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Resurrecting the Spirit of the Securities Act of 1933

Defendant, Dare To Be Great, Inc. (Dare), a wholly owned subsidiary of Glenn W. Turner Enterprises, Inc., was engaged in a pyramid selling program,¹ involving sales of self-improvement courses called "Adventures." Dare's solicitation program consisted of finding prospects and bringing them to an "Adventure Meeting," where defendant's employees, through pretentious displays of wealth and high-pressure sales tactics, would attempt to convince the prospects that success would be theirs if only they would invest in an Adventure and become a part of the organization. Dare's program involved a pyramid because purchasers of certain programs solicited, for a commission, new prospects, who would then attempt to solicit additional prospects.² The Securities and Exchange Commission brought suit to enjoin this scheme as violating the federal securities laws. Since the success of the purchaser's investment depended on the efforts of Dare's employees at the Adventure Meetings, the SEC believed defendants were offering "investment contracts"³ and, thus, securities characterized as self-improvement courses. The district court agreed and enjoined sale of Adventures III and IV and the \$1,000 Plan.⁴ Dare appealed to the Ninth Circuit. *Held, affirmed*: Defendant's offer and sale of self-improvement courses constituted transactions involving unregistered "investment contracts," where the purchasers rely primarily upon Dare's selling effort to recover returns from their investment. *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3194 (U.S. Oct. 9, 1973).

I. DEFINING "INVESTMENT CONTRACT"

The term "security," as defined in the Securities Act of 1933 and the Secu-

¹ According to SEC Securities Act Release No. 5211, Exchange Act Release No. 9387 (Nov. 30, 1971), a typical pyramid program involves a sale to purchasers, who, upon paying various fees, have the right to sell a line of products. Different types of agreements normally are available to the investor. Generally, the larger the investment by the purchaser or investor, the higher the commission for recruiting prospects into the program. Throughout all such pyramid promotions, a sales talk is made emphasizing the amount of money the purchasers can make because of their recruiting efforts. For an additional definition of a pyramid promotion, see, *e.g.*, *Florida Discount Centers, Inc. v. Antinori*, 226 So. 2d 693, 694-95 (Fla. App. 1969), *aff'd*, 232 So. 2d 17 (Fla. 1970).

² Dare sold five interrelated plans. Adventures I and II, costing \$300 and \$700 respectively, consisted of tape recordings, a tape player, and training sessions. Adventures III and IV, costing \$2000 and \$5000 respectively, consisted of the materials of Adventure II, plus additional materials and meetings, and, more importantly, the right to solicit customers for the Adventures. The purchaser of Adventure III could solicit customers for I, II, and III. The purchaser of Adventure IV could solicit customers for all the Adventures. Finally, Dare offered a \$1000 Plan which was similar to the Adventures; however, the purchaser could solicit customers for the plan alone. Each purchaser received a commission based on any plan sold as a result of his solicitations. *SEC v. Glenn W. Turner Enterprises, Inc.*, 348 F. Supp. 766, 769 (D. Ore. 1972).

³ The Securities Act of 1933, 15 U.S.C. § 77b(1) (1970), and the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10) (1970), contain almost identical definitions of the word "security." As defined by both Acts, the word "security" includes "any . . . investment contract, . . . or, in general, any interest or instrument commonly known as a 'security' . . ." (Emphasis added.) Further, the Securities Act provides that in cases where a security is involved, the security must be registered with the SEC unless an exemption is available; otherwise, sales of these securities violate § 5(a) of the 1933 Act. 15 U.S.C. § 77(f) (1970).

⁴ 348 F. Supp. at 775-76. Adventures I and II were not treated as securities, since "the purchasers of them are not given to expect any return from them." *Id.* at 777.

urities Act of 1934, includes many types of instruments, including an "investment contract." The term "investment contract" was, however, left undefined in both the Acts themselves and their legislative histories.⁵ Thus "investment contract" was left to the courts for definition.⁶ Following enactment of the securities acts, the United States Supreme Court first construed this term in *SEC v. C. M. Joiner Leasing Corp.*⁷ In *Joiner* the defendant had induced purchases of leases by promising to drill a well on his nearby lease. Should the defendant have struck oil, the value of all the leases would have increased.⁸ The Supreme Court, finding that the essence of the agreement was the buyer's expectation of enhanced value resulting from defendant's efforts, declared that the defendant had been selling investment contracts in violation of the securities acts, and enjoined sales of the assignments.⁹

Three years later, in *SEC v. W. J. Howey Co.*,¹⁰ the Court was again confronted with the issue of whether an investment contract existed within section 2(1) of the Securities Act of 1933.¹¹ Defendant corporations, W. J. Howey Co. and Howey-in-the-Hills Service, Inc., which were owned and operated jointly, offered to prospective purchasers a land sales contract in a Florida citrus grove development coupled with a long-term service contract.¹² Purchasers were urged to accept the service contract, in which Howey-in-the-Hills Service, Inc. agreed to perform all necessary labor and management in the operation of the groves, remitting the net proceeds to the investors.¹³ Purchasers were typically non-residents of Florida, lacking in the knowledge, skill, and equipment to care for the citrus groves.¹⁴ The Court, looking to earlier state¹⁵ and

⁵ *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298 (1946). Also, neither the Securities Exchange Act of 1934, nor its legislative reports, define the term "investment contract."

⁶ *Id.* For a discussion of state and federal cases defining the term "investment contract" prior to the enactment of the federal securities laws, see Long, *An Attempt To Return "Investment Contracts" To The Mainstream of Securities Regulation*, 24 OKLA. L. REV. 135, 146-59 (1971). The first case to consider the term "investment contract" was *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 177 N.W. 937, 938 (1920), where, in return for both a certificate holder's payment of \$50 and promise to assist defendant in the sale of its products, defendant agreed to divide pro rata among all holders of certificates 10% of the net price for the sale of such merchandise. The court defined an investment contract as a contract or scheme for "[t]he placing of capital or laying out of money in a way intended to secure income or profit from its employment," and concluded that defendant offered an investment contract to the public in violation of the state Blue Sky laws. 177 N.W. at 938.

⁷ 320 U.S. 344 (1943).

⁸ The Court acknowledged that "[w]ithout the drilling of the well, no one's lease had any value . . ." Therefore, it was the "exploration enterprise [which] was woven into these leaseholds," and the opportunity for the purchaser to share in the discovery values, which resulted in the investment character of the purchase. *Id.* at 348-49.

⁹ *Id.* at 351, 355.

¹⁰ 328 U.S. 293 (1946).

¹¹ 15 U.S.C. § 77b(1) (1970).

¹² 328 U.S. 293, 295-96 (1946).

¹³ As a result of defendant's apprising purchasers "that it [would] not [be] feasible to invest in a grove unless service arrangements are made," 85% of the land sold included service contracts with the defendant service company. The 10-year service contract, without an option of cancellation, gave defendant service company a leasehold interest and "full and complete" possession of the acreage. Howey-in-the-Hills Service, Inc. was accountable to the purchaser only for an allocation of the net profits based upon a check made at the time of harvesting. *Id.*

¹⁴ *Id.* at 296.

¹⁵ *Moore v. Stella*, 52 Cal. App. 2d 766, 127 P.2d 300 (1942); *People v. White*, 124 Cal. App. 548, 12 P.2d 1078 (1932); *Prohaska v. Hemmer-Miller Dev. Co.*, 256 Ill. App. 331 (1930); *State v. Evans*, 154 Minn. 95, 191 N.W. 425 (1922); *Stevens v. Liberty*

federal¹⁶ decisions, found that more than the sale of real estate was involved in *Howey*.¹⁷ Drawing on *Joiner* and earlier decisions, the Supreme Court defined an investment contract as:

[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 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.¹⁸

The *Howey* view provides, in large measure, the present state of the law concerning investment contracts.¹⁹ In subsequent cases courts have found the *Howey* test a "workable formula"²⁰ for determining whether or not a challenged arrangement is an investment contract. Through application of the *Howey* test, pyramid sales plans where the investor expends some minimal effort have been found not to be investment contracts.²¹ Thus, through strict application of the *Howey* test, an investment contract can be evaded by adding a requirement that the purchaser contribute some small physical effort.²²

Packing Corp., 111 N.J. Eq. 61, 161 A. 193 (Ch. 1932); *State v. Heath*, 199 N.C. 135, 153 S.E. 855 (1930); *Klatt v. Guaranteed Bond Co.*, 213 Wis. 12, 250 N.W. 825 (1933). For a discussion of these cases, see generally Long, *supra* note 6, at 146-55; Note, *Franchise Sales: Are They Sales of Securities?*, 34 ALBANY L. REV. 383, 384 nn.8 & 9 (1970); Note, *Franchise Regulation Under the California Corporate Securities Law*, 5 SAN DIEGO L. REV. 140, 145 n.29 (1968).

¹⁶ *Penfield Co. v. SEC*, 143 F.2d 746 (9th Cir. 1944); *Atherton v. United States*, 128 F.2d 463 (9th Cir. 1942); *SEC v. Universal Serv. Ass'n*, 106 F.2d 232 (7th Cir. 1939); *SEC v. Crude Oil Corp. of America*, 93 F.2d 844 (7th Cir. 1937); *SEC v. Bourbon Sales Corp.*, 47 F. Supp. 70 (W.D. Ky. 1942); *SEC v. Bailey*, 41 F. Supp. 647 (S.D. Fla. 1941); *SEC v. Pyne*, 33 F. Supp. 988 (D. Mass. 1940); *SEC v. Payne*, 35 F. Supp. 873 (S.D.N.Y. 1940); *SEC v. Timetrust, Inc.*, 28 F. Supp. 34 (N.D. Cal. 1939); *SEC v. Wickham*, 12 F. Supp. 245 (D. Minn. 1935). For a discussion of these cases, see Long, *supra* note 6, at 155-59.

¹⁷ The Supreme Court disregarded the form and looked to the substance, placing emphasis upon economic reality in an effort to broadly construe the existence of an investment contract. The Court stated that defendant companies offered something other than a fee simple interest in land. The investors provided the capital with no inclination to possess or farm the land, and were attracted solely by a share in the profits; the promoters managed all aspects of the enterprise. Thus, the investors' interests involved investment contracts. 328 U.S. at 298-300.

¹⁸ *Id.* at 298-99. For criticisms of the *Howey* definition of an investment contract, see, e.g., *Mitzner v. Cardet Int'l, Inc.*, CCH FED. SEC. L. REP. ¶ 94,015 (N.D. Ill. May 17, 1973); *SEC v. Glenn W. Turner Enterprises, Inc.*, 348 F. Supp. 766 (D. Ore. 1972); *D.M.C. of Colorado, Inc. v. Hayes*, [1954-1971 Transfer Binder] BLUE SKY L. REP. ¶ 70,897 (Colo. Dist. Ct. 1971); *State Comm'r of Sec. v. Hawaii Mkt. Center, Inc.*, 485 P.2d 105 (Hawaii 1971). See SEC Securities Act Release No. 5211, Exchange Act Release No. 9387 (Nov. 30, 1971); Long, *supra* note 6, at 135.

¹⁹ See *Tcherepnin v. Knight*, 389 U.S. 332, 338 (1967); *SEC v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65, 72 n.13 (1959); *United States v. Herr*, 338 F.2d 607, 609-10 (7th Cir. 1964), *cert. denied*, 382 U.S. 999 (1966); *Roe v. United States*, 287 F.2d 435, 438 (5th Cir.), *cert. denied*, 368 U.S. 824 (1961); *SEC v. Koscot Interplanetary, Inc.*, CCH FED. SEC. L. REP. ¶ 93,960 (N.D. Ga., filed Apr. 20, 1973).

²⁰ See, e.g., *Georgia Mkt. Centers, Inc. v. Fortson*, 225 Ga. 854, 171 S.E.2d 620, 623 (1969); *Bruner v. State*, 463 S.W.2d 205, 213 (Tex. Crim. App. 1970).

²¹ *SEC v. Koscot Interplanetary, Inc.*, CCH FED. SEC. L. REP. ¶ 93,960 (N.D. Ga., filed Apr. 20, 1973); *Koscot Interplanetary, Inc. v. King*, 452 S.W.2d 531 (Tex. Civ. App.—Austin 1970), *error ref. n.r.e. Contra*, *SEC v. Glenn W. Turner Enterprises, Inc.*, 348 F. Supp. 766 (D. Ore. 1972); *Frye v. Taylor*, 263 So. 2d 835 (Fla. App. 1972); *cf. Gallion v. Alabama Mkt. Centers, Inc.*, 282 Ala. 679, 213 So. 2d 841 (1968).

²² See Long, *supra* note 6, at 145.

II. INVESTOR CONTROL OVER MANAGERIAL DECISIONS— A REALISTIC TEST

Literal application of the *Howey* test precludes finding that an arrangement is an investment contract in instances where there is any involvement by the investor beyond the mere act of investing.²³ However, some courts have found the existence of an investment contract by focusing on the "economic realities"²⁴ of the challenged security transaction in an inquiry of whether or not the investor, subjecting his money to the risks of an enterprise, exercises control over the managerial decisions in the enterprise.²⁵ When the investor is involved in the managerial decisions of the enterprise, he has the right to full access of all business information and can properly evaluate the investment risk.²⁶ However, when he does not have managerial control and its attendant access to information, he cannot properly evaluate the many business risks involved.²⁷ Thus, a less restrictive reading of *Howey* allows a finding of an investment contract where the investor does not influence the success of the enterprise, and apparently serves the purposes for which the Securities Act of 1933 was enacted. One of those purposes was to protect investors by promoting full disclosure of information thought necessary for investment decisions.²⁸

Several of the decisions cited as a basis for the *Howey* test inquired into whether or not the investor had any control over the managerial decisions of the enterprise.²⁹ Even the language of the *Howey* opinion indicates that the hallmark of an investment contract, that of a common enterprise where profits "come solely from the efforts of others," refers to efforts in the management of the common enterprise required for producing the anticipated return.³⁰

²³ See *Gallion v. Alabama Mkt. Centers, Inc.*, 282 Ala. 679, 213 So. 2d 841 (1968); *Emery v. So-Soft of Ohio, Inc.*, 300 Ohio 2d 226, 199 N.E.2d 120 (1964).

²⁴ The district court in *SEC v. Glenn W. Turner Enterprises, Inc.*, stated that "the subjection of the investor's money to the risk of the enterprise over which he exercises no managerial control is the basic economic reality of a security transaction." 348 F. Supp. at 773. *Accord*, *Mitzner v. Cardet Int'l, Inc.*, CCH FED. SEC. L. REP. ¶ 94,015 (N.D. Ill. May 17, 1973); *State Comm'r of Sec. v. Hawaii Mkt. Center, Inc.*, 485 P.2d 105, 109 (Hawaii 1971). See also *Silver Hills Country Club v. Sobieski*, 55 Cal. 2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961); see *Coffey, The Economic Realities of a "Security": Is There a More Meaningful Formula?*, 18 W. RES. L. REV. 367, 412 (1967).

²⁵ See, e.g., *Mr. Steak, Inc. v. River City Steak, Inc.*, 460 F.2d 666, 669-70 (10th Cir. 1972); *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 640-41 (9th Cir. 1969).

²⁶ See *Polikoff v. Levy*, 55 Ill. App. 2d 229, 204 N.E.2d 807, *cert. denied*, 382 U.S. 903 (1965). When the investor has a direct voice in the managerial affairs of the enterprise and "pools his money with that of others in the group; he has an equal right of control over the project and the opportunity and right to know what is going on . . . [Therefore,] the protection of the full disclosure offered by registration is not needed as it is in cases involving a non-participating investor." 204 N.E.2d at 809.

²⁷ For a discussion of the various ways in which a purchaser's investment can be subjected to the risks of an enterprise, see *Coffey, supra* note 24, at 384-96.

²⁸ SENATE COMM. ON BANKING AND CURRENCY, REGULATION OF SECURITIES, S. REP. NO. 47, 73d Cong., 1st Sess. 1 (1933). The report provides that "[t]he purpose of this bill is to protect the investing public . . . [and] that of informing the investor of the facts concerning securities . . . offered for sale . . . and providing protection against fraud and misrepresentation.

"The aim [of the Act] is to prevent further exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation . . . [and] through crooked promotion . . ."

²⁹ See, e.g., *SEC v. Payne*, 35 F. Supp. 873, 878 (S.D.N.Y. 1940); *Moore v. Stella*, 52 Cal. App. 2d 766, 127 P.2d 300 (1942); *State v. Evans*, 154 Minn. 95, 191 N.W. 425, 427 (1922).

³⁰ *Accord*, *D.M.C. of Colorado, Inc. v. Hays*, [1954-1971 Transfer Binder] BLUE SKY

Howey and subsequent cases have admonished those who would apply "unrealistic and irrelevant formulae"³¹ in order to thwart the remedial nature of the federal securities laws and have encouraged use of a "flexible rather than a static principle,"³² in determining whether or not an investment contract exists. Because of the need for a flexible principle, some courts have recognized that the existence of a security must depend upon the degree and quality of managerial control by the investor over his funds in the business.³³ Therefore, efforts expended by the investor connected with the business, "even if financially significant and plainly contributing to the success of the venture, may be irrelevant to the existence of a security if the investor does not control the use of his funds to a significant degree."³⁴

III. SEC V. GLENN W. TURNER ENTERPRISES, INC.

Several criteria had to be satisfied in order for the Ninth Circuit to determine that defendants offered their investors securities within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934. First, the court was faced with a determination of whether or not the defendants were offering their prospects products and services and not securities or investments. After scrutinizing Dare's system, as it operated, the court concluded that the purchaser was paying for something in addition to the self-motivational material and courses. That "something" was a promise and expectation of receiving profit from the sale of courses by Dare to the prospects whom the purchasers brought to defendants. The court's conclusion was supported by its finding that the prospects were given an impression of "near inevitability of success"³⁵ for the purchasers who followed Dare's direction. Thus, the court determined that the defendants promoted an investment, which was represented as such throughout the scheme's system of operation.

The second obstacle, or sticking point, was reconciling the fact situation in *Turner* with the landmark *Howey* test.³⁶ The defendants argued that, upon a comparison of *Howey* with *Turner*, it was evident that part of the economic relationship between the purchaser and Dare involved the former.³⁷ Therefore,

L. REP. ¶ 70,897, at 67,042 (Colo. Dist. Ct. 1971). See also SEC Securities Act Release No. 5211, Exchange Act Release No. 9387 (Nov. 30, 1971).

³¹ SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946). See also Los Angeles Trust Deed & Mortgage Exch. v. SEC, 285 F.2d 162, 168 (9th Cir. 1960).

³² SEC v. W.J. Howey Co., 328 U.S. 293, 299 (1946). See also *Tcherepnin v. Knight*, 389 U.S. 332, 338 (1967); *D.M.C. of Colorado, Inc. v. Hays*, [1954-1971 Transfer Binder] BLUE SKY L. REP. ¶ 70,897, at 67,042 (Colo. Dist. Ct. 1971); *Bruner v. State*, 463 S.W.2d 205, 213 (Tex. Crim. App. 1970).

³³ See, e.g., *Mr. Steak, Inc. v. River City Steak, Inc.*, 460 F.2d 666 (10th Cir. 1972); *Mitzner v. Cardet Int'l, Inc.*, CCH FED. SEC. L. REP. ¶ 94,015, at 94,082 (N.D. Ill. May 17, 1973); *Venture Inv. Co. v. Schaefer*, [1954-1971 Transfer Binder] BLUE SKY L. REP. ¶ 71,031, at 67,233 (D. Colo. 1972); *D.M.C. of Colorado, Inc. v. Hays*, [1954-1971 Transfer Binder] BLUE SKY L. REP. ¶ 70,897, at 67,042 (Colo. Dist. Ct. 1971); *State Comm'r of Sec. v. Hawaii Mkt. Center, Inc.*, 485 P.2d 105, 111 (Hawaii 1971).

³⁴ SEC Securities Act Release No. 5211, Exchange Act Release No. 9387, at 3 (Nov. 30, 1971). See, e.g., *Blackwell v. Bensten*, 203 F.2d 690, 691 (5th Cir. 1953), cert. dismissed, 347 U.S. 925 (1954) (An investor, in a scheme similar to that in *Howey*, had the right to furnish the management company with "directions as to the marketing of the crop on his tract." The court found the investment to be an investment contract.)

³⁵ 474 F.2d at 479.

³⁶ *Id.* at 481.

³⁷ The court observed that "the investor, or purchaser, must . . . exert some efforts if

the defendants argued that the profits did not come "solely" from the efforts of others, as required by the Supreme Court's definition, and, consequently, were not within the meaning of the statutes. The court replied that the word "solely" in the *Howey* definition "exactly fitted the circumstances in *Howey*,"³⁸ thereby implying that a strict application of the *Howey* test would be inappropriate in *Turner*. This implication became more conclusive when the court commented that the *Howey* test, and more specifically the phrase "'solely' from the efforts of others," merited criticism as an "unduly restrictive view" which would be easy "to evade."³⁹ Hence, the court stated that 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."⁴⁰

The court reasoned that, based upon the remedial nature of the federal securities statutes, legislative policy of providing protection to the public, and the Supreme Court's admonitions that flexibility be accorded the definition of security, a more realistic test for an investment contract should be used in order to fulfill the purpose of the Securities Act and the Exchange Act. The test promulgated by the court 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."⁴¹ Applying this test to the facts in *Turner*, the court stated that even though the purchasers exerted certain efforts in Dare's scheme,⁴² the purchasers were in effect buying a right to "share in the proceeds of the selling efforts of Dare."⁴³ Thus, while the purchasers must contribute something besides their money, they performed merely ministerial acts, and as such were not "in any real business sense, master[s] of [their] own destiny."⁴⁴

The significant problem which arises from an application of the *Turner* test is a determination of what controlling managerial efforts are the undeniably significant ones affecting the failure or success of the enterprise. In evaluating *Turner*, the court concluded that the purchasers were strictly limited to recruiting prospects to attend Adventure meetings, and were prohibited from

he is to realize a return on his initial cash outlay. He must find prospects and persuade them to attend Dare Adventure Meetings, and at least some of them must then purchase a plan if he is to realize that return." *Id.* at 482.

³⁸ *Id.* at 481. In *Howey* no investor participation existed when both a land sales contract and service contract were purchased. See also *Mitzner v. Cardet Int'l, Inc.*, CCH FED. SEC. L. REP. ¶ 94,015, at 94,081 (N.D. Ill. May 17, 1973): "[I]t is the opinion of this court that the language 'solely from the efforts of others' must be read in the context of the facts of the *Howey* case . . ." (Emphasis in original.)

³⁹ 474 F.2d at 482; see *Mitzner v. Cardet Int'l, Inc.*, CCH FED. SEC. L. REP. ¶ 94,015, at 94,081 (N.D. Ill. May 17, 1973); *State Comm'r of Sec. v. Hawaii Mkt. Center, Inc.*, 485 P.2d 105, 108 (Hawaii 1971).

⁴⁰ 474 F.2d at 482.

⁴¹ *Id.*

⁴² In order for the purchaser to receive proceeds of sales, he "invests three things: his money, his efforts to find prospects and bring them to the meetings, and whatever it costs him to create an illusion of his own affluence. He invests them in Dare's get-rich-quick scheme." *Id.* at 482.

⁴³ "Those efforts are the *sine quo non* of the scheme; those efforts are what keeps it going; those efforts are what produces the money which is to make the [purchaser] rich." *Id.*

⁴⁴ *Mitzner v. Cardet Int'l, Inc.*, CCH FED. SEC. L. REP. ¶ 94,015, at 94,082 (N.D. Ill. May 17, 1973).

explaining anything about what they were selling to the prospects. "The Dare people not the purchaser-'salesmen' run the meetings and do the selling" and the other functions in an effort to induce the prospect to purchase one of the Adventures or the plan.⁴⁵ Hence, the investor was not in a position to make any significant effort affecting the failure or success of the enterprise.

Subsequently, the *Turner* test has successfully been applied in *Mitzner v. Cardet International, Inc.*⁴⁶ The district court described defendant's (Cardet) efforts, selling franchises of quality products in the form of distributorship and area manager licenses, as selecting, marketing, advertising, and otherwise controlling the "type, quality and nature of the goods it sells."⁴⁷ The court suggested that the predicament of the distributors and area managers lay in their being "bound by any and all rules or procedures promulgated by the company and . . . not . . . in a position to make any meaningful or independent business decisions."⁴⁸ Therefore, in neither *Turner* nor *Mitzner* did the investor's efforts control the operation of the enterprise.⁴⁹

IV. CONCLUSION

The *Turner* decision is significant in several respects. First, it sets a precedent for an attempt to control such novel schemes as pyramid sales operations, in effect reasserting the Supreme Court's attitude in *Joiner* that "the reach of the [Securities Act of 1933] does not stop with the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved [that they are] 'investment contracts.'"⁵⁰ Promoters of fraudulent schemes, such as in *Turner*, are placed on notice that such devices are considered to be securities under the federal statutes, and thus subject to registration and disclosure requirements.⁵¹ Also, *Turner* follows a trend of cases⁵² which have tried to resolve the "fundamental question whether the

⁴⁵ 474 F.2d at 479.

⁴⁶ *Mitzner v. Cardet Int'l, Inc.*, CCH FED. SEC. L. REP. ¶ 94,015 (N.D. Ill. May 17, 1973).

⁴⁷ *Id.* at 94,082.

⁴⁸ *Id.*

⁴⁹ *Contra*, *Mr. Steak, Inc. v. River City Steak, Inc.*, 460 F.2d 666 (10th Cir. 1972) (the investor in a restaurant franchise had the power to supervise activities, including employment of a manager and the right to direct the daily operations of the restaurant); *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635 (9th Cir. 1969) (the investor in a distributorship, marketing a product, had an active role in advertising, promotion, and merchandising activities).

⁵⁰ 320 U.S. at 351.

⁵¹ Defendant (Dare) declared that "compliance . . . with the provisions of the Securities Acts would mean the death of [Dare] [T]his is so because the disclosure and anti-deception provisions of the statutes would be totally inimical to the success of the promotion, for it is based upon blinding potential prospects to the realities of the scheme." 348 F. Supp. at 772.

⁵² *See, e.g.*, *Venture Inv. Co. v. Schaefer*, [1954-1971 Transfer Binder] BLUE SKY L. REP. ¶ 71,031 (D. Colo. 1972); *D.M.C. of Colorado, Inc. v. Hays*, [1954-1971 Transfer Binder] BLUE SKY L. REP. ¶ 70,897 (Colo. Dist. Ct. 1971). Recent cases which have found the *Turner* decision persuasive are: *Nash & Associates, Inc. v. Lums of Ohio, Inc.*, CCH FED. SEC. L. REP. ¶ 94,126 (6th Cir. Sept. 5, 1973) (the agreement for a fast food restaurant franchise did not constitute an investment contract, since the franchisee invests in the business and is in control of it); *Lino v. City Investing Co.*, CCH FED. SEC. L. REP. ¶ 94,124 (3d Cir. Aug. 20, 1973) (the Third Circuit found franchise agreements were not investment contracts, since the investor was required to make the following efforts in the operation of the franchise: opening a sales center, staffing it, devoting full time and best efforts to the business, and recruiting and training area distributors).