



# California Corporate & Securities Law

## No Rescission Without Privity

Posted In [California Securities Laws](#), [Securities Litigation](#)

1/12/2011

California Corporations Code Section 25401 declares unlawful the sale or purchase of a security by means of a written or oral communication that includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. Section 25401, however, does not prescribe any particular remedies.

Corporations Code Section 25501 provides that a person who violates Section 25401 is liable *either* for rescission or for damages (if the plaintiff or the defendant, as the case may be, no longer owns the security). Section 25504 provides for secondary liability against persons in addition to a “seller” of securities if they “control” the seller. Similarly, Section 25504.1 provides for secondary liability against persons who “assist” sellers in violations of the securities laws (commonly referred to as “aiders and abettors”).

Sometimes, buyers of securities sue even though they still retain the securities. In those cases, their sole potential remedy under Section 25501 is rescission. This raises the following question. Can those buyers sue for rescission under sections 25504 and 25504.1, which provide for liability against “control persons” and “aiders and abettors,” if those persons or entities did not sell the security to the buyers?

In a case of first impression, the California Court of Appeal yesterday answered the question. In [Viterbi v. Wasserman](#), the court concluded that privity of contract is necessary to maintain an action for rescission under Sections 25504 and 25504.1, and therefore a purchaser of securities may not maintain such a claim against someone other than the direct seller. In reaching this conclusion, the court reasoned that rescission requires the contracting parties be placed in the position they were in prior to contracting, and a non-seller, who did not receive any money from the purchaser, cannot return that money to the purchaser.

Please contact [Keith Paul Bishop](#) at Allen Matkins for more information [kbishop@allenmatkins.com](mailto:kbishop@allenmatkins.com)

<http://www.calcorporatelaw.com/>