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Focus

ENTERTAINMENT LAW

REGULATING MANAGERS

By Larry Steinberg

While the eyes of the entertainment world are focused on the labor turmoil being faced by the Writers Guild of America, on Tuesday entertainment litigators and their clients were keenly watching the California Supreme Court argument in *Marathon Entertainment Inc. v. Blasi*, S145428.

The case involves application of the Talent Agencies Act, a controversial section of the California Labor Code that regulates those who act as talent agents, procuring employment for actors, musicians and other entertainment artists.

Breeding Controversy

The controversial aspect of the act is not how it regulates talent agents but how the statute has been applied to personal managers: people who advise, counsel, direct and coordinate artists in the development of their careers but who, because they are not licensed, emphatically must not stray into the forbidden territory of "procuring, offering, promising, or attempting to procure employment" for an artist.

A personal manager who illegally procures employment faces the penalty of having the California Labor Commission, which has exclusive initial jurisdiction over Talent Agencies Act disputes, decree that his or her personal management agreement is terminated and void *ab initio*, and order the offending personal manager to disgorge all commissions paid by the artist during the year preceding initiation of the Labor Commission proceeding.

So what was the holding of the 2nd District Court of Appeal in *Marathon* that has artists, personal managers and talent agents all astir?

Applying Severance

Marathon marks the latest attempt by personal managers to ameliorate the profound effect of the act on their profession. The 2nd District decision marks the first appellate affirmation of a manager's attempt to apply the doctrine of "severance" to violations of the act. Specifically, the Marathon court held that, when a personal manager engages in both lawful activities and unlawful procurement, the personal manager can enforce his or her agreement and collect commissions with respect to the lawful activities unless "the taint of illegality so permeates the entire agreement that it cannot be removed by severance or restriction but only by reformation or augmentation." *Marathon Entertainment Inc. v. Blasi*, 140 Cal.App.4th 1001 (Cal. App. 2nd Dist. June 23, 2006).

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The Labor Commission's remedy of choice — declaring an entire personal management agreement void *ab initio* and ordering the return of past commissions totaling, in some cases, many millions of dollars — has been called Draconian and overly severe. Moreover, many perceive the Labor Commission as a pro-artist and anti-personal-manager forum.

Battle of 'Marathon'

In connection with the case pending before the Supreme Court, Marathon's president and personal manager, Rick Siegel, has waged an active and vocal public relations campaign against the act. Siegel's goals are more ambitious than having the Court of Appeal's ruling on severance affirmed; his position is that the act is intended to regulate only talent agents and should not be applied to personal managers.

On the other side, artists, the entertainment guilds, the Association of Talent Agents and the Labor Commission itself have asked that the Court of Appeal decision be depublished and/or reversed, and they have defended the status quo vigorously as being necessary to protect naive and unsophisticated artists who are preyed on by unscrupulous and unlicensed managers.

Four of the entertainment industry's largest labor unions (the Screen Actors Guild, the American Federation of Television and Radio Artists, the Directors Guild of America, and the Writers Guild of America) filed a 31-page amicus brief asking the Supreme Court to reverse the Court of Appeal decision and remove severability from Talent Agencies Act jurisprudence. In an unusual move, one that has been criticized by the National Conference of Personal Managers, the labor commissioner himself (who is the ultimate judge in disputes under the act) sent an Aug. 22, 2006, letter to the Supreme Court criticizing the Court of Appeal decision as undermining his ability to enforce the law.

Critics of the Court of Appeal decision rely heavily on the 1984 findings of a California Entertainment Commission appointed by the Legislature and on what the critics argue is clear and well-reasoned precedent, citing, among other authorities, *Yoo v. Robi*, 126 Cal.App.4th 1089 (2005).

In *Yoo*, the manager unsuccessfully attempted to commission compensation paid to a singer performing with The Platters under a record contract, arguing

that, because the act has an exemption allowing unlicensed people to procure record contracts, the illegal procurement of employment and concerts should not prevent the manager from commissioning the record contract, which was not procured through illegal activity. The *Yoo* court was unsympathetic, rejecting the manager's plea.

The rhetoric included in Blasi's Supreme Court brief is exemplary of the language used by the act's defenders: "By applying the doctrine of severability to the TAA, the Court of Appeal has eviscerated the deterrent effect that the bright-line rule was intended by the Legislature to promote." Blasi cites, like the legions of artists involved in disputes under the act who came before her, to the 1984 findings of the commission, which declared that "the most effective weapon for assuring compliance with the [act] is the power ... to ... declare any contract entered into between the parties void from the inception." 1984 Report, cited in *Waisbren v. Peppercorn Productions Inc,*, 41 Cal.App.4th 246 (1995).

Proscribed Procurement

Given the broad construction of proscribed "procurement," it is the rare personal manager who has not committed some act on behalf of an artist-client that can be characterized as violative of the act. Attorneys who have occasion to counsel personal managers consistently advise managers to stay away from the Labor Commission and to settle, rather than litigate, their disputes with artist clients over the payment of commissions. Similarly, attorneys advising artists frequently brandish what they perceive as the trump card of filing (or threatening to file) a Labor Commission petition when negotiating with a former personal manager over claimed commissions.

Some practitioners have tried to argue on behalf of their manager clients that procuring employment was limited to attempts in which the manager initiated and actively sought the employment through active solicitation. The Labor Commission routinely has rejected these attempts in decisions such as the one issued in a dispute between comedian Arsenio Hall and his personal manager, in which the commission held that procuring employment is not limited to initiating or soliciting discussions with potential employers but includes any active participation in a communication with a potential employer for the artist, regardless of who initiates the communication. *Hall v. X Management*, TAC No. 19-90 (April 24, 1992).

Another approach of critics of the act has been to argue that inadvertent isolated or de *minimus* acts of procurement should not be a basis for enforcement activity. However, these attempts, too, have been unsuccessful. Case law, both in the appellate courts and in published decisions of the Labor Commission, have held consistently that a single act of "procurement" (or even attempted procurement) is a sufficient violation of the act to vitiate the entire contractual relationship between manager and artist. See *Waisbren*. Proponents of this view cite to the exception contained in New York's enforcement scheme that allows for "incidental procurement." N.Y. General Business Law Section 171, Subdivision 8. But except for rare aberrations, appellate courts and the Labor Commission have squelched such efforts, saying that it is up to the Legislature to codify any such exception. In fact, in 1986, the Legislature did add a "safe harbor" provision to the act, which states that it is not unlawful for a person who is unlicensed "to act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract." Labor Code Section 1700.44(d). The Labor Commission has, with only rare exceptions, construed this safe harbor literally and narrowly, requiring close supervision and coordination between the talent agent and the manager in order for the manager's activities to be protected by the safe harbor.

Ironically, the party who might have the least at stake in how the California Supreme Court resolves the current controversy is actress Rosa Blasi. The dispute over commissions between Blasi and her management company is principally about Blasi's engagement in a starring role on a single cable television series, called "Strong Medicine," which ran for six seasons on Lifetime cable television network. Blasi's counsel has stated publicly that there is clear and overwhelming evidence that "Strong Medicine" was one of the employment opportunities that was procured for her by Marathon Entertainment. Even if the Court of Appeal decision stands, and Marathon is allowed to attempt to rescue portions of its management agreement through severance, it will not be awarded its commissions if Blasi can prove what she claims.

Larry Steinberg is a shareholder of the law firm of Buchalter Nemer and an officer of the Los Angeles Copyright Society. His practice focuses on litigation disputes in the entertainment industry. He has represented both artists and personal managers in Talent Agency Act disputes, and was involved in the constitutional challenge to the Talent Agency Act that resulted in *Wachs v. Curry*, 13 Cal.App.4th 616 (1993). Mr. Steinberg has also written and spoken extensively on California's unfair competition law, Business & Professions Code section 17200.