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2022: The year California's TAA will be enforced as written?

At any time, empowered by the Legislature's giving the administrative agency the power to "adopt, amend, and repeal such rules and regulations as are reasonably necessary for the purpose of enforcing and administering" the Talent Agencies Act to remain consistent with how the act has been codified, the enforcement can be corrected.

In 1967, the California Court of Appeal found that Jefferson Airplane's personal manager had worked to get the band gigs without first applying for and receiving a talent agency license, as required by the state's Talent Agencies Act (Labor Code Section 1700 et seq.). As a penalty for the unlicensed procurement, the court voided the manager's contractual rights. *See Buchwald v. Superior Court*, 254 Cal. App. 2d 347.

Ever since, with courts relying on *Buchwald* to void all or some of an unlicensed procurer's contractual rights -- along with some abandoning owed commissions versus filing suit, and others settling for cents on the dollar instead of going through the full judicial process -- personal managers have forfeited an estimated *half-billion* dollars of otherwise-owed compensation.

Professionals in related fields have been similarly entwined in TAA controversies. Last year, California-licensed sports agency Independent Sports & Entertainment simply walked away from a seven-figure breach-of-contract suit after NBA star Jimmy Butler made a claim that that the agency's procuring of an endorsement deal without also having a talent agency license was a TAA violation.

These losses have compromised businesses, caused personal bankruptcies, broken marriages, and in a few cases, shortened lives. They have also been the continuation of a judicial error of immeasurable proportion.

In her 2008 opinion in *Marathon Entertainment v. Rosa Blasi*, 42 Cal. 4th 974, California Supreme Court Justice Kathryn Werdegar twice noted how the TAA, "provides no remedy for its violation." "The Act is silent -- completely silent -- on the subject of the proper remedy for illegal procurement."

When the California Legislature does not codify a remedy, neither an administrative agency (the labor commissioner in TAA cases) nor a judge has the right to mete an uncodified one.

Violations of law are "made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no [violation]." *U.S. v. Evans*, 333 U.S. 483, 486 (1948). Assigning a penalty without statutory guideposts "is a task outside the bounds of judicial interpretation," reserved only for and by legislative action. *Id*. at 495.

"Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." *Lambert v. California*, 355 U.S. 225, 228 (1957).

"Where a statute fails to provide a penalty it has been uniformly held that it is beyond the power of the court to prescribe a penalty." *New Jersey v. Fair Lawn Service Center, Inc*., 120 A.2d 233, 236 (N.J. 1956).

"[I]n order for a consequence to be implied from a statute there must be greater justification for its inclusion than 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).

The California Supreme Court has made clear that while the Legislature has the power to delegate the administration, interpretation and be the original adjudicator of relevant controversies, it does not delegate the duty of creating a remedy: "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 Empl. & Housing Comm*., 43 Cal. 3d 1385 (1987). "It is fundamental an administrative agency may not usurp the legislative function." *Id*. quoting *Agricultural Lab. Relations Bd. v. Sup. Court*, 16 Cal. 3d 392, 419 (1976).

The *Dyna-Med* court limited its review and thus prohibition to creating a remedy for punitive damages. In *Peralta v. Fair Empl. & Housing Comm*., 52 Cal. 3d 40, 60 (1990), the Supreme Court similarly held that without statutory authority, administrative agencies are barred from creating compensatory remedies.

In 2013, the Daily Journal published my column, "A generation of incorrect Talent Agencies Act rulings," explaining how *Buchwald* got it wrong -- by misinterpreting all four of the California Supreme Court holdings it cited for its authority to void a found violator's contractual rights: *Wood v. Krepps*, 168 Cal. 382, 386 (1914); *Smith v. Bach*, 183 Cal. 259, 262 (1920); *Loving & Evans v. Blick*, 33 Cal. 2d 603, 608-09 (1945); and *Severance v. Knight- Counihan Co*.,

29 Cal. 2d 561, 568 (1947). Yet nine years later, personal managers and now producers, licensed attorneys and sports agents are still being compromised by the findings in *Buchwald*.

This may change soon. At any time, empowered by the Legislature's giving the administrative agency the power to "adopt, amend, and repeal such rules and regulations as are reasonably necessary for the purpose of enforcing and administering" the TAA to remain consistent with how the act has been codified, the enforcement can be corrected.

There is also a case in Los Angeles County Superior Court, *Echo Lake Management LLC v. Meg Deloach*, 21VECP00262, where the lack of a penalty provision and the related consequences has been raised and assumptively will be ruled upon. The end of this draconian, unfair, unconstitutional enforcement cannot come soon enough.

For those wanting more detail about these issues, on February 25 Professor Kevin J. Greene, the John Schumacher chair of Southwestern Law School, is producing, and the Biederman Institute of Southwestern Law School is presenting, a forum on the implications of the most recent TAA decisions and the potential of changes because of litigation using the above-mentioned arguments. Information is available on the Biederman Institute website.