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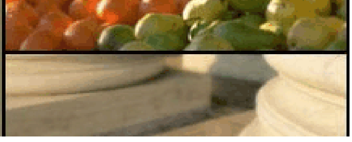

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Stallion Syndicates as Securities

by

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Stallion Syndicates as Securities

BY RUTHEFORD B CAMPBELL, JR.*

INTRODUCTION**

To people outside the horse business, the word "syndicate" may conjure up images of sinister characters and organized crime. People who invest in horses, however, attach quite a different meaning to the word syndicates. Mention of a syndicate may remind them of Secretariat, Niatross, *Aladdinn[1] or Easy Jet, depending upon the particular breed of horse that interests them. They also think of something else: money, big money.[2]

Although one cannot seriously contend that syndicates alone are responsible for the spectacular monetary growth of the horse business,[3] they certainly have facilitated that growth. Syndicates have been and continue to be the principal vehicle for multiple ownership of expensive stallions of the major breeds and have enabled "smaller" investors to own an interest in stallions, which

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** This Article is dedicated to Gayle A. Mohney (1906-1980). He was a decent and generous man whose contributions to the horse industry were enormous.

[1] An asterisk indicates the horse is not American-bred.

[2] Examples of large syndicates are: Conquistador Cielo (thoroughbred) syndicated in 1982 at a value of $36 million, THE HORSEMAN'S J., Oct. 1982 at 5; Niatross (standardbred) syndicated in 1980 at a value of $9.5 million, telephone interview with Louis P. Guida (Sept. 14, 1982); *Aladdinn (Arabian) syndicated in 1979 at a value of $6.3 million, SKY, June 1982, at 102; Easy Jet (quarter horse) syndicated in 1980 at a value of $30 million, telephone interview with Ken Carson. THOROUGHBRED REC. (Sept. 14, 1982). The foregoing values are approximate, and in some of the examples less than 100% of the horse was syndicated or sold. For example, only a 50% interest in Niatross was syndicated for $4.75 million. That particular syndication occurred prior to the retirement of the horse from the track.

[3] The average prices paid for yearlings at the Keeneland Summer Sales over the past few years are as follows:

1978	$121,654
1979	$155,567
1980	$196,863
1981	$250,113
1982	$337,734.

Telephone interview with Linda McDaniels, Keeneland Sales Office (Sept. 15, 1982).

otherwise would be well beyond their means. This additional demand has to some extent helped to establish and maintain the existing price levels for top quality horses.

I. THE TERMS OF A STALLION SYNDICATE

The terms and conditions of stallion syndicates may vary but one generally will find substantial uniformity among the various stallion syndicate agreements. At the most basic level, a stallion syndicate involves multiple ownership of the stallion, and each ownership interest (often called a "fractional interest" or a "share")[4] entitles the owner to certain defined annual breeding rights (often called "nominations" or "seasons") and obligates the owner to share in the expenses of maintaining the stallion. In thoroughbred syndicates, each fractional interest usually entitles the owner to breed one mare per year to the stallion.[5] In other breeds, however, where artificial insemination permits the stallion to be bred more frequently, each fractional interest may entitle the member to multiple breeds per year.[6]

The daily care of the stallions is entrusted to the syndicate manager, who, typically, is the owner of or affiliated with the farm where the stallion will stand for breeding.[7] It is the syndi-

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[4] Many attorneys prefer not to refer to the ownership interests in the syndicates as "shares," since the mere characterization as such may increase the possibility that the interest may be subject to securities laws. *See* United Housing Found., Inc. v. Forman, 421 U.S. 837, 850-51 (1975) (indicating that the characterization of the transaction may affect its inclusion within the definition of a security).

[5] *See, e.g.*, John R. Gaines, SEC No-Action Letter (available Aug. 18, 1977) (involving a thoroughbred stallion, with regard to which artifical insemination is prohibited, where there were 40 interests in the syndicate).

The staff of the Commission will, in certain instances, respond to legal issues that arise in the context of proposed securities transactions. In this regard, an attorney will usually submit a "no-action" request on behalf of the client to the appropriate division of the Commission. The request will typically contain a statement of the relevant facts, the issue presented and the attorney's opinion as to the appropriate resolution of the issue. If the division of the Commission agrees with the analysis of the attorney, it will issue a "no-action letter" in which it states that, based upon the facts presented, it will not recommend any enforcement action to the Commission if the transaction proceeds.

[6] *See, e.g.*, Khemosabi Syndication, SEC No-Action Letter (available Feb. 19, 1980) (involving an Arabian stallion, with regard to which artificial insemination is allowed, where there were 126 interests in the syndicate).

[7] *See, e.g.*, Roosevelt, Franklin, D., Jr., SEC No-Action Letter (available Oct. 8, 1980).

cate manager's responsibility to provide food, shelter and veterinary service for the horse and to supervise all breeding activity. The syndicate manager may, in some instances, be assigned other responsibilities, such as promoting the horse, providing insurance or assisting the syndicate members who wish to sell their breeding rights.[8] Additionally, the syndicate manager maintains records of the activities with regard to the stallions and the syndicate and bills the owners for their pro rata share of the syndicate's expenses. The syndicate manager is compensated for his or her services by cash,[9] "free" breeding rights[10] or sometimes both.[11]

Participants in the major stallion syndications almost invariably are engaged in the horse business and are serious breeders. They purchase breeding rights to use in a manner that best suits their own programs. As a result, breeding syndicates are carefully constructed to maintain maximum flexibility with regard to how members use their breeding rights. Owners, therefore, normally have the option to sell their breeding rights for any particular year[12] or to breed a mare of their choice[13] to the stallion. Usually, any owner may sell his or her share, subject to a right of first purchase in favor of the other owners.[14]

II. THE SECURITIES LEGISLATION

Anyone who practices securities law understands the complication caused when a particular transaction involves the sale of a

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[8] The permissible scope of the activity of the syndicate manager is limited by the securities laws. See notes 25-102 *infra* and the accompanying text for further discussion.

[9] *See, e.g.*, *Aladdinn Syndicate Agreement (1978) (unpublished).

[10] *See, e.g.*, Roosevelt, Franklin D., Jr., *supra* note 7.

[11] *See, e.g.*, Ariston Syndication Agreement, SEC No-Action Letter (available June 23, 1980); Ralph E., Jr., and Diana Schenck, SEC No-Action Letter (available Nov. 20, 1978).

[12] Normally, this right of an owner to sell his or her breeding rights for a breeding season is not subject to any right of first purchase in favor of the other owners. Rather, such a sale requires only notice to the syndicate manager. *See, e.g.*, Doc's Quixote Syndicate Agreement, SEC No-Action Letter (available Nov. 3, 1977).

[13] The syndicate manager invariably retains the right to refuse to breed any mare that is unsound or diseased. *See* letter from Rick Fogle to Ann Glickman, Securities Exchange Commission (Dec. 23, 1981) (requesting a no-action letter) (letter appended to Himito Dancer Syndicate Agreement, SEC No-Action Letter (available Feb. 5, 1982)).

[14] *See, e.g.*, Mr. Crimson Ruler Syndicate Agreement, SEC No-Action Letter (available Apr. 9, 1979).

"security."[15] Because the transaction becomes subject to the Securities Act of 1933[16] (1933 Act), the Securities Exchange Act of 1934[17] (1934 Act) and state securities (blue sky) laws,[18] the costs, time necessary to complete the deal and potential exposure to legal problems increase dramatically. Even if one is not required to register with the federal or state securities commissions, the difficulty in insuring that the deal qualifies for an exemption from such registration requirements increases both the expense associated with the transaction and the time required for competent counsel to complete the deal. This is especially true if the particular exemption from registration relied upon requires disclosures as a prerequisite to the availability of the exemption,[19]

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[15] The Securities Act of 1933 defines a security as:

> [A]ny 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," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Securities Act of 1933 § 2(1), 15 U.S.C. § 77b(1) (1976). The Securities Exchange Act of 1934 defines a security as:

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

Securities Exchange Act of 1934 § 3(a), 15 U.S.C. § 78c(a)(10) (1976).

[16] 15 U.S.C. §§ 77a-77bbbb (1976 & Supp. 1980).

[17] 15 U.S.C. §§ 78a-78kk (1976 & Supp. 1980).

[18] Kentucky's securities laws are found in chapter 292 of the Kentucky Revised Statutes. KY. REV. STAT. §§ 292.310-.630 (Bobbs-Merrill 1981 & Cum. Supp. 1982) [hereinafter cited as KRS].

[19] Even when one is using an exemption that does not require disclosures as a prerequisite, such as Rule 147, 17 C.F.R. § 240.147 (1982), or Rule 504, 17 C.F.R. § 240.504

such as is usually required by Rule 505[20] or Rule 506.[21]

In addition, the generous remedies available to plaintiffs under state and federal securities laws increase the probability of a successful lawsuit if the deal does not prove profitable. Section 12(1)[22] of the 1933 Act, for example, provides a remedy against one who fails to register or qualify for an exemption from registration. Section 12(2)[23] under the 1933 Act and Rule 10b-5[24] under the 1934 Act provide attractive theories for purchasers who claim that the deal was effected through material nondisclosures or misstatements.

The result of all this, of course, is that persons who syndicate stallions attempt to avoid these problems by structuring syndicates to be outside the scope of state and federal securities law. This requires that the syndicate be constructed and operated in such a way that the fractional interests or shares in the syndicate do not represent "securities" as that term is defined under state and federal securities laws. The balance of this Article will be devoted to this problem.

III. THE LANDMARK CASES

Any attempt to determine whether a particular stallion syndicate constitutes a security must start with a discussion of *SEC v. W.J. Howey Co.*[25] In that case, W.J. Howey Co. sold investors small tracts of citrus acreage located in Florida and through an affiliated company made available to the purchasers certain essential services related to the management of the individual tracts. These services included cultivating, developing, harvesting and marketing the citrus crops. The majority of the investors were not Florida residents and were characterized by the Court

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(1982), most attorneys will recommend strongly that the offering include some kind of an offering circular or memorandum in order to insure that all material disclosures are made. This, of course, is to protect against fraud claims, including those authorized by Rule 10b-5, 17 C.F.R. § 240.10b-5 (1982).

[20] 17 C.F.R. § 240.505 (1982).

[21] *Id.* § 240.506 (1982).

[22] 15 U.S.C. § 77*l*(1) (1976).

[23] *Id.* § 77*l*(2) (1976).

[24] 17 C.F.R. § 240.10b-5 (1982).

[25] 328 U.S. 293 (1946).

as people "who lack the knowledge, skill and equipment necessary for the care and cultivation of citrus trees."[26]

In holding that the scheme involved the sale of an "investment contract," which by definition is a security,[27] the 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 third party."[28]

Under the *Howey* definition, therefore, the existence of a security depends upon the presence of four[29] elements: 1) an investment of money;[30] 2) a common enterprise in which the money is invested;[31] 3) an expectation of profits;[32] and 4) such expectation

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[26] *Id.* at 296.

[27] 15 U.S.C. §§ 77(b)(1), 78c(a)(10) (1976).

[28] 328 U.S. at 298-99.

[29] Usually, both commentators and courts separate the *Howey* test into only three elements, combining two of the elements into one. There is, however, no consistency as to which of the two elements are really one. *Compare* FitzGibbon, *What Is a Security?—A Redefinition Based on Eligibility to Participate in the Financial Markets*, 64 MINN. L. REV. 893, 900 (1980), with SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 477 (5th Cir. 1974). It seems, however, a better analysis separates the definition into four separate elements, especially after the "profits" elements apparently received separate treatment in United Housing Found., Inc. v. Forman, 421 U.S. at 837, 853-57.

[30] For cases discussing and interpreting the "investment of money" element *see, e.g.*, International Bhd. of Teamsters v. Daniel, 439 U.S. 551 (1979); Union Planters Nat'l Bank v. Commercial Credit Business Loans, Inc., 651 F.2d 1174 (6th Cir.), *cert. denied*,102 S. Ct. 972 (1981); McGovern Plaza Joint Venture v. First of Denver Mortgage Investors, 562 F.2d 645 (10th Cir. 1977); Hector v. Wiens, 533 F.2d 429 (9th Cir. 1976); El Khadem v. Equity Sec. Corp., 494 F.2d 1224 (9th Cir.), *cert. denied*, 419 U.S. 900 (1974).

[31] For cases discussing and interpreting the "common enterprise" element, *see, e.g.*, 651 F.2d at 1174; Westchester Corp. v. Peat, Marwick, Mitchell & Co., 626 F.2d 1212 (5th Cir. 1980); Rosenburg v. Collins, 624 F.2d 659 (5th Cir. 1980); Curran v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 622 F.2d 216 (6th Cir. 1980); *aff'd*, --U.S.--, 102 S. Ct. 1825 (1982); Cameron v. Outdoor Resorts of America, Inc., 608 F.2d 187 (5th Cir. 1979), *modified on rehearing*, 611 F.2d 105 (5th Cir. 1980) (*remanded on other grounds*); Brodt v. Bache & Co., 595 F.2d 459 (9th Cir. 1978); Hirk v. Agri-Research Council, Inc., 561 F.2d 96 (7th Cir. 1977); SEC v. Commodity Options Int'l, Inc., 553 F.2d 628 (9th Cir. 1977); Bell v. Health-Mor, Inc., 549 F.2d 342 (5th Cir. 1977); Ballard & Cordell Corp. v. Zoller & Danneberg Exploration, Ltd., 544 F.2d 1059 (10th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); 533 F.2d at 429; 497 F.2d at 473; 494 F.2d at 1224.

[32] For cases discussing and interpreting the "expectation of profits" element, *see, e.g.*, 421 U.S. at 837; 651 F.2d at 1174; 608 F.2d at 187; 1050 Tenants Corp. v. Jakobson, 503 F.2d 1375 (2d Cir. 1974).

of profits must be derived solely from the efforts of the promoter or third party.[33] Although each of these elements has generated litigation, the fourth element, the requirement that the profits come solely from the efforts of the promoter or third party, has been litigated most. Also, this element is at the heart of most difficult questions surrounding stallion syndications.

As noted previously, the purchaser of a stallion share typically relies upon the syndicate manager to perform certain functions with regard to the stallion and the syndicate. Invariably, the syndicate manager is charged with the duty of daily care of the stallion, including the supervision of all breeding. Likewise, the syndicate manager will keep the records and accounts for the syndicate and will bill and collect from the syndicate members their pro rata share of the syndicate's expenses. In addition, the syndicate manager may (or, more accurately, may try to convince the syndicate's lawyer to allow him or her to) engage in a campaign to promote the stallion, agree to act as agent for any syndicate member who desires to sell his or her season in any year or, to the extent excess nominations are available, sell those nominations on behalf of the syndicate and divide the resulting revenues pro rata among the syndicate members.

Obviously, as the role of the syndicate manager increases, it is more likely that the fourth element of *Howey* is present. The difficult problem, of course, is to determine what functions the syndicate manager can undertake without satisfying the fourth element of the *Howey* test, since failure to satisfy that or any other element of the *Howey* test causes the transaction to fall outside the definition of a security.[34]

Confusion as to the proper formulation for the fourth element exacerbates this whole problem. The confusion results from

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[33] As examples of litigation involving this issue, see 439 U.S. 551 (1979); Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036 (10th Cir. 1980); SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973); McLish v. Harris Farms, Inc., 507 F. Supp. 1075 (E.D. Cal. 1980).

[34] One author, in commenting generally about the confusion surrounding the application of the *Howey* test, stated: "In a clear majority of [the cases reported during the first six months of 1979], it would have been difficult for anyone to predict the result, and in none was a decision articulated that is likely to afford much predictability." FitzGibbon, *supra* note 29, at 896 n.11.

uncertainty as to whether "solely" literally means solely or, alternatively, whether an investment is still a security even though some portion of the expected profits are to be derived from the efforts of the investor or the impact of some extraneous force such as natural appreciation or the effects of inflation.[35]

The Fifth Circuit faced this problem in *SEC v. Koscot Interplanetary, Inc.*,[36] a case in which the Securities and Exchange Commission (SEC) alleged that a pyramid scheme constituted a security. In *Koscot*, each investor had paid a sum of money which entitled him to become a representative for Koscot in the sale of cosmetics. More importantly, each investor could earn substantial sums by convincing others to become associated with Koscot. These new participants would, of course, pay Koscot a sum of money for the right to participate in the Koscot endeavor, and the original investor who attracted the new participant received a portion of the fees paid by the new participant.

Using the *Howey* test, the court concluded that the original investors had invested money in a common enterprise.[37] There was, however, substantial difficulty in concluding that the original investors' expected return depended "solely" upon the efforts of Koscot, since each original investor did play a role in attracting and selling to the new participants.

Nevertheless, the court found that the scheme constituted a security and, in the course of the opinion, used a standard that softened the *Howey* language. The court stated that "the critical inquiry is '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.' "[38]

Koscot, therefore, stands for the proposition that a security may be present even though the expectation of return depends,

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[35] Most of the circuits faced with the question have not interpreted the "solely" requirement in any restrictive or literal sense. *See, e.g.*, 651 F.2d at 1174 (6th Cir.); Noa v. Key Futures, Inc., 638 F.2d 77 (9th Cir. 1980); 608 F.2d at 187 (5th Cir.); Fargo Partners v. Dain Corp., 540 F.2d 912 (8th Cir. 1976); 497 F.2d at 473 (5th Cir.); Lino v. City Investing Co., 487 F.2d 689 (3d Cir. 1973); 474 F.2d at 476 (9th Cir.).

[36] 497 F.2d at 473.

[37] *Id.* at 478-79.

[38] *Id.* at 483 (quoting 474 F.2d at 482).

at least to some degree, upon someone or something other than the promoter. In other words, one should not read *Howey*'s "solely" language literally.

Although the Supreme Court has never expressly approved the *Koscot* standard,[39] it appears generally accepted that the *Howey* formula can now be met if the efforts of the promoter or third party are the "undeniably significant ones."[40] Demanding a literal adherence to the "solely" language of *Howey* never made sense because an investor who had even an insubstantial participation in the business of the particular entity would lose the protection of the securities laws. In evaluating whether a stallion syndicate involves a security, therefore, one should assume that the existence of a security does not require literal satisfaction of the "solely" language of *Howey* but requires only that the efforts of the promoter or syndicate manager be the "undeniably significant ones."

Even if one accepts this notion, however, substantial interpretative issues remain, since one must decide what degree of dependency on the promoter or syndicate manager must be present in order for his or her efforts to be classified as the "undeniably significant ones." For example, would the promoter's efforts be the "undeniably significant ones" if the expectations were that the profits would depend fifty percent upon the efforts of the promoter and fifty percent upon the efforts of the investor?

United Housing Foundation, Inc. v. Forman[41] indicates, not surprisingly, that no security will be present if the function of the promoter is relatively insubstantial. In that case, tenants, as a precondition to acquiring apartments in a particular apartment complex, had been required to purchase shares in Riverbay, the nonprofit cooperative housing corporation[42] that operated the complex. The tenant could not sell or transfer these shares, and a tenant who moved out of an apartment was required to offer the

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[39] *See, e.g.*, 421 U.S. at 852 n.16.

[40] See note 35 *supra* for a list of cases following the *Koscot* interpretation.

[41] 421 U.S. at 861.

[42] Each tenant was required to purchase 18 shares of stock in Riverbay at $25 per share for each room in an apartment. Thus, the cost for a four-room apartment was $1,800. The Court stated that this was to act as a recoverable deposit. *Id.* at 842.

shares back to Riverbay at the original purchase price of twenty-five dollars per share.

Litigation resulted as cost overruns caused the apartments to become significantly more expensive than anticipated. In that litigation, the question arose whether the sale of the shares in Riverbay involved the sales of securities, as defined in *Howey*.

The Court held that no security was involved in the sale, since the tenants did not expect any "profit" in return for their investment. This holding apparenty eliminated any need to consider the question of whether the role of the promoter was sufficiently significant to meet the "solely" language of *Howey* or whether, alternatively, the Court was willing to modify that language.

The Court was faced with the fact, however, that Riverbay intended to lease commercial space in the complex and use the revenue to lower the rent charged to the tenants. As much as $1 million per year was anticipated from this source.[43] The Court dismissed this factor, stating: "[T]his income—if indeed there is any—is far too speculative and insubstantial to bring the entire transaction within the Securities Acts."[44]

If, indeed, one believes that revenue of $1 million is "insubstantial," *Forman* is consistent with both *Howey* and *Koscot*. Since the profits or revenues to be derived from Riverbay's operation of the commercial facilities were "insubstantial," Riverbay's efforts would seem insignificant to the investor and thus not the "undeniably significant" efforts within the standard of *Koscot*, or the efforts that were "solely" important to the investors.

Four years after its opinion in *Forman*, the Supreme Court decided *International Brotherhood of Teamsters v. Daniel*[45] and again interpreted the definition of a security. Daniel was employed by a trucking firm that had a compulsory and noncontributory[46] pension plan for its employees. Upon his retirement,

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[43] 421 U.S. at 837 (Brennan, J., dissenting).

[44] *Id.* at 856.

[45] 439 U.S. at 551.

[46] As the Court described the plan: "Employees had no choice as to participation in the plan and did not have the option of demanding that the employer's contribution be paid directly to them as a substitute for pension eligibility. The employees paid nothing to the plan themselves." *Id.* at 553.

Daniel applied for his benefits, which were denied because he did not meet the requirement of "continuous service." A lawsuit resulted, with Daniel claiming that his participation in the plan constituted a purchase of a security and that such purchase had been made in violation of the fraud provisions of the 1933 Act and the 1934 Act.

The Supreme Court applied the *Howey* test and held that Daniel's participation in the pension fund did not involve the purchase of a "security." One basis[47] for this holding was that any expectation of profit by Daniel did not depend sufficiently upon the entrepreneurial or managerial efforts of others to meet the *Howey* test. Although the Court recognized that the pensions of the participants in the plan depended "to some extent on earnings from the assets," the Court concluded that "a far larger portion of its income comes from employer contributions, a source in no way dependent on the efforts of the Fund's managers."[48] Interestingly, however, the Court did provide some figures with regard to the earnings of the fund and the contributions of employers to the fund over a twenty-two year period. During that time, earnings on investments amounted to $31 million, while contributions from employers amounted to $153 million.[49] This means that approximately seventeen percent of the total fund available to pay pensions was generated by the investment activity of the fund's managers.

Another factor, however, made any expectation of profit by a participant even less dependant on the efforts of the fund's managers. As the Court pointed out, "the principal barrier to an individual employee's realization of pension benefits . . . is his own ability to meet the Fund's eligibility requirements."[50] As a result, the Court concluded that any "profit would depend primarily on the employee's efforts to meet the vesting requirements, rather than the Fund's investment success."[51]

After the Court's decision in *Daniel*, the definition of a secur-

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[47] The Court also found that there had been no "investment of money" by the participants in the plan. *Id.* at 559-61.

[48] *Id.* at 561-62.

[49] *Id.* at 562.

[50] *Id.*

[51] *Id.*

ity still was not a model of clarity. Nevertheless, one attempting to draft a stallion syndicate had some significant signals to use for guidance. First, the criteria for determining whether a stallion syndicate constituted a security were contained in the *Howey* test, except probably the requirement that the expectation of profits be derived "solely" from the promoter's efforts. Second, with regard to that critical fourth element of the *Howey* test, one might reasonably assume that it could be satisfied if the efforts of the promoter or third party were "undeniably significant."[52] Third, *Daniel* provided a concrete factual pattern that gave at least some guidance with regard to that fourth element. In *Daniel*, the Court held that the role of the fund's manager was not sufficient to satisfy the fourth element even though approximately seventeen percent of the entire return was due to his investment and the entire fund was subject to his discretion and management.

This modicum of clarity, however, may have been destroyed by the Supreme Court's latest case in this area, *Marine Bank v. Weaver.*[53] In that case, the plaintiffs, the Weavers, pledged[54] a certificate of deposit to Marine Bank in order to secure a loan by Marine Bank to a third party, Columbus Packing Company. In return for the Weavers' pledge of the certificate of deposit, the owners of Columbus, the Piccirillos, agreed to pay the Weavers fifty percent of Columbus' net profits and one hundred dollars per month. When the situation deteriorated and it appeared that Marine Bank would resort to the Weavers' certificate of deposit as a way to liquidate the loan, the Weavers sued, claiming that the transaction violated Rule 10b-5[55] of the 1934 Act. Specifically, the Weavers claimed that material nondisclosures and misstatements were made in connection with their pledge of the certificate of deposit to the bank and their agreement with the Piccirillos.

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[52] See note 35 *supra* for a list of cases which have not interpreted the "solely" requirement in a literal manner.

[53] --U.S.--, 102 S. Ct. 1220 (1982).

[54] The Supreme Court previously held that a pledge of a security constitutes a sale of a security for the purposes of the antifraud provisions of the securities laws. Rubin v. United States, 449 U.S. 424 (1981).

[55] 17 C.F.R. § 240.10b-5 (1979).

The Supreme Court held, however, that neither the certificate of deposit nor the agreement between the Weavers and the Piccirillos was a security under the 1934 Act and, therefore, the Weavers had no claim under Rule 10b-5. In holding that the certificate of deposit pledged to the bank was not a security, the Court recognized that debt instruments can in some instances constitute securities under the 1934 Act.[56] The Court, however, concluded that persons purchasing certificates of deposit did not need the special fraud protection of the 1934 Act, because the certificates are issued by institutions subject to comprehensive regulation, and because the deposits are insured by the Federal Deposit Insurance Corporation.[57]

With regard to the agreement between the Weavers and the Piccirillos, the court of appeals had concluded that the transaction might have involved the sale of a security to the Weavers.[58] One basis for that decision was the *Howey* case,[59] since the court of appeals determined that the transaction could be viewed as a $50,000 investment by the Weavers motivated by their desire to earn profits from a business run by the Piccirillos.

Using an unorthodox and confusing analysis, the Supreme Court reversed the court of appeals decision and held that the agreement between the Weavers and the Piccirillos did not involve a security. Chief Justice Burger, writing for a unanimous Court, did not rely upon the traditional *Howey* analysis in deciding the case; interestingly, neither did he reject the *Howey* analysis. Instead, he seemed to base his decision upon the notion that "Congress intended the securities laws to cover those instruments ordinarily and commonly considered to be securities in the commercial world."[60] Chief Justice Burger pointed out that in the previous cases where "unusual instruments [were] found [by the Court] to constitute securities," there had been "offers to a number of potential investors" and the instruments "had equiv-

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[56] The definition of a security under the 1934 Act includes "any note . . . bond, [or] debenture." 15 U.S.C. § 78c(a)(10) (1976).

[57] --U.S. at --, 102 S. Ct. at 1224-25.

[58] Weaver v. Marine Bank, 637 F.2d 157, 161 (3d Cir. 1980) *rev'd*, --U.S.--, 102 S. Ct. 1220 (1982).

[59] *Id.* at 161-62.

[60] --U.S. at--, 102 S. Ct. at 1225.

alent values to most persons and could have been traded publicly."[61] The Court concluded by holding "that this unique agreement, negotiated one-on-one by the parties, is not a security."[62]

It is difficult to restrain the urge to be overly harsh in criticizing *Marine Bank*. It is a thoroughly confusing case. At least the Court should have indicated whether the analysis in *Marine Bank* replaces the *Howey* analysis. If *Marine Bank* does represent a break with the *Howey* test, the Court should have given more guidance regarding the criteria it will use to determine the existence of a security where an "unusual instrument" is involved. If the *Howey* test has not been replaced, the Court should have provided some guidance as to the appropriate use of *Howey* after the *Marine Bank* decision. Forty or so confusing lines may not have fulfilled the Court's obligation to foster an orderly development of the law.

Even though *Marine Bank* is so unclear, one obviously cannot dismiss the case as irrelevant. It is, after all, the Supreme Court's latest decision in the area and is unquestionably significant. One should not, however, underestimate the difficulty in applying the case to concrete situations, such as stallion syndicates.

In that regard, it is possible to interpret *Marine Bank* in two very different ways. First, one could read the decision narrowly and conclude that it eliminates from the definition of a security only unique agreements negotiated face-to-face between no more than two parties. Alternatively, it is possible to read *Marine Bank* as holding that the definition of a security includes only instruments that have equivalent values to most persons and can be traded publicly. Obviously, this latter interpretation would eliminate from the definition of a security significantly more transactions than would the first interpretation.

If the latter interpretation were correct, *Marine Bank* could be an important case with regard to stallion syndications and the scope of the responsibilities that can be allocated to the syndicate manager. Stallion shares do not have equivalent values to all in-

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[61] *Id.*
[62] *Id.*

vestors. Although the shares have value to the serious breeder, who can either use the breeding rights in his or her own program or sell the breeding rights to others in the industry, stallion shares would not be an attractive alternative for the average investor, who has neither the mares nor access to the potential purchasers of seasons necessary to maximize the value of his or her investment. Increasing the role of the syndicate manager, except in an extreme situation, would not seem to affect the foregoing analysis. So long as a stallion share involves breeding rights controlled by the syndicate member, that share would not have equivalent values to the serious breeder and the average investor in securities, even if the syndicate manager assumed additional responsibilities.

The result of all this could be greater flexibility in the terms of future syndicate agreements. Attorneys and horse owners might be willing to allocate more responsibilities to the syndicate manager, even though those added responsibilities might bring the transaction dangerously close to the criteria established by *Howey* and its progeny.

Unfortunately, one cannot be sure of the proper interpretation of *Marine Bank;* thus, assuming such an aggressive posture with regard to the allocation of additional responsibilities to the syndicate manager may involve substantial risk. Additionally, it is not at all clear that the *Marine Bank* decision will cause the Commission to realign its position with regard to stallion syndications. Certainly, the no-action letters issued by the staff after *Marine Bank* give no hint of any change.[63]

The safer course, therefore, is to interpret *Marine Bank* as a case limited in its scope and to continue to evaluate stallion syndications and the permissible limits of the role of the syndicate manager in the traditional manner. This means that one would still seek guidance from *Howey*, *Forman*, *Koscot* and *Daniel*, as well as from the no-action letters and releases of the Commission. For more adventuresome souls, however, *Marine Bank* may provide some theoretical basis for deviating from the traditional syn-

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[63] Dave Parker Quarterhorses, SEC No-Action Letter (available July 8, 1982); Gin & Peppy Horse Syndication, SEC No-Action Letter (available June 25, 1982); Eskimos Stallion Syndication, SEC No-Action Letter (available April 15, 1982).

dicate and its allocation of limited responsibilities to the syndicate manager.

IV. THE POSITION OF THE SEC

A. *Generally*

Our research disclosed more than thirty no-action requests addressed to the staff regarding stallion syndications.[64] Although the letters involved horses of various breeds[65] and quality, the terms of the syndicates were usually quite similar.[66] Another similarity was the generally favorable response of the staff to the no-

[64] Dave Parker Quarterhorses, SEC No-Action Letter (available July 8, 1982); Gin & Peppy Horse Syndication, SEC No-Action Letter (available June 25, 1982); Eskimos Stallion Syndication, SEC No-Action Letter (available Apr. 15, 1982); Secret Passage Syndication Agreement, SEC No-Action Letter (available Feb. 22, 1982); Himito Dancer Syndicate Agreement, SEC No-Action Letter (available Feb. 5, 1982); Dale Ross Lloyd & Lake, SEC No-Action Letter (available Dec. 14, 1981); Blaze Drift Syndicate, SEC No-Action Letter (available Oct. 29, 1981); B.F. Phillips, Jr., SEC No-Action Letter (available Oct. 21, 1981); Markegard, Roy L., SEC No-Action Letter (available June 11, 1981); New Frontier Investments, Inc., SEC No-Action Letter (available June 4, 1981); Owens, Marjorie, SEC No-Action Letter (available Feb. 27, 1981); Carrico, Norman T. and Paula, SEC No-Action Letter (available Dec. 12, 1980); Winger, Richard, SEC No-Action Letter (available Nov. 21, 1980); Roosevelt, Franklin D., Jr., SEC No-Action Letter (available Oct. 8, 1980); Ariston Syndication Agreement, SEC No-Action Letter (available June 23, 1980); Downing, Cathy and Marianne, SEC No-Action Letter (available June 23, 1980); Ostrer Brothers, SEC No-Action Letter (available June 23, 1980); Murphy, Gregory J., SEC No-Action Letter (available May 5, 1980); Khemosabi Syndication, SEC No-Action Letter (available Feb. 19, 1980); J.E. Garrett, SEC No-Action Letter (available Sept. 20, 1979); Darrell Keener, SEC No-Action Letter (available Apr. 23, 1979); B.F. Phillips, Jr., SEC No-Action Letter (available Apr. 9, 1979); Reese Evans Howard, SEC No-Action Letter (available Feb. 23, 1979); Schenck, Ralph E., Jr. and Diana, SEC No-Action Letter (available Nov. 20, 1978); Stallions Unlimited, Inc., SEC No-Action Letter (available Nov. 13, 1978); Kennaugh, Robert Q., SEC No-Action Letter (available Oct. 12, 1978); Rheusdasile, Jerry, SEC No-Action Letter (available Oct. 11, 1978); B.F. Phillips, Jr., SEC No-Action Letter (available Sept. 21, 1978); B.F. Phillips, Jr., SEC No-Action Letter (available Mar. 23, 1978); B.F. Phillips, Jr., SEC No-Action Letter (available Feb. 16, 1978); Crumpler, Paul, SEC No-Action Letter (available Nov. 3, 1977); John R. Gaines, SEC No-Action Letter (available Aug. 18, 1977); Pink Lady Farms, SEC No-Action Letter (available July 18, 1977); J.D.A. Farms, Inc., SEC No-Action Letter (available Dec. 29, 1976).

[65] Generally, however, most letters involved thoroughbreds, standardbreds, Arabians or quarter horses.

[66] For a discussion of terms commonly found in the syndicate agreements, see notes 4-14 *supra* and accompanying text.

action requests.[67] Some of the no-action positions, however, had apparently been the subject of some negotiations with the staff.[68]

The no-action letters reveal that the Commission has uniformly taken the position that a share in a stallion syndicate is not a security, provided the syndicate manager does no more than care for the horse and perform certain ministerial functions for the syndicate.[69] This position seems quite consistent with both *Howey*[70] and *Koscot*,[71] since the role of the syndicate manager would seem too insignificant to meet either test. Certainly, the expectation of return for any syndicate member participating in such a syndicate depends principally upon factors beyond the control of the syndicate manager, and thus, the efforts of the syndicate manager could not be classified as solely or undeniably significant.

With human nature and business pressures being what they are, one should not be surprised to find that syndicate managers often want to engage in activities other than feeding the horse and cleaning its stall. The syndicate manager may want to engage in a substantial promotional campaign on behalf of the horse and the syndicate, act as a broker (with or without compensation) for syndicate members who may desire to sell their annual breeding rights or sell any "excess nominations" on behalf of the syndicate and distribute the revenues pro rata among the syndicate members. Similarly, the original owner (who may or may not become the syndicate manager) may wish to syndicate the stallion before it is retired from racing, showing or other performances. As more responsibilities such as the foregoing are allocated to the syndicate manager or the original owner, his or her efforts become more significant, and it becomes more likely that those efforts may meet the standard of *Koscot* or *Howey*.

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[67] *But see* J.D.A. Farms, Inc., SEC No-Action Letter (available Dec. 29, 1979) (staff refused to take a no-action position).

[68] *See, e.g.*, Himito Dancer Syndicate Agreement, SEC No-Action Letter (available Feb. 5, 1982).

[69] *See, e.g.*, Cathy and Marianne Downing, SEC No-Action Letter (available June 23, 1980). The staff took a no-action position with regard to the syndication of the Arabian stallion, Shah Zam.

[70] See notes 25-35 *supra* and accompanying text for a discussion of *Howey*

[71] See notes 35-39 *supra* and accompanying text for a discussion of *Koscot*.

Understandably, attorneys become more nervous as the syndicate manager's role increases in significance.

B. *Promotion of the Stallion and the Syndicate*

As a practical matter, the syndicate manager always promotes a valuable stallion standing on his or her farm. Such promotion is beneficial to the syndicate members, especially if one decides to sell a nomination or share, and to the syndicate manager, who is anxious to advertise the successful attraction of quality stallions to his or her farm. The promotion may take the form of advertisements in the various trade magazines,[72] although other methods are sometimes used.[73] People who participate in stallion syndicates understand that this promotion will occur, and some syndicates even provide for a special promotion fee to be paid the syndicate manager on a yearly basis.[74]

No attempt appears to have been made to hide this from the Commission in the no-action requests. A number of the requests for no-action letters specifically referred to reimbursement of the syndicate manager for expenses encountered in promoting and advertising the stallion.[75] In one no-action request, the syndicate agreement required each member to pay an annual promotion fee, which would be used by the syndicate manager for advertising and promotion.[76]

In all these cases, the staff was able to assume a no-action position. In fact, the presence of promotion by the syndicate manager did not appear to draw any special attention from the staff, although one cannot, of course, be certain about that matter.

Indeed, it is difficult to conceive of a situation in which the promotion of a stallion could be so significant that the role of the syndicate manager could meet the *Koscot* test. Whatever the

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[72] *See, e.g.*, 108 THE BLOOD-HORSE at 6796 (Oct. 9, 1982); THE HORSEMEN'S J. Oct. 1982, at 8-9.

[73] Promotion most commonly occurs through word of mouth and the syndicate manager's informal efforts.

[74] Ariston Syndication Agreement, SEC No-Action Letter (available June 23, 1980).

[75] *See, e.g.*, Owens, Majorie, SEC No-Action Letter (available Feb. 27, 1981); Stallions Unlimited, Inc., SEC No-Action Letter (available Nov. 13, 1978).

[76] Ariston Syndication Agreement, SEC No-Action Letter (available June 23, 1980).

level of promotion, syndicate members still must decide whether to sell their nominations or breed their own mares, whether to sell the mare in foal or wait for the foal to be born and whether to sell the offspring as a yearling or train the horse for the track or the show ring. Any expectation of return to the syndicate member still depends upon his or her action, whatever the level of promotion.

C. *Racing or Showing the Horse after Syndication*

Stallion syndicates sometimes provide that the stallion will continue to be raced or shown after the syndication but before the stallion is retired to stud.[77] In the case of the thoroughbreds, for example, a top three-year-old may be syndicated[78] after the Triple Crown, but before the completion of the fall campaign.[79] The question arises, therefore, whether such a provision in a syndicate agreement increases the possibility that a syndicate agreement may be considered a security.

Before one can determine the impact of such a provision, however, it is essential to understand the way racing animals and show animals are trained, developed and cared for. As a practical matter, a group of thirty-six syndicate members cannot possibly govern the career of a racing animal, at least with regard to the important day-to-day decisions. For example, because selections of jockeys or drivers, tracks and races do not lend themselves to decisions by scattered members of a group, those decisions must be delegated during the racing career of any syndicated animal.[80] Similar problems require similar delegation with

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[77] *See, e.g.*, Himito Dancer Syndicate Agreement, SEC No-Action Letter (available Feb. 5, 1982); Blaze Drift Syndicate Agreement, SEC No-Action Letter (available Oct. 29, 1981).

[78] Sometimes, the agreement signed by the syndicate member is more in the nature of an agreement to syndicate at the end of the racing career. Although these agreements usually provide that the syndicate will not become effective until the horse is retired, the obligation and rights of the parties with regard to the syndicate are determined at the date of the agreement, which is before the horse is retired.

[79] A recent, notable example of this was Conquistador Cielo, syndicated in August of 1982, with the syndicate to become effective at a later date.

[80] Attempts to allocate management responsibilities equally among the syndicate members have not resulted in the staff's taking a no-action position. In Secret Passage Syn-

regard to any show animal that is syndicated. Obviously, such delegation increases, at least to some degree, the dependence of the syndicate members on some third party.[81]

In this area, however, the staff has concluded that a syndicate agreement will not be deemed a security simply because the horse will continue to be raced or shown for a period of time after syndication. The no-action letter regarding Himito Dancer,[82] a quarter horse stallion, provides an example of this. In that situation, it was anticipated that the syndicate would be formed in 1982 but that the stallion would not be bred until after the Super Stakes in 1984. Until that time, the horse would be in cutting training and would be shown. Although the staff issued a no-action letter for the Himito Dancer Syndicate, the attorney requesting the letter apparently acceded to the staff's request that "earnings as a result of races or shows, if any, must be retained by the sellers (who must also be responsible for any training expenses and entry fees) and are not shared or distributed among shareholders."[83]

It is interesting to note that the no-action position of the staff was taken in an instance where the delay in syndication was substantial, two years, and there was the possibility of substantial revenues and substantial changes in the value of the horse. If the

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dicate Agreement, SEC No-Action Letter (available Feb. 22, 1982), the staff refused to take a position as to whether such shared management responsibilities would remove the syndicate agreement from the definition of a security. *Id.* There is, however, some support for the notion that such shared management responsibility would result in the transaction's not being considered a security. *See* Frazier v. Manson, 651 F.2d 1078 (5th Cir. 1981).

[81] Such considerations have convinced this writer that racing syndicates generally would be deemed securities, since the realities of an active racing career make it difficult to avoid substantial delegation of managerial responsibilities. If, however, a small group of horse owners form a racing syndicate and each participates in the management of the horse, that syndicate should not be considered a security, since no investor is relying on the managerial efforts of another. Even in that case, the Commission has refused to take a no-action position. For a discussion of this matter see note 80 *supra*.

[82] Himito Dancer Syndicate Agreement, SEC No-Action Letter (available Feb. 5, 1982).

[83] Letter from Rick Fogle to Ann Glickman, Securities Exchange Commission (Dec. 23, 1981) (requesting a no-action letter) (letter appended to Himito Dancer Syndication Agreement, SEC No-Action Letter (available Feb. 5, 1982)). In an earlier no-action letter, the staff had taken a similar position. Blaze Drift Syndicate Agreement, SEC No-Action Letter (available Oct. 29, 1981).

staff was inclined to refuse a no-action request, such facts would certainly have elicited that response.

In an earlier no-action letter involving the syndication of another quarter horse, Blaze Drift,[84] it was anticipated that the horse would be shown after syndication. That syndication agreement contained the following provision: "Any prize money earned by the Stallion in competition shall accrue to the Syndicate, to be used to defray the expenses of the Syndicate."[85] Although the staff was willing to take a no-action position with regard to the Blaze Drift syndicate, one should not assume that all prize money can accrue to the benefit of the syndicate members. In the Blaze Drift situation, it was estimated that the maximum prize money per year would amount to only $2,000, which would not even cover the normal expenses of such a horse.[86] The staff would undoubtedly take a different position if significant prize money would accrue to the benefit of the syndicate members. In that case, the staff would probably rely upon the resolution imposed in the syndication of Himito Dancer and require such prize money to accrue to the benefit of the original owners.

In any event, the staff's position does permit the owner to syndicate or agree to syndicate a stallion prior to the termination of its racing or showing career. There may, of course, be substantial and legitimate business reasons why such early syndication is desirable or necessary.

D. *Acting as a "Broker" for the Nominations*

A more difficult question arises when the syndicate agreement includes a provision that requires or permits the syndicate manager to act as a broker or selling agent for syndicate members desiring to sell their breeding rights. Certainly such a provision would benefit syndicate members who may reasonably anticipate they may not use all their breeding rights in every breeding season. Likewise, the syndicate manager may benefit from such

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[84] Blaze Drift Syndicate, SEC No-Action Letter (available Oct. 29, 1981).

[85] Letter from Bruce MacGregor Hall to the SEC (Aug. 27, 1981) (requesting a no-action letter) (letter appended to Blaze Drift Syndicate, SEC No-Action Letter (available Oct. 29, 1981)).

[86] *Id.*

an arrangement even if he or she receives no fee for such services. The manager may find some new, quality mares for the stallion, as well as build up good will among other breeders, if desirable breeding rights are obtained for such breeders.

In an extreme case, such a provision could cause a stallion syndicate to become a security under a *Howey* analysis. For example, assume the owner of a stallion forms a syndicate and sells the shares to people who are not in the horse business. Assume further that the purchasers were induced to buy the syndicate shares by promises that the syndicate manager would, through his or her contacts in the horse industry, sell all of the purchasers' breeding rights each year. In that case, the investor would be relying upon the efforts of the syndicate manager, and the entire transaction would seem to involve a security.[87]

It should be emphasized, however, that the foregoing is an extreme example and is not a situation that is typical in the horse business. As stated earlier, purchasers of interests in stallion syndicates invariably are in the horse business and are purchasing breeding rights to use in their particular programs. Although it may be convenient for syndicate members to have the syndicate manager act as their agent for the sale of unused breeding rights, that arrangement is in no way the principal factor in one's choice to purchase a stallion share. For reasons previously stated, syndicate members still have the major responsibility with regard to any income they may be able to generate.[88] Consequently, the inclusion of a term in the syndicate agreement that obligates the syndicate manager to act as a broker for the syndicate members should not cause the syndicate to become a security within the *Howey* formula.

Unfortunately, it appears that the Commission does not necessarily agree with this position. A request for a no-action letter concerning the syndication of the paint stallion, Sonsational,[89]

[87] Obviously, the facts begin to look very similar to those in SEC v. W.J. Howey Co., 329 U.S. at 293, where the Supreme Court concluded that a security was involved. For a discussion of *Howey*, see notes 25-35 *supra* and accompanying text.

[88] For a discussion of the syndicate members' responsibility, see text accompanying notes 72-76 *supra*.

[89] Ralph E., Jr. and Diana Schenck, SEC No-Action Letter (available Nov. 20, 1978).

revealed that the proposed syndication agreement contained a provision obligating the syndicate manager to act as an agent for the syndicate members in securing buyers for any unused breedings.[90] Each syndicate member was entitled to three breedings per year to the stallion, and it was represented in the request letter that all purchasers were "breeders who wish to breed Sonsational to mares."[91] This would seem to indicate that the purchasers were serious breeders who likely would use the breeding rights in their own programs. Nevertheless, the staff issued a no-action letter only after the agency provision was removed.

It is difficult to understand the basis for the staff's objection in the case of Sonsational syndication even in 1978, when the letter was issued. Since that time, of course, the Supreme Court has decided *Daniel*,[92] which bolsters the conclusion that the Sonsational syndicate agreement, even with the provision obligating the syndicate manager to act as an agent, should not constitute a security. Certainly the role of the syndicate manager in the Sonsational syndicate was less significant than that of the fund's manager in *Daniel*.[93]

Even if one were convinced that a term in the syndicate agreement providing for such an agency arrangement would cause a syndicate to constitute a security, that does not mean that the syndicate manager cannot act on behalf of a syndicate member in order to find a buyer for that member's breeding rights. If the syndicate agreement does not contain an agency provision and if the share is sold without emphasis on such possible activity, a syndicate share will not become a security, even though such activity in fact occurs after the syndicate is complete.[94]

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[90] Letter from Brent A. Schlottman to Securities Exchange Commission (Aug. 24, 1978) (requesting a no-action letter) (letter appended to Ralph E., Jr. and Diana Schenck, SEC No-Action Letter (available Nov. 20, 1978)).

[91] *Id.*

[92] 439 U.S. at 441. For a discussion of *Daniel*, see notes 45-52 *supra* and accompanying text.

[93] For a discussion of the fund manager's role see notes 47-52 *supra* and accompanying text.

[94] As a practical matter, it is impossible to restrain such activity. The obvious focal point for any syndicate is the syndicate manager. If one wants to breed to a syndicated stallion, therefore, he is likely to call the syndicate manager to inquire concerning available breeding. Clearly, the syndicate manager must respond to such inquiries.

Support for this notion can be found in the Commission's famous Condominium Release, issued in 1973.[95] In that release, the Commission stated that a condominium could become a security if sold with a rental arrangement, where the unit was "offered and sold with emphasis on the economic benefits to the purchaser to be derived from the managerial efforts of the promoter."[96] The Commission went on to say, however, that if the unit were originally sold without such emphasis, the promoter or an affiliate could later agree to act as rental agent for the purchaser.

The theory here, apparently, is based upon the *Howey* formula, which requires an expectation of profits to come from the efforts of the promoter or third party.[97] If the promoter's role after the sale is not emphasized, then it is reasonable to assume that the investor's expectation of profits must have been based upon some other factor. This is true even if after the sale the promoter in fact performs services for the investor. The status of an investment contract is determined at the time of investment, rather than by subsequent developments.

The safer course, therefore, would be to omit any such agency provision from the syndicate agreement and omit any emphasis on the possibility of such activity. In that instance, even if such activity in fact later occurs, the Commission would not be likely to conclude that the syndication agreement constituted a security. If, however, the syndicate agreement contains such a provision or if the syndicate shares are sold by emphasizing the availability of such services, the staff, if confronted with the question, may well conclude that the syndicate shares constitute securities. In light of recent Supreme Court cases, that conclusion seems indefensible, except in the most extreme cases.

E. *Pooling of Proceeds from the Sale of Breeding Rights*

In the event extra breedings become available to a stallion,

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[95] Offers and Sales of Condominiums or Units in a Real Estate Development, 1 FED. SEC. L. REP. (CCH) ¶ 1049 (Jan. 4, 1973) [hereinafter cited as *Condominium Release*]; 17 C.F.R. § 231.5382 (1973).

[96] *Condominium Release*, *supra* note 95, at 2072.

[97] For a discussion of this element, see notes 33-34 *supra* and accompanying text.

some allocation of those rights must be made among the syndicate members. The question has arisen as to whether the syndicate agreement can provide for a sale of such breeding rights by the syndicate manager and a distribution of resulting revenues pro rata among the members of the syndicate. In order to understand the impact of such a provision (usually referred to as a "pooling" provision) in a syndicate, one can refer to a thoroughbred syndicate.

Typically, thoroughbred syndicates have about forty shares. Even with the "free" nominations that may be provided to the syndicate manager and sometimes to the trainer of the horse, syndicates normally will require less than fifty breedings to satisfy the annual requirements of the syndicate agreement.[98] Especially while the stallion is young and healthy, he can and usually does cover more than fifty mares per breeding season. Sixty mares per breeding season is not uncommon for a young stallion, and eighty mares per season is not unheard of.

As a result of a stark fear of state and federal securities laws, these excess nominations have usually been allocated directly to the members of the syndicate, who then use the excess breeding rights as they see fit. Literally every successful no-action request contains promises that there will be no pooling of any revenues and that excess nominations will be allocated by lot.[99]

Syndicate managers, however, are generally unhappy with these provisions. They argue that to permit them to sell the excess nominations and distribute the proceeds gives them at least some control of the mares that are bred to the stallion. This control, they contend, will help insure higher quality mares for the stallion and will benefit everyone, as the quality of the progeny increases.

Whatever the need for pooling provisions, the Commission's position is that pooling of revenues causes a transaction like a

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[98] In the syndication of the thoroughbred, Duns Scotus, for example, there were 40 syndicate shares, the owner of the farm where the horse was to stand received four "free" nominations per breeding season, and the trainer received one nomination per breeding season. *See* Roosevelt, Franklin D., Jr., SEC No-Action Letter (available Oct. 8, 1980).

[99] *See, e.g.*, letter from Dennis H. Taylor to Securities and Exchange Commission (April 21, 1982) (requesting a no-action letter) (letter appended to Dave Parker Quarter Horses, SEC No-Action Letter (available July 8, 1982)).

stallion syndicate to become a security. Perhaps the Commission would not take such a position if the revenues were *de minimus*,[100] but even that is not clear.

This notion is contained in the Commission's Condominium Release,[101] where the Commission concluded that the offer of a condominium unit in conjunction with the offering of participation in a rental pool arrangement would cause the transaction to be viewed as an investment contract and, thus, a security. The Commission explained what it meant by a rental pool arrangement as follows:

> [T]he rental pool is 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. The rents received and the expenses attributable to rental of all the units in the project are combined and the individual owner receives a ratable share of the rental proceeds regardless of whether his individual unit was actually rented.[102]

It should be apparent that if a syndicate manager sells breeding rights and pools the income, it is difficult to distinguish the situation from the sale of a condominium with a pooling agreement.

The basis for the Commission's conclusion that pooling causes a condominium to become a security has never been clear to this writer. Since the presence of an investment contract requires that all elements of the *Howey* formula must be met, the efforts of the promoter in the case of a condominium unit with a pooling arrangement must be the "undeniably significant" efforts. Otherwise, the last element of the *Howey* test is not met.

Certainly, if the promoter generates a relatively large sum of

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[100] With regard to the syndication of the quarter horse, Blaze Drift, it was provided that the horse would be shown competitively after syndication. As to any prize money received from such competition, the syndicate agreement provided: "Any prize money earned by the Stallion in competition shall accrue to the Syndicate, to be used to defray the expenses of the Syndicate." Although this obviously permitted the pooling of prize money, the amount was *de minimus*. It was estimated that the horse would earn only $2,000 per year. Letter from Bruce MacGregor Hall to Securities and Exchange Commission (August 27, 1981) (requesting a no-action letter) (letter appended to Blaze Drift Syndicate, SEC No-Action Letter (available Oct. 29, 1981)).

[101] *Condominium Release*, *supra* note 95 at ¶ 1049.

[102] *Id.*

money from the rental of the condominium units, that activity may be significant, and an investment contract may be present. On the other hand, if the particular pooling arrangement involves a relatively insignificant amount of money, those efforts would not be the "undeniably significant ones," and, accordingly, the *Howey* standard would not be satisfied.

As a result, there is nothing magical about a pooling agreement. Rather it is simply another managerial function that may be assigned to a promoter or third party, and its importance should be evaluated in light of the other facts of the transaction. If the pooling arrangement, when considered with the other sevices of the promoter or third party, causes the efforts of the promoter or third party to become the "undeniably significant ones," then an investment contract will be found, assuming the other elements of *Howey* are present. A pooling agreement standing alone, however, does not necessarily satisfy the *Howey* test.

If the foregoing criticism and analysis are correct, a pooling provision should not necessarily cause a stallion syndicate to become a security, unless the pooling provision together with the other functions performed by the syndicate manager constitute undeniably significant efforts with regard to the expectation of income by the syndicate members. The difficulty, of course, is applying this notion in a concrete situation.

If a typical stallion syndicate requires fifty nominations per breeding season and provides for pooling with regard to ten extra nominations, one can make strong arguments that a security is not present. In such a situation, the syndicate members' expectation of value depends essentially upon two factors: first, the success of the stallion as a sire, and second, the ability of the syndicate member to use his or her breeding rights successfully. The fact that approximately one-sixth of the nominations will be sold by the syndicate manager, even when considered with his or her other functions, should not cause the syndicate manager's efforts to be the "undeniably significant" ones. The *Daniel* case supports this conclusion. If, however, the syndicate manager undertook the obligation to sell one-half of all nominations, it would be more difficult to defend that situation from the claim that it constituted a security. That activity, when considered with the other functions performed by the syndicate manager, may cause the

role of the syndicate manager to become the undeniably significant one.

CONCLUSION

Clearly, under existing authority, typical stallion syndicates are not securities. This Article has suggested that they do not become securities even if the role of the syndicate manager is expanded. At some point, the role of the syndicate manager could become so significant that the syndicate share may constitute a security, but the very nature of such an arrangement is antithetical to the traditional stallion syndicate. The whole purpose of the stallion syndicate is to provide breeders with a necessary service which they are free to use in their business as they see fit. Expanding the role of the syndicate manager, at least within the limits discussed in this Article, does not change the fundamental purpose for which one purchases a stallion share.

Furthermore, no compelling policy requires a stallion share to be classified as a security, even if the role of the syndicate manager is expanded. The securities laws are designed to force disclosure of material information and to provide special remedies if such information is not disclosed. No such special disclosure requirements are necessary in the case of a stallion syndicate, since the investor has easy access to all material information. The manager can check the horse's conformation and the pedigree and performance record of the stallion are readily available. Because these are the principal predictors of success as a breeding animal, there is no strong need for special disclosure rules.

It is relevant to recall that in *Marine Bank*,[103] the Supreme Court refused to classify a certificate of deposit as a security, essentially because the transaction did not need the special protections of the securities acts. There, the Court concluded that federal regulation and insurance coverage negated the need for the protection of the securities legislation. In the instance of stallion shares, one can argue that the easy availability of information similarly eliminates the need for the protection of securities legislation.

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[103] --U.S.--, 102 S. Ct. at 1220.