities Acts may be read to limit the class of notes that are securities to notes that meet the *Howey* test. *Id.* at 237 n.15, 248-49. This interpretation of the Acts nevertheless requires a broad application of *Howey*'s "efforts of others" criterion since the profits realized by a note payee usually do not result from the payor's efforts. *See* text accompanying note 96 *supra.*

[100] The only provision of a note that will exempt the note from the Acts' registration requirements is a maturation period of less than 9 months. *See* text accompanying note 93 *supra.*

[101] The *Buffo* Court reasoned that its narrow interpretation of the Acts' definitional sections was consonant with the Supreme Court's recent restrictions on the scope of federal securities law. [1978 Current] FED. SEC. L. REP. (CCH) ¶ 96,708 at 94,744 n.3; *see* text accompanying note 1 *supra.*

[102] 456 F. Supp. 445 (D. Colo. 1978). The plaintiff in *Titsch Printing* alleged violations of the antifraud provisions of the '33 Act and SEC Rule 10b-5. *Id.* at 447.

[103] *See* text accompanying notes 82-86 *supra.*

stock outstanding in two corporations from the defendant and alleged that the transaction constituted a sale of securities.[104] The court reasoned that *Forman* did not require that the *Howey* analysis be used as a generic test for defining a security.[105] Since the term "stock" has an established common law and statutory meaning, the *Howey* test was not needed to characterize the economic interests in *Titsch Printing*.[106]

The court in *Titsch Printing* held that the shares in question were "stocks,"[107] thereby leaving unclear whether the court would have applied the *Howey* test to characterize the economic interests as investment contracts. In *Forman,* the Court applied the *Howey* test to determine whether interests constituted investment contracts after it applied a different test to assess the interests as stock.[108] Since the *Titsch Printing* court relied on *Forman* to define "stock," presumably it would have adhered to the *Forman* analysis by assessing the shares as investment contracts under the *Howey* test if they had failed to qualify as "stocks." Arguably, if *Howey* should be applied each time a court finds that an economic interest does not fall within one of the specific securities listed in the Acts' definitional sections, common sense may dictate the test's application at the outset.[109]

Notwithstanding *Titsch Printing*'s implications, the court's reasoning suggests a fundamental barrier to the application of *Howey* as a generic test to establish the existence of a security. The court noted that dividends on the shares were contingent on the apportionment of profits as required under the *Forman* definition of stock.[110] These profits, however, would not be realized from the efforts of others because the plaintiff acquired the entire corporate structure supporting the shares.[111] Consequently, whether the shares produced dividends was contingent primarily on the shareholder's efforts. Thus, while economic interests that are not within one of the specific classes of securities listed in the Acts nevertheless may meet the *Howey* test,[112] an interest that is within one of the specific classes might not. The use of *Howey* as a generic test for a security could thereby contravene the specific language of the Securities Acts.[113]

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[104] 456 F. Supp. at 447.

[105] *Id.* at 449.

[106] *Id.* at 447-49.

[107] *Id.* at 448.

[108] *See* text accompanying note 85 *supra.*

[109] *See Notes as Securities, supra* note 93, at 242-54.

[110] 456 F. Supp. at 447-48; *see* note 85 *supra.*

[111] 456 F. Supp. at 448.

[112] *See* text accompanying notes 82-85 *supra.*

[113] *See* H. BLOOMENTHAL, 1 SECURITIES AND FEDERAL CORPORATE LAW REPORT MONTHLY UPDATE 8 (1979); *cf.* Bula v. Mansfield, No. 76-F-871 (D. Colo. May 13, 1978) (holding purchase of all outstanding shares in corporation not an investment contract since *Howey*'s "efforts of others" element not met).

The Tenth Circuit has avoided resolving the conflict between *Titsch Printing* and *Bula.* In Chandler v. KEW, Inc., No. 76-1083 (10th Cir. April 19, 1977), the court held that when all of the shares in a close corporation are sold to one person, the purchaser does not acquire

Prior to *Daniel,* the *Titsch Printing* court's narrow reading of *Forman* appeared proper. Rather than applying the *Howey* test to determine whether the shares in question were stock, the *Forman* Court explicitly relied on other factors.[114] Significantly, while deciding that the payment of dividends was one characteristic of "stock," the *Forman* Court did not require that the efforts of others produce the dividends.[115] Thus, the *Forman* definition of "stock" is not synonomous with the *Howey* test.[116] Additionally, when the *Forman* Court stated that the elements of the *Howey* test were central to all of the Court's decisions defining a security, it was addressing the issues of whether the shares were investment contracts or something "commonly known as a 'security.' "[117] Thus, the *Forman* Court used the *Howey* test only to analyze classes of securities which have no generally acknowledged meaning. The *Daniel* Court, however, by analogizing investment contracts to a more specific class of security,[118] can be read as treating *Howey* as a generic definition of a security.[119]

Although *Daniel* supports the use of the *Howey* test to assess the character of all transactions as securities, the Court's decision represents a strict application of the test's requirements. According to *Howey,* an investment contract exists when an economic interest is acquired with a reasonable expectation that profits will be derived from the efforts of others. In previous cases involving the purchase of economic interests with both profit and nonprofit aspects, the Court had been willing to isolate the two aspects for analytical purposes.[120] If any profit related interests were found, the nonprofit interests did not preclude a determination that the

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securities if the shares are merely an indicia of ownership incidental to the purchase of the corporation. The *Titsch Printing* court reasoned that the corporate structure represented by the shares that the plaintiff purchased was used by the plaintiff to direct his additional business enterprises. Consequently, the shares themselves, and not the corporation, were the substance of the purchase. 456 F. Supp. at 448.

[114] *See* note 85 *supra.*

[115] *Id.*

[116] *See* text accompanying notes 110-13 *supra.*

[117] 421 U.S. at 851; *see* Tcherepnin v. Knight, 389 U.S. 332, 338 (1967); SEC v. United Benefit Life Ins. Co., 387 U.S. 202, 211 (1967); SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 67-68 (1959); SEC v. W. J. Howey Co., 328 U.S. 293, 298 (1946); SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943). The phrase "commonly known as a security" appears in the Acts' definitional sections as a general catch-all category of securities. *See* 15 U.S.C. §§ 77b(1), 78c(a)(10) (1976).

[118] 99 S. Ct. at 796 n.11. The Court equated investment contracts and certificates of interest in profit sharing plans. *See* text accompanying note 87 *supra.*

[119] *See* text accompanying notes 89-96 *supra.* While the *Daniel* Court appears to read *Forman* expansively, the Court's decision also can be interpreted consistently with the narrow interpretation of the *Forman* decision. *See* text accompanying notes 101-04 *supra.* In *Forman,* the established definition of "stock" obviated the need to apply the *Howey* test to define stock as a security. *See* note 85 *supra.* Since the characteristics of certificates of interest in profit sharing plans are not defined clearly, equating that class of securities with investment contracts is not necessarily inconsistent with *Forman.*

[120] *See* SEC v. United Benefit Life Ins. Co., 387 U.S. 202, 207-09 (1967); text accompanying notes 124-34 *infra.*

transaction was profit oriented.[121] The *Daniel* Court recognized that part of the Fund's value, from which pension benefits were paid, represented returns on investments of the Fund's nonprofit related assets.[122] Nevertheless, the Court chose to analyze the Fund as whole, and characterized the employees' interest as a noninvestment interest because most of the Fund's assets were not profit related.[123]

In *SEC v. United Benefit Life Insurance Co.*,[124] the Court addressed for the first time the issue of when a contractual relationship, which promises the purchaser both profit and nonprofit related interests, should be treated as two separate transactions for the purposes of securities analysis. United Benefit had sold policies that required purchasers to pay a monthly premium which the company placed in a separate fund account for investment, primarily in common stock.[125] Prior to his policy's maturity date, the purchaser could withdraw his proportionate share of the total fund or receive a percentage of the net premiums that he had paid. The SEC contended that the characteristics of a security permeated this part of the policy.[126] Upon his policy's maturity, the purchaser could elect either to receive the cash value of his policy or to convert his interest into a fixed amount annuity.[127] The parties agreed that the Security Acts' registration require-

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[121] *See* text accompanying notes 124-34 *infra.*

[122] 99 S. Ct. at 797. The Court noted that the pension Fund in *Daniel* was similar to all organizations designed to hold accumulated assets in that the Fund's viability depended in part on supplementing existing assets with the income earned from their investment. *Id.* The Court also recognized that only 20 percent of the Fund's $191.5 million total assets were profit related. *Id.* at 798 n.14.

[123] *See* text accompanying note 137 *infra.*

[124] 387 U.S. 202 (1967).

[125] *Id.* at 205. Traditionally, insurance companies have invested their assets predominantly by financing long term corporate debt in the form of bonds and mortgage loans rather than purchasing equity interests. Johnson & Hofflander, *The Impact of Investment Regulation in the Life Insurance Industry,* 510 INS. L. J. 389, 391 (1965). Thus, insurance company investment policies have emphasized security as much as earnings. *Id.* Due to its emphasis on common stock, the "Flexible Fund" at issue in *United Benefit* was distinct from typical insurance investment accounts. The policyholders' net premiums, which were placed in the Flexible Fund for investment, represented the total premiums reduced by amounts necessary to meet the company's operational expenses. 387 U.S. at 205.

[126] 387 U.S. at 205. The net premiums paid on policies plus whatever income their investment produced constituted the Flexible Fund's total assets. A policyholder's proportionate share of the Fund included the premiums he had paid, plus his proportional share of the Fund's earnings. *Id.* The percentage of the policyholder's paid net premiums available for withdrawal as an alternative to his proportionate share of the Fund increased each year. *Id.* After 10 years, the policyholder could withdraw from the Fund all of the net premiums he had paid. *Id.*

[127] *Id.* at 205-06. Once the policy had matured and the policyholder had elected either to withdraw his interest or convert it into a life annuity, his interest in the Flexible Fund ended. *Id.* at 206. His withdrawable interest at maturity was determined by either the proportionate share method or the net premium percentage guarantee. *See* note 126 *supra.* Life annuities provide for payments at regular intervals during the annuitant's entire life. *See* Johnson, *The Variable Annuity; What It Is and Why It Is Needed,* 401 INS. L. J. 357, 361-62 (1956). Under fixed amount life annuities, which were offered by United Benefit as part of its Flexible Fund

ments did not govern the post-maturity portion of the policy.[128] Purchasers who elected to convert their interest into fixed amount annuities thereby acquired a form of insurance exempt from registration.[129] Moreover, the purchaser always lost his interest in the investment fund upon his policy's maturity.[130] Therefore, the question before the Court was whether the non-profit nature of the post-maturity relationship governed the characterization of the entire transaction.[131] The contract contained two promises,[132]

Policy, the annuitant receives the same sum with each payment the company makes. *Id.* at 362. The amounts that an annuitant is entitled to receive per dollar invested, as annuity payments, are determined according to mortality rates, expected interest, and administrative costs. 387 U.S. at 207. Since the life annuity guarantees payments during the annuitant's lifetime, the insurance company bears the risk that all annuity policyholders will live long lives. The company is able to continue to make payments to policyholders who live unusually long lives only because other policyholders, who have paid for the right to receive payments during an average lifespan as determined by the mortality tables, die prematurely. Funds that would have been paid to the policyholders who die prematurely are used to pay unusually long-living policyholders. *See* Johnson, *supra* at 362.

[128] 387 U.S. at 206.

[129] 15 U.S.C. § 77c (8) (1976). The SEC recently amended Parts 231 and 271 of Title 17 of the Code of Federal Regulations by issuing a General Statement of Policy Regarding Exemptive Provisions Relating to Annuity and Insurance Contracts. Securities Release No. 6051, 1 FED. SEC. L. REP. (CCH) ¶ 2111 (1979). In order for a contract to be exempt from the '33 Act's disclosure requirements pursuant to § 3(a)(8), the insurance company offering the contract must assume significant mortality and investment risks. *Id.* at 2579-3. An offering company does not assume a significant mortality risk unless the contract guarantees annuity payouts at particularized rates. *Id.* Additionally, if the contract is sold to individuals directly the purchase rates must be permanently guaranteed. *Id.* When the contract is sold to a group that makes payments in bulk without allocations for individual members the company assumes a mortality risk if the purchase rates are guaranteed for a "reasonable period of time," defined by the SEC as five years. *Id.* at 2579-4. Contracts that do not include these purchase rate provisions do not place a significant mortality risk on the company and therefore are not insurance or annuity contracts. Moreover, if the annuity benefits are so low that the purchaser probably would not choose to annuitize at the time of his election, the purchase rate guarantee will not suffice to place the required mortality risk on the company. *Id.* The SEC also takes the position that the economic realities of a transaction may lead to the conclusion that the company has not assumed a significant mortality risk. *Id.* at 2579-4 to -5. For instance, the company assumes less mortality risk when it sells annuity contracts to younger people. *Id.* n.9. The Release offers no definitive guidelines as to the purchaser age at which a company would fail to assume an adequate mortality risk.

A contract that places a significant investment risk on the purchaser also fails to meet the requirements for exemption under § 3(a)(8). *Id.* at 2579-3. In resolving this issue, the SEC has determined that the contract terms and the circumstances surrounding the offer and sale of the contract must be considered. *Id.* at 2579-5. Specifically, a company's marketing practices that promote the contracts as investments will remove the contracts from the scope of the exemption provided in § 3(a)(8) of the '33 Act.

[130] 387 U.S. at 206; *see* text accompanying note 117 *supra.*

[131] 387 U.S. at 204. A second issue raised in *United Benefit* was whether the Flexible Fund constituted an investment company under the Investment Company Act of 1940. 15 U.S.C. §§ 80a-3 (defining investment company), 80a-8 (registration of investment companies) (1976). The Court avoided the issue, noting that United Benefit probably was beyond the scope of the Act since its primary business was issuing insurance policies. 387 U.S. at 212; *see* 15 U.S.C. §§ 80a-3(b) (1976). The Court expressed no opinion on whether the Fund itself

each operating at a different point in time. More importantly, the promises were not interdependent since either could have been contracted for independently.[133] Consequently, the Court analyzed the pre-maturity portion of the contract independently, holding that it was not insurance, but was an investment contract.[134]

Courts analyzing single transactions in which plaintiffs have acquired both investment and noninvestment interests may have difficulty reconciling *Daniel* with *United Benefit.*[135] In *United Benefit,* the Court analyzed the two aspects of the transaction separately because the company's performance of one part of the contract was not an integral part of its performance of the other.[136] The *Daniel* Court, however, offered no explanation for

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could be separated from the company's other activities and subjected to a determination of its status as an investment company. 387 U.S. at 212.

[132] United Benefit first promised its Flexible Fund policyholders that the company would invest their net premiums, making the Fund's assets available to the policyholders before the policies' maturity dates. The company also promised to give policyholders the opportunity to convert their share of the Fund's assets into a fixed amount annuity upon their policies' maturation. *See* text accompanying notes 116-17 *supra.*

[133] 387 U.S. at 209. The Court emphasized that the company could have promised to invest net premium payments without also promising to guarantee a life annuity upon the policy's maturation. *Id.* Although United Benefit's Flexible Fund policies always contained both promises, the Court relied on the practice of another company to illustrate United Benefit's ability to separate its policy provisions and offer each one independently. *Id.* n.13.

[134] 387 U.S. at 207.

[135] Few lower courts have addressed the question of when the character of diverse provisions of a single transaction should be analyzed separately under the Securities Act. *See, e.g.,* Hilgeman v. National Ins. Co. of America, 444 F.2d 446 (5th Cir. 1976). The plaintiffs in *Hilgeman* alleged fraud by an insurance company, which had sold them contracts that the plaintiffs claimed were securities. *Id.* at 446-47. The Fifth Circuit remanded the case because the record did not specify the grounds upon which the district court had dismissed the plaintiff's complaint. *Id.* at 448. On remand, the district court held that even if the contracts constituted securities, the court lacked personal jurisdiction over the defendants. Furthermore, the court stated that venue was improper. Brief for Appellant, Supplemental App. at 11-15, Hilgeman v. National Life Ins. Co. of America, 547 F.2d 298 (5th Cir. 1977). In their second appeal, the plaintiffs argued that the district court had personal jurisdiction, that venue was proper, and that the policies were non-exempt securities. Brief for Appellant, Hilgeman v. National Life Ins. Co. of America, 547 F.2d 298 (5th Cir. 1977). The plaintiffs claimed that since the contracts provided for the payment of dividends as well as insurance benefits, *United Benefit* required the policies to be characterized as securities. *Id.* at 61-62. The Fifth Circuit however, did not address the issue, deciding only that the test formulated in SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943), *see* text accompanying notes 6 & 80 *supra,* should be used on remand to assess the plaintiffs' claim that the policies were securities. 547 F.2d at 300.

[136] *See* text accompanying notes 123-24 *supra.* The *Hilgeman* case, *see* note 135 *supra,* is similar to both *Daniel* and *United Benefit* in that the contracts involved have both nonsecurity and traditional security elements. Although the *Daniel* Court refused to take a bifurcated approach in analyzing the economic interests under the Acts, *see* text accompanying notes 137-42 *infra,* the *Hilgeman* court must decide whether the *United Benefit* approach can be applied. The *Daniel* Court emphasized that Daniel had made essentially an employment decision by accepting an interest in the pension Fund. 99 S. Ct. at 797. Looking to the economic reality of the transaction in *United Benefit,* the Court concluded that purchasers of Flexible Fund Annuity contracts were motivated primarily by the contracts' investment

analyzing, as an indivisible package, the diverse economic interests Daniel received in return for his labor.[137] Clearly the two analyses are dissimilar since Daniel may have prevailed under the *United Benefit* approach.[138] In *United Benefit,* the Court emphasized the fact that the company could have sold fixed amount annuities independently of interests in the Flexible Fund.[139] Daniel's employer likewise could have paid his employees a salary without also agreeing to provide pension benefits.[140] Under this analysis, the fact that Daniel's labors could not be allocated between the two parts of his compensation package is irrelevant, and his interest in the Pension Fund's assets would be assessed as a security independently of his interest in wages.[141] The effect of ignoring this analysis in *Daniel* was particularly

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potential. 387 U.S. at 211. Viewed in this manner, *Daniel* and *United Benefit* are distinguishable and courts should not read *Daniel* to preclude the application of *United Benefit*'s analysis to assess transactions that create diverse economic interests. *See also* note 126 *supra.*

[137] 99 S. Ct. at 797; *see* text accompanying note 43 *supra.*

[138] Applying the *United Benefit* approach to the facts in *Daniel* would have led to the conclusion that Daniel's interest in the Fund was a security only if all of the elements of the *Howey* test had been satisfied. *See* text accompanying notes 134 *supra* & 140-47 *infra.*

[139] 387 U.S. at 209. In *United Benefit,* the Court noted that in addition to being able to sell annuities independently of Flexible Fund interests, the company also could have sold interests in the Flexible Fund without promising to make a fixed amount annuity available to the purchasers. *Id.*

[140] The fact that the pension plan in *Daniel* was actually a part of the employees' compensation package is irrelevant under the *United Benefit* approach. The policy in *United Benefit* also was offered as a package which contained both security and non-security elements. *See* text accompanying notes 118-24 *supra.* In *United Benefit,* the dispositive fact was the company's ability to offer each element independently. 387 U.S. at 209.

Whether, as in *United Benefit, see* note 139 *supra,* the defendants in *Daniel* also could have promised the security portion of the interest package without providing the nonsecurity portion is less clear. Employees probably would not agree to work only for future compensation with the characteristics of securities without also receiving a present salary. However, the Court's conclusion in *United Benefit* that either portion of the Flexible Fund annuity contract could have been sold independently was based on the fact that in practice their operation was not integrated. 387 U.S. at 208-09. In *Daniel,* the payments of salaries and pension benefits likewise were not integrated since an employee who was not paid during a break in his service could have maintained his pension eligibility by contributing to the Fund on his own behalf. 99 S. Ct. at 794 n.4. Thus, for analytical purposes under *United Benefit,* Daniel's employer could have contracted to pay employees pension benefits without also agreeing to pay them present salaries.

[141] The *Daniel* Court held that the plaintiff had not invested a specific consideration in return for his interest in the pension Fund. 99 S. Ct. at 797. The Court, however, based its holding on a conclusion that Daniel had exchanged his labor for an indivisible compensation package. *See* text accompanying notes 127-29 *supra.* Arguably, if the Court had applied the analysis from *United Benefit, see* note 123 *supra,* and treated each part of Daniel's compensation package separately, part of his labor properly would have been regarded as consideration exchanged for the pension benefits. The *Daniel* Court recognized that the *United Benefit* Court had allocated the consideration exchanged in that case between the security and nonsecurity portions of the policy once the Court had determined that the policyholder's interests were severable. 99 S. Ct. at 796. Thus, the *Daniel* Court's decision that Daniel had not met *Howey*'s investment or exchange of valuable consideration requirement, *see* note 127 *supra,* hinged on its refusal to apply *United Benefit* to establish the severability of Daniel's dissimilar interests in the pension Fund. However, the Court's analysis of *Howey*'s "solely

significant, since where the economic interests are indivisible the entire transaction probably will not be an investment contract under the Court's reasoning.[142]

The *Daniel* Court's refusal to apply the *United Benefit* analysis to determine when diverse portions of a single economic interest should be analyzed separately to assess their investment character limited the class of transactions subject to the Securities Acts. The Court also restricted the definition of a security by changing that part of the *Howey* test that requires the expected return on investments to result solely from the efforts of others.[143] Lower courts have adhered to the original *Howey* standard for this part of the test by determining whose efforts produced the profits.[144]

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from the efforts of others" criterion would have precluded a finding that Daniel's interest in the Fund was a security. *See* text accompanying notes 143-47 *infra*.

[142] When the *Daniel* Court analyzed Daniel's diverse interests as a whole, it noted that the investment portions were insignificant when compared to the non-investment portions. 99 S.Ct. at 797. However, the Court offered no guidance for determining at what point an investment interest becomes sufficiently significant to treat the entire transaction as an investment contract.

[143] *Id.* at 797-98. *See generally* Tew & Freedman, *supra* note 37, at 424-34; *1977-78 Developments, supra* note 2, at 771-73; note 6 *supra*.

[144] Recent decisions evidence novel means of addressing the "solely" aspect of *Howey*'s "solely from the efforts of others" criterion. *See generally 1977-78 Developments, supra* note 2, at 771-73. Two cases adopting the "no managerial efforts" standard in place of *Howey*'s "solely" requirement are Peyton v. Morrow Elec., Inc., 587 F.2d 413 (9th Cir. 1978) and Goodman v. Epstein, 582 F.2d 388 (7th Cir. 1978). The "no managerial efforts" standard requires that only the functions which are most important to the success of an enterprise need be performed by others in order to establish *Howey*'s "efforts of others" element. SEC v. Glenn W. Turner Enterp. Inc., 474 F.2d 476, 482-83 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973). In *Peyton*, the plaintiff was the marketing manager for the defendant's sales operations. 587 F.2d at 414. His employment contract provided that he would receive a salary plus a percentage of the organization's gross sales. In addition, an informal agreement with his employer gave the plaintiff the right to exchange his services for shares in the company. *Id.* The *Peyton* court adopted the "no managerial efforts" test to determine whether the contract and agreement constituted a security. Since the plaintiff's efforts as marketing manager directly affected the financial success of the company, the court held that no purchase of securities had occurred. *Id.* at 415.

Goodman involved the question of whether limited partnership shares constituted securities. Under state law, limited partners were prohibited from participating in the managerial affairs of the parternship. 582 F.2d at 408. Nevertheless, one of the limited partners in *Goodman* had been primarily responsible for financing the partnership. *Id.* Although the partnership's success depended upon sound financing, the court held that the purchase of the limited partnership shares met the "no managerial efforts" standard. *Id.* The court reasoned that the financing efforts did not "overcome" the effect of the state law prohibiting managerial functions by limited partners, nor did they alter the basic nature of the limited partners' interests as securities. *Id.*

Both *Peyton* and *Goodman* illustrate that the accepted interpretation of the "efforts of others" criteria focuses on whose efforts will produce profits. In *Peyton*, the court noted that the plaintiff's managerial efforts directly affected his company's sales success. 587 F.2d at 415. In *Goodman*, only a broad interpretation of the "no managerial efforts" standard permitted the court to hold that financing an enterprise, which would have collapsed without funding, was an insignificant managerial function performed by the investor. 582 F.2d at 408.

In contrast, the *Daniel* Court addressed the issue by determining whether the investor's receipt of profits was contingent on the efforts of others and not on who produced the profits.[145] The Court stated that if the other elements of the *Howey* test had been met,[146] the employees' interests in the Fund nevertheless would depend primarily upon the employees' ability to meet the plan's eligibility requirements.[147] However, the plan only provided that the employees' receipt of the hypothetical profits was contingent upon their fulfillment of the requirements. The profits themselves would exist regardless of whether the requirements had been met. Transactions which have met the *Howey* test's criteria in the past would not have constituted investment contracts under the *Daniel* Court's analysis since the investor always has control over whether he will receive earned profits.[148] Even assuming that the limitation *Daniel* thus places on the definition of a security is justifiable in light of the remedial purposes of the Acts,[149] the facts in *Daniel* did not justify invoking the limitation. The fact that Daniel's failure to meet the plan's eligibility requirements was involuntary[150] should have convinced the Court that Daniel's lack of effort was not necessarily the greatest barrier to his receipt of benefits.[151]

While the Court appears willing to standardize judicial analysis defining a security,[152] its decision in *Daniel* indicates a continuing restriction of the scope of the Securities Acts. The Court will be reluctant to analyze the investment aspects of a transaction independently of its noninvestment features.[153] Consequently, the Court's new standard for *Howey*'s "investment of money" element, requiring the exchange of an identifiable consideration for a separable investment interest,[154] will be difficult to meet. The Court used an inapposite factor to determine whether profits are

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[145] 99 S. Ct. at 798.

[146] *See* text accompanying notes 33-55 *supra.*

[147] 99 S. Ct. at 798; *see* text accompanying note 16 *supra.*

[148] *See, e.g.,* SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967). In *United Benefit,* if a purchaser of a Flexible Fund Annuity contract had refused to pay premiums prior to his policy's maturity date, he would have breached his contract with the company, terminating the company's obligation to provide him with an interest in the Flexible Fund's assets. *See* 387 U.S. at 205; text accompanying notes 114-23 *supra.* Despite the ultimate control the purchaser thus exercised over his right to an interest in the Flexible Fund's assets, the *United Benefit* Court held that the post maturity portion of the contract constituted a security. *See* text accompanying notes 124-34 *supra.*

[149] *See* SEC v. W. J. Howey Co., 328 U.S. 293, 299 (1946); SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344, 353 (1943); Securities Exchange Act of 1934, ch. 404, § 2, 48 Stat. 881 (1934); Securities Act of 1933, ch. 38, 48 Stat. 74 (1933).

[150] *See* text accompanying note 18 *supra.*

[151] The effect of the Court's analysis of *Howey*'s "efforts of others" element on future attempts to define a security is unclear. Since the Court could have denied Daniel relief under the Acts based on its interpretation of the "investment of money" requirement, *see* text accompanying notes 34-41 *supra,* its "efforts of others" analysis was unnecessary to the Court's holding. *See* text accompanying note 47 *supra.*

[152] *See* text accompanying notes 82-119 *supra.*

[153] *See* text accompanying notes 120-44 *supra.*

[154] 99 S. Ct. at 796-97.