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Daniel Alter Weighs in on Forbes Article on NBA Top Shot Moments Class Action

[Danny Alter](#), Yankwitt LLP partner and former General Counsel at the New York State Department of Financial Services, weighed in on the NBA Top Shot Moments Class Action filed in New York state court against Dapper Labs, Inc. and Roham Gharegozlou, founder and CEO of Dapper Labs, alleging violations of federal securities law. According to the complaint, Dapper Labs is selling “collectible” NBA video clips and marketing them to “investors” as non-fungible tokens (NFTs), which plaintiffs maintain are unregistered securities.

Among other thorny issues, the article explores the question of why this case was filed in state rather than federal court, which is a more suitable venue for handling issues of first impression regarding federal securities law. Danny explains that “bringing the lawsuit in state court could be problematic from the perspective of developing consistent law.” The U.S. Supreme Court defined a “security” under federal law 75 years ago in *SEC v. W. J. Howey Co.* On the other hand, New York State courts construing state securities law have a long history of defining securities very broadly. This tension, he suggests, “could take the Howey test in new directions.”

Later in the article, Danny opines on the potential impact of *Gary Plastics*, a seminal Second Circuit case that demonstrates the flexibility of the *Howey* test, to the Dapper lawsuit. “[A] key component of *Gary Plastics* was the fact that the broker dealer created and maintained the sole marketplace for trading” certificates of deposit – a financial instrument that, standing alone, is not considered a security. Danny emphasizes “that the broker dealer’s oversight and maintenance of the marketplace transformed a non-security into an investment contract. In essence, it was the CDs combined with the program that constituted a security.”

The ultimate question in the Dapper litigation is: Are these video clips “securities” or are they modern day versions of Beanie Babies or baseball trading cards? In Danny’s view, this litigation is just the tip of the iceberg, with similar cases to follow.

[Read the entire article.](#)