

South Carolina Law Review

Volume 60
Issue 5 *ANNUAL SURVEY OF SOUTH CAROLINA
LAW*

Article 8

Summer 2009

Who's Guiding South Carolina's Securities Jurisprudence?: A Major Opportunity to Reapproach South Carolina Securities Law

Justin P. Novak

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Justin P. Novak, Who's Guiding South Carolina's Securities Jurisprudence?: A Major Opportunity to Reapproach South Carolina Securities Law, 60 S. C. L. Rev. 1075 (2009).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

**WHO'S GUIDING SOUTH CAROLINA'S SECURITIES JURISPRUDENCE?:
A MAJOR OPPORTUNITY TO REAPPROACH
SOUTH CAROLINA SECURITIES LAW**

I. INTRODUCTION

In *Majors v. South Carolina Securities Commission*,¹ the South Carolina Supreme Court addressed a novel question of law by interpreting the meaning of the term “investment contract” within the definition of “security” under the South Carolina Uniform Securities Act (SCUSA).² In doing so, the *Majors* court aligned the statutory definition of investment contract with a strong precedent in South Carolina securities law: South Carolina courts will look to federal precedent for guidance in interpreting South Carolina code provisions similar to those in the federal securities statute.³ Interestingly, the *Majors* court simultaneously distanced South Carolina’s securities jurisprudence from this precedent by looking to the South Carolina Reporter’s Official Comments to the South Carolina Uniform Securities Act of 2005 (SCUSA of 2005)⁴ to interpret the term in accordance with the South Carolina General Assembly’s intentions in enacting the recently revised definition of security.⁵

The Supreme Court’s consideration of the General Assembly’s purposes in enacting the statutory term marks an important shift in South Carolina securities law. Prior to the *Majors* decision, South Carolina courts applied the terms of South Carolina’s securities statutes almost exclusively by seeking guidance from federal interpretations of similarly worded provisions in the federal securities statutes.⁶ Federal court interpretations, however, can vary widely by circuit.⁷ As

1. 373 S.C. 153, 644 S.E.2d 710 (2007), *cert. denied*, 128 S. Ct. 441 (2007).

2. *Id.* at 159, 162–63, 644 S.E.2d at 713, 715–16 (citing S.C. CODE ANN. § 35-1-20(12) (1987), *repealed by* South Carolina Uniform Securities Act of 2005, S.C. CODE ANN. § 35-1-102(29) (Supp. 2008)).

3. *Id.* at 163, 644 S.E.2d at 715 (citing *Garrett v. Snedigar*, 293 S.C. 176, 180, 359 S.E.2d 283, 285 (Ct. App. 1987), *overruled on other grounds by* *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003)).

4. S.C. CODE ANN. §§ 35-1-101 to -703 (Supp. 2008) (replacing S.C. CODE ANN. §§ 35-1-10 to -1590 (1987)).

5. *Majors*, 373 S.C. at 165–66, 644 S.E.2d at 717.

6. *See, e.g.*, *Faircloth v. Jackie Fine Arts, Inc.*, 682 F. Supp. 837, 843 (D.S.C. 1988) (citing *Garrett*, 293 S.C. at 180, 359 S.E.2d at 285; *McGaha v. Mosley*, 283 S.C. 268, 273, 322 S.E.2d 461, 464 (Ct. App. 1984)) (“South Carolina courts have yet to perceive any significant difference between the federal and state definitions of ‘security.’”), *aff’d in part, rev’d in part on other grounds sub nom* *Faircloth v. Finesod*, 938 F.2d 513, 519 (4th Cir. 1991); *S.C. Nat’l Bank v. Darmstadter*, 622 F. Supp. 226, 229 (D.S.C. 1985) (“Where the South Carolina securities law is substantially identical to the federal provisions, South Carolina courts will ordinarily follow the federal court’s interpretations of federal securities laws.” (citing *Bradley v. Hullander*, 272 S.C. 6, 21, 249 S.E.2d 486, 494 (1978))); *Biales v. Young*, 315 S.C. 166, 169, 432 S.E.2d 482, 484 (1993) (citing *Bradley*, 272 S.C. at 21, 249 S.E.2d at 494; *Allen v. Columbia Fin. Mgmt., Ltd.*, 297 S.C. 481, 486–87, 377 S.E.2d 352, 355–56 (Ct. App. 1988)) (applying federal precedent to interpret “seller” under the South Carolina securities statute).

a result, South Carolina courts have traditionally employed an unpredictable approach to applying the state securities statute.⁸ Moreover, by relying on federal interpretations of similarly worded federal provisions, South Carolina courts have traditionally served federal, instead of state, regulatory goals and policies.⁹

In *Majors*, however, the South Carolina Supreme Court signaled that the recent enactment of the SCUSA of 2005 presents the opportunity to realign the application of state securities laws with the General Assembly's purposes in enacting the provisions of the new securities statute, particularly those provisions that incorporate nonfederal language.¹⁰ South Carolina's judiciary should embrace this new approach and continue to establish an independent canon of state securities jurisprudence that reflects the intentions of the General Assembly.

This Comment considers the impact of the *Majors* decision on South Carolina securities law by examining the *Majors* court's construction of the term investment contract,¹¹ South Carolina's traditional approach to interpreting the state securities statute,¹² and the revised definition of security under the SCUSA of 2005.¹³ Part II explores the *Majors* decision and its place in South Carolina's securities jurisprudence. Part III examines South Carolina's traditional judicial construction of security and its relationship to federal law. Part IV addresses the passage of the SCUSA of 2005 and the opportunity to reapproach South Carolina securities law.

II. *MAJORS V. SOUTH CAROLINA SECURITIES COMMISSION*

In *Majors*, the South Carolina Supreme Court considered, *inter alia*, whether the South Carolina Securities Commissioner properly ordered a company to cease and desist selling unregistered securities.¹⁴ In affirming a circuit court decision, the *Majors* court determined that the offering and sale of tax lien certificates through a particular investment program were securities because the

7. See 2 LOUIS LOSS ET AL., SECURITIES REGULATION 856, 858 n.6 (4th ed. 2007) (suggesting that policy determinations vary the definition of security among jurisdictions).

8. See, e.g., *Allen*, 297 S.C. at 486–88, 377 S.E.2d at 355–57 (adopting a federal test for “seller” under the state securities statute while independently construing “employee”).

9. See, e.g., Martin C. McWilliams, Jr., *Thoughts on Borrowing Federal Securities Jurisprudence Under the Uniform Securities Act*, 38 S.C. L. REV. 243, 245–46 (1987) (arguing that local values and interests must accompany statutory borrowing by state courts).

10. See *Majors*, 373 S.C. at 165–66, 644 S.E.2d at 717 (citing S.C. CODE ANN. § 35-1-102 official cmt. 28 (Supp. 2008)).

11. See *id.* at 162–67, 644 S.E.2d at 715–18.

12. See, e.g., *S.C. Nat'l Bank v. Darmstadter*, 622 F. Supp. 226, 229 (D.S.C. 1985) (“Where the South Carolina securities law is substantially identical to the federal provisions, South Carolina courts will ordinarily follow the federal court's interpretations of federal securities laws.” (citing *Bradley v. Hullander*, 272 S.C. 6, 21, 249 S.E.2d 486, 494 (1978))).

13. See S.C. CODE ANN. § 35-1-102(29) (Supp. 2008).

14. *Majors*, 373 S.C. at 159, 644 S.E.2d at 713.

transactions satisfied the federal definition of investment contract and thus constituted securities under state law.¹⁵

The promoter, Tax Lien Agents, Inc. (TLA), offered for sale investment opportunities in tax lien certificates (TLC).¹⁶ Local governments generally issue these certificates at public auction after a property owner defaults in the payment of property taxes.¹⁷ The certificates usually bear an interest rate of between 8% and 25%, mature after a period of one to three years, and are secured by real property for which property taxes have not been paid.¹⁸ A TLC may yield a much larger return than the guaranteed rate of interest because the real property is often worth much more than the actual cost of the tax lien certificate, which is typically the amount of the property taxes owed.¹⁹

A delinquent party, or other real party of interest, may redeem the certificate by paying the delinquent property taxes plus any accrued interest before the certificate's maturity date, in which case the government will recall the certificate and reimburse the certificate purchaser for the cost of the certificate and the accrued interest.²⁰ If the delinquent party does not settle the tax lien before the certificate matures, the government will recall the certificate and issue to the certificate purchaser a tax deed for the real property securing the certificate.²¹ The purchaser can then quiet title and take possession of the property.²²

In 1998, Ned Majors founded TLA as a solely-owned South Carolina corporation employing agents to attend government delinquent ad valorem real property tax lien auctions around the country.²³ At those auctions the agents, acting on behalf of the corporation's customers, sought to purchase government TLCs that delinquent parties were unlikely to redeem.²⁴ An agent represented only one principal for each certificate purchase but often represented as many as twenty principals at each auction.²⁵ Upon a successful bid, an agent paid for the certificate with a check issued by an individual customer who had previously drawn the check to the "County Treasurer for Tax Liens."²⁶ After the purchase, the agent received a government-issued, interest-bearing TLC in the principal's name and recorded the certificate in the appropriate public record.²⁷

15. *Id.* at 163–64, 644 S.E.2d at 716.

16. *See id.* at 156–57, 644 S.E.2d at 712–13 (describing TLA's business model).

17. Final Brief of Primary Appellant, Tax Lien Agents, Inc. at 5, *Majors*, 373 S.C. 153, 644 S.E.2d 710 (No. 04-CP-26-874).

18. Petition for Writ of Certiorari at 4–5, *Majors*, 128 S. Ct. 441 (2007) (No. 07-234).

19. *Id.* at 5.

20. *Id.*

21. *Id.*

22. *Id.*

23. *See Majors v. S.C. Sec. Comm'n*, 373 S.C. 153, 156, 644 S.E.2d 710, 712 (2007), *cert. denied*, 128 S. Ct. 441 (2007).

24. *Id.*

25. *Id.* at 157, 644 S.E.2d at 712.

26. *Id.*

27. *See* Petition for Writ of Certiorari at 4, *Majors*, 128 S. Ct. 441 (2007) (No. 07-234).

The principals paid a “non-refundable agency fee” for each certificate purchased, which TLA determined as a percentage of the tax lien purchase price.²⁸ The principals also granted TLA a 50% ownership interest in the net profit of the certificate and any resultant deed.²⁹ Although the principals were responsible for quieting title and closing on the property and had the right to select closing attorneys, the principals rarely exercised this right.³⁰ Instead, customers generally retained TLA’s services to finalize their transactions for an additional fee.³¹

In South Carolina, the attorney general is, by statute, the securities and exchange commissioner (Commissioner).³² In 2003, the Commissioner “entered an order for Majors and TLA to ‘Cease and Desist Selling Unregistered Securities and Engaging in Securities Fraud’ and gave them notice of the right to a hearing.”³³ After the hearing, the administrative hearing officer determined that TLA and Majors were engaged in the sale of securities because their agency contract constituted an investment contract.³⁴ Acting upon the administrative hearing officer’s recommendation, “the Commissioner issued a Final Order to Cease and Desist Selling Unregistered Securities.”³⁵ Majors and TLA appealed the order to the circuit court, which found that the investment opportunity included the offering and sale of securities.³⁶

The South Carolina Supreme Court certified the case from the court of appeals to address several questions, including whether the attorney general properly ordered the appellants to cease and desist the sale of unregistered securities.³⁷ The Supreme Court held, *inter alia*, that the Commissioner properly issued the final cease and desist order because TLA’s sale of TLCs constituted the sale of securities within the meaning of SCUSA.³⁸

The South Carolina Supreme Court predicated its approach upon several propositions: (1) South Carolina courts generally look for guidance to federal interpretations of the federal securities statutes when interpreting similarly worded provisions of SCUSA;³⁹ (2) SCUSA and the federal acts each define the word security to include an investment contract;⁴⁰ and (3) the Fourth Circuit employs the *Howey* test to determine whether an investment instrument qualifies

28. *Majors*, 373 S.C. at 156–57, 644 S.E.2d at 712.

29. *Id.*

30. *Id.* at 157, 644 S.E.2d at 712.

31. *Id.*

32. S.C. CODE ANN. § 35-1-102(28) (Supp. 2008).

33. *Majors*, 373 S.C. at 157–58, 644 S.E.2d at 713.

34. *Id.* at 158, 644 S.E.2d at 713.

35. *Id.*

36. *Id.*

37. *Id.* at 156, 158–59, 644 S.E.2d at 712, 713 (citing S.C. APP. CT. R. 204(b)).

38. *Id.* at 163–64, 644 S.E.2d at 716.

39. *Id.* at 163, 644 S.E.2d at 715 (citing *Garrett v. Snedigar*, 293 S.C. 176, 180, 359 S.E.2d 283, 285 (Ct. App. 1987), *overruled on other grounds by* *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003)).

40. *Id.* (citing *Garrett*, 293 S.C. at 180, 359 S.E.2d at 285).

as an investment contract under federal law.⁴¹ Accordingly, the *Majors* court derived a variation of the *Howey* test's framework from the Fourth Circuit, applied each element of that test using federal precedents from numerous jurisdictions, and determined that TLA's sale of TLCs constituted the sale of securities under SCUSA.⁴²

The *Howey* test is derived from the seminal case of *SEC v. W.J. Howey Co.*,⁴³ and is generally followed by federal and state courts.⁴⁴ According to the *Majors* court, "[u]nder the *Howey* test, an investment contract exists where there has been (i) an investment of money, (ii) in a common enterprise, (iii) with an expectation of profits garnered solely from the efforts of others."⁴⁵ In applying a derivation of the *Howey* test, the *Majors* court relied on the South Carolina Court of Appeals's prior application of the *Howey* test.⁴⁶

The court of appeals's prior analysis of the definition of an investment contract focused on the *Howey* test's third element—the requirement that there be an expectation of profits from the efforts of others—having presumed that the other two requirements were satisfied.⁴⁷ The *Majors* court, therefore, sought guidance from other sources, including the recently passed the SCUSA of 2005 and several federal court decisions, before applying the *Howey* test's first two prongs.⁴⁸ As a result, the *Majors* court adopted a fragmented version of the *Howey* test that relies upon cases from a number of federal circuits.⁴⁹

41. See *id.* at 163, 644 S.E.2d at 716. Although the *Majors* court references the South Carolina Court of Appeals's recognition of the similarity between "our Act and the Federal Act," *id.* at 163, 644 S.E.2d at 715, the Securities Act of 1933 and the Securities Exchange Act of 1934 each govern the federal definition of security, see Securities Act of 1933, 15 U.S.C. § 77b(a)(1) (2006); Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10) (2006); 2 LOSS ET AL., *supra* note 7, at 855–57. The definitions of security within those statutes, however, are "treated as identical." 2 LOSS ET AL., *supra* note 7, at 857 (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686 n.1 (1985)).

42. *Majors*, 373 S.C. at 163–68, 644 S.E.2d at 716–18.

43. 328 U.S. 293 (1946); see discussion *infra* Part III.B.

44. 2 LOSS ET AL., *supra* note 7, at 922–23.

45. *Majors*, 373 S.C. at 163, 644 S.E.2d at 716.

46. *Id.* at 163, 644 S.E.2d at 715–16 (citing *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946); *Garrett*, 293 S.C. at 180, 359 S.E.2d at 285).

47. See *Garrett*, 293 S.C. at 180–82, 359 S.E.2d at 285–86.

48. See *Majors*, 373 S.C. at 164–66, 644 S.E.2d at 716–17 (citing S.C. CODE ANN. § 35-1-102 official cmt. 28 (Supp. 2008); *SEC v. SG Ltd.*, 265 F.3d 42, 49–50 (1st Cir. 2001); *Long v. Shultz Cattle Co.*, 881 F.2d 129, 140–41 (5th Cir. 1989); *Brodt v. Bache & Co.*, 595 F.2d 459, 460 (9th Cir. 1978); *SEC v. TLC Invs. & Trade Co.*, 179 F. Supp. 2d 1149, 1156 (C.D. Cal. 2001); *Top of Iowa Coop. v. Schewe*, 6 F. Supp. 2d 843, 852 (N.D. Iowa 1998); *SEC v. Pinckney*, 923 F. Supp. 76, 80 (E.D.N.C. 1996)).

49. See *id.* (citing § 35-1-102 official cmt. 28; *SG Ltd.*, 265 F.3d at 49–50; *Long*, 881 F.2d at 140–41; *Brodt*, 595 F.2d at 460; *TLC Invs.*, 179 F. Supp. 2d at 1156; *Schewe*, 6 F. Supp. 2d at 852; *Pinckney*, 923 F. Supp. at 80).

A. *An Investment of Money*

The *Majors* court first addressed whether an “investment of money” existed.⁵⁰ In doing so, the court turned for guidance to the United States District Court for the Eastern District of North Carolina.⁵¹ In *SEC v. Pinckney*, the district court held that an investor must place financial assets at risk to make an investment of money.⁵² Although the promoter in *Pinckney* promised “no risk” and the invested funds remained under the investor’s “sole control” and were “guaranteed,” the district court concluded that the investment program required an investment of money because investors could have realized a financial loss through use of a required power of attorney or by virtue of any “trades” made with the invested funds.⁵³

The South Carolina Supreme Court concluded that the arrangement in *Majors* satisfied the *Pinckney* formulation because each customer paid numerous fees and expenses to TLA in order to participate in the program.⁵⁴ The *Majors* court also found that participants could suffer a financial loss because TLA’s contract warned of “potential downside financial risk.”⁵⁵ Accordingly, the *Majors* court found that TLA’s program required an investment of money.⁵⁶

B. *A Common Enterprise*

The *Majors* court then examined the second element of the *Howey* test—whether the investment program constituted a common enterprise.⁵⁷ The court recognized that other jurisdictions have struggled to discern whether a common enterprise requires vertical or horizontal commonality, or both.⁵⁸ The court explained that vertical commonality requires only a pooling of interests between the “promoter and each individual investor,” while horizontal commonality also requires “a pooling of interests among the investors.”⁵⁹ The court further recognized two types of vertical commonality: broad vertical commonality and strict vertical commonality.⁶⁰ The court explained that under broad vertical commonality “the fortunes of the investors need be linked only to the efforts of

50. *Id.* at 164, 644 S.E.2d at 716.

51. *Id.* (citing *Pinckney*, 923 F. Supp. at 80).

52. *Pinckney*, 923 F. Supp. at 80 (citing *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976)).

53. *Id.* at 78–79, 81.

54. *Majors*, 373 S.C. at 164, 644 S.E.2d at 716.

55. *Id.*

56. *Id.*

57. *Id.* at 164–66, 644 S.E.2d at 716–17.

58. *Id.* at 164, 644 S.E.2d at 716 (citing *SEC v. SG Ltd.*, 265 F.3d 42, 49–50 (1st Cir. 2001); *Top of Iowa Coop. v. Schewe*, 6 F. Supp. 2d 843, 852 (N.D. Iowa 1998); *SEC v. Pinckney*, 923 F. Supp. 76, 81 (E.D.N.C. 1996)).

59. *Id.* at 165, 644 S.E.2d at 716 (citing *Schewe*, 6 F. Supp. 2d at 852).

60. *Id.*, 644 S.E.2d at 717.

the promoter,”⁶¹ but under strict vertical commonality “the fortunes of investors [must] be tied to the fortunes of the promoter.”⁶²

In its analysis of commonality, the *Majors* court compared lines of precedent from several federal jurisdictions, including the First, Fifth, Seventh and Ninth Circuits.⁶³ The court also recognized that there are unsettled issues regarding application of the various interpretations.⁶⁴ After assessing each issue, the *Majors* court sought to determine the intent of the South Carolina General Assembly from the South Carolina Reporter’s Official Comments to the SCUSA of 2005,⁶⁵ which had recently replaced SCUSA. Those comments state that the statute “adopts a more restrictive form of vertical commonality that occurs only when there is profit sharing between [any] two persons.”⁶⁶ Although the new version of the statute did not apply in *Majors* because the subject events predated the effective date of the legislation, the court, taking the view that the Official Comments reflected the will of the General Assembly, accorded its decision with those comments by adopting a strict vertical commonality of profit standard for the common enterprise element of the *Howey* test.⁶⁷

The appellants contended that the Commissioner’s finding of a common enterprise was inappropriate even under a strict vertical commonality test, but the court rejected their challenge by applying reasoning derived from another federal district court decision.⁶⁸ In *SEC v. TLC Investments & Trade Co.*, a federal district court in California held that a common enterprise exists where the promoter’s gain is “contingent” upon the investor’s gain.⁶⁹ Accordingly, the *Majors* court concluded that there need not be a showing that the investor’s profits are “dependent” upon the promoter’s profits, only that the promoter’s profits are “contingent” on the investor’s profits.⁷⁰

C. An Expectation of Profits Garnered Solely from the Efforts of Others

The South Carolina Supreme Court, like the South Carolina Court of Appeals, disregarded the requirement that an expectation of profits come *solely*

61. *Id.* (citing *Long v. Shultz Cattle Co.*, 881 F.2d 129, 140–41 (5th Cir. 1989)).

62. *Id.* (citing *Brodt v. Bache & Co.*, 595 F.2d 459, 461 (9th Cir. 1978)).

63. *Id.* at 164–65, 644 S.E.2d at 716–17 (citing *SG Ltd.*, 265 F.3d at 49–50; *SEC v. R.G. Reynolds Enters.*, 952 F.2d 1125, 1130–31 (9th Cir. 1991); *Long*, 881 F.2d at 140–41; *Brodt*, 595 F.2d at 461; *Schewe*, 6 F. Supp. 2d at 852).

64. *Id.* at 164, 644 S.E.2d at 716 (citing *Schewe*, 6 F. Supp. 2d at 852).

65. *Id.* at 165–66, 644 S.E.2d at 717 (citing S.C. CODE ANN. § 35-1-102 official cmt. 28 (Supp. 2008)).

66. *Id.* at 166, 644 S.E.2d at 717 (quoting § 35-1-102 official cmt. 28).

67. *Id.*

68. *Id.* (citing *SEC v. TLC Invs. & Trust Co.*, 179 F. Supp. 2d 1149, 1156 (C.D. Cal. 2001)).

69. *TLC Invs.*, 179 F. Supp. 2d at 1156 (citing *SEC v. R.G. Reynolds Enters., Inc.*, 952 F.2d 1125, 1130–31 (9th Cir. 2001)).

70. *Majors*, 373 S.C. at 166, 644 S.E.2d at 717 (citing *TLC Invs.*, 179 F. Supp. 2d at 1156).

from the efforts of the promoter or a third party.⁷¹ In *Garrett v. Snedigar*, the South Carolina Court of Appeals looked to federal precedents for guidance before concluding that partnership interests are not securities as a matter of South Carolina law.⁷² In *Garrett*, several sophisticated parties entered into a partnership to develop a shopping complex.⁷³ Although the arrangement was structured and marketed as a general partnership, the enterprise shared many characteristics of a limited partnership.⁷⁴ The *Garrett* court recognized that courts generally find limited partnership interests to be investment contracts because the partners are typically passive investors, but that courts usually do not find interests in general partnerships to be securities.⁷⁵ In accordance with a federal precedent, the *Garrett* court concluded that “form should be disregarded for substance and the emphasis should be on economic reality.”⁷⁶

After looking to *Garrett* and to the Eleventh Circuit for guidance, the *Majors* court found the key determination to be “whether the promoters’ efforts, not th[ose] of the investors, form the ‘essential managerial efforts which affect the failure or success of the enterprise.’”⁷⁷ The *Majors* court found that TLA’s investment offering satisfied the *Howey* test’s third element because, “in practice,” investor control was very limited, even though some contractual rights of control existed.⁷⁸ Accordingly, the South Carolina Supreme Court found that TLA’s sale of TLCs satisfied the *Howey* test.⁷⁹ As a result, the court affirmed the determination that TLA’s investment program constituted the sale of investment contracts and, therefore, held that the Commissioner properly ordered TLA and Majors to cease and desist selling absent proper registration.⁸⁰

71. *Id.* at 167, 644 S.E.2d at 717 (“Later cases have eliminated the requirement that one must expect profits solely from the efforts of others in order for an interest to be a security.” (quoting *Garrett v. Snedigar*, 293 S.C. 176, 180, 359 S.E.2d 283, 285 (Ct. App. 1987))).

72. *Garrett*, 293 S.C. at 180–82, 359 S.E.2d at 285–86 (citing *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946); *Odom v. Slavik*, 703 F.2d 212, 214–15 (6th Cir. 1983); *Williamson v. Tucker*, 645 F.2d 404, 424 (5th Cir. 1981); *Bradley v. Hullander*, 272 S.C. 6, 21, 249 S.E.2d 486, 494 (1978); Hugh L. Sowards, *Federal Securities Act of 1933*, in [11–Part 1] BUSINESS ORGANIZATIONS § 2.01[11][ii], at 2-74 (1986)).

73. *Id.* at 178, 182, 359 S.E.2d at 284, 286.

74. *Id.* at 178–79, 359 S.E.2d at 284–85 (“[The Appellant] initially planned to organize the enterprise as a limited partnership with himself as the general partner. . . . [But, upon advice, formed a general partnership in which he] ‘would be the managing general partner and do all the kinds of things normally associated with a limited partnership.’ . . . [In fact, t]he partnership agreement provide[d] that [the Appellant], as managing partner, has ‘full charge of the management, conduct and operation of the Partnership business in all respects.’”).

75. *Id.* at 181, 359 S.E.2d at 286 (citing *Odom*, 703 F.2d at 214–15; Sowards, *supra* note 72, § 2.01[11][ii], at 2-74).

76. *Id.* (quoting *Tcherepnin*, 389 U.S. at 336) (internal quotation marks omitted).

77. *Majors v. S.C. Sec. Comm’n*, 373 S.C. 153, 167, 644 S.E.2d 710, 718 (2007) (citing *SEC v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1201 (11th Cir. 1999)), *cert. denied*, 128 S. Ct. 441 (2007).

78. *Id.*

79. *See id.* at 164–68, 644 S.E.2d at 716–18.

80. *Id.* at 167–68, 644 S.E.2d at 718.

III. SEARCHING FOR “SECURITY”

As the *Majors* decision demonstrates, South Carolina courts have woven together a complex scheme of federal interpretations of statutory terms by which to apply SCUSA.⁸¹ Originally passed in 1961, SCUSA implemented recommendations of the National Conference of Commissioners on Uniform State Laws (NCCUSL) as promulgated in the Uniform Securities Act of 1956 (USA).⁸² The USA was designed, in part, to coordinate state and federal securities laws and to implement national standards for securities regulation.⁸³ The USA sought, in essence, to lower transaction costs associated with national securities offerings that were required to comply with numerous inconsistent state regulatory frameworks.⁸⁴

Nevertheless, some commentators consider SCUSA “complex and in some respects obscure,”⁸⁵ particularly because state courts have not formed many independent interpretations of its provisions. In fact, South Carolina courts generally do not independently analyze whether particular investment instruments are securities.⁸⁶ Instead, South Carolina courts have traditionally looked to federal judicial interpretations of the federal securities laws to inform state judicial interpretations of similarly worded provisions.⁸⁷ Under SCUSA, South Carolina’s definition of a security was almost identical to definitions contained in the federal securities laws.⁸⁸ South Carolina courts’ substantial

81. See *id.* at 162–67, 644 S.E.2d at 715–18; see also *Garrett*, 293 S.C. at 180–182, 359 S.E.2d at 285–86 (determining whether general partnership interests are securities); *McGaha v. Mosley*, 283 S.C. 268, 273, 322 S.E.2d 461, 464 (Ct. App. 1984) (determining whether written assignments of interests in profits under a franchise agreement constitute securities).

82. J. Parks Workman, *The South Carolina Uniform Securities Act of 2005: A Balancing Act Under a New Blue Sky*, 57 S.C.L. REV. 409, 413 (2006).

83. McWilliams, *supra* note 9, at 253.

84. See *id.* at 254 (“Uniformity benefits the states by permitting ‘an interchangeability of precedent and practice’ among the states, while minimizing burdens on legitimate interstate business.” (citing LOUIS LOSS & EDWARD M. COWETT, *BLUE SKY LAW* 238 (1958))).

85. *Id.* at 243.

86. See, e.g., *O’Quinn v. Beach Assocs.*, 272 S.C. 95, 105–06, 249 S.E.2d 734, 739 (1978) (selling condominiums with rental management contracts); *Garrett*, 293 S.C. at 180–82, 359 S.E.2d at 285–86 (general partnership interests); *McGaha*, 283 S.C. at 273, 322 S.E.2d at 464 (written assignments of interests in profits under franchise agreements).

87. E.g., *Garrett*, 293 S.C. at 180, 359 S.E.2d at 285 (citing *Bradley v. Hullander*, 272 S.C. 6, 21, 249 S.E.2d 486, 494 (1978)) (comparing the definition of security in SCUSA and the Securities Act of 1933).

88. Compare S.C. CODE ANN. § 35-1-20(12) (1987) (repealed 2006) (“‘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 of subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease 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. ‘Security’ does not include any insurance or endowment policy or annuity contract

borrowing from federal interpretations of security, at least originally, is likely attributable to efforts to establish uniformity as well as to the substantially greater amount of judicial and academic gloss upon the similarly worded federal statutes.⁸⁹

Regardless of the goal, South Carolina's systematic adoption of federal interpretations of statutory terms is problematic.⁹⁰ Various federal circuits have taken different approaches in their own interpretations of the federal definition of a security.⁹¹ Although the United States Supreme Court has outlined the broad parameters of federal securities law, the Court has not resolved several significant, though nuanced, differences among the federal circuits.⁹² These differences have become more pronounced over time.⁹³ In addition, each circuit has not addressed every issue.⁹⁴ For all practical purposes, each federal jurisdiction has developed its own understanding of what constitutes a security.⁹⁵

Accordingly, South Carolina's tradition of looking to federal law for guidance has resulted in the adoption of pieces of interpretations from numerous federal jurisdictions and enabled a verdict driven selection process for lower courts.⁹⁶ Attempts to predict the manner in which South Carolina courts will

under which an insurance company promises to pay money either in a lump sum or periodically for life or for some other specified period.”), with 15 U.S.C. § 77b(a)(1) (2006) (“The term ‘security’ means any note, stock, treasury stock, security future, 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.”), and 15 U.S.C. § 78c(a)(10) (2006) (“The term ‘security’ means any note, stock, treasury stock, security future, 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.”).

89. McWilliams, *supra* note 9, at 245.

90. *See generally id.* at 245–46 (describing potential issues regarding borrowing).

91. *See* 2 LOSS ET AL., *supra* note 7, at 856–58, 858 n.6 (describing the term’s broad parameters and numerous attempts at interpreting it).

92. *Id.* at 857–58.

93. *See, e.g.,* Long v. Shultz Cattle Co., 881 F.2d 129, 140–41, 140 n.11 (5th Cir. 1989) (discussing the circuit split concerning when a “common enterprise” exists).

94. *See* 2 LOSS ET AL., *supra* note 7, at 855–1143 (surveying interpretations of security).

95. *See id.* at 856–58, 858 n.6 (attributing variety in interpretations to policy dimension).

96. *See, e.g.,* Majors v. S.C. Sec. Comm’n, 373 S.C. 153, 162–67, 644 S.E.2d 710, 715–18 (2007) (adopting interpretations of the elements of a federal test from numerous jurisdictions), *cert. denied*, 128 S.Ct. 441 (2007); Biales v. Young, 315 S.C. 166, 169–70, 432 S.E.2d 482, 484–85 (1993) (applying a federal test to interpret seller under the state statute).

apply South Carolina's securities law are marked by uncertainty.⁹⁷ Most importantly, however, the purposes underlying each federal interpretation have encroached upon the effectuation of South Carolina's regulatory goals.⁹⁸

Federal and state securities laws reflect fundamentally different priorities.⁹⁹ The federal regulatory regime focuses on disclosure requirements to create a transparent environment of reliable information in the national market.¹⁰⁰ State securities statutes are designed to provide states with opportunities to tailor state regulations to state interests and to appropriately supplement federal regulations.¹⁰¹ For example, state regulatory frameworks attempt to protect individual investors by prohibiting the offering of unsound securities through merit review¹⁰² except where preempted by federal law.¹⁰³

The two regulatory approaches may employ similar methods to achieve their ends, but the underlying aims remain distinct.¹⁰⁴ The adoption of a federal court's reasoning in lieu of an independent analysis of state goals, therefore, risks defeating the goals of state regulation.¹⁰⁵ Once this borrowing becomes judicially formalized, the federal rationale for regulation becomes the state rationale for regulation, regardless of statutory intent.¹⁰⁶ The existence of numerous federal jurisdictions—each with distinctive rationales underlying its analysis—further convolutes the manner in which courts may apply state regulations.

A. *Interpreting the South Carolina Uniform Securities Act*

The South Carolina Supreme Court first announced that it would look to federal cases interpreting federal securities statutes for guidance in interpreting corresponding sections of SCUSA in *Bradley v. Hullander*.¹⁰⁷ The *Bradley* court reasoned that South Carolina courts should look for guidance to cases

97. See, e.g., *Allen v. Columbia Fin. Mgmt., Ltd.*, 297 S.C. 481, 486–88, 377 S.E.2d 352, 355–57 (Ct. App. 1988) (adopting federal precedent to interpret the term seller while independently construing the term employee).

98. See, e.g. *McWilliams*, *supra* note 9, at 245 (arguing that inappropriate borrowing can undermine state values and interests).

99. *Id.* at 248.

100. *Id.* at 248–49.

101. See JOEL SELIGMAN, *THE NEW UNIFORM SECURITIES ACT* xvii–xix (2003) (explaining the benefits of the Uniform Securities Act of 2002).

102. *McWilliams*, *supra* note 9, at 249–50.

103. SELIGMAN, *supra* note 101, at xxi (“[The Uniform Securities Act of 1956 and the Revised Uniform Securities Act of 1985] have been preempted in part by the National Securities Markets Improvement Act of 1996 and the Securities Litigation Uniform Standards Act of 1998.”).

104. *McWilliams*, *supra* note 9, at 251.

105. See *id.* at 245 (“[P]ursuit of the goals of convenience and uniformity should not, without analysis, subsume other, ‘exclusive’ state values and interests. If employed mechanically as a rule of construction, wholesale borrowing can become a substitute for analysis.”).

106. *Id.*

107. 272 S.C. 6, 249 S.E.2d 486 (1978).

interpreting federal securities statutes where the state act adopted provisions “almost verbatim” to those in the federal statute.¹⁰⁸ *Bradley* provides the foundation for judicial interpretation of the state securities statute by analogy to federal statutes.¹⁰⁹ South Carolina courts have extended the *Bradley* court’s approach to several provisions of SCUSA.¹¹⁰

In *Carver v. Blanford*,¹¹¹ the South Carolina Supreme Court relied on *Bradley* in examining two contemporary United States Supreme Court cases to determine whether stock in a closely held corporation is a security.¹¹² The *Carver* court found that the federal cases announced a “bright line” rule: “sales of stock in close corporations fall within the federal securities laws if the instruments are labeled stock, and have the usual characteristics of stock.”¹¹³ In a brief decision, the South Carolina Supreme Court adopted the federal rule and concluded that the case “clearly falls” under the protection of SCUSA.¹¹⁴ The court did not analyze the state statute or otherwise examine South Carolina law.¹¹⁵

This trend continued in cases that required South Carolina courts to construe SCUSA in the absence of directly relevant South Carolina authority.¹¹⁶ In fact, few cases after *Bradley* have drawn any distinction between the federal and state definitions of a security.¹¹⁷

108. *Id.* at 21, 249 S.E.2d at 494.

109. *See* *Majors v. S.C. Sec. Comm’n*, 373 S.C. 153, 163, 644 S.E.2d 710, 715 (2007) (citing *Garrett v. Snedigar*, 293 S.C. 176, 180, 359 S.E.2d 283, 285 (Ct. App. 1987), *overruled on other grounds by* *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003)), *cert. denied*, 128 S. Ct. 441 (2007); *Biales v. Young*, 315 S.C. 166, 169, 432 S.E.2d 482, 484 (1993) (citing *Bradley*, 272 S.C. at 21, 249 S.E.2d at 494); *Carver v. Blanford*, 288 S.C. 309, 310, 342 S.E.2d 406, 407 (1986) (citing *Bradley*, 272 S.C. at 21, 249 S.E.2d at 494); *Allen v. Columbia Fin. Mgmt., Ltd.*, 297 S.C. 481, 486–87, 377 S.E.2d 352, 355–56 (Ct. App. 1988) (citing *Carver*, 288 S.C. at 310, 342 S.E.2d at 407); *Garrett*, 293 S.C. at 180, 359 S.E.2d at 285 (citing *Bradley*, 272 S.C. at 21, 249 S.E.2d at 494); *McGaha v. Mosley*, 283 S.C. 268, 273, 322 S.E.2d 461, 464 (Ct. App. 1984) (citing *Bradley*, 272 S.C. at 21, 249 S.E.2d at 494).

110. *E.g.*, *Carver*, 288 S.C. at 310, 342 S.E.2d at 407 (using the approach to determine if stock in a close corporation is a security); *McGaha*, 283 S.C. at 273, 322 S.E.2d at 464 (extending the approach to the definition of security).

111. 288 S.C. 309, 342 S.E.2d 406 (1986).

112. *Carver*, 288 S.C. at 310, 342 S.E.2d at 407.

113. *Id.* (citing *Gould v. Ruefenacht*, 471 U.S. 701, 704 (1985); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686 (1985)).

114. *Id.*

115. *See id.*

116. *See* *Biales v. Young*, 315 S.C. 166, 169, 432 S.E.2d 482, 484 (1993); *Garrett v. Snedigar*, 293 S.C. 176, 180, 359 S.E.2d 283, 285 (Ct. App. 1987) *overruled on other grounds by* *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003).

117. *But see* *Atlanta Skin & Cancer Clinic, P.C. v. Hallmark Gen. Partners, Inc.*, 320 S.C. 113, 119, 463 S.E.2d 600, 603–04 (1995) (citing *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994)) (drawing a distinction between the state and federal securities statutes regarding an implied aiding and abetting cause of action); *Crim v. E.F. Hutton, Inc.*, 298 S.C. 448, 450, 381 S.E.2d 492, 493 (1989) (drawing a distinction between the state and federal securities statutes regarding bona fide pledges or loans as securities).

In *Allen v. Columbia Financial Management, Ltd.*,¹¹⁸ the South Carolina Court of Appeals observed that South Carolina courts had not previously addressed the amount of participation in a sale necessary to make one a “seller” under SCUSA.¹¹⁹ The *Allen* court applied both the principle and reasoning of the United States Supreme Court in *Pinter v. Dahl*,¹²⁰ concluding that the appellants were not primarily liable as sellers under SCUSA because “being a substantial factor in causing the sale of unregistered securities is not sufficient” to be a seller under SCUSA.¹²¹ Again, the court did not analyze any provision of South Carolina law to construe the definition of seller under the state statute.¹²²

The South Carolina Supreme Court subsequently reaffirmed the court of appeals’s adoption of the *Pinter* test and the federal legislative purposes on which the test is based.¹²³ In *Biales v. Young*,¹²⁴ the court determined that an escrow agent employed in the sale of property secured in part by a 2% equity participation in a development project was not a seller under SCUSA because he did not “persuade or urge” the appellant to purchase the securities.¹²⁵ The court observed that the *Pinter* test is “consistent” with SCUSA and “satisfies the legislative purpose of assuring truth in the sales of securities and a predicable application of liability.”¹²⁶

B. Defining “Investment Contract”

Some commentators have argued that the wholesale adoption of federal interpretations of statutory terms by states could be appropriate in order to sustain complete uniformity between state and federal regulatory frameworks as long as states maintain uniformity of interpretation.¹²⁷ However, states have not maintained complete uniformity.¹²⁸ For example, some states have chosen to advance different interests through varying interpretations of statutory terms, such as “investment contract.”¹²⁹

118. 297 S.C. 481, 377 S.E.2d 352 (Ct. App. 1988).

119. *Id.* at 486, 377 S.E.2d at 355 (citing *McCall v. Finley*, 294 S.C. 1, 8, 362 S.E.2d 26, 30 (Ct. App. 1987)).

120. *Id.* at 487, 377 S.E.2d at 356 (citing *Pinter v. Dahl*, 486 U.S. 622, 650 (1988)).

121. *Id.* (citing *Pinter*, 486 U.S. at 650).

122. *See id.*

123. *Biales v. Young*, 315 S.C. 166, 169–70, 432 S.E.2d 482, 484–85 (1993) (citing *Pinter*, 486 U.S. at 650).

124. 315 S.C. 166, 432 S.E.2d 482 (1993).

125. *Id.* at 170, 432 S.E.2d at 485.

126. *Id.*

127. *See* McWilliams, *supra* note 9, at 253–55 (citing LOSS & COWETT, *supra* note 84, at 230–38).

128. *E.g.*, SELIGMAN, *supra* note 101, at xxiv (“The states are divided on the question of whether variable insurance products should be excluded (and not subject to fraud enforcement) or exempted (and subject to fraud enforcement).”).

129. McWilliams, *supra* note 9, at 262 (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 688 (1985)).

Federal and state interpretations of the term “investment contract” begin with the *Howey* test.¹³⁰ In *SEC v. W.J. Howey Co.*,¹³¹ the United States Supreme Court established a test to determine whether investment instruments qualify as investment contracts and are, therefore, subject to regulation.¹³² The Supreme Court intended that federal courts apply the test liberally in an effort to include the novel creations of inventive—and sometimes unscrupulous—promoters.¹³³ Since *Howey*, however, federal courts have interpreted the elements of the test differently.¹³⁴

The *Howey* Court concluded that the offering of land sales contracts for portions of a citrus grove, when coupled with the offering of service contracts for the cultivation, marketing, and harvesting of the crops, constituted an offering of investment contracts and, thus, securities.¹³⁵ In its analysis, the Court examined the history of investment contracts under state blue sky laws predating the federal statute and observed that the term “had been broadly construed by state courts so as to afford the investing public a full measure of protection.”¹³⁶ Accordingly, the Court incorporated into the federal securities laws a similarly broad definition of investment contract.¹³⁷ The *Howey* Court also found that state courts had applied the term “to a variety of situations where individuals were led to invest money in a common enterprise with the expectation that they would earn a profit solely through the efforts of the promoter or of some one other than themselves.”¹³⁸ The Court held:

[A]n investment contract for purposes of 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 solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.¹³⁹

The Court explained that the definition “embodies a flexible rather than 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.”¹⁴⁰

130. 2 LOSS ET AL., *supra* note 47, at 922–23.

131. 328 U.S. 293 (1946).

132. *Id.* at 301.

133. *See id.* at 299.

134. *See* 2 LOSS ET AL., *supra* note 7, at 927–1013.

135. *Howey*, 328 U.S. at 299–300.

136. *Id.* at 298.

137. *See id.* at 299.

138. *Id.* at 298 (citations omitted).

139. *Id.* at 298–99.

140. *Id.* at 299.

The *Howey* test traditionally has four elements: (1) an investment of money, (2) in a common enterprise, (3) that leads to an expectation of profits, (4) solely from the efforts of others.¹⁴¹ Some jurisdictions, however, recognize the third and fourth requirements as a single element.¹⁴² Regardless of the number of elements, each has been interpreted differently in different jurisdictions.¹⁴³ Those differences, at first nuanced, have become more pronounced over time. In addition, the test itself has evolved.¹⁴⁴ Since *Howey*, the United States Supreme Court has expanded “an investment of money” to include any “tangible and definable consideration in return for an interest that have substantially the characteristics of a security.”¹⁴⁵ The Supreme Court has also “significantly amplified” the expectation of profits element.¹⁴⁶ Even more importantly, the Court has observed that lower courts have relaxed the requirement that an expectation of profits come solely from the efforts of others.¹⁴⁷ The Court has held instead that lower courts should examine the “economic realities of the transaction.”¹⁴⁸

C. Approaching “Security” in South Carolina

The South Carolina Supreme Court first addressed the statutory meanings of investment contract and security in *O’Quinn v. Beach Associates*.¹⁴⁹ In *O’Quinn*, the court concluded that the sale of condominium units with an optional provision for managerial services for those purchasers intending to place them on the rental market did not constitute the offering of investment contracts as long as the purchaser retained “ultimate control.”¹⁵⁰ Although the *O’Quinn* court did not cite the then recently decided case of *Bradley v. Hullander*, the court did utilize federal precedent in reaching its decision.¹⁵¹ The *O’Quinn* court observed that other jurisdictions have generally held that investment arrangements in which the investor’s duties are “nominal and insignificant” or in which the

141. 2 LOSS ET AL., *supra* note 7, at 927–28.

142. *E.g.*, *Teague v. Bakker*, 35 F.3d 978, 986 (4th Cir. 1994) (citing *Bailey v. J.W.K. Properties, Inc.*, 904 F.2d 918, 920 (4th Cir. 1990)) (describing a three-element *Howey* test requiring “an expectation of profits garnered ‘solely’ from the efforts of others”).

143. *See* 2 LOSS ET AL., *supra* note 7, at 927–57 (surveying the varied interpretations of each element).

144. *Id.* at 928.

145. *Id.* (quoting *Int’l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 560 (1979)) (internal quotation marks omitted).

146. *Id.* at 939 (citing *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852 (1975)).

147. *Forman*, 421 U.S. at 852 n.16 (citing *SEC v. Glenn W. Turner Enters.*, 474 F.2d 476, 482 (9th Cir. 1973)).

148. *Id.* at 851–52.

149. 272 S.C. 95, 249 S.E.2d 734 (1978).

150. *Id.* at 105–06, 249 S.E.2d at 739.

151. *O’Quinn*, 272 S.C. at 105–06, 249 S.E.2d at 739 (citing *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946); *Fargo Partners v. Dain Corp.*, 540 F.2d 912, 914–15 (8th Cir. 1976)).

investor “lacks any real control” may constitute investment contracts.¹⁵² In *O’Quinn*, the court concluded that the purchaser’s lack of “substantial reliance on the efforts of the seller or third parties for a return on the investment” prevented the arrangement from being an investment contract.¹⁵³

In *McGaha v. Mosley*,¹⁵⁴ the South Carolina Court of Appeals extended the approach of *Bradley*, *Carver*, and *Biales* to the statutory construction of security.¹⁵⁵ The court of appeals held that the written assignment of an interest in profits under a franchise agreement constituted a security under SCUSA.¹⁵⁶ The plaintiff, a part-time receptionist, purchased an interest in the net profits of her failing company’s franchise agreement with a manufacturer.¹⁵⁷ Shortly after her investment, the company ceased doing business.¹⁵⁸ The defendant contended that he could not have violated SCUSA because the assignment was not a security.¹⁵⁹

The *McGaha* court observed that South Carolina courts had not previously addressed the meaning of security but that the statutory definition was “taken almost verbatim” from the federal securities statute.¹⁶⁰ Accordingly, the court sought guidance from cases interpreting the federal statute.¹⁶¹ The *McGaha* court aligned South Carolina’s interpretation of security with federal jurisprudence and explicitly adopted the federal principle that securities laws “should be liberally construed to protect investors.”¹⁶² As a result, the court concluded that a written assignment constitutes a security when “on its face” it is a certificate of interest or participation in a profit-sharing arrangement.¹⁶³

The South Carolina Court of Appeals again addressed the *Howey* test in *Garrett v. Snedigar*,¹⁶⁴ concluding that courts must examine the facts of each case to determine whether a partnership agreement creates an investment contract.¹⁶⁵ The court observed:

152. *Id.* (citing *Fargo Partners*, 540 F.2d at 914–15).

153. *Id.* at 106, 249 S.E.2d at 739 (quoting *Fargo Partners*, 540 F.2d at 915).

154. 283 S.C. 268, 322 S.E.2d 461 (Ct. App. 1984).

155. *McGaha*, 283 S.C. at 273, 322 S.E.2d at 464; see *Biales*, 315 S.C. at 169, 432 S.E.2d at 484; *Carver*, 288 S.C. at 310, 342 S.E.2d at 407; *Bradley v. Hullander*, 272 S.C. 6, 21, 249 S.E.2d 486, 494 (1978).

156. *McGaha*, 283 S.C. at 273, 322 S.E.2d at 464.

157. *Id.* at 272, 322 S.E.2d at 463.

158. *Id.*

159. *Id.* at 272, 322 S.E.2d at 464.

160. *Id.* at 273, 322 S.E.2d at 464 (citing Securities Act of 1933, 15 U.S.C. § 77b(a)(1) (2006)).

161. *Id.* (citing *Bradley v. Hullander*, 272 S.C. 6, 21, 249 S.E.2d 486, 494 (1978)).

162. *Id.* (citing *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)).

163. *Id.*

164. 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987), *overruled on other grounds by* *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003). For a full discussion of *Garrett*, see *supra* Part II.C.

165. See *Garrett*, 293 S.C. at 182, 359 S.E.2d at 286.

In the leading recent case on this issue, the Fifth Circuit Court of Appeals identified three considerations in deciding whether an interest in a general partnership is a security: (1) [whether] 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) [whether] 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) [whether] 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.¹⁶⁶

Although the *Garrett* court cited both federal and state authorities, like the *Bradley* and *McGaha* courts it anchored its opinion almost entirely upon federal interpretations of the term.¹⁶⁷

D. Federal Court Recognition of South Carolina's Reliance

Like the South Carolina judiciary, federal courts within the Fourth Circuit have long recognized South Carolina's reliance upon federal precedents to interpret SCUSA.¹⁶⁸ In fact, in *Kosnoski v. Bruce*,¹⁶⁹ the Fourth Circuit even construed a novel aspect of South Carolina law without certifying the issue to the South Carolina Supreme Court.¹⁷⁰ The Fourth Circuit confidently assumed that the South Carolina Supreme Court would adopt its interpretation and, consequently, followed its own precedent in construing South Carolina law.¹⁷¹

The United States District Court for the District of South Carolina has also recognized South Carolina's reliance upon federal precedent. In *South Carolina National Bank v. Darmstadter*,¹⁷² the district court observed that an attempt to apply the term security under South Carolina law "must necessarily deal with the federal securities laws."¹⁷³ In *Faircloth v. Jackie Fine Arts, Inc.*,¹⁷⁴ the district court found that the two definitions are "virtually identical."¹⁷⁵ In *Faircloth*, the

166. *Id.* at 181, 359 S.E.2d at 286 (alterations in original) (quoting *Williamson v. Tucker*, 645 F.2d 404, 424 (5th Cir. 1981)).

167. *See id.* at 181, 359 S.E.2d at 285–86 (citing *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *Odom v. Slavik*, 703 F.2d 212, 215 (6th Cir. 1983); *Williamson*, 645 F.2d at 424).

168. *See Kosnoski v. Bruce*, 669 F.2d 944, 946 (4th Cir. 1982).

169. 669 F.2d 944 (4th Cir. 1982).

170. *See id.* at 946–47.

171. *Id.* at 946.

172. 622 F. Supp. 226 (D.S.C. 1985).

173. *Id.* at 229 (citing *Bradley v. Hullander*, 272 S.C. 6, 21, 249 S.E.2d 486, 494 (1978)).

174. 682 F. Supp. 837 (D.S.C. 1988), *aff'd in part, rev'd in part on other grounds sub nom Faircloth v. Finesod*, 938 F.2d 513, 519 (4th Cir. 1991).

175. *Id.* at 843.

district court examined several South Carolina cases and concluded that the subject investment “was either a security under state and federal law or not at all.”¹⁷⁶

As these cases demonstrate, South Carolina’s reliance on federal precedents for guidance when interpreting state securities laws has evolved into a tradition of deference.¹⁷⁷ Accordingly, predicting the manner in which securities laws will be applied in South Carolina requires knowledge of the vast gloss on federal securities jurisprudence.¹⁷⁸ This tradition also provides South Carolina courts the opportunity to select the meaning of ambiguous statutory terms within the securities statute, which are likely to be outcome determinative, from myriad federal interpretations of similar terms.¹⁷⁹

IV. A NEW (NONFEDERAL) APPROACH

The South Carolina General Assembly enacted the SCUSA of 2005 to implement the numerous changes to state securities laws promulgated by NCCUSL in the Uniform Securities Act of 2002 (USA of 2002).¹⁸⁰ The USA of 2002 is the latest national effort to modernize state securities statutes in response to new federal preemptive legislation, changes in technology, and the increasingly interstate nature of securities transactions.¹⁸¹ In large part, the USA of 2002 is an effort to maximize the uniformity and effectiveness of state and federal regulatory standards.¹⁸²

In pursuit of these goals, the SCUSA of 2005 redefines security.¹⁸³ The revised definition begins similarly to the definition under SCUSA, which is

176. *Id.*

177. See cases cited *supra* note 6.

178. Compare *Majors v. S.C. Sec. Comm’n*, 373 S.C. 153, 162–67, 644 S.E.2d 710, 715–18 (2007) (citing numerous federal precedents to apply the term investment contract), with 2 LOSS ET AL., *supra* note 7, at 927–1013 (providing an extensive survey of federal interpretations of the term investment contract).

179. See generally *McWilliams*, *supra* note 9, at 245 (examining the potential impact of borrowing federal courts’ construction of similarly worded statutes).

180. *Workman*, *supra* note 82, at 414 (citing S.C. CODE ANN. §§ 35-1-101 to -703 (Supp. 2008) (replacing S.C. CODE ANN. §§ 35-1-10 to -1590 (1987))).

181. SELIGMAN, *supra* note 101, at xxi.

182. *Id.* at xxii–xxiii.

183. Compare S.C. CODE ANN. § 35-1-102(29) (Supp. 2008) (“‘Security’ means any note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a 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; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, an interest or instrument commonly known as a ‘security’; or a 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. The term: (A) includes both a certificated and an uncertificated

constructed “almost verbatim” from the definition in the Federal Securities Act of 1933¹⁸⁴ and includes investment contract.¹⁸⁵ The revised definition substitutes the broader “fractional undivided interests in oil, gas, or other mineral rights” for the prior law’s use of “certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease.”¹⁸⁶ The SCUSA of 2005 also incorporates into the revised definition any interest in, or any interest whose value is based upon, securities futures, puts, calls, straddles, options, privileges on securities, certificates of deposit, and groups or indexes of securities, as well as foreign currency instruments entered into on a national securities exchange.¹⁸⁷ The new definition also includes both “certificated” and “uncertificated” securities, in order to clearly incorporate

security; (B) does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a sum of money either in a lump sum or periodically for life or other specified period; (C) does not include an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974; (D) includes an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor and a ‘common enterprise’ means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors; and (E) ‘Investment contract’ may include, among other contracts, an interest in a limited partnership and a limited liability company and shall include an investment in a viatical settlement or similar agreement.”), with S.C. CODE ANN. § 35-1-20(12) (1987) (repealed 2006) (“‘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 of subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease 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. ‘Security’ does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or for some other specified period.”).

184. *Bradley v. Hullander*, 272 S.C. 6, 21, 249 S.E.2d 486, 494 (1978).

185. *Compare* statutes cited *supra* note 183, with 15 U.S.C. § 77b(a)(1) (2006) (“The term ‘security’ means any note, stock, treasury stock, security future, 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, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, 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.”). The Commodities Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-365 (codified as amended in scattered sections of 7, 11, 12, & 15 U.S.C.), amended § 2(a)(1) of the Securities Act of 1933 to address security futures and securities puts, calls, straddles, options, and privileges, *see id.* § 208, 114 Stat. at 2763A-435 to 2763A-436.

186. *See supra* note 183.

187. S.C. CODE ANN. § 35-1-102(29) (Supp. 2008).

offerings that are not evidenced by a writing,¹⁸⁸ and explicitly excludes interests in contributory or noncontributory pension or welfare plans that are subject to the Employee Retirement Income Security Act of 1974.¹⁸⁹

Unlike earlier uniform acts, USA of 2002 invites states to incorporate nonfederal material into the definition.¹⁹⁰ For example, USA of 2002 provides optional language for states that decide to exclude variable annuities from the definition of security.¹⁹¹ The General Assembly chose not to adopt the optional language and thus appears to have intended that variable annuities be incorporated into the state securities regime even though the statute remains silent on the issue.¹⁹²

The General Assembly chose to accept several provisions intended to clarify the types of instruments that the statute regulates as investment contracts.¹⁹³ The definition of security adopted pursuant to the SCUSA of 2005 supplements the previous definition, in part, by codifying the *Howey* test and by defining the term common enterprise to include both horizontal commonality and a restricted form of vertical commonality resulting from profit sharing between two individuals.¹⁹⁴ In addition, the new statute provides that investment contract may include interests in limited partnerships and limited liability companies and does include investments in viatical settlements.¹⁹⁵ By incorporating these provisions into the new statute, the General Assembly has adopted a policy of nonuniformity in certain aspects of the meaning of investment contract.¹⁹⁶ These variations from federal law conflict with South Carolina's longstanding judicial principle of deference to federal interpretations of terms within the state statute.

The most dramatic departure may be the codification of the *Howey* test.¹⁹⁷ In contrast to the version of the *Howey* test adopted in *Majors*,¹⁹⁸ the new South Carolina statute states that a "security"

includes an investment in a common enterprise with the expectation of profits *to be derived primarily* from the efforts of a person other than

188. *Id.* § 35-1-102 official cmt. 28.

189. *Id.* § 35-1-102(29).

190. SELIGMAN, *supra* note 101, at xxiii.

191. *Id.* at xvii.

192. *See* § 35-1-102(29)(B); *cf. id.* § 35-1-102 official cmt. 28 ("The Drafting Committee recognized that the decision whether to exclude variable annuities from the definition of security will be made on a state-by-state basis. Those states which intend to exclude variable products from the definition of security should add the words 'or variable' to Section 102(29)(B) so that it will read: (B) The term does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed or variable sum of money either in a lump sum or periodically for life or other specified period.").

193. *See* S.C. CODE ANN. § 35-1-102(29)(C)–(E); SELIGMAN, *supra* note 101, at 27–28.

194. *See* S.C. CODE ANN. § 35-1-102 official cmt. 28.

195. *Id.* § 35-1-102(29)(E).

196. *See id.* § 35-1-102(29)(C)–(E); *id.* § 35-1-102 official cmt. 28.

197. *Id.* § 35-1-102(29)(D) & official cmt. 28.

198. *See Majors v. S.C. Sec. Comm'n*, 373 S.C. 153, 163, 644 S.E.2d 710, 716 (2007).

the investor and a “common enterprise” means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors.¹⁹⁹

While the South Carolina Supreme Court gleaned its interpretation of the *Howey* test in *Majors* from myriad federal interpretations of each element,²⁰⁰ South Carolina courts must now interpret the *Howey* test as prescribed by the South Carolina statute.²⁰¹ Although many of the terms are identical, differences do exist.²⁰² In addition, the *Majors* court observed that courts have “relaxed” the “efforts of others” element and adopted a federal test focused on the promoter’s efforts.²⁰³ The SCUSA of 2005, by contrast, provides the requirement that “the expectation of profits . . . be derived primarily from the efforts of a person other than the investor.”²⁰⁴ Accordingly, the SCUSA of 2005 preempts the federal test adopted in *Majors*.

The statutory definition for common enterprise presents similar conflict.²⁰⁵ In *Majors*, the South Carolina Supreme Court adopted the “more restrictive form of vertical commonality” after consulting the Official Comments to the SCUSA of 2005 and discerning a preference for this common enterprise test.²⁰⁶ According to the Official Comments to SCUSA:

The courts have divided over the interpretation of the “common enterprise” element of an investment contract. The courts generally recognize that “horizontal” commonality (for example, the pooling of an investment by two or more investors) is a common enterprise. A small minority of the federal circuits will also find a common enterprise in a “vertical” relationship when a single investor is dependent upon the expertise of a single commodities broker. Since two or more persons do

199. S.C. CODE ANN. § 35-1-102(29)(D) (emphasis added).

200. See *Majors*, 373 S.C. at 163–67, 644 S.E.2d at 716–18; see also 2 LOSS ET AL., *supra* note 7, at 927–1013 (surveying the numerous federal interpretations of the term investment contract).

201. See S.C. CODE ANN. § 35-1-102(29)(D) & official cmt. 28; see also *Purvis v. State Farm Mut. Auto. Ins. Co.*, 304 S.C. 283, 288, 403 S.E.2d 662, 665 (Ct. App. 1991) (“The General Assembly has the power to prescribe legal definitions by statute, and such definitions are binding upon courts and should prevail.” (citing *Brown v. Martin*, 203 S.C. 84, 88, 26 S.E.2d 317, 318 (1943))).

202. Compare S.C. CODE ANN. § 35-1-102(29)(D) (“Security . . . includes an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor . . .”), with *Majors*, 373 S.C. at 163, 644 S.E.2d at 716 (“[A]n investment contract exists where there has been (i) an investment of money, (ii) in a common enterprise, (iii) with an expectation of profits garnered solely from the efforts of others.”).

203. *Majors*, 373 S.C. at 167, 644 S.E.2d at 717 (citing *Garrett v. Snedigar*, 293 S.C. 176, 180, 359 S.E.2d 283, 285 (Ct. App. 1987)).

204. S.C. CODE ANN. § 35-1-102(29)(D).

205. See *id.*

206. *Majors*, 373 S.C. at 165–66, 644 S.E.2d at 717 (citing S.C. CODE ANN. § 35-1-102 official cmt. 28).

not share in the profitability of an undertaking, it is difficult to argue that there is a common enterprise. Section 102(29)(D) follows a significantly larger number of federal circuits and adopts a more restrictive form of vertical commonality that occurs only when there is profit sharing between two persons even if, for example, one is a conventional investor and one is a promoter.²⁰⁷

Although the General Assembly has concluded that profit sharing between any two persons is sufficient to establish a common enterprise,²⁰⁸ South Carolina courts will have to determine the manner in which to apply those concepts. Nevertheless, South Carolina has extricated itself from the ongoing debate among the federal circuits regarding the construction of a common enterprise by defining the term statutorily.

The SCUSA of 2005 also provides that the definition of a security includes, in part, the term investment contract as defined in the statute.²⁰⁹ The statute, however, does not limit the definition of investment contract to the language in the statute.²¹⁰ More specifically, the statute explains that investment contract *may* include interests in limited partnerships and limited liability companies and *does* include interests in viatical settlements and similar agreements.²¹¹ The NCCUSL designed these optional provisions to enable states to tailor the uniform statute to state court decisions.²¹² The provision recognizing that investment contracts may include interests in limited partnerships and limited liability companies is consistent with numerous state and federal securities laws.²¹³ The provision incorporating interests in viatical settlements and other similar agreements into the meaning of investment contract contradicts federal law.²¹⁴

A viatical settlement is “[a] transaction in which a terminally or chronically ill person sells the benefits of a life-insurance policy to a third party in return for a lump-sum cash payment equal to a percentage of the policy’s face value.”²¹⁵ Viatical settlement providers generally aggregate policies from individual patients to sell fractionalized interests in the group of policies.²¹⁶ An investor can purchase an interest in a viatical settlement typically at a 20% to 40% discount,

207. S.C. CODE ANN. § 35-1-102 official cmt. 28.

208. *See id.* § 35-1-102(29)(D).

209. *Id.* § 35-1-102(29).

210. *See id.* § 35-1-102(29)(E).

211. *Id.*

212. *See id.* § 35-1-102 official cmt. 28; *see also* SELIGMAN, *supra* note 101, at xxiii (explaining that in certain instances the uniform act defers to local practice).

213. *See* S.C. CODE ANN. § 35-1-102 official cmt. 28 (citing 2 LOSS, ET. AL., *supra* note 7, at 1028–31).

214. *Id.* (citing SEC v. Life Partners, Inc., 87 F.3d 536, 548 (D.C. Cir. 1996)).

215. BLACK’S LAW DICTIONARY 1405 (8th ed. 2004).

216. Brian Coner Levin, *Killing Life Partners: Why Viatical Settlements are “Securities” in Light of SEC v. Mutual Benefits Corporation and Other Recent Cases that Explicitly Reject SEC v. Life Partners*, 6 J. BUS. & SEC. L. 71, 72 (2006) (citing SEC v. Mutual Benefits Corp., 323 F. Supp. 2d 1337, 1338 (S.D. Fla. 2004)).

depending upon the life expectancy of the insured.²¹⁷ The gain from such an investment depends upon the term of the investment and is realized upon the death of the insured.²¹⁸ The investor's profit is the difference between the purchase price, including transaction costs and premiums paid, and the benefit collected upon death.²¹⁹ This type of transaction became popular in the 1980s as a result of the increasing number of individuals who incurred substantial medical bills for treatment of the AIDS virus.²²⁰

The General Assembly's inclusion of interests in viatical settlements within the statutory definition of security contradicts the federal holding of *SEC v. Life Partners, Inc.*²²¹ In fact, the South Carolina Reporter's Official Comments to the SCUSA of 2005 explicitly reject that case.²²² In *Life Partners*, the United States Court of Appeals for the District of Columbia concluded that fractional interests in viatical settlements are not investment contracts because investment profits did not "flow predominantly from the efforts of others" and "investor[s] did not look to the promoter (or another party) to provide significant post-purchase efforts."²²³ The court reasoned that there is no "venture" in owning "an insurance contract from which one's profit depends entirely upon the mortality of the insured."²²⁴

The new statute, in effect, provides an open-ended foundation for fresh judicial interpretation of South Carolina's version of the *Howey* test and the term investment contract. In general, a well-developed precedent remains: South Carolina courts look to federal precedents for guidance in interpreting South Carolina Code provisions similar to those in federal securities statutes.²²⁵ This precedent, however, no longer applies to the *Howey* test.²²⁶ Interestingly, the precedent may apply to judicial interpretations of the term investment contract.²²⁷

Rejection of a federal precedent, like the codification of the *Howey* test and the incorporation of restrictive vertical commonality into South Carolina's securities jurisprudence, contravenes the longstanding judicial tradition of

217. BLACK'S LAW DICTIONARY 1405 (8th ed. 2004).

218. Levin, *supra* note 216 (citing *Life Partners*, 87 F.3d at 548).

219. *Id.* (citing *Life Partners*, 87 F.3d at 537).

220. *Id.*

221. Compare S.C. CODE ANN. § 35-1-102(29)(E) (Supp. 2008) 87 F.3d 536 (D.C. Cir. 1996). ("Investment contract" may include, among other contracts, an interest in a limited partnership and a limited liability company and shall include an investment in a viatical settlement or similar agreement."), with *Life Partners*, 87 F.3d at 548 (concluding that viatical settlements are not securities). But see *SEC v. Mut. Benefits Corp.*, 408 F.3d 737, 743 (11th Cir. 2005) (rejecting the *Life Partners* test); *Wuliger v. Anstaett*, 363 F. Supp. 2d 917, 922 (N.D. Ohio 2005) (holding that viatical settlements are securities under Ohio law).

222. S.C. CODE ANN. § 35-1-102 S.C. Reporter's cmt. 29.

223. *Life Partners*, 87 F.3d at 548.

224. *Id.*

225. See *supra* Part III.

226. See *supra* notes 197–204 and accompanying text.

227. See *supra* notes 209–14 and accompanying text.

deference to federal interpretations when construing similarly worded state securities provisions. Nevertheless, the state legislature's choices regarding the meaning of investment contract within the definition of security under the SCUSA of 2005 do not foreclose South Carolina courts from seeking guidance from federal precedents regarding the construction of the term security or even the term investment contract.

South Carolina courts may continue to follow the longstanding interpretive approach of seeking guidance from federal court interpretations of investment contract because the term remains within the definition of security, independent of the codified *Howey* test.²²⁸ In fact, South Carolina courts may employ either South Carolina's version of the *Howey* test or the federally-informed interpretation of South Carolina's version of the term investment contract, which now includes interests in limited partnerships, limited liability companies, and viatical settlements. The General Assembly's adoption of a more restrictive form of vertical commonality from several federal approaches also suggests that South Carolina courts may embrace a particular federal approach when the federal circuits differ on an aspect of securities jurisprudence.²²⁹

V. CONCLUSION

The South Carolina Supreme Court's considered analysis of the *Howey* test in *Majors v. South Carolina Securities Commission* prospectively referenced the statute that instantly preempted the test's adoption. In doing so, the supreme court distanced South Carolina's securities jurisprudence from the strong tradition of seeking guidance from federal courts to apply provisions of the state securities statute. Although South Carolina courts may continue to seek guidance from federal precedents, the *Majors* court signaled that the enactment of the SCUSA of 2005 has provided South Carolina with an opportunity to reapproach South Carolina securities law.²³⁰

As this Comment has explained, federal courts have constructed varying interpretations of the *Howey* test,²³¹ but South Carolina's statutory version of the *Howey* test is unencumbered. The enactment of the SCUSA of 2005 means that South Carolina courts no longer have to look to federal courts for guidance regarding whether a particular investment instrument constitutes an investment contract, and thus a security under South Carolina law. Instead, South Carolina courts can now look to South Carolina's statutory version of the *Howey* test. South Carolina courts should continue this new approach when interpreting other provisions of SCUSA, particularly those that incorporate nonfederal material.

228. See S.C. CODE ANN. § 35-1-102(29)(E).

229. See S.C. CODE ANN. § 35-1-102 official cmt. 28.

230. See *supra* Part II.

231. See *supra* notes 92–96 and accompanying text.

Absent federal influence, South Carolina's jurisprudence provides two principles to inform future judicial construction of investment contract. In *Biales v. Young*,²³² the South Carolina Supreme Court found a "legislative purpose of assuring truth in the sales of securities and a predicable application of liability."²³³ In *McGaha v. Mosely*,²³⁴ the South Carolina Court of Appeals held that the definition of security "should be liberally construed to protect investors."²³⁵

The South Carolina Supreme Court should continue to analyze and apply the new securities statute to effect the intentions of the General Assembly. In so doing, South Carolina courts can establish a coherent and independent body of state securities jurisprudence that advances the interests of those the statute is intended to protect—the people of South Carolina.

Justin P. Novak

232. 315 S.C. 166, 432 S.E.2d 482 (1993).

233. *Id.* at 170, 432 S.E.2d at 485.

234. 283 S.C. 268, 322 S.E.2d 461 (Ct. App. 1984).

235. *Id.* at 273, 322 S.E.2d at 464 (citing *Tcherepnin v. Knight*, 389 U.S. 332, 332 (1967)).

