**<u>SEC v. W.J. Howey Co.</u>, 328 U.S. 293 (1946)**

An "investment contract", as used in the Securities Act, means a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits from the efforts of a promoter or a third party, it being immaterial whether shares in the enterprise are evidenced by formal certificate or by nominal interests in physical assets employed in enterprise.

"Investment contract" 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.

**<u>TSC Indus. v. Northway</u>, Inc., 426 U.S. 438 (U.S. 1976)**

The general standard of materiality that best comports with the policies of the federal securities laws is that an omitted fact is material if there is a substantial likelihood that a reasonable person would consider it important in making an investment decision; such a standard contemplates a showing of a substantial likelihood that, under all circumstances, the omitted fact would have assumed actual significance in deliberations of a reasonable shareholder; there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by a investor investor as having significantly altered the "total mix" of information made available.

The issue of the materiality of an omitted fact is a mixed question of law and fact, involving as it does application of a legal standard to a particular set of facts; only if the established omissions are "so obviously important to an investor that reasonable minds cannot differ on the question of materiality" is the ultimate issue of materiality appropriately resolved "as a matter of law" by summary judgment.

**<u>Rausch v. Jones</u>, 509 N.E.2d 236 (1987)**

The spirit and letter of the Indiana Uniform Securities Act requires that the issuer is obligated to see that the investor is informed of all the material facts. To prevail on a claim of exemption under Ind. Code § 23-2-1-2(b)(10)(g) for a private placement of working interest in an oil well, the issuer must prove that the investor was supplied with all material information. It does not matter that the investor did not request such information.

**<u>Reves v. Ernst & Young</u>, 494 U.S. 56 (1990)**

Congress enacted a definition of "security" sufficiently broad to encompass virtually any instrument that might be sold as an investment. Congress' purpose in enacting the securities laws was to regulate *investments,* in whatever form they are made and by whatever name they are called.

The phrase "any note" in the section of the Securities Exchange Act defining the term "security" should not be interpreted to mean literally "any note," but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the statute.

In deciding whether a transaction in a note involves a "security" the court should first examine the transaction to assess the motivations that would prompt a reasonable seller and buyer to enter into it. If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a "security." If the note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties, or to advance some other commercial or consumer purpose, on the other hand, the note is less sensibly described as a "security." Second, the court should examine the "plan of distribution" of the instrument to determine whether it is an instrument in which there is "common trading for speculation or investment." The court should next examine the reasonable expectations of the investing public: Instruments may be considered to be "securities" on the basis of such public expectations, even where an economic analysis of the circumstances of the particular transaction might suggest that the instruments are not "securities" as used in that transaction. Finally, the court should examine whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary.

In determining whether an instrument denominated a "note" is a "security," within the meaning of the Securities Exchange Act, courts should apply the "family resemblance" test. Under that test, a note is presumed to be a "security," and the presumption may be rebutted only by showing that the note bears a strong resemblance, determined by examining four specified factors, to one of a judicially crafted list of categories of instruments that are not securities. If an instrument is not sufficiently similar to a listed item, the court must decide whether another category should be added by examining the same factors. The types of notes that are not “securities” include: the note delivered in consumer financing, the note secured by a mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing a “character” loan to a bank customer, short-term notes secured by an assignment of accounts receivable, or a note which simply formalizes an open-account debt incurred in the ordinary course of business (particularly if, as in the case of the customer of a broker, it is collateralized).

Demand promissory notes sold by a farmer's cooperative to members and nonmembers fell under the “note” category of instruments that are “securities” under the Securities Act and the Securities Exchange Act, considering that the cooperative sold the notes to raise capital, they were bought to earn a profit in the form of interest, there was “common trading” of the notes which were offered and sold to a broad segment of the public, the public reasonably perceived from advertisements that the notes were investments, and there was no risk-reducing factor that would make application of the securities laws unnecessary, since the notes were uncollateralized and uninsured and would escape regulation entirely if the securities laws were held not to apply.

**Johnson v. Colip, 658 N.E.2d 575 (1995)**

An attorney could be considered an agent if he or she represents a broker-dealer or issuer in *effecting or attempting to effect* the purchase or sale of securities. In order to be considered an agent, an attorney must act in a manner that goes beyond legal representation. To rise to the level of "effecting" the purchase or sale of securities, the attorney must actively assist in offering securities for sale, solicit offers to buy, or actually perform the sale.

An attorney is an "agent" if his or her affirmative conduct or failure to act when reasonably expected to do so at a meeting of prospective investors made it more likely than not that the investors would purchase the securities than they would have been without such conduct or failure to act.

**Manns v. Skolnik, 666 N.E. 2d 1236 (1996).**

Under the "family resemblance" test to determine if a note constitutes a "security," the note is presumed to be a security, and that presumption may be rebutted only by showing that the note bears a "strong resemblance" to an enumerated instrument deemed not to be "securities" within the meaning of the securities statute.

The intent to defraud is not a required element for a violation of the securities fraud provision regarding omitting or misstating material information in connection with the sale of securities (Ind. Code § 23-2-1-12(2)); other subsections of the statute expressly include an element of intent (Ind. Code § 23-2-1-12 (1) and (3)). A violation of Ind. Code § 23-2-1-12(2) may be stablished irrespective of the individual's intent to defraud.

**Poyser v. Flora, 780 N.E. 2d 1191 (Ind. App. 2003).**

When determining whether an instrument is a security, the Court turns first to the definitions provision within the Indiana Securities Act. However, the literal inclusion in the statutory list of potential securities within the Indiana Securities Act is not the test for a "security." Final determination of whether a security is involved or not depends upon the economic realities of the transaction in light of legislative intent (i.e. the *Howey* or family resemblance tests). Thus, the viatical settlement contracts were "investment contracts" and, therefore, "securities" even before the legislature specifically added them to the enumerated list contained in the Indiana Securities Act.

**Szpunar v. State, 783 N.E. 2d 1213 (Ind. App. 2003).**

The jury had sufficient information from which to determine whether a coin operated telephone sales and service was a security such that the definition of a security in the statute prohibiting the sale of an unregistered security was not unconstitutional for vagueness as it was applied in defendant's trial involving telephone services agreement, where; (1) investigatory memo of Securities Division was admitted into evidence; (2) Division's administrative complaint against defendant was admitted into evidence; (3) administrative complaint stated that "investments in...purchase of and...leasing of public pay telephone equipment units [were] securities;" (4) and the commissioner testified as to definitions of securities and investment contracts.

**Security Trust Corp. v. Estate of Fisher, 797 N.E.2d 789 (2003 Ind. App.)**

Under the version of the Indiana Securities Act in effect at the time of the sale of viatical settlement, the settlement was an "investment contract" subject to regulation as a security; success of the investment depended not only on the date of the viator's death, but upon others who analyzed and selected the viator and the policy, and established the terms under which the policy was purchased.

**<u>SEC. v. Edwards</u>, 540 U.S. 389, 124 S. St. 892 (2004).**

In determining whether a particular scheme is an “investment contract” and thus within the federal securities statutes' definition of a “security,” the court looks to whether the scheme involves the investment of money in a common enterprise, with the profits, i.e. the return on investors' investment as opposed to the profits of the scheme in which they invest, to come from the efforts of others.

The fact that the investors who bought pay phones and then leased them back to the promoter in exchange for a monthly payment had a contractual entitlement to the return did not mean that such a return was not derived from the efforts of others, so as to preclude the arrangement's classification as an “investment contract” within the federal securities statutes' definition of “security.”

An investment scheme promising a fixed rate of return can be an “investment contract” and thus a “security” subject to the federal securities laws.