The University of New Hampshire Law Review

Volume 8
Number 3 *Pierce Law Review*

Article 6

May 2010

Taking Away an Artist's "Get Out of Jail Free" Card: Making Changes and Applying Basic Contract Principles to California's Talent Agencies Act

Gregory Albert
Franklin Pierce Law Center, Concord, NH

Taking Away an Artist's "Get Out of Jail Free" Card: Making Changes and Applying Basic Contract Principles to California's Talent Agencies Act

GREGORY ALBERT*

TABLE OF CONTENTS

I. INTRODUCTION 383
II. IMPORTANT PROVISIONS OF THE TALENT AGENCIES ACT 385
III. PRECEDENT THAT SHAPED THE ACT PRIOR TO *MARATHON ENTERTAINMENT, INC. V. BLASI* 386
IV. THE *MARATHON* COURT'S SHORTCOMINGS 387
V. ISSUES WITH THE ACT 392
VI. ADDING SENSE TO THE TAA 396
VII. CONCLUSION 399

I. INTRODUCTION

From its predecessors dating back to 1913 to the current version, the California Talent Agencies Act of 1978 ("TAA" or "the Act") has aimed to protect artists from talent agents who would take advantage of them.[1] The Act originally prohibited agents from "sending artists to 'house[s] of ill fame' or saloons, or allowing 'persons of bad character' to frequent their establishments."[2] By requiring talent agents to have a license, "the Act establishes detailed requirements for how the 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."[3]

* J.D. Candidate, Franklin Pierce Law Center (2010); B.A., Mass Communications, Bloomsburg University (2000).

1. Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 746 (Cal. 2008).
2. *Id.* (discussing the purposes of the Act).
3. *Id.* at 747.

However, despite this well-intentioned beginning, the Act no longer binds itself to business realities.[4] Instead, the Act turns a blind eye to the "catch-22" of new artists and their personal managers: without enough success, talent agents are not interested in the artists, but without a talent agent, there is no legal way for the new artist to procure the required employment to find such success.[5] Personal managers frequently face the difficult decision of violating the Act by procuring employment, which then puts their contract in jeopardy because of the illegal procurement.[6] Without procurement in the first place though, there will be no success, nor need for a talent agent.[7]

The California courts' allowance of a "gotcha" by artists who want to disavow an otherwise valid contract drives poor behavior and does not protect the personal managers who work so diligently to help the artists attain a level of success.[8] If the Act was indeed created to protect artists, and the procurement of employment protects artists' interests, then personal managers should be protected from artists disavowing contracts.[9] Further, the *Marathon Entertainment, Inc. v. Blasi* court did not go far enough in its guidance on severability.[10] In that case, the court failed to bring the Act back to a

4. Erick Flores, Note, *"That's a Wrap! (Or Is It?)": The Unanswered Question of Severability Under California's Talent Agencies Act After* Marathon Entertainment, Inc. v. Blasi, 97 GEO. L.J. 1333, 1338 (2009).

5. *Id.* at 1335–36; Gary A. Greenberg, Note, *The Plight of the Personal Manager in California: A Legislative Solution*, 6 HASTINGS J. COMM. & ENT. L. 837, 839–40 (1984).

6. Flores, *supra* note 4, at 1341–42; *see* Greenberg, *supra* note 5, at 839–40 (noting personal managers either must obtain a license or operate in violation of the statute).

7. *See* Flores, *supra* note 4, at 1342.

8. *Id.* at 1343; *see* Greenberg, *supra* note 5, at 857 (noting the fairness of a remedy that compensates the artist without having to compensate the manager seems questionable).

9. *See* Greenberg, *supra* note 5, at 857 (noting the severe damage to a personal manager from what may constitute nothing more than an "administrative oversight").

10. *See Marathon*, 174 P.3d at 752; *cf.* Tracie Parry-Bowers, Note, *The Talent Agencies Act: A Call for Reform*, 27 LOY. L.A. ENT. L. REV. 431, 447 (2007) (discussing the California Court of Appeal's decision, which *Marathon* affirmed).

common-sense approach, and this opinion will only continue to open the door to problems in the future.[11]

This article will review the Act's important provisions and the precedent that shaped its administration. Next, this article will address the problems with the Act itself and how it violates basic common law contract principles. Finally, this article will suggest solutions for the *Marathon* court and the Act itself.

II. IMPORTANT PROVISIONS OF THE TALENT AGENCIES ACT

The Act requires anyone who "engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists" [12] to be registered with the State of California as a talent agent.[13] To become a licensed talent agent, one must submit two sets of fingerprints and affidavits of at least two reputable residents stating that "the applicant is a person of good moral character, or in the case of a corporation, has a reputation for fair dealing."[14] The applicant must then submit $250[15] and deposit a surety bond in the penal sum of $50,000 payable to the people of the State of California.[16]

The Act provides a variety of protections for artists. Talent agents must submit form contracts that the Labor Commissioner must approve.[17] The Labor Commissioner looks for any language that is "unfair, unjust and oppressive to the artist."[18] Though not expressly stated in the statute, unions typically restrict talent agents' commissions to a maximum commission percentage,[19] while per-

11. *See* Flores, *supra* note 4, at 1354–56 (discussing problems resulting from *Blasi* and various potential solutions).
12. CAL. LAB. CODE § 1700.4 (West 2003 & Supp. 2010).
13. *Id.* § 1700.5.
14. *Id.* § 1700.6.
15. *Id.* § 1700.12.
16. *Id.* §§ 1700.15–.16.
17. *Id.*
18. CAL. LAB. CODE § 1700.23.
19. Greenberg, *supra* note 5, at 842; David Zelenski, Note, *Talent Agents, Personal Managers, and Their Conflicts in the New Hollywood*, 76 S. CAL. L. REV. 979, 989–90 (2003).

sonal managers' commissions, which are not subject to the Act, are not subject to these union restrictions.[20]

III. PRECEDENT THAT SHAPED THE ACT PRIOR TO *MARATHON ENTERTAINMENT, INC. V. BLASI*

Prior to the landmark *Marathon* decision, cases involving the Act typically voided the entire contract with the personal manager and required the personal manager to return all proceeds from the contract.[21] Despite the fact that the Act uses the language "engages in the *occupation* of procuring," the courts have found that any booking, incidental or not, is considered a violation of the Act.[22] The courts have not, in any way, differentiated between full-time work as a talent agent versus the single procurement of a show for an aspiring artist by an unlicensed personal manager.[23]

In *Waisbren v. Peppercorn Productions, Inc.*,[24] Waisbren, the personal manager, sued when he was not paid commissions according to the contract with Peppercorn.[25] Peppercorn's sole defense was that Waisbren procured employment for Peppercorn without being a licensed talent agent.[26] Even though the court noted the "catch-22" with the need for personal managers to procure employment in the absence of talent agents, the court shied away from this quandary and held for Peppercorn, voiding the contract.[27]

---

20. *See* Heath B. Zarin, Note, *The California Controversy over Procuring Employment: A Case for the Personal Managers Act*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 927, 941 (1997); Zelenski, *supra* note 19, at 991 (noting that while private franchise agreements regulate agents' activities, the agreements do not regulate managers' activities).

21. *See, e.g.*, Yoo v. Robi, 24 Cal. Rptr. 3d 740, 747 (Cal. Ct. App. 2005); Flores, *supra* note 4, at 1347 (discussing prior cases which demonstrate that courts have been unwilling to apply severability to any contracts that violated the Act).

22. Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 747–48 (Cal. 2008) (emphasis added).

23. *Id.* at 748.

24. 48 Cal. Rptr. 2d 437 (Ct. App. 1995).

25. *Id.* at 439.

26. *Id.*

27. *Id.* at 441, 446–47.

The court further relied on the California Entertainment Commission's ("the Commission") report on the Act in which the Commission proposed the continued prohibition of any procurement, incidental or otherwise, by an unlicensed individual.[28] The legislature fully adopted these proposals and endorsed the Commission's findings, which the *Waisbren* court found especially important.[29] The Commission's report even tackled New York's equivalent of the Act, which exempts persons where their "business only *incidentally* involves the seeking of employment [for artists]."[30] The Commission, and subsequently the legislature, found this provision to be unworkable and expressly declined to extend the incidental booking exception to personal managers.[31]

The *Waisbren* court declared the disputed contract void as an illegal contract as the penalty for even a single act of procurement in violation of the Act.[32] The court stood on the policy that an illegal contract cannot be enforced.[33] In balancing the unjust enrichment to Peppercorn against the procurement activities of Waisbren, the court found that the balance weighed in favor of Peppercorn and deterring illegal conduct.[34] Therefore, Waisbren was not entitled to any of the unpaid commissions.[35]

IV. THE *MARATHON* COURT'S SHORTCOMINGS

Marathon stands as the landmark and most recent case regarding the Act. The California Supreme Court's recent decision created some hope for personal managers by allowing the severance of illegal parts of a contract while preserving valid parts.[36] Unfortunately, the court did not force the Labor Commissioner to apply the doctrine

28. *Id.* at 444–45.
29. *Id.*
30. N.Y. GEN. BUS. LAW § 171(8) (McKinney 2004) (emphasis added).
31. *Waisbren*, 48 Cal. Rptr. 2d at 442.
32. *Id.* at 447.
33. *Id.*
34. *Id.*
35. *Id.*
36. *See* Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 751 (Cal. 2008) (applying the doctrine of severability to the Act).

of severability to every contract.[37] Further, the court gave deference to the legislature's wishes that incidental procurement still be considered a violation of the Act.[38]

In this case, Marathon Entertainment, the defendant's personal manager, sued Rosa Blasi because she did not pay the contractually defined 15 percent of earnings from entertainment employment.[39] Marathon claimed it "provided Blasi with lawful personal manager services by providing the down payment on her house, paying the salary of her business manager, providing her with professional and personal advice, and paying her travel expenses."[40]

The employment in question was Blasi's role in the television series *Strong Medicine*.[41] Blasi had reduced Marathon's commission from 15 percent to 10 percent, and then later sought to replace Marathon with her talent agent.[42] Blasi defended the suit by filing a petition with the Labor Commissioner to declare that Marathon had violated the Act by illegally procuring employment without a license.[43] The Labor Commission agreed, voiding the contract *ab initio* and barring Marathon from any recovery.[44] The trial court affirmed the Labor Commissioner's ruling, but the court of appeal reversed in part, holding that severability was an option because Blasi had not established that Marathon wrongfully procured her a role in *Strong Medicine*.[45]

On the heels of the court of appeal's ruling, the California Supreme Court granted review and affirmed the court of appeal's ruling with some guidance.[46] First, it agreed with the court of appeal that 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 re-

37. *See* Parry-Bowers, *supra* note 10, at 448 (transcribing the Labor Commissioner's opposition to the lower court's decision).
38. *Marathon*, 174 P.3d at 748.
39. *Id.* at 744.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Marathon*, 174 P.3d at 744.
45. *Id.* at 745.
46. *Id.* at 744–45.

quirements."[47] The court applied the Act to any personal manager or talent agent who procures employment, regardless of their title.[48] This closed the loophole left open by other decisions. Personal managers had argued that because they were not mentioned in the Act, they were not subject to its limitations.[49] The court declined to recognize such a distinction and instead focused on the conduct, even incidental conduct, of procurement and the mandatory requirement for licensing.[50]

The California Supreme Court did, however, give some hope to personal managers. It used the California Civil Code section covering severability to allow valid parts of the contract to stay intact when it is possible to separate the illegal conduct from the legal conduct.[51] Even though the Labor Commissioner had not expressly cited this section, the court relied on numerous other occasions where the Labor Commissioner severed contracts and allowed managers to retain or seek commissions based on severability principles.[52] The court further relied on a wide range of cases that allowed severability for contracts involving unlicensed services.[53] The court stopped short of making severability mandatory and simply made it available to the Labor Commissioner "in order to avoid an inequitable windfall or preserve a contractual relationship where doing so would not condone illegality."[54] The court explained by stating, "the fact [that] this remedy is often, or even *almost* always, appropriate, does not support the position that it is *always* proper."[55] Further, "full voiding of the parties' contract is available, but not mandatory; likewise, severance is available, but not mandatory."[56]

As guidance, the court explained that to determine whether a contract clause is severable, courts must consider the "central pur-

47. *Id.* at 747 (citing CAL. LAB. CODE § 1700.4(a) (West 2003)).
48. *Id.*
49. *Id.*
50. *Marathon*, 174 P.3d at 747.
51. *Id.* at 750–51 (citing CAL. CIV. CODE § 1599 (West 1982)).
52. *Id.* at 751.
53. *Id.* at 752.
54. *Id.*
55. *Id.* at 754.
56. *Marathon*, 174 P.3d at 754.

pose" of a contract.[57] If the court determines that the parties intended to engage in substantial procurement activities that are inseparable from managerial services, then the court may void the entire contract.[58] However, an isolated instance of procurement does not automatically bar recovery for services that could lawfully be provided without a license, such as the loans, travel expenses, and salary of Blasi's business manager.[59]

For a Labor Commissioner drawn to fairness rather than administrative efficiency, this language may have been enough to give a fair shot to personal managers in these disputes.[60] However, the Labor Commissioner responsible for the *Marathon* decision, Robert A. Jones, showed his predisposition against severability in a letter to Chief Justice Ronald George.[61] Between the time of the court of appeal's ruling and the California Supreme Court's decision on whether to hear the case, Jones wrote to the Chief Justice urging him to de-publish the ruling so that he was not bound to the policy of severability.[62] In the letter, Jones wrote:

> It is anticipated that if the decision in Marathon Entertainment remains published and controlling, the Talent Agent Controversies hearings will be more complicated and time consuming in that the issues surrounding the severability of the contract will have to be addressed and the determination of whether the illegal procurement activity tainted the entire contract now before us. . . . The other anticipated result is that the ability of the Act to regulate unlicensed talent agents will be greatly eroded.[63]

With the Labor Commissioner himself showing the predisposition against severability, the *Marathon* court's ruling will likely have

57. *Id*. at 755.
58. *Id.*
59. *Id.*
60. *See* Parry-Bowers, *supra* note 10, at 449 (reiterating the Labor Commissioner's history of construing the Act harshly against personal managers).
61. Dave McNary, *Commissioner Backs Blasi*, DAILY VARIETY, Aug. 29, 2006, at 4, *available at* http://www.variety.com/article/VR1117949194.html.
62. *Id.*
63. *Id.*

little effect in promoting the use of severability.[64] "If the Commissioner feels that the 'taint of illegality so permeates the entire agreement that it cannot be removed by severance,' he may still invalidate the entire agreement."[65] Given that the Commissioner has historically been harsh to personal managers, it is quite likely the *Marathon* ruling will carry no additional weight.[66] In the past, even though the Commissioner has the ability to award the personal manager some compensation, he has typically invalidated the whole contract—leaving the manager with nothing.[67] As there has been no strong language from the courts that forces the Commissioner to sever contracts, the great likelihood is that he will continue business as usual and invalidate future contracts *ab initio*.[68]

Additionally, personal managers cannot escape the grasp of the Labor Commissioner. The TAA requires an initial administrative filing with the Commissioner, giving him exclusive original jurisdiction on any TAA matter.[69] Disputes must be heard by the Commissioner and all administrative remedies must be exhausted before the parties can proceed to superior court.[70] Thus, even if the Commissioner is predisposed against severing contracts, personal managers must still go through this administrative process to determine the contract's validity under the TAA.[71]

In denying Blasi's summary judgment, the court found sufficient reasoning to allow severability in the contract, as evidence was not established that Marathon obtained Blasi's role in *Strong Medicine* in violation of the Act.[72] While the court correctly stated the doctrine of severability, it gave the Labor Commissioner, who histori-

64. *See* Parry-Bowers, *supra* note 10, at 449 ("[I]t seems likely that the Commissioner would have little difficulty deciding that *any* procurement activity in violation of the Act taints the entire contract so as to make it un-severable.").

65. *Id.* at 448 (quoting Marathon v. Blasi, 45 Cal. Rptr. 3d 158, 164 (Ct. App. 2006)).

66. *Id.* at 449.

67. *Id.*

68. *Id.*

69. CAL. LAB. CODE § 1700.44(a) (West 2003).

70. Blanks v. Seyfarth Shaw, 89 Cal. Rptr. 3d. 710, 729 (Ct. App. 2009).

71. *See id.* (noting the requirement of exhausting administrative remedies).

72. *See* Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 755 (Cal. 2008) (rejecting both of the artist's arguments and holding that severability was viable in this case).

cally has been predisposed to favoring agents, the option to invalidate contracts.[73] Thus, the court created a rule without any teeth. If the court had truly wanted to sway the Commissioner away from voiding personal manager contracts *ab initio*, it would have used stronger language and placed a burden on the Commissioner to prove severability was improbable or outweighed the equitable concerns.[74]

V. ISSUES WITH THE ACT

While the Act specifically identifies the roles and interactions of a talent agent and artist,[75] it never specifically mentions personal managers. The only veiled reference to a personal manager is an exception in the definition of "talent agency" stating 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."[76] The express language exempts only procurement for the purpose of obtaining recording contracts; "negotiation of contracts for live performances, merchandising, or concert tours" is not excluded and still requires a license.[77]

The Act also allows procurement activities by unlicensed individuals when done in "conjunction with" and "at the request of" licensed talent agents.[78] On its face, this would seem to provide a "safe harbor" for personal managers who work hand-in-hand with licensed talent agents.[79] However, the exclusion only becomes effective if the agents are willing to cooperate and validate the lawful

73. *See* Parry-Bowers, *supra* note 10, at 449 (noting that forcing the Commissioner to consider severability offers no guarantees, especially with a Commissioner who continues to side with artists and agents).

74. *Cf. id.* at 448 (weighing the Commissioner's concerns of complications and time consumption against obtaining a fair and equitable result).

75. CAL. LAB. CODE §§ 1700.23–.47 (West 2003).

76. *Id.* § 1700.4.

77. James M. O'Brien III, Comment, *Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists*, 80 CAL. L. REV. 471, 500 (1992).

78. CAL. LAB. CODE § 1700.44(d).

79. *See* O'Brien, *supra* note 77, at 500.

participation by providing a confirmation letter.[80] In many cases, however, it is the policy of the talent agency not to provide such letters, thereby negating the idea of a safe harbor.[81] This issue is exacerbated when the talent agent wants to double as the artist's personal manager, as was the case in *Marathon*.[82]

Chief among the flaws of the Act is its failure to define "procurement," which has led to inconsistent interpretations by the Labor Commissioner and courts, creating an environment where no one is quite sure what is allowed.[83] The ambiguity leaves unlicensed personal managers unfairly exposed to staggering potential liability.[84] The Labor Commissioner, the individual responsible for determining violations of the Act, and the courts have found the following activities by unlicensed practitioners to be unlawful procurement: "introducing artists to producers or directors, initiating contacts with employers, furthering an offer for an artist-client, and negotiating employment contracts."[85]

The definition of procurement gets even murkier when a personal manager puts on a showcase[86] for an artist in order to procure a recording contract. In *Park v. Deftones*, Park, a personal manager, argued that his actions in procuring eighty-four showcases for the Deftones were excepted from the Act's licensing requirements because he procured the showcases for the purpose of obtaining a recording contract.[87] Emphasizing the definition of a talent agency in the Act, the court found that the exception for talent agents who procure a recording contract did not apply to Park because he was a not a talent agent but a personal manager, who was not covered by the

80. *Id.*

81. *Id.*

82. Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 744 (Cal. 2008).

83. Flores, *supra* note 4, at 1341–42; O'Brien, *supra* note 77, at 497–99.

84. *Cf.* O'Brien, *supra* note 77, at 497–99 (discussing the effect of the lack of a definition on attorneys).

85. *Id.* at 498.

86. A showcase is a live performance by an artist intended to increase the artist's publicity and possibly secure a recording contract. Hinds v. Leve, No. TAC 18-00, at 3 n.2 (Cal. Lab. Comm'r July 13, 2001), http://www.dir.ca.gov/dlse/TAC/18-00.pdf.

87. 84 Cal. Rptr. 2d 616, 617–18 (Ct. App. 1999).

Act.[88] However, in *Hinds v. Leve*, the Labor Commissioner held that because Hinds' manager succeeded in procuring the recording contract, the manager's activity could be distinguished from that of the manager in *Park*.[89]

The question thus becomes how many showcases constitute a violation of the Act. While it is probably more than one, but certainly less than eighty, courts have provided no guidance that would help personal managers work within the Act and avoid the risk of losing all commissions.[90] Further, the Labor Commissioner seems to allow personal managers to hold showcases only where they succeed in obtaining a recording contract, so an unlucky night at a showcase may quickly become illegal procurement.[91]

Without an incidental booking exception that is equivalent to the New York law,[92] and with a broad-sweeping interpretation of procurement, a personal manager is constantly put in awkward positions as he goes about his work.[93] At a cocktail party, a personal manager would essentially either have to avoid the topic of work or immediately excuse himself if a producer or executive discusses a client's work, for such discussion may be perceived as attempting to procure employment.[94] This problem illustrates that the expansive interpretation of the Act, without an incidental booking exception fails to protect the artist at all, which is the original purpose of the Act.[95]

Additionally, while the Act protects licensed talent agents from children disavowing contracts, it does not protect personal managers

88. *Id.* at 618.

89. No. TAC 18-00, at 6–7 (Cal. Lab. Comm'r July 13, 2001), http://www.dir.ca.gov/dlse/TAC/18-00.pdf.

90. *But see Park*, 84 Cal. Rptr. 2d at 619 (noting that even incidental procurement is regulated by the Act).

91. *Compare id*. at 617 (finding illegality when procurement was unsuccessful), *with Hinds*, No. TAC 18-00, at 8–9 (finding no illegality when procurement was successful).

92. N.Y. GEN. BUS. LAW § 171(8) (McKinney 2004).

93. *See generally* Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 743 (Cal. 2008) (explaining the realistic catch-22 of artists who are not established enough to get themselves a talent agent needing to hire personal managers to promote their careers).

94. *See* Flores, *supra* note 4, at 1335–37 (providing a hypothetical fact pattern resulting in the Labor Commissioner voiding the contract pre-*Marathon*).

95. *See Marathon*, 174 P.3d at 756.

from knowing, responsible adults effectively doing exactly the same thing.[96] Generally, and in California's Family Code, a minor can disavow a contract prior to reaching majority or within a reasonable time thereafter, unless barred by statute.[97] Minors are permitted to disavow contracts because, in the eyes of the law, minors lack the judgment and experience to adequately and fairly contract in their best interests.[98] In general, a person contracting with a minor does so at his own peril.[99] The Act, however, specifically denies minors the privilege of disavowing an otherwise valid contract when it has been approved by the superior court.[100] Thus, a talent agent contracting with a child is no longer doing so at his own peril, but rather has the protection of the Act behind him. The Act prohibits minors from disavowing talent contracts because talent agents need to rely on the assurance that their time and hard work cannot be tossed aside simply because the client is a minor.[101] However, the Act provides no protection for personal managers in their contracts with artists, either minors or adults.

Finally, even if personal managers wanted to become licensed as talent agents to procure employment legally, it would invalidate the rest of their business model and cap their commission at 10 percent because they would come under union control.[102] Though it is not a requirement to be a part of a union, talent agents become franchised

96. CAL. LAB. CODE § 1700.37 (West 2003).

97. CAL. FAM. CODE § 6710 (West 2004).

98. Sparks v. Sparks, 225 P.2d 238, 243 (Cal. Ct. App. 1950) ("The law shields minors from their lack of judgment and experience and confers upon them the right to avoid their contracts in order that they may be protected against their own improvidence and the designs and machinations of other people, thus discouraging adults from contracting with them.").

99. *Id.*

100. CAL. LAB. CODE § 1700.37.

101. *See* Thom Hardin, Note, *The Regulation of Minors' Entertainment Contracts: Effective California Law or Hollywood Grandeur?*, 19 J. JUV. L. 376, 378 (1998) ("[A] studio may invest substantial money in these projects because it is relying on a minor to fulfill his or her contractual obligations. If a minor disaffirms his or her contract with a motion pictures studio, the studio may lose its competitive edge as well as its project investments.").

102. *See* Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 745 (Cal. 2008); Zelenski, *supra* note 19, at 989 (discussing the mechanism through which the unions enforce their standards).

through unions based on a mutual understanding among union members not to use non-union members.[103] The unions further require shorter contract durations and bar producing the artist's work and obtaining a producer's fee—all standard parts of a personal manager's contract with an artist.[104] This type of "catch-22" situation is precisely what personal managers face every day while working for their clients' best interests.[105]

VI. ADDING SENSE TO THE TAA

The Act[106] has progressed far past protection for artists and into a law with no basis in business or market realities. In bringing the Act back to reality, a number of simple principles can be implemented to bring fairness to personal managers who take a great deal of risk in emerging artists, only to be hurt by an incidental violation of the Act, especially when that violation, the procurement of the employment, aids the artist.

The first change is obvious: allow incidental booking as the equivalent New York law does.[107] The fear, as stated in *Waisbren*, is that "incidental" is an unworkable standard and would undermine the purpose of the Act.[108] However, "New York has experienced no major problems with its incidental booking exception . . . nor has the entertainment industry in New York fallen apart as a result" of having this exception.[109] Allowing these few instances of procurement by personal managers would avoid the hazard of "punish[ing] most severely those managers who work hardest and advocate most successfully for their clients, allowing the clients to establish them-

103. *See* Zelenski, *supra* note 19, at 989.
104. *See Marathon*, 174 P.3d at 745–46.
105. *See id.* at 743 (explaining the complex realities of procuring employment for new artists while still trying to remain within the bounds of the Act).
106. The Act was enacted in 1913 and was later codified into its current form in 1978. Talent Agencies Act, ch. 282, 1913 Cal. Stat. 519 (codified as amended at CAL. LAB. CODE §§ 1700–1700.47 (2003 & Supp. 2010)).
107. *See* N.Y. GEN. BUS. LAW § 171(8) (McKinney 2004).
108. Waisbren v. Peppercorn Prods., Inc., 48 Cal. Rptr. 2d 437, 442 (Ct. App. 1995).
109. O'Brien, *supra* note 77, at 509.

selves, make themselves marketable to licensed talent agencies, and be in a position to turn and renege on commissions," as the *Marathon* court lamented prior to noting that they have no authority to rewrite the law to include such an exception.[110]

Second, the legislature should allow personal managers to pay a proactive per employment fee instead of requiring that personal managers become a fully-licensed talent agent. This allows for the business reality of procuring employment, especially prior to establishing the artists at a level for which a talent agent would be interested. By allowing this fee, the state would generate income and could restrict any booking commission to the union's standard 10 percent. Additionally, this fee would still allow the personal managers to collect the higher fees for other aspects of their management such as counseling, advising, taking care of business arrangements, and charting the course of an artist's career.[111]

With this change, personal managers will no longer have to fear that their clients will refuse to pay commissions, or that the Labor Commissioner will void the entire contract. The fee itself could be sizable enough to discourage personal managers from making a habit out of procuring employment. More importantly, it would be a guarantee that the artist could not later come back and invalidate the contract on illegal procurement grounds.

Third, the procurement of employment without a license should not be allowed as a defense in a suit seeking commissions by the personal manager for employment procurement that occurred more than a year prior to the suit. Rather than looking for ways to protect personal managers, the courts continue to be lenient when artists use the TAA as a defense. In *Styne v. Stevens*, the court ruled that statute of limitations does not limit this defensive use.[112] The *Styne* court differentiated defensive uses of the TAA by saying that "[s]tatutes of limitations bar 'actions or proceedings,' thus guarding against stale claims."[113] Though *Styne* involved multiple instances of procurement, the court's interpretation allows an artist to keep

110. *Marathon*, 174 P.3d at 756.
111. *See id.* at 745–46.
112. 26 P.3d 343, 351 (Cal. 2001).
113. *Id.* at 350 (citation omitted).

even a single instance of procurement in his back pocket to void a contract *ab initio* if the personal manager later files suit.

This defense should only be allowed if the action occurred within one year from the date of the filing of the suit. Otherwise, a single instance of procurement, which is done purely to help the artist achieve success, immediately and permanently makes the contract voidable by the artist.[114] The personal manager's only hope, and not a strong one with the current Labor Commissioner, is severability of non-illegal purposes.[115]

Finally, the court should, in some cases, enforce the illegal contract. Where a contract is prohibited merely for the protection of a class of persons, as the artists in the Act, the court may award remedies through quantum meruit or quantum valebat.[116] In instances where the artist both received and appreciated the procurement of employment in order to become successful:

> [S]ound public policy may demand either the enforcement of an executory illegal agreement . . . such as when a denial of such relief by the courts would . . . result in harm to those for whose protection such agreements are declared illegal. Thus, in some cases, public policy is best served by rescission or enforcement of the agreement, even though the result is to permit recovery by a guilty plaintiff . . . .[117]

The Act has resulted in unjust enrichment to artists while harming personal managers. Artists are, on one hand, gaining a benefit from the procurement activities of their personal manager while, at the same time, holding these incidents of procurement in their back

---

114. *See Marathon*, 174 P.3d at 748 (holding that a single act of procurement can violate the Act).

115. Severability 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." *Id.* at 750–51. Severability allows the personal manager to be compensated for any services provided which do not violate any laws, such as paying an artist's rent or providing loans as artists struggle to break into the industry. *See id.*

116. 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 19:76 (4th ed. 1998).

117. *Id.* § 19:75 (footnotes omitted).

pockets in case a problem ever arises.[118] A personal manager's procurement for his client helps everyone involved and hurts no one: the artist gains notoriety and gets compensation for his work; the personal manager gets notoriety for his client which improves the likelihood of his client's success; and a talent agent who is uninvolved in the procurement gains a potential client because the artist could potentially gain enough notoriety to be worthy of a talent contract.[119]

In fact, the talent agent only stands to gain from the personal manager procuring employment; the talent agent would not have gotten the commission for procurement because the artists for whom personal managers work typically are not established enough to make it worth a talent agent's time.[120] Despite the benefits that a personal manager confers on the artist and the unknowing talent agent, it is only the personal manager who stands to suffer if the artist brings a claim under the Act.

VII. CONCLUSION

Personal managers take a staggering amount of risk when they represent new artists.[121] They take a greater degree of involvement by lending money to young artists, and serving as spokespersons and sometimes as business managers.[122] Even with all of the hard work, personal managers risk their entire contract being invalidated for procuring employment by doing exactly what the artists want—making them a success.[123]

While normally progressive, the California courts and legislature continue to take an approach with the Talent Agencies Act that disregards the business and market realities of a personal manager's interaction with an artist. Rather than allow the invalidation of an entire contract at the hands of a predisposed Labor Commissioner,

118. *See, e.g.*, *Styne*, 26 P.3d at 351.
119. *See* Flores, *supra* note 4, at 1335–36.
120. *See id.* at 1335.
121. Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 745–46 (Cal. 2008).
122. *Id.*
123. *See generally id.* at 743 (explaining the realistic catch-22 of artists who are not established enough to get talent agents and who need to hire personal managers to promote their careers).

the courts must be stronger in their language and directives, and the legislature must step up and create an incidental booking exception. Further, the courts must apply basic contract principles and prohibit the use of procurement as a defense outside of a statute of limitations. Without these basic principles, fewer artists may be discovered due to personal managers' fears that they will have a contract voided.[124] In order to truly protect artists, as the aim of the Act claims to be, the courts and legislature must protect the personal managers so they feel secure finding and promoting the next needle in a haystack.

124. *See id.*