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INVESTMENT SECURITIES: BEYOND THE SCOPE OF CALIFORNIA'S CONSUMERS LEGAL REMEDIES ACT?

*Melinda Rose Smolin**

I. INTRODUCTION

The consumer revolution of the 1960s inaugurated a new age in consumer rights.¹ In 1970 the California State Legislature responded to this revolt by enacting the Consumers Legal Remedies Act (the Act).² The Act protects consumers from unfair trade practices by outlawing enumerated deceptive acts.³ The Act provides wronged consumers with efficient and economical redress in the way of damages, injunctive relief, and

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1. See James S. Reed, *Legislating For The Consumer: An Insider's Analysis of the Consumers Legal Remedies Act*, 2 PAC. L.J. 1, 5-7 (1971) for a discussion of the consumer revolt that preceded the enactment of the Consumers Legal Remedies Act:

[U]nfortunately the low income, unsophisticated person is most often the victim of deceptive sales practices. . . . The Kerner Commission found that much of the violence in recent urban disorders was directed at stores and other commercial establishments in disadvantaged neighborhoods. Rioters seemed to focus on stores operated by merchants who, they believed, had been charging exorbitant prices or selling inferior goods.

Id. at 5. "The . . . Act . . . represents an attempt to alleviate the effects of these very real social and economic problems." *Id.* at 6-7.

2. Consumers Legal Remedies Act, ch. 1550, § 1, 1970 Cal. Stat. 3157 (codified as amended at CAL. CIV. CODE §§ 1750-1784 (West 1985 & Supp. 1991)). California consumers may also seek redress for consumer fraud under other statutes. See, e.g., Unfair Practices Act, CAL. BUS. & PROF. CODE §§ 17000-17101 (West 1987 & Supp. 1991) (providing injunctive relief for use of deceptive business practices and false advertising).

3. The deceptive practices prohibited under the Act are listed in CAL. CIV. CODE § 1770 (West 1985 & Supp. 1991). This section states:

The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

- (a) Passing off goods or services as those of another.
- (b) Misrepresenting the source, sponsorship, approval, or certification of goods or services.
- (c) Misrepresenting the affiliation, connection, or association with, or certification by, another.
- (d) Using deceptive representations or designations of geographic origin in connection with goods or services.
- (e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person

“correction and replacement” procedures.⁴ Recovery under the Act is

has a sponsorship, approval, status, affiliation, or connection which he or she does not have.

(f) Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand.

(g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

(h) Disparaging the goods, services, or business of another by false or misleading representation of fact.

(i) Advertising goods or services with intent not to sell them as advertised.

(j) Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.

(k) Advertising furniture without clearly indicating that it is unassembled if such is the case.

(l) Advertising the price of unassembled furniture without clearly indicating the assembled price of such furniture if the same furniture is available assembled from the seller.

(m) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.

(n) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.

(o) Representing that a part, replacement, or repair service is needed when it is not.

(p) Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.

(q) Representing that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction.

(r) Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer.

(s) Inserting an unconscionable provision in the contract.

(t) Advertising that a product is being offered at a specific price plus a specific percentage of that price unless (1) the total price is set forth in the advertisement, which may include, but is not limited to, shelf tags, displays, and media advertising, in a size larger than any other price in that advertisement, and (2) the specific price plus a specific percentage of that price represents a markup from the seller's costs or from the wholesale price of the product

(u) Selling or leasing goods in violation of Chapter 4

(v)(1) Disseminating an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message

Id.

4. In contrast to CAL. BUS. & PROF. CODE §§ 17200-17208, 17500-17509 (West 1988 & Supp. 1991), the Act permits recovery by consumers of damages, and consumers may recover both individually and in the form of a class action. *See Chern v. Bank of America*, 15 Cal. 3d 866, 875, 544 P.2d 1310, 1315, 127 Cal. Rptr. 110, 115 (1976) (consumers may not recover damages for false or misleading statements under California Code of Business and Professions). *See CAL. CIV. CODE § 1781* (West 1985 & Supp. 1991) for the Act's provision on consumer class actions. Under § 1780, consumers are entitled to the following types of recovery:

(1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars (\$1,000).

(2) An order enjoining such methods, acts, or practices.

(3) Restitution of property.

(4) Punitive damages.

expressly limited to the sale of consumer "goods" and "services."⁵ Neither the express language of the Act nor its legislative history, however, explain what is meant by the terms "goods" or "services." No California appellate court has directly interpreted the Act's consumer goods or services prerequisite.

The Act expresses only two specific exemptions; it neither exempts nor includes investment securities.⁶ Whether investment securities are consumer goods or services under the Act remains an open question in California.⁷

(5) Any other relief which the court deems proper . . .

(d) The court shall award court costs and attorney's fees to a prevailing defendant in litigation filed pursuant to this section. Reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith.

Id. § 1780 (West 1985 & Supp. 1991). This statute also sets forth the Act's notice and demand provisions requiring that a plaintiff-consumer make written demands to merchants for correction, repair or replacement before suing under the Act. *Id.* § 1782 (West 1985).

5. CAL. CIV. CODE § 1770 (West 1985 & Supp. 1991). The goods or services prerequisite is stated as follows: "The following unfair methods of competition . . . undertaken by any person in a transaction . . . which results in the sale or lease of *goods or services* to any consumer are unlawful . . ." *Id.* (emphasis added).

6. The specific exclusions under the Act involve construction transactions and advertising media. *Id.* § 1754 (West 1985). Section 1754 states in pertinent part:

The provisions of this title shall not apply to any transaction which provides for the construction, sale, or construction and sale of an entire residence or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property or an interest therein, or for the sale of a lot or parcel of real property. . . .

Id. Section 1755 states:

Nothing in this title shall apply to the owners or employees of any advertising medium, including, but not limited to, newspapers, magazines, broadcast stations, billboards and transit ads, by whom any advertisement in violation of this title is published or disseminated, unless it is established that such owners or employees had knowledge of the deceptive methods, acts or practices declared to be unlawful by section 1770.

Id. § 1755 (West 1985).

7. Recent developments in California law make the inquiry of whether the Act encompasses investment securities a timely one. Recent California and federal court decisions have broadly construed the phrase "unfair competition," as used in comprehensive general liability insurance policies, as including statutory definitions of unfair competition—as opposed to narrower common law definitions—for purposes of triggering an insurance company's duty to defend. Statutory definitions of unfair competition broadly define unfair competition as unfair business practices. *See* CAL. BUS. & PROF. CODE § 17200 (West 1987). If a broad interpretation is employed, the Act could fall within the unfair competition definition for purposes of determining an insurance company's duty to defend. If unfair business practices are covered by comprehensive general liability insurance policies as "advertising injuries," and if a plaintiff may sue for securities violations under the Act, then allegations brought under the Act may give rise to an insurer's duty to defend.

The scope of the phrase unfair competition was recently addressed in two California appellate court cases. Although the California Supreme Court has granted rehearing in these cases, and accordingly vacated the appellate court decisions, the issue is discussed in these

The question of whether securities are covered under the Act is pertinent because the Act permits recovery for both attorney's fees and punitive damages, unlike California or federal securities laws.⁸ The attorney's fees provision, added in 1988, makes the Act a particularly attractive theory for securities plaintiffs.⁹

In fact, securities plaintiffs in many other jurisdictions have asserted claims under similar consumer statutes for what are essentially securities violations.¹⁰ The new attorney's fees clause is a compelling invitation to

cases. See *Demonet Indus. v. Transamerica Ins. Co.*, 227 Cal. App. 3d 744, 278 Cal. Rptr. 178, review granted, 810 P.2d 997, 281 Cal. Rptr. 765 (1991); *Bank of the West v. Superior Court*, 226 Cal. App. 3d 835, 277 Cal. Rptr. 219, review granted, 807 P.2d 1006, 279 Cal. Rptr. 777 (1991).

In *Bank of the West*, the court considered the issue of whether the phrase "unfair competition," as it appeared in a comprehensive general liability insurance policy under the definition of advertising injury, was restricted to the common law tort definition of unfair competition or whether it included statutory definitions of unfair competition which embrace all unlawful, unfair or fraudulent business practices. *Bank of the West*, 226 Cal. App. 3d at 844-46, 277 Cal. Rptr. at 223-27. The court held that "unfair competition" as used in standard form Comprehensive General Liability Coverage (CGL) policies includes "coverage for all unlawful and unfair business practices committed against either a business rival and/or the general public." *Id.* at 840, 277 Cal. Rptr. at 220; see also *Keating v. National Union Fire Ins. Co.*, 754 F. Supp. 1431 (C.D. Cal. 1990) (holding that "unfair competition" within meaning of policy's advertising injury coverage included unlawful, unfair or fraudulent business practices). In *Keating*, the district court interpreted the phrase "unfair competition" as it appeared in a comprehensive general liability insurance policy defining advertising injury. The plaintiffs alleged that the defendants perpetrated a scheme whereby corporate bonds were backed by the full faith and credit of the United States Government although, in fact, they were not. *Id.* at 1433-34. In considering whether the defendant's alleged conduct constituted an advertising injury within the terms of the insurance policy, the court held that the term unfair competition, "as used in the primary policies, means unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising." *Id.* at 1437; see, e.g., CAL. BUS. & PROF. CODE § 17200 (West 1987) ("[U]nfair competition shall mean and include all unlawful, unfair or fraudulent business practices."); see also *id.* §§ 17000-17100 (West 1989 & Supp. 1991) (California's unfair trade practices statute).

8. See, e.g., CAL. CIV. CODE § 1780(a)(4) (West Supp. 1991) (providing for recovery of punitive damages for actions arising under Act); *Davis v. Merrill Lynch, Pierce, Fenner & Smith*, 906 F.2d 1206, 1223 n.20 (8th Cir. 1990) (punitive damages not available for violations of Section 10(b) of Securities Exchange Act of 1934); *Bowden v. Robinson*, 67 Cal. App. 3d 705, 714, 136 Cal. Rptr. 871, 878 (1977) (punitive damages not available under anti-fraud provisions of California Corporate Securities Act). Punitive damages may be available for securities violations when the basis for recovery is a common law theory such as fraud. See CAL. CIV. CODE § 3294 (West 1991) (punitive damages may be recovered in non-contract actions when malice proven); *Bowden*, 67 Cal. App. 3d 705, 714, 136 Cal. Rptr. 871, 878 (recognizing punitive damages available to those alleging common law fraud).

9. CAL. CIV. CODE § 1780 (West 1985 & Supp. 1991). The attorney's fees provision is housed in § 1780(5)(d) of the Act and states in pertinent part: "The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section. Reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith." *Id.* § 1780(5)(d).

10. See *infra* notes 106, 142.

creative plaintiffs' attorneys to assert securities related claims under the Act. The propriety of suing under the Act for securities violations must be questioned in light of the statutes' consumer emphasis.¹¹ To resolve whether investment securities were intended to come within the purview of the Act, this Article analyzes the language of the Act and the body of out-of-state case law that has addressed the issue.¹² This Article concludes that investment securities were not intended to come within the scope of California's consumer protection statute.

II. SCOPE OF THE ACT

A. Purposes Underlying the Act

The starting point for construing the scope of the Act and determining its purposes is the Act's legislative history. The legislative history does not specifically address whether investment securities fall within the ambit of the Act. It does, however, record the climate within which the Act was passed,¹³ which sheds some light on whether the legislature intended to permit recovery for securities fraud under the Act.

The legislative history of the Act reveals that it was passed in response to heightened consumer awareness, the corresponding development of consumers as an interest group, and to protect unsophisticated, uneducated and low income consumers.¹⁴

[The Act] represents an extended and thorough effort to arrive at legislation which will give consumers in this state much needed remedies against deceptive practices in the marketplace. . . .

The Report of the National Advisory Commission on Civil Disorders found unethical and deceptive practices of merchants in low income areas to be factors contributing to the disturbances in our cities in recent years. . . . It is my opinion and desire that legislation of this type will have a substantial deterrent effect as to the deceptive practices it makes unlawful.¹⁵

11. See *infra* notes 26-141 and accompanying text.

12. *Id.*

13. Reed, *supra* note 1, at 6-7.

14. *Id.*

15. *Id.* at 7 n.21 (quoting James A. Hayes, Assembly Judiciary Committee, May 25, 1970); see also *id.* at 5-6 (citing REPORT OF NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 274-75 (1968)). A commission led by then-Illinois Governor Otto Kerner found that "much of the violence in recent urban disorders was directed at stores and other commercial establishments in disadvantaged neighborhoods. Rioters seemed to focus on stores operated by merchants who, they believed, had been charging exorbitant prices or selling inferior

One interpretation of this passage is that the Act was written to aid particularly unsophisticated, low-income consumers—those most likely to be taken advantage of by merchants—not consumers who have money to invest.

At least two courts have argued that investors are distinct from ordinary consumers because investors are generally more sophisticated.¹⁶ In *In re Catanella*,¹⁷ the plaintiffs sued the defendants for mishandling their investment portfolios. The plaintiffs' complaint included allegations under New Jersey's consumer fraud statute,¹⁸ but the court declined to hold that investment securities came within its ambit:

[T]here is a distinction, although subtle, between the policies underlying the protection of consumers in general and the protection of investors in particular. . . . Not all investors are savvy, sophisticated financial moguls. Nor are they the poor, uneducated, naive consumers the Consumer Fraud Act was designed to protect. . . . Securities fraud is qualitatively different from the archetypical installment credit sale scam where the uneducated are duped into buying inferior consumer goods at exorbitant prices. The rationale behind the Consumer Fraud Act is inapposite in the securities area.¹⁹

As *Catanella* illustrates, there may be a difference between uneducated, low-income consumers and the typical securities investor. Accordingly, statutory protections afforded investors may be qualitatively different from those afforded low-income consumers. If this distinction is correct, then the protections and procedures granted under the Act should not be applied to investors, and the legislature probably did not intend for the Act to apply to investors.

The logic of this theory is easily challenged. It suggests that persons most often forced to resort to the redress of state and federal securities laws are sophisticated or semi-sophisticated investors. This is not always true. An elderly, uneducated widow defrauded of her life savings through an investment scam may be just as naive as an uneducated con-

goods. . . . [T]he Commission concluded that 'exploitive practices flourish' *Id.* at 5-6 (citing REPORT OF NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 275 (1968)).

16. *Morris v. Gilbert*, 649 F. Supp. 1491, 1497 (E.D.N.Y. 1986); *In re Catanella*, 583 F. Supp. 1388, 1443-44 (E.D. Pa. 1984). *Morris* is discussed *infra* notes 74-78 and accompanying text.

17. 583 F. Supp. 1388 (E.D. Pa. 1984).

18. New Jersey Consumer Fraud Act, N.J. STAT. ANN. §§ 56:8-1 to :8-48 (West 1989 & Supp. 1991).

19. *Catanella*, 583 F. Supp. at 1443-44 (citations omitted) (citing *Kugler v. Romain*, 279 A.2d 640, 648-49 (1971)).

sumer duped into buying goods at exorbitant prices and, in some instances, may be an even more pathetic subject. Although the distinction between sophisticated investors and low-income consumers has some merit, it alone is insufficient to support a conclusion that investment securities are outside the scope of the Act.

B. Liberal Construction Provisions and Express Purposes

The Consumers Legal Remedies Act sets forth its underlying purposes and commands that these purposes be liberally construed.²⁰ Section 1760 states, in pertinent part: "This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection."²¹ The first phrase of section 1760 provides two relevant instructions as to the Act's intended scope. First, the language instructs that the Act be "liberally construed . . . to promote its underlying purposes."²² The "liberal construction" language implies that more causes of action, rather than fewer, should come within the scope of the Act.²³ The subsequent phrase, "applied to promote its underlying purposes," limits this direction.²⁴ The plain directive of the statute is that the Act be liberally construed to the extent that such a construction will promote the Act's underlying purposes of protecting consumers from unfair trade practices. Thus, both the legislative history and the Act's stated purposes suggest that to determine whether investment securities are within the Act's scope requires an analysis of whether purchasers of investment securities are "consumers" within the meaning of the Act.²⁵

20. CAL. CIV. CODE § 1760 (West 1985).

21. *Id.*

22. *Id.*

23. *Leroy T. v. Workmen's Compensation Appeals Bd.*, 12 Cal. 3d 434, 438, 525 P.2d 665, 666-67, 115 Cal. Rptr. 761, 762-63 (1974) (where statutory language plain and clear courts must enforce it as written); *Estate of Richartz*, 45 Cal. 2d 292, 294, 288 P.2d 857, 858 (1955) (courts must construe language in statute according to its ordinary plain meaning unless otherwise clearly indicated); *Wilson v. County of Santa Clara*, 68 Cal. App. 3d 78, 83-84, 137 Cal. Rptr. 78, 80-81 (1977) (liberal construction requires broad interpretation).

24. *Mulville v. San Diego*, 183 Cal. 734, 739, 192 P. 702, 704 (1920) (liberal construction of statute does not mean enlargement of its plain provisions); *Neeley v. Board of Retirement*, 36 Cal. App. 3d 815, 822, 111 Cal. Rptr. 841, 846 (1974) ("[R]ule of liberal construction is applied for the purpose of effectuating the obvious legislative intent and should not blindly be followed so as to eradicate the clear language and purpose of the statute. . . ." (citation omitted)); *Beatty v. Hughes*, 61 Cal. App. 2d 489, 491-92, 143 P.2d 110, 111 (1944) (even when liberal construction of statute demanded, courts must be restrained by clear language of statute).

25. See Texas Deceptive Trade Practices Act-Consumer Protection Act, TEX. BUS. &

III. DISCERNING THE BOUNDARIES OF CONSUMERS, GOODS AND SERVICES

The Consumers Legal Remedies Act defines a consumer as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes."²⁶ According to this definition, whether purchasers of investment securities are consumers turns on whether investment securities constitute consumer goods or services within the meaning of the Act. Several sources aid in discerning the boundaries of the Act's definitions of goods and services: provisions within the Act itself, California case law, other California statutory schemes and out-of-state case law and statutes.

A. Goods and Tangible Chattels

Section 1761(a) of the Act defines goods as tangible chattels, but it does not define tangible chattels.²⁷ No California case decided to date has interpreted the scope of the goods definition under section 1761(a).²⁸

COM. CODE ANN. § .50 (West 1987 & Supp. 1991). Texas' consumer protection statute is similar to California's; both statutes couch recovery in terms of consumers, goods and services. See CAL. CIV. CODE §§ 1761, 1780 (West 1985 & Supp. 1991); TEX. BUS. & COM. CODE ANN. §§ 17.45, .50 (West 1987 & Supp. 1991). The Texas statute provides that any consumer who has been the victim of a deceptive trade practice is entitled to recovery. *Id.* § 17.50. A consumer is defined as "an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services." *Id.* § 17.45(4). Goods are defined as "tangible chattels or real property purchased or leased for use." *Id.* § 17.45(1). Generally, Texas courts construing their consumer statute have analyzed the issue of whether a plaintiff's claim falls within the statute by determining whether the plaintiff was: (1) a consumer as defined in the statute; and (2) whether the alleged good or service was, in fact, a good or service. See *Knight v. International Harvester Credit Corp.*, 627 S.W.2d 382, 389 (Tex. 1982); *Irizarry v. Amarillo Pantex Fed. Credit Union*, 695 S.W.2d 91, 92 (Tex. Ct. App. 1985); *Portland Sav. & Loan Ass'n v. Beville, Bresler & Schulman Gov't Sec.*, 619 S.W.2d 241, 245 (Tex. Civ. App. 1981); see also *Bowyer v. Beardon*, 291 S.W. 219, 222-23 (Tex. 1927) (chattels is "a very comprehensive term . . . including every species of property which is not real estate or a freehold"); *Parr v. Tagco Indus.*, 620 S.W.2d 200, 205-06 (Tex. Civ. App. 1981) (presumption is legislature used term chattels in its "settled judicial sense"); *United Postage Corp. v. Kammeyer*, 581 S.W.2d 716, 721 (Tex. Civ. App. 1979) ("items of personal property which may be seen, weighed, measured, felt or touched"). The California Act also lends itself to this analysis.

26. CAL. CIV. CODE § 1761(d) (West Supp. 1991).

27. *Id.* § 1761(a) (West 1988 & Supp. 1991).

(a) "Goods" means tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for such goods, and including goods which, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of such real property, whether or not severable therefrom.

Id.

28. No California case has addressed the scope of the definition of tangible chattels in the consumer context. Section 6016 of the California Revenue and Taxation Code defines tangible

Black's Law Dictionary defines chattel as "[a]n article of personal property, as opposed to real property. A thing personal and movable. It may refer to animate as well as inanimate property."²⁹ Black's also defines tangible as "[h]aving or possessing physical form. Capable of being touched and seen; perceptible to the touch; tactile; palpable; capable of being possessed or realized; readily apprehensible by the mind; real; substantial."³⁰ However, Black's defines intangibles as "[p]roperty that is a 'right' rather than a physical object. Examples would be patents, stocks, bonds, goodwill, trademarks, franchises and copyrights."³¹ Accordingly, the plain meaning of the term tangible chattels suggests that the Act should not be construed to include investment securities.

personal property as "personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses." CAL. REV. & TAX. CODE § 6016 (West 1987); see *Capital Records, Inc. v. State Bd. of Equalization*, 158 Cal. App. 3d 582, 596, 204 Cal. Rptr. 802, 810 (1984) (upholding use tax for original master tapes acquired by film company on grounds that tapes were tangible personal property); see also *Simplicity Pattern Co. v. State Bd. of Equalization*, 27 Cal. 3d 900, 912, 615 P.2d 555, 562, 167 Cal. Rptr. 366, 373 (1980) (allowing sales tax on transfer of film negatives on grounds that negatives were personal property even though they were valued for intellectual content). For cases generally construing personal property see *In re Dodge's Estate*, 6 Cal. 3d 311, 491 P.2d 385, 98 Cal. Rptr. 801 (1971) (holding that phrase "personal property" in will was inherently ambiguous where decedent's property consisted of note and trust deeds); *In re Borrero's Estate*, 125 Cal. App. 153, 13 P.2d 1017 (1932) (holding corporate stock to be personal property); see also CAL. CIV. CODE § 663 (West 1982) (defining personal property as "[e]very kind of property that is not real [property]").

29. BLACK'S LAW DICTIONARY 215 (5th ed. 1979). Black's Law Dictionary does not define animate or inanimate. Webster's has defined animate as "alive" and inanimate as "not endowed with life or spirit." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 85, 1140 (1976). Inanimate should not be confused with intangible.

30. BLACK'S LAW DICTIONARY, *supra* note 29, at 1305. Black's also defines goods, consumer goods and consumer product. Consumer goods are defined as "[g]oods which are used or bought for use primarily for personal, family or household purposes." *Id.* at 287. Consumer product is similarly defined as "[a]ny tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed)." *Id.* A "consumer" is defined as:

One who consumes. Individuals who purchase, use, maintain, and dispose of products and services. . . . A member of that broad class of people who are affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection, and other trade practices for which state and federal consumer protection laws are enacted.

Id. at 286.

31. *Id.* at 726. Courts within the Fifth Circuit have held that investment securities do not come within Texas' Deceptive Trade Practices Act on the grounds that they are not tangible chattel. *Swenson v. Engelstad*, 626 F.2d 421, 428 (5th Cir. 1980) (stock certificates not "goods" or "tangible chattels" within meaning of Texas' Deceptive Trade Practices Act-Consumer Protection Act because they were evidence of incorporeal rights); *Cowen v. First Nat'l Bank of Brownsville*, 63 S.W. 532, 533 (Tex. 1901) (certificates of deposits are evidence of incorporeal rights and thus not goods or chattel).

Whenever the California State Legislature has intended to include intangible chattels in a definition of personal property, it has specifically done so.³² Consider California's attachment statutes.³³ Although California's attachment statutes do not define consumer goods, they do define personal property and tangible property.³⁴ Section 481.225 of the California Code of Civil Procedure defines tangible personal property as including "chattel paper . . . securities, and money."³⁵ Section 481.175 defines personal property as "both tangible and intangible personal property."³⁶ Notably, securities are personal property under the attachment statutes. These sections indicate that the legislature, had it intended to include intangible chattel or securities within the Act, could have expressly done so. However, the definitions of goods may vary from statute to statute. According to Black's, goods is "[a] term of variable content and meaning. It may include every species of personal property or it may be given a very restricted meaning."³⁷ Thus, the use of the word tangible in the Act must be construed as a limitation on the chattel definition in the Act.³⁸

California's Commercial Code, however, could support a contrary argument.³⁹ Section 2105 of the California Commercial Code defines goods as "all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action." Thus, when the California State Legislature has intended to exclude investment securities from a statutory scheme it has done so. Ultimately, however, because of the variable meanings of the word "goods," analogies to other California statutory schemes provide little guidance in determining whether the

32. See, e.g., CAL. COM. CODE § 9106 (West 1990) ("general intangibles" means any personal property).

33. CAL. CIV. PROC. CODE §§ 481.010-493.050 (West 1979 & Supp. 1991).

34. *Id.* §§ 481.175-.225.

35. *Id.* § 481.225.

36. *Id.* § 481.175.

37. BLACK'S LAW DICTIONARY, *supra* note 29, at 694.

38. Under the statutory construction rule of *noscitur a sociis*, doubt as to the meaning of a word may be removed by reference to the words it is associated with. *Fox v. Hale & Norcross Silver Mining Co.*, 108 Cal. 369, 426, 41 P. 308, 326 (1895). Other California statutes similarly define goods. See CAL. BUS. & PROF. CODE § 17538(d)(1) (West Supp. 1991) (goods defined as "tangible chattels, including certificates or coupons exchangeable for such goods"); see also *id.* § 17504(c) (West 1991) (defining consumer good as "any article which is used or bought for use primarily for personal, family or household purposes"); *cf. id.* § 17024 (West 1987) ("articles" and "products" under Unfair Trade Practices Act include "any article, product, commodity, thing of value, service or output of a service trade").

39. CAL. COM. CODE § 2105 (West 1964 & Supp. 1991).

term "goods" was intended to include investment securities under the Act.

1. Certificates or coupons

Although other California statutory schemes do not provide much guidance in deciphering whether investment securities are tangible chattel under the Act, other provisions of the Act do provide guidance. The plain language of the Act's "goods" definition suggests that it does not encompass investment securities.⁴⁰ Section 1761(a) of the California Civil Code includes as goods "certificates or coupons exchangeable for such goods."⁴¹ Obviously, investment securities are not redeemable for goods and therefore do not explicitly fall within this definition. Nevertheless, investment securities take a similar form since they are usually embodied by certificates. The inclusion of the phrase "certificates or coupons" suggests that the legislature was mindful that certificates or coupons might not be construed as tangible chattel. Inclusion of the "certificates or coupons" language suggests that investment securities could also have been specifically included, had the legislature intended them to be included within the Act's definition of tangible chattel.

2. Notice and demand sections

The notice and demand provisions of the Act also suggest that investment securities were not intended to constitute goods under the Act.⁴² These sections imply that an investment security is not a con-

40. CAL. CIV. CODE § 1761(a) (West 1985 & Supp. 1991). Section 1761(a) defines the term "goods":

[T]angible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for such goods, and including goods which, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of such real property, whether or not severable therefrom.

Id.

41. *Id.*

42. *Id.* §§ 1782, 1784 (West 1985). Section 1782 of the Act states:

(a) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of this title, the consumer shall do the following:

.....

(2) Demand that such person correct, repair, replace or otherwise rectify the goods or services alleged to be in violation of Section 1770.

(c) No action for damages may be maintained under the provisions of Section 1781 upon a showing by a person alleged to have employed or committed methods, acts or practices declared unlawful by Section 1770 that all of the following exist:

.....

(2) All consumers so identified have been notified that upon their request such person shall make the appropriate correction, repair, replacement or other remedy of the goods and services.

sumer good as that term is commonly employed or understood.⁴³ Unlike an automobile or an appliance, an investment security is not bought "for use," and does not carry with it an implied warranty of merchantability. Furthermore, there is no objective standard for determining whether a security is "defective" under the above sections.⁴⁴ An investment security is not capable of being "corrected," "repaired" or "replaced" by the seller upon notice from the buyer pursuant to these sections.⁴⁵ Because application of these provisions of the Act to investment securities would be impossible, it is unlikely that investment securities were intended by the legislature to constitute goods under the Act.

3. California case law

Because the Act is silent on whether investment securities are goods, the next step is to examine case law to determine whether the courts have interpreted the statute to include investment securities. Unfortunately, no California court has addressed the question of whether the Act's definition of goods includes investment securities.⁴⁶ Most of the California appellate court decisions interpreting the Act have involved typical consumer goods.⁴⁷

(3) The correction, repair, replacement or other remedy requested by such consumers has been, or, in a reasonable time, shall be, given.

Id. § 1782. Similarly, § 1784 states in pertinent part:

No award of damages may be given in any action based on a method, act, or practice declared to be unlawful by Section 1770 if the person alleged to have employed or committed such method, act, or practice . . . (b) makes an appropriate correction, repair or replacement or other remedy of the goods and services.

Id. § 1784.

43. *Id.* §§ 1782, 1784.

44. *See id.*

45. *See id.* § 1782(c)(3).

46. *See Kagan v. Gibraltar Sav. & Loan Ass'n*, 35 Cal. 3d 582, 676 P.2d 1060, 200 Cal. Rptr. 38 (1984) (plaintiffs-customers sued defendants for misleading and false advertising for illegally charging fees on individual retirement accounts); *Schneider v. Vennard*, 183 Cal. App. 3d 1340, 228 Cal. Rptr. 800 (1986) (plaintiffs-class/shareholders sued defendants for securities violations and sought to use Act's class action certification procedures; plaintiffs-class did not allege substantive violations under Act; hence, issue of whether Act applied to securities never reached).

47. *See, e.g., Clemons v. Western Photos Camera Hut*, 117 Cal. App. 3d 392, 172 Cal. Rptr. 782 (1981) (rolls of film); *Hogya v. Superior Court*, 75 Cal. App. 3d 122, 142 Cal. Rptr. 325 (1977) (upgraded beef); *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 149, 124 Cal. Rptr. 852 (1975) (off-road motor vehicles). These decisions imply that securities should be excluded from the statutory definition of consumer goods. *See also* *Committee on Children's Television v. General Foods*, 35 Cal. 3d 197, 673 P.2d 660, 197 Cal. Rptr. 783 (1983) (breakfast cereal); *Vasquez v. Superior Court*, 4 Cal. 3d 858, 484 P.2d 964, 94 Cal. Rptr. 796 (1971) (freezers); *Peterson v. Superior Court*, 177 Cal. App. 3d 54, 222 Cal. Rptr. 709 (1986) (airline discount coupons). For a comprehensive article on the scope of state consumer fraud statutes and a review of typical applications, see Donald M. Zupanec, Annotation,

Analogous cases may shed some light on the issue. In *Civil Service Employees Co. v. Superior Court*,⁴⁸ the plaintiffs brought a class action lawsuit against an insurance company for its refusal to pay benefits allegedly owed the members of the class.⁴⁹ The court held that the Act's class action procedures were applicable in all actions.⁵⁰ In this regard, the court stated that the Act "does not directly apply to the present case because insurance is not technically either a 'good' or a 'service' within the meaning of the Act."⁵¹

Investment securities may be compared to insurance policies because the two instruments are similar in several ways. Neither insurance nor investment securities are tangible, movable or capable of being seen. Both insurance and investment securities represent intangible rights embodied by policies and certificates. The physical representations of such intangible rights should not be confused with the rights themselves which are unmovable, invisible, untouchable and intangible. Thus, if insurance policies are excluded from the Act, investment securities should be excluded as well.

Although two California appellate decisions have addressed claims under the Act for damages arising out of the sale of individual retirement accounts, neither expressly or implicitly addressed the issue of the Act's coverage of investment securities.⁵² In one of the cases, *Kagan v. Gibraltar Savings & Loan Ass'n*,⁵³ the plaintiff, a holder of an Individual Retirement Account (IRA), sued the financial institution holding the account. The plaintiff sued under the Act alleging that the institution falsely advertised that its customers would not be charged management fees on their IRAs.⁵⁴ The court did not directly address the issue of whether the sale of IRAs to a bank customer constituted consumer "goods" or "services" under the Act.⁵⁵ However, even if these accounts had been construed as consumer goods within the scope of the Act, IRAs are not

Practices Forbidden By State Deceptive Trade Practice and Consumer Protection Acts, 89 A.L.R. 3d 449 (1979 & Supp. 1990); Donald M. Zupanec, Annotation, *Scope and Exemptions of State Deceptive Trade Practice and Consumer Protection Acts*, 89 A.L.R. 3d 399 (1979 & Supp. 1990).

48. 22 Cal. 3d 362, 372, 584 P.2d 497, 512, 149 Cal. Rptr. 360, 375 (1978).

49. *Id.* at 365, 584 P.2d at 498, 149 Cal. Rptr. at 361.

50. *Id.* at 376, 584 P.2d at 505, 149 Cal. Rptr. at 368.

51. *Id.*

52. *Kagan*, 35 Cal. 3d 582, 676 P.2d 1060, 200 Cal. Rptr. 30; Dean Witter Reynolds v. Superior Court, 211 Cal. App. 3d 758, 259 Cal. Rptr. 789 (1989).

53. 35 Cal. 3d 582, 676 P.2d 1060, 200 Cal. Rptr. 38 (1984).

54. *Id.*

55. *Id.*; see also *Dean Witter Reynolds*, 211 Cal. App. 3d 758, 762-63, 259 Cal. Rptr. 789, 791. Like *Kagan*, *Dean Witter* involved allegations that the defendant-financial institution illegally charged fees in connection with IRA accounts. *Id.* As in *Kagan*, the court did not

investment securities.⁵⁶

4. Case law in jurisdictions outside California

Lacking a specific direction from either the California legislature or courts, decisions from courts of other states may prove instructive. The question of whether consumer goods or services includes investment securities has been addressed many times in Texas. Texas' consumer protection statute is similar to California's, in that both statutes restrict recovery to consumers, goods and services.⁵⁷ In *Portland Savings & Loan Ass'n v. Beville, Bresler & Schulman Government Securities*,⁵⁸ the plaintiff sued a stockbroker for a misrepresentation made during the sale of securities.⁵⁹ The Texas Court of Civil Appeals construed goods "offered, directly or indirectly to the public for sale" to exclude investment securities.⁶⁰ Similarly, in *Allais v. Donaldson, Lufkin & Jenrette*,⁶¹ plaintiffs also sued their stockbroker for misrepresentations made in connection with the sale of securities.⁶² In construing the same statute, the court also held that "a sale of securities is not a sale of goods."⁶³

The definitions of tangible chattel, the notice and repair language of the Act, the dearth of securities cases brought under the Act in California, and other jurisdictions' interpretations strongly suggest that the Act's consumer goods provision was not intended to include investment securities—even under the statute's liberal construction directive.

B. Services

Although it is unlikely that investment securities could be construed

implicitly or explicitly address the issue of whether securities were goods or services under the Act.

56. Section 25019 of the California Corporations Code defines "security":

[A]ny note; stock; treasury stock; membership in an incorporated or unincorporated association; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate . . . put, call, straddle, option or privilege on any security, certificate of deposit . . . or, in general, any interest or instrument commonly known as a "security."

CAL. CORP. CODE § 25019 (West Supp. 1991). In comparison, IRAs are trusts, held by banks, that afford their owners certain federal tax benefits and, generally, preferred interest rates. See 26 U.S.C. § 408(a) (1988).

57. CAL. CIV. CODE §§ 1750-1784 (West 1985); TEX. BUS. & COM. CODE ANN. § 17.50 (West 1987 & Supp. 1991).

58. 619 S.W.2d 241, 245 (Tex. Civ. App. 1981).

59. *Id.* at 243.

60. *Id.* at 245.

61. 532 F. Supp. 749, 750 (S.D. Tex. 1981).

62. *Id.*

63. *Id.*; see also *Swenson*, 626 F.2d at 428 (stock certificates not goods or tangible chattel under Texas' Deceptive Trade Practices Act).

as goods under the Act, they may be construed as services.⁶⁴ The definition of services appears facially broad enough to include investment securities. Services are defined in section 1761(b) as “work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.”⁶⁵ Because this broad definition of services must be interpreted in light of the Act’s underlying purposes and intent—to protect consumers from unfair and deceptive business practices⁶⁶—its scope should be limited to consumer-related services. No California appellate court has addressed the question of whether the act of selling investment securities constitutes a consumer service under the Act.⁶⁷ In an effort to resolve this issue, this Article analyzes the decisions of other jurisdictions.

1. Professional versus consumer-related services

One court that addressed the issue of whether services included investment securities under a consumer fraud statute was *In re Catanella*.⁶⁸ The court in *Catanella* distinguished consumer services from the professional or semi-professional services provided by brokerage firms. The precise issue in *Catanella* was whether New Jersey’s Consumer Fraud Statute’s “merchandise” prerequisite was broad enough to include securities transactions. Noting that the term merchandise meant “goods . . . or services,” the court concentrated its analysis on the services prong of the definition.⁶⁹ The court drew a sharp distinction between professional or semi-professional services and consumer services,⁷⁰ holding that the sale

64. At first blush, an argument that investment securities are somehow “services” appears awkward. As several Texas courts have noted, however, inherent in the sale of every good are incidental services. In the case of securities, the incidental services would be the broker’s act of buying the securities at the investor’s request or the advice given to the investor in connection with the trade. See *infra* notes 84-98 and accompanying text. An argument that securities are services under the Act would turn on whether or not a broker’s services were, in fact, consumer services.

65. CAL. CIV. CODE § 1761(b) (West Supp. 1991).

66. *Id.* § 1760 (West 1985 & Supp. 1991).

67. One California court has suggested that the Act does not apply when a bank provides property tax payment services to customers. *Altman v. Manhattan Sav. Bank*, 83 Cal. App. 3d 761, 770, 148 Cal. Rptr. 100, 105 (1978). In *Altman*, the action was brought by a plaintiff-class against a bank for the bank’s alleged failure to make a timely property tax payment on behalf of the plaintiff-class. *Id.* at 764, 148 Cal. Rptr. at 101. Although the court did not squarely address the issue, the court noted that under the *Altman* facts, the Act would not apply. *Id.* at 770, 148 Cal. Rptr. at 105.

68. 583 F. Supp. 1388 (E.D. Pa. 1984).

69. *Id.* at 1441-43.

70. N.J. STAT. ANN. §§ 56:8-1 to -20 (West 1989). New Jersey’s consumer fraud statute provides consumers with a private remedy for consumer fraud. The statute states in pertinent part: “The act, use or employment by any person of any unconscionable commercial practice,

of investment securities was not within New Jersey's consumer fraud statute.⁷¹ The court relied heavily on the reasoning of a New Jersey decision, *Neveroski v. Blair*,⁷² which held that real estate brokerage services were semi-professional services and therefore did not fall within the scope of its consumer fraud statutes:

Certainly no one would argue that a member of any of the learned professions is subject to the provisions of the Consumer Fraud Act despite the fact that he renders "services" to the public. And although the literal language may be construed to include professional services, it would be ludicrous to construe the legislation with that broad a sweep in view of the fact that the nature of the services does not fall into the category of consumerism.⁷³

deception, fraud, false pretense, false promise, misrepresentation . . . in connection with the sale or advertisement of any merchandise . . . is declared to be an unlawful practice . . ." N.J. STAT. ANN. § 56:8-2 (West 1989). The Act provides for recovery of attorney's fees, treble damages, filing fees and reasonable costs. *Id.* § 56:8-19.

71. *Catanella*, 583 F. Supp. at 1443. *Catanella* only addressed whether the *sale* of investment securities constituted a consumer service under the New Jersey statute. There is a distinction between the service that an investment securities broker renders when he or she merely sells securities to investors and other types of investment securities services such as investment counseling and tax advice. See *infra* notes 91-98 and accompanying text for a discussion of the Texas cases that have developed this distinction.

72. 358 A.2d 473, 479 (N.J. Super. Ct. 1976) (superseded by N.J. STAT. ANN. § 56:8-2 (West 1989)). At least one court has declined to follow *Neveroski* in the real estate context following amendments to the New Jersey's Consumer Fraud Act. See *Arroyo v. Arnold-Baker & Assocs., Inc.*, 502 A.2d 106 (N.J. 1985) (holding real estate brokers subject to New Jersey's Consumer Fraud Act). *Catanella* is not the only court, however, to find the reasoning in *Neveroski* persuasive. See, e.g., *Stella v. Dean Witter Reynolds, Inc.*, 574 A.2d 468 (N.J. 1990) (securities fraud not within scope of New Jersey's Consumer Fraud Act).

73. *Catanella*, 583 F. Supp. at 1443 (quoting *Neveroski v. Blair*, 358 A.2d 473, 481 (N.J. Super. Ct. 1976)). Quoting *Neveroski*, the court in *Catanella* reasoned:

A real estate broker is in a far different category from the purveyors of products or services or other activities. He is in a semi-professional status subject to testing, licensing, regulations and penalties through other legislative provisions Although not on the same plane as other professionals such as lawyers, physicians, dentists . . . the nature of his activity is recognized as something beyond the ordinary commercial seller of goods or services—an activity beyond the pale of the act under consideration.

Id. at 1443 (quoting *Neveroski v. Blair*, 358 A.2d 473, 480-81 (N.J. Super. Ct. 1976)).

In excluding brokerage services, the court in *Catanella* was mindful of the fact that the definition of "services," as here, was "facially broad enough to cover securities." *Id.* at 1442. Nevertheless, it reasoned that "the entire thrust of the Consumer Fraud Act [was] pointed to products and services sold to consumers in the popular sense," *id.* (quoting *Neveroski v. Blair*, 358 A.2d 473, 480 (N.J. Super. Ct. 1976)), and that the reach of the act would otherwise "seem limitless," *id.* Relying again on *Neveroski*, the court reasoned that a literal construction of the term "services" would produce absurd results not intended by the legislature. *Id.* at 1443 (quoting *Neveroski v. Blair*, 358 A.2d 473, 480-81 (N.J. Super. Ct. 1976)); see also *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 165 (4th Cir. 1985) (quoting ITCO Corp. v.

The *Morris v. Gilbert*⁷⁴ court also decided that investment securities services were fundamentally different from other types of services. In *Morris* the court interpreted the breadth of New York's consumer fraud statute which provides consumers with a private remedy for the redress of consumer fraud.⁷⁵ The plaintiff sued the defendant for state and federal securities violations in addition to violations of New York's Consumer Protection Statute.⁷⁶ The court vacillated on the issue of whether or not the defendant's alleged misrepresentations made to the plaintiff were intended to come within the statute.⁷⁷ The court reasoned:

[S]ales of securities are not so obviously outside the scope of the [statute], because . . . the buyer is often less sophisticated than the seller. . . . On the other hand, people do not generally buy securities in the same way that they buy an automobile, a television set, or the myriad of consumer goods found in supermarkets. For one thing, securities are purchased as investments, not as goods to be 'consumed' or 'used'.⁷⁸

As the courts in *Catanela* and *Morris* found, there is a valid distinction between investment services and consumer services.⁷⁹ Unlike most sellers of consumer merchandise, securities brokers must take an examination and obtain certification by the State of California.⁸⁰ They are subject to strict regulation, licensing, testing and penalties.⁸¹ The Commissioner of Corporations is charged with the oversight and enforcement of the licensing provisions.⁸² These regulations suggest that California views securities brokers as professionals. If securities brokers are professionals, then the services they render should not be covered by the Act

Michelin Tire Corp., 722 F.2d 42, 48 n.10 (4th Cir. 1983) (construing North Carolina's consumer protection statute to exclude securities brokerage services, reasoning among other things, that while the "'prohibitory scope of the [statute] . . . is potentially quite broad' . . . [t]he apparent purpose behind the enactment of [the statute] was the protection of the consuming public").

74. 649 F. Supp. 1491 (E.D.N.Y. 1986).

75. N.Y. GEN. BUS. LAW § 349(h) (McKinney 1988). Subsection 349(a) describes what acts trigger the remedies: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service . . . are hereby declared unlawful." *Id.* § 349(a).

76. *Morris*, 649 F. Supp. at 1491.

77. *Id.* at 1497.

78. *Id.* The court dismissed the consumer fraud allegations. *Id.*

79. *See supra* notes 16-19 and accompanying text.

80. CAL. CORP. CODE §§ 25210-25211 (West 1977 & Supp. 1991).

81. *See id.* §§ 25210-25540 (securities licensing, certification, censure, suspension, revocation, penalty, standards, training, experience and qualifications provisions of the California Corporations Code).

82. *See id.* §§ 25530-25532 (West 1991).

because the Act applies to consumer services.⁸³

2. "Incidental" versus "objective of transaction" services

Texas courts have provided the most case law on the issue of whether services include brokerage services under a consumer fraud statute. These courts have generally interpreted investment securities services to fall outside the scope of their Deceptive Trade Practices Act (DTPA).⁸⁴ Recently, in *E.F. Hutton & Co. v. Youngblood*,⁸⁵ an investor sued a brokerage firm under the DTPA to recover for improper investment and tax advice.⁸⁶ The plaintiffs were told that no taxable consequences would occur if they withdrew their funds from their stock purchase plan and reinvested them.⁸⁷ The defendant brokers then sold the plaintiffs shares in investment vehicles.⁸⁸ The appellate court determined that "a brokerage firm may be held liable under the Deceptive Trade Practices Act . . . for erroneous tax and investment advice when it is coupled with other services."⁸⁹ The court stated:

The services of tax and investment counseling and assisting in the purchase of securities were inextricably intertwined. Appellees sought and received from appellant expert tax and investment counseling as to the taxable consequences of the transaction, without which the sale of securities would not have been made. We find that appellees were consumers of a service purchased from appellant.⁹⁰

83. See *supra* notes 1-5 and accompanying text.

84. Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§ 17.41-826 (West 1987 & Supp. 1991).

85. *E.F. Hutton & Co. v. Youngblood* (*Youngblood I*), 708 S.W.2d 865 (Tex. Ct. App. 1986).

86. *Id.* at 866.

87. *Id.*

88. *Id.*

89. *Id.* at 868.

90. *Id.* at 868-89 (citations omitted). The Texas Supreme Court granted review of *Youngblood I* in *E.F. Hutton v. Youngblood* (*Youngblood II*), 30 Tex. S. Ct. J. 508, *withdrawn*, 741 S.W.2d 363 (1987). In *Youngblood II*, the Texas Supreme Court determined that the services rendered under the facts of the case were not services within the meaning of Texas' Deceptive Trade Practices Act. *Id.* at 510. *Youngblood II*, however, was reheard and in *E.F. Hutton & Co. v. Youngblood* (*Youngblood III*), 741 S.W.2d 363 (1987), the court affirmed the appellate court opinion (*Youngblood I*) and held that the issue of whether investment securities are services under the Texas Deceptive Trade Practices Act was not preserved on appeal. *Id.* at 364. Rule 133 of the Texas Rules of Appellate Procedure suggests that since *Youngblood III*, a Texas Supreme Court decision, did not attempt to correct *Youngblood I*, an appellate court decision, the Texas Supreme Court agreed with *Youngblood I*. *Id.*

Similarly, in another Texas case, *Frizzell v. Cook*, 790 S.W.2d 41 (Tex. Ct. App. 1990), an investor sued the defendant-brokerage firm under the DTPA for providing her with faulty

In another case construing the Texas Act, *FDIC v. Munn*,⁹¹ the Court of Appeals for the Fifth Circuit made an important distinction regarding investment securities services. The court noted that there is a difference between incidental services relating to the sale of intangibles on the one hand, and the purchase of services which are purchased as the object of the transaction on the other hand.⁹² In *Munn*, the plaintiffs' guarantor sued the defendant-lender for services rendered when the plaintiffs purchased stock in a corporation.⁹³ In determining whether the plaintiffs were consumers under the DTPA, the Fifth Circuit held that incidental services rendered in connection with the sale of an intangible are *not* covered under Texas' DTPA.⁹⁴ If, however, the service provided is the objective of the transaction (as opposed to an incidental service), then it may be covered.⁹⁵ The *Munn* court stated:

"Goods" has a fairly certain meaning under Texas law. . . .
"Services" has a less certain meaning under Texas law. . . .
[All] transactions involve human service to some extent, the cost of which is included in the price of the transaction. Arguably, then, all services in any transaction are purchased "services" under the DTPA. Under this approach, any service involved in a stock purchase or loan transaction would give rise to DTPA consumer status even though the actual stock purchase or loan could not, thereby undermining the legislature's exclusion of sales of intangible chattels from the DTPA. Thus, . . . some activities related to the sale of intangibles must not be "services" under the DTPA.⁹⁶

The court's distinction between incidental services and object of the

investment advice and counseling services. *Id.* at 42. The defendant brokerage firm brought a partial summary judgment motion on the DTPA allegations, on the grounds that plaintiff could not sue for securities fraud under the DTPA. *Id.* at 41-42. The trial court granted the defendant's partial summary judgment motion. *Id.* The appellate court reversed, holding that a plaintiff suing for securities violations is a consumer and may sue under the DTPA for redress. *Id.* at 47.

91. 804 F.2d 860 (5th Cir. 1986).

92. *Id.* at 865.

93. *Id.* at 862.

94. *Id.* at 865; *see also* *Nottingham v. General Am. Comm.*, 811 F.2d 873 (5th Cir.), *cert. denied*, 484 U.S. 854 (1987). In *Nottingham*, plaintiffs invested in defendants' investment program which included the marketing and sale of videos. *Id.* Defendants agreed to produce and distribute videos and to provide legal counsel to the investors if the IRS challenged the program. *Id.* Plaintiffs sued defendants for securities violations under federal securities laws and the Texas DTPA. *Id.* The court held that the legal, production and distribution services provided were sufficient to bring the action under Texas' DTPA. *Id.* at 878.

95. *Munn*, 804 F.2d at 865.

96. *Id.* at 863-64.

transaction services is a valid one.⁹⁷ If claims based on all investment-related services were permitted under California's Act then, theoretically, actions could be brought for advice relating to the purchase of stock, but not for the purchase of the stock itself. Such a construction would completely usurp the "tangible" chattel directive of the statute. Therefore, at a minimum, incidental services must not be covered under the Act. Preferably, no investment-related services should be covered under the Act for the very reason stated in *Munn*: drawing the line between "incidental" advice and "object of the transaction" advice may prove to be a vague, esoteric and illusory query in light of the tangible chattel limitation.⁹⁸ Nevertheless, this distinction by itself is insufficient to warrant application of the Act to investment securities.

IV. OTHER RATIONALES FOR NOT APPLYING INVESTMENT SECURITIES TO THE ACT

Courts in other jurisdictions deciding the issue of whether investment securities should come within their consumer statutes have done so on numerous grounds.⁹⁹ Many of these reasons apply with equal force to California's Consumers Legal Remedies Act. Although no rationale by itself requires the Act to be interpreted as including investment securities, taken together these rationales suggest that securities should not come within the Act.

A. *Conflicts in Laws and Dual Regulation*

The determining factor for most courts deciding that investment securities do not come within consumer protection statutes is that construing consumer statutes to include investment securities could create conflicts between those statutes and other regulations.¹⁰⁰ Investment securities are already regulated by both state and federal securities laws.¹⁰¹

97. *See id.*

98. *See id.* at 865.

99. *See infra* notes 100, 106, 142.

100. *Skinner v. Steele*, 730 S.W.2d 335, 337 (Tenn. Ct. App. 1987) (purchasers of annuities not protected under Tennessee's consumer statute because business of selling annuities not specifically authorized by state insurance code and purpose of exemption is "intended to avoid conflict between laws, not to exclude from the Act's coverage every activity that is authorized or regulated by another statute or agency"); *see Bache Halsey Stuart, Inc. v. Hunsucker*, 248 S.E.2d 567, 570 (N.C. Ct. App. 1978), *reh'g denied*, 254 S.E.2d 32 (N.C. 1979) (North Carolina's Unfair Trade Practices Act does not support claim against commodities broker for activity regulated under Federal Commodities Exchange Act).

101. Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1988 & Supp. 1989); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1988 & Supp. 1989); Securities Investor Protec-

The abundance of remedies available to the securities plaintiff¹⁰² is a strong basis for finding that investment securities are not within the scope of consumer protection statutes.

Some states specifically exempt from their consumer acts actions or transactions regulated elsewhere.¹⁰³ Different consumer statutes employ different types of exemptions.¹⁰⁴ One commonly used exemption¹⁰⁵ provides that actions and transactions which are otherwise regulated are exempted from the act.¹⁰⁶ Many of these exemptions do not define which

tion Act of 1970, 15 U.S.C. §§ 78aaa-78lll (1988); CAL. CORP. CODE § 25000-25706 (West 1977 & Supp. 1991).

102. See *infra* notes 104, 110.

103. See, e.g., LA. REV. STAT. ANN. §§ 51:1401-51 to :1406 (West 1991) (exempting actions or transactions of the Louisiana Public Service Commission or public utility regulating body); WASH. REV. CODE § 19.86.170 (1989) (exempting actions or transactions by insurance commissioner or utilities and transportation commissions); see also *infra* note 106.

104. Louisiana's Unfair Trade Practices Act specifically excludes transactions subject to the state banking commission. LA. REV. STAT. ANN. §§ 51:1401 to :1406 (West 1991). Courts construing this statute have held that securities transactions are not within the statute's purview on dual regulation grounds due to the exemption. See *Smith v. Cooper*, 846 F.2d 325, 328 (5th Cir. 1988) (plaintiffs-shareholders in family business sued defendants-purchasers of stock in family business for fraud); *Moore v. A.G. Edwards & Sons*, 631 F. Supp. 138, 145 (E.D. La. 1986) (plaintiffs-investors sued defendant-stockbroker and employer for alleged fraud). The court in *Moore* stated:

The application of the UTPA [Unfair Trade Practices Act] to these transactions would produce effects that were not intended, it seems, by the Louisiana legislature. For example, the director of the Governor's Consumer Protection Division is given the power to investigate and enforce the UTPA. The application of the UTPA to securities claims would provide for unintended overlapping investigative and enforcement powers because the state banking commissioner is also authorized to investigate and enforce laws pertaining to securities under the Blue Sky Law.

An even more bothersome factor to the court is the prospect of subjecting securities claims to treble damages under the UTPA. Securities transactions have long been regulated by the state Blue Sky Law. This Court finds that if the legislature wanted to expose securities violators to the punitive spectra of treble damages, the Blue Sky statute would have and could have clearly so provided.

Id.

105. An example of a very exhaustive dual regulation exemption exists in Washington. The Revised Code of Washington § 19.86.170 provides:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States.

WASH. REV. CODE § 19.86.170 (1989).

106. *Nichols v. Merrill Lynch, Pierce, Fenner & Smith*, 706 F. Supp. 1309, 1337 (M.D. Tenn. 1989) ("I decline to recommend that the Court extend the remedies available in a securities fraud action when Congress and the Tennessee legislature have both declined to do so explicitly."); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 675 (N.D. Ga. 1983) (specific exemption in Georgia's Fair Business Practice's Act, O.C.G.A. § 10-1-391 provides that "specifically" authorized conduct justifies exclusion of claims based upon securities violations); *State v. Piedmont Funding Corp.*, 382 A.2d 819, 822 (R.I. 1978) (Rhode Island Deceptive

actions or transactions are otherwise regulated. Courts have used these "catch-all" exemptions to exclude investment securities.¹⁰⁷ Unlike these jurisdictions, California's Act does not have a dual regulation provision.

Some courts have applied the dual regulation rationale despite the lack of a specific, dual regulation exemption in their consumer statute.¹⁰⁸ As in California, North Carolina's consumer protection statute does not have a specific exemption which omits areas "otherwise regulated."¹⁰⁹ The court in *Lindner v. Durham Hosiery Mills*,¹¹⁰ for example, declined to find that securities transactions came within North Carolina's Unfair Trade Practices Act, despite the lack of an express exemption omitting otherwise regulated areas.¹¹¹

Trade Practices Act exempts activities subject to monitoring by state or federal regulatory bodies or officers); *State ex rel. McLeod v. Rhoades*, 267 S.E.2d 539, 541 (S.C. 1980) (South Carolina Unfair Trade Practices Act § 39-5-40 specifically excludes actions or transactions permitted under laws administered by any regulatory body or offices acting under statutory authority of South Carolina); *Kittilson v. Ford*, 595 P.2d 944, 948 (Wash. Ct. App. 1979) (Washington Consumer Protection Act excludes actions or transactions otherwise regulated); see *Morris v. Gilbert*, 649 F. Supp. 1491, 1497 (E.D.N.Y. 1986) ("[I]t is questionable that New York's legislature intended to give securities investors an added measure of protection beyond that provided by the Securities Act and, indeed, by RICO."); *Singer v. Dean Witter Reynolds, Inc.*, 614 F. Supp. 1141, 1145 (D. Mass. 1985) ("Because [the state securities statute] provides a comprehensive regulatory scheme for the registration and sale of securities, the Legislature did not intend . . . to regulate the securities field."); *In re Catanella*, 583 F. Supp. 1388, 1443 (E.D. Pa. 1984) (New Jersey law) ("[T]he very existence of a carefully drawn state securities statute militates against the application of the Consumer Fraud Act to securities transactions."); *Allais v. Donaldson, Lufkin & Jenrette*, 532 F. Supp. 749, 752 (S.D. Tex. 1982) (strict liability actions under consumer fraud statute not applicable to securities transactions because it conflicts with due diligence defense provided under state securities laws).

107. See *Piedmont Funding*, 382 A.2d at 819; *McLeod*, 267 S.E.2d at 539; *Kittilson*, 595 P.2d at 944.

108. See, e.g., *Buie v. Daniel Int'l Corp.*, 289 S.E.2d 118 (N.C. Ct. App. 1982), *reh'g denied*, 305 S.E.2d 574 (N.C. 1982); *Bache Halsey Stuart*, 248 S.E.2d at 567.

109. See *Buie*, 289 S.E.2d at 118; *Bache Halsey Stuart*, 248 S.E.2d at 567.

110. 761 F.2d 162 (4th Cir. 1985).

111. *Id.* at 165, 167; see also N.C. GEN. STAT. § 75-1.1 (1988) (unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce). The *Lindner* plaintiffs appealed from a district court ruling dismissing their claim for relief under the North Carolina Unfair Trade Practices Act. *Lindner*, 761 F.2d at 165. Plaintiffs, former minority shareholders, who owned Class B nonvoting stock in defendant's hosiery company, alleged that defendants had deprived them of the fair market value of their stock by employing a reverse stock split in connection with a merger. *Id.* at 163. The court held:

We do not believe that the North Carolina legislature would have intended § 75-1.1, with its treble damages provision, to apply to securities transactions which were already subject to pervasive and intricate regulation under the North Carolina Securities Act Furthermore, to hold that § 75-1.1 applies to securities transactions could subject those involved with securities transactions to overlapping supervision and enforcement by both the North Carolina Attorney General, who is charged with enforcing § 75-1.1, and the North Carolina Secretary of State, who is charged with enforcing the North Carolina Securities Act.

Although cases interpreting a consumer protection statute with a specific exemption would be distinguishable from California's Act (because the Act does not employ a specific exemption for actions "otherwise regulated") the dual regulation rationales set forth in these cases and in *Lindner* (which similarly interpreted a statute without an otherwise regulated exemption) should apply in California. Dual regulation could result if claims based on securities violations were brought under the Act. Investment securities are regulated under both the Securities Exchange Act of 1934¹¹² and the California Corporate Securities Act.¹¹³ Both of these laws provide specific remedies for deceptive or fraudulent acts in connection with the purchase or sale of securities.¹¹⁴ The anti-fraud provisions of the state and federal securities laws conflict¹¹⁵ directly with the Act because they do not provide for recovery of punitive damages or attorneys' fees and the Act does.¹¹⁶ Thus, the Act should not be extended to apply to investment securities because federal and state securities laws already regulate securities transactions and because the remedies provided under the securities laws are inconsistent with those provided under the Act.

B. Federal Authority

Many courts recognize that their consumer statutes were modeled after the Federal Trade Commission Act (FTCA),¹¹⁷ a federal consumer

Id. at 167-68 (citations omitted); see *Bache Halsey Stuart*, 248 S.E.2d at 567 (commodities transactions not within North Carolina's Unfair Trade Practices Act).

112. 15 U.S.C. §§ 78a-iii (1988).

113. CAL. CORP. CODE §§ 25000-25706 (West 1977 & Supp. 1991).

114. See 15 U.S.C. § 78b (1988); CAL. CORP. CODE § 25400 (West 1985 & Supp. 1991).

115. The conflict between the Act and California's corporate securities laws is illustrated by the statutory construction principle of *in pari materia*, which requires that statutory schemes be construed to be in harmony. *Ex Parte Washer*, 200 Cal. 598, 606, 254 P. 951, 955 (1927) ("A statute should be construed in light of other existing legislation touching the same subject-matter and statutes *in pari materia* are to be construed together."). To this end, the attorney's fees and punitive damages provisions under the Act, see *supra* notes 8-9 and accompanying text, are inconsistent with California's corporate securities laws, which do not provide for such recovery. CAL. CORP. CODE §§ 25000-25706 (West 1977 & Supp. 1991). In order to achieve a harmonious construction of the Act and California's corporate securities laws, investment securities must be found to be outside of the Act.

116. Compare *Davis v. Merrill Lynch, Pierce, Fenner & Smith*, 906 F.2d 1206, 1223 n.20 (8th Cir. 1990) (punitive damages not available for violations of section 10(b) of Securities Exchange Act of 1934) and *Bowden v. Robinson*, 67 Cal. App. 3d 705, 714, 136 Cal. Rptr. 871, 878 (1977) (punitive damages available under anti-fraud provisions of California Corporate Securities Act) with CAL. CIV. CODE § 1780(a)(4), (d) (West 1985 & Supp. 1991) (punitive damages and attorney's fees available under Consumers Legal Remedies Act).

117. 15 U.S.C. §§ 41-77 (1988). This statute allows the Federal Trade Commission to file complaints against persons, partnerships or corporations that utilize unfair or deceptive trade practices. *Id.* § 45(b).

protection statute which provides consumers with a means for recovery under federal law for unfair trade practices.¹¹⁸ In fact, some decisions refer to the consumer protection statutes as "baby FTC statutes."¹¹⁹ Some states' consumer statutes even state that they are to be construed in accordance with Federal Trade Commission rulings and the federal statute.¹²⁰ Even when statutes lack such directives, courts have relied on federal law as a rationale for not including securities within the ambit of their state consumer protection statutes because, under federal law, securities are not included in the consumer statute.¹²¹ The California Act, however, does not state that it is to be construed in accordance with the FTCA.¹²² Nonetheless, because many other jurisdictions look to the federal statutes for guidance in interpreting consumer statutes,¹²³ it is persuasive that no federal court has found the FTCA to include investment securities.

C. *Non-exclusivity Clauses*

The non-exclusivity or "savings" clauses appearing in some consumer statutes are an infrequently used rationale to determine whether securities fall within the scope of a consumer protection statute. A non-exclusivity or savings clause ensures that the remedies provided by the statute will not be interpreted as the sole remedies available.¹²⁴

In *State ex rel. Corbin v. Pickrell*,¹²⁵ the court relied upon Arizona's consumer statute's savings clause to hold that securities claims were

118. *Island Tobacco Co. v. R.J. Reynolds Tobacco*, 627 P.2d 260, 268 (Haw. 1981); *Manely v. Wichita Business College*, 701 P.2d 893, 898 (Kan. 1985); *State ex rel. Guste*, 528 So. 2d 198, 200 (La. Ct. App. 1988); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 534 (Wash. 1986).

119. *See, e.g., Bulgo v. Munoz*, 853 F.2d 710, 714 (9th Cir. 1988) (Hawaiian law); *Spinner Corp. v. Princeville Dev. Corp.*, 849 F.2d 388, 389 (9th Cir. 1988) (Hawaiian law).

120. *See, e.g., ARIZ. REV. STAT. ANN. § 44-1522B* (1987 & Supp. 1990); *HAW. REV. STAT. § 480-3* (1985 & Supp. 1990); *see infra* note 132.

121. *See, e.g., Lindner v. Durham Hosiery Mills*, 761 F.2d 162, 166-67 (4th Cir. 1985) (interpreting North Carolina law) ("We also find it significant that [North Carolina General Statute] Section 75-1.1 . . . is reproduced verbatim from Section 5 of the FTC Act, 15 U.S.C. Section 45 (a)(1) (1982), . . . it [is] appropriate to look to the federal decisions interpreting the FTC Act for guidance. . . . Thus, the fact that no federal court decision has applied Section 5(a)(1) of the FTC Act to securities transactions is additional evidence of the scope of Section 75-1.1.").

122. *See CAL. CIV. CODE §§ 1750-1784* (West 1985 & Supp. 1991).

123. *See supra* note 121.

124. *See State ex rel. Corbin v. Pickrell*, 667 P.2d 1304 (Ariz. 1983) (interpreting savings clause as ensuring that remedies provided by statute will not be interpreted as exclusive remedies).

125. 667 P.2d 1304 (Ariz. 1983).

within the scope of their statute.¹²⁶ The court in *Corbin* considered the issue of whether Arizona's consumer fraud statute permitted recovery for securities violations.¹²⁷ A prior ruling by an Arizona appellate court held that securities violations could not be brought under the consumer fraud statute.¹²⁸ In that case, *Babbitt v. Green Acres Trust*,¹²⁹ the court based its holding on the theory that the Arizona legislature had not intended to provide cumulative remedies.¹³⁰ The court stated that because securities were already comprehensively regulated, it did not find that the legislature "by enactment of the Consumer Fraud Act, intended to provide an additional avenue of relief" to plaintiffs.¹³¹ The court in *Corbin* took the opposing view in light of an amendment passed by the Arizona State Legislature after *Babbitt* but prior to *Corbin*.¹³² The amendment provided in pertinent part: "The provisions of this article are in addition to all other causes of action, remedies and penalties available to this state."¹³³ The court in *Corbin* relied upon this amendment to find that the legislature *did* intend to include securities within the realm of the consumer statute.¹³⁴

California's Act contains similar savings-type provisions.¹³⁵ These provisions provide that the Act's remedies are in addition to other remedies and procedures available. Under the reasoning in *Corbin*, the California non-exclusive remedies and cumulative remedies provisions are a strong argument that the legislature intended to include investment se-

126. *Id.* at 1307.

127. *Id.*

128. *Id.*

129. 618 P.2d 1086 (Ariz. Ct. App. 1980).

130. *Id.* at 1091.

131. *Id.*

132. *Corbin*, 667 P.2d at 1307.

133. ARIZ. REV. STAT. ANN. § 44-1533(A) (1987); *see also id.* § 44-1522(B) (stating in part that "the courts may use as a guide interpretations given by the . . . federal courts").

134. *Corbin*, 667 P.2d at 1307 ("We believe that the clear language of the amendment mandates the conclusion that the legislature intended the consumer fraud act to provide an additional avenue of relief to those aggrieved by securities act violations.").

135. Section 1749.3 of the Act states in pertinent part: "The remedies provided by this title are cumulative and shall not be construed as restricting any remedy that is otherwise available." CAL. CIV. CODE § 1749.3 (West 1991). Additionally, § 1752 provides:

The provisions of this title are not exclusive. The remedies provided herein for violation of any section of this title or for conduct proscribed by any section of this title shall be in addition to any other procedures or remedies for any violation or conduct provided for in any other law.

. . . If any act or practice proscribed under this title also constitutes a cause of action in common law or a violation of another statute, the consumer may assert such common law or statutory cause of action under the procedures and with the remedies provided for in such law.

Id. § 1752 (West 1985 & Supp. 1991).

curities under the Act. Under the *Corbin* rationale, a court could find that the legislature intended for consumers to sue and recover under the Act, as well as under other statutory and common law theories.

The lack of a cumulative or exclusive remedies provision in a consumer fraud statute was used as a point of distinction by the Court of Appeals for the Ninth Circuit in *Spinner Corporation v. Princeville Development*.¹³⁶ The court in *Spinner* addressed the issue of whether Hawaii's consumer protection statute applies to claims arising from securities transactions.¹³⁷ The court relied upon "the structure of the statute, the legislative command to refer to Federal Trade Commission Act jurisprudence, the existence of Hawaii statutes that cover securities transactions, and the trend of the relatively few applicable judicial decisions" to determine that securities were not included.¹³⁸ The court summarily distinguished *Corbin*: "The difference between this Arizona case and the instant one is that the Hawaii baby FTC act does not contain a similar savings clause."¹³⁹ In California such a savings clause does exist.

Although *Corbin* provides a valid argument for the view that investment securities fall within the realm of the Arizona Act, because that Act has a savings clause, an important distinction can be made between it and the California Act. California's cumulative and non-exclusive remedies provisions are different from Arizona's because Arizona's savings clause was arguably passed as a sign of legislative wrath at the *Babbitt* decision.¹⁴⁰ The California Act's savings clauses were not enacted in response to an appellate court decision excluding investment securities, but in response to California's consumers' demands for redress.¹⁴¹ If a court were to find that investment securities were intended to come within the Act, the *Spinner* and *Corbin* decisions and the Act's extensive savings clause would provide the best grounds.

136. 849 F.2d 388, 392 (9th Cir. 1988) (Hawaiian law).

137. *Id.* at 390.

138. *Id.* at 393.

139. *Id.* at 393 n.6.

140. See *Corbin*, 667 P.2d at 1307 (legislature's amendment to consumer fraud act "stripped [*Babbitt*] of its foundation").

141. The Act's savings clause was within the original statute when it was enacted in 1970, however, it was further clarified by the amendment of 1975 and expanded to include:

[T]his shall not be construed so as to deprive a consumer of any statutory or common law right to bring a class action without resort to this title. If any act or practice proscribed under this title also constitutes a cause of action in common law or a violation of another statute, the consumer may assert such common law or statutory cause of action under the procedures and with the remedies provided for in such law.

CAL. CIV. CODE § 1752 (West 1985 & Supp. 1991).

D. *The Trend Toward Not Including Securities Within the Realm of Consumer Protection Statutes*

Fifteen out of the seventeen jurisdictions that have considered whether investment securities are within the scope of their consumer protection statutes have held that claims based upon securities violations are not within the ambit of their statutes.¹⁴² Many courts deciding this issue cite the dearth of cases deciding that securities fall within consumer statutes as a reason for deciding that claims based upon securities violations are not within the ambit of their consumer protection statutes. The court in *Spinner Corp. v. Princeville Development*¹⁴³ did just that. In deciding that securities were not within Hawaii's consumer fraud statute, the court stated that "we are persuaded by . . . the trend of the relatively few applicable judicial decisions."¹⁴⁴ To date, only two jurisdictions have held to the contrary.¹⁴⁵

V. CONCLUSION

A court presented with the issue of whether to apply the California Consumers Legal Remedies Act to investment securities will be confronted with numerous rationales with which to find that the legislature did or did not intend investment securities to come within the meaning of consumer goods or services. The most persuasive arguments supporting the inclusion of investment securities within the Act are the "object of the transaction" investment services line of cases in Texas and the Act's

142. Cases in jurisdictions that have determined that securities are not within the ambit of their consumer protection statute include: *Spinner Corp. v. Princeville Dev. Corp.*, 849 F.2d 388 (9th Cir. 1988) (Hawaiian law); *Smith v. Cooper*, 846 F.2d 325 (5th Cir. 1988) (Louisiana law); *Nichols v. Merrill Lynch, Pierce, Fenner & Smith*, 706 F. Supp. 1309 (M.D. Tenn. 1989); *Morris v. Gilbert*, 649 F. Supp. 1491 (E.D.N.Y. 1986); *Robertson v. White*, 633 F. Supp. 954 (W.D. Ark. 1986) (interpreting Arkansas and Oklahoma law); *In re Catanella*, 583 F. Supp. 1388 (E.D. Penn. 1984); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667 (N.D. Ga. 1983); *Russell v. Dean Witter*, 510 A.2d 972 (Conn. 1986); *Cabot Corp. v. Baddour*, 477 N.E.2d 399 (Mass. 1985); *Skinner v. E.F. Hutton*, 333 S.E.2d 236 (N.C. 1985); *State v. Piedmont Funding Corp.*, 332 A.2d 694 (R.I. 1978); *State ex rel McLeod v. Rhoades*, 267 S.E.2d 539 (S.C. 1980); *Kittilson v. Ford*, 595 P.2d 944 (Wash. Ct. App. 1979), *aff'd*, 608 P.2d 264 (Wash. 1980). All federal jurisdictions also exclude investment securities from the scope of the Federal Trade Commission Act. 15 U.S.C. § 45(a)(1) (1988). Courts in Texas, as noted previously, have held that goods or services under the DTPA do not include investment securities. See *Portland Sav. & Loan Ass'n v. Beville, Bresler & Schulman Gov't Sec.*, 619 S.W.2d 241, 245 (Tex. Civ. App. 1981). However, as noted, this rule is being eroded and many courts permit recovery for securities transactions under the DTPA. See, e.g., *FDIC v. Munn*, 804 F.2d 860, 863-64 (5th Cir. 1986) (whether or not plaintiff's claim fell under DTPA was question for jury).

143. 849 F.2d 388, 393 (9th Cir. 1988).

144. *Id.*

145. See *Corbin*, 667 P.2d 1304 (Ariz.); *Frizzell v. Cook*, 790 S.W.2d 41 (Tex. Ct. App. 1990).

extensive savings clause provisions. Several potential arguments exist, however, with which to attack these theories: the underlying consumer focus of the Act, as revealed in the Act's own language, its legislative history and its application to date; the dearth of jurisdictions which have applied consumer statutes to investment securities; and the presence of dual regulation and inconsistent remedies. Although other jurisdictions' statutes are necessarily distinguishable because each statute is different, the underlying rationales provide strong reasons for not applying the Act to investment securities. Ultimately, it is the plain consumer language of the Act itself which suggests that investment securities should not be construed to be within the scope of the Act.