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# Fraudulent Advertising: The Right of a Public Attorney to Seek Restitution for Consumers

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# Fraudulent Advertising: The Right Of A Public Attorney To Seek Restitution For Consumers

*The power of a public attorney to seek relief for consumers has expanded rapidly in recent years. This comment examines the standing of a public attorney to seek restitution for defrauded private parties in conjunction with an action to enjoin fraudulent advertising. The standing issue is first analyzed in a discussion of recent judicial decisions. The author then examines the legislative intent behind A.B. 1763, a 1972 amendment to the California Business and Professions Code, which, the author concludes, gives the public attorney standing to seek restitution for victims of fraudulent advertising.*

Consumer fraud is an area of increasing public concern.<sup>1</sup> This comment deals with one aspect of consumer fraud—fraudulent advertising—and with the most recent attempt of the California Legislature to deal with the problem.<sup>2</sup> By amending California Business and Professions Code Section 17535, the Legislature has provided that courts may order restitution to “any person in interest.”<sup>3</sup> This supplements an existing provision permitting the Attorney General to bring actions for injunction.<sup>4</sup> The problem with this enactment is that it leaves unclear whether the Attorney General or others may seek restitution for private persons in conjunction with their injunctive actions. To resolve this ambiguity it is necessary to explore the judicial background, available indicia of legislative intent, and analogous federal law.

## *Judicial Background*

Discussion of the judicial attitude toward this problem is uniquely

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1. *Vasquez v. Superior Court*, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

2. A.B. 1763, CAL. STATS. 1972, c. 244. Section 1 of the bill is particularly relevant and, in addition to previously held injunctive powers, courts of competent jurisdiction are given the power to “. . . make such orders or judgments, including the appointment of a receiver, as . . . may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.”

3. *Id.*

4. CAL. BUS. & PROF. CODE §17535.

aided by a case currently before the Supreme Court of California which epitomizes the problem encountered in an attempt by the State Attorney General to seek restitution on behalf of private citizens. This case, *People v. Superior Court of Los Angeles County*<sup>5</sup> (hereinafter *Jayhill*—the real party in interest), will soon be determined as to the parties involved. However, because A.B. 1763 was enacted after this case was filed, for parties with subsequent factually identical actions the law will remain unsettled.

The problem in the *Jayhill* case centers on the powers of the Attorney General to sue for injunctive relief and, in the same action, to seek restitution for nonparty victims of fraudulent advertising. The *Jayhill* facts, substituting a hypothetical Mr. C. for the victims in the case, are illustrated as follows: Assume that Mr. C., enjoying an evening at home with his family, was confronted at his door by a gentlemen representing himself as an employee of a national firm which had selected Mr. C.'s family as an evaluation unit for their product. Relying upon the representative's promises that the product was being placed in his home for only a small service charge,<sup>6</sup> that the company would monitor and rectify all the future school problems of his children,<sup>7</sup> and other promises,<sup>8</sup> Mr. C. found himself the owner of a new set of encyclopedias. The fact that these assertions were false did not immediately affect Mr. C., since he did not know of their falsity and, indeed, could not become aware of it for years in the case of several of the promises.<sup>9</sup>

Although Mr. C. would have a remedy at law for rescission, in the majority of such cases the remedy would prove inadequate for reasons discussed later in this comment.<sup>10</sup> In the *Jayhill* case, the Office of the State Attorney General filed a complaint against the company in Los Angeles superior court upon a receipt of numerous reports of such fraudulent advertising. In the prayer, the Attorney General requested that the court order the defendant to offer restitution to the several

5. 23 Cal. App. 3d 128, 100 Cal. Rptr. 38 (1972).

6. Attorney General's Brief for Petition for Hearing, submitted before the Supreme Court of California. On file, California State Law Library, Sacramento, California [hereinafter cited as Attorney General's *Jayhill* Brief].

7. *Id.*

8. *Id.*

9. *Id.*

10. A person "who has been induced by fraudulent misrepresentation to enter into a contract . . . may have the contract . . . set aside and secure a restitution of those benefits lost to him by the transaction." *Seeger v. Odell*, 18 Cal. 2d 409, 414, 115 P.2d 977, 980 (1941); "A party to a contract may rescind the same . . . [i]f the consent of the party rescinding or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence . . ." CAL. CIV. CODE §1689. See notes 74-83 and accompanying text *infra* for a discussion of why this remedy often proves inadequate.

thousand defrauded individuals.<sup>11</sup> The trial court sustained a demurrer to the complaint.<sup>12</sup> Upon appeal, the Court of Appeal, Second District, affirmed the lower court ruling that the Attorney General had no power to seek restitution for nonparty individuals since he had not himself been harmed and thus did not have standing to bring such an action. A hearing before the California Supreme Court was granted on April 19, 1972.

### *The Right of the Attorney General to Seek Injunctive Relief*

In addressing the issue of the standing of the Attorney General to sue for injunction on behalf of private parties, California courts identify two bases under which standing can be acquired: (1) the common law powers of the Attorney General, or (2) an express statutory provision.<sup>13</sup>

It is generally agreed that under his common law powers, the Attorney General has standing to seek injunctions against persons in violation of the laws of the state if a public right or interest is involved. For example, in *People v. Centr-O-Mart*, the California Supreme Court held that the Attorney General has broad common law powers to take action and seek adequate relief in order to protect public rights and interests.<sup>14</sup> Quoting from *Pierce v. Superior Court*,<sup>15</sup> the court held that

the Attorney General, as the chief law officer of the state, had broad powers derived from the common law, and, in the absence of any legislative restriction, has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the law of the state, the preservation of order, and the protection of the public rights and interests.<sup>16</sup>

Similarly, in *People ex rel. Lynch v. San Diego Unified School District*, the Court of Appeal, Fourth District, directed the school district to "exercise its discretion to take reasonably feasible steps to prevent, alleviate, and eliminate racial imbalance."<sup>17</sup> Overruling a demurrer alleging lack of standing on the part of the Attorney General, the court stated that in the absence of legislative restriction the Attorney Gen-

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11. *People v. Superior Court*, County of Los Angeles, 23 Cal. App. 3d 128, 100 Cal. Rptr. 38 (1972).

12. Following the sustaining of the demurrer, the people petitioned for a writ of mandate. An alternative writ was issued. The writ was discharged upon appeal.

13. *People v. Oakland Water Front Co.*, 118 Cal. 234, 240, 50 P. 305, 306 (1897).

14. 34 Cal. 2d 702, 214 P.2d 378 (1950).

15. 1 Cal. 2d 759, 37 P.2d 453 (1934).

16. 34 Cal. 2d 702, 704, 214 P.2d 378, 379 (1950).

17. 19 Cal. App. 3d 252, 257, 96 Cal. Rptr. 658, 660 (1971); *cert. denied*, 405 U.S. 1016 (1972).

eral was free to bring such an action when necessary for the protection of public rights and interests.<sup>18</sup>

In addition to the aforementioned common law powers, there are specific statutory provisions which permit injunctive actions to be brought by the Attorney General. In the *Jayhill* case, and in any case involving false advertising, these provisions are found in California Civil Code, Section 3369, which provides that

any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction<sup>19</sup> . . . . Actions for injunction under this section may be prosecuted by the Attorney General . . . in the name of the people of the State of California.<sup>20</sup>

The California Business and Professions Code, Section 17535, contains the same basic provisions.<sup>21</sup>

On the other hand, there are certain statutes which impose a limitation upon the right of any plaintiff to bring an action. The California Code of Civil Procedure, Section 367, provides in part, "[e]very action must be prosecuted in the name of the real party in interest. . . ."<sup>22</sup> Sections 22, 26, and 30 also restrict the power of one attempting to bring suit on behalf of another.<sup>23</sup> In general, these sections hold that an action consists of a primary right coupled with a corresponding duty. When this duty is breached a remedial right arises in favor of the plaintiff and a remedial duty arises in the defendant. The right to pursue the remedy is owned by the person to whom the obligation is owed and to no other person.<sup>24</sup> "[A]n action is nothing else than the right or power of prosecuting *what is owed to one*—which is but to say an *obligation*," as stated by the supreme court in *Frost v. Witter*.<sup>25</sup> Therefore, the courts which have held that the Attorney General was not a real party in interest within the meaning of the statutes have done so on the ground that the Attorney General had sustained no damage and no public rights and interest were

18. *Id.*

19. CAL. CIV. CODE §3369, para. 2.

20. CAL. CIV. CODE §3369, para. 5.

21. See note 51 and accompanying text *infra*.

22. CAL. CODE CIV. PROC. §367, relating to parties to civil actions.

23. CAL. CODE CIV. PROC. §22: An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

§26: An obligation is a legal duty, by which one person is bound to do or not to do a certain thing, and arises from (1) contract, or (2) operation of law.

§30: A civil action is prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong.

24. *Hurt v. Haering*, 190 Cal. 198, 211 P. 228 (1922); *McKee v. Dodd*, 152 Cal. 637, 93 P. 854 (1908).

25. 132 Cal. 421, 426, 64 P. 705, 707 (1901); see also *Orloff v. Los Angeles Turf Club*, 36 Cal. 2d 734, 227 P.2d 449 (1951).

involved. The Supreme Court of California in *People v. Pacheco*, stated that “[a] private person has not the right or power to use . . . the name of the people for the purpose of obtaining redress for private wrongs.”<sup>26</sup> In *People v. Oakland Water Front Company*, the supreme court held that the Attorney General’s right to initiate actions on behalf of the state was limited to those situations in which the rights and interests of the state are “directly” involved.<sup>27</sup> Some appellate courts have similarly required that the interest of the state in such cases be “primary and direct,”<sup>28</sup> or “present, direct, and immediate.”<sup>29</sup> Examples of “direct” interests include the state’s interest in regulation and stabilization of certain industries,<sup>30</sup> abatement of a public nuisance,<sup>31</sup> and monitoring and regulation of election procedures.<sup>32</sup> However, no definite criteria appear to have been developed and each case is determined on its own merits.

### *The Right of the Attorney General to Seek Restitution*

In addition to seeking an injunction in the *Jayhill* case, the Attorney General is further asking the court to order that restitution be offered to the private victims of the fraud. Such a request raises two main issues: the standing of the Attorney General to actively seek restitution on behalf of nonparties in his injunctive action and the general equity power of the court to order restitution once equity jurisdiction is properly invoked.

While conceding that, in certain cases, the Attorney General has standing to seek injunction on behalf of private parties, the *Jayhill* Corporation urges that neither the common law nor the statutory powers of the Attorney General are appropriate when an order of restitution is sought with the injunction. It is argued that the Attorney General is not a party to the contract,<sup>33</sup> that no public rights or interests are involved, and that, under these circumstances, he could not meet the requirements of a real party in interest under the Code of Civil Procedure, Section 367. In support of this argument the *Jayhill* Corporation cited the cases and statutory material previously discussed.<sup>34</sup>

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26. 29 Cal. 210, 213 (1865).

27. 118 Cal. 234, 240, 50 P. 305, 306 (1897).

28. *People v. San Diego*, 71 Cal. App. 421, 433, 236 P. 377, 381 (1925).

29. *People v. Brophy*, 49 Cal. App. 2d 15, 34, 120 P.2d 946, 957 (1942).

30. *Jersey Maid Milk Products Co. v. Brock*, 13 Cal. 2d 661, 91 P.2d 599 (1939).

31. *People v. Lim*, 18 Cal. 2d 872, 118 P.2d 472 (1941).

32. *Pierce v. Superior Court*, 1 Cal. 2d 759, 37 P.2d 453 (1934).

33. CAL. CIV. CODE §1692.

34. *Jayhill Corporation*, Brief In Answer to Petition for Hearing, submitted before the Supreme Court of California. On file, California State Law Library, Sacramento, California [hereinafter cited as *Jayhill Corp.*, *Jayhill* Brief].

The Attorney General contends that he has standing to sue for restitution under *both* his broad common law powers and under the specific statutory enactments granting him power to seek an injunction.<sup>35</sup>

The apparent strength of the Attorney General's argument lies in his contention that the true issue is not whether a public attorney has the proper standing to sue for restitution on behalf of nonparty individuals but whether, once equity jurisdiction has been properly invoked in the injunctive action, the court may render a decree which will afford full justice. This would necessarily include restitution to the defrauded individuals, otherwise, "the guilty party keeps his gains and is merely ordered not to defraud people in the same way again."<sup>36</sup>

A court of equity has broad discretion to determine the nature and scope of allowable relief.<sup>37</sup> This is true whether a fraudulent advertiser is enjoined in an action brought pursuant to a relevant statute or pursuant to the common law powers of the Attorney General. The Court of Appeal, First District, in *Roman v. Ries*, stated "[e]quity . . . will adjust itself to those situations where right and justice would be defeated but for its intervention."<sup>38</sup> There is considerable additional state<sup>39</sup> and federal<sup>40</sup> authority in support of this position.

Perhaps through an oversight, but more likely due to the surfeit of authority concerning the inherent power of the equity court, the Jayhill Corporation declined to counter on this point and merely reiterated its position that the only party that may properly bring such an action for restitution is the one directly harmed and that person is not the Attorney General. The appellate court also ignored this aspect and concentrated its efforts, instead, on an analysis of the standing problem.

The argument by the Attorney General that he has standing and is a proper party to initiate a suit and seek restitution would appear to stand or fall upon a finding of whether the rights involved are purely private or involve public rights and interests which the Attorney General might properly deem to be within his power to assert and protect.

It is submitted that public interests are involved. The state has a clear and compelling interest in eliminating fraudulent advertising and

35. Attorney General's *Jayhill* Brief.

36. CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 21 (1965).

37. A court of equity has full power "to do complete rather than truncated justice." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

38. 259 Cal. App. 2d 65, 70, 66 Cal. Rptr. 120, 123 (1968).

39. *People ex rel. Mosk v. National Research Co. of California*, 201 Cal. App. 2d 765, 20 Cal. Rptr. 516 (1962); *Holibough v. Stokes*, 192 Cal. App. 2d 564, 13 Cal. Rptr. 528 (1961).

40. "The essence of equity jurisdiction has been the power of the chancellor to do equity and to mold each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321 (1944); "A court of equity ought to do justice completely, and not by halves." *Camp v. Boyd*, 229 U.S. 530 (1913).

in assisting the unfortunate consumer to regain whatever he has lost as a result of the fraud.<sup>41</sup> Public policy demands that the consumer be afforded relief where evidence of fraud is clearly shown. As stated in *Vasquez v. Superior Court*:<sup>42</sup> "Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society."<sup>43</sup> In many cases it is impractical for the individual to bring suit on his own behalf due to the fact that he may not be aware of legal forms of assistance or his claim may be too small to justify litigation.<sup>44</sup>

The judicial background to A.B. 1763 as illustrated by the arguments presented in *Jayhill* demonstrates the primary concern over whether a particular interest is public or private. However, as indicated above, standing may be granted by a specific statute which makes a binding determination that certain activities do affect a direct public interest and which also specifies appropriate remedies. The ultimate question at issue in this comment is whether A.B. 1763 was intended to constitute such a specific statute. For, regardless of how *Jayhill* is decided, the impact of the new statute is uncertain.

### *The Impact of A.B. 1763*

#### *A. Legislative Intent*

Before any attempt can be made to determine the probable effect of Business and Professions Code, Section 17535, as amended by A.B. 1763, it will be necessary to ascertain the legislative intent in passing the amendment.<sup>45</sup> Traditionally, this is accomplished by first considering the statute on its face,<sup>46</sup> followed by evidence of intent gained from extrinsic evidence such as statements of the proponents of the bill,<sup>47</sup> and lastly, by a consideration of public policy.<sup>48</sup>

Looking at the wording of the document, there appear to be ambiguities which present the possibility of future conflict and disagreement. Its thrust is not so obvious nor its terms so clear that resort to

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41. See notes 84-86 and accompanying text *infra*.

42. 4 Cal. 3d 800, 94 Cal. Rptr. 796 (1971).

43. *Id.* at 808, 94 Cal. Rptr. at 800.

44. See notes 74-81 and accompanying text *infra*.

45. In the interpretation of statutes, the legislative will is the all important or controlling factor. *United States v. N.E. Rosenblum Truck Lines*, 315 U.S. 50 (1942).

46. "When the language and meaning of a statute is clear and certain, there is no room for the application of the rules of construction." *Bodinson Mfg. Co. v. Cal. Employment Commission*, 101 P.2d 165, 172 (1940); *aff'd*, 17 Cal. 2d 321, 109 P.2d 935 (1941).

47. In interpretation of a statute of doubtful meaning, it is proper to take into consideration its purpose. *Jardine v. Superior Court*, 213 Cal. 301, 2 P.2d 756 (1931).

48. When interpreting statutes, courts may consider the general policy of the law and this is proper where the statute in question is a part of other legislation designed as a whole to establish an express state policy. 50 AM. JUR. *Statutes* §299 (1944).



interpretation and construction will be rendered unnecessary.<sup>49</sup> Paragraph 1 of Section 1 of the amended statute empowers “. . . any court of competent jurisdiction . . . [to] make such orders or judgments . . . which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practices in this chapter declared to be unlawful.”<sup>50</sup> [emphasis added]. Paragraph 2 of the same section states “[a]ctions for *injunctions* under this section may be prosecuted by the *Attorney General* or any district attorney . . .”<sup>51</sup> [emphasis added]. It should be noted that S.B. 912 extends this power to city attorneys, city prosecutors, and county counsels.<sup>52</sup>

The result is that the Attorney General, or any other enumerated public attorney, is authorized to invoke the equity power of the court in an injunctive suit. Once this is accomplished, may the public attorney actively seek the restitution that this law places within the power of the court to grant? The amendment, on its face, does not resolve this question. For this reason, resort to extrinsic evidence is both necessary and proper.

By literal construction of the statute, an argument can be made that the Legislature, by specifically empowering the Attorney General to seek injunctions against false advertisers and declining to specifically grant him restitutory powers, intended him not to have the latter power. The statute empowers the court to grant restitution to any person in interest.<sup>53</sup> Arguably, this could include the Attorney General or other appropriate public attorneys if the rights and interests involved are considered public as well as private.<sup>54</sup> In any event, any conclusions drawn from a consideration of this doctrine may not be determinative upon the ultimate conclusion since, like other rules of construction, a literal approach gives way when it would operate contrary to the legislative intent to which it is subordinate or where its application would nullify the essence of the statute.<sup>55</sup>

Additional evidence of legislative intent can be deduced from the presence of certain other statutes<sup>56</sup> concerned with fraudulent advertising and by a consideration of three other bills passed in conjunction

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49. See notes 50-51 and accompanying text *infra*.

50. A.B. 1763, CAL. STATS. 1972 c. 244.

51. *Id.*

52. S.B. 912, CAL. STATS. 1972, c. 711.

53. A.B. 1763, CAL. STATS. 1972, c. 244.

54. See notes 14-18 and accompanying text *supra*.

55. “Once the intention of the legislature is ascertained it will be given effect even though it may not be consistent with the strict letter of the statute.” *People v. Black*, 45 Cal. App. 2d 87, 94, 113 P.2d 746, 750 (1941), *appeal dismissed*, 315 U.S. 782 (1941); *Crawford v. Payne*, 12 Cal. App. 2d 485, 55 P.2d 1240 (1936); *see also In re Sekeguchi*, 123 Cal. App. 537, 11 P.2d 655 (1932).

56. See note 48 *supra*; see notes 57-59 and accompanying text *infra*.

with A.B. 1763.<sup>57</sup> Business and Professions Code Sections 17534<sup>58</sup> and 17536,<sup>59</sup> already in force for a number of years, include penal and civil sanctions for use against fraudulent advertisers. Section 17536, in particular, was added due to the previous ineffectiveness of the existing code sections in dealing with the problem.<sup>60</sup> This would appear to establish a legislative trend, of which A.B. 1763 would be a part, toward more effective control of, and stiffer punishment for, conscious defrauders. Also, it can be shown that A.B. 1763 was part of a "package"<sup>61</sup> which broadened the scope of a public attorney's authority and power in regard to prosecuting violators of Chapter 1 (Business and Professions Code, Section 17500 *et seq.*).<sup>62</sup> The other bills are free of ambiguity and were obviously intended to improve the public attorney's position vis-a-vis false advertisers.<sup>63</sup> Assuming that there was no other evidence available to determine the intent of the Legislature, it seems logical to infer from an examination of the bills in the "package," three of which unequivocally improve the position of one attempting to gain redress for losses to a fraudulent advertiser, that the fourth bill, while not as clear, is also intended to improve the position of the victimized consumer.

The above indicators are far from conclusive and it is probable that the true intent of the Legislature cannot be established to any satisfactory degree by mere examination of the statute and other legislation concerned with false advertising. This being the case, it is proper, as stated earlier, to resort to further extrinsic evidence in an attempt to shed additional light on the ambiguous feature of the enactment.<sup>64</sup>

This amendment was proposed by the Office of the State Attorney General and various district attorney consumer fraud units throughout

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57. S.B. 912, CAL. STATS. 1972, c. 711, A.B. 1264, CAL. STATS. 1972, c. 1105, A.B. 1267, CAL. STATS. 1972, c. 823.

58. CAL. BUS. & PROF. CODE §17534, CAL. STATS. 1941, c. 63, at 727.

59. CAL. BUS. & PROF. CODE §17536, CAL. STATS. 1965, c. 827, at 2419.

60. CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 21 (1965).

61. Each of the bills contain cross references to one of the other bills: A.B. 1763, A.B. 1264, and A.B. 1267 refer to S.B. 912. S.B. 912 refers to A.B. 1763. The effectiveness of the various provisions in each bill depends upon the sequence in which the bills are chaptered. Three make changes to either Section 17535 or 17536 of the Business and Professions Code. A.B. 1267 amends Code of Civil Procedure §338 but refers directly to Business and Professions Code §17536.

62. The chapter establishes what conduct will be considered unlawful in the field of advertising.

63. S.B. 192 extends the power to bring actions against fraudulent advertisers to city attorneys, city prosecutors, and county counsels. A.B. 1264 deletes the exemption earlier in effect regarding false advertising in the area of real estate. A.B. 1267 extends the statute of limitations to three years for an action brought by the enumerated public attorneys for civil damages for fraudulent advertising.

64. 50 AM. JUR. *Statutes* §§214, 228 (1944).

the state.<sup>65</sup> The purpose in proposing the bill was to clarify the power of the public attorneys to seek restitution on behalf of victims of false advertising.<sup>66</sup> The motive of the proponents was twofold: the victim's remedy at law was usually inadequate<sup>67</sup> and a bill of this type was required to give the Attorney General added leverage against false advertisers in order to insure proper redress and to provide an additional deterrent to this conduct.<sup>68</sup>

While this evidence provides an insight into the intentions and motives of the proposing agency, it does not provide the public or the courts with any true measure of the legislative intent itself. Perhaps the most enlightening extrinsic evidence of this intent is to be gleaned from testimony taken at the California Assembly Judiciary Committee hearing during which the bill was first considered. Although there is no written record of the hearing, there is testimony available as to the proceedings.<sup>69</sup> The committee noted that in the past many courts have been reluctant to punish perpetrators of consumer crime.<sup>70</sup> The subsequent approval of the bill by the committee would appear to be strong evidence of the Legislature's intent that the courts should no longer consider themselves constrained when dealing with the fraudulent advertiser.<sup>71</sup> It is submitted that it was the intent of the Legislature then and now that the equity court have and use its power to order restitution to nonparty individuals in an injunctive action brought by the Attorney General or other public attorney.<sup>72</sup> Considerations of public policy were undertaken by the committee and were a major motivating force behind favorable recommendation of the bill.<sup>73</sup>

### B. *Public Policy*

In view of the above indications regarding the legislative intent, there is good reason to believe that at the time of the first litigation involving A.B. 1763 the statute will be construed to allow public attorneys to seek restitution on behalf of defrauded consumers. When

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65. Telephone interview with Peter Demauero, Deputy Attorney General, State of California, Sacramento, California, Oct. 5, 1972 [hereinafter cited as *Demauero*].

66. *Demauero*.

67. See notes 74-83 and accompanying text *infra*.

68. *Demauero*.

69. Telephone interview with Hal Eisenberg, Committee Consultant, Assembly Judiciary Committee, Sacramento, California, Oct. 27, 1972 [hereinafter cited as *Eisenberg*].

70. "The conscious defrauder has been, and in many courts still is, treated more tenderly than other wrongdoers; the interests of those who have suffered at his hands have been traditionally only grudgingly protected." Seavey, *Caveat Emptor as of 1960*, 38 TEXAS L. REV. 439, (1960); see note 60 and accompanying text *supra*.

71. *Eisenberg*.

72. *Id.*

73. *Id.*

these indications are supplemented by strong public policy considerations such a conclusion would appear inescapable.

Assuming that the consumer is aware that he has been victimized,<sup>74</sup> there is great doubt whether he would know where to turn for help.<sup>75</sup> While any person may be the unwitting victim of fraud, it is evident that the poor fall prey much more often than the more affluent.<sup>76</sup> Most low income consumers are unaware of the existence of legal aid, small claims courts, or agencies such as the Better Business Bureau and therefore never consider the possibility of initiating legal process for their benefit.<sup>77</sup> One surveyor of low income consumer problems stated that "when asked directly where they would go for help if they found themselves being cheated by a merchant, some 64 percent said they did not know."<sup>78</sup> In the same survey, "only 3 percent of the families said they would turn to a private lawyer for help."<sup>79</sup>

Regrettably, it is doubtful whether a satisfactory result would be achieved by even that small percentage who seek the services of a private attorney. "Even where a good case exists, the damage to a consumer resulting from a deceptive practice may be so trivial that a lawsuit is not worth the expense."<sup>80</sup> Moreover, experienced operators carefully avoid extracting too large a sum from any one consumer on the theory that no one will undertake the expense of a lawsuit merely to vindicate a principle when such an action will cost him more than his initial loss.<sup>81</sup>

A class action against the defrauder by the injured consumers may not be a workable solution either. There has been a paucity of fully litigated consumer class actions in California due to the extremely complicated, expensive, and lengthy nature of such processes.<sup>82</sup> A statewide organization such as the Attorney General's Office is much better equipped to assess the most effective means for halting wide-

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74. In situations such as *Jayhill* the consumer is unlikely to be aware of the fraud due to the fact that performance is often to be rendered several years after the making of the contract. Attorney General's *Jayhill* Brief.

75. HEW, CONFERENCE ON THE EXTENSION OF LEGAL SERVICES TO THE POOR at 64 (1964).

76. "[T]he evidence is clear that the poor tend to deal with less ethical sellers, encounter defective goods more often, and obviously miss their payments more often." THE LAW AND THE LOW INCOME CONSUMER, 127 (C. Katz ed. 1968).

77. Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967).

78. CONFERENCE, *supra* note 75, at 64.

79. *Id.* at 65.

80. Reed, *Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act*, 2 PAC. L.J. 1, 5 (1971); see also, *Report of National Advisory Commission on Civil Disorder*, 274-275 (Bantam 1968).

81. Note, *Transplanting Sympathy for Deceived Consumers into Effective Programs for protection*, 114 U. PA. L. REV. 395 (1966).

82. Note, *Consumers Class Actions and Costs: An Economic Perspective on Deceptive Advertising*, 18 U.C.L.A. L. REV. 592 (1971).

spread fraudulent practices.<sup>83</sup>

Perhaps the strongest public policy consideration is the obvious interest which the state has in curtailing fraudulent advertising. The results of widespread consumer fraud can have violent and devastating effects upon the entire state.<sup>84</sup> Aside from the more dramatic, but infrequent, violent demonstrations, the web which ensnares most consumers is more pervasive and subtle. As stated in a Department of Health, Education and Welfare conference considering the scope of the problem, “. . . substantial numbers of today’s poor have met with exploitation in the marketplace, have become almost hopelessly entangled in installment debt, and have been faced with the legal penalties stemming from missed payments.”<sup>85</sup> This unfortunate result of consumer fraud was the motivating force behind the wording in *Vasquez v. Superior Court* which declared it to be the policy of the court to protect “unwary consumers” from “unscrupulous sellers.”<sup>86</sup>

*Precedent In Federal Law*

In the *Jayhill* case the Attorney General, by way of analogy, depended heavily for support on federal precedent in the area of restitution. An appreciable amount of this precedent recognizes the right of a public attorney to seek restitution on behalf of defrauded individuals and the power of the equity court to fashion a workable decree.<sup>87</sup> It appears that federal law has accomplished by judicial evolution what California is attempting to establish by the statute A.B. 1763.

Although the Court of Appeal, Second District, ignored this federal authority when rendering the *Jayhill* opinion, it should be noted that the Court of Appeal, Third District, in *People ex rel. Mosk v. National Research Company of California*, stated that federal law in the area of unfair competition is “more than ordinarily persuasive.”<sup>88</sup> The court, considering the meaning of Civil Code, Section 3369, stated, “[w]e refrain from construing the language narrowly in a field where the trend is opposed to unfair trade practices which affect the public interest.”<sup>89</sup>

Both federal and state courts are strongly against limiting the broad

83. Note, *Transplanting Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395 (1966).

84. Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967).

85. CONFERENCE, *supra* note 75, at 61.

86. 4 Cal. 3d 800, 94 Cal. Rptr. 796 (1971).

87. See notes 91-101 and accompanying text *supra*.

88. 201 Cal. App. 2d 765, 773, 20 Cal. Rptr. 516, 522 (1962).

89. *Id.* at 771, 20 Cal. Rptr. at 521.

inherent power of equity courts.<sup>90</sup> In *Walling v. O'Grady*<sup>91</sup> and *McComb v. Frank Scerbo and Sons*,<sup>92</sup> the United States Court of Appeals, Second Circuit, held that an administrator within the United States Department of Labor could bring an injunctive action and request restitution for back wages and overtime wages on behalf of individuals not party to the action. An order requiring these payments was held proper as an ancillary remedy to the primary injunctive relief. In *Mitchell v. DeMario Jewelry*,<sup>93</sup> a case involving the Fair Labor Standards Act of 1938,<sup>94</sup> the United States Supreme Court held that a court of equity has the "implied power to order reimbursement."<sup>95</sup> Indeed, an order of restitution is a well established means of effectuating public policy.<sup>96</sup> In *Securities Exchange Commission v. Golconda Mining Company*, the United States Supreme Court stated that, "[t]he injunction against future violations, while of some deterrent force, is only a partial remedy since it does not correct the consequences of past conduct. . . . One requirement . . . is a basic policy that those who have engaged in proscribed conduct surrendered all profits flowing therefrom."<sup>97</sup> In the same case, the court held that the power of a trial court to formulate effective decrees is not dependent upon the prayer in the complaint but exists independently and is inherent in the very nature of the equity court.<sup>98</sup>

Two recent federal cases involving corporate activity leading to losses by the respective shareholders have further established the right of representatives of the public to seek restitution on behalf of non-party individuals and the power of the court to grant it. In *Securities Exchange Commission v. Texas Gulf Sulphur Company*,<sup>99</sup> corporate directors and others profited by the use of improperly withheld inside information at the expense of corporate shareholders. The trial court required that the defendants make restitution by placing their profits in an account to be distributed to the victims as directed by the court. In *Securities Exchange Commission v. Manor Nursing Centers, Inc.*,<sup>100</sup> the United States Court of Appeals, Second Circuit, ordered the persons profiting from a false and misleading prospectus to "disgorge all

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90. See notes 37-40 and accompanying text *supra*.

91. 146 F.2d 422 (2d Cir. 1944).

92. 177 F.2d 137 (2d Cir. 1949).

93. 361 U.S. 288 (1960).

94. 29 U.S.C. §§201-219 (1970).

95. 361 U.S. 288, 291 n.91 (1960).

96. *Securities Exch. Comm. v. Golconda Mining Co.*, 327 F. Supp. 257 (S.D.N.Y. 1971).

97. *Id.* at 259.

98. *Id.*

99. 446 F.2d 1301 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005 (1971), *rehearing denied*, 404 U.S. 1064 (1972).

100. 458 F.2d 1082 (2d Cir. 1971).

the proceeds received in connection with the public offering of Manor stock . . ." and appointed a trustee to receive the funds and distribute them to the defrauded public investors.<sup>101</sup>

The Jayhill Corporation contended that these federal cases are distinguishable from the facts in *Jayhill*, and are therefore not particularly persuasive. The first ground for distinguishing these cases is that federal courts are not subject to the same procedural statutes as the California courts.<sup>102</sup> It is urged that restitution can be allowed nonparty individuals in order to extend the effectiveness of federal regulatory policies<sup>103</sup> whereas California courts are restricted and may entertain requests for restitution and grant such relief only within the statutory boundaries delineated by the Legislature. This contention is technically valid but fails to recognize that federal courts have often held that to have standing the plaintiff must be able to demonstrate injury to a legally protected interest.<sup>104</sup> This would seem to rebut the implication by the Jayhill Corporation that a federal court might allow any uninterested party to bring suit.

Secondly, it is argued that the federal cases allowing restitution under these circumstances involve complex and broad statutory schemes with comprehensive powers, including rulemaking, vested in the body charged with administering the regulatory scheme.<sup>105</sup> The contention is that the allowance of restitution was required to prevent frustration of the complex statutory schemes whereas this is unnecessary in California in view of the existence of penal and civil penalties provided for in the Business and Professions Code.<sup>106</sup> Considering the scope of the Fair Labor Standards Act of 1938,<sup>107</sup> the Securities Exchange Act of 1934,<sup>108</sup> and the Emergency Price Control Act of 1942,<sup>109</sup> as compared with the code sections under which the Attorney General operates in this case—Civil Code Section 3369 and Business and Professions Code Section 17535—there is little doubt that the latter assume lilliputian proportions when juxtaposed with these Brobdingnagians of the federal system.

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101. *Id.* at 1103.

102. CAL. CODE CIV. PROC. §367; CAL. CIV. CODE §1692.

103. See Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 363 (1964).

104. *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938); *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118 (1937).

105. *Jayhill Corp.*, *Jayhill* Brief.

106. CAL. BUS. & PROF. CODE §17536 provides for a \$2500 civil penalty for each violation of the Code regarding advertising. CAL. BUS. & PROF. CODE §17534 provides that any violation of Chapter 1 of Div. 7, Part 3 of that code shall be a misdemeanor.

107. 29 U.S.C. §§201-219 (1970).

108. 15 U.S.C. §§77b-77e, 77j, 77k, 77m, 77o, 77s, 78a-78o, 78o-3, 78p-78hh (1970).

109. 50 U.S.C. §1911 (1970).

While the counter-arguments succeed in airing the differences between the federal statutes and the relevant California Code sections regarding size, they cannot deny the persuasiveness of the federal precedent. Size alone cannot be considered an adequate criterion for distinction. It is submitted that the federal precedent strongly supports the view that public attorneys have the standing to request, and equity courts have the power to grant, restitution on behalf of defrauded individuals even without statutory reinforcement. When this federal precedent is considered by analogy as expressing public policy at the federal level, its effect on the interpretation of A.B. 1763 should be significantly persuasive.

### *Conclusion*

There are strong indications that the Legislature intended A.B. 1763 to permit public attorneys to seek restitution concurrently with injunctive actions. Compelling public policy considerations demand relief of this nature. Federal law has evolved to this point already. It is submitted that A.B. 1763 both determines that the withholding of wrongfully gained profits by a fraudulent advertiser is a matter of public interest and provides the remedy—restitution—to be sought by public attorneys on behalf of the victims.

*William R. Elliott, Jr.*