What Every Securities Lawyer Should Know About The Enforceability of Arbitration, Forum Selection and "Choice" of Law Provisions

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Banks Law Office, P.C.

January 15, 2014

att.com

JOHN G DOE
123 ANY STREET
DULUTH GA 30097-1234

Page 1 of 2
Account Number 678 123-1234 545 1889
Billing Date Mar 05, 2010

Web Site att.com

at&t

Monthly Statement

Bill-At-A-Glance

Previous Bill	29.05
Payment Received 2-11 Thank You!	29.05CR
Adjustments	.00
Balance	.00
Current Charges	29.05
Total Amount Due	**$29.05**
Amount Due in Full by	**Mar 27, 2010**

Billing Summary

Questions? Visit att.com	**Page**	
Plans and Services 1 888-757-6500 **PIN: 9999** Repair Service: 611	1	29.05
Total Current Charges		**29.05**

AT&T Benefits

- Smarter TV. Better value. AT&T U-versež .

There has never been a better time to get AT&T U-versež . Now you can get incredible channels and features at a better value than cable. Plus, you can take advantage of some of our best offers ever. Geographic and service restrictions apply. Call 1.866.291.2278 or go online at att.com/uversenow today!

Plans and Services

Monthly Service - Mar 5 thru Apr 4

1. Residential Line		17.55

Surcharges and Other Fees

Item No.	Description	Quantity	
2.	Federal Universal Service Fee	1	.91
3.	Federal Subscriber Line Charge	1	6.50
Total Surcharges and Other Fees			**7.41**

Government Fees and Taxes

Item No.	Description	Quantity	
4.	Federal Excise Tax		.74
5.	GA - State/Local Tax		1.27
6.	GA-Johns Creek Franchise Fee		.53
7.	Telecommunication Relay Svc Fund	1	.05
8.	Emergency 911 - Johnscreek	1	1.50
Total Government Fees and Taxes			**4.09**

Total Plans and Services **29.05**

Plus Undisclosed Sales Tax 30.00

Federal Arbitration Act

9 U.S.C.A. § 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

Currentness

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

131 S.Ct. 1740

Supreme Court of the United States

AT&T MOBILITY LLC, Petitioner,
v.
Vincent CONCEPCION et ux.
No. 09–893. | Argued Nov. 9, 2010. | Decided April 27, 2011.

Synopsis
Background: Customers brought putative class action against telephone company, alleging that company's offer of a free phone to anyone who signed up for its cellphone service was fraudulent to the extent that the company charged the customer sales tax on the retail value of the free phone. The United States District Court for the Southern District of California, Dana M. Sabraw, J., 2008 WL 5216255, denied company's motion to compel arbitration. Company appealed. The United States Court of Appeals for the Ninth Circuit, Carlos T. Bea, Circuit Judge, 584 F.3d 849, affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Justice Scalia, held that the Federal Arbitration Act preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts, abrogating *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100.

Reversed and remanded.

How Does *Conception* Affect Securities Lawyers?


TALK TO
CHUCK
charles SCHWAB

FINRA RULES

12204. Class Action Claims

The Customer Code applies to claims filed on or after April 16, 2007. In addition, the list selection provisions of the Customer Code apply to previously filed claims in which a list of arbitrators must be generated after April 16, 2007; in these cases, however, the claim will continue to be governed by the remaining provisions of the old Code unless all parties agree to proceed under the new Code.

(a) Class action claims may not be arbitrated under the Code.

(b) Any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, or that is ordered by a court for class-wide arbitration at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, unless the party bringing the claim files with FINRA one of the following:

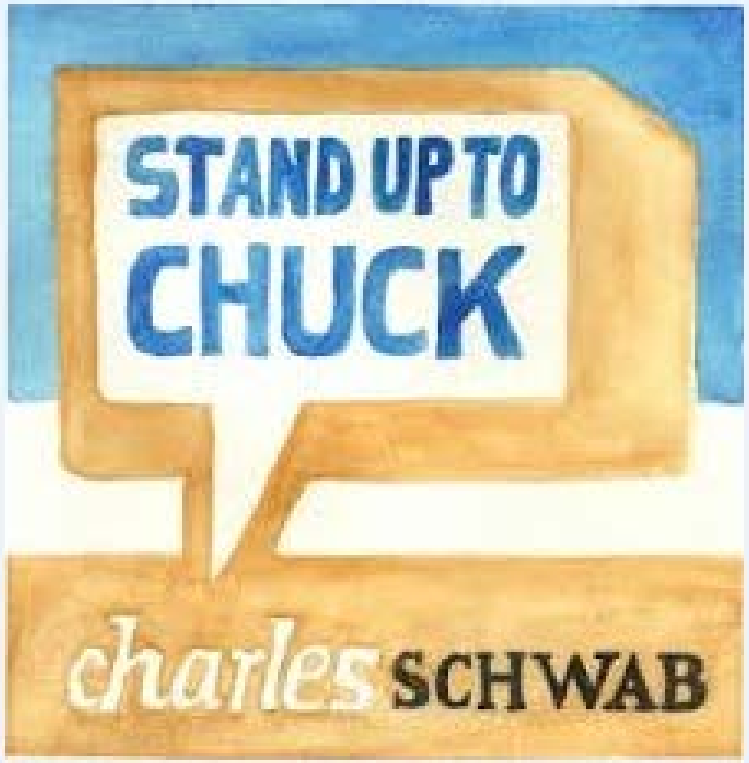
(1) a copy of a notice filed with the court in which the class action is pending that the party will not participate in the class action or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court; or

(2) a notice that the party will not participate in the class action or in any recovery that may result from the class action.

(c) The Director will refer to a panel any dispute as to whether a claim is part of a class action, unless a party asks the court hearing the class action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(d) A member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until:

- The class certification is denied;
- The class is decertified;
- The member of the certified or putative class is excluded from the class by the court; or
- The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.


STAND UP TO
CHUCK
charles SCHWAB

FINRA v Charles Schwab.pdf

The Schwab Questions:

Does *Conception* Go Beyond Preempting State Law Prohibiting Arbitration? Does It Also Prohibit The Enforcement of FINRA Rules That Are Agreed To By All FINRA Members And Approved By The SEC?

If So, What Does That Say About *McMahon*, Which Extolled the Virtues of NASD Rules And Relied On Their Inherent Fairness To Justify Forced Arbitration?

133 S.Ct. 2304
Supreme Court of the United States

AMERICAN EXPRESS CO., et al., Petitioners
v.
ITALIAN COLORS RESTAURANT et al.
No. 12–133. | Argued Feb. 27, 2013. | Decided June 20, 2013.

Synopsis

Background: Merchants filed class action antitrust suit against charge-card issuer. The United States District Court for the Southern District of New York, George B. Daniels, J., 2006 WL 662341, granted issuer's motion to compel arbitration and dismissed the underlying claims. Merchants appealed. The United States Court of Appeals for the Second Circuit, Pooler, Circuit Judge, 554 F.3d 300, reversed, finding that class-action waiver provision contained in mandatory arbitration clause in card acceptance agreement was unenforceable. Issuer petitioned for writ of certiorari. The Supreme Court granted writ, —— U.S. ——, 130 S.Ct. 2401, 176 L.Ed.2d 920, and vacated and remanded for reconsideration in light of its decision in *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.* The Court of Appeals, Pooler, Circuit Judge, 634 F.3d 1, again reversed the district court, but placed a hold on mandate in order for issuer to petition for writ of certiorari. While mandate was on hold, Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion*, —— U.S. ——, 131 S.Ct. 1740, 179 L.Ed.2d 742, addressing the issue of class-action waivers. The Court of Appeals, Pooler, Circuit Judge, 667 F.3d 204, again reversed the district court and remanded with instructions, and reconsideration en banc was denied, 681 F.3d 139. Certiorari was granted.

L.Ed.2d 444, also does not invalidate the instant arbitration agreement. The exception comes from a desire to prevent "prospective waiver of a party's right to pursue statutory remedies," *id.*, at 637, n. 19, 105 S.Ct. 3346; but the fact that it is not worth the expense involved in *proving* a statutory

Opinion

Justice SCALIA delivered the opinion of the Court.

We consider whether a contractual waiver of class arbitration

is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

559 U.S. 1103, 130 S.Ct. 2401, 176 L.Ed.2d 920 (2010). The Court of Appeals stood by its reversal, stating that its earlier ruling did not compel class arbitration. *In re American Express Merchants' Litigation*, 634 F.3d 187, 200 (C.A.2 2011). It then *sua sponte* reconsidered its ruling in light of

Justice Scalia's Analysis

Tree Financial Corp.—Ala. v. Randolph, 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant … from effectively vindicating her federal statutory rights"). But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy. See 681 F.3d, at 147 (Jacobs,

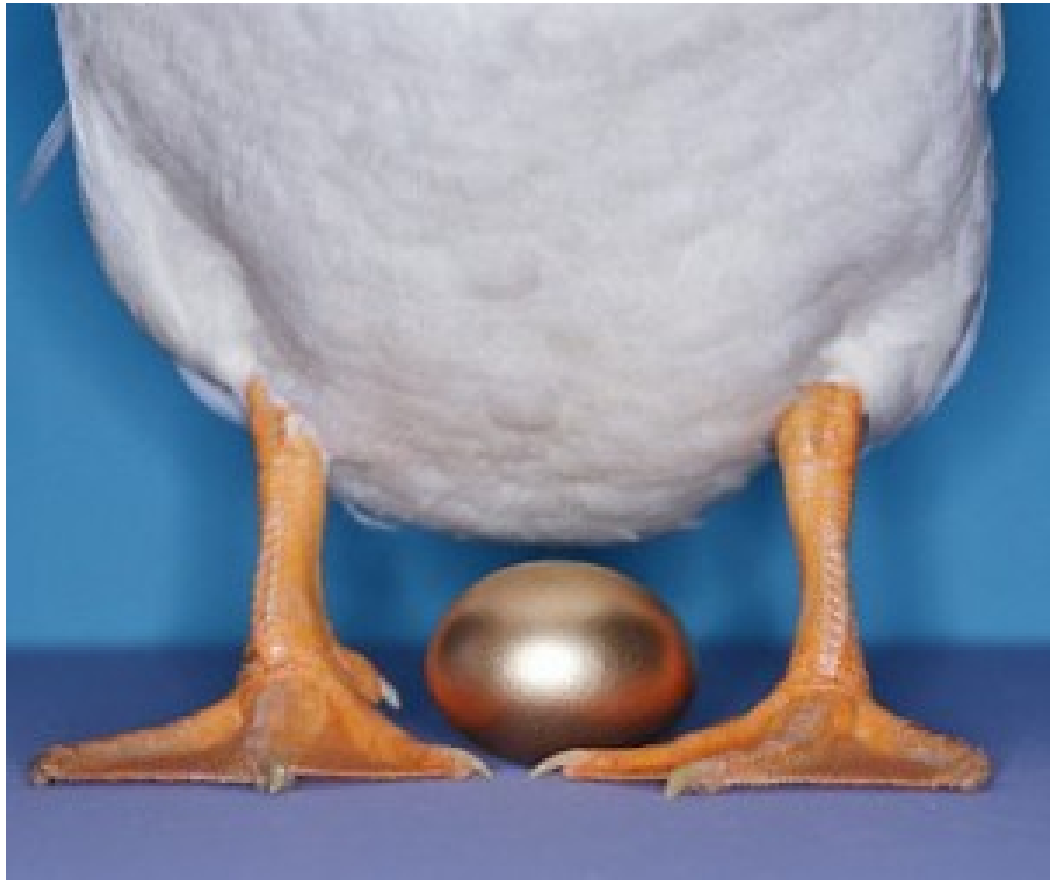
Justice Kagan's Dissent

Justice KAGAN, with whom Justice GINSBURG and Justice BREYER join, dissenting.

Here is the nutshell version of this case, unfortunately obscured in the Court's decision. The owner of a small restaurant (Italian Colors) thinks that American Express (Amex) has used its monopoly power to force merchants to accept a form contract violating the antitrust laws. The restaurateur wants to challenge the allegedly unlawful provision (imposing a tying arrangement), but the same contract's arbitration clause prevents him from doing so. That term imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool's errand. So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.

And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad.

Will Schwab And SCOTUS Ultimately Kill The Goose That Laid The Golden McMahon Egg??



15 US Senators Protest Mandatory Securities Arbitration

Congress of the United States
Washington, DC 20510

April 26, 2013

The Honorable Mary Jo White
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chairman White,

We write to express our strong belief that the Securities and Exchange Commission (the "Commission") should promptly exercise its authority under Section 921 of the Dodd-Frank Wall Street Reform and Consumer Protection Act to prohibit the use of mandatory arbitration provisions in customer service agreements.

We recognize that the Commission is balancing competing demands, and that it must prioritize its recent mandates by Congress. The exigent circumstances at hand, however, require that the Commission exercise its authority under Section 921 of the Dodd-Frank Act and prohibit the use of mandatory arbitration provisions.

Sincerely,

Al Franken
United States Senator

Patrick J. Leahy
United States Senator

[1] Senate Committee on Banking, Housing, and Urban Affairs on S. 3217, S. Rep. No.111-176, at 110.

2

Tom Harkin
United States Senator

Bernard Sanders
United States Senator

Richard Blumenthal
United States Senator

Richard J. Durbin
United States Senator

Sheldon Whitehouse
United States Senator

Jeff Merkley
United States Senator

Consumer Groups Urge SEC Action

May 2, 2013

The Honorable Mary Jo White
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Request for action pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 921, *Authority to restrict mandatory pre-dispute arbitration*

Dear Chairman White:

As you begin your tenure as chairman and deliberate over the pressing issues facing investors, the undersigned organizations urge you to review and exercise the explicit authority to restrict pre-dispute binding mandatory arbitration that Congress granted to the Securities and Exchange Commission (SEC or Commission) in 2010 under Section 921 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[1]

Sincerely,

AARP
Americans for Financial Reform
American Association for Justice
Center for Justice and Democracy
Citizen Works
Consumer Action
Consumer Federation of America
Consumers Union
DC Consumer Rights Coalition
Homeowners Against Deficient Dwellings
National Association of Consumer Advocates
National Association of Shareholder and Consumer Attorneys (NASCAT)
National Consumers League
Public Citizen
U.S. Public Interest Research Group (PIRG)
Workplace Fairness

Cc: Commissioner Elisse B. Walter
Commissioner Luis A. Aguilar
Commissioner Troy A. Paredes
Commissioner Daniel M. Gallagher

Investor Choice Act of 2013

SEC. 3. ARBITRATION AGREEMENTS IN THE SECURITIES EXCHANGE ACT OF 1934

Section 15(o) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(o)) is amended to read as follows:

> (o) **LIMITATIONS ON PRE-DISPUTE AGREEMENTS.—**
>
> Notwithstanding any other provision of law, it shall be unlawful for any broker, dealer, funding portal, or municipal securities dealer to enter into, modify, or extend an agreement with customers or clients of such entity with respect to a future dispute between the parties to such agreement that —
>
> (1) mandates arbitration for such dispute;
>
> (2) restricts, limits, or conditions the ability of a customer or client of such entity to select or designate a forum for resolution of such dispute; or
>
> (3) restricts, limits, or conditions the ability of a customer or client to pursue a claim relating to such dispute in an individual or representative capacity or on a class action or consolidated basis.

Forum Selection and “Choice” of Law Provisions In Oregon

The Good Old Days

Forum Selection Clauses Were Void.

State ex rel Kahn v. Tazwell, 125 Or 528 (1928)

Invalidated Clause In Insurance Contract For Venue in Germany

The Camel’s Nose Under The Tazwell Tent: The “Unfair or Unreasonable" Standard

Reeves v. Chem Indus. Co., 262 Or. 95 101, 495 P.2d 729, 731 (1972)

A forum selection provision is not void per se, but "will not be enforced if it is determined to be unfair or unreasonable."

But the standard was liberally applied. Included were contracts of adhesion and forums that were seriously inconvenient.

The Colonial Leasing Cases

- *Colonial Leasing v Best 552 F. Supp. 605 (D. Or. 1982)* - Oregon corp leased tools to mechanic in St. Louis with an Oregon COL provision. Sued him in Oregon for breach of lease. Not bargained for, adhesion contract –unfair and unreasonable.
- *Colonial Leasing Co. of New England, Inc. v. Pugh Bros. Garage*, 735 F.2d 380, 382 (9th Cir. 1984) 3 consolidated cases involving the same Oregon forum selection clauses. Defendant mechanics leased at their shops in Georgia, Nevada, and Missouri Judge Solomon dismissed them all, and the 9th affirmed. No bargaining, form contract, and take it or leave it.
- *Colonial Leasing v McIlroy*, 94 Or App 273 (1988) Chiropractor in Tx leased a computer from plaintiff. Same Oregon choice of forum clause. Oregon Ct App Held: Valid. Why? because the general counsel of Colonial testified that the provision was negotiable and when people asked Colonial to remove it, they sometimes did. So, it was not take it or leave it. Query: was it the fact difference, or the different court that resulted in the new outcome.

Black v. Arizala, 337 Or 250 (2004)

Black Facts

- Ps invested in a Puerto Rico LP
- LP Agreement provided for Del law and binding arbitration in P.R. for all claims *arising from the LP agreement*
- *Ps sued in Multnomah County and Ds moved to dismiss*
- *Parties agreed that Del law governed!*
- *Judge Nely Johnson Granted MTD, and case went to Oregon Supreme Court*

Black's Holding

- Ct. applied *Del law*, so it is of limited value in cases where Oregon law applies
- Del courts give great deference to arbitration provisions, but since they are creatures of contract, have to apply the contractual terms
- Based on Del case law, court concluded that the securities and RICO claims were not based on the limited partnership agreement that had the provision, because the allegations of misrepresentation occurred before the parties entered into the LP agreement
- Thus, provision didn't require plaintiffs to file in Puerto Rico
- Would result be same applying Oregon law? Was Puerto Rico unfair or unreasonable venue? What effect would *Reeves*, *Colonial Leasing* cases have? What about *Conception*?

Two Multnomah County Cases Of Note

Amerivest v. Malouf, No. 0802-01987 (now in the court of appeals on other issues)

Evans v. Master, No. 1306-08417

Amerivest Enforces Forum Selection Clause

- Sale of life settlement contracts, which may be securities.
- Forum selection clause between plaintiff and defendant for Clark County, Nevada. Plaintiff was a Colorado corp, and 9 of 10 defendants were not Oregon.
- Plaintiffs, represented by Milo Petranovich and Tanya Urbach, made good arguments under the *Colonial* cases, *Black, and Reeves*.
- Judge Kantor applied the law and granted the motion and dismissed the claims vs defendant Malouf. Rest of claims stayed in Multnomah County
- Enforcing clauses in multi party cases can result in splitting the cases and risk of possibly inconsistent results.

Evans v. Master

- Misrep and omissions case based on Ch. 59
- 16 plaintiffs, 13 in Oregon, 6 defendants, all Oregon but NYC law firm that participated in the offering, as we allege; and sales in Oregon.
- Para 14 of the subscription agreement provided that all disputes were to be litigated in NYC applying Delaware law.
- All defendants moved to dismiss last Fall and force plaintiffs to re-file in NY.
- Judge Leslie Roberts issued a 12 page opinion in November
- Result?

Evans "Choice" of Law Ruling

- Judge Roberts denied the application of Delaware law. Held that ORS 15.350 governs, which says that choice of law clauses can be valid, but must be express and conspicuous, and this provision was not conspicuous. So, Or law applies.
- Query: What does express mean? Explain all ramifications? Here, they were important differences.
- Query: Can Investors Waive Protections of Ch. 59?

Evans Forum Selection Ruling

- Granted in part the motion to dismiss w/ leave to refile in NY. The contract requiring Oregon investors to litigate part of their claims in NYC was not unreasonable or unfair.
- Judge Roberts relied on *Best v. US National Bank*, 303 OR 557 (1987), where court found NSF charges not unconscionable in part because plaintiffs were not forced to have accounts at US Bank and could have gone elsewhere. Plaintiffs d/n have to make the investment.
- If these were small consumer claims, it might be unreasonable to go to NY, but since the investments were in the hundreds of thousands of dollars, it wasn't.
- Note that all plaintiffs were unaware of the para 14 provision in the subscription agreement.

Evans, continued

- J. Roberts also denied the motion of defendants who were not parties to the subscription agreements. So, the claims vs. the NY law firm and the investment manager stay in Oregon, as well as claims for those plaintiffs where there was no proof that they signed the agreements.
- RESULT: all plaintiffs have some claims in Oregon; some plaintiffs have to proceed vs. some Ds in NY and others in Oregon on the same investment. Almost inevitable consequence if a court is going to enforce these agreements in multi-party cases.
- Note to judges: these decisions give lawyers a headache!

Attention Transactional Lawyers: Using Registration Statements and Proxy Statements to Amend Bylaws to Require Arbitration.

In 2012, Carlyle Group LP amended an SEC registration statement for an initial public offering of its LP units to disclose that the Carlyle partnership agreement would require investors to arbitrate all disputes with the LP, including federal securities claims. It also would prohibit consolidated claims, and the proceedings, including any awards, were confidential. SEC was not happy, some members of Congress wrote letters and Carlyle dropped it.

Pfizer, Gannett, Google, and Frontier Communications have all filed shareholder proxy statements seeking to amend bylaws to require that all shareholder cases be subject to arbitration, and prohibiting class treatment, on grounds that such cases are expensive and harmful to the companies. See e.g. http://www.sec.gov/Archives/edgar/data/20520/000093041312001787/c68718_def14a.htm#c68718_stockholder2. The SEC issued no action letters stating that such provisions might violate federal securities laws, and the proxys died before a vote. We have not seen the end of this.

Parting Thoughts: Democracy and Equal Justice

- If parties with power can craft **arbitration, COL and venue provisions** to make pursuing claims "a fool's errand," they can immunize themselves from the prohibitions enacted by the legislatures.
- If **forum selection clauses** are enforced, Oregon courts will not only **not** decide Oregon disputes between investors and broker-dealers, but will also **not** decide many other disputes that are governed by Oregon securities laws. Who should decide questions of Oregon law?
- If **"choice" of law** provisions are enforced, Oregon investors will unknowingly waive their rights under the Oregon Securities Laws, a remedial statutory scheme that is to be interpreted to provide the greatest possible protection to investors. Is that what the legislature intended when it passed those laws?