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False advertising is a substantial evil in our society, undermining fair competition,\(^1\) defrauding consumers of millions—if not billions—of dollars annually,\(^2\) while victimizing frequently the elderly and the poor.\(^3\) Although California has been liberal in affording defrauded consumers class remedies,\(^4\) such private actions have generally proven inadequate weapons in fighting false advertising.\(^5\) Recognizing this, the California legislature has supplemented private remedies with broad, publicly enforced measures.\(^6\) In doing so, the state’s name, power, and investigative resources are added to the prosecution.\(^7\)

The statutory basis of all major false advertising prosecutions in

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5. A consumer’s ability to seek individual redress is drastically limited by the fact that many consumers do not know when they have been abused, do not know how to seek a lawyer, and cannot afford a lawyer’s fees if one is found. Furthermore, the typical consumer transaction is too small to justify the expense of the legal time necessary for proper representation. Kripke, Gesture and Reality in Consumer Credit Reform, 44 N.Y.U.L. Rev. 1, 41 (1969). In the proper situation, many of the aforementioned disadvantages of the individual action are overcome by a class action. However, California law is in a confused state as to when such class actions are maintainable and thus the usefulness of the class action is minimized. Note, The Role of California’s Attorney General and District Attorneys in Protecting the Consumer, 4 U.C. Davis L. Rev. 35, 42-43 (1971).
7. See Lorenz, Consumer Fraud and the San Diego District Attorney’s Office, 8 San Diego L. Rev. 47, 48-50 (1971). Two other advantages are realized by centralizing the enforcement of false advertising laws in governmental agencies: (1) The interests of judicial economy are better served by consolidating complaints; and (2) A more effective overall approach to prevention is achieved through the selection of highly visible or particularly unscrupulous defendants.
California is Business and Professions Code section 17500. The Legislature enacted this section in 1941, drawing together various Printers' Ink Statutes and provided a comprehensive prohibition against virtually all deceptive advertising, whether intentional or unintentional.

To enforce section 17500, the legislature in 1941 provided a criminal sanction in section 17534 of the Business and Professions Code, which makes violation of section 17500 a misdemeanor punishable by a $500 fine and/or six months in jail. It appears, however, that criminal procedure has proven to be too burdensome and the punishment too light for section 17534 to be an effective weapon against false advertising, for there have been few prosecutions under this section. Nevertheless, the statute remains on the books.


9. American consumer fraud statutes originated with a proposal in Printers' Ink magazine in 1911 recommending a false advertising law that was subsequently adopted, in original or modified form, in forty-four states and the District of Columbia. Note, The Regulation of Advertising, 56 COLUM. L. REV. 1018, 1058 (1956).

10. "It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this State, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement, concerning such real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any such person, firm, or corporation to make or disseminate or cause to be so made or so disseminated any such statement as part of a plan or scheme with the intent not to sell such personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised." CAL. BUS. & PROF. CODE § 17500 (West 1964). Cf. People v. Wahl, 39 Cal. App. 2d 771, 773, 100 P.2d 550, 551 (App. Dept. Super. Ct. 1940) (liberally interpreting elements of false advertising under former statute).


Commenting on the factors which detract from the effectiveness of the criminal penalties involved, one authority stated: "Since [the nature of the conduct restrained] is not criminal under traditional categories of crime and, apart from the regulatory pro-
Business and Professions Code section 17535, also enacted in 1941, empowers the attorney general or the district attorney to seek injunctions against false advertising. This section was also greatly broadened in 1972. As amended, section 17535 now permits any county counsel, city attorney or city prosecutor, as well as the attorney general and district attorney, to seek whatever equitable relief the court deems necessary to prevent false advertising, specifically including the remedies of receivership and restitution for defrauded parties. In 1973 the legislature created an expedited remedy for disobedience of section 17535 court orders: rather than suing formally for contempt of the court order, prosecutors may now seek in priority proceedings summary penalties for repeating wrongdoers of up to $6,000 per day of violation.

In 1965, the Legislature recognized that the false advertising remedies then in force were inadequate since criminal prosecutions had proven too cumbersome and injunctive relief had only affected prospective behavior. In response to the need for a more effective rem-

cription closely resembles acceptable aggressive business behavior, the stigma of moral reprehensibility does not naturally associate itself with the regulated conduct. Moreover, the conduct is engaged in by persons of relatively high social and economic status; since it is motivated by economic considerations, it is calculated and deliberate rather than reactive; it is usually part of a pattern of business conduct rather than episodic in character; and it often involves group action through the corporate form. Kadish, Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations, 30 U. Chi. L. Rev. 423, 425-26 (1963) (footnotes omitted).

13. "Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or 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 practice in this chapter declared to be unlawful.

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public." Cal. Bus. & Prof. Code § 17535 (West Supp. 1974).

The prosecuting attorney often couples a prayer for all of the applicable equitable remedies with a prayer for monetary penalties under section 17536. See note 15 infra. E.g., People v. Superior Court, 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973).

14. Cal. Bus. & Prof. Code §§ 17534-36 (West 1964 & Supp. 1974) are statutory remedies available for a variety of deceptive trade practices enumerated in id. §§ 17500-533 (West 1964 & Supp. 1974). Of these deceptive trade practices, the major prosecutions under these statutes have been for false advertising.
The legislature enacted the sanction which is the focus of this note, section 17536 of the Business and Professions Code.\(^{15}\) Section 17536 provides for a “civil” penalty of up to $2,500 for each violation of section 17500.\(^{16}\) Courts have interpreted this to mean up to $2,500

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15. CAL. BUS. & PROF. CODE § 17535.5 (West Supp. 1974) provides:

“(a) Any person who intentionally violates any injunction issued pursuant to section 17535 shall be liable for a civil penalty not to exceed six thousand dollars ($6,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of such conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of harm caused by the conduct constituting a violation, the nature and persistence of such conduct, the length of time over which the conduct occurred, and any corrective action taken by the defendant.

(b) The civil penalty prescribed by this section shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction. An action brought pursuant to this section to recover such civil penalties shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

(c) If such an action is brought by the Attorney General, one-half of the penalty collected pursuant to this section shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the state treasurer. If brought by a district attorney or county counsel, the entire amount of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county in which the judgment was entered and one-half to the city.

16. “(a) Any person who violates any provision of this chapter, except Section 17530, shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

(b) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel, the entire amount of penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county and one-half to the city.

(c) If the action is brought at the request of a board within the Department of Consumer Affairs, the court shall determine the reasonable expenses incurred by the board in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (b), the amount of such reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund the moneys shall be paid to the State Treasurer.

As used in this subdivision, ‘board’ includes commission, bureau, division, and other similarly constituted agency.” CAL. BUS. & PROF. CODE § 17536 (West Supp. 1974).
for each offeree who perceives the misleading advertisement.\(^7\) Given the circulation of a single advertisement, penalties for one mass false solicitation can easily mount into the tens or hundreds of thousands of dollars.\(^8\) Considering that these penalties can presently be assessed over and above any restitution ordered to be paid injured parties, it can be seen that the penalties of section 17536 are quite severe.\(^9\)

Indeed, section 17536 penalties are virtually indistinguishable in form and effect from criminal fines:\(^\text{20}\) (1) the actions are brought in the name of the People by state or local prosecutors; (2) the penalties are paid directly to the coffers of the government; and (3) the purposes of section 17536 are plainly retributive and deterrent, given the severity of the penalty.

With the criminal overtones of this civil penalty, it is possible that defendants in actions brought pursuant to section 17536 might seek the protections of criminal procedure. Thus, wherever civil and crim-

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18. Indeed, the state attorney general recently recovered a one million dollar penalty from Bestline Products, Inc. for false advertising and unfair trade practices. People v. Bestline Products, Inc., Civil No. C-2842 (Super. Ct., Los Angeles County, California, filed July 26, 1973). In People v. Witzerman, 29 Cal. App. 3d 169, 105 Cal. Rptr. 284 (1972), the court assessed penalties of $50,000 under section 17536. Large settlements have also been obtained in People v. Goodyear, Inc., Civil No. 99310 (Super. Ct., Santa Barbara County, California, filed April 25, 1973) ($80,000).

Violators wishing to avoid unfavorable publicity often stipulate to an injunction and penalties before a complaint is filed. For example, The Emporium department store avoided litigating a complaint in Santa Clara County by agreeing to an injunction and $10,000 penalties. Telephone interview with Clay Howpert, Deputy District Attorney, Consumer Fraud Division, Santa Clara County, California, Nov. 9, 1973.

19. Indeed, the monetary penalties under CAL. BUS. & PROF. CODE § 17536 (West Supp. 1974) may be the most stringent false advertising remedies in the country. Similar penalties in other states include, e.g., N.J. REV. STAT. 56:8-13-16 (Supp. 1973) (not more than $2,000 for the first offense, not more than $5,000 for each subsequent offense); N.Y. GEN. BUS. LAW § 350(c) (McKinney Supp. 1973) ($500 per violation). For willful violations see, e.g., S.D. COMPIL. LAWS ANN. § 37-24-27 (1972) ($2,000 per violation). For a tabulation of false advertising remedies by state see Lovett, State Deceptive Trade Practice Legislation, 46 Tul. L. Rev. 724, 757-60 (1972). A number of states listed in Lovett have followed the precedent of the Federal Trade Commission and provided for civil penalties only upon the violation of an injunction or cease and desist order, making the remedy in the nature of a contempt citation. See Dole, Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act, 76 YALE L.J. 485 (1967); Kintner, Federal Trade Commission Regulation of Advertising, 64 Mich. L. Rev. 1269 (1966). While the notice provided by the injunction or order satisfies certain notions of due process, it also allows the lawbreaker "one free bite" before he is punished. A scheme of immediate civil enforcement is, therefore, thought to be more protective of consumers. See W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE 70 (1968).

inal procedures differ in the course of section 17536 litigation, questions as to the proper procedure potentially arise. For example, can the state court exercise jurisdiction over out-of-state defendants through the use of civil process? Must the standards of criminal or civil pleading apply? Do civil or criminal statutes of limitation apply? Are there search and seizure or self-incrimination protections available to shield defendants from discovery or from examination at trial? Does the defendant have a right to a trial by jury? Does the Sixth Amendment right of confrontation apply? What is the standard of proof? Is a second prosecution by the government blocked by the double jeopardy clause? Finally, is the judgment extraterritorially enforceable?

In false advertising prosecutions under section 17536 to date, defendants have often raised the question of criminal versus civil procedure, and the results have not been uniform from county to county.


The most frequently raised question is the availability of the Fifth Amendment in discovery. Mr. Hershal Elkins, Deputy Attorney General, Consumer Fraud Unit, Los Angeles, the state's chief consumer advocate, states that the self-incrimination problem arises in many cases, and courts often will grant protective orders based on the facts of the particular cases. Telephone interview with Hershal Elkins, Aug. 2, 1973. Mr. John Porter, Assistant Attorney General, Consumer Fraud Unit, San Francisco, also states that the civil-criminal question has been raised several times and needs to be definitively resolved. Telephone interview with John Porter, Feb. 17, 1973. Likewise, Mr. Gordon Bowley, formerly of the state attorney general's office, now Deputy District Attorney for Sacramento County, as well as Professor Thomas McCall, formerly of the state attorney general's office, now Associate Professor of Law, Hastings College of the Law, agree that procedural problems have inhibited, and may continue to inhibit false advertising prosecutions until the civil-criminal questions are resolved. Telephone interview with Gordon Bowley, Feb. 9, 1973. Interview with Thomas McCall in San Francisco, California, Nov. 7, 1973.

Most representatives of county consumer fraud units who were interviewed indicated that their experience has been that defendants seek an early settlement of false advertising claims to avoid adverse publicity. Consequently, these procedural problems often do not arise. All those interviewed, however, felt that section 17536 has significant quasi-criminal overtones which could give rise to potential procedural problems. Telephone interviews with John Stillman, Deputy District Attorney for Consumer Fraud, Los Angeles County; Clay Howpert, Deputy District Attorney, Consumer Fraud Division, Santa Clara County; Sam Mesnick, Assistant District Attorney, Contra Costa County; James R. Grube, Assistant District Attorney, Consumer Protection Division, City and County of San Francisco, Nov. 9, 1973.

Walt Matthews, Deputy District Attorney for Consumer Protection in Santa Barbara County, unlike any of his colleagues interviewed, files a criminal action simultaneously with the filing of his civil complaint to expedite settlement. Since criminal actions with their attendant publicity would be tried within two or three months of filing,
For example, lower courts in Los Angeles and San Luis Obispo Counties have rejected demurrers which asserted that section 17536 is a criminal statute that cannot be civilly enforced, whereas a trial court in Sacramento County citing the criminal nature of the penalties, limited the prosecutor to criminal discovery procedures, and a trial court in San Diego County imposed the shorter criminal statute of limitations on the action. At the same time, the defendants have been able to challenge and seek review of such procedural rulings by a writ of mandate, thus delaying prosecution. Only two procedural rulings on the civil-criminal issue have been handed down by appellate courts, and these rulings have been restricted to the narrow questions presented in each case: (1) the right to a jury trial under the Sixth Amendment, and (2) the stringency of pleading requirements. Thus, for the answers to the many other as yet unresolved procedural problems arising under section 17536 one must turn to analogous case law. In doing so, however, one soon discovers that cases setting forth steps to be followed under similar penalties are not easily reconciled. As explained below, courts have used various tests to ascertain whether a sanction is civil or criminal, but such tests of the sanction are not determinative of procedure. Instead, the standards of due process must be examined procedure by procedure. This note, therefore, reviews the authority for each procedural question to determine, at the major junctures of section 17536 litigation, whether civil or criminal procedures should be followed. Civil procedures, of course, would be more expeditious and thus more effective against false advertising, but such expediency cannot be obtained at the expense of the defendant's rights to due process. In the end, it is shown that he feels the pending criminal count gives him a significant bargaining tool in forcing a rapid settlement. This practice seems to be unique to Mr. Matthews, and as a result of the practice, he has on occasion allowed individual defendants to invoke the Fifth Amendment at depositions. All of his cases, however, have settled well before trial. Telephone interview with Walt Matthews, Nov. 9, 1973.


28. See text accompanying notes 30-45 infra.
predominantly civil procedures will apply to section 17536 prosecutions, despite the many criminal characteristics of the penalty.

Because of the importance of section 17536 as a false advertising remedy in California, and because of the generally emerging interest in the use of civil penalties to enforce regulations of contemporary social concern, such as, pollution control, consumer protection, and discrimination, this note offers its guide to adjudication under section 17536. Hopefully, it will aid courts in reaching uniform results and deprive defendants of dilatory tactics.

Civil or Criminal Procedures? The Missing Test

To determine whether civil or criminal procedures should be applied in a particular case, most courts first attempt to characterize the sanction as civil or criminal, and having decided one way or the other, they apply the procedures accordingly. Yet, as fundamental as the distinction between civil and criminal law is to our system of jurisprudence, the courts have not applied a uniform test in making this delineation. Instead, when confronted with the problem, the courts have employed diverse, often irreconcilable criteria.

A number of courts have held, for example, that legislative intent is determinative, ruling that if the language of the statute indicates whether the sanction is civil or criminal, then the manifest expression of legislative intent should be honored, and procedures applied accordingly. However, in opposition to the line of cases holding legislative

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30. On civil penalties and the criminal-civil distinction see Note, Statutory Penalties—A Legal Hybrid, 51 HARV. L. REV. 1092 (1938) [hereinafter cited as Statutory Penalties]; and Note, Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett, Trop, Perez, and Speiser Cases, 34 Ind. L. J. 231 (1959) [hereinafter cited as Punishment: Its Meaning]. Both of these notes discuss civil penalties, the former being an extensive survey of case law and the latter being a more theoretical discussion of penalties. Alas, both end more with a whimper than a bang, for the former finds case law so anomalous that its best recommendation is to resolve procedural questions on a case by case method. "No court, apparently, has thoughtfully analyzed the nature of this action in order to place its decision on clearly justifiable grounds." Statutory Penalties, supra, at 1100.). The latter commentator calls for clarification of the role of governmental sanctions, concluding that then and only then can the criminal and civil burdens be apportioned. "[O]ne cannot expect too much from a theory." Punishment: Its Meaning, supra, at 287. "Possibly the conclusion is that there are no workable standards at all." Id. at n.237.


31. Hepner v. United States, 213 U.S. 103 (1909) held that the statute under which the action was brought was civil because it contained the terms "sue for and
intent to be dispositive, there is equally strong authority holding that it is not controlling in the least: "[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards."

Thus, legislative intent cannot be said to be determinative.

Other courts deem an action to be criminal if the statutory violation is a "public offense." Blackstone enunciated this test in his Commentaries, basing the civil-criminal distinction on whether the conduct offended an individual's private rights or the community's public rights. But when is harm to one not harm to all, and is such a distinction not entirely a matter of degree? Blackstone's test, therefore, seems to offer no real practical guidelines for drawing the line between civil and criminal law.

Other criteria have been put forth to determine whether a sanction is civil or criminal. In general, however, they represent oversimplified attempts to provide a litmus test for criminality, and consequently they fail because of their superficiality. For example, two such tests are: (1) whether the action is brought by the state or by an individual, and (2) whether it is initiated by information or indictment.

No matter which test the courts have used, their attempts first to characterize the sanction as criminal or civil and then to decide the procedural question have led to uneven results. For example, in Lees v. United States and Hepner v. United States the Supreme Court was dealing with the same type of offense—violation of alien labor laws. In Lees the Court extended the protection of the Fifth Amend-
ment to the defendant, while in Hepner the Court held that the defendant's right to jury trial was not denied by a directed verdict for the government. Thus, similar statutory offenses were held to be criminal for one procedural purpose and civil for another. Similarly, the United States ex rel. Marcus v. Hess and United States ex rel. Bensliber v. Bausch & Lomb Optical Co., the very same statute was held to be civil for one purpose and criminal for another. In Marcus the Supreme Court held that the defendant was not put in double jeopardy when he was both criminally and civilly prosecuted for obtaining a government contract by fraud. The penalties, even though three times the amount of the criminal fine, were held to be civil in nature. In Bausch and Lomb, however, the Second Circuit held the same statute to be "not only penal, but drastically penal," in requiring that the statute be strictly construed. The Supreme Court affirmed the decision per curiam only a few months after handing down Marcus v. Hess.

These cases illustrate that the consideration of the sanction alone is not sufficient to determine the procedural rights of the defendant. Instead, the nature of the right must also be weighed, and each procedure considered separately. As the cases illustrate, the decision of a court on the one procedural point may not control its decision on another. Consequently, in the following guide to procedural rights, the authority on each procedure is examined independently. In this way, the guide to adjudication can conform to the due process requirements of controlling case law.

A Procedural Guide to False Advertising Actions

Initiating the Action

Jurisdiction. If, for jurisdictional purposes, section 17536 were deemed criminal in nature, the territorial jurisdiction of the court would be limited to the boundaries of the state. On the other hand, if section 17536 were found to be civil in nature, the longarm statute and other liberal means of obtaining jurisdiction over the person would

41. 317 U.S. 537 (1943).
42. 131 F.2d 545 (2d Cir. 1942), aff'd, 320 U.S. 711 (1943).
43. Id. at 547.
44. 320 U.S. 711 (1943).
45. This approach was suggested, but not expressly followed in Helvering v. Mitchell where Justice Brandeis stated: "In determining whether particular rules of criminal procedure are applicable to civil actions to enforce sanctions, the cases have usually attempted to distinguish between the type of procedural rule involved rather than the kind of sanction being enforced." 303 U.S. 391, 400 n.3 (1938).
46. If CAL. BUS. & PROF. CODE § 17536 (West Supp. 1974) is considered criminal for the purposes of jurisdiction, the complicated procedures of extradition must be used to return defendants to the state. See UNIFORM EXTRADITION ACT § 2.
be available. For the protection of California consumers, it would be desirable to have the broadest jurisdiction possible, since, because of the modern media, the false advertiser can make his deceptive representations without ever entering the state, or, as in many false advertising rackets, the unscrupulous advertisers can operate hit-and-run rackets which evade prosecution through planned transciency.

The question of extraterritorial service of process has not yet been raised under section 17536. However, in a case involving similar regulations in New York, a court held that trade violations for which civil penalties may be recovered constitute simple torts and thus the violator is subject to the service of process just as any other tortfeasor who has injured parties within the state.

The jurisdictional problem of extraterritorial service of process should not be confused with the conflict-of-laws problem of extraterritorial enforcement of a judgment. While it has been shown that process may extend over state lines, the collection of the judgment may not. It is a well established rule of conflicts that the court of one state will not execute the penal laws of another, and for many years this rule has been applied to civil penalties. Thus, in section 17536 actions, California has the power to submit out-of-state defendants to civil jurisdiction, but not to enforce its penalties outside the state.

Venue. There would be no difference in the proper place for trial should the court find section 17536 civil or criminal, because the controlling civil venue statute comports with the Sixth Amendment in making the proper venue the county where the cause or some part thereof arose.

47. "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CODE CIV. PROC. § 410.10 (West 1973). See also id. § 415.40 (service outside the state); id. § 415.50 (service by publication).


50. E.g., Huntington v. Attrill, 146 U.S. 657 (1892).

51. "Subject to the power of the court to transfer actions and proceedings as provided in this title, the county in which the cause, or some part thereof, arose, is the proper county for the trial of the following actions: (a) For the recovery of a penalty or forfeiture imposed by statute . . . ." CAL. CODE CIV. PROC. § 393(1)(a) (West 1973).

52. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ." U.S. CONST. Amend VI.
Pleading. The standards of pleading in a section 17536 action have been litigated and ruled upon by the California Supreme Court in People v. Superior Court, Jayhill real party in interest. In Jayhill, the attorney general filed a complaint for section 17536 civil penalties against an encyclopedia company alleging a "scheme to sell encyclopedias, other publications and related services to members of the public by making false and misleading statements and engaging in other acts of unfair competition." By way of demurrer, the defendant challenged the specificity of the pleading. Upholding the trial court, the court of appeals on a writ of mandate held that each violation of section 17500 had to be pleaded as a separate paragraph, even if it be a "Doe-type" paragraph. Furthermore, it held that each separate misleading statement to each individual constituted a cause of action under section 17536. Requiring that each misleading statement to each consumer be alleged in a separate paragraph, however, resembles more the criminal pleading of counts or charges than the liberal rules of civil pleading.

The California Supreme Court, however, reversed the appellate court, settling the question of pleading requirements by stating:

[E]videntiary facts need not be pleaded, and the acts relied upon by the Attorney General as constituting the violations are alleged in sufficient detail to apprise defendants of the basis of the cause of action. If defendants require further specifics in order to prepare their defense, such matters may be the subject of discovery proceedings.

Thus, the civil rules of pleading apply to actions brought under section 17536.

Note, however, that both the court of appeals and the California Supreme Court in reaching their decisions endeavored to construe section 17536 so as to reduce its potential severity. The appellate court tried to impose strict pleading requirements to lessen the severity of the penalty, but placed no limits on the causes of action, allowing assessment of up to $2,500 for each representation. The supreme court, on the other hand, allowed liberal pleading, but expressly limited penalties "one-to-a-customer," as it were, by construing the statute to assess up to $2,600 for each offeree, rather than each representation.

55. Id. at 41-42. While defendant's demurrer was predicated on the severity of the penalty, the civil-criminal distinction was not specifically argued in this case.
56. Id. at 50-51.
57. 9 Cal. 3d at 288, 507 P.2d at 1403, 107 Cal. Rptr. at 195.
58. People v. Superior Court, 100 Cal. Rptr. 38 (1972).
59. "The Attorney General contends that each misrepresentation by a defendant
The Statute of Limitations. Effective March 7, 1973, the legislature amended the Code of Civil Procedure section 338 so as to set the date barring actions under section 17536 at three years from the date of discovery by the injured party or by any attorney empowered to sue under the statute—the attorney general, district attorney, or city or county attorneys and prosecutors. The question then arises as to what statute of limitations applies to false advertising offenses alleged to have occurred prior to March 7, 1973.

If section 17536 were deemed purely criminal, defendants could argue that the statute of limitations for misdemeanors applied. Under section 17(a) of the California Penal Code “[a] felony is a crime which is punishable with death or by imprisonment in a state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.” Therefore, since section 17536 is not punishable by imprisonment and not classified as an infraction, if held to be criminal, it would be a misdemeanor. Under Penal Code section 801 “[a]n indictment for any misdemeanor must be found or an information or complaint filed within one year after its commission.” Therefore, if section 17536 is determined to be criminal, not only would the statute of limitations be lowered from three years to one year, but the period would begin to run when the false advertisements were made instead of when the defrauded consumer or prosecuting attorney became aware of the false advertisement as under the present law.

Alternatively, but to the same effect, defendants could argue that Code of Civil Procedure section 340(2) also imposes a one-year limitation period. Section 340(2) specifically applies to actions “upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the people of the state . . . .” constitutes a separate violation subject to a $2,500 civil penalty. As the number of misrepresentations allegedly committed by defendant Jayhill alone is no less than 25, under the Attorney General's theory Jayhill would be liable for a $62,500 penalty for each customer solicited if the allegations were proved. While the intent of section 17536 was to strengthen the hand of the Attorney General in seeking redress for violations of section 17500, it is unreasonable to assume that the Legislature intended to impose a penalty of this magnitude for the solicitation of one potential customer. Rather, we believe, the Legislature intended that the number of violations is to be determined by the number of persons to whom the misrepresentations were made and not by the number of separately identifiable misrepresentations involved. Thus, regardless of how many misrepresentations were allegedly made to any one potential customer, the penalty may not exceed $2,500 for each customer solicited by a defendant.”


60. CAL. CODE CIV. PRoc. § 338.8 (West Supp. 1974).
61. CAL. PEN. CODE § 17(a) (West 1970).
62. Id. § 801 (emphasis added).
The legislature cannot extend statutes of limitations so as to revive actions once barred without specific language expressing such an intent.64 No such language appears in the recent amendment to Code of Civil Procedure section 338. Thus, defendants may seek to bar claims arising one year before March 7, 1973 on the basis of the two arguments outlined above.

On the other hand, prosecutors suing on section 17500 offenses committed prior to March 7, 1973 may argue that the three-year statute of limitations for civil fraud65 has always been applicable by implication. The hypothesis of such an argument is that when the legislature provides no express statute of limitations for statutory action, courts will look to the statute most analogous to the one under consideration and set the period accordingly. The minor premise of the argument is that civil fraud is most analogous to section 17536, and thus the three-year limitation for fraud applies.66 The similarities between civil fraud and section 17536 are apparent since both actions are for money damages resulting from defendants' misrepresentations.

Furthermore, legislative intent, while not controlling,67 may be persuasive. In 1965, the legislature enacted the civil penalty provision of section 17536 to supplement the express misdemeanor sanction of section 17534.68 Thus, the legislature by implication acknowledged the inefficacy of the misdemeanor provision, presumably including the attendant statute of limitations. This implied legislative intent was made express by the amendment to Code of Civil Procedure section 338 making the civil three-year statute applicable to section 17536 actions.69

Defendants, however, may point out that no such implication can be made and that the amendment was necessary because section 338(1) applies a three-year limitation to "actions upon a liability created by statute, other than a penalty or forfeiture."70 By the express language of section 338(1) therefore, the three-year limitation cannot apply because section 17536 actions clearly seek statutory penalties. The prosecutors' only retort is that section 338 is clearly written in the disjunctive so that the exclusion of statutory penalties in subsection (1) of 338 in no way affects the fraud provisions of subsection 4.

To date, the only trial court deciding the issue has found in favor

64. See Volkswagen Pacific, Inc. v. City of Los Angeles, 7 Cal. 3d 48, 60-61 n.4, 496 P.2d 1237, 1246-47 n.4, 101 Cal. Rptr. 869, 878-79 n.4 (1972).
65. See, e.g., Bristol v. Washington County, 177 U.S. 133, 146-49 (1900).
67. See text accompanying notes 31-33 supra.
70. Id. § 338.1 (emphasis added).
of the defendants, electing to implement the plain words of the statutes rather than torturing analogies for tenuous implications.\textsuperscript{71} The purpose of the penalty, if civil at all, is deterrence of future violations.\textsuperscript{72} So, while the omission of the limitation period was an unfortunate legislative oversight, present-day offenders are fully on notice and, thus, the deterrent effect of the penalty operates in full force. At the same time defendants are not unfairly subjected to the resurrection of state claims once barred.

Finally, the significant difference between the criminal and civil statutes of limitation should be pointed out. As explained above, the criminal period would run for one year from the date of the commission of the offense; the civil period, absent the recent statutory change, not only runs a total of three years, but commences on the date of discovery of the fraud. As amended, the period is prospectively extended to the date of discovery by the victim or by the prosecuting attorney.\textsuperscript{73} This "tolling" until the prosecutor discovers the offense compensates for the fact that false advertising victims rarely suffer sufficient injury to report the incident.\textsuperscript{74} So, under the new statute, until the prosecution is alerted, the rights of the silent are preserved. The legislature, therefore, has exercised its power to set reasonable limitations on actions in favor of consumers.\textsuperscript{75} Until March 7, 1975, however, prosecutors and consumers will have to abide the partial effect of the criminal statute of limitations.

Discovery

A full discovery using the entire range of civil procedures would certainly promote efficient and effective prosecution of false advertisers. Deception in advertising, though measured objectively, is a matter of degree and therefore is hard to prove. Elements of intent so difficult to elicit could be important to the jury. Furthermore, discovering the full number of offerees for the damages phase of the deceptive advertising case would be difficult without access to defendant's records, books and true recollections. It is important to prosecutors, therefore, that they be able to request the production of documents in the custody of the defendant, to request admissions of the defendant, to propound interrogatories to the defendant, and to require his testimony in deposition and at trial.

\textsuperscript{71} People v. Earl Scheib, Inc., Civil No. 340826 (Super. Ct., San Diego County, California, filed Sept. 26, 1973).
\textsuperscript{73} CAL. CODE CIV. PROC. § 338.8 (West Supp. 1974).
\textsuperscript{74} See note 5 supra.
\textsuperscript{75} See, e.g., Wilson v. Iseminger, 185 U.S. 55 (1902); Sohn v. Waterson, 84 U.S. (17 Wall.) 596 (1873).
At one time, the search and seizure provision of the Fourth Amendment and its implicit right of privacy would have prevented the production of defendant's documents in a suit by the government to assess a penalty. Moreover, the self-incrimination provision of the Fifth Amendment could have prevented the defendant from testifying against himself through such documents or through other means of discovery. Presently, however, these constitutional claims pose few problems.

First, it should be noted that corporations are not entitled to invoke the Fifth Amendment, since they cannot be incriminated per se. Nor can corporate officials attempt to protect the corporation by taking the Fifth Amendment on behalf of the corporate entity. Instead, the privilege applies only to individuals, and even then the privilege is restricted.

The fountainhead case in this field is Boyd v. United States, which held that the Fourth and Fifth Amendment rights apply to bar

77. However, a trial court in Sacramento County held that the prosecution could not take defendant's depositions. People v. Anderson, Civil No. 210781 (Super. Ct. Sacramento County, California, filed Dec. 29, 1971).
78. "It is settled that a corporation is not protected by the constitutional privilege against self-incrimination. A corporate officer may not withhold testimony or documents on the ground that his corporation would be incriminated. Nor may the custodian of corporate books or records withhold them on the grounds that he personally might be incriminated by their production. Even after the dissolution of a corporation and the transfer of its books to any individual stockholders, the transferees may not invoke their privilege with respect to the former corporate records." Curcio v. United States, 354 U.S. 118, 122 (1957) (citations omitted) (emphasis added). In Long Island Moving and Storage Ass'n, Inc. v. Lefkowitz, 24 App. Div. 2d 452, 260 N.Y.S.2d 192 (1965), a membership corporation could not resist a subpoena duces tecum by invoking the privilege against self-incrimination on its own behalf, or on behalf of its officers.
80. "[T]he privilege against self-incrimination is a purely personal one [and] it cannot be utilized by or on behalf of . . . a corporation. Moreover, the papers and effects which the privilege protects must be private property of the person claiming the privilege, or at least in his possession in a purely personal capacity." United States v. White, 322 U.S. 694, 699 (1944) (citations omitted).
81. 116 U.S. 616 (1886). "As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of quasi-criminal nature, we think that they are within the reason of criminal proceedings for all purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself, and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." Id. at 634-35.
government prosecutors from examining defendant's books in an action for monetary penalties, even though authorized to do so by statute. In *Boyd*, Justice Bradley presented an extended historical discourse on the writs of assistance during the Revolutionary Period and the rise of the Fourth and Fifth Amendments, emphasizing that the individual must be protected from such governmental abuse of its power. Thus, *Boyd* was strongly rooted in the past and inextricably tied to individual rights.

However, *Boyd* was decided in 1886, before society became so industrialized that meaningful business regulations were required to monitor our complex economy, and an erosion of the *Boyd* rule has occurred. The law first distinguished corporate papers, which were public, from an individual's private papers, which were still subject to protection. Then courts held that even private papers which were comparably impersonal were subject to production. Now, the law requires the production of all but the most personal documents, with the burden of proof on the defendants to establish their personal character. Consequently, it is difficult to imagine the Fourth or Fifth Amendments and the *Boyd* rule interfering with defendant's production of documents in a prosecution under Business and Professions Code section 17536.

Compelling testimony in an action for civil penalties is not supported by such clearcut authority. A defendant is entitled to assert his Fifth Amendment rights to avoid self-incrimination, of course, if he has not been granted immunity from prosecution under the misdemeanor statute, Business and Professions Code section 17534. Needless to say, however, such immunity is routinely granted. Additionally, a defendant who is subjected to potential criminal liability from other statutes may invoke the privilege. For example, a defendant in a section 17536 action could not be made to reveal personal information which would lead to his criminal conviction for tax fraud.

*Lees v. United States*, an 1893 case, is the only Supreme Court case discussing self-incrimination in civil penalty actions. There the Court reversed the conviction of a defendant who was forced to give his own deposition, saying:

82. *Id.* at 624-33.
83. "Thus in response to a burgeoning of the economy in an open society, the Court was led to examine business documents in aid of regulation of business activities . . . ." *In re Mal Brothers Contracting Co.*, 444 F.2d 615, 618 (1971).
85. Of course, a forcible search and seizure without benefit of a warrant would be barred by the Fourth Amendment. Efrain T. Suarez, 58 T.C. 792 (1972).
87. 150 U.S. 476 (1893).
This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of Boyd v. United States . . . .88

While Lees relied on Boyd, the same erosion of the rule has not occurred. Instead, the law as to compelled testimony in monetary penalty actions is presently contradictory. In Bowles v. Towbridge89 the government sought treble damages and the court held the defendant was not required to answer interrogatories because the action was penal. Likewise, in United States v. Fishman,90 the court was again confronted with an action by the government to recover monetary penalties and held the defendant was not required to give a deposition. At the other extreme, in United States v. LaFontaine91 the court held the treble damage action to be remedial and required the defendant to answer a request for admissions.

Perhaps the most equitable position was taken in Porter v. Heend.92 The district court, explicitly spurning the penal-remedial dichotomy which LaFontaine used to distinguish Bowles, required the defendant to supply only such information as would be available from the examination of business documents. Thus, in Porter the Boyd and Lees rules were integrated, just as they were in the original Lees decision.

In conclusion, there appears to be no recent definitive authority on the question of whether individual defendants should be compelled to produce testimony incriminating themselves. The penalties under section 17536 potentially run into the hundreds of thousands, even millions, of dollars, and without Fifth Amendment privileges defendants could be forced to subject themselves to these heavy sanctions through their own testimony. However, while the policy behind the Fourth and Fifth Amendments is the protection of privacy and security, section 17536 is designed to regulate public statements. It would seem reasonable, therefore, to make defendants accountable through their own testimony for any statements which they have made to members of the public. Accordingly the privilege against self-incrimination should only be available in the following situations: (1) Any statement which would subject the defendant to true criminal liability, (2) The most personal documents, and (3) Nonbusiness-related oral testimony. The evolution of analogous case law discussed above as well as sound public policy support this result.

88. Id. at 480.
89. 60 F. Supp. 48 (N.D. Cal. 1945).
92. 6 F.R.D. 588 (N.D. Ill. 1947).
Trial

Jury Trial. Two questions emerge in considering the defendant's right to a jury trial: (1) Is section 17536 so punitive and criminal in nature as to entitle defendant to a jury trial under the Sixth Amendment? (2) If there is no guarantee to a jury trial under the United States Constitution, are there state constitutional provisions providing for a trial by jury?

The Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ." 93 There are two procedural contexts in which defendant's Sixth Amendment right to jury trial might arise. First, the judge must decide at the outset of the trial whether to impanel a jury at all. Second, if a jury is impanelled but the defense fails to prove its case, the judge must then decide whether he is empowered to direct a verdict, thereby denying the defendant his right to take the issues of fact to the jury.

These questions have been resolved definitively under section 17536 by the case of People v. Witzerman. 94 In this case the California Court of Appeals held that a defendant in a section 17536 action was not entitled to a jury trial under the Sixth Amendment. This decision was in accord with similar cases involving monetary penalties, holding that defendant had no right to a jury trial because of the criminal nature of the penalty per se, 95 and holding that a directed verdict in favor of the prosecuting government does not deny defendant's right to a jury trial. 96

While properly resolving the Sixth Amendment question as to jury trial, People v. Witzerman rendered, in the authors' opinion, an unfortunate decision on the defendant's right to a jury trial under the state constitution. The facts of the case were as follows: The defendants were being prosecuted under section 17536 for misrepresentations made in the sale of cattle-care sales contracts. At the time of trial the defendants' sales operation had been shut down for more than two years without any contemplation of resurrection. Consequently, defendants offered to stipulate to the issuance of a permanent injunction barring the making of further representations in regard to the defunct cattle program. The prosecuting attorney, however, refused to so stipulate without an admission of past violations on the defendants' part. Such an admission, of course, would have exposed the defend-

93. U.S. CONST. Amend. VI.
ants to the massive civil penalties under section 17536; hence the prosecution's demands were not realistic and bordered on the frivolous. In spite of the mootness of the injunction and the defendants' offer to stipulate, the trial court held that equitable remedies remained at issue; and, therefore, defendants were not entitled to a jury trial. The appellate court affirmed.\textsuperscript{97} Such a capricious manipulation of defendants' rights by the prosecution seems to be unconscionable.

In the future, new remedies under Business and Professions Code section 17535 make it more likely that equitable remedies, such as receivership and restitution, will \textit{truly} remain at issue at the time of trial.\textsuperscript{98} Even if these remedies are being sought at trial, the California Constitution requires a jury trial on all issues triable by a jury at common law.\textsuperscript{99} An action for civil penalties at common law constituted an action for debt.\textsuperscript{100} Being legal rather than equitable in nature, such actions were tried by a jury at common law. Thus, defendants are entitled to a jury trial in the assessment of monetary penalties. Where legal and equitable remedies are mixed, as is usually the case in actions seeking section 17535\textsuperscript{101} and section 17536 remedies, the equitable issues under section 17535 may be tried first,\textsuperscript{102} but the determination of damages—fixing the specific sum of the penalty under section 17536—is solely in the province of a jury.\textsuperscript{103}

In conclusion, therefore, defendants in an action under section 17536 are not entitled to a jury trial under the Sixth Amendment, as \textit{Witzerman} correctly held, but are guaranteed a jury trial on all legal issues under the California Constitution. While equitable issues may be tried first, the actual assessment of civil penalties represents a legal issue to be determined by a jury. It is believed, therefore, that \textit{Witzerman} is subject to further judicial modification.

\textbf{The Burden of Proof.} If section 17536 is deemed criminal in nature, defendants would be entitled to the presumption of innocence and would require proof beyond a reasonable doubt for conviction. Needless to say, such restrictions would severely hamper false advertising prosecutions in California. While no appellate case has expressly

\textbf{Footnotes:}

\textsuperscript{98} See text accompanying note 13 supra.
\textsuperscript{99} "The right of trial by jury shall be secured to all, and remain inviolate . . ." \textit{CAL. CONST. Art. 1, § 7; see People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 231 P.2d 832 (1951).}
\textsuperscript{101} See note 13 supra.
\textsuperscript{103} \textit{Cf.} Pacific Western Oil Co. v. Bern Oil Co., 13 Cal. 2d 60, 87 P.2d 1045 (1939).
decided the standard of proof in section 17536 actions,\textsuperscript{104} arguments have been presented in favor of the civil burden of proof.\textsuperscript{106}

The leading analogous case is \textit{United States v. Regan}.\textsuperscript{108} In this prosecution for civil penalties under the Alien Immigration Act of 1903, the Court squarely decided that the civil burden of proof was applicable in the recovery of civil penalties. The Court reasoned that the civil penalty action sounded in debt, being in essence like any other action for a sum certain. The Court also alluded to analogous civil actions involving proof of a criminal act, such as, bastardy, divorce, intentional torts, and other proceedings where proof is by a mere preponderance of the evidence. Then in a statement of policy, the Court held that proof beyond a reasonable doubt was only required in cases effecting the life or liberty of the defendant. Thus, in actions for money only, even though they be great sums of money such as actions under section 17536, proof by only a preponderance of the evidence is necessary. To the extent that the lower burden of proof encourages prosecutions, it serves the interests of California consumers. The lower burden, therefore, is not only sound law but good social policy as well.

\textit{Confrontation.} The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."\textsuperscript{107} From this phrase have been inferred the rights of the defendant to be present, to face his accuser, and to exclude testimony by deposition.\textsuperscript{108} Whether the defendant is entitled to confront witnesses against him in cases involving civil penalties was settled definitively in \textit{United States v. Zucker}.\textsuperscript{109} In this case, the government sought to recover, as a penalty, the value of merchandise smuggled into the country. The trial court excluded the deposition of an absent witness on the ground that the action was

\begin{itemize}
\item \textsuperscript{104} The trial court in People v. Witzerman, Civil No. 890068 (Super. Ct., Los Angeles County, California, filed Nov. 25, 1970), \textit{aff'd}, 29 Cal. App. 3d 169, 105 Cal. Rptr. 284 (1972) expressly held that proof was to be by a preponderance of the evidence. This issue, however, was not raised on appeal.
\item \textsuperscript{105} Comment, \textit{Actions for False Advertising Under Cal. Bus. & Prof. Code § 17536: An Argument for Applying Civil Rules of Proof}, 5 U.S.F.L. REV. 440 (1971). Like many courts, this note first attempted to characterize section 17536 as wholly civil, and then declare, accordingly, that the civil burden of proof was apropos. In so doing, the note disregarded such cases as \textit{Boyd} and \textit{Lees} which suggest that the sanction of section 17536 might indeed be criminal in nature, at least for some procedural purposes.
\item \textsuperscript{106} 232 U.S. 37 (1914).
\item \textsuperscript{107} U.S. CONST. Amend. VI.
\item \textsuperscript{109} 161 U.S. 475 (1896).
\end{itemize}
criminal in nature entitling the defendant to the right of confrontation, but the Supreme Court reversed, holding:

A witness who proves facts entitling the plaintiff in a proceeding in a Court of the United States, even if the plaintiff be the government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the sixth amendment, a witness against an "accused" in a criminal prosecution; and his evidence may be brought before the jury, in the form of a deposition, taken as prescribed by the statutes regulating the mode in which depositions to be used in the courts of the United States may be taken. The defendant in such a case, is no more entitled to be confronted at the trial with the witnesses of the plaintiff than he would be in a case where the evidence related to a claim for money that could be established without disclosing any facts tending to show the commission of crime.\(^\text{110}\)

To date no cases have deviated from Zucker. Defendant in a civil penalty action, therefore, has no right to confront his accusers.

Judgment

Double Jeopardy. The double jeopardy clause of the Fifth Amendment may be applicable to prosecutions under section 17536 in the following context: If the defendant has been tried under the misdemeanor statute, section 17534, he could attempt to invoke the double jeopardy clause to bar prosecution under section 17536 on the theory that he could not be twice subjected to severe punishment for the same act.\(^\text{111}\) As noted previously, however, the misdemeanor sanction of section 17534 is so trifling when compared to the civil penalties of section 17536, that it is rarely used.\(^\text{112}\) Indeed, defendants in section 17536 actions are routinely granted immunity from criminal prosecution under section 17534 to assure that they cannot use the threat of prosecution under that sanction to invoke the Fifth Amendment and frustrate discovery.\(^\text{113}\)

Even though the double jeopardy question has not been specifically presented in a section 17536 action, defendants have often raised the question of subsequent prosecution in similar situations under analogous statutory schemes, where there are co-existing criminal and civil sanctions. Precedent clearly holds, however, that the legislature can enact a criminal and a civil penalty for the same conduct and that prosecution under one of the two statutes does not bar prosecution

\(^{110}\) Id. at 481.

\(^{111}\) "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. Amend. V.

\(^{112}\) See text accompanying notes 11-12 supra.

\(^{113}\) See text accompanying note 86 supra.
under the other\textsuperscript{114} (although principles of res judicata may come into play).\textsuperscript{115}

\textbf{Enforcing the Judgment Outside the State.} As discussed previously, the general rule is that penalties such as section 17536 will not be enforced across state lines.\textsuperscript{116} Many false advertising rackets are based on collapsible schemes which operate dishonestly until the last possible minute, when, just before the ax falls, the racketeers vanish across the state’s borders. The unscrupulousness of such behavior may make theft or criminal fraud remedies more desirable than the monetary penalties of section 17536. Still, the entry of a large judgment for penalties, even though not collectable outside the state, would deter the false advertiser from returning to California. At the same time, the prosecuting attorney could seek equitable remedies under section 17535 to achieve divestiture through restitution and cessation of activities through an injunction.\textsuperscript{117} Such equitable remedies would, of course, be enforced extraterritorially through comity. Thus, while the moneys assessed under section 17536 may not be collected outside California, the state is not left without remedies with which to combat out-of-state false advertisers. Meanwhile, the penalties of section 17536 will deter the wrongdoers from re-entering the state, and thereby will serve a beneficial purpose for California consumers.

\section*{Conclusion}

The severe monetary penalties of California Business and Professions Code section 17536 make it potentially the most effective weapon against false advertising in California. It is socially desirable to have such strong and effective sanctions available to public prosecutors without imposing on them undue procedural constructions. On the other hand, defendants exposed to severe and retributive penalties cannot be denied procedural due process of law.


\textsuperscript{115} If defendant has been prosecuted on the criminal charge under § 17534, the state will be estopped from pursuing the civil penalty action. Coffey v. United States, 116 U.S. 436 (1886). \textit{See also} McKeehan v. United States, 438 F.2d 739, 746 (6th Cir. 1971) (Weick, J., concurring).

\textsuperscript{116} The general rule that one state will not enforce the penal laws of another state was laid down in Huntington v. Attrill, 146 U.S. 657 (1892). There is some small evidence of erosion of this doctrine in Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935), where the Supreme Court ordered Illinois to give full faith and credit to a Wisconsin judgment for taxes, including a 5 percent penalty. The basis of decision emphasized the tax aspects of the recovery, and as such, casts doubt as to the enforcement of the minimal 5 percent penalty standing alone.

\textsuperscript{117} See text accompanying note 13 \textit{supra}. 
An examination of authority has shown that predominantly civil procedures will apply to prosecutions under Business and Professions Code section 17536, in spite of its extremely punitive nature. Few criminal protections potentially apply, namely: the criminal statute of limitations (to a limited extent), the privilege against self-incrimination, the protection against double jeopardy, and the unenforceability of the penalty across state lines.

By statutory amendment, the legislature recently expanded the limitation period for section 17536 actions to three years from date of discovery by the consumer or the prosecutor, but that amendment only became effective March 7, 1973. For offenses committed prior to that date, therefore, a one-year statute of limitations applies, so that the prosecutions of offenses pre-dating March 7, 1973 are barred. Such a limitation, however, is of decreasing significance as every day passes, and certainly offers no bar to vigorous prosecution of present offenses.

The procedural consequence of granting the privilege against self-incrimination is that the defendant may not be compelled to give testimony either in a deposition or at trial. We have seen, however, that the courts have eroded the privilege against self-incrimination in the production of business-related documents. It seems, therefore, that business-related testimony should be equally available; for an advertiser who makes representations to the public should be accountable for those representations, even though he may be subjected to civil penalties for failing to advertise honestly. It should also be remembered that the privilege against self-incrimination applies only to natural persons and thus no privilege exists for corporate defendants. So, if the law evolves in accordance with the current trend, the privilege against self-incrimination should not present a significant barrier to effective enforcement of California’s false advertising law.

Nor should the double jeopardy clause inhibit effective false advertising prosecutions in California, because it can only be invoked when there has been a prior criminal prosecution, and immunity from criminal prosecution (under the misdemeanor provision of Business and Professions Code section 17534) is routinely granted.

The lack of extraterritorial enforceability of the penalties should not bar effective use of section 17536, even though the actual moneys may never be collected. Criminal and equitable remedies may be asserted extraterritorially to combat out-of-state false advertisers. Meanwhile, just having on the California judgment rolls a substantial personal judgment in the form of a civil penalty entered against the individual wrongdoers would tend to deter these operators from ever returning to the state. If so, then section 17536 will have adequately fulfilled its purpose.
The use of predominantly civil procedures in section 17536 actions will, of course, aid California prosecutors in the efficient prosecution of false advertisers, thereby benefiting California consumers as a whole. In addition, these findings are relevant to procedures to be followed under other "civil" penalties, and thus have a broader significance: for trade regulation and consumer protection laws in other states; for pollution control laws throughout the country; as well as for other socially oriented statutes which use monetary penalties to enforce desirable regulations. Thus, the civil penalty may become an even more important tool in the development of effective and progressive regulations for the benefit of the public.

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