Second DCA Takes Issue With Fourth DCA Over Privity

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Privity is one those requirements that isn't intrinsically interesting and yet it is extremely important. Over the last year, I've written several posts discussing the privity requirement (or lack thereof) under the Corporate Securities Law of 1968, including these posts:

- Court Rejects Control Requirement For Director Liability (discussing *Hellum v. Breyer*, 194 Cal.App.4th 1300 (2011));
- Is Privity Required Or Not Required Under Section 25500? (discussing *Louisiana Pacific Corp. v. Money Mkt. 1 Institutional Inv. Dealer*, Fed. Sec. L. Rep. (CCH) P96,262 (March 28, 2011))
- Court Applies California Common Law To New York Rating Agencies (discussing *The Anschutz Corp. v. Merrill Lynch & Co.,* Fed. Sec. L. Rep. (CCH) P96,258 (N.D. Cal. March 27, 2011));
- No Rescission Without Privity (discussing *Viterbi v. Wasserman,* 191 Cal. App. 4th 927 (2011)).

Yesterday, the Second District Court of Appeal in Los Angeles added Moss v. Kroner, Case No. B227421 (July 20, 2011) to this recent spate of privity cases. This case involved two causes of action. One for violation of Section 25110 (failure to qualify) and one for violation of Section 25401 (false statements or omissions). The trial court sustained the defendant's demurrer as to both of these causes. The Court of Appeal reversed.

As to the first cause of action, the Court of Appeal found that the plaintiff had sufficiently alleged a claim for two reasons. First, Section 25504 imposes liability on agents (not simply control persons as the trial court apparently believed). Second, Section 25504.1 imposes joint and several liability on any person who materially assists in a Section 25110 violation with the intent to deceive or defraud.

As the second cause of action, the Court of Appeal also looked to both Sections 25504 and 25504.1. The trial court, relying on *SEC v. Seaboard Corp.,* 677 F.2d 1289 (9th Cir. 1982), had sustained the demurrer because the plaintiff did not allege that he purchased the securities from the defendant. The Court of Appeal noted that the Ninth Circuit's decision in *Seabord* did not make "any ruling purporting to bar joint and several liability under sections 25504 or 25504.1."

The opinion really gets interesting when the Court of Appeal takes on its sister court's opinion in *Viterbi v. Wasserman.* In *Viterbi,* the Fourth DCA held that secondary liability for defendants other than the seller in a cause of action under Section 25504 or 25504.1 depends on the remedy available against the primary violator under Section 25501 (specifying the remedy for violation of Section 25401). If the plaintiff still has the

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securities and thus must seek rescission, then strict privity between the plaintiff and the secondarily liable defendants is required. The Second DCA disagreed, concluding that if the relief available against the primary violator is rescission, then a secondary actor can be liable even though a rescission cannot be effected because of a lack of privity. This is a complicated area, but the opinion is short and you really must read it in its entirety to understand the argument.

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