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Trouble in tinsel town

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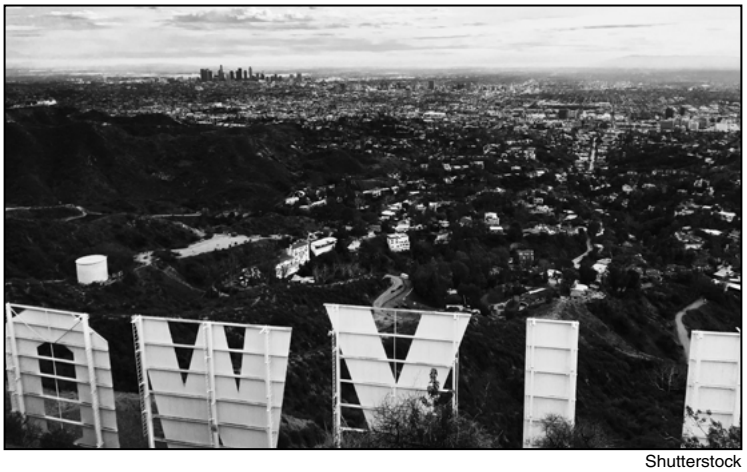
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Hollywood talent agents and writers are at war with each other in what augurs to be the most important litigation in the entertainment industry since this century began. The Writers Guild of America, West, Inc., and Writers Guild of America, East, Inc., are the negotiating bodies for approximately 15,000 screenwriters. There are four "big" talent agencies — Creative Artists Associates, WME Entertainment, United Talent Agents and International Creative Management — that overwhelmingly comprise the representation of actors, directors and producers of film and television, and they have been growing even more powerful over the last two decades as they have merged with or acquired other smaller agencies.

The WGA and the agencies, represented by their interest group, the Association of Talent Agents, have been in collective bargaining negotiations that broke down on April 12. The WGA had two demands: that "packaging fees" be eliminated and that the agencies no longer engage in the production of movies. Shortly thereafter, in what some viewed as a surprise move (given that it was the union, rather than an action exclusively by writers), the WGA filed an action in Los Angeles County Superior Court on behalf of themselves and eight prominent writers, alleging breach of fiduciary duties and unfair competition under Business and Professions Code Section 17200 et. seq.

This is not the first go-round over agency packaging practices. In the 1970s, the William Morris Agency, then the biggest packager of television shows, refused to sign the WGA ban on packaging and unsuccessfully sought to enjoin the ban on the grounds it violated antitrust laws. Adams, *Ray & Rosenberg v. William Morris Agency*, 411 F. Supp. 403 (C.D. Cal. 1976). The case was thereafter settled and ultimately the William Morris Agency continued to package.

Over the past decade, agencies have engaged in the production of television shows and movies. For many years, agencies entered into "franchise agreements" with the WGA, the Screen Actors Guild (now SAG-AFTRA) and the Directors Guild of America. These agreements regulated what the agents must do to maintain the client, such as securing a certain amount of work or opportunities within a given period, and set a cap on commissions that could be taken. The writers asserted then and now that when their agents produce or take a financial interest in a production, the agents become the writers' employer, causing an inherent conflict of interest.

In the 1950s and early 1960s, the most powerful talent agency in the world was MCA. In 1958, MCA acquired Universal Pictures and its lot and went into production. Complaints were raised that talent was being forced to work on projects controlled by the agents who were not protecting talent's interests as fiduciaries. At its height, in 1960, MCA had a major participation in 45 percent of the television shows in primetime, producing many under its production company, Revue Productions. The Department of Justice eventually moved in, lead by Robert Kennedy, and gave MCA an ultimatum: divest one of the entities. In 1962, MCA went out of business.

SAG had forbade the agencies from producing (known as "Rule 16(g)"), but in 2002 no renewal of that franchise agreement was reached with that provision intact, and the previous agreement expired. The agencies (but not International Creative Management) thereafter commenced producing. WME in particular has been very actively doing so.

The agents argue that talent is being paid at competitive rates and that increased production is occurring, which benefits all talent and the industry.

The corresponding issue — the ability of the agencies to demand packaging fees in connection with productions — is bitterly contested. Agents traditionally have been paid 10 percent of the gross earnings of talent. However, the William Morris Agency, before it became WME, took a commission on the gross of the entire production under the logic that, when it put two "elements" together, say a writer and actor, they should be paid on the entire budget and earnings, which in many cases are far in excess of the normal 10 percent. The other agencies followed suit, and now over 90 percent of all scripted shows on television are packaged, bringing enormous revenues to the big agencies, who will share commissions with each other when they "co-package," but won't do so with smaller agencies. Packaging fees are generally demanded by the agencies, and they will not budge when a client asks that no packaging fee be taken.

Until the recent brouhaha, the WGA franchise agreement with the agencies explicitly permitted packaging fees. Packaging fees are generally based on a "3-3-10" formula, with the upfront fee 3 percent of the "license fee" paid by the studio for the program, the "deferred fee" 3 percent of the license fee paid by the studio (paid when there are profits), and the profit participation 10 percent of the "modified adjusted gross profits."

The agencies have traditionally argued that talent benefits as the agents don't commission the individual client, just the package, and in many cases programs do not go into profits, so the fees generated are less than the 10 percent that would otherwise be paid. This true in some circumstances because many productions never go into profits.

The WGA complaint states that packaging fees, depending on the profit definition, often reduces the amount otherwise payable to the writer. There are situations where the agency is paid on "gross" and the talent on "net." Further, the WGA claims that agencies will often not work with talent at other agencies in order to preserve packaging fees, and will make deals where they get the best packaging arrangements, rather than what is in the best interests of the client.

According to the WGA, the writers are often not informed of the pros and cons of packaging deals. The complaint filed last week cites cases where the agency made more than the client because it had a packaging deal, rather than 10 percent of what the talent made. "Packaging fees have deprived writers of conflict-free and loyal representation in their negotiations with production companies," asserts the complaint. Writer David Simon claimed in the complaint that his agency, CAA, never informed him that it got a packaging fee, while "simultaneously representing the purchase of Simon's IP, thus deliberately suppressing Simon's compensation and profit participation."

Because of the foregoing problems, the WGA claims that its members must hire other professionals — lawyers and managers — to protect their interests, which means paying up to an additional 20 percent of earnings.

In addition to the fiduciary duties cause of action, the WGA asserts that these are unfair business practices because they "divert compensation away from the writers and other creative talent that are responsible for creating valuable television and film properties, and undermine the market for writers' creative endeavors." Further, the claim is made that the agencies' conduct violates Section 302 of the Labor-Management Relations Act, 29 U.S.C. Section 186, the so-called "anti-kickback" provision of the Taft-Hartley Act.

After negotiations broke down between the ATA and WGA earlier this month, the writers were instructed by WGA to fire any agents who refused to sign its "code of conduct" prohibiting production and packaging fees. According to the WGA, with few exceptions, its members overwhelmingly have complied. This puts the industry into a no-man's land. Talent must now find other ways obtain employment. This is a tricky area.

The WGA has suggested that writers use their managers and lawyers to obtain work. However, this likely will violate California's Talent Agencies Act, Labor Code Section 1700.4 et seq. A remedy under the TAA is "disgorgement" of any fees taken in violation of the act. The WGA informed its members that it will reimburse managers and attorneys for such services if they are unable to be paid because of violation of the TAA. The ATA has stated it is reviewing its options regarding this.

Under the TAA, one cannot offer, promise, procure or attempt to procure employment for talent absent a talent agency license. Personal managers thus are vulnerable absent a license. But it's generally considered too much trouble to get a license unless one is truly engaged in the business of being an agent — that is, securing work. In reality, many personal managers do "shop" for deals for their clients because in many cases the client cannot get an agent, or the agent, who may have dozens of clients, is not actively seeking employment for the client. Managers are often are sued with disgorgement sought for procurement activity absent a license.

Attorneys have a similar problem. In two Labor Commission cases lawyers have been found to have violated the TAA notwithstanding they are members of the California Bar. *In Solis v. Blancarte*, TAC-27089 (2013), the lawyer didn't secure the engagement for the client, who had been solicited by a television station. The labor commissioner ruled that an attorney could not negotiate the deal absent a talent agency license. The parties soon settled, but the case remains on the books. The same type of facts and ruling occurred in *Doughty v. Hess*, TAC 39547 (2017), where a lawyer negotiated various talent deals. Hess' agreement was declared void and unenforceable. Note that these are cases brought by talent against the lawyer. This is problematic given this is what transactional lawyers in the entertainment business do — draft and negotiate contracts.

There was an attempt after *Solis* to get a law passed allowing lawyers to negotiate and procure, but not enough of a groundswell was created, with the top firms of the opinion that they clients needed them more than they needed the clients. Moreover, the Legislature eschews the TAA issue given the powerful lobbies involved: labor and talent agencies, neither of which the politicians wished to antagonize. Personal managers are too poorly organized and weak to have much influence. Perhaps now lawyers will care more and attempt to get the law changed to allow them to at least negotiate, if not solicit employment, given the strict licensing and ethical requirements to be a member of the bar. But are lawyers willing to risk the consequences, and would there be potential bar prosecution if they violate the TAA?

The current dispute concerns hundreds of millions of dollars a year in packaging fees involving writers. Add actors, directors and producers to this mix, and it is billions. Will SAG and/or the Directors Guild of America join the fray? Can producers contest packaging fees, though they do not have a union like the WGA, but rather an association, the Producer's Guild of America? It is unclear, given the statute of limitations, how far back the WGA can go, but it is seeking "disgorgement" of all fees previously earned.

How will writers secure "pitch meetings" hereafter, particularly for rookie or unknown talent?

Obviously, talent stands to gain from the reduction or elimination of packaging fees, but so do the studios which pay out these fees out. They have been reluctant to challenge the agencies because of the power they wield in keeping talent and projects from them, the lifeblood of the industry. But if studios are not subject to packaging fees anymore, that would free up monies to be paid to talent.

Given the intransigence of the warring factions, these are issues that undoubtedly will require judicial rulings before serious settlement talks resume. In the meantime, it's a free for all. The war has just begun in the courts: Powerful law firms will be engaged in a massive battle over powerful economic, ethical, and practical issues involving powerful parties with the entire entertainment community in flux as to how to do business in the meantime.

One important takeaway is that talent must hereafter be provided independent legal advice about the propriety of any deal where an agent is a producer, profit participant or seeks a packaging fee. Agents who do not ensure this run a big risk.

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