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# SECURITIES LAW

## COOPERATIVE SHARES DEEMED SUBJECT TO SECURITIES ACTS

*Forman v. Community Services, Inc.*

*1050 Tenants Corp. v. Jakobson*

One of the most persistent problems courts have faced in the interpretation of the 1933 Securities Act<sup>1</sup> and the 1934 Securities Exchange Act<sup>2</sup> is the determination of whether an investment offering is a security or a real property interest not included within the coverage of the statutes.<sup>3</sup> The problem is often more difficult to resolve than first appearances would indicate. In the words of Professor Loss, "Some things which look like real estate are securities, some things which look like securities are real property."<sup>4</sup>

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<sup>1</sup> 15 U.S.C. § 77(a) *et seq.* (1971) [hereinafter cited as Securities Act].

<sup>2</sup> 15 U.S.C. § 78(a) *et seq.* (1971) [hereinafter cited as Exchange Act].

<sup>3</sup> The question arose early in the history of the 1933 and 1934 Acts in connection with agricultural developments. *See* SEC v. Bailey, 41 F. Supp. 647 (D. Fla. 1941) (sale of land, planted with oil producing trees, with a simultaneous offering of development contracts ruled a security); SEC v. Tung Corp. of America, 32 F. Supp. 371 (N.D. Ill. 1940) (sale of land, planted with a commercially valuable tree, combined with a lease-back and development contract ruled a security). These decisions culminated in the landmark opinion of the Supreme Court in SEC v. W.J. Howey Co., 328 U.S. 293, *rehearing denied*, 329 U.S. 819 (1946) (sale of citrus groves with a contract for care and development ruled a security). Similar "citrus cases" have continued to reappear over the years. *See* Blackwell v. Bentsen, 203 F.2d 690 (5th Cir. 1953), *cert. dismissed*, 347 U.S. 925 (1954); SEC v. Orange Grove Tracts, 210 F. Supp. 81 (D. Mass. 1962) (both cases finding a security where groves were sold along with development contracts).

Such holdings have not, however, been limited to the agricultural field. *See* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943) (sale of oil lease assignments along with exploration contracts ruled a security); Roe v. United States, 287 F.2d 435 (5th Cir.), *cert. denied*, 368 U.S. 824 (1961) (sale of oil leases with representation that test wells would be drilled by promoters ruled a security); Mansfield v. United States, 155 F.2d 952 (5th Cir.), *cert. denied*, 329 U.S. 792 (1946) (sale of land under false promise to drill oil wells ruled a security); Atherton v. United States, 128 F.2d 463 (9th Cir. 1942) (sale of fractional assignments of oil and gas leases with representation that test wells would be drilled ruled a security).

Cases involving the sale of personal property present a similar problem. *See* Continental Marketing Corp. v. SEC, 387 F.2d 466 (10th Cir. 1967), *cert. denied*, 391 U.S. 905 (1968) (sale of live beavers with contracts for their care and sale ruled a security); Penfield Co. v. SEC, 143 F.2d 746 (9th Cir. 1944) (exchange of bottling contracts for whiskey warehouse receipts along with agreement to sell bottled whiskey and pay a portion of the proceeds to the contract holders ruled a security); SEC v. Bourbon Sales Corp., 47 F. Supp. 70 (W.D. Ky. 1942) (purchase of whiskey with agreement to pay seller proceeds of eventual sale of whiskey less expenses ruled a security); SEC v. Payne, 35 F. Supp. 873 (S.D.N.Y. 1940) (sale of live silver foxes along with care and marketing agreement ruled a security). *See generally* 1 L. LOSS, SECURITIES REGULATIONS 489-94 (2d ed. 1961) [hereinafter cited as Loss] and Selvers, *Investment Contracts: Expanding Effective Securities Regulation*, 43 ST. JOHN'S L. REV. 525 (1974).

<sup>4</sup> Loss, *supra* note 3, at 493.

In two closely connected cases, *Forman v. Community Services, Inc.*<sup>5</sup> and *1050 Tenants Corp. v. Jakobson*,<sup>6</sup> the Second Circuit was presented with the question whether shares in a cooperative housing development are securities within the meaning of the 1933 and 1934 Acts.<sup>7</sup> Both cases involved allegations by cooperative unit purchasers that the developers had violated the antifraud provisions of the two Acts.<sup>8</sup> The defendants in *1050 Tenants* were private promoters<sup>9</sup> while in *Forman*, the defendant promoters included a state government housing finance agency.<sup>10</sup> In each case, the Second Circuit declared that cooperative stock, whether issued in conjunction with a private development or a publicly financed nonprofit project, is a security within the meaning of the two Securities Acts.<sup>11</sup> Thus, the offerors could be subject to liability under the applicable antifraud provisions.

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<sup>5</sup> 500 F.2d 1246 (2d Cir. 1974), cert. granted sub nom. United Housing Foundation, Inc. v. Forman, 43 U.S.L.W. 3403 (U.S. Jan. 20, 1975) (No. 74-157). The panel consisted of Judges Hays and Oakes, joined by Judge Christensen of the District of Utah, sitting by designation.

<sup>6</sup> 503 F.2d 1375 (2d Cir. 1974). The panel consisted of Judges Timbers and Smith, joined by Judge Tyler of the Southern District of New York, sitting by designation.

<sup>7</sup> The statutory definition of the term "security" in the Securities Act was designed to be "in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the concept of a security." H.R. REP. No. 85, 73d Cong., 1st Sess. 11 (1933). Section 2(1) of the Act states, in pertinent part:

[T]he 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 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.

15 U.S.C. § 77b(1) (1971). For a closely parallel definition, see Exchange Act § 3(a)(10), 15 U.S.C. § 78c(10) (1971). The two definitions have been treated as identical by the courts. See *Tcherepnin v. Knight*, 389 U.S. 332, 335-36 (1967).

Whether the cooperative stock in both *Forman* and *1050 Tenants* falls within the definition of a security is, in the first instance, a jurisdictional question. The lower court in *Forman*, finding no security to be present, denied federal jurisdiction. *Forman v. Community Services, Inc.*, 366 F. Supp. 1117, 1132 (S.D.N.Y. 1973). In *1050 Tenants*, the district court upheld federal jurisdiction on the basis of its finding that the offering was a security. *1050 Tenants Corp. v. Jakobson*, 365 F. Supp. 1171, 1171-72 (S.D.N.Y. 1973).

<sup>8</sup> The *Forman* complaint alleged violations of both the Securities Act § 17(a), 15 U.S.C. § 779(a) (1970), and the Exchange Act § 10(b), 15 U.S.C. § 78j(b) (1970), and rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1973). 500 F.2d at 1248.

The *1050 Tenants* complaint similarly alleged violations of these general antifraud provisions of both Acts, as well as a violation of Securities Act § 12(2), 15 U.S.C. § 77l(2) (1970), which specifically prohibits the use of false or misleading statements in an oral communication or a prospectus concerning the purchase or sale of a security.

<sup>9</sup> 503 F.2d at 1377.

<sup>10</sup> Co-op City, the cooperative development with which the *Forman* case is concerned, was initiated by the United Housing Foundation (UHF), a New York nonprofit corporation, under New York's Mitchell-Lama Act, N.Y. PRIVATE HOUSING FIN. L. §§ 10-37 (McKinney 1962). The purpose of the Mitchell-Lama Act and the UHF is to foster "the growth of nonprofit cooperative housing for low and low-middle income families." 500 F.2d at 1249.

<sup>11</sup> 500 F.2d at 1250; 503 F.2d at 1378.

In reaching its decision,<sup>12</sup> the court employed two alternate tests for finding the cooperative offering to be a security within the meaning of the Acts. Based on a "literal" test, the offering was found to be within the statutory ambit solely because the thing offered, cooperative *stock*, is denominated in a manner commonly understood to describe a security.<sup>13</sup> Alternatively, the court ruled that the offering fulfilled the substantive requirements necessary to a finding that a security is present.<sup>14</sup>

Since the inception of investor protection legislation as embodied in the 1933 and 1934 Acts, courts have consistently given an expansive interpretation to the definition of a security as enunciated by those Acts.<sup>15</sup> As a result, investor protection has been extended to include not only the commonly recognized forms of securities but also any "[n]ovel, uncommon, or irregular devices, whatever they appear to be,"<sup>16</sup> whenever they are, in effect, securities.<sup>17</sup> Thus, courts have often been faced with the task of bringing such "novel" schemes within the coverage of the Acts.<sup>18</sup> For this reason, it has been the position of the courts that substance will prevail over form in bringing a questionable offering within the statutory definition.<sup>19</sup> The Supreme Court expressed the general rule by noting that "in searching for the meaning and scope of the word 'security' . . . , form should be disregarded for substance and the emphasis should be on economic reality."<sup>20</sup> Accordingly, mere appearances will not suffice to exclude an offering from the coverage of the Acts so long as the factual elements of a security are present.<sup>21</sup>

These substantive elements were set forth by the Supreme Court in the landmark decision of *SEC v. W. J. Howey Co.*<sup>22</sup> There, the

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<sup>12</sup> Since the holding of the court in *1050 Tenants* relies directly on the reasoning of the *Forman* decision, the two opinions may be discussed concurrently.

<sup>13</sup> 500 F.2d at 1252-53; 503 F.2d at 1378.

<sup>14</sup> 500 F.2d at 1253-55; 503 F.2d at 1378.

<sup>15</sup> See *Tcherepnin v. Knight*, 389 U.S. 332, 338 (1967); *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946); *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 352-53 (1943). See generally *Loss*, *supra* note 3, at ch. 3A; cases cited in note 3 *supra*.

<sup>16</sup> *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351 (1943).

<sup>17</sup> *Id.* See *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946).

<sup>18</sup> Some recent examples include *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973) (pyramid investment plan); *SEC v. M.A. Lundy Associates*, 362 F. Supp. 226 (D.R.I. 1973) (whiskey warehouse receipts); *SEC v. American Foundation for Advanced Educ.*, 222 F. Supp. 828 (W.D. La. 1963) (college education finance plan). See also cases cited in note 3 *supra*.

<sup>19</sup> *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946). See *SEC v. Crude Oil Corp. of America*, 93 F.2d 844, 846-47 (7th Cir. 1937). See also *Loss*, *supra* note 3, at 488.

<sup>20</sup> *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967), *citing* *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946).

<sup>21</sup> See *Loss*, *supra* note 3, at 488.

<sup>22</sup> 328 U.S. 293, *rehearing denied*, 329 U.S. 819 (1946).

Court established the definition of an "investment contract," and, therefore, a security, 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."<sup>23</sup> With minor modifications,<sup>24</sup> the *Howey* test has remained the controlling definition of a security.<sup>25</sup> It has been applied to a wide range of investment contracts despite the facial characterization of the offering as something which would not ordinarily be deemed a security.<sup>26</sup>

It appears logical to conclude that the *Howey* test would apply equally well to exclude an offering from coverage of the Acts when the offering fails to meet the substantive requirements of a security. In fact, such has been the prevailing view of the courts.<sup>27</sup> However, in *Forman*, the Second Circuit set forth the view that the substantive test is solely inclusory in nature.<sup>28</sup> In other words, while substance will prevail over form to render an offering includable, an offering which has the facial appearance of a security will also be included even though, in substance, it would not otherwise qualify.

The *Forman* court, relying on the Supreme Court's literal test in *SEC v. C. M. Joiner Leasing Corp.*,<sup>29</sup> held that "if a given instrument

<sup>23</sup> 328 U.S. at 298-99.

<sup>24</sup> Some of the more important modifications include relaxation of the requirement that there be exclusive third party management and that profits be solely monetary. See *Andrews v. Blue*, 489 F.2d 367, 375 (10th Cir. 1973) ("in name only" management role of investor not sufficient to avoid a finding of third-party management within the *Howey* test); *Lino v. City Investing Co.*, 487 F.2d 689, 692 (3d Cir. 1973) (requirement that investor perform nominal or limited managerial duties not sufficient to evade the third-party management test); *SEC v. Glenn W. Turner Enterprises Inc.*, 474 F.2d 476, 482 (9th Cir. 1973) (element of third-party management is present where the undeniably significant managerial efforts are made by the third-party manager); *Davenport v. United States*, 260 F.2d 591 (9th Cir. 1958), cert. denied, 359 U.S. 909 (1959) (job security a sufficient "profit"); *SEC v. American Foundation for Advanced Educ.*, 222 F. Supp. 828, 831 (W.D. La. 1963) (assurance that investor's children will have financial capability to attend college a sufficient "profit").

<sup>25</sup> See generally Loss, *supra* note 3, at ch. 3A.

<sup>26</sup> See, e.g., cases cited notes 3 & 18 *supra*.

<sup>27</sup> Courts have generally excluded questionable offerings where any one of the *Howey* elements is lacking. See, e.g., *Lynn v. Caraway*, 379 F.2d 943 (5th Cir. 1967) (element of dependence on efforts of third party lacking); *Woodward v. Wright*, 266 F.2d 108 (10th Cir. 1959) (third-party management lacking); *Darwin v. Jess Hickey Oil Corp.*, 153 F. Supp. 667 (N.D. Tex. 1957) (element of common enterprise lacking). The *Forman* court recognized that the weight of authority still lies with this view, stating that "there is still substantial authority for the proposition that substance should govern rather than form even to restrict coverage of the Acts." 500 F.2d at 1253.

<sup>28</sup> See 500 F.2d at 1252-53. The *Forman* court adopted the literal test for purposes of inclusion of the cooperative stock but, nevertheless, noted that form alone could not be used to exclude an instrument.

For a discussion of the dangers of the literal view, see *Davis v. Avco Corp.*, 371 F. Supp. 782, 786-87 (N.D. Ohio 1974); Coffey, *The Economic Realities of a "Security": Is There a More Meaningful Formula?*, 18 CASE W. RES. L. REV. 367, 406-07 (1967).

<sup>29</sup> 320 U.S. 344 (1943). The *Joiner* Court instructed that "[i]nstruments may be in-

is a share of stock 'on its face' it is literally within the ambit of the statute."<sup>30</sup> Thus, exclusion from the coverage of the Acts could not be argued where the offering is of an instrument which is labelled "stock."<sup>31</sup> This would appear to be the case even where the substantive factors involved would lead an issuer to believe that the instrument could not be deemed a security under the *Howey* test.

The Second Circuit grounded the rationale for the literal test on the proposition that the purchaser of what on its face appears to be stock may be led to believe that he is entitled to protection under the Acts.<sup>32</sup> Although the theory of the court may have some general applicability,<sup>33</sup> it is difficult to accept uncritically the conclusion that the layman cooperative unit buyer looks upon his transaction with the developer as something more than the "purchase" of an apartment. Nevertheless, the underlying purpose of the court in adopting this line of reasoning is not without merit. There is little doubt that, regardless of any imputed reliance, the cooperative unit purchaser is in urgent need of the protection afforded by the Acts.<sup>34</sup>

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cluded within any of [the Acts] definitions, as a matter of law, if on their face they answer to the name or description." *Id.* at 351.

<sup>30</sup> 500 F.2d at 1252. In *1050 Tenants*, the court grounded its decision upon the literal test propounded in *Forman*. 503 F.2d at 1378.

<sup>31</sup> The literal view is not without precedential support. See *Movielab, Inc. v. Berkey Photo Inc.*, 321 F. Supp. 806 (S.D.N.Y. 1970), *aff'd*, 452 F.2d 662 (2d Cir. 1971) (the 15 U.S.C. § 78c(a)(10) inclusion of "any note" within the definition of a security was alone sufficient to find the installment promissory notes in question to be securities). State courts have also, on occasion, taken the literal approach. See, e.g., *Strauss v. State*, 13 Ga. App. 90, 147 S.E.2d 367 (Ct. App. 1966) (money orders held to be securities simply because they were "evidences of indebtedness" under state security laws).

<sup>32</sup> The *Forman* court observed:

[W]here one utilizes the outward and traditional manifestations of a "stock" organization, the buyer may be led to believe that what he is buying is "stock" as normally considered and which would be protected by the federal or state securities laws. Indeed, the buyer of the purported "stock" may rely to some extent on the notion that he will at least be protected by those laws.

500 F.2d at 1252.

<sup>33</sup> The theory of the court would certainly apply in the case of forged securities where the investor's reliance on the protection of the Acts is a relevant consideration. Forged securities have been included within the coverage of the Acts. See *Seeman v. United States*, 90 F.2d 88, 89 (5th Cir. 1937), *rev'd and remanded on other grounds, subsequent conviction on the same indictment aff'd*, 96 F.2d 732 (5th Cir.), *cert. denied*, 305 U.S. 620 (1938); Loss, *supra* note 3, at 511-12.

<sup>34</sup> Cooperative offerings have long been marred by significant abuses on the part of promoters. These activities have included: exorbitant profit taking; pre-subscription self-dealing; coercion of tenants during conversions; and, perhaps most important to the purchaser, gross underestimation of carrying charges. Underestimation of carrying charges, in particular, provided the basis for the plaintiffs' complaint in *Forman*. 500 F.2d at 1250. See P. ROHAN & M. RESKIN, *COOPERATIVE LAW AND PRACTICE* § 3A.02[1] (1974) [hereinafter cited as ROHAN & RESKIN]; Note, *Cooperative Housing Corporations and the Federal Securities Laws*, 71 COLUM. L. REV. 118, 118-22 (1971) [hereinafter cited as *Cooperative Housing Corporations*].

The fact that little actual protection has been provided to the cooperative purchaser

After utilizing the literal test to deem the cooperative stock a "security," both the *Forman* and *1050 Tenants* opinions held alternatively that even under the substantive test of *Howey*, the result would be the same.<sup>35</sup> The *Howey* elements of transaction, investment, common enterprise, and third-party management were all clearly present in the cooperative offerings.<sup>36</sup> Consequently, the *Forman* and *1050 Tenants* courts focused their attention on the more difficult issue of whether there existed an "expectation of profit" sufficient to warrant the inclusion of the stock within the coverage of the Acts.

The determination that profit expectation is indeed present in a cooperative offering was made with relative ease in *1050 Tenants*.<sup>37</sup> Most obviously, the cooperative purchaser, like any other home buyer, looks to an appreciation in the value of his dwelling.<sup>38</sup> Since legal realities dictate that the cooperative stock held by the owner is unalterably tied to the unit, the appreciation is, in legal terms, realized as a result of selling the stock which entitles the purchaser to occupancy of the unit.<sup>39</sup> While the cooperative unit owner may look upon the appreciation as deriving from a sale of "the unit," it actually results from the sale of the stock. The expectation of profit can therefore be said to attend the purchase of cooperative stock, thereby fulfilling the *Howey* formula.<sup>40</sup> Furthermore, the *1050 Tenants* court discerned three additional areas of profit:

- (1) the shareholder-tenants . . . benefit directly from substantial non-residential income [resulting from rental proceeds of pro-

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by state law has led to suggestions that effective safeguards could be assured if cooperative stock were made subject to the Securities Acts. The commentators advocating this approach have noted that any difficulty with the *Howey* test could be obviated by adoption of a literal test. See ROHAN & RESKIN, *supra*, at § 3A.02[2]; *Cooperative Housing Corporations*, *supra* at 122. The *Forman* and *1050 Tenants* opinions implicitly adopt this reasoning.

<sup>35</sup> 500 F.2d at 1253; 503 F.2d at 1378.

<sup>36</sup> 500 F.2d at 1253-54; 503 F.2d at 1378.

<sup>37</sup> 503 F.2d at 1378.

<sup>38</sup> *Id.*

<sup>39</sup> See ROHAN & RESKIN, *supra* note 34, at § 2.01[5].

<sup>40</sup> In the alternative, it is possible to look upon the offering as one of real property in conjunction with a contract or agreement for management and development. Since some confusion has arisen as to the status of cooperative ownership as either real or personal property, see ROHAN & RESKIN, *supra* note 34, at § 1.03, this alternative view warrants consideration. A number of state courts have taken the view that the cooperator's interest is in real property. See, e.g., *Willmont v. Tellone*, 137 So. 2d 610 (2d Dist. Ct. App. Fla. 1962) (the cooperative is real estate and the issue of stock is meaningless to the determination); *Lacaille v. Feldman*, 44 Misc. 2d 370, 353 N.Y.S.2d 937 (Sup. Ct. N.Y. County 1964) (cooperator's interest is in the nature of a quasi-real property interest). Nevertheless, even if considered a real property interest, the classification as a security would still appear appropriate. See cases cited in note 3 *supra*.

- fessional apartments] which is used by the corporation to reduce the monthly carrying charges;
- (2) they are afforded an opportunity to make substantial savings on their personal income tax in the form of deductions for their payment of a proportional share of the corporation's deductible expenses [including mortgage interest expense];
  - (3) they stand to benefit from obtaining optimum services at the lowest possible cost.<sup>41</sup>

Needless to say, these areas of cost saving have always been significant inducements to cooperative unit purchasers.<sup>42</sup> Additionally, they represent some of the more important practical financial advantages of cooperative ownership over apartment rental.<sup>43</sup>

The *Forman* court found it necessary to rely solely on these three cost-saving factors to serve as the element of profit.<sup>44</sup> Since the project in which the *Forman* purchasers acquired their stock is a publicly supervised project under New York's Mitchell-Lama Act,<sup>45</sup> cooperators are not permitted to profit by the sale of their stock.<sup>46</sup> The possibility of appreciation in the value of the stock is, therefore, not present. Nevertheless, the potential enjoyment of profit through appreciation was not, in the court's view, necessary for a finding that the *Howey* requirements were fulfilled. Moreover, recognizing that the project in *Forman* was publicly financed and that the promoter, the United Housing Foundation, is a nonprofit entity under state supervision, the court observed that "the fact that there may be no profit motive on the part of the promoter . . . does not by any means affect the profit motives on the part of the subscribers."<sup>47</sup> On the contrary, the court ruled that application of nonresidential income of the project to reduce carrying costs, the deductibility to the unit lessee of mortgage interest expenses paid by the corporation, and the probability that cooperators will obtain optimum services at the lowest possible cost were, in themselves, sufficient "profit" for purposes of the substantive test.<sup>48</sup>

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<sup>41</sup> 503 F.2d at 1378.

<sup>42</sup> See 4A R. POWELL, REAL PROPERTY ¶ 632 (rev. ed. 1974).

<sup>43</sup> *Id.*

<sup>44</sup> 500 F.2d at 1254, citing 1050 Tenants Corp. v. Jakobson, 365 F. Supp. 1171, 1176 (S.D.N.Y. 1973).

<sup>45</sup> N.Y. PRIVATE HOUSING FIN. L. §§ 10-37 (McKinney 1962). See note 10 *supra*.

<sup>46</sup> *Id.* § 31a.

<sup>47</sup> 500 F.2d at 1255.

<sup>48</sup> The "substantial" nonresidential income that the tenant-shareholders relied on consisted of approximately \$1.1 million in rents paid by retail stores, \$667,000 in office space rental and coin-operated washing machine revenues, and \$2.5 million in annual parking fees collected from tenants and others. 500 F.2d at 1254. The court noted that this income would not be sent to tenants in the form of a dividend check, but would nevertheless, inure to their benefit since it was used to reduce carrying charges. Although



The immediate effect of the *1050 Tenants* and *Forman* decisions is to bring all cooperative stock within the ambit of the antifraud provisions of the 1933 and 1934 Securities Acts.<sup>49</sup> Undoubtedly, the implications for the cooperative promoter are enormous. For example, a primary concern will be the potential for liability under section 10(b) of the Exchange Act<sup>50</sup> and its complement, rule 10b-5,<sup>51</sup> which together outlaw the use of any manipulative or deceptive device "in connection with the purchase or sale of any security."<sup>52</sup> The plaintiff is provided with significant advantages in prosecuting a 10b-5 fraud action, particularly relaxation of the reliance, causation, and scienter requirements of fraud.<sup>53</sup>

Moreover, it seems that the wide breadth of the two decisions will reach beyond the cooperative field. The reasoning of the Second Circuit in including cooperative stock within the coverage of federal securities laws appears to have at least some application to promoters of non-cooperative forms of co-homeownership. A particularly apropos example is the sponsor of a condominium project in which the common elements are incorporated.<sup>54</sup> Considering the literal test applied by the Second Circuit to cooperative shares, a condominium offering plan containing a provision for incorporation of common elements might be viewed as the offering of a security. Certainly, the shares representing ownership of common elements would be tied to each

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not a direct monetary benefit, it was "profit" under the *Howey* concept. *Id.* This reasoning is in line with prior determinations that profit need not be in the form of a direct monetary return. *See* cases cited in note 24 *supra*.

<sup>49</sup> Specifically, it is conceivable that an action could be brought under both the Securities Act § 17(a), 15 U.S.C. § 77q(a) (1970) (prohibiting use of any means of interstate commerce to employ a device, scheme, or artifice to defraud by false or misleading statements in the offer of sale of a security), and the Exchange Act § 10(b), 15 U.S.C. § 78j(b) (1970) (prohibiting use of any means of interstate commerce to employ any manipulative or deceptive device in connection with the purchase or sale of any security). Should the sale of the cooperative stock also involve a false or misleading oral communication or prospectus, an additional cause of action might be brought under the Securities Act § 12(2), 15 U.S.C. § 77i(2) (1970).

<sup>50</sup> 15 U.S.C. § 78j(b) (1970).

<sup>51</sup> 17 C.F.R. § 240.10b-5 (1973). Rule 10b-5 was promulgated by the Securities and Exchange Commission pursuant to the authority granted in section 10(b) of the Exchange Act.

<sup>52</sup> 15 U.S.C. § 78j(b) (1970); 17 C.F.R. § 240.10b-5 (1973).

<sup>53</sup> *See generally* Note, *SEC Rule 10b-5: A Recent Profile*, 13 WM. & MARY L. REV. 860 (1972).

<sup>54</sup> Incorporation of the condominium's common elements, e.g., hallways, sidewalks, and recreational centers, has been proposed as a means of insulating individual unit owners from tort liability for acts of negligence in connection with the common areas. P. ROHAN & M. RESKIN, *CONDOMINIUM LAW AND PRACTICE* § 10A.03[1] (1974); *see* Knight, *Incorporation of Condominium Common Areas? An Alternative*, 50 N.C.L. REV. 1 (1971); Comment, *The Condominium and the Corporation—A Proposal for Texas*, 11 HOUSTON L. REV. 454 (1974) [hereinafter cited as *Texas Proposal*].

unit and thereby be inextricably a part of the offering.<sup>55</sup> As such, the purchase of a unit would include the purchase of shares which literally qualify as securities.<sup>56</sup> With this realization in mind, the prudent condominium developer would steer clear of common element incorporation, lest he inadvertently expose himself to securities fraud liability under the federal law.

Additional questions arise from the substantive test used by the Second Circuit. The *Howey* criteria, read concurrently with the *Forman* and *1050 Tenants* definition of profits, would seem to find application in the condominium as well as the cooperative field. A condominium unit purchaser most certainly invests his money in a common enterprise and is led to expect profits both in the form of appreciation upon resale and cost savings arising from nonresidential income, deduction of real estate taxes, and the acquisition of maximum services at minimum cost. Likewise, in all condominiums, a major portion of the value of the unit as well as the maximization of cost saving is likely to depend on the efforts of a third party, *i.e.*, the board of managers, much the same as it does in a cooperative. The voting rights of the unit owner and his ability to participate in management are not likely to defeat the essential third-party nature of the board any more than the voting and participation rights of the cooperator defeat the third-party nature of the cooperative corporation.<sup>57</sup>

In many respects, it is difficult to make substantive distinctions between the condominium and cooperative purchaser.<sup>58</sup> Although it is generally held that the cooperator's property interest is personal<sup>59</sup> while that of the condominium unit owner is most certainly real property,<sup>60</sup> if substance is truly allowed to govern form, the distinction is tenuous at best. Moreover, one need only look to the *Howey* decision

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<sup>55</sup> See *Texas Proposal*, *supra* note 54, at 464.

<sup>56</sup> The *Texas Proposal* author argues for exemption of the condominium stock on the ground that the corporation would be nonprofit in nature. *Id.* at 463. However, if the *Forman* logic is applied, the nonprofit character of the corporation is irrelevant. See 500 F.2d at 1255.

<sup>57</sup> The *Howey* phrase, "solely from the efforts of the promoter or third party," 328 U.S. at 299 (emphasis added), is no longer taken literally. See cases cited in note 24 *supra*.

<sup>58</sup> It has been noted that condominium and cooperative purchasers encounter many of the same consumer problems. See Note, *Florida Condominiums—Developer Abuses and Securities Law Implications Create a Need for a State Regulatory Agency*, 25 U. FLA. L. REV. 350 (1973). These difficulties are almost identical to those which affected the court's determination in *Forman* and *1050 Tenants*. See note 34 *supra*.

<sup>59</sup> See ROHAN & RESKIN, *supra* note 34, at § 1.03.

<sup>60</sup> See, *e.g.*, CONN. GEN. STAT. ANN. ch. 825, §§ 47-73, 47-74(a) (1973); FLA. STAT. ANN. §§ 711.04(1), (3) (1969); N.J. STAT. ANN. §§ 46:8A-4, 46:8A-6 (Supp. 1974); N.Y. REAL PROP. LAW §§ 339-e(15), 339-g, 339-h (McKinney 1968); PA. STAT. ANN. tit. 68, § 700.201 (1965). See generally P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 1.01[2] (1974).

to rebut a contention that the real property interest involved in a condominium is alone sufficient to disallow coverage under the Acts.<sup>61</sup> Furthermore, the *Joiner* Court,<sup>62</sup> in considering an offering of what appeared to be real estate, pointed out that "courts have not been guided by the nature of the assets back of a particular document or offering."<sup>63</sup>

If the *Forman* court's rationale is adopted by the Supreme Court, or if other circuits accept its expansive definition of real estate securities, it is probable that both cooperative and condominium promoters may find themselves defending a new torrent of federal securities fraud claims. Confusing the situation, however, is a statement by the Securities and Exchange Commission that most condominium offerings, typically sales of primary residences without rental pools, would not be deemed securities, at least for registration purposes:

In situations where commercial facilities are a part of the common elements of a residential project, no registration would be required under the investment contract theory where (a) the income from such facilities is used only to offset common area expenses, and (b) the operation of such facilities is incidental to the project as a whole and are not established as a primary income source for the individual owners of a condominium or cooperative unit.<sup>64</sup>

Since the Second Circuit's analysis of investment contracts appears inconsistent with this position, it is understandable that the real estate bar is anxious for more concrete guidelines on the applicability of federal securities laws to the housing market.<sup>65</sup>

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<sup>61</sup> The *Howey* case, discussed in the text accompanying notes 22-26 *supra*, involved the sale of citrus groves along with a contract for service. Despite the fact that the offering included a sale of real property, the Court had no difficulty in finding a security. 328 U.S. at 299-300.

<sup>62</sup> SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943), discussed in text accompanying note 29 *supra*.

<sup>63</sup> *Id.* at 352.

<sup>64</sup> Securities Act Release No. 5347 (Jan. 4, 1973). The release principally concerned the use of rental pool arrangements in resort condominium offerings, which would trigger the registration requirements of the 1933 Act. A rental pool is defined as a device whereby the promoter or a third party undertakes to rent the unit on behalf of the actual owner during that period of time when the unit is not in use by the owner . . . . [T]he individual owner receives a ratable share of the rental proceeds regardless of whether his individual unit was actually rented.

*Id.*

<sup>65</sup> See, e.g., Weiss, *Real Estate or a Security*, 172 N.Y.L.J. 96, Nov. 18, 1974, at 1, col. 1.