

THE PEOPLE ex rel. WILLIAM P. WOOD, as Commissioner of Corporations, etc., Plaintiff and Respondent, v. INNOVATIVE FINANCIAL SERVICES, INC. et al., Defendants and Appellants.

D045555

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

2006 Cal. App. Unpub. LEXIS 1439

February 17, 2006, Filed

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PRIOR HISTORY: APPEAL from a judgment of the Superior Court of San Diego County, No. GIC 785226. Ronald S. Prager, Judge.

DISPOSITION: Affirmed.

JUDGES: O'ROURKE, J.; BENKE, Acting P.J., NARES, J. concurred.

OPINIONBY: O'ROURKE

OPINION:

The People of the State of California by and through the Commissioner of Corporations, brought a civil enforcement action against Robert L. Shearburn (Shearburn) and his son, Robert N. Shearburn (Bobby) n1 alleging they violated California's securities laws from 1998 until some unidentified date, by selling viatical settlement contracts n2 without having them qualified as securities, without obtaining the proper license, and by means of untrue statements or omission of material facts. (Corp. Code, § § 25110, 25210, 25401.) n3 The court, sitting without a jury, concluded the viatical settlements [*2] were regulated securities at all relevant times, found true the allegations, and imposed fines on both defendants under sections 25530 and 25535.

n1 We refer to Robert L. and Bobby collectively as the Shearburns.

n2 A viatical settlement contract is an agreement between a person owning a life insurance policy on a person with a catastrophic or life-threatening illness, and another person. Under the agreement, the policy owner receives value that is less than the death benefits of the policy in return for assigning or transferring the policy or its death benefits. (§ 25023(a); Ins. Code, § 10113.1(a)(1).)

n3 All statutory references are to the Corporations Code unless otherwise stated.

The Shearburns contend: (1) California did not regulate the sale of viatical settlements as securities during the relevant times; (2) they lacked the scienter requirement to be found liable under sections 25110, 25210, and 25401; (3) they were improperly found liable for violating section 25210 [*3] because the Commissioner did not include that section in his demand for relief; and (4) the court's disgorgement/restoration order was excessive and violated their constitutional due process rights and the Excessive Fines Clause of the federal constitution. We Affirm.

STATEMENT OF FACTS n4

n4 The People's civil lawsuit named additional defendants, including Carmen J. Palmieri (Palmieri) and the companies he owned or controlled; C. Palmieri Enterprises, Inc., National Medical Funding, and Trust Management Services. The court entered judgment against Palmieri and accepted Palmieri's stipulation to the following:

"1. The investments, referred to as 'viaticals,' were securities under California Securities Law;

2. The securities were not qualified as required by [section] 25510;

3. Neither [Palmieri], nor any of the companies or corporations he owned or controlled, were licensed to offer or sell securities as required by [section] 25210; 4. [Palmieri], individually, and on behalf of the companies or corporations he owned or controlled, made material misrepresentations or omitted essential facts in the offer or sale of securities in violation of [section] 25401, including, but not limited to, the following:

a. The 'viatical' investment was guaranteed.

b. The investment was 100% liquid.

c. The investors would become beneficiaries of life insurance policy death benefits.

d. Trust Management Services was an independent, licensed, bonded escrow company.

e. Trust Management Services was the beneficiary of any insurance policy benefit purchased by Palmieri.

f. The escrow company, Trust Management Services, was solely owned and controlled by [Palmieri].

g. Trust Management Services was not licensed to engage in the escrow business in violation of Financial Code § 17200.

h. [The Shearburns] were the only sales people recruited by [Palmieri] to offer and sell 'viatical' settlements."

[*4]

The facts are not in dispute on appeal. Accordingly, we adopt the trial court's recitation of the facts, the relevant portions of which are set forth below:

"From 1998, defendant [Palmieri] opened several businesses, one of which was National Medical Funding, a viatical settlement company run by a Palmieri-controlled corporation; C. Palmieri Enterprises, Inc., a California corporation . . . ; Trust Management Services, a purported escrow company, also owned by C. Palmieri Enterprises, Inc. . . . C. J. Palmieri also possessed a license issued by the State of California, Department of Insurance, authorizing the corporation he controlled, C. Palmieri Enterprises, Inc. to broker and/or solicit within California viatical settlement contracts (viaticals). . . .

"Although Palmieri may have brokered or sold viaticals on a limited basis, his viatical business began selling viaticals on a large scale to retail investors after he entered into a business relationship with defendant Robert N. Shearburn (Shearburn), . . . owner of a company known as Innovative Financial Services, in late 1998. Virtually all the investors who obtained viaticals from Palmieri-controlled entities purchased these [*5] investments through Innovative Financial Services, [Shearburn] or his son, an employee, . . . [Bobby].

"Before beginning the viatical business with Palmieri, Shearburn met personally with Palmieri on two occasions in California. Shearburn did some superficial checking into Palmieri's background and the business entity Palmieri used in conjunction with the sale of viaticals. Shearburn, however, never obtained independent substantiation of Palmieri's representations. For example, Palmieri told Shearburn that Trust Management Services was an independent, bonded escrow company which was a subsidiary of Chicago Title. Shearburn telephoned Chicago Title but was unable to verify Palmieri's representation. Eventually he claims to have received oral information from a person answering the telephone at Trust Management Services that indeed Trust Management Services was a subsidiary of Chicago Title, but Shearburn never obtained any written documentation from any source other than Palmieri and never obtained any sort of bond to substantiate Palmieri's representations.

"During the course of their business relations, as Palmieri supposedly found viatical investments suitable for Shearburns' [*6] clients, Palmieri would fax Shearburn documents on National Medical Funding letterhead purportedly listing the viaticals which were available, listing the name and age of the insured, diagnosis, life expectancy, insurance company, policy amount, policy date, AM Best rating, type of policy and policyholder. . . .

"Shearburn would then sell shares in the death benefit to investors using forms Palmieri provided, including the purchase agreements . . . and an agency agreement. . . . The purchase agreement was entered into by C. Palmieri Enterprises, Inc., doing business as National Medical Funding, called the 'agent,' with a principal who was referred to as 'purchaser,' on a given date for a certain amount with a projected life expectancy, usually zero to 12 months, and the rate of return, typically 14 to 16 percent. The purchase agreement also listed the name of the original insured, the life insurance company and the total amount of the death benefit. The purchaser's checks were made payable to Trust Management Services, 218 Bush Street, San Francisco, California. In fact, Trust Management Services in San Francisco was a Mail Boxes Etc. location in San Francisco. All telephone calls [*7] made to the San Francisco phone number were automatically forwarded to a Palmieri-controlled phone in San Diego.

"Shearburn forwarded investor checks to National Medical Funding in San Diego, which checks went to Palmieri.

"In addition to the National Medical Funding purchase agreement, a National Medical Funding agency agreement was filled out with the investor by Shearburn or Bobby. This document states that checks are to be forwarded directly to agent, National Medical Funding, and that checks were to be made out to Trust Management Services.

"Once Trust Management Services received the investor's check, written acknowledgement was sent to the investor listing the policy funding deposit, percent of death benefit, and total amount to be received by the investor upon the death of the 'viator,' the original life insurance beneficiary. . . .

"A letter from Trust Management Services was purportedly signed by Lawrence C. Reed, but in fact the letter was signed by Palmieri using the name of Lawrence C. Reed. The real person named Lawrence C. Reed had nothing to do with Trust Management Services.

"Robert Shearburn advertised in the Arizona Republic that viaticals were the 'perfect [*8] no risk investment,' returned 15 percent, were fully secured, had a fixed rate and short term 12-month liquidity and no surrender fees. . . .

"Potential investors received a brochure stating that viaticals offered, 'Exceptionally high returns, short term maturity, completely insured, always liquid, principal and profit are fixed, zero market risk.' The brochure stated, 'Not too good to be true. It is simply the perfect no-risk investment for now and into the next millennium.'

. . . Shearburn came up with the idea of advertising in promotional materials that the viatical investments were 'guaranteed' and were 'risk free.'

"Shearburn told every new prospective investor that viaticals had three primary risks: (1) too long maturity period, i.e. over three years; (2) viators who were AIDS patients were likely to live too long; and (3) risk of fraud, which was somewhat common in the viaticals business. He then explained that the viaticals he sold did not have any of these risks since, (1) they always paid off within 14 months; (2) the viators were terminally ill cancer patients who no chance of living more than 14 months; and (3) he had personally checked out the viaticals he sold and [*9] there was no risk of fraud.

"Once investor checks were cashed, [Shearburn] received what amounted to a commission check from Palmieri in the form of a cashier's check. Although Shearburn testified in his deposition that he was only paid upon maturation of the policy, that is at the time of the death of the viator, at trial he admitted he was paid shortly after the investment checks were cashed. In essence, Shearburn relied on what Palmieri told him about the nature of the operation. He never saw nor did he ever even ask to see any actual insurance policies. Although familiar with the requirement for written change of beneficiary forms on the life insurance policies, Shearburn never saw nor did he ever ask to see any beneficiary forms in connection with the investments.

"Palmieri informed Shearburn that Trust Management Services, not the individual investor, was named as beneficiary in the life insurance policies.

"Shearburn never received any 1099 or W-2 forms in connection with commissions earned from Palmieri. He produced no normal records of his income received from the Palmieri-controlled enterprises at trial.

"In late 1999, Bobby became a salesman for Innovative Financial [*10] Services. In late 2000, Shearburn developed colon cancer and had surgery, and Bobby took over until May 6, 2001.

"In mid-2001, investors began complaining about not receiving pay-offs on their investments. On July 26, 2001, a check from C. Palmieri Enterprises, Incorporated, fund control number 1228, to investors Therrel and Delores Mortimore, was returned for insufficient funds. Eventually payments to investors ceased.

"Six investors testified how they decided to invest through Shearburn or his agents in viatical investments of Palmieri, how much they invested, and what they lost. [P] . . .

"According to the records of Palmieri seized by investigators from the Department of Corporations and District Attorney's Office, Shearburn received in excess of \$ 3 million in commissions and other income from Palmieri. . . .

"None of the investments sold by the Shearburn defendants were qualified as securities under California law. Shearburn admitted he was not a licensed securities broker when he sold viaticals to investors in this case. Further, neither Robert N. nor Robert L. Shearburn were licensed to sell securities when they sold viaticals to the investor victims in this case.

"The [*11] San Diego District Attorney's Office and Department of Corporations began an investigation. Early in 2002, this court issued a Temporary Restraining Order to freeze assets of Carmen J. Palmieri, C. Palmieri Enterprises, Inc., National Medical funding, and Trust Management Services. Further, the superior court appointed Charles LaBella as receiver to marshal the assets of C. J. Palmieri and the businesses he controlled, to identify investor victims of fraud and disburse moneys that would be returned to the investors. An interim distribution of \$ 2,411,223 was made to investors in October, 2003. As of today, \$ 14,512,025 in investor losses have been identified by the receiver from 221 investors. Palmieri testified that probably none of the investors in this case actually received any interest in viatical investments.

"Palmieri was prosecuted criminally by the District Attorney's Office and pled guilty to 144 counts of criminal fraud and made factual admissions he made material misrepresentations in the offer and sale of securities, in violation of Corporations Code sections 24501 and 25535. Palmieri was sentenced on January 31, 2004, to serve 30 years in state [*12] prison and to pay restitution of \$ 11,200,000.

"An audit conducted by the Department of Insurance on 58 policies identified as viaticals by National Medical Funding in which beneficiary interests were purportedly sold to investors by Robert N. Shearburn and/or his agents established that although the policies existed, that neither the beneficiaries or their estates retained all beneficial interest in the policies. That is, there was no transfer of interest to any Palmieri entities or any investors."

The court made legal findings and issued a final order that imposed fines:

"To summarize, Mr. Shearburn made material omissions and misrepresentations. He profited handsomely from his misleads, reaping over \$ 3 million from bilked investors. He has no genuine remorse. His testimony lacked credibility. He played an indispensable role in the fleecing of 221 investors who lost over \$ 14 million.

"Mr. Shearburn, therefore, [individually and on behalf of his corporation, Innovative Financial Services, Inc.] has committed at least 221 violations of Corporations Code section 25210 by selling securities without a license, and 221 violations of Corporations Code section 25401 [*13] by selling securities based on untrue statements and omissions of material facts.

"This court imposed a fine of \$ 7,500 for each violation, for a total of \$ 4,972,500 in civil penalties.

"In addition, this court required restitution in the amount of \$ 14,512,025.

Restitution shall be joint and several [with the other defendants including Innovative Financial Services, Inc.], and [Shearburn] will receive credit for any amounts recouped by investors through the receivership or in restitutionary payments from [Palmieri] or Bobby to avoid double recovery. "Since there was no convincing evidence that any 'profits' were reaped from the investments, a court order of disgorgement would be inappropriate.

". . . As to Bobby, the record is clear that he bears responsibility for his acts violative of Corporations Code [sections] 25110, 25120 and 25401, yet his involvement is somewhat mitigated by the fact that he was in essence acting as an employee of his father and his role lacks the global significance of his father, who was an indispensable party in the scheme.

"Further, the record is unclear as to the [*14] number of transactions in which Bobby was actually involved. What is clear is that Bobby was involved in connection with five investors . . . whose testimony established that Bobby committed five violations of Corporations Code[] sections 25110, 25120 and 25401.

"Although it appears that Bobby was likely involved in a significant portion of other transactions involving victimized investors, the exact number is difficult to precisely ascertain.

"Accordingly, this court imposed a civil penalty of \$ 2,500 for each of the 15 violations based on the testimony of the five investor victims: five violations of Corporations Code section 25110, sale of illegal securities; five violations of Corporations section 25210, selling securities without a license; and five violations of Corporations Code section 25401, material omissions or material misrepresentations made in the sale of a security, for a total of \$ 37,500 in civil penalties.

"Further, it appears Bobby, according to his own testimony, earned \$ 60,000 per year for at least one and a half years. The only credible [*15] evidence presented establishes that his salary was based almost exclusively on his selling of Palmieri viaticals. Since it has been established that Bobby earned at least \$ 75,000 from the illegal sale of Palmieri viaticals, that money must be returned to the investors; that is [Bobby] must make restitution in the amount of \$ 75,000. . . . [P] . . .

"Finally this court permanently enjoins Robert L. Shearburn, Innovative Financial Services, Inc. and Robert N. Shearburn from any future violation of the California Securities Law."

DISCUSSION

I.

Our review is de novo because on appeal the trial court's findings of fact are not in dispute. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

The Shearburns contend the viatical settlement contracts were not regulated as securities under California law during the relevant period when they sold them. Their argument is based upon one federal court's ruling in *SEC v. Life Partners* (1996) 318 U.S. App. D.C. 320, 87 F.3d 536 (*Life Partners*), which concluded that the viatical settlements contracts at issue there were not securities; and the fact that viatical settlement contracts were not included [*16] within the definition of "secu-

rities" until 2001, when amendments to section 25019 took effect. We find both arguments unpersuasive.

Although the California Corporate Securities Law was patterned after the federal Securities Act of 1933, "the federal cases interpreting the federal law offer *persuasive* rather than controlling authority in construing state law." (*Moreland v. Department of Corporations* (1987) 194 Cal. App. 3d 506, 512, 239 Cal. Rptr. 558 (*Moreland*.) *Life Partners* was decided under *SEC v. Howey Co.* (1946) 328 U.S. 293, 298-299, 90 L. Ed. 1244 (*Howey*), but as we explain below, California applies both the *Howey* test and the Risk Factor test, and both were met in this case. In any event, we are not persuaded by the analysis of the court in *Life Partners*, which in finding the viatical settlement contracts were not investment contracts, made a distinction between an investment promoter's activities prior to his having use of an investor's money and his activities after he has use of the money. (*Life Partners, supra*, 87 F.3d at p. 548.) Like other federal courts, "we are not convinced that [[*17] *Howey*] requires such a clean distinction." (*S.E.C. v. Mutual Benefits Corp.* (11th Cir. 2005) 408 F.3d 737.)

With respect to the Legislature's amendment of section 25019 to expressly include in the definition of securities a "viatical settlement contract or a fractionalized or pooled interest therein," and a "life settlement contract or fractionalized or pooled interest therein," we note the legislative summary of the bill that adopted the changed definition explained that although California regarded viatical settlements as securities, the *Life Partners* decision and its contrary conclusion required clarification of section 25019. "The Department of Corporations maintains that SB 1837 would 'clarify that viatical and life settlement contracts (or fractionalized or pooled interests therein) are securities. Consequently, this proposal would allow DOC to focus its enforcement efforts on investigation of, and specific action concerning, particular companies offering viatical investments instead of on whether there is definitional jurisdiction.'" (Senate Committee on Finance, Investment and International Trade, Digest. on SB 1837, at p. 3.) Accordingly, we conclude [*18] that the amendment was intended only to clarify existing law, and reject the Shearburns' claim that the amendment applies only prospectively. (*McClellan v. County of San Diego Dept. of Child Support Services* (2005) 130 Cal.App.4th 247, 255 [concluding that when a court finds an amendment only clarifies existing law, it need not analyze the "retroactivity issue"].)

In making the determination whether an investment is a security in the form of an investment contract, California appellate courts have set forth two separate and distinct tests. The first is the federal or *Howey* test formulated by the United States Supreme Court in *Howey, supra*, 328 U.S. at pp. 298-299. (*Moreland, supra*, 194 Cal. App. 3d at p. 513.) The second test is the Risk Factor test articulated in *Silver Hills Country Club v. Sobieski* (1961) 55 Cal.2d 811, 13 Cal. Rptr. 186.

The *Howey* test concludes an investment offering is an investment contract when a person has (1) invested money, (2) in a common enterprise, (3) with an expectation of profit, (4) to be derived from the substantial efforts of others. (See *People v. Syde* (1951) 37 Cal.2d 765, 768.) [*19] Here, the investors gave their money to the Shearburns, who promised them a "100 [per cent] liquid," "safe" investment with a "fixed" profit. The Shearburns and Palmieri pooled the funds of the individual investors into a common fund, channeled into Trust Management Service's bank account, and the funds were used to pay commissions and pay some investors their promised profits. n5 Clearly, the investors expected their promised profit of 14 to 16 per cent return on their investment. After they contributed their money, they never participated in any decision making regarding their investment, but instead relied on the expertise of the Shearburns, who had promoted the investment.

The promotional brochure asked and answered, "who handles all the details? This particular investment is a non-participating program. In other words, we take care of all the details." Accordingly, we conclude the viatical settlement contracts were securities within the *Howey* test.

n5 (See *Moreland, supra*, at p. 514 [finding a common enterprise is a venture in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment of third parties].)

[*20]

The Risk Factor test finds a security whenever (1) capital is raised for a business venture or enterprise; (2) the transaction is offered indiscriminately to the public at large; (3) investors are substantially powerless to affect the success of the enterprise; and (4) investors money is substantially at risk because it is inadequately secured. (Id. at p. 815.) We agree with the trial court that this test was met because "The members of the general public placed money into the hands of Shearburn to be given to Palmieri, who would select certain investments, taking a risk with the pool of money of the investors with the objective of investing in selected viaticals chosen according to criteria employed by Palmieri in the hope of making profitable returns. The investment money of the passive investor was essentially at risk because in fact their investment was inadequately secured."

II.

Section 25110 makes it "unlawful for any person to offer or sell in this state any security in an issuer transaction . . . unless such sale has been qualified . . . or unless such security or transaction is exempted or not subject to qualification." On appeal, the Shearburns do not attempt to show [*21] their investments were exempt from qualification; rather, they urge that they were not required to comply with section 25110 because viatical settlements were not regarded as securities in California during before 2001. In their opening brief, the Shearburns explain in detail the efforts Shearburn purportedly made to investigate the nature of viatical settlements as investments in California, and conclude, "only when he had exasperated [*sic*] all avenues without receiving information that they were regulated as securities under California law did he decide to offer them for sale."

Section 25535 establishes civil penalties for violations of any provision of the corporations code or who violates any rule or order under the corporations code. The plain language of section 25535 does not have any scienter requirement. Accordingly, the Shearburns' claim that they made every effort to find out whether the viatical settlements were securities in California is unavailing. We note that even in the criminal setting, where the related statute dealing with penalties requires that an individual be found guilty of a "willful violation" of the corporations code, it has been held "evidence of [*22] good faith is not a defense to a charge of dealing in unqualified securities." (*People v. Clem* (1974) 39 Cal. App. 3d 539, 543, 114 Cal. Rptr. 359; section 25540.)

III.

The Shearburns contend they should not have been found liable for violations of section 25210 - which required them to have a broker's license - because the original complaint against them did not comply with Code of Civil Procedure section 425.10(a)(2) n6, which required that the Commissioner include a prayer for relief for a violation of section 25210. The contention is waived because

the Shearburns have not included in the record a copy of the complaint for us to ascertain the merits of the claim. n7 Moreover, the parties' "joint trial readiness conference report" does not include this issue among those listed as being in dispute. Finally, the Shearburns have not pointed us to any record citation that documents their efforts to preserve the issue for appeal by objecting in the trial court, and the ruling, if any, on their objection. Generally, we are "not required to make an independent, unassisted study of the record in search of error or grounds to support the [*23] judgment." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.) It is counsel's duty to refer us to the portion of the record that supports appellant's contentions on appeal. (9 Witkin, Cal. Procedure, *supra*, Appeal, § 589, p. 624.) If no citation "is furnished on a particular point, the court may treat it as waived . . ." (9 Witkin, Cal. Procedure, *supra*, Appeal, § 594, p. 627.) This is an appropriate case in which to apply the waiver rule. (See e.g. *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)

n6 Code of Civil Procedure, section 425.10 states: (a) "A complaint or cross-complaint shall contain both of the following:

(1) A statement of the facts constituting the cause of action, in ordinary and concise language.

(2) A demand for judgment for the relief to which the pleader claims to be entitled. If the recovery of money or damages is demanded, the amount demanded shall be stated.

b) Notwithstanding subdivision (a), where an action is brought to recover actual or punitive damages for personal injury or wrongful death, the amount demanded shall not be stated, but the complaint shall comply with Section 422.30 and in a limited civil case, with Section 72055 of the Government Code.

[*24]

n7 Relatedly, we note that neither party included in its brief a procedural summary, and the record lacks documents by which we could ascertain the precise arguments raised in proceedings held in the trial court, like the motion for a new trial. The Department of Corporations sought a dismissal of the appeal because of the inadequate record, but we denied the motion.

In any event, the trial court found, "The undisputed evidence in this case is that neither Shearburn nor Bobby was licensed to make any sales of the securities (the viaticals) sold to investors in this case." The Shearburns do not challenge this factual finding on appeal; accordingly, they were properly found liable for violations of section 25210.

IV.

The Shearburns argue the court improperly found they violated section 25401 because it did not make a prior finding they knew of the false or misleading statements. Shearburn also contends he used due diligence to verify that Palmieri's business was legitimate.

The trial court specifically found there were false statements and material omissions in the brochure that the Shearburns [*25] used to promote their investment. The California Supreme Court explained that there are different scienter requirements found in California's corporate securities law: In the administrative enforcement action, no scienter is required; in a civil setting, when an injured investor files suit, scienter is required; finally, in a criminal action, scienter also is required. (*People v. Simon* (1995) 9 Cal.4th 493, 515-516 (*Simon*)). The trial court correctly applied *Simon's* reasoning to this enforcement action against both defendants: "It is irrelevant that the defendant knows that the statements or omissions are false or misleading. In light of the language of section 25401, it is reasonable to conclude that the Legislature did not intend to permit members of the public to be harmed by such sales simply because the offeror was unaware that his or her sales pitch was misleading." (*Id.* at p. 516.)

The Shearburns contend that *Simon's* conclusion regarding the lack of a scienter requirement in enforcement actions was partly predicated on the lower fine of \$ 2,500 per violation that was in effect at that time; therefore, the 1998 amendment of section [*26] 25535 which increased the maximum fine to \$ 25,000 per violation has undermined *Simon's* holding, and the court was required to find they knowingly committed fraud before imposing the increased fines on them. We find this argument unconvincing. The Legislature is presumed to have known of the *Simon* decision when it modified section 25535 and increased the fine; yet, it elected not to interject a knowledge requirement in section 25401. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1156, 278 Cal. Rptr. 614 ["When the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have be aware of and to have acquiesced in the previous judicial construction'"].) Consequently, in the absence of a clear legislative mandate, we cannot read into the statute a scienter requirement for violations of securities law in the civil or administrative enforcement setting in an action brought by the appropriate governmental agency under sections 25530, 25532 and 25535. "A court engaged in statutory construction cannot create exceptions, contravene plain meaning, insert [*27] what is omitted, omit what is inserted, or rewrite the statute." (*San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn.* (1990) 222 Cal. App. 3d 146, 149, 272 Cal. Rptr. 38.)

V.

The Shearburns contend the court's order of fines for \$ 14, 512, 025 was disgorgement and excessive because it exceeded the \$ 3,000,000.00 in commissions Shearburn received for selling the viatical settlement contracts. We conclude, "whether one calls the remedy disgorgement or restitution, the Commissioner was entitled to recover the funds in question." (*People v. Martinson* (1986) 188 Cal. App. 3d 894, 901, 233 Cal. Rptr. 617.)

The trial court ordered restitution, and it expressly disavowed it was ordering disgorgement: "Since there was no convincing evidence that any 'profits' were reaped from the investments, a court order of disgorgement would be inappropriate." (Emphasis added.) "Disgorgement is not precisely restitution. Disgorgement wrests ill-gotten gain from the hands of a wrongdoer . . . It is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs. Disgorgement does not aim to compensate the victims [*28] of the wrongful acts, as restitution does." (*S.E.C. v. Huffman* (5th Cir. 1993) 996 F.2d 800, 802.)

The standard of review is an abuse of discretion; therefore, we will interfere with the trial court's exercise of discretion only if we conclude that under all the circumstances, viewed most favorably

in support of the trial court's action, no judge could have reasonably reached the challenged result. Here, the trial court was not required to limit its award of fines to the amount of the Shearburns' commissions; rather, the court was allowed to order fines in the amount of the loss the investors suffered, and give the Shearburns credit for any amounts recouped by investors through the receivership or in restitutionary payments from Palmieri to avoid double recovery. "If the commissioner determines it is in the public interest, the commissioner may include in any action authorized by [section 25530, subd. (a)] a claim for ancillary relief, including but not limited to, a claim for restitution or disgorgement or damages on behalf of the persons injured or practice constitution the subject matter of the action, and the court shall have jurisdiction to award additional [*29] relief." (§ 25530, subd. (b).) A separate subdivision of section of 25530 addresses restitution as follows: "In any case in which a defendant is ordered by the court to pay restitution to a victim, the court may in its order require the payment as a money judgment, which shall be enforceable by a victim as if the restitution order were a separate civil judgment. (§ 25530, subd. (c).) The trial court was empowered with broad authority to fashion an equitable adequate remedy in this case: "as applied to the penalties for acts in violation of this division, the remedies provided by this section and by other sections of this division are *not exclusive*, and may be sought and employed *in any combination* to enforce the provisions of this division." (§ 25535 (b), emphasis added.)

We also reject the Shearburns' claim the fine was excessive. Although under section 25535 the trial court could have imposed higher fines, it imposed significantly reduced fines for each defendant, and explained at a hearing, "I think I have to take into account the severity of the conduct on a scale between zero and [\$]25000, per violation. I came up with [\$]7500 per violation for [Shearburn] [*30] and [\$]2500 per [violation] for [Bobby]." The court's ruling awarded both defendants credit for any amounts recouped by investors through the receivership or in restitution payments from the other defendants. (*Hall v. Superior Court* (1983) 150 Cal. App. 3d 411, 417, 197 Cal. Rptr. 757 ["California's policy is to protect the public from fraud and deception in securities transactions. The Corporate Securities Law of 1968 was enacted to effectuate this policy by regulating securities transactions in California and providing statutory remedies for violations of the Corporations Code, in addition to those available under the common law"].)

VI.

The Shearburns assert that the fines the trial court imposed against them violated the Excessive Fines Clause of the 8th Amendment and their due process rights because "the court failed to make an examination of the relevant factors for establishing the appropriate level of statutory damages, namely the gravity of the conduct and the imprecision of calculation of harm." The factual premise of this assertion is incorrect; therefore we need not address this contention beyond pointing out the factual error. As we stated [*31] above, the court explained its reasoning for reducing Shearburn's fine for each violation from \$ 25,000 to \$ 7,500. The trial court's statement of decision also explained that it reduced Bobby's fine because his involvement in the violations was "somewhat mitigated by the fact that he was in essence acting as an employee of his father and his role lacks the global significance of his father, who was an indispensable party in the scheme."

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P.J.

NARES, J.