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David R. Frankstone

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waiver opportunities to narrowly defined groups, such as the current Pennsylvania law. Only after such action can each member of the public be assured of protection.

SANDRA R. JOHNSON

Securities Regulation—*Glenn Turner*: Closer to Economic Realities

A transaction comes within the purview of the federal securities laws¹ only if it can be brought within one or more of the terms listed in the statutory definition of a security.² The traditional test enunciated by the Supreme Court³ for one of these terms, the "investment contract," has been criticized by some state courts⁴ and by several commentators.⁵ Such criticism, however, was absent in the federal court opinions when the Oregon federal district court, in *SEC v. Glenn W. Turner Enter-*

¹Securities Act of 1933, 15 U.S.C. §§ 77a-aa (1970); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-z (1970).

²Securities Act of 1933, § 2 (1), 15 U.S.C. § 77 (b)(1) (1970); Securities Exchange Act of 1934, § 3 (a)(10), 15 U.S.C. § 78c (a)(10) (1970). Section 77 (b)(1) reads:

The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferrable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security,"

Securities Act of 1933, § 2 (1), 15 U.S.C. § 77 (b)(1) (1970).

The definition in the 1933 Act is "virtually identical to that contained in the 1934 Act." *Tcherepnin v. Knight*, 389 U.S. 332, 335-36 (1967).

If the transaction alleged to be a security does not fall within one of the specific categories delineated in the definition, reference should be made to the more general classifications. *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943).

³*SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

⁴*See, e.g., Florida Discount Centers, Inc. v. Antinori*, 226 So. 2d 693 (Fla. Dist. Ct. App. 1969), *aff'd*, 232 So. 2d 17 (Fla. 1970); *State v. Hawaii Market Center, Inc.*, 52 Hawaii 642, 485 P.2d 105 (1971); *cf. Silver Hills Country Club v. Sobieski*, 55 Cal. 2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961); *State v. Silberberg*, 166 Ohio St. 101, 139 N.E.2d 342 (1956).

⁵*See, e.g., Augustine & Hrusoff, Franchise Regulation*, 21 HASTINGS L.J. 1347 (1970); Coffey, *The Economic Realities of a "Security": Is There a More Meaningful Formula*, 18 W. RES. L. REV. 367 (1967); Coleman, *A Franchise Agreement: Not a "Security" Under the Securities Act of 1933*, 22 BUS. LAW. 493 (1967); Goodwin, *Franchising in the Economy: The Franchise Agreement as a Security Under Securities Acts, Including 10b-5 Considerations*, 24 BUS. LAW. 1311 (1969); Long, *An Attempt to Return "Investment Contracts" to the Mainstream of Securities Regulation*, 24 OKLA. L. REV. 135 (1971); *Franchise Symposium: Franchising as a Security*, 33 OHIO ST. L.J. 718 (1972); Note, *Pyramid Schemes: Dare to Be Regulated*, 61 GEO. L.J. 1257 (1973).

prises, Inc.,⁶ modified the qualification in the traditional test requiring that profits from an investment contract "come solely from the efforts of others."⁷ The Ninth Circuit affirmed this decision and will now find an investment contract in spite of investor participation if the investor efforts are not "those essential managerial efforts which affect the failure or success of the enterprise."⁸ The purpose of this note is to determine whether the test should have been changed at all, and if so, whether the *Glenn Turner* modification is a good one.

The *Glenn Turner* court was confronted with the pyramid sales scheme of Dare to Be Great, Inc., a wholly owned subsidiary of Glenn W. Turner Enterprises, Inc. Ostensibly Dare sold through four "adventures" and one "plan" a motivation training course consisting of printed materials, tape recordings, and group instruction. The most important feature of two of the "adventures" and of the "plan," however, was the right granted to the purchaser to help sell the motivational courses to others. A handsome commission was the reward for a successful sale.⁹ In spite of his technical role as a salesman, the investor's duties and responsibilities were somewhat limited;¹⁰ his task was to induce prospective purchasers or "prospects" to attend meetings and weekend Golden Opportunity Tours during which his selling effort was secondary to that of the Dare "people."¹¹ The general tone of the meetings and tours was reminiscent of revival meetings, and the element of high pressure, hard-sell salesmanship was never absent.¹² In affirming the District Court's holding that the transactions of Dare were investment contracts,¹³ the Court of Appeals for the Ninth Circuit found (1) an investment of

⁶348 F. Supp. 766 (D. Ore. 1972), *aff'd*, 474 F.2d 476 (9th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3194 (U.S. October 9, 1973).

⁷SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946).

⁸SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 482 (9th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3194 (U.S. Oct. 9, 1973).

⁹*Id.* at 477-80. "The major emphasis . . . is on the opportunities for earning money by purchasing Adventure 4." 348 F. Supp. at 770.

¹⁰474 F.2d at 478-80. For example, salesmen were instructed not to explain to prospective purchasers what they were selling. 348 F. Supp. at 770.

¹¹474 F.2d at 479. At each meeting, after the speakers had finished, the purchaser-salesman would attempt to convince his prospect to buy. Often "agents of defendants who are specialists at the required techniques of psychological hard-sell take over and accomplish the sale." 348 F. Supp. at 770.

¹²474 F.2d at 479-80.

¹³The district court held that the transactions of Dare were securities under three separate parts of the statutory definition, first, "a certificate of interest or participation in any profit-sharing agreement," secondly, "investment contract," and, finally, any "instrument commonly known as a 'security.'" 348 F. Supp. at 773-76.

money, (2) a common enterprise, and (3) an expectation of profits to come from the efforts of others. The court was troubled by the language in the traditional test that profits come *solely* from the efforts of others.¹⁴ The court, however, adopted a more flexible approach and held,

[I]n light of the remedial nature of the legislation, the statutory policy of affording broad protection to the public, and the Supreme Court's admonitions that the definition of securities should be a flexible one, the word "solely" should not be read as a 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.¹⁵

The test thus adopted was "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."¹⁶

In applying the definitional provisions of the securities acts, the Supreme Court has employed two broad policies which are set forth in *SEC v. C.M. Joiner Leasing Corp.*¹⁷ and *Tcherepnin v. Knight*.¹⁸ In *Joiner*, the term "investment contract" was held to include the offer and sale of assignments of oil leases when the transaction also involved the drilling of a test well "so located as to test the oil-producing possibilities of the offered leaseholds."¹⁹ *Joiner* had argued that, notwithstanding its remedial nature, the Securities Act should be construed strictly, since its violation is a crime. The Court answered, "Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature."²⁰ Moreover, in explain-

¹⁴474 F.2d at 481-82.

¹⁵*Id.* at 482.

¹⁶*Id.* The district court's phrasing of the test is similar, but is set in terms of the relevancy of the efforts. "In applying the Supreme Court's definition of an investment contract . . . the efforts of others which are relevant for purposes of the definition are those essential managerial efforts which affect the failure or success of the enterprise." 348 F. Supp. at 775.

¹⁷320 U.S. 344 (1943).

¹⁸389 U.S. 332 (1967).

¹⁹320 U.S. at 346. "The exploration enterprise was woven into these leaseholds, in both an economic and a legal sense; the undertaking to drill a well runs through the whole transaction as the thread on which everybody's beads were strung." *Id.* at 348. Furthermore, the fraud found by the trial court, though not material to the question of security *vel non*, involved the location of the leased properties in respect to the test well. *Id.* at 347 n.4.

²⁰*Id.* at 354. Legislative intent as expressed by the 1933 Act is "[T]o provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." Securities Act of 1933, ch. 38, Preamble, 48 Stat. 74. In addition, House of Representatives' Report No. 85 states that

ing the proper construction of the terms in section 2(1) of the 1933 Act,²¹ the Court emphasized that "the reach of the Act does not stop with the obvious and commonplace."²²

In *Tcherepnin*, the Court found a withdrawable capital share in an Illinois savings and loan association to be a security under the Securities Exchange Act of 1934.²³ Pointing out that remedial legislation, such as the 1934 Act, "should be construed broadly to effectuate its purposes,"²⁴ the Court continued, "One of the Act's central purposes is to protect investors through the requirement of full disclosure by issuers of securities. . . ."²⁵ Furthermore, in striving to determine the meaning of the word "security" for the purposes of the securities laws "form should be disregarded for substance and the emphasis should be on economic reality."²⁶

The leading case defining an "investment contract" is *SEC v. W.J. Howey Co.*²⁷ Two transactions were involved in *Howey*: first, the sale of Florida orange grove acreage and, secondly, the sale of service contracts for the cultivation of the purchased property.²⁸ Noting that the investors were by and large non-resident professional people,²⁹ Justice Murphy, speaking for the Court, found that the transactions were securities.³⁰ Though the term "investment contract" was undefined by the

one of the aims of the 1933 legislation is "that the persons, whether they be directors, experts, or underwriters, who sponsor the investment of other people's money should be held up to the high standards of trusteeship." H.R. REP. NO. 85, 73d Cong., 1st Sess. 3 (1933).

²¹See note 2 *supra*.

²²320 U.S. at 351.

Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as a matter of fact that they are widely offered or dealt in under terms or courses of dealing which established their character in commerce as "investment contracts," or as "any interest or instrument commonly known as a 'security'."

Id.

²³389 U.S. at 345.

²⁴*Id.* at 336.

²⁵*Id.*

²⁶*Id.*

²⁷328 U.S. 293 (1946).

²⁸*Id.* at 295. The W.J. Howey Company sold the land, and Howey-in-the-Hills Service, Inc. cultivated and cared for the acreage thus sold, if such services were desired by the purchaser. Both corporations, however, shared the same offices, utilized the same personnel, and were under direct common control. *SEC v. W.J. Howey Co.*, 60 F. Supp. 440, 441 (S.D. Fla. 1945).

²⁹328 U.S. at 296. These investors did not possess the requisite skills or equipment for the care and cultivation of citrus groves. "They [were] attracted by the expectation of substantial profits."

Id.

³⁰*Id.* at 299.

Thus all the elements of a profit-seeking business venture are present here. The

1933 Act, he determined that at the time of the enactment, the meaning had been crystallized by state court decisions under the "blue sky" laws.³¹ It was "therefore reasonable to attach that meaning to the term as used by Congress, especially since such a definition is consistent with the statutory aims."³² The meaning thus derived was stated as follows:

[A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.³³

The Court of Appeals for the Fifth Circuit,³⁴ though agreeing with the SEC that securities law coverage extended to established businesses, had viewed the non-speculative character of the Howey enterprises as controlling.³⁵ This evaluation of the risk of the particular enterprise was viewed as apposite to the determination of "the critical question, whether in fact the purchase was of a specific thing having specific value in itself or was of a thing having no value unless the enterprise as a whole should succeed."³⁶ The Supreme Court disagreed with this approach saying, "[I]t is immaterial whether the enterprise is speculative or non-speculative or whether there is a sale of property with or without intrinsic value. . . . The statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae."³⁷

investors provide the capital and share in the earnings and profits; the promoters manage, control and operate the enterprise. It follows that the arrangements whereby the investors' interests are made manifest involve investment contracts, regardless of the legal terminology in which such contracts are clothed.

Id. at 300.

³¹*Id.* at 298. See, e.g., *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 177 N.W. 937 (1920), where the court, finding a security under the state law, said, "The placing of capital or laying out of money in a way intended to secure income or profit from its employment is an 'investment' as that word is commonly known and understood." *Id.* at 56, 177 N.W. at 938. The North Carolina Supreme Court applied the above quoted statement from *State v. Gopher Tire & Rubber Co.* in *State v. Heath*, 199 N.C. 135, 153 S.E. 855 (1930), and found no security saying, "[The investor] was to get his income from the gross amount received for his individual service . . ." *Id.* at 139, 153 S.E. at 858.

³²293 U.S. at 298.

³³*Id.* at 298-99.

³⁴*SEC v. W.J. Howey Co.*, 151 F.2d 714 (5th Cir. 1945).

³⁵*Id.* at 717. "But it may not be doubted that in close cases, like Joiner's was, the fact that an activity is purely promotional and speculative does have weight. . . ." *Id.*

³⁶*Id.*

³⁷293 U.S. at 301.

The *Howey* test has been applied without deviation by many federal courts to varying situations: brokerage discretionary accounts,³⁸ franchise agreements,³⁹ contracts for the purchase and raising of beaver,⁴⁰ and distributorship agreements.⁴¹

In *State v. Hawaii Market Center, Inc.*,⁴² the Hawaiian court determined that the transactions of a corporation employing a pyramid-sales scheme similar to that of *Dare to Be Great*⁴³ were securities. The promoter desired to open a retail store selling merchandise only to possessors of special authorization cards. Each investor (founder-member) in the enterprise was to receive a commission on future retail sales to persons to whom that founder-member had given authorization cards. In addition, the investor was to receive a fee for recruiting others into the organization.⁴⁴

The State urged a liberal interpretation of the *Howey* test and contended that the efforts expected of the investors were minimal in nature and that "the founders are substantially dependent upon the management of the corporation for a successful return on their invest-

³⁸*E.g.*, *Berman v. Dean Witter & Co.*, 353 F. Supp. 669 (C.D. Cal. 1973) (investment contract; broker was to make all investment decisions); *Berman v. Orimex Trading, Inc.*, 291 F. Supp. 701 (S.D.N.Y. 1968) (no investment contract; plaintiff was to make investment decisions).

³⁹*E.g.*, *Beefy Trail, Inc. v. Beefy King Int'l, Inc.*, 348 F. Supp. 799 (M.D. Fla. 1972) (no investment contract; investor realized success of business depended on his own efforts); *Huberman v. Denny's Restaurants, Inc.*, 337 F. Supp. 1249 (N.D. Cal. 1972) (investment contract; purchase agreement for property included provision that the rent paid by the lessee, in whose operation investor did not participate, was to be determined in part from lessee's profits).

⁴⁰*E.g.*, *Kemmerer v. Weaver*, 445 F.2d 76 (7th Cir. 1971) (investment contract; defendants provided everything necessary to profit); *Continental Marketing Corp. v. SEC*, 387 F.2d 466 (10th Cir. 1967), *cert. denied*, 391 U.S. 905 (1968) (investment contract; after buying beaver and paying ranching fee, investor did nothing more).

⁴¹*E.g.*, *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635 (9th Cir. 1969) (no investment contract; both agreement and brochure demonstrated that scheme relied on efforts of the investor); *United States v. Herr*, 338 F.2d 607 (7th Cir. 1964) (investment contract; profit was anticipated whether investors participated actively or inactively).

⁴²52 Hawaii 642, 485 P.2d 105 (1971).

⁴³The Hawaii Market Center and Dare-type plans are both discussed by the Securities Exchange Commission under the topic "Multilevel Distributorships." SEC Securities Act of 1933 Release No. 5211, Securities Exchange Act of 1934 Release No. 3387 (November 24, 1971), reproduced in 1971-72 CCH FED. SEC. L. REP. ¶ 78,446 [hereinafter cited as SEC Release].

⁴⁴52 Hawaii at 643-44, 485 P.2d at 107. To become a founder-member at the distributor level, the investor executed a founder-member contract and purchased for \$320.00 merchandise with a wholesale value of \$70.00. To enter the organization at the supervisor level, the investor executed the contract, and purchased for \$820.00 merchandise with a wholesale value of \$140.00. A supervisor earned higher fees and commissions than a distributor and also received override commissions when his distributors were successful. *Id.*

ment."⁴⁵ The court, however, declined to base its decision on the *Howey* test opining that *Howey* had "led courts to analyse investment projects mechanically, based on a narrow concept of investor participation"⁴⁶ rather than on a sounder concept focusing on the economic realities of a security.⁴⁷ The court determined that the basic economic reality of a security was the "subjection of the investor's money to the risks of an enterprise over which he exercises no managerial control."⁴⁸

Following this basic precept, the court posited a new definition, saying:

[A]n investment contract is created whenever:

- (1) An offeree furnishes initial value to an offeror, and
- (2) a portion of this initial value is subjected to the risks of the enterprise, and
- (3) the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise, and
- (4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.⁴⁹

The court viewed the initial value as being subjected to the risks of the enterprise⁵⁰ for two reasons. First, the recruitment fee was based

⁴⁵*Id.* at 646, 485 P.2d at 108. This is the general approach advocated in SEC Release.

⁴⁶52 Hawaii at 647, 485 P.2d at 108.

⁴⁷*Id.*, 485 P.2d at 109.

⁴⁸*Id.* at 648, 485 P.2d at 109. This concept was advanced by Professor Coffey. *See* Coffey, *supra* note 5, at 412.

⁴⁹52 Hawaii at 649, 485 P.2d at 109. As the court acknowledges, this new test is essentially the same as that proposed by Professor Coffey. *Id.* at 648 n.5, 485 P.2d at 109 n.5; *see* Coffey, *supra* note 5, at 377. There are two principle distinctions. First, Professor Coffey delineates the various ways in which the investor's initial value can be subjected to the risks of the enterprise, i.e., proprietary interest in the enterprise; creditor's claims against the enterprise; recommitment of property to use or control by the enterprise; value paid in recognition of anticipated, but, as yet unrealized, success of the enterprise; and a conditional right to receive payments. *Id.* at 377, 384-96. Secondly, while the court emphasizes "the right to exercise practical and actual control over the managerial decisions of the enterprise," 52 Hawaii at 648-49, 651-52, 485 P.2d at 109, 111, Professor Coffey characterizes investor participation as follows: "[A]t the time of the transaction, the buyer is not familiar with the operations of the enterprise or does not receive the right to participate in the management of the enterprise." Coffey, *supra* note 5, at 377.

⁵⁰The leading case advocating this risk analysis to the question of security *vel non* is *Silver Hills Country Club v. Sobieski*, 55 Cal. 2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961). *Silver Hills* involved the sale of memberships in a nascent country club. The memberships granted the purchaser and his immediate family the use of club facilities, but no right "in the income or assets of the club." *Id.* at 813, 361 P.2d at 907, 13 Cal. Rptr. at 187. Justice Traynor, in finding a security,

largely on the ability of the promoter to convince prospective founder-members of the probable success of the venture.⁵¹ Secondly, noting that the organization membership was limited to five thousand persons and, also, that memberships would increase geometrically, the court reasoned, "[A] very large percentage of founder-members [would] be totally dependent on sales commissions to recover their initial investment plus income."⁵² The fact that the inducements leading to the investments were based on fixed returns rather than a share in profits was termed irrelevant. The court indicated that "[t]he unwary investor lured by promises of fixed fees deserves the same protection as a participant in a profit sharing plan."⁵³

Finally, investor participation in *Hawaii Market Center* was seen as being minor and certainly not rising to the required level of managerial control.⁵⁴ The reason for requiring practical and actual control was that such control would have given the investor the ability and opportunity to safeguard his investment "thus obviating the need for state intervention."⁵⁵

Though the *Glenn Turner* case does change the traditional test for an investment contract, it seems, nevertheless, to adhere closely to the avowed policies underlying judicial interpretation of the federal securities laws.⁵⁶ This confluence is clearly shown by contrasting *Glenn Turner* with *SEC v. Koscot Interplanetary, Inc.*,⁵⁷ in which, on facts paralleling

focused on protection for those who risk their capital "in legitimate ventures whether or not they expect a return on their capital in one form or another." *Id.* at 815, 361 P.2d at 908-09, 13 Cal. Rptr. at 188.

⁵¹*Id.* Hawaii at 650, 485 P.2d at 110.

⁵²*Id.*

⁵³*Id.* at 651, 485 P.2d at 110. The Securities Exchange Commission advocates basically the same position, saying, "Nor is it significant that the return promised for the use of an investor's money may be something other than a share of the profits of the enterprise." SEC Release at 80,975; *cf.* *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967); *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959); *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943); see text accompanying notes 78-83 *infra*.

⁵⁴52 Hawaii at 651-52, 485 P.2d at 111. Again, the SEC is in substantial agreement with the Hawaiian court. The Commission believes that investor efforts, though financially significant and contributing to the enterprise's success, may nevertheless be irrelevant "if the investor does not control the use of his funds to a significant degree." SEC Release at 80,975. Furthermore, the SEC construes the reference to "efforts of others" in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946), as limited "to those types of essential managerial efforts but for which the anticipated return could not be produced." SEC Release at 80,975.

⁵⁵52 Hawaii at 652, 485 P.2d at 111. The court adds that the focus should be "on the quality of the participation." *Id.*

⁵⁶These policies are discussed in the text accompanying notes 17-26 *supra*.

⁵⁷CCH FED. SEC.L. REP. ¶ 93, 960 (N.D. Ga. April 19, 1973).

those in *Glenn Turner*, a federal district court found no investment contract. Koscot, a sister corporation of Dare to Be Great, Inc. in the parent organization of Glenn W. Turner Enterprises, Inc.,⁵⁸ was technically in the business of marketing a line of cosmetics. As with Dare, however, the real attraction to investors was the potential profit to be derived from the successful recruitment of others into the organization through the use of high-pressure sales methods.⁵⁹

In spite of its characterization of the Koscot pyramid sales plan as a "get-rich-quick scheme in the worst sense,"⁶⁰ the court refused to accept the invitation extended by the *Glenn Turner* case. Two distinct bases for the adherence to the strict "solely" standard were presented: first, the *Koscot* court viewed the *Glenn Turner* holding as "a new, different and more expansive standard in light of . . . binding higher court decisions;"⁶¹ secondly, the efforts of the investors were not viewed as token, but rather as fundamental and substantial ones without which "distributors cannot expect any money from Koscot."⁶²

The portrayal of the *Glenn Turner* holding as "new, different and more expansive" presents a point of sharp distinction with the Ninth Circuit view that the holding does not "represent any real departure from the Supreme Court's definition of an investment contract as set out in *Howey*."⁶³ This distinction comes into clearer focus if one credits the premise that the definition of a security should be keyed to economic realities.⁶⁴ While the district court in *Koscot* made what might be interpreted as a standard reference to the remedial nature of the legislation and the need to focus *supra* on economic realities,⁶⁵ the Ninth Circuit and the

⁵⁸*Franchise Symposium, Dare to be Great, Inc.: A Case Study of Pyramid Sales Plan Regulation*, 33 OHIO ST. L.J. 676, 677, 694 n.57 (1972).

⁵⁹CCH FED. SEC. L. REP. ¶ 93,960 at 93,845. For a full explanation of the business methods of Koscot, see *Koscot Interplanetary, Inc. v. King*, 452 S.W.2d 531 (Tex. Civ. App. 1970).

⁶⁰CCH FED. SEC. L. REP. ¶ 93,960 at 93,845.

⁶¹*Id.* at 93,846. In addition, Chief Judge Smith, in *Koscot*, indicated that regulation of franchises generally under the securities laws required a definite broadening in the scope of the legislation. *Id.* at 93,848 n.1. In *Cobb v. Network Cinema Corp.*, 339 F. Supp. 95, 98 n.1 (N.D. Ga. 1972) (opinion by Smith, C.J.) he said that such broadening "should originate with the Congress."

⁶²CCH FED. SEC. L. REP. ¶ 93,960 at 93,846.

⁶³474 F.2d at 483. One writer feels that the *Howey* Court did not intend the literal meaning to attach to the word "solely." As support, he asserts that the factual situation in *Howey* happened to provide a situation which facilitates attachment of the literal meaning and cites *Blackwell v. Bentsen*, 203 F.2d 690 (5th Cir. 1953), *cert. dismissed*, 347 U.S. 925 (1954); *Coleman, supra* note 5, at 503-04; see note 76 *infra*.

⁶⁴See *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *Coffey, supra* note 5, at 376-77; see text accompanying note 26 *supra*.

⁶⁵See, e.g., *Mitzner v. Cardet Int'l, Inc.*, 358 F. Supp. 1262, 1265 (N.D. Ill. 1973); *Wicboldt*

Oregon district court actually reasoned from these philosophical underpinnings. For instance, Judge Skopil, at the district level in *Glenn Turner*, asserted that it was not clear that the *Howey* definition was intended to be applied as a "litmus test," and continued,

A narrow focus on this particular locution seems anomalous for the court has already said . . . that liberal and broad interpretations [of the statutes] are required in order to carry out the intent of Congress. From this flows the court's stress on the economic realities behind transactions, on substance rather than form.⁶⁶

The Ninth Circuit reinforces this emphasis on the substance of the transaction and economic realities in its careful scrutiny of the efforts required of both parties by the Dare scheme. In return for investment of his money, his time and effort to find and induce prospects to attend meetings, and the cost of an affluent appearance,⁶⁷ the investor-purchaser receives a share in the proceeds of the selling efforts of the Dare organization which the court views as "the *sine qua non* of the scheme; those efforts are what keeps it going; those efforts are what produces the money which is to make him rich."⁶⁸

The *Koscot* court indicated that, if the efforts of the investors there had been "token," the scheme might have fallen within the traditional definition of an investment contract.⁶⁹ The *Glenn Turner* court, on the other hand, would not find a security if the investors contributed "essential managerial efforts."⁷⁰ The controversy thus centers in the middle ground of "fundamental and substantial efforts" not rising to the level of control. Why does the presence of such efforts serve to remove the transaction from the watchful eye and the swift hand of securities regulation? Traditionally, the active investor has been thought to have less

v. Metz, 355 F. Supp. 255, 256-57 (S.D.N.Y. 1973); *Mr. Steak, Inc. v. River City Steak, Inc.*, 324 F. Supp. 640, 641-42 (D. Colo. 1970), *aff'd*, 460 F.2d 666 (10th Cir. 1972).

⁶⁶348 F. Supp. at 774; *accord*, *Nash & Assoc., Inc. v. Lum's of Ohio, Inc.*, 484 F.2d 392 (6th Cir. 1973); *Lino v. City Investing Co.*, CCH FED. SEC. L. REP. ¶ 94,124 (3d Cir. Aug. 20, 1973).

⁶⁷474 F.2d at 482. "The 'salesman' is . . . told that to maximize his chances of success he should impart an aura of affluence, whether spurious or not. . . . He is told to 'fake it 'til you make it,'" *Id.* at 480.

⁶⁸*Id.* at 482.

⁶⁹CCH FED. SEC. L. REP. ¶ 93,960 at 93,846.

⁷⁰474 F.2d at 482, 483; *cf. Romney v. Richard Prows, Inc.*, 289 F. Supp. 313 (D. Utah 1968), cited with approval by the *Glenn Turner* district court, 348 F. Supp. at 775, where a determination of no investment contract resulted from a finding that the parties were engaged in "a joint venture, each to contribute substantial services or capital or both in furtherance of the venture . . . the success of which depended to an important degree upon [the investor's] services and activity in the venture." 289 F. Supp. at 315.

need for the protections provided by the federal securities laws since, by virtue of his non-monetary involvement in the enterprise, he should be in a better position than the passive investor to protect his own investment.⁷¹ This superiority, though, is only present in relation to the passive investor. When compared to the investor who exercises essential managerial efforts, the active investor is seen as dependent on the success of the promoter; in other words, effective control is in the promoter.⁷² This dependency or lack of effective control has been viewed as crucial in determining the existence of an investment contract.⁷³

The essential managerial_efforts approach of the *Glenn Turner* court would seem to look not at how much effort is required of the investor, but rather at what kind of effort is required.⁷⁴ In the opinion of some commentators this emphasis on the quality of investor participation is essential in light of the economic realities of security transactions.⁷⁵ One commentator even indicates that, in spite of the gloss later decisions have given the *Howey* test, the *Howey* court may have intended that the analysis should be of the quality of investor participation rather than of the amount.⁷⁶ From the standpoint of investor protection, such a qualitative approach seems appropriate since an investor with

⁷¹*Cf.* *Mr. Steak, Inc. v. River City Steak, Inc.*, 324 F. Supp. 640 (D. Colo. 1970), *aff'd*, 460 F.2d 666 (1972). In *Mr. Steak*, the franchise agreement provided that the franchisor would have significant control over the franchisee's receipts and operations. *Id.* at 643-44. It was contemplated that the franchisee "would play an active, if severely circumscribed, role in the conduct of the restaurant." *Id.* at 645. The franchisee's active participation and his status as an informed investor were factors prompting the court to a finding of no security. *Id.* See also Coleman, *supra* note 5, at 503-04.

⁷²See Coffey, *supra* note 5, at 396; Note, 61 GEO. L.J., *supra* note 5, at 1279-80.

⁷³*Mitzner v. Cardet Int'l, Inc.*, 358 F. Supp. 1262 (N.D. Ill. 1973); *Polikoff v. Levy*, 55 Ill. App. 2d 229, 204 N.E.2d 807, *cert. denied*, 382 U.S. 903 (1965); *State v. Silberberg*, 166 Ohio St. 101, 139 N.E.2d 342 (1956); see Long, *supra* note 5, at 170-74.

⁷⁴This qualitative approach bears striking similarity to a part of the definition of an investment contract formulated in *State v. Hawaii Market Center, Inc.*, 52 Hawaii 642, 649, 652, 485 P.2d 105, 109, 111 (1971); see text accompanying note 49 *supra*.

⁷⁵Goodwin, *supra* note 5, at 1318-19; Long, *supra* note 5, at 170-72; cf. Note, 61 GEO. L.J., *supra* note 5, at 1279-80, 1286-87.

⁷⁶See Long, *supra* note 5, at 144-46, where Professor Long says, "[I]f the [*Howey*] test is followed literally, all the *Howey* Company would have had to do would be to require the investor to pick a single orange." *Id.* at 145. In advocating lack of direct control as a factor militating for a finding of a security, Long points out significant language in the *Howey* opinion, quoting as follows: "'A common enterprise managed by respondents or third-parties with adequate personnel and equipment is therefore essential if the investors are to achieve their paramount aim of return on their investments. . . . Thus all the elements of a profit-seeking business venture are present here. The investor provides the capital and shares in the earnings and profits; the promoters manage, control and operate the enterprise.'" *Id.* at 176 (emphasis by Long), quoting SEC v. W.J. Howey Co., 328 U.S. 293, 300 (1946).

actual control can be "the master of his own destiny"⁷⁷ thus obviating the need for the protection provided by the federal securities laws.

Notwithstanding the appropriateness of the *Glenn Turner* approach; the failure of the Ninth Circuit Court to explore the possible inadequacy of the *Howey* test's insistence on an expectation of profits⁷⁸ warrants comment. The risk capital approach enunciated by Justice Traynor in *Silver Hills County Club v. Sobieski*⁷⁹ and amplified by *State v. Hawaii Market Center, Inc.*⁸⁰ provides what some consider to be a more satisfactory approach⁸¹ and one in which the controlling efforts analysis forms a part.⁸² The federal courts, however, seem content to restrict application of the risk capital analysis to those "situations where exceptionally high risk speculative franchises are involved."⁸³

The *Glen Turner* court's change in the traditional test is best viewed as a step along the road to a test fully consistent with the economic realities of a security. Although the court only went as far as the facts presented necessitated, its analysis of investor participation should be appreciated and its fealty to basic policy considerations commended.

DAVID R. FRANKSTONE

⁷⁷*Mitzner v. Cardet Int'l, Inc.*, 358 F. Supp. 1262 (N.D. Ill. 1973).

⁷⁸328 U.S. at 298, 301.

⁷⁹55 Cal. 2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961); see note 50 *supra*.

⁸⁰52 Hawaii 642, 485 P.2d 105 (1971); see text accompanying notes 42-55 *supra*.

⁸¹*Coffey, supra* note 5, at 374-76, 395-96; Long, *supra* note 5, at 167-70.

⁸²See, e.g., *Wieboldt v. Metz*, 355 F. Supp. 255, 258-61 (S.D.N.Y. 1973). The controversy in *Wieboldt* involved a contract entitling the investor to operate a Simplified Business And Tax Center. Conceding that he had no investment contract under the traditional test, *Wieboldt* urged the adoption of a risk capital approach to the definition of an investment contract. *Id.* at 258. Speaking to the element of control, the court said:

[I]t is only necessary that the franchisee exercise policy-making power over his unit of the enterprise. . . . Only franchise agreements, like those found in *Turner*, which give the franchisee no meaningful control over his own enterprise (or, of course, that of the franchisor) should be considered investment contracts within this interpretation of the "risk capital" approach.

Id. at 260.

⁸³*Mr. Steak, Inc. v. River City Steak, Inc.*, 324 F. Supp. 640, 647 (D. Colo. 1970), *aff'd*, 460 F.2d 666 (1972); accord, *Wieboldt v. Metz*, 355 F. Supp. 255, 260 (S.D.N.Y. 1973). This limitation, perhaps, stems from a reluctance on the part of the federal courts to provide for regulation of all franchises, see Note, 61 GEO. L.J., *supra* note 5, at 1287. The position that franchises should come within the purview of the securities laws is argued by Goodwin, *supra* note 5, who sees a need for availability of the anti-fraud provisions (especially 10b-5) which can, with appropriate legislation, be made available without the necessity of registration and the concomitant harassment of the legitimate franchisor. *Id.* at 1321.

