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I. INTRODUCTION

California's Talent Agencies Act (the "Act" or "TAA"),[1] which regulates licensed talent agents and prohibits anyone without a license from acting in that capacity, has long needed an overhaul. Despite tremendous (and justified) criticism of the Act by personal managers, attorneys, business managers, and other industry professionals the California Legislature has chosen not to amend the Act, perhaps succumbing to the intense lobbying by the Association of Talent Agents and the powerful talent agencies that comprise the Association.[2]

However, two court cases this year have severely restricted the grossly expanded interpretation that the Labor Commissioner and the California courts have given to the Act over the last several years. In *Marathon Entertainment, Inc. v. Blasi*,[3] the California Supreme Court, for the first time, addressed the doctrine of severability in conjunction with the Act, and held that one, or even a few, isolated violations of the Act do not necessarily render the entire agreement (or multiple agreements) between the parties void and unenforceable.[4]

The Labor Commissioner had determined in numerous cases that one act of "procurement,"[5] irrespective of how many years or even decades ago

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1. CAL. LAB. CODE § 1700 (West 2003).

2. *See, e.g.*, Edwin F. McPherson, *The Talent Agencies Act: Time for a Change*, 19 HASTINGS COMM. & ENT. L.J. 899, 919 (1997).

3. 174 P.3d 741 (Cal. 2008).

4. *Id.* at 755.

5. "Procurement" has been defined by the Labor Commissioner to include any act of negotiation. *See, e.g.*, Hall v. X Mgmt., Inc., No. TAC 19-90, at 31 (Cal. Lab. Comm'n Apr. 24, 1992).

that act happened, was enough to render every contract between the manager[6] and the artist void, and precluded the manager from recovering, in some instances, millions of dollars in owed commissions, whether or not the manager was seeking any commissions specifically for the violative act.[7]

The Court in *Marathon* held that the Doctrine of Severance is as available to litigants in a TAA case as it is in any other case.[8] If the commissions sought by the manager are for lawful acts, generally those acts may be severed from the unlawful acts, and the manager may recover his commissions—unless his or her acts in violation of the Act were so pervasive of the relationship that the lawful acts and unlawful acts are impossible to separate.[9]

The second case, *Preston v. Ferrer*,[10] was decided by the United States Supreme Court. Similar to *Marathon*, the *Preston* Court decided that cases brought under the Act are to be treated the same way as any other cases, this time in connection with arbitration clauses and the Federal Arbitration Act.[11] Like all other cases, arbitration clauses in management agreements and other agreements that are relevant to the Act are to be liberally construed and strongly enforced.[12]

The Labor Commissioner has consistently ruled that it is her function to determine whether or not agreements between artists and managers are enforceable. If the entire agreement is unenforceable, then so too are arbitration provisions in that agreement, as well as choice of law and forum selection clauses.[13]

Generally, the Labor Commissioner never even gets to the arbitrability issue; she merely decides whether or not there was a violation of the Act. If there was no violation, then that is the end of the inquiry; if there was a violation, the Commissioner rules the entire agreement void, including the

6. *See, e.g.*, Tool Dissectional LLC v. Gardner, No. TAC 35-01 (Cal. Lab. Comm'n June 5, 2002); Pole v. Sheffield, No. TAC 14-91 (Cal. Lab. Comm'n Oct. 25, 1996). Although the Act precludes *anyone* who is not licensed as a talent agent from performing any of the functions of a talent agent, the overwhelming majority of cases filed under the Act are against personal managers. As such, and to the extent that *Marathon* and *Preston* dealt with personal managers, the "agreements" that are referenced in this article are *personal management* agreements.

7. *See, e.g.*, Blanks v. Greenfield, No. TAC 27-00 (Cal. Lab. Comm'n Mar. 11, 2002).

8. *Marathon*, 174 P.3d at 751.

9. *Id.* at 750-51.

10. 128 S. Ct. 978 (2008).

11. *Id.* at 981.

12. *Id.*

13. As a result, managers from all over the country have found themselves deeply entrenched in proceedings before the California Labor Commissioner, whether or not they committed any acts in California. *See, e.g.*, Webb v. Rosen, No. TAC 36-03 (Cal. Lab. Comm'n June 29, 2007).

arbitration provision, and that provision is pronounced void along with the rest of the agreement.[14] The loser before the Labor Commissioner then generally seeks *de novo* review before the Superior Court.[15] In short, TAA cases rarely—if ever—get to arbitration.

The Supreme Court in *Preston* decided that, notwithstanding the California Supreme Court case of *Styne v. Stevens*,[16] which mandated that all cases that colorably arise within the purview of the Act must be filed first with the California Labor Commissioner,[17] the Federal Arbitration Act supersedes *Styne* and all contrary state law, and mandates that arbitration provisions in all agreements must be honored.[18] According to *Preston*, only an arbitrator may decide whether the arbitration provision and the entire management agreement are valid,[19] with no right to be heard *de novo* in Superior Court, as provided for in the Act.[20]

II. *MARATHON V. BLASI*

In 1998, actress Rosa Blasi retained Marathon Entertainment as her personal manager.[21] Blasi also was represented by a licensed talent agent during her entire relationship with Marathon.[22] At one point during the relationship, Blasi obtained a starring role in a cable television series entitled *Strong Medicine* (the "Series"), which became very successful, and ran for six seasons.[23] However, Blasi terminated Marathon after the second production season, and hired her agent as her new manager.[24] Blasi ultimately refused to pay Marathon any commission on any of the remaining eighty-eight episodes, in violation of the terms of her contract with Marathon.[25]

14. Styne v. Stevens, 26 P.3d 343, 351-53 (Cal. 2001).

15. *Id.* at 351.

16. 26 P.3d 343 (Cal. 2001); *see also* Edwin F. McPherson, Styne v. Stevens*: The California Supreme Court Has the Final (But Not the First) Word on the Talent Agencies Act*, 31 SW. U. L. REV. 737 (2002).

17. *Styne*, 26 P.3d at 356.

18. Preston v. Ferrer, 128 S. Ct. 978, 987 (2008).

19. *Id.* at 985-87.

20. CAL. LAB. CODE § 1700.44(a) (West 2003), *preempted by* Preston v. Ferrer, 128 S. Ct. 978 (2008).

21. Opening Brief of Plaintiff-Appellant at 4, Marathon Entm't, Inc. v. Blasi, 174 P.3d 741 (Cal. 2008) (No. S145428).

22. *Id.* at 4-5.

23. *Id.* at 5.

24. *Id.*

25. *Id.*

Marathon eventually sued Blasi in Superior Court to recover unpaid commissions for the Series, asserting claims for breach of oral contract, *quantum meruit*, false promise, and unfair business practices.[26] Blasi immediately sought and obtained a stay of the entire action.[27] She then commenced a Labor Commission proceeding, claiming that Marathon had violated the TAA by "procuring employment for [her] without a talent agency license."[28]

After a lengthy hearing, the Labor Commissioner ruled that Marathon had violated the TAA on multiple occasions by sending out demo reels, setting up meetings with casting directors and producers, negotiating employment agreements, and seeking promotional opportunities.[29] The Commissioner therefore ruled that the management agreement was completely unenforceable, and that Marathon had "no entitlement to any payments of any kind."[30]

Marathon immediately filed a request for trial *de novo* in Superior Court, after which Blasi filed a motion for summary judgment, which was granted.[31] The court rejected Marathon's claim that the Act is unconstitutional.[32] Although Blasi's motion detailed violations that had nothing to do with the Series for which Marathon was seeking commissions, the trial court nevertheless held, consistent with the Labor Commissioner's ruling, that the entire management agreement was unenforceable, ab initio.[33]

After extensive briefing on appeal, the California Court of Appeal, at oral argument, requested both parties to submit supplemental briefing on the applicability of the doctrine of severability to agreements regulated by the Act.[34]

Ultimately, the Court of Appeal reversed the Superior Court's decision, ruling that the trial court had erroneously failed to consider the doctrine of

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

27. *Id.*

28. *Id.*

29. Blasi v. Marathon Entm't, Inc., No. TAC 15-03, at 3, 7 (Cal. Lab. Comm'n Jan. 30, 2004).

30. *Id.* at 8.

31. *Marathon*, 174 P.3d at 744.

32. *Id.* at 745.

33. *Id.* Although the Court of Appeal indicated that no violation was alleged in connection with the *Strong Medicine* project, Blasi claims that such a violation was alleged and proved at the Labor Commission proceeding, but that, because there were so many other violations, she did not pursue that claim on Summary Judgment. Opening Brief of Defendants-Respondents at 10-11, Marathon Entm't, Inc. v. Blasi, 174 P.3d 741 (Cal. 2008) (No. S145428).

34. *Marathon*, 174 P.3d at 745.

severability, and remanded the case to the Labor Commissioner.[35] Because there was no evidence presented to the trial court that Marathon had engaged in procurement activities in connection with the Series, the appellate court held that the doctrine of severability may allow Marathon to recover commissions that were not tainted by the illegal procurement activity.[36]

A. Marathon's Position

After the Court of Appeal's decision was rendered, it was actually Marathon that filed the initial Petition for Review with the California Supreme Court.[37] Marathon challenged the Court of Appeal's decision to remand the case to the Labor Commissioner, claiming that the Labor Commissioner did not have jurisdiction because personal managers are not regulated by the Act.[38]

In its briefs to the California Supreme Court, Marathon argued that the language of the Act itself makes it clear that personal managers are not covered by the Act.[39] The Act defines a talent agent as "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."[40] Marathon argued further that, because the name of the Act suggests the regulation of *talent agents*, and there is no mention of *personal managers* anywhere in the Act, such personal managers are not regulated by the Act.[41]

Marathon went on to an extensive review and discussion of the legislative history of California Assembly Bill 2535, originally called the "Artists' Managers Act," which became the TAA.[42]

Marathon referred to the internal analysis by the Assembly Policy Committee ("APC"), which noted that: "[t]he personal manager in

35. *Id.*

36. *Id.*

37. Petition for Review, Marathon Entm't, Inc. v. Blasi, 174 P.3d 741 (Cal. 2008).

38. *Id.* at 12.

39. Opening Brief of Plaintiff-Appellant, *supra* note 21, at 11.

40. CAL. LAB. CODE § 1700.4(a) (West 2003).

41. Opening Brief of Plaintiff-Appellant, *supra* note 21, at 11.

42. *Id.* at 13-24. Blasi later pointed out in her responding brief that the legislative history from which Marathon quoted generously was actually not the final version, which did make it clear that, though the legislature did not intend to regulate managers *per se* with the Act, it did intend to preclude everyone but licensed talent agents from procuring employment for artists. Opening Brief of Defendants-Respondents, *supra* note 33, at 17-18.

California today is running a tremendous risk by being alive."[43] It suggested that the only way a personal manager could protect himself "from attack as an unlicensed artists' manager is to obtain an agent's license," and that such a resolution is "unworkable."[44] The only "workable solution," according to the APC, would be for the personal manager to be separately licensed.[45]

Such solution was introduced in legislation as (proposed) Labor Code section 1700.5(b).[46] However, though the proposed legislation did mandate the separate licensing of personal managers, it also forbade managers from procuring any employment, which the APC determined to be equally "unworkable."[47] The APC acknowledged that the legislation did "not reflect the needs of the personal manager, but rather would benefit the [agent] . . . ."[48]

The APC further concluded that, in licensing personal managers, the lawmakers must accept the "reality of managers' procurement responsibilities":[49] "In summary, AB 2535 is not representative of the entertainment industry needs, nor of the personal manager's needs. It is a short-sighted attempt to prohibit the personal manager from procuring employment without substantive value or purpose."[50]

The Assembly Committee on Labor offered its own analysis of the draft, noting that an integral part of personal managers' function to serve their clients' best interests was to "give some employment assistance" to them.[51] As a result, the May 1, 1978 draft offered an entire chapter devoted to the licensing of personal managers.[52] However, just nine days later, all references to "personal managers" were deleted from the Bill.[53]

The Court of Appeal has certainly used language that suggests that the Act does not regulate managers, *per se*, and simply regulates the profession

43. Opening Brief of Plaintiff-Appellant, *supra* note 21, at 14 (quoting ASSEMB. POLICY COMM. ON LABOR, EMPLOYMENT & CONSUMER AFFAIRS, ANALYSIS OF THE PROBLEM, R.J.N. 1, A.B. 2535 [hereinafter ANALYSIS OF THE PROBLEM], at 63-66 (1978)).

44. *Id.* (quoting ANALYSIS OF THE PROBLEM, at 64).

45. *Id.* at 15 (quoting ANALYSIS OF THE PROBLEM, at 64-66).

46. *Id.* (quoting R.J.N. 1, A.B. 2535, at 5-6 (1978)).

47. *Id.*

48. *Id.* at 15-16 (quoting ASSEMB. POLICY COMM. ON LABOR, EMPLOYMENT & CONSUMER AFFAIRS, ANALYSIS OF THE PROPOSAL, R.J.N. 1, A.B. 2535 [hereinafter ANALYSIS OF THE PROPOSAL], at 70 (1978)).

49. Opening Brief of Plaintiff-Appellant, *supra* note 21, at 16.

50. *Id.* (quoting ANALYSIS OF THE PROPOSAL, at 70).

51. *Id.* at 17 (quoting ASSEMB. POLICY COMM. ON LABOR, EMPLOYMENT & CONSUMER AFFAIRS, R.J.N. 1, A.B. 2535, at 163 (1978)).

52. *Id.*

53. *Id.* at 18.

of talent agents. According to the court in *Buchwald v. Superior Court*,[54] the purpose of the Act, and the licensing requirement in particular, is to "prevent improper persons from becoming [agents] and to regulate such activity for the protection of the public" and artists.[55]

Clearly, preventing improper persons from becoming talent agents was the intent of the Legislature in enacting the Act. In fact, even the Labor Commissioner, as early as 1981, acknowledged that the procurement activity had to be pervasive to constitute a violation of the Act. In *Tucker v. Far Out Management, Ltd.*,[56] the Commissioner noted that "the California Legislature's enactment of the Talent Agencies Act was intended to charge the Labor Commissioner with responsibility for ensuring that persons whose *usual or principal work* was the procurement of employment for artists, were licensed."[57]

However, notwithstanding what at least appears to have been the Legislature's original intent in enacting the TAA, the Labor Commissioner, numerous trial courts, the Court of Appeal, and even the California Supreme Court have made it abundantly clear that they do not interpret the Act to be simply for the regulation of talent agencies; the Act's prohibition of procurement applies to everyone who is not licensed as a talent agent.

B. Blasi's Position

Blasi first argued that any severance would be incompatible with the "remedial purpose" of the Act, and that the Legislature intended that a management agreement be voided in its entirety "to maximize the deterrent effect of the [Act],"[58] citing the conclusions of the 1982 California Entertainment Commission (which was comprised primarily of artists, talent agents, and the California Labor Commissioner),[59] as discussed in *Waisbren*.[60]

Blasi went on to discuss *Yoo v. Robi*,[61] in which Division 7 of the Court of Appeal (interestingly, the same division that decided *Wachs v. Curry*,[62]

54. 62 Cal. Rptr. 364 (Ct. App. 1967).

55. *Id.* at 367.

56. No. TAC 14-79 (Cal. Lab. Comm'n 1981).

57. *Id.* at 10 (emphasis added).

58. Opening Brief of Defendants-Respondents, *supra* note 33, at 16 (citing Waisbren v. Peppercorn Prods., Inc., 48 Cal. Rptr. 2d 437, 441 (Ct. App. 1995)).

59. For a discussion of why the conclusions of this obviously biased Commission must be revisited, see McPherson, *supra* note 2.

60. *See* 48 Cal. Rptr. 2d at 442-45.

61. 24 Cal. Rptr. 3d 740 (Ct. App. 2005).

which held that "incidental" procurement was allowed under the Act)[63] determined that, although section 1599 of the Civil Code "authorizes a court to sever the illegal object of a contract from the legal it does not require the court to do so," and that "the public policy underlying the Act is best effectuated by denying all recovery, even for activities which did not require a talent agency license."[64]

Blasi next argued that, if a manager "can retain all commissions associated with employment he did not procure, he has every incentive to 'take a free shot' at procuring employment under the most basic cost-benefit analysis."[65]

Blasi further argued that the Court of Appeal opinion is contrary to the "Commission's unwavering position on the subject of severance."[66] In fact, according to Blasi, in every case but one, the Commission voided the management agreement "in its entirety"[67] and, in every case but one, when the agreement was voided, it was voided ab initio.[68]

Blasi finally referred to a letter brief from the Labor Commissioner that was filed in connection with the *Marathon* case, indicating that the Commissioner has had a longstanding practice, "in keeping with the legislative history and the leading case law in this area," of implementing a "bright line" test in resolving disputes under the Act by declaring the agreement void ab initio.[69]

62. 16 Cal. Rptr. 2d 496 (Ct. App. 1993).

63. *Id.* at 503.

64. Opening Brief of Defendants-Respondents, *supra* note 33, at 22 (quoting *Yoo*, 24 Cal. Rptr. at 751).

65. *Id.* at 27.

66. *Id.* at 34-35.

67. *Id.* at 35 (referring to the exception of Almendarez v. Unico Talent Mgmt., Inc., No. TAC 55-97 (Cal. Lab. Comm'n Aug. 26, 1999)).

68. *Id.* (referring to the exception of Cuomo v. Atlas/Third Rail Mgmt., Inc., No. TAC 21-01 (Cal. Lab. Comm'n Jan. 3, 2003)).

69. *Id.* at 37. This letter from the Labor Commissioner was sent as an amicus curiae brief in connection with the original Petition for Review to the California Supreme Court. The fact that such a letter was sent by the very Commission that is charged with the responsibility of enforcing the Act, and the very Commission that decided the *Marathon* case initially, is unusual at best, and is no different than if the trial judge himself had sent such a letter.

C. *The California Supreme Court Decision*

i. History of the Act

The California Supreme Court began its opinion by acknowledging the similarities and differences between agents and managers.[70] In fact, the Court even correctly recognized that the practicalities of the entertainment industry often *require* a manager to procure employment for "artists," particularly those "not-yet-established talents, lacking access to the few licensed agents in Hollywood."[71] Nevertheless, the Court readily acknowledged that the Act presently precludes such procurement activities by anyone who is not licensed by the State.[72]

The Court then discussed the history of the Act, noting that its "roots extend back to 1913, when the Legislature passed the Private Employment Agencies Law . . . for employment agents."[73] The "[e]xploitation of artists by representatives has remained the Act's central concern through subsequent incarnations to the present day."[74]

"In 1978, the Legislature considered enacting a separate licensing scheme for personal managers[,]" but ultimately abandoned that concept, shifted the regulation of music booking agents to the Labor Commissioner, and renamed the Artists' Managers Act the Talent Agencies Act.[75]

In 1982, the Legislature amended the Act, imposing a one-year statute of limitations for claims under the Act, eliminating criminal sanctions for violations thereof, and establishing an exception to the blanket proscription by allowing managers to avoid liability under the Act if they worked in conjunction with, and at the request of, a licensed talent agent.[76]

ii. Application to Personal Managers

The Court then addressed Marathon's argument that the Act does not apply to managers.[77] It noted that the Act regulates the *conduct* of acting like a talent agency, and not the *label* that one places on himself.[78]

70. Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 743 (Cal. 2008).
71. *Id.*
72. *Id.* at 747.
73. *Id.* at 746.
74. *Id.*
75. *Id.*
76. *Marathon*, 174 P.3d at 746.
77. *Id.* at 747.
78. *Id.*

Essentially, irrespective of who or what a person may call himself, if he procures employment, he is doing the work of a talent agency, and is therefore subject to regulation.[79] It also noted the unanimity with which the Labor Commissioner and the Courts of Appeal had agreed in that regard.[80]

In two footnotes, the Court noted that even the Legislature had indicated its agreement that the Act clearly applies to managers.[81] In 1978, the Legislature rejected a special exemption from the Act for personal managers to be allowed to procure work for artists that were already represented by licensed talent agents.[82] In 1982, it rejected a special exemption from the Act for "a particular class of personal managers."[83] Finally, in 1986, it enacted the compromise "safe harbor" provision, whereby unlicensed agents who worked in conjunction with, and at the request of, a licensed talent agent would be exempt from the Act.[84]

The Court acknowledged that Marathon correctly pointed out that the Legislature, "in 1978, after much deliberation, . . . decided not to add separate licensing and regulation of personal managers to the legislation."[85] However, the Court disagreed with Marathon's conclusion that managers are therefore exempt from the Act.[86] The Court found that managers remain exempt from the 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."[87]

The Court then addressed Marathon's argument concerning California's "single-subject rule," which is set forth in the California Constitution.[88] The rule requires that each statute "embrace but one subject, which shall be expressed in its title."[89] Marathon argued that the single subject and title of "The Talent Agencies Act" precludes the Act from regulating anything but talent agents.[90] The Court found that Marathon's interpretation of the rule was a tortured one, and that the legislation and its title easily comply with the rule.[91]

79. *Id.*
80. *Id.*
81. *Id.* at 747 n.4, 748 n.5.
82. *Marathon*, 174 P.3d at 747 n.4.
83. *Id.* at 748 n.5.
84. *Id.* at 747 n.4.
85. *Id.* at 749.
86. *Id.* at 750.
87. *Id.*
88. *Marathon*, 174 P.3d at748.
89. *Id.*
90. *Id.*
91. *Id.* at 749.

iii. Sanctions for Solicitation

The Court turned to the key issue of the case, to wit: "What is [an] artist's remedy for a violation of the Act?"[92] More specifically, the question was, once a violation of the Act has been determined, is the manager barred from the recovery of *all* commissions, or may the Doctrine of Severability be applied?[93]

The Court first noted that the Act contains no definition of "procurement," and that the Labor Commissioner has "struggled over time" to refine the definition of the term.[94] However, it also found that there was no material dispute that Marathon had engaged in one or more acts of procurement, and that there was no evidence presented to the trial court that Marathon had actually "procured" *Strong Medicine*.[95]

The Court also found that the Act is "completely silent" on the subject of the proper remedy—or *any* available remedy—for illegal procurement.[96] On the contrary, the Court found that Civil Code section 1599 is a "clear" codification of the common law doctrine of severability of contracts: "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."[97]

The Court noted that this doctrine only applies "when the parties have contracted, [but only] in part, for something illegal."[98] Notwithstanding that illegality, the doctrine "preserves and enforces any lawful portion of a parties' [sic] contract that feasibly may be severed."[99]

The Court also noted that, under ordinary rules of interpretation, both statutes must be read to give effect to both.[100] It ruled that the TAA and Civil Code section 1599 are not in conflict because the TAA provides no remedy for its violation, while the Civil Code section is clear.[101] Unless there is "persuasive evidence that the Legislature intended to reject [this] rule in disputes under the Act[,]" the rule must apply.[102]

92. *Id.* at 750.
93. *Id.*
94. *Marathon*, 174 P.3d at750.
95. *Id.*
96. *Id.*
97. *Id.* (quoting CAL. CIV. CODE § 1599 (Deering 1872)).
98. *Id.*
99. *Id.* at 750-51.
100. *Marathon*, 174 P.3d at751.
101. *Id.*
102. *Id.*

The Court noted that the Labor Commissioner had actually rendered decisions consistent with this rule on numerous occasions, including *Almendarez v. Unico Talent Management, Inc.*[103] (in which the Commissioner cited and specifically applied section 1599), *Danielewski v. Agon Investment Co.*[104] (partially enforcing agreement involving both a lawful loan repayment and some unlawful services), *Gittelman v. Karolat*[105] (invalidating agreement only for the years of unlawful procurement), *Cuomo v. Atlas/Third Rail Management, Inc.*[106] (voiding agreement only for the period after procurement), *Anderson v. D'Avola*[107] (denying right to recover commission only for unlawfully obtained role), and *Bank of America National Trust and Savings Association v. Fleming*[108] (ordering return of twenty percent of commission based upon determination that manager spent twenty percent of time unlawfully procuring).

The Court then reviewed the appellate decisions under the Act, finding that, in only two such cases did any court consider the application of Civil Code section 1599 to allow a personal manager to seek commissions for lawful services. In *Yoo v. Robi*,[109] the Court of Appeal found that the application of severance is not mandatory, but may occur, on a case to case basis, depending upon equitable considerations.[110] The *Yoo* court ruled that "the windfall for the artist [in that case] was not so great as to warrant severance."[111]

Similarly, in *Chiba v. Greenwald*,[112] the Court of Appeal also considered the applicability of the doctrine of severance in a dispute involving the Act.[113] In that case, the court also concluded that equity did not require the severance of the lawful portions of the agreement from the unlawful portions for the purposes of the Act.[114]

The Court found that "[n]either *Chiba* nor *Yoo* stands for the proposition that severance is never available under the Act[,]" and

103. No. TAC 55-97, at 19 (Cal. Lab. Comm'n Aug. 26, 1999).

104. No. TAC 41-03, at 28 (Cal. Lab. Comm'n Oct. 28, 2005).

105. No. TAC 24-02, at 15 (Cal. Lab. Comm'n July 19, 2004).

106. No. TAC 21-01, at 13 (Cal. Lab. Comm'n Jan. 3, 2003).

107. No. TAC 63-93, at 11-12 (Cal. Lab. Comm'n Feb. 24, 1995).

108. No. 1098 ASC MP-432, at 16 (Cal. Lab. Comm'n Jan. 14, 1982).

109. 24 Cal. Rptr. 3d 740 (Ct. App. 2005).

110. *Id.* at 751.

111. Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 752 (Cal. 2008) (citing *Yoo*, 24 Cal. Rptr. 3d at 750-51).

112. 67 Cal. Rptr. 3d 86 (Ct. App. 2007).

113. *Id.* at 88.

114. *Marathon*, 174 P.3d at 752 (citing *Chiba*, 67 Cal. Rptr. 3d at 81-82).

concluded that severance clearly is therefore available in TAA cases.[115] The Court noted that such a conclusion is consistent with a "wide range" of cases in which the doctrine was applied to other unlicensed services.[116]

Blasi argued that, even if severability may generally apply to cases under the Act, the Court should nevertheless announce a rule precluding its use.[117] She cited language from the Entertainment Commission's 1985 Report to the Legislature indicating its approval of the penalty of voiding the entire agreement ab initio.[118] However, the Court found that the passage only recognized that the Labor Commissioner has the *power*, but not the *duty*, to so void agreements.[119]

Blasi relied on a series of Court of Appeal and Labor Commissioner decisions that voided management agreements in their entirety.[120] The Court rejected Blasi's position, noting that the decisions cited by Blasi actually suggest that the Labor Commissioner has the *authority* to allow partial recovery in appropriate circumstances, whether or not she uses that authority.[121]

The Court did note that the Labor Commissioner's more recent decisions were much more definitive in disallowing any recovery for unlicensed agents.[122] However, according to the Court, those decisions were based upon a mistaken assessment by the Labor Commissioner that the legislative history and case law require such a result, as well as "a policy judgment that voiding contracts in their entirety is necessary to enforce the Act effectively."[123]

The Court found that such an assessment is erroneous.[124] In fact, the Court found that neither the Court nor the Labor Commissioner is authorized to impose such a limitation of remedies, as the Act neither

115. *Id.*

116. *Id.* (citing Birbrower, Montalbano, Condon & Frank v. Superior Court, 949 P.2d 1, 13 (Cal. 1998) (unlicensed practice of law); Levinson v. Boas, 88 P. 825, 828 (Cal. 1907) (unlicensed pawnbroker); Lindenstadt v. Staff Builders, Inc., 64 Cal. Rptr. 2d 484, 491 (Ct. App. 1997) (unlicensed real estate broker); Broffman v. Newman, 261 Cal. Rptr. 532, 534 (Ct. App. 1989) (unlicensed real estate broker); Southfield v. Barrett, 91 Cal. Rptr. 514, 516 (Ct. App. 1970) (unlicensed commission merchant)).

117. *Id.* at 753.

118. *Id.*

119. *Id.*

120. *Marathon*, 174 P.3d at 753.

121. *Id.* at 754.

122. *Id.* (citing Smith v. Harris, No. TAC 53-05, at 16-17 (Cal. Lab. Comm'n Aug. 27, 2007); Cham v. Spencer/Cowings Entm't, LLC, No. TAC 19-05, at 17-18 (Cal. Lab. Comm'n July 30, 2007)).

123. *Id.*

124. *Id.*

expresses nor implies any such limitation.[125] The Court therefore held that "the full voiding of the parties' contract is available, but not mandatory; likewise, severance is available, but not mandatory."[126]

The Court went on to discuss the imposition of the doctrine of severability to specific instances.[127] It noted that a personal manager who devotes ninety-nine percent of his time to counseling a client (a typical management duty) is not insulated from the Act if he spends one percent of his time procuring work for the client.[128] However, the one percent of his time spent soliciting should not render illegal the ninety-nine percent of time spent engaging in legal activity, particularly when that conduct "may involve a level of personal service and attention far beyond what a talent agency might have time to provide."[129]

If a court decides in a given instance that the central purpose of a management agreement is for procurement, or that "the representative engaged in substantial procurement activities that are inseparable from manage[ment] services, [the court] may void the entire contract."[130] "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."[131]

Finally, the Court discussed the mountain of criticism that had been lining up to the Act's application.[132] It noted that the "briefs submitted by personal managers indicate[d] a uniform dissatisfaction" with the Act.[133] According to the Court, the Legislature also has "expressed dissatisfaction with the Act's enforcement scheme."[134] The Court noted that, even "counsel for Blasi [at oral argument] likewise agreed that the Legislature might profitably consider revisiting the Act."[135]

The Court went on to discuss the practical ramifications of the harsh enforcement scheme that was presently being used by the Labor Commissioner and the courts.[136] This has resulted in a "limited pool of

125. *Id.*

126. *Marathon*, 174 P.3d at 754.

127. *Id.*

128. *Id.* at 755.

129. *Id.*

130. *Id.*

131. *Id.* (citing Lindenstadt v. Staff Builders, Inc., 64 Cal. Rptr. 2d 484, 491 (Ct. App. 1997)).

132. *Marathon*, 174 P.3d at 755-56.

133. *Id.*

134. *Id.* at 756.

135. *Id.* What Blasi's counsel actually argued was that any changes in the enforcement of the Act should be done by the Legislature, and not by the courts.

136. *Id.*

licensed talent agencies," which created a "black market for unlicensed talent agency services."[137] Although an artist can use the Act to combat "abuses by unlicensed talent agencies, . . . this is a blunt and unwieldy instrument."[138]

The Court further noted that unestablished artists may not ever utilize the Act because they fear blacklisting, and that the Act may very 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."[139]

Finding that it had "no authority to rewrite the regulatory scheme[,]" the Court affirmed the Court of Appeal's decision, and remanded the case to the trial court for further proceedings.[140]

III. *PRESTON V. FERRER*

In *Preston v. Ferrer*,[141] the United States Supreme Court determined that, when an artist and a manager (or any other representative) enter into an arbitration agreement, the Federal Arbitration Act ("FAA") supersedes the Talent Agencies Act,[142] which purports to require the parties to submit all colorable controversies under the Act to the Labor Commissioner in the first instance. In such a case, the arbitrator, and only the arbitrator, may determine the validity of the contract, and of the arbitration clause itself.[143]

In that case, the defendant, Alex Ferrer, was a television judge ("Judge Alex").[144] The plaintiff, Arnold Preston, was a California attorney[145] and personal manager, who had represented Ferrer on a commission basis.[146] The agreement between them contained a mandatory arbitration provision

137. *Id.* (citing ASSEMB. LABOR & EMPLOYMENT COMM., REPUBLICAN ANALYSIS OF S.B. 1359, 1989-90 Reg. Sess. (as amended May 1, 1989)).

138. *Marathon*, 174 P.3d at 756.

139. *Id.* (citing, *e.g.*, Kilcher v. Vainshtein, No. TAC 02-99, at 18-19 (Cal. Lab. Comm'n May 30, 2001)).

140. *Id.*

141. 128 S. Ct. 978 (2008).

142. *Id.* at 981.

143. *Id.* (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006)).

144. *Id.* at 981-82.

145. Oddly, there is no exception to the Act for licensed California attorneys, who go through an infinitely more rigorous licensing and testing procedure than talent agents. *See, e.g.*, Kilcher v. Vainshtein, No. TAC 02-99, at 25-26 (Cal. Lab. Comm'n May 30, 2001).

146. *Preston*, 128 S. Ct. at 982.

that required the parties to submit all disputes between them to arbitration under the rules of the American Arbitration Association.[147]

When Ferrer ultimately refused to pay the commissions to Preston, Preston filed a demand for arbitration.[148] Ferrer responded by immediately filing a motion with the arbitrator to stay the arbitration and a Petition to Determine Controversy with the California Labor Commissioner, claiming that the Act superseded the arbitration clause,[149] and that relevant case law, particularly *Styne v. Stevens*,[150] mandated that all issues relating to the Act must be adjudicated by the Labor Commissioner in the first instance.[151] In his Petition, Ferrer alleged that, because Preston violated the Act by procuring employment for Ferrer, the entire agreement between them was void, including the mandatory arbitration provision.[152]

Preston filed a motion to dismiss Ferrer's Petition for lack of subject matter jurisdiction, claiming essentially that the arbitration provision trumped all.[153] The Labor Commissioner denied the motion, citing *Styne*, finding that Ferrer's claim constituted a "colorable" claim, and therefore must be submitted to the Commissioner.[154] The Commissioner also declined to stay the arbitration on the ground that only the Superior Court had authority to impose the stay.[155]

Ferrer next filed a suit in the Los Angeles Superior Court, and immediately moved to stay the arbitration proceeding pending the determination of all TAA issues by the Labor Commissioner.[156] The Superior Court sided with Ferrer, readily granting his motion to stay.[157]

On appeal, the Second District Court of Appeal, in a 2-1 decision, affirmed the Superior Court's ruling, holding that, irrespective of the clear language of the arbitration provision, all issues relating to the Act, including the issues between Ferrer and Preston, must be submitted in the first instance to the California Labor Commissioner, consistent with *Styne v. Stevens*.[158]

147. *Id.*

148. *Id.*

149. Ferrer v. Preston, 51 Cal. Rptr. 3d 628, 630 (Ct. App. 2006).

150. 26 P.3d 343 (Cal. 2001).

151. *Id.* at 356-57.

152. *Preston*, 128 S. Ct. at 982.

153. Brief for Respondent at 20-21, Preston v. Ferrer, 128 S. Ct. 978 (2008) (No. 06-1463).

154. *Id.*

155. *Id.* at 21.

156. *Preston*, 128 S. Ct. at 982.

157. *Id.*

158. Ferrer v. Preston, 51 Cal. Rptr. 3d 628, 631-32 (Ct. App. 2006) (citing Styne v. Stevens, 26 P.3d 343, 350, 354 (Cal. 2001)).

The appellate court considered the United States Supreme Court case of *Buckeye Check Cashing, Inc. v. Cardegna*,[159] which held that the FAA supersedes state statutes that refer certain state law controversies initially to a judicial forum.[160] However, it ruled that *Buckeye* does not apply to cases in which a state statute refers certain state law controversies to an administrative agency with exclusive jurisdiction over a disputed issue—in this case, the Labor Commissioner for violations of the TAA.[161]

Preston then filed a Petition for Review with the California Supreme Court, which was denied.[162] Thereafter, Preston filed a Petition for Certiorari in the United States Supreme Court.[163] In his Petition, Preston claimed that the FAA[164] overrides and supersedes state law that vests initial adjudicatory authority not only in a judicial forum, but also in an administrative agency.[165] The Supreme Court granted Certiorari.[166]

In its opinion, the Supreme Court first noted that the FAA's "displacement of conflicting state law" was already "well-established,"[167] i.e., when a plaintiff alleges that a contract that he signed is somehow illegal under state law, and void ab initio, it is for the *arbitrator*, and *not* the courts, to decide whether or not the contract is void. The Court went on to discuss the issue of whether the same rule applied with respect to reference to administrative agencies.[168]

The Court noted that the TAA already "permits arbitration in lieu of [a] proceeding before the Labor Commissioner," but only if a contract "'between a talent agency and [an artist]' both 'provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration

159. 546 U.S. 440 (2006).

160. *Ferrer*, 51 Cal. Rptr. 3d at 633.

161. *Id.* at 634.

162. *Preston*, 128 S. Ct. at 982.

163. *Id.* at 982-83.

164. Section 2 of the FAA provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2006). This section of the FAA reflects the "'national policy favoring arbitration' of claims that parties contract to settle in that matter." *Preston*, 128 S. Ct. at 983 (quoting Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)). "This national policy . . . 'appli[es] in state as well as federal courts' and 'foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.'" *Id.* (quoting *Southland Corp.*, 465 U.S. at 16).

165. Brief for Petitioner at 12-13, Preston v. Ferrer, 128 S. Ct. 978 (2008) (No. 06-1463).

166. *Preston*, 128 S. Ct. at 982-83.

167. *Id.* at 983.

168. *Id.* at 984-85.

hearings' and [also] gives the Commissioner 'the right to attend all arbitration hearings.'"[169]

The Court found that such a procedure indicates that the concept of arbitration is not antithetical to the Act.[170] However, the Court noted that this procedure: (a) does not apply to alleged unlicensed talent agencies; and (b) "imposes prerequisites to enforcement of an arbitration agreement [under the TAA] that are not applicable to contracts generally."[171]

Ferrer contended that, when the losing party files for *de novo* review in Superior Court, either party could move to compel arbitration at that point, and that the TAA is therefore compatible with the FAA because the TAA merely *postpones* arbitration until after the Labor hearing.[172] However, the Court noted that Ferrer had taken a completely contrary view in the California courts, claiming that the issue of the validity of the contract is not subject to arbitration at all.[173]

The Court also indicated that "[a] prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'"[174] Even if Preston could ultimately compel arbitration after a Labor Commission hearing (in lieu of the statutory *de novo* Superior Court review), that objective would clearly be frustrated if any portion of the case were decided in any forum other than arbitration.[175] The Court noted that: "[r]equiring initial reference of the parties' dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy."[176]

The Court therefore held that, "[w]hen parties agree to arbitrate all questions arising under a contract, . . . [any and all] state laws lodging primary jurisdiction in another forum, whether judicial or administrative[,]" are superseded by the FAA.[177]

It is therefore now specifically and unequivocally settled that, notwithstanding *Styne v. Stevens*, a party to an agreement that contains an arbitration clause, which party asserts a violation of the TAA, may not submit the claim to the Labor Commissioner or to anyone else other than an

169. *Id.* at 985 (quoting CAL. LAB. CODE § 1700.45 (West 2003)).

170. *Id.* at 985.

171. *Id.*

172. Brief for Respondent, *supra* note 153, at 14, 40.

173. *Preston*, 128 S. Ct. at 985.

174. *Id.* at 986 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985).

175. *Id.*

176. *Id.* at 986.

177. *Id.* at 987.

arbitrator.[178] In addition, in the event that one of the parties erroneously submits such a claim to the Labor Commissioner, and it is rejected, neither party may seek *de novo* review to the Superior Court.[179]

IV. THE FUTURE

The question arises as to whether *Marathon* and *Preston* have completely emasculated the Talent Agencies Act, or whether the Act is still alive and well. In theory, *Preston* will not change the *outcome* of cases; only the means by which one gets to that outcome. In other words, *Preston* does not alter the law at all; it only mandates that an arbitrator be the decision maker instead of the Labor Commissioner (with *de novo* review to the Superior Court and ultimately to the Court of Appeal and the California Supreme Court).

However, with general arbitration law being so clear as to the extremely limited challenges that one can make to an arbitrator's decision,[180] particularly because there appears to be no challenge for a clearly erroneous interpretation of the law or the facts, it is apparent that the *Preston* decision will at least potentially benefit the manager. Given the ferocity with which the Labor Commissioner has traditionally approached most recent cases, it is highly doubtful that a manager could do worse with an arbitrator, who is not necessarily constrained by things like *the law*.

The *Marathon* decision is almost certain to benefit managers, particularly because the Act heretofore has been stretched and distorted so far beyond anything that the Legislature possibly could have intended. Nowhere in the Act is there any prescribed penalty for a violation thereof. In fact, the Act itself purports only to prohibit "procurement," and not, as the Labor Commissioner and the courts have expanded that concept to be, the slightest negotiation of the most trivial term of an unsolicited agreement.

The Act has been expanded and manipulated so far that, prior to *Marathon*, one could argue that one such negotiation of one such trivial term, done thirty years before, by a manager that had not even remotely come close to violating the Act since that time, might very well cause the

178. *Id.*

179. *See* CAL. LAB. CODE §§ 1700.15, 1700.23, 1700.6 (West 2003); CAL. CODE REGS. tit. 8, §§ 12000, 12000.1 (2009).

180. The new case of *Hall Street Associates v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), even prohibits the parties to an arbitration agreement, which of course is a voluntary, presumably negotiated document, from agreeing between themselves to increase the number of ways in which to challenge an arbitrator's award. *Id.* at 1400.

forfeiture of millions of dollars in commissions, notwithstanding that the one "violation" might not have earned any commissions for the manager, notwithstanding that the commissions presently being sought had nothing to do with the "violative" conduct, and notwithstanding the purportedly very strict, one-year statute of limitations of the Act.

The *Marathon* decision, if nothing else, should, at the very least, preclude such results. Under *Marathon*, unless the violations by the manager so permeate the entire relationship between that manager and the artist that the unlawful acts cannot be severed from the lawful acts, the agreement will not be voided unless the commissions that are sought by the manager are for the work that the manager actually "procured."

Unfortunately, it is still up to the Legislature to pull the reigns in on the Act even further, by actually defining the term "procurement." If the Act truly exists in order to ensure that unlicensed individuals and entities do not *engage in the business* of a talent agency, the term must be restricted to its most common definition, i.e., the actual *solicitation* of employment for an artist, rather than any *negotiation* of any deal point.

In order to obtain a talent agency license in California, there is little more to do than to fill out a license application and post a surety bond.[181] There is no requirement of a college degree; there is not even a requirement of a high school diploma. In fact, there may be literally tens of individuals working under one single license.[182] There is certainly no requirement that any of those people submit to an examination; there is not even any requirement that any of those people, save one, submit an application or obtain a bond.[183] In fact, it is much more difficult to become a Notary Public in this state than to become a licensed talent agent.[184]

To the extent that the prohibitions of the Act apply equally to managers and licensed attorneys alike, it is inconceivable that the California Legislature intended to leave the negotiation of complex legal issues in talent contracts to individuals who theoretically may not have finished high school[185]—rather than to individuals who have completed a minimum of seventeen years of school, and have passed arguably the most rigorous screening process and license examination in the country. Yet, not one

181. *See* tit. 8, §§ 12000, 12000.1.

182. *See* tit. 8, § 12000.

183. *See* tit. 8, § 12000.1.

184. *See* CAL. GOV'T. CODE §§ 8201, 8201.1, 8201.2, 8201.5, 8214.1.

185. This is not to say that all agents are uneducated. Many licensed agents hold college degrees; some even hold law degrees. However, there is no state or guild requirement that a licensed or franchised agent have any particular level of education or knowledge, and there is almost no oversight by the state or the guilds as to the quality of sub-agents under the one agent's license.

published judicial opinion or Labor Commission decision has even mentioned this as a possible problem with their interpretation of the Act.[186]

As indicated fairly strongly by the California Supreme Court in *Marathon*, it is up to the Legislature to revisit this decades-old law, and to determine whether the Act still primarily protects the artists, whom it was designed to protect, or the agents, who do not appear to need any further protection.

186. Certainly, the agencies have no problem with this abomination. In fact, when a specific exemption for lawyers was raised as a possibility in 2006, the agencies unanimously condemned the concept, and fought very hard to quash the idea before it made its way to the Legislature. One might argue that such an opposition makes it clear who the Act really protects—and who wants to continue to maintain that protection.