

## *Reves v. Ernst & Young*, 494 U.S. 56 (1990)\*

This case presents the question whether certain demand notes issued by the Farmers Cooperative of Arkansas and Oklahoma (Co-Op) are “securities” within the meaning of § 3(a)(10) of the Securities Exchange Act of 1934. We conclude that they are.

### I

The Co-Op is an agricultural cooperative that, at the time relevant here, had approximately 23,000 members. In order to raise money to support its general business operations, the Co-Op sold promissory notes payable on demand by the holder. Although the notes were uncollateralized and uninsured, they paid a variable rate of interest that was adjusted monthly to keep it higher than the rate paid by local financial institutions. The Co-Op offered the notes to both members and nonmembers, marketing the scheme as an “Investment Program.” Advertisements for the notes, which appeared in each Co-Op newsletter, read in part: “YOUR CO-OP has more than \$11,000,000 in assets to stand behind your investments. The Investment is not Federal [*sic*] insured but it is ... Safe ... Secure ... and available when you need it.” Despite these assurances, the Co-Op filed for bankruptcy in 1984. At the time of the filing, over 1,600 people held notes worth a total of \$10 million.

After the Co-Op filed for bankruptcy, petitioners, a class of holders of the notes, filed suit against Arthur Young & Co., the firm that had audited the Co-Op's financial statements (and the predecessor to respondent Ernst & Young). Petitioners alleged, *inter alia*, that Arthur Young had intentionally failed to follow generally accepted accounting principles in its audit, specifically with respect to the valuation of one of the Co-Op's major assets, a gasohol plant. Petitioners claimed that Arthur Young violated these principles in an effort to inflate the assets and net worth of the Co-Op. Petitioners maintained that, had Arthur Young properly treated the plant in its audits, they would not have purchased demand notes because the Co-Op's insolvency would have been apparent. On the basis of these allegations, petitioners claimed that Arthur Young had violated the antifraud provisions of the 1934 Act as well as Arkansas' securities laws.

Petitioners prevailed at trial on both their federal and state claims, receiving a \$6.1 million judgment. Arthur Young appealed, claiming that the demand notes were not “securities” under either the 1934 Act or Arkansas law, and that the statutes' antifraud provisions therefore did not apply. A panel of the Eighth Circuit, agreeing with Arthur Young on both the state and federal issues, reversed. We granted certiorari to address the federal issue, and now reverse the judgment of the Court of Appeals.

### II

#### A

This case requires us to decide whether the note issued by the Co-Op is a “security” within the meaning of the 1934 Act. Section 3(a)(10) of that Act is our starting point:

“The term ‘security’ means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, 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 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.”

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\* Note: In editing the case, footnotes and citations were omitted or abbreviated.

The fundamental purpose undergirding the Securities Acts is “to eliminate serious abuses in a largely unregulated securities market.” In defining the scope of the market that it wished to regulate, Congress painted with a broad brush. It recognized the virtually limitless scope of human ingenuity, especially in the creation of “countless and variable schemes devised by those who seek the use of the money of others on the promise of profits,” and determined that the best way to achieve its goal of protecting investors was “to define ‘the term “security”’ in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of a security.’ Congress therefore did not attempt precisely to cabin the scope of the Securities Acts.<sup>1</sup> Rather, it enacted a definition of “security” sufficiently broad to encompass virtually any instrument that might be sold as an investment.

Congress did not, however, “intend to provide a broad federal remedy for all fraud.” Accordingly, “[t]he task has fallen to the Securities and Exchange Commission (SEC), the body charged with administering the Securities Acts, and ultimately to the federal courts to decide which of the myriad financial transactions in our society come within the coverage of these statutes.” In discharging our duty, we are not bound by legal formalisms, but instead take account of the economics of the transaction under investigation. Congress’ purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called.

A commitment to an examination of the economic realities of a transaction does not necessarily entail a case-by-case analysis of every instrument, however. Some instruments are obviously within the class Congress intended to regulate because they are by their nature investments. In *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 105 S.Ct. 2297, 85 L.Ed.2d 692 (1985), we held that an instrument bearing the name “stock” that, among other things, is negotiable, offers the possibility of capital appreciation, and carries the right to dividends contingent on the profits of a business enterprise is plainly within the class of instruments Congress intended the securities laws to cover. *Landreth Timber* does not signify a lack of concern with economic reality; rather, it signals a recognition that stock is, as a practical matter, always an investment if it has the economic characteristics traditionally associated with stock. Even if sparse exceptions to this generalization can be found, the public perception of common stock as the paradigm of a security suggests that stock, in whatever context it is sold, should be treated as within the ambit of the Acts.

We made clear in *Landreth Timber* that stock was a special case, explicitly limiting our holding to that sort of instrument. Although we refused finally to rule out a similar *per se* rule for notes, we intimated that such a rule would be unjustified. Unlike “stock,” we said, “‘note’ may now be viewed as a relatively broad term that encompasses instruments with widely varying characteristics, depending on whether issued in a consumer context, as commercial paper, or in some other investment context.” While common stock is the quintessence of a security, and investors therefore justifiably assume that a sale of stock is covered by the Securities Acts, the same simply cannot be said of notes, which are used in a variety of settings, not all of which involve investments. Thus, the phrase “any note” 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 Securities Acts.<sup>2</sup>

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<sup>1</sup> We have consistently held that “[t]he definition of a security in § 3(a)(10) of the 1934 Act, ... is virtually identical [to the definition in the Securities Act of 1933] and, for present purposes, the coverage of the two Acts may be considered the same.” We reaffirm that principle here.

<sup>2</sup> An approach founded on economic reality rather than on a set of *per se* rules is subject to the criticism that whether a particular note is a “security” may not be entirely clear at the time it is issued. Such an approach has the corresponding advantage, though, of permitting the SEC and the courts sufficient flexibility to ensure that those who market investments are not able to escape the coverage of the Securities Acts by creating new instruments that would not be covered by a more determinate definition. One could question whether, at the expense of the goal of clarity, Congress overvalued the goal of avoiding manipulation by the clever and dishonest. If Congress erred, however, it is for that body, and not this Court, to correct its mistake.

Because the *Landreth Timber* formula cannot sensibly be applied to notes, some other principle must be developed to define the term “note.” A majority of the Courts of Appeals that have considered the issue have adopted, in varying forms, “investment versus commercial” approaches that distinguish, on the basis of all of the circumstances surrounding the transactions, notes issued in an investment context (which are “securities”) from notes issued in a commercial or consumer context (which are not).

The Second Circuit's “family resemblance” approach begins with a presumption that *any* note with a term of more than nine months is a “security.” Recognizing that not all notes are securities, however, the Second Circuit has also devised a list of notes that it has decided are obviously not securities. Accordingly, the “family resemblance” test permits an issuer to rebut the presumption that a note is a security if it can show that the note in question “bear[s] a strong family resemblance” to an item on the judicially crafted list of exceptions, or convinces the court to add a new instrument to the list.

In contrast, the Eighth and District of Columbia Circuits apply the test we created in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946), to determine whether an instrument is an “investment contract” to the determination whether an instrument is a “note.” Under this test, a note is a security only if it evidences “(1) an investment; (2) in a common enterprise; (3) with a reasonable expectation of profits; (4) to be derived from the entrepreneurial or managerial efforts of others.”

We reject the approaches of those courts that have applied the *Howey* test to notes; *Howey* provides a mechanism for determining whether an instrument is an “investment contract.” The demand notes here may well not be “investment contracts,” but that does not mean they are not “notes.” To hold that a “note” is not a “security” unless it meets a test designed for an entirely different variety of instrument “would make the Acts' enumeration of many types of instruments superfluous,” and would be inconsistent with Congress' intent to regulate the entire body of instruments sold as investments.

The other two contenders – the “family resemblance” and “investment versus commercial” tests—are really two ways of formulating the same general approach. Because we think the “family resemblance” test provides a more promising framework for analysis, however, we adopt it. The test begins with the language of the statute; because the Securities Acts define “security” to include “any note,” we begin with a presumption that every note is a security.<sup>3</sup> We nonetheless recognize that this presumption cannot be irrebuttable. As we have said, Congress was concerned with regulating the investment market, not with creating a general federal cause of action for fraud. In an attempt to give more content to that dividing line, the Second Circuit has identified a list of instruments commonly denominated “notes” that nonetheless fall without the “security” category [...] (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 [...] and] “notes evidencing loans by commercial banks for current operations”).

We agree that the items identified by the Second Circuit are not properly viewed as “securities.” More guidance, though, is needed. It is impossible to make any meaningful inquiry into whether an instrument bears a “resemblance” to one of the instruments identified by the Second Circuit without specifying what it is about *those* instruments that makes *them* non-“securities.” Moreover, as the Second Circuit itself has noted, its list is “not graven in stone,” and is therefore capable of expansion. Thus, some standards must be developed for determining when an item should be added to the list.

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<sup>3</sup> The Second Circuit's version of the family resemblance test provided that only notes *with a term of more than nine months* are presumed to be “securities.” No presumption of any kind attached to notes of less than nine months' duration. The Second Circuit's refusal to extend the presumption to *all* notes was apparently founded on its interpretation of the statutory exception for notes with a maturity of nine months or less. Because we do not reach the question of how to interpret that exception, we likewise express no view on how that exception might affect the presumption that a note is a “security.”

An examination of the list itself makes clear what those standards should be. In creating its list, the Second Circuit was applying the same factors that this Court has held apply in deciding whether a transaction involves a “security.” First, we 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.” See, e.g., *Forman*, 421 U.S., at 851, 95 S.Ct., at 2060 (share of “stock” carrying a right to subsidized housing not a security because “the inducement to purchase was solely to acquire subsidized low-cost living space; it was not to invest for profit”). Second, we 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”. Third, we examine the reasonable expectations of the investing public: The Court will consider instruments 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, we 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.

We conclude, then, that in determining whether an instrument denominated a “note” is a “security,” courts are to apply the version of the “family resemblance” test that we have articulated here: A note is presumed to be a “security,” and that presumption may be rebutted only by a showing that the note bears a strong resemblance (in terms of the four factors we have identified) to one of the enumerated categories of instrument. If an instrument is not sufficiently similar to an item on the list, the decision whether another category should be added is to be made by examining the same factors.

## B

Applying the family resemblance approach to this case, we have little difficulty in concluding that the notes at issue here are “securities.” Ernst & Young admits that “a demand note does not closely resemble any of the Second Circuit’s family resemblance examples.” Nor does an examination of the four factors we have identified as being relevant to our inquiry suggest that the demand notes here are not “securities” despite their lack of similarity to any of the enumerated categories. The Co-Op sold the notes in an effort to raise capital for its general business operations, and purchasers bought them in order to earn a profit in the form of interest. Indeed, one of the primary inducements offered purchasers was an interest rate constantly revised to keep it slightly above the rate paid by local banks and savings and loans. From both sides, then, the transaction is most naturally conceived as an investment in a business enterprise rather than as a purely commercial or consumer transaction.

As to the plan of distribution, the Co-Op offered the notes over an extended period to its 23,000 members, as well as to nonmembers, and more than 1,600 people held notes when the Co-Op filed for bankruptcy. To be sure, the notes were not traded on an exchange. They were, however, offered and sold to a broad segment of the public, and that is all we have held to be necessary to establish the requisite “common trading” in an instrument. See, e.g., *Landreth Timber* (stock of closely held corporation not traded on any exchange held to be a “security”); [...] *Howey* (units of citrus grove and maintenance contract “securities” although not traded on exchange).

The third factor – the public’s reasonable perceptions – also supports a finding that the notes in this case are “securities.” We have consistently identified the fundamental essence of a “security” to be its character as an “investment.” The advertisements for the notes here characterized them as “investments,” and there were no countervailing factors that would have led a reasonable person to question this characterization. In these circumstances, it would be reasonable for a prospective purchaser to take the Co-Op at its word.

Finally, we find no risk-reducing factor to suggest that these instruments are not in fact securities. The notes are uncollateralized and uninsured. Moreover, unlike the certificates of deposit in [*Marine Bank v. Weaver*, 455 U.S. 551], which were insured by the Federal Deposit Insurance Corporation and subject to substantial regulation under the federal banking laws, and unlike the pension plan in *Teamsters v. Daniel*, which was comprehensively regulated under the Employee Retirement Income Security Act of 1974, the notes here would escape federal regulation entirely if the Acts were held not to apply.

The court below found that “[t]he demand nature of the notes is very uncharacteristic of a security,” on the theory that the virtually instant liquidity associated with demand notes is inconsistent with the risk ordinarily associated with “securities.” This argument is unpersuasive. Common stock traded on a national exchange is the paradigm of a security, and it is as readily convertible into cash as is a demand note. The same is true of publicly traded corporate bonds, debentures, and any number of other instruments that are plainly within the purview of the Acts. The demand feature of a note does permit a holder to eliminate risk quickly by making a demand, but just as with publicly traded stock, the liquidity of the instrument does not eliminate risk altogether. Indeed, publicly traded stock is even more readily liquid than are demand notes, in that a demand only eliminates risk when, and if, payment is made, whereas the sale of a share of stock through a national exchange and the receipt of the proceeds usually occur simultaneously.

We therefore hold that the notes at issue here are within the term “note” in § 3(a)(10).

[The above portion of the decision was unanimous. The court goes on to decide, 5-4, that the fact that the notes were payable on demand does not bring them within the statutory exception exempting “any note ... which has a maturity at the time of issuance of not exceeding nine months.”]

Note: Clarification of *Reves* in *SEC v. Edwards*, 540 U.S. 389 (2004)

In *Edwards*, the Supreme Court held that a moneymaking scheme that offered a fixed rather than variable return (e.g., a bond, as opposed to stock) may be an “investment contract”. In doing so, the court clarified that a note could fall within the definition of a security even if it does not qualify as a “note” under the “family resemblance” test, if it qualifies as an “investment contract” under the *Howey* test.