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[Viterbi v. Wasserman: California Securities Law Requires Privity of Contract for Remedy of Rescission](#)

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In order for a purchaser of securities to seek the remedy of rescission under California securities laws, she must be in privity of contract with the defendant, a conclusion supported by several cases interpreting federal securities statutes. This was explained in the [published decision](#) *Viterbi v. Wasserman*, (2011) 191 Cal.App.4th 927. The plaintiff Viterbi was a sophisticated investor. Before purchasing the securities at issue, she read a Private Placement Memorandum which detailed the investment risks. Viterbi learned of the opportunity through defendant Wasserman (no relation to the author of this post), a former employee of Viterbi whom Viterbi hired to work as an analyst on Viterbi's biotech investments.

Wasserman was an officer, director and member of the advisory board of the company that issued the disputed securities. Viterbi claimed that Wasserman did not disclose a certain contract the company had entered into which Viterbi claimed made the securities worthless. Viterbi still owned the securities when she filed suit. She sought, inter alia, rescission against Wasserman under California Corporations Code Section 25504, which provides for control person liability for persons who control the seller of securities. She also sought rescission under Section 25504.1, which provides for secondary liability for persons who assist sellers in violation of the securities laws, that is, aider and abettor liability.

The trial court granted Wasserman's motion for nonsuit on the claim for rescission on the ground that rescission requires privity of contract. The Court of Appeal affirmed. "Plaintiffs have cited no California case, and we could locate none, allowing the remedy of *rescission* for securities fraud against a defendant *who is not in privity of contract with the purchaser.*" (Italics in original.) This so because rescission requires the contracting parties to return one another to the positions they held prior to the transaction, including returning consideration received. Since the defendant Wasserman was not the seller of the securities, nor had she received the consideration paid for the securities, she could not return that which she had not received. In short, the plaintiff's attempt to use control person and aider and abettor liability to expand the remedy of rescission to persons other than the parties to the contract of sale of securities was unavailing.

The plaintiff argued that since control person and aider and abettor liability applied to persons other than the seller, rescission should be available as a remedy against such persons. The Court of Appeal pointed out that while such persons might be liable, that does not determine what remedies might be available against them.