

Entertainment Law

Lawyers For The Talent

Richard Dooling

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Lawyers For The Talent

by Richard Dooling

Representation

Talent Representation & Regulation

Lawyers

What do entertainment lawyers do?

Just like Frances Gumm became Judy Garland, and Thomas Mapother III became Tom Cruise, “entertainment law” is actually a more glamorized, fabricated name for contract law, copyright law, intellectual property law, licensing law, litigation, and working really hard just like every other lawyer out there. ... Entertainment lawyers are merely copyright, contract, or IP lawyers who have clients in the entertainment business, just like sports lawyers have clients in the sports business.

- Erica Winter, [Entertainment Law - Glamor By Association?](#)
- Diane Dannenfeldt, [How Entertainment Lawyers Work](#)

As in any industry, the lawyer (in this case, the entertainment or publishing or music lawyer) is a kind of “super fiduciary,” overseeing problems the talent has with “regular” fiduciaries (agents, managers, producers). Publishing lawyers know the book industry and can offer legal and practical advice. Music lawyers know the music business, and nobody explains it better than Donald Passman in [All You Need To Know About The Music Business](#) (10th ed. 2019). The music business has its own representation wrinkles, because managers act more like talent agents in the music business, and Passman explains the difference well.

A good entertainment or publishing lawyer may be able to offer disinterested advice about the disposition of rights when the agents have conflicts of interest with their clients. For example, the Hollywood talent agent who sells film rights to the author’s novel usually will go for top dollar, of course, but what if the talent agent is selling those rights to a producer who also happens to be

represented by the same large talent agency? There's at least a potential for conflict. The big agencies will often provide a second opinion, a disinterested review of the terms to guard against conflicts of interest.

Literary Agents

In the publishing world, an author with a great agent often doesn't need a lawyer. Finding an agent is the brass ring. The hardest part. It can take years, sometimes decades. Real literary agents know what sells, and they are picky when it comes to representing new authors.

As Stephen King put it:

Of course there has to be some talent involved, but talent is a dreadfully cheap commodity, cheaper than table salt. What separates the talented individual from the successful one is a lot of hard work and study; a constant process of honing.

Literary agents want to represent hard-working professional authors who dependably turn out good prose, not daydreamers who think they might have an idea for a book someday. Often an unpublished author with a manuscript to sell needs help answering the eternal question: How Do I Get An Agent? First rule: Nobody phones a literary agent. The would-be author approaches via a query letter, these days usually submitted via email.

Publishing industry blogger [Jane Friedman](#) is great on these practical matters, with good posts on [finding a literary agent](#) and writing [query letters](#). Also take a peek at [How to Research Literary Agents and Book Publishers](#). Industry folk follow [Publishers Weekly](#) and [Publishers Marketplace](#) for what [rights](#) sold and to whom.

It's a happy day when an agent calls with the good news: She'd love to represent the author. After rejoicing together over their engagement, now comes a prenuptial contract in the form of an agency agreement. At this point in the author-agent relationship, the author needs legal advice before signing the agency agreement.

Unlike New York and California talent agents, New York literary agents are not governed by the New York or California Labor Codes. But literary agents are governed by the common law of agency. The agent's obligations to her author are also often spelled out in a written agreement with the agency. Some agents still have handshake verbal agreements and protect themselves only with the agency clause contained in the book contracts the agent negotiates for the author.

A first-time author needs legal help with that agency agreement. First stop, the [Authors Guild](#). If the author does not yet qualify for assistance, then the author should probably find a lawyer. Yes, agents owe their clients duties under the law. Agents are supposed to bargain *for* their clients, not *with* their clients over the terms of an agency agreement. The one time the literary agent is *adverse* to her client (instead of looking out for the client's best interests) is possibly in negotiations about the terms of the agency agreement itself.

The agent may overreach and attempt to include an interminable agency clause (see *Peter Lampack Agency* case below), or some other one-sided clause. As discussed in our materials on book contracts, the Authors Guild often will help authors and their representatives [negotiate and edit these contracts](#).

Literary Agents and Lawyers

Once the agent and author are fast friends, their interests are usually aligned. The agent gets 15% of everything the author earns, an incentive to work hard for a bigger share.

An author represented by a good literary agent may publish several books and never need a lawyer. But when an author “travels,” as they say, meaning their books appeal to international audiences, the contract terms become more complex. The international rights issues are more arcane and complex. Once Hollywood begins optioning an author's books, the author probably would do well to meet with a few entertainment lawyers. Hollywood deals involve multiple agents, managers, and lawyers (film, literary, music) all get involved. It's no place to be wandering around without a good lawyer and perhaps a passport, because it feels like a foreign country.

The Interminable Agency Clause

- [Description of clause](#)

Peter Lampack Agency, Inc. v. Martha Grimes

Superior Court New York (2010)

- [case on Google Scholar](#)
- [case on Westlaw](#)

BERNARD J. FRIED, J.

This case involves the Peter Lampack Agency, Inc. (“PLA”), and Martha Grimes (“Grimes”), and various corporate affiliates of the Penguin Group (USA) Inc. (“Penguin”).

It is undisputed that in or about 1996, Grimes, an author of literary and commercial fiction, retained PLA as her literary agent. PLA acted in this capacity for twelve years, during which it procured publishing agreements for many works authored by Grimes. Those works were published and Grimes received over twelve million dollars from the publication and domestic and international sale of her novels.

In or about May 2007, Grimes notified PLA that she would no longer be using PLA as her literary agent and retained a new representative.

On November 18, 2009, PLA filed a complaint against all defendants alleging breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, and seeking a declaratory judgment and injunctive relief ...

The first cause of action alleges that Grimes breached the four book publishing agreement entered into by Grimes, Penguin, and Viking-Penguin in 2005 (“2005 Penguin/Viking-Penguin Agreement”). The 2005 Penguin/Viking-Penguin Agreement contains an option clause providing:

[T]he Author hereby grants to the Publisher the exclusive right and option to publish ... her next book-length work of fiction ... The Publisher shall have a period of thirty (30) days after receipt by the Publisher of the notification from the Author or her agent of the Author’s desire to commence negotiation concerning such next book-length work of fiction within which to notify the Author whether it desires to publish such work and to negotiate the terms and conditions of such publication.

On February 4, 2009, in accordance with the terms of the Option on Next Work clause, Grimes’ counsel sent a letter to Penguin enclosing a manuscript of “The Black Cat.” On February 27, 2009, Penguin made an oral proposal to Grimes’ counsel and the agreement for “The Black Cat” was finalized on August 20, 2009. PLA alleges the publishing agreement for “The Black Cat” arose out of the Option on Next Work clause and that Grimes violated the terms of the 2005 Penguin/Viking-Penguin Agreement by refusing to account to PLA and refusing to pay PLA the sums due for “The Black Cat.” PLA also alleges that the defendants acted in bad faith and breached the covenant of good faith and fair dealing implied in the 2005 Penguin/Viking-Penguin Agreement....

The issues presented in this motion are whether PLA has sufficiently pleaded:

1. The first cause of action to establish that the terms of the 2005 Penguin/Viking-Penguin Agreement entitle PLA to commission for publishing agreements arising out of the Option on Next Work clause;
2. The second through seventh causes of action to establish that the terms of the publishing agreements mentioned in these causes of action entitle PLA to commission on extensions of those agreements;
3. The eleventh and fourteenth causes of action to establish that Grimes owes PLA a fiduciary duty.

I. First Cause of Action

In the first cause of action, PLA alleges that the publishing agreement for Grimes' book "The Black Cat" arose out of the Option on Next Work clause in the 2005 Penguin/Viking-Penguin Agreement and that Grimes violated the terms of the 2005 Penguin/Viking-Penguin Agreement by refusing to pay PLA commission for "The Black Cat." Defendant Grimes moves to dismiss the first cause of action, arguing that under the 2005 Penguin/Viking-Penguin Agreement, PLA is not entitled to commission for "The Black Cat" because:

1. PLA's agency is not coupled with an interest and PLA's agency was revoked in May 2007;
2. the Option on Next Work clause is an unenforceable "agreement to agree"; and
3. the publishing agreement for "The Black Cat" does not arise out of the Option on Next Work clause.

Turning to the arguments set forth in the Motion to Dismiss, the first issue is whether the terms of the 2005 Penguin/Viking-Penguin Agreement entitle PLA to receive commission for "The Black Cat." Grimes argues that the terms of the 2005 Penguin/Viking-Penguin Agreement do not entitle PLA to commission for "The Black Cat" because PLA's agency was not coupled with an interest and it was revoked before negotiations for the "The Black Cat" publishing agreement began. PLA argues that even if its agency was revoked, the first cause of action for breach of contract is sufficiently pleaded in the complaint because the publishing agreement for "The Black Cat" arose out of the Option on Next Work clause in the 2005 Penguin/Viking-Penguin Agreement and under the terms of that Agreement, PLA is entitled to commission for publishing agreements arising out of the Option on Next Work clause.

The only part of the 2005 Penguin/Viking-Penguin Agreement that entitles PLA to commission is the commission provision. The Option on Next Work clause does not provide for PLA to receive commission for publishing agreements

arising out of the clause.

Therefore, in order to determine whether PLA has sufficiently pleaded a breach of contract claim for the first cause of action, I must look to the commission provision in the 2005 Penguin/Viking-Penguin Agreement and determine whether this provision entitles PLA to receive commission for publishing agreements arising out of the Option on Next Work clause. The commission provision in the 2005 Penguin/Viking-Penguin Agreement provides in relevant part:

The Author hereby appoints (PLA) irrevocably as the Agent in all matters pertaining to or arising from this Agreement.... Such Agent is hereby fully empowered to act on behalf of the Author in all matters in any way arising out of this Agreement.... All sums of money due the Author under this Agreement shall be paid to and in the name of said Agent The Author does also irrevocably assign and transfer to [PLA], as an agency coupled with an interest, and [PLA] shall retain a sum equal to fifteen percent (15%) of all gross monies due and payable to the account of the Author under this Agreement.

It is the general rule that an agency for no definite term is revocable at will.... However, when an agency authority is coupled with an interest, the agency is irrevocable.... An agency is coupled with an interest where, as a part of the arrangement with the principal, the agent receives title to all or part of the subject matter of the agency.... Words alone are not enough to establish an agency coupled with an interest. ...

In this case, the commission provision grants PLA a 15% commission in the proceeds from its sale of rights in Grimes' literary works and not an interest in those literary works themselves.

The mere fact that the commission provision "appoints PLA irrevocably" as an agent is not enough to create an agency coupled with an interest....

However, an agent who is authorized to reimburse himself out of the proceeds of the agency for advances made or expenses incurred does not have a power coupled with an interest unless he is also given a property interest in the subject matter of the power. ... Since PLA does not have a property interest in Grimes' literary works, its agency is revocable and it was revoked in May 2007. Therefore, PLA's argument fails in so far as PLA relies on its alleged irrevocable agency to support its claim for breach of contract in the first cause of action.

The remainder of the commission provision in the 2005 Penguin/Viking-Penguin Agreement provides that

PLA shall retain a sum equal to fifteen percent (15%) of all gross

monies due and payable to the account of the Author under this Agreement....

The commission provision does not provide that PLA is entitled to commission on agreements arising out of the Option on Next Work clause and it only entitles PLA to commission for the four books that are the subject of the 2005 Penguin/Viking-Penguin Agreement. Therefore, PLA is not entitled to commission for “The Black Cat” and the first cause of action is dismissed. In light of this disposition, it is unnecessary to address Grimes’ other arguments with respect to the first cause of action.

II. Second Through Seventh Causes of Action

The second through seventh causes of action allege breach of contract for the following publishing agreements:

1. an agreement made in 2000 between Grimes, Penguin, and Putnam;
2. an agreement made in 1999 between Grimes, Putnam, and New American;
3. an agreement made in 2001 between Grimes, Putnam, and Signet;
4. an agreement made in 2002 between Grimes, Penguin-Putnam, and Penguin;
5. an agreement made in 2003 between Grimes, Penguin, and Signet; and
6. an agreement made in 2003 between Grimes, Penguin, and Signet.

PLA alleges that the agreements Grimes entered into with Penguin after she terminated PLA as her literary agent are “extensions” of the agreements that PLA procured on behalf of Grimes and that Grimes violated the terms of the underlying agreements by refusing to pay commission to PLA for the extensions. Defendant Grimes moves to dismiss the second through seventh causes of action, arguing that PLA is not entitled to commission for the extensions because PLA’s agency is not coupled with an interest and PLA’s agency was revoked in May 2007. PLA responds by arguing that whether or not its agency was revoked does not affect the sufficiency of the pleadings in the second through seventh causes of action for breach of contract.

The only provision of the underlying publishing agreements that entitles PLA to commission is the commission provision. Since the commission provision in the underlying publishing agreements only grants PLA a 15% commission in the proceeds from its sale of right in Grimes’ literary works, and not an interest in those literary works themselves, PLA’s agency is revocable and it was revoked in May 2007.

The remainder of the commission provision in the underlying publishing

agreements only entitles PLA to commission for the literary works that are the subject of those agreements and it does not entitle PLA to commission for extensions of these agreements. Furthermore, PLA does not allege any facts or cite any cases to support its argument that despite the unambiguous terms of the commission provision in the underlying agreements, PLA is entitled to commission for extensions of these agreements....

Accordingly, it is hereby ORDERED that the motion to dismiss the first, second through seventh ... causes of action is granted; and it is further

Notes on *Peter Lampack Agency, Inc. v. Grimes*

The Peter Lampack Agency (PLA, a literary agency) sued Martha Grimes, an author of literary and commercial fiction, for unpaid commissions allegedly due and owing under contracts negotiated by PLA on behalf of Grimes.

PLA had acted as literary agent for Grimes for twelve years and had procured publishing agreements for works authored by Grimes. Those works were published, and Grimes received over \$12 million dollars from the publication and domestic and international sale of her novels.

Among the contracts PLA procured for Grimes was a four-book publishing agreement entered into by Grimes, Penguin, and Viking-Penguin in 2005.

That 2005 agreement contained an option clause, similar to option clauses found in many publishing agreements, in effect giving the publisher the right of “first look” at the author’s next work:

[T]he Author hereby grants to the Publisher the exclusive right and option to publish ... her next book-length work of fiction.... The Publisher shall have a period of thirty (30) days after receipt by the Publisher of the notification from the Author or her agent of the Author’s desire to commence negotiation concerning such next book-length work of fiction within which to notify the Author whether it desires to publish such work and to negotiate the terms and conditions of such publication.

The 2005 Penguin agreement also contained an agency commission clause, providing that:

The Author hereby appoints [PLA] irrevocably as the Agent in all matters pertaining to or arising from this Agreement.... Such Agent is hereby fully empowered to act on behalf of the Author in all matters in any way arising out of this Agreement.... All sums of money due

the Author under this Agreement shall be paid to and in the name of said Agent.... The Author does also irrevocably assign and transfer to [PLA], as an agency coupled with an interest, and [PLA] shall retain a sum equal to fifteen percent (15%) of all gross monies due and payable to the account of the Author under this Agreement.

In or about May 2007, Grimes notified PLA that she would no longer be using PLA as her literary agent and retained a new representative.

On February 4, 2009, in accordance with the terms of the Option on Next Work clause, Grimes' counsel sent a letter to Penguin enclosing a manuscript of "The Black Cat."

On February 27, 2009, Penguin made an oral proposal to Grimes' counsel and the agreement for "The Black Cat" was finalized on August 20, 2009.

On November 18, 2009, PLA filed a complaint against Grimes and her publishers alleging breach of contract among other claims. PLA alleged that the publishing agreement for "The Black Cat" arose out of the Option on Next Work clause and that Grimes violated the terms of the 2005 Penguin/Viking-Penguin Agreement by refusing to account to PLA and refusing to pay PLA the sums due for "The Black Cat."

PLA also alleged that the defendants acted in bad faith and breached the covenant of good faith and fair dealing implied in the 2005 Penguin/Viking-Penguin Agreement.

PLA also contended that Grimes owed it commissions on various extensions of publishing agreements that PLA had procured for Grimes over the years.

Defendant Martha Grimes moved to dismiss arguing that under the 2005 Penguin/Viking-Penguin Agreement, PLA was not entitled to commission for "The Black Cat" because:

1. PLA's agency is not coupled with an interest and PLA's agency was revoked in May 2007;
2. the Option on Next Work clause is an unenforceable "agreement to agree"; and
3. the publishing agreement for "The Black Cat" does not arise out of the Option on Next Work clause.

The trial court ruled in favor of author Martha Grimes on all counts holding:

The only part of the 2005 Penguin/Viking-Penguin Agreement that entitles PLA to commission is the commission provision. The Option

on Next Work clause does not provide for PLA to receive commission for publishing agreements arising out of the clause.

Instead, the court looked at the commission provision and found that PLA was not entitled to commissions on “The Black Cat” or any other publishing agreements or extensions of prior publishing agreements entered into after Grimes had notified PLA that it was no longer her literary agent.

On the question of whether the commission clause found in the Penguin 2005 publishing agreements constituted an “agency with an interest,” the court had this to say:

It is the general rule that an agency for no definite term is revocable at will. However, when an agency authority is coupled with an interest, the agency is irrevocable. An agency is coupled with an interest where, as a part of the arrangement with the principal, the agent receives title to all or part of the subject matter of the agency.

Citing the Restatement 2nd of Agency 2d Agency § 63 and New York law, the court said:

To make the power irrevocable, there must be an interest in the subject of the agency itself, and not a mere interest in the result of the execution of the authority.;... Words alone are not enough to establish an agency coupled with an interest.

The court found that 2005 Penguin commission provision granted PLA a 15% commission in the proceeds from its sale of rights in Grimes’ literary works and not an interest in those literary works themselves. The mere fact that the commission provision “appoints PLA irrevocably” as an agent was not enough to create an agency coupled with an interest.

Because PLA did not have a property interest in Grimes’ literary works, its agency was revocable, and it was revoked in May 2007.

- [Trial Court Opinion: Peter Lampack Agency v. Martha Grimes](#), (2010 NY Slip Op 51749).
- [Court of Appeals: Peter Lampack Agency v. Martha Grimes](#), 93 A.D.3d 430 (NY.Ct. App. 2012).

Hollywood Representation

Usually involves one or more of the following:

- Talent Agent

- Personal Manager
- Business Manager
- Entertainment Lawyer
- The Talent Guild or Union

Even with suitcases of talent it's a long march to earn a living wage in the entertainment industry. New talents looking for work often assume that any representation is better than no representation and sign on with agents or managers who may do little in the way of finding their clients work. In defense of the agents, it's not their job to find their clients' work. In my experience, good agents are superb at extracting maximum terms from interested buyers. The day is so filled with those negotiations that the agent doesn't need to go "find" work for talented clients. If clients are working hard, there will be something new to sell soon. Until then, interested buyers holding on lines 2 and 3. Goodbye for now.

Talent Agents

Like New York literary agents, talent agents want to represent clients who are hard-working professionals, as well as being talented artists. The giant agencies (CAA, WME, UTA) use form agreements whose terms have already been fought over by unions and lawyers for decades. If the talent (actor, writer, director) are members of guilds, then agency agreements with these big agencies are usually safe. But a boutique agency may or may not be a "franchised agent," meaning, for actors, an agent licensed by the state in which they operate and officially approved by the guilds (SAG, AFTRA, AEA). Union actors may only work with union-franchised agents. A franchised agent may still represent actors who are not members of the guilds for non-union work, or for work that leads to union membership.

See discussion below in *Marathon v. Blasi* for an excellent description of how the guilds control access to both agents and entities who wish to employ their members.

Talent Agencies and Packaging Fees

The Writers Guild of America At War Please watch these two videos ahead of us dealing with Representation. The first one I sent you earlier, but watch them both so you understand what the Writers Guild is fighting about.

- [Agency Conflicts of Interest](#)

- [The Truth About Agency Studios](#)

An article in the *Wall Street Journal*, written in March, 2019, just before the Writers Guild voted to go to war with the Association of Talent Agents (ATA), gives a fair description of the ongoing fight:

The middle-class wage squeeze is affecting an unlikely group: Hollywood movie and television writers, who are threatening to fire their agents en masse over what their union calls unfair business practices.

Their union, the Writers Guild of America, is convinced agencies' pursuit of lucrative side deals—with the studios actually employing the writers—has created conflicts of interests in which talent agents put their own paydays ahead of their clients', precipitating a decline in wages for a vast swath of the screenwriting community.

Some 15,000 WGA members are currently voting whether the union should demand their agents agree to new employment terms that would bar the longstanding practice known as “packaging,” in which an agency creates the framework for a new television series or movie by bundling various clients—writers, directors, actors and others—and sells it as a whole to a studio that then funds the production and distributes it.

When an agency enters into a package deal with a studio, it collects a fee and waives the commissions it would normally receive from clients involved in the project, meaning the agent's financial interest isn't as closely tied as usual to those clients'. The upshot, writers argue, is that the agency is effectively a partner in the production, and that is a conflict of interest.

“The rule of thumb is you work for the person who pays you,” said television writer Evan Wright, whose credits include Showtime's “Homeland.” Mr. Wright fired his agency, William Morris Endeavor, or WME, last year after learning after the agency received a packaging fee for a show he executive produced for Discovery.

“WME was Col. Tom Parker to me,” Mr. Wright said, comparing the agency to Elvis Presley's notoriously greedy and controlling manager. The agency declined to comment on the remark.

Hollywood deal making is dominated by four major agencies including WME, Creative Artists Agency, United Talent Agency and ICM Partners.

These agencies counter that packaging deals, which have been widespread in Hollywood for decades, offer their clients more opportunities to work. Such packages are presented to studios as fully developed ideas, increasing the chances they will get made. Nearly 90% of scripted television series during the 2016-2017 season were packaged, according to the WGA. HBO's "Game of Thrones" is a packaged show.

"Elements of a series need to be assembled or packaged so that studios get a clear vision of what they are buying," said Chris Silbermann, who as managing director of ICM Partners represents Shonda Rhimes, the creator of "Grey's Anatomy."

...

The dispute comes at what would seem an unlikely moment: a TV-industry boom fueled in part by the rise of streaming services like Netflix Inc., Amazon.com Inc.'s Prime Video and Walt Disney Co.-controlled Hulu, which have poured billions of dollars into developing new series. Netflix has struck multimillion-dollar deals with marquee writers and producers including Ms. Rhimes, Ryan Murphy and Brad Falchuk.

Traditional studios are also ponying up more to keep top talent. Last year AT&T Inc.'s Warner Bros. struck a deal with producer Greg Berlanti, whose credits include "The Flash," worth more than \$300 million.

Earlier this month, Comcast Corp.'s NBCUniversal signed a lucrative deal to keep Mike Schur, whose producing credits include "The Office," "Brooklyn Nine-Nine" and "The Good Place," on its lot.

The writers' union says that while such high-profile writers are enjoying unprecedented success, wages for more typical writers have declined.

Average WGA members saw their weekly incomes decline by more than 20% between 2014 and 2016, the union said.

WME says average pay for writer clients has risen during the past three years.

"There will always be superstar writers who are able to benefit. There are a select few that have been able to get these massive deals," said Laura Blum-Smith, WGA's director of research and public policy.

“But the middle-class writer is not seeing their earnings rise according to the increase in demand.”

Shorter television seasons are another culprit in typical writers’ declining incomes.

The WGA is also alarmed by a more recent brand of side dealing on the part of the two biggest agencies, WME and CAA. In an effort to diversify their business models, the two agencies have created their own mini-studios that aim to produce content, a move the writers’ union says is an even more blatant conflict of interest than traditional packaging deals. The agencies say these mini-studios don’t represent a conflict, because they are operated separately from their talent-representation businesses. But the writers’ union contends their role in funding productions makes them writers’ counterparties in negotiations, not their representatives.

“That is a monopoly,” said Tony Krantz, a former CAA packaging agent who is now a writer and WGA member. “It doesn’t make sense for your agent to essentially be your boss.”

Write to Joe Flint at joe.flint@wsj.com

Excerpted from: [Labor Action, With a Hollywood Twist: Screenwriters Threaten to Fire Their Agents - WSJ](#)

The following agencies are currently franchised by the WGA and may represent writers: [Talent Agencies Franchised by the WGA](#) that purports to give them the right to 15% of all royalties arising out of the publishing agreement. Forever. These provision are controversial, and lately not enforced by courts. (See *Lampack* below.)

By definition, a writer who belongs to the WGA may not work for any entity unless that entity is a signatory to the guild. But in addition the WGA keeps a list of employers who writers may not work for, unless the producer posts a bond with the Guild.

WGA members are bound by Working Rule 10, which provides:

No member may enter into a contract for the rendition of writing services with any producer whose name is contained in the then current Guild unfair list unless such producer shall have first posted a bond with the Guild guaranteeing the full amount of the writer’s proposed compensation pursuant to such contract. See, e.g., [Writers Guild of America Strike/Unfair List](#)

New York's Employment Agent Regulation

New York regulates “theatrical employment” agencies under its general business laws where section 171 defines a “theatrical employment agency” as:

any person ... who procures or attempts to procure employment or engagements for circus, vaudeville, the variety field, the legitimate theater, motion pictures, radio, television, phonograph recordings, transcriptions, opera, concert, ballet, modeling or other entertainments or exhibitions or performances, *but such terms does not include the business of managing such entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefore.*

[New York General Business - Article 11 - § 171 Definitions](#)

The following case discusses not only New York's Employment Agent Regulation, but also looks at the intricacies of being both a lawyer *and* a manager.

Mandel v. Liebman

New York Supreme Court (1951)

Louis Mandel brought an action against Max Liebman to collect commission allegedly due under contract whereby plaintiff Mandel agreed to act as defendant Liebman's personal representative and manager. The Court ... dismissed the complaint at close of plaintiff Mandel's evidence and entered judgment for defendant Liebman, which judgment was affirmed by [the appellate court] and plaintiff Mandel appealed. The Court of Appeals, Conway, J., held, inter alia, that the contract was not unconscionable and void.

Reversed and new trial granted.

Opinion

CONWAY, Judge (edited passim)

The defendant Max Liebman is an author, writer and director in the entertainment world. The plaintiff Louis Mandel is an attorney who devotes himself to the business of acting as personal representative, advisor and manager for persons engaged in the entertainment world. On May 8, 1946, they entered into a written contract whereby Liebman (the talent) agreed to employ attorney Mandel 'as his personal representative and manager' for a term of five years.

Liebman agreed to pay to Mandel, as compensation, 10% of all his earnings during the term of the contract, and thereafter on earnings from employments commenced during the term of the contract and continued or renewed or resumed beyond the term of the contract....

Soon after several disputes arose about business records which Mandel refused to return to Liebman because Liebman had failed to pay the percentage of earnings agreed upon in the contract of May 8, 1946. Defendant then obtained an order of Special Term, dated February 17, 1947, in a summary turnover proceeding, directing plaintiff to turn over the papers to defendant.

Mandel commenced this action to recover the compensation allegedly due him for the period from May 8, 1948, to May 8, 1949, under the contract of May 8, 1946.

The action was dismissed on the merits at the close of Mandel's case upon the grounds of the relationship of attorney and client between plaintiff and defendant. The Trial Justice presumably was relying upon the rule that a client who has signed a retainer agreement with respect to some matter in controversy may discharge the attorney at any time, with or without cause, and relegate the attorney to a quantum meruit action for his services to the time of the discharge.... The court also found that the specific business records at issue had come into Mandel's possession in the course of an attorney-client relationship.

The [appellate court] affirmed the judgment dismissing the complaint, but on a ground different from that advanced by the trial court. The [appellate court] held that the original contract of May 8, 1946 ... 'was void and unconscionable and against public policy'. In reaching that conclusion, the court pointed out that, under the original contract of May 8, 1946, Mandel was not required to render any services to Liebman; that Mandel had introduced no proof of the rendition of any services to Liebman; and yet Liebman was required to pay to Mandel 'what might be called a tribute in perpetuity.'...

It is apparent that the majority, in holding the contracts to be 'unconscionable', thought that the obligations assumed thereunder by the parties were so shockingly disproportionate that they could not be enforced. It is commonplace, of course, that adult persons, suffering from no disabilities, have complete freedom of contract and that the courts will not inquire into the adequacy of the consideration. "If a person chooses to make an extravagant promise for an inadequate consideration, it is his own affair." 8 Holdworth, History of English Law....

Despite the general rule, courts sometimes look to the adequacy of the consideration in order to determine whether the bargain provided for is so

grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms.... It has been suggested that an unconscionable contract is one such as no man in his senses and not under a delusion would make on the one hand, and as no honest or fair man would accept, on the other.... The inequality ... must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense.

There might be some force to the claim of unconscionability in the case at bar if the contract could properly be construed as was done by the majority in the Appellate Division. That court held that under the express terms of the contract of May 8, 1946, Mandel was not required to render any services to Liebman. We do not think that that is a permissible construction under our decisions. See *Wood v. Lucy, Lady Duff-Gordon*.

Here, the contract provides that it is mutually agreed by the parties ... that the Liebman 'hereby employs' Mandel 'as his personal representative and manager to use his ability and experience as such manager and personal representative in the guidance and furtherance' of Liebman's career and 'to advise him in connection with all offers of employment and contracts for services, and conclude for him such contracts.' Thus, there is a clear implication that Mandel was required to do that for which he was employed. Even if the contract had merely provided that Mandel was employed 'as personal representative and manager,' with no further description of his duties, that would have been sufficient, for it could be shown that to these parties, in a specialized field with its own peculiar customs and usages, that phrase was enough to measure the entire extent of Mandel's required services.

The provision in the contract that Mandel 'shall only devote as much time and attention to the activities and affairs' of Liebman 'as the opinion and judgment' of Mandel 'deems necessary' must be given a reasonable interpretation consonant with the purpose of the contract. It would be an unnatural and bizarre construction of the document to hold that that provision was intended to excuse plaintiff from any obligation to render service under the contract, while continuing to reap benefits thereunder. The provision seems merely to constitute an attempt on the part of Mandel to protect himself from excessive and unreasonable demands upon his time.

See *Meyers v. Nolan* ... where it was said:

The fact that the contract provided that the managers could devote as much time to defendant's affairs as they deemed necessary does not destroy its mutuality. The very nature of the business of the parties was such that representation of other actors was to be expected. The

clause was evidently inserted to avoid any misunderstanding on the subject and to more clearly define the rights and obligations of the managers.

Of course, as Liebman urges, it is theoretically possible that Mandel, under this provision, could deem it necessary to devote no time to the activities and affairs of defendant, but in that event, it is clear that Mandel would not be performing the contract but would be breaching it and foregoing his right to compensation.

Since Mandel, as we hold, was required to render some service to Liebman under the contract, it cannot be said that the contract was unconscionable. Liebman was the best judge of the necessity and worth of Mandel's services, and of the price he wished to pay to obtain them. In return for Mandel's contractual obligation to render such services, Liebman agreed to pay as compensation an amount based upon a percentage of his earnings. It is not for the court to decide whether Liebman made a good or bad bargain. We fail to see how the contract can be described as one "such as no man in his senses ... would make" and "no honest or fair man would accept" ... or one which would 'shock the conscience and confound the judgment of any man of common sense' ... or even one which is 'so extreme as to appear unconscionable according to the mores and business practices of the time and place' ... particularly since, as we are told, without denial the contract of May 8, 1946, is similar in most respects to contracts in current and general use in the entertainment industry.

There is thus no need at this time to discuss the measure of compensation provided in the contract which the Appellate Division characterized as 'a tribute in perpetuity.'

Finally, we do not think that the contract of May 8, 1946, at least upon its face, may be held to be a retainer agreement between attorney and client with respect to some matter in controversy under which the client may discharge the attorney at any time, with or without cause, and relegate the attorney to an action for his services to the time of discharge....

Here, Mandel was employed as Liebman's personal representative and manager, a position which might well have been filled by a nonlawyer. As a lawyer, Mandel might be called upon to use his legal training in handling Liebman's affairs, but that is not sufficient, as a matter of law, to transform an otherwise binding contract of employment into a contract at will on the part of the employer. An attorney, like any other man, may enter into a contract of employment which can be enforced against the employer, and that is so even though the employment may envisage the exercise of his legal skills and ability....

Likewise, it cannot be said as matter of law that the contract was illegal and void

for the reason that Mandel ... was conducting a theatrical employment agency without a license therefor. By express exemption ... a person engaged in the business of managing 'entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefor' is not required to be licensed. As noted, Mandel was employed as Liebman's 'personal representative and manager'. It was specifically provided that:

this contract does not in any way contemplate that the second party (Mandel) shall act as agent for the purpose of procuring further contracts or work' for Liebman, the plaintiff was 'not required in any way to procure' such contracts or work, and that in the event Liebman 'needs additional employment or work then an agent shall be employed by the second party (Liebman) to procure such employment, and the services of said agent shall be separately paid for' by Liebman.

The judgments below should be reversed and a new trial granted, with costs to abide the event.

California Talent Agencies Act

§§ 1700.23-1700.47 of the California Labor Code

In California, talent agents and talent agencies are regulated by the Talent Agencies Act (TAA), which is part of the [California Labor Code](#).

[TAA Section 1700.4](#) carefully defines its terms:

“Talent agency” means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.

So, under the TAA, a talent agent is:

A person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment for artist or artists.

Put simply agents find artists work. By contrast, managers are supposed to simply “manage” their clients careers. If managers start “procuring, offering, promising or attempting to procure employment” for their clients, then they are engaging in activities regulated by the statute, and they are acting like unlicensed agents. If their clients complain to the Labor Commissioner, the managers may forfeit any commissions earned from unlawfully acting like agents.

No better illustration than the following case. The case is a long one, because it attempts to definitively deal with a contentious recurring problem: What happens when managers cross the line and act like agents insofar as they “solicit or procure employment” for their clients? In the course of addressing this issue, the opinion becomes almost an essay about how Hollywood works.

Marathon Entertainment, Inc. v. Blasi,

California Supreme Court (2008)

- [Case on Google scholar](#)
- [Case on Westlaw](#)

WERDEGAR, J.

In Hollywood, talent—the actors, directors, and writers, the Jimmy Stewarts, Frank Capras, and Billy Wilders who enrich our daily cultural lives—is represented by two groups of people: agents and managers. 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. Agents sometimes counsel and advise; managers sometimes procure work. Indeed, the occasional procurement of employment opportunities may be standard operating procedure for many managers and an understood goal when not-yet-established talents, lacking access to the few licensed agents in Hollywood, hire managers to promote their careers.

We must decide what legal consequences befall a manager who steps across the line and solicits or procures employment without a talent agency license. We hold that:

1. contrary to the arguments of personal manager Marathon Entertainment, Inc. (Marathon), the strictures of the Talent Agencies Act (Act) apply to managers as well as agents;
2. contrary to the arguments of actress Rosa Blasi (Blasi), while the Labor Commissioner has the authority to void manager-talent contracts *ab initio* for unlawful procurement, she also has discretion to apply the doctrine of severability to partially enforce these contracts; and
3. in this case, a genuine dispute of material fact exists over whether severability might apply to allow partial enforcement of the parties' contract.

Accordingly, we affirm the Court of Appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In 1998, Marathon and Blasi entered into an oral contract for Marathon to serve as Blasi's personal manager. Marathon was to counsel Blasi and promote her career; in exchange, Blasi was to pay Marathon 15 percent of her earnings from entertainment employment obtained during the course of the contract. During the ensuing three years, Blasi's professional appearances included a role in a film, *Noriega: God's Favorite* (Industry Entertainment 2000), and a lead role as Dr. Luisa Delgado on the television series *Strong Medicine*.

According to Marathon, Blasi reneged on her agreement to pay Marathon its 15 percent commission from her *Strong Medicine* employment contract. In the summer of 2001, she unilaterally reduced payments to 10 percent. Later that year, she ceased payment altogether and terminated her Marathon contract, stating that her licensed talent agent, John Kelly, who had served as her agent throughout the term of the management contract with Marathon, was going to become her new personal manager.

Marathon sued Blasi for breach of oral contract, quantum meruit, false promise, and unfair business practices, seeking to recover unpaid *Strong Medicine* commissions. Marathon alleged that it had provided Blasi with lawful personal manager services by providing the downpayment on her home, paying the salary of her business manager, providing her with professional and personal advice, and paying her travel expenses.

After obtaining a stay of the action, Blasi filed a petition with the Labor Commissioner alleging that Marathon had violated the Act by soliciting and procuring employment for Blasi without a talent agency license. The Labor Commissioner agreed, finding that Marathon had violated the Act by providing

talent agency services without a license, including "procuring] work for Blasi as an actress on the ... television series, *Strong Medicine*." It voided the parties' contract *ab initio* and barred Marathon from recovery.

Marathon appealed the Labor Commissioner's ruling to the superior court for a trial de novo.... It also amended its complaint to include declaratory relief claims challenging the constitutionality of the Act. Marathon alleged that the Act's enforcement mechanisms, including the sanction of invalidating the contracts of personal managers that solicit or procure employment for artists without a talent agency license, violated the managers' rights under the due process, equal protection, and free speech guarantees of the state and federal Constitutions.

Blasi moved for summary judgment on the theory that Marathon's licensing violation had invalidated the entire personal management contract. Blasi submitted excerpts from the Labor Commissioner hearing transcript as evidence that Marathon had violated the Act by soliciting or procuring employment for her without a talent agency license. Blasi did not specifically argue or produce evidence that Marathon had illegally procured the *Strong Medicine* employment contract.

The trial court granted Blasi's motion for summary judgment and invalidated Marathon's personal management contract as an illegal contract for unlicensed talent agency services in violation of the Act, denied Marathon's motion for summary adjudication of the Act's constitutionality, and entered judgment for Blasi.

The Court of Appeal reversed in part. It agreed with the trial court that the Act applied to personal managers. However, it concluded that under the law of severability of contracts ... because the parties' agreement had the lawful purpose of providing personal management services that are unregulated by the Act, and because Blasi had not established that her *Strong Medicine* employment contract was procured illegally, the possibility existed that Blasi's obligation to pay Marathon a commission on that contract could be severed from any unlawful parts of the parties' management agreement. In reaching this conclusion, the Court of Appeal distinguished prior cases that had voided management contracts in their entirety.

We granted review to address the applicability of the Act to personal managers and the availability of severance under the Act.

DISCUSSION

I. Background

A. Agents and Managers In Hollywood, talent agents act as intermediaries between the buyers and sellers of talent. While formally artists are agents' clients, in practice a talent agent's livelihood depends on cultivating valuable connections on both sides of the artistic labor market. Generally speaking, an agent's focus is on the deal: on negotiating many short-term, project-specific engagements between buyers and sellers.

Agents are effectively subject to regulation by the various guilds that cover most of the talent available in the industry: most notably, the Screen Actors Guild, American Federation of Television and Radio Artists, Directors Guild of America, Writers Guild of America, and American Federation of Musicians. Artists may informally agree to use only agents who have been "franchised" by their respective guilds; in turn, as a condition of franchising, the guilds may require agents to agree to a code of conduct and restrictions on terms included, in agent-talent contracts. Most significantly, those restrictions typically include a cap on the commission charged (generally 10 percent), a cap on contract duration, and a bar on producing one's client's work and obtaining a producer's fee. These restrictions create incentives to establish a high volume clientele, offer more limited services, and focus on those lower risk artists with established track records who can more readily be marketed to talent buyers.

Personal managers, in contrast, are not franchised by the guilds. They typically accept a higher risk clientele and offer a much broader range of services, focusing on advising and counseling each artist with an eye to making the artist as marketable and attractive to talent buyers as possible, as well as managing the artist's personal and professional life in a way that allows the artist to focus on creative productivity. "Personal managers primarily advise, counsel, direct, and coordinate the development of the artist's career. They advise in both business and personal matters, frequently lend money to young artists, and serve as spokespersons for the artists." Given this greater degree of involvement and risk, managers typically have a smaller client base and charge higher commissions than agents (as they may, in the absence of guild price caps); managers may also produce their clients' work and thus receive compensation in that fashion.

B. The Talent Agencies Act Aside from guild regulation, the representation of artists is principally governed by the Act. (§§ 1700-1700.47.) The Act's roots extend back to 1913, when the Legislature passed the Private Employment

Agencies Law and imposed the first licensing requirements for employment agents. From an early time, the Legislature was concerned that those representing aspiring artists might take advantage of them, whether by concealing conflicts of interest when agents split fees with the venues where they booked their clients, or by sending clients to houses of ill-repute under the guise of providing “employment opportunities.” (See Stats. 1913, ch. 282, § 14, pp. 519-520 [prohibiting agents from fee-splitting, sending artists to “house[s] of ill fame” or saloons, or allowing “persons of bad character” to frequent their establishments]; *Talent Agencies Act*, at pp. 386-387) ... Exploitation of artists by representatives has remained the Act’s central concern through subsequent incarnations to the present day.

In 1978, the Legislature considered establishing a separate licensing scheme for personal managers. ... Unable to reach agreement, the Legislature eventually abandoned separate licensing of personal managers and settled for minor changes in the statutory regime, shifting regulation of musician booking agents to the Labor Commissioner and renaming the Artists’ Managers Act the Talent Agencies Act....

In 1982, the Legislature provisionally amended the Act to impose a one-year statute of limitations, eliminate criminal sanctions for violations of the Act, and establish a “safe harbor” for managers to procure employment if they did so in conjunction with a licensed agent.... It subjected these changes to a sunset provision and established the 10-person California Entertainment Commission (Entertainment Commission), consisting of agents, managers, artists, and the Labor Commissioner, to evaluate the Act and “recommend to the Legislature a model bill.” ...

In 1986, after receiving the Entertainment Commission Report, the Legislature adopted its recommendations, which included making the 1982 changes permanent and enacting a modest series of other changes.... So the Act has stood, with minor modifications, for the last 20 years.

In its present incarnation, the Act requires anyone who solicits or procures artistic employment or engagements for **artists** to obtain a talent agency license. (§§ 1700.4, 1700.5.)

‘Artists’ means actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment

enterprises. (§ 1700.4, subd. (b).)

In turn, the Act establishes detailed requirements for how licensed talent agencies conduct their business, including a code of conduct, submission of contracts and fee schedules to the state, maintenance of a client trust account, posting of a bond, and prohibitions against discrimination, kickbacks, and certain conflicts of interest.... No separate analogous licensing or regulatory scheme extends to personal managers. *Waisbren v. Peppercorn Productions, Inc.*,

With this background in mind, we turn to two questions not previously addressed by this court: whether the Act in fact applies to personal managers, as the Courts of Appeal and Labor Commissioner have long assumed, and if so, how.

II. *The Scope of the Talent Agencies Act: Application to Managers*

Marathon contends that personal managers are categorically exempt from regulation under the Act. We disagree; as we shall explain, the text of the Act and persuasive interpretations of it by the Courts of Appeal and the Labor Commissioner demonstrate otherwise.

We begin with the language of the Act.... Section 1700.5 provides in relevant part: “No *person* shall engage in or carry on the occupation of a *talent agency* without first procuring a license therefor from the Labor Commissioner.” (Italics added.) In turn, “person” is expressly defined to include “any individual, company, society, firm, partnership, association, corporation, limited liability company, *manager*, or their agents or employees” (§ 1700, italics added), and “‘talent agency’ means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists” other than recording contracts (§ 1700.4, subd. (a)).

The Act establishes its scope through a functional, not a titular, definition. It regulates *conduct*, not labels; it is the act of procuring (or soliciting), not the title of one’s business, that qualifies one as a talent agency and subjects one to the Act’s licensure and related requirements. (§ 1700.4, subd. (a).) Any person who procures employment—any individual, any corporation, any manager—is a talent agency subject to regulation.... Consequently, as the Courts of Appeal have unanimously held, a personal manager who solicits or procures employment for his artist-client is subject to and must abide by the Act. *Park v. Deftones*; *Waisbren v. Peppercorn Productions, Inc.*.... The Labor Commissioner, whose interpretations of the Act we may look to for guidance ... has similarly uniformly applied the Act to personal managers.

As to the further question whether even a single act of procurement suffices to bring a manager under the Act, we note that the Act references the “occupation” of procuring employment and serving as a talent agency. (§§ 1700.4, subd. (a), 1700.5.) Considering this in isolation, one might interpret the statute as applying only to those who regularly, and not merely occasionally, procure employment. (See *Wachs v. Curry* (Act applies only when “the agent’s employment procurement function constitutes a significant part of the agent’s business as a whole”). However, as we have previously acknowledged in dicta, “[t]he weight of authority is that even the incidental or occasional provision of such services requires licensure.”...

In agreement with these decisions, the Labor Commissioner has uniformly interpreted the Act as extending to incidental procurement.... accordingly, we likewise conclude the Act extends to individual incidents of procurement.

Marathon offers two main arguments against the conclusion that it is subject to the Act whenever it solicits or procures employment. First, it objects that the Act’s title and contents reference only talent agencies and thus only talent agencies may be regulated under the Act.... Marathon reasons that (1) the Act’s title omits reference to regulation of personal managers, and (2) to the extent it purports to regulate personal managers, it is thus void.

This is a misreading of the constitutional provision and the 1978 legislation. The single-subject rule is intended to prevent “log-rolling by the Legislature, i.e., combining several proposals in a single bill so that legislators, by combining their votes, obtain a majority for a measure which would not have been approved if divided into separate bills.” ...

Here, the 1978 legislation and its title satisfy the California Constitution. The legislation’s provisions pertain to a single subject, the comprehensive regulation of persons and entities that provide talent agency services. The title, quoted in full in the margin, identifies that subject and specifically references the existing comprehensive regulations that are to be modified. The legislation defines talent agencies the see that engage in particular conduct; thus, to the extent personal managers engage in that conduct, they fit within the legislation’s title and subject matter and may be regulated by its provisions.

Second, Marathon correctly notes that in 1978, after much deliberation, the Legislature decided not to add separate licensing and regulation of personal managers to the legislation.... The consequence of this conscious omission is not, as Marathon contends, that personal managers are therefore exempt from regulation. Rather, they remain exempt from regulation insofar as they do those things that personal managers do, but they are regulated under the Act to the extent they stray into doing the things that make one a talent agency under the

Act.

The Entertainment Commission articulated precisely this rationale in concluding there was no need to separately license personal managers: “It is not a person who is being licensed [under] the [Act;] rather, it is the activity of procuring employment. Whoever performs that activity is legally defined as a talent agent and [must be] licensed, as such. Therefore, the licensing of a personal manager—or anyone else who undertakes to procure employment for an artist—with the [Act] already in place would be a needless duplication of licensure activity.”...

III. Sanctions for Solicitation and Procurement Under the Act

A. Marathon’s Procurement We note we are not called on to decide, and do not decide, what precisely constitutes “procurement” under the Act. The Act contains no definition, and the Labor Commissioner has struggled over time to better delineate which actions involve mere general assistance to an artist’s career and which stray across the line to illicit procurement. Here, however, the Labor Commissioner concluded Marathon had engaged in various instances of procurement, the trial court concluded there was no material dispute that Marathon had done so, and Marathon has not further challenged that conclusion. We thus take it as a given that Marathon has engaged in one or more acts of procurement and that (as the parties also agree) Marathon has no talent agency license to do so.

We also take as a given, at least at this stage, that Marathon’s unlicensed procurement did not include the procurement specifically of Blasi’s *Strong Medicine* role. Blasi takes issue with this point, correctly pointing out that the Labor Commissioner found to the contrary, but (1) under the Act’s statutorily guaranteed trial de novo procedure, the Labor Commissioner’s findings carry no weight ... and (2) neither Blasi’s separate statement of undisputed material facts nor the evidence supporting it establish that Marathon procured the *Strong Medicine* role. Thus, for present purposes we presume Marathon did not procure that role for Blasi.

Finally, although Marathon argued below that it fell within section 1700.44, subdivision (d)’s “safe harbor” for procurement done in conjunction with a licensed talent agency, it has not preserved that argument here. Accordingly, we assume for present purposes that the safe harbor provision does not apply.

B. The Applicability of the Doctrine of Severability to Manager-talent Contracts

We turn to the key question in Blasi's appeal: What is the artist's remedy for a violation of the Act? 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?

Again, we begin with the language of the Act. On this question, it offers no assistance. The Act is silent—completely silent—on the subject of the proper remedy for illegal procurement.

On the other hand, the text of Civil Code section 1599 is clear. Adopted in 1872, it codifies the common law doctrine of severability of contracts: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." (*Ibid.*) By its terms, it applies even—indeed, only—when the parties have contracted, in part, for something illegal. Notwithstanding any such illegality, it preserves and enforces any lawful portion of a parties' contract that feasibly may be severed.

Under ordinary rules of interpretation, we must read Civil Code section 1599 and the Act so as to, to the extent possible, give effect to both.... The two are not in conflict. The Act defines conduct, and hence contractual arrangements, that are illegal: An unlicensed talent agency may not contract with talent to provide procurement services.... The Act provides no remedy for its violation, but neither does it repudiate the generally applicable and long-standing rule of severability. Hence, that rule applies absent other persuasive evidence that the Legislature intended to reject the rule in disputes under the Act.

The conclusion that the rule applies is consistent with those of the Labor Commissioner's decisions that recognize severability principles may apply to disputes under the Act. In *Almendarez v. Unico Talent Management, Inc.* (Cal.Lab.Com., Aug. 26, 1999) TAC No. 55-97, a radio personality sought a determination that his personal manager had acted as an unlicensed talent agency. The Labor Commissioner concluded the manager had engaged in unlawful procurement—indeed, that procuring employment was the manager's primary role (*id.* at pp. 2, 14)—but stopped short of voiding all agreements between the parties in their entirety. Citing and applying Civil Code section 1599, the Labor Commissioner concluded that a 1997 agreement between the parties had both a lawful purpose (repayment of personal expenses the manager had fronted for Almendarez) and an unlawful purpose (payment of commissions for unlawful procurement services) and should be partially enforced. (*Almendarez*, at

pp. 18-21.) On numerous other occasions, the Labor Commissioner has severed contracts and allowed managers to retain or seek commissions based on severability principles without expressly citing Civil Code section 1599.

Until two years ago, Court of Appeal decisions under the Act had neither accepted nor repudiated the general applicability of the severability doctrine. In 2005, in *Yoo v. Robi* however, the Court of Appeal considered whether to apply Civil Code section 1599 to allow a personal manager to seek commissions for lawfully provided services. It noted, correctly, that severance is not mandatory and its application in an individual case must be informed by equitable considerations.... Civil Code section 1599 grants courts the power, not the duty, to sever contracts in order to avoid an inequitable windfall or preserve a contractual relationship where doing so would not condone illegality.... The *Yoo* Court of Appeal concluded the windfall for the artist, Robi, was not so great as to warrant severance.

In *Chiba v. Greenwald* the Court of Appeal also considered whether severance was available for an unlicensed manager/agent who in that case alleged she had had a *Marvin* agreement with her deceased musician client/partner. Acknowledging she had acted without a license, the manager relinquished any claim to commissions, and the Court of Appeal thus was not presented with the question whether severance might apply to any management services that required no license. In light of the facts as pleaded, the Court of Appeal concluded equity did not require severance of any lawful portions of the *Marvin* agreement from the unlawful agreement to provide unlicensed talent agency services....

Neither *Chiba* nor *Yoo v. Robi* stands for the proposition that severance is never available under the Act. In contrast, the Court of Appeal here expressly concluded, as we do, that it is available.

More generally, the conclusion that severance is available is consistent with a wide range of cases that have applied the doctrine to partially enforce contracts involving unlicensed services....

Blasi contends that even if severability may generally apply to disputes under the Act, we should announce a rule categorically precluding its use to recover for artist advice and counseling services. She relies on three sources in support of this rule: the legislative history, case law interpreting the Act, and decisions of the Labor Commissioner. None persuades us that the Legislature intended to foreclose the application of severability, as codified in Civil Code sections 1598 and 1599, to manager-talent contracts that involve illegal procurement, either generally or with regard to recovery specifically for personal manager services.

For legislative history, Blasi relies on a portion of the Entertainment Commission's 1985 report to the Legislature. Addressing whether criminal sanctions for violations of the Act, temporarily suspended in 1982, should be reinstated, the Entertainment Commission said: "The majority of the Commission believes that existing civil remedies, which are available by legal action in the civil courts, to anyone who has been injured by breach of the Act, are sufficient to serve the purposes of deterring violations of the Act and punishing breaches. These remedies include actions for breach of contract, fraud and misrepresentation, breach of fiduciary duty, interference with business opportunity, defamation, infliction of emotional distress, and the like. *Perhaps the most effective weapon for assuring compliance with the Act is the power of the Labor Commissioner, at a hearing on a Petition to Determine Controversy, to find that a personal manager or anyone has acted as an unlicensed talent agent and, having so found, declare any contract entered into between the parties void from the inception and order the restitution to the artist, for the period of the statute of limitations, of all fees paid by the artist and the forfeiture of all expenses advanced to the artist. If no fees have been paid, the Labor Commissioner is empowered to declare that no fees are due and owing, regardless of the services which the unlicensed talent agent may have performed on behalf of the artist.* These civil and administrative remedies for violation of the Act continue to be available and should serve adequately to assure compliance with the Act." (Entertainment Com. Rep., *supra*, at pp. 17-18.) According to Blasi, this passage demonstrates the Entertainment Commission endorsed voiding of contracts in all instances, and the Legislature necessarily embraced this view because it adopted all of the commission's proposals when it amended the Act in 1986.

We are not persuaded. The passage acknowledges what all parties recognize that the Labor Commissioner has the "power" to void contracts, that she is "empowered" to deny all recovery for services where the Act has been violated, and that these remedies are "available." But the *power* to so rule does not suggest a *duty* to do so in all instances. The Labor Commissioner is empowered to void contracts in their entirety, but nothing in the Entertainment Commission's description of the available remedies suggests she is obligated to do so, or that the Labor Commissioner's power is untempered by the ability to apply equitable doctrines such as severance to achieve a more measured and appropriate remedy where the facts so warrant. Thus, we need not consider at length Blasi's further contention that these two paragraphs in the Entertainment Commission Report accurately reflect the views of the Legislature as a whole. Even if so, they do not connote an intent that managers in proceedings under the Act be deprived of the opportunity even to raise severability.

Second, Blasi relies on those Court of Appeal decisions that have voided manager-talent contracts in their entirety. (e.g., *Chiba v. Greenwald supra Yoo v. Robi supra Park v. Deftones, supra, Waibren v. Peppercorn Productions, Inc., supra*, With the exception of *Chiba* and *Yoo*, discussed above, however, the decisions do not touch on when or whether the doctrine of severability should apply under the Act; as such, they offer no persuasive arguments in favor of reading the Act as precluding application of Civil Code section 1599.

Finally, Blasi relies on a long line of Labor Commissioner decisions that have denied personal managers any right to recover commissions where they engaged in unlicensed solicitation or procurement.... But the fact this remedy is often, or even *almost* always, appropriate, does not support the position that it is *always* proper. The Labor Commissioner decisions cited above ... suggest the Labor Commissioner historically has recognized she has the authority to allow partial recovery in appropriate circumstances.

We recognize, however, that in more recent decisions, the Labor Commissioner has expressly adopted the position Blasi advocates: severance is never available to permit partial recovery of commissions for managerial services that required no talent agency license.... The weight accorded agency adjudicatory rulings such as these varies according to the validity of their reasoning and their overall persuasive force....

Here, the Labor Commissioner's views rest in part on a reading of the legislative history as suggesting such a rule, in part on a reading of past Court of Appeal decisions as announcing such a rule, and perhaps in part on a policy judgment that voiding contracts in their entirety is necessary to enforce the Act effectively. With due respect, the Labor Commissioner's assessment of the legislative history and case law is mistaken; as we have explained, neither requires the rule she proposes.⁷ And any view that it would be better policy if the Act stripped the Labor Commissioner (and the superior courts in subsequent trials de novo) of the power to apply equitable doctrines such as severance would be squarely at odds with the Act's text, which contains no such limitation. Neither we nor the Labor Commissioner are authorized to engraft onto the Act such a limitation neither express nor implicit in its terms. We are thus unpersuaded and decline to follow the Labor Commissioner's interpretation.

In sum, the Legislature has not seen fit to specify the remedy for violations of the Act. Ordinary rules of interpretation suggest Civil Code section 1599 applies fully to disputes under the Act; nothing in the Act's text, its history, or the decisions interpreting it justifies the opposite conclusion. We conclude the full voiding of the parties' contract is available, but not mandatory; likewise, severance is available, but not mandatory.

C. Application of the Severability Doctrine Finally, we turn to application of the severability doctrine to the facts of this case, insofar as those facts are established by the summary judgment record. Given the procedural posture, our inquiry is narrow: On this record, has Blasi established as a matter of law that there is no basis for severance?

In deciding whether severance is available, we have explained “[t]he overarching inquiry is whether “the interests of justice ... would be furthered” by severance.” ... “Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.”...

Blasi does not contend that particular evidence in the record unique to this contract establishes severance cannot apply. Instead, she offers two arguments applicable to this contract and to manager-talent contracts in general.

First, Blasi points to the nature of the compensation. In the Marathon-Blasi contract, as with most such contracts, there is no match between services and compensation. That is, a personal manager provides an undifferentiated range of services; in exchange, he receives an undifferentiated right to a certain percentage of the client’s income stream.

This compensation scheme is essentially analogous to a contingency fee arrangement, in which an attorney provides an undifferentiated set of services and is compensated not for each service but as a percentage of the ultimate recovery her efforts yield for her client....

While an undifferentiated compensation scheme may in some instances preclude severance ... it does not represent a categorical obstacle to application of the doctrine. Accordingly, we may not affirm summary judgment on this basis.

Second, Blasi argues that once a personal manager solicits or procures employment, all his services—advice, counseling, and the like—become those of an unlicensed talent agency and are thus uncompensable. We are not persuaded. In this regard, the conduct-driven definitions of the Act cut both ways. A personal manager who spends 99 percent of his time engaged in counseling a client and organizing the client’s affairs is not insulated from the Act’s strictures if he spends 1 percent of his time procuring or soliciting; conversely, however, the 1 percent of the time he spends soliciting and procuring does not thereby render illegal the 99 percent of the time spent in conduct that requires no license and that may involve a level of personal service and attention far beyond what a

talent agency might have time to provide. Courts are empowered under the severability doctrine to consider the central purposes of a contract; if they determine in a given instance that the parties intended for the representative to function as an unlicensed talent agency or that the representative engaged in substantial procurement activities that are inseparable from managerial services, they may void the entire contract. For the personal manager who truly acts as a personal manager, however, an isolated instance of procurement does not automatically bar recovery for services that could lawfully be provided without a license....

Inevitably, no verbal formulation can precisely capture the full contours of the range of cases in which severability properly should be applied, or rejected. The doctrine is equitable and fact specific, and its application is appropriately directed to the sound discretion of the Labor Commissioner and trial courts in the first instance. As the Legislature has not seen fit to preclude categorically this case-by-case consideration of the doctrine in disputes under the Act, we may not do so either.

In closing, we note one final point apparent from the briefing and oral argument. Letters and briefs submitted by personal managers indicate a uniform dissatisfaction with the Act's application. At oral argument, counsel for Blasi likewise agreed that the Legislature might profitably consider revisiting the Act. The Legislature has in the past expressed dissatisfaction with the Act's enforcement scheme.... Adopted with the best of intentions, the Act and guild regulations aimed at protecting artists evidently have resulted in a limited pool of licensed talent agencies and, in combination with high demand for talent agency services, created the right conditions for a black market for unlicensed talent agency services.... (The Labor Commissioner believes unlicensed talent agencies outstrip licensed talent agencies two to one.) In the event of any abuses by unlicensed talent agencies, the principal recourse for talent is to raise unlawful procurement as a defense against collection of commissions, but this is a blunt and unwieldy instrument. It is of little use to unestablished artists, who it appears may legitimately fear blacklisting ... and 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 ...

We, of course, have no authority to rewrite the regulatory scheme. In the end, whether the present state of affairs is satisfactory is for the Legislature to decide, and we leave that question to the Legislature's considered judgment.

Disposition

For the foregoing reasons, we affirm the Court of Appeal's judgment and remand this case for further proceedings consistent with this opinion.

Wachs v. Curry,

Cal.Ct.App.2d 1993

- *Wachs v. Curry*, 16 Cal.Rptr.2d 496 (Cal.Ct.App.2d 1993).

Marathon v. Blasi essentially abrogated the ruling in what was until that time the leading case, *Wachs v. Curry*. In *Wachs* actor and talk-show host [Arsenio Hall](#) sued his former manager, Robert Wachs (a lawyer) of X Corporation, accusing Wachs of trying to “procure employment” for Arsenio even though manager Wachs was not licensed as an agent under the California Talent Agency Act.

The California Labor Commissioner ruled that Wachs had been involved in the occupation of procuring employment for Hall. Commissioner ordered that X Management reimburse Hall for \$2.2 million in fees they had been paid for Hall's role in *The Arsenio Hall Show* and screen credit they received as well.

Manager Robert Wachs sued the Labor Commissioner and made the following arguments that the Talent Agencies Act (TAA) is unconstitutional:

- The California legislature has “no rational basis” for exempting the recording industry from the provisions of the TAA.
- The TAA is unconstitutionally *vague*. How does a manager know when he or she is *procuring* employment?

The court ruled in favor of Arsenio. The court said that the provision exempting the procurement of recording contracts from the Act was rational and should be retained because entertainers in the recording industry tend to have *personal managers* conduct many of the negotiations for recording contracts – *they conduct a wide array of activities*. And in the recording industry, the ambiguities and intangibles of the activities performed by a personal manager create problems of attempting to license or otherwise regulate them

The court ruled in favor of Arsenio on the vagueness claim also. A statute will not be held void for uncertainty if any reasonable and practical construction can be given its language. It will be upheld if its terms may be made reasonably certain by reference to other definable sources. The Talent Agencies Act focuses on the employment procurement function and most people in the industry know what procuring employment means.

RULE: If the agent's employment procurement function constitutes a significant part of the agent's business as a whole, *then he/she is subject to the licensing requirement of the Act, even if procurement of employment was only an incidental part of the agent's overall duties*

Effect of *Wachs v. Curry*:

1. Upheld constitutionality of the Talent Agencies Act;
2. Limited the scope of the Act by confining the licensing requirement to those for whom the employment procurement function constitutes a significant part of the agent's business as a whole.

But as *Marathon* indicates prong two is no longer the law in California. Managers can get in trouble by soliciting or procuring employment for the clients, even if those activities constitute but a small portion of their overall business. All *Marathon* allows is the possibility of severance, i.e., that the court will allow the manager to charge for "legal" portions of the representation provided and sever the illegal ones.

- For more information, see: [How to obtain a California Talent Agency License](#).

Music Industry Exception

Notice that California's regulation of agents contains an exception under the TAA for managers working in the music business:

. . . except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter.

Meaning the TAA prohibits managers from procuring, offering, or promising employment for their clients, except for managers in the music business. This was a good portion of Manager Wachs argument, i.e., that this exemption for managers in the music business made no sense.

But the *Wachs* court explained the music-manager exception this way:

A recording contract is an employment contract of a different nature from those in common usage in the industry involving personal services. The purpose of the contract is to produce a permanent and repayable showcase of the talents of the artist. In the recording industry, many successful artists retain personal managers to act as

their intermediaries, and negotiations for a recording contract are commonly conducted by a personal manager, not a talent agent. Personal managers frequently contribute financial support for the living and business expenses of entertainers. They may act as a conduit between the artist and the recording company, offering suggestions about the use of the artist or the level of effort which the recording company is expending on behalf of the artist.... However, the problems of attempting to license or otherwise regulate this activity arise from the ambiguities, intangibles and imprecisions of the activity.... The majority of the Commission concluded that the industry would be best served by resolving these ambiguities on the side of preserving the exemption of this activity from the requirements of licensure”.... On the commission’s recommendation, the exemption for those who procure recording contracts became permanent.

[*Wachs v. Curry*](#), (Cal.Ct.App. 1993).

Many Hollywood talent managers don’t buy this distinction and the regulations remain extremely controversial. *See, e.g.:*

- [Actors Union Introduces Voluntary Regulation of Talent Managers](#)
- [Did the California Labor Commissioner Just Shake Up the Music Industry?](#)

Conflicts of Interest:

Croce v. Kurnit

United States District Court (S.D.N.Y. 1982)

- [*Croce v. Kurnit*](#), 565 F.Supp. 884 (SDNY 1982).
- [case on Google Scholar](#)

OPINION

SWEET, District Judge.

This diversity action, a portion of which was tried to the court, presented facts which evoked memories of “A Star Is Born,” except that the star in this case, James Croce, died all too soon after his ascendancy. The complaint filed by Ingrid Croce, his widow and heir (“Mrs. Croce”), a California resident, sought to obtain certain damages from the defendants, citizens of states other than

California, arising out of an alleged breach of certain contracts as well as rescission of the contracts on the ground of fraud, and breach of fiduciary duty. On the findings and conclusions set forth below, judgment will be granted to the defendants dismissing the claims of unconscionability and breach of fiduciary duty against Cashman and West and granting Croce's breach of fiduciary claim against Kurnit. The defendants' motion for judgment notwithstanding the verdict is denied....

Findings of Fact James Joseph Croce ("Jim Croce") was born in 1943 and in the course of his schooling attended Villanova University. There he met Ingrid, who subsequently became his wife, and also Tommy West, who became both his friend and, as it developed, a business associate. During the college years Jim Croce sang, played guitar and wrote songs, as did West.

After graduation from college, Jim Croce sought to shape a career out of his interest in music, played and sang in coffee houses, and developed both his own style and his own music. He managed to produce a record album entitled *Facets* containing certain of his songs which he performed. He sent the album to Tommy and sought to interest the latter in his work.

West in the meantime also developed a career in music, producing, singing and playing for commercials. He had met Cashman with whom he collaborated as well as Kurnit, an attorney who had been working at ABC Records, Inc. By 1968 all three, West, Cashman and Kurnit were at CBS, Cashman, West in the music department and Kurnit serving in the legal department. The two musicians together with Eugene Pistilli ("Pistilli") decided to enter the record business on their own and set up CP & W for that purpose. Kurnit was also a participant in the enterprise.

In the summer of 1968, while Kurnit was still at CBS, Jim and Ingrid Croce arrived in New York, stayed with West, and met Kurnit, who was introduced to them as "the lawyer." West and the Croces discussed the possibility of CP & W producing a record by Jim Croce. The outlines of the contractual arrangements were discussed, the Croces returned to Pennsylvania and according to West, proposed contracts were taken to them after their trip to New York and before their return to New York on September 17, 1968. Whether or not that occurred (Mrs. Croce maintains it did not), the Croces did not conduct any meaningful review of the contract until September 17, 1968.

On that date the Croces were in New York again, staying with the Wests. They met Kurnit for the second time. He outlined the contract terms to them in a two to three hour meeting. According to Kurnit, there was no negotiation although a

minor change in the proposed contract was made. The Croces signed three agreements, a recording contract with CP & W, a publishing contract with Blendingwell and a personal management contract also with Blendingwell (“the contracts”). The Croces were unrepresented, and they were not advised to obtain counsel by Kurnit who signed the contracts on behalf of the corporate entities. Kurnit was known to the Croces to be a participant with Cashman, Pistilli and West in their enterprises. The Croces did not enter into any retainer agreement with Kurnit, were never billed by him in connection with the contracts, and aside from the meeting of September 17, received no advice from him concerning the contracts.

The contracts that were executed on September 17, 1968 provided that Croce would perform and record exclusively for CP & W, as well as the terms under which all the Croce’s songs would be published and managerial services would be provided for the Croces. The contracts placed no affirmative requirements on the defendants other than to pay each of the Croces approximately \$600 a year and to make certain royalty payments in the event that music or records were sold. The duration of the contracts was seven years if options to extend were exercised by the defendants. All rights to the Croces’ musical performances and writings were granted to the defendants. The management contract was assignable.

The expert testimony offered by Mrs. Croce focused on the effect of the assignability of the management contract, the lack of any objective threshold to be achieved before the exercise of options, and the interrelationship of the three contracts. In addition other significant provisions were cited as being unfavorable to the Croces which would have been the subject of negotiation had the Croces in September, 1968 been represented by the expert retained in 1982. These included the term of the contracts, the royalty rate and its escalation, a revision of the copyrights, a minimum recording sides obligation, and the time for making objections to royalty statements.

However, certain of the provisions which were under attack were also contained in the forms published by various organizations involved in the entertainment industry, and there was no evidence presented in this action, meticulously prepared by able counsel on both sides, which established that the terms of these contracts differed significantly from others prepared by Kurnit on behalf of the defendants. These contracts include many terms of art and are customarily the subject of hard bargaining in the event that the artist and the producer both have established economic power. Here, however, no significant changes were made in the contracts as initially proposed by Kurnit on behalf of the other defendants.

After the contracts were executed, the parties undertook their performance. In the summer of 1969 the recording contract was assigned to Interrobang

Productions, Inc. ("Interrobang"), as was the management contract a year later. Cashwest is the successor in interest to Interrobang. The management contract was assigned to Showcase Management, a company in which CP & W had an interest, a demonstration record was prepared (a "demo") and thereafter Capital Records undertook to produce a Croce recording under the direction of Nick Vanet. This recording was published in the spring of 1969 and after its publication, Jim Croce worked hard to promote it. By the winter of 1969-70 it was apparent the album was a failure, and Jim turned to other pursuits.

In the fall of 1968 Kurnit represented the Croces in connection with a lease. In April, 1969 Kurnit listed his firm as the party to whom all ASCAP correspondence for Croce should be sent. In January, 1970 Kurnit executed a document as attorney in fact for the Croces and also was involved in the dispute between the Croces and their then manager.

Notwithstanding, on March 19, 1970 Jim and Ingrid, unhappy with the management with which they had been provided, sought legal advice with respect to breaking the contracts. They retained Robert Cushman ("Cushman") of Pepper, Hamilton & Schatz in Philadelphia. On June 9, 1970 Croce wrote to Kurnit seeking to terminate the contracts and advising him that "Ingrid and I are getting out of music." In the summer of 1970, Cushman met with Kurnit and discussed the grievances which the Croces had expressed to him, supported at one point by a statement of Pistilli which, according to Cushman, established that the Croces had been defrauded. Some revisions and amendments to the contracts were discussed.

In December 1970 Ingrid became pregnant, and Jim returned to songwriting and performing. Thereafter, he sent material to West who expressed interest and delight. Cushman requested a further retainer to pursue the revision or cancellation of the contracts and never heard again from either of the Croces.

In the early part of 1971 West and Cashman worked with Croce and prepared a demo. With Kurnit's help, they sold the idea of its production to ABC, interested an established management agency in Croce with the result that Interrobang delegated its management contract for Croce to BNB Associates, Ltd. ("BNB") in September 1971. Once the relationship with the defendants resumed in 1971, Kurnit represented the Croces on various matters. After the summer of 1971 and the birth of his son in September, Jim's career began to move. His work was well received and in April 1972, ABC records contracted to manufacture, distribute and sell Croce records. Jim was on the road late in 1971 and 1972 promoting and performing. His career sky-rocketed and until September 20, 1973 the future appeared halcyon for all concerned. During 1972 Kurnit represented Croce on matters other than the contracts.

On September 20, 1973, after a concert in Louisiana, Croce took off in a private plane. The plane crashed in a thunderstorm, and Croce was killed.

Very shortly thereafter Kurnit visited Mrs. Croce and offered to represent the estate and to take care of the wrongful death action arising from the crash. On September 26, 1973, Kurnit became the attorney for the Estate and Mrs. Croce. In connection with the wrongful death action, Kurnit later stated on the form filed with the Appellate Division on October 4, 1973:

“Ingrid Croce, and her deceased husband, James J. Croce, have been my clients since 1968. I have been their personal attorney in a majority of their legal matters.”

Kurnit served as counsel to the estate from September 26, 1973 until June 24, 1976. During the spring of 1976 Kurnit, on behalf of the defendants, had consulted Donnenfeld and Brent, a Los Angeles law firm, with respect to a movie proposal. Thereafter, at his request on June 24, 1976 that firm was substituted for him as counsel for the estate.

In 1975, Mrs. Croce remarried and in the company of her husband discussed with Kurnit the use of certain material which had not been the subject of the contracts. These discussions, involving what the parties have termed “the estate sides,” were the subject of the contract issues concerning the publication of “The Faces I Have Been” album resolved by the jury’s Special Verdict. During these discussions Kurnit represented CP & W and after the initial discussion, Mrs. Croce retained Ivan Hoffman, an attorney, to represent her. Hoffman and Kurnit exchanged correspondence, drafts and telephone calls. There is no evidence that Hoffman was consulted about the contracts or Mrs. Croce’s rights which resulted from the contracts.

However, in November 1975 Mrs. Croce retained Howard Thaler to represent her on a number of matters unrelated to the contracts. At his deposition, Thaler invoked the attorney/client privilege when questioned about his discussions with Mrs. Croce about the contracts. Thaler’s invocation of the privilege may imply that Thaler has information against Mrs. Croce’s interests in this action. However, even assuming that this inference is permitted, Kurnit has failed to establish the date on which Mrs. Croce conferred with Thaler concerning the contracts prior to June 10, 1976.

On that day Thaler met with Donnenfeld and some discussion was had concerning Mrs. Croce’s rights under the contracts. Mrs. Croce was advised that since the Estate had been referred to them by Kurnit, a conflict of interest existed which precluded their initiating any claim against Kurnit. It was pointed out, however, that since the Estate was shortly to be terminated, Mrs. Croce would

thereafter initiate any action she felt appropriate. Obviously these issues had been discussed between Mrs. Croce and Thaler prior to June 10, 1976 but Kurnit has not sustained his burden of proof to establish an earlier date to end the toll of the statute of limitations as discussed below.

The Estate was closed on September 27, 1977 and this action was initiated on July 21, 1978.

During the period from 1968 to date the defendants received approximately \$6.9 million as a consequence of the performance of the contracts. The recording and entertainment career of Croce is not atypical, representing as it does, initially a famine, and ultimately a feast. No expert who testified claimed the prescience to determine in advance what records the public will buy or in what amount. Though the returns on a successful record are unbelievably high, the risk of initial failure is also high. Judgment, taste, skill and luck far outweigh the time spent or the capital expended on any particular recording.

It is on these facts that Mrs. Croce's claims of unconscionability and breach of fiduciary duty, must be resolved, as well as the defendants' affirmative defenses of the statute of limitations and election of remedies. The claim of fraud has not been pressed by Mrs. Croce, and indeed there is no proof of misrepresentation, falsity or reliance except in connection with the fiduciary duty claims.

1. *Representation by Kurnit* The claims of breach of fiduciary duty and procedural unconscionability are based on the role and actions of Kurnit at the signing and during the performance of the contracts. Indeed, the nature of Kurnit's relationship with the Croces determines whether this action is barred by the statute of limitations. Therefore, this court will assess the September 17, 1968 transaction before proceeding to the merits of each claim.

Mrs. Croce asserts that after Kurnit had been introduced to the Croces on a prior occasion as "the lawyer," Kurnit acted as the Croces' attorney at the signing of the contracts or in such a manner as to lead the Croces to reasonably believe that they could rely on his advice. The Croces were aware of the fact that Kurnit was an officer, director and shareholder of Blendingwell and Cashwest on whose behalf Kurnit signed the contracts.

In light of the facts set forth above, Kurnit did not act as the Croces' attorney at the signing of the contracts. Even in the absence of an express attorney-client relationship, however, a lawyer may owe a fiduciary obligation to persons with whom he deals.... In particular, a fiduciary duty arises when a lawyer deals with persons who, although not strictly his clients, he has or should have reason to believe rely on him.... Kurnit's introduction as "the lawyer," his explanation to

the Croces of the “legal ramifications” of the contracts which contained a number of legal terms and concepts, his interest as a principal in the transactions, his failure to advise the Croces to obtain outside counsel, and the Croces lack of independent representation taken together establish both a fiduciary duty on the part of Kurnit and a breach of that duty....

Although I conclude that Kurnit did not act as counsel to the Croces before September, 1968, the events surrounding the execution of the contracts, in particular his failure to advise the Croces to obtain counsel, establish the applicability of *Howard v. Murray* in determining the obligations of Kurnit.

Moreover, the limits of the fiduciary relationship as defined in *Penato v. George*, apply. The court there realized that the

exact limits of such a relationship are impossible of statement.... Broadly stated, a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another.

383 N.Y.S.2d at 904-95. (citations omitted).

This definition of a fiduciary duty applies not only to Kurnit’s relationship but also on the facts of this case to West and Cashman, in whom the Croces placed their trust.

Before further addressing Mrs. Croce’s breach of fiduciary duty allegations, however, the defendants’ statute of limitations defense warrants examination. For these purposes, Kurnit’s relationship with the Croces controls....

3. Unconscionability and Breach of Fiduciary Duty Mrs. Croce contends that the contracts were unconscionable. An unconscionable contract “affronts the sense of decency,” ... and usually involves gross onesidedness, lack of meaningful choice and susceptible clientèle.... A claim of unconscionability “requires some showing of ‘an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.’ ”...

Additionally, Mrs. Croce alleges that defendants breached their fiduciary duty to the Croces. A fiduciary relationship is bound by a standard of fairness, good faith and loyalty....

Substantial testimony was adduced on the subject of the inherent conflict presented by the control of the management contract by the publisher. The management contract, of course, served only the interest of the artist, although obviously the interest of the artist and his career were inextricably interwoven with the publication and promotion of his product. For example, BWB, when undertaking the assignment to manage Croce, immediately obtained a royalty rate increase, of course, thus affecting its own compensation.

The significance of management contracts depends on the needs of artists, some of whom are entirely capable of performing all the business and promotion duties while others seek to concentrate solely on their artistic efforts. As the relationship developed, Croce depended on his manager significantly, but the conflict between the artist and the producer does not so completely overbalance the mutuality of their interest as to make management and recording contracts held or controlled by the same interests, as occurred here, in and of itself, determinative of the issues of unfairness and unconscionability. Indeed, it was Kurnit who ultimately arranged for a separate management contract, albeit that the contract with BWB barred the manager from urging the artist to terminate the contracts.

As the facts stated above indicate, the contracts were hard bargains, signed by an artist without bargaining power, and favored the publishers, but as a matter of fact did not contain terms which shock the conscience or differed so grossly from industry norms as to be unconscionable by their terms. The contracts were free from fraud and although complex in nature, the provisions were not formulated so as to obfuscate or confuse the terms. Although Jim Croce might have thought that he retained the right to choose whether to exercise renewal options, this misconception does not establish that the contracts were unfair. Because of the uncertainty involved in the music business and the high risk of failure of new performers, the contracts, though favoring the defendants, were not unfair.... Therefore, I conclude that the terms of the contracts were neither unconscionable nor unfair and that Cashman and West did not breach a fiduciary duty.

In considering procedural unconscionability this court notes that the instant situation lacks the elements of haste and high pressure tactics ... , and that the contracts did not provide for the sole benefit of the defendants, ... Indeed, they benefited the Croces by millions of dollars. Thus Kurnit's actions do not rise to the level of procedural unconscionability. Kurnit, however, as a lawyer and principal, failed to advise the Croces to retain independent counsel and proceeded to give legal advice to the Croces in explaining the contracts to them. These actions, as discussed above, constitute a breach of the fiduciary duty Kurnit owed the Croces.

4. Remedy Mrs. Croce seeks rescission of the contracts or more specifically termination of the contracts on the date of judgment....

The breach of fiduciary duty by Kurnit is not so fundamental as to defeat the intent or purpose of the contract.

Moreover, the contracts have been performed. In attempting to return to the status quo Mrs. Croce would have the defendants retain the money they received under the contracts as compensation for their services and return the master tapes and copyrights to her. Defendants oppose this remedy as unjust enrichment. Although this court has difficulty perceiving how the status quo ante could ever be determined, achieving this possibility does not make rescission appropriate when, as in the instant case, the breach of fiduciary duty is not a breach going to the root of the contract.

Mrs. Croce is, however, entitled to damages resulting from Kurnit's breach of fiduciary duty in failing to advise the Croces to seek independent counsel. Given the bifurcated nature of this lawsuit, and the fact that, but for Kurnit's breach, the second branch of Mrs. Croce's complaint, claiming fraud, unconscionability, and breach of fiduciary duty, would in all likelihood not have arisen, this court assesses Mrs. Croce's damages to be the costs and attorneys' fees expended in prosecuting those claims, and determines that Kurnit is liable for this amount....

IT IS SO ORDERED.

Totally Optional Reading & Viewing

Gary Shandling v. Brad Grey

- [LA Times on the lawsuit itself](#)
- [Deadline on Shandling testimony at trial](#)
- [NYTimes on Shandling v. Brad Grey](#)

Others

- [Slate: *The Difference Between an "Agent" and a "Manager"*](#)
- Poke around johnaugust.com. Podcasts, primarily for screenwriters, but John (*Go*, *Big Fish*, *Charlie & The Chocolate Factory*) and Craig Mazin (*Scary Movie* and *Hangover* sequels) often discuss topics such as:
 - [whether to get a manager, an agent, or both](#);
 - The eternal question: [How do I get an agent?](#)
 - [What is coverage?](#)
- [How To Query A Literary Agent](#), by Richard Dooling
- [Agents Who Ask For Fees](#)

- [Wikipedia: Literary Agent](#)
- Legal definition of a “literary agent”.