Lawyers For The Talent

Entertainment Law

Richard Dooling

Contents

Doing Deals

by Richard Dooling

Dealmaking in the publishing industry has always been a civilized sport with just a few usually friendly players: author, agent and publisher. Even deals worth millions are relatively simple and sound, never mind that it was made over the phone weeks ago. The same is true in Hollywood, despite the occasional high-profile lawsuits, some of which we read about.

People in the entertainment industry do deals worth millions with phone calls, handshakes, napkin and iPad agreements. They haggle via texts and tweets and emails, until somebody says the magic words "we are closed," after which everybody makes friendly noises. That means they have a deal, and 99% of the time they *do* have a deal. The written parts of that deal might not come for months. But eventually people in business affairs cut, cull, and paste those original messages into deal memos and letter agreements and proposed contract drafts that often say:

> These contract terms are void and unenforceable unless this agreement is signed by both parties.

Often these proposed terms never get signed, which means by their own terms they cannot be enforceable contracts. At most they are some evidence of what the parties intended during negotiations. Alas the law does not enforce negotiations (offer and counteroffer), it enforces contracts.

The entertainment industries move too fast and involve too many players and contingent deals to wait for lawyers fuss over contract language and obtain signatures. Usually the bargains struck work out fine. Blockbusters and tent poles get made, and the players compromise on any terms that weren't included in the conversations surrounding the original deal.

As the authors of the leading Entertainment Law textbook put it:

> Typically, agents put the initial pact together by negotiating the major deal points for each side. After an oral agreement is reached, participants then turn to their attorneys to finalize the agreement and draft a "deal memo," or letter of intent, documenting the material terms of the contract. These terms specify the salary, percentage of profit, tentative filming dates, and degree of credit the start will receive. Some deal memos also include arrangements for the level of creative control and personal perks that a party will enjoy. *Often these deal memos are never signed by the parties.* While contracting parties contemplate the completion of lengthy, signed agreements, in

> many cases pre-production work, even filming, commences before each side's attorneys are able to finish negotiating and drafting a final personal service contract.
>
> *Entertainment, Media, and The Law: Text, Cases, and Problems*, (4th Ed. 2011), Paul C. Weiler, Gary C. Meyers, William Berry III.

When deals fall through, a judge or jury comes along and asks almost metaphysical questions about what happened: Did the parties agree? Or did they just agree to agree later, after some indefinite length of time? Did they "agree to agree" only after some uncertain event? For example, "Yes, we agreed to make this deal, but only if Spielberg directs and Daniel Craig plays the hero." Is this a deal? Or just a deal to make a deal *if*—?

Rarely the dispute ends in litigation. If it actually goes to trial, the tabloids and trades chronicle the egos, the treachery, and the feuds. If somebody appeals, the dispute may be writ in the case law and memorialized for the ages.

Movie deals get done during one or more of the five stages of film production. As the story rights and talent deals fall into place, the players make a series of offers and counter-offers, some of which lead to enforceable contracts; others not.

5 Stages of Film Production

1. Development: The script is written and drafted into a workable blueprint for a film.
2. Pre-production: Preparations are made for the shoot, in which cast and crew are hired, locations are selected, and sets are built.
3. Production: The raw elements for the finished film are recorded. (First Day of Principal Photography!)
4. Post-Production: The film is edited; production sound (dialogue) is concurrently (but separately) edited, music tracks (and songs) are composed, performed and recorded
5. Sales and distribution: The film is screened for potential buyers (distributors), is picked up by a distributor and reaches its cinema and/or home media audience.

A Deal (Contract) Contains All Of The Following:

- An *offer* that is *accepted*.
- *Terms* that are definite and specific, not vague or ambiguous.
- *Consideration* - something that each party gives or gets for entering into the contract.

- *Legal capacity* - the parties are all of legal age and competent to contract.
- *Legal purpose* - can't contract to do anything illegal.

Mainline v. Basinger

Court of Appeal, California (1994)

- Case on Westlaw 1994 WL 814244 (Cal.Ct.App.2d 1994)(not officially published).
- *Los Angeles Times* on *Basinger* case.
- SAG strict nudity clause extends to TV

GRIGNON, Judge.

Defendants and appellants, actress Kim Basinger and her "loan-out" corporation Mighty Wind, Inc. appeal from an $8 million judgment against them and in favor of plaintiff and respondent Main Line Pictures, Inc. in Main Line's breach of contract action relating to production of the movie "Boxing Helena." (A "loan-out" corporation is a personal service corporation which lends the services of an artist to a production company.)…

Facts

In December 1990, Main Line sent a copy of the screenplay of "Boxing Helena" to Basinger. Basinger was a well known actress, having starred in many movies, including "Batman" and "9 1/2 Weeks." On December 28, 1990, Main Line's president, Carl Mazzocone, wrote to Basinger through her agent Intertalent offering Basinger $500,000 plus additional deferred compensation to star in the movie.

Basinger was excited about the script and interested in playing the female lead. Barbara Dreyfus, Basinger's assistant and Mighty Wind's director of development, arranged for Basinger to meet the film's screenwriter and director, Jennifer Lynch.

Mighty Wind was Basinger's "loan-out" corporation, a company through which Basinger "loaned" her acting services. Payment for Basinger's services was made to Mighty Wind, which in turn employed and paid Basinger. On January 11, 1991, Lynch, Basinger and Dreyfus met at Mighty Wind's office. Basinger expressed an interest in the movie, which she believed would be a tremendous showcase for an actress. She also stated she felt a kinship to the role because it concerned a woman who was obsessed, a situation which was familiar to Basinger.

The screenplay contained a few nude scenes. On January 18, 1991, Basinger and Lynch met to address Basinger's concerns regarding the treatment of the nude scenes. Lynch explained in detail how she expected to film the scenes with Basinger, stating there would be no gratuitous sex scenes or frontal nudity below the waist. While the film would be sensual, it would not be explicit. The meeting lasted more than one hour and all issues involving nudity were resolved. Basinger agreed to act in the film as it had been presented to her in the script.

On January 24, 1991, Basinger met with Intertalent and agreed to act in "Boxing Helena."

Main Line's attorney, Robert Wyman, discussed the contract's material terms with defendants' attorneys Robin Russell and Julie Philips. Mazzocone also had contract discussions with Attorney Russell. Other contract discussions took place between Attorney Wyman, Mazzocone or Lynch and Intertalent or Dreyfus.

Compensation and credit were discussed at the outset. The parties agreed Basinger would receive her usual fee of $3 million for the picture, consisting of guaranteed compensation of $600,000 plus additional deferred and contingent compensation. Basinger agreed to accept second billing behind Ed Harris, the male lead.

On February 27, 1991, Mazzocone, Attorney Wyman and Attorney Philips discussed each material term of the contract. Attorney Wyman reviewed a checklist of all terms in issue, Attorney Philips agreeing to each term as described. Following this conversation, Attorney Wyman sent Attorney Philips a "deal memo" dated February 27, 1991, setting forth the contractual terms for Basinger's performance in "Boxing Helena."

> The memorandum provided for "guaranteed compensation" of $600,000, "Gross deferment [compensation] payable out of first receipts of producer of $400,000, adjusted gross receipts … of $1,000,000 payable out of 35% of producer's receipts … adjusted gross receipts deferment of $1,000,000 payable out of 25% of producer's receipts … and contingent compensation equal to 15% of producer's receipts thereafter."

On February 28, 1991, Attorney Philips sent an annotated copy of the "deal memo" back to Attorney Wyman. Attorney Philips's annotations requested certain changes to be included in a formal written document. For example, she wanted to change the number of days Basinger would work in post-production. On Attorney Philips's own copy of the document, she noted:

> There is substantial nudity - KB ok with it … no frontal nudity - nothing graphic - more subliminal.

Attorney Philips also noted that the "Loan-out company is Mighty Wind Productions." Mazzocone understood Mighty Wind was "Kim's production company and that's who the contract should be made with and that's where the payment [was to] be paid – to Mighty Wind." Such arrangements were standard and did not materially change the contract.

As soon as the agreement for Basinger's acting services was reached at the end of February, Main Line received authorization to use Basinger's photo to promote the movie. On February 28, 1991, Republic Pictures, a foreign distribution company, learned that Basinger had agreed to perform in the film; it began preselling the film in foreign markets with Basinger's name attached. Eventually, foreign presales for the movie with Basinger's name attached totaled $6.8 million. Main Line reasonably expected to receive approximately $3 million in domestic presales. The money obtained from the foreign presales would secure financing for the film.

> A presale is a minimum guarantee by a distributor in a specific market to procure that distributor's rights to show the movie in a given territory. After Basinger declined to perform in "Boxing Helena," Main Line produced the movie with a lesser known actress. Without Basinger, total presales declined to $2.5 million.

In April 1991, Main Line began preproduction activities including casting, wardrobe, special effects and model construction.

Because timing is critical, film industry contracts are frequently oral agreements based on unsigned "deal memos." Often, artists authorize their agents or lawyers to bind them. Sometimes, however, the parties also desire to memorialize the agreement in an executed written contract, commonly referred to as a "long form agreement." This written contract is usually negotiated by attorneys and contains many standard terms. Although the parties may intend their oral agreement to be binding, many subsidiary or ancillary terms may subsequently be agreed upon and incorporated into the written contract. The written agreement also enables parties to formalize their understanding in legal language. The absence of an executed written agreement does not mean there is no legally binding agreement. Basinger, for example, had entered into executed written agreements for only two of her prior films.

After the oral agreement had been reached, Attorney Wyman incorporated its material terms into written documents, an "Acting Service Agreement" and a "Producer's Standard Terms and Conditions for an Actor/Actress – Loan-out." An "Inducement" was also drafted. These documents were sent to Attorney Philips on March 7, 1991. Thereafter, Attorney Wyman and Attorney Philips exchanged numerous drafts of the Acting Service Agreement and the Producer's

Standard Terms and Conditions, copies of which were sent to Basinger and others. During the exchange process, many ancillary terms were revised and eventually agreed upon.

In April 1991, Basinger changed agents; she replaced Intertalent with International Creative Management (ICM). After ICM read the screenplay for "Boxing Helena," ICM concluded Basinger should not do the film.

Sometime in May of 1991, Lynch heard a rumor that Basinger was not intending to perform in the movie. Lynch telephoned Dreyfus and relayed the rumor. Dreyfus repeated the rumor to Basinger, who at the time was in the room with Dreyfus. Basinger denied the rumor and confirmed her commitment to star in the film.

On May 6, 1991, Basinger called Lynch and Mazzocone and expressed reservations about the script. Basinger stated she wanted the character to be more sympathetic. Two days later, ICM told Lynch and Mazzocone it had suggested to Basinger she not act in the film. Lynch attempted to accommodate Basinger's reservations by modifying the script. Lynch met with Basinger at Basinger's office to discuss the proposed changes.

On May 29, 1991, Attorney Wyman sent to Attorney Philips final execution drafts dated February 29, 1991, of the Acting Service Agreement and the Producer's Standard Terms and Conditions. The cover letter stated Attorney Wyman was delivering an execution copy of the "Agreement between Main Line Pictures, Inc. and Mighty Wind Productions, Inc. f/s/o [for the services of] Kim Basinger."

The Acting Service Agreement described Main Line as "producer," Mighty Wind as "lender" and Basinger as "artist." The Agreement called for "Lender [to] cause Artist to report for the rendition of exclusive services in connection with … ['Boxing Helena.']" Compensation was to be paid to lender, subject to lender's and artist's full performance. The Acting Service Agreement specified artist's credit and perquisites, such as transportation and dressing facilities. It also provided for merchandising and the use of artist's likeness. The signature line called for execution by "Main Line Pictures, Inc. By Carl Mazzocone" and "Mighty Wind Productions, Inc. By Kim Basinger." There was no place for Basinger to sign as an individual. The Acting Service Agreement was never executed.

The Producer's Standard Terms and Conditions provided that Mighty Wind, "employer," agreed to "loan-out" the services of Basinger to Main Line. It provided, inter alia, that Main Line was entitled to seek equitable relief if artist breached and employer was to indemnify producer if artist made any claim for compensation. Employer warranted that it was a duly organized and bona fide corporation. No signature lines were included in this document.

On June 10, 1991, Main Line learned that Basinger was not going to act in "Boxing Helena."

Procedural Background

On June 21, 1991, Main Line filed a complaint naming as defendants Basinger and Mighty Wind. The complaint alleged that defendants breached an oral and a written contract to provide Basinger's acting services....

The jury concluded that "Basinger and/or MightyWind" had entered into both an oral and a written contract, had breached the contract and had caused damages to Main Line in the amount of $7,421,694. The jury further determined that "Basinger and/or Mighty Wind" had denied in bad faith the existence of the contract, and awarded an additional $1.5 million in damages. The jury did not award any punitive damages.

... Upon motion, the trial court awarded Main Line $713,522.05 in attorney's fees and costs. A $8,135,216.05 judgment was entered against Basinger and/or Mighty Wind.

Alexander v. MGM

United States District Court, C.D. California (2017)

- Case on Westlaw

HONORABLE RONALD S.W. LEW, Senior U.S. District Judge

Currently before the Court is Defendants Metro-Goldwyn-Mayer Studios Inc. ("MGM"), Warner Brothers Entertainment, Inc. ("Warner Brothers"), New Line Cinema Corporation ("New Line"), Chartoff-Winkler Productions Inc. ("CWP"), Sylvester Stallone ("Stallone"), Ryan Coogler ("Coogler"), and Aaron Covington's ("Covington") (collectively, "Defendants") Motion to Dismiss Plaintiff Jarrett Alexander's ("Plaintiff") Complaint in its Entirety with Prejudice ("Motion" or "Motion to Dismiss"). Having reviewed all papers submitted pertaining to this Motion, the Court *NOW FINDS AND RULES AS FOLLOWS:* the Court *GRANTS* Defendants' Motion to Dismiss *WITHOUT LEAVE TO AMEND.*

I. BACKGROUND

A. Factual Background This is an Action common to this district, where a plaintiff claims that defendants, typically entertainment industry corporations or executives, stole his idea for a popular television show or motion picture.

Plaintiff is a New Jersey citizen and a largely unknown television and movie actor. MGM, Warner Brothers, New Line, and CWP are Delaware corporations, a Delaware LLC, and a California corporation, respectively. All have their principal place of business throughout the greater Los Angeles area.

Rocky is an internationally-known movie released in 1976. Stallone starred as the titular character, Rocky Balboa, a professional boxer. Apollo Creed is another character featured in four of the *Rocky* franchise sequels.

In 2008, Plaintiff, a lifelong fan of the *Rocky* franchise, allegedly came up with an idea to create a story about the fighting career of Apollo Creed's son. The story would emphasize the theme of building one's own legacy. He drafted a screenplay, initially titled "Creed: Rocky Legacy," later titled "Creed" (the "Screenplay"). The Screenplay follows Apollo Creed's son as he establishes himself in the boxing community, copes with his father's death, and builds his own legacy with Rocky Balboa's advice and mentorship.

In 2010, Plaintiff registered the Screenplay, titled "Creed: Rocky Legacy" with the Writer's Guild of America ("WGA"), registration number VPFA4D8DCEF2. Thereafter, he registered the Screenplay, this time entitled "Creed," with the United States Copyright Office, registration number PA0001861140.

Plaintiff also made a "pitch reel," a short promotional film about the Screenplay and its "legacy" theme (the "Pitch Reel"). The Pitch Reel starts with a reporter interviewing Apollo Creed's son and asking him whether he will uphold his father's legacy. Plaintiff posted the Pitch Reel on Vimeo, a social networking platform for sharing video content. In 2012, he created a website, www.creedmovie.com (the "Website"), which was later transferred to a different domain, www.jarrettalexander.com, after the original domain lapsed in June 2014. The Website contained the Pitch Reel and described how Plaintiff developed the Screenplay. The Screenplay, Pitch Reel, and Website are collectively referred to as the "Creed Idea."

Between 2010 and 2013, Plaintiff attempted to generate interest in the Creed Idea. In 2010, he circulated the Screenplay to individuals in the movie industry. He alleges that Coogler knows and interacts with some of these individuals; for example, Coogler and one of the Screenplay recipients both attended the American Black Film Festival in Miami, Florida in July 2011.

Because Plaintiff lacked the financial means or connections to make a movie on his own, he also took to social media to pitch the Creed Idea to movie industry insiders. In April 2012, Plaintiff and several friends started promoting the Creed

Idea on Twitter, a social media platform where individuals can post or "tweet" short, public messages that can be directed at specific users. They tweeted links to the Website and the Pitch Reel to several individuals in the movie and professional fighting industries.

For instance, they tweeted at actor and ex-professional wrestler, Dwayne "The Rock" Johnson, Stallone, and Carl Weathers (the actor who played Apollo Creed in the *Rocky* movies), attaching a link to the Website. Stallone, MGM, and New Line all allegedly "follow" Dwayne Johnson's twitter account and Plaintiff alleges that Stallone and Dwayne Johnson are friends. Plaintiff's friend also tweeted Stallone directly: "@TheSlyStallone next rocky installment4u? 2min trailer. Wants to meet u creedmovie.com." Between April 2012 and July 2013, Plaintiff and his friends allegedly sent more than 25 tweets that hyperlinked to the Website and encouraged Stallone to work with Plaintiff on the Creed Idea. Plaintiff alleges that Defendants reviewed the Screenplay, Website, and Pitch Reel.

On July 24, 2013, MGM and Stallone announced their plans to develop *Creed*, a motion picture about Apollo Creed's son. They recruited Coogler to write the screenplay. Plaintiff alleges that Defendants' movie, *Creed*, is premised exactly on the Creed Idea he created. Specifically, Defendants' *Creed* follows Apollo Creed's son as he strives to create his own legacy under the tutelage of the now-retired fighter, Rocky Balboa. And the official *Creed* trailer features the following phrase: "Your Legacy is More Than a Name." Alleging that Defendants stole his idea, Plaintiff filed the instant Action.

b. Breach of Implied Contract "California law recognizes that an implied-in-fact contract arises when the writer submits material to a producer with the understanding that the writer expects to be paid if the producer uses his concept." Counts v. Meriwether (C.D. Cal. 2015)(citing Desny). As the Ninth Circuit has recognized, the so-called Desny claim protects individuals "who wish to find an outlet for creative concepts and ideas." Montz.

"To establish a Desny claim for breach of implied-in-fact contract, the plaintiff must show that the plaintiff prepared the work, disclosed the work to the offeree for sale, and did so under circumstances from which it could be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work."

Plaintiff alleges that he prepared the Creed Idea between 2008 and 2011, creating the Screenplay, Pitch Reel, and Creed Website. He disclosed the Creed Idea at least to Stallone, by tweeting him a link to the Website, and by distributing the Screenplay to individuals who apparently know and work with Coogler. Plaintiff claims that the remaining Defendants "reviewed" the Creed

Idea, but alleges no facts to support this allegation.

But Plaintiff has no allegations that the Creed Idea was offered for sale. "The law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been used for profit … plaintiff must fail unless … he can establish a contract to pay. Desny. *See also* Wilder v. CBS Corp. (C.D. Cal. 2016) (plaintiff told defendants during a pitch meeting that she wanted payment for her proposed talk-show idea). Indeed, the allegations portray that Plaintiff offered the Creed Idea gratuitously—asking Stallone, through his Twitter account, "@TheSlyStallone next rocky installment4u? 2min trailer. Wants to meet u creedmovie.com."

Plaintiff argues that he understood, based on industry custom, that he would be compensated for the Creed Idea. He adds that industry custom dictates that writers will submit ideas to producers and industry insiders with the expectation of compensation, and that Defendants implicitly understood this norm was in play here. While industry custom may inform the implied contract calculus, "reasonable expectation of payment … should be inferred from the facts and circumstances."

The facts and circumstances do not show Plaintiff was to receive compensation. Plaintiff's allegations make two tenuous inferences: (1) that he expected payment for tweeting his Creed Idea to Stallone's Twitter account (Stallone has over 1.7 million followers), to which no response was received; (2) or that he expected compensation after plastering his Creed Idea all over the Internet. Indeed, Plaintiff invites the Court to premise a claim for breach of implied contract on a "tweet" that was never responded to. Jordan-Benel v. Univ. City Studios, Inc. (C.D. Cal. Feb. 13, 2015) ("There needs to be more than a unilateral offer and Plaintiff only offers arguments as to his intent, not Defendants' understanding or conduct"). While requiring an in-person meeting for a misappropriation of idea claim in the world of movie and television pitching may be unrealistic in light of communication and social media advancements, Plaintiff's theory of implied contract by tweet and by mass-mailing of his Screenplay might turn mere idea submission into a free-for-all.

Plaintiff's breach of implied contract claim also fails to show that "defendants voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work." *Grosso*. Defendants argue that the Complaint is devoid of this requisite privity between the parties, and the Court agrees. Nowhere in his Complaint does Plaintiff indicate the conditions on which he sent Defendants the Screenplay or link to the Website. Instead, Plaintiff alleges that he "intended to generate interest in the Creed Idea so that it would be produced into a motion picture with the expectation that Plaintiff would be compensated for use of the concept," and he expected that Defendants would just compensate him down the road. Plaintiff does not allege any exchange or dialogue with Defendants. It strains reason that Defendants "accepted" Plaintiff's offer to enter a contract or understood the conditions under which he tendered the Creed Idea from a unilateral tweet and from Plaintiff disseminating his Creed Idea on the Internet. *Desny* (contract liability cannot attach where defendant has not had an opportunity to reject an idea before its disclosure). Even in cases where the plaintiff alleged a more concrete exchange between the parties, courts have been wary to let an implied contract claim proceed at the motion to dismiss stage. *Reed v. Nat'l Football League* (C.D. Cal. 2015)(granting motion to dismiss even where plaintiff sent defendants a voicemail with his proposed idea for a television series, defendants' representative told him to forward his proposal to another executive, and the NFL informed plaintiff it would not accept his unsolicited proposal).

Above all else, the concern outlined in Desny comes to fruition here: "the idea man who blurts out his idea without having first made his bargain has no one but himself to blame for the loss of his bargaining power. The law will not in any event, from demands stated subsequent to the unconditioned disclosure of an abstract idea, imply a promise to pay for the idea, for its use, or for its previous disclosure." The Court thus GRANTS Defendants' Motion to Dismiss as to the breach of implied contract claim.

Did We Make A Deal?

- Did your client make a deal?
- Did she just discuss terms?
- Did he agree on some terms but not on others?
- Did your client agree to pay a writer to do a screenplay for me, but never settled on *when* the writer would do it?
- Did your client promise to act in a music video next Wednesday, but never settled on for how much?
- And now she has a chance to be in the next *Hunger Games* and wants out?

Deals get made and deals go bad, and rarely do parties pursue the nuclear option and sue each other. But if they do sue each other for breach of contract, the courts will try to guess what agreement the parties made. The terms of the contract must be definite and enforceable, and the court wants to be assured that the parties reached that point of negotiations, where the parties made a deal.

At a minimum, oral and written contracts must usually answer the following questions:

- Who?

- What?
- When?
- Where?
- How much?

Statute of Frauds

Contracts may be oral or written, implied or explicit. For centuries, the common law had required that some contracts *must be* in writing, or courts will not enforce them.

- Contracts for the sale of land;
- Contracts for the sale of goods above a certain dollar amount (often $500.00);
- Contracts that cannot be completed in less than one year;
- Contract promising to marry someone;
- Contracts where somebody promises to pay the debt of somebody else.

In the entertainment business, the most common statute of frauds issue arises when an artist promises to perform services for more than one year. Usually such contracts must be in writing, or courts will not enforce them. But what about contracts that *could* last more than a year? Must those contracts be in writing? In general, contracts of indefinite duration don't require a writing no matter how long they may take.

Promissory Estoppel

> "The law is simply expediency wearing a long white dress." –Quentin Crisp

The legal magic words "promissory estoppel" and "detrimental reliance" mean that sometimes the law will enforce promises, even if those promises aren't contained in binding contracts. That's what happened when singer Aretha Franklin promised to perform in a Broadway musical and then backed out at the last minute.

Elvin Associates v. Aretha Franklin

United States District Court SDNY (1990)

- Case on Westlaw
- Case on Google Scholar

In early 1984, Broadway producer Ashton Springer wanted to make a Broadway musical about gospel singer Mahalia Jackson, her life and her music.

Springer wrote to singer Aretha Franklin and asked her to appear in the title role.

Aretha personally called Springer and expressed strong interest in the role. She told Springer to contact her agents at the William Morris Agency.

Springer had several conversations with Aretha's agents and traded proposals and counter-proposals with them. Springer also began making arrangements to begin production.

Near the end of February 1984, Aretha's agents called Springer and accepted his final proposal.

Meanwhile Springer spoke often with Aretha about artistic and production issues, as he continued working out the terms of the deal with her agents.

In a conversation about rehearsal and performance dates, Aretha told Springer that she had no conflicts on her schedule. "This is what I am doing," she told Springer.

In New York, Springer struck deals with various investors to finance the *Mahalia* production and spoke with promoters and theaters in other cities to reserve dates. In discussions with several promoters, Springer learned for the first time that Aretha Franklin had canceled several recent performances because of a fear of flying.

Springer called Aretha's agents and asked about the canceled performances. The agents told Springer not to worry, that the canceled engagements had been made by other agents without Aretha's approval, and that there were no such problems with this deal.

Springer also checked with Aretha, who told him that she wanted to do the show and would fly as necessary.

Springer met with his lawyer and Aretha's agents on March 23rd 1984 and agreed to the same basic terms that had been proposed before. Springer asked the agents to call Franklin and confirm. The agents stepped out, called Franklin, returned to the meeting and told Springer that Aretha had agreed.

After that meeting, Springer's lawyer wrote the contract in the form of a letter to Franklin's company. The contract draft began:

> This letter … **when countersigned by you**, shall constitute our understanding until a more formal agreement is prepared.

More drafts circulated, all of them had the same "when countersigned by you" language, all of them quibbling over details. Meanwhile, Springer hired set, lighting and costume designers, stage and crew, reserved dance studios, and did everything necessary to begin rehearsals.

A final draft of the contract was ready for signatures on June 7th, the date that Aretha was scheduled to come to New York to begin rehearsals.

Aretha Franklin never showed on June 7th and never came to New York for rehearsals. When Springer's lawyer called Aretha's agents they reported that Franklin would not fly to New York.

Springer paid off the cast, canceled production and sued Aretha Franklin.

Springer's problem? The letter his lawyer wrote plainly said that it would be our understanding "when signed by you." The judge said this meant that Springer did not have a contract, either express or implied, until Aretha Franklin signed the letter, and she never did.

Now what? Aretha Franklin did not make a contract, but she did make repeated promises, and her promises caused Springer to spend a lot of money getting the show ready. In the magic words of contract law, Springer "detrimentally relied" on Aretha's promises.

Unjust? Yes. Meaning we need some magic words to make Aretha Franklin pay Springer for breaking her promise to perform, even though she never made a final, formal contract.

Voila. Promissory estoppel. It requires:

- A makes a clear and unambiguous promise to B;
- B relies on that promise.
- B is "injured" (loses money, suffers other damages) when A fails to keep the promise.

Excerpts from *Elvin Associates v. Aretha Franklin* The central issue pertaining to Springer's claim for breach of contract is whether … the parties to that proposed contract … evinced an intent not to be formally bound before execution of a written, integrated contract. Language inserted in a draft of the agreement referring to its validity upon execution has generally been found to be strong (though not conclusive) evidence of intent *not* to be bound prior to execution.…

All of the incidental terms had been worked out by the final draft, and … the understanding was that Franklin would sign the agreement when she came to New York, [but] there remains the obstacle of the preamble that [Springer's lawyer, Jay Kramer] drafted and that remained in every draft, namely:

> "This letter, when countersigned by you, shall constitute our understanding until a more formal agreement is prepared."

We … find that such language indicates that [Aretha Franklin] was not to be contractually bound to Springer until the draft agreement was executed. This clause is simply too close to the language held to be decisive in [other cases] to be ignored. The cause of action for breach of contract must therefore be dismissed. …

That, however, does not end the case. As above noted, Springer has asserted, in the alternative, a right to recover on a theory of promissory estoppel.

The elements of a claim for promissory estoppel are:

1. A clear and unambiguous promise;
2. A reasonable and foreseeable reliance by the party to whom the promise is made;
3. and an injury sustained by the party asserting the estoppel by reason of his reliance.…

The circumstances [must be] such as to render it unconscionable to deny the promise upon which plaintiff has relied.

It is difficult to imagine a more fitting case for applying the above-described doctrine. Although for her own business purposes Franklin insisted that the formal contract be with the corporate entity through which her services were to be "furnished," in the real world the agreement was with her, and we find that she had unequivocally and intentionally committed herself to appear in the production long before the day on which it was intended that the finalized agreement with her corporation would be signed.

First, it is clear from the testimony of all of the witnesses that Franklin was enthusiastic about appearing in the production and that at all times during the relevant period gave it the highest professional priority. She early on stated to Springer: "This is what I am doing." Combined with her oral agreement, through her agents, to the basic financial terms of her engagement, her continued expression of this enthusiasm to Springer more than amply afforded Springer a reasonable basis for beginning to make the various arrangements and expenditures necessary to bring the production to fruition.

Second, Franklin could not possibly have assumed that Springer could have performed his obligations to her— which, among other things, included arranging a complicated schedule of performances to commence shortly after her arrival in New York— without committing himself to and actually spending considerable sums prior to her affixing her signature to the contract on the date of such arrival. Throughout the time that he was making those commitments and advancing the necessary sums, she accepted his performance without any disclaimer of her prior promises to him. Indeed, she actively participated in many aspects of the necessary arrangements.

Third, Franklin's expression to Springer of her fear of flying did not, as she has contended, make her promise conditional or coat it with a patina of ambiguity that should have alerted Springer to suspend his efforts to mount the production. Although Franklin rejected Springer's offer to make alternative ground transportation arrangements, her primary reason for doing so was that she was determined to overcome her fear of flying, and it was reasonable for Springer to rely on her reassurances that she would be able to fly. Moreover, it was also entirely reasonable for him to assume that if she could not overcome her fear she would travel to New York by other means, even if it meant spreading the trip over several days. In short, Franklin's fear of flying provides no basis whatsoever for avoiding liability for failing to fulfill her promise, reiterated on several occasions, to appear in "Mahalia." If she could not bring herself to fly, she should have traveled by way of ground transportation. It has not been established that she was otherwise unable to come to New York to meet her obligations.

We conclude that under the circumstances as we have outlined them it would be unconscionable not to compensate Springer for the losses he incurred through his entirely justified reliance on Franklin's oral promises. A determination of the exact amount to be awarded has been reserved for a later trial on damages.

[The court awarded Springer $209,364.07 to compensate his losses in preparing for the production of *Mahalia*.]

Oral Deals With Unsigned Writings

The Second Circuit has a famous four-prong test it uses to "help determine whether the parties intended to be bound in the absence of a document executed by both sides."

The court is to consider:

1. whether there has been an express reservation of the right not to be bound in the absence of a writing;
2. whether there has been partial performance of the contract;
3. whether all of the terms of the alleged contract have been agreed upon; and
4. whether the agreement at issue is the type of contract that is usually committed to writing.

No single factor is decisive, but each provides significant guidance.

Winston v. Mediafare Entertainment, 777 F.2d 78 (2nd Cir. 1985).

Restatement 2nd of Contracts § 27 Existence of Contract Where Written Memorial is Contemplated

> Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.

These circumstances may be shown by "oral testimony or by correspondence or other preliminary or partially complete writings."

Restatement (2nd) Contracts § 27

Definite terms

The eternal ambiguity. The parties shake hands (or trade emails) and say:

> "Hooray! We have a deal."

Do they mean: We have a deal *now*? Or do they mean we *will* have a deal, once we sign contracts?

Gold Seal v. RKO

District Court of Appeal California (1955)

- Case on Westlaw
- Case on Google Scholar

An oldie but a goodie.

Movie producer Jack Skirball owned the motion picture rights to *Appointment In Samara,* a novel by John O'Hara.

In March 1950, Skirball spoke with Sidney Rogell, an executive producer with RKO, about making a movie based on *Appointment In Samara*. Then Skirball and Rogell bargained over terms: RKO would pay Skirball a sum of money and a percentage of profits to produce the movie on the RKO lot for distribution by the studio.

At the same time, RKO was negotiating for the services of Gregory Peck to play the leading role and with Skirball for the rights.

On May 16, RKO faced a deadline for making a deal with Gregory Peck, so they presented Skirball with a final offer for the film. They reached an *oral* *understanding* that would pay Skirball $125,000 plus 20% of the movie's profits, to produce the film.

Skirball confirmed that the other terms of his deal would be the same as another movie he had made for RKO and then he confirmed that his agreement with Rogell and RKO was a deal **"with or without Peck."**

Skirball and Rogell shook hands and said, "We have a deal."

After budgeting the film and securing Gregory Peck's participation, RKO publicized the deal in trade journals and news sources.

RKO's legal department sent a deal memo to Skirball outlining the terms of the agreement. A draft of the contract was then submitted to Skirball's attorney with a letter that stated *any enforceable agreement would be subject to the execution of a written contract.*

On May 24th, Skirball met with an RKO attorney and told him that the deal was satisfactory. Skirball also reiterated his understanding that the parties had a deal with or without Peck.

The next day, Gregory Peck backed out of the deal, and RKO told Skirball that it would not sign a contract without first approving a replacement for Peck.

After discussions about other leading actors, a change in management occurred at RKO. In February, 1951, RKO told Skirball the deal was off. Skirball tried to sell rights elsewhere but was unable to because RKO's advertisements, followed by their canceling the deal, made other studios and directors leery of getting involved with an iffy deal.

Skirball sued RKO for breach of their oral contract. The trial court entered judgment for Skirball to the tune of $397,486.

On appeal, RKO argued that the alleged agreement of May 16th left many important terms open and also that the parties had explicitly said that they did not intend to be bound until they each signed a *written contract.* Unsettled terms included: The starting date, the budget, the director, and principal cast, and minor script revisions.

RKO argued that the words "we have a deal" were ambiguous:

> it could not be determined therefrom whether the parties were not to be bound until the formal agreement was signed, or whether they were to be bound immediately and that the formal agreement to be prepared would be a memorial of their present agreement.
>
> [the words] meant that the parties had agreed upon the basic points (story, star and money) and that other points were details as to which,

> it was anticipated, the parties could agree without difficulty; but that a formal agreement would be prepared.

Excerpts from *Gold Seal v. RKO* RKO contends, as above stated, that the evidence was insufficient to support the finding that the parties entered into a contract. It concedes that the basic terms of such a contract, namely the story, leading actor and money consideration, were agreed upon. It argues, however, that the alleged agreement of May 16 left various terms of the final contract open for future agreement; and the parties did not intend to be bound until a written contract was signed. Some of the terms which, appellant asserts, were left open were: the starting date; budget; director and principal cast; minor revisions of the script; assignment of television, radio, and stageplay rights to the novel … With reference to those terms, which allegedly were left open, appellant refers to the Gwenaud contract (the pattern of which allegedly was to be followed herein) and states in effect that provisions therein, regarding terms allegedly left open herein, manifestly were not applicable to the present case by reason of different dates, names, amounts, etc., and therefore that the parties in the present case must have contemplated further agreement as to those matters.

With reference to the parties not intending to be bound until a contract was signed, appellant [RKO] argues that the words "we have a deal" were ambiguous and did not import a present agreement; that the unexpressed subjective intent of the parties was immaterial; and that the surrounding circumstances showed that the parties did not intend to be bound immediately. As to the words "we have a deal," appellant asserts that they meant that the parties had agreed upon the basic points (story, star and money) and that the other points were details as to which, it was anticipated, the parties could agree without difficulty; but that a formal agreement would be prepared. It asserts further that the words were ambiguous in that it could not be determined therefrom whether the parties were not to be bound until the formal agreement was signed, or whether they were to be bound immediately and that the formal agreement to be prepared would be a memorial of their present agreement. As to the unexpressed subjective intent of the parties, appellant is referring to testimony of Skirball and Rogell to the effect that they "felt" or "understood" the parties were "bound" or "committed" when they said they had a deal and then shook hands; and appellant is also referring to the testimony of Rogell to the effect that the handshaking was "in a manner in which you shake hands when you have concluded a deal." …

As above stated, the court found that on May 16 the parties entered into an oral contract, with the mutual intention that it should thereupon become binding, and at that time the parties contemplated that a memorial thereof would be prepared and executed; on May 24 a memorial, setting forth all the terms of the oral contract, was orally approved by the parties; the second draft of the agreement (May 24), incorporating changes in the first draft (May 20), was prepared in order to memorialize the oral contract entered into between the parties. The parties had entered into prior contracts, including the Gwenaud contract. Appellant concedes that on May 16 the parties agreed orally upon the basic points of the contract (story, star and money) and that the other points were details which the parties anticipated could be agreed upon without difficulty. The other points or "details" were to follow the pattern of the Gwenaud contract. (Youngman's letter to the resident attorney of RKO, directing him to draw the agreement herein, stated that "All of the other terms and provisions are the same as those in the last contract [Gwenaud contract].") …

In *Mancuso v. Krackov,* it was said: "It is not necessary that each term [of an oral contract] be spelled out in minute detail." In *Thompson v. Schurman,* it was said:

> The rule is well established and uniformly followed that when the respective parties orally agree upon all the terms and conditions of a contract with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract. … The question as to whether an oral agreement, including all the essential terms and conditions thereof, which according to the mutual understanding of the parties is to be subsequently reduced to writing, shall take effect forthwith as a completed contract depends on the intention of the parties, to be determined by the surrounding facts and circumstances of a particular case. …
>
> The significance of shaking hands, under such circumstances and following the conversation herein before mentioned, and at the same time saying 'We have a deal,' was material. The intention of the persons who shook hands and used those words, under such circumstances, was material. The testimony of both persons, with respect to intention, was to the same effect—that they intended to close the deal.

[The court ultimately decided that on May 16th the parties entered into an oral contract and that they intended it to be legally binding. Two drafts incorporated those terms and the parties orally agreed to them. Skirball conceded that there were other points to be decided, but the parties had stated they would be handled according to the terms of the deal he for the other movie he had going at RKO.]

Consideration and Mutuality

"Consideration" is anything of value promised to another when making a contract. It can take the form of money, physical objects, services, promised actions, abstinence from a future action, and much more.

Consideration fulfills at least two functions in entertainment law contracts:

1. an evidentiary function (proof that you are making a contract;
2. a cautionary function (you stand to lose x or you must do y, if this contract is enforceable).

Must both sides assume some detriment or obligation?

Wood v. Lucy, Lady Duff-Gordon

New York (1917)

- Case on Google Scholar

We all recall from first-year contracts, the famous case.

- Fashion designer Lady Duff-Gordon gives Wood the exclusive rights to market her designs.
- Wood agrees to pay Lady DG half the profits from selling Lady DG products.
- Lady DG breaches the K by endorsing the products of someone else.
- Wood sues for breach of K.
- Lady Duff-Gordon says she hasn't breached because no valid contract existed between her and Wood, because the deal they made could not be enforced for lack of consideration.

Judge Cardozo famously found that the agreement contained an implied promise:

> The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day. A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed. If that is so, there is a contract.

Bonner v. Westbound Records

Illinois Court of Appeals (1979)

Case on Westlaw

Mr. PRESIDING JUSTICE SIMON delivered the opinion of the court:

The defendants Westbound Records, Inc. (Westbound), and Bridgeport Music, Inc. (Bridgeport), appeal from a summary judgment in favor of the plaintiffs. The circuit court held that two contracts dated March 24, 1972, between the defendants and a rock music performing group known as The Ohio Players, of which the plaintiffs were members, were void and unenforceable.

Westbound's business is making master recordings and selling them to others for production and distribution. The agreement between Westbound and The Ohio Players (the recording agreement) required The Ohio Players to make records exclusively for Westbound for a 5-year period. Bridgeport is in the business of owning and licensing copyrights to music compositions. The agreement between Bridgeport and The Ohio Players (the publishing agreement) provided that Bridgeport would employ The Ohio Players as authors and arrangers so long as the recording agreement was in existence, and that The Ohio Players would render these services exclusively for Bridgeport. Both agreements provided they were to be governed by and construed in accordance with Michigan law. The capital stock of both Westbound and Bridgeport was owned by the same person.

In the 21 months immediately following the execution of the recording agreement, The Ohio Players recorded four single records and two albums for Westbound. They were successfully distributed on a national basis, and one of the records, *Funky Worm*, was the recipient of a gold record, which in the record industry symbolizes sales in excess of $1,000,000. During the months these recordings were being made, Westbound advanced $59,390 for costs of recording sessions for The Ohio Players, artwork, travel expenses, and recording session wages paid to The Ohio Players. In addition, Westbound and Bridgeport advanced $22,509 to enable The Ohio Players to pay income taxes they owed and to settle litigation against them. Neither of the defendants was obligated to make the latter advances. The Ohio Players had no personal obligation to repay these advances; under the recording agreement and the publishing agreement, Westbound and Bridgeport could recoup the advances they made only out of royalties payable to The Ohio Players.

In January 1974, five of The Ohio Players, the plaintiffs in this case, repudiated the recording agreement, and signed an agreement with Phonogram, Inc., and Unichappell (hereinafter collectively referred to as Mercury Records), competitors of Westbound, to record exclusively for Mercury Records under the "Mercury" label. On March 8, 1974, they filed this action seeking a judgment declaring that the recording agreement was invalid and unenforceable, and that, consequently, they were no longer obligated to record for Westbound.

Proceeding to the merits, the plaintiffs contend that the recording agreement is unenforceable because no consideration passed from Westbound to The Ohio Players for their agreement to record exclusively for Westbound. Plaintiffs emphasize especially that the recording agreement lacked mutuality because even though The Ohio Players were obligated to make a minimum number of recordings, Westbound was not required to make even a single recording using The Ohio Players. …

Contrary to the conclusion reached by the circuit court judge, it is our view that consideration passed to The Ohio Players when they accepted $4,000 to enter into the agreements. The fact that this payment was made by Westbound and Bridgeport by a check containing the notation that it was "an advance against royalties" does not disqualify the payment from being regarded as consideration. If sufficient royalties were not earned to repay Westbound the $4,000, The Ohio Players would not have been obligated to return it. By making the $4,000 advance, Westbound suffered a legal detriment and The Ohio Players received a legal advantage.…

Although the $4,000 payment to plaintiffs was not recited in either of the agreements, parol evidence was properly admitted to establish that the payment was made in consideration of the agreements. Where a contract is silent as to consideration, its existence may be established through parol evidence.… The agreements are valid and enforceable even if they lack mutuality because they are supported by the executed consideration of $4,000 passing from the defendants to The Ohio Players.…

Even had the defendants not made the $4,000 advance, the plaintiffs could not prevail. The circuit court judge erred in finding that "there was no obligation on the part of the defendants to do anything under their respective agreements" with The Ohio Players. During the first 21 months after the date of the recording agreement, Westbound expended in excess of $80,000 to promote The Ohio Players and to pay their taxes and compromise litigation against them, and during this period the performers recorded four single records and two albums. The consistent pattern of good faith best efforts exerted by the parties during the first third of the term of the agreements demonstrates that they intended to be bound and to bind each other. Even contracts which are defective due to a lack of mutuality at inception may be cured by performance in conformance therewith.…

Disregarding the performance under the agreements, the conclusion that the parties intended to be and were mutually obligated is also compelled by the rule that the law implies mutual promises to use good faith in interpreting an agreement and good faith and fair dealing in carrying out its purposes.

In *Wood v. Lucy*, an often-cited decision, the plaintiff, a dress manufacturer, obtained exclusive rights to market dresses designed by the defendant, a prominent designer, in return for the plaintiff's agreement to pay the designer one-half of its profits. The designer endorsed fabrics and dresses of plaintiff's competitors, and defended the plaintiff's suit for damages by contending, as the plaintiffs in this case argue, that the contract lacked mutuality because it did not require the plaintiff to do anything. Mr. Justice Cardozo, speaking for the New York Court of Appeals, rejected this argument, saying:

> The defendant insists that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed. If that is so, there is a contract."

Justice Cardozo relied upon features identical with those included in the recording agreement as a basis for implying that the manufacturer had a contractual obligation. Referring to the manufacturer's exclusive privilege to market the designer's creations, the court reasoned that absent the manufacturer's efforts, the designer would have had no right to market her own fashions. Justice Cardozo explained the significance of this factor:

> "We are not to suppose that one party was to be placed at the mercy of the other."

The court noted that it was to be assumed that the plaintiff's business organization would be used for the purpose for which it was adapted, to manufacture and distribute the designer's creations. The court also regarded as relevant that the designer's compensation depended upon the manufacturer's efforts. The court next stressed the duty of the manufacturer to account for profits, commenting that this obligation supported the conclusion that the manufacturer had an obligation to use reasonable efforts to bring profits and revenues into existence....

The plaintiffs attempt to distinguish *Wood v. Lucy* in three ways. First, they contend that the agreements in this case resulted in the transfer of their total creative efforts, while the designer in *Wood v. Lucy* transferred only limited rights. The reverse is true. The designer transferred not only endorsement rights, but the exclusive right to sell her designs and to license others to sell them. In other words, she transferred the identity of her creative efforts and her major source of livelihood as a dress designer. In this case, The Ohio Players retained the right to perform in nightclubs and in concerts. This is significant, for at the time these agreements were signed, the major portion of The Ohio Players' income was from their live performances rather than their recording or song-writing efforts.…

Finally, plaintiffs, relying upon provisions of the recording agreement and the publishing agreement, argue that those agreements expressly negated any implied promise by defendants to perform in good faith, and *Wood v. Lucy* is, therefore, not applicable. The recording agreement provided:

> "Company is not obligated to make or sell records manufactured from the master recordings made hereunder or to license such master recordings or to have Artist record the minimum [number] of record sides referred to in Paragraph 2 (B)."

The publishing agreement provided:

> "The extent of exploitation of any Musical Composition, including the publication of sheet music or other printed editions, or the decision to refrain therefrom, shall be entirely within the discretion of Publisher."

Plaintiffs' argument is inconsistent with the meaning of the agreements, taken in their entirety, and also is at odds with the interpretation placed upon the agreements by the parties. Neither of the above-quoted provisions states that Westbound and Bridgeport may sit idly by for 5 years, and they did not. Neither agreement states that Westbound and Bridgeport may act in bad faith. Neither provision quoted above contradicts the implied promises of good faith which we attribute to the agreements.

As we interpret the provision of the recording agreement quoted above, it states only that Westbound is not obligated to record the full minimum number of records set forth in another provision of the contract which The Ohio Players were obligated to record, or after going to the expense of making master recordings, to license them or make or sell records from the master recordings in the event the master recordings proved not to be suitable for that purpose. It does not mean, as plaintiffs urge, that Westbound is not required to make even one recording with The Ohio Players. And, the Bridgeport provision merely left to the discretion of the publisher the amount of advertising and publicity that would be given to any musical composition written by The Ohio Players. These provisions reserve to Westbound and Bridgeport discretion to control the content of recordings and the timing and number of releases. Flexibility of this type was essential in order to achieve the greatest success for The Ohio Players as well as Westbound and Bridgeport. Nothing in either the recording agreement or the publishing agreement or in the conduct of the parties demonstrates that

Westbound or Bridgeport could or did use this discretion arbitrarily or in bad faith.

This interpretation of the recording agreement finds support in a seemingly unrelated provision of that agreement. The agreement was to run for an initial term of 5 years, but Westbound had the option to extend it for 2 years. If, as the plaintiffs contend, Westbound had absolutely no obligations under the contract, that extension would be practically automatic, for Westbound would have nothing to lose by exercising its option, and perhaps something to gain. The agreement would be essentially for one 7-year term, and the "option" phrasing a meaningless complication. Under our interpretation of the contract, however, the option provision makes perfect sense: Westbound could extend its right to the plaintiffs' services, but only at the cost of renewing its own obligation to use reasonable efforts on their behalf. The law prefers an interpretation that makes sense of the entire contract to one that leaves a provision with no sense or reason for being a part of a contract.…

The circuit court also erred in failing to give effect to the doctrine of promissory estoppel as a substitute for consideration. Decisions in Illinois as well as Michigan state that promissory estoppel may be relied upon to uphold a contract otherwise lacking in consideration or mutuality at the time of its execution, where injustice can be avoided only by enforcement of the promise.…

Prior to their agreement with Westbound, The Ohio Players had made only a few recordings, none of which met with great success. Their performances were mainly in nightclubs and discotheques; they were virtually unknown in the recording field. Yet, Westbound, in reliance upon the execution of the recording agreement by The Ohio Players, undertook a substantial business risk, incurring more than $80,000 in expenses which it could recoup only if the recordings were successful. The recording agreement provided for royalty payments to The Ohio Players at percentage rates ordinarily found in the record industry in contracts providing for exclusive services of performers over a period of time. Assuming Westbound and Bridgeport were not obligated to do anything, the expenses and liabilities they incurred in reasonable reliance upon enjoying the exclusive services of The Ohio Players for a 5-year period obligated The Ohio Players to perform as they promised to do.

Plaintiffs assert that promissory estoppel is not an appropriate doctrine in this case because it applies only when there is unjust enrichment. No Michigan authority is cited. However, because the agreements are supported by consideration, the defendants need not rest on the doctrine of promissory estoppel as a substitute for consideration. Our purpose in considering the promissory estoppel issue is primarily to illuminate the fundamental unfairness of the plaintiffs' claim, and so we shall, for the sake of argument, accept the plaintiffs' legal doctrine that unjust enrichment is required.

The plaintiffs' theory is that there is no unjust enrichment once Westbound recoups its advances from the royalties The Ohio Players have earned, and thereby suffers no actual loss. This, however, is possible only because of the success The Ohio Players enjoyed in recording for Westbound. If we adopt the plaintiffs' view and refuse to enforce the agreement, the outlook at the time promissory estoppel arises, when Westbound, relying on plaintiffs' promises, works and advances money on their behalf, but before those efforts succeed or fail, is this: if the venture fails, Westbound's money will vanish, but if The Ohio Players become a hit, they will allow Westbound to break even. Conversely, The Ohio Players can do no worse than break even, having nothing invested, and they may perhaps enjoy a great profit, largely due to Westbound's work and backing. It is obvious that no one would ever voluntarily take Westbound's end of this deal. The Ohio Players should not be able to impose it on Westbound by backing out of their agreement. For The Ohio Players to obtain for themselves the possibility of a bonanza, while imposing the risk of loss on Westbound, by breaking their promises after Westbound's reliance on those promises for a period of almost 2 years, would unfairly enrich The Ohio Players at Westbound's expense.

The Ohio Players had nothing to offer Westbound but an interest in their future, the chance to make a great deal of money by making them famous. The Ohio Players had nothing to lose; Westbound was to take all the risks. Having induced Westbound to perform as fully and faithfully as anyone could desire by signing these agreements, The Ohio Players now seek to deny Westbound the sole reward of its success. Their aim is to keep for themselves the fame and money which, judging by their past experience, they could not have acquired without Westbound's aid, by asserting that Westbound did not originally *promise* to do what it has already actually done. This the plaintiffs are estopped to do; even if the agreements were not originally supported by consideration, they became enforceable when Westbound performed in reliance on the promises of The Ohio Players, and indeed advanced additional monies not called for by the contract, to protect its investment.…

For the above reasons, we conclude that the recording agreement and the publishing agreement were supported by consideration consisting of the cash advances and the mutual promises of the parties, and that the agreements may also be upheld by the doctrine of promissory estoppel.

Order vacated and cause remanded.

Notes on *Bonner v. Westbound Records*

- Ohio Players (OP) enter into a recording agreement with Westbound Records in 1972.
- Contract requires OP to make records *only* for Westbound for a 5-year period.
- In 1974 (two years later) OP signs a new deal to record exclusively for Phonogram.

What is the consideration offered by Westbound? There isn't any. The contract is silent as to consideration.

OP seeks a declaratory judgment.

Lower Court entered summary judgment for the Ohio Players, recording agreement is invalid and unenforceable.

On appeal, the court holds that the existence of consideration may be established through parol evidence) Contracts valid because of the money passing from Westbound to OP.

> By making the $4,000 advance, Westbound suffered a legal detriment and The Ohio Players received a legal advantage…It is not the function of either the circuit court or this court to review the amount of the consideration which passed to decide whether either party made a bad bargain…unless the amount is so grossly inadequate as to shock the conscience of the court. The advance The Ohio Players received, taken together with their expectation of what Westbound would accomplish in their behalf, does not shock our conscience. On the contrary, to a performing group which had never been successful in making records, Westbound offered an attractive proposal. The adequacy of consideration must be determined as of the time a contract is agreed upon, not from the hindsight of how the parties fare under it.

Court looks beyond the four corners of the contract for an implied promise, promissory estoppel, detrimental reliance, parol evidence

Legal capacity

Consider the stories of Shirley Temple and Macauley Culkin. Both started their acting carriers at age 4 and had huge, early Hollywood hits. Shirley Temple was Hollywood's biggest star in the '30s and '40s and has made more than 50 movies. Culkin made more than $23 million, plus percentages of gross revenues. Both were managed by their parents, and both faced hardships due to the money made while each was a minor. When Temple got married shortly after World War II, she was shocked to find out that she had very little money left from her years of box office stardom. Statutory safeguards protected Culkin's $40 million trust fund, until he emancipated from his parents and gained sole control over his contracting and spending rights. Yet the Culkin family was embroiled in litigation over custody of Culkin himself and gaining access to the his funds to maintain the lifestyle of which they were accustomed.

- For a nice discussion on the statutory safeguards in place and how they can be improved: A Matter of Trust for Rising Stars: Protecting Minors' Earnings in California and New York

When dealing with minors, the studios and other contracting parties must consider other issues, as well.…

Scott Eden Management v. Kavovit

563 NYS2d 1001 (NY 1990)

- Case at Westlaw

Facts

Defendant was 12-year-old actor who entered into a deal with Eden to act as his manager. Eden was to receive 15% commission of Kavovit's earnings. After two years, Eden had Kavovit sign with Andreadis Agency, who would receive an additional 10% commission. Soon after, Kavovit signed a contract to be on "As the World Turns." Kavovit's attorney contacted Eden, informing him that Kavovit was disaffirming the contract on the grounds of infancy.

From the opinion of the court:

> An infant's contract is voidable and the infant has an absolute right to disaffirm.… After disaffirmance, the infant is not entitled to be put in a position superior to such a one as he would have occupied if he had never entered into his voidable agreement. He is not entitled to retain an advantage from a transaction which he repudiates. 'The privilege of infancy is to be used as a shield and not as a sword.' …

While Kavovit was allowed to disaffirm the contract, he was required to pay Eden all commissions Eden would have been due over the course of the contract.

Duration

De Havilland v. Warner Bros.

- The De Havilland Law

  Hollywood industry lawyers in the 1920s, 1930s, and 1940s took the position that an exclusive personal services contract should be treated as suspended during the periods when the artist was not actually working. Since no artist could be working every single day (that is, including holidays and weekends), this interpretation meant that two, or later seven, years of actual service would be spread over a much longer calendar period, thus extending the time during which the studio system had complete control of a young artist's career.

  In response, actress Olivia de Havilland filed a lawsuit on August 23, 1943 against Warner Bros. which was backed by the Screen Actors Guild. The lawsuit resulted in a landmark decision … de Havilland's favor on December 8, 1944. In a unanimous opinion by Justice Clement Lawrence Shinn, the three-justice panel adopted the common sense view that seven years from the commencement of service means seven calendar years. Since de Havilland had started performance under her Warner annual contract on May 5, 1936 (which had been renewed six times pursuant to its terms since then), and seven calendar years had elapsed from that date, the contract was no longer enforceable and she was free to seek projects with other studios.

Such an old case might feel antique, but the same theory has been used right up to the present day, and will likely be deployed in a major dispute between two talent titans (CAA vs. UTA).

CAA vs. UTA, Corporate Raiding and the Ghost of Ed Limato (Analysis)

> Consider the case of the late legendary agent, who spent most of his career at ICM before defecting to William Morris in 2007, taking with him such clients as Denzel Washington, Steve Martin and more. Limato was under contract to ICM but when the agency tried to diminish his status, he argued, in effect, that his contract was "illegal" because it violated California's strict "seven-year rule" for personal services contracts. That law dates back to actress Olivia de Havilland's lawsuit against Warner Bros. in the 1940s for repeatedly extending her contract with the studio after "suspending" her for rejecting suggested roles. In 1944, the California Court of Appeal

> ruled that de Havilland— or any other actor, director or other talent in the entertainment industry— could not be subject to a contract to perform personal services beyond seven years from the beginning of the deal. The so-called "de Havilland law" fundamentally changed Hollywood, brought about the end of the old studio system and allowed talent agencies to amass power.

The Movie Option

Where Publishing Meets Hollywood

What does optioning your book mean? Screenwriter John August answers the question for working authors and writers at his blog for screenwriters.

> "I'm gonna pay you $1000 today. In exchange for that $1000, you promise you won't sell anyone else the rights during the next twelve months. Also, any time during these twelve months, I can pay you $25,000 and you'll sell me all the film rights to the book."
>
> In this example, $1000 is the option price, and $25,000 is the full purchase (or buyout) price. But those are completely arbitrary numbers. Often the option price is just $1. Sometimes the full purchase price is $1 million. And the length of the option can vary as well, from six months up to two years or more, perhaps with a clause allowing the producer to renew the option at fixed price.
>
> In short, the dollars and dates can be anything, but the basic structure of the deal is the same.
>
> From "Optioning your book", by John August.

Options

Movie options are common in Hollywood, but they are also common in many industries, anytime a buyer wants an option to buy something valuable for an agreed period of time. It may be an option to buy fine art, rights to music, a building, a Stradivarius, stocks, whole corporations. It doesn't matter. The basics of the option are the same.

In the movie biz, it works this way. A producer or a studio thinks that your novel (magazine article, graphic novel, treatment, screenplay) might make for a nice feature film. They call your novel "source material" or "story material," and total story costs (including the screenplay) usually account for about 2-5% of a movie's budget.

Budgets for feature films average $70 million these days. Therefore if the producer were to buy the movie rights to your novel outright, she should pay roughly $1.5 to $2 million (1-3% of $70 million)(which leaves another 2% to pay the screenwriter). Nobody wants to spend that kind of money only to find out that a movie can't be made. And movies don't get made for many reasons: because they've paid three different screenwriters and still can't get a script they like, or they can't make deals with enough A-list talent, or dozens of other reasons from insurance to tax credits. The slip between cup and lip in Hollywood is a mile wide. Most projects don't get made.

So instead of buying the rights outright and risking the full purchase price for the rights to your novel, the producer *rents* the rights. She buys the *option* OPTION to purchase the movie rights to your novel, for a fixed time period, probably with an option to renew. How does that work?

Three Essential Terms of any Option Agreement

1. The option period (for how long?);
2. The option payment (how much for the right to buy the rights?);
3. The purchase price (how much to actually buy the rights?)

1. The Option Period. The producer or the studio buys a period of time during which they will try to strike a movie deal. How many months or years are they asking the seller not to sell to someone else?

With budgets at $70 million or more and with complicated deals for talent, a producer wants time to "set up" the project at a major studio. At a minimum, 6, 12, or 18 months, or even two years. Longer periods of time are common, only because most options include another option to renew, or to buy another period of time, but for steadily escalating dollar amounts. For independent movies, the producer may need even more time to "pre-sell" foreign rights to exhibit movies which have not even been made yet, usually because a major name is associated with the project.

Usually measured in months, this is called the "Option Period." During this period of time if the producer or studio wish to "execute their option," they have the right to buy the movie rights for a pre-arranged purchase price.

2. The Option Payment How much is the producer or studio willing to pay for the right to buy those rights? This is the option payment (the "small money," or "the rent"). It goes something like this: I will pay you $20,000 for the right to buy the movie rights to your novel for 18 months. If I decide to make the movie during those 18 months, the full purchase price will be $700,000 (minus the $20,000 I already paid). If I don't buy the rights; after 18 months go by, the option expires. You keep the option payment, and you are free to sell the movie rights to your novel to any willing buyer, or option them again.

The option payment varies greatly (depending if you are J.K. Rowling or a minor Midwestern novelist). The rule of thumb is that the option payment should be in the neighborhood of 10% of purchase price.

3. The Purchase Price If the movie gets made, the producer or studio will pay the total amount of money due to the writer, usually on the first day of principal photography. This is the execution price or purchase price (the "big money"), the full price for the movie rights (usually 1-3% of the film's budget with a cap).

The option agreement MUST CONTAIN A PURCHASE PRICE to be an enforceable promise (PL 101-105). Otherwise the producer has promised only to BUY the movie rights, not how much she will pay.

The price may vary greatly, but it must be negotiated up front at the time the option agreement is made. If the movie gets made, the author is paid in full. If the deal falls through for any reason and the movie does NOT get made in the option period, then the novelist keeps the option payment and the movie rights remain with the novelist, too.

More on Movie Options

- See Would My Book Make A Good Movie? by Richard Dooling.