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DISCRETIONARY TRADING ACCOUNTS AS SECURITIES: *HOWEY* REVISITED

I. INTRODUCTION

The unprecedented popularity of commodities futures trading¹ in the 1970's² brought with it a new investment vehicle that proved to be ripe for controversy under the federal securities laws. Investors in commodities futures began to use a trading medium known as a discretionary trading account. Such an arrangement exists when an investor deposits funds with a broker, entrusting him with total discretion to make all investment decisions. Although aggrieved commodities futures investors are free to seek redress under the Commodity Exchange Act of 1936, as amended by the Commodity Futures Trading Commission Act of 1974,³ many injured investors, viewing those remedies as inadequate, seek the protection of the Securities Act of 1933⁴ and the Securities Exchange Act of 1934.⁵ In order to avail themselves of the

1. For an overview of commodities futures trading, see Note, *The Role of the Commodity Futures Trading Commission Under the Commodity Futures Trading Commission Act of 1974*, 73 MICH. L. REV. 710, 711-15 (1975).

2. In 1960, 8.168 million futures contracts were traded, involving \$54.7 billion. By 1973, the commodity exchanges recorded 51.6 million futures transactions, valued at \$520 billion. See *Hearings on S. No. 2485 Before the Senate Comm. on Agriculture & Forestry*, 93d Cong., 2d Sess. 540, 543-46 (1974). In 1977, total trading volume was estimated at 42.09 million contracts, with a value of \$1.1 trillion. S. REP. NO. 850, 95th Cong., 2d Sess. 1, 13 (1978).

3. 7 U.S.C. §§ 1-22 (1976 & Supp. III 1979). The Commodity Exchange Act (CEA) contains a broad prohibition against cheating, defrauding, deceiving, or making false reports or statements in connection with the sale of commodities for future delivery. *Id.* §§ 4b, 6b. The Commodity Futures Trading Commission (CFTC) has regulatory authority over all commodities except onions, *id.* § 2, and is empowered to bring actions in federal court to enjoin violations of the Act. *Id.* § 13a-1.

There are several provisions which serve to protect those engaged in discretionary agreements. Commodity firms are required to provide supervision over all discretionary trades, 17 C.F.R. § 166.3 (1980), and written confirmation to clients of all trades. *Id.* § 1.33. Most importantly, commodity brokers are required to furnish investors with risk disclosure statements explaining the risk of loss inherent in futures trading. *Id.* § 1.55.

4. 15 U.S.C. §§ 77a-77aa (1976).

5. *Id.* §§ 78a-78hh. Under the federal securities laws, an investor may recover the value of his investment merely by showing that the broker failed to register the account as required by section 5 of the Act, *id.* § 77e. See, e.g., *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 99 (7th Cir. 1977) (plaintiff claimed full reimbursement on the ground that his discretionary trading account was an unregistered security).

In addition, the history of private rights of action is well established under the securities laws, whereas under the commodities laws it is a subject of some controversy. See generally Bromberg, *Commodities Law And Securities Law—Overlap and Presumptions*, 1 J. CORP. L. 217, 288-96 (1976). For a general overview of the current status of implied private rights of action see Com-

protections offered in the federal securities laws, however, investors must first prove that their transactions fall within the statutory definition of security.⁶

II. DEFINING THE ISSUE

Courts have repeatedly held that commodity futures contracts are not securities⁷ and there is no question about the status of such contracts. The important controversy concerns the standing of a discretionary account as a security.

Congress intended to eliminate exploitation of the investing public by fashioning a definition of security that would be broad enough to include the many types of commercial instruments and investment schemes that would come into existence and might fall within the ordinary concept of a security.⁸ Thus the focus of any inquiry should be on whether the investment vehicle itself, a discretionary trading account,

ment, *Confusing Signals from the Burger Court: Judicial Refinement of Private Causes of Action*, 16 TULSA L.J. 91 (1980).

6. 15 U.S.C. § 77b(1) (1976).

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, pre-organization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Id.

Section 3(c)(10) of the Securities Exchange Act of 1974, 15 U.S.C. § 78c(a)(10) (1976), provides a similar definition of security.

[A]ny note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing

Id. The Supreme Court has held that the two definitions are "virtually identical." *Tcherepnin v. Knight*, 389 U.S. 332, 342 (1967).

7. *See, e.g.*, *Moody v. Bache & Co.*, 570 F.2d 523, 525-26 (5th Cir. 1978); *SEC v. Commod. Options Int'l, Inc.*, 553 F.2d 628, 632 (9th Cir. 1977); *Milnarik v. M-S Commod. Inc.*, 457 F.2d 274, 275 n.1 (7th Cir. 1972); *Berman v. Dean Witter & Co.*, 353 F. Supp. 669, 671 (C.D. Cal. 1973); *Sinva, Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 253 F. Supp. 359, 365-67 (S.D.N.Y. 1966).

8. *See* H.R. REP. NO. 85, 73d Cong., 1st Sess. 11 (1933). *See also* *SEC v. W. J. Howey Co.*, 328 U.S. 293, 299 (1946). The definition of security "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Id.* For an expression of the purposes of the Securities Act of 1933, *see Senate Committee on Banking & Currency*, S. REP. NO. 47, 73d Cong., 1st Sess. 1 (1933).

fits the existing definition of a security under the federal laws.⁹ That a particular discretionary trading account happens to involve commodities futures contracts should not be a factor in a court's decision on the threshold definition issue.

The securities laws should not be construed to exclude discretionary trading accounts in commodities futures solely because of the protections already available under the commodities laws.¹⁰ Nor should the securities laws be broadened to include discretionary trading accounts solely in response to a view that the commodities investor is not sufficiently protected under the applicable laws.¹¹ The policy considerations involved in determining whether a discretionary trading account in commodities futures *should* be a security is a question best suited for the legislature.¹² The sole issue facing the courts should be limited to whether a discretionary trading account, regardless of its underlying subject, meets the existing test for identifying a security under the federal laws.¹³

III. THE CONTROVERSY

Attempts to invoke the federal securities laws center around that part of the statutory definition of security which is termed "investment contract."¹⁴ Although the term is found within the definition, the courts have been responsible for giving it meaning.¹⁵ That task was undertaken by the Supreme Court in the landmark case of *SEC v. W. J. Howey Co.*¹⁶ The Court developed a three-prong test requiring an

9. See note 6 *supra*.

10. See note 3 *supra*.

11. See note 5 *supra*.

12. For an overview of the policy considerations germane to this issue, see Bromberg, *supra* note 5, at 225-26; Moreno, *Discretionary Accounts*, 32 *MIAMI L. REV.* 401, 411-14 (1977).

13. As stated in *Forman v. Community Serv., Inc.*, 366 F. Supp. 1117 (S.D.N.Y. 1973), *rev'd*, 500 F.2d 1246 (2d Cir. 1974), "the question before this Court is not whether the plaintiffs *should* be protected; rather, the question is whether or not they *are* protected by the federal securities laws." 366 F. Supp. at 1125.

14. See note 6 *supra*.

15. In adopting the term "investment contract" in § 2(1) of the Securities Act of 1933, Congress was merely following the example of many state "blue sky" laws which had included the term in an effort to fully protect the public in transactions which strayed from the traditional forms of a security. *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298 (1946).

16. 328 U.S. 293 (1946). The Supreme Court in *Howey* relied on the Minnesota case of *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 177 N.W. 937 (1920), a case involving the sale of securities without a license in violation of the Minnesota Blue Sky Law. 1919 Minn. Laws, ch. 105 (current version at MINN. STAT. §§ 80A.01-31 (1979 & Supp. 1981)). The court summarized that act as follows:

All persons, firms, and corporations are prohibited from engaging, within this state, in the business of selling or negotiating for the sale of any stocks, bonds, *investment con-*

investment of money, a common enterprise, and an expectation of profits to come solely from the efforts of others¹⁷ before an investment contract could be found to exist. That the *Howey* test is still recognized as the definitive approach to analyzing investment contracts is evidenced by the two recent Supreme Court decisions addressing that issue, *International Brotherhood of Teamsters v. Daniel*¹⁸ and *United Housing Foundation, Inc. v. Forman*.¹⁹

In the typical discretionary arrangement, whereby an investor deposits funds with a broker and authorizes the broker to exercise full discretion over the investment decisions, the first and third elements of the *Howey* test are easily met. By its very nature, such a discretionary agreement involves an investor placing funds in the hands of the broker on whom he relies to achieve a profit.²⁰ Satisfaction of the common enterprise element, however, has been open to considerable dispute among the lower courts, since the *Howey* opinion failed to supply guidelines for identifying the existence of a common enterprise.

tracts, or others securities issued by him or it, except securities specifically enumerated in section 2 of the act. No investment company or dealer shall sell or offer for sale, or profess the business of selling or offering for sale, securities coming within the scope of the act, unless and until he or it shall have furnished to the state securities commission information touching the honesty, good faith, and character of the business of the company or dealer, and shall have obtained from the commission a license to sell securities. Violation of any of the provisions of the act is made a gross misdemeanor.

146 Minn. at 56, 177 N.W. at 938 (emphasis added).

Gopher Tire was the first case to consider the term "investment contract," defining it as "[t]he placing of capital or laying out of money in a way intended to secure income or profit from its employment." *Id.*

17. 328 U.S. at 301. "[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. . . ." *Id.*

18. 439 U.S. 551 (1979).

19. 421 U.S. 837 (1975). Both *Forman* and *Daniel* used the three-prong *Howey* test to determine whether shares of common stock in a cooperative housing corporation and a compulsory, non-contributory pension plan, respectively, are investment contract securities. A long line of cases preceding *Forman* and *Daniel* evidence the fact that the *Howey* test is used by the majority of courts faced with such an issue. *See, e.g.*, *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96 (7th Cir. 1977); *Hector v. Wiens*, 533 F.2d 429 (9th Cir. 1976); *SEC v. Continental Commod. Corp.*, 497 F.2d 516 (5th Cir. 1974); *Milnarik v. M-S Commod., Inc.*, 457 F.2d 274 (7th Cir. 1972); *Continental Marketing Corp. v. SEC*, 387 F.2d 466 (10th Cir. 1967).

Some state courts have replaced *Howey* with a new test. Under the risk capital theory, the definition turns on who bears the risk of loss and who manages the business. *See, e.g.*, *Silver Hills Country Club v. Sobieski*, 55 Cal. 2d 811, 13 Cal. Rptr. 186, 361 P.2d 906 (1961); *State v. Hawaii Mkt. Center, Inc.*, 52 Hawaii 642, 485 P.2d 105 (1971). Under such an approach, a discretionary trading account would almost certainly be a security. The investor bears the risk of loss and the broker controls the business. Although the risk-capital theory has been used since 1961, federal courts have continued to follow *Howey*. Furthermore, the Supreme Court failed to acknowledge the risk-capital theory in its recent determination of the investment contract issue in *Forman* and *Daniel*.

20. *See, e.g.*, *Brodt v. Bache & Co.*, 595 F.2d 459, 460 (9th Cir. 1978).

A. *Horizontal Commonality*

Some courts have adopted a restrictive approach to the common enterprise element. Known as horizontal commonality, this approach focuses on the relationship among the investors and requires a pooling of funds among investors before the requisite commonality can be met.²¹ The leading proponent of the horizontal approach to commonality is the Seventh Circuit Court of Appeals. That court first addressed the issue in 1972 in *Milnarik v. M-S Commodities, Inc.*,²² holding that the discretionary commodities trading account lacked the commonality required by the *Howey* investment contract test.

The court found that even though the broker entered into similar discretionary arrangements with customers other than the plaintiff, the success or failure of those other accounts had no direct impact on the profitability of the plaintiff's account. On that basis the court held that the various customers were not joint participants in a common investment enterprise.²³ The author of the opinion, Judge Stevens, now sitting on the Supreme Court bench, went on to describe the relationship between investor and broker as that of an agency for hire.

No matter how many different persons [defendant] became an agent for under similar or even identical discretionary accounts, his relationship with each would remain as that of agent and principal. Each contract creating this relationship is unitary in nature and each will be a success or failure without regard to the others.²⁴

Five years later the Seventh Circuit was again confronted with a discretionary trading account. In *Hirk v. Agri-Research Council, Inc.*²⁵ the court reaffirmed its narrow interpretation of the common enterprise element. In holding that the discretionary trading account at issue was not a security, the court focused on the lack of ties among the investors. Relying on *Milnarik*, the opinion stressed the necessity of a pooling of funds.²⁶ The court further strengthened its conviction by stating that constructively similar treatment of individual accounts is not sufficient

21. *See, e.g.*, *Curran v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216 (6th Cir. 1980); *Commercial Iron & Metal Co. v. Bache & Co.*, 478 F.2d 39 (10th Cir. 1973); *Wasnowic v. Chicago Bd. of Trade*, 352 F. Supp. 1066 (M.D. Pa. 1972), *aff'd mem.*, 491 F.2d 752 (3d Cir. 1973).

22. 457 F.2d 274 (7th Cir.), *cert. denied*, 409 U.S. 887 (1972).

23. 457 F.2d at 277.

24. *Id.* at 278.

25. 561 F.2d 96 (7th Cir. 1977).

26. *Id.* at 101. "It is apparent then that this Court's decision in *Milnarik* was based on the assumption that a sharing or pooling of funds is required by *Howey*, and we are unwilling to overrule that determination." *Id.*

to meet the pooling requirement of the common enterprise element.²⁷

The Third Circuit adopted the reasoning and conclusion of the Seventh Circuit in a case substantially similar to *Hirk* and *Milnarik*. In *Wasnowic v. Chicago Board of Trade*,²⁸ the court relied on the absence of a pooling of funds among investors and a pro-rata distribution of profits to find that the discretionary trading account failed the commonality test of an investment contract security.²⁹

B. Vertical Commonality

Not all courts have viewed the common enterprise element in such a restrictive light. The earliest cases involving a discretionary trading account in commodity futures held that pooling of investors' funds is not a necessary element of an investment security.³⁰ These decisions led to a more flexible interpretation of the common enterprise requirement, the theory of vertical commonality. This approach focuses on the relationship between investor and promoter ignoring the absence of multiple investors, pooling of resources, and sharing of profits.

The line of cases adopting this view of commonality³¹ rely on a Ninth Circuit definition of common enterprise. In *SEC v. Glenn W. Turner Enterprises, Inc.*,³² a common enterprise is defined as "one in which the fortunes of the investor are interwoven with and dependent

27. *Id.* The court stated that treating the accounts "as if commingled" was not the same as an actual pooling of investors' funds.

28. 352 F. Supp. 1066 (M.D. Pa 1972), *aff'd mem.*, 491 F.2d 752 (3d Cir. 1973).

29. 352 F. Supp. at 1069.

As in *Milnarik*, nothing in the instant complaint suggests the type of common enterprise or pooling of funds for a common purpose required to convert the discretionary account . . . into a statutory security. . . . Although, as in *Milnarik*, it is alleged that [the broker] had opened similar accounts with numerous customers, no claim is made that a joint enterprise existed comprised of a group of investors holding discretionary accounts with him. Indeed, the opposite appears to be the case. At various parts in the complaint, plaintiffs allege that [the broker] violated his duty to segregate and separately account for the funds in plaintiffs' account from other discretionary accounts. . . . Thus, it is clear that plaintiffs did not enter into discretionary trading agreements with [the broker] with the understanding that their customers would share ratably in the profits. Without the presence of this element of the *Howey* test, plaintiffs' individual discretionary trading account with [the broker] cannot be considered as a security within the meaning of the Securities laws.

Id.

30. See, e.g., *Berman v. Orimex Trading, Inc.*, 291 F. Supp. 701 (S.D.N.Y. 1968); *Maheu v. Reynolds & Co.*, 282 F. Supp. 423 (S.D.N.Y. 1967). See also *Anderson v. du Pont & Co.*, 281 F. Supp. 705 (D. Minn. 1968) (arrangements similar to discretionary accounts involving trading on the commodities market found to be investment contract securities).

31. See, e.g., *SEC v. Continental Commod. Corp.*, 497 F.2d 516 (5th Cir. 1974); *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974); *Jones v. Int'l Inventors, Inc.*, 429 F. Supp. 119 (N.D. Ga. 1976).

32. 474 F.2d 476 (9th Cir.), *cert. denied*, 414 U.S. 82 (1973).

upon the efforts and success of those seeking the investment of third parties."³³ This definition is found in a footnote to the court's opinion, accompanied by no further elaboration. The court in *Turner* was presented not with a discretionary trading account in commodities futures, but with a pyramid selling scheme in which each participant makes money by recruiting new investors to enter the program.³⁴ The court's emphasis in *Turner* was not on the common enterprise element of the *Howey* test. The essence of *Turner* was its treatment of the third element of *Howey* and its holding regarding that issue.

Nevertheless, the definition was adopted by later courts³⁵ and used as support for the proposition that investor dependence on the expertise of the promoter is the critical factor in determining the existence of a common enterprise.³⁶ Under the vertical approach to commonality, the *Howey* investment contract test can be satisfied without pooling or profit sharing, as long as the investor's reliance upon the efforts of the promoter is of critical importance to the success of the venture.³⁷

One commentator recognized that under this view, the common enterprise element of the *Howey* test appears to merge with the reliance element of the test, thus creating, by a de facto elimination of one of the elements, a two-prong *Howey* test.³⁸ This seeming infidelity to *Howey* troubles at least one commentator who sees the next step in the erosion of the *Howey* test as diminishing the degree of dependence required under the third element.³⁹ Another problem with this approach is that such an interpretation presupposes the idea that the common enterprise element of the test is mere surplusage and need not be treated as a

33. *Id.* at 482 n.7.

34. See generally Note, *Pyramid Schemes: Dare to be Regulated*, 61 GEO. L.J. 1257 (1973).

35. See, e.g., *Hector v. Weins*, 533 F.2d 429 (9th Cir. 1976); *SEC v. Continental Commod. Corp.*, 497 F.2d 516 (5th Cir. 1974); *El Khadem v. Equity Sec. Corp.*, 494 F.2d 1224 (9th Cir.), cert. denied, 419 U.S. 900 (1974).

36. 497 F.2d at 522. "[T]he critical inquiry is confined to whether the fortuity of the investments collectively is essentially dependent upon promoter expertise." *Id.*

37. See, e.g., *Marshall v. Lamson Bros.*, 368 F. Supp. 486 (S.D. Iowa 1974) (a single investor and broker can satisfy the common enterprise element).

38. Bonnett, *How Common Is a "Common Enterprise"?*, 1974 ARIZ. ST. L. J. 339, 365-66. Bonnett approves of such a merging:

[I]t seems sufficient to recommend that courts confronted with common enterprise arguments should avoid a dogmatic four-part checklist approach to the necessary factual analysis. If the other parts of the *Howey* test are present, the lack of a "common enterprise" should rarely defeat the finding of an investment contract.

Id. at 366. Bonnett characterizes *Howey* as a four-part test: (1) investment of money (2) in a common enterprise (3) with the expectation of profits (4) solely from the efforts of the promoter or a third party. *Id.* at 341.

39. Bromberg, *supra* note 5, at 255.

distinct element. It can be argued that the Supreme Court would not have fashioned a three-prong test if it intended to require satisfaction of only two of the elements.

IV. RETURN TO *HOWEY*

Not only did the Supreme Court fail to offer a definition of common enterprise in *Howey*, it also declined to state exactly what relationship in the *Howey* case comprised the common enterprise element of its newly enunciated test. It is unclear what relationship the Court looked to in finding the requisite commonality: that of the individual investors, that of each investor with the promoter, or that of the investors as a whole with the promoter. Commentators turn to the facts of *Howey* for an insight on the answer to that question.⁴⁰

In *Howey*, prospective investors were offered the opportunity to purchase units of a citrus grove development owned by the W. J. Howey Company. These potential investors were primarily tourists and vacationers who were not engaged in the citrus business, but rather were induced to invest their money upon the expectation of substantial profits. In addition to the land sales contract, each individual was offered a service contract with Howey-in-the-Hills Service, Inc. The service contract gave Howey-in-the-Hills a leasehold interest in the property, along with full discretion and authority over the cultivation, harvesting, and marketing of the citrus crops in return for a specified fee plus the cost of labor and materials used in servicing that purchaser's acreage.⁴¹ Investors were advised that ownership of a tract would not be profitable without accompanying arrangements for service of the grove, although purchasers were free to engage service corporations other than Howey-in-the-Hills.⁴²

The District Court⁴³ and the Court of Appeals⁴⁴ denied plaintiffs protection under the federal securities laws, interpreting the case as involving separate transactions consisting of no more than a sale of real estate and an agreement by the seller to manage the property for the buyer.⁴⁵ The Supreme Court disagreed, emphasizing the fact that the

40. See, e.g., Bonnett, *supra* note 38, at 346-362; 43 Mo. L. REV. 779, 781-85 (1978).

41. 328 U.S. at 296.

42. 85% of the acreage sold during the three-year period ending May 31, 1943 was covered by service contracts with Howey-in-the-Hills. *Id.* at 295.

43. SEC v. W. J. Howey Co., 60 F. Supp. 440 (S.D. Fla. 1945).

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

45. The district judge "correctly concluded that the facts so strongly relied on by the plaintiff . . . could not convert what was in law and in fact the purchase in fee simple of a designated and

individual tracts were not separately fenced or otherwise significantly distinguished. It further emphasized that individual development of the land would seldom be economically feasible.⁴⁶

In deciding that the sales and service contracts taken together are an investment contract security, the Court concentrated on what the defendant was actually offering: an opportunity to contribute money and to share in the profits of a large citrus fruit operation without individual management and development efforts.⁴⁷ The opinion referred only once to a common enterprise. "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 a return on their investments."⁴⁸

Yet what is the "common enterprise" to which the Court alludes? Emphasis was definitely given to the relationship between the investors and the promoter of the venture. The individuals provided the capital and the promoter provided the management, control and operation of the enterprise. It would appear that neither the investor nor the promoter could prosper without the other, thus giving credence to the *Turner* definition.⁴⁹

The Court also alluded to the success of the plan being dependent upon its exercise as a full scale operation. Profits are substantial because a large amount of capital, derived from several investors, is available to pay for uniform services to be rendered to uniform units together comprising a large citrus grove development.⁵⁰ One commentator viewed "the overall undertaking," the business of growing and selling citrus fruit, as the enterprise to which the Court referred.⁵¹ Such an analysis would support the conclusion that a common enterprise refers to the relationship between a group of investors who have combined capital in order to support a large business undertaking and the promoter. In that light, a mere showing of reliance between a single investor and broker would hardly be in keeping with the enterprise found in *Howey*.

described grove, and the making of a separate contract for servicing it, into the purchase of a security. . . ." *Id.* at 717.

46. 328 U.S. at 300. "Such tracts gain utility as citrus groves only when cultivated and developed as component parts of a larger area." *Id.*

47. *Id.* at 299.

48. *Id.* at 300.

49. See text accompanying notes 32-33 *supra*.

50. See note 46 *supra*.

51. Bonnett, *supra* note 38, at 348.

In recognition of the fact that *Howey* provides us with little more than the notion that the basis of the investment contract must be a speculative profit-seeking business venture, commentators have turned to the authorities⁵² cited in *Howey* as a source of information on what factors are necessary to find a common enterprise.⁵³ They conclude that in none of those cases was a pooling of funds or profit-sharing arrangement a significant factor in determining the existence of an investment contract.⁵⁴ Their theory, then, is that since the Supreme Court relied on those cases in deciding *Howey* and formulating its investment contract test, the Court could not have intended that its definition be dependent upon such restrictive factors.⁵⁵

It is conceded that the *Howey* Court intended its definition of investment contract to be flexible. The Court stressed that its test "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."⁵⁶ Given the language, it seems unlikely that the Court intended that the existence of an investment contract be determined by the number of investors, which is substantially what the theory of horizontal commonality⁵⁷ reduces to.

In *Howey*, the Court was not fooled by the fact that each investor

52. See notes 53-54 *infra*.

53. See Bonnett, *supra* note 38, at 351-52; Note, *Discretionary Commodity Accounts as "Securities": Applying the Howey Investment Contract Test to a New Investment Medium*, 67 GEO. L. J. 269, 282-90 (1978) [hereinafter cited as *Discretionary Accounts*]. Both commentators conduct their discussion according to a breakdown of the state and federal authorities relied on in *Howey*.

54. The underpinnings of the Supreme Court's definition of investment contract indicate that the Court did not intend to require a pooling of investors' funds by using the phrase "common enterprise." The state cases cited by the Court in *Howey* support a broader reading of the term Finally, several of the federal cases relied on by the Supreme Court found investment contracts in schemes without a pooling of investors' funds.

Discretionary Accounts, *supra* note 53, at 290. See, e.g., *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 177 N.W. 937 (1920). Although the facts show that investors' funds were pooled and profits paid out pro rata, the court's holding contained no reference to those facts as germane to its finding an investment contract. The Supreme Court also relied on *Prohaska v. Hemmer-Miller Dev. Co.*, 256 Ill. App. 331 (1930), in which a single contract for one tract of land was at issue. Even in the apparent absence of multiple investors, the court found an investment contract to exist. *Accord*, *People v. White*, 124 Cal. App. 548, 12 P.2d 1078 (1932). But the *Howey* court also relied on *Penfield Co. v. SEC*, 143 F.2d 746 (9th Cir. 1944), in which the Court of Appeals supported its holding that an investment contract existed with an emphasis on pooling and profit-sharing. *But see* *SEC v. Payne*, 35 F. Supp. 873 (S.D.N.Y. 1940), in which the District Court's holding seemed to indicate an investment contract could be based on either vertical or horizontal commonality.

55. *E.g.*, Bonnett, *supra* note 38, at 356-62.

56. 328 U.S. at 299. "[T]he statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae." *Id.* at 301.

57. See text accompanying notes 21-29 *supra*.

purchased an individual tract of land and was given an individual land sales contract and warranty deed. The Court looked to the "substance" of the enterprise and based its decision on the economic reality of the situation.⁵⁸ According to the Court, the fortunes of the investors and the promoter-manager were interwoven so that neither would achieve profits without the contribution of the other. Thus a lack of horizontal commonality in the case of a single investor should not be used to defeat the finding of an investment contract if the other elements are present. Yet that determination is not sufficient to conclude that a discretionary trading account possesses the requisite commonality. There is still the matter of whether *vertical* commonality is found in discretionary trading accounts and, if so, whether such a finding brings those transactions within the realm of the securities laws.

A recent Ninth Circuit Court of Appeals case considered that very issue and answered it in the negative. In *Brodt v. Bache & Co.*,⁵⁹ the Ninth Circuit Court of Appeals relied on its own definition of common enterprise⁶⁰ to find that under vertical commonality no common enterprise existed between the investor and the broker.⁶¹ The court emphasized the fact that there was no direct correlation between the success or failure of the broker and the brokerage firm and the profit or loss of the individual investor.⁶² The court concluded that "[m]erely furnishing investment counsel to another for a commission, even when done by way of a discretionary commodities account, does not amount to a common enterprise."⁶³

V. CONCLUSION

Howey clearly stood for the proposition that in order to be an

58. Just as the Supreme Court stated in *Tcherepnin v. Knight*, 389 U.S. 332 (1967), in searching for the meaning and scope of the word security, form should be disregarded for substance and the emphasis should be on the economic reality of the situation. *Id.* at 336.

59. 595 F.2d 459 (9th Cir. 1978).

60. See text accompanying notes 32-33 *supra*.

61. Our definition rejects any requirement of horizontal commonality in favor of requiring only *vertical* commonality The concept of vertical commonality requires that the investor and the promoter be involved in some common venture without mandating that other investors also be involved in that venture Our case comes to this. Using the classic definition of *Howey*, there existed an "investment" by the appellant, the profits from which were "to come solely from the efforts of others." The investment, however, was not in a "common enterprise." It was in commodities futures. Appellant's enterprise was a "solitary" one.

595 F.2d at 461-62.

62. *Id.* at 461.

63. *Id.* at 462.

investment contract, there must be a relationship between investor and promoter whereby the two share a common interest in the underlying scheme in addition to the investor's reliance upon the expertise of the promoter. In the typical discretionary arrangement, the investor and broker share no common bond other than that of a customer's belief that the company he has chosen will perform its services well. The broker normally receives a flat commission regardless of the success or failure of the individual's account.⁶⁴

It was the Ninth Circuit Court of Appeals that promulgated the definition of common enterprise requiring that the fortunes of the investor and the promoter be interwoven.⁶⁵ The same court recently utilized that analysis in *Brodt v. Bache & Co.*⁶⁶ to find that no such relationship existed between an investor and a broker under a discretionary trading account arrangement, and thus that an investment contract did not exist.⁶⁷ A discretionary trading account fails the existing test for an investment contract security because it lacks the necessary element of a common enterprise. Therefore, aggrieved investors using such an account as an investment vehicle should be unable to invoke the federal securities laws through the investment contract provision.⁶⁸

64. In fact, exchange rules prohibit brokers from sharing in the profits or losses of their customers. See Moreno, *supra* note 12, at 404 n.17.

65. See notes 32-33 *supra* and accompanying text.

66. 595 F.2d 459 (1978).

67. Note that a discretionary trading account *may* be a security if the investor and broker agree to enter into a profit-sharing agreement whereby the broker is compensated by a share of the profits. Section 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1) (1976), and Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10) (1976), include such an arrangement in their respective definitions of security as "an interest in any profit-sharing agreement." See, e.g., SEC v. Wickham, 12 F. Supp. 245 (D. Minn. 1935) (profits to be shared 60-40 between broker and investor). See also Moreno, *supra* note 12, at 403-04.

68. The narrowness of this conclusion should be noted. The fact that injured speculators in discretionary accounts are unable to receive federal statutory protection under the investment contract provision of the securities laws in no way leaves them without a route to remedy. Commodities investors, the class most likely to use discretionary trading accounts, still enjoy federal protection under the federal commodities laws. 7 U.S.C. §§ 1-22 (1976).

Investors can always look to state blue sky laws, although they may find themselves faced with similar issues. Thirty-four jurisdictions have now adopted the Uniform Securities Act in a substantially similar form. ALA. CODE §§ 8-6-1 to -33 (1975); ALASKA STAT. §§ 45.55.010-.270 (1980); ARK. STAT. ANN. §§ 67-1235 to -1263 (1959); COLO. REV. STAT. §§ 11-51-101 to -129 (1973); CONN. GEN. STAT. ANN. §§ 36-470 to -502 (West 1977); D.C. CODE ENCYCL. §§ 2-2401 to -2418 (West 1964); HAWAII REV. STAT. §§ 485-1 to -25 (1957); IDAHO CODE §§ 30-1401 to -1462 (1980); IND. CODE §§ 23-2-1-1 to -24 (1976); IOWA CODE §§ 502.101-.614 (1975); KAN. STAT. ANN. §§ 17-1252 to -1275 (1975); KY. REV. STAT. §§ 292.310-.550, .991 (1970); MD. CORP. & ASS'NS CODE ANN. §§ 11-101 to -805 (1975); MASS. GEN. LAWS ANN. ch. 110A, §§ 101-417 (West 1972); MICH. COMP. LAWS §§ 451.501-.818 (1970); MINN. STAT. §§ 80A.01-.31 (1979 & Supp. 1981); MO. ANN. STAT. §§ 409.101-.418 (Vernon 1968); MONT. REV. CODES ANN. §§ 15-2001 to -2025 (1961); NEB. REV. STAT. §§ 8-1101 to -1124 (Supp. 1965); NEV. REV. STAT. §§ 90.010-.210

The conclusion reached above is not to stand for the proposition (a) that Congress cannot revise the definition of security to include discretionary trading accounts; or (b) that the Supreme Court cannot revise the *Howey* investment contract test by eliminating the common enterprise element; or (c) that the Supreme Court or Congress cannot offer a definition of common enterprise. Any of the above would serve to eliminate the confusion and hopefully end the existing controversy. Resolution of this issue is inevitable, as the amount of futures trading continues to increase with discretionary trading accounts as the prominent investment vehicle.

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(1963); N.J. REV. STAT. §§ 49:3-47 to -76 (Supp. 1980); N.M. COMP. STAT. §§ 58-13-1 to -47 (1978); N.C. GEN. STAT. §§ 78A-1 to -65 (1975); OKLA. STAT. tit. 71, §§ 101-504 (1971); OR. REV. STAT. §§ 59.005-.995 (1975); 70 PA. CONS. STAT. §§ 1-101 to -704 (1980); P.R. LAWS ANN. tit 10 §§ 851-895 (1963); S.C. CODE §§ 35-1-10 to -1590 (1976); UTAH CODE ANN. §§ 61-1-1 to -30 (Supp. 1980); VA. CODE §§ 13.1-501 to -527.3 (1956); WASH. REV. CODE §§ 21.20.005-.940 (1974); W. VA. CODE §§ 32-1-101 to -4-418 (1974); WIS. STAT. §§ 551.01-.69 (1979); WYO. STAT. §§ 17-4-101 to -129 (1977).

The definition of security in the Uniform Securities Act is based on that offered in the federal securities acts. Thus an investor would have to get past the initial hurdle of defining a discretionary account as a security under state law as well.

The fact that attempts to invoke protection under both state and federal securities laws have centered on the investment contract phrase does not preclude an investor from focusing on another part of the definition, such as "profit-sharing agreement." See note 67 *supra*.

Also available to the aggrieved investor are the common law actions based on fraud, misrepresentation, and breach of contract. The main disadvantage of such an approach is the lack of uniformity among the fifty states. Although recovery in such actions is not as certain as under statutory law, the potential damages are equally as great.