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75373-8

No. 75373-8-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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WORKHOUSE MEDIA, INC., a Washington Corporation,

Respondent/Plaintiff,

v.

FERNANDO VENTRESCA aka Fernando Ventura, a single person;  
GREG SHERRELL, a single person,

Appellants/Defendants,

2016 SEP -2 PM 2:05

COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

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BRIEF OF APPELLANTS

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SHERRELL, a single person

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Commissioner has “the exclusive right to decide in the first instance all the legal and factual issues on which an act-based defense depends.”) Did the Trial Court act without subject matter jurisdiction when it rendered a decision as to the enforceability of the Agency Agreements given that Defendants raised the TAA as a defense to the enforcement of the same? (Assignment of Error 1.) ..... 4

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## I. INTRODUCTION

Defendants/Appellants Fernando Ventresca aka Fernando Ventura (Ventresca) and Greg Sherrell (Sherrell) (Ventresca and Sherrell will be referred to collectively as “Defendants”) are co-hosts of San Francisco-based morning radio show “Fernando & Greg in the Morning” on KVMQ-FM 99.7 [NOW!]. In May 2009, Defendants entered into separate but identical Agency Agreements with Paul B. Anderson (Anderson), through his corporation, Paul B. Anderson Media Agent, Inc. (PBAMA), which was succeeded by Plaintiff/Respondent Workhouse Media, Inc. (“WHM” or “Plaintiff”) (the “Agency Agreements”). The Agency Agreements memorialize an agreement between Defendants on the one hand and Anderson on the other hand under which Anderson was to act as Defendants’ exclusive talent agent for the purpose of procuring employment for Defendants as radio hosts in the San Francisco Bay Area of California. Plaintiff is a licensed attorney in Washington who, prior to engaging in the talent agency business, was in private practice for a number of years.

Despite acting as a talent agent in California for decades, Anderson consciously and intentionally refused to become licensed as a “talent agency” or comply with any of the requirements for the operation of a “talent agency” in California as set forth in the California Talent Agencies Act (TAA), California Labor Code § 1700, *et seq.* In an attempt to avoid being subject to California’s talent agency regulatory scheme, Anderson inserted a choice of law and venue provision into the Agency Agreements, which stated that all disputes under the Agency Agreements would be

governed by Washington law and any action to enforce the Agency Agreements would be made in King County, Washington.

The Agency Agreements were negotiated, executed and entirely performed in California where Defendants reside and where they have at all relevant times been employed. WHM, whose business as a talent agency is heavily dependent upon California artists and California employment opportunities for those artists, has an office in Santa Monica, California.

The relationship between Defendants and Plaintiff ultimately soured due to: 1) Plaintiff's failure to appropriately advise Defendants as to the effect of a "right to match" provision in Defendants' identical employment contracts with CBS Radio, Inc., the parent company of KCMQ-FM 99.7 [NOW!] (CBS Radio); and 2) Plaintiff's failure to competently negotiate on Defendants' behalf when the terms of the employment contract with CBS Radio was set to expire. Defendants subsequently lost an incredibly beneficial employment opportunity with a competing radio station as a result of Plaintiff's failure to properly advise Defendants and negotiate on their behalf. Due to Plaintiff's failure to advise Defendants of the legal and practical effect of this material provision in their employment contracts and negotiate competently with the desired competing radio station, Defendants were "locked in" to their CBS Radio contracts for an additional five years. Plaintiff's failure directly caused Defendants to have to forego more favorable and career-advancing opportunities that were terms of the competing station's offer; for example, Defendants were told that they would be the exclusive radio personalities appearing on the competing station's LGBT international digital platform, Pride, which would allow for

Defendants to enjoy significantly more exposure. CBS Radio had no existing similar digital platform.

In an effort to force Defendants to pay commissions under the employment contracts, which Plaintiff failed to properly advise and negotiate for Defendants, Plaintiff filed suit against Defendants in the King County Superior Court (the “Trial Court”).

Defendants have at all times maintained that the Trial Court lacks jurisdiction to hear this matter and that California, not Washington, law is applicable to the present dispute. The Trial Court, in contravention of established Washington Supreme Court precedent, refused to engage in a conflict of law analysis to determine which state’s law (Washington or California) should apply to the dispute, and instead, in deciding Plaintiff’s Motion for Partial Summary Judgment (MSJ), rendered Judgments against Defendants in favor of Plaintiff based on its assumption that Washington law applied and engaging in a conflict of law analysis was not required despite the true conflict existing between Washington and California law.

Herein, Defendants allege that the Trial Court acted without subject matter jurisdiction when it rendered a decision as to the effect of the California TAA on the instant dispute, a decision over which the California Labor Commissioner has exclusive original subject matter jurisdiction. Defendants also allege that the Trial Court was obligated to engage in a conflict of law analysis, that under that analysis, California law applies and that under California law, specifically, the TAA, the Agency Agreements are void. Accordingly, Defendants seek to have the Order Granting the MSJ

overturned and the Judgments entered thereon vacated.<sup>1</sup>

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The Trial Court acted without subject matter jurisdiction in determining the enforceability of the Agency Agreements

2. The Trial Court erred in failing to engage in a conflict of law analysis to determine the enforceability of the Agency Agreements

3. The Trial Court erred in applying Washington law to determine the enforceability of the Agency Agreements

4. The Trial Court erred in entering the Order of March 18, 2016 granting the MSJ (and subsequent Judgments thereon)

### **B. Issues Pertaining to Assignments of Error**

1. Plaintiff, a “talent agency” as defined under the TAA, entered into Agency Agreements with Defendants, who are “artists” as defined under the TAA, for the purpose of procuring employment for Defendants as radio hosts in the San Francisco Bay Area of California. Plaintiff is not now and has never registered as a “talent agency” as required under the TAA. Defendants asserted the TAA as a defense to the instant litigation in the Opposition to the MSJ. Under California law, the California Labor Commissioner has exclusive original subject matter jurisdiction to hear all matters related to the TAA, including instances in which the TAA is being raised a defense. *Styne v. Stevens*, 26 Cal. 4th 42, fn. 6 (2001) (holding that

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<sup>1</sup> Defendants have elected not to proceed with the appeal as it relates to the dismissal of Defendants’ counterclaims.

the California Labor Commissioner has “the exclusive right to decide in the first instance all the legal and factual issues on which an Act-based defense depends.”) Did the Trial Court act without subject matter jurisdiction when it rendered a decision as to the enforceability of the Agency Agreements given that Defendants raised the TAA as a defense to the enforcement of the same? (Assignment of Error 1.)

2. The Agency Agreements at issue contain a choice of law clause stating that Washington law will be applicable to any dispute thereunder. Under the TAA, agreements entered into by a “talent agency” for the rendering of talent agent services are void *ab initio* where the talent agency is not licensed as required under California Labor Code § 1700.5. *Blanks v. Seyfarth Shaw LLP*, 171 Cal. App. 4th 336, 359-60 (2009). Washington has no law regulating talent agencies. Does an “actual conflict” of law exist such that the Trial Court was obligated to undergo the conflict of law analysis set forth in Restatement (Second) Conflict of Laws (1971) (the “Restatement”) § 187 to determine whether to apply Washington or California law? (Assignment of Error 2.)

3a. California recognizes that the “remedial purpose of the [TAA] and the statutory goal of protecting artists from long recognized abuses” warrants a finding that the TAA “should be liberally construed to promote its general object. *Park v. Deftones*, 71 Cal. App. 4th 1465, 1470-71 (1999). California has also expressly stated that the TAA is fundamental policy of California. *Sebert v. DAS Comms., LTD*, No. TAC-19800, at \*4-13 (Cal. Lab. Comr. Mar. 27, 2012). The Washington Supreme Court has similarly

recognized that state statutes that place special emphasis on protection of the public weighs in favor of finding that that state has a compelling interest in application of its laws. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holding, Inc.*, 180 Wn.2d 954, 970-71 (2014). Is the TAA a fundamental policy of California? (Assignment of Error 3.)

3b. Defendants, radio hosts, are both residents of and employed in California and have been at all relevant times. Plaintiff, a talent agent, represents talent throughout California and operates an office in Santa Monica, California. The Agency Agreements were negotiated and executed by Defendants in California. Further, all employment procured by Plaintiff for Defendants was performed in California. California is widely-considered the entertainment capital of the world. Does California have a materially greater interest than Washington in the determination of the enforceability of the Agency Agreements? (Assignment of Error 3.)

3c. Defendants are both residents of and employed in California and have been at all relevant times. Plaintiff represents talent throughout California and operates an office in Santa Monica, California but has a principal place of business in Washington. The Agency Agreements were negotiated and executed by Defendants in California. Further, all employment procured by Plaintiff for Defendants was performed in California. California is widely-considered the entertainment capital of the world. Would California be the state of applicable law in the absence of an effective choice of law by the Parties under the “Most Significant

Relationship Test” set forth in Restatement § 188? (Assignment of Error 3.)

4. Plaintiff, a “talent agency” as defined under the TAA, entered into Agency Agreements with Defendants, “artists” as defined under the TAA, for the purpose of procuring employment for Defendants as radio hosts in the San Francisco Bay Area of California. Plaintiff is not licensed as a talent agency in California. Under California law, “[a]ny contract of an unlicensed person for talent agency services is illegal and void ab initio.” *Blanks, supra*. Are the Agency Agreements void? (Assignment of Error 4.)

### III. STATEMENT OF THE CASE

#### A. Factual Background

Defendants are co-hosts of San Francisco-based morning radio show “Fernando & Greg in the Morning” on KVMQ-FM 99.7 [NOW!]. CP 2, 51, 166. Defendants both reside in San Francisco, California. CP 2, 25, 51, 166.

Anderson, through his corporation, PBAMA, which was succeeded by WHM, entered into the Agency Agreements with Defendants in May 2009. CP 2, 51, 125, 131-36. Under the Agency Agreements, Anderson, agreed to be Defendants’ “exclusive representative in all employment-related activities within the broadcast industry . . . .” CP 132, 135. Anderson also agreed that his “services include employment searches, career strategy, and negotiating [Defendants’] employment and/or separation agreement(s).” *Id.* The Agency Agreements contain a

“Governing Law & Venue” provision that states in relevant part as follows: “This agreement shall be governed by the laws of the State of Washington, and any action to enforce its terms shall be made in King County, Washington.” CP 133, 136. Simply put, the Agency Agreements memorialize a contractual relationship between Defendants, on the one hand, and Anderson (first through PBAMA and then through WHM), on the other hand, in which Anderson was to serve as Defendants’ exclusive talent agent for the purpose of procuring employment for Defendants within the San Francisco Bay Area radio broadcast industry.

Beginning in November 2011, Defendants were bound to an employment contract with CBS Radio to co-host “Fernando & Greg in the Morning” (the “CBS Radio Contract”). CP 3, 125. The CBS Radio contract expired by its own terms on November 10, 2014 but contained a “right to match” provision, which provided CBS Radio the option to match any competing employment agreement proposed to Defendants within the same market within six months of their departure, if any, from CBS Radio. CP 3-5, 125-127.

The relationship between Defendants and Plaintiff soured due to Anderson’s failure to appropriately advise Defendants as to the enforceability of the “right to match” provision in the CBS Radio Contract and failure to competently negotiate on Defendants’ behalf, and Defendants’ resulting inability to broaden their exposure and earning capacity by accepting an offer of employment from iHeart + Entertainment, Inc. dba iHeart Radio (iHeart Radio). CP 52-53. As a result, Sherrell terminated his relationship with Plaintiff on December 6, 2014 and

Ventresca terminated his relationship with Plaintiff on January 9, 2015. CP 5, 23-24, 128.

The Agency Agreements were negotiated, executed and wholly performed in California. All of the negotiations between Defendants and Anderson related to the Agency Agreements occurred in the San Francisco Bay Area of California. CP 167. Defendants never travelled to Washington to either negotiate the Agency Agreements or engage in any business whatsoever with Anderson, PBAMA or WHM. *Id.* Defendants executed the Agency Agreements in San Francisco, California. *Id.* Additionally, under the CBS Radio Contract and the proposed iHeart Radio offer of employment, Defendants were to perform as co-hosts of terrestrial radio shows broadcast from San Francisco, California. CP 167-168. Plaintiff's ties to and dependency upon the California entertainment industry are so strong that WHM maintains an office in Santa Monica, California. CP 163.

The TAA requires all talent agents to be licensed in order to procure employment on behalf of artists. Cal. Lab. Code § 1700.5. Failure to maintain a "talent agency" license renders any contracts entered into by the talent agent void *ab initio* and entitles the artist to restitution of all monies collected thereunder. *Blanks, supra*, at 359-60. Despite acting as a talent agent in California for decades, Anderson "made a conscious choice not to be licensed [as a "talent agency"] in California." RP 6:21-22. Anderson refused to submit to California's strict talent agency licensing scheme because in his estimation, "being a licensed attorney in Washington" "is far greater than simply going down to the California Department of Licensing [sic], filling out a form, and then getting a license to be a talent agent." RP

7:9-10, 12-15. Anderson's interpretation of the TAA, as presented to the Trial Court, is that registration as a talent agent under the TAA merely invokes the provision of the TAA requiring "[a]ny complaint or controversy that the artist has . . . to be first given or presented to the California Department of Labor." RP 7:15-19.

### **B. Procedural Background**

Despite this matter's and the Parties' pervasive connections to California, on August 26, 2015, Plaintiff, in reliance on the venue provision in the Agency Agreements, filed a Complaint against Defendants in the King County Superior Court (Case No. 15-2-20901-9) alleging: 1) breach of contract; 2) monies due; 3) unjust enrichment/disgorgement; 4) declaratory judgment; and 5) attorneys' fees and costs. CP 1-11. Therein, Plaintiff alleged that Washington State law governed the dispute and that venue and jurisdiction were properly in King County, Washington. CP 2.

"Defendants' Answer Complaint, Affirmative Defenses and Counterclaim" (the "Answer") was filed on November 30, 2015. CP 22-29. Therein, Defendants conceded and affirmatively represented that they are residents of San Francisco County, California; asserted that the Trial Court did not have jurisdiction over the dispute; and alleged that California law applied. CP 2, 22, 25, 27. "Defendants' Answer, Affirmative Defenses and Amended Counterclaims" (the "Amended Answer") was filed on December 22, 2015. CP 48-58. In the Amended Answer, Defendants again conceded and affirmatively represented that they are residents of San Francisco County, California; again asserted that the Trial Court did not have jurisdiction over the dispute; and again alleged that California law

applied. CP 2, 48, 51, 55-56.

Plaintiff filed a Motion for Partial Summary Judgment as to its first cause of action for breach of contract (the “MSJ”) on February 19, 2016. CP 103-123. The MSJ was supported by the Declaration of Anderson and the Declaration of Keith Kauffman, the Senior Vice President of Business Affairs for iHeart Radio. CP 124-139. Defendants filed an Opposition to the MSJ on March 7, 2016 (the “Opposition”). CP 140-161. The Opposition was supported by the Declaration of Cameron D. Bordner (Bordner), counsel for Defendants, and the Declaration of Sherrrell. CP 162-168. The Opposition alleged that under applicable Washington Supreme Court precedence, *Erwin v. Cotter Health Centers, Inc.*, 161 Wn.2d 676 (2007), the Trial Court was required to engage in a conflict of law analysis and that under that analysis, California, not Washington, law applied. CP 143-145, 146-154. Defendants also alleged that under California law, specifically the TAA, the Agency Agreements were void and that as a result, Plaintiff was barred from maintaining any action under them. CP 154-155. Plaintiff filed a Reply in support of the MSJ on March 14, 2016. CP 169-179. In support thereof, Plaintiffs filed the Declaration of Anderson and the Declaration of Arnold M. Willig (Willig), counsel for Plaintiff. CP 180-244.

At the hearing on the MSJ (the “Hearing”), Plaintiff made little attempt to address Defendants’ claim that California, not Washington, law should be applied. Summarily, Plaintiff stated that Defendants’ sought to have California law applied “despite the parties written agreement to the contrary” and further alleged that Anderson had met the purpose of the TAA

because he is a licensed Washington attorney and that “is far greater than simply going down to the California Department of Licensing [sic], filling out a form, and then getting a license to be a talent agent.” RP 6:10-13; 7:8-15. In response, Defendants urged that “the choice of law provision that has been challenged in [the Agency Agreements] should be looked at by the Court.” RP 11:20-23. Defendants went on to reiterate the argument set forth in the Opposition by stating that “there is a real conflict, i.e., the outcome of this situation in California would be vastly different than the outcome of this situation in Washington, given that we have a real conflict, we do need to engage in a conflict-of-laws analysis . . . .” CP 143-154; RP 12:1-5. In response to the Trial Court’s question as to whether or not it was “the policy in the State of Washington to enforce such agreements,” Defendants alleged that under *Erwin*, Washington Courts utilize the approach set forth in Restatement § 187 to determine which state’s law should apply. RP 12:19-13:1. Defendants again notified the Trial Court that a “real conflict” existed between Washington law and California law as it related to the instant dispute and that as a result, the validity of the choice of law provision in the Agency Agreements must be analyzed under Restatement § 187. RP 13:2-9, 14:1415:19.

In rendering its decision granting the MSJ, the Court stated as follows:

As far as the choice of law, one starts with the very strong presumption in valid contracts of the parties’ meeting of the minds about this very issue. And the agreements here clearly indicate both jurisdiction and venue is here. I see no argument anywhere that there was not a meeting of the minds, that there was undue coercion and all the rest.

Mindful of all arguments, then, the Court can find no genuine issue of material fact. The motion is therefore granted.

RP 22:13-22.

#### IV. STANDARD OF REVIEW

The question of a trial court's subject matter jurisdiction is reviewed *de novo*. *State v. Peltier*, 181 Wn.2d 290, 294 (2014) (citations omitted). Under RAP 2.5(a), a party may raise lack of subject matter jurisdiction for the first time before the appellate court.

The grant of summary judgment is similarly reviewed *de novo*, with the appellate court “engaging in the same inquiry as the trial court and viewing the facts and reasonable inference from those facts in the light most favorable to the nonmoving party.” *City of Spokane v. Spokane County*, 158 Wn.2d 661, 671 (2006). Under CR 56(c), summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Where only legal questions are before the court, the appellate court reviews such questions *de novo*. *Lunsford v. Sabrhagen Holdings, Inc.*, 166 Wn.2d 264, 270 (2009) (citations omitted). Choice of law is a question of law that is reviewed *de novo*. *Erwin, supra*, at 691 (citations omitted).

#### V. ARGUMENT

##### A. The Trial Court Did Not Have Subject Matter Jurisdiction to Render a Decision as to Defendants' TAA Defense

The California Labor Commissioner has exclusive original subject matter jurisdiction to determine all controversies arising under the TAA.

The TAA specifies that “[i]n cases of controversy arising under this chapter, the parties involved shall refer the matters in disputes to the Labor Commissioner, who shall hear and determine the same, subject to an appeal . . . to the superior court where the same shall be heard *de novo*.” Cal. Lab. Code § 1700.44(a). The reference of disputes involving the TAA to the California Labor Commissioner is mandatory. *Buchwald v. Superior Court*, 254 Cal. App. 2d 347, 357 (1967). Additionally, “[w]hen the Talent Agencies Act is invoked in the course of a contract dispute, the [California Labor] Commissioner has exclusive jurisdiction to determine his jurisdiction in the matter . . . .” *Styne, supra*.

As the California Labor Commissioner has made clear, any invocation of the TAA during the course of a dispute requires that the dispute be referred to the Labor Commissioner:

Even when the Talent Agencies Act is only being raised as a defense to an action for commissions purportedly due under a ‘personal management contract’, there is no concurrent original jurisdiction: ‘[T]he plain meaning of [Labor Code] section 1700.44 subdivision (a), and the relevant case law, negate any inference that courts share original jurisdiction with the Commissioner in controversies arising under the Act. On the contrary, the [California Labor] Commissioner’s original jurisdiction of such matter is exclusive.’ *Styne, supra*, at 58.

*Garcia v. Bonilla*, No. TAC-4-02, at \*8-9 (Cal Lab. Comr. January 21, 2003). This means that the California Labor Commissioner has “the

exclusive right to decide in the first instance all the legal and factual issues on which an Act-based defense depends.” *Styne, supra*, at fn. 6. Failure of a court to defer to the Labor Commissioner’s jurisdiction “compels the conclusion that the court acted in excess of its own jurisdiction.” *Beky v. Bonilla*, No. TAC-11-02, at \* 9 (Cal. Lab. Comr. Nov. 22, 2003). Further, any claim or defense that *colorably* arises under the TAA must first be submitted to the Labor Commissioner before it may be considered by a superior court. *Styne, supra*, at fn. 10. In determining whether a claim or defense *colorably* arises under the TAA, the “use of the term ‘colorable’ [should be construed] in its broadest sense” such that “if a dispute in which the Act is invoked plausibly pertains to the subject matter of the [TAA], the dispute should be submitted to the Commissioner for first resolution of both jurisdictional and merits issues as appropriate.” *Id.*

The Answer and Amended Answer both allege that Washington lacked jurisdiction and that California law applied to the dispute (i.e. the TAA applied to the Agency Agreements). CP 25, 27, 51, 55-56. Further, the Opposition alleged that the Agency Agreements were void as a result of WHM’s failure to register as a talent agency as required under the TAA. CP 145-155. Because Defendants invoked the TAA, the California Labor Commissioner had exclusive original subject matter jurisdiction to: 1) determine its own jurisdiction; and 2) decide all legal and factual issues on

which Defendants' TAA defense was based. *Styne, supra*, at 54, fn. 6.

Where a court lacks subject matter jurisdiction to issue an order, the order is not merely voidable but is void. *See Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 541 (1994). The Trial Court acted without subject matter jurisdiction in both determining its own jurisdiction to consider Defendants' TAA-based defense and in deciding the legal and factual issues on which the TAA-based defense was based. *Styne, supra*. The Trial Court was deprived of subject matter jurisdiction the moment that Defendants raised the TAA as a defense and as a result, all orders, including the Order Granting the MSJ are void. *See Marley, supra*.

For the foregoing reasons, Defendants respectfully request that this Court reach a determination that the Trial Court acted without subject matter jurisdiction and vacate the Order Granting the MSJ and the Judgments entered thereon.

**B. The Agreements are Void Under California Law, which Should be Applied Here**

Defendants allege that California law is governing law in determining the enforceability of the Agency Agreements and that under California law, the Agreements are void.

**1. An Actual Conflict of Law Exists Between the Laws of Washington and California**

“When parties dispute choice of law, there must be an actual conflict

between the laws or interests of Washington and the laws or interests of another state before Washington courts will engage in a conflict of laws analysis.” *Erwin, supra*, at 692. (citing *Seizer v. Sessions*, 132 Wn.2d 642, 648 (1997)). “If the result for a particular issue ‘is different under the law of the two states, there is a real conflict.’” *Id.* (citation omitted).

Under California law, talent agencies are regulated by the TAA. California Labor Code § 1700.5 provides, “No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner.” Under the TAA, agreements entered into by a “talent agency” for the rendering of talent agent services are void *ab initio* where the talent agency is not licensed as required under California Labor Code § 1700.5. *Blanks, supra*. Washington has no such requirement. In this case, there is an actual conflict between the laws and interests of Washington and those of California, because California requires talent agencies to be licensed, while Washington does not and California voids talent agency contracts entered into by unlicensed talent agents and Washington does not.

## **2. The Choice of Washington Law in the Agreements is Not Effective Under § 187 of the Restatement**

Once it has been determined that an actual conflict of laws exists between the two states, as here, the Court must determine whether the

parties' contractual choice of Washington law is effective. *Erwin, supra*, at 693. When faced with a choice-of-law provision selecting Washington law, Washington court's analyze the validity of such a provision under § 187 of the Restatement. *Id.* Section 187 reads as follows:

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of the intention, the reference is to local law of the state of the chosen law.

Defendants submit that the exception in § 187(2)(b) of the Restatement applies. Under that exception,

[T]hree questions are posed,' all of which must be answered in the affirmative for the exception to apply. To wit, (1) application of the parties' chosen law must be 'contrary to the fundamental policy of a state (2) which

has a materially greater interest than the chosen state in the determination of the particular issue and (3) which, under the rule of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

*Erwin, supra*, at 696 (citing Restatement § 187(2)(b)).

**a. The Agreements on Which Plaintiff is Suing Are Contrary to the Fundamental Policy of the State of California**

Under the applicable conflict of law analysis, the Agency Agreements satisfy the first element for application of section 187(2)(b) of the Restatement because application of Washington law by allowing an unlicensed talent agent to collect commissions from Defendants would be contrary to the fundamental policy of California. In discussing the history and purpose of the TAA, the California Supreme Court explained, “[e]xploitation of artists by representatives has remained the Act’s central concern through subsequent incarnations to the present day.” *Marathon Entertainment, Inc. v. Blasi*, 42 Cal. 4th 974, 984 (2008) (citation omitted). The California Supreme Court recognized the intent of the legislature to apply the TAA broadly so that “even the incidental or occasional provision of such services requires licensure.” *Id.* at 987. The legislation pertains to the “*comprehensive* regulation of persons and entities that provide talent agency services.” *Id.* at 989 (emphasis added). California courts recognize “the remedial purpose of the Act and the statutory goal of protecting artists from long recognized abuses . . . . Because the Act is remedial, it should be

liberally construed to promote its general object.” *Park, supra*, at 1470 -71.

The California Labor Commissioner, the entity with exclusive original subject matter jurisdiction to consider claims brought under the TAA, has held that “[t]he strict policy of invalidating contracts violative of the TAA and the TAA’s comprehensive licensing scheme for scrupulously regulating talent agencies – both of which are aimed at effectively protecting artists – makes it abundantly clear that the TAA ‘is a matter of significant importance to the state . . . is fundamental and may not be waived.’” *Sebert, supra*, at \*11 (citation omitted).

Since the TAA places special emphasis on protecting artists from long recognized abuses and exploitation, under Washington case law, the TAA is considered “remedial in nature and has as its purpose broad protection of the public.” *FutureSelect, supra*. The Washington Supreme Court has recognized that such a special emphasis on protection of the public weighs in favor of a finding that the state with such a statutory scheme has a more compelling interest in application of its laws under a conflict of laws analysis. *Id.* at 970-71 (where Washington’s State Securities Act was deemed “unique” with “special emphasis placed on protecting investors from fraudulent schemes,” Washington law would apply rather than New York law, which would “necessarily frustrate this purpose.”).

Application of Washington law, which would result in a waiver of the protections of the TAA, is, for the reasons stated above, contrary to a fundamental policy of California.

**b. California has a Materially Greater Interest than Washington in the Determination of Whether the Agreements are Enforceable**

“[T]he interest of a state in having its contract rule applied in the determination of a particular issue will depend upon the purpose sought to be achieved by that rule and upon the relation of the state to the transaction and the parties.” Restatement § 188 cmt c. The TAA’s “purpose is to protect artists seeking professional employment from the abuses of talent agencies.” *Beky, supra*, at \*6. In line with that purpose, the TAA contains several requirements. California Labor Code § 1700.15 requires that a talent agency deposit with the Labor Commissioner, prior to the issuance or renewal of a license, a surety bond in the penal sum of fifty thousand dollars (\$50,000). California Labor Code § 1700.23 requires that:

Every talent agency shall submit to the Labor Commissioner a form or forms of contract to be utilized by such talent agency in entering into written contracts with artists for the employment of the services of such talent agency by such artists, and secure the approval of the Labor Commissioner thereof. Such approval shall not be withheld as to any proposed form of contract unless such proposed form of contract is unfair, unjust and oppressive to the artist. Each such form of contract, except under the conditions specified in Section 1700.45, shall contain an agreement by the talent agency to refer any controversy between the artist and the talent agency relating to the terms of the contract to the Labor Commissioner for adjustment. There shall be printed on the face of the contract in prominent type the following:

“This talent agency is licensed by the Labor Commissioner of the State of California.”

California Labor Code § 1700.24 states that “[e]very talent agency shall file with the Labor Commissioner a schedule of fees to be charged and collected in the conduct of that occupation, and shall also keep a copy of the schedule posted in a conspicuous place in the office of the talent agency.” Section 1700.26 of the California Labor Code states that “[e]very talent agency shall keep records in a form approved by the Labor Commissioner,” and specifies the form of the records to be kept, including the amount of fee received from the artist and the specifics of the employments secured by the artist. California Labor Code § 1700.28 requires every talent agency to post in a conspicuous place in the office of such talent agency a printed copy of the chapter and such other statutes as may be specified by the Labor Commissioner. In summary, California has a thorough licensing scheme for talent agencies that is designed to protect artists.

Defendants are radio hosts, which are expressly “artists” as defined in the TAA. Cal. Lab. Code § 1700.4(b) (“talent” includes “radio artists”); CP 2, 25, 51, 166. Plaintiff is a “talent agency” as defined in the TAA because it “engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists.” *Id.* at 1700.4(a); CP 132, 135. The TAA is, therefore, designed to protect artists like Defendants from talent agents like Plaintiff.

In analyzing California’s connection to the transaction and the parties to determine whether or not California had a greater material interest than New York, a state that, unlike Washington, has a thriving

entertainment industry, the California Labor Commissioner held that the following facts warranted a finding that California had a materially greater interest: the talent was a resident of California, the meetings and discussions between the talent and the talent agent that led to the parties entering into the contract occurred in California, the talent agent managed the talent through frequent emails and telephone calls to California and, importantly, the “activities asserted to constitute illegal procurement involved performances, meetings, recording sessions, and other events that took place or were scheduled to take place in California.” *Sebert, supra*, at \* 2, 12. Based on the foregoing, the Labor Commissioner concluded that:

The delineated facts make clear that California has a very strong interests in having its law, the TAA, apply to this case. California has an overwhelming interest in protecting its resident artist[s]. California also has a critical interest in insuring that its fundamental public policy is not flouted with impunity by out of state entities that enter the state and then proceed to engage in illegal procurement activities within its state’s boundaries. Additionally, California has a crucial interest in insuring that California is not used as a base of operations for orchestrating or pursuing procurement activities that are illegal under the TAA ....”

*Id.*

Here, all of the facts relied upon by the California Labor Commissioner in *Sebert* are present. Defendants are both California residents and Plaintiff maintains an office in and frequently conducts business in California. CP 2, 25, 51, 163, 166. Additionally, all of the negotiations between Defendants and Anderson related to the Agency Agreements occurred in the San Francisco Bay Area of California. CP

167. Defendants never travelled to Washington to either negotiate the Agency Agreements or engage in any business whatsoever with Anderson, PBAMA or WHM. *Id.* Defendants executed the Agency Agreements in San Francisco, California. *Id.* Additionally, under the CBS Radio Contract and the proposed iHeart Radio offer of employment, Defendants were to perform as co-hosts of terrestrial radio shows broadcast from San Francisco, California. CP 167-168.

Based on the foregoing, Defendants respectfully assert that California, the state of Defendants' residence and where Plaintiff holds and office, the state where the relevant contract was negotiated, executed and carried out and the state that is the entertainment capital of the world, has a materially greater interest in the application of the TAA to the Agency Agreements.

**c. California Would be the State of the Applicable Law in the Absence of an Effective Choice of Law by the Parties Under the “Most Significant Relationship Test” in *Restatement §188***

Finally, under the Restatement § 187(2)(b) exception allowing disregard of the state law chosen by the parties to a contract, it must be determined that California law would apply in the absence of an effective choice of law by the parties under § 188 of the Restatement. “In the absence of an effective choice of law by the parties, the validity and effect of a contract are governed by the law of the state having the most significant relationship with the contract.” *Pac Gamble Robinson Co. v. Lapp*, 95

Wn.2d 341, 343 (1980); Restatement § 188.

Section 188 of the Restatement sets forth the factors in determining the state with the most significant relationship as follows:

(1) the rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) The place of contracting;
- (b) The place of negotiation of the contract,
- (c) The place of performance,
- (d) The location of the subject matter of the contract, and
- (e) The domicile, residence, nationality, place of incorporation and place of business of the parties.

***Place of contracting.*** Defendants contracted in California, for radio talent services to be provided in California. CP 2, 25, 51, 163, 166-167. This factor weighs in favor of applying California law.

***Place of negotiation.*** At no time did Defendants travel to Washington to negotiate with Anderson concerning the Agency Agreements; rather Defendants were in California at all times when negotiating the Agency Agreements. CP 167.

***Place of performance.*** “[W]here the contract is for the rendition of services, the most significant contact is the location where the contract requires performance.” *Nelson v. Kaanapali Properties*, 19 Wn. App. 893, 897 (1978). It is undisputed that Defendants could and did *only* perform their services as radio talent in San Francisco, California. CP 167-168. Given that Plaintiff was retained to procure employment for services as radio talent in San Francisco, California, Plaintiff also necessarily rendered his services solely in California. California is, therefore, undeniably the place of performance of the Agency Agreements.

***Location of subject matter.*** The subject matter of the Agency Agreements was Plaintiff securing employment for Defendants as radio personalities in San Francisco, California. *Id.* Whether this court considers Defendants the subject matter of the Agency Agreements or Defendants’ potential employment secured through the Agency Agreements as the subject matter of the Agency Agreements, California is the relevant locale.

***Domicile of the parties.*** Plaintiff is a Washington corporation with close ties to California such that it maintains an office in Santa Monica, California and conducts business in California regularly. CP 163. Conversely, Defendants both reside in California and have no ties whatsoever to Washington. CP 2, 25, 51, 166-167. Accordingly, this factor weighs heavily in favor of applying California law.

For the foregoing reasons, there can be no question that California law would be applied in the absence of an effective choice of law provision under Restatement §188. Defendants therefore, respectfully request that this Court enter a decision confirming that California law is applicable to the instant dispute.

**d. The Agency Agreements are Void Under California Law**

Plaintiff acted as a talent agent for Defendants and negotiated employment contracts for Defendants under which they worked as radio personalities who co-hosted their own broadcast radio program in San Francisco, California. CP 167-168. Plaintiff is not and was not licensed in California as a talent agent as required by the TAA at all times material to this action. CP 162-163.

The TAA “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.” *Marathon, supra*, at 985. California Labor Code § 1700.5 prohibits any person from engaging in or carrying on the occupation of a talent agency without first procuring a license therefor from the California Labor Commissioner. Under the TAA, the definition of “talent agency” includes a person or

corporation who engages in the occupation of procuring or attempting to procure employment or engagements for an artist or artists. *Id.* at § 1700.4(a). The definition of “artists” includes radio artists such as Defendants. *Id.* at § 1700.4(b).

Under California law,

Any contract of an unlicensed person for talent agency services is illegal and void *ab initio*. When a person has engaged in unlawful procurement because that person is not licensed, the Labor Commissioner has to power to void the contract and is empowered to deny all recovery for services where the Act has been violated and order restitution to the artist.

*Blanks, supra.* See also *Nuttall v. Juarez* No. TAC-22711, at \*5 (Cal. Lab. Comr. Sept. 11, 2012) (“When a person contracts to act as a talent agent without first having obtained a talent agency license as required by the TAA, the contract that has been entered into is illegal, void, and unenforceable.”). Under California law, specifically the TAA, the Agreements are void, illegal and unenforceable because Plaintiff was not and has never been licensed as a talent agency in California. For this reason, Defendants respectfully request that this Court overturn the Order Granting the MSJ.

## VI. CONCLUSION

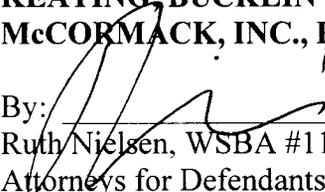
Based on the foregoing, Defendants respectfully request that this Court reach a determination that the Trial Court lacked subject matter jurisdiction, thereby overruling any Orders and Judgments entered by the Trial Court.

Defendants also seek a determination by this Court that the Trial Court failed to engage in the required conflict of law analysis, that under that analysis, California law applies and that under California law the Agency Agreements are void *ab initio*. Alternatively, Defendants seek any other relief that this Court deems just and proper based on the foregoing Appellant's Brief.

Respectfully submitted this 2nd day of September, 2016.

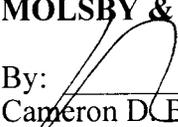
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**DECLARATION OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that on September 2, 2016 a true and correct copy of the foregoing Brief of Appellants and Appendix thereto, was served upon the parties listed below via the method indicated:

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## VII. APPENDIX

### Cases

<i>Beky v. Bonilla</i> , No. TAC-11-02 (Cal. Lab. Comr. Nov. 22, 2003) .....	A-2
<i>Blanks v. Seyfarth Shaw LLP</i> , 171 Cal. App. 4th 336 (2009).....	A-17
<i>Buchwald v. Superior Court</i> , 254 Cal. App. 2d 347 (1967) .....	A-50
<i>Garcia v. Bonilla</i> , No. TAC-4-02 (Cal Lab. Comr. January 21, 2003) .....	A-59
<i>Marathon Entertainment, Inc. v. Blasi</i> , 42 Cal. 4th 974 (2008) .....	A-72
<i>Nuttall v. Juarez</i> , No. TAC-22711 (Cal. Lab. Comr. Sept. 11, 2012) .....	A-92
<i>Park v. Deftones</i> , 71 Cal. App. 4th 1465 (1999).....	A-99
<i>Sebert v. DAS Comms., LTD</i> , No. TAC-19800 (Cal. Lab. Comr. Mar. 27, 2012) .....	A-106
<i>Styne v. Stevens</i> , 26 Cal. 4th 42 (2001).....	A-137

### Statutes

Cal. Talent Agencies Act (TAA), Cal. Lab. Code § 1700, <i>et seq.</i> .....	A-153
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6  
7

8 BEFORE THE LABOR COMMISSIONER

9 STATE OF CALIFORNIA

10

11	HERNAN DE BEKY,	)	No. TAC 11-02
		)	
12	Petitioner,	)	
		)	
13	vs.	)	
		)	
14	PIEDAD BONILLA, an individual dba	)	DETERMINATION OF
	Pinata Productions and Management,	)	CONTROVERSY
15		)	
	Respondent.	)	
16		)	

17

18 The above-captioned matter, a petition to determine  
19 controversy under Labor Code §1700.44, came on regularly for  
20 hearing on October 29, 2002, in Los Angeles, California, before  
21 the Labor Commissioner's undersigned hearing officer. Hernan de  
22 Beky (hereinafter "Petitioner") was represented by Ronald G.  
23 Rosenberg; Piedad Bonilla, an individual dba Pinata Productions  
24 and Management (hereinafter "Respondent") appeared in propria  
25 persona. Based on the evidence presented at this hearing and on  
26 the other papers on file in this mater, the Labor Commissioner  
27 hereby adopts the following decision.

28 //

1 FINDINGS OF FACT

2 1. Petitioner performs as an actor and a Spanish language  
3 voice-over artist in radio and television commercials and movie  
4 trailers.

5 2. On September 5, 2000, Petitioner entered into a written  
6 "personal management agreement" with Respondent for a period of  
7 one and one-half years, commencing May 2, 2000, whereby  
8 Respondent was to provide advice and counsel "with respect to  
9 decisions concerning employment ... and all other matters  
10 pertaining to [Petitioner's] professional activities and career  
11 in entertainment, amusement, music, recording, literary fields  
12 and in any and all media." Under the terms of this contract,  
13 petitioner agreed to pay commissions to respondent in the amount  
14 of 15% of his gross earnings in these fields during the term of  
15 ~~the agreement, and his earnings following expiration of the~~  
16 agreement as to any agreements entered into or substantially  
17 negotiated during the term of the contract. The contract  
18 specified that respondent is not a theatrical agent, and is not  
19 licensed to obtain, seek or procure employment for the  
20 petitioner. The contract also provided that "in any arbitration  
21 or litigation under this agreement, the prevailing party shall be  
22 entitled to recover from the other party any and all costs  
23 reasonably incurred by the prevailing party in such arbitration  
24 or litigation, including without limitation, reasonable  
25 attorney's fees."

26 3. Respondent has never been licensed by the State Labor  
27 Commissioner as a talent agency.

28 4. Prior to May 3, 2000, petitioner was not represented by

1 a licensed talent agency. Since May 3, 2000, petitioner has been  
2 represented by Larry Hummel, an agent employed by ICM  
3 (International Creative Management, Inc.), a licensed talent  
4 agency.

5 5. On March 9, 2000, petitioner performed work as an extra  
6 in the movie "Blow". Petitioner learned of this job from  
7 respondent, who telephoned the petitioner to advise him of the  
8 opportunity. According to respondent, she was employed by the  
9 production company that produced "Blow" as an assistant to the  
10 casting director, and her call to petitioner was to secure his  
11 services for the film in her capacity as an assistant to the  
12 film's casting director. No evidence was presented that would  
13 indicate that respondent collected or attempted to collect any  
14 commission from petitioner for this job.

15 6. On September 13, 2000, petitioner sent an e-mail to  
16 respondent inquiring about the progress of obtaining work doing  
17 the Spanish language voice-over for the trailer for the movie  
18 "Woman on Top". Respondent responded by e-mail, stating "I have  
19 to talk to the owner. . . I'll keep you informed." Larry Hummel,  
20 the ICM agent, credibly testified that ICM had no role whatsoever  
21 in attempting to procure or in procuring work for the petitioner  
22 in connection with this film. Nonetheless, petitioner did get  
23 the job doing the voice-over for the trailer for this film. The  
24 production company paid petitioner \$825 for his work on the  
25 trailer, and paid an additional check for \$100 made out to the  
26 respondent. Respondent's testimony that she did not procure this  
27 job for petitioner was not credible, as it is contradicted by all  
28 of the other evidence on this issue. The weight of this evidence

1 compels the finding that respondent attempted to procure, and did  
2 procure, this employment for petitioner.

3       7. On December 7, 2000, petitioner performed work doing the  
4 Spanish language voice-over for a trailer for the movie "Quills".  
5 Larry Hummel credibly testified that ICM had no role whatsoever  
6 in attempting to procure or in procuring work for the petitioner  
7 in connection with this film, and furthermore, that prior to this  
8 hearing, ICM wasn't even aware that petitioner performed any work  
9 in connection with that film . Petitioner credibly testified  
10 that he found out that he got the "Quills" job through  
11 respondent, and that until the respondent told him about this  
12 job, he had not had any sort of contact with any production  
13 company regarding the job. Respondent's testimony that this job  
14 was procured by ICM is not believable, as it is contradicted by  
15 all of the other evidence on this issue. From this evidence, we  
16 draw the inference that this job was procured by the respondent.

17       8. On December 19, 2000, the respondent invoiced the  
18 production company that produced the Spanish language trailer for  
19 "Quills", in the amount of \$2,000, payable to the respondent.  
20 The production company paid this amount to the respondent the  
21 next day. On January 16, 2001, respondent sent a check to  
22 petitioner in the amount of \$1,800, retaining \$200 as a  
23 commission.

24       9. In November 2001, petitioner notified respondent of his  
25 intent to terminate the personal management agreement. On  
26 December 31, 2001, respondent filed a small claims action against  
27 petitioner for payment of \$1,500 allegedly owed under the  
28 personal management agreement.

1           10. By letter dated January 4, 2002, the law firm Holguin &  
2 Garfield, acting on behalf of the petitioner, advised respondent  
3 that because she procured employment for the petitioner without  
4 having been licensed as a talent agent by the State Labor  
5 Commissioner, the "personal management agreement" is  
6 unenforceable and void from its inception, and demanded that  
7 respondent not pursue the small claims action.

8           11. Despite the letter from petitioner's attorney,  
9 respondent proceeded with her small claims action against the  
10 petitioner. The small claims court entered a judgment in favor  
11 of respondent, from which petitioner filed a de novo appeal. A  
12 judgment was ultimately entered in favor of the respondent in the  
13 amount of \$1,620.42. On June 5, 2002, respondent executed on  
14 this judgment by levying on petitioner's bank account. As a  
15 ~~result of the levy, \$1,670.42 (the amount of the judgment plus a~~  
16 \$50 bank fee) was removed from petitioner's account.

17           12. On March 21, 2002, petitioner filed this petition to  
18 determine controversy with the Labor Commissioner, seeking a  
19 determination that the "personal management agreement" is  
20 unenforceable and void from its inception, with reimbursement for  
21 all amounts paid to the respondent pursuant to this agreement,  
22 and payment of petitioner's attorney's fees incurred in this  
23 proceeding.

24           13. On May 23, 2002, respondent filed a second small claims  
25 action against the petitioner, seeking payment of \$2,000 in  
26 commissions allegedly owed under the personal management  
27 contract. As of the date of the hearing before the Labor  
28 Commissioner, this small claims action was still pending.



1 obtained a talent agency license from the Labor Commissioner,  
2 respondent violated Labor Code §1700.5.

3 An agreement that violates the licensing requirement of the  
4 Talent Agencies Act is illegal and unenforceable. "Since the  
5 clear object of the Act is to prevent improper persons from  
6 becoming [talent agents] and to regulate such activity for the  
7 protection of the public, a contract between an unlicensed  
8 [agent] and an artist is void." *Buchwald v. Superior Court*  
9 (1967) 254 Cal.App.2d 347, 351. Having determined that a person  
10 or business entity procured, promised or attempted to procure  
11 employment for an artist without the requisite talent agency  
12 license, "the [Labor] Commissioner may declare the contract  
13 [between the unlicensed agent and the artist] void and  
14 unenforceable as involving the services of an unlicensed person  
15 ~~in violation of the Act."~~ *Styne v. Stevens, supra*, 26 Cal.4th at  
16 55. "[A]n agreement that violates the licensing requirement is  
17 illegal and unenforceable . . . ." *Waisbren v. Peppercorn*  
18 *Productions, Inc.* (1995) 41 Cal.App.4th 246, 262. Moreover, the  
19 artist that is party to such an agreement may seek disgorgement  
20 of amounts paid pursuant to the agreement, and "may . . . [be]  
21 entitle[d] . . . to restitution of all fees paid the agent."  
22 *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626. This remedy of  
23 restitution is, of course, subject to the one year limitations  
24 period set out at Labor Code §1700.44(c), so that the Labor  
25 Commissioner will not, absent extraordinary circumstances, order  
26  
27  
28 order to employ artists for work on the film or project that the  
production company is producing. See *Chinn v. Tobin* (TAC No. 17-  
96).

1 the reimbursement of amounts paid to an unlicensed agent prior to  
2 one year before the filing of the petition to determine  
3 controversy.

4       The primary legal question presented herein is whether the  
5 Labor Commissioner has the authority to reimburse petitioner for  
6 the amount that petitioner was required to pay to the respondent  
7 pursuant to the superior court's judgment after trial de novo on  
8 appeal from the small claims court on respondent's claim that  
9 petitioner owed this amount under the "personal management  
10 agreement." The question that we must address is whether the  
11 court judgment can now be attacked through this proceeding before  
12 the Labor Commissioner.

13       Our analysis begins with the observation that the Labor  
14 Commissioner has exclusive primary jurisdiction to determine all  
15 ~~controversies arising under the Talent Agencies Act. The Act~~  
16 specifies that "[i]n cases of controversy arising under this  
17 chapter, the parties involved shall refer the matters in dispute  
18 to the Labor Commissioner, who shall hear and determine the same,  
19 subject to an appeal . . . to the superior court where the same  
20 shall be heard de novo." (Labor Code §1700.44(a).) Courts  
21 cannot encroach upon the Labor Commissioner's exclusive original  
22 jurisdiction to hear matters (including defenses) arising under  
23 the Talent Agencies Act.

24       "The Commissioner has the authority to hear and determine  
25 various disputes, *including the validity of artists' manager-*  
26 *artist contracts and the liability of parties thereunder.*  
27 (*[Buchwald v. Superior Court, supra, 254 Cal.App.2d 347,] 357.*)  
28 The reference of disputes involving the [A]ct to the Commissioner

1 is mandatory. (*Id.* at p. 358.) Disputes must be heard by the  
2 Commissioner, and all remedies before the Commissioner must be  
3 exhausted before the parties can proceed to the superior court.  
4 (*Ibid.*)" (*REO Broadcasting Consultants v. Martin* (1999) 69  
5 Cal.App.4th 489, 494-495, italics in original.)

6 Therefore, "[w]hen the Talent Agencies Act is invoked in the  
7 course of a contract dispute, the Commissioner has exclusive  
8 jurisdiction to determine his jurisdiction in the matter,  
9 including whether the contract involved the services of a talent  
10 agency." *Styne v. Stevens, supra*, 26 Cal.4th 42, 54. This means  
11 the Commissioner, not the court, has "the exclusive right to  
12 decide in the first instance all the legal and factual issues on  
13 which an Act-based defense depends." *Ibid.* at fn. 6, italics in  
14 original. Here, the court's failure to defer to the Labor

15 Commissioner's jurisdiction compels the conclusion that the court  
16 acted in excess of its own jurisdiction. "Our conclusion that  
17 section 1700.44, by its terms, gives the Commissioner exclusive  
18 original jurisdiction over controversies arising under the Talent  
19 Agencies Act comports with, and applies, the general doctrine of  
20 exhaustion of administrative remedies. With limited exceptions,  
21 the cases state that where an adequate administrative remedy is  
22 provided by statute, resort to that forum is a "jurisdictional"  
23 prerequisite to judicial consideration of the claim." *Ibid.* at  
24 56. Even when the Talent Agencies Act is only being raised as a  
25 defense to an action for commissions purportedly due under a  
26 "personal management contract", there is no concurrent original  
27 jurisdiction: "[T]he plain meaning of section 1700.44,  
28 subdivision (a), and the relevant case law, negate any inference

1 that courts share original jurisdiction with the Commissioner in  
2 controversies arising under the Act. On the contrary, the  
3 Commissioner's original jurisdiction of such matters is  
4 exclusive." *Ibid.* at 58.

5 Here we are confronted by a final judgment -- albeit a  
6 judgment was issued by a court that lacked subject matter  
7 jurisdiction. After a final judgment has been rendered in an  
8 action, a new action or proceeding based on the same cause of  
9 action or defense, ignoring the normal effect of judgment as a  
10 merger or bar, is a collateral attack. *Woulridge v. Burns* (1968)  
11 265 Cal.App.2d 82, 84. This petition to determine controversy  
12 constitutes a collateral attack on the superior court judgment.  
13 In a collateral attack, a judgment may be effectively challenged  
14 only if it is so completely invalid as to require no ordinary  
15 review to annul it. ~~*Ibid.* The grounds for collateral attack~~  
16 include lack of subject matter jurisdiction. *Witkin, 8 Cal. Proc.*  
17 *(4th), Attack on Judgment in Trial Court, §6.*

18 When a collateral attack is made against a California  
19 judgment, including a judgment issued by a court of limited or  
20 special jurisdiction (such as small claims court or a superior  
21 court hearing an appeal de novo of a small claims judgment),  
22 there is a presumption of that the court acted in the lawful  
23 exercise of its jurisdiction, and the judgment is presumed valid.  
24 Evidence Code §666. In a collateral attack made against a  
25 California judgment, jurisdiction is conclusive if the  
26 jurisdictional defect does not appear on the face of the record.  
27 *Superior Motels v. Rinn Motor Hotels* (1987) 195 Cal.App.3d 1032,  
28 1049. Extrinsic evidence is inadmissible even though it might

1 show that jurisdiction did not in fact exist. *Hogan v. Superior*  
2 *Court* (1925) 74 Cal.App. 704, 708. A judgment "void on its face"  
3 may be collaterally attacked when the defect may be shown without  
4 going outside the record or judgment roll. *Becker v. S.P.V.*  
5 *Const. Co.* (1980) 27 Cal.3d 489, 493. Here, as we are dealing  
6 with a judgment stemming from a small claims proceeding, the  
7 record does not appear to reveal any jurisdictional defect.  
8 Nonetheless, there are exceptions to the rule that collateral  
9 attack against a California judgment will fail unless the  
10 judgment is void on its face. Of significance here, a party  
11 relying on a judgment may waive the benefit of this rule  
12 excluding extrinsic evidence by failure to object to the  
13 extrinsic evidence when offered. See *Witkin, 8 Cal. Proc. (4th),*  
14 *Attack on Judgment in Trial Court, §13,* and various cases cited  
15 therein.

16 In the hearing of this controversy, the petitioner presented  
17 extrinsic evidence to which no objection was raised that the  
18 respondent had engaged in unlawful procurement activities in  
19 violation of the Talent Agency Act, so as to constitute a defense  
20 to respondent's small claims action for payment of commissions  
21 owed under the personal management agreement. This evidence  
22 establishes that the judgment based on the small claims  
23 proceeding was void, as it was issued by a court that lacked  
24 subject matter jurisdiction.

25 Having found that this proceeding to determine controversy  
26 under the Talent Agencies Act is not barred by the judgment on  
27 the small claims proceeding, and having found that respondent  
28 engaged in unlawful procurement activities, we necessarily

1 conclude that the personal management contract was unlawful and  
2 void from its inception, and that respondent has no enforceable  
3 rights thereunder. We find that in order to effectuate the  
4 purposes of the Act, the petitioner must be reimbursed for all  
5 amounts paid to respondent pursuant to this contract from one  
6 year prior to the date of the filing of this petition to the  
7 present. The total amount that must be reimbursed consists of  
8 the \$1,620.42 obtained by respondent pursuant to a levy on  
9 petitioner's bank account on June 5, 2002, as that amount was  
10 levied pursuant to the void judgment awarding damages to  
11 respondent for breach of the void personal management contract.

12 Turning to petitioner's request for attorneys' fees incurred  
13 in connection with this proceeding, the contract between the  
14 parties did provide for an award of reasonable attorney's fees to  
15 the prevailing party "in the event of litigation or arbitration  
16 arising out of this agreement or the relationship of the parties  
17 created hereby." But an administrative proceeding before the  
18 Labor Commissioner pursuant to Labor Code §1700.44 neither  
19 constitutes "litigation" nor "arbitration". Litigation is  
20 commonly understood as "the act or process of carrying out a  
21 lawsuit." (Webster's New World Dictionary, Third College Edition  
22 (1988)) Lawsuits take place in courts, not before administrative  
23 agencies. Black's Law Dictionary defines "litigation" as a  
24 "contest in a court of justice for the purpose of enforcing a  
25 right." And an "arbitration", obviously, takes place before an  
26 arbitrator, not an administrative agency authorized to hear  
27 disputes pursuant to statute. Consequently, we conclude that the  
28 contract does not provide for an award of attorneys' fees

1 incurred in a proceeding to determine controversy before the  
2 Labor Commissioner. Therefore, even though the petitioner  
3 prevailed before the Labor Commissioner, he is not entitled to  
4 attorneys' fees in this proceeding.

5 We take this opportunity, however, to caution the respondent  
6 that failure to pay the full amount awarded herein to the  
7 petitioner within ten days of the date of service of this  
8 determination may result in liability for petitioner's attorneys  
9 fees in any subsequent judicial proceedings. Such subsequent  
10 proceedings could either be initiated by the respondent through  
11 the filing of a de novo appeal from this determination, pursuant  
12 to Labor Code §1700.44(a), or by the petitioner through the  
13 filing of a petition to confirm the determination and enter  
14 judgment thereon. See *Buchwald v. Katz* (1972) 8 Cal.3d 493.  
15 Of course, the respondent can prevent any subsequent judicial  
16 proceedings by expeditiously paying the petitioner the full  
17 amount found due herein.

18 ORDER

19 For the reasons set forth above, IT IS HEREBY ORDERED that:

20 1. The personal management contract between petitioner and  
21 respondent is illegal and void from its inception, and respondent  
22 has no enforceable rights thereunder;

23 2. The judgment that was entered on the small claims court  
24 action is void for lack of subject matter jurisdiction;

25 3. Respondent reimburse petitioner for the commissions paid  
26 to respondent from March 21, 2001 to the present, in the amount  
27 of \$1,620.42;

28 //

1 4. All parties shall bear their own costs and attorney's  
2 fees incurred in this proceeding.

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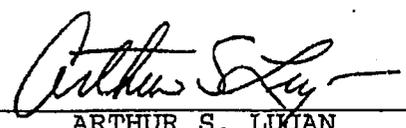
Dated: 1/22/03



\_\_\_\_\_  
MILES E. LOCKER  
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 1/22/03



\_\_\_\_\_  
ARTHUR S. LUJAN  
State Labor Commissioner





Caution  
As of: Aug 31, 2016

**BILLY BLANKS et al., Plaintiffs and Respondents, v. SEYFARTH SHAW LLP et al., Defendants and Appellants.**

**B183426 (consolidated with B186025)**

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,  
DIVISION THREE**

*171 Cal. App. 4th 336; 89 Cal. Rptr. 3d 710; 2009 Cal. App. LEXIS 187*

**February 20, 2009, Filed**

**SUBSEQUENT HISTORY:** Review denied by *Blanks (Billy) v. Seyfarth Shaw LLP.*, 2009 Cal. LEXIS 5199 (Cal., May 20, 2009)

**PRIOR HISTORY:** [\*\*\*1]

APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC308355, Susan Bryant-Deason, Judge.  
*Greenfield v. Superior Court*, 106 Cal. App. 4th 743, 131 Cal. Rptr. 2d 179, 2003 Cal. App. LEXIS 290 (Cal. App. 2d Dist., 2003)

**DISPOSITION:** Reversed and remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff client sued defendants, a law firm and its attorneys, for legal malpractice, breach of fiduciary duty, and fraudulent concealment. Following a jury trial, the Los Angeles County Superior Court, California, entered judgment for the client, who was awarded \$ 10.5 million in compensatory damages, \$ 15 million in punitive damages

against the firm only, and more than \$ 5.6 million in interest, attorney fees, and costs. Defendants appealed.

**OVERVIEW:** The client accused defendants of losing his right to seek redress from an unlicensed talent agent because defendants failed to timely file a petition with the California Labor Commissioner. The instant court concluded that the California Talent Agencies Act (TAA) included an unambiguous requirement that actions colorably arising under the TAA had to first be presented to the state's Labor Commissioner within one year. The client's failure to comply with this procedural requirement was an absolute bar to his cause of action that defendants violated California's Unfair Competition Law. The trial court prejudicially erred in refusing to instruct that an agreement between the client and the talent agent was subject to the doctrine of severability. Although the trial court correctly concluded on a motion in limine that the discovery rule did not apply, it exceeded its authority when it also held that defendants were negligent as a matter of law. If the client wished to obtain a ruling prior to trial that defendants were negligent as a matter of law, he should have raised the

issue in a motion for summary judgment or summary adjudication where all relevant facts could be assessed.

**OUTCOME:** The judgment was reversed, and the case was remanded to the trial court for further proceedings.

**CORE TERMS:** cause of action, talent, Talent Agencies Act TAA, statute of limitations, unlicensed, artist's, limine, unfair competition law, severability, immunity, discovery, legal malpractice, matter of law, license, manager's, original jurisdiction, severance, discovery rule, lawsuit, notice, "void, accrual, delayed, civil lawsuit, timely filed, malpractice, procurement, licensed, procure, civil penalties

#### LexisNexis(R) Headnotes

*Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies*

*Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview*

*Governments > Legislation > Statutes of Limitations > Time Limitations*

*Governments > State & Territorial Governments > Employees & Officials*

*Torts > Business Torts > Unfair Business Practices > General Overview*

[HN1] Plaintiffs seeking affirmative relief under the California Talent Agencies Act (TAA), *Lab. Code, § 1700 et seq.*, must bring their cases to the Labor Commissioner within the TAA's one-year statute of limitations and cannot rely on the longer statute contained in California's Unfair Competition Law, *Bus. & Prof. Code, § 17200 et seq.*

*Torts > Damages > General Overview*

*Torts > Malpractice & Professional Liability > Attorneys*

*Torts > Negligence > Causation > Proximate Cause > General Overview*

*Torts > Negligence > Duty > General Overview*

*Torts > Negligence > Standards of Care > Special Care > Highly Skilled Professionals*

[HN2] In civil malpractice cases, the elements of a cause of action for professional negligence are: (1) the duty of the attorney to use such skill, prudence and diligence as members of the profession commonly possess; (2) a

breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage.

*Torts > Malpractice & Professional Liability > Attorneys*

*Torts > Negligence > Duty > General Overview*

*Torts > Negligence > Standards of Care > Special Care > Highly Skilled Professionals*

[HN3] In addressing breach of duty in a legal malpractice action, the crucial inquiry is whether the attorney's advice was so legally deficient when it was given that the attorney may be found to have failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.

*Torts > Damages > General Overview*

*Torts > Malpractice & Professional Liability > Attorneys*

*Torts > Negligence > Causation > Cause in Fact*

[HN4] With regard to causation and damages in a legal malpractice action, the plaintiff is required to prove that but for the defendant's negligent acts or omissions, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred. This method of presenting a legal malpractice lawsuit is commonly called a "trial-within-a-trial." It may be complicated, but it avoids speculative and conjectural claims. The trial-within-a-trial method does not recreate what a particular judge or factfinder would have done. Rather, the jury's task is to determine what a reasonable judge or fact finder would have done. Even though "should" and "would" are used interchangeably by the courts, the standard remains an objective one. The trier of fact determines what should have been, not what the result would have been, or could have been, or might have been, had the matter been before a particular judge or jury.

*Civil Procedure > Trials > Jury Trials > Province of Court & Jury*

*Torts > Malpractice & Professional Liability > Attorneys*

[HN5] If the underlying issue in a legal malpractice action originally was a factual question that would have gone to a tribunal rather than a judge, it is the jury who must decide what a reasonable tribunal would have done.

The identity or expertise of the original trier of fact (i.e., a judge or an arbitrator or another type of adjudicator) does not alter the jury's responsibility in the legal malpractice trial-within-a-trial. However, if reasonable minds cannot differ as to what would have happened had the attorney acted otherwise, the issue can become a legal issue for the court.

***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview  
Governments > State & Territorial Governments > Licenses***

[HN6] The California Talent Agencies Act (TAA), *Lab. Code, § 1700 et seq.*, defines talent agencies as persons or corporations that procure professional employment or engagements for creative or performing artists in the entertainment media, including theater, movies, radio, and television. *Lab. Code, § 1700.4, subds. (a) & (b)*. The TAA requires anyone who solicits or procures artistic employment or engagements for artists to obtain a talent agency license. *Lab. Code, §§ 1700.4 & 1700.5*. No separate analogous licensing or regulatory scheme extends to personal managers. Also, the TAA does not govern assistance in an artist's business transactions other than professional employment.

***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview  
Governments > State & Territorial Governments > Licenses***

[HN7] See *Lab. Code, § 1700.5*.

***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview  
Contracts Law > Defenses > Illegal Bargains  
Contracts Law > Remedies > Restitution  
Governments > State & Territorial Governments > Employees & Officials  
Governments > State & Territorial Governments > Licenses***

[HN8] The California Talent Agencies Act (TAA), *Lab. Code, § 1700 et seq.*, 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 TAA's licensure and related requirements. *Lab. Code, § 1700.4, subd. (a)*. Any person who procures employment - any individual, any corporation, any manager - is a talent agency subject to

regulation. *Lab. Code, §§ 1700 & 1700.4, subd. (a)*. Thus, a personal manager who solicits or procures employment for his or her artist-client is subject to and must abide by the TAA. A single or incidental act of procurement brings one under the TAA. Any contract of an unlicensed person for talent agency services is illegal and void ab initio. When a person has engaged in unlawful procurement because that person is not licensed, the California Labor Commissioner has the power to void the contract and is empowered to deny all recovery for services where the TAA has been violated and order restitution to the artist.

***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview  
Governments > Legislation > Statutes of Limitations > Time Limitations  
Governments > State & Territorial Governments > Employees & Officials***

[HN9] The California Labor Commissioner is given exclusive original jurisdiction over controversies colorably arising under the California Talent Agencies Act, *Lab. Code, § 1700 et seq.*, which must be brought within one year.

***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview  
Governments > Legislation > Statutes of Limitations > Time Limitations  
Governments > State & Territorial Governments > Employees & Officials***

[HN10] See *Lab. Code, § 1700.44, subd. (c)*.

***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview  
Governments > State & Territorial Governments > Employees & Officials***

[HN11] Filing a complaint in the superior court does not satisfy *Lab. Code, § 1700.44's* filing requirement as it is not an action or proceeding as envisioned in the California Talent Agencies Act, *Lab. Code, § 1700 et seq.* Rather, a petition must be filed with the California Labor Commissioner.

***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview  
Governments > State & Territorial Governments >***

171 Cal. App. 4th 336, \*; 89 Cal. Rptr. 3d 710, \*\*;  
2009 Cal. App. LEXIS 187, \*\*\*1

**Employees & Officials**

[HN12] See *Lab. Code*, § 1700.44, subd. (a).

**Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview**  
**Civil Procedure > Discovery > General Overview**  
**Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview**  
**Governments > State & Territorial Governments > Employees & Officials**

[HN13] Generally, there is no due process right to discovery in hearings before the California Labor Commissioner held pursuant to the California Talent Agencies Act, *Lab. Code*, § 1700 et seq. Rather, the scope of discovery is governed by statute and the Commissioner's discretion.

**Administrative Law > Judicial Review > Standards of Review > De Novo Review**

**Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview**  
**Civil Procedure > Judgments > Entry of Judgments > Stays of Proceedings > General Overview**  
**Governments > State & Territorial Governments > Employees & Officials**  
**Governments > State & Territorial Governments > Licenses**

[HN14] After the issues in a proceeding brought under the California Talent Agencies Act, *Lab. Code*, § 1700 et seq., are first addressed by the California Labor Commissioner, both parties have the right to a trial de novo. De novo review means that the appealing party is entitled to a complete new hearing - a complete new trial - in the superior court that is in no way a review of the prior proceeding. If an artist seeking to recover funds paid to an unlicensed agent prematurely files a civil lawsuit prior to filing with the Commissioner, the superior court proceedings are stayed until the remedies before the Commissioner are exhausted.

**Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview**  
**Governments > State & Territorial Governments > Employees & Officials**

[HN15] *Lab. Code*, § 1700.4, subd. (a), of the California Talent Agencies Act (TAA), *Lab. Code*, § 1700 et seq., specifies that in all cases of controversy arising under the TAA, the parties involved shall refer the matters in

dispute to the California Labor Commissioner. This broad language plainly requires all such controversies and disputes between parties to be examined in the first instance by the Commissioner, not merely those controversies and disputes where the party invoking the TAA seeks affirmative relief.

**Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies**

**Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue**

**Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview**  
**Governments > State & Territorial Governments > Employees & Officials**  
**Governments > State & Territorial Governments > Licenses**

[HN16] The California Labor Commissioner has the authority to hear and determine various disputes, including the validity of artists' manager-artist contracts and the liability of the parties thereunder. The reference of disputes involving the California Talent Agencies Act (TAA), *Lab. Code*, § 1700 et seq., to the Commissioner is mandatory. Disputes must be heard by the Commissioner, and all remedies before the Commissioner must be exhausted before the parties can proceed to the superior court. When the TAA is invoked in the course of a contract dispute, the Commissioner has exclusive jurisdiction to determine his or her jurisdiction over the matter, including whether the contract involved the services of a talent agency. Having so determined, the Commissioner may declare the contract void and unenforceable as involving the services of an unlicensed person in violation of the TAA. It follows that a claim to this effect must first be submitted to the Commissioner, and that forum must be exhausted, before the matter can be determined by the superior court.

**Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies**

**Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue**

[HN17] With limited exceptions, where an adequate administrative remedy is provided by statute, resort to that forum is a jurisdictional prerequisite to judicial consideration of the claim.

**Administrative Law > Judicial Review > Reviewability >**

***Exhaustion of Remedies******Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue***

[HN18] When statutes require a particular class of controversies to be submitted first to an administrative agency as a prerequisite to judicial consideration, and the parties reasonably dispute whether their case falls into that category, it lies within the agency's power to determine in the first instance, and before judicial relief may be obtained, whether the controversy falls within the agency's statutory grant of jurisdiction.

***Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue******Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview******Governments > State & Territorial Governments > Employees & Officials***

[HN19] The superior court need not refer to the California Labor Commissioner a case which, despite a party's contrary claim, clearly has nothing to do with the California Talent Agencies Act (TAA), *Lab. Code, § 1700 et seq.* For example, an automobile collision suit between persons unconnected to the entertainment industry is manifestly not a controversy arising under the TAA, and it cannot be made one by mere utterance of words. On the other hand, if a dispute in which the TAA is invoked plausibly pertains to the subject matter of the TAA, the dispute should be submitted to the Commissioner for first resolution of both jurisdictional and merits issues, as appropriate.

***Torts > Business Torts > Unfair Business Practices > Elements***

[HN20] Causes of action under California's Unfair Competition Law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, include any unlawful, unfair or fraudulent business act or practice. By proscribing any unlawful business practice, the UCL borrows violations of other laws and treats them as unlawful practices that the UCL makes independently actionable.

***Torts > Business Torts > Unfair Business Practices > General Overview***

[HN21] An act may violate California's Unfair Competition Law, *Bus. & Prof. Code, § 17200 et seq.*, even if the unlawful practice affects only one victim.

***Governments > Legislation > Statutes of Limitations > Time Limitations******Torts > Business Torts > Unfair Business Practices > General Overview******Torts > Procedure > Statutes of Limitations > Borrowing Statutes***

[HN22] California's Unfair Competition Law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, has a four-year statute of limitations, which applies even if the borrowed statute has a shorter limitations statute. *Bus. & Prof. Code, § 17208.* That is because § 17208 states that any action to enforce any cause of action under the UCL shall be commenced within four years after the cause of action accrued. The general rule is that a UCL cause of action borrows the substantive portion of the borrowed statute to prove the unlawful prong of that statute, but not the limitations procedural part of the borrowed statute.

***Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue******Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview******Governments > Legislation > Statutes of Limitations > Time Limitations******Governments > State & Territorial Governments > Employees & Officials******Torts > Business Torts > Unfair Business Practices > General Overview***

[HN23] The applicable provisions of the California Talent Agencies Act (TAA), *Lab. Code, § 1700 et seq.*, vest exclusive original jurisdiction in the California Labor Commissioner and impose a one-year limitations period as a predicate to the assertion of any claim thereunder. These are fundamental parts of the TAA and the assertion of any claim based on a violation of its provision, but pursued under California's Unfair Competition Law, *Bus. & Prof. Code, § 17200 et seq.*, is necessarily burdened by this one-year limitations period.

***Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies******Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue******Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview******Governments > State & Territorial Governments > Employees & Officials******Torts > Business Torts > Unfair Business Practices > General Overview***

[HN24] The legislature has determined that it is valuable to have the California Labor Commissioner first examine claims brought under the California Talent Agencies Act (TAA), *Lab. Code, § 1700 et seq.*, prior to any judicial consideration because the Commissioner's expertise in applying the TAA is particularly significant in cases where the essence of the parties' dispute is whether services performed were by a talent agency for an artist. Thus, the superior court is foreclosed from awarding any relief unless the Commissioner has first considered the issue because to do otherwise would usurp the Commissioner's original jurisdiction. The TAA statutory scheme creates an absolute bar to plaintiffs who wish to circumvent the pre-suit requirement of filing first with the Commissioner. Even if remedies under California's Unfair Competition Law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, are cumulative to those available under other statutes and thus cumulative of those under the TAA, a TAA claim must be first brought to the Commissioner.

***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview  
Contracts Law > Contract Interpretation > Severability  
Contracts Law > Defenses > Illegal Bargains  
Governments > State & Territorial Governments > Employees & Officials  
Governments > State & Territorial Governments > Licenses***

[HN25] It is often unclear as to whether a person is acting as an artist's agent or in some other capacity, such as a manager. However, the doctrine of severability of contracts, as codified in *Civ. Code, § 1599*, applies to contracts involving such arrangements. Thus, if an unlicensed person renders procurement services that require a license under the California Talent Agencies Act, *Lab. Code, § 1700 et seq.*, and also renders non-procurement services, that person may be entitled to compensation for those acts that did not involve unlawful procurement. In such cases, the California Labor Commissioner hearing the dispute is empowered to void contracts in their entirety, however, the Commissioner is not obligated to do so. Rather, the Commissioner has the ability to apply equitable doctrines such as severance to achieve a more measured and appropriate remedy where the facts so warrant.

***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview***

***Contracts Law > Contract Interpretation > Severability  
Governments > State & Territorial Governments > Licenses***

[HN26] In deciding whether severance of a contract between an unlicensed talent agent and his or her client is available, the 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. The analysis is case specific. Further, the doctrine of severability can apply even if the unlicensed person receives an undifferentiated right to a certain percentage of the client's income stream.

***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview  
Governments > Legislation > Statutes of Limitations > Tolling  
Torts > Procedure > Statutes of Limitations > Accrual of Actions > Discovery Rule  
Torts > Procedure > Statutes of Limitations > Tolling > General Overview***

[HN27] In some instances, the accrual of a cause of action in tort is delayed until the plaintiff discovered (or reasonably should have discovered or suspected) the factual basis for his or her claim. The discovery rule postpones accrual of the cause of action. It may be expressed by the legislature or implied by the courts. The discovery rule is designed to protect plaintiffs who were unaware of their claims and to prevent tort claims from expiring before they are discovered. It is inappropriate to apply the rule when plaintiffs have ample time after discovery to protect their rights by filing a civil lawsuit or to file a petition under the California Talent Agencies Act, *Lab. Code, § 1700 et seq.*

***Governments > Legislation > Statutes of Limitations > Time Limitations***

[HN28] When the issue is accrual of a cause of action, belated discovery is usually a question of fact, but may be decided as a matter of law when reasonable minds cannot differ.

***Civil Procedure > Summary Judgment > Motions for***

**Summary Judgment > General Overview  
Civil Procedure > Pretrial Matters > Motions in Limine  
> General Overview**

[HN29] In limine motions are designed to facilitate the management of a case, generally by deciding difficult evidentiary issues in advance of trial. The usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. The advantage of such motions is to avoid the obviously futile attempt to "unring the bell" in the event a motion to strike is granted in the proceedings before the jury. What in limine motions are not designed to do is to replace the dispositive motions prescribed by the California Code of Civil Procedure. Although trial courts may exercise their inherent powers to permit nontraditional uses of motions in limine, when used in such fashion they become substitutes for other motions, such as summary judgment motions, thereby circumventing procedural protections provided by the statutory motions or by trial on the merits; they risk blindsiding the nonmoving party; and, in some cases, they could infringe a litigant's right to a jury trial. *Cal. Const., art. I, § 16.*

**Torts > Malpractice & Professional Liability > Attorneys**

**Torts > Negligence > General Overview**

[HN30] The issue of negligence in a legal malpractice case is ordinarily an issue of fact.

**Torts > Negligence > Defenses > Private Immunities > General Overview**

[HN31] In the realm of tort liability, immunities protect a class of defendants based upon public policy. An "immunity" is any exemption from a duty or liability. It avoids liability in tort under all circumstances, within the limits of the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but rather the resulting liability. When the law grants an immunity, it does not mean that the defendant's conduct is not tortious, but rather that the defendant is absolved from liability.

**Torts > Malpractice & Professional Liability > Attorneys**

**Torts > Negligence > Defenses > Private Immunities > General Overview**

[HN32] The judgmental immunity doctrine relieves an attorney from a finding of liability even where there was an unfavorable result if there was an honest error in judgment concerning a doubtful or debatable point of law. This doctrine recognizes that an attorney does not ordinarily guarantee the soundness of his or her opinions and accordingly, is not liable for every mistake he or she may make in his or her practice. In order to prevail on this theory and escape a negligence finding, the attorney must show that there were unsettled or debatable areas of the law that were the subject of the legal advice rendered and this advice was based upon reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem. Because attorneys must possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, as part of the analysis, the attorney must demonstrate that he or she has taken steps to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques. It is not sufficient that the attorney exercise his or her best judgment; rather, that judgment must be consistent with the standard of practice.

**Torts > Malpractice & Professional Liability > Attorneys**

**Torts > Negligence > Duty > General Overview**

[HN33] An attorney's obligation to his or her client is not satisfied by simply determining that the law on a particular subject is doubtful or debatable. Even if the law is unsettled, an attorney's decision must be informed, based upon an intelligent evaluation of the case. In other words, an attorney has a duty to avoid involving the client in murky areas of the law if research reveals alternative courses of conduct. The attorney should at least inform the client of uncertainties and let the client make the decision.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

A client sued a law firm and its attorneys for legal malpractice, breach of fiduciary duty, and fraudulent concealment. The client accused defendants of losing his right to seek redress from an unlicensed talent agent because defendants failed to timely file a petition with the

171 Cal. App. 4th 336, \*; 89 Cal. Rptr. 3d 710, \*\*;  
2009 Cal. App. LEXIS 187, \*\*\*]

Labor Commissioner. Following a jury trial, the trial court entered judgment in favor of the client. The client was awarded \$10.5 million in compensatory damages, \$15 million in punitive damages against the law firm only, and more than \$5.6 million in interest, attorney fees, and costs. (Superior Court of Los Angeles County, No. BC308355, Susan Bryant-Deason, Judge.)

The Court of Appeal reversed the judgment and remanded the case to the trial court for further proceedings. The court concluded that the Talent Agencies Act (TAA) (*Lab. Code, § 1700 et seq.*) includes an unambiguous requirement that actions colorably arising under the TAA must first be presented to the Labor Commissioner within one year. The client's failure to comply with this procedural requirement was an absolute bar to his cause of action against defendants under the unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*). The trial court prejudicially erred in refusing to instruct that an agreement between the client and the talent agent was subject to the doctrine of severability. The instructional error contravened the law and usurped the jury's responsibility to determine causation and damages. Although the trial court correctly concluded on a motion in limine that the discovery rule did not apply, the trial court exceeded its authority when it also held that defendants were negligent as a matter of law. If the client wished to obtain a ruling prior to trial that defendants were negligent as a matter of law, he should have raised the issue in a motion for summary judgment or summary adjudication where all relevant facts could be assessed. (Opinion by Aldrich, J., with Croskey, Acting P. J., and Kitching, J., concurring.) [\*337]

## HEADNOTES

### CALIFORNIA OFFICIAL REPORTS HEADNOTES

**(1) Actors and Other Professional Performers § 7--Actions--Talent Agencies Act--Labor Commissioner--Statute of Limitations--Unfair Competition Law.**--Plaintiffs seeking affirmative relief under the Talent Agencies Act (TAA) (*Lab. Code, § 1700 et seq.*) must bring their cases to the Labor Commissioner within the TAA's one-year statute of limitations and cannot rely on the longer statute of limitations contained in the unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*).

**(2) Attorneys at Law § 20--Malpractice--Elements.--In**

civil malpractice cases, the elements of a cause of action for professional negligence are (1) the duty of the attorney to use such skill, prudence and diligence as members of the profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage.

**(3) Attorneys at Law § 20--Malpractice--Breach of Duty.**--In addressing breach of duty in a legal malpractice action, the crucial inquiry is whether the attorney's advice was so legally deficient when it was given that the attorney may be found to have failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.

**(4) Attorneys at Law § 20--Malpractice--Causation and Damages.**--With regard to causation and damages in a legal malpractice action, the plaintiff is required to prove that but for the defendant's negligent acts or omissions, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred. This method of presenting a legal malpractice lawsuit is commonly called a trial within a trial. It may be complicated, but it avoids speculative and conjectural claims. The trial within a trial method does not recreate what a particular judge or factfinder would have done. Rather, the jury's task is to determine what a reasonable judge or fact finder would have done. Even though "should" and "would" are used interchangeably by the courts, the standard remains an objective one. The trier of fact determines what should have been, not what the result would have been, or could have been, or might have been, had the matter been before a particular judge or jury.

**(5) Attorneys at Law § 20--Malpractice--Underlying Issue.**--If the underlying issue in a legal malpractice action originally was a factual question that would have gone to a tribunal rather than a judge, it is the [\*338] jury who must decide what a reasonable tribunal would have done. The identity or expertise of the original trier of fact (i.e., a judge or an arbitrator or another type of adjudicator) does not alter the jury's responsibility in the legal malpractice trial within a trial. However, if reasonable minds cannot differ as to what would have happened had the attorney acted otherwise, the issue can become a legal issue for the court.

**(6) Actors and Other Professional Performers § 1--**

**Talent Agencies--Act---Licensing Requirement.**--The Talent Agencies Act (TAA) (*Lab. Code, § 1700 et seq.*) defines talent agencies as persons or corporations that procure professional employment or engagements for creative or performing artists in the entertainment media, including theater, movies, radio, and television (*Lab. Code, § 1700.4, subds. (a), (b)*). The TAA requires anyone who solicits or procures artistic employment or engagements for artists to obtain a talent agency license (*Lab. Code, §§ 1700.4, 1700.5*). No separate analogous licensing or regulatory scheme extends to personal managers. Also, the TAA does not govern assistance in an artist's business transactions other than professional employment.

**(7) Actors and Other Professional Performers § 1--Talent Agencies--Act---Licensing Requirement--Unlawful Procurement--Labor Commissioner--Power to Void Contract.**--The Talent Agencies Act (TAA) (*Lab. Code, § 1700 et seq.*) 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 TAA's licensure and related requirements (*Lab. Code, § 1700.4, subd. (a)*). Any person who procures employment--any individual, any corporation, any manager--is a talent agency subject to regulation. Thus, a personal manager who solicits or procures employment for his or her artist-client is subject to and must abide by the TAA. A single or incidental act of procurement brings one under the TAA. Any contract of an unlicensed person for talent agency services is illegal and void *ab initio*. When a person has engaged in unlawful procurement because that person is not licensed, the Labor Commissioner has the power to void the contract and is empowered to deny all recovery for services where the TAA has been violated and order restitution to the artist.

**(8) Actors and Other Professional Performers § 1--Talent Agencies Act--Labor Commissioner--Exclusive Original Jurisdiction--Statute of Limitations.**--The Labor Commissioner is given exclusive original jurisdiction over controversies colorably arising under the Talent Agencies Act (*Lab. Code, § 1700 et seq.*), which must be brought within one year. [\*339]

**(9) Actors and Other Professional Performers § 1--Talent Agencies Act--Filing Requirement.**--Filing a complaint in the superior court does not satisfy *Lab.*

*Code, § 1700.44's* filing requirement as it is not an action or proceeding as envisioned in the Talent Agencies Act (*Lab. Code, § 1700 et seq.*). Rather, a petition must be filed with the Labor Commissioner.

**(10) Actors and Other Professional Performers § 1--Talent Agencies--Act---Proceedings--Discovery.**--Generally, there is no due process right to discovery in hearings before the Labor Commissioner held pursuant to the Talent Agencies Act (*Lab. Code, § 1700 et seq.*). Rather, the scope of discovery is governed by statute and the commissioner's discretion.

**(11) Actors and Other Professional Performers § 1---Talent Agencies--Act---Filing of Civil Lawsuit--Stay of Proceedings.**--After the issues in a proceeding brought under the Talent Agencies Act (*Lab. Code, § 1700 et seq.*) are first addressed by the Labor Commissioner, both parties have the right to a trial de novo. De novo review means that the appealing party is entitled to a complete new hearing--a complete new trial--in the superior court that is in no way a review of the prior proceeding. If an artist seeking to recover funds paid to an unlicensed agent prematurely files a civil lawsuit prior to filing with the commissioner, the superior court proceedings are stayed until the remedies before the commissioner are exhausted.

**(12) Actors and Other Professional Performers § 1--Talent Agencies Act--Proceedings--Controversies and Disputes.**--*Lab. Code, § 1700.4, subd. (a)*, part of the Talent Agencies Act (TAA) (*Lab. Code, § 1700 et seq.*), specifies that in all cases of controversy arising under the TAA, the parties involved shall refer the matters in dispute to the Labor Commissioner. This broad language plainly requires all such controversies and disputes between parties to be examined in the first instance by the commissioner, not merely those controversies and disputes where the party invoking the TAA seeks affirmative relief.

**(13) Actors and Other Professional Performers § 1--Talent Agencies Act--Proceedings--Exhaustion of Administrative Remedies.**--The Labor Commissioner has the authority to hear and determine various disputes, including the validity of artists' manager-artist contracts and the liability of the parties thereunder. The reference of disputes involving the Talent Agencies Act (TAA) (*Lab. Code, § 1700 et seq.*) to the commissioner is mandatory. Disputes must be heard by the commissioner,

and all remedies before the commissioner must be exhausted before the parties can [\*340] proceed to the superior court. When the TAA is invoked in the course of a contract dispute, the commissioner has exclusive jurisdiction to determine his or her jurisdiction over the matter, including whether the contract involved the services of a talent agency. Having so determined, the commissioner may declare the contract void and unenforceable as involving the services of an unlicensed person in violation of the TAA. It follows that a claim to this effect must first be submitted to the commissioner, and that forum must be exhausted, before the matter can be determined by the superior court.

**(14) Administrative Law § 85--Judicial Review--Exhaustion of Administrative Remedies--Jurisdictional Prerequisite.**--With limited exceptions, where an adequate administrative remedy is provided by statute, resort to that forum is a jurisdictional prerequisite to judicial consideration of the claim.

**(15) Administrative Law § 85--Judicial Review--Exhaustion of Administrative Remedies--Agency's Statutory Grant of Jurisdiction.**--When statutes require a particular class of controversies to be submitted first to an administrative agency as a prerequisite to judicial consideration, and the parties reasonably dispute whether their case falls into that category, it lies within the agency's power to determine in the first instance, and before judicial relief may be obtained, whether the controversy falls within the agency's statutory grant of jurisdiction.

**(16) Actors and Other Professional Performers § 1--Talent Agencies Act--Jurisdictional and Merits Issues.**--The superior court need not refer to the Labor Commissioner a case which, despite a party's contrary claim, clearly has nothing to do with the Talent Agencies Act (TAA) (*Lab. Code, § 1700 et seq.*). For example, an automobile collision suit between persons unconnected to the entertainment industry is manifestly not a controversy arising under the TAA, and it cannot be made one by mere utterance of words. On the other hand, if a dispute in which the TAA is invoked plausibly pertains to the subject matter of the TAA, the dispute should be submitted to the commissioner for first resolution of both jurisdictional and merits issues, as appropriate.

**(17) Unfair Competition § 8---Causes of--Action--Unlawful Practice--Independently Actionable.**--Causes of action under the unfair

competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) include any unlawful, unfair or fraudulent business act or practice. By proscribing [\*341] any unlawful business practice, the UCL borrows violations of other laws and treats them as unlawful practices that the UCL makes independently actionable.

**(18) Unfair Competition § 4--Unlawful Practice--One Victim.**--An act may violate the unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*) even if the unlawful practice affects only one victim.

**(19) Unfair Competition § 8--Actions--Statute of Limitations.**--The unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) has a four-year statute of limitations, which applies even if the borrowed statute has a shorter limitations statute (*Bus. & Prof. Code, § 17208*). That is because § 17208 states that any action to enforce any cause of action under the UCL shall be commenced within four years after the cause of action accrued. The general rule is that a UCL cause of action borrows the substantive portion of the borrowed statute to prove the unlawful prong of that statute, but not the limitations procedural part of the borrowed statute.

**(20) Actors and Other Professional Performers § 1----Talent Agencies--Act----Jurisdiction of Labor Commissioner--Statute of Limitations--Unfair Competition Law.**--The applicable provisions of the Talent Agencies Act (TAA) (*Lab. Code, § 1700 et seq.*) vest exclusive original jurisdiction in the Labor Commissioner and impose a one-year limitations period as a predicate to the assertion of any claim thereunder. These are fundamental parts of the TAA and the assertion of any claim based on a violation of its provision, but pursued under the unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*) is necessarily burdened by this one-year limitations period.

**(21) Actors and Other Professional Performers § 7----Actions--Talent Agencies Act--Exhaustion of Administrative Remedies--Unfair Competition Law.**--The Legislature has determined that it is valuable to have the Labor Commissioner first examine claims brought under the Talent Agencies Act (TAA) (*Lab. Code, § 1700 et seq.*), prior to any judicial consideration because the commissioner's expertise in applying the TAA is particularly significant in cases where the essence of the parties' dispute is whether services performed were by a talent agency for an artist. Thus, the superior court is foreclosed from awarding any relief unless the

commissioner has first considered the issue because to do otherwise would usurp the commissioner's original jurisdiction. The TAA statutory scheme creates an absolute bar to plaintiffs who wish to circumvent the presuit requirement of filing first with the commissioner. Even if remedies under the unfair competition law (*Bus. & Prof. Code*, [\*342] § 17200 *et seq.*) are cumulative to those available under other statutes and thus cumulative of those under the TAA, a TAA claim must be first brought to the commissioner.

**(22) Actors and Other Professional Performers § 7--Actions--Talent Agencies--Act---Exhaustion of Administrative Remedies--Unfair Competition Law.**--Because the Talent Agencies Act (TAA) (*Lab. Code*, § 1700 *et seq.*) includes an unambiguous requirement that actions colorably arising under the TAA must first be presented to the Labor Commissioner within one year, a client's failure to comply with this procedural requirement was an absolute bar to his cause of action that a law firm that had represented the client in a lawsuit against an unlicensed talent agent violated the unfair competition law (*Bus. & Prof. Code*, § 17200 *et seq.*).

[*Cal. Forms of Pleading and Practice (2008) ch. 474A, Timing of Judicial Review of Agency Decisions*, § 474A.11; 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 449; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 107; 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 368; 1 Witkin, Cal. Procedure (5th ed. 2008) Attorneys, § 329.]

**(23) Actors and Other Professional Performers § 2--Contracts--Unlicensed Talent Agent--Severance.**--It is often unclear as to whether a person is acting as an artist's agent or in some other capacity, such as a manager. However, the doctrine of severability of contracts, as codified in *Civ. Code*, § 1599, applies to contracts involving such arrangements. Thus, if an unlicensed person renders procurement services that require a license under the Talent Agencies Act (*Lab. Code*, § 1700 *et seq.*) and also renders nonprocurement services, that person may be entitled to compensation for those acts that did not involve unlawful procurement. In such cases, the Labor Commissioner hearing the dispute is empowered to void contracts in their entirety, however, the commissioner is not obligated to do so. Rather, the commissioner has the ability to apply equitable doctrines such as severance to achieve a more measured and appropriate remedy where the facts so warrant.

**(24) Actors and Other Professional Performers § 2--Contracts--Unlicensed Talent Agent--Severance.**

--In deciding whether severance of a contract between an unlicensed talent agent and his or her client is available, the 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 [\*343] 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. The analysis is case specific. Further, the doctrine of severability can apply even if the unlicensed person receives an undifferentiated right to a certain percentage of the client's income stream.

**(25) Limitation of Actions § 57--Tolling--Discovery Rule--Talent Agencies Act.**

--In some instances, the accrual of a cause of action in tort is delayed until the plaintiff discovered (or reasonably should have discovered or suspected) the factual basis for his or her claim. The discovery rule postpones accrual of the cause of action. It may be expressed by the Legislature or implied by the courts. The discovery rule is designed to protect plaintiffs who were unaware of their claims and to prevent tort claims from expiring before they are discovered. It is inappropriate to apply the rule when plaintiffs have ample time after discovery to protect their rights by filing a civil lawsuit or to file a petition under the Talent Agencies Act (*Lab. Code*, § 1700 *et seq.*).

**(26) Limitation of Actions § 57--Accrual of Cause of Action--Belated Discovery.**

--When the issue is accrual of a cause of action, belated discovery is usually a question of fact, but may be decided as a matter of law when reasonable minds cannot differ.

**(27) Motions and Orders § 1--In Limine--Purpose.**

--In limine motions are designed to facilitate the management of a case, generally by deciding difficult evidentiary issues in advance of trial. The usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. The advantage of such motions is to avoid the obviously futile attempt to unring the bell in the event a motion to strike is granted

in the proceedings before the jury. What in limine motions are not designed to do is to replace the dispositive motions prescribed by the Code of Civil Procedure. Although trial courts may exercise their inherent powers to permit nontraditional uses of motions in limine, when used in such fashion they become substitutes for other motions, such as summary judgment motions, thereby circumventing procedural protections provided by the statutory motions or by trial on the merits; they risk blindsiding the nonmoving party; and, in some cases, they could infringe a litigant's right to a jury trial (*Cal. Const., art. I, § 16*).

**(28) Attorneys at Law § 20--Malpractice--Negligence--Issue of Fact.**--The issue of negligence in a legal malpractice case is ordinarily an issue of fact. [\*344]

**(29) Torts § 10--Defenses--Immunity.**--In the realm of tort liability, immunities protect a class of defendants based upon public policy. An immunity is any exemption from a duty or liability. It avoids liability in tort under all circumstances, within the limits of the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but rather the resulting liability. When the law grants an immunity, it does not mean that the defendant's conduct is not tortious, but rather that the defendant is absolved from liability.

**(30) Attorneys at Law § 20---Malpractice--Negligence--Judgmental Immunity Doctrine.**--The judgmental immunity doctrine relieves an attorney from a finding of liability even where there was an unfavorable result if there was an honest error in judgment concerning a doubtful or debatable point of law. This doctrine recognizes that an attorney does not ordinarily guarantee the soundness of his or her opinions and, accordingly, is not liable for every mistake he or she may make in his or her practice. In order to prevail on this theory and escape a negligence finding, the attorney must show that there were unsettled or debatable areas of the law that were the subject of the legal advice rendered and this advice was based upon reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem. Because attorneys must possess knowledge of those plain and elementary principles of law that are commonly known by well-informed attorneys, as part of the analysis, the

attorney must demonstrate that he or she has taken steps to discover those additional rules of law that, although not commonly known, may readily be found by standard research techniques. It is not sufficient that the attorney exercise his or her best judgment; rather, that judgment must be consistent with the standard of practice.

**(31) Attorneys at Law § 20--Malpractice--Unsettled Law--Intelligent Evaluation.**--An attorney's obligation to his or her client is not satisfied by simply determining that the law on a particular subject is doubtful or debatable. Even if the law is unsettled, an attorney's decision must be informed, based upon an intelligent evaluation of the case. In other words, an attorney has a duty to avoid involving the client in murky areas of the law if research reveals alternative courses of conduct. The attorney should at least inform the client of uncertainties and let the client make the decision. [\*345]

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Gibson, Dunn & Crutcher, Daniel M. Kolkey, Kevin S. Rosen, William E. Thomson and Dominic Lanza for Defendant and Appellant William H. Lancaster.

Law Offices of James R. Rosen, James R. Rosen, Adela Carrasco; Esner, Chang & Ellis, Stuart B. Esner and Gregory R. Ellis for Plaintiffs and Respondents.

**JUDGES:** Opinion by Aldrich, J., with Croskey, Acting P. J., and Kitching, J., concurring.

**OPINION BY:** Aldrich

**OPINION**

[\*\*716] **ALDRICH, J.--**

I.

**INTRODUCTION**

In this legal-malpractice-based lawsuit, plaintiff and respondent Billy Blanks (Blanks) won a multimillion-dollar judgment against his former attorneys, defendants and appellants William H. Lancaster (Lancaster) and Seyfarth Shaw LLP (Seyfarth

Shaw), jointly Seyfarth.<sup>1</sup>

1 Lancaster and Seyfarth Shaw have filed separate briefs in this matter raising separate issues. However, the only possible conflict of interest between [\*\*\*2] them is with regard to whether Seyfarth Shaw can be held liable for punitive damages, an issue we do not address. Thus, for simplicity and unless otherwise noted, we refer to Lancaster and Seyfarth Shaw jointly as Seyfarth.

The issues raised require us to discuss the exclusive jurisdiction of the Labor Commissioner in cases involving the Talent Agencies Act (*Lab. Code, § 1700 et seq.*; the TAA or the Act) as most recently decided by the Supreme Court in *Styne v. Stevens* (2001) 26 Cal.4th 42 [109 Cal. Rptr. 2d 14, 26 P.3d 343] (*Styne*). We are [\*\*717] also called upon to discuss the effect of Seyfarth's failure to file a petition with the commissioner within the Act's one-year statute of limitations (*Lab. Code, § 1700.44, subd. (c)*), and the doctrine of severability of contracts applied to the TAA as addressed in *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974 [70 Cal. Rptr. 3d 727, 174 P.3d 741] (*Marathon*). [\*346]

(1) We hold that (1) [HN1] plaintiffs seeking affirmative relief under the TAA must bring their cases to the Labor Commissioner within the Act's one-year statute of limitations and cannot rely on the longer statute of limitations contained in the unfair competition law; (2) the trial court prejudicially erred in failing to properly instruct on the doctrine of severability [\*\*\*3] of contracts; (3) the discovery rule cannot extend the TAA statute of limitations in this case; (4) the trial court prejudicially erred by addressing a subject not presented in a motion in limine; and (5) the issue of "judgmental immunity" must be addressed on remand.

We reverse and remand to the trial court for further proceedings.

II.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Factual background of the underlying case.<sup>2</sup>

2 Following the usual rules on appeal from a judgment rendered after a trial, we view the facts

in the light most favorable to the judgment. (*Woodman Partners v. Sofa U Love* (2001) 94 Cal.App.4th 766, 771 [114 Cal. Rptr. 2d 566].)

#### 1. The initial facts.

Blanks is a celebrity karate champion. He developed Tae Bo, a fitness routine combining calisthenics, karate, dance, and pushups. The routine was ideal for weight control, organized exercise classes, and training. Blanks developed an enthusiastic following and established the Billy Blanks World Karate Center where people lined up around the block to take classes. Radio and television programs spotlighted the Tae Bo craze. Blanks was in demand for film projects and public appearances. The first mass-marketed Tae Bo videotape was a huge success.

#### 2. Blanks [\*\*\*4] hires Greenfield.

In 1991 or 1992, certified public accountant Jeffrey Greenfield (Greenfield) came into Blanks's studio as a client. Soon thereafter, Greenfield became Blanks's accountant.

In December 1997, Blanks hired licensed talent agent Suzy Unger (Unger) at the William Morris Agency.

In 1998, Greenfield convinced Blanks to change their relationship and allow Greenfield to manage Blanks's business affairs, negotiate business [\*347] deals and media appearances, and schedule Blanks's appearances, in return for 10 percent of Blanks's revenues. Greenfield did not have a talent agency license. Greenfield began to manage and oversee many aspects of Blanks's business. His responsibilities ranged from doing the payroll to handling computer problems, hiring employees who addressed apparel design and product marketing, and negotiating with the parking valet.

Greenfield introduced Blanks to his lawyers, John Younesi and Jan Yoss. Blanks retained Younesi & Yoss LLP's services.

While Blanks was represented by the William Morris Agency, Greenfield arranged a number of movie and television appearances in 1998 and 1999. However, Greenfield's inept actions also harmed Blanks. For example, Greenfield's [\*\*\*5] negotiations relating to a television action project [\*\*718] called *Tae Bo Squad* did not result in an agreement. The project fizzled during

the contract stage. In 1999, Greenfield's mishandling of the negotiations for a television series called *Battle Dome* resulted in Blanks being paid only as a consultant and at a sum far below Blanks's worth.<sup>3</sup> Greenfield did not return telephone messages from those seeking to hire Blanks, resulting in lost opportunities.

<sup>3</sup> The testimony as to the amount Blanks was paid for the *Battle Dome* project is conflicting. One witness guessed that Blanks was paid less than \$ 10,000, but certainly less than \$ 50,000. Another witness testified Blanks may have received \$ 5,000.

Greenfield said he wanted to be Blanks's agent. Greenfield convinced Blanks to fire the William Morris Agency. On February 19, 1999, Yoss wrote a letter to the agency terminating its services.

In 1999, Greenfield tried to license the Tae Bo trademark to NCP Marketing Group, Inc. (NCP), the company that produced Blanks's infomercials. However, the deal fell through because Greenfield could not work with NCP's principal. Eventually, Blanks and Younesi & Yoss negotiated the deal, securing for Blanks [\*\*\*6] \$ 20 million annually for 7 years. Blanks received \$ 30 million upon signing the NCP deal, including a \$ 20 million advance.

Greenfield was receiving a 10 percent fee on royalties, appearance fees, and other income generated by Blanks, including that from the NCP infomercials and product sales.

While the NCP deal was pending and Blanks still was represented by the William Morris Agency, Greenfield proposed to Blanks a partnership in which Greenfield would leave his accounting practice and oversee all of Blanks's current and future business interests, including all financial, management, operational, and marketing functions. Greenfield was also to help Blanks set up a charitable foundation and obtain movie, television, and [\*348] clothing deals. In exchange, Greenfield would obtain a percentage of all of Blanks's business. The proposal called for Greenfield initially to receive one-third of all of Blanks's income, escalating to a 49 percent share in 5 years. Blanks resisted, but agreed to a trial period during which Greenfield was to be given an opportunity to prove if he could be an agent and run Blanks's business. The agreement was never reduced to a writing and Blanks

never considered Greenfield [\*\*\*7] to be his partner. Greenfield began receiving periodic checks.

Blanks's wife, Gayle Blanks, had always been involved in Blanks's business. Around August 2, 1999, Mrs. Blanks wrote a lengthy letter to Greenfield detailing numerous complaints about Greenfield's role in Blanks's affairs. The letter prompted a four-hour meeting in August 1999, between Mrs. Blanks and Greenfield. At its conclusion, Mrs. Blanks was pressured into signing two checks Greenfield previously had prepared that were made payable to him. Mrs. Blanks signed the two checks, which totaled more than \$ 7.6 million, in order "[t]o get Jeffrey out of our life." After arriving back at her home, Mrs. Blanks collapsed and was taken to the emergency room.

Including the two August 1999 checks, Greenfield received 16 checks from December 29, 1998 through August 2, 1999, totaling approximately \$ 10.6 million. The record does not reflect how the amount of each check was calculated.<sup>4</sup>

<sup>4</sup> The dates and the amounts of the checks are: (1) December 29, 1998--\$ 16,000; (2) January 26, 1999--\$ 16,000; (3) February 2, 1999--\$ 1,540.80; (4) February 25, 1999--\$ 605.30; (5) March 3, 1999--\$ 1,361,667; (6) April 15, 1999--\$ 75,570.65; [\*\*\*8] (7) May 10, 1999--\$ 41,059.84; (8) May 10, 1999--\$ 173,182.85; (9) May 17, 1999--\$ 14,000; (10) June 2, 1999--\$ 793,436.23; (11) June 24, 1999--\$ 34,988.24; (12) July 7, 1999--\$ 400,000; (13) July 16, 1999--\$ 25,611.61; (14) July 21, 1999--\$ 27,848.32; (15) August 2, 1999--\$ 3,600,000; and (16) August 2, 1999--\$ 4,053,031.64.

[\*\*719] In August 1999, Greenfield's check writing authority on Blanks's accounts was eliminated.

### 3. Blanks hires Seyfarth Shaw to pursue Greenfield.

In September 1999, Blanks, Mrs. Blanks, Jan Yoss, and John Younesi met with Greenfield at the Blanks's home. The meeting was contentious. After this meeting, Blanks and his wife met privately with Yoss. Yoss informed Blanks that Greenfield did not have a talent agency license. This was the first time Blanks had heard that Greenfield was supposed to be licensed.<sup>5</sup> Yoss [\*349] suggested Blanks bring a lawsuit against Greenfield to recover the money Greenfield had received.

Yoss referred Blanks to Seyfarth Shaw, a prominent law firm.

5 Mrs. Blanks testified that her best recollection was that she learned in August or September 1999 that Greenfield was unlicensed. Mrs. Blanks stated in a written chronology of events [\*\*\*9] prepared by her that the contentious meeting occurred in September 1999.

In October 1999, Blanks met with Seyfarth Shaw lawyers, Barbara A. Fitzgerald and Lancaster. During this first meeting, there was a discussion of Greenfield's unlicensed status under the TAA. Seyfarth began preparing a civil complaint no later than October 22, 1999. On October 27, 1999, Blanks formally retained the law firm to represent him. Lancaster had primary responsibility for the case.

The TAA requires all agents to be licensed. If an agent procures work for an artist and is unlicensed, the Act permits the Labor Commissioner to void *ab initio* all contracts between the parties and order the unlicensed agent to disgorge funds earned for those services. Such requests for affirmative relief first must be made by filing a claim with the Labor Commissioner, who has original jurisdiction over TAA claims. The TAA has a one-year statute of limitations, which the parties agree begins to run from the date the payment is made to the unlicensed agent. (*Lab. Code, § 1700.44.*) Generally, there is no right to conduct discovery in TAA matters before the commissioner.<sup>6</sup>

6 We discuss the TAA more fully *post*.

Lancaster knew, within [\*\*\*10] a week or so after his first meeting with Blanks, that the Labor Commissioner had original jurisdiction over Blanks's TAA claim.

On November 4, 1999, Lancaster filed a civil lawsuit in the superior court on behalf of Blanks. The first cause of action was for violation of the TAA. It was based upon the fact that Greenfield was unlicensed. Greenfield's lack of licensure was also a foundational fact in the complaint's 16 other causes of action. For example, Blanks alleged as to all causes of action that "Greenfield gradually began to perform career management tasks on Blanks's behalf, including, for example, the negotiation of personal appearances and Tae Bo training engagements. ... [A]t no time did [Greenfield] obtain

licensure as ... a talent agent ... as required for the legitimate performance of the roles Greenfield purported to assume for Blanks." The complaint alleged that Greenfield handled and mishandled negotiations and often referred to Greenfield as a "manager/agent." The complaint sought disgorgement of all funds that had been paid to Greenfield, and other relief.

[\*\*720] On December 6, 1999, Greenfield cross-complained for breach of contract. The cross-complaint alleged that Greenfield [\*\*\*11] was owed at least \$ 49 million based on a partnership agreement. That same week, Greenfield served his first round of discovery requests on Blanks. [\*350]

On December 29, 1999, the one-year TAA statute of limitations lapsed on the first check. The TAA statute of limitations lapsed on the 16th check on August 2, 2000.

From November 4, 1999, when Lancaster filed the civil lawsuit, until August 2, 2000, when the one-year TAA statute of limitations lapsed on the last of the 16 checks, the following occurred:

On February 8, 2000, Division Two of the Second District Court of Appeal filed and certified for publication *Styne v. Stevens (B121208)* in which the Court of Appeal prominently discussed the Labor Commissioner's exclusive original jurisdiction in TAA matters and the TAA's one-year statute of limitations. This decision involved a case in which an entertainer defended a lawsuit filed by her longtime personal manager. She argued that any contract with her manager was unenforceable because he was not a licensed talent agent. About a week after the Court of Appeal rendered its decision, another lawyer with whom Blanks had consulted wrote Blanks a letter alerting him to the opinion and the lawyer's concern that Seyfarth had [\*\*\*12] not filed a petition with the Labor Commissioner within the one-year statute of limitations. Blanks forwarded the letter to those at Seyfarth involved in Blanks's case. A Seyfarth attorney researched the Court of Appeal decision and Seyfarth held conferences about the issues it raised. Lancaster knew that an older case, *Buchwald v. Superior Court (1967) 254 Cal.App.2d 347 [62 Cal. Rptr. 364]*, held that the Labor Commissioner had original jurisdiction over TAA issues. Seyfarth researched and prepared a petition to be filed with the commissioner.

On March 16, 2000, a status conference was held in

the superior court during which Lancaster admitted he might have to file a petition with the Labor Commissioner in order to preserve Blanks's TAA claims and file a motion to stay the civil lawsuit. In response, the court invited Blanks to bring a stay motion. The court set trial and final status conference dates for February 2001.

On March 23, 2000, Lancaster sent Blanks a letter advising him of the status of the case, including an update as to ongoing discovery disputes. Lancaster stated in the letter that a motion to stay the TAA claim and the TAA petition were "being prepared and will be filed next week."

On June [\*\*\*13] 2, 2000, the California Supreme Court granted review of the February 8, 2000, Court of Appeal opinion, *Styne v. Stevens* (June 2, 2000, S086787).<sup>7</sup>

7 On July 12, 2001, the Supreme Court filed *Styne, supra*, 26 Cal.4th 42 extensively addressing the one-year statute of limitations under the Act. We discuss the Supreme Court opinion more fully *post*. It focused on whether the one-year TAA statute of limitations precluded an artist from using the TAA as a defense.

[\*351]

During the spring of 2000, Blanks's new business advisor, Michael Crum, became concerned that Blanks already had spent \$ 300,000 on the case against Greenfield. Crum requested Lancaster to prepare a projected budget for the Greenfield litigation for the next six months. In response, Lancaster informed Crum that the estimated budget to pursue the case was in excess of \$ 200,000. This included the cost of taking 10 to 15 depositions.

By the summer of 2000, Seyfarth had not requested a stay of the civil action [\*\*721] against Greenfield. In July 2000, Seyfarth served its first notice of Greenfield's deposition. Blanks's deposition commenced on July 12, 2000.

In late August 2000, Lancaster made a frantic telephone call to Blanks's home. Lancaster asked Mrs. Blanks when Blanks [\*\*\*14] first had learned that Greenfield was not a licensed talent agent. Mrs. Blanks told Lancaster that Yoss had told Blanks about Greenfield's lack of licensure in August or September 1999. (See fn. 5, *ante*.) Blanks's recollection was that the

purpose of the telephone call was that Lancaster had inquired about when Blanks had last paid Greenfield. Lancaster abruptly ended the call after stating he had to get something filed. Less than 24 hours later, Seyfarth sent Blanks's petition to determine controversy to the Labor Commissioner by Federal Express. The petition was received by the commissioner the next business day, Monday, August 28, 2000.

On September 6, 2000, Greenfield refused to appear for his deposition scheduled for the next day because Seyfarth had filed a petition with the Labor Commissioner. In October 2000, Seyfarth filed a motion to stay the *Blanks v. Greenfield* civil lawsuit.

#### 4. *Blanks fires Seyfarth.*

Blanks hired the law firm of Allen Matkins Leck Gamble & Mallory, LLP, which substituted into the case against Greenfield on October 20, 2000. On November 2, 2000, the superior court heard and granted the motion to stay that had been filed by Seyfarth, pending the TAA hearing before [\*\*\*15] the Labor Commissioner.

While Seyfarth was handling Blanks's case against Greenfield, Blanks paid Seyfarth approximately \$ 400,000. According to Seyfarth, Blanks still owed approximately \$ 46,000.

Attorney Martin Singer of Lavelly & Singer was experienced in handling TAA claims. He associated into the case against Greenfield and presented [\*352] Blanks's claims to the Labor Commissioner. The hearing before the Labor Commissioner began on September 10, 2001, and was continued to November 5, 2001. At the hearing, Attorney Singer explained how Greenfield had violated the TAA.

#### 5. *The Labor Commissioner's ruling.*

On March 11, 2002, the Labor Commissioner issued a formal determination of controversy finding that Greenfield was operating as an unlicensed talent agent and had violated the TAA at least twice (once for *Tae Bo Squad* and once for *Battle Dome*). The commissioner further ruled that Blanks's petition was untimely because Blanks had not satisfied the one-year TAA statute of limitations and thus, the commissioner could not order Greenfield to disgorge monies he had received from Blanks. Finally, the commissioner ruled that Greenfield's "partnership" agreement was void *ab initio* and [\*\*\*16]

unenforceable.

Blanks and Greenfield both requested a trial de novo in the superior court.

6. *In writ proceedings we have concluded that Blanks's TAA disgorgement request is time-barred.*

The superior court lifted the stay of the *Blanks v. Greenfield* civil proceedings. Greenfield moved for summary adjudication, arguing the TAA statute of limitations barred all recovery by Blanks on the first cause of action for violating the TAA. Greenfield noted that the last payment to him had been made on August 2, 1999, yet Blanks had not filed his petition with the commissioner until August 28, 2000. On May 17, 2002, the trial court denied the [\*\*722] motion. Greenfield filed a petition for writ of mandate in this court requesting that we direct the trial court to grant the motion and enter a judgment in his favor on the first cause of action. In opposing the petition, Blanks argued that he had complied with the time limitations contained in *Labor Code section 1700.44* because he had timely filed an "action or proceeding."

On February 27, 2003, we filed *Greenfield v. Superior Court* (2003) 106 Cal.App.4th 743 [131 Cal. Rptr. 2d 179]. We rejected Blanks's argument that filing a complaint in the superior court tolled the TAA one-year [\*\*\*17] statute of limitations. In doing so, we rejected Blanks's position that by filing in the superior court he had complied with *Labor Code section 1700.44's* filing requirement as he had timely filed an "action or proceeding." (*Greenfield, supra, at pp. 747-751.*) We also rejected Blanks's argument that there was no time limit on filing his TAA petition based upon the assertion that his complaint was a defensive pleading. (*Greenfield, at pp. 751-753; see fn. 7, [\*353] ante; Styne, supra, 26 Cal.4th 42, discussed post.*) We directed the superior court to grant Greenfield's motion for summary adjudication because Blanks had failed to timely bring his TAA cause of action before the commissioner. (*Greenfield v. Superior Court, supra, at p. 753.*) Blanks then filed a petition for review with the Supreme Court.

7. *Blanks settles with Greenfield.*

On April 9, 2003, Blanks and Greenfield entered into a settlement agreement conditioned upon the Supreme Court's denial of Blanks's petition for review. Pursuant to the conditional settlement, the TAA petition and all

disputes between Blanks and Greenfield contained in Blanks's civil complaint and Greenfield's cross-complaint were resolved by Greenfield's payment to Blanks of \$ 225,000, [\*\*\*18] and a \$ 25,000 charitable contribution. On June 11, 2003, the Supreme Court denied the petition for review and the conditional settlement was implemented.

B. *The present action against Seyfarth Shaw and Lancaster.*

Blanks filed this lawsuit against Seyfarth Shaw and Lancaster alleging causes of action for legal malpractice, breach of fiduciary duty, and fraudulent concealment. The essence of the complaint was that Seyfarth Shaw and Lancaster failed to timely file a petition before the Labor Commissioner, which resulted in Blanks's inability to recover all of the approximate \$ 10.6 million Blanks had paid to Greenfield. Blanks alleged the loss of his case against Greenfield was a direct result of Seyfarth's conscious decision to defer filing the petition with the Labor Commissioner in order to generate legal fees. Blanks also alleged that Seyfarth misled him into believing that the petition would be, or was, timely filed, and concealed the running of the TAA statute of limitations.

Seyfarth answered the complaint. Seyfarth Shaw cross-complained for breach of contract alleging Blanks owed \$ 46,365.97 in attorney's fees. After a critical pretrial ruling by the trial court, Seyfarth Shaw dismissed [\*\*\*19] the cross-complaint without prejudice.

1. *The trial in this legal-malpractice-based case.*

The jury trial lasted six weeks. Because the trial involved accusations of legal malpractice, there was a trial within a trial, i.e., Blanks had to prove that Seyfarth was negligent and that had Seyfarth not been negligent, Blanks would have been successful in pursuing the underlying case [\*\*723] against Greenfield and would have recovered more than the settlement amount. [\*354]

Blanks argued that had Seyfarth timely filed a petition with the commissioner, Blanks would have been able to obtain a disgorgement order from the Labor Commissioner requiring Greenfield to return the entire amount paid to him (approximately \$ 10.6 million) because Greenfield did not have a talent agency license. Blanks claimed it was irrelevant whether Greenfield's unlicensed acts could be severed from the licensed ones.

Blanks claimed that Seyfarth intentionally delayed filing the petition in order to inflate attorney's fees.

With regard to the breach of fiduciary duty and fraudulent concealment causes of action, Blanks asserted Seyfarth purposefully and knowingly put its financial interests above Blanks's and concealed the fact that [\*\*\*20] the TAA petition had not been timely filed.

## 2. Seyfarth's defense.

Lancaster's stated reason for filing the civil complaint, rather than filing a claim with the Labor Commissioner, was that he wished to conduct civil discovery and take Greenfield's deposition. He testified he knew that as soon as the TAA petition was filed, the civil action would be stayed, precluding discovery. Without corroboration, Lancaster testified that on May 10 or 11, 2000, Blanks agreed to the strategy of deferring the filing of the TAA petition with the Labor Commissioner in favor of conducting discovery in the civil lawsuit. Lancaster admitted he knew that the crucial date was the date each payment was made to Greenfield and that he knew the commissioner had original jurisdiction over Blanks's TAA claim.

On a motion in limine, the trial court held that Seyfarth Shaw and Lancaster were negligent as a matter of law and precluded most of Lancaster's testimony with regard to his trial strategy rationale. The trial court's ruling precluded Seyfarth from arguing that the "judgmental immunity doctrine" precluded a finding that it had been negligent. However, Lancaster was permitted to testify that he was confident [\*\*\*21] that the TAA statute of limitations would be tolled based upon the delayed discovery doctrine. Alternatively, Lancaster testified he believed that bringing suit in the superior court might satisfy the TAA's filing requirements because it was the filing of an "action or proceeding."<sup>8</sup> Lancaster also testified he believed there was an open question as to whether the TAA applied if the arrangement between Blanks and Greenfield was a partnership, as claimed by Greenfield.<sup>9</sup> Lancaster further testified he had concluded that the non-TAA causes of action had [\*355] longer statutes of limitations and could yield equal or better remedies than those under the TAA.<sup>10</sup> He believed that Blanks's TAA claims were [\*\*724] worth far less than \$ 10.6 million because virtually all of the \$ 10.6 million came from the NCP deal. Lancaster acknowledged that if the commissioner did not order disgorgement of all sums paid to Greenfield, the commissioner could order partial

disgorgement, or exercise equitable powers to disallow all recovery.

8 As discussed above, we rejected this argument in *Greenfield v. Superior Court*, *supra*, 106 Cal.App.4th at pages 747 to 751.

9 Lancaster noted that *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246 [48 Cal. Rptr. 2d 437] [\*\*\*22] declined to address whether the Act applied when the nonlicensed agent was an artist's partner or coproducer. (*Waisbren*, at p. 263.) (*Styne*, *supra*, 26 Cal.4th at pp. 57-58 distinguishes *Waisbren* on other grounds.)

10 To support this theory, Lancaster mentioned in the trial a number of causes of action, including those brought under the Miller-Ayala Athlete Agents Act (relating to professional athlete representation, *Bus. & Prof. Code*, § 18895 *et seq.*) and the unfair competition law (*Bus. & Prof. Code*, § 17200 *et seq.*). On appeal, Seyfarth focuses on the unfair competition law and merely alludes to the Miller-Ayala Athlete Agents Act.

## 3. The verdict and judgment.

The jury returned a series of special verdicts finding that Greenfield had acted as a talent agent and that had Seyfarth timely filed a TAA petition with the Labor Commissioner, Blanks would have been entitled to an award of \$ 10,634,542.48.

The jury also found Seyfarth liable on all causes of action. On the legal malpractice claim, the jury found Seyfarth had been negligent in allowing Blanks's TAA claim to lapse, and awarded Blanks \$ 9,310,972.<sup>11</sup> The jury further found that Seyfarth breached fiduciary duties to Blanks and awarded Blanks \$ 500,000 in damages.<sup>12</sup> [\*\*\*23]

11 This damage award is precisely Greenfield's net worth at the time Blanks's TAA claim lapsed, signifying that the jury believed this was the amount that was collectable.

12 This damage award may have been based on the amount of attorney's fees Blanks had paid to Seyfarth Shaw. Blanks paid a total of \$ 400,240.59 in attorney's fees to Seyfarth Shaw and \$ 198,331.95 to successor counsel.

The jury found, by clear and convincing evidence,

that Seyfarth Shaw had ratified Lancaster's conduct, which was committed with malice, fraud or oppression. The jury awarded Blanks \$ 10 million on the fraudulent concealment cause of action, finding that Seyfarth had concealed or suppressed a material fact. In the second phase of trial, the jury imposed \$ 15 million in punitive damages against Seyfarth Shaw only.

The superior court deemed the \$ 10 million fraud jury award to be duplicative of the damages awarded by the jury for legal malpractice. Judgment was entered in favor of Blanks against Seyfarth for \$ 10.5 million in compensatory damages and \$ 15 million in punitive damages against Seyfarth [\*356] Shaw only. The court also awarded Blanks more than \$ 5.6 million in interest, attorney's fees, and costs. <sup>13</sup> [\*\*\*24]

13 Mrs. Blanks and Blanks had a wholly owned production company, BG Star Productions, Inc. Mrs. Blanks and the production company were also plaintiffs and judgment was also rendered in their favor. They also appear on appeal as respondents. For simplicity and unless otherwise necessary, we have referred only to Blanks.

Seyfarth appeals from the judgment.

III.

### CONTENTIONS

Seyfarth Shaw and Lancaster contend they are entitled to judgment as a matter of law because Blanks cannot prove causation and damages in this legal-malpractice-based lawsuit. This argument is premised upon these two theories: (1) in the underlying lawsuit the unfair competition law cause of action would have yielded the same result as the TAA cause of action and so it does not matter that Seyfarth failed to timely file a petition with the Labor Commissioner; and (2) when the doctrine of severability is applied to his case, Blanks did not show he was entitled to more than that recovered in his settlement with Greenfield. We first address these two contentions because they could have been dispositive. In doing so, we must discuss the burden of proof required in legal malpractice cases and the parameters of the TAA (*Lab. Code, § 1700 et seq.*). [\*\*\*25] Thereafter, we address a number of other arguments raised by the parties, including those relating to the doctrines of [\*\*725] delayed discovery and "judgmental immunity." Because there were two

prejudicial instructional errors, we reverse the judgment and remand to the trial court for further proceedings.

IV.

### DISCUSSION

#### A. *Trial within a trial.*

In this case premised upon a claim of legal malpractice, Blanks accuses Seyfarth of losing his right to seek redress from Greenfield because Seyfarth failed to timely file a petition with the Labor Commissioner.

[HN2] (2) "In civil malpractice cases, the elements of a cause of action for professional negligence are: '(1) the duty of the attorney to use such skill, prudence and diligence as members of the profession commonly possess; [\*357] (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage. [Citations.]' [Citation.]" (*Wiley v. County of San Diego (1998) 19 Cal.4th 532, 536 [79 Cal. Rptr. 2d 672, 966 P.2d 983]*; see also *Lazy Acres Market, Inc. v. Tseng (2007) 152 Cal.App.4th 1431, 1435 [62 Cal. Rptr. 3d 378]*.)

[HN3] (3) "In addressing breach of duty, 'the crucial inquiry is whether [the attorney's] advice was so legally deficient when it was given that he [\*\*\*26] [or she] may be found to have failed to use "such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." [Citation.]' [Citations.]" (*Dawson v. Toledano (2003) 109 Cal.App.4th 387, 397 [134 Cal. Rptr. 2d 689]*, citing, among others, *Smith v. Lewis (1975) 13 Cal.3d 349, 356 [118 Cal. Rptr. 621, 530 P.2d 589]*, disapproved on another ground in *In re Marriage of Brown (1976) 15 Cal.3d 838, 851, fn. 14 [126 Cal. Rptr. 633, 544 P.2d 561]*; accord, *Unigard Ins. Group v. O'Flaherty & Belgum (1995) 38 Cal.App.4th 1229, 1237 [45 Cal. Rptr. 2d 565]*.)

[HN4] (4) With regard to causation and damages, the plaintiff is required to prove that but for the defendant's negligent acts or omissions, "the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred." (*Viner v. Sweet (2003) 30 Cal.4th 1232, 1241 [135 Cal. Rptr. 2d 629, 70 P.3d 1046]*; accord, *DiPalma v. Seldman (1994) 27 Cal.App.4th 1499, 1506-1507 [33 Cal. Rptr. 2d*

219].) As such, a determination of the underlying case is required. This method of presenting a legal malpractice lawsuit is commonly called a trial within a trial. It may be complicated, but it avoids speculative and conjectural claims. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 834 [60 Cal. Rptr. 2d 780]; [\*\*\*27] accord, *Viner v. Sweet, supra, at p. 1241.*)<sup>14</sup>

14 Other courts have used the phrases "suit-within-a-suit" or "case-within-a-case." (*Mattco Forge, Inc. v. Arthur Young & Co., supra, 52 Cal.App.4th at pp. 832-833.*)

"The trial-within-a-trial method does not 'recreate what a particular judge or fact finder would have done. Rather, the jury's task is to determine what a reasonable judge or fact finder would have done ... .' [Citation.] Even though 'should' and 'would' are used interchangeably by the courts, the standard remains an *objective* one. The trier of fact determines what *should* have been, not what the result *would* have been, or could have been, or might have been, had the matter been before a *particular judge* or jury. [\*\*726] [Citations.]" (*Mattco Forge, Inc. v. Arthur Young & Co., supra, 52 Cal.App.4th at p. 840*; see also *Piscitelli v. Friedenber*g (2001) 87 Cal.App.4th 953, 973 [105 Cal. Rptr. 2d 88].)

[HN5] (5) If the underlying issue originally was a factual question that would have gone to a tribunal rather than a judge, it is the jury who must decide [\*\*358] what a reasonable tribunal would have done. The identity or expertise of the original trier of fact (i.e., a judge or an arbitrator or another type of adjudicator) does [\*\*\*28] not alter the jury's responsibility in the legal malpractice trial within a trial. (*Piscitelli v. Friedenber*g, *supra, 87 Cal.App.4th at pp. 969-971.*) However, if reasonable minds cannot differ as to what would have happened had the attorney acted otherwise, this issue can become a legal issue for the court. (*Id. at pp. 970-971, citing Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 864 [64 Cal. Rptr. 2d 324] ["The question about what would have happened had [the lawyer] acted otherwise is one of fact unless reasonable minds could not differ as to the legal effect of the evidence presented."].)<sup>15</sup>

15 *Piscitelli v. Friedenber*g, *supra, 87 Cal.App.4th 953* provides an example. In *Piscitelli*, the plaintiff hired an attorney to bring claims against his ex-employer, an investment firm. The proceedings would have involved an arbitration proceeding before the New York Stock

Exchange (NYSE). The attorney appealed from a verdict against him in the plaintiff's legal malpractice case. As part of its discussion, the *Piscitelli* court stated that a determination of the underlying case in a legal malpractice action required a determination as to whether the plaintiff, Piscitelli, "would have prevailed in an arbitration [\*\*\*29] proceeding before the NYSE and obtained an award against [Piscitelli's ex-employer] absent [his attorney's] negligence. [Citations.]" (*Id. at p. 970.*) "Under this format, it was precisely the jury's role to step into the shoes of the arbitrators, consider the facts of Piscitelli's underlying claims and ultimately determine their merits." (*Id. at p. 974.*)

## B. The TAA.

### 1. The general parameters of the TAA.

In the recent case of *Marathon, supra, 42 Cal.4th 974*, the Supreme Court examined the TAA. (*Lab. Code, § 1700 et seq.*) *Marathon* explained: "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 [\*\*\*30] be, is often blurred and sometimes crossed." (*Marathon, supra, at p. 980.*) "In Hollywood, talent agents act as intermediaries between the buyers and sellers of talent. [Citation.] ... Generally speaking, an agent's focus is on the deal: on negotiating numerous short-term, project-specific engagements between buyers and sellers. [Citation.]" (*Id. at p. 983.*) "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." [Citation.]" [\*\*727] (*Id. at p. 984.*) [\*359]

The TAA regulates talent agencies. Its "roots extend back to 1913, when the Legislature ... imposed the first licensing requirements for employment agents. [Citations.] 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.' [Citations.] Exploitation of artists by representatives [\*\*\*31] has remained the Act's central concern through subsequent incarnations to the present day. [Citation.]" (*Marathon, supra, 42 Cal.4th at p. 984*, citing, among others, *Buchwald v. Superior Court, supra, 254 Cal.App.2d at p. 357*.)

[HN6] (6) The TAA defines talent agencies as "persons or corporations that procure professional 'employment or engagements' [citation] for creative or performing 'artists' [citation] in the entertainment media, including theater, movies, radio, and television [citation]." (*Styne, supra, 26 Cal.4th at p. 46*, citing *Lab. Code, § 1700.4, subds. (a), (b)*.) The TAA "requires anyone who solicits or procures artistic employment or engagements for artists to obtain a talent agency license. ([*Lab. Code,*] §§ 1700.4, 1700.5.)" (*Marathon, supra, 42 Cal.4th at p. 985*, fn. omitted.)<sup>16</sup> "No separate analogous licensing or regulatory scheme extends to personal managers. (*Waisbren v. Peppercorn Productions, Inc., supra, 41 Cal.App.4th at p. 252*.)" (*Marathon, supra, at p. 985*.) Also, the TAA does not "govern assistance in an artist's business transactions other than professional employment." (*Styne, supra, at p. 51*; accord, *Marathon, supra, at pp. 983-985*.)

16 *Labor Code section 1700.5* reads [\*\*\*32] in part: [HN7] "No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner."

[HN8] (7) The Act "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. ([*Lab. Code,*] § 1700.4, *subd. (a)*.) Any person who procures employment--any individual, any corporation, any manager--is a talent agency subject to regulation. ([*Lab. Code,*] §§ 1700, 1700.4, *subd. (a)*.)" (*Marathon, supra, 42 Cal.4th at p. 986*.) Thus, "a personal manager who solicits or procures employment for his [or her] artist-client is subject to and must abide by the Act. [Citations.]" (*Ibid.*)

A single or incidental act of procurement brings one

under the TAA. (*Marathon, supra, 42 Cal.4th at pp. 987-988*.) "[A]ny contract of an unlicensed person for talent agency services is illegal and void *ab initio*." (*Styne, supra, 26 Cal.4th at p. 46*.) When a person has engaged in unlawful procurement because that person is not licensed, the Labor Commissioner has the power to void the contract and is empowered "to deny [\*\*\*33] all recovery for [\*360] services where the Act has been violated" and order restitution to the artist. (*Marathon, supra, at p. 995*.)

[\*\*728] 2. *Commissioner's exclusive original jurisdiction.*

[HN9] (8) The Labor Commissioner is given exclusive original jurisdiction over controversies colorably arising under the TAA, which must be brought within one year.

(9) *Labor Code section 1700.44, subdivision (c)* details the TAA limitation period. It provides that [HN10] "[n]o action or proceeding shall be brought pursuant to [the Act] with respect to any violation which is alleged to have occurred more than one year prior to commencement of the action or proceeding." As we held in *Greenfield v. Superior Court, supra, 106 Cal.App.4th 743*, [HN11] filing a complaint in the superior court does not satisfy *Labor Code section 1700.44's* filing requirement as it is not an "action or proceeding" (*Greenfield, supra, at p. 748*) as envisioned in the Act. Rather, a petition must be filed with the commissioner. (*106 Cal.App.4th at pp. 747-751*.)

The jurisdiction of the commissioner is specified in *Labor Code section 1700.44, subdivision (a)*, which reads in part: [HN12] "In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute [\*\*\*34] to the Labor Commissioner, who 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*."

[HN13] (10) Generally, there is no due process right to discovery in TAA hearings before the commissioner. Rather, the scope of discovery is governed by statute and the commissioner's discretion. (See generally *Gov. Code, §§ 11500 et seq., 11507.5-11507.7, 11513*; cf. *California Teachers Assn. v. California Com. on Teacher Credentialing (2003) 111 Cal.App.4th 1001, 1012 [4 Cal. Rptr. 3d 369]*; *Cimarusti v. Superior Court (2000) 79 Cal.App.4th 799, 808-809 [94 Cal. Rptr. 2d 336]*.)

[HN14] (11) After the issues are first addressed by the commissioner, both parties have the right to a trial de novo. "De novo" review "means that the appealing party is entitled to a complete new hearing--a complete new trial--in the superior court that is in no way a review of the prior proceeding." (*Buchwald v. Katz* (1972) 8 Cal.3d 493, 502 [105 Cal. Rptr. 368, 503 P.2d 1376].) If an artist seeking to recover funds paid to an unlicensed agent prematurely files a civil lawsuit prior to filing with the commissioner, the superior court proceedings are stayed until the remedies before the commissioner are exhausted. (*Styne, supra*, 26 Cal.4th at p. 58; [\*\*\*35] cf. *Pacific Bell v. Superior Court* (1986) 187 Cal.App.3d 137, 140-141 [231 Cal. Rptr. 574].) [\*361]

*Styne, supra*, 26 Cal.4th 42, provides the Supreme Court's most recent discussion about the commissioner's jurisdiction in TAA matters. In *Styne*, plaintiff *Styne* sued "Connie Stevens, a prominent entertainer, for sums allegedly due under an oral contract. Before trial, Stevens sought summary judgment on grounds that the alleged contract involved *Styne's* procurement of professional employment for Stevens, that *Styne* thus acted as a talent agency but lacked the necessary license, and that the contract was therefore illegal and void under the Talent Agencies Act." (26 Cal.4th at pp. 46-47.) The Supreme Court first held that the TAA one-year statute of limitations did not prevent Stevens from relying upon the TAA as a defense. (26 Cal.4th at pp. 51-54.)

*Styne* then rejected Stevens's argument that referral to the commissioner was "not necessary when the artist alleges a violation [\*\*729] of the Talent Agencies Act solely as a defense in a garden-variety court action for breach of contract." (*Styne, supra*, 26 Cal.4th at p. 56.) The Supreme Court concluded that the proper procedure "is simply to stay the superior court proceedings and file a 'petition [\*\*\*36] to determine controversy' before the Commissioner. [Citations.]" (*Id.* at p. 58.) In reaching this conclusion, the court relied upon the statutory language and also upon a number of earlier cases, dating back to 1949, discussing the commissioner's broad jurisdiction. (*Id.* at pp. 54-59, citing, among others, *Buchwald v. Katz, supra*, 8 Cal.3d 493; *Garson v. Div. of Labor Law Enforcement* (1949) 33 Cal.2d 861 [206 P.2d 368]; *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489 [81 Cal. Rptr. 2d 639]; and *Buchwald v. Superior Court, supra*, 254 Cal.App.2d 347.)

(12) *Styne* noted that Labor Code [HN15] "[s]ection

1700.4, subdivision (a) specifies that in all 'cases of controversy' arising under the Talent Agencies Act, 'the parties involved shall refer the matters in dispute' to the Commissioner. ... This broad language plainly requires all such 'controvers[ies]' and 'dispute[s]' between 'parties' to be examined in the first instance by the Commissioner, not merely those 'controvers[ies]' and 'dispute[s]' where the 'part[y]' invoking the Act seeks affirmative relief." (*Styne, supra*, 26 Cal.4th at p. 56, fn. omitted.)

(13) The Supreme Court also referred to predecessor case law when it stated, [HN16] "[t]he Commissioner has the authority to [\*\*\*37] hear and determine various disputes, including the validity of artists' manager-artist contracts and the liability of the parties thereunder. ([*Buchwald v. Superior Court, supra*, 254 Cal.App.2d 347.] 357.) The reference of disputes involving the [A]ct to the Commissioner is mandatory. [Citation.] Disputes must be heard by the Commissioner, and all remedies before the Commissioner must be exhausted before the parties can proceed to the superior court. [Citation.] [Citations.] [\*362] [¶] When the Talent Agencies Act is invoked in the course of a contract dispute, the Commissioner has exclusive jurisdiction to determine his jurisdiction over the matter, including whether the contract involved the services of a talent agency. (*Buchwald v. Katz, supra*,] 8 Cal.3d 493, 496 ... ; see *Buchwald v. Superior Court, supra*, 254 Cal.App.2d 347, 360-361.) Having so determined, the Commissioner may declare the contract void and unenforceable as involving the services of an unlicensed person in violation of the Act. [Citations.] It follows that a claim to this effect must first be submitted to the Commissioner, and that forum must be exhausted, before the matter can be determined by the superior court." (*Styne, supra*, 26 Cal.4th at pp. 54-56, [\*\*\*38] fn. omitted.)

(14) *Styne* continued, "Our conclusion that [*Labor Code*] section 1700.44, by its terms, gives the Commissioner exclusive original jurisdiction over controversies arising under the Talent Agencies Act comports with, and applies, the general doctrine of exhaustion of administrative remedies. [HN17] With limited exceptions, the cases state that where an adequate administrative remedy is provided by statute, resort to that forum is a 'jurisdictional' prerequisite to judicial consideration of the claim. [Citations.]" (*Styne, supra*, 26 Cal.4th at p. 56.) "[R]eferral to the Commissioner serves the intended purpose of the doctrine of exhaustion [\*\*730] of administrative remedies--to reduce the burden

on courts while benefiting from the expertise of an agency particularly familiar and experienced in the area. [Citations.]" (*Id. at p. 58.*)

(15) *Styne* explained the broad and comprehensive reach of the commissioner's jurisdiction: "The Commissioner's exclusive jurisdiction to determine his jurisdiction over issues colorably arising under the Talent Agencies Act thus empowers him alone to decide, in the first instance, whether the facts do bring the case within the Act. [HN18] When statutes require a particular class [\*\*\*39] of controversies to be submitted *first* to an administrative agency as a *prerequisite* to judicial consideration, and the parties reasonably dispute whether their case falls into that category, it lies within the agency's power 'to determine *in the first instance*, and *before judicial relief may be obtained*, whether [the] controversy falls within the [agency's] statutory grant of jurisdiction [citations].' [Citations.] ... [C]ases involving the Talent Agencies Act are in accord. (*Buchwald v. Katz, supra, 8 Cal.3d 493, 496* [where facts alleged in court permitted inference that parties' relationship involved unlicensed talent agency services, Commissioner had exclusive jurisdiction to determine his jurisdiction over the dispute, first ascertaining whether plaintiff had in fact acted as talent agency by securing employment and bookings pursuant to contract]; see *Buchwald v. Superior Court, supra, 254 Cal.App.2d 347, 360* [citation].) [¶] ... [¶] Here, and in many similar cases under the Talent Agencies Act, a conclusion that the superior court has the prior exclusive right to determine the issue of jurisdiction would undermine the clear purpose of [*Labor Code*] section 1700.44, subdivision (a), [\*\*\*40] and the [\*363] principle of exhaustion of administrative remedies generally, by giving the court, not the Commissioner, the exclusive right to decide in the first instance *all the legal and factual issues on which an Act-based defense depends*. Once the court resolved whether *Styne* had acted as a talent agency under the contract, and even if the court concluded he *had done so*, there would be little or nothing left for the Commissioner to resolve." (*Styne, supra, 26 Cal.4th at p. 55, fn. 6.*)

(16) *Styne* used the term "colorable" in its broadest sense: "Certainly [HN19] the superior court need not refer to the Commissioner a case which, despite a party's contrary claim, clearly has *nothing to do* with the Act. For example, an automobile collision suit between persons unconnected to the entertainment industry is manifestly not a controversy arising under the Act, and it

cannot be made one by mere utterance of words. On the other hand, if a dispute in which the Act is invoked plausibly pertains to the subject matter of the Act, the dispute should be submitted to the Commissioner for first resolution of both jurisdictional and merits issues, as appropriate." (*Styne, supra, 26 Cal.4th at p. 59, fn. 10.*)<sup>17</sup>

17 *Styne, supra, 26 Cal.4th 42*, [\*\*\*41] distinguished the commissioner's original exclusive jurisdiction with tribunals having concurrent jurisdiction: "This situation is distinct from that which arises when parties dispute whether an injured person is entitled to one or the other of two *mutually exclusive* kinds of relief in *separate and parallel* fora, e.g., tort damages to be awarded by a court, or statutory benefits for an industrial injury administered by the Workers' Compensation Appeals Board. In that instance, the two tribunals have *concurrent* jurisdiction *to determine their subject matter jurisdiction* over the dispute, and the first forum invoked has jurisdiction, to the exclusion of the other, to finally determine if the facts give it, rather than the other, jurisdiction over the merits of the controversy. [Citations.]" (*Id. at p. 55, fn. 6.*)

[\*\*731] *C. Seyfarth may not circumvent the mandatory TAA procedural requirements by asserting that Blanks would have been fully compensated under the unfair competition law.*

The civil lawsuit filed by Seyfarth on behalf of Blanks on November 4, 1999, identified 17 causes of action, *all* premised upon the allegation that Greenfield must return the \$ 10.6 million paid to him because Greenfield [\*\*\*42] had acted as an agent without first procuring a license as required by the Labor Code. One cause of action alleged a violation of *Business and Professions Code section 17200*, the unfair competition law (UCL). It alleged that Greenfield had engaged in an unlawful business practice because he did not have the required licensure under the TAA.

[HN20] (17) UCL causes of action "include any unlawful, unfair or fraudulent business act or practice ... ." (*Bus. & Prof. Code, § 17200.*) "By proscribing 'any unlawful' business practice, [the UCL] "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law [\*364] makes independently actionable. [Citation.]" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone*

*Co. (1999) 20 Cal.4th 163, 180 [83 Cal. Rptr. 2d 548, 973 P.2d 527]; accord, Schnall v. Hertz Corp. (2000) 78 Cal.App.4th 1144, 1153 [93 Cal. Rptr. 2d 439].)*

[HN21] (18) An act may violate the UCL even if the unlawful practice affects only one victim. (*Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal.App.3d 432, 452-453 [249 Cal. Rptr. 872].*) [HN22] (19) The UCL has a four-year statute of limitations, which applies even if the borrowed statute has a shorter limitations statute. (*Bus. & Prof. Code, § 17208; Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163, 178-179 [96 Cal. Rptr. 2d 518, 999 P.2d 706] [\*\*\*43] (Cortez).*) "That is because *Business and Professions Code section 17208* states that any action to enforce any cause of action under the UCL chapter shall be commenced within four years after the cause of action accrued. [Citation.]" (*In re Vaccine Cases (2005) 134 Cal.App.4th 438, 458 [36 Cal. Rptr. 3d 80] (Vaccine).*) This language "admits of no exceptions." (*Cortez, supra, at p. 179.*) Thus, for example, in *Cortez*, the Supreme Court held that the plaintiff could bring a UCL cause of action even though the Labor Code statute used as the basis for the UCL cause of action had a shorter statutory limitations period. (*Cortez, at pp. 178-179.*) Thus, the general rule is that a UCL cause of action borrows the substantive portion of the borrowed statute to prove the "unlawful" prong of that statute, but not the limitations procedural part of the borrowed statute.

(20) As we explain below, this general rule is not applicable here. We are presented with something more than a "procedural" limitations period. [HN23] The applicable provisions of the TAA vest exclusive original jurisdiction in the Labor Commissioner and impose a one-year limitations period as a predicate to the assertion of any claim thereunder. These are fundamental parts [\*\*\*44] of the TAA and the assertion of any claim based on a violation of its provision, but pursued under the UCL, is necessarily burdened by this one-year limitations period.

Seyfarth argues that even if it was negligent in allowing the TAA statute to expire [\*\*732] prior to filing with the Labor Commissioner, such negligence did not harm Blanks because the statute of limitations for Blanks's UCL cause of action had not expired and that cause of action would have yielded the same recovery as alleged in the first cause of action for violating the TAA. Therefore, Seyfarth argues, as a matter of law, Blanks

could not prove causation and damages required by the trial-within-a-trial methodology. We hold that by this argument, Seyfarth unpersuasively seeks to circumvent the comprehensive statutory scheme in which the Legislature has given exclusive original jurisdiction to the Labor Commissioner with regard to TAA claims. (*Lab. Code, § 1700.44, subd. (a); Styne, supra, 26 Cal.4th at pp. 54-56 & fn. 6; Buchwald v. Superior Court, supra, 254 Cal.App.2d at pp. 358-359.*) [\*365]

As discussed above, the commissioner has the exclusive original jurisdiction in the first instance to decide if a controversy arises under [\*\*\*45] the Act. (*Styne, supra, 26 Cal.4th at pp. 47, 54-60 & fns. 6 & 10.*) *Labor Code section 1700.44, subdivision (a)* requires all "'controvers[ies]' and 'dispute[s]' between 'parties' to be examined in the first instance by the Commissioner ... ." (*Styne, supra, at p. 56.*) It permits parties seeking affirmative relief to invoke the superior court's jurisdiction only after the commissioner has first considered the issues. (*Lab. Code, § 1700.44, subd. (a).*) *Labor Code "[s]ection 1700.44 confers a right to appeal to the superior court from the Labor Commissioner's award ... ." (Buchwald v. Katz, supra, 8 Cal.3d at p. 500.)* Unlike other statutes that might be used as the basis for a UCL cause of action, the TAA mandates that cases colorably arising under the TAA *must first* be filed with the commissioner within the one-year statute of limitations period. This is a procedural predicate-filing requirement that cannot be circumvented by recasting a TAA cause of action as a UCL cause of action. Persons, such as Blanks, seeking affirmative relief under the TAA may not invoke the jurisdiction of the superior court until after the commissioner has issued a ruling. This is not a matter of judicial [\*\*\*46] discretion, but is a fundamental rule of procedure. (*Buchwald v. Superior Court, supra, 254 Cal.App.2d at p. 359.*)

(21) "'The reference of disputes involving the [A]ct to the Commissioner is *mandatory*. [Citation.] Disputes *must* be heard by the Commissioner, and all remedies before the Commissioner *must* be exhausted before the parties can proceed to the superior court. [Citation.]" [Citations.]" (*Styne, supra, 26 Cal.4th at p. 54.*) [HN24] The Legislature has determined that it is valuable to have the commissioner first examine TAA claims prior to any judicial consideration because the commissioner's "expertise in applying the Act is particularly significant in cases where, as here, the essence of the parties' dispute is whether services performed were by a talent agency for

an artist." (*Styne*, at p. 58.) Thus, the superior court is foreclosed from awarding any relief unless the commissioner has first considered the issue because to do otherwise would usurp the commissioner's original jurisdiction. The TAA statutory scheme creates an absolute bar to plaintiffs who wish to circumvent the presuit requirement of filing first with the commissioner. Even if UCL remedies are cumulative to those available [\*\*\*47] under other statutes (*Bus. & Prof. Code*, § 17205; e.g., *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 942 [14 Cal. Rptr. 3d 751] [violation of Lab. Code may be brought under UCL]), and thus cumulative of [\*\*733] those under the TAA, a TAA claim must be first brought to the Labor Commissioner.

There can be no argument here that the essence of the underlying case involves a dispute as to whether the relationship between Blanks and Greenfield was controlled by the TAA. The only possible way to satisfy the broad jurisdictional boundaries of the TAA is to require that this issue first be [\*366] examined by the commissioner, who would determine if Greenfield procured employment for Blanks. (*Lab. Code*, § 1700.44, *subd. (a)*.) This, and many other issues involved in the *Blanks v. Greenfield* case, including whether or not severance (discussed *post*) is appropriate, are the precise types of issues that the TAA demands initially be examined by the commissioner, who has special competence in rendering such decisions. (Cf. *Styne*, *supra*, 26 Cal.4th at p. 61.) Seyfarth may not plead around the TAA by stating the requested relief alternatively as a UCL cause of action.

Our result is buttressed by our prior case, *Vaccine*, *supra*, 134 Cal.App.4th 438. [\*\*\*48] In *Vaccine*, parents and their children sued vaccine manufacturers and other related defendants after the children received vaccines containing a mercury-based preservative. (*Id.* at p. 445.) The plaintiffs alleged that the defendants violated the Safe Drinking Water and Toxic Enforcement Act of 1986, *Health and Safety Code* section 25249.5 *et seq.* (Proposition 65). (*Vaccine*, *supra*, at p. 445.) This statutory scheme permitted authorized public agencies to bring actions to enforce Proposition 65. However, private actions were permitted under Proposition 65 if two requirements were met: (1) the private action was commenced 60 days after the individual had given notice of an alleged violation to the governmental agency in whose jurisdiction the violation was said to have occurred, accompanied by a certificate of merit; and (2)

there was no pending public action. (134 Cal.App.4th at pp. 453-454, citing *Health & Saf. Code*, § 25249.7, *subd. (d)*.) We noted that the plaintiffs' cause of action under Proposition 65 "alleges unfair competition that is 'unlawful' rather than 'unfair' or 'deceptive.'" (*Vaccine*, *supra*, at p. 457.)

In *Vaccine*, we addressed the plaintiffs' argument that they could proceed with their UCL cause [\*\*\*49] of action against three defendants who had *not* been named in their Proposition 65 cause of action, even though those defendants had not been served with 60-day notices. (*Vaccine*, *supra*, 134 Cal.App.4th at pp. 457-459.) We held that the plaintiffs' failure to comply with the prenotice requirement precluded the plaintiffs' UCL cause of action. We stated in part, "*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*, 20 Cal.4th 163 (*Cel-Tech*) prohibits plaintiffs from recasting their Proposition 65 action as an unfair competition action. *Cel-Tech* holds that where the Legislature has specifically concluded that no action should lie, the plaintiff cannot use the unfair competition law to "plead around" an "absolute bar to relief." [Citation.] The question is whether plaintiffs' failure to comply with the presuit notice required to bring an action under [Proposition 65] is such an 'absolute bar to relief.' We believe that it is. [¶] 'To forestall an action under the unfair competition law, another provision must actually "bar" the action or clearly permit the conduct.' (*Cel-Tech*, *supra*, ... at p. 183.) Failure to provide 60-day notices which comply with requirements of [\*\*\*50] [Proposition 65] does bar plaintiffs' action. [Citation.] ... [T]he [\*\*734] Legislature did specifically conclude that 'no action should lie' unless plaintiffs provided [\*367] a 60-day notice required by [*Health and Safety Code* section] 25249.7, *subdivision (d)(1)*. (*Cel-Tech*, at p. 182.) Plaintiffs' failure to comply with [the 60-day notice provision], bars their Proposition 65 action against these three defendants." (*Vaccine*, *supra*, at p. 458, *fn. omitted*.)

We noted in *Vaccine* that barring the plaintiffs' UCL cause of action was consistent with the purposes of the 60-day notice requirement, that "is to encourage public enforcement, thereby avoiding the need for a private lawsuit altogether, and to encourage resolution of disputes outside the courts." [Citation.] Proposition 65 conditioned a private right of action for violation of [it] on compliance with these substantive provisions. To allow plaintiffs to bring a UCL action against these three

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defendants without complying with [the 60-day notice provision], would frustrate the purpose of this requirement and would nullify its enactment." (*Vaccine, supra*, 134 Cal.App.4th at p. 459.)

We also noted in *Vaccine* that "[t]he *Cel-Tech* decision considered a UCL [\*\*\*51] action based on 'unfair' business practices, and not on 'unlawful' business practices. The California Supreme Court has expressly not decided whether this rule applies to the latter 'unlawful' business practices. (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827-828 [135 Cal. Rptr. 2d 1, 69 P.3d 927].) We believe, however, that given the purpose of the [60-day notice provision contained in *Health and Safety Code*] section 25249.7, subdivision (d), ... the *Cel-Tech* rule applies to this appeal in which plaintiffs have alleged an 'unlawful' business practice." (*Vaccine, supra*, 134 Cal.App.4th at p. 458, fn. 4.)

(22) As stated above, the TAA includes an unambiguous requirement that actions colorably arising under the TAA, i.e., where the dispute "plausibly pertains to the subject matter of the Act" (*Styne, supra*, 26 Cal.4th at p. 59, fn. 10), must first be presented to the commissioner within one year. The failure to comply with this procedural requirement is an absolute bar to Blanks's UCL cause of action.

*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365 [36 Cal. Rptr. 3d 31] (*Caliber*) does not lead to a contrary result. *Caliber* addressed another Labor Code act's prefiling requirements and the UCL, but its procedural posture [\*\*\*52] distinguishes it from *Vaccine* and the case before us. "[T]he Labor and Workforce Development Agency (LWDA) and its constituent departments and divisions--are authorized to assess and collect civil penalties for specified violations of the Labor Code committed by an employer. [Citation.]" (*Caliber, supra*, at p. 370, fn. omitted.) The Labor Code Private Attorneys General Act of 2004 (§ 2698 *et seq.*), permits, "as an alternative, an aggrieved employee to initiate a private civil action on behalf [\*368] of himself or herself and other current or former employees to recover civil penalties if the LWDA does not do so. ... Before an employee may file an action seeking to recover civil penalties for violations of any of the Labor Code provisions enumerated in section 2699.5, however, he or she must comply with the [Private Attorneys General Act's] administrative procedures as set forth in section 2699.3, subdivision (a), which include

providing notice to the LWDA and the employer and waiting a prescribed period of time to permit the LWDA to investigate and to decide whether to cite the employer for the alleged [\*\*735] violations." (*Caliber, supra*, at p. 370.)

In *Caliber*, "aggrieved employees ... filed [\*\*\*53] a wage-and-hour action against their former employer seeking, among other remedies, civil penalties for violations of several of the Labor Code provisions specified in section 2699.5. The employees did not allege they had satisfied the [Labor Code Private Attorneys General Act's] prefiling notice and exhaustion requirements before initiating their lawsuit; and their operative complaint does not mention [that act], let alone request remedies under it." (*Caliber, supra*, 134 Cal.App.4th at p. 370.)

*Caliber* distinguished between "civil penalties" recoverable under the Labor Code Private Attorneys General Act of 2004 and other remedies (wages and interest and statutory penalties) authorized in the Labor Code. (*Caliber, supra*, 134 Cal.App.4th at pp. 377-378.) *Caliber* first held that the prefiling notice and exhaustion requirements only applied to "civil penalties," not to other damages and thus, those causes of action that asked for civil penalties (exclusively or combined with requests for other types of relief) must first be brought to the LWDA (Labor and Workforce Development Agency). (*Id.* at pp. 378, 383, 386.)<sup>18</sup> It then held that the UCL cause of action survived a demurrer and was not subject to the prefiling notice requirements [\*\*\*54] because it was not asking for civil penalties. (134 Cal.App.4th at p. 386.) Thus, in *Caliber* the UCL cause of action survived because the prenotice requirement did not apply to the plaintiff's case, as the statute at issue (the Labor Code Private Attorneys General Act) was designed in that manner. In contrast, as discussed above, the TAA is designed to mandate hearings before the commissioner for all requests of relief that colorably arise under the Act.

18 With regard to those causes of action that were "hybrid," i.e., those causes of action that sought both "civil penalties" and other remedies, *Caliber* directed the trial court to strike the demands for civil penalties. (*Caliber, supra*, 134 Cal.App.4th at p. 385.)

Because Blanks could not utilize the UCL cause of action to avoid the commissioner's exclusive primary

jurisdiction requiring the timely filing of a petition with the commissioner, Seyfarth's causation and damages argument [\*369] premised upon the suggestion that the UCL cause of action would have provided the same remedy is simply wrong.

D. *The trial court prejudicially erred in refusing to instruct that the agreement between Blanks and Greenfield was subject to the doctrine of severability.*

Seyfarth [\*\*\*55] contends that the contract between Blanks and Greenfield was subject to the doctrine of severability. This contention is persuasive and because the instructions did not comport with the law in this regard, reversal of the judgment is required.

Blanks's legal malpractice lawsuit against Seyfarth was based upon the theory that he would have been successful in the underlying case against Greenfield had Seyfarth not placed its interests above Blanks's. Blanks argued that had Seyfarth timely filed a petition with the Labor Commissioner rather than delaying the filing of the TAA petition to inflate attorney's fees, Blanks would have been entitled to recover all sums Blanks paid Greenfield because Greenfield was not a licensed talent agent, i.e., had Seyfarth timely filed with the commissioner, Blanks would have obtained a disgorgement award from the commissioner of approximately \$ 10.6 million dollars.

[\*\*736] Seyfarth did not concede liability. However, it argued that even *if* the Blanks/Greenfield arrangement was tainted with illegality because Greenfield was not a licensed talent agent, and even *if* a TAA petition had been timely filed, the doctrine of severability of contracts applied and Blanks [\*\*\*56] was not entitled to disgorgement of *all* sums paid. In making this argument, Seyfarth noted that Greenfield rendered many nonagent services. Thus, according to Seyfarth, even *if* it was liable, Greenfield's agent activities (which would have been illegal) had to be severed from the nonagent activities (which did not violate the TAA), and any recovery to Blanks in the legal malpractice case was limited to those sums attributable to Greenfield's agent activities.

The trial court rejected this argument. The trial court refused to instruct on the doctrine of severability. Rather, the trial court instructed the jury with special instruction No. 9, which stated that under the TAA, a contract under which an unlicensed party procured or attempted "to

procure employment for an artist ... [was] void ab initio and the party procuring the employment is barred from recovering commissions for any activities ... ."

(23) This was error. A year ago, in *Marathon, supra*, 42 Cal.4th 974, the Supreme Court examined the TAA, the role of agents and managers, and the [\*370] doctrine of severability.<sup>19</sup> *Marathon* recognized that [HN25] it is often unclear as to whether a person is acting as an artist's agent or in some other [\*\*\*57] capacity, such as a manager. (42 Cal.4th at p. 980.) *Marathon* held, however, that the doctrine of severability of contracts, as codified in *Civil Code section 1599*, applies to contracts involving such arrangements. (*Marathon, supra*, at pp. 980-981.) Thus, if an unlicensed person renders procurement services that require a license under the TAA and also renders nonprocurement services, that person may be entitled to compensation for those acts that did not involve unlawful procurement. In such cases, the Labor Commissioner hearing the dispute "is empowered to void contracts in their entirety," however, the commissioner is not "obligated to do so ... . [Rather, the Labor Commissioner has] the ability to apply equitable doctrines such as severance to achieve a more measured and appropriate remedy where the facts so warrant." (42 Cal.4th at p. 995.)

19 When this appeal was originally briefed, *Marathon, supra*, 42 Cal.4th 974 had not been decided by the Supreme Court. In the original briefing, the parties argued over whether the doctrine of severability could be applied to claims made pursuant to the TAA and they discussed at length a number of cases, including *Marathon Entertainment, Inc. v. Blasi* (B179819), review [\*\*\*58] granted September 20, 2006, S145428, that had been filed and certified for publication on June 23, 2006. We stayed the appellate proceedings because the Supreme Court granted review of the Court of Appeal decision on September 20, 2006. After the Supreme Court rendered its opinion, the parties submitted supplemental briefing.

[HN26] (24) "In deciding whether severance is available, [*Marathon* has] explained '[t]he overarching inquiry is whether "the interests of justice ... would be furthered"' by severance.' [Citation.] '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.' [Citations.]" [\*\*737] (*Marathon, supra*, 42 Cal.4th at p. 996.) The analysis is case specific. (*Id. at p. 998.*) Further, the doctrine of severability can apply even if the unlicensed person "receives an undifferentiated right to a certain percentage of the client's income stream." (*Id. at p. 997.*)

Here, [\*\*\*59] instruction No. 9 was given over Seyfarth's objection and differed significantly from the instructions proposed by Seyfarth that would have included the concept of severability. Instruction No. 9 removed from the jury all consideration of severability. It informed the jury that the contract between Blanks and Greenfield was "void ab initio [and Greenfield was] barred from recovering commissions for any activities under the contract[, and a]ll recovery [was to be] denied even when the majority of [Greenfield's] activities did not require a talent agency license and the activities which did require a license were minimal and incidental." [\*\*371]

This instructional error contravenes the law and usurped the jury's responsibility to determine causation and damages. (See *Mattco Forge, Inc. v. Arthur Young & Co., supra*, 52 Cal.App.4th at p. 838 [discussing when instructional error requires reversal].) It was for the jury to decide what the commissioner would have done had a petition been timely filed. Had the case been timely presented to the commissioner, she would have had to make a case-specific determination whether or not the TAA required Greenfield to hold a license, if the entirety or parts of the Blanks/Greenfield [\*\*\*60] agreement were enforceable, if the purpose of the contract was so tainted with illegality that Blanks was entitled to a complete refund of all monies paid, and if the illegal aspects of the contract could be extirpated by severance. (*Marathon, supra*, 42 Cal.4th at p. 996; *Viner v. Sweet, supra*, 30 Cal.4th at p. 1241 [requiring plaintiffs in legal malpractice case to prove that but for the defendant's alleged negligence, the plaintiff would have obtained a more favorable judgment or settlement in the action in the underlying case]; accord, *Mattco Forge, Inc. v. Arthur Young & Co., supra*, at pp. 841-844; *DiPalma v. Seldman, supra*, 27 Cal.App.4th at pp. 1506-1507; *Piscitelli v. Friedenbergl, supra*, 87 Cal.App.4th at p. 970.) Thus, in the trial within a trial, it was the jury's

responsibility to determine how a reasonable commissioner would have addressed severability, had Seyfarth timely filed a TAA petition with the commissioner.

Blanks argues on appeal that any instructional error on severability was ameliorated because after special instruction No. 9 was read to the jury, Seyfarth argued that the jury could award nothing and the trial court instructed that, "The Labor Commissioner considers [\*\*\*61] both equitable relief and legal remedies." However, neither Seyfarth's short argument nor this single-line instruction could extinguish the harm of instruction No. 9, which precluded the jury from considering severability or alternative remedies. This incorrect instruction also infected the presentation of evidence and formed the theories and arguments presented. Both Seyfarth and Blanks were harmed by the roadmap that resulted.

The trial court permitted Blanks, over objection, to elicit some testimony from witnesses that Blanks was entitled to disgorgement of the entire \$ 10.6 million. Further, Blanks repeatedly argued to the jury that he was entitled to recover all sums he had paid Greenfield. For example, [\*\*738] Blanks argued the TAA demanded that "[a]ll recovery to personal managers is denied even when the majority of the manager's activities did not require a talent agent's license and activities which did require a license were minimal and incidental." However, neither Seyfarth nor Blanks sufficiently presented evidence or argument relating to whether the entire Blanks/Greenfield agreement was tainted with illegality because Greenfield was unlicensed. While there was evidence of the many [\*\*\*62] activities undertaken by Greenfield, there was scant evidence as to the value of these services or the time spent on them. There [\*\*372] was virtually no evidence about how the 16 checks were calculated. The record did not definitively disclose whether a talent agency license was required for the NCP deal. The parties did not fully address whether it was equitable or feasible to sever Greenfield's unlicensed procurement activities from the lawful, nonprocurement ones. They did not discuss if the income Greenfield derived was attributable to the central purpose of the Blanks/Greenfield agreement, or if Greenfield's talent agent activities permeated all other services rendered. The parties did not discuss the relevance of the fact that Greenfield was entitled to a percentage of Blanks's total income and how this undifferentiated income affects the

severability question.<sup>20</sup>

20 We find unpersuasive Seyfarth's argument that it is entitled to judgment as a matter of law when the doctrine of severability of contracts is applied to this case. Seyfarth proposes that even if it is liable to Blanks, Blanks has failed to prove he would have obtained from Greenfield more than \$ 250,000 (the amount of the [\*\*\*63] settlement). Seyfarth asserts it is entitled to judgment because Greenfield's agent activities are worth less than the settlement, and thus, Blanks has failed to prove causation and damages. However, the evidence about the value of Greenfield's services is conflicting and incomplete. Further, contrary to Seyfarth's request, we will not bind Blanks to a statement he made in a motion in limine made in an entirely different context.

Seyfarth's assertion that it is entitled to judgment as a matter of law on the intentional tort causes of action also is not persuasive. Seyfarth fails to explain how severability destroys Blanks's arguments that Seyfarth concealed from Blanks that a TAA petition had not been filed even though promises had been made to the contrary and that Seyfarth breached its fiduciary duty by churning the case to inflate attorney's fees.

Lastly, it appears the jury accepted Blanks's all-or-nothing approach because the jury awarded Blanks the exact amount he had paid to Greenfield--\$ 10,634,542.48--thereby finding that had Seyfarth timely filed a petition with the commissioner, the commissioner would have awarded Blanks that sum.<sup>21</sup>

21 In retrospect, it is evident that Blanks's [\*\*\*64] strategy is weakened by the holding in *Marathon, supra*, 42 Cal.4th 974, that the doctrine of severability applies to TAA claims. But, at the time Blanks pursued his trial strategy, *Marathon* had not been decided and Blanks's position was supported by some Labor Commissioner decisions that had concluded "severance is never available to permit partial recovery of commissions for managerial services that required no talent agency license. [Citations.]" (42 Cal.4th at pp. 995-996.) It was only when the Supreme Court decided *Marathon* that Blanks's trial strategy was totally undermined. (*Id.* at p. 996 ["the Labor

Commissioner's assessment ... is mistaken ... . 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."].)

Citing *Watenpaugh v. State Teachers' Retirement* (1959) 51 Cal.2d 675, 680 [336 P.2d 165] (discussing invited error) and *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166 [143 Cal. Rptr. 633] (same), Seyfarth suggests that Blanks chose a course of action and may not make contrary [\*\*\*65] factual or legal arguments on appeal. Seyfarth also argues that Blanks had the burden of proof in the trial court and if evidence is missing from the record, Blanks is to blame for that hole. As Seyfarth notes, we often do not permit parties to retry cases on theories they could have presented in the trial court. (Cf. *JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178 [8 Cal. Rptr. 3d 840].) However, waiver and estoppel are equitable concepts. It is inequitable to hold Blanks to the trial strategy he formulated prior to the Supreme Court's 2008 decision in *Marathon, supra*, 42 Cal.4th 974. Unlike *Estate of Swetmann* (2000) 85 Cal.App.4th 807 at pages 822 to 823 [102 Cal. Rptr. 2d 457], where the appellate court directed judgment for the appellants, here the entire story relevant to the issues is not in the record. There are many additional facts relevant to severability that will determine the outcome.

[\*373]

[\*\*739] Thus, the trial court's instructional error relating to the doctrine of severability infected the entire trial and the judgment must be reversed.<sup>22</sup>

22 On remand the trial court must present to the jury instructions that correctly articulate the law on severance, including that the commissioner [\*\*\*66] has equitable powers to consider if the central purpose of the contract is tainted with illegality.

E. *On an in limine motion, the trial court correctly concluded that the discovery rule does not apply in this case. However, the trial court exceeded its authority*

when it also held that Seyfarth was negligent as a matter of law.

1. *Additional facts.*

One theory presented by Seyfarth was that it was not negligent because the TAA one-year statute of limitations can be extended by the discovery rule, often referred to as the delayed accrual rule. In his motion in limine No. 10, Blanks moved to "preclude Defendants ... from introducing any evidence of ... delayed accrual of the statute of limitations applicable to the Talent Agencies Act."

The trial court conducted an *Evidence Code section 402* hearing during which the sole witness was defense expert Edwin McPherson. He opined that Seyfarth's reliance upon the discovery rule to extend the statute of limitations did not fall below the standard of care. At the conclusion of the hearing, Blanks asked the trial court to prevent Seyfarth from relying on the delayed discovery rule and additionally to conclude, as a matter of law, that Seyfarth [\*\*\*67] breached the applicable standard of care.

The trial court granted Blanks's motion ruling that "the concept of delayed accrual does not apply in this case [because it] applies when the statute of limitations on a violation or a cause of action has run, and then there's a discovery down the road of ... some malfeasance or facts that weren't known, and at that point the statute of limitations is actually ... 'revived ... .' " The court continued, by stating that here, Blanks had learned in August or September 1999 that Greenfield was unlicensed and at that time, the one year had not expired. Thus, the trial court ruled that the discovery rule did not apply in this case. [\*374]

After granting the motion, the trial court went on to rule "as a matter of law [that Seyfarth's and Lancaster's actions] fell below the standard of care when they missed the [TAA] statute of limitations ... ." The court ordered that the professional negligence claim be tried on the issues of causation and damages alone. Consistent with this ruling, the trial court instructed the jury that, as a matter of law, Seyfarth breached its duty to use the care and skill of an attorney.<sup>23</sup>

<sup>23</sup> The trial court instructed the jury: "The [\*\*\*68] Court has found as a matter of law that Seyfarth Shaw, LLP and William H. Lancaster

breached the duty to use the care and skill ordinarily exercised in like cases by reputable members of the profession practicing in the same or similar locality under similar circumstances by not filing the Petition to Determine Controversy with the Labor Commissioner within the Statute of Limitations."

[\*\*740] 2. *The discovery rule cannot extend the TAA statute of limitations in this case.*

Seyfarth's contention that the trial court erred in ruling that the TAA statute of limitations could not be extended by the discovery rule is unpersuasive.

[HN27] (25) "[I]n some instances, the accrual of a cause of action in tort is delayed until the plaintiff discovered (or reasonably should have discovered or suspected) the factual basis for his or her claim. [Citation.]" (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1248 [7 Cal. Rptr. 3d 576, 80 P.3d 676]; see also *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807 [27 Cal. Rptr. 3d 661, 110 P.3d 914]; *Samuels v. Mix* (1999) 22 Cal.4th 1, 9 [91 Cal. Rptr. 2d 273, 989 P.2d 701]; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398 [87 Cal. Rptr. 2d 453, 981 P.2d 79].) The discovery rule postpones accrual of the cause of action. It "may be expressed by the Legislature or implied by the courts. [Citation.]" (*Norgart v. Upjohn Co.*, *supra*, at p. 397; see [\*\*\*69] *Samuels v. Mix*, *supra*, at p. 9.)

The discovery rule is designed to protect plaintiffs who were unaware of their claims (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 826-827 [195 Cal. Rptr. 421]) and "to prevent tort claims from expiring before they are discovered ... ." (*Lambert v. Commonwealth Land Title Ins. Co.* (1991) 53 Cal.3d 1072, 1079 [282 Cal. Rptr. 445, 811 P.2d 737].) It is inappropriate to apply the rule when plaintiffs have ample time after discovery to protect their rights by filing a civil lawsuit, or in this case, to file a TAA petition. (Cf. *Lobrovich v. Georgison* (1956) 144 Cal.App.2d 567, 573-574 [301 P.2d 460] ["If there is still ample time to institute the action within the statutory period after the circumstances inducing delay have ceased to operate, the plaintiff who failed to do so cannot claim an estoppel."].) [\*375]

[HN28] (26) When the issue is accrual, belated discovery is usually a question of fact, but may be decided as a matter of law when reasonable minds cannot

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differ. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1320 [64 Cal. Rptr. 3d 9].)

Here, Blanks learned that Greenfield was unlicensed in August or September 1999. (See fn. 5, *ante.*) Blanks retained Seyfarth in October 1999. Thus, there was plenty of time to file the [\*\*\*70] TAA petition before the one-year TAA statute of limitations would have expired on the first check dated December 29, 1998. In fact, Lancaster admitted he knew that with regard to the TAA statute of limitations, the critical date was the date each payment was made to Greenfield and he knew the commissioner had original jurisdiction over Blanks's TAA claim. Seyfarth has not cited one case where the discovery rule has been applied to a situation where the plaintiff made a deliberate tactical decision to delay filing a lawsuit knowing about the limitations period and purposefully trying to circumvent it. Thus, the trial court correctly concluded that in this case, the discovery rule had no applicability and the court's ruling on the motion in limine with regard to delayed accrual was correct.

3. *The trial court exceeded its authority when it addressed an issue that was not presented in the motion in limine.*

As noted above, the in limine motion solely addressed delayed discovery. [\*\*741] However, after addressing the specific issue presented, the trial court went on to hold that Seyfarth was negligent as a matter of law because its actions fell below the standard of care. On appeal, Seyfarth persuasively argues [\*\*\*71] the trial court exceeded its authority in ruling that Seyfarth was negligent as a matter of law.

[HN29] (27) "In limine motions are designed to facilitate the management of a case, generally by deciding difficult evidentiary issues in advance of trial. "The usual purpose of motions *in limine* is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order *in limine* excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. [Citation.] 'The advantage of such motions is to avoid the obviously futile attempt to "unring the bell" in the event a motion to strike is granted in the proceedings before the jury.' [Citation.]" [Citation.] What in limine motions are *not* designed to do is to replace the dispositive motions prescribed by the Code of Civil Procedure." (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1593 [71 Cal. Rptr. 3d 361].)

Although trial courts may exercise their inherent powers to permit nontraditional uses of motions in limine (*id.* at [\*376] p. 1595), <sup>24</sup> when used in such fashion they become substitutes for other motions, such as summary judgment motions, thereby circumventing [\*\*\*72] "procedural protections provided by the statutory motions or by trial on the merits; they risk blindsiding the nonmoving party; and, in some cases, they could infringe a litigant's right to a jury trial. (*Cal. Const., art. I, § 16.*)" (*Amtower v. Photon Dynamics, Inc., supra*, at p. 1594.)

24 Compare Superior Court of Los Angeles County, Local Rules, rule 8.92(b) (in limine motions are not to be used for purpose of seeking summary judgment or the summary adjudication of issues) with *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 26 to 27 [61 Cal. Rptr. 2d 518] (in limine motion may be treated as demurrer, judgment on the pleadings, or nonsuit and address purely legal issue) and *Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 Cal.App.4th 672, 676 to 677 [78 Cal. Rptr. 2d 225] (motion in limine to exclude all evidence functional equivalent to demurrer or motion for judgment on the pleadings).

Here, when the trial court ruled on motion in limine No. 10, the only issue presented was whether Seyfarth could present evidence as to whether the discovery rule applied to Blanks's TAA claims. However, the trial court exceeded the scope of the motion and made an evidentiary ruling that had critical ramifications. [\*\*\*73] The trial court held, and later instructed, that Seyfarth was negligent, as a matter of law. This ruling did not address the single issue presented in the motion in limine. The ruling also was contrary to the only expert evidence that had been presented, by McPherson, who testified that Lancaster's action did *not* fall below the standard of care.

(28) Further,[HN30] the issue of negligence in a legal malpractice case is ordinarily an issue of fact. (*Dawson v. Toledano, supra*, 109 Cal.App.4th at p. 396 [whether attorneys breached their duty is ordinarily question of fact for the jury]; accord, *Unigard Ins. Group v. O'Flaherty & Belgum, supra*, 38 Cal.App.4th at pp. 1237-1238; *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1094-1095 [41 Cal. Rptr. 2d 768].) The trial court's ruling did not give the parties an opportunity to address the facts required to assess negligence, as would have been the case had the issue been raised on an in limine

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motion, a motion [\*\*742] for summary judgment or adjudication.

The prejudice from the trial court's ruling was evident. (*Mattco Forge, Inc. v. Arthur Young & Co.*, *supra*, 52 Cal.App.4th at p. 838 [discussing when instructional error is prejudicial].) Consistent with its ruling that Seyfarth was [\*\*\*74] negligent as a matter of law, the trial court substantially curtailed Seyfarth's presentation of evidence during trial. The court effectively denied Seyfarth the ability to explain its actions and present its position that it had met the standard of care and had made an informed decision as to a course of conduct based upon an intelligent assessment of the problem. Seyfarth was precluded from fully explaining its rationale for its trial strategy in handling the *Blanks v. Greenfield* lawsuit, including that discovery was crucial to develop [\*377] all theories in the multiple pled causes of action and to defend Greenfield's \$ 49 million cross-complaint. Seyfarth's representation of Blanks preceded the rulings in *Greenfield v. Superior Court*, *supra*, 106 Cal.App.4th 743 and *Marathon*, *supra*, 42 Cal.4th 974, occurred after the rulings in *Buchwald v. Katz*, *supra*, 8 Cal.3d 493, *Garson v. Div. of Labor Law Enforcement*, *supra*, 33 Cal.2d 861, *REO Broadcasting Consultants v. Martin*, *supra*, 69 Cal.App.4th 489, *Buchwald v. Superior Court*, *supra*, 254 Cal.App.2d 347, and *Waisbren v. Peppercorn Productions, Inc.*, *supra*, 41 Cal.App.4th 246, and happened concurrently with the filing of the Court of Appeal opinion [\*\*\*75] on February 8, 2000, in *Styne v. Stevens*. All of these cases addressed aspects of the underlying case and were relevant to Seyfarth's legal analysis; yet, the trial court's in limine ruling limited Seyfarth's ability to discuss their relevancy. By prohibiting Seyfarth from making a complete presentation that would have included extensive testimony from Lancaster and defense experts, the trial court denied Seyfarth an opportunity to provide an explanation for its tactical decision to the jury and exceeded the trial court's powers. (*Unigard Ins. Group v. O'Flaherty & Belgum*, *supra*, 38 Cal.App.4th at p. 1239 ["In negligence cases arising from the rendering of professional services, as a general rule the standard of care against which the professional's acts are measured remains a matter peculiarly within the knowledge of experts. Only their testimony can prove it, unless the lay person's common knowledge includes the conduct required by the particular circumstances."]; *Piscitelli v. Friedenber*, *supra*, 87 Cal.App.4th at pp. 985-986 [jury entitled to expert testimony on the standard of care and

the propriety of the actions of the attorney].) <sup>25</sup> If Blanks wished to obtain a ruling prior [\*\*\*76] to trial that Seyfarth was negligent as a matter of law, Blanks should have raised the issue in a motion for summary judgment or summary adjudication where all relevant facts could be assessed.

25 However, experts may not be called upon to testify as to what the reasonable trier of fact in the underlying case would have done. (*Piscitelli v. Friedenber*, *supra*, 87 Cal.App.4th at pp. 972-974.)

We hold that the trial court's ruling on the motion in limine with regard to delayed accrual was correct. However, the trial court exceeded its authority by ruling that Seyfarth was negligent as a matter of law, which is an issue that must be decided upon a full development of the facts either upon the proper motion or by the jury. The trial court's ruling that Seyfarth was [\*\*743] negligent as a matter of law, and the instruction to the jury to that effect, are other reasons mandating reversal. <sup>26</sup>

26 The instructional error also affected the intentional tort verdicts and the punitive award.

[\*378]

F. *On remand, the issue of the "judgmental immunity doctrine" is likely to be addressed.*

On remand, it is expected that in response to Blanks's assertion that Seyfarth was negligent, Seyfarth will claim that it is protected [\*\*\*77] by the "judgmental immunity doctrine." (See *Code Civ. Proc.*, § 43.) This doctrine, although often commonly referred to as an "immunity," is not an immunity at all.

[HN31] (29) In the realm of tort liability, immunities protect a class of defendants based upon public policy. An "immunity" is "[a]ny exemption from a duty [or] liability ... ." (Black's Law Dict. (8th ed. 2004) p. 765, col. 2.) It "avoids liability in tort under all circumstances, within the limits of the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but [rather] the resulting liability. ..." [Citation.] (*Whitcombe v. County of Yolo* (1977) 73 Cal.App.3d 698, 704-705 [141 Cal. Rptr. 189].) When the law grants an immunity, it does not mean that the defendant's conduct is not tortious, but rather that the

defendant is absolved from liability. For example, an immunity exempts public employees from liability who, in the exercise of their discretion, injure another. (*Gov. Code, § 820.2.*) Another immunity protects real property owners from liability for injury or death "that occurs upon that property during the course of or after the [\*\*\*78] commission of [specified] felonies ... by the injured or deceased person." (*Civ. Code, § 847.*)

(30) In contrast, when courts discuss what has come to be called the "judgmental immunity doctrine," they are actually addressing the factual issue as to whether an attorney breached the standard of care. [HN32] The judgmental immunity doctrine relieves an attorney from a finding of liability even where there was an unfavorable result if there was an "honest error in judgment concerning a doubtful or debatable point of law ... ." (*Davis v. Damrell (1981) 119 Cal.App.3d 883, 887 [174 Cal. Rptr. 257]*; see also *Smith v. Lewis, supra, 13 Cal.3d at p. 359*; *Aloy v. Mash (1985) 38 Cal.3d 413, 417-419 [212 Cal. Rptr. 162, 696 P.2d 656]*; *Village Nurseries v. Greenbaum (2002) 101 Cal.App.4th 26, 36-38 [123 Cal. Rptr. 2d 555]*.) This doctrine recognizes that an attorney does not "ordinarily guarantee the soundness of his [or her] opinions and, accordingly, is not liable for every mistake he [or she] may make in his [or her] practice." (*Smith v. Lewis, supra, at p. 358.*)

In order to prevail on this theory and escape a negligence finding, an attorney must show that there were unsettled or debatable areas of the law [\*379] that were the subject of the legal advice rendered and this advice was based [\*\*\*79] upon "reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem." (*Smith v. Lewis, supra, 13 Cal.3d at p. 359*; see *Village Nurseries v. Greenbaum, supra, 101 Cal.App.4th at pp. 37-38.*) Because attorneys must "possess knowledge of those plain and elementary principles of law [\*\*744] which are commonly known by well informed attorneys," (*Smith v. Lewis, supra, at p. 358*; accord, *Dawson v. Toledano, supra, 109 Cal.App.4th at p. 397*), as part of the analysis, the attorney must demonstrate that he or she has taken steps to "discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques. [Citations.]" (*Smith v. Lewis, supra, at p. 358.*) It is not sufficient that the attorney exercise his or her best judgment; rather, that judgment must be consistent with the standard of

practice.

(31) We note that when the issue of Seyfarth's negligence is raised upon remand, Seyfarth will have to be able to show that it made a reasoned choice to delay filing Blanks's TAA petition and it was a prudent trial strategy to risk losing the [\*\*\*80] TAA claims when the basis for Seyfarth's strategy was a number of uncertain and untested legal hypothesis that equal or greater results could be achieved for Blanks outside the commissioner's arena. [HN33] "[A]n attorney's obligation is not satisfied by simply determining that the law on a particular subject is doubtful or debatable ... ." (*Horne v. Peckham (1979) 97 Cal.App.3d 404, 416 [158 Cal. Rptr. 714]*, disapproved on other grounds in *ITT Small Business Finance Corp. v. Niles (1994) 9 Cal.4th 245, 255-256 [36 Cal. Rptr. 2d 552, 885 P.2d 965]*.) Even if the law is unsettled, an attorney's decision must be informed, based upon an intelligent evaluation of the case. "In other words, an attorney has a duty to avoid involving his [or her] client in murky areas of the law if research reveals alternative courses of conduct. At least he [or she] should inform his [or her] client of uncertainties and let the client make the decision." (*Horne v. Peckham, supra, at p. 416.*) Although attorneys have wide latitude in selecting strategy (*Kirsch v. Duryea (1978) 21 Cal.3d 303, 309 [146 Cal. Rptr. 218, 578 P.2d 935]*), Seyfarth will have the burden to explain why its choice to delay filing a TAA petition was based upon a rational, professional judgment, that would have been made by other reputable [\*\*\*81] attorneys in the community under the same or substantially similar circumstances.

Upon remand, the parties will be free to present all relevant facts regarding whether Seyfarth met the standard of care. [\*380]

IV.

#### DISPOSITION

The judgment is reversed and the matter is remanded to the trial court. The parties are to bear their own costs on appeal.

Croskey, Acting P. J., and Kitching, J., concurred.

Appellants' petition for review by the Supreme Court was denied May 20, 2009, S171675. George, C. J., did not participate therein.



1 of 1 DOCUMENT



Positive

As of: Sep 01, 2016

**MARTYN BUCHWALD et al., Petitioners v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; MATTHEW KATZ, Real Party in Interest**

Civ. No. 24382

Court of Appeal of California, First Appellate District, Division One

*254 Cal. App. 2d 347; 62 Cal. Rptr. 364; 1967 Cal. App. LEXIS 1401*

September 15, 1967

**SUBSEQUENT HISTORY:** [\*\*\*] A Petition for a Rehearing was Denied September 29, 1967, and the Petition of the Real Party in Interest for a Hearing by the Supreme Court was Denied November 8, 1967.

**PRIOR HISTORY:** PROCEEDING in prohibition or mandamus to review orders of the Superior Court of the City and County of San Francisco denying a motion to restrain arbitration, restraining petitioners from proceeding further before the labor commissioner and ordering them to arbitrate a dispute before the arbitration association.

**DISPOSITION:** Orders annulled; writ of certiorari granted.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Respondent manager instituted proceedings to arbitrate a contract dispute between the parties. Petitioner band filed a motion to restrain arbitration. The Superior Court of San Francisco (California) denied the band's motion to restrain arbitration and restrained the band from proceeding before the Labor Commissioner. The band challenged the trial court's orders.

**OVERVIEW:** On appeal the manager argued that the Artists' Managers Act (act) did not apply to him because

he was not licensed. The court rejected this argument and held that the manager was subject to the act and the Labor Commissioner's jurisdiction. The court reasoned that to rule otherwise would allow a manager to avoid the act simply because he was not licensed. The court found that such result would be unreasonable. The court also found that the Labor Commissioner had original jurisdiction to hear controversies arising under act to the exclusion of superior court. The manager also argued that that he was not a manger within the provisions of the act. The court rejected this argument, holding that the argument was one of form and not substance. The substance of the facts indicated that the manger agreed to and did act as the band's manager. Finally, the court determined that the dispute was not subject to arbitration. The court reasoned that there was no valid contract between the parties. The court reasoned that the contract between the parties was invalid because the manger was not licensed.

**OUTCOME:** The court annulled the orders that restrained the band from proceeding before the Labor Commissioner and required them to arbitrate the contract dispute with the manager.

**CORE TERMS:** artist, manager, employment agency, arbitration, Artists' Managers Act, licensed, written contract, arbitrate, procure, void, matters in dispute, unlicensed, arbitrator, subterfuge, restrain, bookings, hear, administrative remedy, grant of jurisdiction, summary judgment, illegality, thereunder, engagements, remedial,

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mischief, proper remedy, adequate remedy, controversies arising, prima facie, obtain employment

**LexisNexis(R) Headnotes**

***Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Judicial Review of Awards > General Overview***

***Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Intervention***

[HN1] Section 1700.44 of the Artists' Managers Act provides: In all cases of controversy arising under this chapter the parties involved shall refer the matters in dispute to the Labor Commissioner, who 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.

***Governments > Local Governments > Licenses***

[HN2] Section 1700.5 of the Artists' Managers Act provides: No person shall engage in or carry on the occupation of an artists' manager without first procuring a license therefor from the Labor Commissioner.

***Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview***

[HN3] Section 1700.23 of the Artists' Managers Act provides: Every artists' manager shall submit to the Labor Commissioner a form or forms of contract to be utilized by such artists' manager in entering into written contracts with artists for the employment of the services of such artists' managers by such artists, and secure the approval of the Labor Commissioner thereof.

***Civil Procedure > Alternative Dispute Resolution > Mandatory ADR***

***Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Judicial Review of Awards > General Overview***

[HN4] An appeal does not lie from an order compelling, nor is any other plain, speedy or adequate remedy apparent.

***Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview***

[HN5] Section 1700.3 of the Artists' Managers Act defines "licensee" as an artists' manager which holds a valid, unrevoked, and unforfeited license.

***Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview***

[HN6] It is well settled that a legislative body has the power within reasonable limitations to prescribe legal definitions of its own language, and when an act passed by it embodies a definition it is binding on the courts. If possible, significance should be given to every word and phrase of an act in pursuance of the legislative purpose.

***Governments > Legislation > Interpretation***

[HN7] Remedial statutes should be liberally construed to effect their objects and suppress the mischief at which they are directed.

***Governments > Legislation > Interpretation***

[HN8] Statutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers one that is practical rather than technical, and that will lead to wise policy rather than to mischief or absurdity.

***Governments > Legislation > Interpretation***

[HN9] It is a fundamental principle of law that, in determining rights and obligations, substance prevails over form.

***Contracts Law > Contract Interpretation > General Overview***

***Contracts Law > Defenses > Illegal Bargains***

***Evidence > Documentary Evidence > Parol Evidence***

[HN10] The Labor Commissioner, is free to search out illegality lying behind the form in which a transaction has been cast for the purpose of concealing such illegality. The court will look through provisions, valid on their face, and with the aid of parol evidence, determine that the contract is actually illegal or is part of an illegal transaction.

***Governments > Legislation > Interpretation***

[HN11] It is a cardinal principle of statutory construction that where legislation is framed in the language of an earlier enactment on the same or an analogous subject, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment.

***Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview***

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[HN12] Section 1700.44 of the Artists' Managers Act (act) is mandatory. It provides that the parties involved, artists and artists' manager, in any controversy arising under the act, shall refer the matters in dispute to the Labor Commissioner.

**Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies**

**Civil Procedure > Justiciability > Exhaustion of Remedies > Administrative Remedies**

**Governments > Legislation > Statutory Remedies & Rights**

[HN13] Where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. It is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding upon all courts.

**Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview**

[HN14] Jurisdiction may not be waived by a party or conferred on the court by consent.

**Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Authority**

[HN15] The power of the arbitrator to determine the rights of the parties is dependent upon the existence of a valid contract under which such rights might arise.

**Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview**

[HN16] It lies within the power of the administrative agency to determine in the first instance, and before judicial relief may be obtained, whether a given controversy falls within a statutory grant of jurisdiction.

**HEADNOTES**

**CALIFORNIA OFFICIAL REPORTS HEADNOTES**

**(1) Labor--Employment Agencies and Contractors--Artists' Managers.** -- --The object of the Artists' Managers Act (*Lab. Code*, §§ 1700-1700.46) is to prevent improper persons from becoming artists' managers and to regulate such activity for the protection of the public; and a contract between an unlicensed artists' manager and an artist is void. Furthermore, contracts

otherwise violative of the act are void, and as to such contracts, artists, being of the class for whose benefit the act was passed, are not to be ordinarily considered as being in *pari delicto*.

**(2) Id.--Arbitration--Review.** -- --Certiorari is the proper remedy to attack orders by a superior court denying petitioners' motion to restrain arbitration, restraining petitioners from proceeding further before the Labor Commissioner, and ordering them to arbitrate their dispute before the arbitration association, where an appeal does not lie from an order compelling arbitration, and there is no other plain, speedy or adequate remedy apparent.

**(3) Statutes--Construction and Interpretation--Power and Duty of Courts.** -- --A legislative body has the power within reasonable limitations to prescribe legal definitions of its own language, and when an act passed by it embodies a definition it is binding on the courts.

**(4) Id.--Construction and Interpretation--Giving Effect to Every Word and Part.** -- --If possible, significance should be given to every word and phrase of an act in pursuance of the legislative purpose.

**(5) Id.--Construction and Interpretation--Liberal Construction--Remedial Statutes.** -- --Remedial statutes should be liberally construed to effect their objects and suppress the mischief at which they are directed.

**(6) Id.--Construction and Interpretation--Giving Effect to Intent of Legislature.** -- --Statutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers--one that is practical rather than technical, and that will lead to wise policy rather than to mischief or absurdity.

**(7) Labor--Employment Agencies and Contractors--Artists' Managers.** -- --Artists' managers, as defined by the Artists' Managers Act (*Lab. Code*, §§ 1700-1700.46), whether they be licensed or unlicensed, are bound and regulated by the act.

**(8) Id.--Employment Agencies and Contractors--Reference of Disputes to Labor Commissioner.** -- --Where a party may in fact have agreed to, and did, act as an artists' manager, a written contract between the parties which did not provide for his acting as an artists' manager would not control, and such party would be under the jurisdiction of the Labor Commissioner.

**(9) Id.--Employment Agencies and Contractors--Reference of Disputes to Labor Commissioner.** -- --It is a fundamental principle of law that, in deter-

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mining rights and obligations, substance prevails over form; and the Labor Commissioner is free to search out illegality lying behind the form on which a transaction has been cast for the purpose of concealing such illegality.

**(10) Statutes--Construction and Interpretation--Adopted and Reenacted Statutes.** -- --Where legislation is framed in the language of an earlier enactment on the same or an analogous subject, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment.

**(11) Labor--Employment Agencies and Contractors--Artists' Managers.** -- --The Artists' Managers Act (*Lab. Code*, §§ 1700-1700.46) is a broad and comprehensive one, under which the Labor Commissioner is empowered to hear and determine disputes, including the validity of the artists' manager-artist contract and the liability, if any, of the parties thereunder; he may be compelled to assume this power; the jurisdiction of the Labor Commissioner in the settlement of disputes is similar to, but broader, than the power of an arbitrator under *Code Civ. Proc.*, §§ 1280-1294.2; the Labor Commissioner's awards are enforceable in the same manner as awards of private arbitrators under *Code Civ. Proc.*, §§ 1285-1288.8.

**(12) Administrative Law--Judicial Review--Exhaustion of Administrative Remedies.** -- --Where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.

**(13) Labor--Employment Agencies and Contractors--Reference of Disputes to Labor Commissioner.** -- --As to cases of controversies arising under the Artists' Managers' Act (*Lab. Code*, §§ 1700-1700.46) the Labor Commissioner has original jurisdiction to hear and determine the same to the exclusion of the superior court, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo.

**(14) Id.--Employment Agencies and Contractors--Reference of Disputes to Labor Commissioner.** -- --Where a controversy arose between artists and an alleged artists' manager, such artists did not waive any right they might have had to proceed before the Labor Commissioner by filing an action in the superior court to restrain the artists' manager from proceeding to arbitrate the dispute before the American Arbitration Association.

**(15) Id.--Employment Agencies and Contractors--Artists' Managers.** -- --If an agreement between artists and an alleged artists' manager is void because of the latter's noncompliance with the Artists' Managers Act (*Lab. Code*, §§ 1700-1700.46), no rights, including a claimed right to private arbitration, can be derived from it.

**(16) Id.--Employment Agencies and Contractors--Reference of Disputes to Labor Commissioner.** -- --Where a prima facie showing was made to the Labor Commissioner that a party had agreed to and did act as an artists' manager, the Labor Commissioner had the power and the duty to determine, in the first instance, whether the controversy was within the grant of jurisdiction of the Artists' Managers Act (*Lab. Code*, §§ 1700-1700.46).

**COUNSEL:** Maxwell Keith for Petitioners.

Andrew H. D'Anneo, Louis Giannini, Douglas M. Phillips and Bruce Weathers as Amici Curiae on behalf of Petitioners.

No appearance for Respondent.

Howard L. Thaler for Real Party in Interest.

Irmas & Rutter and Michael R. Shapiro as Amici Curiae on behalf of Real Party in Interest.

**JUDGES:** Elkington, J. Molinari, P. J., and Brown (H. C.), J., ' concurred.

\* Assigned by the Chairman of the Judicial Council.

**OPINION BY: ELKINGTON**

**OPINION**

[\*350] [\*\*366] By their "Petition for Writ of Review (and/or, in the Alternative, a Writ of Prohibition or Mandamus)" petitioners seek review of orders of the superior court [\*\*\*2] in an action commenced by them against Matthew [\*\*367] Katz, hereinafter referred to as Katz, who is here the real party in interest. Concerned is the Artists' Managers Act which we shall hereafter refer to as the Act.

The Act comprises sections 1700- 1700.46 of the *Labor Code*.<sup>1</sup> It is found in division 2, part 6 of that code, relating to "Employment Agencies." It requires licensing, and regulates the business, of artists' managers.

<sup>2</sup>

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1 Unless otherwise indicated, all statutory references herein will be to the Labor Code.

2 Section 1700.4 defines artists' managers as follows: "An artists' manager is hereby defined to be a person who engages in the occupation of advising, counseling, or directing artists in the development or advancement of their professional careers and who procures, offers, promises or attempts to procure employment or engagements for an artist only in connection with and as a part of the duties and obligations of such person under a contract with such artist by which such person contracts to render services of the nature above mentioned to such artist."

[\*\*\*3] The Act is a remedial statute. Statutes such as the Act are designed to correct abuses that have long been recognized and which have been the subject of both legislative action and judicial decision. (See *Collier & Wallis, Ltd. v. Astor*, 9 Cal.2d 202, 206 [70 P.2d 171].) Such statutes are enacted for the protection of those seeking employment. (See *Smith v. La Farge*, 242 Cal.App.2d 806, 808-809 [51 Cal.Rptr. 877].) They properly fall within the police power of the state ( *Collier & Wallis, Ltd. v. Astor*, *supra*) and their constitutionality has been repeatedly affirmed. (See *Garson v. Division of Labor Law Enforcement*, 33 Cal.2d 861, 864 [206 P.2d 368]; *Collier & Wallis, Ltd. v. Astor*, *supra*; *Smith v. La Farge*, *supra*, at p. 811.)

(1) Since the clear object of the Act is to prevent improper persons from becoming artists' managers and to regulate such activity for the protection of the public, a contract between an unlicensed artists' manager and an artist is void. (See *Wood v. Krepps*, 168 Cal. 382, 386 [143 P. 691, L.R.A. 1915B 851]; *Loving & Evans v. Blick*, 33 Cal.2d 603, 608-609 [204 P.2d 23]; *Albaugh [\*\*\*4] v. Moss Constr. Co.*, 125 Cal.App.2d 126, 131-132 [269 P.2d 936]; 1 Witkin, Summary of Cal. Law (1960) Contracts, § 171, p. 185.) Contracts otherwise violative of the Act are void (see *Severance v. Knight-Counihan Co.*, 29 Cal.2d 561, 568 [177 P.2d 4, 172 A.L.R. 1107]; *Smith v. Bach*, 183 Cal. 259, 262 [191 P. 14]; 1 Witkin, *op. cit.*, § 157, p. 167). And as to such contracts, artists, being of the class for whose benefit the Act was passed, are not to be ordinarily considered as being *in pari delicto*. (See *Lewis & Queen v. N. M. Ball Sons*, 48 Cal.2d 141, 153 [308 P.2d 713], and authorities there cited.)

[HN1] Section 1700.44 of the Act, as pertinent here, provides: "In all cases of controversy arising under this chapter the parties involved shall refer the matters in dispute to the Labor Commissioner, who 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."

Petitioners constitute a professional musical group known as the "Jefferson Airplane." They are "artists" as defined by section 1700.4 of the Act. Each petitioner entered into a separate [\*\*\*5] and identical contract with Katz, who for a percentage of each petitioner's earnings undertook, among other things, to act as "exclusive personal representative, advisor and manager in the entertainment field." The contract contained a provision reading: "It is clearly understood that you [Katz] are not an employment agent or theatrical agent, that you have not offered or attempted or promised to obtain employment or engagements for me, and you are not obligated, authorized or expected to do so." It also provided for arbitration of any dispute thereunder in accordance with the rules of the American Arbitration Association.

[\*352] [\*\*368] A dispute arose between the petitioners and Katz in relation to the subject matter of the contract. Katz thereupon, on September 21, 1966, commenced proceedings with the arbitration association seeking to compel arbitration of the dispute.

On October 18, 1966, petitioners filed with the Labor Commissioner a "Petition to Determine Controversy," alleging among other things: "Complainants complain that in September of 1965, defendant [Matthew Katz] acting as an artists-manager and through false and fraudulent statements and by duress, [\*\*\*6] caused complainants to sign with defendant as an artists-manager; that defendant, prior to the time of signing said contracts, promised the complainants and each of them that he would procure bookings for them; that defendant thereafter procured bookings for the complainants and insisted that the complainants perform the bookings procured by him; that complainants sought to procure their own bookings, and that defendant refused them the right to procure their own bookings; that at the time that said contracts were negotiated, defendant Matthew Katz was not licensed as an artists-manager pursuant to the provisions of the *California Labor Code, Section 1700.5*; <sup>3</sup> that the contract presented to each complainant was not submitted to the Labor Commissioner, State of California, as required under Section 1700.23; <sup>4</sup> that Matthew Katz has not performed in accordance with *Sections 1700.24, 1700.25, 1700.26, 1700.27, 1700.28, 1700.31, 1700.32, 1700.36 and 1700.40 of the Labor Code* and other provisions of the Labor Code; that Matthew Katz never rendered an accounting to the complainants for thousands of dollars received by Mr. Katz for their services; that Matthew Katz has not allowed complainants [\*\*\*7] to inspect the books and records maintained by Matthew Katz with respect to fees earned by the complainants; that Matthew Katz has and continues to obtain payments intended for one or more of the above complainants and has cashed checks intended for

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one or more of the above complainants for his own use and benefit."

3 [HN2] *Section 1700.5*, as pertinent here, provides: "No person shall engage in or carry on the occupation of an artists' manager without first procuring a license therefor from the Labor Commissioner."

4 [HN3] *Section 1700.23*, as pertinent here, provides: "Every artists' manager shall submit to the Labor Commissioner a form or forms of contract to be utilized by such artists' manager in entering into written contracts with artists for the employment of the services of such artists' managers by such artists, and secure the approval of the Labor Commissioner thereof."

Katz appeared and filed his answer to the petition, in which he objected to the jurisdiction of the Labor Commissioner and [\*353] denied [\*\*\*8] that he had agreed to act, or that he was or had been acting, as an artists' manager.

On October 21, 1966 while the Labor Commissioner proceedings were pending, petitioners filed an action against Katz in the superior court, seeking relief, among other things, that Katz be restrained from proceeding before the arbitration association.

In the superior court action Katz appeared and moved the court to order petitioners to arbitrate as provided by the contracts, and to restrain the proceedings before the Labor Commissioner. Petitioners opposed Katz' motion contending that a bona fide controversy existed before the Labor Commissioner as to whether Katz had agreed to act, and had been acting as their artists' manager, and as to the legality and validity of the contracts. They contended that the language of the contracts "you have not offered, or attempted or promised to obtain employment or engagements for me, etc." was but a subterfuge to conceal the fact that Katz did act, and had agreed to act, as an artists' manager. Evidence was introduced by petitioners in support of their contentions. Katz offered evidence to the contrary.

[\*\*369] The court thereafter on January 17, 1967 [\*\*\*9] made its orders denying petitioners' motion to restrain arbitration; restraining petitioners from proceeding further before the Labor Commissioner; and ordering them to arbitrate their dispute before the arbitration association. These orders are the subject of the instant proceedings.

Real party in interest Katz has rather clearly stated the issues to be determined in this proceeding. Our discussion will follow the contentions as presented by him.

First Contention: *Neither certiorari, prohibition nor mandamus is a proper remedy.*

(2) It appears that the superior court's orders constitute completed judicial acts. If the orders were in excess of the court's jurisdiction and if there is available neither appeal nor other plain, speedy and adequate remedy, certiorari is proper. (See 3 Witkin, *Cal. Procedure* (1954) Extraordinary Writs, pp. 2490-2493.)

[HN4] An appeal does not lie from an order compelling arbitration (*Corbett v. Petroleum Maintenance Co.*, 119 Cal.App.2d 21 [258 P.2d 1077]); nor is any other plain, speedy or adequate remedy apparent. We consider certiorari to be the proper remedy.

[\*354] Second Contention: *The Artists' Managers Act does not give the Labor [\*\*\*10] Commissioner jurisdiction over an artists' manager who is not licensed as such by the commissioner.*

Admittedly Katz was not licensed as an artists' manager.

[HN5] The Act, section 1700.3, defines "licensee" as an "artists' manager which holds a valid, unrevoked, and unforfeited license. . . ." Section 1700.4 defines "artists' manager" (see fn. 2, *ante*).

Certain sections, i.e., 1700.17, 1700.19, 1700.21, 1700.42, 1700.43, refer to licensee in such context that the word can reasonably apply only to a licensed artists' manager. Other sections, including those which are the subject of the Petition to Determine Controversy, refer to artists' manager in such manner that they apply reasonably to both licensed and unlicensed artists' managers. The Act thus refers to and covers two classes of persons, "licensees" who are artists' managers with valid licenses, and "artists' managers" who may or may not be so licensed.

(3) "[HN6] 'It is well settled that a legislative body has the power within reasonable limitations to prescribe legal definitions of its own language, and when an act passed by it embodies a definition it is binding on the courts.'" (*Application of Monrovia Evening Post*, 199 Cal. [\*\*\*11] 263, 269-270 [248 P. 1017]; see also *People v. Western Air Lines, Inc.*, 42 Cal.2d 621, 638 [268 P.2d 723]; *In re Miller*, 31 Cal.2d 191, 198 [187 P.2d 722].) (4) If possible, significance should be given to every word and phrase of an act in pursuance of the legislative purpose. (*Select Base Materials v. Board of Equalization*, 51 Cal.2d 640, 645 [335 P.2d 672]; *People v. Hampton*, 236 Cal.App.2d 795, 801 [46 Cal.Rptr. 338]; *Brown v. Cranston*, 214 Cal.App.2d 660, 672-673 [29 Cal.Rptr. 725].)

(5) [HN7] Remedial statutes should be liberally construed to effect their objects and suppress the mis-

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chief at which they are directed ( *Lande v. Jurisich*, 59 Cal.App.2d 613, 616-617 [139 P.2d 657]; see also *Union Lbr. Co. v. Simon*, 150 Cal. 751, 757 [89 P. 1077, 1081]; 45 Cal.Jur.2d, Statutes, § 182, p. 681). It would be unreasonable to construe the Act as applying only to licensed artists' managers, thus allowing an artists' manager, by nonsubmission to the licensing provisions of the Act, to exclude himself from its restrictions and regulations enacted in the public interest. (6) [HN8] "Statutes must be given a reasonable and common sense construction [\*\*\*12] in accordance with the apparent purpose and intention of the lawmakers -- one that is practical rather than technical, and [\*355] that will lead to wise policy rather than to mischief or absurdity." (45 Cal.Jur.2d, Statutes, § 116, pp. 625-626.)

[\*\*370] (7) We conclude that artists' managers (as defined by the Act), whether they be licensed or unlicensed, are bound and regulated by the Artists' Managers Act.

Third Contention: *By virtue of his written contract, Katz as a matter of law is not an artists' manager and therefore is not subject to the Artists' Managers Act.*

(8) The Act gives the Labor Commissioner jurisdiction over those who are artists' managers in fact. The petition filed with the Labor Commissioner alleges facts which if true indicate that the written contracts were but subterfuges and that Katz had agreed to, and did, act as an artists' manager. Clearly the Act may not be circumvented by allowing language of the written contract to control -- if Katz had in fact agreed to, and had acted as an artists' manager. The form of the transaction, rather than its substance would control.

(9) [HN9] "It is a fundamental principle of law that, in determining rights and obligations, [\*\*\*13] substance prevails over form." ( *San Diego Federation of Teachers v. Board of Education*, 216 Cal.App.2d 758, 764 [31 Cal.Rptr. 146]; *Civ. Code*, § 3528.) This principle is recognized in a case Katz cites and relies upon, *Pawlowski v. Woodward*, 122 Misc. 695 [203 N.Y.S. 819, 820], where the court said, "This contract is no subterfuge to evade the General Business Law. An employment agency could not circumvent the statute by putting its contract to procure employment for an artist in the form of an agreement for management."

The court, or as here, [HN10] the Labor Commissioner, is free to search out illegality lying behind the form in which a transaction has been cast for the purpose of concealing such illegality. ( *Lewis & Queen v. N. M. Ball Sons*, *supra*, 48 Cal.2d 141, 148.) "The court will look through provisions, valid on their face, and with the aid of parol evidence, determine that the contract is actually illegal or is part of an illegal transaction." (1 Witkin, Summary of Cal. Law (1960) Contracts, § 157, p. 169.)

In support of his position that as a matter of law he is not an artists' manager Katz cites *Raden v. Laurie*, 120 Cal.App.2d 778 [262 [\*\*\*14] P.2d 61]. That case, decided in 1953, concerned the Private Employment Agencies Act, sections 1550-1650 (also found in part 2, div. 6 relating to "Employment Agencies") which at that time regulated persons doing business as artists' managers.

[\*356] Raden was employed by Laurie, an actress, as a counselor and advisor under a written contract which specified he was to receive 10 percent of Laurie's professional earnings. Among other things the contract provided: "It is expressly agreed that . . . nothing herein contained shall be deemed to require you or authorize you to seek or obtain employment for the undersigned [Laurie]." (120 Cal.App.2d at p. 779.) Raden was not paid his 10 percent so he sued in the superior court. As to the subject matter of the complaint the superior court clearly had jurisdiction. Laurie moved for summary judgment, alleging the suit to be without merit. (*Code Civ. Proc.*, § 437c.) She contended the contract was invalid because it was a subterfuge used by an artists' manager who had not complied with the Private Employment Agencies Act. The motion for summary judgment was granted by the superior court.

The appellate court reversed, stating as [\*\*\*15] follows (at p. 782): "It would seem clear that his [Raden's] duties were intentionally limited to the rendition of services which would not require his being licensed as an artists' manager. Respondent says: 'It is the act of seeking employment, not the contract provision, which brings the legislation into play.' This might be true if the contract were a mere sham and pretext designed by plaintiff to misrepresent and conceal the true agreement of the parties and to evade the law. But there was no evidence which would have justified the court in reaching that conclusion. There was no evidence of misrepresentation, fraud or mistake as to the terms of the contract nor as to plaintiff's [\*\*371] obligations thereunder, nor evidence that defendants did not understand and willingly accept the limitation of plaintiff's duties. . . . *In the absence of any evidence that the July 30th agreement was a mere subterfuge or otherwise invalid the court was required to give effect to its clear and positive provisions.* . . . Since plaintiff was employed only to counsel and advise [Laurie] and to act as her business manager in matters not related to obtaining engagements for her, he [\*\*\*16] was not acting as an 'Employment Agency' as defined by section 1551, *Labor Code*." (Italics added; pp. 782-783.)

The inapplicability of *Raden v. Laurie* to the instant controversy is obvious. There, on a motion for summary judgment, no showing, prima facie or otherwise, was made (as regards the contract sued upon or its subject matter) that Raden had agreed to act, or had acted as

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an artists' manager (or employment agency). The District Court of Appeal found [\*357] no evidence which would support a conclusion that the contract was a sham or pretext designed to conceal the true agreement or to evade the law. On the uncontroverted facts the court had jurisdiction over the controversy and the Labor Commissioner did not. In the proceedings before us a prima facie showing was made to the Labor Commissioner as to matters over which he had jurisdiction.

Fourth Contention: *The superior court had jurisdiction over the controversy referred to the Labor Commissioner by petitioners.*

The Artists' Managers Act (enacted in 1959) so far as we can determine, has never been mentioned in the reported decisions of the courts of this state. However, an earlier, similar and in many [\*\*\*17] respects identical, statute has been frequently interpreted. This statute is the previously referred to Private Employment Agencies Law (§§ 1550-1650). Both statutes are, as previously stated, contained in part 6 (entitled "Employment Agencies") of division 2 of the Labor Code. Each is an outgrowth of a 1913 statute relating to employment agencies. (See Stats. 1913, ch. 282, p. 515, and amendments thereto.) Indeed, section 1700.44, previously quoted and on which the instant dispute is focused was taken word for word from section 1647 of the Private Employment Agencies Law, which language in turn was taken in its entirety from an amendment to the 1913 statute. (See Stats. 1923, ch. 412, p. 936.)

(10) [HN11] "It is a cardinal principle of statutory construction that where legislation is framed in the language of an earlier enactment on the same or an analogous subject, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment. . . ." ( *Greve v. Leger, Ltd.*, 64 Cal.2d 853, 865 [52 Cal.Rptr. 9, 415 P.2d 824]; *Union Oil Associates v. Johnson*, 2 Cal.2d 727, 734-735 [43 P.2d 291, [\*\*\*18] 98 A.L.R. 1499].)

(11) Applying to the Act the construction given to its sister and parent statutes the following appears: The Act is broad and comprehensive. The Labor Commissioner is empowered to hear and determine disputes under it, *including the validity of the artists' manager-artist contract* and the liability, if any, of the parties thereunder. (See *Garson v. Division of Labor Law Enforcement*, 33 Cal.2d 861, 866 [206 P.2d 368].) He may be compelled to assume this power. ( *Bolotin v. Workman Service Co.*, 128 Cal.App.2d 339, 341 [275 P.2d [\*358] 599].) In the settlement of disputes the jurisdiction of the Labor Commissioner is similar to, but broader, than the power of an arbitrator under *Code of Civil Procedure sections 1280- 1294.2*. ( *Robinson v.* [\*\*\*372] *Superior*

*Court*, 35 Cal.2d 379, 387 [218 P.2d 10]; *Garson v. Division of Labor Law Enforcement*, *supra*, 33 Cal.2d 861, 865.) The Labor Commissioner's awards are enforceable in the same manner as awards of private arbitrators under *Code of Civil Procedure sections 1285-1288.8*.<sup>5</sup> (See *Robinson v. Superior Court*, *supra*, 35 Cal.2d 379, 388.)

5 The Act, section 1700.45, under conditions not applicable or relevant here, allows private arbitration of a dispute between an artists' manager and artist.

[\*\*\*19] [HN12]

Section 1700.44 of the Act is mandatory. It provides that the parties involved, artists and artists' manager, in any controversy arising under the Act, *shall* refer the matters in dispute to the commissioner. <sup>6</sup> (See *Garson v. Division of Labor Law Enforcement*, *supra*, 33 Cal.2d 861, 864; *ABC Acceptance v. Delby*, 150 Cal.App.2d Supp. 826, 827 [310 P.2d 712]; *Abraham Lehr, Inc. v. Cortez*, 57 Cal.App.2d 973, 975-976 [135 P.2d 684].) It has been held under the Private Employment Agencies Law that the commissioner has original jurisdiction, to the exclusion of the superior court, over controversies such as those here involved. In *Collier & Wallis, Ltd. v. Astor*, *supra*, 9 Cal.2d 202, the plaintiff, a private employment agency, sued Mary Astor, an artist, to recover on a contract relating to her employment. At that time the previously mentioned predecessor (1913) statute to both the Private Employment Agency Law and the Act contained the provision concerning reference of matters in dispute to the Labor Commissioner which is presently found in the Private Employment Agencies Law. As the dispute had not been submitted to the Labor Commissioner the [\*\*\*20] court held the action in the superior court to be premature. The court (p. 204) stated: "It is conceded that the respondent did not, before commencing this action, refer 'the matter in dispute' to the commissioner of labor, and consequently that official made no determination of said matter before this action was commenced. Therefore if this section of said act is a valid legislative act *the point made by appellant that this action was prematurely brought must be sustained.*" (Italics added.)

6 Although the Act says "the parties involved shall refer the matters in dispute" it is sufficient if one of the parties shall submit the controversy. (See *Bess v. Park*, 144 Cal.App.2d 798, 805 [301 P.2d 978].)

The holding of *Collier & Wallis, Ltd. v. Astor*, *supra*, as to premature superior court filing has been consistently followed [\*359] in cases under the Private Employment Agencies Law. (See *Garson v. Division of*

254 Cal. App. 2d 347, \*, 62 Cal. Rptr. 364, \*\*;  
1967 Cal. App. LEXIS 1401, \*\*\*

*Labor Law Enforcement, supra*, 33 Cal.2d 861, 864; *ABC Acceptance* [\*\*\*21] *v. Delby, supra*, 150 Cal.App.2d Supp. 826, 828; *Bess v. Park, supra*, 144 Cal.App.2d 798, 806; *Abraham Lehr, Inc. v. Cortez, supra*, 57 Cal.App.2d 973, 977.)

Since the instant controversy was pending before, and was properly within the jurisdiction of, the Labor Commissioner, the doctrine of "exhaustion of administrative remedies" applies. (12) This well known concept is expressed in *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 292-293 [109 P.2d 942, 132 A.L.R. 715], as [HN13] "where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. . . . It is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all courts." (See also 2 Cal.Jur.2d, Administrative Law, § 184, p. 304; 1 Witkin, Cal. Procedure (1954) pp. 316, 578.)

(13) We hold as to cases of controversies arising under the Artists' Managers Act that the Labor Commissioner has original jurisdiction to hear and determine the same to the exclusion of the superior court, subject to an [\*\*\*22] appeal within 10 days after determination, to the superior court where the same shall be heard de novo. (See § 1700.44.)

Fifth Contention: *The petitioners waived any right they may have had to proceed before the Labor Commissioner by filing their action in the superior court.*

(14) It appears that the superior court action was brought primarily to restrain Katz from proceeding to arbitrate the dispute before the American Arbitration Association. This is in no way inconsistent with the proceedings before the Labor Commissioner [\*\*373] and cannot be deemed an "intentional or voluntary relinquishment of a known right" (see Black's Law Dictionary (4th ed.) p. 1751) to proceed before the commissioner. Nor may one waive the benefits of a statute established for a public reason (*Civ. Code*, § 3513), as were the Labor Code provisions here. (See *Collier & Wallis, Ltd. v. Astor, supra*, 9 Cal.2d 202, 206; *Smith v. LaFarge, supra*, 242 Cal.App.2d 806, 811.) At most the superior court action was premature. (See *Garson v. Division of Labor Law Enforcement, supra*, 33 Cal.2d 861, 864; *Collier & Wallis, Ltd. v. Astor, supra*, at p. 204; *ABC Acceptance v. [\*\*\*23] Delby, supra*, 150 Cal.App.2d Supp. 826, 828; [\*360] *Bess v. Park, supra*, 144 Cal.App. 798, 806; *Abraham Lehr, Inc. v. Cortez, supra*, 57 Cal.App.2d 973, 977.)

And since the Act gives initial jurisdiction of the controversy here to the Labor Commissioner neither party could confer such jurisdiction on the court for [HN14] "jurisdiction may not be waived by a party or conferred on the court by consent." (*Sampsell v. Superior Court*, 32 Cal.2d 763, 773 [197 P.2d 739]; see also *Harrington v. Superior Court*, 194 Cal. 185, 188 [228 P. 15]; *Taylor v. Taylor*, 192 Cal. 71, 78 [218 P. 756, 51 A.L.R. 1074]; *ABC Acceptance v. Delby, supra*, 150 Cal.App.2d Supp. 826, 828.)

Sixth Contention: *Private arbitration being permissible under the Act (§ 1700.45) and the parties having agreed to arbitrate before the American Arbitration Association, the orders of the superior court were proper.*

(15) This argument overlooks the basic contention of petitioners that their agreement with Katz is wholly invalid because of his noncompliance with the Act. If the agreement is void no rights, including the claimed right to private arbitration, can be [\*\*\*24] derived from it.

*Loving & Evans v. Blick, supra*, 33 Cal.2d 603, 610, states: "It seems clear that [HN15] the power of the arbitrator to determine the rights of the parties is dependent upon the existence of a valid contract under which such rights might arise. [Citations.]" (See also 1 Witkin, Summary of Cal. Law (1960) Contracts, § 165, 177.)

Seventh Contention: *The superior court had jurisdiction to determine, as in Raden v. Laurie, supra*, 120 Cal.App.2d 778, whether the controversy here in question fell within the Act's grant of jurisdiction to the labor commissioner.

In *Raden v. Laurie*, as previously stated, the District Court of Appeal found no evidence on a motion for summary judgment to support Laurie's contention that Raden agreed to or did act as an artists' manager. (16) Here a prima facie showing was made to the Labor Commissioner that Katz had so agreed and had so acted. The Labor Commissioner had the power and the duty to determine, in the first instance, whether the controversy was within the Act's grant of jurisdiction. See *United States v. Superior Court*, 19 Cal.2d 189, 195 [120 P.2d 26], where the court stated: [HN16] "[It] lies within the [\*\*\*25] power of the administrative agency to determine in the [\*361] first instance, and before judicial relief may be obtained, whether a given controversy falls within a statutory grant of jurisdiction."

We conclude that petitioners are entitled, by way of certiorari, to the relief sought by them. The orders of the superior court dated January 17, 1967 are annulled.

1 Miles E. Locker, CSB #103510  
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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

11 EDGAR FRANCISCO JIMENEZ GARCIA, ) No. TAC 4-02  
12 )  
13 Petitioner, )  
14 vs. )  
15 )  
16 PIEDAD BONILLA, an individual dba ) DETERMINATION OF  
17 Pinata Productions and Management, ) CONTROVERSY  
18 )  
19 Respondent. )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

18 The above-captioned matter, a petition to determine  
19 controversy under Labor Code §1700.44, came on regularly for  
20 hearing on October 16, 2002, in Los Angeles, California,  
21 before the Labor Commissioner's undersigned hearing officer.  
22 Edgar Francisco Jimenez Garcia (hereinafter "Petitioner") was  
23 represented by Ronald G. Rosenberg; Piedad Bonilla, an  
24 individual dba Pinata Productions and Management (hereinafter  
25 "Respondent") appeared in propria persona. Based on the  
26 evidence presented at this hearing and on the other papers on  
27 file in this mater, the Labor Commissioner hereby adopts the  
28 following decision.

1 //

2 FINDINGS OF FACT

3 1. Petitioner performs as a Spanish language voice-over  
4 artist in radio and television commercials and movie trailers.

5 2. On April 17, 2000, Petitioner entered into a written  
6 "personal management agreement" with Respondent for a period  
7 of three years whereby Respondent was to provide advice and  
8 counsel "with respect to decisions concerning employment ...  
9 and all other matters pertaining to {Petitioner's}  
10 professional activities and career in entertainment,  
11 amusement, music, recording, literary fields and in any and  
12 all media." Under the terms of this contract, petitioner  
13 agreed to pay commissions to respondent in the amount of 15%  
14 of his gross earnings in these fields during the term of the  
15 agreement, and his earnings following expiration of the  
16 agreement as to any agreements entered into or substantially  
17 negotiated during the term of the contract. The contract  
18 specified that respondent is not a theatrical agent, and is  
19 not licensed to obtain, seek or procure employment for the  
20 petitioner. The contract also provided that "in any  
21 arbitration or litigation under this agreement, the prevailing  
22 party shall be entitled to recover from the other party any  
23 and all costs reasonably incurred by the prevailing party in  
24 such arbitration or litigation, including without limitation,  
25 reasonable attorney's fees."

26 3. Respondent has never been licensed by the State Labor  
27 Commissioner as a talent agency.

28 4. Prior to January 2001, petitioner was not represented

1 by a licensed talent agency. Since January 2001, petitioner  
2 has been represented by Larry Hummel, an agent employed by ICM  
3 (International Creative Management, Inc.), a licensed talent  
4 agency.

5 5. During the period from April 28, 2000 to October 18,  
6 2000, during which time petitioner was not represented by a  
7 licensed talent agent, petitioner performed voice overs in  
8 approximately 50 commercials for the following advertisers:  
9 Southern California Edison, Sears, JC Penny, Circle K,  
10 Mitsubishi, and Burger King. All of these engagements were  
11 procured by respondent. Respondent was paid commissions for  
12 all of these engagements.

13 6. On May 14, 2001 petitioner performed a voice over on  
14 a radio spot for Planned Parenthood. Even though petitioner  
15 was then represented by ICM, the engagement was procured  
16 solely by the respondent, without any sort of involvement by  
17 ICM. The production company that produced the radio spot paid  
18 \$460 to respondent for petitioner's voice over performance.  
19 Respondent retained \$60 as her commission, and transmitted the  
20 \$400 balance to petitioner.

21 7. On or about November 29, 2001, respondent filed a  
22 small claims action against petitioner for payment of  
23 allegedly due "management commissions" in the sum of \$2,000.

24 8. By letter dated December 7, 2001, Steve Holguin, an  
25 attorney acting on behalf of the petitioner, advised  
26 respondent that because she procured employment for the  
27 petitioner without having been licensed as a talent agent by  
28 the State Labor Commissioner, the "personal management

1 agreement" is unenforceable and void from its inception. By  
2 this letter, petitioner demanded reimbursement of all  
3 commissions paid to respondent under this agreement, that  
4 respondent cease and desist from any further attempts to  
5 secure commissions from petitioner, and that respondent cease  
6 interfering with petitioner's career and with his relationship  
7 with his licensed talent agent.

8 9. Despite the letter from petitioner's attorney,  
9 respondent proceeded with her small claims action against the  
10 petitioner. The small claims court entered a judgment in  
11 favor of respondent, from which petitioner filed an appeal. A  
12 trial de novo took place before Los Angeles County Superior  
13 Court Judge Lisa Hart Cole, with both parties appearing in pro  
14 per. Following the trial de novo, on March 27, 2002, the  
15 superior court entered a judgment in favor of respondent, in  
16 the amount of \$1,878.67. The next day, petitioner mailed a  
17 check to the respondent for the full amount of this judgment.

18 10. On January 31, 2002, during the pendency of the  
19 small claims proceeding, petitioner filed this petition to  
20 determine controversy with the Labor Commissioner, seeking a  
21 determination that the "personal management agreement" is  
22 unenforceable and void from its inception, with reimbursement  
23 for all amounts paid to the respondent pursuant to this  
24 agreement, and payment of petitioner's attorney's fees  
25 incurred in this proceeding. Despite the filing of this  
26 petition to determine controversy, and despite having asserted  
27 the Talent Agencies Act as a defense to the small claims  
28 action, neither the small claims court nor the superior court

1 stayed their judicial proceedings to first allow the Labor  
2 Commissioner to resolve the petition to determine controversy.

3 //

4  
5 LEGAL ANALYSIS

6 Petitioner is an artist within the meaning of Labor Code  
7 section 1700.4(b). Labor Code section 1700.4(a) defines  
8 "talent agency" as "a person or corporation who engages in the  
9 occupation of procuring, offering, promising, or attempting to  
10 procure employment or engagements for an artist or artists."  
11 Labor Code §1700.5 provides that "[n]o person shall engage in  
12 or carry on the occupation of a talent agency without first  
13 procuring a license . . . from the Labor Commissioner." The  
14 Talent Agencies Act is a remedial statute; its purpose is to  
15 protect artists seeking professional employment from the  
16 abuses of talent agencies. For that reason, "even the  
17 incidental or occasional provision of such [procurement]  
18 services requires licensure." *Styne v. Stevens* (2001) 26  
19 Cal.4th 42, 51. Here, the procurement activities began  
20 virtually at the start of the parties' contractual  
21 relationship, and these procurement activities were ongoing  
22 and pervasive. By attempting to procure and by procuring  
23 employment as a voice over artist for petitioner, Respondent  
24 acted as a "talent agency" within the meaning of Labor Code  
25 §1700.4(a), and by doing so without having obtained a talent  
26 agency license from the Labor Commissioner, respondent  
27 violated Labor Code §1700.5.

28 An agreement that violates the licensing requirement of

1 the Talent Agencies Act is illegal and unenforceable. "Since  
2 the clear object of the Act is to prevent improper persons  
3 from becoming [talent agents] and to regulate such activity  
4 for the protection of the public, a contract between an  
5 unlicensed [agent] and an artist is void." *Buchwald v.*  
6 *Superior Court* (1967) 254 Cal.App.2d 347, 351. Having  
7 determined that a person or business entity procured, promised  
8 or attempted to procure employment for an artist without the  
9 requisite talent agency license, "the [Labor] Commissioner may  
10 declare the contract [between the unlicensed agent and the  
11 artist] void and unenforceable as involving the services of an  
12 unlicensed person in violation of the Act." *Styne v. Stevens,*  
13 *supra*, 26 Cal.4th at 55. "[A]n agreement that violates the  
14 licensing requirement is illegal and unenforceable . . . ."  
15 *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th  
16 246, 262. Moreover, the artist that is party to such an  
17 agreement may seek disgorgement of amounts paid pursuant to  
18 the agreement, and "may . . . [be] entitle[d] . . . to  
19 restitution of all fees paid the agent." *Wachs v. Curry*  
20 (1993) 13 Cal.App.4th 616, 626. This remedy of restitution  
21 is, of course, subject to the one year limitations period set  
22 out at Labor Code §1700.44(c), so that the Labor Commissioner  
23 will not, absent extraordinary circumstances, order the  
24 reimbursement of amounts paid to an unlicensed agent prior to  
25 one year before the filing of the petition to determine  
26 controversy.

27 The primary legal question presented herein is whether  
28 the Labor Commissioner has the authority to reimburse

1 petitioner for the amount that petitioner was required to pay  
2 to the respondent pursuant to the superior court's judgment  
3 after trial de novo on appeal from the small claims court on  
4 respondent's claim that petitioner owed this amount under the  
5 "personal management agreement." The question that we must  
6 address is whether the court judgment can now be attacked  
7 through this proceeding before the Labor Commissioner.

8 Our analysis begins with the observation that the Labor  
9 Commissioner has exclusive primary jurisdiction to determine  
10 all controversies arising under the Talent Agencies Act. The  
11 Act specifies that "[i]n cases of controversy arising under  
12 this chapter, the parties involved shall refer the matters in  
13 dispute to the Labor Commissioner, who shall hear and  
14 determine the same, subject to an appeal . . . to the superior  
15 court where the same shall be heard de novo.' (Labor Code  
16 §1700.44(a).) Courts cannot encroach upon the Labor  
17 Commissioner's exclusive original jurisdiction to hear matters  
18 (including defenses) arising under the Talent Agencies Act.

19 "The Commissioner has the authority to hear and determine  
20 various disputes, *including the validity of artists' manager-*  
21 *artist contracts and the liability of parties thereunder.*  
22 (*[Buchwald v. Superior Court, supra, 254 Cal.App.2d 347,]*  
23 *357.)* The reference of disputes involving the [A]ct to the  
24 Commissioner is *mandatory.* (*Id.* at p. 358.) Disputes *must* be  
25 heard by the Commissioner, and all remedies before the  
26 Commissioner *must* be exhausted before the parties can proceed  
27 to the superior court. (*Ibid.*)" (*REO Broadcasting Consultants*  
28 *v. Martin* (1999) 69 Cal.App.4th 489, 494-495, italics in

1 original.)

2       Therefore, "[w]hen the Talent Agencies Act is invoked in  
3 the course of a contract dispute, the Commissioner has  
4 exclusive jurisdiction to determine his jurisdiction in the  
5 matter, including whether the contract involved the services  
6 of a talent agency." *Styne v. Stevens, supra*, 26 Cal.4th 42,  
7 54. This means the Commissioner, not the court, has "the  
8 exclusive right to decide in the first instance *all the legal*  
9 *and factual issues on which an Act-based defense depends.*"  
10 *Ibid.* at fn. 6, italics in original. Here, the court's  
11 failure to defer to the Labor Commissioner's jurisdiction  
12 compels the conclusion that the court acted in excess of its  
13 own jurisdiction. "Our conclusion that section 1700.44, by  
14 its terms, gives the Commissioner exclusive original  
15 jurisdiction over controversies arising under the Talent  
16 Agencies Act comports with, and applies, the general doctrine  
17 of exhaustion of administrative remedies. With limited  
18 exceptions, the cases state that where an adequate  
19 administrative remedy is provided by statute, resort to that  
20 forum is a "jurisdictional" prerequisite to judicial  
21 consideration of the claim." *Ibid.* at 56. Even when the  
22 Talent Agencies Act is only being raised as a defense to an  
23 action for commissions purportedly due under a "personal  
24 management contract", there is no concurrent original  
25 jurisdiction: "[T]he plain meaning of section 1700.44,  
26 subdivision (a), and the relevant case law, negate any  
27 inference that courts share original jurisdiction with the  
28 Commissioner in controversies arising under the Act. On the

1 contrary, the Commissioner's original jurisdiction of such  
2 matters is exclusive." *Ibid.* at 58.

3 Here we are confronted by a final judgment of the  
4 superior court -- albeit a judgment that the superior court  
5 issued without having subject matter jurisdiction. After a  
6 final judgment has been rendered in an action, a new action or  
7 proceeding based on the same cause of action or defense,  
8 ignoring the normal effect of judgment as a merger or bar, is  
9 a collateral attack. *Woulridge v. Burns* (1968) 265 Cal.App.2d  
10 82, 84. This petition to determine controversy constitutes a  
11 collateral attack on the superior court judgment. In a  
12 collateral attack, a judgment may be effectively challenged  
13 only if it is so completely invalid as to require no ordinary  
14 review to annul it. *Ibid.* The grounds for collateral attack  
15 include lack of subject matter jurisdiction. *Witkin, 8 Cal.*  
16 *Proc.* (4th), *Attack on Judgment in Trial Court*, §6.

17 When a collateral attack is made against a California  
18 judgment, including a judgment issued by a court of limited or  
19 special jurisdiction (such as small claims court or a superior  
20 court hearing an appeal de novo of a small claims judgment),  
21 there is a presumption of that the court acted in the lawful  
22 exercise of its jurisdiction, and the judgment is presumed  
23 valid. Evidence Code §666. In a collateral attack made  
24 against a California judgment, jurisdiction is *conclusive* if  
25 the jurisdictional defect does not appear on the face of the  
26 record. *Superior Motels v. Rinn Motor Hotels* (1987) 195  
27 Cal.App.3d 1032, 1049. Extrinsic evidence is inadmissible  
28 even though it might show that jurisdiction did not in fact

1 exist. *Hogan v. Superior Court* (1925) 74 Cal.App. 704, 708.  
2 A judgment "void on its face" may be collaterally attacked  
3 when the defect may be shown without going outside the record  
4 or judgment roll. *Becker v. S.P.V. Const. Co.* (1980) 27  
5 Cal.3d 489, 493. Here, as we are dealing with a judgment  
6 stemming from a de novo appeal of a small claims judgment, the  
7 record does not appear to reveal any jurisdictional defect.  
8 Nonetheless, there are exceptions to the rule that collateral  
9 attack against a California judgment will fail unless the  
10 judgment is void on its face. Of significance here, a party  
11 relying on a judgment may waive the benefit of this rule  
12 excluding extrinsic evidence by failure to object to the  
13 extrinsic evidence when offered. See Witkin, 8 *Cal. Proc.*  
14 (4th), *Attack on Judgment in Trial Court*, §13, and various  
15 cases cited therein.

16 In the hearing of this controversy, the petitioner  
17 presented extrinsic evidence to which no objection was raised  
18 that the respondent had engaged in unlawful procurement  
19 activities in violation of the Talent Agency Act, so as to  
20 constitute a defense to respondent's small claims action for  
21 payment of commissions owed under the personal management  
22 agreement. This evidence establishes that the small claims  
23 court and the superior court that entered the judgment  
24 following the de novo trial on the appeal from the small  
25 claims judgment lacked subject matter jurisdiction, and  
26 therefore, that the superior court judgment is void.

27  
28 Having found that this proceeding to determine

1 controversy under the Talent Agencies Act is not barred by the  
2 judgment of the superior court following the de novo appeal of  
3 respondent's small claims action against the petitioner, and  
4 having found that respondent engaged in unlawful procurement  
5 activities, we necessarily conclude that the personal  
6 management contract was unlawful and void from its inception,  
7 and that respondent has no enforceable rights thereunder. We  
8 find that in order to effectuate the purposes of the Act, the  
9 petitioner must be reimbursed for all amounts paid to  
10 respondent pursuant to this contract from one year prior to  
11 the date of the filing of this petition to the present. The  
12 amounts that must therefore be reimbursed include the \$60 paid  
13 as commissions for the Planned Parenthood radio spot on May  
14 14, 2001, plus the \$1,878.67 paid as commissions on March 28,  
15 2002 pursuant to the judgment in the de novo appeal following  
16 the small claims proceeding, for a total of \$1,938.67.

17 Turning to petitioner's request for attorneys' fees  
18 incurred in connection with this proceeding, the contract  
19 between the parties did provide for an award of reasonable  
20 attorney's fees to the prevailing party "in the event of  
21 litigation or arbitration arising out of this agreement or the  
22 relationship of the parties created hereby." But an  
23 administrative proceeding before the Labor Commissioner  
24 pursuant to Labor Code §1700.44 neither constitutes  
25 "litigation" nor "arbitration". Litigation is commonly  
26 understood as "the act or process of carrying out a lawsuit."  
27 (Webster's New World Dictionary, Third College Edition (1988))  
28 Lawsuits take place in courts, not before administrative

1 agencies. Black's Law Dictionary defines "litigation" as a  
2 "contest in a court of justice for the purpose of enforcing a  
3 right." And an "arbitration", obviously, takes place before  
4 an arbitrator, not an administrative agency authorized to hear  
5 disputes pursuant to statute. Consequently, we conclude that  
6 the contract does not provide for an award of attorneys' fees  
7 incurred in a proceeding to determine controversy before the  
8 Labor Commissioner. Therefore, even though the petitioner  
9 prevailed before the Labor Commissioner, he is not entitled to  
10 attorneys' fees in this proceeding.

11 We take this opportunity, however, to caution the  
12 respondent that failure to pay the full amount awarded herein  
13 to the petitioner within ten days of the date of service of  
14 this determination may result in liability for petitioner's  
15 attorneys fees in any subsequent judicial proceedings. Such  
16 subsequent proceedings could either be initiated by the  
17 respondent through the filing of a de novo appeal from this  
18 determination, pursuant to Labor Code §1700.44(a), or by the  
19 petitioner through the filing of a petition to confirm the  
20 determination and enter judgment thereon. See *Buchwald v.*  
21 *Katz* (1972) 8 Cal.3d 493.

22 Of course, the respondent can prevent any subsequent judicial  
23 proceedings by expeditiously paying the petitioner the full  
24 amount found due herein.

25 ORDER

26 For the reasons set forth above, IT IS HEREBY ORDERED  
27 that:

- 28 1. The personal management contract between petitioner

1 and respondent is illegal and void from its inception, and  
2 respondent has no enforceable rights thereunder;

3 2. The judgment that was entered by the superior court  
4 following the de novo appeal of the small claims judgment on  
5 respondent's claim for unpaid commissions is void for lack of  
6 subject matter jurisdiction;

7 3. Respondent reimburse petitioner for the commissions  
8 paid to respondent from January 31, 2001 to the present,  
9 consisting of \$60 paid as commissions for the Planned  
10 Parenthood radio spot on May 14, 2001, plus \$1,878.67 paid as  
11 commissions on March 28, 2002 pursuant to the judgment in the  
12 de novo appeal following the small claims proceeding, for a  
13 total of \$1,938.67;

14 //

15 //

16 4. All parties shall bear their own costs and  
17 attorney's fees incurred in this proceeding.

18  
19  
20 Dated:

\_\_\_\_\_  
MILES E. LOCKER  
Attorney for the Labor Commissioner

21  
22  
23 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

24  
25 Dated:

\_\_\_\_\_  
ARTHUR S. LUJAN  
State Labor Commissioner



**MARATHON ENTERTAINMENT, INC., Plaintiff and Appellant, v. ROSA BLASI  
et al., Defendants and Respondents.**

**S145428**

**SUPREME COURT OF CALIFORNIA**

**42 Cal. 4th 974; 174 P.3d 741; 70 Cal. Rptr. 3d 727; 2008 Cal. LEXIS 805**

**January 28, 2008, Filed**

**SUBSEQUENT HISTORY:** Reported at *Marathon Entertainment v. Blasi (Rosa)*, 2008 Cal. LEXIS 1784 (Cal., Jan. 28, 2008)

Time for Granting or Denying Rehearing Extended *Marathon Entertainment v. Blasi (Rosa)*, 2008 Cal. LEXIS 2558 (Cal., Feb. 19, 2008)

Modified by *Marathon Entertainment, Inc. v. Blasi*, 2008 Cal. LEXIS 2852 (Cal., Mar. 12, 2008)

Rehearing denied by, Motion to modify denied by *Marathon Entertainment, Inc. v. Blasi (Rosa)*, 2008 Cal. LEXIS 2963 (Cal., Mar. 12, 2008)

Related proceeding at *Siegel v. Bradstreet*, 2008 U.S. Dist. LEXIS 82789 (C.D. Cal., Sept. 9, 2008)

**PRIOR HISTORY:**

Court of Appeal of California, Second Appellate District, Division One, No. B179819. Superior Court of Los Angeles County, No. BC290839, Rolf M. Treu and James C. Chalfant, Judges.

*Marathon Entertainment, Inc. v. Blasi*, 140 Cal. App. 4th 1001, 45 Cal. Rptr. 3d 158, 2006 Cal. App. LEXIS 932 (Cal. App. 2d Dist., 2006)

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

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** In an action for, inter alia,

breach of oral contract, the trial court granted defendant actress's motion for summary judgment and invalidated plaintiff entertainment company's personal management contract with the actress as an illegal contract for unlicensed talent agency services in violation of the California Talent Agencies Act. The California Court of Appeal, Second Appellate District, Division One, reversed in part. Review was granted.

**OVERVIEW:** The parties entered into an oral contract for the company to serve as the actress's personal manager. The actress alleged that the company violated the Act by soliciting and procuring employment for her without a talent agency license. The court concluded that the Act applied to managers as well as agents, and that the Act extended to individual incidents of procurement. The California Labor Commissioner had the discretion to apply the doctrine of severability under *Civ. Code*, § 1599, to allow partial recovery of fees owed for legally provided services. A genuine dispute of material fact existed over whether severability might apply to allow partial enforcement of the parties' contract. In return for providing an undifferentiated range of services, the company was to receive an undifferentiated right to a certain percentage of the actress's income stream. The undifferentiated compensation scheme was not a categorical obstacle to application of the severability doctrine. The court rejected the actress's argument that once the company solicited or procured employment, all of its other services became those of an unlicensed talent

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agency and were thus uncompensable.

**OUTCOME:** The judgment of the intermediate appellate court was affirmed, and the case was remanded for further proceedings.

**CORE TERMS:** manager, talent, artist, severability, procurement, severance, unlicensed, entertainment, license, procure, Talent Agencies Act, procuring, licensed, void, "equitable, guild, lawful, solicit, soliciting, illegality, single subject rule, licensing requirements, licensing, empowered, partial, undifferentiated, engagements, entirety, spends, radio

#### LexisNexis(R) Headnotes

***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview Governments > State & Territorial Governments > Licenses***

[HN1] The California Talent Agencies Act, *Lab. Code, § 1700 et seq.*, requires anyone who solicits or procures artistic employment or engagements for artists to obtain a talent agency license. *Lab. Code, §§ 1700.4, 1700.5*. 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. *Lab. Code, §§ 1700.23-1700.47*. No separate analogous licensing or regulatory scheme extends to personal managers.

***Labor & Employment Law > General Overview***

[HN2] See *Lab. Code, § 1700.4, subd. (b)*.

***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview Governments > State & Territorial Governments > Licenses***

[HN3] *Lab. Code, § 1700.5*, provides that no person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the California Labor Commissioner. 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, *Lab. Code, § 1700*, 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. *Lab. Code, § 1700.4, subd. (a)*.

***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview Governments > State & Territorial Governments > Licenses***

[HN4] The California Talent Agencies Act, *Lab. Code, § 1700 et seq.*, 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. *Lab. Code, § 1700.4, subd. (a)*. Any person who procures employment - any individual, any corporation, any manager - is a talent agency subject to regulation. *Lab. Code, §§ 1700, 1700.4, subd. (a)*. Consequently, a personal manager who solicits or procures employment for his or her artist-client is subject to and must abide by the Act.

***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview***

[HN5] The California Talent Agencies Act, *Lab. Code, § 1700 et seq.*, extends to individual incidents of employment procurement.

***Constitutional Law > State Constitutional Operation Governments > Legislation > Enactment***

[HN6] See *Cal. Const., art. IV, § 9*.

***Governments > Legislation > Enactment***

[HN7] The single subject rule is intended to prevent logrolling 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. In turn, the requirement that the single subject of a bill shall be expressed in its title is to prevent misleading or inaccurate titles so that legislators and the public are afforded reasonable notice of the contents of a statute.

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**Constitutional Law > State Constitutional Operation  
Governments > Legislation > Enactment**

**Governments > Legislation > Interpretation**

[HN8] The single subject rule is to be liberally construed to uphold proper legislation and not used to invalidate legitimate legislation. The legislature may combine in a single act numerous provisions governing projects so related and interdependent as to constitute a single scheme, and provisions auxiliary to the scheme's execution may be adopted as part of that single package. The act's title need not contain either an index or an abstract of its provisions. The constitutional mandate is satisfied if the provisions themselves are cognate and germane to the subject matter designated by the title, and if the title intelligently refers the reader to the subject to which the act applies, and suggests the field of legislation which the text includes.

**Business & Corporate Law > Agency Relationships >  
Duties & Liabilities > General Overview  
Constitutional Law > State Constitutional Operation  
Governments > Legislation > Enactment**

[HN9] The California Talent Agencies Act, *Lab. Code*, § 1700 *et seq.*, and its title satisfy the single subject rule of *Cal. Const.*, art. IV, § 9. The legislation's provisions pertain to a single subject, the comprehensive regulation of persons and entities that provide talent agency services. The title identifies that subject and specifically references the existing comprehensive regulations that are to be modified. The legislation defines talent agencies as those 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.

**Business & Corporate Law > Agency Relationships >  
Duties & Liabilities > General Overview**

[HN10] Personal managers are exempt from regulation under the California Talent Agencies Act, *Lab. Code*, § 1700 *et seq.*, insofar as they do those things that personal managers do, but they are regulated under the Act to the extent they stray into doing things that make one a talent agency under the Act.

**Contracts Law > Contract Interpretation > Severability  
Contracts Law > Defenses > Illegal Bargains**

[HN11] See *Civ. Code*, § 1599.

**Contracts Law > Contract Interpretation > Severability**

**Contracts Law > Defenses > Illegal Bargains**

[HN12] By its terms, *Civ. Code*, § 1599, applies 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.

**Contracts Law > Contract Interpretation > Severability**

**Contracts Law > Defenses > Illegal Bargains**

[HN13] See *Civ. Code*, § 1598.

**Business & Corporate Law > Agency Relationships >  
Duties & Liabilities > General Overview**

**Contracts Law > Defenses > Illegal Bargains**

**Governments > Legislation > Interpretation**

**Governments > State & Territorial Governments >  
Licenses**

[HN14] Under ordinary rules of interpretation, *Civ. Code*, § 1599, and the California Talent Agencies Act, *Lab. Code*, § 1700 *et seq.*, must be read 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. *Lab. Code*, §§ 1700.4, *subd. (a)*, 1700.5. The Act provides no remedy for its violation, but neither does it repudiate the generally applicable and long-standing rule of severability. Hence, the severability rule of *Civ. Code*, § 1599, applies absent other persuasive evidence that the legislature intended to reject the rule in disputes under the Act.

**Contracts Law > Contract Interpretation > Severability**

**Contracts Law > Defenses > Illegal Bargains**

[HN15] Severance of a contract that is, in part, illegal, is not mandatory, and its application in an individual case must be informed by equitable considerations.

**Contracts Law > Contract Interpretation > Severability**

**Contracts Law > Defenses > Illegal Bargains**

[HN16] *Civ. Code*, § 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.

**Business & Corporate Law > Agency Relationships >**

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***Duties & Liabilities > General Overview***

***Contracts Law > Contract Interpretation > Severability***

***Contracts Law > Defenses > Illegal Bargains***

[HN17] The California Labor Commissioner is empowered to deny all recovery for services where the California Talent Agencies Act, *Lab. Code, § 1700 et seq.*, has been violated. 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 is not obligated to do so. The Labor Commissioner's power is tempered by the ability to apply equitable doctrines such as severance to achieve a more measured and appropriate remedy where the facts so warrant.

***Business & Corporate Law > Agency Relationships >***

***Duties & Liabilities > General Overview***

***Contracts Law > Contract Interpretation > Severability***

***Contracts Law > Defenses > Illegal Bargains***

[HN18] Ordinary rules of interpretation suggest *Civ. Code, § 1599*, applies fully to disputes under the California Talent Agencies Act, *Lab. Code, § 1700 et seq.* Nothing in the Act's text, its history, or the decisions interpreting it justifies the opposite conclusion.

***Contracts Law > Contract Interpretation > Severability***

***Contracts Law > Defenses > Illegal Bargains***

[HN19] In deciding whether severance of a contract is available, the 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.

***Contracts Law > Contract Interpretation > Severability***

***Contracts Law > Defenses > Illegal Bargains***

[HN20] While an undifferentiated compensation scheme may in some instances preclude severance, *Civ. Code, § 1608*, it does not represent a categorical obstacle to application of the severability doctrine.

***Business & Corporate Law > Agency Relationships >***

***Duties & Liabilities > General Overview***

***Contracts Law > Contract Interpretation > Severability***

***Contracts Law > Defenses > Illegal Bargains***

***Governments > State & Territorial Governments > Licenses***

[HN21] A personal manager who spends 99 percent of his or her time engaged in counseling a client and organizing the client's affairs is not insulated from the strictures of the California Talent Agencies Act, *Lab. Code, § 1700 et seq.*, if he or she spends one percent of his or her time procuring or soliciting; conversely, however, the one percent of the time the personal manager 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.

***Business & Corporate Law > Agency Relationships >***

***Duties & Liabilities > General Overview***

***Contracts Law > Contract Interpretation > Severability***

***Contracts Law > Defenses > Illegal Bargains***

***Governments > State & Territorial Governments > Licenses***

[HN22] With respect to a personal manager who solicits or procures employment for an actor without a talent agency license, no verbal formulation can precisely capture the full contours of the range of cases in which the severability doctrine 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 California Labor Commissioner and trial courts in the first instance.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

An entertainment company sued an actress for breach of oral contract, quantum meruit, false promise,

and unfair business practices, seeking to recover unpaid commissions. The parties had entered into an oral contract for the company to serve as the actress's personal manager. The trial court granted the actress's motion for summary judgment and invalidated the company's personal management contract with the actress as an illegal contract for unlicensed talent agency services, in violation of the Talent Agencies Act (*Lab. Code, § 1700 et seq.*). (Superior Court of Los Angeles County, No. BC290839, Rolf M. Treu and James C. Chalfant, Judges.) The Court of Appeal, Second Dist., Div. One, No. B179819, reversed in part, concluding that because the parties' agreement had the lawful purpose of providing personal management services that were unregulated by the act, and because the actress had not established that her employment contract for a television series was procured illegally, the possibility existed that the actress's obligation to pay the company a commission on the employment contract could be severed from any unlawful parts of the parties' management contract.

The Supreme Court affirmed the judgment of the Court of Appeal and remanded the case for further proceedings. The court held that the Talent Agencies Act applies to managers as well as agents, and that the act extends to individual incidents of procurement. While the Labor Commissioner is authorized to void manager-talent contracts *ab initio* for unlawful procurement, the commissioner also has discretion to apply the severability doctrine (*Civ. Code, § 1599*) to partially enforce such contracts. A genuine dispute of material fact existed over whether severability might apply to allow partial enforcement of the parties' contract. In return for providing an undifferentiated range of services, the company was to receive an undifferentiated right to a certain percentage of the actress's income stream. The undifferentiated compensation scheme was not a categorical obstacle to application of the severability doctrine. The court rejected the actress's argument that once the company solicited or procured employment, all of its other services became those of an unlicensed talent agency and were thus uncompensable. (Opinion [\*975] by Werdegar, J., with Kennard, Acting C. J., Baxter, Chin, Moreno, Corrigan, JJ., and McAdams, J.,\* concurring.)

\* Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Acting Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

## HEADNOTES

### CALIFORNIA OFFICIAL REPORTS HEADNOTES

**(1) Actors and Other Professional Performers § 1--Talent Agencies--Licensing Requirement.**--The Talent Agencies Act (*Lab. Code, § 1700 et seq.*) requires anyone who solicits or procures artistic employment or engagements for artists to obtain a talent agency license (*Lab. Code, §§ 1700.4, 1700.5*). 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 (*Lab. Code, §§ 1700.23-1700.47*). No separate analogous licensing or regulatory scheme extends to personal managers.

**(2) Actors and Other Professional Performers § 1--Talent Agencies--Licensing Requirement.**--*Lab. Code, § 1700.5*, provides that no person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner. 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 (*Lab. Code, § 1700*); 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 (*Lab. Code, § 1700.4, subd. (a)*).

**(3) Actors and Other Professional Performers § 1--Talent Agencies--Licensing Requirement--Personal Managers.**--The Talent Agencies Act (*Lab. Code, § 1700 et seq.*) 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 (*Lab. Code, § 1700.4, subd. (a)*). Any person who procures employment--any individual, any corporation, any manager--is a talent agency subject to regulation (*Lab. Code, §§ 1700, 1700.4, subd. (a)*). Consequently, a personal manager who solicits or procures employment for his or her artist-client is subject to and must abide by the act. [\*976]

**(4) Actors and Other Professional Performers § 1--**

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**Talent Agencies--Procurement of Employment--Incidental Incidents.**--The Talent Agencies Act (*Lab. Code, § 1700 et seq.*) extends to individual incidents of employment procurement.

**(5) Statutes § 11--Enactment--Single Subject Rule.**--The single subject rule is intended to prevent "logrolling" 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 that would not have been approved if divided into separate bills. In turn, the requirement that the single subject of a bill shall be expressed in its title is to prevent misleading or inaccurate titles so that legislators and the public are afforded reasonable notice of the contents of a statute.

**(6) Statutes § 11--Enactment--Single Subject Rule--Liberal Construction.**--The single subject rule is to be liberally construed to uphold proper legislation and not used to invalidate legitimate legislation. The Legislature may combine in a single act numerous provisions governing projects so related and interdependent as to constitute a single scheme, and provisions auxiliary to the scheme's execution may be adopted as part of that single package. The act's title need not contain either an index or an abstract of its provisions. The single subject rule is satisfied if the provisions themselves are cognate and germane to the subject matter designated by the title, and if the title intelligently refers the reader to the subject to which the act applies and suggests the field of legislation which the text includes.

**(7) Statutes § 11--Enactment--Single Subject Rule--Talent Agencies Act.**--The Talent Agencies Act (*Lab. Code, § 1700 et seq.*) and its title satisfy the single subject rule (*Cal. Const., art. IV, § 9*). The legislation's provisions pertain to a single subject, the comprehensive regulation of persons and entities that provide talent agency services. The title identifies that subject and specifically references the existing comprehensive regulations that are to be modified. The legislation defines talent agencies as those 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.

**(8) Actors and Other Professional Performers § 1--Talent Agencies--Regulation--Personal Managers.**--Personal managers are exempt from regulation under the Talent Agencies Act (*Lab. Code, §*

*1700 et seq.*) insofar as they do those things that personal managers do, but they are regulated under the act to the extent they stray into doing things that make one a talent agency under the act. [\*977]

**(9) Contracts § 13--Legality--Severability--Talent Agencies--Procurement of Employment--Partial Recovery of Fees--Legally Provided Services.**--Where an actress's personal manager engaged in unlawful procurement of employment for the actress in violation of the Talent Agencies Act (*Lab. Code, § 1700 et seq.*), the manager was not barred from any recovery of outstanding fees from the artist. The Labor Commissioner had the discretion to apply the doctrine of severability (*Civ. Code, § 1599*) to allow partial recovery of fees owed for legally provided services.

[*Cal. Forms of Pleading and Practice (2007) ch. 140, Contracts, § 140.24*; 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 449; 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 133.]

**(10) Contracts § 13--Legality--Severability.**--By its terms, *Civ. Code, § 1599*, applies 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.

**(11) Actors and Other Professional Performers § 1--Talent Agencies--Licensing Requirement--Procurement of Employment--Illegal Contract--Severability.**--Under ordinary rules of interpretation, *Civ. Code, § 1599*, and the Talent Agencies Act (*Lab. Code, § 1700 et seq.*) must be read 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 (*Lab. Code, §§ 1700.4, subd. (a), 1700.5*). The act provides no remedy for its violation, but neither does it repudiate the generally applicable and long-standing rule of severability. Hence, the severability rule of *Civ. Code, § 1599*, applies absent other persuasive evidence that the Legislature intended to reject the rule in disputes under the act.

**(12) Contracts § 13--Legality--Severability--Equitable Considerations.**--Severance of a contract that is, in part, illegal is not mandatory, and its application in an

individual case must be informed by equitable considerations.

**(13) Contracts § 13--Legality--Severability--Court's Power--Prevention of Inequitable Windfall--Preservation of Contractual Relationship.**--*Civ. Code, § 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. [\*978]

**(14) Actors and Other Professional Performers § 1--Talent Agencies--Labor Commissioner--Power to Void Entire Contract--Severance.**--The Labor Commissioner is empowered to deny all recovery for services where the Talent Agencies Act (*Lab. Code, § 1700 et seq.*) has been violated. But the power to so rule does not suggest a duty to do so in all instances. The commissioner is empowered to void contracts in their entirety, but is not obligated to do so. The commissioner's power is tempered by the ability to apply equitable doctrines such as severance to achieve a more measured and appropriate remedy where the facts so warrant.

**(15) Contracts § 13--Legality--Severability--Talent Agencies.**--Ordinary rules of interpretation suggest *Civ. Code, § 1599*, applies fully to disputes under the Talent Agencies Act (*Lab. Code, § 1700 et seq.*). Nothing in the act's text, its history, or the decisions interpreting it justifies the opposite conclusion.

**(16) Contracts § 13--Legality--Severability--Interests of Justice.**--In deciding whether severance of a contract is available, the 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.

**(17) Contracts § 13--Legality--Severability--Undifferentiated Compensation Scheme.**--While an undifferentiated compensation scheme may in some instances preclude severance (*Civ. Code, § 1608*), it is not a categorical obstacle to application of the severability doctrine.

**(18) Contracts § 13--Legality--Severability--Talent Agencies--Licensing Requirement--Substantial Procurement Activities--Recovery for Services.**--A personal manager who spends 99 percent of his or her time engaged in counseling a client and organizing the client's affairs is not insulated from the strictures of the Talent Agencies Act (*Lab. Code, § 1700 et seq.*) if he or she spends 1 percent of his or her time procuring or soliciting; conversely, however, the 1 percent of the time the personal manager 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 [\*979] 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.

**(19) Contracts § 13--Legality--Severability--Talent Agencies--Licensing Requirement--Procurement of Employment.**--With respect to a personal manager who solicits or procures employment for an actor without a talent agency license, no verbal formulation can precisely capture the full contours of the range of cases in which the severability doctrine 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.

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Law Offices of B. Paul Husband and B. Paul Husband for

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National Conference of Personal Managers, Inc., as Amicus Curiae on behalf of Plaintiff and Appellant.

Greines, Martin, Stein & Richland, Kent L. Richland, Barbara W. Ravitz and Tillman J. Breckenridge for Talent Managers Association as Amicus Curiae on behalf of Plaintiff and Appellant.

Alschuler Grossman Stein & Kahan, Dreier Stein & Kahan, Michael J. Plonsker and Daniel A. Fiore for Defendants and Respondents.

Rintala, Smoot, Jaenicke & Rees, William T. Rintala and Michael B. Garfinkel for Association of Talent Agents as Amicus Curiae on behalf of Defendants and Respondents.

Duncan W. Crabtree-Ireland, Laura Beedy Ritchie, Danielle S. Van Lier; Reich, Adell, Crost & Cvitan, Hirsch Adell, Laurence S. Zakson; Robert S. [\*980] Giolito; Rothner, Segall & Greenstone and Anthony R. Segall for Screen Actors Guild, Inc., American Federation of Television and Radio Artists, AFL-CIO, Directors Guild of America, Inc., and Writers Guild of America, West, Inc., as Amici Curiae on behalf of Defendants and Respondents.

Anne P. Stevason for the State Labor Commissioner as Amicus Curiae.

**JUDGES:** Opinion by Werdegar, J., Kennard, Acting C. J., Baxter, Chin, Moreno, Corrigan, and McAdams, JJ., concurring.

**OPINION BY:** Werdegar

## OPINION

[\*\*730] [\*743] **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.<sup>1</sup>

1 See Zelenski, *Talent Agents, Personal Managers, and Their Conflicts in the New Hollywood* (2003) 76 *So. Cal. L.Rev.* 979, 993-998 (hereafter *Conflicts in the New Hollywood*); Comment, *The Talent Agencies Act: Reconciling the Controversies Surrounding Lawyers, Managers, and Agents Participating in California's Entertainment Industry* (2001) 28 *Pepperdine L.Rev.* 381, 386 (hereafter *Talent Agencies Act*); Comment, *Regulation of Attorneys Using California's Talent Agencies Act: A Tautological Approach to Protecting Artists* (1992) 80 *Cal. L.Rev.* 471, 481-484 (hereafter *Regulation of Attorneys*). Additionally, in connection with the petition for review in this case, this court has received dozens of letters from personal managers working in the entertainment industry who suggest they owe a fiduciary duty to their clients to procure employment.

[\*\*744] 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 (*Lab. Code, § 1700 et seq.*) (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 [\*981] 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 [\*\*\*731] 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.<sup>2</sup> The Labor Commissioner agreed. The commissioner found Marathon had procured various engagements for Blasi, including a role in the television series *Strong Medicine*. Concluding that one or more acts of solicitation and procurement by Marathon violated the Act, the commissioner voided the parties' contract *ab initio* and barred Marathon from recovery.

<sup>2</sup> The Labor Commissioner has original and exclusive jurisdiction over issues arising under the Act. (*Styne v. Stevens* (2001) 26 Cal.4th 42, 54-56 [109 Cal. Rptr. 2d 14, 26 P.3d 343]; *Lab. Code*, § 1700.44, *subd. (a)*.) All further undesignated statutory references are to the Labor Code.

Marathon appealed the Labor Commissioner's ruling to the superior court for a trial de novo. (See § 1700.44, *subd. (a)*; *Buchwald v. Katz* (1972) 8 [\*982] Cal.3d 493, 500-501 [105 Cal. Rptr. 368, 503 P.2d 1376].) 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 [\*\*745] 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 (*Civ. Code*, § 1599), 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 (*Yoo v. Robi* (2005) 126 Cal.App.4th 1089 [24 [\*\*\*732] Cal. Rptr. 3d 740]; *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246 [48 Cal. Rptr. 2d 437]) and in some cases expressly refused to sever the contracts (*Yoo*, at pp. 1104-1105).

We granted review to address the applicability of the Act to personal managers and the availability of severance under the Act. [\*983]

## DISCUSSION

## I. Background

## A. Agents and Managers

In Hollywood, talent agents act as intermediaries between the buyers and sellers of talent. (*Regulation of Attorneys, supra, 80 Cal. L.Rev. at p. 479.*) 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. (Birdthistle, *A Contested Ascendancy: Problems with Personal Managers Acting as Producers* (2000) 20 *Loyola L.A. Ent. L.Rev.* 493, 502-503 (hereafter *Contested Ascendancy*); *Regulation of Attorneys, at p. 479.*) Generally speaking, an agent's focus is on the deal: on negotiating numerous short-term, project-specific engagements between buyers and sellers. (*Conflicts in the New Hollywood, supra, 76 So.Cal. L.Rev. at p. 981.*)

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. (*Regulation of Attorneys, supra, 80 Cal. L.Rev. at p. 487.*) 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. (*Conflicts in the New Hollywood, supra, 76 So.Cal. L.Rev. at pp. 989-990; Contested Ascendancy, supra, 20 Loyola L.A. Ent. L.Rev. at p. 520.*) 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. (Screen Actors Guild, Codified Agency Regs., rule 16(g); American Federation of Television and Radio Artists, Regs. Governing Agents, rule 12-C; *Matthau v. Superior Court* (2007) 151 *Cal.App.4th* 593, 596-597 [60 *Cal. Rptr. 3d* 93]; *Conflicts in the New Hollywood, at pp. 989-990; Contested Ascendancy, at pp. 520-521.*) 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. (*Conflicts in the New Hollywood, at p. 981; Contested Ascendancy, at p. 503.*)

Personal managers, in contrast, are not franchised by the guilds. (*Conflicts in the New Hollywood, supra, 76 So.Cal. L.Rev. at p. 991; Contested Ascendancy, supra, 20 Loyola L.A. Ent. L.Rev. at p. 522.*) They typically accept a higher risk clientele and offer a much broader range of services, focusing on [\*984] [\*\*746] 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. (*Waisbren v. Peppercorn Productions, Inc., supra, 41 Cal.App.4th at pp. 252-253; Rep. of Cal. Entertainment Com. (Dec. 2, 1985) p. 9* (hereafter *Entertainment Commission Report*); *Regulation of Attorneys, supra, 80 [\*\*\*733] Cal. L.Rev. at pp. 482-483.*) "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." (*Park v. Deftones* (1999) 71 *Cal.App.4th* 1465, 1469-1470 [84 *Cal. Rptr. 2d* 616].) 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. (*Conflicts in the New Hollywood, at p. 992; Talent Agencies Act, supra, 28 Pepperdine L.Rev. at p. 383; Contested Ascendancy, at pp. 508, 526-527; Regulation of Attorneys, at p. 483.*)

## 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. (*Buchwald v. Superior Court* (1967) 254 *Cal. App. 2d* 347, 357 [62 *Cal. Rptr.* 364]; *Talent Agencies Act, supra, 28 Pepperdine L.Rev. at p. 387; Regulation of Attorneys, supra, 80 Cal. L.Rev. at p. 493.*) 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; *Regulation of Attorneys*, at p. 493.) Exploitation of artists by representatives has remained the Act's central concern through subsequent incarnations to the present day. (See *Styne v. Stevens*, *supra*, 26 Cal.4th at p. 50.)

In 1978, the Legislature considered establishing a separate licensing scheme for personal managers. (See Assem. Bill No. 2535 (1977-1978 Reg. Sess.) as amended May 1, 1978, § 41; Assem. Com. on Labor, Employment & Consumer Affairs, Analysis of Assem. Bill No. 2535 (1977-1978 Reg. Sess.) as amended May 1, 1978, pp. 1-4; Entertainment [\*985] Com. Rep., *supra*, at p. 8.) 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. (Stats. 1978, ch. 1382, pp. 4575-4583.)

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. (Former § 1700.44, as enacted by Stats. 1982, ch. 682, § 3, p. 2815; Entertainment Com. Rep., *supra*, at pp. 8, 38-39.) 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." (Former §§ 1701-1704, added by Stats. 1982, ch. 682, § 6, p. 2816, repealed by its own [\*\*\*734] terms Jan. 1, 1986.) 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 [\*\*747] changes. (Stats. 1986, ch. 488, pp. 1804-1808; Entertainment Com. Rep., at pp. 22-34; Sen. Com. on Industrial Relations, Analysis of Assem. Bill No. 3649 (1985-1986 Reg. Sess.) as amended Apr. 15, 1986, p. 5 [bill would implement Entertainment Commission's recommendations "in full"].) So the Act has stood, with minor modifications, for the last 20 years.

(1) In its present incarnation, [HN1] the Act requires anyone who solicits or procures artistic employment or engagements for artists<sup>3</sup> to obtain a talent agency license. (§§ 1700.4, 1700.5.) 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. (§§ 1700.23-1700.47.) No separate analogous licensing or regulatory scheme extends to personal managers. (*Waisbren v. Peppercorn Productions, Inc.*, *supra*, 41 Cal.App.4th at p. 252.)

3 [HN2] " '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.)*)

[\*986]

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.

(2) We begin with the language of the Act. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 927 [22 Cal. Rptr. 3d 530, 102 P.3d 915].) [HN3] 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 "[t]alent 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)).

[HN4] (3) 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. (§§ 1700, 1700.4, subd. (a).) [\*\*\*735] 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*, supra, 71 Cal.App.4th at pp. 1470-1471; *Waisbren v. Peppercorn Productions, Inc.*, supra, 41 Cal.App.4th at p. 253; see also *Buchwald v. Superior Court*, supra, 254 Cal. App. 2d at pp. 354-355 [deciding same issue under the Act's predecessor, the Artists' Managers Act].) <sup>4</sup> The [\*\*\*748] Labor [987] Commissioner, whose interpretations of the Act we may look to for guidance (see *Styne v. Stevens*, supra, 26 Cal.4th at p. 53; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8 [78 Cal. Rptr. 2d 1, 960 P.2d 1031]), has similarly uniformly applied the Act to personal managers. (See, e.g., *Sheridan v. Yoches, Inc.* (Cal.Lab.Com., Sept. 4, 2007) TAC No. 21-06, pp. 2, 13-20; *Jones v. La Roda Group* (Cal.Lab.Com., Dec. 30, 2005) TAC No. 35-04, pp. 9-11; *Hall v. X Management, Inc.* (Cal.Lab.Com., Apr. 24, 1992) TAC No. 19-90, pp. 28-35.)<sup>5</sup>

<sup>4</sup> The Legislature clearly agreed with this understanding of the Act. In 1978, it considered but ultimately rejected a special exemption that would have specifically authorized personal managers to procure employment for artists already represented by licensed talent agencies. (See Assem. Bill No. 2535 (1977-1978 Reg. Sess.) as amended May 10, 1978 [deleting proposal to enact new § 1708, which would have codified special exemption].) In 1986, it made permanent *section 1700.44, subdivision (d)*, which creates a safe harbor for an unlicensed person or entity to "act in conjunction with, and at the

request of, a licensed talent agency in the negotiation of an employment contract." Both the originally contemplated exemption and the ultimately adopted safe harbor provision would have been largely superfluous if unlicensed entities were already free to procure employment, so long as they did not label themselves as talent agencies. (See *Waisbren v. Peppercorn Productions, Inc.*, supra, 41 Cal.App.4th at p. 259.)

<sup>5</sup> While we do not place great weight on legislative inaction, we note as well that the Legislature in 1982 considered but ultimately rejected an amendment to the Act that would have expressly exempted a particular class of personal managers--an amendment that would have been wholly superfluous if, as Marathon argues, they were already exempt. (Compare Assem. Bill No. 997 (1981-1982 Reg. Sess.) as amended Aug. 17, 1982 [including exemption] with Assem. Bill No. 997 (1981-1982 Reg. Sess.) as amended Aug. 26, 1982 [deleting exemption].)

(4) 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* (1993) 13 Cal.App.4th 616, 628 [16 Cal. Rptr. 2d 496] [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." (*Styne v. Stevens*, supra, 26 Cal.4th at p. 51, citing *Park v. Deftones*, supra, 71 Cal.App.4th 1465, and *Waisbren v. Peppercorn Productions, Inc.*, supra, 41 Cal.App.4th 246.) <sup>6</sup> In [\*\*\*736] agreement with these decisions, the Labor Commissioner has uniformly interpreted the Act as extending to incidental procurement. (See, e.g., *Gittelman v. Karolat* (Cal.Lab.Com., July 19, 2004) TAC No. 24-02, p. 14; *Kilcher v. Vainshtein* (Cal.Lab.Com., May 30, 2001) TAC No. 02-99, pp. 20-21; *Damon v. Emler* (Cal.Lab.Com., Jan. 12, [988] 1982) TAC No. 36-79, p. 4.) The Labor Commissioner's views are entitled to substantial weight if not clearly erroneous (*Styne v.*

*Stevens*, at p. 53); accordingly, we likewise conclude[HN5] the Act extends to individual incidents of procurement.

6 Post-*Styne*, the Courts of Appeal have arrived at unanimity on this question. In *Yoo v. Robi*, *supra*, 126 Cal.App.4th 1089, the same court that had issued *Wachs v. Curry*, *supra*, 13 Cal.App.4th 616, effectively repudiated its prior interpretation, noting with approval that courts have "unanimously denied ... recovery to personal managers even when the majority of the managers' activities did not require a talent agency license and the activities which did require a license were minimal and incidental." (*Yoo*, at p. 1104, fn. omitted.)

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. (See *Cal. Const.*, art. IV, § 9; *Brunson v. City of Santa Monica* (1915) 27 Cal.App. 89, 92-93 [148 P. 950] [act whose title limits its scope to public officer liability may not constitutionally be interpreted to alter public municipal corporation liability].) Article IV, section 9 sets out this state's single-subject rule and, as relevant here, requires: [HN6] "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not in its title, only the part not expressed is void." From this, Marathon reasons that (1) the Act's title omits reference to regulation of [\*\*749] personal managers, and (2) to the extent it purports to regulate personal managers, it is thus void.

(5) This is a misreading of the constitutional provision and the 1978 legislation. [HN7] 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." (*Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1096 [240 Cal. Rptr. 569, 742 P.2d 1290].) In turn, "the requirement that the single subject of a bill shall be expressed in its title is to prevent misleading or inaccurate titles so that legislators and the public are afforded reasonable notice of the contents of a statute." (*Ibid.*; see also *Homan v. Gomez* (1995) 37 Cal.App.4th 597, 600 [43 Cal. Rptr. 2d 647]

[rule intended to prevent unrelated provisions from sliding through "unnoticed and unchallenged"]; *Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal. App. 3d 1187, 1196 [219 Cal. Rptr. 664] [rule intended to "prevent legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another"].)

(6) However,[HN8] the single-subject rule "is to be liberally construed to uphold proper legislation and not used to invalidate legitimate legislation." (*San Joaquin Helicopters v. Department of Forestry* (2003) 110 Cal.App.4th 1549, 1556 [3 Cal. Rptr. 3d 246]; accord, *Harbor v. Deukmejian*, *supra*, 43 Cal.3d at pp. 1097-1098; *Metropolitan Water Dist. v. Marquardt* (1963) 59 Cal.2d 159, 172-173 [28 Cal. Rptr. 724, 379 P.2d 28]; *Evans v. Superior Court* (1932) 215 Cal. 58, 62 [8 P.2d 467].) The Legislature may combine in a single act numerous provisions "governing projects so related and interdependent as to constitute a single scheme," "and provisions auxiliary to the [989] scheme's execution may be adopted as [\*\*\*737] part of that single package. (*Harbor*, at p. 1097, quoting *Evans*, at p. 62.) The Act's title "need not contain either an index or an abstract of its provisions. The constitutional mandate [citation] is satisfied if the provisions themselves are cognate and germane to the subject matter designated by the title, and if the title intelligently refers the reader to the subject to which the act applies, and suggests the field of legislation which the text includes." (*Powers Farms v. Consolidated Irr. Dist.* (1941) 19 Cal.2d 123, 130 [119 P.2d 717]; see also *City of Whittier v. Dixon* (1944) 24 Cal.2d 664, 666 [151 P.2d 5] [to satisfy the Constitution, title need only "contain[] a reasonably intelligible reference to the subject to which the legislation is addressed"]; *Lyons v. Municipal Court* (1977) 75 Cal. App. 3d 829, 841 [142 Cal. Rptr. 449].)

[HN9] (7) 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. <sup>7</sup> The legislation defines talent agencies as those 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.

7 The title of the legislation is: "An act to amend Section 9914 of, to repeal Section 9902.8 of, and to repeal Chapter 21.5 (commencing with Section 9999) of Division 3 of, the Business and Professions Code, and to amend the heading of Chapter 4 (commencing with Section 1700) of Part 6 of Division 2 of, to amend Sections 1700.2, 1700.3, 1700.4, 1700.5, 1700.6, 1700.7, 1700.9, 1700.11, 1700.12, 1700.13, 1700.15, 1700.16, 1700.17, 1700.19, 1700.20a, 1700.20b, 1700.23, 1700.24, 1700.25, 1700.26, 1700.27, 1700.28, 1700.30, 1700.31, 1700.32, 1700.33, 1700.34, 1700.35, 1700.36, 1700.37, 1700.38, 1700.39, 1700.40, 1700.41, 1700.43, and 1700.45 of, to add Section 1700.47 of, and to repeal and add Section 1700.10 of, the Labor Code, *relating to talent agencies.*" (Stats. 1978, ch. 1382, p. 4575, italics added.)

(8) 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. (See Assem. Bill No. 2535 (1977-1978 Reg. Sess.) as amended May [\*\*750] 10, 1978, pp. 16-18 [deleting new licensure provisions].) The consequence of this conscious omission is not, as Marathon contends, that personal managers are therefore exempt from regulation. Rather, [HN10] 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.<sup>8</sup>

8 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." (Entertainment Com. Rep., *supra*, at pp. 20-21.)

[\*990]

### 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 [\*\*\*738] 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 (*Buchwald v. Katz, supra, 8 Cal.3d at p. 501*), and (2) neither Blasi's separate statement of undisputed material facts nor the evidence supporting it establishes 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*

(9) 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? [\*991]

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.

(10) 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: [HN11] "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.*) [HN12] 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 [\*\*751] portion of a parties' contract that feasibly may be severed.<sup>9</sup>

9 *Civil Code section 1598* codifies the companion principle for when severability is infeasible: [HN13] "Where a contract has but a single object, and such object is unlawful, whether in whole or in part ... , the entire contract is void."

[HN14] (11) 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. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 15, fn. 11 [50 Cal. Rptr. 3d 585, 145 P.3d 462]; *People v. Garcia* (1999) 21 Cal.4th 1, 6 [\*\*\*739] [87 Cal. Rptr. 2d 114, 980 P.2d 829].) 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. (*Lab. Code*, §§ 1700.4, subd. (a), 1700.5.) 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 Labor Commissioner 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 [\*992] retain or seek commissions based on severability principles without expressly citing *Civil Code section 1599*.<sup>10</sup>

10 See, e.g., *Danielewski v. Agon Investment Co.* (Cal.Lab.Com., Oct. 28, 2005) TAC No. 41-03, pages 24-27 (partially enforcing agreement to the extent it involved loan repayment and invalidating it to the extent it involved payment of commissions for unlawful services); *Gittelman v. Karolat*, *supra*, TAC No. 24-02, pages 14-16 (where manager engaged in unlawful procurement before 1997 but not thereafter, holding agreement unenforceable through 1997, but allowing manager to seek commissions earned thereafter); *Cuomo v. Atlas/Third Rail Management, Inc.* (Cal.Lab.Com., Jan. 3, 2003) TAC No. 21-01, pages 13-14 (voiding contract only for the period of time after manager commenced acting as an unlicensed talent agency and denying disgorgement of commissions for earlier lawful services); *Anderson v. D'Avola* (Cal.Lab.Com., Feb. 24, 1995) TAC No. 63-93, pages 11-12 (where manager acted as an unlicensed talent agency in procuring role, denying right to recover commissions for that role, but preserving right to recover commissions for personal manager services in connection with later role lawfully procured by Anderson's licensed talent agency); *Bank of America Nat. Trust & Sav. Assn. v. Fleming* (Cal.Lab.Com., Jan. 14, 1982) No. 1098 ASC MP-432, page 16 (ordering return of 20 percent of compensation based on a determination respondent spent 20 percent of time acting as an unlicensed talent agency). More recent Labor Commissioner decisions appear to take a more stringent view toward the availability of

42 Cal. 4th 974, \*992; 174 P.3d 741, \*\*751;  
70 Cal. Rptr. 3d 727, \*\*\*739; 2008 Cal. LEXIS 805

severance. We address these decisions *post* at pages 995-996.

(12) Until two years ago, Court of Appeal decisions under the Act had neither accepted nor repudiated the general applicability of the severability doctrine.<sup>11</sup> In 2005, in *Yoo v. Robi, supra*, 126 Cal.App.4th 1089, however, the Court of Appeal considered whether to [\*\*\*740] apply *Civil Code section 1599* to allow a personal manager to seek commissions for lawfully provided services. It noted, correctly, that [HN15] severance is not mandatory and its application in an individual [\*\*752] case must be informed by equitable considerations. (*Yoo, at p. 1105.*) [HN16] (13) *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. (*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 123-124 [99 Cal. Rptr. 2d 745, 6 P.3d 669].*) The *Yoo* Court of Appeal concluded the windfall for the artist, Robi, was not so great as to warrant severance.

11 The same is true of our own decisions. In *Styne v. Stevens, supra*, 26 Cal.4th at page 51, we correctly noted in dicta that "an unlicensed person's contract with an artist to provide the services of a talent agency is illegal and void." We did not address whether severance could ever apply to contracts with artists to provide personal management services.

In *Chiba v. Greenwald (2007) 156 Cal.App.4th 71 [67 Cal. Rptr. 3d 86]*, 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<sup>12</sup> 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 [\*\*993] 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. (*Chiba, at pp. 81-82.*)

12 *Marvin v. Marvin (1976) 18 Cal.3d 660 [134 Cal. Rptr. 815, 557 P.2d 106]*.

Neither *Chiba* nor *Yoo v. Robi, supra*, 126 Cal.App.4th 1089, 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. Thus, for example, in *Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal.4th 119 [70 Cal. Rptr. 2d 304, 949 P.2d 1]* (*Birbrower*), a law firm licensed in New York, but not California, provided legal services in both states. The trial court and Court of Appeal invalidated the entire attorney fee agreement, but we reversed in part, explaining that under the doctrine of severability the firm might be able to recover the fees it had lawfully earned by providing services in New York, notwithstanding its unlicensed provision of services in California. (*Id. at pp. 138-139.*)<sup>13</sup> Likewise, in *Lindenstadt v. Staff Builders, Inc. (1997) 55 Cal.App.4th 882 [64 Cal. Rptr. 2d 484]*, an individual assisted a company in finding home health care businesses to acquire. The individual may have acted only as a finder with regard to some businesses, but may have crossed the line into providing [\*\*\*741] broker services without a real estate broker license in other instances. The Court of Appeal explained that the provision of unlicensed services did not bar all relief; on remand, the unlicensed individual could still recover for those services that did not require a broker's license. (*Id. at p. 894; see also Levinson v. Boas (1907) 150 Cal. 185, 194 [88 P. 825]* [severance doctrine applies to contract with unlicensed pawnbroker]; *Broffman v. Newman (1989) 213 Cal. App. 3d 252, 261-262 [261 Cal. Rptr. 532]* [unlicensed real estate broker may defend entitlement to compensation for services for which no license is required]; *Southfield v. [\*\*994] Barrett (1970) 13 Cal. App. 3d 290, 294 [91 Cal. Rptr. 514]* [under equitable principles, unlicensed commission merchant entitled to partial recovery under contract].)

13 *Blasi* distinguishes *Birbrower* on the ground that there the basis for differentiating services for which recovery could be had from those for which it could not was jurisdictional. This is a distinction without a difference. We recognized in *Birbrower* a point equally applicable here: In the absence of an express contrary legislative determination, the equitable principles of

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severability may be applied to contracts where some portion of the services provided was unlicensed and hence unlawful. (*Birbrower, supra*, 17 Cal.4th at pp. 138-139; cf. *Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 151 [308 P.2d 713] [*Bus. & Prof. Code*, § 7031 "represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties" and forecloses severance of those contracts to which it applies].)

[\*\*753] 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.

(14) We are not persuaded. The passage acknowledges what all parties recognize—that the Labor Commissioner has the "power" to void contracts, [\*995] that [HN17] 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 [\*\*\*742] 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*, 156 Cal.App.4th 71; *Yoo v. Robi, supra*, 126 Cal.App.4th 1089; *Park v. Deftones, supra*, 71 Cal.App.4th 1465; *Waisbren v. Peppercorn Productions, Inc., supra*, 41 Cal.App.4th 246.) 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.<sup>14</sup>

14 For this same reason, we see no basis for concluding the Legislature has acquiesced in an interpretation of the Act under which severability

is precluded. Until 2005, the issue had never been discussed in the Courts of Appeal.

[\*\*754] 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. (See, e.g., *Cher v. Sammeth* (Cal.Lab.Com., July 17, 2000) TAC No. 17-99, pp. 12-13; *Sevano v. Artistic Productions, Inc.* (Cal.Lab.Com., Mar. 20, 1997) TAC No. 8-93, pp. 23-25.) 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 (see *ante*, at pp. 991-992) 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. (*Smith v. Harris* (Cal.Lab.Com., Aug. 27, 2007) TAC No. 53-05, pp. 16-17; *Cham v. Spencer/Cowings Entertainment, LLC* (Cal.Lab.Com., July 30, 2007) [\*996] TAC No. 19-05, pp. 17-18.) The weight accorded agency adjudicatory rulings such as these varies according to the validity of their reasoning and their overall persuasive force. (*Yamaha Corp. of America v. State Bd. of Equalization, supra*, 19 Cal.4th at pp. 12-15.) 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. And any view that it would be better policy if the Act stripped the Labor Commissioner (and the superior [\*\*\*743] 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 the Labor Commissioner nor we 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.

(15) In sum, the Legislature has not seen fit to specify the remedy for violations of the Act. [HN18] 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?

[HN19] (16) In deciding whether severance is available, we have explained "[t]he overarching inquiry is whether 'the interests of justice ... would be furthered' ' by severance." (*Armendariz v. Foundation Health Psychcare Services, Inc., supra*, 24 Cal.4th at p. 124.) "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." (*Ibid.*; accord, *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074 [130 Cal. Rptr. 2d 892, 63 P.3d 979].) [\*997]

[\*\*755] 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.

(17) 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. In *Birbrower*, we dealt with both fixed fee and contingency fee arrangements, and nothing in the nature of the latter stood as an obstacle to application of severability. We directed the trial court to determine on remand, if it determined a partially valid agreement existed, what value should be attributed to legally provided services and what to illegally provided services. (*Birbrower*, *supra*, 17 Cal.4th at pp. 139-140.) [HN20] While an undifferentiated compensation scheme may in some instances preclude severance (see *Civ. Code*, § 1608; *Selten v. Hyon* (2007) 152 Cal.App.4th 463, 471 [60 Cal. Rptr. 3d 896]), *Birbrower* demonstrates that it does not represent a categorical obstacle to application [\*\*\*744] of the doctrine.<sup>15</sup> Accordingly, we may not affirm summary judgment on this basis.

15 Other courts have likewise recognized that severability may apply, so long as the service provider contributes lawful consideration wholly independent of the illegal services, without regard to whether payment was allocated in advance between the lawful and unlawful services. (E.g., *Whorton v. Dillingham* (1988) 202 Cal. App. 3d 447, 452-454 [248 Cal. Rptr. 405] [applying severance where the plaintiff alleged a *Marvin* agreement based on both sexual services and chauffeur, bodyguard, secretarial, and business services].)

(18) 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. [HN21] 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 [\*998] 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. (See *Lindenstadt v. Staff Builders, Inc.*, *supra*, 55 Cal.App.4th at p. 894.)

(19) Inevitably, [HN22] 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 [\*\*756] 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. (See Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1359 (1989-1990 Reg. Sess.) as amended May 1, 1989, p. 2 [decrying absence of effective regulatory and enforcement mechanisms in the wake of the Entertainment Commission's inability to devise an "equitable civil or criminal penalty system"].) 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. (See Assem. Labor and Employment Com., Republican Analysis of Sen. Bill No. 1359 (1989-1990 Reg. Sess.) as amended May 1, [\*\*\*745] 1989 [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

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unwieldy instrument. It is of little use to unestablished artists, who it appears may legitimately fear blacklisting (*Talent Agencies Act, supra, 28 Pepperdine L.Rev. at p. 402; Contested Ascendancy, supra, 20 Loyola L.A. Ent. L.Rev. at p. 517*), 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 (e.g., *Kilcher v. Vainshtein, supra, TAC No. 02-99; Contested Ascendancy, at p. 517*). [\*999]

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.

Kennard, Acting C. J., Baxter, J., Chin, J., Moreno, J., Corrigan, J., and McAdams, J.,\* concurred.

Appellant's petition for a rehearing was denied March 12, 2008, and the opinion was modified to read as printed above. George, C. J., and Moreno, J., did not participate therein.

\* Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Acting Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

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Special Hearing Officer for the Labor Commissioner

9 BEFORE THE LABOR COMMISSIONER  
10 OF THE STATE OF CALIFORNIA

11 MICHAEL NUTTALL,

12 Petitioner,

13 vs.

14 BOBBY JUAREZ, aka ROB JUAREZ, aka  
15 ROB G. JUAREZ,

16 Respondent.

CASE NO.: TAC-22711

DETERMINATION OF  
CONTROVERSY

17 The above-captioned matter, a petition to determine controversy under Labor Code  
18 §1700.44, came on regularly for hearing on June 13, 2012 in Los Angeles, California,  
19 before the undersigned attorney for the Labor Commissioner assigned to hear this case.  
20 Petitioner MICHAEL NUTTALL (hereinafter "petitioner") appeared personally and  
21 represented himself. Respondent BOBBY JUAREZ, aka ROB JUAREZ, aka ROB G.  
22 JUAREZ (hereinafter "respondent") did not appear; however, attorney SURESH C.  
23 PATHAK appeared on behalf of respondent, as his counsel.  
24

25 This proceeding arises out of the Petition to Determine Controversy filed by  
26 petitioner with the Labor Commissioner on May 9, 2011. The petition alleges that  
27 respondent entered into a representation agreement with petitioner, pursuant to which  
28

1 respondent agreed to act and acted as an unlicensed talent agent in violation of Labor  
2 Code section 1700.5, a provision of the Talent Agencies Act (TAA), Labor Code section  
3 1700 et seq. The petition seeks a declaration that the contract is void and unenforceable,  
4 and an order requiring respondent to repay all of the commissions collected by respondent  
5 under the contract during the year preceding the filing of the petition. Due consideration  
6 having been given to the evidence presented at the hearing and to the documents and  
7 other papers on file in this proceeding, the Labor Commissioner now renders the  
8 following decision.

9  
10 **FINDINGS OF FACT**

11  
12 1. Petitioner is a singer and musician. He is the founding member and  
13 head of the band When In Rome.

14  
15 2. Petitioner met Respondent in 2006. At the time, Respondent offered  
16 to book shows and engagements for Petitioner and his band, and to act as their agent.

17  
18 3. Respondent operated under the name The Boss Booking Agency,  
19 and his practice was to book engagements on behalf of several bands together as a  
20 package deal.

21  
22 4. Respondent offered to provide his services as an agent for a  
23 commission of 15% of all bookings obtained for Petitioner and the band. Thereafter,  
24 Petitioner entered into an oral contract hiring Respondent as his agent on the terms  
25 specified.

26  
27 5. Respondent acted as Petitioner's agent, booking shows for Petitioner  
28

1 and the band, from 2006 until sometime in February, 2011, when the relationship ended.  
2 During this period, in accordance with the parties' contract, Respondent received a  
3 commission of 15% of the gross amount paid on each of the engagements that  
4 Respondent was able to secure for Petitioner and the band.

5  
6 6. Throughout the period that he acted as Petitioner's agent,  
7 Respondent was not licensed as a "talent agency" under the provisions of the TAA.

8  
9 7. Apart from acting as Petitioner's agent, Respondent also became a  
10 member of the When In Rome band. For his services as a drummer with the band,  
11 Respondent was paid a certain amount of monetary compensation for each live  
12 performance, in the same manner as the other band members. This amount, which was  
13 specifically determined by Petitioner for each performance, was separate and distinct  
14 from the 15% of the gross that Respondent received as an agent for each booking.

15  
16 8. Between May 1, 2010 and September 18, 2010, Respondent obtained  
17 11 separate engagements for Petitioner and the band. The gross total amount paid by the  
18 different venues for the 11 bookings was \$21,000.00, and from this amount, respondent  
19 collected and retained commissions totaling \$3,125.00

20  
21 9. In his Response to the Petition to Determine Controversy filed in this  
22 case, Respondent alleges facts which constitute an admission of the basic facts recited  
23 above.

24  
25 **LEGAL ANALYSIS**

26  
27 1. Labor Code section 1700.5 provides in relevant part as follows:

1 No person shall engage in or carry on the occupation of a talent agency  
2 without first procuring a license therefor from the Labor Commissioner.

3  
4 2. Under Labor Code section 1700.4, subdivision (a), "[t]alent agency"  
5 is defined in relevant part as follows:

6 "Talent agency" means a person or corporation who engages in the  
7 occupation of procuring, offering, promising, or attempting to procure  
8 employment or engagements for an artist or artists, except that the activities  
9 of procuring, offering, or promising to procure recording contracts for an  
10 artist or artists shall not of itself subject a person or corporation to  
11 regulation and licensing under this chapter.

12 3. Labor Code section 1700.4, subdivision (b) defines "[a]rtists" as  
13 follows:

14 "Artists" means . . . musical artists, . . . composers, lyricists, arrangers, . .  
15 .and other artists and persons rendering professional services in motion  
16 picture, theatrical, radio, television and other entertainment enterprises.

17 4. In this case, it is clear Petitioner was an artist within the meaning of  
18 section 1700.4, subdivision (a).

19  
20 5. In addition, it is clear that here Respondent engaged in the  
21 occupation of a talent agency without first procuring a license. During the entire period  
22 that Respondent represented Petitioner as an agent, Respondent was plainly and  
23 indisputably engaged in the occupation of procuring engagements for Petitioner and his  
24 band and of offering and attempting to procure such engagements. Respondent carried on  
25 these activities without being licensed as a talent agency, and therefore his conduct was in  
26 direct violation of the prohibition on unlicensed activities contained in Labor Code  
27 section 1700.5.  
28

1           6.     When a person contracts to act as a talent agent without first having  
2 obtained a talent agency license as required by the TAA, the contract that has been  
3 entered into is illegal, void, and unenforceable. "Since the clear object of the Act is to  
4 prevent improper persons from becoming [talent agents] and to regulate such activity for  
5 the protection of the public, a contract between an unlicensed [talent agent] and an artist  
6 is void." (*Buchwald v. Superior Court* (1967) 254 Cal.App. 2d 347, 351.).  
7

8           7.     As recognized in *Marathon Entertainment, Inc. v. Blasi* (2008) 42  
9 Cal.4th 974, in some cases there may be a basis for severing the illegal portions of a  
10 contract violative of the TAA's licensure requirements from the other parts of the  
11 contract. However, this will be permissible only where there are both illegal and legal  
12 aspects to the contract and where the two aspects can be properly severed in accordance  
13 with the legal standards governing application of the severance doctrine. In the present  
14 case, there are absolutely no legal aspects to the representation contract that the parties  
15 entered into and that Petitioner seeks to have declared void. The contract was concerned  
16 exclusively with compensating respondent for the illegal activity of procuring  
17 engagements for Petitioner and his band without being licensed as a talent agent. As a  
18 consequence, the severance doctrine cannot apply and does not apply in this case.  
19

20           8.     Petitioner seeks to recover the \$3,125.00 in commissions paid to  
21 respondent during the period May 1, 2010 through September 18, 2010. Since the funds  
22 were collected pursuant to an illegal and void contract, Respondent cannot retain the  
23 money, and Petitioner is entitled to an order directing restitution of the illegally obtained  
24 sum of \$3,125.00.  
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**ORDER**

For the reasons set forth above, **IT IS HEREBY ORDERED** as follows:

1. The contract between Petitioner and Respondent is declared to be illegal, void and unenforceable, and Petitioner is found to be entitled to restitution, as hereinbelow specified, of the funds illegally collected by Respondent.

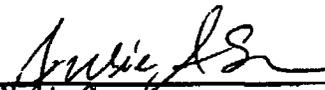
2. Respondent BOBBY JUAREZ, aka ROB JUAREZ, aka ROB G. JUAREZ shall pay to petitioner MICHAEL NUTTALL the sum of \$3,125.00, together with interest thereon at the rate of 10% per annum from September 18, 2010 in the amount of \$591.62, for a total of \$3,716.62.

Dated: 9-7-12

  
William A. Reich  
Special Hearing Officer

Adopted:

Dated: 9-11-12

  
Julie A. Su  
State Labor Commissioner





Caution

As of: Aug 31, 2016

**DAVE PARK, Plaintiff and Appellant, v. DEFTONES et al., Defendants and Respondents.**

**No. B124598.**

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,  
DIVISION TWO**

*71 Cal. App. 4th 1465; 84 Cal. Rptr. 2d 616; 1999 Cal. App. LEXIS 463; 99 Cal. Daily Op. Service 3447; 99 Daily Journal DAR 4407*

**May 11, 1999, Decided**

**SUBSEQUENT HISTORY:** [\*\*\*1] Review denied, July 28, 1999, Reported at: *1999 Cal. LEXIS 5248*.

**PRIOR HISTORY:** APPEAL from a judgment of the Superior Court of Los Angeles County. Super. Ct. No. BC158457. Emilie H. Elias, Commissioner.

**DISPOSITION:** The judgment appealed from is affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant sought review of judgment from the Superior Court of Los Angeles County (California) which granted summary judgment to respondents in appellant's action for breach of contract and intentional interference with contractual relations. Summary judgment was granted on ground that the management contract between appellant and respondent music group was void because appellant violated the Talent Agencies Act, *Cal. Lab. Code § 1700 et seq.*

**OVERVIEW:** Respondent music group terminated appellant's contract as personal manager of their group. Appellant brought an action for breach of contract by respondent music group and intentional interference with contractual relations by respondent record company. The trial court granted summary judgment in favor of respondents on the ground that the management contract was void because appellant violated the Talent Agencies Act (the act), *Cal. Lab. Code § 1700 et seq.*, by securing performance engagements for respondent music group without being licensed as a talent agency. The appellate court affirmed the judgment. The court rejected appellant's argument that his actions were exempt from regulation, holding that even incidental activity in procuring employment for an artist was subject to regulation under the act. Additionally, the court held that the act required a license to engage in procurement activities even if no commissions were received for the service.

**OUTCOME:** The court affirmed summary judgment for respondents in appellant's action for breach of contract

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and intentional interference with contractual relations because a management contract was void where appellant violated statute by securing performance engagements for respondent music group without being licensed as a talent agency.

**CORE TERMS:** artist, manager, procuring, talent, engagements, procurement, recording, license, procure, licensed, Talent Agencies Act, incidental, occupation, void, management agreements, summary judgment, remedial, advise, recommendations, entertainment, contractual, compensated, enforcing, licensing, exempt, Agencies Act, concert, booked, agency charged, statute of limitations

#### **LexisNexis(R) Headnotes**

#### ***Governments > Legislation > Interpretation***

[HN1] In construing a statute, the court gives considerable weight to the interpretation placed on the statute by the administrative agency charged with enforcing it.

#### ***Governments > State & Territorial Governments > Licenses***

[HN2] The Talent Agencies Act (the Act), *Cal. Lab. Code § 1700 et seq.*, provides that no person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner. *Cal. Lab. Code § 1700.5*. A talent agency is 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. *Cal. Lab. Code § 1700.4(a)*. Unlike talent agents, personal managers are not covered by the act. 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.

#### ***Governments > State & Territorial Governments >***

#### ***Licenses***

[HN3] Even incidental activity in procuring employment for an artist is subject to regulation under the Talent Agencies Act, *Cal. Lab. Code § 1700 et seq.*

#### ***Governments > Legislation > Interpretation Governments > State & Territorial Governments > Licenses***

[HN4] Under the Talent Agencies Act (the act), *Cal. Lab. Code § 1700 et seq.*, an agent must have his form of contract approved by the Labor Commissioner, maintain his client's funds in a trust fund account, record and retain certain information about his client, and refrain from giving false information to an artist concerning potential employment. *Cal. Lab. Code §§ 1700.23, 1700.25, 1700.26, 1700.32, and 1700.41*. Because the act is remedial, it should be liberally construed to promote its general object.

#### ***Governments > State & Territorial Governments > Licenses***

[HN5] The Talent Agencies Act, *Cal. Lab. Code § 1700 et seq.*, requires a license to engage in procurement activities even if no commission is received for the service.

#### **SUMMARY:**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

In October 1996, the former personal manager of a singing group brought an action for breach of management agreements against the group and for intentional interference with contractual relations against a record company and its agent. In February 1997, the group filed a petition before the Labor Commissioner, seeking to void the management agreements. The commissioner found the petition to be timely filed, and declared the management agreements void because the former manager had violated the Talent Agencies Act (*Lab. Code, § 1700 et seq.*) by obtaining 84 performance engagements for the group without being a licensed talent agency. The trial court entered summary judgment in favor of defendants based on the commissioner's finding. (Superior Court of Los Angeles County, No. BC158457, Emilie H. Elias, Commissioner.)

The Court of Appeal affirmed. The court held that the group's petition before the Labor Commissioner was

timely filed under the Talent Agencies Act's one-year statute of limitations (*Lab. Code, § 1700.44, subd. (c)*), even though the manager had last booked a concert for the group more than two years before they filed their petition, since the petition was filed within one year after the former manager filed his legal action, which itself was a violation of the act. The court also held that the Labor Commissioner properly declared the agreements between the group and their former manager void under the act. The court further held irrelevant the former manager's statements that his goal in procuring engagements for the group was to obtain a recording agreement and that he had received no commission for the engagements, since even incidental activity in procuring employment for an artist is subject to regulation under the act, and the act does not expressly include or exempt procurement when no compensation is paid. (Opinion by Nott, Acting P. J., with Zebrowski, J., and Mallano, J., \* concurring.)

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

## HEADNOTES

### CALIFORNIA OFFICIAL REPORTS HEADNOTES Classified to California Digest of Official Reports

**(1a) (1b) Employment Agencies § 5--Actions--Brought Pursuant to Talent Agencies Act--Statute of Limitations.** -- --A singing group's petition before the Labor Commissioner under the Talent Agencies Act (*Lab. Code, § 1700 et seq.*), in which the group sought to void its management agreements with its former personal manager, was timely filed under the act's one-year statute of limitations (*Lab. Code, § 1700.44, subd. (c)*), even though the manager had last booked a concert for the group more than two years before they filed their petition. The petition was timely because it was filed within one year after the former manager filed a legal action based on the agreements, which itself was a violation of the act, since the manager was not licensed to procure engagements.

**(2) Statutes § 44--Construction--Aids--Contemporaneous Administrative Construction.** -- --In construing a statute, the court gives considerable weight to the interpretation placed on the statute by the administrative agency charged with enforcing it.

**(3) Employment Agencies § 1--Regulation--Talent Agencies Act--Application to Personal Managers.** -- --Unlike talent agents, personal managers are not covered by the Talent Agencies Act (*Lab. Code, § 1700 et seq.*). 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.

**(4a) (4b) (4c) Employment Agencies § 1--Regulation--Talent Agencies Act--Requirement of License for Procuring Engagements for Artist--Effect of Violation on Management Agreements.** -- --The management agreements between a singing group and its former personal manager were properly declared void by the Labor Commissioner because the former manager had violated the Talent Agencies Act (*Lab. Code, § 1700 et seq.*) by obtaining 84 performance engagements for the group without being licensed as a talent agency. It was irrelevant that the former manager's goal in procuring engagements for the group was to obtain a recording agreement, since even incidental activity in procuring employment for an artist is subject to regulation under the act. Furthermore, the former manager's statements that he received no commission for the engagements were also irrelevant, since the contracts provided for compensation, the manager intended to ultimately receive compensation when he obtained the recording contract for the group, and the act does not expressly include or exempt procurement when no compensation is paid.

[See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 430, 450.]

**(5a) (5b) Employment Agencies § 1--Regulation--Talent Agencies Act--Constitutionality--Construction.** -- --The requirement in the Talent Agencies Act (*Lab. Code, § 1700 et seq.*) that an agent obtain a license before procuring employment for artists does not violate either the equal protection clause or due process. Furthermore, because the act is remedial, it should be liberally construed to promote its general object.

**COUNSEL:** Johnson & Rishwain and Neville L. Johnson for Plaintiff and Appellant.

Browne & Woods, Allen B. Grodsky and James D. Kozmor for Defendants and Respondents the Deftones, Camillo Wong Moreno, Stephen Carpenter, Abe

Cunningham and Chi Ling Cheng.

Greenberg, Glusker, Fields, Claman & Machtinger, Lawrence Y. Iser and Matthew N. Falley for Defendants and Respondents Maverick Records and Guy Oseary.

**JUDGES:** Opinion by Nott, Acting P. J., with Zebrowski, J., and Mallano, J., \* concurring.

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

#### OPINION BY: NOTT

#### OPINION

[\*1467] [\*\*617] **NOTT, Acting P. J.**

Dave Park appeals from the summary judgment entered against him in his action for breach of contract and intentional interference with contractual relations. His action arises from the termination of his personal manager [\*\*\*2] contract by the Deftones, a music act whose members are Camillo Wong Moreno, Stephen Carpenter, Abe Cunningham, and Chi Ling Cheng (referred to collectively as the Deftones), without paying him commissions which he asserts are due him. In addition, Park alleges that after he secured a recording contract for the Deftones with Maverick Records (Maverick), the record company and one of its agents, Guy Oseary, purposefully interfered with Park's contractual relationship with the Deftones. The trial court granted summary judgment on the ground that the management contract between the Deftones and Park was void, Park [\*1468] having violated the Talent Agencies Act (the Act) by securing performance engagements for the Deftones without being licensed as a talent agency. (*Lab. Code, § 1700 et seq.*)<sup>1</sup> We affirm on that ground.

1 All statutory references are to the Labor Code, unless otherwise indicated.

#### PROCEDURAL AND FACTUAL BACKGROUND

Park filed this action in October 1996, alleging [\*\*\*3] breach of certain management agreements against the Deftones and the individual band members and intentional interference with contractual relations against Maverick and Oseary. He attached to his complaint his written agreements with the Deftones entered into in

February 1992, February 1993, and January 1994. In February 1997, the Deftones filed a petition before the Labor Commissioner, seeking to void the management agreements. Park unsuccessfully sought dismissal of the petition as untimely filed. The Labor Commissioner determined that Park had violated the Act by obtaining performance engagements for the Deftones on 84 occasions without a license. He issued an order stating that the personal management agreements entered into in 1992, 1993, and 1994 were "null, void and unenforceable." Park demanded a trial de novo in the administrative proceeding.

[\*\*618] Maverick and Oseary filed a motion for summary judgment on the grounds that the undisputed facts showed that (1) Park and the Deftones entered into a written contract for management services dated January 18, 1994, (2) between September 1991 and September 1994, Park procured numerous performances for the Deftones, and (3) [\*\*\*4] Park was not a licensed talent agency during that period. Maverick and Oseary relied in part upon the transcript of the Labor Commission proceeding to establish the facts. The Deftones filed a similar motion.

Park opposed the motions. He objected to use of the Labor Commission hearing transcript, but admitted that he had obtained more than 80 engagements for the Deftones. He asserted that the Deftones' petition before the Labor Commission was untimely filed and that his services did not require a talent agency license because they were rendered without a commission and were undertaken in order to obtain a recording agreement. The trial court entered summary judgment in favor of all defendants.

#### DISCUSSION

##### I. *Timeliness*

(1a) Park contends that the Deftones' petition before the Labor Commissioner and the defense based upon the Act are barred by the one-year statute [\*1469] of limitations: "No action or proceeding shall be brought pursuant to this chapter with respect to any violation which is alleged to have occurred more than one year prior to commencement of the action or proceeding." (§ 1700.44, *subd. (c).*)

In declaration testimony, Park stated that the last time he [\*\*\*5] booked a concert for the Deftones was in

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August 1994. He urges that the Deftones' petition, filed in February 1997, was therefore not timely. Park concludes that the Deftones may not rely upon the Act as a defense because Park's own action was filed more than one year after he last booked a concert for the Deftones.

The Labor Commissioner, who is statutorily charged with enforcing the Act (§ 1700.44, *subd. (a)*), found that the Deftones' petition was timely because it was brought within one year of Park's filing an action to collect commissions under the challenged contract. <sup>2</sup> The Commissioner stated that the attempt to collect commissions allegedly due under the agreements was itself a violation of the Act. (*Moreno v. Park* (Jan. 20, 1998, Lab. Comr.) No. 9-97, p. 4.)

<sup>2</sup> The commissions sought were apparently for procuring a recording agreement, not procuring engagements.

(2) [HN1] In construing a statute, the court gives considerable weight to the interpretation placed on the statute by the administrative [\*\*\*6] agency charged with enforcing it. (*Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal. 4th 226, 234 [5 Cal. Rptr. 2d 782, 825 P.2d 767].) (1b) The Labor Commissioner's interpretation avoids the encouragement of preemptive proceedings before it. It also assures that the party who has engaged in illegal activity may not avoid its consequences through the timing of his own collection action. We conclude that the Labor Commissioner's interpretation is reasonable, and that the Deftones' petition was timely filed.

## II. Incidental procurement of employment

[HN2] The Act provides that "No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." (§ 1700.5.) A talent agency is "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. . . ." (§ 1700.4, *subd. (a)*.)

[\*\*\*7] (3) Unlike talent agents, personal managers are not covered by the Act. Personal managers primarily

advise, counsel, direct, and coordinate the [\*1470] development of the artist's career. They advise in both business and personal matters, frequently lend money [\*\*619] to young artists, and serve as spokespersons for the artists. (See *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal. App. 4th 246, 252-253 [48 Cal. Rptr. 2d 437] (*Waisbren*).)

(4a) Park argues that as a personal manager his goal in procuring engagements for the Deftones was to obtain a recording agreement. He contends that his actions were therefore exempt from regulation. That position was rejected in *Waisbren, supra*, 41 Cal. App. 4th at page 259. In *Waisbren*, a promoter brought an action for breach of contract against a company engaged in designing and creating puppets. The defendant moved for summary judgment on the ground the parties' agreement for the plaintiff's services was void because he had performed the duties of a talent agent without obtaining a license. The plaintiff asserted that a license was unnecessary because his procurement activities were minimal and [\*\*\*8] incidental. He had also assisted in project development, managed certain business affairs, supervised client relations and publicity, performed casting duties, coordinated production, and handled office functions. In return, he was to receive 15 percent of the company's profits. *Waisbren* holds that [HN3] even incidental activity in procuring employment for an artist is subject to regulation under the Act.

The reasoning of *Waisbren* is convincing. It relies upon the remedial purpose of the Act and the statutory goal of protecting artists from long recognized abuses. The decision is also based upon the Labor Commissioner's long-held position that a license is required for incidental procurement activities. The court in *Waisbren* found the Labor Commissioner's position to be supported by legislative history and, in particular, by the recommendations contained in the Report of the California Entertainment Commission, which were adopted by the Legislature in amending the Act in 1986.

*Wachs v. Curry* (1993) 13 Cal. App. 4th 616 [16 Cal. Rptr. 2d 496], relied upon by Park, does not further his cause. In *Wachs*, the personal manager plaintiffs brought a declaratory [\*\*\*9] relief action challenging the constitutionality of the Act on its face. (5a) They took the position that the Act's exemption for procurement activities involving recording contracts violated the equal protection clause and that the Act's use of the term

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"procure" was so vague as to violate due process. *Wachs* rejected both of those positions. **(4b)** It also interpreted the Act, which applies to persons engaged in the occupation of procuring employment for artists, as applying only where a person's procurement activities constitute a significant part of his business. (*Id. at pp. 627-628.*) The court did not define "significant part." The court acknowledged that ". . . the only question before us is whether the word [\*1471] 'procure' in the context of the Act is so lacking in objective content that it provides no standard at all by which to measure an agent's conduct" (*id. at p. 628*, italics omitted). We agree with *Waisbren* that the interpretation stated in *Wachs* is dictum and that even incidental procurement is regulated.

### III. Absence of a commission

Park also contends that his procuring employment for the Deftones is not regulated by the [\*\*\*10] Act because he was not compensated for that work. We disagree.

Park's 1993 and 1994 agreements with the Deftones expressly provided that Park was to receive a 20 percent commission on all income earned from employment that Park secured. Although Park stated in declaration testimony that he received no commission for procuring engagements for the Deftones, the contracts appear to provide for compensation.<sup>3</sup> In addition, Park would receive compensation for his services ultimately from commissions for obtaining a recording contract for the Deftones. Thus, it is not clear that Park should be treated as one who was not compensated for his services.

3 The agreements acknowledge that Park is not a licensed talent agent and is under no obligation to procure employment for the Deftones.

Park's position, moreover, is not supported by the language of the Act. The Act regulates those who engage in the occupation of procuring engagements for artists. (§ 1700.4, [\*\*620] *subd. (a).*) The Act does not expressly [\*\*\*11] include or exempt procurement where no compensation is made. *Waisbren* states at footnote 6: "By using [the term 'occupation'], the Legislature intended to cover those who are compensated for their procurement efforts." (41 Cal. App. 4th at p. 254, *fn. 6.*) The issue of compensation, however, was not before the court in *Waisbren*. The language in footnote 6 is dictum which we conclude is not supported by the purpose and legislative history of the Act. One may engage in an occupation

which includes procuring engagements without receiving direct compensation for that activity.

As explained in *Waisbren*, the purpose of the Act is remedial, and its aim goes beyond regulating the amount of fees which can be charged for booking acts. For example, [HN4] an agent must have his form of contract approved by the Labor Commissioner, maintain his client's funds in a trust fund account, record and retain certain information about his client, and refrain from giving false information to an artist concerning potential employment. (See § 1700.23, 1700.25, 1700.26, 1700.32, and 1700.41.) **(5b)** Because the Act is remedial, it should be liberally construed to promote its general object. [\*\*\*12] (See *Buchwald v. Superior Court (1967) 254 Cal. App. 2d 347, 354* [\*1472] [62 Cal. Rptr. 364].) **(4c)** The abuses at which these requirements are aimed apply equally where the personal manager procures work for the artist without a commission, but rather for the deferred benefits from obtaining a recording contract.

In 1982, the Legislature created the California Entertainment Commission (the Commission) to study the laws and practices of this and other states relating to the licensing of agents and representatives of artists in the entertainment industry in order to recommend to the Legislature a model bill regarding licensing. (See *Waisbren, supra*, 41 Cal. App. 4th at p. 256.) In 1985, the Commission submitted its report to the Governor and the Legislature (the Report). The Legislature followed the Commission's recommendations in enacting the 1986 amendments to the Act. (See *Waisbren, supra*, 41 Cal. App. 4th at p. 258.)

The Report<sup>4</sup> states that the Commission reviewed and rejected a proposal which would have exempted from the Act anyone who does not charge a fee or commission for procuring employment for an artist. The [\*\*\*13] Commission concluded: "It is the majority view of the Commission that personal managers or anyone not licensed as a talent agent should not, under any condition or circumstances, be allowed to procure employment for an artist without being licensed as a talent agent, except in accordance with the present provisions of the Act." (Rep., *supra*, at p. 6.)

4 We grant respondents' request that we take judicial notice of the Report. (*Evid. Code*, § 452, *subd. (c).*)

The Legislature accepted the Report and codified the

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Commission's recommendations, approving the Commission's view that no exemption should be created for those who do not charge a fee for procuring employment for an artist. We conclude that [HN5] the Act requires a license to engage in procurement activities even if no commission is received for the service.

**DISPOSITION**

The judgment appealed from is affirmed.

Zebrowski, J. and Mallano, J., \* concurred.

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

[\*\*\*14] Appellant's petition for review by the Supreme Court was denied July 28, 1999.

1 STATE OF CALIFORNIA  
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9 Special Hearing Officer for the Labor Commissioner

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BEFORE THE LABOR COMMISSIONER  
OF THE STATE OF CALIFORNIA

KESHA ROSE SEBERT pka KESHA, an individual,

Petitioner,

vs.

DAS COMMUNICATIONS, LTD., a corporation,

Respondent.

CASE NO.: TAC-19800

DETERMINATION ON PETITION  
OF KESHA ROSE SEBERT

This proceeding arose under the provisions of the Talent Agencies Act ("TAA" or "Act"), Labor Code §§ 1700 – 1700.47<sup>1</sup>. On September 29, 2010, petitioner KESHA ROSE SEBERT pka KESHA ("petitioner" or "Sebert") filed a petition with the Labor Commissioner pursuant to §1700.44 seeking determination of an alleged controversy with respondent DAS COMMUNICATIONS, LTD. ("Respondent" or "DAS"). On October 25, 2010 respondent filed an answer to the petition. Thereafter, on July 20 and 21, 2011, a full evidentiary hearing was held before William A. Reich, attorney for the Labor Commissioner assigned as a hearing officer. Due consideration having been given to the

<sup>1</sup> Unless otherwise specified, all subsequent statutory references are to the Labor Code.

1 testimony, documentary evidence, briefs, and arguments submitted by the parties, the  
2 Labor Commissioner now renders the following decision.

3  
4 I. DETERMINATION ON ISSUE OF SUBJECT MATTER JURIDICION.

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6 A. FACTUAL AND PROCEDURAL BACKGROUND

7  
8 Petitioner is a performing artist, who is recognized for her work as a singer,  
9 songwriter, and musician. Respondent is an artist management firm that is incorporated  
10 in the state of New York, and has its principal office in New York City. On January 27,  
11 2006, petitioner and respondent entered into a written artist management agreement (also  
12 sometimes herein referred to as the "contract") under the terms of which petitioner  
13 engaged respondent to act as her manager. The contract contains a choice-of-law clause  
14 which provides as follows:

15  
16 This agreement is made and executed in the State of New York and shall be  
17 construed in accordance with the laws of said State applicable to contracts  
18 wholly to be performed therein.

19 On September 11, 2008, petitioner, through her counsel, sent respondent a notice  
20 purporting to terminate the artist management contract. One year and eight months later,  
21 on May 26, 2010, respondent filed a lawsuit in the New York Supreme Court seeking to  
22 recover moneys due under the contract and also a declaration that the contract remained  
23 in effect. Petitioner entered her appearance in the New York action by filing a motion to  
24 dismiss. The motion was eventually denied, and the New York action remains an actively  
25 litigated case.

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1 On September 29, 2010, while the motion to dismiss was pending, petitioner  
2 initiated the instant proceeding by filing the aforementioned petition with the Labor  
3 Commissioner alleging a case and controversy under the TAA. In her petition, petitioner  
4 specifically alleged that over the course of more than two years, despite not being  
5 licensed as a talent agent, respondent repeatedly engaged in the occupation of procuring  
6 or attempting, promising, or offering to procure engagements for petitioner as an artist in  
7 contravention of the provisions of the TAA. Petitioner asserted that, by virtue of these  
8 statutorily prohibited acts, the contract was illegal under the TAA and therefore void and  
9 unenforceable. Respondent's answer countered with a denial of all of the petitioner's  
10 allegations. In the answer, respondent also interposed an affirmative defense which  
11 asserted that the instant dispute concerning the legality of the parties' contract was  
12 governed by New York law and not by the provisions of California's TAA, and that  
13 consequently the petition was barred and should be dismissed. Since the Labor  
14 Commissioner's subject matter jurisdiction is confined to cases and controversies that  
15 arise under the TAA, the affirmative defense essentially advanced the contention that the  
16 Labor Commissioner lacked subject matter jurisdiction to hear the case.

17  
18 In late March, 2011, the parties were asked to submit briefs addressing the conflict  
19 of laws issue raised by the lack of subject matter jurisdiction defense. Following  
20 consideration of the briefs and other supporting papers submitted by the parties in  
21 response to the request for briefing, the Labor Commissioner issued a tentative  
22 determination addressing the related questions of which state's law is to be applied in this  
23 case and whether the Commissioner lacks subject matter jurisdiction. The Labor  
24 Commissioner now renders a final determination on these questions. Some additional  
25 facts bearing on this determination are set out where appropriate in the discussion that  
26 follows.

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**B. DISCUSSION**

The subject matter jurisdiction of the Labor Commissioner is confined to disputes that are governed by the TAA. Where one of the parties to a TAA case contends that the dispute is governed not by California law (*i.e.*, the TAA) but by the law of some other state, the Labor Commissioner must decide the question of jurisdiction by applying the apposite choice-of-law rules to determine whether or not California law applies.

The issue presented by this case is whether the parties' artist management contract is legal and enforceable. Respondent contends that this issue must be decided under New York law because the contract contains a choice-of-law clause that calls for such questions to be decided in accordance with the law of the state of New York. In response, petitioner asserts that, for reasons of fundamental California public policy and the superior interest of California in having its law applied, the choice-of-law clause should not be given effect and the issue of the legality of the contract should be resolved based on the application of California law.

A threshold question that must be addressed is whether as to the issue of legality there is in fact a conflict between California law and New York law. An analysis of the parties' presentations reveals that the laws of the two states are markedly different. Under New York law, a contract that authorizes an unlicensed manager to engage in procurement activities on behalf of an artist is not illegal, provided such activities are only incidental to the management of the artist. (New York General Business Law §§171(f) and 172.) By contrast, under California law any contract which authorizes a manager to engage in procurement activities on behalf of an artist is at least partially, if not entirely, illegal, except where the contract is one that authorizes activities aimed at

1 procuring recording contracts. (Lab. Code §§1700.4, 1700.5.) Given the operative  
2 difference in the two laws and their capacity to produce different results, it is clear that a  
3 true conflict exists. Accordingly, the Commissioner must address and resolve that  
4 conflict.

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6 In determining what effect should be given to a choice-of-law clause contained in  
7 a contract, California follows the choice-of-law approach set forth in section 187 of the  
8 Restatement Second of Conflict of Laws (Restatement). (*Nedlloyd Lines B.V. v. Superior*  
9 *Court* (1992) 3 Cal.4th 459, 464 (*Nedlloyd*).

10  
11 (1) The law of the state chosen by the parties to govern their  
12 contractual rights and duties will be applied if the particular issue  
is one which the parties could have resolved by an explicit provision  
in their agreement directed to that issue.

13 (2) The law of the state chosen by the parties to govern their  
14 contractual rights and duties will be applied, even if the particular  
15 issue is one which the parties could not have resolved by an explicit  
provision in their agreement directed to that issue, unless either

16 (a) the chosen state has no substantial relationship  
17 to the parties or the transaction and there is no other  
reasonable basis for the parties choice, or

18 (b) application of the law of the chosen state  
19 would be contrary to a fundamental policy  
20 of a state which has a materially greater  
21 interest than the chosen state in the determination  
of the particular issue and which, under the rule of  
§ 188, would be the state of the applicable law in the  
absence of an effective choice of law by the parties.

22 (3) In the absence of a contrary indication of intention,  
23 the reference is to the local law of the state of the chosen law.

24 In this case, respondent's initial argument is that the reference to New York law in  
25 the choice-of-law clause is intended to encompass not only New York's local substantive  
26 law but also its choice-of-law rules for determining whether a choice-of-law clause in an  
27 agreement should be given effect. In light of the language of the choice-of-law clause,  
28

1 and subject to application of the standard in Restatement section 187, California would  
2 normally look to the law of the chosen state to interpret the scope of the choice-of-law  
3 clause. (*Nedlloyd, supra*, 3 Cal.4th at p. 469, fn. 7.) Here, however, no showing has been  
4 made of how this interpretive issue would have been resolved under New York law.  
5 Accordingly, this becomes an issue that must be resolved under California law. (*Ibid.*)

6  
7 Restatement section 187, subdivision (3) states that “[i]n the absence of a contrary  
8 indication of intention,” the reference to a state’s law in a choice-of-law clause is to the  
9 state’s “local law.” (Cf. *Nedlloyd; Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal.App.4th  
10 1312 (*Brack*); *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881  
11 (*Application Group*) – cases in which the choice-of-law clause was treated as referring  
12 solely to the chosen state’s local substantive law, without consideration being given to the  
13 clause encompassing the state’s choice-of-law rules.) As stated in *Nedlloyd, supra*, 3  
14 Cal.4th at p. 464, California has chosen to follow section 187’s approach. Here, not only  
15 is there no “contrary indication of intention,” but the choice-of-law clause plainly  
16 manifests an intent to refer solely to the local law of the chosen state – *i.e.*, the contract is  
17 to be “construed in accordance with the laws of said State applicable to contracts wholly  
18 to be performed therein.” (Emphasis added.) In other words, the agreement is to be  
19 viewed as a purely local contract that is to be construed exclusively under New York local  
20 law. It follows that the choice-of-law clause must be interpreted as referring only to New  
21 York’s local substantive law.

22  
23 The proper standard for resolving the instant choice-of-law issue is set out in  
24 subdivision (2) of Restatement section 187. The Supreme Court has summarized how  
25 that standard is to be applied.<sup>2</sup>

26  
27 <sup>2</sup> Subdivision (1) of section 187 does not apply here because this is not a case in  
28 which the parties have explicitly incorporated a provision of foreign law to permissibly  
resolve a particular issue. (See *Nedlloyd, supra*, 3 Cal.4th at p. 465, n. 3.)

1 Briefly restated, the proper approach under Restatement section 187,  
2 subdivision (2) is for the court first to determine either: (1) whether the  
3 chosen state has a substantial relationship to the parties or their transaction,  
4 or (2) whether there is any other reasonable basis for the parties' choice of  
5 law. If neither of these tests is met, that is the end of the inquiry, and the  
6 court need not enforce the parties' choice of law. If, however, either test is  
7 met, the court must next determine whether the chosen state's law is  
8 contrary to a fundamental policy of California. If there is no such conflict,  
9 the court shall enforce the parties' choice of law. If, however, there is a  
10 fundamental conflict with California law, the court must then determine  
11 whether California has a "materially greater interest than the chosen state in  
12 the determination of the particular issue...." (*Rest.*, § 187, subd. (2).) If  
13 California has a materially greater interest than the chosen state, the choice  
14 of law shall not be enforced, for the obvious reason that in such  
15 circumstance we will decline to enforce a law contrary to this state's  
16 fundamental policy.

17 (*Nedlloyd, supra*, 3 Cal.4th at p. 466.)

18 As a preliminary matter, it is clear that, since New York was respondent's state of  
19 incorporation, New York had a "substantial relationship" with the parties. (*Nedlloyd*,  
20 *supra*, 3 Cal.4th at p. 467; *Brack, supra*, 164 Cal.App.4th at p. 1325.) Consequently,  
21 there was a reasonable and sufficient basis for the parties' choice to have New York law  
22 applied to their agreement.

23 The next matter to be determined is whether New York law is in conflict with the  
24 fundamental public policy of the state of California.

25 In the *Brack* case, the court addressed the public policy issue in the context of a  
26 statutory scheme known as the California Finance Lenders Law ("Finance Lenders  
27 Law"), Financial Code section 22000 et seq., which regulates consumer lending in  
28 California. The Finance Lenders Law provides that a loan company cannot engage in the  
business of a "finance lender" and make personal consumer loans unless it has obtained a  
license from the Commissioner of Corporations. In *Brack*, the defendant loan company  
engaged in the prohibited activity of making consumer loans in California without having

1  
2 secured the requisite license. Relying on a choice-of-law provision in its loan agreements  
3 which called for the application of Nevada law, the loan company, which was  
4 incorporated in Nevada, asserted that the Finance Lenders Law did not apply and that any  
5 claim based on its lending activities should be decided under Nevada law.  
6

7       After reviewing the purpose of the Finance Lenders Law, the legal remedies  
8 provided to redress violations of the Law's statutory provisions, and the administrative  
9 mechanism established to enforce the Law's requirements, the court in *Brack* found that  
10 the Finance Lenders Law embodied the fundamental public policy of the state which  
11 could not be waived by agreement of the parties. (*Brack, supra*, 164 Cal.App.4th at pp.  
12 1325-1329.)  
13

14       First, the *Brack* court observed that a significant and core purpose of the Finance  
15 Lender's Law was the protection of consumers from unfair lending practices. Second, the  
16 court focused on the remedies for statutory violations. The court pointed out that willful  
17 violations of the statutory prohibition on lenders entering into loan contracts without a  
18 license rendered the contracts void, and that even where such violations were not willful,  
19 the lender nevertheless forfeited any charges or interest. Third, the court examined the  
20 comprehensive licensing scheme established for the purpose of regulating finance  
21 lenders. The court noted the requirements for licensure and the authority of the  
22 Commissioner to ensure those requirements are satisfied before a license is issued. The  
23 court then explained that the licensees must comply with various substantive and  
24 procedural obligations which are subject to regulation, oversight, and enforcement by the  
25 Commissioner – these include Commissioner imposed requirements on clearly stating the  
26 rates to be charged, Commissioner imposed requirements on advertising copy, and  
27 various statutory restrictions on the charges, fees, interest, and terms that may be imposed  
28

1 under the loan agreements. The court then observed that all the requirements established  
2 by or under the Finance Lenders Law could be enforced by the Commissioner through the  
3 power of suspension or revocation of any license. The court commented that this  
4 comprehensive licensing scheme would be rendered essentially useless if it could be  
5 waived through the simple expedient of an agreement between the lender and the  
6 borrower.

7  
8 The court stated its conclusion as follows:

9 In sum, the Legislature, in voiding contracts made in violation of the  
10 Finance Lenders Law and in creating a licensing scheme through which it  
11 directly regulates the finance lenders market, has made it clear that the  
12 Finance Lenders Law is a matter of significant importance to the state  
and...is fundamental and may not be waived.

13 (*Brack, supra*, 164 Cal.App.4th at p. 1327.)

14  
15 The analysis undertaken in *Brack* applies with equal force to the TAA, and  
16 compels the same conclusion.

17  
18 First, the core objective of the TAA is to provide protection to artists. “The Act is  
19 remedial; its purpose is to protect artists seeking professional employment from the  
20 abuses of talent agencies.” (*Styne v. Stevens* (2001) 26 Cal.4th 42, 50; *Waisbren v.*  
21 *Peppercorn Productions, Inc.*, (1995) 41 Cal.App.4th 246, 254.) Second, the TAA  
22 prohibits anyone from acting in the capacity of a talent agency without securing a license  
23 from the Labor Commissioner (Lab. Code §1700.5), and makes illegal contracts pursuant  
24 to which such unlicensed persons seek to represent artists as talent agents. “In  
25 furtherance of the Act’s protective aims, an unlicensed person’s contract with an artist to  
26 provide the services of a talent agency is illegal and void.” (*Styne v. Stevens, supra*, 26  
27 Cal.4th at p. 51; *Waisbren v. Peppercorn Productions, Inc., supra*, 41 Cal.App.4th at p.  
28 261.)

1  
2 Third, as an integral means of insuring that artists are properly and effectively  
3 protected, the TAA regulates talent agencies through a comprehensive licensing scheme  
4 that is administered by the Labor Commissioner. Application for licensure requires  
5 specifying the business location, describing at least the prior two years of business  
6 activity, identifying persons with a financial interest in the contemplated talent agency  
7 operation, supplying fingerprints, and providing the affidavits of at least two reputable  
8 persons who vouch for the good moral character or reputation for fair dealing of the  
9 applicant. (Lab. Code §1700.6.) The Commissioner is empowered to investigate an  
10 applicant and where appropriate deny a license. (Lab. Code §§1700.7, 1700.8.)  
11 Licensees must comply with numerous substantive and procedural obligations, which  
12 include, among others, the following: they must post a \$50,000.00 bond to guarantee  
13 compliance with the TAA and performance of their obligations to artists (Lab. Code  
14 §§1700.15, 1700.16), submit proposed forms of written contracts to be entered into with  
15 artists for review and approval by the Labor Commissioner (Lab. Code §1700.23), file a  
16 schedule of fees to be charged artists with the Labor Commissioner and conspicuously  
17 post the schedule (Lab. Code §1700.24), deposit fees received on behalf of an artist in a  
18 trust account and disburse the fees promptly after deducting commissions (Lab. Code  
19 §1700.25), maintain accurate records of their dealings with and/or on behalf of each artist  
20 (Lab. Code §1700.25), refrain from entering into employment contracts that are illegal  
21 (Lab. Code §1700.31), refrain from publishing false, fraudulent, or misleading  
22 information (Lab. Code §1700.32), refrain from sending artists to places that are unsafe  
23 (Lab. Code §1700.33), abstain from dividing fees with an employer or agent of an  
24 employer (Lab. Code §1700.39), and reimburse artists for expenses incurred in traveling  
25 outside the city in unsuccessful attempts to obtain employment (Lab. Code §1700.41).  
26 Licensees are subject to additional regulations that have been or may be promulgated by  
27 the Labor Commissioner. (Lab. Code §1700.20.) All of these obligations and  
28

1 requirements are enforced by the Labor Commissioner through the Commissioner's  
2 power to revoke or suspend a license pursuant to Labor Code section 1700.21, which  
3 authorizes revocation or suspension for, among other things, any violation of the TAA or  
4 ceasing to be of good moral character.

5  
6 The strict policy of invalidating contracts violative of the TAA and the TAA's  
7 comprehensive licensing scheme for scrupulously regulating talent agencies – both of  
8 which are aimed at effectively protecting artists – make it abundantly clear that the TAA  
9 "...is a matter of significant importance to the state and ... is fundamental and may not  
10 be waived." (*Brack, supra*, 164 Cal.App.4th at p. 1327.)

11  
12 Having concluded that the TAA represents the fundamental public policy of the  
13 state of California, it becomes necessary to determine whether California has a materially  
14 greater interest in the application of the TAA to the issue of the contract's legality than  
15 New York has in the application of its conflicting law, and whether California is the state  
16 whose law would be applied in the absence of a valid choice of law by the parties. In  
17 answering the latter inquiry, of which state's law would be applicable in the absence of a  
18 contractual choice-of-law clause, California follows the "governmental interest" and  
19 "comparative impairment" approach to resolving a choice-of-law issue. (*Application*  
20 *Group, supra*, 61 Cal.App.4th at p. 896.) Where, as here, the conflict is between the law  
21 of the forum state and the law of the chosen state, the "governmental interest"/  
22 "comparative impairment" inquiry will frequently overlap with and be determinative of  
23 the separate inquiry as to which state has the materially greater interest in the application  
24 of its law. (*Brack, supra*, 164 Cal.App.4th at pp. 1328-1329; *Application Group, supra*,  
25 61 Cal.App.4th at pp. 898-905.)

1           The evidence establishes the following facts that bear on the governmental interest  
2 analysis. During the period from the inception of the relationship between petitioner and  
3 respondent in the latter part of 2005 until petitioner gave respondent notice that she was  
4 terminating the contract in September 2008, petitioner resided in the state of California,  
5 and more particularly in the county of Los Angeles. The meetings and discussions  
6 between petitioner and respondent's representative, that led to the parties entering into the  
7 contract, took place in Los Angeles, California. The representative of respondent who  
8 was assigned as the day to day manager of petitioner resided in Los Angeles at the time of  
9 the parties' initial contact in 2005 and continued to reside there for the first eleven months  
10 that the contract was in effect. The day to day manager then moved to New York but  
11 continued to regularly manage petitioner in California, through frequent e-mail and  
12 telephone communications to petitioner in California, and through periodic trips to  
13 California to personally meet with her and participate in a variety of career related  
14 activities. It is the activities engaged in by this day-to-day manager—both directly in  
15 California and indirectly in California through the communications with petitioner—that  
16 petitioner contends constituted unlawful procurement activities violative of the TAA. In  
17 addition, many of these activities asserted to constitute illegal procurement involved  
18 performances, meetings, recording sessions, and other events that took place or were  
19 scheduled to take place in California. Viewing the totality of the 2005 to 2008 period,  
20 California was the hub of the activities that the parties engaged in under the contract.

21  
22           The delineated facts make clear that California has a very strong interest in having  
23 its law, the TAA, apply to this case. California has an overwhelming interest in  
24 protecting its resident artist, petitioner. California also has a critical interest in  
25 insuring that its fundamental public policy is not flouted with impunity by out of state  
26 entities that enter the state and then proceed to engage in illegal procurement activities  
27 within the state's boundaries. Additionally, California has a crucial interest in insuring  
28

1 that California is not used as a base of operations for orchestrating or pursuing  
2 procurement activities that are illegal under the TAA, even though they may relate to a  
3 performance the artist will ultimately deliver out of state. By contrast, New York's  
4 interest in having its law apply is limited to its general interest in the application of New  
5 York contract law to a dispute in which one of its corporations is involved.

6  
7 Turning next to the question of "comparative impairment," it is evident that to  
8 apply New York law in this case will effect a very substantial impairment of California's  
9 interests. If New York law is applied, California will be unable to protect its resident  
10 artists from out of state entities which enter the state and utilize their contracts to engage  
11 in unlicensed procurement activities that violate the state's fundamental public policy. In  
12 addition, if New York law is applied, California's legal protections will be rendered a  
13 nullity through the simple expedient of a contractual choice of the law of another state,  
14 and California will be forced to countenance conduct within its boundaries that is illegal  
15 under California law and antithetical to the state's fundamental public policy. On the  
16 other hand, New York will suffer no such drastic impairment of its interests if California  
17 law is applied. New York has no significant interest in having its law applied to activities  
18 with no substantial connection to the state, and has no interest in precluding its  
19 corporation from complying with California's TAA requirements where the activities of  
20 the corporation are substantially connected to California. Thus, it is clear that California  
21 would suffer a far greater impairment of its interests from the application of New York  
22 law, than New York would suffer from the application of California law.

23  
24 The foregoing analysis establishes that in this case California would be the state of  
25 the applicable law in the absence of a valid choice of law clause in the parties' contract.  
26 The analysis also establishes that California has a materially greater interest in the  
27 application of its law to the issue of the legality of the parties' contract than New York  
28

1 has in the application of its law. Accordingly, it is concluded that—notwithstanding the  
2 choice of law provisions in the contract—California law, namely the TAA, applies to the  
3 parties’ dispute in this case, and that consequently the Labor Commissioner has  
4 jurisdiction to adjudicate the instant controversy, which arises under the TAA.

5  
6 II. DETERMINATION ON ISSUE OF VIOLATION OF LICENSING  
7 REQUIREMENTS OF TAA.

8  
9 A. ADDITIONAL FACTUAL BACKGROUND

10  
11 As noted earlier, the contract between petitioner Sebert and respondent DAS was  
12 entered into on January 27, 2006. DAS was owned and operated by David Sonenberg,  
13 and he actively directed and controlled all of DAS’s activities. At the inception of the  
14 relationship between Sebert and DAS, Sonenberg designated Georgina McAvena as the  
15 agent and representative of DAS charged with managing and coordinating DAS’s day to  
16 day activities on behalf of Sebert. McAvena and Sonenberg undertook a number of  
17 efforts on Sebert’s behalf as early as December 12, 2005, even before the contract was  
18 signed.

19  
20 The contract, which was to remain in effect for five years, provided for DAS to  
21 render a wide range of services as a personal manager for the purpose of furthering  
22 Sebert’s career as a musical artist. The contract also contained a provision pursuant to  
23 which Sebert authorized DAS to “negotiate for me on my behalf any and all agreements,  
24 documents and contracts for my services, talents and/or artistic, literary and musical  
25 materials.” In exchange for DAS’s services, and subject to the time limitations  
26 established under the contract, Sebert agreed to pay DAS twenty percent (20%) of the  
27 gross monies generated by any and all of her income producing activities as a musical  
28

1 artist. DAS's services, which were provided by McAvenna and by Sonenberg, spanned  
2 the period from December 12, 2005 to September 11, 2008, the date on which Sebert sent  
3 her letter communicating her intention to terminate the artist management agreement.  
4

5 The evidence establishes that McAvenna, acting on behalf of DAS, provided  
6 Sebert with an extensive range of strictly managerial services that were quite beneficial.  
7 She connected Sebert with writers and producers so she could co-write songs, produce  
8 recordings, and build up her catalogue. She sought to further Sebert's career by regularly  
9 introducing her to influential people in the music industry. She encouraged Sebert to  
10 explore various musical ideas and concepts, and provided feedback and direction on the  
11 material she developed. She provided advice on Sebert's appearance, attire, fashion, and  
12 health, and arranged for a stylist and fitness instructor. In addition, McAvenna provided  
13 Sebert with personal advice, guided her on establishing her presence on the web, and  
14 brought her into contact with visual artists and photographers.  
15

16 The evidence establishes that Sonenberg also provided Sebert with many strictly  
17 managerial services. He set up meetings and contacts with record companies with an eye  
18 toward obtaining a recording contract for Sebert. He assisted Sebert in selecting songs,  
19 and regularly provided evaluation and feedback on the songs and arrangements that she  
20 created. He assisted Sebert in her difficult dealings with her prior manager, and provided  
21 advice on her health, fitness, and attire. Sonenberg maintained regular contact with  
22 McAvenna to keep abreast of the day to day activities affecting Sebert and to provide  
23 overall guidance and direction to DAS's efforts on Sebert's behalf.  
24

25 Irrespective of DAS's managerial activities, Sebert contends that the evidence in  
26 this case also shows that DAS was engaged in unlicensed talent agency activities in  
27 violation of the TAA. Specifically, Sebert asserts that the evidence demonstrates that  
28

1 McAvenna and Sonenberg, acting on behalf of DAS, were engaged in procuring  
2 engagements or employment for Sebert and in attempting, promising, or offering to  
3 procure such engagements or employment.  
4

5 The unlicensed talent agency activities ascribed to DAS fall into four categories.  
6 The first category pertains to certain activities which Sebert asserts involved the  
7 procurement or attempted, promised, or offered procurement of engagements for live  
8 performances by Sebert. The second category encompasses activities which are said to  
9 involve the attempted procurement of publishing/songwriting agreements with publishing  
10 houses, whereby Sebert would be engaged to write songs and compositions to be  
11 administered by the publishing house. The third category covers those activities which—  
12 it is asserted—involved procuring or attempting, promising, or offering to procure  
13 engagements or employments pursuant to which Sebert would provide songwriting and  
14 vocal services to other artists. The fourth category denotes those activities which Sebert  
15 claims involved the procurement of engagements or employments calling for Sebert to  
16 perform in or write songs for films, television, and commercials. The specifics of the  
17 activities embraced within each of these categories and whether they evidence unlicensed  
18 talent agency conduct violative of the TAA are examined in detail in the discussion that  
19 follows.  
20

## 21 B. DISCUSSION

22

23 Section 1700.5 provides in pertinent part:

24 No person shall engage in or carry on the occupation of a talent  
25 agency without first procuring a license therefor from the Labor  
26 Commissioner.

27 ///

1 Section 1700.4 provides in relevant part as follows:

2 “Talent agency” means a person or corporation who engages in the  
3 occupation of procuring, offering, promising, or attempting to procure  
4 employment or engagements for an artist or artists.

5  
6 Since DAS was not licensed as a talent agency, to ascertain whether DAS violated  
7 the licensure requirements of section 1700.5 we must determine whether it engaged in  
8 any of the talent agency activities delineated in section 1700.4.

9  
10 1. Live Performances

11  
12 On February 25, 2008, McAvenna received an e-mail suggesting that between  
13 April 24 and 27, 2008 Sebert should participate in a four-city tour as the support for a  
14 show to be headlined by musical artist Calvin Harris. The e-mail had been sent by  
15 Harris’s manager, Mark Gillespie, and McAvenna passed the information onto Sebert. In  
16 an e-mail dated March 20, 2008, McAvenna acknowledged that this e-mail had been an  
17 offer for Sebert to tour with Harris. At some point, McAvenna sent Mark Gillespie, an e-  
18 mail indicating that Sebert could do the four shows and that DAS could get her travel  
19 covered. On April 14, 2008, nine days before the date of the first scheduled show at the  
20 Henry Fonda Theater in Los Angeles, McAvenna forwarded this e-mail to Sebert.  
21 Although ultimately Sebert did not participate in the Harris tour, the recounted facts  
22 plainly show that McAvenna attempted to arrange and therefore to procure this four-show  
23 engagement on behalf of Sebert. DAS has sought to characterize the e-mail to Gillespie  
24 as merely informing him that Sebert would be available for the tour provided they could  
25 get funding for it from Warner Brothers, with whom they were trying to negotiate a  
26 recording contract for Sebert. Given the precise and unequivocal language in the e-mail,  
27 however, which stated that Sebert could do the shows and that her travel was covered, the  
28 characterization advanced by DAS is rejected as unconvincing. The acts of DAS

1 constituted the attempted procurement of an engagement for Sebert.  
2

3 On September 24, 2007, McAvenna sent Sebert an e-mail stating that she could  
4 probably get Sebert a “mini performance” at a musical event scheduled to take place at  
5 the Avalon Hollywood Club on September 28, 2007. There was no mention of using a  
6 talent agent, and the e-mail makes clear that McAvenna intended to make the  
7 arrangements herself. The e-mail plainly constituted an offer to procure employment for  
8 Sebert.  
9

10 On March 20, 2008, McAvenna sent Mark Gillespie an e-mail stating that there  
11 might be a gig at a hot new club in New York for Sebert and for Calvin Harris and Tom  
12 Neville, who were managed by Gillespie. There was never an appearance at that club,  
13 and neither the e-mail nor any other evidence shows an offer, promise, or attempt by  
14 McAvenna to procure an engagement for Sebert at the club.  
15

16 On April 14, 2008, McAvenna sent an e-mail to Sebert stating that when Sebert  
17 traveled to London in June it was contemplated that she would be doing some little down-  
18 n’dirty club shows. This statement was informational and far too general to constitute an  
19 offer or promise to procure employment or engagements for Sebert. There was no  
20 evidence of attempted procurement, and the performances never took place.  
21

22 Sebert points to three instances in which she gave live performances, and contends  
23 that those performances were procured by McAvenna. One was a performance at a house  
24 party in Coachella, California; the second a performance at a private home in Malibu,  
25 California; and the third at a bar in Los Angeles, California known as Molly Malone’s.  
26 Although McAvenna attended two of the performances, the evidence is insufficient to  
27 support a finding that McAvenna personally procured any of the three performances.  
28

1  
2 In sum, the evidence establishes that DAS was involved in offering or attempting  
3 to procure two engagements for live performances by Sebert.  
4

5 **2. Songwriting and Publishing Agreements.**  
6

7 A central objective of DAS was to obtain a recording contract for Sebert. To that  
8 end, Sonenberg spent a considerable amount of time attempting to negotiate a recording  
9 agreement for Sebert with Warner Bros. Records, Inc. These activities were not subject  
10 to the licensure requirements of section 1700.5 by virtue of the exemption for “the  
11 activities of procuring, offering, or promising to procure recording contracts for an artist  
12 or artists.” (§1700.4, subd. (a).)  
13

14 During the same period that he was negotiating with Warner Bros., Sonneberg was  
15 expending a great deal of time and effort attempting to negotiate a publishing agreement  
16 for Sebert with a publishing company known as Arthouse. While the attempt to negotiate  
17 a combined recording agreement and publishing agreement may have been driven in part  
18 by Warner Bros. insistence that such agreements be entered into concurrently as part of  
19 one package, the evidence unequivocally establishes that it was always the intention of  
20 DAS to solicit and negotiate a publishing agreement on behalf of Sebert, as well as a  
21 recording agreement.  
22

23 DAS advances two arguments for why its unlicensed attempts to procure a  
24 publishing agreement with Arthouse should not be treated as violative of the TAA. First,  
25 DAS asserts that the publishing agreement was inextricably intertwined with the record  
26 deal being negotiated with Warner Bros., and that Warner Bros. conditioned its  
27 acquiescence to the recording contract on Sebert agreeing to concurrently execute the  
28

1 publishing contract. Based on these assertions, DAS contends that the exemption for  
2 procurement of “recording contracts” (§1700.4, subd. (a)) should encompass not only the  
3 Warner Bros. record contract but also the interconnected Arthouse publishing agreement.  
4

5 The argument fails for a couple of reasons. To begin with, the fact that Warner  
6 Bros. wanted to have the recording and publishing agreements executed together, as part  
7 of one combined document, is not an excuse for not bringing in a licensed talent agent to  
8 handle and negotiate that part of the deal——i.e., the publishing agreement——requiring  
9 for its legality the participation of a talent agency duly licensed under the TAA. In  
10 addition, importantly, the Labor Commissioner has explicitly concluded that publishing  
11 agreements do not fall within the scope of the “recording contracts” exemption even  
12 where the musical rights they confer are inextricably linked to the songs generated  
13 pursuant to the terms of a recording agreement.  
14

15 Respondent argues, however, that the rights granted to him under the  
16 music publishing provision of the Artist Agreement are expressly defined to  
17 include only those musical compositions that are “recorded by [Petitioners]  
18 under this [Artist] Agreement”, that these music publishing rights were  
19 therefore dependent upon and “merely incidental to” the recording contract,  
20 and thus, that these music publishing rights fall within the statutory  
21 exemption for recording contracts. This argument ignores the fact that  
22 music publishing and recording are two separate endeavors, that musicians  
23 who compose and record their own songs may have separate music  
24 publishing and recording contracts, that there are recording artists who are  
25 not songwriters, and that there are songwriters who are not recording artists.  
26 We therefore conclude that music publishing and songwriting does not fall  
27 within the recording contract exemption, regardless of whether the right to  
28 publish an artist’s music is limited only to compositions that are contained  
on that artist’s record.

(*Chinn v. Tobin* (Cal.Lab.Com., March 26, 1997) TAC No. 17-96, p. 6, n.1.)

///

///

1 It follows that DAS cannot invoke the recording contract exemption to exclude its  
2 attempted procurement of a publishing agreement with Arthouse on behalf of Sebert from  
3 the licensure requirements of the TAA.  
4

5 The second argument advanced by DAS, in support of the proposition that the  
6 attempted procurement of the proposed publishing agreement with Arthouse did not  
7 require licensure, is that the agreement that was being sought and negotiated did not  
8 contemplate the employment or engagement of Sebert. Put another way, DAS argues that  
9 the proposed agreement was purely a deal for the administration of existing and newly  
10 created compositions, and did not require Sebert to render any services. (See *Kilcher v.*  
11 *Vainshtein* (Cal.Lab.Com., May 30, 2001) TAC No. 02-99.) This argument is  
12 unsustainable. The combined recording agreement and publishing agreement gave  
13 Warner Bros. the option to require Sebert to create and record up to six albums. With  
14 respect to at least two and up to four of those albums, a request by Warner Bros. for an  
15 album would give rise to a concomitant obligation on the part of Sebert to create and  
16 provide the newly written compositions to Arthouse. Furthermore, the publishing  
17 agreement set forth a “minimum delivery obligation,” which if not complied with might  
18 give rise to a breach of contract claim against Sebert, especially in light of the initial and  
19 other advances payable under the agreement’s provisions. Finally, there were certain  
20 circumstances under which the publishing agreement imposed a minimum delivery  
21 commitment of ten newly written compositions and a minimum record and release  
22 commitment of six compositions. In short, it is clear that the publishing agreement  
23 contemplated Sebert rendering services under its provisions. Since the solicitation and  
24 negotiation of the publishing agreement involved the attempted procurement of an  
25 engagement for Sebert, DAS violated the TAA by engaging in these activities without  
26 being licensed as a talent agency in compliance with section 1700.5.  
27  
28

1           During the period December 2005 to September 2008, DAS solicited interest in a  
2 publishing agreement for Sebert from five other publishing houses: EMI Music  
3 Publishing U.S., EMI Music Publishing U.K., Universal Music Publishing, Sony Music  
4 Publishing, and Global Publishing. These solicitation activities were pursued by both  
5 McAvenna and Sonenberg. DAS contends that these unlicensed activities did not  
6 contravene the TAA because DAS was not seeking an engagement or employment for  
7 Sebert; specifically, DAS asserts that it never pursued publishing deals that would have  
8 required Sebert to provide services to a publishing company. This assertion, however, is  
9 belied by the contemplated publishing agreement with Arthouse, the final version of  
10 which was put together based on the negotiations between DAS and Arthouse. That  
11 agreement plainly shows that DAS envisioned the possibility of negotiating a publishing  
12 agreement that would require Sebert to render services. Because that distinct possibility  
13 was known to exist, DAS was engaged in the attempted procurement of publishing  
14 agreements that it understood might result in the engagement or employment of Sebert.  
15 To engage in such activities legally, DAS was required to be licensed as a talent agency.  
16 It follows that DAS's attempted procurement of publishing agreements on behalf of  
17 Sebert violated the requirements of section 1700.5.

### 18 19                           3. Songwriting and Vocal Services for Other Artists

20  
21           Sebert contends that DAS procured or attempted to procure engagements for  
22 Sebert to provide vocal services on the recordings of five or more different artists. The  
23 evidence establishes that it was McAvenna's practice to continually introduce and  
24 connect Sebert to other artists. McAvenna's goal, among other things, was to energize  
25 and develop Sebert's talents, to have her write and record songs, to acquaint her with the  
26 various facets of the music industry, and to achieve broad exposure for her with artists,  
27 producers, and various other members of the music community. As part of these efforts,  
28

1 McAvena sought to arrange opportunities for Sebert to work collaboratively with other  
2 artists to record songs that would be included on the artists' record albums. McAvena  
3 viewed these collaborations as joint efforts where both Sebert and the other artist would  
4 retain reciprocal rights and a 50/50 ownership interest in the recorded songs. These hook-  
5 ups raised the possibility that in some particular instance a collaborating artist might seek  
6 to engage or employ Sebert to render services as a hired vocalist on a song or songs being  
7 recorded by the artist. The existence of this possibility, however, did not mean that  
8 McAvena was required to refrain from engaging in her proactive activities on behalf of  
9 Sebert, nor did it mean that McAvena was required to have a talent agent tag along with  
10 her at all times just because some offer of employment might unexpectedly materialize.  
11 Provided the activities were not a subterfuge for procuring engagements or employment,  
12 McAvena and DAS were entitled to pursue the legitimate managerial strategy they had  
13 devised for maximizing Sebert's potential as an artist.

14  
15 The evidence in this case does not show that the collaborative recording efforts  
16 that McAvena arranged or attempted to arrange were aimed at procuring employment for  
17 Sebert. Nor does the evidence show that these were in fact occasions when such offers of  
18 employment were made, and that DAS treated those occasions as an opportunity to  
19 negotiate the terms of the prospective employment. In short, there was no evidence of  
20 procurement or attempted procurement, and accordingly it is concluded that these  
21 collaborative vocal recordings, arranged by Sebert, did not involve talent agency activity  
22 requiring licensure under the TAA.

23  
24 Sebert also contends that DAS procured or attempted to procure engagements for  
25 Sebert to provide songwriting services to four different artists. Pertinent here, once again,  
26 is the above description of the activities McAvena undertook in seeking to accomplish  
27 DAS's goal of effectively managing Sebert's career as a musical artist. As part of her  
28

1           Sebert contends that DAS procured or attempted to procure engagements for  
2 Sebert to provide services as a songwriter and/or performer in connection with a motion  
3 picture, a television show, and a number of commercials.

4  
5           Sebert asserts that DAS attempted to arrange for Sebert to write and perform a  
6 song for a McDonald's commercial. The evidence establishes that at some point  
7 McAvenna became aware of an opportunity for Sebert to work on a song to be used by  
8 McDonald's in a commercial that was to be part of an advertising campaign. McAvenna  
9 asked Sebert to write a song that might garner McDonald's interest in having Sebert do  
10 the work on the song to be used in the commercial. Sebert wrote a song and, around  
11 March 12, 2008, McAvenna arranged for the song to be submitted to McDonald's for the  
12 purpose of trying to obtain this work opportunity for Sebert. It is evident that the  
13 objective of this effort was not to sell the specific song that had been submitted, but rather  
14 to cause McDonald's to select Sebert as the artist who would write and possibly perform  
15 the actual song that would ultimately be used by McDonald's in the advertising campaign.  
16 These activities clearly constituted an offer and attempt by DAS to procure an  
17 engagement for Sebert and therefore required licensure under the TAA.

18  
19           Sebert asserts that DAS attempted to procure an engagement for Sebert to write  
20 songs for the movie "Sex and the City." The evidence shows that DAS arranged for three  
21 of Sebert's songs to be submitted for the movie. All three were previously written songs  
22 that already existed. At McAvenna's suggestion, all three of the songs were modified and  
23 fine-tuned prior to their submission. There is no evidence that the submitted final  
24 versions of these songs contemplated any further or future songwriting services on the  
25 part of Sebert. In other words, the evidence indicates that the submission was made for  
26 the purpose of licensing the finished songs and did not envision further work by Sebert.  
27 Consequently, the submission of the songs did not involve an attempt to unlawfully  
28

1 procure employment.  
2

3           Sebert asserts that DAS attempted to procure an engagement for Sebert to provide  
4 songwriting services in connection with the submission of her song "Backstabber" to  
5 MTV for use in the television show "The Hills." The evidence establishes that  
6 McAvenna submitted the song "Backstabber" to the television program's supervisor with  
7 the recognition that those responsible for the show might require changes in the song  
8 before they used it. In other words, this submission clearly contemplated the possibility  
9 that Sebert might be required to render additional songwriting services before a final  
10 version of the song would be used on the show. It follows that the submission of the  
11 proposed song in these particular circumstances constituted an illegal attempt to procure  
12 an engagement for Sebert.  
13

14           Sebert asserts that DAS attempted to procure an engagement for Sebert to provide  
15 songwriting services in connection with her previously written song "Red Lipstick,"  
16 which was submitted to Revlon. The evidence shows that McAvenna asked Sebert to  
17 prepare a clean version of the song which would then be provided to Revlon. (A clean  
18 version of a song is one in which the lyrics have been tweaked to remove any profanities.)  
19 The evidence indicates that the clean version of "Red Lipstick" was submitted to Revlon  
20 with the objective of licensing it for use as a finished song. There is no evidence to  
21 indicate that the submission contemplated further songwriting services on the part of  
22 Sebert. Accordingly, the submission did not constitute an attempt to procure employment  
23 for Sebert.  
24

25           Sebert asserts that DAS promised to secure engagements for Sebert to sing jingles,  
26 and that it secured one such engagement, where Sebert sang in a candy bar commercial.  
27 The evidence in this case is insufficient to support a finding that DAS promised Sebert  
28

1 that it would obtain engagements for her to sing jingles. Also, the evidence is insufficient  
2 to establish that DAS was in some way involved in securing or lining up the candy bar  
3 commercial on which Sebert sang. Accordingly, it cannot be found that DAS promised to  
4 procure, attempted to procure, or actually procured engagements for Sebert to sing  
5 jingles.

6  
7 In sum, the evidence establishes that, in contravention of the TAA, DAS did  
8 attempt to procure songwriting engagements for Sebert on both a film and a television  
9 commercial.

10  
11 III. DETERMINATION OF APPROPRIATE REMEDY FOR VIOLATIONS OF  
12 SECTION 1700.5

13  
14 As has been discussed, DAS contracted with Sebert to engage in unlicensed talent  
15 agency activity that is illegal under the TAA. Although this illegality affects the  
16 enforceability of the parties' contract, in *Marathon Entertainment, Inc. v. Blasi* (2008) 42  
17 Cal.4th 974 (*Marathon*) the Supreme Court held that a violation of the TAA does not  
18 automatically require invalidation of the entire contract. More particularly, the court  
19 explained that the TAA does not prohibit application of the equitable doctrine of  
20 severability and thus, in appropriate cases, authorizes a court to sever the illegal parts of a  
21 contract from the legal ones and enforce the latter. (*Id.* at pp. 990-996.)

22  
23 In discussing how severability should be applied in TAA cases involving disputes  
24 between managers and artists as to the legality of a contract, the court in *Marathon* made  
25 the following observations.

26 No verbal formulation can precisely capture the full contours of the  
27 range of cases in which severability properly should be applied, or rejected.  
28 The doctrine is equitable and fact specific and its application is appropri-

1 ately directed to the sound discretion of the Labor Commissioner and trial  
2 courts in the first instance.

3  
4 (*Marathon, supra*, 42 Cal. 4th at p. 998.) In the present case, for the reasons set out  
5 below, we find that severance is appropriate.

6  
7 In assessing the appropriateness of severance, two important considerations are (1)  
8 whether the central purpose of the contract was pervaded by illegality and (2) if not,  
9 whether the illegal portions of the contract are such that they can be readily separated  
10 from those portions that are legal. In this case, as the prior discussion has already shown,  
11 it is clear that the central purpose of the parties' contract was not the illegal procurement  
12 of employment or engagements for Sebert. Rather, the plain primary purpose was to  
13 secure a recording contract for Sebert and to provide effective managerial guidance to  
14 Sebert in furthering, promoting, and maximizing her career as an artist. Furthermore, the  
15 illegal activities engaged in by DAS, though substantial and significant, were clearly  
16 separable and distinct from the legal activities. Thus, the threshold criteria for severance  
17 are met.

18  
19 The question now becomes what is the appropriate method of implementing that  
20 severance in the circumstances of this case. In its current lawsuit against Sebert, DAS is  
21 seeking to recover 20% of all of Sebert's earnings based on the provisions of the contract  
22 entitling it to such payments. This 20% in commissions claimed by DAS is not based on  
23 any specific service rendered by DAS, but rather constitutes undifferentiated  
24 compensation payable to DAS as consideration for the undifferentiated services DAS has  
25 provided to Sebert under the contract. The undifferentiated services provided by DAS to  
26 Sebert include both legal managerial services and illegal talent agency services.  
27 However, DAS is not entitled to receive compensation for its illegal services. In such  
28 circumstances, the proper approach is to deduct the value of the illegal services

1 and permit recovery only for the value of the legal services. (*Marathon, supra*, 42 Cal. 4th  
2 at p. 997; *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.  
3 4<sup>th</sup> 119, 139-140; *Whorton v. Dillingham* (1988) 202 Cal. Ap.3d 447.452-454.)  
4

5 In the present case, it is determined that the illegal activities engaged in by DAS  
6 were substantial and significant, especially when it is considered that the efforts and  
7 negotiations directed at procuring a publishing agreement involved a considerable  
8 expenditure of time and effort commensurate with and in excess of the time and effort  
9 expended in pursuing the primary objective of securing a recording contract. When the  
10 illegal activities are measured against the totality of DAS's activities, and compared with  
11 the activities that were legal, one is led to the conclusion that the illegal services provided  
12 by DAS to Sebert represent roughly 45% of the total services provided under the contract.  
13 It follows that the value of the legal services provided by DAS is equal to only 55% of the  
14 value of the total services provided pursuant to the contract, and that accordingly DAS  
15 should receive and be paid only 55% of the amount that would have been due for the full  
16 value of all the services. Put another way, the value of the services that were legal  
17 represents only 55% of the 20% in commissions that was to be paid for the full value of  
18 all the services, and therefore the commissions payable to DAS for the compensable legal  
19 services must be reduced to 11%.  
20

21 In sum, based on the application of the doctrine of severability, it is concluded that  
22 DAS can recover for the services that it provided legally under the contract. However,  
23 since these services represent only 55% of the value of all the services furnished under  
24 the contract, the compensation due pursuant to the terms of the contract must be reduced  
25 by 45%, such that the commissions payable to DAS shall be limited to 11% of the  
26 earnings generated by Sebert during the period covered by the contract.  
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DISPOSITION

Accordingly, it is hereby ordered as follows:

1. The artist management agreement entered into by Sebert and DAS is determined to be partially illegal, and it is further determined that the illegal parts of the agreement are severable from the remainder of the agreement.

2. Severance of the illegal portions of the agreement requires a 45% reduction in the commissions due to DAS under the agreement, and by virtue of such reduction the commissions to which DAS is entitled under the agreement shall be limited to 11% of the earnings generated by Sebert during the period covered by the agreement.

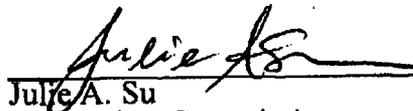
Dated: *MARCH 27, 2012*



William A. Reich  
Attorney and Special Hearing Officer  
for the Labor Commissioner

The above determination is adopted in its entirety by the Labor Commissioner.

Dated: *3. 29. 12*



Julie A. Su  
State Labor Commissioner





**NORTON STYNE, Plaintiff and Appellant, v. CONNIE STEVENS et al.,  
Defendants and Respondents.**

**No. S086787.**

**SUPREME COURT OF CALIFORNIA**

*26 Cal. 4th 42; 26 P.3d 343; 109 Cal. Rptr. 2d 14; 2001 Cal. LEXIS 4236; 2001 Cal. Daily Op. Service 5862; 2001 Daily Journal DAR 7191*

**July 12, 2001, Decided**

**PRIOR HISTORY:** Superior Court of Los Angeles County. Super. Ct. No. BC142878. Reginald A. Dunn, Judge. Court of Appeal of California, Second Appellate District, Division Two. B121208.

**DISPOSITION:** The judgment of the Court of Appeal is reversed. The Court of Appeal is instructed to reinstate the order for new trial, and to direct the superior court to stay further new trial proceedings in that court pending submission to the Commissioner of issues arising under the Talent Agencies Act, as set forth in this opinion.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant sought review of the order of the Court of Appeal of California, Second Appellate District, reversing the trial court's grant of its motion for a new trial.

**OVERVIEW:** Plaintiff sued defendant, a prominent entertainer, for sums allegedly due under an oral contract. Defendant sought summary judgment on grounds that under the alleged contract plaintiff acted as a talent agency, but lacked the necessary license, and that the contract was therefore illegal and void under the Talent Agencies Act, *Cal. Lab. Code § 1700 et seq.* The trial court denied the motion. The jury found for plaintiff, but the trial court granted defendant's motion for a new trial. The court of appeal reversed the new trial order and

reinstated the verdict. Upon review of the disposition of the court of appeals, the new trial order was reinstated. The statute of limitations set forth in *Cal. Lab. Code § 1700.44 (c)* did not bar defendant's assertion of her contract defense based on plaintiff's alleged violation of the Talent Agencies Act. The court of appeals' erroneously barred defendant from raising its defense.

**OUTCOME:** The judgment of the court of appeals was reversed. The court of appeals was instructed to reinstate the order for new trial, and to direct the superior court to stay further new trial proceedings in that court pending submission to the Labor Commissioner of issues arising under the Talent Agencies Act.

**CORE TERMS:** Talent Agencies Act, artist, talent, statute of limitations, affirmative relief, void, referral, controversy arising, colorable, limitations period, new trial, license, professional employment, administrative remedy, engagement', summary judgment, breach of contract, trial order, unlicensed, television, lawsuit, waived, exhaustion, illegality, italics, network, defensive, invoked, procure, matters in dispute

**LexisNexis(R) Headnotes**

*Antitrust & Trade Law > Industry Regulation > General*

**Overview**

[HN1] The Talent Agencies Act, *Cal. Lab. Code § 1700 et seq.*, regulates the activities of a "talent agency," i.e., 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. § 1700.4 (a). "Artists" include stage and screen actors; radio and musical artists; musical organizations; theater, movie, and radio 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 (b). The Act is remedial; its purpose is to protect artists seeking professional employment from the abuses of talent agencies.

**Antitrust & Trade Law > Industry Regulation > General Overview**

[HN2] The definition of a talent agency under the Talent Agencies Act, *Cal. Lab. Code § 1700 et seq.*, is narrowly focused on efforts to secure professional employment or engagements for an artist or artists. § 1700.4 (a). Thus, it does not cover other services for which artists often contract, such as personal and career management i.e., advice, direction, coordination, and oversight with respect to an artist's career or personal or financial affairs, nor does it govern assistance in an artist's business transactions other than professional employment.

**Antitrust & Trade Law > Industry Regulation > General Overview**

[HN3] The Talent Agencies Act, *Cal. Lab. Code § 1700 et seq.*, provides that no person shall engage in or carry on the occupation of a talent agency without first procuring a license from the Labor Commissioner. § 1700.5. The weight of authority is that even the incidental or occasional provision of such services requires licensure. In furtherance of the Act's protective aims, an unlicensed person's contract with an artist to provide the services of a talent agency is illegal and void.

**Antitrust & Trade Law > Industry Regulation > General Overview****Governments > Legislation > Statutes of Limitations > Time Limitations**

[HN4] After providing that all "cases of controversy" arising thereunder "shall first be referred" by the parties

to the Labor Commissioner, *Cal. Lab. Code § 1700.44 (a)*, the Talent Agencies Act, *Cal. Lab. Code § 1700 et seq.*, further declares that no action or proceeding shall be brought pursuant to the Act with respect to any violation which is alleged to have occurred more than one year prior to commencement of the action or proceeding. § 1700.44 (c).

**Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview****Contracts Law > Defenses > Statutes of Limitations > Governments > Legislation > Statutes of Limitations > General Overview**

[HN5] Under well-established authority, a defense may be raised at any time, even if the matter alleged would be barred by a statute of limitations if asserted as the basis for affirmative relief. The rule applies in particular to contract actions. One sued on a contract may urge defenses that render the contract unenforceable, even if the same matters, alleged as grounds for restitution after rescission, would be untimely.

**Contracts Law > Defenses > Fraud & Misrepresentation > General Overview****Contracts Law > Performance > General Overview > Governments > Legislation > Statutes of Limitations > Time Limitations**

[HN6] Statutes of limitations bar actions or proceedings, thus guarding against stale claims and affording repose against long-delayed litigation. They act as shields, not swords. Thus, with respect to a fraud defense that neither the limitation of the statute nor the doctrine of laches will operate to bar the defense of the invalidity of the agreement upon the ground of fraud, for so long as the plaintiff is permitted to come into court seeking to enforce the agreement, the defendant may allege and prove fraud as a defense. In short, it is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud. The same reasoning applies to any grounds for asserting the illegality of the contract upon which the plaintiff sues.

**Antitrust & Trade Law > Industry Regulation > General Overview****Governments > Legislation > Statutes of Limitations >**

26 Cal. 4th 42, \*; 26 P.3d 343, \*\*;  
109 Cal. Rptr. 2d 14, \*\*\*; 2001 Cal. LEXIS 4236

**Time Limitations**

[HN7] The one-year limitations period of *Cal. Lab. Code § 1700.44 (c)* does not apply to pure defenses arising under the Talent Agencies Act, *Cal. Lab. Code § 1700 et seq.*

**Antitrust & Trade Law > Industry Regulation > General Overview**

**Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Intervention**

[HN8] See *Cal. Lab. Code § 1700.44 (a)*.

**Antitrust & Trade Law > Industry Regulation > General Overview**

**Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Intervention**

[HN9] The Labor Commissioner has the authority to hear and determine various disputes, including the validity of artists' manager-artist contracts and the liability of the parties thereunder. The reference of disputes involving the Talent Agencies Act, *Cal. Lab. Code § 1700 et seq.*, is mandatory. Disputes must be heard by the Commissioner, and all remedies before the Commissioner must be exhausted before the parties can proceed to the superior court.

**Administrative Law > Separation of Powers > Primary Jurisdiction**

**Business & Corporate Law > Agency Relationships > Causes of Action & Remedies > Breach of Contract  
Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Intervention**

[HN10] When the Talent Agencies Act, *Cal. Lab. Code § 1700 et seq.*, is invoked in the course of a contract dispute, the Labor Commissioner has exclusive jurisdiction to determine his jurisdiction over the matter, including whether the contract involved the services of a talent agency. Having so determined, the Commissioner may declare the contract void and unenforceable as involving the services of an unlicensed person in violation of the Act. It follows that a claim to this effect must first be submitted to the Commissioner, and that forum must be exhausted, before the matter can be determined by the superior court.

**Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies**

**Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview**

**Governments > Legislation > Statutory Remedies & Rights**

[HN11] The conclusion that *Cal. Lab. Code § 1700.44*, by its terms, gives the Labor Commissioner exclusive original jurisdiction over controversies arising under the Talent Agencies Act, *Cal. Lab. Code § 1700 et seq.*, comports with, and applies, the general doctrine of exhaustion of administrative remedies. With limited exceptions, the cases state that where an adequate administrative remedy is provided by statute, resort to that forum is a jurisdictional prerequisite to judicial consideration of the claim.

**Antitrust & Trade Law > Industry Regulation > General Overview**

[HN12] *Cal. Lab. Code § 1700.4 (a)* specifies that in all "cases of controversy" arising under the Talent Agencies Act, *Cal. Lab. Code § 1700 et seq.*, the parties involved shall refer the matters in dispute to the Labor Commissioner. This broad language plainly requires all such "controversies" and "disputes" between "parties" to be examined in the first instance by the Commissioner, not merely those "controversies" and "disputes" where the "party" invoking the Act seeks affirmative relief.

**Governments > Courts > Judicial Precedents**

[HN13] An opinion is not authority for a point not raised, considered, or resolved therein.

**Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview**

**Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview**

**Governments > Legislation > Statutes of Limitations > Pleading & Proof**

[HN14] Controversies colorably arising under the Talent Agencies Act, *Cal. Lab. Code § 1700 et seq.*, are within the exclusive original jurisdiction of the Labor Commissioner under *§ 1700.44 (a)*, even when Act-based issues are first raised as an affirmative defense to a court suit. On the other hand, the Act's statute of limitations under *§ 1700.44 (c)* does not restrict the time within such a defense may be raised and presented to the Commissioner.

26 Cal. 4th 42, \*; 26 P.3d 343, \*\*;  
109 Cal. Rptr. 2d 14, \*\*\*; 2001 Cal. LEXIS 4236

***Antitrust & Trade Law > Industry Regulation > General Overview***

***Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview***

[HN15] Although the parties to a controversy arising under the Talent Agencies Act, *Cal. Lab. Code § 1700 et seq.*, must first exhaust proceedings before the Labor Commissioner, one who first asserts the Act as a defense against a lawsuit does not waive the defense insofar as he or she failed to pursue and exhaust the administrative remedy before the suit was filed. The Act simply requires that controversies thereunder be referred by the parties to the Commissioner when they arise under § 1700.44 (a); it does not require any party to invoke the Commissioner's jurisdiction before such a controversy has arisen. The filing of a lawsuit may be the defendant's first inkling that such a controversy exists.

***Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials***

[HN16] The court's implicit conclusion is entitled to great deference on review of its order granting a new trial. Indeed, so long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, it will not be set aside.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

An individual filed an action against a prominent entertainer for sums he alleged were due under an oral contract involving defendant's association with a cable television network and the sales of her products. Defendant's defense was that plaintiff acted as a talent agency but lacked the requisite license, rendering the contract void under the Talent Agencies Act (*Lab. Code, § 1700 et seq.*). The act provides that in cases of controversy arising under it the parties involved shall refer the matters in dispute to the Labor Commissioner, who has the authority to hear and determine various disputes, including the validity of artists' manager-artist contracts and the liability of the parties thereunder. After the trial court denied defendant's motion for summary judgment on that ground, the jury returned a verdict for plaintiff. Thereafter, the trial court granted defendant's motion for a new trial, concluding that it had erred in refusing defendant's request for instructions on the on the requirements of the act. (Superior Court of Los Angeles

County, No. BC142878, Reginald A. Dunn, Judge.) The Court of Appeal, Second Dist., Div. Two, No. B121208, reversed the new trial order and reinstated the verdict.

The Supreme Court reversed the judgment of the Court of Appeal and instructed that court to reinstate the order for new trial, and to direct the trial court to stay further new trial proceedings pending submission to the commissioner of issues arising under the act. The court held that defendant's defense was not barred by the act's one-year statute of limitations for bringing the action before the commissioner. The court further held that under the act, the reference of disputes involving the act to the commissioner is mandatory, and all remedies before the commissioner must be exhausted before the parties can proceed to the superior court. Such referral is necessary when an artist asserts the act as a defense to an agent's civil suit for breach of contract, even though the artist seeks no affirmative relief. When the defendant in a court suit raises a colorable defense based on a violation of the act, the merits of that issue cannot be considered by a court until it has first been submitted to, and examined by, the commissioner. When an issue under the act arises in this fashion, the appropriate course is to stay the superior court proceedings and file a petition to determine controversy before the commissioner. In this case, defendant raised a colorable basis for exercise of the commissioner's initial and exclusive jurisdiction over the dispute. (Opinion by Baxter, J., expressing the unanimous view of the court.)

**HEADNOTES**

**CALIFORNIA OFFICIAL REPORTS HEADNOTES**  
Classified to California Digest of Official Reports

**(1) Actors and Other Professional Performers § 2--Employment Contracts--Talent Agencies Act: Employment Agencies § 1--Regulation.** -- --The Talent Agencies Act (*Lab. Code, § 1700 et seq.*) regulates the activities of a talent agency, and its remedial purpose is to protect artists seeking professional employment from the abuses of talent agencies. The act's definition of a talent agency is narrowly focused on efforts to secure professional employment or engagements for an artist or artists. Thus, it does not cover other services for which artists often contract, such as personal and career management (i.e. advice, direction, coordination, and oversight with respect to an artist's career or personal or financial affairs), nor does it govern assistance in an

artist's business transactions other than professional employment. Even the incidental or occasional provision of such services requires licensure, and an unlicensed person's contract with an artist to provide the services of a talent agency is illegal and void.

**(2a) (2b) Actors and Other Professional Performers § 2--Employment Contracts--Talent Agencies Act Referral of Disputes to Labor Commissioner: Employment Agencies § 1--Regulation.** -- --In an action by an individual against a prominent entertainer for sums he alleged were due under an oral contract involving defendant's association with a cable television network and the sales of her products, defendant's defense that plaintiff acted as a talent agency but lacked the requisite license, rendering the contract void under the Talent Agencies Act (*Lab. Code, § 1700 et seq.*), was not barred by the act's one-year statute of limitations for bringing the action before the Labor Commissioner. A defense may be raised at any time, even if the matter alleged would be barred by a statute of limitations if asserted as the basis for affirmative relief. The rule applies in particular to contract actions. One sued on a contract may urge defenses that render the contract unenforceable, even if the same matters, alleged as grounds for restitution after recession, would be untimely. The commissioner, whose interpretation of a statute he is charged with enforcing deserves substantial weight, has consistently held that the one-year limitations period does not apply to pure defenses arising under the act.

[See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 444.]

**(3) Courts § 37--Decisions and Orders--Stare Decisis--Unpublished Labor Commissioner Opinions.** -- --Although the Labor Commissioner does not have a system of publication in which precedential decisions under the Talent Agencies Act (*Lab. Code, § 1700 et seq.*) are printed, that does not obviate the rule of deference to administrative construction, though it may weaken an inference that the Legislature was aware of a prior administrative interpretation when adopting or amending statutory language. Moreover, *Cal. Rules of Court, rule 977(a)*, which prohibits citation of unpublished Court of Appeal and appellate department decisions, does not bar citation of the commissioner's unpublished decisions to demonstrate administrative construction.

**(4) Actors and Other Professional Performers § 2--**

**Employment Contracts--Talent Agencies Act--Referral of Disputes to Labor Commissioner: Employment Agencies--Regulation.** -- --Under the Talent Agencies Act (*Lab. Code, § 1700 et seq.*), which provides that in cases of controversy arising under it the parties involved shall refer the matters in dispute to the Labor Commissioner, the commissioner has the authority to hear and determine various disputes, including the validity of artists' manager-artist contracts and the liability of the parties thereunder. The reference of disputes involving the act to the commissioner is mandatory, and all remedies before the commissioner must be exhausted before the parties can proceed to the superior court. When the act is invoked in the course of a contract dispute, the commissioner has exclusive jurisdiction to determine his jurisdiction over the matter, including whether the contract involved the services of a talent agency.

**(5) Administrative Law § 85--Judicial Review and Relief--Exhaustion of Administrative Remedies--Agency's Original Jurisdiction.** -- --When statutes require a particular class of controversies to be submitted first to an administrative agency as a prerequisite to judicial consideration, and the parties reasonably dispute whether their case falls into the category, it lies within the agency's power to determine in the first instance, and before judicial relief may be obtained, whether the controversy falls within the agency's statutory grant of jurisdiction.

**(6) Actors and Other Professional Performers § 2--Employment contracts--Talent Agencies Act--Referral of Disputes to Labor Commissioner--Act Raised as Defense: Employment Agencies § 1--Regulation.** -- --Under the Talent Agencies Act (*Lab. Code, § 1700 et seq.*), which provides that in cases of controversy arising under it the parties involved shall refer the matters in dispute to the Labor Commissioner, referral to the commissioner is necessary when an artist asserts the act as a defense to an agent's civil suit for breach of contract, even though the artist seeks no affirmative relief. *Lab. Code, § 1700.4, subd. (a)*, specifies that in all "cases of controversy" arising under the act, the parties involved shall refer the matters in dispute to the commissioner. This broad language plainly requires all such controversies and disputes between parties to be examined in the first instance by the commissioner, not merely those controversies and disputes where the party invoking the

act seeks affirmative relief. When the defendant in a court suit raises a colorable defense based on a violation of the act, the merits of that issue cannot be considered by the court until it has first been submitted to, and examined by, the commissioner. When an issue under the act arises in this fashion, the appropriate course is to stay the superior court proceedings and file a petition to determine controversy before the commissioner.

(See 2 Witkin, Summary of Cal. law (9th ed. 1987) Agency and Employment, § 342]

**(7) Actors and Other Professional Performers § 2--Employment Contracts--Talent Agencies Act--Referral of Disputes to Labor Commissioner--Colorable Issue: Employment Agencies § 1--Regulation.** -- --In an action by an individual against a prominent entertainer for sums he alleged were due under an oral contract involving defendant's association with a cable television network and the sales of her products, defendant's defense that plaintiff acted as a talent agency but lacked the requisite license, rendering the contract void under the Talent Agencies Act ( *Lab. Code, § 1700 et seq.*), raised a colorable basis for exercise of the Labor Commissioner's initial and exclusive jurisdiction over the dispute. Thus, the action was subject to a stay pending submission to the commissioner. The trial court had granted defendant a new trial after a verdict for plaintiff, on grounds the jury should have been instructed on the requirements of the act. The trial court thus necessarily determined that, contrary to its prior assumption under which the trial was conducted, defendant had at least a colorable defense based on matters governed by the act. The trial court found that the evidence, though far from conclusive, included testimony tending to show that plaintiff was actively engaged in promoting defendant's employment opportunities pursuant to a contract with her. The act is concerned with contracts to procure either "employment" or "engagements" for artists, and its coverage is thus not necessarily confined to instances where the artist receives direct payment for his or her professional efforts.

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**JUDGES:** Opinion by Baxter, J., expressing the unanimous view of the court.

**OPINION BY: BAXTER**

**OPINION**

[\*46] [\*\*346] [\*\*\*18] **BAXTER, J.**

*Sections 1700 to 1700.47 of the Labor Code* (hereafter sometimes the Talent Agencies Act, or Act) <sup>1</sup> regulate " [t]alent agenc[ies] " (§ 1700.4, *subd. (a)*)--persons or corporations that procure professional "employment or engagements" (*ibid.*) for creative or performing "artists" (*ibid.*) in the entertainment media, including theater, movies, radio, and television (*id.*, *subd. (b)*). One must have a license to act as a talent agency (§ 1700.5), and any contract of an unlicensed person for talent agency services is illegal and void *ab initio*. All "cases of controversy arising under [the Act]" must be "refer[red]" by the parties to the Labor Commissioner (Commissioner) for resolution, subject to de novo appeal to the superior court. (§ 1700.44, *subd. (a)*.) No "action or proceeding shall be brought pursuant to [the Act]" for any "violation" that occurred more than one year previously. (*Id.*, *subd. (c)*.)

1 All further unlabeled statutory references are to the Labor Code unless otherwise indicated.

Plaintiff Norton Styne sued defendant Connie Stevens, a prominent entertainer, for sums allegedly due under an oral contract. Before trial, Stevens [\*47] sought summary judgment on grounds that the alleged contract [\*\*347] involved Styne's procurement of professional employment for Stevens, that Styne thus acted as a talent agency but lacked the necessary license, and that the contract was therefore illegal and void under the Talent Agencies Act. The trial court denied the motion, reasoning that Styne's activities on Stevens's behalf were not of a kind governed by the Act. Later, the court refused Stevens's request for a jury instruction presenting her Act-based defense.

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The jury found for Styne, but the trial court granted Stevens's motion for a new trial. The court concluded it had erred in refusing Stevens's request for a jury instruction on the requirements of the Talent Agencies Act.

Styne appealed the new trial order. He urged that the Talent Agencies Act was not involved in the parties' dispute because the trial evidence disclosed no activities requiring a license. In any event, he also asserted, Stevens's Act-based defense was barred by her failure to raise it, and submit it to the Commissioner, within the Act's one-year limitations period. Stevens responded that the evidence did suggest Styne had acted as a talent agency, and that Stevens was free to assert the consequent illegality of the contract *as a defense* [\*\*\*19] *to Styne's court suit* without regard to the Act's statute of limitations or its requirement of first referral to the Commissioner.

The Court of Appeal reversed the new trial order and reinstated the verdict. The appellate court held that Stevens's defense under the Talent Agencies Act was barred because she had failed to invoke the Act, and to refer the matter to the Commissioner, within one year after she was served with Styne's complaint.

On review, we reach the following conclusions: Contrary to the Court of Appeal's holding, a *statute of limitations* does not bar a *defense* involving no claim for affirmative relief. Hence, *section 1700.44, subdivision (c)*, the one-year limitations period contained in the Talent Agencies Act, did not affect the times within which Stevens could take actions necessary to assert her Act-based defense against Styne's suit for breach of contract. On the other hand, the Court of Appeal was correct insofar as it determined that under *section 1700.44, subdivision (a)*, Stevens's Act-based claims, if colorable, must first be referred to the Commissioner for resolution. Stevens's claim that *section 1700.44, subdivision (a)* does not apply to defenses lacks merit.

By granting a new trial on grounds that an *instruction* concerning the Talent Agencies Act's requirements should have been given, the superior court necessarily determined, contrary to its prior assumption, that Stevens [\*48] has a colorable defense under the Act. The Court of Appeal agreed that the trial evidence permitted such an inference, and that conclusion appears correct. Accordingly, Stevens is entitled to maintain her Act-based defense, though it must be pursued in the first

instance before the Commissioner.

As we explain in greater detail below, the appropriate disposition is therefore to reverse the judgment of the Court of Appeal, thus reinstating the new trial order. However, we will instruct the Court of Appeal to direct that new trial proceedings in the superior court be stayed pending submission to the Commissioner of issues arising under the Talent Agencies Act.

## FACTS

In January 1996, Styne sued Stevens, asserting various theories arising from Stevens's claimed breach of contract. Styne's original and amended complaints alleged as follows: Styne was Stevens's longtime personal manager. He had devoted professional efforts that substantially led to Stevens's deal with Home Shopping Network (HSN) to feature Stevens as a celebrity spokesperson selling her own line of beauty products on cable television. Under the deal, Stevens's company would gain profits by selling products to HSN, which would then resell them to consumers. At the time of these events, Styne and Stevens had an oral "management contract," whereby Styne would "use his efforts to advance the career efforts of Stevens." In return, Stevens would pay Styne a commission of 10 percent of all "gross monies derived by Stevens . . . arising out of or in connection with Stevens'[s] professional endeavors." [\*\*\*348] Between 1989 and the date of the complaint, Stevens's company made many sales of beauty products to HSN, and Stevens earned profits from these sales. Styne made demand on Stevens for his share of these profits, and Stevens refused to pay.

Stevens did not cross-complain. Her April 1996 answer asserted no defense under the Talent Agencies Act. However, in July 1997, after discovery, Stevens moved for summary judgment on grounds that the contract Styne alleged was void because Styne had no talent agency license. Stevens's theory was that Styne's various discussions with HSN, including those relating [\*\*\*20] to the sale of Stevens's own beauty products, were efforts to "procure . . . employment or engagements" for Stevens in her capacity as an "artist" (§ 1700.4, *subd. (a)*; see also *id.*, *subd. (b)*), and thus were the services of a talent agency for which the Act required a license.<sup>2</sup>

<sup>2</sup> According to the motion, Styne's deposition indicated he discussed several concepts with

HSN, including Stevens's appearance as a celebrity spokesperson for products marketed by HSN, projects involving "the production and marketing of records of Stevens'[s] performances and Stevens performing in concert," and finally the idea of Stevens's appearances on the network to promote her own line of products, to be purchased and resold by HSN.

In opposition, Styne did not dispute he lacked a talent agency license. However, he urged that (1) Stevens's defense, based on a claimed violation [\*49] of the Talent Agencies Act, was within the exclusive original jurisdiction of the Commissioner, (2) the defense was waived because not raised within the Act's one-year statute of limitations, and (3) Styne had not acted as a talent agency because, among other things, his efforts to help Stevens market her company's product line were not the procurement of her *employment or engagement* as an *artist*.

The trial court denied Stevens's motion for summary judgment "based on the grounds set forth in the opposing party's papers." In particular, the court opined that Stevens's claim that Styne had acted as an unlicensed talent agency was "without merit," because the income derived from HSN "was based upon sales generated from . . . products [of Stevens's company] sold to the public and not through the 'employment or engagement' of the artist. [*Labor Code section 1700.4(a)*.] Connie Stevens was not employed by the Home Shopping Club."

Trial began in January 1998. At the outset, Stevens proposed an instruction that would require the jury to determine whether Styne had violated the Talent Agencies Act. The trial court ultimately refused the instruction.

The trial evidence, like that adduced on summary judgment, permitted an inference that, under an agreement with Stevens, Styne undertook extensive efforts to promote her employment with HSN as a celebrity spokesperson, and through record albums<sup>3</sup> and live concert performances to be produced by HSN. In numerous meetings with HSN personnel, Styne touted Stevens's wholesome image and communications skills. Styne provided HSN with detailed budgets and profit projections for the ideas he proposed. He set up a face-to-face meeting between Stevens and top HSN executives to cement a deal, and he took credit for bringing about the final arrangement with HSN. As

before, the evidence also indicated that, while Stevens ultimately appeared on the network to promote her own company's products, she was not paid by HSN for these appearances as such, but instead derived revenue from sales of her company's products to HSN.

3 We note that efforts to secure *recording contracts* for artists "shall not of [themselves] subject a person or corporation to regulation and licensing" under the Talent Agencies Act. (§ 1700.4, *subd. (a)*.)

The jury found for Styne and awarded some \$ 4.3 million in damages. Stevens moved for judgment notwithstanding the verdict (judgment n.o.v.), and alternatively, for a new trial. In the motion for judgment n.o.v., Stevens urged that the alleged contract was void for violation of the Talent Agencies Act. In the new trial motion, Stevens argued that the trial court had erred by [\*50] refusing her proffered instruction allowing the jury to void the contract [\*\*\*21] for violation of the Act if it concluded that Styne's activities were an attempt to procure professional employment for Stevens.

[\*\*349] The trial court denied the motion for judgment n.o.v. However, the court granted the motion for new trial, agreeing with Stevens that it should have instructed the jury "re the requirements of the Talent [Agencies] Act."

Styne appealed from the new trial order. The Court of Appeal, Second Appellate District, Division Two, reversed. The appellate court first concluded that any dispute arising under the Talent Agencies Act must first be submitted to the Commissioner, and no exception arises when a violation of the Act is raised solely as a defense in a court suit. Second, the Court of Appeal reasoned that such a defense had been waived in any event, because Stevens had failed to raise it, or submit it to the Commissioner, within one year after the statute of limitations set forth in *section 1700.44* began to run. For purposes of "defensive application," the Court of Appeal held, the limitations period commenced when Stevens received formal notice of Styne's claim by service of process in his lawsuit.

We granted review.

## DISCUSSION

### 1. *Overview of Talent Agencies Act.*

(1) As indicated above, [HN1] the Talent Agencies Act (§ 1700 *et seq.*) regulates the activities of a "talent agency," i.e., "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 . . .*" (§ 1700.4, *subd. (a)*, italics added.) "Artists" include stage and screen actors; radio and musical artists; musical organizations; theater, movie, and radio 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." (*Id.*, *subd. (b)*.) The Act is remedial; its purpose is to protect artists seeking professional employment from the abuses of talent agencies. (*Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal. App. 4th 246, 254 [48 Cal. Rptr. 2d 437] (*Waisbren*); *Buchwald v. Superior Court* (1967) 254 Cal. App. 2d 347, 350-351 [62 Cal. Rptr. 364].)

As also indicated, [HN2] the Act's definition of a talent agency is narrowly focused on efforts to secure professional "employment or engagements" for [\*51] an "artist or artists." (§ 1700.4, *subd. (a)*.) Thus, it does not cover other services for which artists often contract, such as personal and career *management* (i.e., advice, direction, coordination, and oversight with respect to an artist's career or personal or financial affairs) (*Park v. Deftones* (1999) 71 Cal. App. 4th 1465, 1469-1470 [84 Cal. Rptr. 2d 616] (*Park*); *Waisbren, supra*, 41 Cal. App. 4th 246, 252-253), nor does it govern assistance in an artist's business transactions other than professional employment.

Among other things, [HN3] the Act provides that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license . . . from the Labor Commissioner." (§ 1700.5.) The weight of authority is that even the incidental or occasional provision of such services requires licensure. (*Park, supra*, 71 Cal. App. 4th 1465, 1470; *Waisbren, supra*, 41 Cal. App. 4th 246, 253-261; but see *Wachs v. Curry* (1993) 13 Cal. App. 4th 616, 627-628 [16 Cal. Rptr. 2d 496].) In furtherance of the Act's protective aims, an unlicensed person's contract with an artist to provide the services of a talent agency is illegal and [\*\*\*22] void. (*Waisbren, supra*, at p. 261; *Buchwald v. Superior Court, supra*, 254 Cal. App. 2d 347, 351.)

## 2. Statute of limitations.

[HN4] After providing that all "cases of controversy" arising thereunder "shall [first be] refer[red]" by the parties to the Commissioner (§ 1700.44, *subd. (a)*), the Talent Agencies Act further declares that "[n]o *action or proceeding* shall be *brought* pursuant to [the Act] with respect to any violation which is alleged to have occurred more than *one year* prior to commencement of the action or proceeding" (*id.*, *subd. (c)*, italics added). The Court of Appeal ruled that this limitations period applied to Stevens's *defensive* use of the Act, and that it began to run against her [\*\*350] when Styne filed and served his complaint against her in January 1996. (See *Park, supra*, 71 Cal. App. 4th 1465, 1469.) As the Court of Appeal noted, Stevens did not raise the Act as a defense until she filed her motion for summary judgment in August 1997. In the Court of Appeal's view, Stevens's Act-based defense was thus barred by her failure to invoke it, or to submit it to the Commissioner, within the applicable one-year period.

(2a) Stevens insists the Court of Appeal's holding contravenes the clear rule that statutes of limitations do not apply to defenses. We agree. [HN5] Under well-established authority, a defense may be raised at any time, even if the matter alleged would be barred by a statute of limitations if asserted as the basis for affirmative relief. The rule applies in particular to contract actions. One sued on a contract may urge defenses that render the contract unenforceable, even if the same matters, alleged as grounds for restitution after [\*52] rescission, would be untimely. (E.g., *Estate of Cover* (1922) 188 Cal. 133, 140 [204 P. 583]; *Bank of America v. Vannini* (1956) 140 Cal. App. 2d 120, 127 [295 P.2d 102]; *Stiles v. Bodkin* (1941) 43 Cal. App. 2d 839, 844 [111 P.2d 675]; see *French v. Construction Laborers Pension Trust* (1975) 44 Cal. App. 3d 479, 485 [118 Cal. Rptr. 731] (*French*) [nonjudicial rescission on grounds of fraud and mistake]; *Cox v. Schnerr* (1916) 172 Cal. 371, 382 [156 P. 509] [quiet title suit based on fraudulent deed]; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 423, p. 532.)

[HN6] Statutes of limitations bar "actions or proceedings" (e.g., *French, supra*, 44 Cal. App. 3d 479, 485), thus guarding against stale claims and affording repose against long-delayed litigation. They act as shields, not swords. (*Id.* at p. 486.) Thus, we long ago explained with respect to a fraud defense that "neither the limitation of the statute nor the doctrine of laches will operate to bar the defense of the invalidity of the

agreement upon the ground of fraud, for so long as the plaintiff is permitted to come into court seeking to enforce the agreement, the defendant may allege and prove fraud as a defense. In short, it is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud." (*Estate of Cover, supra*, 188 Cal. 133, 140-141.) The same reasoning applies to any grounds for asserting the illegality of the contract upon which the plaintiff sues.

As the United States Supreme Court recently stated in another context, "the object of a statute of limitation in keeping 'stale litigation out of the courts,' . . . would be distorted if the statute were applied to bar an otherwise legitimate defense to a timely lawsuit, for limitation [\*\*\*23] statutes 'are aimed at lawsuits, not at the consideration of particular issues in lawsuits.' . . ." (*Beach v. Ocwen Fed. Bank* (1998) 523 U.S. 410, 415-416 [118 S. Ct. 1408, 1411, 140 L. Ed. 2d 566], citations omitted.)

Styne suggests that under *Park*, the defendant in a contract suit must assert a Talent Agencies Act defense, and submit it to the Commissioner, within one year after commencement of the action. In *Park*, however, the matter was submitted to the Commissioner within one year after the action began, and the Court of Appeal simply endorsed the Commissioner's conclusion that it was therefore timely. (*Park, supra*, 71 Cal. App. 4th 1465, 1469.) There is no indication the issue whether statutes of limitations apply *at all* to defenses was considered. Hence, *Park* is not authority for the proposition that the Act's statute of limitations may bar assertion of the Act as a defense.

[\*53] (3) (See fn. 4.) Indeed, the Commissioner, whose interpretation of a statute he is charged with enforcing deserves substantial weight (see, e.g., *Kelly v. Methodist Hospital of So. California* (2000) 22 Cal. 4th 1108, 1118 [95 Cal. Rptr. 2d 514, 997 P.2d 1169]), has consistently held that [HN7] the one-year limitations period of section 1700.44, subdivision (c) does not apply to pure defenses arising under the Talent Agencies Act. (E.g., *Hyperion Animation Co., Inc. v. Toltec Artists, Inc.* (Cal.Lab.Com., Dec. 27, 1999) TAC No. 7-99 [pure defenses not untimely though invoked more than one year after both challenged contracts [\*\*351] and commencement of agent's superior court action]; *Sevano*

*v. Artistic Productions, Inc.* (Cal.Lab.Com., Mar. 20, 1997) TAC No. 8-93 [defense not untimely because not raised within one year after plaintiff's demand for arbitration]; *Rooney v. Levy* (Cal.Lab.Com., Feb. 10, 1995) TAC No. 66-92 [Act's statute of limitations does not bar Commission petition seeking declaration that contract is void based on Act "violation" that occurred more than one year earlier; limitations period does not apply to defenses]; *Church v. Brown* (Cal.Lab.Com., June 2, 1994) TAC No. 66-92 [same]; but see *Moreno v. Park* (Cal.Lab.Com., Jan. 20, 1998) TAC No. 9-97.)<sup>4</sup>

4 The Commissioner does not have a system of publication in which precedential decisions under the Talent Agencies Act are printed. This does not obviate the rule of deference to administrative construction, though it may weaken an inference that the Legislature was aware of a prior administrative interpretation when adopting or amending statutory language. (See *Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal. 4th 226, 235, fn. 7 [5 Cal. Rptr. 2d 782, 825 P.2d 767].) Moreover, the Rules of Court do not bar our citation of such unpublished decisions to demonstrate administrative construction. (See *Cal. Rules of Court, rule 977(a)* [prohibiting citation of unpublished Court of Appeal and appellate department decisions].)

(2b) Styne asserts that Stevens has actually sought affirmative relief by asking, in effect, for a declaration that the contract is void and unenforceable. But the cases belie such an argument; one who raises the defense that a contract is illegal and unenforceable necessarily asks for a determination to that effect. If the result the defendant seeks is simply that he or she owes no obligations under an agreement alleged by the plaintiff, the matter must be deemed a defense to which the statute of limitations does not apply.

Styne notes that the Talent Agencies Act limits "actions and proceedings" (§ 1700.44, *subd. (c)*) and contains no *exception* for defensive use, though the Legislature must have understood that artists would routinely commence "proceedings" before the Commissioner, seeking to avoid their contractual commitments by claiming [\*\*\*24] violations of the Act. But the Act's phrase "actions and proceedings"--which parallels the universal statute of limitations reference to "actions" (see, e.g., *Code Civ. Proc.*, § 335 *et seq.*)--must

be construed in the same fashion, as referring to claims for affirmative relief. Nothing in the language of *section 1700.44, subdivision (c)* suggests that, in contrast with other statutory limitations periods, it was intended to bar a mere defense to a claim for relief initiated by another.

[\*54] We therefore conclude that the statute of limitations set forth in *section 1700.44, subdivision (c)* does not bar Stevens's assertion of her contract defense based on Styne's alleged violation of the Talent Agencies Act.<sup>5</sup>

<sup>5</sup> As an additional basis for arguing that her defense is not barred, Stevens cites the maxim that the illegality of a contract need not be pled, can be asserted at any time, and is never waived. (See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 444, p. 397.) However, this principle appears concerned not with limitations periods as such, but with the procedural issue whether a defense is waived by failure to assert it in a timely fashion once a lawsuit has commenced. Moreover, it is not clear that *all* issues of illegality in a contract fall within the unwaivable category. (*Ibid.*) Because we conclude on other grounds that *section 1700.44, subdivision (c)* does not bar Stevens's defense, we do not reach Steven's additional argument. On the other hand, Styne suggests that Stevens's claim of illegality is among those defenses which *must* be correctly and timely pled. Styne notes that Stevens never pled this defense in her answer and raised it only by her motion for summary judgment. But again, *section 1700.44, subdivision (c)*, a *statute of limitations*, is not concerned with the general procedures or time limits for asserting defenses to a lawsuit. Styne did not argue, in his opposition to the new trial order here under review, that Stevens had waived her Act-based defense by failing to follow the general rules of timely and correct pleading. He has only vaguely alluded to that issue on appeal, *and the Court of Appeal did not address it*. Thus, the issue is not before us.

### 3. Labor Commissioner's jurisdiction.

(4) [HN8] The Talent Agencies Act specifies that "[i]n cases of *controversy* arising under this chapter, the parties involved *shall refer the matters in dispute* to the Labor Commissioner, who shall hear and determine the

same, subject to an appeal . . . to the superior court where the same shall be heard *de novo*." (§ 1700.44, *subd. (a)*, italics added.) [HN9] "The Commissioner has the authority to hear and determine various disputes, *including* [\*\*352] *the validity of artists' manager-artist contracts and the liability of the parties thereunder*. (*Buchwald v. Superior Court, supra, 254 Cal. App. 2d 347, 357.*) The reference of disputes involving the [A]ct to the Commissioner is *mandatory*. (*Id. at p. 358.*) Disputes *must* be heard by the Commissioner, and all remedies before the Commissioner *must* be exhausted before the parties can proceed to the superior court. (*Ibid.*)" (*REO Broadcasting Consultants v. Martin (1999) 69 Cal. App. 4th 489, 494-495 [81 Cal. Rptr. 2d 639] (REO Broadcasting)*, italics in original; see also *Garson v. Div. of Labor Law Enforcement (1949) 33 Cal. 2d 861, 864-866 [206 P.2d 368]*; *Collier & Wallis, Ltd., v. Astor (1937) 9 Cal. 2d 202, 204-206 [70 P.2d 171]*; *Humes v. MarGil Ventures, Inc. (1985) 174 Cal. App. 3d 486, 494-495 [220 Cal. Rptr. 186] (Humes)*; *Buchwald v. Superior Court, supra, at pp. 358-359.*)

(5) (See fn. 6.) [HN10] When the Talent Agencies Act is invoked in the course of a contract dispute, the Commissioner has exclusive jurisdiction to determine his jurisdiction over the matter, including whether the contract involved the services of a talent agency. (*Buchwald v. Katz (1972) 8 Cal. 3d 493, 496 [105 [\*55] Cal. Rptr. 368, 503 P.2d 1376]*; see *Buchwald v. Superior Court, supra, 254 [\*\*\*25] Cal. App. 2d 347, 360-361.*)<sup>6</sup> Having so determined, the Commissioner may declare the contract void and unenforceable as involving the services of an unlicensed person in violation of the Act. (See, e.g., *Park, supra, 71 Cal. App. 4th 1465, 1468*; *REO Broadcasting, supra, 69 Cal. App. 4th 489, 492, 500*; *Humes, [\*\*353] supra, 174 Cal. App. 3d 486, 492, 494-495.*) It follows that a claim to this effect must first be submitted to the Commissioner, and that [\*56] forum must be exhausted, before the matter can be determined by the superior court.

<sup>6</sup> The Commissioner's exclusive jurisdiction to determine his jurisdiction over issues colorably arising under the Talent Agencies Act thus empowers him alone to decide, in the first instance, whether the facts do bring the case within the Act. When statutes require a particular class of controversies to be submitted *first* to an administrative agency as a *prerequisite* to judicial consideration, and the parties reasonably dispute

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whether their case falls into that category, it lies within the *agency's* power "to determine *in the first instance, and before judicial relief may be obtained*, whether [the] controversy falls within the [agency's] statutory grant of jurisdiction [citations]." ( *United States v. Superior Court* (1941) 19 Cal. 2d 189, 195 [120 P.2d 26], italics added; see *Morton v. Superior Court* (1970) 9 Cal. App. 3d 977, 981-982 [88 Cal. Rptr. 533]; *Smith v. City of Duarte* (1964) 228 Cal. App. 2d 267, 269-270 [39 Cal. Rptr. 524]; *People v. Coit Ranch, Inc.* (1962) 204 Cal. App. 2d 52, 57-58 [21 Cal. Rptr. 875] (*Coit Ranch*) [barring assertion of court defense, without first exhaustion of administrative remedy, where agency has jurisdiction to determine its jurisdiction]; see also *Stone v. Turton* (1963) 220 Cal. App. 2d 417, 421-422 [33 Cal. Rptr. 853]; but see *County of Alpine v. County of Tuolumne* (1958) 49 Cal. 2d 787, 798 [322 P.2d 449] [rule does not apply where the agency is given no jurisdiction to make a determination "of the type involved"].) As indicated in the text, cases involving the Talent Agencies Act are in accord. ( *Buchwald v. Katz*, *supra*, 8 Cal. 3d 493, 496 [where facts alleged in court permitted inference that parties' relationship involved unlicensed talent agency services, Commissioner had exclusive jurisdiction to determine his jurisdiction over the dispute, first ascertaining whether plaintiff had in fact acted as talent agency by securing employment and bookings pursuant to contract]; see *Buchwald v. Superior Court*, *supra*, 254 Cal. App. 2d 347, 360 [same, citing *United States v. Superior Court*, *supra*, 19 Cal. 2d 189, 195].)

This situation is distinct from that which arises when parties dispute whether an injured person is entitled to one or the other of two *mutually exclusive* kinds of relief in *separate and parallel* fora, e.g., tort damages to be awarded by a court, or statutory benefits for an industrial injury administered by the Workers' Compensation Appeals Board. In that instance, the two tribunals have *concurrent* jurisdiction to *determine their subject matter jurisdiction* over the dispute, and the first forum invoked has jurisdiction, to the exclusion of the other, to finally determine if the facts give it, rather than

the other, jurisdiction over the merits of the controversy. ( *Scott v. Industrial Acc. Com.* (1956) 46 Cal. 2d 76, 81-89 [293 P.2d 18]; see also, e.g., *Taylor v. Superior Court* (1956) 47 Cal. 2d 148, 151 [301 P.2d 866]; *Jones v. Brown* (1970) 13 Cal. App. 3d 513, 520-521 [89 Cal. Rptr. 651]; but see *Sea World Corp. v. Superior Court* (1973) 34 Cal. App. 3d 494, 496-503 [110 Cal. Rptr. 232].)

Here, and in many similar cases under the Talent Agencies Act, a conclusion that the superior court has the prior exclusive right to determine the issue of jurisdiction would undermine the clear purpose of *section 1700.44, subdivision (a)*, and the principle of exhaustion of administrative remedies generally, by giving the court, not the Commissioner, the exclusive right to decide in the first instance *all the legal and factual issues on which an Act-based defense depends*. Once the court resolved whether Styne had acted as a talent agency under the contract, and even if the court concluded he *had done so*, there would be little or nothing left for the Commissioner to resolve.

[HN11]

Our conclusion that *section 1700.44*, by its terms, gives the Commissioner exclusive original jurisdiction over controversies arising under the Talent Agencies Act comports with, and applies, [\*\*\*26] the general doctrine of exhaustion of administrative remedies. With limited exceptions, the cases state that where an adequate administrative remedy is provided by statute, resort to that forum is a "jurisdictional" prerequisite to judicial consideration of the claim. (E.g., *Johnson v. City of Loma Linda* (2000) 24 Cal. 4th 61, 70 [99 Cal. Rptr. 2d 316, 5 P.3d 874]; *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal. 4th 489, 495 [87 Cal. Rptr. 2d 702, 981 P.2d 543]; *Abelleira v. District Court of Appeal* (1941) 17 Cal. 2d 280, 292-293 [109 P.2d 942, 132 A.L.R. 715] (*Abelleira*).)

(6) Stevens nonetheless argues that referral to the Commissioner is not necessary when the artist alleges a violation of the Talent Agencies Act solely as a *defense* in a garden-variety court action for breach of contract. She urges that *section 1700.44, subdivision (a)* requires referral only of "cases" (*ibid.*) arising under the Act. In Stevens's view, a "case" is limited to a *claim for*

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*affirmative relief* that *itself relies* on the Act. She insists that when an artist merely asserts the Act as a defense to the agent's civil suit for breach of contract, and seeks no affirmative relief for herself, no "case" arises for referral to the Commissioner.

Stevens misreads the statute. [HN12] *Section 1700.4, subdivision (a)* specifies that in all "cases of controversy" arising under the Talent Agencies Act, "the parties involved shall refer the matters in dispute" to the Commissioner. (Italics added.) This broad language plainly requires all such "controvers[ies]" and "dispute[s]" between "parties" to be examined in the first instance by the Commissioner, not merely those "controvers[ies]" and "dispute[s]" where the "part[y]" invoking the Act seeks affirmative relief.<sup>7</sup>

<sup>7</sup> At oral argument, Stevens's counsel asserted, without support, that only a claim for affirmative relief based on the Talent Agencies Act is a controversy "arising under" the Act (§ 1700.44, *subd. (a)*), and that matters asserted purely for defensive purposes do not qualify. The primary federal jurisdictional statute, 28 *United States Code section 1331*, gives United States district courts original jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States" (italics added); in that context, the "arising under" language has been construed to extend only to matter appearing on the face of the plaintiff's complaint, and not as an affirmative defense. (See *Louisville & Nashville Railroad v. Mottley* (1908) 211 U.S. 149, 152 [29 S. Ct. 42, 43, 53 L. Ed. 126]; 13 Wright et al., *Federal Practice and Procedure* (2d ed. 1984) § 3522, pp. 72-73.) But the language of the two statutes is distinguishable in a critical respect. The federal law speaks of "civil actions," while *section 1700.44, subdivision (a)* speaks more broadly of "cases of controversy." We find Stevens's interpretation unpersuasive.

A number of courts, and the Commissioner himself, have assumed that even when the Talent Agency Act is first invoked by the defendant in a civil [\*57] action, and whether or not the defendant seeks affirmative relief, the matter is properly submitted to the Commissioner in the first instance. (See, e.g., *Park, supra*, 71 Cal. App. 4th 1465, 1468-1469 [breach of contract suit, defense of illegality based on Act; no indication defendant sought

affirmative relief]; *REO Broadcasting, supra*, 69 Cal. App. 4th 489, 492 [same; defendant originally sought, but ultimately waived, claim for damages]; *Humes, supra*, 174 Cal. App. 3d 486, 492 [same; defendant sought return of commissions paid]; *Ivy v. Howard* (Cal.Lab.Com., Oct. 27, 1994) TAC No. 18-94 [same; no claim for affirmative relief].)<sup>8</sup> This assumption conforms to the general [\*\*\*27] principle that the requirement of exhaustion of administrative remedies applies to defenses. (E.g., *South Coast Regional Com. v. Gordon* (1977) 18 Cal. 3d 832, 836-838 [135 Cal. Rptr. 781, 558 P.2d 867] [landowner who failed to seek coastal zone building permit cannot raise [\*\*354] "vested rights" defense in action for violation of Coastal Zone Conservation Act]; *People v. West Publishing Co.* (1950) 35 Cal. 2d 80, 87-88 [216 P.2d 441] [corporation sued by state for use taxes due cannot raise tax-calculation issues after failing to pursue available administrative remedies]; *Aguirre v. Lee* (1993) 20 Cal. App. 4th 1646, 1654 [25 Cal. Rptr. 2d 367] [landlord sued for rent control violation cannot raise exemption defense after failing to seek exemption permit from rent control board]; *Coit Ranch, supra*, 204 Cal. App. 2d 52, 56-58 [farmer sued by Director of Agriculture for past-due cantaloupe advertising assessment cannot, for the first time, raise ultra vires defense available in administrative proceedings before the director].)

<sup>8</sup> We recognize, of course, that cases are not dispositive authority for points not directly considered. (See text discussion, *post*.)

Stevens insists *Waisbren, supra*, 41 Cal. App. 4th 246 supports a rule that defenses under the Talent Agencies Act need not be submitted to the Commissioner. In *Waisbren*, artists defending a court suit for breach of contract won summary judgment on grounds the agreement was void as involving unlicensed talent agency services. The Court of Appeal affirmed, rejecting the plaintiff's claims that the mere "occasional" or "incidental" procurement of employment for artists requires no license, and that the sanction of voiding the contract was too harsh. (*Id.* at pp. 251-262.) As Stevens points out, there is no indication the matter was first submitted to the Commissioner, and the Court of Appeal did not suggest this barred a judicial determination of the merits.

However, it appears neither party raised the exhaustion issue in *Waisbren*, and the Court of Appeal

did not address it. [HN13] An opinion is not authority for a point not raised, considered, or resolved therein. (E.g., *People v. Castellanos* [\*58] (1999) 21 Cal. 4th 785, 799, fn. 9 [88 Cal. Rptr. 2d 346, 982 P.2d 211]; *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal. 4th 893, 943 [55 Cal. Rptr. 2d 724, 920 P.2d 669].)

Stevens asserts that requiring an artist to submit a mere defense to the Commissioner contravenes the Talent Agencies Act's remedial purposes. To avoid this result, she urges, we should hold the court and the Commissioner have "concurrent" original jurisdiction in such cases. But the plain meaning of *section 1700.44, subdivision (a)*, and the relevant case law, negate any inference that courts share original jurisdiction with the Commissioner in controversies arising under the Act. On the contrary, the Commissioner's original jurisdiction of such matters is exclusive.

Moreover, Stevens's policy arguments are unpersuasive. No reason appears why the Talent Agencies Act's purposes to protect artists from unscrupulous and unqualified talent agencies warrant a conclusion that an artist's claims for affirmative relief under the Act must first be submitted to the Commissioner, but that an artist's defenses under the Act need not be. In both instances, referral to the Commissioner serves the intended purpose of the doctrine of exhaustion of administrative remedies--to reduce the burden on courts while benefiting from the expertise of an agency particularly familiar and experienced in the area. (See, e.g., *Rojo v. Klinger* (1990) 52 Cal. 3d 65, 83 [276 Cal. Rptr. 130, 801 P.2d 373] [Department of Fair Housing and Employment]; *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal. 3d 465, 476-477 [131 Cal. Rptr. 90, 551 P.2d 410] [internal hospital [\*\*\*28] board]; *Abelleira, supra*, 17 Cal. 2d 280, 306 [California Employment Commission].) The Commissioner's expertise in applying the Act is particularly significant in cases where, as here, the essence of the parties' dispute is whether services performed were by a talent agency for an artist.

Stevens implies that requiring submission to the Commissioner of defenses under the Talent Agencies Act will somehow inhibit artists from availing themselves of its protective purposes. We disagree. When an issue under the Act arises in this fashion, the appropriate course is simply to stay the superior court proceedings and file a "petition to determine controversy" before the

Commissioner. (See *Cal. Code Regs., tit. 8, § 12022; REO Broadcasting, supra*, 69 Cal. App. 4th 489, 492; see also *Park, supra*, 71 Cal. App. 4th 1465, 1468, [\*\*355] 84 Cal. Rptr. 2d 616.)<sup>9</sup> Accordingly, we agree with Styne and the Court of Appeal that when the defendant in a court suit raises a colorable defense [\*59] based on a violation of the Act, the merits of that issue cannot be considered by the court until it has first been submitted to, and examined by, the Commissioner.<sup>10</sup>

<sup>9</sup> Stevens appears concerned that when an artist faces a civil suit for breach of contract, the Talent Agencies Act's *limitations period* (§ 1700.44, *subd. (c)*) might preclude submission to the Commissioner of a defense based on a "violation" of the Act (*ibid.*) that occurred more than one year previously. As amici curiae, the Directors Guild of America, the Writers Guild of America, and the American Federation of Television and Radio Artists (collectively amici curiae) similarly worry that application of the Act's limitation period to defenses would inhibit the private arbitration of such disputes. But these concerns are unfounded for reasons we have explained in the prior part.

Amici curiae additionally argue that arbitration will be undermined by a requirement that artists' Talent Agencies Act defenses (particularly defensive claims that an alleged contract is void under the Act) must be referred to the Commissioner. But this assertion does not appear directed at the issue of defenses in particular. The contention raised by amici curiae, if valid at all, applies equally whether the artist seeks affirmative relief under the Act, or raises the Act only for defensive purposes. Moreover, the Talent Agencies Act specifically allows parties to provide in their contract that disputes thereunder shall be resolved by private arbitration, rather than by the Commissioner. (§ 1700.45.) Nothing in our reasoning restricts this right.

<sup>10</sup> We have indicated throughout that all claims or defenses which *colorably* arise under the Talent Agencies Act must be submitted to the Commissioner before consideration by the superior court, because the Commissioner has exclusive original jurisdiction not only to decide the merits of a controversy arising under the Act, but also to determine, in the first instance, whether the dispute actually falls within this

statutory grant of authority. Adhering to this principle, we use the term "colorable" in its broadest sense. Certainly the superior court need not refer to the Commissioner a case which, despite a party's contrary claim, clearly has *nothing to do* with the Act. For example, an automobile collision suit between persons unconnected to the entertainment industry is manifestly not a controversy arising under the Act, and it cannot be made one by mere utterance of words. On the other hand, if a dispute in which the Act is invoked plausibly pertains to the subject matter of the Act, the dispute should be submitted to the Commissioner for first resolution of both jurisdictional and merits issues, as appropriate.

#### 4. *Disposition.*

The question remains how these principles should apply to the facts, and in the procedural posture, of this case. As indicated above, [HN14] controversies colorably arising under the Talent Agencies Act are within the exclusive original jurisdiction of the Commissioner (§ 1700.44, *subd. (a)*), even when Act-based issues are first raised as an affirmative defense to a court suit. On the other hand, as we have also [\*\*\*29] explained, the Act's statute of limitations (§ 1700.44, *subd. (c)*) does not restrict the time within such a defense may be raised and presented to the Commissioner.

Moreover, we are persuaded that [HN15] although the parties to a controversy arising under the Act must first exhaust proceedings before the Commissioner, one who first asserts the Act as a defense against a lawsuit does not waive the defense insofar as he or she failed to pursue and exhaust the administrative remedy *before the suit was filed*. The Act simply requires that "controvers[ies]" thereunder be "refer[red]" by the parties to the Commissioner *when they "aris[e]"* (§ 1700.44, *subd. (a)*); it does not require any [\*60] party to invoke the Commissioner's jurisdiction *before* such a controversy has arisen. The filing of a lawsuit may be the defendant's first inkling that such a controversy exists.

(7) We therefore conclude that if this case presents any colorable basis for exercise of the Commissioner's jurisdiction, the matter still may, and must, be submitted for his examination. <sup>11</sup> Accordingly, we address whether such a colorable basis arises here.

11 At oral argument, Styne's counsel suggested Stevens waived her defense under the Act by failing, pretrial, to seek a superior court stay pending a referral to the Commissioner, and by instead resisting any such referral, thus causing the matter to proceed to trial. As we have explained, Stevens's contention that mere defenses under the Act need not be referred to the Commissioner is wrong. Moreover, as Styne suggests, the preferable procedure is for the party asserting the Act to seek a pretrial stay and referral. Still, and putting aside whether Stevens's illegality defense could be waived at all, we conclude no waiver arose under the particular circumstances of this case. As indicated in the text, Stevens first raised the defense by a motion for summary judgment in the superior court. Styne opposed the motion on two grounds, among others; first, that the defense lacked merit, and second, that if it had potential merit, *it should be referred to the Commissioner*. In denying the motion, the superior court ruled that *all* the points set forth in Styne's opposition were valid, and specifically determined that Stevens's Act-based defense was unmeritorious as a matter of law. Subsumed in this ruling was the premise that *no reference to the Commissioner was necessary, and none would occur*. Later, the court denied Stevens's renewed attempt, through a requested instruction, to inject the Act into the case, and the matter thus proceeded to trial as though the Act was not involved. Only after trial, in response to Stevens's new trial motion, did the court conclude it had taken an erroneous view of the Act's relevance.

Thus, any specific effort by Stevens to refer the matter pretrial would have been futile. Styne would have opposed referral on grounds the Act did not apply, and the superior court would have agreed. We note further that until the Court of Appeal so held in this case, no appellate court decision had specifically deemed it necessary to refer Act-based defenses to the Commissioner. We granted review to resolve that unsettled issue. Stevens's contrary position was thus not so unreasonable or implausible as to give rise to a waiver of her Act-based defense.

[\*\*356] We confront an appeal from a new trial

order, granted by the superior court on grounds the jury should have been instructed on the requirements of the Talent Agencies Act. The trial court thus necessarily determined that, contrary to its prior assumption under which the trial was conducted, Stevens has at least a colorable defense based on matters governed by the Act.

[HN16] The court's implicit conclusion is entitled to great deference on review of its order granting a new trial. (E.g., *Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal. 3d 379, 387 [93 Cal. Rptr. 769, 482 P.2d 681, 52 A.L.R.3d 92].) Indeed, "[s]o long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, [it] will not be set aside. [Citations.]" (*Ibid.*)

[\*\*\*30] That standard is met here. Without dispute, Styne seeks a share of revenues derived from an arrangement involving entertainer Stevens and [\*61] HSN, a cable television network, which required Stevens to make on-camera use of her professional talents, personality, image, and status. On appeal, Styne admits he initiated contact with HSN on Stevens's behalf, promoted her skills and image, and tried to interest the network in using her as a celebrity spokesperson for products sold on the air. Styne further acknowledges he set up and attended a key meeting between Stevens and HSN that led to the final deal between those parties, and that he maintained contact with HSN executives to "protect Stevens[s] interests *vis-a-vis* HSN" as the deal developed. Finally, Styne appears to concede that any promise Stevens made to provide him a share of the revenues from this venture was as compensation for his help in securing the deal. <sup>12</sup>

12 We note that although the Court of Appeal specifically declined to reach the issue whether Styne's activities violated the Talent Agencies Act, it observed that "[t]he evidence, although far from conclusive, included testimony tending to show that Styne was actively engaged in promoting Stevens's employment opportunities" pursuant to a contract with Stevens.

Styne argues about the *meaning* of these facts under the Talent Agencies Act. He has contended throughout that there is no issue of unlicensed talent agency services because, in the final analysis, his efforts did not produce, and his monetary claims do not arise from, the procurement of "employment" for an "artist." (§ 1700.4, *subd. (a)*.) In this regard, he stresses that Stevens was not

directly paid for her television appearances, but went on camera to promote her own company's products. <sup>13</sup> In Styne's view, therefore, the most he did was to broker a business deal for the sale of cosmetics by Stevens's company to HSN, and he seeks only his promised share of *profits* derived from that commercial venture.

13 Of course, the Act is concerned with contracts to procure either "employment" or "engagements" for artists. (§ 1700.4, *subd. (a)*.) Hence, its coverage is not necessarily confined to instances where the artist receives direct payment for his or her professional efforts.

But this is precisely the sort of issue that the Talent Agencies Act commits in the first instance to the exclusive jurisdiction and special competence of the Commissioner. Here, the Commissioner was never given the opportunity to resolve Stevens's colorable claim that the contract alleged by Styne is void [\*\*\*357] under the Act. He should now be allowed to do so.

Accordingly, the Court of Appeal's judgment, overturning the new trial order and reinstating the trial verdict, must be reversed. We will instruct the Court of Appeal to reinstate the new trial order, and to direct the superior court not to go forward immediately with a retrial, but instead to stay its [\*62] proceedings pending first submission to the Commissioner of the issues arising under the Talent Agencies Act. <sup>14</sup>

14 Subject to any valid objections, the Commissioner may be able to make evidentiary use of the transcripts of the superior court trial. Any appeal *de novo* from the Commissioner's decision (see § 1700.44, *subd. (a)*) may, of course, be consolidated with the pending superior court contract action.

## CONCLUSION

The judgment of the Court of Appeal is reversed. The Court of Appeal is instructed to reinstate the order for new trial, and to direct the superior court to stay further new trial proceedings in that court pending submission to the Commissioner of issues [\*\*\*31] arising under the Talent Agencies Act, as set forth in this opinion.

George, C. J., Kennard, J., Werdegar, J., Chin, J., and Brown, J., concurred.

# **LAWS RELATING TO TALENT AGENCIES**

**Excerpts from the  
California Labor Code**

**and**

**California Code of Regulations, Title 8**



**Department of Industrial Relations (DIR)  
Division of Labor Standards Enforcement (DLSE)  
P.O. Box 420603  
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## LABOR CODE SECTIONS 1700 THROUGH 1700.47

### Article 1: Scope and Definitions

#### § 1700. "Person."

As used in this chapter, "person" means any individual, company, society, firm, partnership, association, corporation, limited liability company, manager, or their agents or employees.

#### § 1700.1. "Theatrical engagement"; "Motion picture engagement"; "Emergency engagement."

As used in this chapter:

(a) "Theatrical engagement" means any engagement or employment of a person as an actor, performer, or entertainer in a circus, vaudeville, theatrical, or other entertainment, exhibition, or performance.

(b) "Motion picture engagement" means any engagement or employment of a person as an actor, actress, director, scenario, or continuity writer, camera man, or in any capacity concerned with the making of motion pictures.

(c) "Emergency engagement" means an engagement which has to be performed within 24 hours from the time when the contract for such engagement is made.

#### § 1700.2. "Fee"; "Registration fee"

(a) As used in this chapter, "fee" means any of the following:

(1) Any money or other valuable consideration paid or promised to be paid for services rendered or to be rendered by any person conducting the business of a talent agency under this chapter.

(2) Any money received by any person in excess of that which has been paid out by him or her for transportation, transfer of baggage, or board and lodging for any applicant for employment.

(3) The difference between the amount of money received by any person who furnished employees, performers, or entertainers for circus, vaudeville, theatrical, or other entertainments, exhibitions, or performances, and the amount paid by him or her to the employee, performer, or entertainer.

(b) As used in this chapter, "registration fee" means any charge made, or attempted to be made, to an artist for any of the following purposes:

(1) Registering or listing an applicant for employment in the entertainment industry.

(2) Letter writing.

(3) Photographs, film strips, video tapes, or other reproductions of the applicant.

(4) Costumes for the applicant.

(5) Any activity of a like nature.

#### § 1700.3. "License"; "Licensee"

As used in this chapter:

(a) "License" means a license issued by the Labor Commissioner to carry on the business of a talent agency under this chapter.

(b) "Licensee" means a talent agency which holds a valid, unrevoked, and unforfeited license under this chapter.

#### § 1700.4. "Talent agency"; "Artists"

(a) "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.

(b) "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.

## **Article 2: Licenses**

### **§ 1700.5. Necessity and posting of license**

No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefore from the Labor Commissioner. The license shall be posted in a conspicuous place in the office of the licensee. The license number shall be referred to in any advertisement for the purpose of the solicitation of talent for the talent agency.

Licenses issued for talent agencies prior to the effective date of this chapter shall not be invalidated thereby, but renewals of those licenses shall be obtained in the manner prescribed by this chapter.

### **§ 1700.6. Application for license; Contents; Accompanying affidavits and fingerprints**

A written application for a license shall be made to the Labor Commissioner in the form prescribed by him or her and shall state:

- (a) The name and address of the applicant.
- (b) The street and number of the building or place where the business of the talent agency is to be conducted.
- (c) The business or occupation engaged in by the applicant for at least two years immediately preceding the date of application.
- (d) If the applicant is other than a corporation, the names and addresses of all persons, except bona fide employees on stated salaries, financially interested, either as partners, associates, or profit sharers, in the operation of the talent agency in question, together with the amount of their respective interests. If the applicant is a corporation, the corporate name, the names, residential addresses, and telephone numbers of all officers of the corporation, the names of all persons exercising managing responsibility in the applicant or licensee's office, and the names and addresses of all persons having a financial interest of 10 percent or more in the business and the percentage of financial interest owned by those persons.

The application shall be accompanied by two sets of fingerprints of the applicant and affidavits of at least two reputable residents of the city or county in which the business of the talent agency is to be conducted who have known, or been associated with, the applicant for two years, that the applicant is a person of good moral character or, in the case of a corporation, has a reputation for fair dealing.

### **§ 1700.7. Investigation of license applicant's character and proposed place of business**

Upon receipt of an application for a license the Labor Commissioner may cause an investigation to be made as to the character and responsibility of the applicant and of the premises designated in such application as the place in which it is proposed to conduct the business of the talent agency.

### **§ 1700.8. Denial of license; Requirement of notice and hearing; Statutory provisions governing proceeding**

The commissioner upon proper notice and hearing may refuse to grant a license. The proceedings shall be conducted in accordance with Chapter 5 (commencing at Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the commissioner shall have all the power granted therein.

### **§ 1700.9. Where and to whom license may not be granted**

No license shall be granted to conduct the business of a talent agency:

- (a) In a place that would endanger the health, safety, or welfare of the artist.
- (b) To a person whose license has been revoked within three years from the date of application.

**§ 1700.10. Duration of license; Renewal**

The license when first issued shall run to the next birthday of the applicant, and each license shall then be renewed within the 30 days preceding the licensee's birthday and shall run from birthday to birthday. In case the applicant is a partnership, such license shall be renewed within the 30 days preceding the birthday of the oldest partner. If the applicant is a corporation, such license shall be renewed within the 30 days preceding the anniversary of the date the corporation was lawfully formed. Renewal shall require the filing of an application for renewal, a renewal bond, and the payment of the annual license fee, but the Labor Commissioner may demand that a new application or new bond be submitted.

If the applicant or licensee desires, in addition, a branch office license, he shall file an application in accordance with the provisions of this section as heretofore set forth.

**§ 1700.11. Information required in applications for renewal**

All applications for renewal shall state the names and addresses of all persons, except bona fide employees on stated salaries, financially interested either as partners, associates or profit sharers, in the operation of the business of the talent agency.

**§ 1700.12. Fees; Filing fee for application; Fees for license and branch office when license is issued or renewed**

A filing fee of twenty-five dollars (\$25) shall be paid to the Labor Commissioner at the time the application for issuance of a talent agency license is filed.

In addition to the filing fee required for application for issuance of a talent agency license, every talent agency shall pay to the Labor Commissioner annually at the time a license is issued or renewed:

- (a) A license fee of two hundred twenty-five dollars (\$225).
- (b) Fifty dollars (\$50) for each branch office maintained by the talent agency in this state.

**§ 1700.13. Filing fee on application to transfer or assign license; Consent required for change of location**

A filing fee of twenty-five dollars (\$25) shall be paid to the Labor Commissioner at the time application for consent to the transfer or assignment of a talent agency license is made but no license fee shall be required upon the assignment or transfer of a license.

The location of a talent agency shall not be changed without the written consent of the Labor Commissioner.

**§ 1700.14. Temporary or provisional license; Duration**

Whenever an application for a license or renewal is made, and application processing pursuant to this chapter has not been completed, the Labor Commissioner may, at his or her discretion, issue a temporary or provisional license valid for a period not exceeding 90 days, and subject, where appropriate, to the automatic and summary revocation by the Labor Commissioner. Otherwise, the conditions for issuance or renewal shall meet the requirements of Section 1700.6.

**§ 1700.15. Bond required of licensee**

A talent agency shall also deposit with the Labor Commissioner, prior to the issuance or renewal of a license, a surety bond in the penal sum of fifty thousand dollars (\$50,000).

**§ 1700.16. Obligee and condition**

Such surety bonds shall be payable to the people of the State of California, and shall be conditioned that the person applying for the license will comply with this chapter and will pay all sums due any individual or group of individuals when such person or his representative or agent has received such sums, and will pay all damages occasioned to any person by reason of misstatement, misrepresentation,

fraud, deceit, or any unlawful acts or omissions of the licensed talent agency, or its agents or employees, while acting within the scope of their employment.

**§ 1700.18. Disposition of moneys collected for licenses and violations**

All moneys collected for licenses and all fines collected for violations of the provisions of this chapter shall be paid into the State Treasury and credited to the General Fund.

**§ 1700.19. Contents of license**

Each license shall contain all of the following:

- (a) The name of the licensee.
- (b) A designation of the city, street, and number of the premises in which the licensee is authorized to carry on the business of a talent agency.
- (c) The number and date of issuance of the license.

**§ 1700.20. Restriction of license's protection to person and place for which issued; Consent prerequisite to transfer**

No license shall protect any other than the person to whom it is issued nor any places other than those designated in the license. No license shall be transferred or assigned to any person unless written consent is obtained from the Labor Commissioner.

**§ 1700.20a. Estate certificate of convenience to conduct business of talent agency**

The Labor Commissioner may issue to a person eligible therefor a certificate of convenience to conduct the business of a talent agency where the person licensed to conduct such talent agency business has died or has had a conservator of the estate appointed by a court of competent jurisdiction. Such a certificate of convenience may be denominated an estate certificate of convenience.

**§ 1700.20b. Persons to whom certificate may be issued; Duration of certificate**

To be eligible for a certificate of convenience, a person shall be either:

- (a) The executor or administrator of the estate of a deceased person licensed to conduct the business of a talent agency.
- (b) If no executor or administrator has been appointed, the surviving spouse or heir otherwise entitled to conduct the business of such deceased licensee.
- (c) The conservator of the estate of a person licensed to conduct the business of a talent agency.

Such estate certificate of convenience shall continue in force for a period of not to exceed 90 days, and shall be renewable for such period as the Labor Commissioner may deem appropriate, pending the disposal of the talent agency license or the procurement of a new license under the provisions of this chapter.

**§ 1700.21. Revocation or suspension of license; Grounds**

The Labor Commissioner may revoke or suspend any license when it is shown that any of the following occur:

- (a) The licensee or his or her agent has violated or failed to comply with any of the provisions of this chapter.
- (b) The licensee has ceased to be of good moral character.
- (c) The conditions under which the license was issued have changed or no longer exist.
- (d) The licensee has made any material misrepresentation or false statement in his or her application for a license.

**§ 1700.22. Requirement of opportunity to be heard; Statutory provisions governing proceeding**

Before revoking or suspending any license, the Labor Commissioner shall afford the holder of such license an opportunity to be heard in person or by counsel. The proceedings shall be conducted in accordance with Chapter 5 (commencing at Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the commissioner shall have all the powers granted therein.

**Article 3: Operation and Management**

**§ 1700.23. Forms of contracts for services of talent agency; Approval; Prerequisites**

Every talent agency shall submit to the Labor Commissioner a form or forms of contract to be utilized by such talent agency in entering into written contracts with artists for the employment of the services of such talent agency by such artists, and secure the approval of the Labor Commissioner thereof. Such approval shall not be withheld as to any proposed form of contract unless such proposed form of contract is unfair, unjust and oppressive to the artist. Each such form of contract, except under the conditions specified in Section 1700.45, shall contain an agreement by the talent agency to refer any controversy between the artist and the talent agency relating to the terms of the contract to the Labor Commissioner for adjustment. There shall be printed on the face of the contract in prominent type the following: "This talent agency is licensed by the Labor Commissioner of the State of California."

**§ 1700.24. Fee schedules of talent agency; Filing; Posting; Changes**

Every talent agency shall file with the Labor Commissioner a schedule of fees to be charged and collected in the conduct of that occupation, and shall also keep a copy of the schedule posted in a conspicuous place in the office of the talent agency. Changes in the schedule may be made from time to time, but no fee or change of fee shall become effective until seven days after the date of filing thereof with the Labor Commissioner and until posted for not less than seven days in a conspicuous place in the office of the talent agency.

**§ 1700.25. Trust fund accounts; Disbursement of funds; Recordkeeping requirements**

(a) A licensee who receives any payment of funds on behalf of an artist shall immediately deposit that amount in a trust fund account maintained by him or her in a bank or other recognized depository. The funds, less the licensee's commission, shall be disbursed to the artist within 30 days after receipt. However, notwithstanding the preceding sentence, the licensee may retain the funds beyond 30 days of receipt in either of the following circumstances:

(1) To the extent necessary to offset an obligation of the artist to the talent agency that is then due and owing.

(2) When the funds are the subject of a controversy pending before the Labor Commissioner under Section 1700.44 concerning a fee alleged to be owed by the artist to the licensee.

(b) A separate record shall be maintained of all funds received on behalf of an artist and the record shall further indicate the disposition of the funds.

(c) If disputed by the artist and the dispute is referred to the Labor Commissioner, the failure of a licensee to disburse funds to an artist within 30 days of receipt shall constitute a "controversy" within the meaning of Section 1700.44.

(d) Any funds specified in subdivision (a) that are the subject of a controversy pending before the Labor Commissioner under Section 1700.44 shall be retained in the trust fund account specified in subdivision (a) and shall not be used by the licensee for any purpose until the controversy is determined by the Labor Commissioner or settled by the parties.

(e) If the Labor Commissioner finds, in proceedings under Section 1700.44, that the licensee's failure to disburse funds to an artist within the time required by subdivision (a) was a willful violation, the Labor Commissioner may, in addition to other relief under Section 1700.44, order the following:

(1) Award reasonable attorney's fees to the prevailing artist.

(2) Award interest to the prevailing artist on the funds wrongfully withheld at the rate of 10 percent per annum during the period of the violation.

(f) Nothing in subdivision (c), (d), or (e) shall be deemed to supersede Section 1700.45 or to affect the enforceability of a contractual arbitration provision meeting the criteria of Section 1700.45.

**§ 1700.26. Records to be maintained by talent agency; Requisite information; Prohibition against false entry**

Every talent agency shall keep records in a form approved by the Labor Commissioner, in which shall be entered all of the following:

- (1) The name and address of each artist employing the talent agency.
- (2) The amount of fee received from the artist.
- (3) The employments secured by the artist during the term of the contract between the artist and the talent agency, and the amount of compensation received by the artists pursuant thereto.
- (4) Any other information which the Labor Commissioner requires.

No talent agency, its agent or employees, shall make any false entry in any records.

**§ 1700.27. Inspection; Copies and reports**

All books, records, and other papers kept pursuant to this chapter by any talent agency shall be open at all reasonable hours to the inspection of the Labor Commissioner and his agents. Every talent agency shall furnish to the Labor Commissioner upon request a true copy of such books, records, and papers or any portion thereof, and shall make such reports as the Labor Commissioner prescribes.

**§ 1700.28. Posting copy of statutes**

Every talent agency shall post in a conspicuous place in the office of such talent agency a printed copy of this chapter and of such other statutes as may be specified by the Labor Commissioner. Such copies shall also contain the name and address of the officer charged with the enforcement of this chapter. The Labor Commissioner shall furnish to talent agencies printed copies of any statute required to be posted under the provisions of this section.

**§ 1700.29. Rules and regulations**

The Labor Commissioner may, in accordance with the provisions of Chapter 4 (commencing at Section 11370), Part 1, Division 3, Title 2 of the Government Code, adopt, amend, and repeal such rules and regulations as are reasonably necessary for the purpose of enforcing and administering this chapter and as are not inconsistent with this chapter.

**§ 1700.30. Sale or transfer of interest in agency without official consent**

No talent agency shall sell, transfer, or give away to any person other than a director, officer, manager, employee, or shareholder of the talent agency any interest in or the right to participate in the profits of the talent agency without the written consent of the Labor Commissioner.

**§ 1700.31. Prohibition against issuing contract or filling order for illegal employment**

No talent agency shall knowingly issue a contract for employment containing any term or condition which, if complied with, would be in violation of law, or attempt to fill an order for help to be employed in violation of law.

**§ 1700.32. Prohibition against false or misleading information; Advertisements**

No talent agency shall publish or cause to be published any false, fraudulent, or misleading information, representation, notice, or advertisement. All advertisements of a talent agency by means of cards, circulars, or signs, and in newspapers and other publications, and all letterheads, receipts, and blanks shall be printed and contain the licensed name and address of the talent agency and the words "talent agency." No talent agency shall give any false information or make any false promises or representations

concerning an engagement or employment to any applicant who applies for an engagement or employment.

**§ 1700.33. Sending artist to unsafe place; Duty of reasonable inquiry**

No talent agency shall send or cause to be sent, any artist to any place where the health, safety, or welfare of the artist could be adversely affected, the character of which place the talent agency could have ascertained upon reasonable inquiry.

**§ 1700.34. Prohibition against sending minor to place where intoxicating liquor sold or consumed**

No talent agency shall send any minor to any saloon or place where intoxicating liquors are sold to be consumed on the premises.

**§ 1700.35. Prohibition against permitting persons of bad character at place of business**

No talent agency shall knowingly permit any persons of bad character, prostitutes, gamblers, intoxicated persons, or procurers to frequent, or be employed in, the place of business of the talent agency.

**§ 1700.36. Prohibition against accepting application or placing minor in unlawful employment**

No talent agency shall accept any application for employment made by or on behalf of any minor, as defined by subdivision (c) of Section 1286, or shall place or assist in placing any such minor in any employment whatever in violation of Part 4 (commencing with Section 1171).

**§ 1700.37. Contract between minor and talent agency; Absence of right to disaffirm approved contract; Approval by Labor Commissioner; Proceeding for judicial approval**

A minor cannot disaffirm a contract, otherwise valid, entered into during minority, either during the actual minority of the minor entering into such contract or at any time thereafter, with a duly licensed talent agency as defined in Section 1700.4 to secure him engagements to render artistic or creative services in motion pictures, television, the production of phonograph records, the legitimate or living stage, or otherwise in the entertainment field including, but without being limited to, services as an actor, actress, dancer, musician, comedian, singer, or other performer or entertainer, or as a writer, director, producer, production executive, choreographer, composer, conductor or designer, the blank form of which has been approved by the Labor Commissioner pursuant to Section 1700.23, where such contract has been approved by the superior court of the county where such minor resides or is employed.

Such approval may be given by the superior court on the petition of either party to the contract after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard.

**§ 1700.38. Requirement that talent agency notify artists of labor trouble in place of employment**

No talent agency shall knowingly secure employment for an artist in any place where a strike, lockout, or other labor trouble exists, without notifying the artist of such conditions.

**§ 1700.39. Division of fees.**

No talent agency shall divide fees with an employer, an agent or other employee of an employer.

**§ 1700.40. Registration fees; Referral to entity in which agency has financial interest; Acceptance of referral fee**

(a) No talent agency shall collect a registration fee. In the event that a talent agency shall collect from an artist a fee or expenses for obtaining employment for the artist, and the artist shall fail to procure the employment, or the artist shall fail to be paid for the employment, the talent agency shall, upon demand

therefor, repay to the artist the fee and expenses so collected. Unless repayment thereof is made within 48 hours after demand therefor, the talent agency shall pay to the artist an additional sum equal to the amount of the fee.

(b) No talent agency may refer an artist to any person, firm, or corporation in which the talent agency has a direct or indirect financial interest for other services to be rendered to the artist, including, but not limited to, photography, audition tapes, demonstration reels or similar materials, business management, personal management, coaching, dramatic school, casting or talent brochures, agency-client directories, or other printing.

(c) No talent agency may accept any referral fee or similar compensation from any person, association, or corporation providing services of any type expressly set forth in subdivision (b) to an artist under contract with the talent agency.

**§ 1700.41. Reimbursement of artist for expenses incurred in going outside city in unsuccessful effort to obtain employment**

In cases where an artist is sent by a talent agency beyond the limits of the city in which the office of such talent agency is located upon the representation of such talent agency that employment of a particular type will there be available for the artist and the artist does not find such employment available, such talent agency shall reimburse the artist for any actual expenses incurred in going to and returning from the place where the artist has been so sent unless the artist has been otherwise so reimbursed.

**§ 1700.42 (repealed)**

**§ 1700.43 (repealed)**

**§ 1700.44. Reference of disputes to Labor Commissioner; Statute of limitations; Unlicensed persons**

(a) In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who 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. To stay any award for money, the party aggrieved shall execute a bond approved by the superior court in a sum not exceeding twice the amount of the judgment. In all other cases the bond shall be in a sum of not less than one thousand dollars (\$1,000) and approved by the superior court.

The Labor Commissioner may certify without a hearing that there is no controversy within the meaning of this section if he or she has by investigation established that there is no dispute as to the amount of the fee due. Service of the certification shall be made upon all parties concerned by registered or certified mail with return receipt requested and the certification shall become conclusive 10 days after the date of mailing if no objection has been filed with the Labor Commissioner during that period.

(b) Notwithstanding any other provision of law to the contrary, failure of any person to obtain a license from the Labor Commissioner pursuant to this chapter shall not be considered a criminal act under any law of this state.

(c) No action or proceeding shall be brought pursuant to this chapter with respect to any violation which is alleged to have occurred more than one year prior to commencement of the action or proceeding.

(d) It is not unlawful for a person or corporation which is not licensed pursuant to this chapter to act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract.

**§ 1700.45. Contract provision for arbitration; Provisions prerequisite to validity**

Notwithstanding Section 1700.44, a provision in a contract providing for the decision by arbitration of any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid:

(a) If the provision is contained in a contract between a talent agency and a person for whom the talent agency under the contract undertakes to endeavor to secure employment, or

(b) If the provision is inserted in the contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to a talent agency, and

(c) If the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and

(d) If the contract provides that the Labor Commissioner or his or her authorized representative has the right to attend all arbitration hearings.

Except as otherwise provided in this section, any arbitration shall be governed by the provisions of Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure.

If there is an arbitration provision in a contract, the contract need not provide that the talent agency agrees to refer any controversy between the applicant and the talent agency regarding the terms of the contract to the Labor Commissioner for adjustment, and Section 1700.44 shall not apply to controversies pertaining to the contract.

A provision in a contract providing for the decision by arbitration of any controversy arising under this chapter which does not meet the requirements of this section is not made valid by Section 1281 of the Code of Civil Procedure.

**§ 1700.46 (repealed)**

**§ 1700.47. Equal Opportunity**

It shall be unlawful for any licensee to refuse to represent any artist on account of that artist's race, color, creed, sex, national origin, religion, or handicap.

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**California Code of Regulations, Title 8  
Chapter 6. Division of Labor Standards Enforcement  
Subchapter 3. Employment Agencies**

**Article 1. General Rules and Regulations for Artists' Managers**

**§12000. Application.**

Application for the original license shall be made upon the form prescribed by the Labor Commissioner and shall contain the following information:

- (a) The proposed business name of the talent agency, which may not be identical or similar to that of another licensed talent agency.
- (b) The proposed places of business and the main office address of the talent agency in California, which address shall also be its mailing address for purposes of notice required by these regulations and provisions of the Labor Code or any other applicable statute.
- (c) If applicant is not a corporation, names and addresses of all persons who are financially interested either as partners, associates, profit sharers, or employees or other persons receiving as compensation a share of the net profits from the operation of the talent agency; said application shall also show the share of said net profit each person is to receive.
- (d) If the applicant is a corporation, the following information must be shown: name, address and title of the persons acting as executive officers of the corporation who have managing responsibility in California.
- (e) If applicant is not a corporation, questions must be answered as to each person or profit sharer listed in the application as having a financial interest in or the right to share in the net profits of the talent agency (1) regarding his business or occupation for the preceding five (5) years; (2) whether or not such person or profit sharer has ever been associated in any capacity in the operation or business of a talent agency; (3) whether or not such person has had a talent agency license or any license or permit issued by any agency of the State of California revoked, suspended, or refused, or any disciplinary action taken with respect to any such license or permit; (4) whether or not such person has been convicted of a crime except for minor traffic violations.
- (f) In the case of an application by a corporation, the foregoing information must be submitted by the executive officers acting in a managerial capacity for or on behalf of the corporation within the State of California.
- (g) Application, if by an individual, must be signed, giving full name; if by partnership, must be signed by all partners; if by a corporation, must be signed by an officer of the corporation, affixing the seal of the corporation thereto.

**§12000.1. Required Documents.**

The following documents, in addition to those required by Labor Code Section 1700.6, must be filed with the application for license:

- (a) Surety bond as required by Labor Code Section 1700.15, issued by a corporate surety company authorized to write surety bonds in California, and on the form prescribed by the Labor Commissioner. The name of the talent agency and principal on the bond must correspond to the name of the talent agency and principal on the application.

(b) Contract forms in triplicate which are proposed to be used in the conduct of the business of the talent agency in accordance with the requirements of Labor Code Section 1700.23. If any of said proposed contract forms is a standard form of union contract previously approved by, and on file with the Labor Commissioner, that form need not be submitted by the applicant if it is identified on the application.

(c) Fee schedules in triplicate in the form required by Labor Code Section 1700.24, and California Code of Regulations, Title 8, Section 12003.4.

#### **12000.2. Application and Documents in Proper Form.**

If the application and/or the required documents are not in proper form or contain any provisions contrary to law when submitted and are not corrected and resubmitted in proper form within 30 days after written notice from the Labor Commissioner, the license applied for will be denied without prejudice to either the submission of a new application or the required documents in proper form.

#### **§12000.3. Renewal Applications.**

Renewal applications shall be filed with the Labor Commissioner by each licensee at least 30 days before the commencement of the new license year. If mailed, the postmark will be considered the date of filing. If the renewal application is not filed on or before the expiration date of the license as set forth in Labor Code Section 1700.10, the license expires and cannot be renewed. Such licensee, having failed to renew his, her, its license, must submit a new application and comply with the provisions of Labor Code Section 1700.12 in the same manner as a new applicant.

#### **§12000.4. Fees for License.**

The license fee, together with the filing fee as required by Labor Code Section 1700.12, shall be submitted in the form of cashier's check, certified check, or money order and must accompany the application for a license or for a renewal thereof.

#### **§12000.5. Transfer of License.**

Consent for the transfer of a license, as required by Labor Code Section 1700.20, shall be given only after the filing of a transfer application executed by the licensee and the proposed transferee in the form prescribed by the Labor Commissioner, which must be accompanied by the required filing fee, a surety bond as required in the case of a new application, together with the information required by Labor Code Section 1700.6(d) and California Code of Regulations, Title 8, Section 12000(e) regarding the proposed transferee. The proposed transferee must also submit, for approval or certification, any contract forms, or fee schedules in their proposed new form should changes in substance from previously approved or certified forms be intended.

#### **§12000.6. Transfer of Interest in the Business or Right to Participate in Profits.**

Before the issuance of written consent for the transfer of interest in the talent agency or in the right to participate in the profits as required by Labor Code Section 1700.30, notification shall be made to the Labor Commissioner in writing within 10 days of the transfer. The Labor Commissioner may require, pursuant to his or her discretion, that the person or persons to whom such interest in the business of the talent agency or right to share in the profits thereof is to be sold, transferred or given, complete the transfer application required by California Code of Regulations, Title 8, Section 12000.5 and supply the information required by Labor Code Section 1700.6(d) and California Code of Regulations, Title 8, Section 12000(e).

**§12000.7. Change in Location of Main or Branch Office.**

A talent agency shall notify the Labor Commissioner of a proposed change of address of its main or branch office at least 20 days before such change.

**§12000.8. Transfer of Interest in the Business or Right to Participate in Profits.**

Renumbering and amendment of former Section 12000.8 to Section 12000.6 filed 7-20-89; operative 8-19-89 (Register 89, No. 30). For prior history, see Register 84, No. 11.

**§12000.9. Change in Location of Main or Branch Office.**

Renumbering and amendment of former Section 12000.9 to Section 12000.7 filed 7-20-89; operative 8-19-89 (Register 89, No. 30). For prior history, see Register 84, No. 11.

**§12001. Form of Talent Agency Contracts--General Provisions.**

Any contract in writing to be entered into between a talent agency and an artist wherein the talent agency agrees to act or function as such for, or on behalf of the artist, shall contain in words or substance in addition to any other provisions set forth therein, each of the following provisions:

(a) A provision stating the term of employment of the talent agency by the artist or a blank space for the insertion of said term.

(b) A provision containing a blank space for the insertion of the compensation or rate of compensation to be paid by the artist to the talent agency which compensation shall not exceed the maximum compensation or maximum rate of compensation set forth in the schedule of fees filed with the Labor Commissioner by the talent agency. Said talent agency contract may provide for the payment of compensation after the termination thereof with respect to any employment contracts entered into or negotiated for or to any employment accepted by the artist during the term of the talent agency contract, or any extensions, options or renewals of said employment contracts or employment.

To be entitled to the payment of compensation after termination of the contract between the artist and the talent agency, the talent agency shall be obligated to serve the artist and perform obligations with respect to any employment contract or to extensions or renewals of said employment contract or to any employment requiring the services of the artist on which such compensation is based.

(c) A provision that the talent agency may advise, counsel or direct the artist in the development or advancement of his professional career.

(d) A provision that the talent agency shall, subject to the availability of the artist, use all reasonable efforts to procure employment for the artist in the field or fields of endeavor specified in the contract in which the talent agency is representing the artist.

(e) A provision that, in the event of the failure of the artist to obtain employment or a bona fide offer therefor from a responsible employer, in the field or fields of endeavor specified in the contract in which the talent agency is representing the artist, for a period of time in excess of four consecutive months, such failure shall be deemed cause for the termination of the contract by either party; provided, however, that the artist shall at all times during such period of four consecutive months be ready, willing, able and available to accept employment and to render the services required in connection therewith. Notices of intention of either party to such a contract to terminate same must be given in writing to the other party to such a contract directed to the last known address of said party. In the event the artist accepts employment prior to any written notice of termination, said right of termination is deemed waived as to all past periods of unemployment but not as to future four consecutive months of employment.

(f) A provision that in all cases of controversy between a talent agency and an artist arising under the Labor Code, or under these Rules and Regulations, relating to the terms of the contract, the parties involved therein shall refer the matters in dispute to the Labor Commissioner or one of his duly authorized agents to be determined, as provided in Section 1700.44 of the Labor Code. However, such a provision need not be inserted in contracts governed by the provisions of Section 1700.45 of the Labor Code.

**§12001.1. Copy of Contract to Artist.**

The talent agency shall deliver to the artist a copy of the contract required by California Code of Regulations, Title 8, Section 12001 which has been executed by the talent agency and the artist.

**§12002. Oral Contracts.**

A talent agency shall be entitled to recover a fee, commission or compensation under an oral contract between a talent agency and an artist as long as the particular employment for which such fee, commission or compensation is sought to be charged shall have been procured directly through the efforts or services of such talent agency and shall have been confirmed in writing within 72 hours thereafter. Said confirmation may be denied within a reasonable time by the other party. However, the fact that no written confirmation was ever sent shall not be, in and of itself, sufficient to invalidate the oral contract.

**§12003. Form of Contracts Must Be Approved.**

Approval of the form of contract as required by Labor Code Section 1700.23 will be indicated by an endorsement thereon by the Labor Commissioner which must be retained by the talent agency, or by a letter from the Labor Commissioner that the contract adopted by the talent agency has been endorsed by the Labor Commissioner.

**§12003.1. Required Statements on Contract Forms Indicating Approval of Labor Commissioner.**

After approval of the form of contract by the Labor Commissioner, the same may be legibly reproduced, which reproduction must bear thereon the following statement:

"THIS TALENT AGENCY IS LICENSED BY THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA

The form of this contract has been approved by the State Labor Commissioner on the \_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_."

**§12003.2. Approval of the Labor Commissioner for Reproduction of Approved Contract Forms.**

No form of contract which incorporates substantial changes in the form of contract previously approved shall be reproduced again unless the same shall be submitted to the Labor Commissioner for approval and shall not be reproduced again prior to the granting of approval and written consent by the Labor Commissioner.

**§12003.3. Modifications of Contract Forms Which Do Not Require Approval of the Labor Commissioner.**

Modifications of contract forms previously approved by the Labor Commissioner which do not substantially change the substance and which, therefore, do not require further approval by the Labor Commissioner pursuant to California Code of Regulations, Title 8, Section 12003.2 include, but are not limited to the following:

1. A provision for the commencement of the term of the contract at some specified date in the future, which date may be fixed by the occurrence of an event or contingency.
2. The deletion of certain fields of endeavor, such as motion pictures, television, etc., from the scope of the talent agency's representation, or a designation of specific engagements.
3. A reduction in the compensation to be paid by the artist to the talent agency.
4. Any waiver by the talent agency of commission or compensation to be received from the artist.
5. A reduction in the four month termination period required by California Code of Regulations, Title 8, Section 12001(e).
6. Any provision for additional or special services, facilities or benefits to be rendered by the talent agency on behalf of the artist.
7. Any other modification which operates to the advantage of the artist.

**§12003.4. Fee Schedule.**

Fee schedules posted, as required by Labor Code Section 1700.24, shall be printed or lettered in a size no less than Twelve-Point Cheltenham Roman Type or its equivalent. The printing or lettering shall be in a legible style and there shall be adequate separation between the various classifications. Each fee schedule, when submitted to the Labor Commissioner, must have a clear space of at least 2 1/2 inches at the bottom to permit certification.

**§12003.5. Contents--Fee Schedule.**

(a) Each fee schedule shall be headed by the words, SCHEDULE OF FEES.

(b) Additionally, in each fee schedule the following paragraphs shall appear at the end of said fee schedule:

1. "If any controversy arises between the parties, including one as to liability for the payment of fees, the parties involved shall refer the matter in dispute to the Labor Commissioner for hearing and determination as provided in Labor Code Section 1700.44, unless such controversy can be handled in accordance with the provisions of Labor Code Section 1700.45."

2. "In the event that a talent agency shall collect from an artist a fee or expenses for obtaining employment for the artist, and the artist shall fail to procure such employment, or the artist shall fail to be paid for such employment, such talent agency shall, upon demand therefor, repay to the artist the fee and expenses so collected. Unless repayment thereof is made within forty-eight (48) hours after demand therefor, the talent agency shall pay to the artist an additional sum equal to the amount of the fee." (Section 1700.40, California Labor Code).

**§12003.6. Regulations Do Not Affect Prior Contracts.**

These rules and regulations shall not apply to contracts heretofore entered into between talent agencies and artists, if the same have been approved by the Labor Commissioner and said contracts do not contain any provisions contrary to law.

**§12004. Termination of Contract.**

Any incapacity which shall prevent a talent agency from performing the services to be rendered by such talent agency to an artist for a period of three consecutive months or the failure of the talent agency to maintain a regular office for the transaction of business in the State of California for a period of one month shall be sufficient grounds for cancellation or termination of the contract by the artist.

**§12005. Revocation or Suspension of License.**

The failure of any talent agency to comply with these Rules and Regulations or with any order made by the Labor Commissioner in pursuance thereof shall be cause for the suspension or revocation of the license of such talent agency pursuant to Labor Code Section 1700.21.

**§12006. Amendment or Revision of Rules and Regulations.**

Repealer filed 7-20-89; operative 8-19-89 (Register 89, No. 30). For prior history, see Register 84, No. 11.

**Article 2. Controversies Submitted Under**

**§12022. Filing of Application for Hearing to Determine Controversy.**

Proceedings shall be commenced by filing at the office of the Labor Commissioner, Licensing Division, P.O. Box 420603, San Francisco, CA 94142-0603, a petition to determine controversy between the artist and talent agency, which shall set forth the claim or demand of the petitioner and shall be signed by the petitioner or a person duly authorized to act for him and shall set forth:

- (a) A statement as to the nature of the controversy, including submission of such pertinent information as is within the knowledge of the petitioner.
- (b) The claim or demand of the petitioner.
- (c) A copy of any contract pertaining to the controversy.

**§12022.1. Form of Petition.**

The following form represents the minimum requirements for Petition to Determine Controversy.

///  
///  
///

NAME:  
ADDRESS:  
CITY & STATE:

Telephone:

In Propria Persona

BEFORE THE LABOR COMMISSIONER  
OF THE STATE OF CALIFORNIA

No.: \_\_\_\_\_

_____	)
	)
	)
Petitioner,	)
	)
vs.	)
	)
	)
Repondents.	)
_____	)

PETITION TO DETERMINE  
CONTROVERSY  
(Labor Code Section 1700.44)

Petitioner alleges as follows:

I

This petition is filed pursuant to the authority of Section 1700.44 of the Labor Code of the State of California.

II

At the time mentioned herein \_\_\_\_\_ was and is now a resident of the county of \_\_\_\_\_, State of California, and an artist (Talent Agency) as that term is defined in Section 1700.44 of the Labor Code.

III

At all times mentioned herein petitioner (respondent) acted in the capacity of a Talent Agency and was (was not) duly licensed by the laws of the State of California.

IV

On or about \_\_\_\_\_, 20\_\_\_\_, the parties hereto entered into a written contract. A copy of said contract is attached hereto marked Exhibit "A".

V

A controversy has arisen between petitioner and respondent under said contract in that petitioner contends, and respondent denies as follows:

WHEREFORE, petitioner seeks the following determination:

DATED: \_\_\_\_\_

SIGNED: \_\_\_\_\_

In Propria Persona

**§12023. Requirements As to Documents for Filing.**

All pleadings, petitions and papers, before being filed or served, shall be printed or written on white paper of standard quality not less than 13-pound weight, 8 1/2 by 11 inches in size with numbered lines, connected at the top and paged at the bottom, and shall be written or printed upon only one side of the paper. All copies served shall be true and legible copies of the original. The office address and telephone number of the representative appearing for a party filing any petition, answer or notice, or the office or residence address and telephone number of a party appearing in his own behalf must be endorsed upon such petition, answer or notice, in the upper left hand corner of the first page.

**§12024. Service of Copy of Petition on Other Party to the Controversy.**

No petition to determine controversy heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all petitions to determine controversies heretofore or hereafter commenced must be dismissed by the Labor Commissioner on his own motion, or on the motion of any party interested therein, whether named in the petition as party or not, unless petition be served and return thereon made within one year after the filing of said petition. But all such petitions may be prosecuted if general appearance has been made in said proceedings by the respondent within said one year in the same manner as if said petition had been served; provided that no dismissal shall be had under this section as to any respondent because of the failure to serve the petition on him during his absence from the State, or while he has secreted himself within the State to prevent the service of said petition on him.

**§12024.1. Dismissal of Petition.**

No petition to determine controversy heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all petitions to determine controversies heretofore or hereafter commenced must be dismissed by the Labor Commissioner on his own motion, or on the motion of any party interested therein, whether named in the petition as party or not, unless petition be served and return thereon made within one year after the filing of said petition. But all such petitions may be prosecuted if general appearance has been made in said proceedings by the respondent within said one year in the same manner as if said petition had been served; provided that no dismissal shall be had under this section as to any respondent because of the failure to serve the petition on him during his absence from the State, or while he has secreted himself within the State to prevent the service of said petition on him.

**§12025. Answer to Petition.**

Written notice to the respondent, requiring him to answer said petition within 20 days from service thereof, shall be served upon the respondent at the time of service of said petition to determine controversy.

Within 20 days from, and after service of the petition to determine controversy, the respondent in said proceeding shall serve and file an answer thereto, setting forth the defense and any claims of said respondent. Said answer shall be signed by the respondent or a person duly authorized to act for said respondent.

**12025.1. Forms for Notice to Answer.**

Notice to Answer as set forth in Section 12025 above, shall be in the following form:

TO THE ABOVE NAMED \_\_\_\_\_, respondent.  
YOU ARE DIRECTED to file at the office of the State Labor Commissioner, (insert address) \_\_\_\_\_,  
a written pleading in response to the Petition to Determine Controversy within 20 days after the service on  
you of this notice. You are notified that unless you so file a written responsive pleading, the petitioner may  
apply to the Labor Commissioner for any relief demanded in the petition.

**§12026. Setting and Notice of Hearing.**

In a proceeding for the determination of a controversy, either party, after service of petition and filing of the answer, or, if no answer has been filed after the 20 day period set forth in California Code of Regulations, Title 8, Section 12025, may file with the Labor Commissioner a Request for Setting of Hearing; said request for hearing shall include a certificate of service by mail on the opposing party. Thereafter, the Labor Commissioner shall give notice of the time and place of hearing to each of the parties, using first-class mail.

**§12027. Right to Subpoena.**

(a) Subpoena. Upon request of either party to the controversy, the Labor Commissioner may issue a subpoena for the attendance of witnesses before the Labor Commissioner at the time and place of the hearing of the controversy. Said subpoena shall be served in the manner provided for serving subpoenas in civil actions.

(b) Subpoena Duces Tecum. Upon request of either party to the controversy, accompanied by a declaration showing good cause for the production thereof and showing the relevance thereof, and upon the determination of the Labor Commissioner, he or she may issue a subpoena duces tecum requiring the production of books, documents or other things under the control of the party subpoenaed, which the party is bound to produce at the time and place of the hearing. Said subpoena duces tecum shall be served in the manner provided for serving subpoenas in civil actions.

**§12028. Depositions.**

On application of a party to the controversy, the Labor Commissioner may order the deposition of a witness to be taken for use as evidence, and not for discovery, if the witness cannot be compelled to attend the hearing or if such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally at the hearing, to allow the deposition to be taken. The deposition shall be taken in the manner prescribed by law for the taking of depositions in civil actions.

**§12029. Proceedings to Be Had Under Oath.**

All testimony adduced at the hearing of the controversy shall be under oath.

**§12030. Proceedings May Be Reported.**

Any proceedings held before the Labor Commissioner may be reported. The person desiring the reporting shall bear the expense thereof, and if the testimony is transcribed, a copy of this transcript shall be furnished without cost to the Labor Commissioner.

**§12031. Conduct of Hearing.**

The hearing may be reported or phonographically recorded. The parties to the controversy are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but the Labor Commissioner is not bound by the rules of evidence or judicial procedure.

**§12032. Decision of Labor Commissioner.**

The decision of the Labor Commissioner shall be in writing and shall be served upon the parties to the controversy by first-class mail. Either party to the controversy, at the commencement of the hearing, may request that findings of fact be made by the Labor Commissioner, but the making of such findings of fact shall be discretionary with the Labor Commissioner.

**§12033. Custody of Papers Filed with the Labor Commissioner.**

All papers on file in the office of the Labor Commissioner shall remain in his or her custody, and no paper on file therein shall be taken from the Labor Commissioner's office, unless the same is subpoenaed in an action pending before a court of competent jurisdiction; except that documents introduced by the parties into evidence may be withdrawn upon stipulation of the parties or by their respective representatives.