by Amy Nashon

Practice Tips

Talent Agency Act Jurisdictional Issues

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The question of whether someone is a talent agent or a talent manager is more than one of semantics. It presents a pitfall that has landed both industry newcomers and seasoned professionals into serious trouble. Their attorneys can similarly fall prey to the confusion that surrounds this question, because the answer determines whether their clients' dispute belongs in civil court, arbitration, or before the California Labor Commissioner. Choosing the wrong forum can have significant repercussions and can even lead to forfeiture of a client's claims.

The regulation of artistic representation in the entertainment industry dates back over one hundred years. In 1913, the California Legislature imposed the first licensing requirements to prevent talent agents from taking financial advantage of aspiring artists by concealing side deals or sending the artists to "houses of ill repute." The licensing requirements evolved into the "Artist Manager Law" of 1937, which conflated the roles of agents and managers by defining managers as those who procured employment (an agent's responsibility) and those who advised, counseled, or directed artists in the development or advancement of their careers (a manager's responsibility). In 1959, the law received its own chapter in the Labor Code and became known as the "Artists' Managers Act" and, in 1978, it was replaced by the modern Talent Agency Act. Recognizing the more prominent role that talent managers were playing in the industry, and the confusion that arose between a manager's realm of influence versus that of a talent agent, the legislature considered a separate licensing scheme for managers but ultimately failed to implement it.

Talent Agency Act

The Talent Agency Act defines a talent agent as someone who procures, offers, promises, or attempts to procure employment or engagement for an artist, and it requires that such persons first obtain a talent agency license from the California Labor Commissioner.[1] A licensed agent must comply with various regulations set forth in the act, which governs everything from what terms are included in the agent's contract to the timing of payments to its artists. An "artist" is broadly defined by the act to include actors, radio artists, musical artists and bands, directors, writers, cinematographers, composers, models, "and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises."[2]

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A talent manager is not defined in the act, and a manager's responsibilities are traditionally more broad, amorphous, and flexible than that of an agent. For example, managers may counsel and advise artists on their career paths, whether to accept certain roles, how to market themselves, what brands to align themselves with, what to do with their money, and how to handle publicity, among other things.

The murkiness of the theoretical and practical distinctions between agents and managers was perhaps best described by the California Supreme Court in 2008:

> Agents procure roles; they put artists on the screen, on the stage, behind the camera; indeed, by law, only they may do so. Managers coordinate everything else; they counsel and advise, take care of business arrangements, and chart the course of an artist's career. This division largely exists only in theory. The reality is not nearly so neat. The line dividing the functions of agents, who must be licensed, and of managers, who need not be, is often blurred and sometimes crossed.[3]

While an agent can act as a talent manager, a talent manager can never act independently as an agent and is prohibited from procuring employment for an artist (unless the manager is working under the direction of the artist's licensed agent[4]). In fact, the penalty for doing so is undeniably harsh: even a single act of procurement means that the court (or the Labor Commissioner) can void the manager's contract ab initio and force the return of some or all of the commissions the manager earned from that artist over the years.

Jurisdictional Considerations

The California Labor Commissioner has exclusive original jurisdiction over controversies "colorably arising" under the Talent Agency Act, and claims must be brought within one year of the alleged violation.[5] In other words, any dispute between a talent agent and an artist over their respective obligations under the act must first be raised with the California Labor Commissioner. If an artist or agent files a civil lawsuit instead, that proceeding must be stayed until the complainant has exhausted all remedies before the Labor Commissioner.[6]

The situation gets complicated when a talent manager brings a civil suit against an artist, generally as a result of the artist's failure to pay commissions. Invariably, the artist responds by claiming that the manager illegally procured employment on the artist's behalf and that the contract between artist and manager is therefore invalid. Whether the artist's claim is raised as an affirmative defense or a counterclaim, the claim triggers the jurisdiction of the California Labor Commissioner. Even if the issue of illegal procurement is disputed, the Labor Commissioner is the one tasked with determining in the first instance whether the controversy falls within its jurisdictional purview. The civil suit must be stayed and the question of procurement referred to the Labor Commissioner. If the Labor Commissioner finds that there was no illegal procurement, then the civil case may proceed. If, on the other hand, the Labor Commissioner determines that there was even one instance of illegal procurement, the Labor Commissioner is empowered to void the contract. Any party who is dissatisfied with the Labor Commissioner's ruling may appeal to the superior court within ten days for a trial de novo.[7]

In *Styne v. Stevens,* talent manager Norton Styne sued actress and singer Connie Stevens for breaching their oral management contract.[8] Stevens moved for summary judgment on the grounds that Styne had illegally procured employment on her behalf and, therefore, the contract was void under the Talent Agency Act. The motion was denied, and Styne prevailed at trial. However, the court later granted Stevens's motion for a new trial, after concluding that it should have instructed the jury on the applicability of the act. Styne appealed, in part on the basis that Stevens's defense was barred because she failed to raise it with the Labor Commissioner within the one-year statute of limitations. Stevens responded that she could assert illegality as a defense to Styne's suit irrespective of the act's limitations period or original jurisdiction requirement. The court of appeal reinstated the original verdict for Styne on the grounds that Stevens had failed to refer her claims to the Labor Commissioner within one year of receiving Styne's complaint. Stevens appealed to the California Supreme Court.

The California Supreme Court reversed based on the well-established rule that a statute of limitations does not bar a defense involving no claim for affirmative relief. Therefore, Stevens could assert illegality under the act as a defense to Styne's claims, irrespective of the act's one-year limitations period. At the same time, the supreme court ruled that Stevens's claim of illegal procurement, even though asserted as an affirmative defense, had to first be referred to the Labor Commissioner before the trial court could hold a new trial. In doing so, it defined the statute's use of the term "colorable" in the broadest possible sense:

> Certainly the superior court need not refer to the Commissioner a case which, despite a party's contrary claim, clearly has nothing to do with the Act. For example, an automobile collision suit between persons unconnected to the entertainment industry is manifestly not a controversy arising under the Act, and it cannot be made one by mere utterance of words. On the other hand, if a dispute in which the Act is invoked plausibly pertains to the subject matter of the Act, the dispute should be submitted to the Commissioner for first resolution of both jurisdictional and merits issues, as appropriate.[9]

Unfortunately for Styne, once the case was referred to the Labor Commissioner, the commissioner ultimately found that Styne had indeed engaged in illegal procurement of a deal between Stevens and the Home Shopping Network, and it voided the contract between them and required that he forfeit the $4 million in commissions he had sought.[10]

Five years later, in *Marathon Entertainment, Inc. v. Blasi*, the court acknowledged the harshness of the Labor Commissioner's rulings against talent managers and endorsed a softer approach.[11] Marathon Entertainment was the personal manager for actress Rosa Blasi. Marathon sued Blasi for breach of contract for failing to pay a 15 percent commission on her income from the television series *Strong Medicine*. Blasi obtained a stay of the civil suit and filed a petition with the Labor Commissioner alleging illegal procurement by Marathon. The commissioner determined that Marathon had engaged in one or more acts of solicitation and procurement of employment for Blasi and voided the parties' contract. Marathon appealed to the superior court for a de novo review. Marathon also sought declaratory relief on the basis that the Labor Commissioner's ability to invalidate talent management contracts was unconstitutional and violated the managers' due process, equal protection, and free speech rights. The case eventually made its way to the California Supreme Court.

The supreme court first confirmed that, contrary to Marathon's urging, the Talent Agency Act does apply to talent managers, at least once they venture into the act's territory and solicit or procure employment on behalf of their clients. The court also confirmed that even a single, isolated incidence of procurement was sufficient to trigger the act. The court then turned to the central question of available remedies for a violation of the act, asking: "In particular, when a manager has engaged in unlawful procurement, is the manager always barred from any recovery of outstanding fees from the artist or may the court or Labor Commissioner apply the doctrine of severability (Civ. Code §1599) to allow partial recovery of fees owed for legally provided services?"[12]

The court acknowledged that voiding the contract was a "blunt and unwieldy instrument" that "may well punish most severely those managers who work hardest and advocate most successfully for their clients, allowing the clients to establish themselves, make themselves marketable to licensed talent agencies, and be in a position to turn and renege on commissions."[13] In concluding that the rule of severability should apply when doing so would further the interests of justice, and particularly, when the procurement was isolated and incidental to the performance of the contract as a whole, the court also urged the legislature to consider whether the act should be revisited in light of the widespread dissatisfaction with its existing enforcement scheme. Unfortunately, that has not yet occurred.

In 2009, the California Court of Appeal decided a case that underscored the importance of selecting the proper forum for artists seeking to invalidate their management contracts. In *Blanks v. Seyfarth Shaw,* Tae Bo creator Billy Blanks sued his attorneys for legal malpractice for failing to file a petition against his talent manager with the Labor Commissioner within the one-year statute of limitations.[14] The manager had unequivocally acted as Blanks's agent, albeit ineptly, and had demanded and received over 10 million dollars from him in less than a year. Blanks's attorneys at Seyfarth Shaw knew the Labor Commissioner had original jurisdiction over Blanks's claims but instead filed a civil lawsuit in superior court for the manager's violations of the Talent Agency Act. They did not file a petition with the Labor Commissioner until almost a year later. By then, the commissioner ruled that Blanks's petition was untimely and therefore, the commissioner could not order the manager to disgorge the millions of dollars he had received from Blanks, even though the contract was void and unenforceable. Blanks appealed, but the court of appeals confirmed that Blanks's filing of the superior court action did not toll the one-year statute of limitations. Blanks filed suit against his attorneys at Seyfarth Shaw, and a jury awarded him $10.5 million in compensatory damages, $15 million in punitive damages, and more than $5.6 million in interest, attorney's fees, and costs.

Seyfarth appealed, arguing that the other causes of action asserted in its civil lawsuit, and in particular, the Unfair Competition Law[15] claim, had longer statutes of limitations. The court of appeals rejected the argument, because the Talent Agency Act's mandate that all claims first be filed with the Labor Commissioner within the one-year period is:

> a procedural predicate-filing requirement that cannot be circumvented by recasting a TAA cause of action as a UCL cause of action…. The TAA statutory scheme creates an absolute bar to plaintiffs who wish to circumvent the pre-suit requirement of filing first with the Commissioner. Even if UCL remedies are cumulative to those available under other statutes…and thus cumulative of those under the TAA, a TAA claim must be first brought to the Labor Commissioner.[16]

However, the court of appeals did find that reversal was appropriate on the basis that the trial court should have instructed the jury that the doctrine of severability was applicable to the contract between Blanks and his manager, and the failure to do so may have affected the jury's determination of the amount that Blanks would have been able to recover had his petition been timely filed with the Labor Commissioner. After remand and another a year of litigation in the trial court, the parties ultimately settled for an undisclosed amount.

As with most rules, however, there is an exception to the Labor Commissioner's exclusive original jurisdiction. The Talent Agency Act provides that an arbitration provision in a talent agent's contract is valid as long as the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings and that the Labor Commissioner has the right to attend said hearings.[17] The U.S. Supreme Court has ruled that arbitration is likewise the appropriate forum for determination of whether a talent manager has acted as an unlicensed agent when the management contract contains an arbitration clause.

In *Preston v. Ferrer*, entertainment lawyer Arnold Preston commenced arbitration against his client, television personality "Judge Alex," over unpaid fees due under their personal management contract.[18] Judge Alex responded by filing a petition with the California Labor Commissioner alleging that the contract was void because Preston had acted as an unlicensed talent agent. Judge Alex then filed suit in superior court seeking a declaration that the contract was not subject to arbitration, and Preston countered by moving to compel arbitration. However, Preston was in an awkward position. He could not claim that the Talent Agency Act's arbitration statute applied to support his motion to compel arbitration because he had taken the position that he was not subject to the act's statutory regime, as he had never acted as a talent agent.

The court denied Preston's motion to compel arbitration until the Labor Commissioner determined its jurisdiction over the dispute, which the commissioner declined to do. The case eventually made its way to the U.S. Supreme Court on a writ of certiorari, for determination of who should decide whether Preston had acted as manager or agent.

The late Justice Ruth Bader Ginsburg, writing for the Court, found that the Talent Agency Act conflicts with the Federal Arbitration Act in two basic respects. That is, the Talent Agency Act grants the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate, and it imposes conditions on the enforcement of the arbitration agreement that are not applicable to contracts generally.[19] Justice Ginsburg concluded: "When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative."[20] The arbitrator was the proper authority to determine whether Preston had violated the Talent Agency Act.

The *Preston* case demonstrates that inclusion of an arbitration clause in a management contract can result in a potentially friendlier forum than the California Labor Commissioner, whom

many in the entertainment industry accuse of finding "licensing violations almost by rote."[21] However, the practical implementation of *Preston*'s holding may be diminished by the realities of long-standing industry practices, in that most management contracts have historically been "handshake" oral agreements—and that remains true today.

In the unlikely event that an attorney is brought in at the contract drafting stage, consideration should be given to whether an arbitration clause should be included. If the contract is one between an agent and an artist, such a clause should include the requisite statutory language set forth in Labor Code Section 1700.45. If the contract is a management contract, those requirements are technically inapplicable, but the arbitration clause should expressly state that its validity, interpretation, and enforcement should be referred to the arbitrator to determine. Once an attorney is presented with a dispute between a talent manager and an artist, due attention should be given to the one-year statute of limitations set forth in the Talent Agency Act and the Labor Commissioner's original exclusive jurisdiction to determine any colorable dispute over the illegal solicitation and procurement of employment. ■

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[1] Lab. Code §1700.4(a).
[2] Lab. Code §1700.4(b).
[3] Marathon Entm't, Inc. v. Blasi, 42 Cal. 4th 974, 980 (2008).
[4] Lab. Code §1700.4(d) allows a talent manager to negotiate and procure employment for a client only if the manager is working in conjunction with and at the request of that client's licensed talent agent. This is commonly referred to as the "Safe Harbor Provision."
[5] Blanks v. Seyfarth Shaw LLP, 171 Cal. App. 4th 336, 363 (2009).
[6] *Id.* at 360.
[7] REO Broad. Consultants v. Martin, 69 Cal. App.4th 489, 495 (1999).
[8] Styne v. Stevens, 26 Cal. 4th 42 (2001).
[9] *Id.* at 59 n.10.
[10] Styne v. Stevens, No. TAC 33-01 (Div. Lab. Standards Enforcement Sept. 29, 2003).
[11] Marathon Entm't, Inc. v. Blasi, 42 Cal. 4th 974 (2008).
[12] *Id.* at 990.
[13] *Id.* at 998.
[14] Blanks v. Seyfarth Shaw, LLP, 171 Cal. App. 4th 336 (2009).
[15] Bus. & Prof. Code §§17200 *et seq.*
[16] Blanks, 171 Cal. App. 4th at 365 (citations omitted).
[17] Lab. Code §1700.45.
[18] Preston v. Ferrer, 552 U.S. 346 (2008).
[19] *Id.*
[20] *Id.* at 359.
[21] Amicus Curiae Brief of Nat'l Conf. of Personal Manager, Inc., et al., No. 90-5358, 2007 WL 526100.