

RECENT DEVELOPMENTS

SECURITIES LAW—STOCK UNDER THE DEFINITION OF SECURITIES—ADOPTION OF A REBUTTABLE PRESUMPTION THAT STOCK USED TO ACQUIRE GREATER THAN FIFTY PERCENT INTEREST IN A CORPORATION IS NOT A SECURITY AS DEFINED BY THE SECURITIES ACTS. *Sutter v. Groen*, 687 F.2d 197 (7th Cir. 1982). The seventy percent shareholder of Happy Radio, Inc.¹ sued the sellers of Bret Broadcasting Corporation, alleging that the defendants overstated the corporation's earnings which induced Happy Radio's purchase of one hundred percent of Bret Broadcasting's stock and the plaintiff's purchase of a controlling interest in Happy Radio at inflated prices.² The plaintiff alleged that the misrepresentation of corporate earnings violated the federal securities laws.³ The defendant moved to dismiss the federal claims, asserting that neither the plaintiff's purchase of seventy percent of Happy Radio stock nor Happy Radio's acquisition of one hundred percent of Bret Broadcasting stock involved the purchase of a security.⁴

1. Happy Radio was the acquiring corporation. Aside from capital contributed by its shareholders, Happy Radio, Inc.'s only asset was a contract for the purchase of the stock of Bret Broadcasting from the defendants. *Sutter v. Groen*, 687 F.2d 197, 198 (7th Cir. 1982). The defendant challenged the plaintiff's standing under rule 10b-5, 17 C.F.R. § 240.10b-5 (1982), because his purchase of Happy Radio occurred after Happy Radio entered the agreement with the defendants. The court left this issue as well as a determination of whether the plaintiff's action should have been brought derivatively for the district court to consider on remand. *Id.* at 203-04.

2. 687 F.2d at 198.

3. Count I of the complaint alleged that the defendants violated rule 10b-5, 17 C.F.R. § 240.10b-5 (1982), which prohibits the use of manipulative and deceptive devices "in connection with the purchase or sale of any security." 687 F.2d at 199. *See* 15 U.S.C. § 78j(b) (1976). *See also* The Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1976) [hereinafter referred to as Securities Act]; The Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976) [hereinafter referred to as Exchange Act]. "Securities Acts" is used throughout to refer to both Acts generally. *See generally* Corporation of Foreign Bondholders Act of 1933, 15 U.S.C. §§ 77bb-77mm (1976); Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbb (1976); Investment Advisors Act of 1940, 15 U.S.C. §§ 80b-1 to -21 (1976); Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to -52 (1976); Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa-78lll (1976).

Count II alleged that the defendants violated state tort law. The plaintiffs brought this count under the doctrine of pendant jurisdiction. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). 687 F.2d at 199. For a discussion of state securities laws, see *infra* notes 14-15.

4. 687 F.2d at 199. *See supra* note 3 and *infra* notes 19-27, 30-53 and accompanying text. The Securities Act of 1933 defines a security as follows:

When used in this subchapter, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable

The trial court dismissed the plaintiff's complaint.⁵ Vacating the district court's dismissal,⁶ the Seventh Circuit *held*: the sale of business doctrine⁷ applies to determine whether the transfer of one hundred per-

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 participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. § 77b(1) (1976).

Similarly, section 3 of the Securities Exchange Act of 1934 provides,

When used in this chapter, unless the context otherwise requires—

• • • • •
 (10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

15 U.S.C. § 78c(a)(10) (1976).

The courts have construed these provisions, despite their dissimilarity, as equivalents. *See, e.g.*, *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 847 n.12 (1975); *Tcherepnin v. Knight*, 389 U.S. 332, 336, 342 (1967); *Coffin v. Polishing Machs., Inc.*, 596 F.2d 1202, 1204 (4th Cir. 1979), *cert. denied*, 444 U.S. 868 (1979); *United Cal. Bank v. THC Fin. Corp.*, 557 F.2d 1351, 1356 (9th Cir. 1977); *Miffin Energy Sources, Inc. v. Brooks*, 501 F. Supp. 334, 335 (W.D. Pa. 1980); *Hannan & Thomas, The Importance of Economic Reality and Risk in Defining Federal Securities*, 25 *HASTINGS L.J.* 219, 221-23 n.13 (1974).

See also Public Utility Holding Company Act of 1935, 15 U.S.C. § 79b(a)(16) (1976); Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(36) (1976); Investment Advisers Act of 1940, 15 U.S.C. § 80b-2(a)(18) (1976); The Trust Indenture Act of 1939, 15 U.S.C. § 77ccc(1) (1976); ALI FED. SEC. CODE § 201(a) (1980).

5. The circuit court was uncertain about the extent of the trial court's dismissal and issued an order asking for clarification. Only Count I was dismissed and certified for appeal. 687 F.2d at 199.

6. *Id.* at 204.

7. The "sale of business" doctrine is a particularized application of the economic realities approach under the *Howey* test. *See infra* notes 11-34 and accompanying text. The doctrine's first appearance, in *Chandler v. Kew, Inc.*, 691 F.2d 443 (10th Cir. 1977), consisted solely of a conclusory statement that "[t]he economic realities of the case at bar show that the plaintiff was buying a liquor store and, incidentally as an indicia of ownership, was receiving 100% of the stock of the company which owned the store." *Id.* at 96,054. The only authority cited for this position was *United Hous. Found., Inc. v. Forman*, 421 U.S. 837 (1975). *Id.* For a discussion of the Supreme Court's analysis in *Forman*, *see infra* notes 18-27 and accompanying text. The number of cases adopting the "sale of business" doctrine has grown steadily. *See Sutter v. Groen*, 687 F.2d 210 (7th Cir. 1982); *Canfield v. Rapp & Son, Inc.*, 654 F.2d 459 (7th Cir. 1981); *Frederiksen v. Poloway*, 637 F.2d 1147 (7th Cir. 1981), *cert. denied*, 101 S. Ct. 3006 (1981); *Reprosystem v. SCM Corp.*, 522 F. Supp. 1257 (S.D.N.Y. 1981); *Golden v. Garafalo*, 521 F. Supp. 350 (S.D.N.Y. 1981), *rev'd*, 678 F.2d 1139 (2d Cir. 1982); *Zilker v. Klien*, 510 F. Supp. 1070 (N.D. Ill. 1981); *Anchor-*

cent of a corporation's stock constitutes a transaction in securities covered by the federal securities laws.⁸ Furthermore, a rebuttable presumption arises that stock is acquired for other than an investment purpose when greater than fifty percent of a corporation's stock is purchased.⁹

The Supreme Court on several occasions has attempted to define the limits of the terms constituting securities in the federal securities laws.¹⁰ In *SEC v. W.J. Howey Co.*,¹¹ the Court first articulated a definition of the term "investment contract"¹² found in the Securities Acts.¹³ Examining the state court interpretations of the term, as used in blue sky laws,¹⁴ and the legislative intent of the Securities Acts,¹⁵ the Court held

Darling Indus., Inc. v. Suozzo, 510 F. Supp. 659 (E.D. Pa. 1981); *Barsy v. Verin*, 508 F. Supp. 952 (N.D. Ill. 1981); *Dueker v. Turner*, [1979-80 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,386 (N.D. Ga. 1979); *Bula v. Mansfield*, 1979 FED. SEC. L. REP. (CCH) ¶ 96,964 (D. Colo. 1977). See also Seldin, *When Stock Is Not a Security: The "Sale of Business" Doctrine under the Federal Securities Laws*, 37 BUS. LAW. 637, 642-62 (1982); Thompson, *The Shrinking Definition of a Security: Why Purchasing All of a Company's Stock Is Not a Federal Security Transaction*, 57 N.Y.U. L. REV. 225, 236-52 (1982). See *infra* notes 30-34 and accompanying text.

8. 687 F.2d at 202. See *infra* notes 30-34 & 42 and accompanying text.

9. 687 F.2d at 203. See *infra* notes 43, 50-53 and accompanying text. The court remanded the case to the district court to afford the plaintiff an opportunity to demonstrate that he, in fact, had an investment purpose. *Id.*

10. See *Marine Bank v. Weaver*, 102 S. Ct. 1220 (1982); *International Bhd. of Teamsters v. Daniels*, 439 U.S. 551 (1979); *United Hous. Found., Inc. v. Forman*, 421 U.S. 837 (1975); *Tcherpnin v. Knight*, 389 U.S. 332 (1967); *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. W.J. Howey Co.*, 328 U.S. 293 (1946); *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943).

11. 328 U.S. 293 (1946).

12. Specifically, the issue before the Court in *Howey* was whether an interest in a citrus grove resulting from a transaction involving a land sales contract, a warranty deed, and a service contract was an "investment contract" and, therefore, a security subject to registration, see 15 U.S.C. § 77e (1976), under The Securities Act. 328 U.S. at 297. An earlier Supreme Court decision addressed the definition of security under the Securities Act as well. See *SEC v. C.M. Joiner Corp.*, 320 U.S. 344 (1943) (assignments of oil leases are securities). See *infra* notes 14 & 15 and accompanying text.

13. See *supra* note 4.

14. 328 U.S. at 298. The Court stated:

The term "investment contract" is undefined by the Securities Act or by relevant legislative reports. But the term was common in many state "blue sky" laws in existence prior to adoption of the federal statute and, although the term was also undefined by state laws, it had been broadly construed by state courts so as to afford the investing public a full measure of protection. Form was disregarded for substance and emphasis was placed on economic reality. An *investment contract* thus came to mean a contract or scheme for "the placing of capital or laying out of money in a way intended to secure income or profit from its employment."

Id. (emphasis added) (quoting *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 56, 177 N.W. 937, 938 (1920)). Interestingly, the certificate that was found to be a security in *Gopher Tire*

that an investment contract is an "investment of money in a common enterprise with profits to come solely from the efforts of others."¹⁶

Adopting the expansive reading of the catch-all language of the definitions articulated in *Howey*, the Court in subsequent decisions broadened the applicability of the federal securities laws to encompass unconventional investment schemes.¹⁷ In *United Housing Foundation*,

required the investors to participate in the enterprise. 146 Minn. at 54, 177 N.W. at 937. See Long, *An Attempt to Return "Investment Contracts" to the Mainstream of Securities Regulation*, 24 OKLA. L. REV. 135, 146-47 (1971). See also *infra* note 38.

15. 328 U.S. at 298-99. The Court found that Congress, in including investment contract in the § 2(1) definition of security, looked to the state court decisions that had "crystallized" its meaning. *Id.* at 298. This crystallized definition, the Court stated,

permits the fulfillment of the statutory purpose of compelling full and fair disclosure relative to the issuance of "the many types of instruments that in our commercial world fall within the ordinary concept of a security." . . . It embodies a flexible rather than a static principle, one that is capable of adaption 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. at 299 (citation omitted), quoting H.R. REP. NO. 85, 73d Cong., 1st Sess. 11 (1933), reprinted in 2 J. ELLENBERGER & E. MAHAR, LEGISLATIVE HISTORY OF SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 item 18, at 11 (1973).

16. 328 U.S. at 301. The Court elaborated, "The statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae." *Id.*, quoted in *Tcherepnin v. Knight*, 389 U.S. 332, 338 (1967).

The *Howey* test purports to examine the economic characteristics of the interest and, as a result, is frequently referred to as the economic realities test. Even when limited to defining investment contracts the *Howey* test has not been without its detractors. For example, in a leading article Professor Joseph Long wrote:

Justice Murphy was in error when he claimed to be restating a definition which had received universal acceptance by prior cases and the effect of the *Howey* case was to perpetuate a test which was misleading and did not accurately reflect the policy behind securities regulation. What makes the *Howey* test even more tragic is the ill-chosen language used to frame the test and the fact that the test is totally unnecessary to the disposition of the case.

Long, *supra* note 14, at 177.

17. See *Tcherepnin v. Knight*, 389 U.S. 332 (1967); *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967); *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959).

Prior to *Forman* the Court used the *Howey* test expansively so as to afford a federal remedy when none would otherwise be available. See, e.g., 389 U.S. at 338. The focus of the test inexplicably changed in *Tcherepnin*: "[I]n searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality." *Id.* at 336 (citing 328 U.S. at 298) (emphasis added). The Court's use of the economic realities approach in *Howey*, however, only applied to investment contracts. See 328 U.S. at 298-301. Indeed, *Howey* acknowledged that "investment contract" and "any interest or instrument commonly known as a 'security'" were terms that required a treatment different from that to be given the other interests enumerated in the statutes. *Id.* at 297.

The Court in *Forman*, however, adopted *Tcherepnin's* imprecise paraphrase of *Howey* and held that the economic realities test applies to the definition of "security" in general. 421 U.S. at 848. Thus, no reason has ever been given for applying this phrase to securities as a generic term includ-

Inc. v. Forman,¹⁸ the Court looked to the *Howey* decision for guidance in determining whether an interest in a cooperative housing project labelled "stock" constituted a security.¹⁹ The Court held that, despite the specific mention of the term "stock," the interest did not fall within the meaning of security under federal law, for two reasons.²⁰

First, while admitting that Congress intended a broad gloss to be placed on the definition of security,²¹ Justice Powell, writing for the majority, rejected a literal interpretation of section 2(1) of the Securities Act and refused to find that the definitions encompass "any . . . stock."²² Instead, the Court reasoned that the parties' interest in the cooperative housing project did not possess any of the characteristics typically attributed to stock: The right (1) to receive dividends contingent upon an apportionment of profits, (2) to alienate the stock freely, (3) to pledge or hypothecate the interest, (4) to vote on corporate matters in proportion to the number of shares owned, (5) to share in the appreciation of the underlying assets.²³

ing "stock." Yet, several lower courts have readily used the *Howey* test to narrow the definition of "security." See, e.g., *Frederiksen v. Poloway*, 637 F.2d 1147, 1151 (7th Cir. 1981), *cert. denied*, 101 S. Ct. 3006 (1981); *infra* notes 30-34 and accompanying text.

18. 421 U.S. 837 (1975).

19. See *id.* at 842, 848.

20. *Id.* at 859-60. See *supra* note 4; *infra* notes 21-27 and accompanying text.

21. 421 U.S. at 847-48. See *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("[W]e are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes."); *SEC v. Capital Gains Res. Bureau, Inc.*, 375 U.S. 180, 195 (1963) (federal securities legislation should not be construed "technically and restrictively, but flexibly to effectuate its remedial purpose."). See also *Titsch Printing, Inc. v. Hastings*, 456 F. Supp. 445, 449 (D. Colo. 1978). See generally Long, *supra* note 14, at 135.

22. 421 U.S. at 848.

23. *Id.* at 851.

In holding that the name given to an instrument is not dispositive, we do not suggest that the name is wholly irrelevant to the decision whether it is a security. There may be occasions when the use of a traditional name such as "stocks" or "bonds" will lead to purchaser justifiably to assume that the federal securities laws apply. *This would clearly be the case when the underlying transaction embodies some of the significant characteristics typically associated with the named instrument.*

Id. (emphasis added). See *Seagrave Corp. v. Vista Resources, Inc.*, 696 F.2d 227, 230 (2d Cir. 1982); *Mifflin Energy Sources, Inc. v. Brooks*, 501 F. Supp. 334, 335 (W.D. Pa. 1980); *Titsch Printing Inc. v. Hastings*, 456 F. Supp. 445, 447-48 (D. Colo. 1978); *Bronstein v. Bronstein*, 407 F. Supp. 925, 928-29 (E.D. Pa. 1976). See *infra* notes 37-40, 56-57 and accompanying text. Because the common characteristics test requires inquiry beyond labels it is a more rigorous test than that which looks no further than the face of the definition.

Several lower courts have expressly rejected the common characteristics test before applying the *Howey* test. See *Frederiksen v. Poloway*, 637 F.2d 1147 (7th Cir.), *cert. denied*, 101 S. Ct. 3006 (1981); *Anchor-Darling Indus., Inc. v. Suozzo*, 510 F. Supp. 659 (E.D. Pa. 1981); *Dueker v. Tur-*

Second, the Court applied the *Howey* test to the interest in the cooperative housing project.²⁴ The Court found that the promise of inexpensive housing rather than the hope of investment returns motivated the buyers in purchasing the interest.²⁵ Therefore, the "economic realities" of the transaction did not involve an investment purpose, and the

ner, [1979-80 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,386 (N.D. Ga. 1979); *Bula v. Mansfield*, 1979 FED. SEC. L. REP. (CCH) ¶ 96,964 (D. Colo. 1977).

Apparently, these courts would apply the common characteristics tests if the party can show that his reliance on such characteristics induced him to enter the transaction. *See, e.g.*, 510 F. Supp. at 666 quoting *McAneny, Acquisition of Businesses Through Purchases of Corporate Stock: An Argument for Exclusion From Federal Securities Regulation*, 8 FLA. ST. U.L. REV. 295, 316 (1980). The theory that reliance on common characteristics might constitute an exception when the *Howey* test, *see supra* note 16 and accompanying text, otherwise would be applied derives from the statement in *Forman* that "[t]here may be occasions when the use of a traditional name such as 'stocks' or 'bonds' will lead a purchaser justifiably to assume that the federal securities laws apply." 421 U.S. at 850. Because we are concerned, however, with transactions that involve corporate stock, which comes within the literal meaning of the statute, the better argument would be that the Securities Acts apply unless the common characteristics test is rebutted. *But see* *McAneny, supra* at 316-17.

24. 421 U.S. at 851-85.

25. 421 U.S. at 851. The Court applied an economic realities test. *See supra* note 16. In discussing the *Howey* test, the Supreme Court stated in *Forman* that,

By profits, the Court has meant either capital appreciation resulting from the development of the initial investment . . . or a participation in earnings resulting from the use of investor's funds. . . . In such cases the investor is "attracted solely by the prospects of a return" on his investment. . . . By contrast, when a purchaser is motivated by a desire to use or consume the item purchased . . . the securities laws do not apply.

421 U.S. at 852-53. This investment/commercial or investor/entrepreneur dichotomy first appeared in cases inquiring into the Securities Act's applicability to promissory notes. *See, e.g.*, *Baurer v. The Planning Group, Inc.*, [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,365 (D.C.D.C. Dec. 4, 1981); *Emisco Indus., Inc. v. Pro's Inc.*, 543 F.2d 38 (7th Cir. 1976); *C.N.S. Enters., Inc. v. G. & G. Enters., Inc.*, 508 F.2d 1354 (7th Cir.), *cert. denied*, 423 U.S. 825 (1975); *Zabriski v. Lewis*, 507 F.2d 546 (10th Cir. 1974); *McClure v. First Nat'l Bank*, 497 F.2d 490 (5th Cir. 1974), *cert. denied*, 420 U.S. 930 (1975); *Bellah v. First Nat'l Bank*, 495 F.2d 1109 (5th Cir. 1974); *Lino v. City Investing Co.*, 487 F.2d 689 (3d Cir. 1973); *Sanders v. John Nuveen & Co.*, 463 F.2d 1075 (7th Cir.), *cert. denied*, 409 U.S. 1009 (1972); *Movielab, Inc. v. Berkey Photo, Inc.*, 452 F.2d 662 (2d Cir. 1971). *See also* A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 119-25 (1939). *But see* *Lehigh Valley Trust Co. v. Central Nat'l Bank*, 409 F.2d 989 (5th Cir. 1969). *See generally* Newton, *What Is a Security?: A Critical Analysis*, 48 MISS. L.J. 167 (1977); Comment, *Bank Loan Participations as Securities: Notes, Investment Contracts, and the Commercial/Investment Dichotomy*, 15 DUQ. L. REV. 261 (1977); Comment, *Commercial Notes and Definition of "Security" Under Securities Exchange Act of 1934: A Note Is a Note Is a Note?*, 52 NEB. L. REV. 478 (1973). This standard clearly benefitted from the exclusion under The Exchange Act of "any note, draft, bill of exchange, or bankers' acceptance which has a maturity at the time of issuance of not exceeding nine months," 15 U.S.C. § 78c(a)(10) (1976), and the similar exclusion under the Securities Act of "[a]ny note, draft, bill of exchange, or bankers' acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months," 15 U.S.C. § 77c(a)(3) (1976). These instruments can be classified generically as commer-

interest failed to pass the *Howey* test.²⁶ The Court thus used *Howey* to narrow the scope of the federal securities laws for the first time.²⁷

The two-pronged test applied by the Court in *Forman* is frequently invoked in cases involving the transfer of closely held corporations²⁸

cial paper—thus the distinction. No such exception, however, was provided for stock. The following is typical of judicial statements setting forth the dichotomy:

[B]uying share of the common stock of a publicly-held corporation, where the impetus for the transaction comes from the person with the money, is an investment; borrowing money from a bank to finance the purchase of an automobile, where the impetus for the transaction comes from the person who needs the money, is a loan.

508 F.2d at 1359. See 421 U.S. at 851-52. Corporate stock, even when 100% is acquired, does not seem to depart from the first example. Indeed, in all purchases of corporate stock the buyer is putting forth his assets in the hope of receiving a return—that is, making an investment.

26. 421 U.S. at 859-60.

27. See *supra* note 17. Subsequent cases have adhered to this generally restrictive treatment of the Securities Acts. Compare *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 976 (1977); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232 (1976); *Cort v. Ash*, 422 U.S. 66 (1975); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975); *United Hous. Found., Inc. v. Forman*, 421 U.S. 837 (1975) and *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1972) with *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1975); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971); *SEC v. Capital Gains Res. Bureau, Inc.*, 375 U.S. 180 (1963) and *Eason v. General Motors Acceptance Corp.*, 490 F.2d 654 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974). But see *Herman & MacLean v. Huddleston*, 103 S. Ct. 683 (1983).

The Supreme Court has considered the definition of security twice since *Forman*. In *International Bhd. of Teamsters v. Daniel*, the Court determined that a noncontributory, compulsory pension plan was not subject to federal securities laws as an investment contract. 439 U.S. 551, 556-57, 570 (1979). More recently the Supreme Court in *Marine Bank v. Weaver*, held that a certificate of deposit is not a security. 102 S. Ct. 1220, 1225 (1982). It is somewhat unclear what standard the Court applied in *Marine Bank*. Compare *Golden v. Garafalo*, 678 F.2d 1139, 1143 (2d Cir. 1982) with *Sutter v. Groen*, 687 F.2d 197, 200 (7th Cir. 1982).

28. For cases concerning closely-held corporations, see *infra* notes 30 & 36. Two cases have proposed that the sale of business doctrine should also extend to publicly-held corporations. See *Zilker v. Klein*, 510 F. Supp. 1070 (N.D. Ill. 1981); *Reprosystem v. SCM Corp.*, 522 F. Supp. 1257 (S.D.N.Y. 1981); see also *Seagrave Corp. v. Vista Resources, Inc.*, 696 F.2d 227 (2d Cir. 1982) (purchase of sizeable portion of a publicly traded corporation's assets by a closely held corporation subject to Securities Acts). Although the facts of *Zilker* indicate that the acquired corporation had been closely-held, the plaintiff tried to distinguish *Zilker* from *Frederiksen* as applying only to nonpublicly-held corporations. 510 F. Supp. at 1075. The court declared that this was an insufficient basis for distinguishing the cases. *Id.* Other bases, however, may exist. The sale of business doctrine can effect a metamorphosis of an interest—that is, render it a security for one transaction and not for another. For example, stock that is clearly a security in the hands of a seller would not be a security in the hands of a purchaser who could exercise control over the corporation. See *infra* note 52. The sale of business doctrine may be incompatible with other provisions, which treat the stock of publicly held corporations as securities. For example, in a "going private" transaction, the stock purchased would not be a security; yet, the cases clearly hold that the minority shareholders have a right of action under rule 10b-5. See, e.g., *Healey v. Catalyst Recovery of Pa., Inc.* 616 F.2d 641 (3d Cir. 1980) (minority shareholders have a cause of action under rule 10b-5 when a misrepresentation deprives the shareholder under state law of the opportunity to enjoy a

through the sale of stock.²⁹ The weight of authority considering the acquisition of a one-hundred percent interest in a corporation's stock supports finding the Securities Acts inapplicable under the sale of busi-

merger); *Alabama Farm Bureau Mutual Cas. Co., Inc. v. American Fidelity Life Ins. Co.*, 606 F.2d 602 (5th Cir. 1979) (minority shareholders may bring a 10b-5 action upon a showing that a prima facie case exists when remedies were available under state law), *cert. denied*, 449 U.S. 820 (1980); *Kidwell ex rel. Penfold v. Meikle*, 597 F.2d 1273 (9th Cir. 1979) (minority shareholders, though not entitled to vote on the transaction in question, may have a rule 10b-5 cause of action); *Goldberg v. Meridor*, 567 F.2d 209 (2d Cir. 1977) (minority shareholders may bring a derivative action under rule 10b-5), *cert. denied*, 434 U.S. 1069 (1978); *Wright v. Heizer Corp.*, 560 F.2d 236 (7th Cir. 1977) (a rule 10b-5 action exists when a majority shareholder so dominates the board of directors that only the minority shareholders can represent the corporation's interests), *cert. denied*, 434 U.S. 1066 (1978). One might try to distinguish a "going private" transaction from the acquisition cases by arguing that in an acquisition the plaintiff would be the purchaser whose intent is to control, whereas in the going private case the plaintiff would be the seller who holds securities that met the *Howey* test in an earlier transaction. The definition of what is being sold, however, should not depend on who the plaintiff is. The statutes do not draw such a distinction. *Compare McGrath v. Zenith Radio Corp.*, 651 F.2d 458 (7th Cir.), *cert. denied*, 102 S. Ct. 136 (1981) with *Oakhill Cemetery of Hammond, Inc. v. Tri-State Bank*, 513 F. Supp. 885 (N.D. Ill. 1981).

A similar analysis applies to tender offers. *See generally* 15 U.S.C. § 78n(d)-(e) (1976). The Exchange Act protects security holders against the use of fraudulent practices in the solicitation of their shares. *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (5th Cir. 1974). It is illogical that one could offer to buy securities that are not securities.

Section 7 of the Exchange Act, 15 U.S.C. § 78(g) (1976), which regulates margin transactions, also contains the term "security." Regulations promulgated by the Federal Reserve Board govern loans granted by banks or arranged by brokers with securities as collateral. *See Reg. T*, 12 C.F.R. § 220 (1982); *Reg. U*, 12 C.F.R. § 221 (1982). A number of cases have arisen in connection with tender offer financing and margin requirements. *E.g.*, *Pargas, Inc. v. Empire Gas Corp.*, 423 F. Supp. 199, 238-39 (D. Md.), *aff'd*, 546 F.2d 25 (4th Cir. 1976) (per curiam); *Alaska Interstate Co. v. McMillan*, 402 F. Supp. 532, 553-65 (D. Alaska 1975). Extension of the *Howey* test could eliminate federal subject-matter jurisdiction in these cases. Consequently, a "thin corporation" could make a tender offer, using the stock as collateral, without regard to disclosure requirements, *see* 15 U.S.C. §§ 78m(d), 78n(d) (1976 & Supp. V 1981), and justify the transaction under *Zilker* as an acquisition of a business and not of securities.

The applicability of the Williams Act, 15 U.S.C. §§ 78 m(d)-(C), 78 n(d)-(f) (1976 & Supp. V 1981), may also be jeopardized under the sale of business doctrine. The purpose of the Act is to provide the public with information concerning shifts in control. It ought to apply, therefore, regardless of the extent to which control shifts. The Williams Act, however, applies to "securities." If the sale of business doctrine applies, the Act's usefulness may be curtailed.

29. The leading case is *Frederiksen v. Poloway*, 637 F.2d 1147 (7th Cir.), *cert. denied*, 101 S. Ct. 3006 (1981). In *Frederiksen* the plaintiff purchased the assets and the stock of a corporation, which operated a boat marina, from the defendant and contracted for the defendant's consulting services for five years. Upon early termination of the employment agreement by the plaintiff, the defendant brought suit in state court for breach of contract and for fraud. The plaintiff then sued for fraud under the Securities Acts in federal court. *Id.* at 1148-49. The Seventh Circuit affirmed the district court's dismissal of the plaintiff's claim. *Id.* at 1154. In so holding the court emphasized that the Supreme Court had stated that the securities laws are inapplicable when the purchase is not for the purpose of investment. *Id.* at 1150. Furthermore, without discussion, the

ness doctrine.³⁰ The sale of business doctrine requires a rejection of a literal approach to defining security³¹ in favor of an analysis of the economic realities of a particular transaction.³² A transaction involving one-hundred percent of a corporation's stock fails to meet the *Forman* economic realities approach for two reasons. First, the transaction does not involve an investment in a common enterprise under the *Howey* analysis.³³ Furthermore, when the buyer purchases 100% of the stock he takes an active entrepreneurial role rather than a passive investment

court found that *Forman* expressly rejected a literal approach in favor of an economic realities approach. *Id.* at 1150-51.

Several commentators have addressed the question of the status of stock under the definitions of securities when the stock is used to acquire a corporation. McAneny, *supra* note 23; Schneider, *The Elusive Definition of "Security,"* 14 REV. SEC. REG. 981 (1981); Seldin, *supra* note 7; Thompson, *supra* note 7; Comment, *The Sale of a Close Corporation Through a Stock Transfer: Covered By The Federal Securities Laws?*, 11 SETON HALL L. REV. 749 (1981). See generally Coffey, *The Economic Realities of a "Security": Is There a More Meaningful Formula?*, 18 W. RES. L. REV. 367 (1967); Hannan & Thomas, *The Importance of Economic Reality and Risk in Defining Securities*, 25 HASTINGS L.J. 219 (1974); Long, *supra* note 14; Lowenfels, *Recent Supreme Court Decisions Under The Federal Securities Laws: The Pendulum Swings*, 65 GEO. L.J. 891 (1977); Comment, *Bank Loan Participations as Securities: Notes, Investment Contracts, and The Commerical/Investment Dichotomy*, 15 DUQ. L. REV. 261 (1976); Note, *The Securities Exchange Act and The Rule of Exclusive Federal Jurisdiction*, 89 YALE L.J. 95 (1979).

30. See *Sutter v. Groen*, 687 F.2d 197 (7th Cir. 1982); *Canfield v. Rapp & Son, Inc.*, 654 F.2d 459 (7th Cir. 1981); *Frederiksen v. Poloway*, 637 F.2d 1147 (7th Cir.), *cert. denied*, 101 S. Ct. 3006 (1981); *Chandler v. Kew*, 691 F.2d 443 (10th Cir. 1977); *Reprosystem v. SCM Corp.*, 522 F. Supp. 1257 (S.D.N.Y. 1981); *Golden v. Garafalo*, 521 F. Supp. 350 (S.D.N.Y. 1981), *rev'd*, 678 F.2d 1139 (2d Cir. 1982); *Zilker v. Klien*, 510 F. Supp. 1070 (N.D. Ill. 1981); *Anchor-Darling Indus., Inc. v. Suozzo*, 510 F. Supp. 659 (E.D. Pa. 1981); *Barys v. Verin*, 508 F. Supp. 952 (N.D. Ill. 1981); *Dueker v. Turner* [1979-1980] FED. SEC. L. REP. (CCH) ¶ 97,386 (N.D. Ga. 1979); *Bula v. Mansfield*, 1979 FED. SEC. L. REP. (CCH) ¶ 96,964 (D. Colo. 1977). See also *Tech Resources, Inc. v. Estate of Hubbard*, 246 Ga. 583, 272 S.E.2d 314 (1980). Cf. *McGrath v. Zenith Radio Corp.*, 651 F.2d 458 (7th Cir.) (The *Howey* test can be met by either party to the transaction), *cert. denied*, 102 S. Ct. 136 (1981); *Somogy v. Butler*, 518 F. Supp. 970 (D. N.J. 1981) (no security present when the plaintiff purchased the assets of a business, simultaneously incorporated the business, and thereupon issued stock to himself); *Oakhill Cemetery of Hammond, Inc. v. Tri-State Bank*, 513 F. Supp. 885 (N.D. Ill. 1981) (*Howey* test applied when the plaintiff was neither the purchaser nor the seller in the transaction on the theory that *Frederiksen* must result in the same treatment of the interest for all parties). See also *Ellis v. Henderson*, 1980 FED. SEC. L. REP. (CCH) ¶ 97,722 (W.D. Okla. 1980); *Chiodo v. General Waterworks Corp.*, 380 F.2d 860 (10th Cir.), *cert. denied*, 389 U.S. 1004 (1976); *Fox v. Ehrmantraut*, 28 Cal. 3d 127, 615 P.2d 1383, 167 Cal. Rptr. 595 (1980).

31. E.g., *Frederiksen v. Poloway*, 637 F.2d 1147, 1150-51 (7th Cir.), *cert. denied*, 101 S. Ct. 3006 (1981). See *infra* note 38.

32. See *supra* note 7.

33. The common enterprise requirement of the *Howey* test requires that there be two investors at a minimum. See *Golden v. Garafalo*, 678 F.2d 1139, 1142 (2d Cir. 1982); *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 100-03 (7th Cir. 1977).

role in which management would be left to others.³⁴

Despite the trend towards exemption of closed corporation stock sales from federal security law coverage,³⁵ the Second Circuit has recently rejected the sale of business doctrine. In *Golden v. Garafalo*,³⁶ the court argued that the drafters of the definitions would not have included specific types of instruments in the definition had they intended for a significant proportion of the instruments to be excluded by an economic realities test.³⁷ The court reasoned that a literal approach, on the other hand, comports with the legislative intent that the definition of security should include "the many types of instruments that in our commercial world fall within the ordinary concept of security."³⁸

34. The *Howey* test states that profits must come "solely from the efforts of others." 328 U.S. at 299. See *supra* note 16 and accompanying text. This element of the test, however, has not always been rigidly upheld. See, e.g., *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974); *SEC v. Glenn W. Turner Enters.*, 474 F.2d 476 (9th Cir. 1973). See also *supra* note 25.

35. See *supra* notes 28-34 and accompanying text.

36. 678 F.2d 1139 (2d Cir. 1982).

37. 678 F.2d at 1144.

If an 'economic reality' test were intended, reference to such specific types of instruments, and common variations of them, would have been inappropriate because a substantial portion of each class of instrument would, in fact, not be within the definition. We believe that Congress intended to draft an expansive definition and to include with specificity all instruments with characteristics agreed upon in the commercial world, such as 'debentures,' 'stock,' 'treasury stock' or 'voting-trust certifications.' Catch-all phrases such as 'investment contract,' were then included to cover unique instruments not easily classified. If the 'economic reality' test were to be the core of the definition, only general catch-all terms would have been used.

Id. See *Seagrave Corp. v. Vista Resources, Inc.*, 696 F.2d 227, 229-30 (2d Cir. 1982). See also *Daily v. Morgan*, 701 F.2d 496 (5th Cir. 1983); *Glick v. Campagna*, 613 F.2d 31 (3d Cir. 1979); *Coffin v. Polishing Machs., Inc.*, 596 F.2d 1202 (4th Cir.), *cert. denied*, 444 U.S. 868 (1979); *Mifflin Energy Sources v. Brooks*, 501 F. Supp. 334 (W.D. Pa. 1980); *Titsch Printing v. Hastings*, 456 F. Supp. 445 (D. Colo. 1978); *Bronstein v. Bronstein*, 407 F. Supp. 925 (E.D. Pa. 1976).

38. 678 F.2d at 1144. See H. REP. NO. 45, 73d Cong., 1st Sess. 11 (1933). See also *supra* note 14 and accompanying text.

Although the language of a statute is the most important evidence in statutory construction, see *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 558 (1979), the context in which the language was drafted colors the literal meaning. See *SEC v. C.M. Joiner Corp.*, 320 U.S. 344, 350-51 (1943). For the Securities Acts, the context was the speculation and fraud of the financial world during the Roaring Twenties, and the depression they helped to create. H.R. REP. NO. 85, 73d Cong., 1st Sess. 2-3 (1933); H.R. DOC. NO. 12, 73d Cong., 1st Sess. 1-2 (1933), *reprinted in* 2 J. ELLENBERGER & E. MAHAR, *supra* note 14, at Item 15, 1-2. The state "blue sky" laws and the federal mail fraud laws had proved to be ineffective in thwarting securities fraud. H.R. REP. NO. 85, 73d Cong., 1st Sess. 10-11 (1933). It was left to Congress to provide a solution.

Congress' intent to prevent and punish securities fraud is clearly indicated by The House Report accompanying the Securities Act. H.R. REP. NO. 85, 73d Cong., 1st Sess. 9-10 (1933). This is manifest in the disclosure and antifraud provisions. See L. LOSS, *SECURITIES REGULATION* 1421-28 (temp. st. ed. 1961). Numerous decisions have relied on this intent in broadly applying the

Although the literal approach to interpreting the definition of security, adopted by the Second Circuit, has not been widely accepted for sales of 100% of a corporation's stock,³⁹ a number of decisions involving the sale of less than 100% of a corporation's stock have invoked a literal approach.⁴⁰

In *Sutter v. Groen*⁴¹ the Seventh Circuit reaffirmed its application of the sale of business doctrine to sales involving 100% of a corporation's stock.⁴² Additionally, the court created a rebuttable presumption against finding an investment purpose in the event of a sale involving less than a 100% interest if the purchaser at the conclusion of the transaction holds more than 50% of the corporation's stock.⁴³ Judge Posner, writing for the court, found that although the Second Circuit in *Golden* successfully distinguished the Supreme Court's *Forman* decision as involving an instrument lacking the common characteristics of corporate stock,⁴⁴ a recent decision by the Supreme Court⁴⁵ conclusively reaf-

third provision of the *Howey* test so as to exclude those who exercise control over the corporation from the protection of the Securities Acts. See, e.g., *United Hous. Found., Inc. v. Forman*, 421 U.S. 849 (1975); *Anchor-Darling Indus., Inc. v. Suozzo*, 510 F. Supp. 659, 662 (1981). The Senate Committee on Banking and Currency, however, expressed a broader purpose in discussing the definition of "security" that is consistent with the Supreme Court's pre-*Forman* decisions. See H. REP. No. 45, 73d Cong., 1st Sess. 11 (1933). From the Committee's report, it is clear that Congress intended to "include . . . the many types of instruments that in our commercial world fall within the ordinary concept of a security." *Id.*

39. Compare *Canfield v. Rapp & Son, Inc.*, 654 F.2d 459 (7th Cir. 1981); *Frederiksen v. Poloway*, 637 F.2d 1147 (7th Cir.), *cert. denied*, 101 S. Ct. 3006 (1981); *Reprosystem v. SCM Corp.*, 522 F. Supp. 1257 (S.D.N.Y. 1981); *Golden v. Garafalo*, 521 F. Supp. 350 (S.D.N.Y. 1981), *rev'd*, 678 F.2d 1139 (2d Cir. 1982); *Zilker v. Klien*, 510 F. Supp. 1070 (N.D. Ill. 1981); *Anchor-Darling Indus., Inc. v. Suozzo*, 510 F. Supp. 659 (E.D. Pa. 1981); *Barsy v. Verin*, 508 F. Supp. 952 (N.D. Ill. 1981); *Dueker v. Turner*, [1979-80] FED. SEC. L. REP. (CCH) ¶ 97,386 (N.D. Ga. 1979) and *Bula v. Mansfield*, 1979 FED. SEC. L. REP. (CCH) ¶ 96,964 (D. Colo. 1977) with *Daily v. Morgan*, 701 F.2d 496 (5th Cir. 1983); *Occidental Life Ins. Co. v. Pat Ryan & Assocs., Inc.*, 496 F.2d 1255 (4th Cir.), *cert. denied*, 419 U.S. 1023 (1974) and *Titsch Printing, Inc. v. Hastings*, 456 F. Supp. 445 (D. Colo. 1978).

40. See, e.g., *Coffin v. Polishing Machs., Inc.*, 596 F.2d 1202, 1204 (4th Cir.), *cert. denied*, 444 U.S. 868 (1979); *Bronstein v. Bronstein*, 407 F. Supp. 925, 928-29 (E.D. Pa. 1976).

41. 687 F.2d 197 (7th Cir. 1982).

42. *Id.* at 202. See *Canfield v. Rapp & Son, Inc.*, 654 F.2d 459 (7th Cir. 1981); *Frederiksen v. Poloway*, 637 F.2d 1147 (7th Cir.), *cert. denied*, 101 S. Ct. 3006 (1981). See also *supra* notes 7 & 29.

43. 687 F.2d at 203. "The presumption can be rebutted by showing that the purchaser's main purpose was investment." *Id.* See *supra* notes 25 & 34. The court did not address the question of what result should occur when only 50% is involved. 687 F.2d at 203.

44. 687 F.2d at 200. See *supra* note 23 and accompanying text.

45. *Marine Bank v. Weaver*, 102 S. Ct. 1220 (1982).

firmed a rejection of a literal reading of the definitions.⁴⁶ Judge Posner emphasized that the purpose underlying the Securities Acts is to protect investors⁴⁷ rather than entrepreneurs.⁴⁸ Recognizing this purpose of the statutes, the court applied the sale of business doctrine to the acquisition of 100% of the stock in Bret Broadcasting.⁴⁹

Judge Posner found a closer question when the transaction involves less than 100% of the stock.⁵⁰ The distinction between entrepreneurial and investment purposes, however, remained paramount.⁵¹ A greater than 50% interest in a corporation gives its owner control and commands a premium.⁵² Accordingly, Judge Posner held that the purchaser

46. 687 F.2d at 201. This conclusion does not appear, however, to flow by necessity from *Marine Bank*. See *supra* note 27.

47. 687 F.2d at 201. Judge Posner found support for this position in President Roosevelt's recommendation to Congress that legislation "providing for the regulation by the Federal Government of the operations of exchanges dealing in securities and commodities for the protection of investors, for the safeguarding of values, and so far as it may be possible, for the elimination of unnecessary, unwise, and destructive speculation" be enacted. *Id.* quoting S. REP. NO. 792, 73d Cong., 2d Sess. 2 (1934) (emphasis added). See *supra* notes 25 & 34. But see H.R. REP. NO. 85, 73d Cong., 1st Sess. 11 (1933).

48. Judge Posner noted that this distinction appeared in A. BERLE & G. MEANS, *supra* note 25, before the Securities Acts were passed. 687 F.2d at 201.

49. 687 F.2d at 202.

50. *Id.* In *Golden v. Garafalo* the Second Circuit in part concluded that the sale of business doctrine has the potential for creating uncertainty in the applicability of the Securities Acts when the investment/entrepreneurship distinction has to be resolved. 678 F.2d at 1146. The court preferred to err on the side of overinclusion rather than underinclusion. *Id.* Judge Posner, however, observed that courts are frequently concerned with and capable of line-drawing. 687 F.2d at 202. This view, however, does not answer the Second Circuit's contention that,

So far as the antifraud policies of the Acts are concerned, the possibilities of fraud and the ability to protect oneself through contract are the same as to a 'passive' investor buying 30% of a corporation's shares from a sole shareholder or an 'active' purchaser taking 100% and expecting to manage it directly. So far as curing the overbreadth of the Act is concerned, therefore, the relevant distinction is between transactions in a public market for stock and negotiated transactions involving close corporations, whether or not they involve transfers of control. . . . [T]he Act has always been understood to apply to transactions in shares of close as well as publicly held corporations and to negotiated as well as market sales and purchases of shares. . . . *Forman* provides us no reason to reexamine that understanding.

678 F.2d at 1146-47 (citations omitted). See *supra* note 28.

51. 687 F.2d at 202-03.

52. *Id.* at 203. See 13 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5805 (rev. perm. ed. 1980). It is possible in a corporation with many shareholders for the holder of less than 50% of the outstanding shares to have a controlling interest, for example, through the use of voting trusts or proxies.

The presence of a controlling interest is not easily detectible in situations which rely on the implementation of a device or agreement whereby a minority interest effectively acquires control. The logic of the sale of business doctrine would therefore require a rebuttable presumption that such interests do not represent control. On a showing that the minority, through some device or

should have the burden of overcoming the presumption that control indicates an entrepreneurial purpose rather than an investment purpose.⁵³

The decision in *Sutter* is the logical culmination of the Seventh Circuit's attempt to foreclose private rights of action under the anti-fraud provisions of the Securities Act⁵⁴ by narrowing the scope of federal subject-matter jurisdiction.⁵⁵ These decisions rest on a strained interpretation of both Supreme Court precedent and legislative history.⁵⁶ As the statutes are drafted and as they have been interpreted, "stock" should be accorded its ordinary meaning.⁵⁷

The investor/entrepreneur dichotomy that the economic reality approach of *Howey* and *Forman* brings into play, however, has a great deal to commend it.⁵⁸ As the cases involving acquisitions of corporations through stock purchases indicate, such purchasers as a rule do not need the same protection that a stock exchange investor, for example, needs.⁵⁹ Furthermore, the federal courts should not be cluttered with cases brought by plaintiffs to whom the doctrine of caveat emptor ought to apply.⁶⁰ Should a revision of the federal securities provisions

agreement, has acquired control the presumption would be rebutted and the Securities Act should no longer apply. Under the definitions of security as they were drafted, however, neither presumption is warranted. The definitions do not adopt the concepts of control or investment purpose. Instead, the definitions include "stock." See *infra* notes 56-57 and accompanying text.

53. 687 F.2d at 203. The court did not consider whether the sale of business doctrine should apply to purchases of 50% or less of a corporation's stock.

54. See, e.g., 17 C.F.R. § 240.10b-5 (1982).

55. 687 F.2d at 202. See, e.g., *Frederiksen v. Poloway*, 637 F.2d 1147 (7th Cir.), cert. denied, 101 S. Ct. 3006 (1981); *Emisco Indus., Inc. v. Pro's, Inc.*, 543 F.2d 38 (7th Cir. 1976); *supra* notes 27-28.

56. See *supra* notes 10-27 and accompanying text.

57. See *supra* note 23.

58. The cases that have applied the sale of business doctrine argue that the Securities Acts were intended to protect only investors. The legislative history, however, better suits a more inclusive application under the Acts. See *supra* notes 15 & 38. On the other hand, even the cases supporting a literal approach recognize that investors comprise the only class that needs a federal remedy. See, e.g., *Golden v. Garafalo*, 678 F.2d 1139, 146-47 (2d Cir. 1982). An economic realities criteria would provide the judicial flexibility necessary for distinguishing investors from all others. See generally *Thompson, supra* note 7.

59. The typical investor in a NYSE stock acquires a small percentage of the shares in any one stock and does not have the equality of bargaining power that would be necessary to otherwise get disclosure from the seller.

60. See *McClure v. First Nat'l Bank of Lubbock, Texas*, 497 F.2d 490, 495 (5th Cir. 1974). Cases applying the literal approach argue that, because the statute is there for all to read, when parties choose to use stock in their transaction they expect the Securities Acts to apply. See, e.g., *Coffin v. Polishing Machs., Inc.*, 596 F.2d 1202, 1204 (4th Cir.), cert. denied, 444 U.S. 868 (1979).

be forthcoming, therefore, it would be appropriate for Congress to adopt an economic reality approach in defining security.⁶¹

T.K.L.

The best argument in support of the sale of business doctrine is that, in effect, the acquisition of a corporation by a stock purchase is the same as the acquisition of a corporation by an asset purchase. The stock is merely an indicia of ownership of the underlying assets similar to a deed. *See, e.g.*, 637 F.2d at 1151-52.

61. Appeals for reform of the federal securities laws have come from many quarters. *See, e.g.*, ALI FED. SEC. CODE (1980).