

Can You “Plead the Fifth” in a Sign Case?

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Most people know that the Fifth Amendment to the US Constitution provides, among other protections, that no one shall be compelled to give testimony that would tend to incriminate himself. “No person . . . shall be compelled in any criminal case to be a witness against himself.”

However, how does that square when an illegal and unpermitted billboard is installed in California and you’re facing a \$166,000 fine from Caltrans? Not well, it turns out.

In an unpublished decision¹, *AMG Outdoor Advertising v. Caltrans* (Oct 5, 2023 #B317500), the 2nd District Court of Appeal (Los Angeles) held that AMG CEO Alex Garcia’s reliance on the Fifth Amendment to avoid testifying was unprotected.

FACTS

Briefly, this case – which took 10 years to resolve – started in 2013 when AMG entered into a 20-year billboard lease with the property owner. Without permits from Caltrans or the City, AMG installed a billboard adjacent to the highway in Los Angeles. In January 2014, Caltrans issued violation notices and the matter was eventually referred to an Administrative Law Judge (ALJ) for review (normal protocol).

On July 3, 2014, the Los Angeles City Attorney's Office filed a misdemeanor complaint (*People v. AMG Outdoor Advertising, Inc. et al.*, case No. 4CA03603) charging AMG, Garcia, and another individual with various violations of the Los Angeles Municipal Code related to the operation of the billboard on the property.

For several years the parties filed requests to postpone the administrative hearing for a multitude of reasons, including the pending criminal case and representations by AMG's counsel that Garcia would invoke his Fifth Amendment right at the hearing.

The administrative hearing ultimately occurred on April 4, 2018 – while the criminal matter was still pending. The following individuals testified at the hearing: two Caltrans employees, Raj Champaneri and George Anzo, and a City of Los Angeles employee, Frank Lara. The property owner and Garcia invoked the Fifth Amendment and did not testify, apparently believing that if they didn’t (or refused to) testify, there would be no or insufficient evidence to establish Caltrans’ case.

¹ “Unpublished” decisions are not precedent in California and thus not binding on other courts.

On June 15, 2018, the ALJ issued a proposed decision finding that AMG entered into a lease on the property on November 1, 2013, for the purpose of erecting and maintaining a billboard, and that AMG operated the billboard without a permit in violation of the Outdoor Advertising Act. The ALJ recommended that Caltrans order AMG to remove the billboard from the property and impose \$166,000 in penalties. On July 12, 2018, Caltrans adopted the proposed decision as its final decision.

After the ALJ decision, AMG responded by filing a “petition for writ of mandate,” which is the next level review step after an administrative decision. The petition is filed in the Superior Court and asks the trial judge to review the record to determine whether there was substantial evidence to support the ALJ decision. Nearly three years later, on September 9, 2021, the trial court denied the petition and entered judgment in favor of Caltrans on October 4, 2021. AMG then appealed to the Court of Appeal.

COURT OF APPEAL CONCLUSIONS

The Court of Appeal upheld the lower court and affirmed that since Garcia, individually, was not a party to the administrative proceeding, he could not claim the Fifth Amendment privilege against self-incrimination, which applies only to and may be invoked by, natural persons, not corporations or other organizations. (*Braswell v. United States* (1988) 487 U.S. 99, 102.)

Paraphrasing the court: “This is not a criminal case [...]. AMG failed to present any evidence to refute it owned and operated the unpermitted billboard on the property . . . In fact, "while the [Fifth Amendment] privilege of a criminal defendant is absolute, in a civil case a witness or party may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it." (*Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712.)[3]

BOTTOM LINE

- *The Fifth Amendment does not apply in a civil (non-criminal) matter.*
- *A Caltrans outdoor advertising administrative hearing is a civil matter.*
- *A corporation may not invoke the Fifth Amendment.*
- *Do not install unpermitted billboards along the highway.*

*Calif B&P Code §5485(b), pertaining to billboards, provides:

(b) If a display is placed or maintained without a valid, unrevoked, and unexpired permit, the following penalties shall be assessed:

(1) If the advertising display is placed or maintained in a location that conforms to the provisions of this chapter, a penalty of one hundred dollars (\$100) shall be assessed.

(2) If the advertising display is placed or maintained in a location that does not conform to the provisions of this chapter or local ordinances, and is not removed within thirty days of written

notice from the department or the city or the county with land use jurisdiction over the property upon which the advertising display is located, a penalty of ten thousand dollars (\$10,000) plus one hundred dollars (\$100) for each day the advertising display is placed or maintained after the department sends written notice shall be assessed.

(c) In addition to the penalties set forth in subdivision (b), the gross revenues from the unauthorized advertising display that are received by, or owed to, the applicant and a person working in concert with the applicant shall be disgorged.

(d) The department or a city or a county within the location upon which the advertising is located may enforce the provisions of this section.

(e) Notwithstanding any other provision of law, if an action results in the successful enforcement of this section, the department may request the court to award the department its enforcement costs, including, but not limited to, its reasonable attorneys' fees for pursuing the action.

(f) It is the intent of the Legislature in enacting this section to strengthen the ability of local governments to enforce zoning ordinances governing advertising displays.