

# What Hath Ovitz Wrought?

**F**or more than 60 years, a feud has raged between artists' managers and talent agents. In part, this has to do with philosophical differences concerning the role which each plays in the development and furtherance of their clients' careers, and in part it concerns the levels of compensation each can receive. As a general rule of thumb, the job of an agent is to find work for his/her clients, whereas the job of a manager is to guide and develop the client's career. Of equal importance is the manner in which they are regarded by prevailing law.

## AGENTS v. MANAGERS *Revisited*

Agents have been heavily regulated by state legislation in New York and California and by guild franchising agreements. For example, Actors Equity, which represents actors in the theatre, only permits its members to deal with agents who are licensed (i.e., "franchised") by the union. The union, among other things, insists that agents not commission the minimum "scale" payments negotiated between the union and the producers.<sup>1</sup>

By Donald E. Biederman

However, until now, managers were not subject to an overall regulatory scheme established by legislation or by the entertainment guilds.

Managers have lived in a sort of never-land, vulnerable to potentially disastrous results if they step over the line into the role of agent. The management agreement of a manager who procures work for a client can be nullified, even where the client has encouraged the manager to do so. Managers feel ill-used by this treatment.<sup>2</sup> Robert Wachs, an extremely experienced and highly successful manager who figures prominently in the development of case law in this area, puts the matter this way:

If an actor or actress comes out to make a career in Hollywood, how do they get work? They can't go to a manager because a manager is not allowed to get them work ... So you have to have an agent. But you can't get an agent because you don't have any credits yet. So you have to get a manager to develop your talent. But the manager can't get you work, so no one ends up doing it. In reality, the agent only wants to book once you've got a part or a career, but they do not want to work to develop the talent. So the [Talent Agencies] Act, which is supposed to be protecting talent, makes them suffer because their careers are going nowhere. So it has fallen on the managers to try to help. And when the manager then submits their clients for jobs, they are soliciting work and violating the Act. ... We're talking about nothing but success that the manager helped accomplish. And then the Act allows the client to sabotage the manager—every good piece of work he's done for the client. ... Every manager, every single manager is in violation of the Act, except for [those who manage] the big stars [who don't need help procuring contracts].<sup>3</sup>

In recent years, this established tension has been further exacerbated as managers—until now, the most prominent being Brillstein-Grey Entertainment—have branched out into developing film and television productions with their management clients. Agents, meanwhile, are prohibited by law from doing this because of the conflict of interests it creates. Now, as a result of the founding by former superagent Michael Ovitz of Artists Management Group (who, presumably, will develop proj-

ects in the same manner as Brillstein-Grey), and the introduction of a California bill—AB 884—by Assembly Member Sheila James Kuehl,<sup>4</sup> the tension in the California entertainment community has been ratcheted up considerably. This comes “at a time when there are challenges to the traditional structure of talent representation, not to mention profit equations of the entertainment industry as a whole.”<sup>5</sup>

How serious is this? According to Tom Pollock, longtime “A-list” entertainment attorney and former head of Universal Pictures:

Something's going to have to happen because the playing field's not level. Either the managers will end up being regulated by both the state and the guilds, or the next time the guilds' franchises come up the agencies won't sign them. Why shouldn't they be able to own pieces of movies when managers already can?<sup>6</sup>

As an example of this phenomenon, DAILY VARIETY reported on March 19, 1999, that New Line Cinema had acquired feature film rights to Tess Gerritsen's novel GRAVITY for \$1,000,000 (with another \$500,000 to be paid upon production), and that the film would be produced by Michael Ovitz's Artists Management Group. According to DAILY VARIETY, “AMG will likely package the project with as many of the banner's [sic] clients as possible.”<sup>7</sup>

At first blush, this issue might seem to concern only those resident in or whose businesses are based in New York and California. The expansive nature of long-arm jurisdiction, however, should make this issue one of concern to managers in other states who conduct any business with clients or production companies located in the major markets of New York or California. Moreover, the fact that an individual is licensed to practice law will not necessarily provide insulation against the impact of legislation regulating agents.

In this article, we will review the history of California's Talent Agencies Act<sup>8</sup> and the comparable New York statute,<sup>9</sup> with an analysis of the leading cases which have arisen under each act, and discuss the current controversy and pending legislation.

## MAKING THE GRADE ON THE A-LIST

Agents and managers have played extremely important roles in the entertainment industries for more than a 100 years. Legendary agents such as Jules Stein and Lew Wasserman of MCA;<sup>10</sup> Sam Weisbord and Abe Lastfogel of the William Morris Agency;<sup>11</sup> Sam Cohn of

International Creative Management; Michael Ovitz, Ron Meyer, and Bill Haber of Creative Artists Agency;<sup>12</sup> Irving “Swift” Lazar;<sup>13</sup> and David Geffen<sup>14</sup> have—for good or ill—left a huge footprint.

So, too, have managers. The late British manager Gordon Mills, for example, was instrumental in creating and advancing the careers of Tom Jones, Engelbert Humperdinck, and Gilbert O’Sullivan. Mills not only managed these artists and produced their recordings, he created personae for them. Tom Jones (born Matthews) was cast by Mills as a sex symbol in tight black clothing, Engelbert Humperdinck (born Gerry Dorsey) as a suave smoothie in a tuxedo, and Gilbert (born Raymond) O’Sullivan as something of a geek with a bowl haircut, a red college sweatshirt with “G” on it, and short pants. The skyrocketing early success and ultimate meltdown of the relationship between Mills and O’Sullivan is recounted in O’Sullivan v. Management Agency and Music, Ltd.<sup>15</sup> Similarly, in the late 1960s and early 1970s, a San Francisco-based manager, Matthew Katz, was instrumental in advancing the careers of such acts as It’s A Beautiful Day, Moby Grape, and Jefferson Airplane. The decline and fall of the relationship between Katz and Jefferson Airplane is described in Buchwald v. Superior Court.<sup>16</sup>

In recent years, as the economics of the entertainment industries became more and more “hit-driven,” a number of leading performers (such as Harrison Ford, Kevin Costner, Jackie Chan, and Sharon Stone) have stopped working with agents and instead rely solely on their managers.<sup>17</sup>

Inevitably, clashes occurred between agents and managers, and between managers and their clients. In the former instance, this took the form of legislation designed to protect the agents’ “turf.” In the latter, this took the form of lawsuits in New York and proceedings before the Labor Commissioner in California. And now, to borrow a phrase from the legendary Al Jolson, it looks like “you ain’t seen nothin’ yet!”

## TURF WAR OVER TALENT AGENCIES

New York and California have been the primary centers for both agents and managers, so it is not surprising that the principal legislation in this area was enacted in those states.<sup>18</sup> The two statutes have a lot in common; however, there are a number of significant distinctions between them.

### New York

In New York, the legislation embodied in §§170-190 of

the General Business Law was designed to regulate “employment agencies,” with “theatrical employment agency” being a subset.<sup>19</sup> The statute applies to:

any person ... who procures or attempts to procure employment or engagements for [a virtually encyclopedic range of talent] ... *but such term 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 therefor*” (emphasis supplied).

A talent agent must be licensed by the Commissioner of Labor (for agents located in New York City, by the Commissioner of Consumer Affairs),<sup>20</sup> who investigates the applicant for character and responsibility.<sup>21</sup> The license fee is \$200 at issuance (\$400 if the agency has more than four employees) and a \$5,000 bond is required. A written contract is required,<sup>22</sup> and the maximum fee chargeable for “theatrical engagements”<sup>23</sup> is ten percent of “the compensation paid” to the talent, with an exception allowing a fee of 20 percent for “engagements for orchestras and employment or engagements in the opera and concert fields.”<sup>24</sup>

The Commissioner is empowered to suspend or revoke an agency license for “violat[ion] of any provision of this article or [if the agent] is not a person of good character and responsibility.”<sup>25</sup> The action of the Commissioner is subject to review by the New York Supreme Court<sup>26</sup> in a so-called “Article 78 proceeding,” in which the “substantial evidence” rule generally applicable to review of administrative decisions applies.<sup>27</sup> In addition, violation of the article can constitute a misdemeanor punishable by imprisonment for up to a year and/or a fine of not more than \$1,000.<sup>28</sup> Criminal proceedings may be instituted by the Commissioner or by “any person aggrieved by such violations.”<sup>29</sup> The Commissioner has no power to nullify contracts between the artist and agent, nor does the Commissioner have power to order an agent to return commissions already paid to the agent. Moreover, the Commissioner has no power to hear complaints against unlicensed agents. Aggrieved artists must pursue their remedies in the New York Supreme Court.

### California

At first glance, California’s statute has many things in common with New York’s. A talent agent must obtain a license from the Labor Commissioner.<sup>30</sup> The applicant

must be a person of "good moral character" (corporate agencies must have a "reputation for fair dealing")<sup>31</sup> with two years' experience in a business or occupation.<sup>32</sup> The initial license fee is \$25, and there is an annual renewal fee of \$225.<sup>33</sup> An agent's contract forms are subject to approval by the Commissioner, who may withhold them if they are "unfair, unjust and oppressive to the artist."<sup>34</sup> While fee limitations are not prescribed legislatively, contrary to the case in New York, California agents' fees are limited in practice to ten percent by guild franchising agreements and by the Commissioner's review power during licensure. Agency contract forms must provide for referral of "any controversy" to the Labor Commissioner "for adjustment."<sup>35</sup> An agent must maintain his/her/its clients' funds in a separate trust account, and monies received by an agent on behalf of a client must be disbursed within 30 days, except where there is a valid offset in favor of the agent.<sup>36</sup>

As is the case in New York, there is an extremely broad definition of "theatrical engagement."<sup>37</sup> A talent agency is defined to engage 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 to person or corporation to regulation and licensing under this chapter*<sup>38</sup> (emphasis supplied).

In addition to the recording-contracts exception, "[i]t is

not unlawful ... to act in conjunction with, and at the request of, a licensed talent agent in the negotiation of an employment contract."<sup>39</sup> The two exceptions were enacted in the early 1980s as part of the Waters Amendment, carried by then-Assembly Member (now U.S. Representative) Maxine Waters of Los Angeles. The recording contracts exception was enacted to recognize the business reality that a recording artist could not secure the services of an agent without a recording agreement. Thus, managers almost universally handled such matters, thereby exposing themselves to being discharged once their clients experienced success. The exception for managers working with agents was similarly based upon the business reality that managers and agents customarily worked as part of an overall representative team. In addition to these reforms, the amendment removed criminal penalties for violations of the Talent Agencies Act and established a one-year statute of limitations.

Thus, California, too, provides some comfort for managers, albeit less broadly than New York. However, since talent agencies "may counsel, or direct artists in the development of their professional careers,"<sup>40</sup> it is easy to see why the traditional agents are alarmed at what they perceive as an increasing invasion of their turf by essentially unregulated competition.

Where the two statutes part company most dramatically is in the area of enforcement. In "cases of controversy arising under [the Talent Agencies Act]," the Commissioner "shall hear and determine the same, subject to an appeal within 10 days after determination to the superior court where the same shall be heard de novo."<sup>41</sup> However, under California Labor Code §1700.45, an agency agreement may provide for private arbitration if (1) enumerated in the agency agreement, in the union rules applicable to "franchising agreements," or in such agreements themselves, and (2) the contract provides for reasonable notice to the Commissioner and an opportunity for the Commissioner to attend all arbitration hearings.

#### MANAGING MANAGERS IN COURT

The New York and California statutes have fared very differently in the courts. The Labor Commissioner appears to have been far more active in this area than the Commissioner of Consumer Affairs, and there have been many more lawsuits in California.

## License and Registration, Please

If a Manager is Caught Acting as an  
Unlicensed Agent in Violation of the  
California Talent Agencies Act:

1. The management contract is void from inception.
2. Past commissions paid to the manager may be required to be returned to the artist.
3. All commissions owed to the manager by the artist are discharged.

There have been three major court cases under the New York statute: Mandel v. Liebman,<sup>42</sup> Pine v. Laine,<sup>43</sup> and Gershunov v. Panov.<sup>44</sup>

In Mandel, a legendary television producer fired his manager (who happened to be a licensed attorney, although not functioning as an attorney vis-à-vis Liebman). Mandel's management agreement with Liebman provided for a five-year term and a ten percent commission applicable in perpetuity to all contracts entered into during the term.<sup>45</sup> The agreement stated that Liebman "employ[ed]" Mandel to "use his ability and experience as [a] manager and personal representative" to further Liebman's career and to "advise him in connection with all offers of employment and contracts for services, and conclude for him such contracts." Mandel was only required to devote as much time and attention to Liebman's affairs as Mandel's "opinion and judgment ... deem[ed] necessary."

Liebman argued that the agreement was unconscionable and lacking in mutuality. The Court of Appeals<sup>46</sup> rejected the unconscionability argument by reviewing the agreement in light of industry custom and usage, stating that the description of Mandel as Liebman's "personal representative and manager" was sufficient to constitute a commitment on Mandel's part to provide customary services. As to the provision leaving the amount of time dedicated to managerial duties to Mandel's discretion, the Court of Appeals regarded this simply as a recognition that Mandel might have other clients beside Liebman, and thus he would have to budget his time. The court similarly rejected Liebman's argument that since Mandel was an attorney, the management agreement was in essence a retainer agreement, which generally allows for a client to fire his attorney at any time. It explained that since Mandel's services might be performed as adequately by a non-lawyer as by a lawyer, Mandel had not served as Liebman's attorney. Finally, the court rejected Liebman's argument that Mandel was an unlicensed talent agent in violation of the General Business Law by pointing out the management exception in GBL §171 and by citing provisions in their contract. The contract stated that it "does not in any way contemplate that [Mandel] shall act as agent for the purpose of procuring further contracts or work for [Liebman]," that Mandel was "not required in any way to procure" employment for Liebman, and that in the event that Liebman needed further work "then an agent shall

be employed by [Liebman] to procure such employment and the services of said agent shall be separately paid for" by Liebman. As will be seen, the deference accorded by the Court of Appeals to the terms of the agreement is far greater than that accorded by the Labor Commissioner and by the California courts.

The Pine decision held that the "incidental management" exception was unavailable where the sole activity of the purported "manager" consisted of negotiating a record deal (and the performer already had a manager). Thus, New York does not judicially recognize the equivalent of California's recording-contracts exception.

In Gershunov, a well-known impresario/manager, fluent in Russian, signed two Russian ballet artists who had emigrated to Israel. The agreement between them provided for a fee of 20 percent of the artists' earnings. If, however, Gershunov acted as a promoter for any engagement, the fees for such services would be negotiated between them. As the Panovs became more experienced, they became increasingly dissatisfied with Gershunov, who sued them for damages and injunctive relief. They countersued for an accounting of past receipts, as well as for the value of engagements which Gershunov had rejected without consulting them. They accused him additionally of general misconduct in his fiduciary capacity. Citing an instance in which Gershunov had received \$25,000 to "promote" a concert in Philadelphia (when he had borne little or no risk), plus a \$4,000 fee from the \$20,000 paid to the Panovs for that appearance, the lower court found Gershunov guilty of a conflict of interest and ordered him to forfeit *both* fees. This result was upheld on appeal. Thus, the courts recognized that the management exception under GBL §171(8) was to be read in light of normal principles governing conflict of interest.

## California

In contrast to New York, California has experienced a plethora of administrative and judicial decisions, beginning with Raden v. Laurie.<sup>47</sup> In that case, the California Supreme Court held that an individual who merely worked to develop his client's poise and skills and took her to auditions, without ever directly seeking employment for her, was a personal manager rather than an agent.

Greater involvement in the employment process, however, led the court in Buchwald v. Superior Court to conclude that a manager was acting as an unlicensed agent.<sup>48</sup> In this case, Matthew Katz had signed Jefferson Airplane to what one author termed "the blessed trinity

of contracts.”<sup>49</sup> agreements signing the band to Katz for management, to Katz’s record production company, and to Katz’s music publishing company. Such situations were by no means uncommon in the 1960s<sup>50</sup> and are still encountered today. When disputes arose, Katz tried to enforce a contractual arbitration provision; the band went to the Labor Commission. Despite Katz’s argument that the Commissioner lacked jurisdiction over him because he had not obtained a talent agent’s license, a federal district court found for the Commissioner. The Talent Agencies Act, the court stated, was a remedial statute enacted for the protection of artists, and thus it should be construed liberally in favor of those whom the statute was intended to protect. Artists were not to be ordinarily considered as being *in pari delicto* with un-

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licensed agents with whom they contracted, and so a contract between an artist and an unlicensed agent would be void. This conclusion was based upon Katz’s heavy involvement in the procuring of, and contracting for, the band’s engagements, despite stipulations in their contract that Katz was not an

agent and that Katz would not offer, attempt, or promise to obtain work for the band. The agreements between Katz and Jefferson Airplane were “wholly invalid”—including the clause requiring private arbitration.

The substance of their relationship, rather than the contractual form, controlled Buchwald. This was a far different result from the New York Court of Appeals in Mandel v. Liebman.<sup>51</sup> The ascendancy of substance over form is qualified, however, as shown by the subsequent decision of the Labor Commissioner in Ivy v. Howard.<sup>52</sup> In that case, the special hearing officer voided an agreement which provided that the personal manager would attempt to procure personal engagements for the client, and which lacked a “severability” clause under which the offending provisions might have been excised in order to save the agreement.

Another important decision was Pryor v. Franklin.<sup>53</sup> in which the Labor Commissioner voided the manage-

ment agreement between Richard Pryor and David Franklin. Franklin was ordered to return the management commissions he had received between 1975 and 1980, as well as the fees he had received as an executive producer on films in which Pryor appeared, for an aggregate of \$3,110,918 (inclusive of interest). Franklin had promised to secure employment for Pryor and had, in fact, negotiated numerous deals. He had dismissed Pryor’s former agents (as well as Pryor’s former attorney, accountant, and other personal representatives) and held himself out to third parties as Pryor’s “agent.” Franklin’s defenses were (1) that he had not instigated negotiations, but merely “furthered” offers which came in from third parties and (2) that he was an attorney. Special Hearing Officer Joseph rejected both theories. He observed that if Franklin’s first defense were valid, the Talent Agencies Act would never apply to those artists who were in greatest demand. SHO Joseph rejected the second claim because of the absence of proof that Franklin was licensed to practice either in Georgia—where he made his office—or in California. The ruling made clear, however, that it did not have to reach the question of whether an attorney’s license to practice law in California would excuse the lack of a talent agency license.

So, can an attorney/manager rest easily, protected securely by his/her license to practice law?

Not in the view of the Labor Commission. In a March 2, 1999, telephone interview, David Gurley, Staff Counsel for the Division of Labor Standards Enforcement of the Department of Industrial Relations, stated:

[C]learly there is a fiduciary duty that has to be met. And as such, the fiduciary duty requires licensure. We don’t exempt attorneys from being required to be licensed as talent agents. I think that attorneys, after taking the bar exam, should have a clear concept of what their fiduciary responsibilities are. Nevertheless, the Labor Commission takes each applicant individually and does a background check independently of the California Bar and requires them to be licensed as well.<sup>54</sup>

This position will not sit well with the legal community, since Chapter 4 of the Business & Professions Code<sup>55</sup> establishes a highly detailed structure for the bar and its administration. An attorney’s qualifications<sup>56</sup> are established at a level far higher than those prescribed for talent agents, as are the duties required of an attorney.<sup>57</sup> The disciplinary aspects of Chapter 4 are similarly rigor-

ous; for example, under §6106,

The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of [the attorney's] relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.

The Code prescribes detailed requirements for fee agreements.<sup>58</sup> Mandatory fee arbitration is available at the election of the client.<sup>59</sup> When these statutory provisions are combined with the Rules of Professional Conduct, it is clear that the bar is set far higher for attorneys than for talent agents. In the opinion of the author, it is therefore questionable (except from the standpoint of uniformity of enforcement) whether a *second* license should be required of an attorney. In the words of commentator James M. O'Brien III,

[A]ttorneys should be exempted because the [Talent Agencies] Act was never intended to apply to their activities. ... The Professional Rules and the State Bar Act ... provide greater protection to artists than the [Talent Agencies] Act does... and are sufficient to safeguard artists from any unscrupulous conduct by lawyers.”<sup>60</sup>

As far as the author is aware, there are no court decisions on this issue. However, given the fact that the vast majority of music publishing deals are negotiated by attorneys, it seems inevitable that litigation will eventuate in this area. In Tobin v. Chinn,<sup>61</sup> Special Hearing Officer Locker observed that the recording contract exemption “does not expressly extend to the procurement of music publishing contracts” (underlining in original). Further, “exemptions must be strictly construed,” and “music publishing and recording are two separate endeavors. ... Music publishing and songwriting does not fall within the recording exemption.”

A manager who confined her involvement in the employment area to creative matters was protected, however, in Barr v. Rothberg.<sup>62</sup> In that instance, unlike the situation in Pryor, Roseanne Barr had a licensed talent agent as well as an attorney. Although Barr's manager attended and took part in contract negotiations, attorney Barry Hirsch acted as lead negotiator, and the manager confined herself to “creative” issues. Even more latitude was afforded a manager working in conjunction with an agent in Snipes v. Dolores Robinson Entertainment,<sup>63</sup> in which the agent brought the man-

ager in as part of a manager/attorney/agent team. Although the manager sometimes directly negotiated aspects of employment agreements (such as “perks,” and, on occasion, compensation), there was no violation because there was “no showing of subterfuge or an attempt to circumvent the law.”

The Talent Agencies Act itself came under attack in Wachs v. Curry,<sup>64</sup> in which Robert Wachs, the longtime manager of Arsenio Hall, asserted that the Act was unconstitutional because the term “occupation of procuring employment” was void for vagueness. The court rejected this after reviewing the history of the Talent Agencies Act, noting that the definition had been shifted so as to concentrate on the employment aspects of the relationship rather than the management aspects.<sup>65</sup> The court then went on to posit what appeared to be a new test:

the significance of the agent's employment procurement function compared to the agent's business as a whole. If the agent's employment constitutes *a significant part* of the agent's business as a whole, then he or she is subject to the ... Act even if, with respect to a particular client, procurement of employment was only an incidental part of the agent's overall duties. On the other hand, if counseling and directing the clients' careers constitutes *the significant part* of the agent's business then he or she is not subject to the ... Act, even if, with respect to a particular client, counseling and directing the client's career was only an incidental part of the agent's activities”<sup>66</sup> (emphasis supplied).

To those who might end up scratching their heads while trying to comprehend this formulation, the court stated, “What constitutes a ‘significant part’ of the agent's business is an element of degree we need not decide in this case.”<sup>67</sup>

Thereafter, in Church v. Brown,<sup>68</sup> Special Hearing Officer Reich explained the Wachs discussion in the following manner:

The word “significant” is defined in the American Heritage Dictionary as follows: “Having or expressing a meaning; meaningful.” This definition, coupled with the obvious purpose of the Wachs court, seems to imply that the conduct which constitutes an important part of the relationship constitutes a “significant” portion of the activities of an agent if the procurement is not due to inadvertence or

mistake and the activities of procurement have some importance and are not simply a *de minimis* aspect of the overall relationship between the parties when compared with the agent's counseling functions on behalf of the artist.<sup>69</sup>

Not long after that, another panel of the same appellate court which had decided Wachs v. Curry handed down its decision in Waisbren v. Peppercorn Productions, Inc.,<sup>70</sup> rejecting the above-quoted dictum in Wachs. It held instead that a personal manager would require a talent agency license even when he devoted only an incidental portion of his business to the agency function. According to Division of Labor Standards Staff Counsel David Gurley,

The Labor Commissioner feels that the line is a strict bright-line rule, where any incidental procurement of employment would require licensure under the Act. So if a manager in any way is attempting to procure, or offering, or even promising to procure, even to the point of having incidental conversation about potential jobs, that's going to require licensure. We've created a bright-line test as much as is possible to be able to distinguish between managers and agents. Case law determines this rule. In the Waisbren case, it says "any incidental procurement of employment." We're just following the case law as it's been brought down.<sup>71</sup>

In sum, then, subject to further word from the appellate courts, any employment/procurement activity other than (1) securing a recording contract, or (2) working in conjunction with, and at the request of, a licensed talent agent, can cause grief under the Talent Agencies Act.

However, the Labor Commission takes the position that its jurisdiction does not extend to a "packaging" situation proposed by a manager,<sup>72</sup> and recent cases indicate that "procurement" activities are not involved where the artist is employed by an entity owned by the manager. In Tobin v. Chinn,<sup>73</sup> there was no violation when a manager signed an artist to a recording/music publishing agreement with his own company as well as a personal management agreement. In his status as record company, the manager/owner arranged for and paid for the artist's recordings, "shopped" them to distributor labels, and behaved in other ways as a functioning record production company. In the words of Special Hearing Officer Locker,<sup>74</sup>

[A] person or entity who employs an artist does not "procure" employment for that artist, with-

in the meaning of Labor Code section 1700.04(a), by directly engaging the services of that artist. ... [T]he activity of "procuring employment," under the Talent Agencies Act, refers to the role an agent plays when acting as an intermediary between the artist whom the agent represents and a third-party employer.

Continuing on, SHO Locker made a statement which is bound to resonate with the new breed of entrepreneurial management companies:

Petitioners' novel argument would mean that every television or film production company that directly hires an actor, and that every concert producer that directly engages the services of a musical group, without undertaking any communications or negotiations with the actor's or musical group's talent agent, would itself need to be licensed as a talent agency. ... To suggest that any person who engages the services of an artist for himself is engaged in the occupation of procuring employment ... is to radically expand the reach of the Talent Agencies Act beyond recognition.

SHO Locker distinguished Humes v. MarGil Ventures, Inc.,<sup>75</sup> where a "theatrical production company" existed "in name only" and "was not engaged in the production of any entertainment or theatrical enterprise, but merely functioned as a loan-out company." A similar conclusion was reached in Rose v. Reilly,<sup>76</sup> in which the Commissioner found an agency relationship despite the presence of a "television production company." The claimant was never employed directly by the "production company" and was never on salary. All compensation came via a third party. In addition, depending on the production, the director/client might be employed by the advertiser which utilized his services in connection with its commercials.

Although the personal management agreement in Tobin was part of an interlinked contractual arrangement, and although the form allowed the manager to "prepare, negotiate, consummate, sign, execute and deliver" contracts for the artist, this did not cause the arrangement to collapse. The form contained the usual disclaimer that the manager was not "an employment agent, theatrical agent, or artist's manager" and that he "[was] not permitted, obligated, authorized or expected to do so." Further, the manager would,

consult with and advise Artist with respect to



the selection, engagement and discharge of theatrical agents, artists' managers, employment agencies and booking agents ... but manager is not authorized to select, engage, discharge or direct any such talent agent in the performance to [sic] the duties of such talent agent.

The manager did not commission revenues under the recording/publishing agreement.

It seems logical, therefore, under the reasoning in Tobin v. Chinn, that if a production company is not considered an agent when it hires an actor directly, there should be no objection when a manager and a client form a production company to develop film or television properties and the production company thereafter signs the actor to an employment agreement.

Thus, it would appear that managers have considerable latitude, so long as the structures they create with their clients are truly active and not simply pretextual.

## THE GATHERING STORM

Until a few years ago, agents predominated in representing literary authors and stage, film, and television performers, while managers tended to predominate in the recording and music publishing fields. According to Gregg Kilday, a reporter for L.A. MAGAZINE, "It used to be that only established actors had managers."<sup>77</sup> It was common for managers and agents to work together for the same client.<sup>78</sup> Now, however, the role of agents in film and television seems to be declining and the role of managers in this field seems to be increasing. There are several reasons for this.

Escalating production and marketing costs have led many studios to cut the number of theatrical films they produce and distribute each year. The salaries of top box-office names (e.g., Tom Cruise, Tom Hanks, Jim Carrey, Harrison Ford, Mel Gibson, Julia Roberts) have soared past \$20 million (often against a percentage of the gross receipts rather than the net). Since special effects are costly and the salaries of "below the line" personnel (basically, everyone except the producer, director, leading actors, and writers) are largely determined through collective bargaining, there has been downward pressure on the salaries of lesser actors. The number of television series which last long enough to trigger substantial syndication monies (generally a minimum of four years) also has shrunk. All of this has narrowed the range of possibilities within which many agents work. In addition, thanks in large measure to the aggressive approach of

Michael Ovitz and Creative Artists Agency over a 20-year period, there has been a substantial increase in movement of artists and agents between agencies. In many cases, agents compete on price, taking less than the ten percent fee limit prescribed under applicable union franchise agreements.

Because of the convergence of these negative forces, the business model adopted by Brillstein-Grey has become more and more attractive to companies that see the prospects of talent agencies diminishing. The Brillstein-Grey Company was something of a pioneer in creating television series which they owned together with their management clients. Instead of simply working for a fee, Bernie Brillstein and Brad Grey were creating assets. How did they do this?

As Gregg Kilday puts it:

Agents were legally barred from producing films and TV shows, since, it is argued, to allow them to do so would lead to inevitable conflicts of interests. ... Managers, though,

## *Agents Will Be Agents*

### Differences Between Agents and Managers in California:

1. Agents are limited to a ten percent commission by guild agreements and Labor Commission action, whereas managers typically charge a 15 percent commission.
2. Agents tend to have a large stable of clients, who typically do not receive intense personalized attention, whereas managers have a much smaller stable of clients, who receive significant personal attention.
3. The primary role of the agent is the procurement of employment for the client, whereas the manager counsels the client in personal and professional matters in an advisory capacity.
4. Agents are strictly regulated under the Talent Agencies Act, whereas managers are unregulated in their professional capacity.

operate under no such restrictions.”<sup>79</sup>

Brillstein-Grey produced shows such as *The Days and Nights of Molly Dodd*, *Buffalo Bill*, *Alf*, *Just Shoot Me*, and *The Sopranos*, all featuring their management clients. In addition, they produced *The Larry Sanders Show* with Gary Shandling. However, Shandling filed suit against Brillstein-Grey in January 1998, claiming that they had leveraged his popularity to line their own pockets without sharing the profits.<sup>80</sup>

Other firms, such as More-Medavoy (*Dharma & Greg*) and Addis-Wechsler (*Eve’s Bayou*, *The Player*, *Love Jones*) have produced television shows and/or films with their management clients. Prominent longtime agent Lou Pitt recently left ICM to set up The Pitt Co.

Then came the return of Michael Ovitz. Having left CAA for the presidency of The Walt Disney Co., Ovitz and Disney parted company after 14 months. However, Ovitz did not go away quietly. In addition to his other activities,<sup>81</sup> Ovitz recently organized Artists Management Group, creating instant headlines by attracting two of Hollywood’s hottest managers, Rick Yorn and his sister-in-law, Julie Silverman Yorn. Together, they brought with them such names as Leonardo DiCaprio, Claire Danes, Samuel L. Jackson, Cameron Diaz, Geena Davis, and Matt Dillon. Then Ovitz brought in Michael Menchel, a senior agent at CAA, who represents Robin Williams. For CAA, this was the last straw; the agency announced it would no longer represent any talent which signed with AMG for management services.<sup>82</sup> This appears to have been only the first challenge in what may turn out to be a lengthy duel.

#### The Labor Commission’s View

It appears that managers can lawfully develop film and television productions with their management clients, without running afoul of the Talent Agencies Act. If a manager and his/her client set up a joint venture or a corporation—under an agreement which provides that the manager is responsible for financing and producing entertainment programming, and the talent is responsible for acting in it—this may provide an eight-lane highway through the heart of the Talent Agencies Act. However, based upon the decisions reviewed on pages 9-13, *supra*, the Commissioner will not object as long as the entity actually functions in the manner for which it is intended.

Of course, agents engaged in “packaging” producers, writers, directors, and actors on the same project can make serious money from their share of the license fees

charged to the purchaser of the package. This is not considered by the Labor Commissioner to be within the scope of the Talent Agencies Act. In an opinion letter dated June 22, 1959, then-Commissioner Sigmund Arywitz stated that a packaging agreement form,

is not such as requires the approval of the Labor Commissioner ... [because] this type of contract is concerned exclusively with “creative property or package show” and contains nothing with respect to the employment of an artist.<sup>83</sup>

This policy was confirmed by Commissioner Jose Millan in an October 30, 1998, letter which stated that the Commissioner,

lack[s] jurisdiction with respect to “Packaging Agreements.” ... A “packaging agreement” or “package program” as the term is customarily understood in the television and motion picture industries is more analogous to selling an idea or a concept. In packaging agreements, the requisite obtaining or getting possession elements are not present. The concept of packaging is a “pitch” that must be sold prior to any procurement of employment. ... [It] is more analogous to selling an idea or a concept ... prior to any procurement of employment. After the idea is sold, and once the artist begins work under the signed package agreement, only then would jurisdiction of the Labor Commissioner commence. ... Furthermore, it appears that artists benefit from packaging agreements.

The letter then cited the SAG, AFTRA, DGA, and WGA guild agreements, all of which approve packaging arrangements while precluding agents from receiving fees from artists when the agent also represents the owners or producers of programs. This saves expenses for the artists. However, while the agent can reap significant rewards from the packaging fees, the agent can not share in the ownership of the packaged property.

Can a manager also package in this manner, without the “cover” of working in conjunction with a licensed talent agent? Discussions with the office of the Division of Labor Standards, together with the Labor Commission decisions cited above, indicates that a manager can do this if the talent is already employed by the production company and the manager is therefore literally not attempting to secure employment for the talent. Moreover, under this model, the manager—unlike the

agent—*can* share in the ownership of the package.

If a manager does not wish to (or is not in a position to) follow the production company model, is there safety in distance?

Many managers, of course, make their offices outside of California and would never—until now—have dreamed of applying for an agent's license in California. Is there safety for a manager based out of state who represents talent resident in California, and who either works strictly by phone, fax, and e-mail or makes only occasional trips to California? Does it matter to the Labor Commission whether or not the talent resides in California? Because the Talent Agencies Act is remedial in nature and expressive of a strong public policy designed to protect artists and performers, the Commission maintains that it will invoke "long-arm" jurisdiction to the fullest extent permitted by the United States Supreme Court in International Shoe Co. v. Washington<sup>84</sup> and in the subsequent cases deriving therefrom. As an example of the expansiveness of "long-arm" jurisdiction, in Burger King Corporation v. Rudzewicz,<sup>85</sup> the Supreme Court held that a Florida franchisor was able to obtain jurisdiction over a Michigan franchisee which had never physically entered Florida, because:

it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State within which business is being conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.<sup>86</sup>

"This conflict is not going to go away":

The Kuehl Amendment

Assembly Bill 884 was introduced by California Assembly Member Sheila James Kuehl on February 25, 1999. Although some observers interpreted the timing of the bill as a sign that it was focused on the present dispute, a memorandum issued by Member Kuehl's office states that the bill intends to remedy,

fraudulent representations made to potential child actors and others by scam artists posing as "talent managers" ... [and] to ensure that actors breaking into the business know whether they are dealing with a reputable

manager who is licensed by the state.

Kuehl's memorandum states that "AB 884 does not alter the working relationships that exist among agents, managers, and their clients."<sup>87</sup> For example, the memorandum states,

managers, in addition to their career development responsibilities, *will retain the right to produce*. Agents will remain the only entities licensed to procure employment for their clients (emphasis in original).

Nevertheless, to underscore her intention to avoid interference with the relationships between agents and managers and their respective clients, Kuehl met with 80 managers on March 12, 1999, at the Hollywood Roosevelt Hotel. There, she stated her willingness to revise and amend AB 884. "I'm very likely to narrow the bill to deal with the fraud aspect. ... I'm not interested in regulating an industry that doesn't need to be regulated." However, she said, "I'm telling you that this conflict between managers and agents, if there is any, is not going to go away."<sup>88</sup>

The Amendment would add a new Chapter 4.5, entitled "Artist's Manager," to Division 2 of the Labor Code. An "artist's manager" is defined as a person who does one or both of the following:

(1) Engages in the occupation of advising, counseling, or directing an artist in the development or advancement of his or her professional career.

(2) Offers, advertises, or represents that

the artist's manager can or will provide any of the following services to artists for a fee: career counseling, vocational guidance, aptitude testing, executive consulting, personal consulting, career management, evaluation, or planning, or the development of resumes and other promotional materials relating to the preparation

Since talent agencies "may counsel, or direct artists in the development of their professional careers," it is easy to see why the traditional agents are alarmed at what they perceive as an increasing invasion of their turf by essentially unregulated competition.

for employment as an artist.<sup>89</sup>

The definition “does not include a person licensed as a talent agency” pursuant to §1700.5.<sup>90</sup>

Apart from “vocational guidance” and “aptitude testing,” which would appear to be categories found in the child actor arena—Assembly Member Kuehl’s avowed area of concern—all of the above describes the typical personal manager.

AB 884 would require an artist’s manager to obtain a license from the Labor Commissioner,<sup>91</sup> the application for which must disclose “the business or occupation engaged in by the applicant for at least [the last] two years,”<sup>92</sup> and must be accompanied by affidavits of:

at least two reputable residents of the city or county in which the business is to be conducted who have known or been associated with the applicant for two years, [and who attest] that the applicant is a person of good moral character or, in the case of a corporation, has a reputation for fair dealing.<sup>93</sup>

As is the case with agents, the initial license fee would be \$25,<sup>94</sup> and there would be a \$225 annual renewal fee,<sup>95</sup> as well as a \$10,000 bond.<sup>96</sup>

If the Commissioner revokes a manager’s license, there can be no new license for three years thereafter.<sup>97</sup>

As is now required of agents,<sup>98</sup> a manager would be required to submit proposed forms of contracts to the Commissioner for approval, which could not be withheld “unless the proposed form of contract is unfair, unjust and oppressive to the artist.”<sup>99</sup> As is the case with agents,<sup>100</sup> a manager would have to file a schedule of fees.<sup>101</sup> Like the agent,<sup>102</sup> the manager would have to establish a trust fund for monies collected for clients, and would have to disburse (subject to legitimate offset) within 30 days after receipt.<sup>103</sup>

The rest of the bill similarly parallels the provisions of the existing Chapter 4, with one major exception: there are no provisions equivalent to the dispute determination procedure set forth §1700.44.<sup>104</sup> Therefore, a licensed manager and his/her/its client would resolve their contractual disputes in the same manner as now prevails in New York—in the courts (or, if the parties so provide in their contracts, by arbitration). However, that would apply presumably only where the dispute involved conduct by a manager within the scope of the license; if the manager were to procure, offer to procure, attempt to procure, or promise to procure employment for a client, the client could then invoke the doctrines described on

pages 9-13, *supra*.

Therefore, it seems to the author that—at least as presently written—AB 884 would accomplish precisely what Assembly Member Kuehl’s explanatory memorandum suggests: “Agents will remain the only entities licensed to procure employment for their clients.”

Thus, the basic conflict between agents and managers in California remains to be resolved.

## WAITING FOR THE HOLLYWOOD HAPPY ENDING

The essential issues which divide agents and managers show no signs of abating any time soon. At this writing, the statutory and case law of New York appears to afford considerably more lenient treatment to the manager who procures work for a client than does the statutory and case law of California. However, California managers can achieve considerable “wiggle room” either by working in conjunction with licensed agents or by establishing working production companies with their clients. The ultimate outcome of the latest feud between the agents and the managers in California cannot be predicted, although it would seem that the managers are thriving at the present moment. They may take a considerable amount of business away from the agents through judicious use of the “packaging exemption,” originally accorded to agents, and by establishing real production entities. However, as presently written, the Kuehl Amendment does not address the concerns of managers such as Robert Wachs who, rightly or wrongly, feel that they are treated unfairly because they act as agents by default—only to be discarded once their clients achieve success, often with ruinous repayment obligations. A licensed California attorney negotiating contracts (other than a recording contract) for a client may be at risk, and managers or attorneys based outside of New York and California may find themselves subject to long-arm jurisdiction in those states if the “minimum standards” requirement of the International Shoe line of cases are met. ♦

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<sup>1</sup> This was upheld in H.A. Artists & Associates, Inc. v. Actors' Equity Ass'n, 451 U.S. 704 (1981).

<sup>2</sup> In New York, however, a measure of comfort is provided by an "incidental booking" exception. See discussion *infra* page 9.

<sup>3</sup> Telephone interview by Daniel A. Cohen with Robert Wachs (Mar. 1, 1999). For a view sympathetic to the position articulated by Robert Wachs, see Heath B. Zarin, Note, *The California Controversy Over Procuring Employment: A Case For The Personal Managers Act*, 7 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 927 (Spring 1997).

<sup>4</sup> An appropriate person to sponsor such legislation, Kuehl was a child actress who played Zelda on the late-1950s sitcom *The Many Lives of Dobie Gillis*. Claudia Eller, *Ovitz, Kuehl Rocking Boat For Agents, Managers*, L.A. TIMES, Feb. 23, 1999, at C1.

<sup>5</sup> Peter Bart, *When Worlds Collide: Managing The Managers*, DAILY VARIETY, Feb. 1, 1999, at 42.

<sup>6</sup> Gregg Kilday, *Barbarians At The Gate*, L.A. MAGAZINE, Mar. 1999, at 93 (quoting Tom Pollock).

<sup>7</sup> Oliver Jones and Chris Petrikin, *New Line Orbits With AMG On Pic*, DAILY VARIETY, Mar. 19, 1999, at 1.

<sup>8</sup> CAL. LAB. CODE §§1700 et. seq. (Deering 1999) [hereinafter "Labor Code"].

<sup>9</sup> N.Y. GEN. BUS. LAW §§170-190 (Consol. 1998) [hereinafter "General Business Law"].

<sup>10</sup> Stein and Wasserman started out booking bands as Music Corporation of America, based in Chicago. After moving to Los Angeles, they became perhaps the most influential agents who ever worked in movies and television. Wasserman's signing of Jack Benny to then-also-ran CBS-TV is credited with putting the CBS network on the map. MCA then acquired Universal Pictures from the founding Laemmle family and, under pressure from the Justice Department, stuck with production and renounced the agency business forever. Wasserman continued to wield enormous influence within the entertainment industries until MCA was taken over by Matsushita of Japan and, later, Seagrams of Canada. The history of the great agencies is recounted in FRANK ROSS, *THE AGENCY: WILLIAM MORRIS AND THE HIDDEN HISTORY OF SHOW BUSINESS* (1995) [hereinafter "ROSS"].

<sup>11</sup> William Morris—born Zelman Moses, a Jewish immigrant—had founded the William Morris Agency in 1898 as a clearing house for vaudevillians. Abe Lastfogel went to work for Morris in 1929 and stayed for the rest of his long life. In its heyday, WMA represented such megastars as James Cagney, George Raft, Al Jolson, Eddie Cantor, Louis Armstrong, Duke Ellington, and Will Rogers. In its later years, it represented, for varying periods of time, Frank Sinatra, Marilyn Monroe, Kevin Costner, Mel Gibson, Richard Gere, and Michelle Pfeiffer.

<sup>12</sup> Ovitz, Haber, and Meyer left William Morris to form CAA, taking with them WMA's top "packaging" agents: people who put together entire slates of talent (e.g., stars, directors, writers, producers) for film and television projects. This "transform[ed] agenting from a sporting enterprise to cutthroat competition." See ROSS, *supra* note 10.

<sup>13</sup> The late Lazar's post-Academy Awards parties were perennially

one of Hollywood's hottest tickets.

<sup>14</sup> The legendary Geffen started out in the William Morris mail room, went on to manage such stars as Laura Nyro and the Eagles, founded Asylum Records and, later, Geffen Records (now part of the Universal Music Group), produced such films as *Personal Best* and *Beetlejuice*, and, still later, became (with Steven Spielberg and Jeffrey Katzenberg) a founder of Dreamworks SKG, which recently released the worldwide hit *Saving Private Ryan*.

<sup>15</sup> [1984] 3 W.L.R. 448 (C.A. Aug. 10, 1984) (U.K.).

<sup>16</sup> Buchwald v. Superior Court, 62 Cal. Rptr. 364 (Cal. Ct. App. 1967).

<sup>17</sup> See Kilday, *supra* note 6.

<sup>18</sup> This is spreading, however, to other states with significant entertainment involvement, such as Minnesota, which adopted Minn. Stat. Ch. 184A, Entertainment Services, in 1993.

<sup>19</sup> General Business Law §171(1), (8).

<sup>20</sup> General Business Law §173.

<sup>21</sup> General Business Law §174.1. An applicant must be of good character and have at least two years' experience in the area or in equivalent business (at §174.1(2)) and must secure the Commissioner's approval of the contract forms to be used by the agent, such approval to be granted where the terms of the form "fairly and clearly represent contractual terms and conditions." General Business Law §173(2)(b).

<sup>22</sup> General Business Law §185.

<sup>23</sup> Because of the comprehensive definition of "theatrical employment agency" in General Business Law §171(8), this is essentially comprehensive of the entertainment industries.

<sup>24</sup> General Business Law §185. This language is perhaps vague enough to offer comfort to managers of rock bands and other performers who perform live—an interesting concept since many managers establish their fees at 15 to 25 percent of gross compensation for such activities.

<sup>25</sup> General Business Law §189(5).

<sup>26</sup> The "Supreme Court," despite its title, is New York's court of general jurisdiction, comparable to the "Superior Court" in California.

<sup>27</sup> N.Y. C.P.L.R. §§7803-04 (Consol.). Revocation of a license is a quasi-judicial act. Matter of 125 Bar Corp v. State Liquor Authority, 24 N.Y.2d 174 (N.Y. 1969) (stating that the "substantial evidence" test applies); Matter of Older v. Board of Education, 27 N.Y.2d 333, 337 (N.Y. 1941).

<sup>28</sup> General Business Law §190.

<sup>29</sup> Id.

<sup>30</sup> Labor Code §1700.5.

<sup>31</sup> Labor Code §1700.6(d).

32 This is implicit from Labor Code §1700.6(c). However, the statute does not say that the experience must be in the agency business or the equivalent, which New York does require. General Business Law §174(2).

33 Labor Code §1700.12.

34 Labor Code §1700.23. This appears to permit the Commissioner to be more pro-active than would be the case in New York, where, under General Business Law §173(2)(b), proposed forms “must be approved” if they “fairly and clearly represent contractual terms and conditions ... such as are permitted by this article.”

35 Id.

36 Labor Code §1700.25. New York does not mandate a separate trust fund in the statute; however, given the obvious fiduciary nature of the relationship, it would seem to be implicit.

37 Labor Code §1700.1(a).

38 Labor Code §1700.4.

39 Labor Code § 1700.44(d).

40 Id.

41 Labor Code §1700.44(a). Although, strictly speaking, the agency determination is entitled to no deference in a trial de novo (in contrast to N.Y. C.P.L.R. §§7803-04, under which the New York commissioner’s ruling is upheld if supported by substantial evidence), it is “generally the case that courts give considerable weight to administrative agency rulings.” Chester L. Migden, *Arsenio Hall Case: The Novel Aspect*, 14 ENT. L. RPTR. 3 (Oct. 1992).

42 Mandel v. Liebman, 100 N.E.2d 149 (N.Y. 1951).

43 Pine v. Laine, 321 N.Y.S.2d 303 (N.Y. App. Div. 1971).

44 Gershunov v. Panov, 430 N.Y.S.2d 299 (N.Y. App. Div. 1980).

45 There was, additionally, a provision whereby Liebman acknowledged that any employment opportunities which might come his way after the term also would be attributable to Mandel’s efforts—a provision which the Court of Appeals scorned.

46 Here, again, New York marches to a different drummer in naming its courts. The “Court of Appeals” is New York’s highest court.

47 Raden v. Laurie, 262 P.2d 61 (Cal. 1953). The client, Piper Laurie, went on to a long and distinguished film and television career. A similar result was reached in Azizi v. Stein, Labor Commission Case No. TAC 11- 96 (Sept. 15, 1997) (stating that “employment may ‘derive from’ a personal manager’s efforts while having been ‘procured’ by someone else”).

48 Buchwald v. Superior Court, 62 Cal. Rptr. 364 (Cal. Ct. App. 1967).

49 Bob Donnelly, *Managers Shouldn’t Be Endangered Species*, BILLBOARD, Feb. 20, 1999, at 4.

50 See, e.g., Croce v. Kurnit, 565 F. Supp. 884 (S.D.N.Y. 1982).

51 See supra note 42.

52 Ivy v. Howard, Labor Commission Case No. TAC 18-94 (1994).

53 Pryor v. Franklin, Labor Commission Case No. TAC 17 MP 114 (1982).

54 Telephone Interview by Daniel A. Cohen with David Gurley, Staff Counsel for the Division of Labor Standards Enforcement of the Department of Industrial Relations (Mar. 2, 1999).

55 CAL. BUS. & PROF. CODE §§6000 et seq. (Deering 1999) [hereinafter B&PC].

56 B&PC §6060.

57 B&PC §6068.

58 B&PC §§6146 et seq.

59 B&PC §§6200 et seq.

60 James M. O’Brien III, *Regulation of Attorneys Under California’s Talent Agencies Act: A Tautological Approach to Protecting Artists*, 80 CAL. L. REV. 471, 492-3 (Mar. 1992).

61 Tobin v. Chinn, Labor Commission Case No. TAC 17-96 (1997).

62 Barr v. Rothberg, Labor Commission Case No. TAC 14-90 (1992).

63 Snipes v. Dolores Robinson Entertainment, Labor Commission Case No. TAC 36-96 (1998).

64 Wachs v. Curry, 16 Cal. Rptr. 2d 496 (Cal. Ct. App. 1993). This was the outgrowth of a trial de novo after the decision of the Labor Commissioner that voided Wachs’ agreement with Hall. Arsenio Hall v. X Management, Inc., Labor Commission Case No. TAC No. 19-90 (1992).

65 The old definition in the Artists’ Managers Act of 1943 described a manager as “a person who engages in the occupation of advising, counseling, or directing artists in the development or advancement of their careers and who procures, offers, promises or attempts to procure employment ... only in connection with and as part of the duties and obligations of such person,” a formulation similar to that in General Business Law §171(8).

66 Wachs, 16 Cal. Rptr. 2d at 503 (emphasis supplied).

67 Id.

68 Church v. Brown, Labor Commission Case No. TAC 52-92 (1994).

69 An interesting aspect of this case is that even though the procurement acts had occurred more than a year before Church filed his petition, and therefore Church could not recover commissions paid more than a year prior to filing, he was able to use the procurement acts defensively to void the remainder of the agreement.

70 Waisbren v. Peppercorn Productions, Inc., 48 Cal. Rptr. 2d 437 (Cal. Ct. App. 1995).

71 Gurley, *supra* note 54.

72 Telephone Interview with David Gurley, Staff Counsel for the Division of Labor Standards Enforcement for the Department of Industrial Relations (Mar. 15, 1999).

73 Tobin v. Chinn, Labor Commission Case No. TAC 17-96 (1997). However, assuming the status of employer can have its downside. In another decision, Kern v. Entertainers Direct, Inc., Labor Commission Case No. TAC 25-96 (1997), a manager who functioned as a “clearing-house of entertainers” who worked at private parties, established the rates of payment by customers, and set the rates to be paid by the entertainers was held to be the employer and was therefore liable for wages when a customer defaulted.

74 Tobin v. Chinn, Labor Commission Case No. TAC 17-96 (1997).

75 Humes v. MarGil Ventures, Inc., 220 Cal. Rptr. 186 (Cal. Ct. App. 1985).

76 Rose v. Reilly, Labor Commission Case No. TAC 43-97 (1998).

77 Kilday, *supra* note 6.

78 See Barr v. Rothberg, Labor Commission Case No. TAC 14-90 (1992) (describing such a situation).

79 Kilday, *supra* note 6.

80 Brillstein-Grey counterclaimed, alleging that Shandling’s erratic behavior had damaged *The Larry Sanders Show*. Trial of this action is anticipated in June.

81 Ovitz and his colleagues took over theatrical production powerhouse Livent just before it was forced into bankruptcy, and Ovitz was also part of a group negotiating to bring NFL football back to Los Angeles.

82 This is serious: Claire Danes, Marisa Tomei, Lauren Holly, Minnie Driver, Mimi Rogers, Martin Scorsese, and Sydney Pollack were clients common to CAA and AMG. As of January 29, 1999, Scorsese, Tomei, and Rogers had elected AMG. Claudia Eller, *To His Old Partners, Ovitz Hasn’t Changed A Bit*, L.A. TIMES, Jan. 29, 1999, at C1. Bill Murray and producer-director Ivan Reitman were reported to be staying with CAA. Stephen Galloway and David Robb, *The Great CAA-Ovitz War: Whose Side Are You On?*, THE HOLLYWOOD REPORTER, Jan. 27, 1999, at 1.

83 Letter from Sigmund Arywitz, State Labor Commissioner, *State of Cal. Dept. of Industrial Relations* to Gang, Tyre, Rudin & Brown, attorneys (June 22, 1959) (File No. ‘59 IAc. A24E233-T).

84 International Shoe Co. v. Washington, 326 U.S. 310 (1945).

85 Burger King v. Rudzewicz, 471 U.S. 462 (1985).

86 Id. at 476.

87 However, it should be noted that the statute of limitations under Labor Code §1700.44(c) for bringing proceedings for violations of the Act would be extended from one year to three years. Cal. Assembly Bill 884 §9, 1999-00 Reg. Sess. (Cal. 1999).

88 David Robb, *Kuehl Manages Managers*, THE HOLLYWOOD REPORTER, Mar. 15, 1999, at 1.

89 Cal. Assembly Bill 884 §11, 1999-00 Reg. Sess. (Cal. 1999), proposed addition of Labor Code §1701.4(a).

90 Cal. Assemb. Bill 884 §11, proposed addition of Labor Code §1701.4(b).

91 Cal. Assemb. Bill 884 §11, proposed addition of Labor Code §1701.5.

92 Cal. Assemb. Bill 884 §11, proposed addition of Labor Code §1701.6(a)(3).

93 Cal. Assemb. Bill 884 §11, proposed addition of Labor Code §1701.6(b). This tracks the language applicable to agents. See Labor Code §1700.5(d).

94 Cal. Assemb. Bill 884 §11, proposed addition of Labor Code §1701.12. The comparable agency fee is found in Labor Code §1700.12.

95 Cal. Assemb. Bill 884 §11, proposed addition of Labor Code §1701.12(b). The comparable agency fee is found in Labor Code §1700.12(b).

96 Cal. Assemb. Bill 884 §11, proposed addition of Labor Code §1701.15. The comparable agency bond is found in Labor Code §1700.15.

97 Cal. Assemb. Bill 884 §11, proposed addition of Labor Code §1701.9(b). Again, this is the same as for agents. See §1700.9(b).

98 Labor Code §1700.23.

99 Cal. Assemb. Bill 884 §11, proposed addition of Labor Code §1701.23(a).

100 Labor Code §1700.24.

101 Cal. Assemb. Bill 884 §11, proposed addition of Labor Code §1701.24(a). Although the bill does not specifically grant the Commissioner power to approve or disapprove fee rates, the Commissioner considers fees one of the elements subject to the Commissioner’s approval.

102 Labor Code §1700.25.

103 Cal. Assemb. Bill 884 §11, proposed addition of Labor Code §1701.25(a).

104 Labor Code §1700.44(a) provides that the statute governs “cases of controversy arising under *this* chapter” (emphasis supplied). The Kuehl Amendment would create a new—and different—Chapter 4.5 of Division 2 of the Labor Code. See Cal. Assemb. Bill 884 §11.