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A Generation of Incorrect Talent Agencies Act Rulings

By Rick Siegel

In a recent Talent Agencies Act determination, the labor commissioner voided the contractual rights of a transactional attorney for not having a talent agency license or involving a licensed talent agent to help renegotiate a sportscaster's talent deals. *Solis v. Blancarte*, TAC-27089 (Sept. 30, 2013). "Entertainment lawyers are not above the law," seems to be the message at first glance.

An examination of the arguments being forwarded by the National Conference of Personal Managers (NCOPM) in its lawsuit alleging the TAA is unconstitutional on its face and as applied (*NCOPM v. Brown*, No. 13-55545 (9th Cir., filed Oct. 8, 2013)) may suggest something else: Is, as the NCOPM alleges, the labor commissioner creating and enforcing laws that do not exist, and if so, is it above the law?

The act "is silent - completely silent - on the subject of the proper remedy for illegal procurement." *Marathon v. Blasi*, 42 Cal. 4th 974, 990 (2008). The *Marathon* court believed that silence "offer[ed] no assistance"

in determining "the proper remedy" and ultimately concluded that the voidance of management contracts is proper when severance is not appropriate.

NCOPM argues the lack of statutory remedy leaves courts no choice but to leave contractual rights untouched: "An administrative agency cannot by its own regulations create a remedy which the Legislature has withheld. 'Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations.'" *Dyna-Med Inc. v. Fair Employment & Housing Comm.*, 43 Cal. 3d 1385, 1388 (1987) (quoting *Morris v. Williams*, 67 Cal 2d 733, 748 (1967)) (internal citations omitted).

"*[I]n order for a consequence to be implied from a statute there must be greater justification for its inclusion than a consistency or compatibility with the act from which it is implied. A necessary implication within the meaning of the law is one that is so strong in its probability that the contrary thereof cannot reasonably be supposed." Grubb & Ellis Co. v. Bello*, 19 Cal. App. 4th 231 (1993) (emphasis in original).

The *Solis* determination - quoting *Buchwald v. Superior Court*, 254 Cal. App. 2d 347, 351 (1967), as is standard with TAA determinations that find violations for unlicensed procurement - states that, "Since the clear object of the Act is to prevent improper persons from becoming [talent agents] and to regulate such activity for the protection of the public, a contract between an unlicensed [talent agent] and the artist is void."

This holding has been the basis of five decades of determinations where personal managers - and now transactional attorneys - lose the benefit of their labors. It is also legally unsupportable: It is wrong about the act's "clear object," and all four state Supreme Court precedents *Buchwald* cites in its holding conflict with the *Buchwald*

conclusion.

There is no evidence that the state ever worried about "improper persons" becoming talent agents. You cannot just decide to be an attorney: You first have to have the overall academic qualifications and test scores to be accepted to a law school. After this post-graduate schooling, which includes intensive study regarding the legality of contracts, attorneys must pass a famously detailed test, and each year thereafter participate in continuing education seminars. Much of this is codified in the State Bar Act.

If the Legislature wanted to put qualifications of competence, experience or education as a barrier to licensure, as it does for lawyers, contractors, doctors, etc., to ensure "improper persons" did not become agents, it would have codified similar provisions into the TAA. It did not, and there is no evidence the Legislature ever considered such barriers to becoming or remaining a talent agent. Applicants must fill in a couple of forms, mainly about contact information, get a couple of associates to make personal recommendations, remit a $250 fee (which, argues the NCOPM, makes the act violative of the Commerce Clause of the U.S. Constitution) and send in some fingerprints. The fingerprints do not have to be notarized, so they may not even be from the applicants. So the only real barrier to a talent agency license is one's ability to remit the $50,000 bond, and improper cannot be defined as "not able to afford something."

It is uniformly accepted the act was created to keep employers from masquerading as employment counselors, to stop owners of burlesque halls and bordellos from fronting as talent representatives to lure ingenues to work for them. But even after three years of studying the act, the California Entertainment Commission issued a report saying they could find "no clear legislative intent" as to the state's stance as to whether "anyone other than a licensed talent agent [may] procure employment for an artist without obtaining a talent agent's license from the Labor Commissioner." Report of the California Entertainment Commission, at 15.

An analysis of the five precedents the *Buchwald* holding references to conclude that procuring without a license is even more damning to the current enforcement:

Wood v. Krepps, 168 Cal. 382, 386 (1914), refused to void a contract because the ordinance did not "declare that a contract made by any one in the conduct of the various businesses for which licenses are provided to be procured ... be invalid; nor is there any provision therein indicating in the slightest that this failure was intended to affect in any degree the right of contract." As the TAA has no ordinance declaring the contracts of unlicensed people to be invalid or such failures are to in any way affect the right of contract, *Buchwald*'s voiding the personal manager's contractual rights misinterprets *Wood*.

Loving & Evans v. Blick, 33 Cal. 2d 603, 608-09 (1949), holds, "it has been repeatedly declared in this state that 'a contract madeÂ contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract." As the TAA does not prescribe a penalty making unlicensed procurement "illegal and void," *Buchwald* misinterprets *Loving*.

Smith v. Bach, 183 Cal. 259, 262, holds, "The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void." With no statute imposing a penalty" and thus no implication of prohibition, *Buchwald* misinterprets *Smith*.

Severance v. Knight-Counihan Co., 29 Cal. 2d 561, 568 (1847), follows *Smith*, and therefore *Buchwald* misinterprets *Severance*.

Albaugh v. Moss Constr. Co., 125 Cal. App. 2d 126, 131-32 (1954), is a Contractors

Act dispute. That act expressly prohibits nonlicensees from engaging in the activities of a contractor and expressly prohibits compensation for unlicensed work. As the TAA has no such provisions, *Buchwald* misinterprets *Albaugh*.

Thus the current enforcement cannot pass the rational basis test of constitutionality. Attorneys specialize in creating and negotiating contracts, skills that benefit artists. The TAA was created to protect artists, not to give a commercial and protectionist advantage for talent agents to the detriment of the artist; but as interpreted, an artist who wants this benefit must also add the financial burden of engaging an agent.

The *Solis* decision is important. Not, as it might initially seem, because the determination stands as a warning that attorneys must get their talent agency licenses or stop negotiating entertainment industry contracts, but rather because it will lead to the legal community to finally and rightfully galvanize against the labor commissioner's compromising enforcement policies.

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