Denver Law Review

Volume 68
Issue 4 *Tenth Circuit Surveys*

Article 9

February 2021

General Partnership Interests as Securities in the Tenth Circuit

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GENERAL PARTNERSHIP INTERESTS AS SECURITIES IN THE TENTH CIRCUIT

I. INTRODUCTION

The definition of a security has puzzled courts since the inception of the federal securities laws. The term explicitly encompasses common investments including stocks, bonds and notes. The provisions, however, cover more than these ordinary types of investments. Section 2(1) of the Securities Act of 1933 (the 1933 Act)[1] and Section 3(a)(10) of the Securities Exchange Act of 1934 (the Exchange Act)[2] include an "investment contract"[3] in the definition of "security."

The securities laws do not define the term "investment contract," and courts have liberally construed the term as a catch-all for any type of investment that arguably could be deemed a security.[4] In 1946, the Supreme Court filled this definitional void in *S.E.C. v. W.J. Howey Co.*[5] In *Howey*, the Court stated "[t]he test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."[6] Justification for broad interpretation emanated from state "blue sky" legislation[7] and the remedial nature of the federal securities laws.[8]

The Tenth Circuit recently addressed the enigmatic definition of investment contract in *Banghart v. Hollywood General Partnership*.[9] The court expressly considered whether a general partnership interest con-

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1. Securities Act of 1933, 15 U.S.C. § 77b(1) (1988).
2. Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10) (1988).
3. The 1933 Act provides:

> When used in this title 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 share, investment contract . . . .

15 U.S.C § 77b(1) (1988).

The 1934 Act 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 . . . .

15 U.S.C. § 78c(a)(10) (1988).

4. *See generally* Note, *Catch-All Investment Contracts: The Economic Realities Otherwise Require*, 14 CUMB. L. REV. 135 (1983-84).
5. 328 U.S. 293 (1946).
6. *Id.* at 301.
7. *Id.* at 298. In *Howey* the Court articulated that a broad interpretation of the term "investment contract" was warranted due to the term's common use in state blue sky laws and the broad interpretation of the term by state courts.
8. *Id.* at 298-99. *See also* Tcherepnin v. Knight, 389 U.S. 332, 338 & n.19 (1967). "Even a casual reading of § 3(a)(10) of the 1934 Act reveals that Congress did not intend to adopt a narrow or restrictive concept of security in defining that term."
9. 902 F.2d 805 (10th Cir. 1990).

stituted a security. The Tenth Circuit's application of the "solely from the efforts of others" wording from the *Howey* test to general partnership interests is the topic of this Article.

II. BACKGROUND

A. S.E.C. v. W.J. Howey Co.

The Supreme Court defined an investment contract in the seminal case of *S.E.C. v. W.J. Howey Co.*[10] The W.J. Howey Company ("Howey") owned large tracts of citrus acreage in Florida. Over several years, Howey planted about 500 acres annually and offered roughly half of this acreage to the public "to help . . . finance additional development."[11] In addition to selling the parcel of land, Howey also offered each prospective customer a service contract with Howey-in-the-Hills Service, Inc. ("Hills"). Hills cultivated and developed the parcels of land.

The issue confronted by the Court involved determining whether a land sales contract, coupled with a conveyance of land and a service contract, constituted a security.[12] Specifically, the Court addressed whether the arrangement amounted to an investment contract. In defining the phrase "investment contract," the Court noted that the securities laws had to be broadly construed in order to effectuate the legislative policy for protecting investors.[13] The Court easily found that the purchases had a number of attributes of an investment contract, including the investment of money with the expectation of profits.

The most difficult analysis arose under the element which required that profits come solely from the efforts of others. The Court found that because most investors were out-of-state residents unable to participate in management, and the size of the parcels of land were individually insignificant, the investors relied on the efforts of Howey and Hills to produce profits from the common enterprise.[14]

B. United Housing Foundation, Inc. v. Forman

Since the Supreme Court had interpreted the term "solely" within the context of the specific facts of *Howey*, lower courts were given little guidance for interpreting the term generally. After *Howey*, lower courts generally rejected a literalist interpretation of the word "solely" in favor of a functionalist definition. In *S.E.C. v. Glenn W. Turner Enterprises, Inc.*,[15] the Ninth Circuit stated "the term 'solely' should not be read as a strict or literal limitation on the definition of an investment contract, but

10. 328 U.S. 293 (1946).
11. *Id.* at 295.
12. *Id.* at 297.
13. *Id.* at 299. "[The concept of security] embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."
14. *Id.* at 300. "Thus all the elements of a profit-seeking business venture are present here. The investors provide the capital and share in the earnings and profits; the promoters manage, control and operate the enterprise."
15. 474 F.2d 476 (9th Cir. 1973).

rather must be construed realistically, so as to include within the definition those schemes which involve in substance, if not form, securities."[16] Other courts generally followed suit.

The Supreme Court explicitly accepted the prevailing definition of "solely" in *United Housing Foundation, Inc. v. Forman*.[17] *United Housing* involved the issue of "whether shares of stock entitling a purchaser to lease an apartment in Co-op City, a state subsidized and supervised nonprofit housing cooperative, are 'securities' within the purview of the [securities laws]."[18] The Court found the investment not to be a security because the purchasers bought the investment in order to obtain low cost housing and not to make a profit.

In deciding the case, the Court redefined the *Howey* test. Rather than relying upon the names given the investment by the parties, the economic realities of the transaction governed whether a security existed.[19] The Court also reformulated the *Howey* test by stating: "The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."[20] The reformulation effectively changed the *Howey* test in three ways. First, the expectation of profits needed to be reasonable. Second, the economic realities requirement allowed a court the discretion to avoid the *Howey* test altogether if the economic realities of a given situation dictated the absence of a security.[21] The third and most important change resulted from the Court's implicit adoption of the broader interpretation of the term "solely" created by the lower courts.[22]

III. *WILLIAMSON V. TUCKER*

Under the *Howey-United Housing* test, while limited partnership interests usually constituted investment contracts, general partnership interests did not. The distinction resulted from the significant amount of control retained by the general partners.[23] This changed six years after *United Housing* when the Fifth Circuit decided *Williamson v. Tucker*.[24] In *Williamson*, M.L. Goodwin Investments, Inc. ("Goodwin") executed con-

16. *Id.* at 482. *Contra* S.E.C. v. Koscot Interplanetary, Inc., 365 F. Supp. 588 (N.D. Ga. 1973), *rev'd*, 497 F.2d 473 (5th Cir. 1974) (The district court adopted a literalist view of "solely" which was overruled by the Fifth Circuit's adoption of the more prevalent functional definition).

17. 421 U.S. 837 (1975).

18. *Id.* at 840.

19. *Id.* at 851-52. "In considering these claims we . . . must examine the substance—the economic realities of the transaction—rather than the names that may have been employed by the parties."

20. *Id.* at 852.

21. Note, *Catch-All Investment Contracts: The Economic Realities Otherwise Require*, 14 CUMB. L. REV. 135 (1983-84).

22. United Hous. Found., Inc. v. Forman, 421 U.S. 837, 852 n.16 (1975). The Court cited with approval the definition provided by the Ninth Circuit in S.E.C. v. Glenn W. Turner Enters., 474 F.2d 476 (9th Cir. 1973).

23. McConnell v. Frank Howard Allen & Co., 574 F. Supp. 781, 785 (N.D. Cal. 1983).

24. 645 F.2d 404 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981).

tracts to purchase joint venture interests in development of a large tract of land around the then proposed Dallas-Fort Worth Airport. Goodwin represented to potential investors that he would pursue development or sale of the property, perform all management functions and endeavor to rezone the land from single-family to another, more beneficial category.

Despite the representations of Goodwin, the investors retained considerable control over the investment. The investors' unanimous consent was required to confess a judgment, make guarantees, execute deeds of trust, borrow money in the name of the joint venture or use joint venture property as collateral. In order to develop the property, a vote of at least sixty percent was mandated. Any dissenter who voted against the development could compel the remaining venturers to purchase the dissenter's interest.

Although the Fifth Circuit remanded on other grounds, the court, in dicta, applied the *Howey* test to determine whether these joint venture interests were securities. The court easily found the first two elements present. The problem arose over whether the income from interests purchased was derived from the managerial efforts of others. The court enunciated factors relevant to whether the venturers retained meaningful partnership powers, stating:

> [A] general partnership interest or joint venture interest can be designated a security if the investor can establish, for example, that (1) an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership; or (2) the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.[25]

The first standard related specifically to the partnership agreement. If the agreement gave significant power to all general partners, the interest was not a security. Moreover, the court would only have to look to the powers created in the agreement and not the powers actually exercised.

The second and third factors required the court to go beneath the underlying contract and look subjectively at the investor and the promoter or manager. By analyzing each party to a transaction, the court created the possibility of anomalous results.[26] For example, identical general partnerships would be regarded differently under the securities laws if the investors in the first venture consisted of real estate developers while the second venture consisted of persons with little or no mana-

25. *Id.* at 424.

26. Matek v. Murat, 862 F.2d 720, 729 (9th Cir. 1988). The court recognized the possibility of varying results as to different investors in the same venture.

gerial experience.[27]

IV. POST-*WILLIAMSON* DECISIONS

After *Williamson*, a debate arose among the federal circuits concerning the possibility that a general partnership interest could constitute a security.[28] The Fourth and Ninth Circuits expressly refused to adopt all of the enumerated standards, using only the first *Williamson* standard requiring judicial inquiry into the contractual rights of the parties and nothing more.

In *Matek v. Murat*,[29] Murat decided to purchase an old Navy vessel in order to convert it into a fish processing plant. Murat formed a general partnership to finance the venture. Twelve people invested $100,000 each to start-up the business. In deciding whether a general partnership interest in the venture constituted a security, the Ninth Circuit looked to the partnership agreement and held that Matek retained sufficient control over partnership affairs to exclude the investment from being construed as an investment contract. In reaching this decision, the court expressly declined to use the second and third prongs of the *Williamson*[30] test, stating that use of these additional prongs would "create uncertainty in the area of business investing."[31] Once its analysis was limited to the agreement between the parties, the court concluded that the general partnership interest gave sufficient control over partnership management to Matek. The interest was not, therefore, an investment contract.

The Fourth Circuit also specifically addressed the use of the second and third prongs of the *Williamson* test in *Rivanna Trawlers Unlimited v. Thompson Trawlers*.[32] Rivanna Trawlers Unlimited ("RTU") was formed when twenty-three parties executed a general partnership agreement in order to engage in a commercial fishing business. After approximately one year of operations at below profit expectations, the partners twice replaced management and removed the original managing partner. After two years of operations, certain partners filed a complaint alleging their interests to be securities and arguing that Thompson Trawlers violated the federal securities laws. In resolving the controversy, the court agreed with the approach articulated in *Williamson* but declined to look

27. Morgenstern, *Real Estate Joint Venture Interests as Securities: The Implications of Williamson v. Tucker*, 59 WASH. U.L.Q. 1231, 1246 (1982).

28. Some courts explicitly or implicitly adopted the *Williamson* approach in its entirety. *See* Youmans v. Simon, 791 F.2d 341 (5th Cir. 1986); Odom v. Slavik, 703 F.2d 212 (6th Cir. 1983); Pfohl v. Pelican Landing, 567 F. Supp 134 (N.D. Ill. 1983); Fund of Funds, Ltd. v. Arthur Andersen & Co., 545 F. Supp. 1314 (S.D.N.Y. 1982). Other courts have adopted only the first *Williamson* standard. *See* Rivanna Trawlers Unlimited v. Thompson Trawlers, 840 F.2d 236 (4th Cir. 1988); Matek v. Murat, 862 F.2d 720 (9th Cir. 1988). One court has expressly declined to follow *Williamson*. *See* Goodwin v. Elkins & Co. 730 F.2d 99 (3rd Cir. 1984).

29. 862 F.2d 720 (9th Cir. 1988).

30. *Id.* at 729. "Except for the first element . . . we decline to follow the *Williamson* test."

31. *Id.*

32. 840 F.2d 236 (4th Cir. 1988).

into the actual knowledge and business expertise of any individual partner in order to determine that partner's ability to exercise powers.[33] The court held the interests were not securities due to the broad authority conferred on the partners under the original agreement.

The Third Circuit, in *Goodwin v. Elkins & Co.*,[34] decided to reject *Williamson* and chose, instead, to allow partnership and contract law to settle disputes concerning general partnership interests. The court held that "a participant who holds a general partnership interest in an enterprise, at least as that interest is defined under Pennsylvania law, does not possess a security within the meaning of the federal securities laws."[35] The court placed critical reliance on the powers possessed by general partners under state law. Specifically, the court found relevant a non-managing partner's ability to act as an agent and to bind the firm in the same manner as managing partners. The rights granted under state law were sufficient to withdraw non-managing partnerships from the scope of the federal securities laws.

V. TENTH CIRCUIT TREATMENT

A. *The Road to* Banghart: Maritan v. Birmingham Properties

After *Williamson*, the Tenth Circuit did not face the same issue presented to the Fifth Circuit until *Banghart*.[36] In the interim, the court confronted a residual issue. In *Maritan v. Birmingham Properties*,[37] the Tenth Circuit addressed whether a limited partnership interest was a security subject to the federal securities laws. It determined that the proper inquiry was limited to the actual agreement originally signed.[38] After performing the examination, the court appropriately determined that the contract provided adequate basis for protection of Maritan's investment, thereby removing the limited partnership interest from the reach of the securities laws. Although inquiry primarily focused on the agreement, the amount of control *actually exercised* by Maritan remained important. The actual control exercised by Maritan was not deemed conclusive as to what kind of interest was acquired. Instead, the agreement or contract was first analyzed and any exercise of managerial control by the parties would be viewed as "shed[ding] light on how the parties regarded Maritan's rights and status under the agreement all along."[39]

B. Banghart v. Hollywood General Partnership

Maritan set the stage for resolution of the general partnership issue. Although *Maritan* held that limited partnership interests might not be

33. *Id.* at 241 n.7.
34. 730 F.2d 99 (3rd. Cir. 1984).
35. *Id.* at 108 (footnote omitted).
36. Banghart v. Hollywood General Partnership, 902 F.2d 805 (10th Cir. 1990).
37. 875 F.2d 1451 (10th Cir. 1989).
38. *Id.* at 1458.
39. *Id.* at 1459.

securities when the partnership agreement allocated sufficient managerial control, the converse issue of whether a general partnership interest could be a security had not been confronted.

The Tenth Circuit addressed this issue in *Banghart v. Hollywood General Partnership*.[40] In *Banghart*, Dallas and Michael Banghart sued the Hollywood General Partnership, alleging various misrepresentations which induced them into entering an "Exchange Agreement"[41] to purchase a general partnership interest.[42] Because a partnership interest usually allowed the general partner to participate in the business and inspect documents, the plaintiff seemed to lack the necessary passivity for the instrument to be deemed an investment contract.[43] Instead, relying on the analysis in *Williamson*, Banghart argued that "a lack of any discernible role for some general partners within the Hollywood General Partnership raise[d] a triable issue of whether the partnership interest contemplated in the 'Exchange Agreement' was a security."[44]

The Tenth Circuit, however, decided against Banghart and upheld the trial court's grant of summary judgment for the Partnership. The court deemed the core issue to be whether the interest plaintiffs sought to acquire pursuant to the agreement constituted an investment contract.[45] The court examined the agreement under the three part *Howey* test, as modified by *United Housing*.[46]

The first and second parts of the *Howey* test were not at issue in *Banghart*.[47] Instead, the argument centered on the third element of the

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40. 902 F.2d 805 (10th Cir. 1990).

41. The "Exchange Agreement" contained in relevant part the following:

> This Agreement . . . [b]etween Hollywood General Partnership, hereinafter referred to as HOLLYWOOD, who are owners of the building located at 5601 Hollywood NE, and between Dallas Banghart, hereinafter referred to as BANGHART, owner of two tri-plexes located at 523 and 527 Texas NE, is for the exchange of the two tri-plexes for a 30% interest in the building of Hollywood NE under the following terms and conditions:
>
> 1. Hollywood agrees to the exchange of the tri-plexes at a net equity value to Banghart of $31,000.00 Total and to assume the mortgages on the two tri-plexes, subject to verification of mortgage amounts.
>
> 2. For the Above $31,000 equity, Hollywood agrees to grant to Banghart a 30% interest in the Hollywood Property. To accomplish this, the Hollywood General Partnership Agreement will be amended or re-done to show the additional interest by Banghart . . . .

42. *Banghart*, 902 F.2d at 806. The court stated that "[a]ccording to plaintiffs, they were induced into entering this agreement by the representations of defendants and, had the agreement been consummated, they would have acquired a general partnership interest in the Hollywood General Partnership."

43. If Banghart had claimed he would have received a general partnership interest with full managerial rights, this claim would have been dispositive in the case in light of Maritan v. Birmingham Properties, 875 F.2d 1451 (10th Cir. 1989).

44. *Banghart*, 902 F.2d at 807.

45. *Id.* at 806.

46. *Id.* at 807. The court did not state the proposition explicitly but adopted the wording of the *Howey* test as expressed in Crowley v. Montgomery Ward & Co., Inc., 570 F.2d 877 (10th Cir. 1978). In *Crowley*, the court stated "[w]e are bound by the Howey test as reaffirmed in United Housing. The requirements are (1) an investment, (2) in a common enterprise, (3) with 'a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.' " *Id.* at 880.

47. Generally, there will not be a dispute regarding the first two elements of the test since there is almost always an investment of money (or something of value) and a com-

Howey-Forman test.[48] The court stated, "[a]n investment satisfies this third prong when the efforts made by those other than the investor are the ones which affect significantly the success or failure of the enterprise."[49] The court first considered the Fifth Circuit approach created in *Williamson* and, subsequently, restated the three exceptions to the rule that general partnership interests cannot constitute securities.[50]

After reviewing the test, the court implicitly rejected the *Williamson*[51] approach by relying on *Maritan*.[52] Moreover, it directly relied on the Fourth and Ninth Circuit's approaches in *Rivanna*[53] and *Matek*.[54] Judicial inquiry, therefore, became restricted to the terms of the partnership agreement. The Tenth Circuit looked strictly at the "Exchange Agreement"[55] in order to determine what type of interest Banghart had acquired. Since the agreement spoke of Banghart obtaining a general partnership interest, the court focused on the general partnership agreement to determine the level of participation it contractually granted to Banghart. Because Banghart presented no evidence with respect to the general partnership agreement at trial, there was nothing in the record to guide the court in deciding the participation granted to Banghart. This evidentiary void proved fatal to Banghart's case.

The *Banghart* decision created some interesting consequences, the most important of which concerned the contractual rights of the investor to obtain information from the partnership.[56] The court ostensibly recognized that without this protection, an investor actually has no reasonable mechanism to become informed of the current status of the in-

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mon purpose of the partnership. The main focus will be on interpreting the part of the third element relating to the "reasonable expectation of profits *to be derived from the entrepreneurial or managerial efforts of others.*" *Banghart*, 902 F.2d at 807 (emphasis added). Inherent in a general partnership interest is the ability to manage the business. Without this control, the interest becomes more analogous to a limited partnership interest. *See* Power Petroleums, Inc. v. P & G Mining Co., 682 F. Supp. 492, 493 (D. Colo. 1988) ("Generally, partnership interests are not securities. Defendants admit, however, that the key in determining whether a general partnership interest is a security is whether the partner has the power to exercise partnership functions.")(citation omitted).

48. This prong of the test requires that the investment be made "with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." *Banghart*, 902 F.2d at 807.

49. *Banghart*, 902 F.2d at 807. *See also* Meyer v. Dans un Jardin, S.A., 816 F.2d 533, 535 (10th Cir. 1987) ("In many situations, however, a strict interpretation of the word 'solely' would run counter to the broad remedial purposes of the securities acts and defeat the Court's intent to follow 'a flexible rather than a static principle.' Accordingly, we have adopted the view that the reliance element is met when '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.' ")(citations omitted).

50. *Banghart*, 902 F.2d at 807-08.

51. Williamson v. Tucker, 645 F.2d 404 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981).

52. Maritan v. Birmingham Properties, 875 F.2d 1451 (10th Cir. 1989).

53. Rivanna Trawlers Unlimited v. Thompson Trawlers, 840 F.2d 236 (4th Cir. 1988).

54. Matek v. Murat, 862 F.2d 720 (9th Cir. 1988).

55. *See supra* note 41.

56. *See Matek*, 862 F.2d at 728. The Ninth Circuit properly stated that "[t]he principal purpose of the securities acts is to protect investors by promoting full disclosure of information necessary to informed investment decisions. Therefore, access to information about the investment, and not managerial control, is the most significant factor." (citations omitted).

vestment, aside from active participation in management. Consequently, a lack of protection under state partnership law may entitle an investor to protection under the federal securities laws.

C. *Consequences*

By requiring disclosure to the investor, the court diminished the necessity for the second and third *Williamson* factors related to the subjective knowledge, business intelligence, and abilities of the investors. Because full appraisal of partnership endeavors is now required, the burden should naturally shift to the investor to make his own decision as to the quality of the investment. Once a partner has received disclosure and the ability to maintain it, contract and partnership law should determine the rights of the partners.

Another important consideration concerns the managerial control allocated to the investor under the partnership agreement. Where sufficient control over the affairs of the partnership is not granted, the possibility that the sale of the partnership interest will be considered a security arises. The Fourth Circuit has aptly stated:

> When, however, a partnership agreement allocates powers to the general partners that are specific and unambiguous, and when those powers are sufficient to allow the general partners to exercise ultimate control, as a majority, over the partnership and its business, then the presumption that the general partnership is not a security can only be rebutted by evidence that it is not possible for the partners to exercise those powers.[57]

Two important consequences result. First, the court will only look to the partnership agreement to determine the actual amount of control allocated to the partners. If no control is present, then the investment looks like a security. Second, a substantial burden is placed on a plaintiff to rebut the presumption that the securities laws do not apply to a partnership interest that has been allowed contractually to participate in management. Mere non-participation by the investor is insufficient to rebut this presumption. The plaintiff must show that he was affirmatively obstructed from participation in management.

By looking to the contractual ability to participate in management, the court negated the need for the third *Williamson* factor.[58] Since the investor is able to participate in management through the contract, he is not totally dependent on the "unique entrepreneurial or managerial ability of the promoter or manager . . . ."[59] Even though the investor might be relying on another's efforts, he is still able to exercise sufficient managerial control under the agreement. Whether that particular investor desires to participate is of no consequence since the ability is actually present.

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57. *Rivanna*, 840 F.2d at 241.

58. *See supra* note 41 for the Exchange Agreement at issue in *Banghart*.

59. Williamson v. Tucker, 645 F.2d 404, at 424 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981).

Finally, *Banghart* stabilized this area of law. By requiring courts to look only to the partnership agreement, the Tenth Circuit opted for a bright line rule and thereby created certainty. Although under certain circumstances an occasional injustice might result, the security established by the Tenth Circuit's approach outweighs the possible negative effects. Promoters and others offering general partnership interests as investments will not risk being subjected to federal securities laws so long as the partners retain real and substantial rights under the partnership agreement.

VI. CONCLUSION

The Tenth Circuit correctly decided *Banghart* by looking to the contract to determine whether the third part of the *Howey* test had been satisfied. The court adopted the best approach because it only allows judicial inquiry into the contract to determine the parties' intentions. By looking at the contract, the court created certainty in an area which had previously been overreaching in its scope. Now, promoters selling partnership interests will know that in order to avoid application of the securities laws, they must continually disclose all relevant information and grant some amount of meaningful managerial control to the investor. If this is done, there will be little room for a plaintiff to argue that the securities laws apply, because the plaintiff must show that the promoter or other partners affirmatively kept that investor/partner from participation in partnership affairs.

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60. I would like to give special thanks to J. Robert Brown for generously spending his time to assist in preparation of this article.