
“An Offer California Can’t Refuse”: How an Efficient and Adaptable Framework Can Improve Remedies Under the Talent Agency Act and Correct the Issues With its Interpretation

Keith Warren and Ryan Wechsler*

California has a longstanding issue with the Talent Agency Act, which states that only a licensed agent may seek out, or procure, employment for an artist. The TAA has caused major headaches for Hollywood’s personal managers, who find their contracts with artists voided for engaging in even minor acts of procurement. Many commentators initially believed that Marathon Entertainment Inc. v. Blasi solved the dilemma. However, it turns out that the Labor Commissioner, who has exclusive jurisdiction to hear claims arising under the TAA, continues to void contracts between California’s personal managers and their clients at an alarming rate. Personal managers disapprove of the Labor Commissioner’s failure to employ the doctrine of severability, as advised by the Blasi court, to these contracts. In response, the personal managers recently filed a challenge to the constitutionality of the TAA. The United States District Court for the Central District of California, however, dismissed the claim and upheld the

* Keith Warren is an associate at The Lomnitzer Law Firm, P.A. Keith practices entertainment law, intellectual property law, and civil litigation with an emphasis on music, film, and television representation; Florida State University College of Law, J.D. 2012; University of Central Florida, B.S. 2009.

Ryan Wechsler is a third year law student and serves as the Articles & Notes Editor on the Florida State University College of Law Business Review for the 2013-2014 academic school year; Florida State University College of Law, J.D. 2014 (expected); Florida State University College of Business, B.S. 2010 (*cum laude*).

constitutionality of the controversial Act. Because this debate spans over one hundred years, and the constitutional challenge was unsuccessful, the authors of this comment advocate a two-fold approach to correcting the dilemma: (1) place the burden of production in Labor Commissioner hearings on the artist to prove that the entire manager contract should be voided, and (2) assess statutory civil penalties to those personal managers who willfully violate the TAA by procuring employment. The authors of this Comment argue that the California legislature should consider applying this approach because it is not only easily adaptable, but also in line with the true purpose of the TAA.

I. INTRODUCTION.....	81
II. AGENTS, MANAGERS, AND THE TALENT AGENCY ACT	84
A. <i>The Functional and Legal Dichotomy of Agents & Managers</i>	84
1. Agents.....	84
2. Managers	85
B. <i>The Need for the Talent Agency Act</i>	87
C. <i>The TAA's Implications on Agents & Managers</i>	90
III. CONFUSION IN INTERPRETATING THE TAA'S REMEDIES	92
A. <i>The Pre-Blasi Landscape</i>	94
B. <i>Marathon v. Blasi and Severability at Last!</i>	98
C. <i>Post-Blasi: Continued Frustration Leads to a Challenge to the TAA's Constitutionality</i>	101
IV. A TWO-PART SOLUTION TO CORRECTING <i>BLASI'S</i> MISAPPLICATION.....	106
A. <i>Shifting the Burden of Production</i>	107
B. <i>Statutory Penalties for Willful Acts of Procurement</i>	110
1. Why Penalties are the Right Fit.....	111
2. The Willfulness Requirement.....	112
3. The Willfulness Framework: Actual and Constructive Willfulness	114
a. <i>Actual Willfulness</i>	115
b. <i>Constructive Willful Violations—Totality of the Circumstances & Factors</i>	116
V. CONCLUSION.....	119

I. INTRODUCTION

Eric Murphy, Vincent Chase's manager on the hit television series *Entourage*, runs into Harvey Weingard in the bathroom of an airport at the Sundance Film Festival. Harvey is a big time movie producer in Hollywood, and Eric jumps at the opportunity to introduce himself. Eric informs Harvey that he represents Vincent Chase as his personal manager. Harvey replies, "*Tell me something. The managers, agents—what the hell is the difference between you guys?*" Eric quickly responds, "*Managers are the ones who care.*" Harvey laughs and wipes his brow with a paper towel, interpreting Eric's response as a joke. Then noticing Eric's stern expression, Harvey responds, "*That's good. I like that. You're not serious, are you?*"¹

In this exchange, fictional film producer Harvey Weingard's dismissal of Eric Murphy's role in Hollywood presages the reality of a personal manager's legal footing in California. Indeed, California contract law fails to clarify the distinction between agents and managers. Specifically, the Talent Agency Act (hereinafter referred to as "the TAA" or "the Act"),² provides that *only* licensed agents are allowed to procure employment contracts for artists, and employment contracts procured by anyone else (including a personal manager) are deemed illegal.³ Under the Act, "procurement" encompasses a broad sweep of activities in which employment is sought for an artist. As a result, artists have exploited this provision to invalidate, in entirety, contracts procured by their managers.⁴ With damages not limited to prevention of contracted-for future commissions, managers who procure employment also endure disgorgement for *all* past commissions obtained through representing the artist,⁵ irrespective of legality.

This is how the situation plays out: when an artist fails to pay his personal manager money due under contract, the manager has the right to file a breach of contract action in state court. The artist, however,

¹ *Entourage: The Sundance Kids* (HBO television broadcast July 17, 2005).

² CAL. LAB. CODE §§ 1700–1700.47 (West 2013).

³ *Marathon Entm't, Inc. v. Blasi*, 42 Cal. 4th 974, 984-86 (Cal. 2008) ("Any person who procures employment—any individual, any corporation, any manager—is a talent agency subject to regulation." (citing CAL. LAB. CODE §§ 1700 (a), 1700.4(a) (West 2013))).

⁴ For a discussion regarding the exploitation of the TAA by artists at the expense of managers, see *infra* Part III.A.

⁵ See, e.g., *Waisbren v. Peppercorn Prods., Inc.*, 48 Cal. Rptr. 2d 437, 446-47 (Cal. Ct. App. 1995) (holding that "the most effective weapon for assuring compliance with the Act is the power . . . to . . . declare any contract entered into between the parties void from the inception.").

typically responds by filing a claim with the Labor Commissioner (who has exclusive jurisdiction to hear these causes of action) seeking to invalidate the allegedly breached contract on the grounds that the manager engaged in illegal acts of procurement.⁶ The Labor Commissioner has jurisdiction to decide whether the manager has engaged in illegal acts of procurement and, if so, whether to void the entire contract between the artist and manager. If the contract is voided, any claims by the manager arising from the contract are precluded, and any benefits conferred or commissions earned legally are, therefore, unattainable.⁷ Regrettably for managers like the fictional Eric Murphy, the Labor Commissioner rules to void these contracts in their entirety in the vast majority of circumstances.⁸ Consequently, grim ramifications befall managers, as they inescapably risk losing the commissions they earn and resources they invest while assisting in an artist's rise to fame and fortune.

Responding to the conundrum, the Supreme Court of California addressed the issue head on in *Marathon Entertainment Inc. v. Blasi*.⁹ As an alternative to voiding the entire contract based on a manager's procurement, the court instructed the Labor Commissioner to first determine the central purpose of the contract and, if appropriate, apply the doctrine of severability.¹⁰ The court emphasized analyzing whether the illegal act(s) of procurement frustrated the central purpose of the contract between the manager and the artist.¹¹ According to the court, if the central purpose of the contract rendered managerial functions, the contract should be severed of any illegal procurement by the manager.¹² Hence, the *Blasi* court's ruling intended for contracts found to be centrally managerial to survive invalidation, with the doctrine of severability voiding *only* the illegal acts of procurement rather than the entire contract. However, where the illegal procurement frustrates the central purpose of the contract, the contract should be voided entirely.

Managers rejoiced in the aftermath of *Blasi*.¹³ Yet problems arose

⁶ Matthew Belloni, *Hollywood Managers Back New Appeal Challenging Talent Agency Act*, HOLLYWOOD REP. (Nov. 22, 2011), <http://www.hollywoodreporter.com/thr-esq/hollywood-managers-back-new-appeal-264942>.

⁷ *Waisbren*, 48 Cal Rptr. 2d at 446-47.

⁸ For a discussion of the Labor Commissioner's tendency to void manager contracts, see *infra* Part III.

⁹ *Marathon Entm't, Inc. v. Blasi*, 42 Cal. 4th 974, 974 (Cal. 2008).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Matt Belloni, *Supreme Court Gives Another Boost to Managers With 'Judge Alex' Deci-*

regarding the standard of review for the Labor Commissioner to follow when determining whether the central purpose of the contract had been frustrated. Consistent with decisions preceding *Blasi*, the Labor Commissioner continues to err on the side of voiding manager contracts in their entirety, rather than severing the contracts.¹⁴ Disgruntled by the Labor Commissioner's application of the TAA, a group of managers recently challenged the TAA as unconstitutional.¹⁵ Specifically, the managers filed a void for vagueness challenge to the term "procurement" as proscribed in the TAA, arguing ambiguity as to its meaning and application.¹⁶ The California District Court of the Central District, however, disagreed and dismissed the claim, upholding the constitutionality of the Act.¹⁷ Once again, managers' hopes of finally resolving this dilemma had been discharged and managers are currently waiting at a standstill for a definitive solution.

This Comment addresses the practical inadequacies of the TAA's legal effect on managers' contracts by scrutinizing the Labor Commissioner's process of voiding these contracts over time. Part II uncovers the functional and legal dichotomy between agents and managers and provides the history and legal parameters of the TAA. Part III explains, in three components, case law that reveals the application and interpretation of remedies under the TAA. Part III.A. describes the pre-*Blasi* landscape and its intolerant precedent of voiding managers' contracts for acts of procurement, even those acts that are arguably limited and incidental. Part III.B. analyzes the *Blasi* decision and highlights its alternative solution to voiding managers' contracts based on limited acts of procurement. Part III.C. discusses the Labor Commissioner's failure to follow *Blasi*'s directives and the continuance of the voidance problem. Part IV unveils the authors' recommendations of reviving and reinvigorating the *Blasi* standard by shifting the burden of production. Additionally, the authors advocate adding a statutory civil penalty provision to stabilize the deterrence force of the TAA. Part V concludes this Comment.

sion, HOLLYWOOD REP. (Feb. 21, 2008), <http://www.hollywoodreporter.com/blogs/thr-esq/supreme-court-boost-managers-judge-62328>.

¹⁴ See, e.g., *James v. Bryan*, Case No. TAC 4699 (Cal. Labor Comm'n Aug. 29, 2008), <http://www.dir.ca.gov/dlse/dlse-tacs.htm>; see also *Brookes v. Unique Artists*, Case No. TAC 08-07 (Cal. Labor Comm'n Mar. 21, 2008), <http://www.dir.ca.gov/dlse/dlse-tacs.htm>.

¹⁵ See *Order Granting Motion to Dismiss*, Nat'l Conference of Personal Managers, Inc., v. Edmond G. Brown, Jr., No. CV 12-09620 DDP (RZx) (C.D. Cal. Mar. 5, 2013), available at <http://www.scribd.com/doc/128887051/NCOPM>.

¹⁶ *Id.*

¹⁷ *Id.*

II. AGENTS, MANAGERS, AND THE TALENT AGENCY ACT

A. *The Functional and Legal Dichotomy of Agents & Managers*

To the distant observer, the role of agent and manager may appear equivalent: both act as an artist's representative and are compensated on a commission basis. And, in a broad sense, both inherently take an interest in promoting the artist's career. However, in their representative capacities, the difference in obligations assumed and duties performed reveals the stark contrast between agents and managers. Undoubtedly, the functional and legal distinctions of agents and managers derive from their unique positions in the marketplace and diverse demands of artists.

1. Agents

Agents primarily act as middlemen between buyers and sellers of talent.¹⁸ Although the agent's client is formally the artist, the agent's livelihood depends on cultivating valuable connections on both sides of the artistic labor market.¹⁹ Additionally, agents are concerned with immediate, project-specific arrangements²⁰ between the artist and the parties interested in employing the artist. Generally, agents focus on exploiting all employment opportunities for the artist. Moreover, agents are typically compensated by a contractual commission of their client's earnings.²¹ Therefore, agents are volumetrically inclined; agents are financially incentivized to represent a large number of artists and to secure as many employment opportunities for each artist as possible.²² Important to this Comment, the effect is a diminished personal dynamic between the agent and artist.

Because of this diminished interpersonal dynamic, agents are subject to specific regulations from various entertainment guilds and state laws for the purpose of protecting the artists.²³ Essentially, this oversight affirms the integrity of the entertainment business and assures

¹⁸ David Zelenski, *Talent Agents, Personal Managers, and Their Conflicts in the New Hollywood*, 76 S. CAL. L. REV. 979, 981-82 (2001) ("[A talent agent's] job is to negotiate deals between talent-sellers and talent-buyers on behalf of the talent-sellers.").

¹⁹ William Birdthistle, *A Contested Ascendancy: Problems with Personal Managers Acting as Producers*, 20 LOY. L.A. ENT. L. REV. 493, 502-503 (2000).

²⁰ Zelenski, *supra* note 18, at 981.

²¹ DINA APPLETON & DANIEL YANKELVITS, *HOLLYWOOD DEALMAKING: NEGOTIATING TALENT AGREEMENTS FOR FILM, TV, AND NEW MEDIA* 2 (2010).

²² Zelenski, *supra* note 18, at 981.

²³ APPLETON & YANKELVITS, *supra* note 21, at 2-3.

that agents will not take advantage of vulnerable artists. History is illustrative of this policy: in the early days of Hollywood, for example, it was not uncommon for agents, incentivized by their commissions, to send young women to nude photo shoots or houses of ill repute.²⁴ Examples of responding agent regulation include—but are not limited to—a commission cap of ten percent of the artist’s gross income and a bar to producing an artist’s work and obtaining a producer’s fee.²⁵ Furthermore, these restrictions, limiting the agent’s piece of the profit, pertinently characterize the talent marketplace by discouraging agents from representing up-and-coming, low-level artists.²⁶ Instead, agents seek established artists that typically render a larger, and altogether more likely, commission. Additionally, agents commonly poach artists from smaller agents or managers, pitching their superior connections and exclusive access in the industry.²⁷ Wholly, the agent’s advanced position in the market and disinterest in representing low-level talent produces a void for newcomers to the industry who lack the contacts and wherewithal to procure their own employment.

2. Managers

Managers, or *personal managers* as they prefer to be dubbed,²⁸ traditionally act as artists’ career advisors by focusing on developing,

²⁴ See *Marathon Entm’t, Inc. v. Blasi*, 42 Cal. 4th 974, 984 (Cal. 2008) (“From an early time, the Legislature was concerned that those representing aspiring artists might take advantage of them, whether by concealing conflicts of interest when agents split fees with the venues where they booked their clients, or by sending clients to houses of ill-repute under the guise of providing ‘employment opportunities.’”).

²⁵ See, e.g., American Federation of Television and Radio Artists Regulations Governing Agents, Rule 12-B, § XVIII, at 18 (2002); Bylaws of the American Federation of Musicians of the United States and Canada, art. XVI, § 6(a), at 74-75 (2010); Screen Actors Guild Agency Regulations, Amended Rule 16(g), § XI, at 24-31 (1991).

²⁶ Heath B. Zarin, *The California Controversy over Procuring Employment: A Case for the Personal Managers Act*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 927, 935 (1997) (“In general, this is because talent agents will represent an artist only if a sufficient economic return is likely; not surprisingly, agents profit more from representing established artists than from representing the unknowns.”).

²⁷ It is important to note that many production companies will not accept materials (literary works, headshots, or reels) unless they are submitted through a reputable agency. “The theory is that if the project is represented by an agent, it must be of a certain standard, and hence, worth the investment of time needed to evaluate the material.” See APPLETON & YANKELVITS, *supra* note 21, at 3.

²⁸ Managers are called “personal managers” so as not to be confused with business managers, who are commonly employed by talent in Hollywood as well. *Id.*

guiding, and enhancing artists' career.²⁹ Largely, managers are concerned with strategizing long-term career growth for the artist.³⁰ This role extends beyond mere financial consultation, as the manager typically assists in counseling the artist's creative decisions. For instance, a manager typically directs the artist on what jobs to take and considers the proper vehicles for showcasing and promoting the artist's talent.³¹ Notably, managers work in tight proximity with the artist and, consequently, assume a wide range of daily responsibilities on the artist's behalf as well.³² Managers, for example, routinely schedule meetings with other personal representatives and act as the artist's confidant in all matters of their personal and professional life.³³ As legendary personal manager Bernie Brillstein described the role, "Your job is to be supportive when they hate the director, when their price isn't met, when their dressing room is too small, when their wife leaves, when they can't get work, and when they're such self-involved pains in the ass that everyone hates them—including you."³⁴

The daily demands of representing the artist in both a professional and personal capacity usually result in managers taking on fewer clients and charging higher commissions than agents.³⁵ Typically, reputable managers take a 15 percent commission fee, although some charge only 10 percent and others charge as much as 50 percent.³⁶ Moreover, as there is no legal cap on their commissions, managers are better incentivized than agents, who do have a commission cap, to invest in low-level artists.³⁷ And because low-level artists have trouble finding agents willing to offer representation, they are encouraged to employ managers instead. Moreover, it is commonplace for managers representing a low-level artist to loan the artist money and fund the up-

²⁹ Zelenski, *supra* note 18, at 982.

³⁰ Erick Flores, "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).

³¹ *Id.*

³² APPLETON & YANKELVITS, *supra* note 21, at 3.

³³ Zelenski, *supra* note 18, at 982.

³⁴ BERNIE BRILLSTEIN & DAVID RENSEN, WHERE DID I GO RIGHT?: YOU'RE NO ONE IN HOLLYWOOD UNLESS SOMEONE WANTS YOU DEAD 71 (2008).

³⁵ Zelenski, *supra* note 18, at 983 (describing that for managers' fees, "in order to compensate for their having fewer sources of income, the commission tends to be larger than what agents demand").

³⁶ APPLETON & YANKELVITS, *supra* note 21, at 3.

³⁷ Zelenski, *supra* note 18, at 983; *see also* Zarin, *supra* note 26, at 941 ("Personal managers invest a considerable amount of time and money in the long-term development of an unknown artist's career, and therefore charge higher fees to cover their expenses.").

and-comer's career, banking on the presumption that the manager will be compensated once the artist breaks into the industry.³⁸ Also, managers, unlike agents, are entitled to producer credits, which encourages them to invest in projects in which the artist participates.³⁹

Although not absent rigorous debate,⁴⁰ no statutory regulation exists for managers, who are only bound to mere common law fiduciary duties.⁴¹ Under the TAA, however, the unlicensed manager may not procure employment without also running the risk of forfeiture of past and future commissions and the rescission of their managerial contract. The repercussions of procurement pose particular danger to managers, who assume extensive responsibility and investment in their limited client base.

B. *The Need for the Talent Agency Act*

The TAA's roots are traceable to legislation predating the Act. Imposing the first licensing requirements for employment agents, the California legislature implemented the Private Employment Agencies Law of 1913.⁴² In 1937, specifically emphasizing the protection of artists from talent agents, California adopted the Artist Manager Law

³⁸ Flores, *supra* note 30, at 1338 ("But in addition to this consultative role, managers assume the risk of investing their financial resources in the up-and-coming artist, often loaning him money until the artist can begin making money on his own. As a result of this risk and the strains of handling all of the daily aspects of the artist's career, managers frequently take on fewer clients and charge higher commissions than agents to compensate for their limited client base."); see also Adam B. Nimoy, *Personal Managers and the California Talent Agencies Act: For Whom the Bill Toils*, 2 LOY. L.A. LAW REV. 145, 148 (1982) (stating that personal managers may even lend financial support to new artists in order to help them get started in their careers).

³⁹ Zelenski, *supra* note 18, at 983 ("Other times, the payment takes the form of an equity interest in the production employing their clients. In other words, managers sometimes opt for ownership interests or producers' fees that they negotiate from their clients' employers (the studios) in lieu of charging fees to their clients. These ownership interests can be very lucrative because they allow managers to share in the profits of possibly successful television programs and motion pictures.").

⁴⁰ Many commentators opine for a separate act regulating personal managers. See Gary A. Greenberg, *The Plight of the Personal Manager in California: A Legislative Solution*, in COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 485 (PLI Pats., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. 359, 1993). Greenberg argues that a personal managers act would serve two basic functions: (1) providing personal managers and artists with access to inexpensive dispute resolution; and (2) defining the fiduciary obligations that personal managers owe to their clients. *Id.* at 512. Greenberg also asserts that invoking a PMA would finally define managers' roles and avoid the current conflicts of the TAA. *Id.*

⁴¹ APPLETON & YANKELVITS, *supra* note 21, at 4.

⁴² Zarin, *supra* note 26, at 944.

(“AML”) into the state’s labor code.⁴³ Under the code, “artist managers” were defined as individuals engaged in procurement activities for the artist and, in accordance with the roles of modern-day managers, the AML further described “artist managers” as those engaged in “advising, counseling, or directing artists in the development or advancement of their professional careers.”⁴⁴ In 1959, the legislature enacted a new chapter of the Labor Code unique to the issues and concerns related to artists’ representatives dubbed the Artists’ Managers Act (“AMA”), which subsequently became the TAA.⁴⁵

During the interlude of the Artists’ Managers Act, the entertainment industry’s subsequent expansion and the responding growth of talent agencies shaped new employment relationships in the business.⁴⁶ The connection between agents and artists became progressively depersonalized,⁴⁷ as agents increased their attention on procuring employment, and the resulting decrease in assistance with day-to-day activities provided a professional platform for managers.⁴⁸ Nevertheless, the difficulty of distinguishing managers’ functions from procurement consequently clashed agents and managers.

Established in 1978, the Talent Agency Act aimed to shield artists from exploitation by their representatives. In particular, the legislature sought to alleviate concerns that agents, licensed and unlicensed, capitalized on artists’ lack of business acumen through inappropriate, unscrupulous practices.⁴⁹ The TAA enumerated several prohibited

⁴³ Flores, *supra* note 30, at 1339.

⁴⁴ *Id.* (referring to CAL. ENTM’T COMM’N, REPORT TO LEGISLATURE AND GOVERNOR ON THE TALENT AGENCIES ACT 36 (1985)).

⁴⁵ James M. O’Brien III, *Regulation of Attorneys Under California’s Talent Agencies Act: Tautological Approach to Protecting Artists*, 80 CALIF. L. REV. 471, 494 (1992) (citing Letter from John F. Henning, Director of the California Department of Industrial Relation, to Julian Beck, Legislative Secretary, Governor’s Office (May 28, 1959)).

⁴⁶ Flores, *supra* note 30, at 1339 (citing Chip Robertson, *Don’t Bite the Hand that Feeds: A Call for a Return to an Equitable Talent Agencies Act Standard*, 20 HASTINGS COMM. & ENT. L.J. 223, 229–31 (1997)).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Marathon Entm’t, Inc. v. Blasi*, 42 Cal. 4th 974, 984 (Cal. 2008) (“From an early time, the Legislature was concerned that those representing aspiring artists might take advantage of them, whether by concealing conflicts of interest when agents split fees with the venues where they booked their clients, or by sending clients to houses of ill-repute under the guise of providing “employment opportunities.”); *see also* Zarin, *supra* note 26, at 943 (“The California legislature enacted the TAA to protect artists seeking employment in California’s entertainment industry from the unscrupulous practices of agents. The issue of whether artists need protection arose when the California legislature learned that talent agents were engaging in inappropriate actions, such as sending female artists to houses of prostitution, sending artists to dangerous locations, arranging for minors to work in bars, and splitting fees with owners or

business practices for agents.⁵⁰ The foremost provision, however, marks enforcement of the distinction between managers and agents. According to the TAA, a talent agent is “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.”⁵¹ Furthermore, the TAA demands that before engaging in such activity, a license must be obtained from the Labor Commissioner.⁵² Moreover, the TAA establishes its scope through a functional—not titular—definition by regulating *conduct* instead of labels.⁵³ Essentially, it is the act of procuring (or soliciting) employment that qualifies an individual as a talent agent (or business as a talent agency) and subjects the individual (or business) to the TAA’s regulation. The Legislature considered and rejected establishing a separate licensing scheme for personal managers.⁵⁴

Chiefly concerned with the Act’s harshness, the Legislature amended the TAA in 1982 by imposing a one-year statute of limitations,⁵⁵ eliminating criminal sanctions for violations,⁵⁶ and establishing a “safe harbor” for managers⁵⁷ to procure employment when acting in conjunction with a licensed agent.⁵⁸ Additionally, the amendment established the California Entertainment Commission, a ten-person board of artists, managers, and agents assigned to oversee the effectiveness of the TAA and to recommend modifications.⁵⁹ However, with only mi-

managers of the venues that booked their artists.”).

⁵⁰ Expressly, the TAA prohibits agents from misleading clients about employment engagements; sending clients to unsafe places; arranging unlawful employment for minors; splitting fees with the clients’ employers; and allowing “prostitutes, gamblers, [or] intoxicated persons . . . [to] be employed in . . . the place of business of the talent agency.” CAL. LAB. CODE § 1700.35-1700.39 (West 2013).

⁵¹ CAL. LAB. CODE § 1700.4(a) (West 2013).

⁵² *Blasi*, 42 Cal. 4th at 985 (citing CAL. LAB. CODE § 1700.4-1700.5 in finding that “in its present incarnation, the Act requires anyone who solicits or procures artistic employment or engagements for artists to obtain a talent agency license”).

⁵³ *Id.* (citing CAL. LAB. CODE § 1700.4(a)).

⁵⁴ It is important to note this distinction, because had a separate licensing scheme for personal managers been established at that time, there is a strong likelihood that the Labor Commissioner would not have struck down millions of dollars in commissions. *See id.* at 733.

⁵⁵ CAL. LAB. CODE § 1700.44(c) (West 2013); *see also* Zarin, *supra* note 26, at 945 (noting that amendments to the TAA established a one-year statute of limitations).

⁵⁶ *Blasi*, 42 Cal. 4th at 994.

⁵⁷ CAL. LAB. CODE § 1700.44(d) (West 2013).

⁵⁸ These amendments, put together, were dubbed the “sunset provisions.” *See* Zarin, *supra* note 26, at 945.

⁵⁹ *See Blasi*, 42 Cal. 4th at 985 (noting that the “sunset provisions” established the ten-

nor modifications, the TAA has largely remained intact since the Commission's inception.⁶⁰

C. *The TAA's Implications on Agents & Managers*

The TAA applies solely to agents, and for purposes of the Act, procurement activity qualifies an individual as an agent and necessitates a license.⁶¹ Agents advocate a strict reading of the TAA, contending that managers should not infringe on agents' market by engaging in procurement activity without acquiring the same regulation of licensed agents.⁶² Pertinently, there exists no regulation of managers; they are regulated neither in the TAA nor in any other analogous regulatory scheme. Nevertheless, the effect of the TAA's license requirement for procurement activity implicates unlicensed managers, as they are prohibited from engaging in any activity categorized as procurement. Moreover, the license requirement for procurement functionally interferes with managers, who contend that their profession unavoidably engages limited or incidental activities which may be construed as procurement.⁶³ To illustrate the TAA's disruption with managers' activities, scholars narrate a classic example of the manager awkwardly cutting off conversation about a client for fear of violating the TAA.⁶⁴ The underlying proposition is that many deals in the entertainment business are made casually and the Act upsets this opportunity for managers.

Managers maintain that their business cannot feasibly be subjected to licensure under the TAA.⁶⁵ Because their duties require extensive

person California Entertainment Commission, consisting of agents, managers, artists, and the Labor Commissioner, to evaluate the Act and "recommend to the Legislature a model bill"); see also Zarin, *supra* note 26, at 945-46 (noting that the Entertainment Commission advocated elimination of the sunset provisions and the permanent adoption of all three amendments).

⁶⁰ Blasi, 42 Cal. 4th at 985.

⁶¹ CAL. LAB. CODE §§ 1700.4(a), 1700.5 (West 2013).

⁶² Flores, *supra* note 30, at 1342-43 (noting that unlike agents, managers would likely "demand a narrow reading of the Act that would account for the realities of the business, in which new artists—who have neither the experience to elicit the attention of an agent nor the financial resources to afford one—often have to rely on managers to lay the groundwork for the artist's career. The Act, they would argue, should only serve to invalidate the most egregious cases of procuring employment because creating an agent-worthy résumé would require a manager to incidentally procure employment for artists . . .").

⁶³ See *Waisbren v. Peppercorn Prods., Inc.*, 48 Cal. Rptr. 2d 437, 444 (Cal. Ct. App. 1995).

⁶⁴ Gary E. Devlin, *The Talent Agencies Act: Reconciling the Controversies Surrounding Lawyers, Managers, and Agents Participating in California's Entertainment Industry*, PEPP. L. REV. 381, 385 (1999).

⁶⁵ See *Waisbren*, 48 Cal. Rptr. 2d at 444.

allocations of time for each client, managers argue that licensure under the TAA and, in turn, regulation by the guilds⁶⁶ effectively destroys their profession. For example, managers assert that the incentive for investing such an extensive amount of time and effort on a small number of clients diminishes if they are unable to receive more than a ten percent commission.⁶⁷ The argument premises on the declaration that, under such a commission cap, managers would be incentivized, as agents similarly situated, to represent more clients and spend less time with each client. Further, because managers focus on far fewer clients than agents, managers emphasize the right to invest in their clients' projects and to receive producer credits. According to the managers, this opportunity provides a necessary means of income to compensate managers for their smaller client base.⁶⁸ The license requirement eliminates this source of income for managers.

In addition, and equally principal to this Comment, the TAA grants the Labor Commissioner original and exclusive jurisdiction to resolve disputes arising under the TAA.⁶⁹ The Labor Commissioner's jurisdictional power to hear and determine all controversies involving alleged violators of the TAA provides what is arguably the most obstinate hurdle for managers' contract disputes with artists.⁷⁰ For instance, after a

⁶⁶ For example, movie actors and certain television actors are in the Screen Actors Guild ("SAG"), writers are in the Writers Guild ("WGA"), and directors are in the Directors Guild ("DGA") and they have caps on commissions. See APPLETON & YANKELVITS, *supra* note 21, at 3.

⁶⁷ Zarin, *supra* note 26, at 941 (describing that "[p]ersonal managers usually earn a commission of ten to fifty percent of the artist's gross receipts, as compared to the standard ten percent received by talent agents. They justify their high fees by enduring greater risks than talent agents").

⁶⁸ Zelenski, *supra* note 18, at 983 ("Other times, the payment takes the form of an equity interest in the production employing their clients. In other words, managers sometimes opt for ownership interests or producers' fees that they negotiate from their clients' employers (the studios) in lieu of charging fees to their clients. These ownership interests can be very lucrative because they allow managers to share in the profits of possibly successful television programs and motion pictures.").

⁶⁹ CAL. LAB. CODE § 1700.44 (West 2013). Further, California Labor Code section 1700.5 provides: "No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefore from the Labor Commissioner." CAL. LAB. CODE § 1700.5 (West 2013).

⁷⁰ California Labor Code sections 1700.23 to 1700.41 illustrate the extreme grant of interpretive power to the Labor Commissioner. CAL. LAB. CODE §§ 1700.23-1700.41 (West 2013). Labor Code section 1700.23 requires every talent agency to obtain the Labor Commissioner's approval for form contracts utilized by the agency. CAL. LAB. CODE § 1700.23 (West 2013). Generally, the Labor Commissioner will disapprove any provision that creates a conflict of interest between the talent agency and the artist, or that diminishes the protection afforded by the TAA. See Zarin, *supra* note 26, at 949. The Labor Commissioner must approve the proposed

manager files a breach of contract action in state court, an artist's allegation of procurement by the manager, filed with the Labor Commissioner, will result in the state court staying the manager's contract proceeding, pending the Labor Commissioner's verdict.⁷¹ The Labor Commissioner then decides whether the manager has engaged in illegal acts of procurement and, if so, whether to void the entire contract between the artist and manager. If the contract is voided, the manager no longer has a viable contract claim to bring in state court, and any benefits conferred or commissions earned through the contract, irrespective of legality, are thus unattainable. Therefore, in practice, the TAA renders a jurisdictional hook to the Labor Commissioner that extends not only to agents, but to managers as well.

III. CONFUSION IN INTERPRETATING THE TAA'S REMEDIES

With this background in mind, we now turn to the headaches the current standing TAA presents to managers, who are still unsure about what degree of conduct the Act actually regulates. Successive to the TAA's formulation, the appellate court interpreting the Act failed to come up with a perfect, workable definition for what constitutes "procurement."⁷² And, in turn, the failure to adequately define this term created confusion as to whether certain activities—such as submitting headshots or screenplays—violated the Act.⁷³ As the court in *Marathon Entertainment Inc. v. Blasi* stated, "[a]dopted with the best inten-

contract form before the issuance of a talent agency license. *Id.* California Labor Code section 1700.24 requires all agents to file a fee schedule with the Labor Commissioner. CAL. LAB. CODE § 1700.24 (West 2013). Furthermore, the fee schedule must be filed before an agency license is issued. Zarin, *supra* note 26, at 949 n.119. The Labor Commissioner does not allow any registration fee, defined at Labor Code section 1700.2(b), as any charge for registering or listing an artist for employment in the entertainment industry, letter writing, photographs, film strips, video tapes, or other reproductions of the artist. CAL. LAB. CODE §§ 1700.2(b), 1700.40(a) (West 2013).

⁷¹ In regards to staying the proceedings, the Labor Commissioner has taken months, and sometimes even years to render a final decision. See Eriq Gardener, *Orson Scott Card's Ex-Manager Aims to Speed Up 'Enders Game' Commission Dispute*, HOLLYWOOD REP. (Sep. 16, 2013), <http://www.hollywoodreporter.com/thr-esq/orson-scott-cards-manager-aims-629839>. For example, the personal manager of the sci-fi writer Orson Scott Card had to wait more than a year to hear the Labor Commissioner's decision after a full day hearing in January 2012. *Id.*

⁷² *Marathon Entm't, Inc. v. Blasi*, 42 Cal. 4th 974, 989 (Cal. 2008) (reasoning that the court was not called on to decide what precisely constitutes "procurement" under the Act, and further stating that "[t]he Act contains no definition, and the Labor Commissioner has struggled over time to better delineate which actions involve mere general assistance to an artist's career and which stray across the line to illicit procurement.").

⁷³ Flores, *supra* note 30, at 1342 (discussing the conflict between agents and managers, and how the conflict stems from the failure of the California courts and legislatures failure to adequately define "procurement").

tions, the Act and guild regulations aimed at protecting artists evidently have resulted in a limited pool of licensed talent agencies and, in combination with high demand for talent agency services, created the right condition for a black market for unlicensed talent agency services.”⁷⁴

Although conveyed to protect artists from scheming talent agents capitalizing on their naive clientele, the TAA’s current regime benefits those artists who have the wherewithal to use the Act to void a manager’s contract. Due to the lack of a perfect definition for the word “procurement,” the Labor Commissioner has voided a significant number of manager contracts based on even the slightest violations of the TAA.⁷⁵ In turn, and as many commentators have emphasized, artists fail to employ the TAA as a shield to ensure the range of protections originally envisioned by the legislature.⁷⁶ Rather, artists use the TAA as a sword to strike down manager contracts as void and regain any fees paid to the manager. This poses a colossal problem for managers, as artists such as Arsenio Hall,⁷⁷ All 4 One,⁷⁸ and The Deftones⁷⁹ have successfully used the TAA’s protections to void their managers’ contracts and regain all commissions. The National Conference of Personal Managers estimates that over the past forty years the California Labor Commissioner has voided approximately \$250 million in personal management commissions.⁸⁰ In addition, because the Court of

⁷⁴ *Blasi*, 42 Cal. 4th 974, 998 (2008).

⁷⁵ See, e.g., *Chiba v. Greenwald*, 156 Cal. App. 4th 71 (2007); *Yoo v. Robi*, 126 Cal. App. 4th 1089 (2005); *Park v. Deftones*, 71 Cal. App. 4th 1465 (1999); *Waisbren v. Peppercorn Prods., Inc.*, 41 Cal. App. 4th 246 (1995).

⁷⁶ Tracie Parry-Bowers, *The Talent Agencies Act: A Call for Reform*, 27 LOY. L.A. ENT. L. REV. 431, 447 (2007) (arguing that “the *Marathon* decision was . . . a commendable move by the court to uphold the spirit of the TAA” because “[t]he Act was meant to protect artists from abuses at the hands of agencies and unlicensed agents,” not to “allow artists to receive gratis services from managers who undertook to develop their careers”); see also Richard Busch, *Walking on the California Talent Agency Act’s Thin Ice: Personal Managers Beware!*, FORBES (Mar. 25, 2013), <http://www.forbes.com/sites/richardbusch/2013/03/25/walking-on-the-california-talent-agency-acts-thin-ice-personal-managers-beware/> (articulating that “[a]rtists like the Deftones have used the TAA to escape the obligations of their California management contracts by claiming that their manager has violated the statute”).

⁷⁷ *Wachs v. Curry*, 13 Cal. App. 4th 616 (1993) (ruling in favor of Hall and rescinding \$2.1 million earned by his managers under their contract).

⁷⁸ *Jones v. La Roda Group*, TAC 35-04, at 10-11 (2005), <http://www.dir.ca.gov/dlse/dlse-tacs.htm>.

⁷⁹ *Park*, 71 Cal. App. 4th at 1465.

⁸⁰ See Flores, *supra* note 30, at 1343; see also Leslie Simmons, *Dispute Between Patti Davis, Manager Thickens*, HOLLYWOOD REP., Nov. 6, 2008, http://www.hollywoodreporter.com/hr/content_display/news/e317e776b2746cf1559ddcf8c0d0378a035.

Appeals consistently upheld the Labor Commissioner's decisions, managers defended hopelessly against the artist's wielded sword.

A. *The Pre-Blasi Landscape*

As noted in Part II.B, the TAA hands the Labor Commissioner exclusive jurisdiction to hear cases arising under its licensing scheme.⁸¹ Historically, the Labor Commissioner retains latitudinous discretion in fashioning a remedy appropriate for the circumstances in each case.⁸² However, in the twenty-five years following the Act's inception, the Labor Commissioner, for the most part, mandated contract rescission and disgorgement of past commissions for even incidental instances of procurement.⁸³ Also, because the Act grants exclusive jurisdiction to the Labor Commissioner to render such decisions, the Court of Appeals avoided overruling any of the Labor Commissioner's holdings.⁸⁴

The repeated application of avoidance commenced even before the TAA's current formulation. For example, in the 1967 case *Buchwald v. Superior Court*, the Court of Appeals reviewed a contract between the band Jefferson Airplane and their manager, Matthew Katz.⁸⁵ This case addressed important issues concerning the jurisdiction and the scope of the Artist Manager's Act (which would eventually become the TAA),⁸⁶ but failed to address the proper remedies for its violation. In *Buchwald*, the written contract between the parties stated that the manager was not authorized to obtain employment for the band.⁸⁷ Nevertheless, the band alleged that Katz procured engagements. In an attempt to avoid the Artist Manager Act's licensing requirement, Katz argued that the provision regarding procurement, instead, established that the AMA's statutory regulation no longer applied to him.⁸⁸ On ap-

⁸¹ CAL. LAB. CODE § 1700.44 (West 2013). Under Labor Code section 1700.44, the Labor Commissioner has exclusive jurisdiction to determine controversies that arise under the TAA. *Id.* The Labor Commissioner's jurisdiction is limited by Labor Code section 1700.45, which allows the parties to refer contractual disputes to an arbitrator in limited circumstances. *Id.*

⁸² See Flores, *supra* note 30, at 1344.

⁸³ See cases cited *supra* note 75.

⁸⁴ See *Marathon Entm't, Inc. v. Blasi*, 42 Cal. 4th 974, 974 (Cal. 2008) (noting that in the more recent decisions, courts have consistently upheld the Labor Commissioner's adoption of the principle that severance is rarely, if ever, available to personal managers and the courts have upheld decisions to void these contracts in entirety).

⁸⁵ *Buchwald v. Superior Court*, 254 Cal. App. 2d 347 (1967).

⁸⁶ Nimoy, *supra* note 38, at 150.

⁸⁷ *Buchwald*, 254 Cal. App. 2d at 347.

⁸⁸ *Id.* at 354-55 (reciting Katz's third contention that "[b]y virtue of his written contract, Katz as a matter of law is not an artists' manager and therefore is not subject to the Artists' Managers Act").

peal, the court emphasized Katz's inability to use the written contract to circumvent the AMA, rather than addressing the issue of whether voiding the contract in its entirety was the appropriate remedy.⁸⁹ The court then declared the entire contract void,⁹⁰ although the contract included provisions requiring Katz to perform significant and costly "managerial" functions.⁹¹ When deciding cases arising under the current Talent Agencies Act, the Labor Commissioner's office consistently follows the reasoning and remedy of its own *Buchwald* opinion.⁹²

The California courts, more recently, further distinguished the appropriate remedy for a violation of the TAA in *Waisbren v. Peppercorn Productions, Inc.*⁹³ This case upheld the standard feared by managers: incidental procurement of employment violated the TAA and justified declaring an entire contract unenforceable. In *Waisbren*, the manager sued his client, a puppeteer and television producer, for recovery on a contract spanning over six years.⁹⁴ Evidence provided to the Labor Commissioner showed that the manager assisted in the artist's project development, managed the artist's business affairs, advised the artist regarding selection of artistic talent, and supervised client public relations and other publicity.⁹⁵ The artist defended on grounds that the manager illegally procured employment by negotiating television commercial deals and other project terms.⁹⁶ The manager admitted to engaging in these acts, but stated that these acts comprised only a fraction of the activities he undertook under the parties' agreement.⁹⁷ After reviewing the TAA's plain meaning, its remedial purpose, its legislative history, and its prior interpretation by the Labor Commissioner and the courts, the *Waisbren* court determined that voiding these contracts under which a manager had illegally procured employment was the "most effective weapon for assuring compliance with the Act."⁹⁸

Since *Waisbren*, managers have found themselves subject to extreme punitive measures for minor acts of procurement.⁹⁹ Managers

⁸⁹ *Id.* at 354-57.

⁹⁰ *Id.* at 359.

⁹¹ *Id.* at 350.

⁹² Nimoy, *supra* note 38, at 152.

⁹³ 41 Cal. App. 4th 246, 261-62 (1995).

⁹⁴ *Id.* at 246.

⁹⁵ *Id.* at 246.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 262.

⁹⁹ Several cases came before the Court of Appeals, after the *Waisbren* decision, in which

were particularly offended that the *Waisbren* court failed to address the idea of severing the contracts to separate the portions tainted by illegal procurement from the sections that were legal in their formulation and execution.¹⁰⁰ Managers' outrage stems from the belief that, even if the act complained of qualified as "procurement" under the TAA, basic rules of *quantum meruit* and unjust enrichment require that managers ultimately be compensated for managerial functions performed under the contract.¹⁰¹ Essentially, because the Labor Commissioner's predisposition to voiding the contract prohibits the manager from recovery under the contract's terms, managers retain no alternate means of recovery. Furthermore, when the Labor Commissioner voids a management contract, the voided agreement invalidates any collateral agreements or contracts entered into by the parties.¹⁰² The Labor Commissioner, consequently, maintains the power to strip personal managers of both past and future earnings.¹⁰³ And based on the court's decision in *Waisbren*, the Labor Commissioner's power to void manager contracts without considering any other remedies for violations of the TAA seemed boundless.

Several years prior to the court's decision in *Blasi*, and especially following the *Waisbren* decision, the Labor Commissioner's remedy of choice—declaring an entire personal management agreement void and ordering the return of commissions—became even more punitive in nature.¹⁰⁴ Millions of dollars were handed back to artists who could correctly use the TAA as a sword and the Labor Commissioner as an advisory. Many commentators suggested that the Labor Commissioner adopt the doctrine of severability as a potential remedy for violations of the TAA, instead of voiding contracts in their entirety.¹⁰⁵ Under Cal. Civ. Code § 1599, the doctrine of severability states that "[w]here a

extremely large contracts were voided and entire past commissions were disgorged. See, e.g., *Chiba v. Greenwald*, 156 Cal. App. 4th 71 (2007); *Yoo v. Robi*, 126 Cal. App. 4th 1089 (2005); *Park v. Deftones*, 71 Cal. App. 4th 1465 (1999).

¹⁰⁰ See Flores, *supra* note 30, at 1343.

¹⁰¹ On rare occasions, the Labor Commissioner has found that the manager has a right to some or all compensation based on quantum meruit, but these cases are few and far between. See O'Brien, *supra* note 45, at 491.

¹⁰² Zarin, *supra* note 26, at 952; see also O'Brien, *supra* note 45, at 491.

¹⁰³ Zarin, *supra* note 26, at 952; see also O'Brien, *supra* note 45, at 491.

¹⁰⁴ See Larry Steinberg, Regulating Personal Managers, L.A. DAILY J. (Nov. 9, 2007), <http://www.buchalter.com/bt/images/stories/la%20daily%20journal%2011-9-07.pdf>.

¹⁰⁵ See *Marathon Entm't, Inc. v. Blasi*, 42 Cal. 4th 974, 974 (Cal. 2008) (holding that the key question regarding personal manager cases is whether the manager is always barred from any recovery of outstanding fees from the artist or whether the court or Labor Commissioner may apply the doctrine of severability to allow partial recovery of fees owed for legally provided services).

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.”¹⁰⁶ This section goes on to state, “[b]y its terms, severability applies even—indeed, 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.”¹⁰⁷

The California Court of Appeals previously discussed whether to apply this doctrine to the concerning cases of managers who engage in illegal acts of procurement, but never decided to apply it. For example, in *Yoo v. Robi*, the Court of Appeals considered whether to apply the doctrine of severability to allow a personal manager to seek commissions for the lawful services he provided under a contract.¹⁰⁸ The court correctly noted that severability is not mandatory and its application to individual cases must be informed by equitable considerations.¹⁰⁹ The court further pointed out that Cal. Civ. Code § 1599 grants courts the power, not the duty, to sever contracts—in order to avoid an inequitable windfall or preserve a contractual relationship—where doing so does not condone illegality.¹¹⁰ However, the court in *Yoo* concluded the windfall for the artist, Robi, insufficient to warrant severance.¹¹¹

Further, in *Chiba v. Greenwald*, the Court of Appeals again considered whether severance was applicable for an unlicensed manager who, in that case, alleged she had a *Marvin* agreement¹¹² with her deceased client/partner.¹¹³ However, the manager did not plead for severance of the illegal and non-illegal portions of the contract.¹¹⁴ Based on this omission in the manager’s pleadings, the court determined that there was no longer a question presented regarding whether severance might apply to any management services that required no license.¹¹⁵ In light

¹⁰⁶ CAL. CIV. CODE § 1599 (West 2013).

¹⁰⁷ *Id.*

¹⁰⁸ *Yoo v. Robi*, 126 Cal. App. 4th 1089 (2005).

¹⁰⁹ *Id.* at 1105.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² A *Marvin* agreement is the term in California for the division of financial assets and real property on the termination of a personal live-in relationship wherein the parties are not legally married, but where the parties have an agreement to share assets in a certain way. The term was coined in the famous case in which Michelle Triola Marvin filed an unsuccessful suit against the actor Lee Marvin. *See generally* *Marvin v. Marvin*, 134 Cal. Rptr. 815 (Cal. 1976).

¹¹³ *Chiba v. Greenwald*, 156 Cal. App. 4th 71, 74 (2007).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

of the facts pled, the court instead concluded equity did not require severance of any lawful portions of the *Marvin* agreement from the unlawful agreement to provide unlicensed talent agent services.¹¹⁶

Although neither the *Yoo* nor *Chiba* courts decided to sever the manager's contracts, they also did not conclude that the doctrine of severability was *unavailable* in those cases.¹¹⁷ The Court of Appeals seemed to be indicating that the doctrine of severability could be applicable to manager's contracts, but it simply needed to be correctly presented with the question. Thus, the landscape seemed ripe for change.

B. *Marathon v. Blasi and Severability at Last!*

The Supreme Court of California in *Marathon v. Blasi* turned the tables for managers, or intended to do so, in deciding the doctrine of severability is applicable in cases arising under the TAA.¹¹⁸ The court concluded that the doctrine of severability is available to managers engaging in acts of procurement in which the "central purpose" of the underlying contract remains intact.¹¹⁹ The *Blasi* court stated that the doctrine of severability and the TAA are not at odds because the Act defines conduct, and hence contractual arrangements, that are illegal.¹²⁰ The Act provides no remedy for its violation, but neither does the Act repudiate the generally accepted and long-standing rule of severability.¹²¹ Therefore, the court declared, the rule of severability applies absent other convincing evidence that the Legislature intended to reject the rule under the Act.¹²²

¹¹⁶ In a lengthy dissent in the *Chiba* case, Judge Johnson sets forth a number of scenarios which would allow for severance. *Id.* at 81 (Johnson, J., dissenting). He believed that the *Chiba* case was an opportunity, distinct from cases like *Waisbren* and *Yoo*, in which the doctrine of severability should finally be addressed. *Id.* at 86. In holding that the court should have severed the *Marvin* Agreement, Judge Johnson stated "[i]n my view, this 'overriding public policy' can be served without the overkill inherent in effectively canceling independent contractual arrangements that happen to have been agreed to by the same parties." *Id.* at 90-91.

¹¹⁷ See *Marathon Entm't, Inc. v. Blasi*, 42 Cal. 4th 974, 974 (Cal. 2008) (holding that Neither *Chiba*, nor *Yoo*, stands for the proposition that severance is never available under the Act).

¹¹⁸ *Id.* at 974.

¹¹⁹ See *id.* The court held that "[c]ourts are empowered under the severability doctrine to consider the central purposes of a contract; if they determine in a given instance that the parties intended for the representative to function as an unlicensed talent agency or that the representative engaged in substantial procurement activities that are inseparable from managerial services, they may void the entire contract. 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." *Id.*

¹²⁰ *Id.* at 996.

¹²¹ *Id.*

¹²² *Id.*

Furthermore, the court noted that the doctrine of severability is consistently available in a wide range of similar cases involving unlicensed services.¹²³ Based on this precedent, the court concluded that the doctrine should also be available to manager contracts involving the failure to obtain a license.¹²⁴ For example, in *Birbrower, Montalbano, Condon & Frank v. Superior Court*, a law firm licensed in New York, but not California, provided legal services in both states.¹²⁵ The trial court and court of appeals in California invalidated the entire attorney fee agreement, but the Supreme Court of California reversed in part, explaining that under the doctrine of severability the firm might be able to recover the fees it lawfully earned by providing services in New York, notwithstanding its unlicensed provision of services in California.¹²⁶

The court also acknowledged the more punitive nature of recent Labor Commissioner decisions,¹²⁷ in which even the slightest act of procurement caused the Labor Commissioner to void the entire contract. The *Blasi* court held improper the Labor Commissioner's recent assessment of the legislative history of the TAA and the interpretive case law.¹²⁸ Specifically, the court found that the *Waisbren* ruling, and the wide array of subsequent decisions invalidating entire contracts, failed to conform to the legislature's intent in forming the Act.¹²⁹ The court specifically stated that "any view that it would be better policy if the Act stripped the Labor Commissioner of the power to apply equitable doctrines such as severance would be squarely at odds with the Act's text, which contains no such limitation."¹³⁰

The court made a strong argument for the applicability of sever-

¹²³ See, e.g., *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119 (Cal. 1998); see also *Lindenstadt v. Staff Builders, Inc.*, 55 Cal. App. 4th 882 (1997) (provision for unlicensed services as a health care broker did not bar all recovery); *Levinson v. Boas*, 150 Cal. 185 (Cal. 1907) (severance applied to contract with unlicensed pawn broker).

¹²⁴ *Blasi*, 42 Cal. 4th 974, 996 (2008).

¹²⁵ *Birbrower*, 17 Cal. 4th at 123-24.

¹²⁶ *Id.* at 139 ("Thus, the portion of the fee agreement between Birbrower and ESQ that includes payment for services rendered in New York may be enforceable to the extent that the illegal compensation can be severed from the rest of the agreement. On remand, therefore, the trial court must first resolve the dispute surrounding the parties' fee agreement and determine whether their agreement conforms to California law.").

¹²⁷ *Blasi*, 42 Cal. 4th at 996.

¹²⁸ *Id.* (In regards to the Labor Commissioner's recent decisions, the court declared "[w]ith due respect, the Labor Commissioner's assessment of the legislative history and case law is mistaken; as we have explained, neither requires the rule she proposes").

¹²⁹ *Id.*

¹³⁰ *Id.*

ance,¹³¹ but also noted that the doctrine of severability should not be applied in all instances.¹³² Thus, the court correctly directed the application of the doctrine of severability to the sound discretion of the Labor Commissioner.¹³³ The *Blasi* court subsequently attempted to lay out a standard to assist the Labor Commissioner in determining when severability should be applied to a contract between a manager and an artist. The court declared that the first step should always be to look to the various purposes of the contract.¹³⁴ Next, the court held that the Labor Commissioner should determine whether the “central purpose” of the contract is tainted with illegality. If the central purpose is so tainted, then the court declared the contract as a whole should be voided.¹³⁵ On the other hand, the court found that if the illegal procurement is only collateral to the central purpose of the contract, and the illegal provisions in the contract can be removed by means of severability, then severability is the appropriate remedy.¹³⁶ Finally, the court noted that “the overreaching inquiry is whether the interests of justice would be furthered by severance.”¹³⁷

The *Blasi* court, in laying out a standard for the Labor Commissioner to follow, put an emphasis on the central purpose of the contract.¹³⁸ The court empowered the Labor Commissioner under the severability doctrine to consider the central purpose as the deciding factor in determining whether the doctrine should apply.¹³⁹ The stand-

¹³¹ *Id.* at 994 (“The passage acknowledges what all parties recognize—that the Labor Commissioner has the “power” to void contracts, that she is “empowered” to deny all recovery for services where the Act has been violated, and that these remedies are “available.” But the *power* to so rule does not suggest a *duty* to do so in all instances.”).

¹³² *Id.*

¹³³ *Id.* at 996.

¹³⁴ *Id.* at 996 (“Courts are to look to the various purposes of the contract.”).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 996.

¹³⁸ The central purpose of the contract was emphasized in several parts of the decision, and the court consistently noted its importance. *See id.* at 996-97 (“If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.”); *see also id.* (“Courts are empowered under the severability doctrine to consider the central purposes of a contract; if they determine in a given instance that the parties intended for the representative to function as an unlicensed talent agency or that the representative engaged in substantial procurement activities that are inseparable from managerial services, they may void the entire contract. 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.”).

¹³⁹ *Id.*

ard laid out is equitable and fact specific.¹⁴⁰ Still, the court failed to advise the Labor Commissioner regarding a standard for deciding exactly what conduct illustrated such a taint of illegality so as to void the contract as a whole. Further, the court made no indication of which party bore the burden of producing the evidence to determine whether the central purpose of the contract became so violated.

Despite *Blasi*'s shortcomings concerning the standard handed down to the Labor Commissioner, the case was generally considered a victory for managers.¹⁴¹ In the post-*Waisbren* world, managers maintained almost no chance of recovery. *Blasi* gave them hope. The case's notoriety comes from changing the landscape of remedies applicable to managers who engaged in illegal acts of procurement. Nevertheless, as is the case with many influential court decisions where a new standard is articulated, problems would arise in *Blasi*'s interpretation and application.

C. *Post-Blasi: Continued Frustration Leads to a Challenge to the TAA's Constitutionality*

The jubilation after the Supreme Court of California handed down its decision in *Blasi* was short lived. Although the Commissioner began applying the doctrine of severability to manager contracts, these contracts continued to be voided more often than they were severed. In fact, in eight out of the eleven instances that the Labor Commissioner addressed the question of severability in the wake of *Blasi*, the Commissioner voided the entire contracts.¹⁴² In interpreting *Blasi*, the Commissioner indicates that unless evidence is provided to show that the central purpose of the contract has *not* been frustrated by the illegal acts of procurement, the contract should be held void.¹⁴³

Under the standard set forth in *Blasi*, the Labor Commissioner ap-

¹⁴⁰ *Id.* at 998.

¹⁴¹ Belloni, *supra* note 13 (stating that *Blasi* "was seen as a victory for managers, who previously found their entire management agreements void if a former client could demonstrate even the smallest act of procurement").

¹⁴² A complete list of Labor Commissioner decisions invalidating manager contracts can be located at *Talent Agency Cases*, CAL. DEP'T OF INDUSTRIAL RELATIONS, <http://www.dir.ca.gov/dlse/dlse-tacs.htm> (last visited Feb. 8, 2013).

¹⁴³ See, e.g., *Blanks v. Ricchio*, TAC 7163, at 10-11 (Cal. Labor Comm'n 2009) <http://www.dir.ca.gov/dlse/dlse-tacs.htm> (indicating that the manager "presented no compelling evidence that the duties Respondent primarily performed during this period of time were of the type considered 'managerial' such as providing career advice, counsel and coordinating the development of Petitioner's careers").

plied severability to a small number of cases,¹⁴⁴ yet these cases include situations where a vast majority of the evidence, usually provided by the manager, points to the manager performing managerial functions the majority of the time. An illustrative example of the misapplication of *Blasi* is noted in the distinction between the recent cases of *Sebert v. DAS Communications, LTD* and *James v. Bryan*. In the *Sebert* case, pop star Ke\$ha and her manager entered into a contract specifically titled “Artist Management Agreement.”¹⁴⁵ The contract provided for DAS to render a wide range of services as a manager for the purpose of furthering Ke\$ha’s career.¹⁴⁶ The evidence provided by Ke\$ha showed that DAS did in fact procure employment for two live performances, attempted procuring employment for certain publishing agreements, and attempted procuring certain songwriting agreements.¹⁴⁷ In contrast, DAS supplied the court with a multitude of evidence establishing that the central purpose of the contract was based strictly on managerial functions and, therefore, severability should apply under *Blasi*’s holding.¹⁴⁸ Because DAS provided such extensive information regarding the central purposes of the contract,¹⁴⁹ the Labor Commissioner found that the doctrine of severability should apply.¹⁵⁰

To the contrary, the Labor Commissioner in *James v. Bryan* voided an “Artist Management Contract” in which the manager, a resident of Alabama, failed to appear personally.¹⁵¹ The Commissioner found the

¹⁴⁴ See, e.g., *Todd v. Meagher*, TAC 13418 (Cal. Labor Comm’n 2012), <http://www.dir.ca.gov/dlse/dlse-tacs.htm>; *Sebert v. DAS Communications, LTD.*, TAC 19800 (Cal. Labor Comm’n 2012), <http://www.dir.ca.gov/dlse/dlse-tacs.htm>; *Yoakam v. Ebbins*, TAC 8774 (Cal. Labor Comm’n 2009), <http://www.dir.ca.gov/dlse/dlse-tacs.htm>.

¹⁴⁵ *Sebert*, TAC 19800 at 2.

¹⁴⁶ *Id.* at 14.

¹⁴⁷ *Id.* at 17-27.

¹⁴⁸ *Id.* at 14-16 (“The evidence establishes that Sonenberg also provided Sebert with many strictly managerial services. He set up meetings and contacts with record companies with an eye toward obtaining a recording contract for Sebert. He assisted Sebert in selecting songs, and regularly provided evaluation and feedback on the songs and arrangements that she created. He assisted Sebert in her difficult dealings with her prior manager, and provided advice on her health, fitness, and attire. Sonenberg maintained regular contact with McAvenna to keep abreast of the day to day activities affecting Sebert and to provide overall guidance and direction to DAS’s efforts on Sebert’s behalf.”).

¹⁴⁹ *Id.* at 28 (holding that the plain primary purpose, as supplied by the evidence, was to secure a recording contract for Sebert and to provide effective managerial guidance to Sebert in furthering, promoting, and maximizing her career as an artist).

¹⁵⁰ Although the Labor Commissioner severed the contract in the *Sebert* case, the Labor Commissioner voided 45% of the manager’s contract based on the illegal acts of procurement the managers engaged in. *Id.* at 29. The Labor Commissioner failed to give an exact description of his calculation in coming to this figure. *Id.*

¹⁵¹ *James v. Bryan*, Case No. TAC 4699, at 2-3 (Cal. Labor Comm’n Aug. 29, 2008),

entire two-year contract void, based on a single act of procurement.¹⁵² In line with the *Sebert* decision, the ruling appeared to place a burden on the manager to provide the Commissioner with enough evidence to apply the doctrine of severability. The Commissioner found through a simple analysis,¹⁵³ that one act of telephoning the promoter of a Halloween concert to procure the artist's services, was sufficient to void the entire contract.¹⁵⁴ The decision of the Labor Commissioner in this case evidences the multitude of post-*Blasi* holdings. In the absence of evidence provided by managers to prove the central purpose of the contract, the Labor Commissioner continues consistently voiding manager contracts.¹⁵⁵

Needless to say, managers' optimism after *Blasi* began seriously fading away. Managers did, nevertheless, gain another short glimpse of hope with the holding of the United States Supreme Court in *Preston v. Ferrer*.¹⁵⁶ In *Preston*, the television personality "Judge Alex" Ferrer brought a claim before the Labor Commissioner to void a contract with his manager based on illegal acts of procurement.¹⁵⁷ However, the contract between the parties contained a valid arbitration clause.¹⁵⁸ Justice Ginsburg wrote for an 8-1 majority holding that when parties agree in a contract to private arbitration, "state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the Federal Arbitration Act."¹⁵⁹ For that reason, if a manager's contract contains a valid arbitration clause, an arbitrator, rather than the Labor Commissioner, is allowed to hear the case. At first, this case appeared an enormous win for managers, who began advising all other managers to put arbitration clauses in their contracts.¹⁶⁰

<http://www.dir.ca.gov/dlse/dlse-tacs.htm>.

¹⁵² *Id.* at 4 (holding that "the management contract between the parties is deemed void ab initio based on Respondent's violation of the Act").

¹⁵³ The court in *James* (a post-*Blasi* Labor Commissioner hearing) even cited *Waisbren* in holding the contract was void in its entirety based on a single act of illegal procurement. *Id.* at 4.

¹⁵⁴ *Id.*

¹⁵⁵ See, e.g., *Brookes v. Unique Artists*, TAC 2007-08 (Cal. Labor Comm'n 2008), <http://www.dir.ca.gov/dlse/dlse-tacs.htm> (finding that one act of procurement in getting a client an audition voided the contract, even after *Blasi*).

¹⁵⁶ Belloni, *supra* note 13.

¹⁵⁷ *Preston v. Ferrer*, 552 U.S. 346, 349 (2008).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 359.

¹⁶⁰ Belloni, *supra* note 13 (quoting entertainment litigator Gordon Firemark in stating "[a]t this point, I think it's fair to say that we're all updating our management agreements to include

In application however, *Preston* fails to change the outcome of cases; the holding merely affects the means by which one gets to that outcome. In other words, *Preston* does not alter the TAA; it only mandates that an arbitrator hear the case 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).¹⁶¹ Further, arbitration is costly and because these manager contracts are generally entered into while the artist is unknown,¹⁶² and likely indigent, many of these arbitration clauses do not make it to paper.

Managers' frustration from the continued failure to adequately provide a remedy for incidental acts of procurement elevated in the years following *Blasi* and *Ferrer*.¹⁶³ These frustrations recently reached a boiling point when the National Conference of Personal Managers filed a lawsuit against Edmund G. Brown Jr., the governor of the state of California, along with the Labor Commissioner's office.¹⁶⁴ The suit challenged the constitutionality of the TAA on the basis that the Act mandates a form of involuntary servitude, interferes with interstate commerce, violates freedom of association, and that it is overly vague.¹⁶⁵ The managers based these claims against the TAA on the century-long confusion surrounding its parameters.¹⁶⁶

The managers in *NCOPM v. Brown* first argued that the TAA is a form of involuntary servitude and, therefore, unconstitutional because it causes the managers to perform work for the artists with no compensation and without being convicted of a crime.¹⁶⁷ California District

arbitration clauses and ensure that a single, isolated act of procurement won't void the entire agreement in the future").

¹⁶¹ Edwin F. McPherson, *Did Marathon and Preston Kill the Talent Agencies Act?*, 38 Sw. U. L. REV. 443, 461 (2009) ("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.").

¹⁶² Zelenski, *supra* note 18 at 982.

¹⁶³ Belloni, *supra* note 6 ("What's interesting now is how a number of prominent management companies have joined the fight, submitting letters to the court or otherwise backing the appeal. The biggest managers in Hollywood—companies like Anonymous Content, Brillstein, Mosaic and Management 360—seem to be absent from the list, but there are a few companies included with considerable clout, such as Luber Roklin, Generate and Thruline, as well as the Talent Managers Association and the National Conference of Personal Managers.").

¹⁶⁴ Nat'l Conference of Personal Managers, Inc., v. Edmond G. Brown, Jr., No. CV 12-09620 (C.D. Cal. filed Mar. 5, 2013), <http://www.scribd.com/doc/128887051/NCOPM>.

¹⁶⁵ *Id.* at 3-4.

¹⁶⁶ Eric Gardener, *California Judge Shoots Down Challenge to Talent Agency Act*, HOLLYWOOD REP. (Mar. 6, 2013), <http://www.hollywoodreporter.com/thr-esq/california-judge-dismisses-talent-managers-426263>.

¹⁶⁷ *Nat'l Conference of Personal Managers*, No. CV 12-09620 at 8.

Court Judge Dean Pregerson disagreed. He avowed “[n]ot being compensated for work performed does not inevitably make that work involuntary servitude.”¹⁶⁸ He went further to explain, “[p]laintiff’s members have choices. They have the choice to refrain from procuring employment for their clients, to procure employment without a license and risk the voiding of parts of their contracts, or to obtain a license.”¹⁶⁹

Subsequently, the court struck down the argument that the Act interferes with interstate commerce.¹⁷⁰ The managers opined that because the Act deprives out of state managers access to the California talent market on equal terms, there is a substantial effect on interstate commerce.¹⁷¹ Judge Pregerson found the inference of commerce interference to be weak and implausible, holding that the allegation that a license must contain a designation of location doesn’t add up to an allegation that the managers were refused licenses because they were located outside of California.¹⁷² Further, the court struck down the argument that the Act represents a violation of free expression and association because it precludes the managers from communicating and performing tasks directly related to their occupation.¹⁷³ In so deciding against this latter argument, the court found that the TAA “regulates conduct, not speech” and so first amendment analysis was unnecessary.¹⁷⁴

The argument which the court appeared to take most seriously in *NCOPM* was the issue of the Act’s vagueness.¹⁷⁵ The managers asserted that the vagueness of the Act failed to instruct the Labor Commissioner with enough specificity on the allowances and limits of its enforcement. The managers pointed out that the TAA bill was amended several times before being adopted by the California legislature in 1978.¹⁷⁶ One of the amendments was to have governed personal managers. That provision was removed, which the managers asserted only confirmed their claim that the legislature chose not to regulate personal

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 9.

¹⁷¹ Gardener, *supra* note 166.

¹⁷² *Nat’l Conference of Personal Managers*, No. CV 12-09620 at 9.

¹⁷³ *Id.* at 9-10.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 5-7

¹⁷⁶ Complaint at 5, *Nat’l Conference of Personal Managers, Inc., v. Edmond G. Brown, Jr.*, No. CV 12-09620 (C.D. Cal. Nov. 8, 2012).

managers.¹⁷⁷ To illustrate their contention, the managers emphasized the title of the Act. The managers argued that “the legislature did not entitle it the Talent Representatives Act, but specifically entitled it the Talent Agencies Act.”¹⁷⁸ The managers believed the legislature’s pronouncement in this regard made it clear the occupation of talent agent is what the legislature intended regulated, not personal managers, publicists or attorneys, or others who procured employment opportunities for artists.¹⁷⁹

Nevertheless, the *NCOPM* court ultimately rejected this argument.¹⁸⁰ The court accepted that the restrictions of the TAA “can compromise a broad range of activities, broader than is desirable in the eyes of the plaintiffs.”¹⁸¹ However, the court found the TAA is not rendered standard-less due to its breadth, and even if the breadth of the TAA does render it standard-less, California courts have previously interpreted the phrase “procure employment” and determined that its meaning is not vague.¹⁸² The court held that the Labor Commissioner, and the Courts of Appeal, in interpreting the term “procure” have used the term in its proper, ordinary, sense.¹⁸³

The managers suffered a considerable defeat when the *NCOPM* court rendered its decision to dismiss their claim and uphold the constitutionality of the TAA. The case is currently up for appeal in the Ninth Circuit.¹⁸⁴ Yet, if precedent towards managers in the state of California gives any indication, it seems unlikely that the Court of Appeals would reverse the lower court’s decision. The managers’ position currently rests at an impasse; with no means available to challenge the TAA through the courts, and with the Labor Commissioner continuing to void millions of dollars in commissions without severing contracts. So where do the managers go from here?

IV. A TWO-PART SOLUTION TO CORRECTING *BLASI*’S MISAPPLICATION

The TAA is a remedial statute.¹⁸⁵ Still, a constant topic of debate

¹⁷⁷ *Id.* at 6-8.

¹⁷⁸ *Id.* at 8.

¹⁷⁹ *Id.*

¹⁸⁰ *Nat’l Conference of Personal Managers*, No. CV 12-09620 at 6-7.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Gardener, *supra* note 166.

¹⁸⁴ Ted Johnson, *Talent Managers Lose Legal Effort to Toss California Law*, VARIETY (Mar. 6, 2013, 9:18 AM), <http://variety.com/2013/biz/news/talent-managers-lose-legal-effort-to-toss-california-law-1200004111/>.

¹⁸⁵ *Buchwald v. Superior Court*, 254 Cal. App. 2d 347, 364 (1967).

subsequent to the Act's formulation concerns the correct remedies for violations of the Act. The Labor Commissioner's continued practice of voiding the majority of manager contracts, following the *Blasi* decision, only further amplifies the confusion surrounding the correct remedy for a violation of the TAA. Therefore, because the courts and legislature of California appear bent on maintaining the Act's purpose, the authors of this Comment suggest correcting the predicament by merely altering the process by which the Labor Commissioner considers the evidence and imposes penalties for violations of the Act. Our suggestion is two-fold: (1) shift the burden of production at Labor Commissioner hearings and place it upon the artists, who are moving to have these contracts voided in the first place, and (2) impose statutory civil penalties for willful offenders of the TAA.

A. *Shifting the Burden of Production*

Under federal evidence law and the common law of contracts, the party attempting to void a contract generally bears the burden of showing the court that the contract should indeed be voided. As was held in the early English common law case of *Richardson v. Mellish*, "In proving a contract invalid on the ground of its contravention of public policy, as in proving it void on account of fraud or other illegality, the burden of proof is upon him who asserts its invalidity."¹⁸⁶ Further, each and every common law affirmative defense to a contract's enforceability places the burden of production upon the party moving to void the contract.¹⁸⁷ California courts also overwhelmingly embrace the general principle that the party moving to invalidate a contract bears the burden of proving the invalidity of the contract.¹⁸⁸ Neverthe-

¹⁸⁶ *Richardson v. Mellish*, (1824) 130 Eng. Rep. 294; 2 Bing. 229 (Eng.).

¹⁸⁷ For example, the party asserting the affirmative defense of impossibility bears the burden of proving a real impossibility and not a mere inconvenience or unexpected difficulty. *East Capitol View Comm. Dev. Corp., Inc. v. Robinson*, 941 A.2d 1036, 1040 (D.C. 2008). Further, the burden of proof for the affirmative defense of unconscionability is on the party claiming the contract is unconscionable. *Earman Oil Co., Inc. v. Burroughs Corp.*, 625 F.2d 1291, 1299 (5th Cir. 1980). In terms of the affirmative defense of fraud, courts have held a fundamental essential to a valid defense of fraud is that the defendant must show that it relied on the alleged misrepresentation. *Bush v. Remington Rand, Inc.*, 213 F. 2d 456, 462 (2d Cir. 1954). The burden was on the defendant to prove that element. *Id.* Duress and undue influence are affirmative defenses which may invalidate a contract, and the defendant bears the burden of proof to establish them. *Mullins v. TestAmerica, Inc.*, 564 F.3d 386 (5th Cir. 2009).

¹⁸⁸ *See, e.g., Cohn v. Bugas*, 116 Cal. Rptr. 810, 817 (Cal. Ct. App. 1974) (holding that the burden of proof, in both the sense of producing evidence and in the sense of the burden of persuasion to prove fraud, either by reason of the alleged misrepresentations or unconscionable inadequacy of the consideration or both, was on the party moving to void the contract on those

less, and despite this vast precedent, in the cases brought in front of the Labor Commissioner under the TAA, the Labor Commissioner appears to leave it up to managers to prove that the contract's central purpose remains unbroken. Based on the aforementioned precedent, the Labor Commissioner should instead require the artist, who is moving to have the contract declared void, to prove that the central purpose of the contract is disturbed enough to void the entire contract.¹⁸⁹

Although the Labor Commissioner expresses no indication in its decisions as to who bears the burden of production in post-*Blasi* cases, the Labor Commissioner in practice applies the doctrine of severability to cases where the managers provide extensive evidence of the managerial services performed under the contract. In fact, the Labor Commissioner in the *Sebert* case specifically noted that the extensive evidence provided by the managers was the factor which most swayed the Labor Commissioner towards severance.¹⁹⁰ On the other hand, if the manager in the *Sebert* case failed to provide such extensive evidence, the Labor Commissioner would likely have voided the contract in its entirety. Consider the post-*Blasi* case of *Billy Blanks, Jr. v. Ricchio*, where the fitness instructor Billy Blanks provided the Labor Commissioner with evidence that his manager illegally procured employment for him on four separate occasions.¹⁹¹ The Labor Commissioner again decided this evidence warranted voiding the entire contract between the parties. In so holding, the Labor Commissioner stated that the manager "presented no compelling evidence that the duties Respondent primarily performed during this period of time were of the type typically considered managerial such as providing career advice, counsel and coordinating the development of Petitioner's ca-

grounds); *Oosten v. Hay Haulers Emp. & Helpers Union*, 291 P.2d 17, 20 (Cal. 1955) ("Impossibility is a defense on which the moving party must bear the burden of proof."); see also *Kelly v. Meridian Oil*, No. 87-4389 (9th Cir. Aug. 9, 1989) (stating that the party raising the defense that the contract was void due to lack of consideration or duress bears the burden of proof).

¹⁸⁹ Previous Labor Commissioner decisions have also been scrutinized as contradictory regarding the burden of proof and production. For example, in *Blasi v. Marathon Entm't, Inc.*, the Labor Commissioner ruled that Marathon did not meet its burden of proving its acts of procurement were done lawfully. TAC 15-03 at 7. Yet in *Hayes v. Marathon Entm't, Inc.*, TAC 33-02 at 6-7, decided the same day by the same hearing officer, the Commission determined Hayes had not met his burden of proving that Marathon had procured unlawfully. See Petition for Rehearing at 10-11, *Marathon Entertainment Inc. v. Blasi*, 174 P.3d 741 (Cal. 2008) (No. S145428), 2008 WL 1745928.

¹⁹⁰ *Sebert*, TAC 19800 at 14-16.

¹⁹¹ *Blanks v. Riccio*, TAC 7163 (Cal. Lab. Comm'n 2009), <http://www.dir.ca.gov/dlse/dlse-tacs.htm>.

reer.”¹⁹² This declaration by the Labor Commissioner made it clear that the burden of production in that case rested on the manager, rather than placing such a burden on the moving party.

The authors’ of this Comment believe that a shift in the burden of production is in line with the true intention of the *Blasi* court as well. Consistent with the language of that decision, it follows that the *Blasi* court’s articulation agrees with placing the burden of production on an artist in accordance with common law. Note that the *Blasi* court held that the common law rule of severability should apply “absent other persuasive evidence that the Legislature intended to reject the rule in disputes under the Act.”¹⁹³ Hence, the same court would likely take a similar approach to applying the common law burden of production to cases involving an artist attempting to invalidate a manager’s contract. The TAA says nothing about rejecting the common law rules regarding the burden of production required to void a contract. Consequently, and based upon the holding in *Blasi*, because there is no persuasive evidence that the legislature intended to reject the common law rules regarding the burden of production in these cases, the common law should be applicable and the moving party should bear the burden of production.

The Labor Commissioner has simply applied the wrong standard, and should apply the common law burden of production to his hearings. In applying this burden, and further in line with the *Blasi* decision, the Labor Commissioner should first look to the contract and see what its purposes are. If the purpose of the contract isn’t plainly to engage in illegal procurement, it should then be the artist’s burden, as the moving party, to prove that the central purpose of the contract was frustrated by the illegal acts of procurement. Otherwise, the Labor Commissioner should simply sever the contract’s legal and illegal terms. Once the contract is severed, the manager would still be required to return any commissions received for illegal acts of procurement. Yet with this new approach, managers will have an improved chance to recover for the legal functions they performed under the contract by validly filing a breach of contract action for the remaining portions of the contract.

This suggestion would greatly alleviate the strain placed upon managers in forming contracts with young artists. The shift in the burden of production would help avoid unjust enrichment at the expense

¹⁹² *Id.* at 11.

¹⁹³ *Blasi*, 42 Cal. 4th at 991.

of managers who engage in limited, and sometimes unknowing, acts of procurement. Contracts under this suggestion would be less likely to be voided in their entirety and the heated battles between managers and the legislature in California would likely cease. Further, the shift in the burden of production would also eliminate some of the managers' concerns with the Labor Commissioner's purported bias towards agents, whom managers consider favored over the years at the expense of managers.¹⁹⁴ The Labor Commissioner would be required to reduce his opinion to writing and state precisely the method used in finding that the artist met his burden of production, thus eliminating a degree of the Labor Commissioner's discretion to void manager contracts in entirety.

This suggestion would also maintain the purposes behind the TAA because it would continue to protect artists from unlicensed procurement. Any unlicensed procurement that is proven at a Labor Commissioner hearing would cause the manager to lose the entire commission received. As a result, the TAA's protection of artists against unlicensed procurement would carry on, only now without the artists being unjustly enriched. Moreover, agents would ultimately be protected as the only entities that can legally procure employment for an artist. Furthermore, the possibility of statutory penalties for willful offenders of the statute will provide these agents with even greater piece of mind, in that willful offenders may be assessed additional damages for illegal acts of procurement.

B. *Statutory Penalties for Willful Acts of Procurement*

Although severing the contract of any provisions tainted by illegal procurement offers a fairer outcome for managers, critics of our approach may assert that the TAA's current deterrent force is undermined if our recommendation, without more, is adopted. Perceptibly, a manager is more likely to procure employment if, as a result of procuring, the manager's contract will be severed rather than entirely voided and disgorged. The unyielding approach to invalidating and disgorging entire managerial contracts for unlicensed acts of procurement—even procurement which is limited or incidental to the artist and manager's contractual relationship—undoubtedly equips the TAA's license re-

¹⁹⁴ Parry-Bowers, *supra* note 76, at 449 (“After the California Court of Appeal handed down its decision in *Blasi*, then-Labor Commissioner Robert Jones wrote to the California Supreme Court expressing his opposition to the court’s potential application of the severability doctrine to the TAA. Soon after, the National Conference of Personal Managers voiced its complaints to Governor Schwarzenegger, calling the Commissioner’s actions ‘biased,’ ‘improper,’ and ‘illegal’ because he would still be adjudicating the decision after the supreme court handed down its decision.”).

quirement with a valuable deterrent force. This deterrent regime, however, has been overestimated and, as we again reiterate, compromises fairness and adequacy to managers. In practice, the Act's harshness on violators permits artists to exploit the Act in order to escape their managerial contracts for enrichment purposes and at the managers' expense. Nevertheless, under our recommendation, a more sensible balance of fairness and deterrence can be achieved by amending the TAA with a statutory civil penalty provision for willful acts of procurement. Applying civil penalties to willful offenders of the TAA maintains the deterrent capacity of the license requirement without also persecuting innocent offenders.

1. Why Penalties are the Right Fit

In California, statutory penalties are often collected by the State, not private litigants.¹⁹⁵ The State's collection of penalties from managers who violate the license requirement reflects a sounder policy for the TAA. For instance, in the context of artists suing their managers for unlicensed acts of procurement, it is nonsensical for the artists to collect damages because the artist typically does not suffer direct harm from the manager's procurement. Ordinarily, a manager's unlicensed act of procurement only leads to one of two outcomes: (1) the artist receives employment or (2) the artist does not receive employment.¹⁹⁶ Under the first outcome, the artist benefits on behalf of the manager's procurement, and receiving a punitive award against the manager for activity from which the artist benefits is obviously illogical. Under the second outcome, the artist is not harmed as a result of the manager's procurement because the artist winds up in the same place after the procurement that the artist was in prior to the procurement.

The primary purpose of the TAA's license requirement is to protect artists from unscrupulous agents taking advantage of artists as a group, not to individually compensate artists. Hence, the TAA's license requirement necessitates a punitive sanction. Penalties are the appropri-

¹⁹⁵ CAL. BUS. & PROF. CODE § 17206(a), § 17536(a); *see also* WILLIAM A. STERN, BUS. & PROF. C. § 17200 PRACTICE 9:51 (2013) (citing *People v. Steelcase, Inc.*, 792 F. Supp. 84, 86 (C.D. Cal. 1992) (holding that California is the real party in interest in regard to penalties)); *see also* *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002) (holding that a private plaintiffs' remedies are limited to restitution and injunctive relief).

¹⁹⁶ Procurement need not be successful in order to violate the TAA's prohibition of unlicensed procurement. Again, even *attempted* procurement suffices to violate the Act. *See Blasi*, 174 P.3d at 747.

ate punitive sanction because, unlike punitive damages,¹⁹⁷ penalties do not require a showing of damages felt by the litigant.¹⁹⁸ Penalties are assessed regardless of damage traceable to the individual.¹⁹⁹ Thus, penalties appropriately sustain the TAA's punitive force because the harm that the TAA intends to punish is broad, not litigant-specific. Conceivably, because requiring litigant-specific damages effectively hinders the TAA's enforcement of the license requirement,²⁰⁰ the automatic nature of penalties provides a sufficient alternative.

2. The Willfulness Requirement

Statutory penalties should be allotted to managers who engage in willful acts of procurement. The willfulness requirement appears frequently in California's statutory penalty provisions.²⁰¹ Further, and most pertinently, requiring that managers act willfully efficiently reciprocates the practical implications for managers in the entertainment business. Managers' essential contention with the TAA's license requirement protests that the modern enforcement mechanism is unresponsive to the realistic position of managers in the entertainment business. In many instances, procurement is either practically neces-

¹⁹⁷ Barbara Eckhart Buchanan, Note, *New Limits, New Licenses? The Impact of Adams v. Murakami on the California Punitive Damages System*, 33 SANTA CLARA L. REV. 735, 741 (1993) (asserting that if requested by the defendant, the standard jury instruction must instruct the jury to consider that the punitive damages must bear a reasonable relation to the injury, harm, or damages actually suffered by the plaintiff) (citing CALIFORNIA JURY INSTRUCTIONS CIVIL, BAJI 14.72.2 (1989 Re-Revision) (7th ed. Supp. 1993)).

¹⁹⁸ See WILLIAM A. STERN, BUS. & PROF. C. § 17200 PRACTICE 9:78 (2013); see also People v. Toomey, 203 Cal. Rptr. 642, 658 (Cal. Ct. App. 1984) ("Neither Reliance Nor Actual Damages Need Be Proven. The People do not have to prove that any of the victims of the practice actually relied or suffered actual damages as a result.").

¹⁹⁹ CAL. CIV. PRAC. TORTS § 7:5 (2013) ("Statutory damages may either take the form of penalties, which impose damages in an arbitrary sum, *regardless of actual damages suffered*, or may provide for the doubling or trebling of the actual damages as determined by the judge or jury.").

²⁰⁰ It can be expected that an artist will not have been actually damaged by the manager's illegal procurement. For example, an artist may have received employment, thus not actually incurring damages. Nevertheless, the Act maintains an interest in punishing the manager, regardless of the artist's actual damages or lack thereof.

²⁰¹ CAL. LAB. CODE § 226.8 (West 2013) ("It is unlawful for any person or employer to engage in...willful misclassification of an individual as an independent contractor."); CAL. FOOD. & AGRIC. CODE § 29306 (West 2013) ("In addition to any other penalty provided for by law, and by this article, any person who willfully . . . violates any provision of this chapter shall be liable for a civil penalty . . ."); CAL. VEH. CODE § 38392 (West 2013) ("When a court finds that a person has willfully violated any provision of this article, such person shall be fined the maximum amount that may be imposed for such an offense . . ."); CAL. BUS. & PROF. CODE § 17206, §17356 (West 2013) (listing "willfulness" as one of six factors to be considered when assessing the amount of a civil penalty).

sary or functionally unavoidable, and punishing managers for scenarios of innocent and incidental procurement unfairly compensates for managers' professional capacity. The reality of the industry at the low level vividly illustrates the dilemma. For example, low-level managers invest in unknown and otherwise unrepresented artists. Unknown artists typically cannot employ agents because agents focus on representing well-known clientele (or, in other words, artists who can acquire work and render the agent a commission). Accordingly, low-level artists rely on managers who, for purposes of receiving return on their investment, necessarily promote the unknown artists' careers. Such promotion undoubtedly leads to procurement activity. Hence, managers fill a significant void in the industry, and the industry's demand for management at the low level is unequivocally subverted by the TAA's current regime for enforcing the license requirement.

Even at the high level, procurement is oftentimes inevitable for managers. Seemingly, managers unexpectedly find themselves at the receiving end of employment solicitations for the artist they represent. The film producer approaching the manager at a cocktail party demonstrates a classic paradigm.²⁰² Punishing the manager representing the low level artist and the manager at the cocktail party for procuring without a license (any further than simply disgorging the procured commissions) is an insensible and impractical approach. These managers are passive offenders; they are largely inculpable because their procurement activity flows from functional conditions of the industry. Therefore, because their procurement activity arises from the landscape of the industry, it is altogether questionable whether the Act's deterrence policy is sound, let alone achievable, in the context of managers who incidentally procure.

The willful manager, on the other hand, actively violates the license requirement, and the Act undoubtedly intends to deter this conduct. The spirit of the TAA's license requirement certainly aims to prevent managers from affirmatively disregarding the license requirement, encroaching on agents' professional territory, and usurping the market. Notably, willful procurement is not a product of unavoidable circumstances in the industry. Rather, willful procurement results from autonomous and deliberate choice by the manager. For that reason, willful managers can conceivably be deterred, and punishing culpable instances of procurement reflects a more balanced approach.

Additionally, willfulness requirements appear frequently in Cali-

²⁰² Devlin, *supra* note 64, at 385.

fornia's penalty statutes.²⁰³ For example, the California legislature amended the California Business and Professional Code in 1992 to include "willfulness of the defendant's misconduct" as a consideration to assessing penalties.²⁰⁴ Particularly, the Business and Professional Code emphasizes the importance of compliance with professional licensure, ordering penalties against contractors who act without a license.²⁰⁵ What's more, California's Labor Code statutorily outlaws individuals willfully misclassifying themselves as independent contractors and prescribes penalties for doing so.²⁰⁶ The term willfulness is also rooted in the California Civil Code's section on exemplary (punitive) damages.²⁰⁷ The term willfulness under California law has been described as misconduct involving intent "to do an act with a positive, active, and absolute disregard of its consequences."²⁰⁸

3. The Willfulness Framework: Actual and Constructive Willfulness

Penalties should be assessed for each willful act of unlicensed procurement.²⁰⁹ In scrutinizing whether an unlicensed act of procurement is willful, we recommend two questions to be determined: (1) is there

²⁰³ See *supra* note 201 and accompanying text.

²⁰⁴ CAL BUS. & PROF. CODE § 17206, §17356 (West 2013) (listing "willfulness" as one of six factors to be considered when assessing the amount of a civil penalty).

²⁰⁵ CAL BUS. & PROF. CODE § 7028 (West 2013) ("These penalties, in fact, are made criminal, which demonstrates California's heightened intolerance for professionals acting in contrast with pertinent professional licensing regimes.").

²⁰⁶ CAL. LAB. CODE § 226.8 (West 2013).

²⁰⁷ CAL. CIV. CODE § 3294 (West 2013) ("In proscribing the parameters for assessing punitive damages at common law, the Civil Code emphasizes the mental state of the defendant, requiring that the defendant act with oppression, fraud, or malice. Moreover, in describing what conduct constitutes malice, the Civil Code specifies "conduct which is carried on by the defendant with a willful and conscious disregard of the rights . . . of others. Because California courts hold penalties and exemplary damages to be so punitively equivalent as to render the remedies transposable where both apply."); see also *Clauson v. Superior Court*, 79 Cal. Rptr. 2d 747 (Cal. Ct. App. 1998) (stating that the plaintiffs must elect between statutory penalties or treble damages under Penal Code § 637.2, subdivision (a) and punitive damages). The California Civil Code's inclusion of "willfulness" in its basis for applying punitive damages is informative.

²⁰⁸ JOHN A. GEBAUER, RACHEL M. KANE & SONJA LARSEN, WILLFUL MISCONDUCT DISTINGUISHED FROM NEGLIGENCE, 46 Cal. Jur. 3d *Negligence* § 100 (2013).

²⁰⁹ California courts have assessed penalties for each act. See, e.g., *People v. Nat'l Ass'n of Realtors*, 202 Cal. Rptr. 243, 248 (Cal. Ct. App. 1984) (holding that, regardless of related motive and effect amongst all acts, "each act is subject to separate punishment"); *People v. Bestline Prods., Inc.*, 132 Cal. Rptr. 767 (Cal. Ct. App. 1976) (holding it reasonable to find 3,000 violations and to impose a penalty of \$3,000 per violation against defendant for "ponzi scheme").

actual willfulness; and, if not, (2) is there constructive willfulness? Under our approach, both actual and constructive willfulness satisfy the willfulness requirement and allow the manager to be penalized. Furthermore, we suggest two distinct analytical frameworks to be followed in order to answer these questions.

a. Actual Willfulness

Proof of actual willful procurement will be found where managers (1) know they do not possess a license and (2) expressly misrepresent themselves as agents. The knowledge requirement does not necessitate knowledge of the TAA's license requirement,²¹⁰ but instead necessitates knowledge of the fact that they do not hold a license. This knowledge requirement protects good faith violators, such as agents who procure while unknowingly possessing an expired license.²¹¹ Procuring managers will seemingly always meet this knowledge requirement. However, whether the procuring managers misrepresented themselves as agents will be a more controvertible evidentiary hurdle. For purposes of proving a manager's misrepresentation, any express communication by the manager that he or she is the artist's agent will suffice. The clearest form of express communication will be demonstrated through documented or recorded correspondence, such as a written contract or recorded conversation. Outside of presentation of documented or recorded correspondence, proving actual willful procurement will be difficult, although hypothetically possible.²¹² Explicitly describing oneself as an "agent" or "agency" is necessary to prove actual willful procurement. In *Redden v. Candy Ford Group*, for example, a manager contracted to act as an artist's "modeling agency."²¹³ Moreover, the California legislature has demonstrated distaste for professional misrepresentation, and has assessed criminal penalties for doing so.²¹⁴

²¹⁰ Requiring proof that the manager in fact knew of the license requirement would provide a near impossible hurdle for litigants. Indeed, California's civil penalty regime does not require knowledge of the law. See *People ex rel. Lockyer v. RJ Reynolds Tobacco Co.*, 124 P.3d 408 (Cal. 2005) (holding that "although ignorance of the law is not a defense to a violation of section 118050, a defendant's good faith or bad faith is relevant to the evaluation of the fine assessed against the defendant").

²¹¹ Agents have to renew their licenses.

²¹² For example, providing several eyewitnesses who all testify consistently with one another that the manager expressly misrepresented himself as an agent may suffice.

²¹³ *Redden v. Candy Ford Grp.*, TAC 13-06 (Cal. Lab. Comm'n 2007), <http://www.dir.ca.gov/dlse/dlse-tacs.htm>.

²¹⁴ CAL BUS. & PROF. CODE § 7028 (West 2013).

b. Constructive Willful Violations—Totality of the Circumstances & Factors

A finding of constructive willfulness is fact specific and will chiefly be found where the manager's acts, professional background, or a combination thereof indicate the manager's culpability for procuring employment. Moreover, we propose that a totality of the circumstances approach be followed by courts in determining whether the manager acted willfully. In particular, courts should consider the following factors to guide their determination: (1) whether the procurement involved an affirmative solicitation by the manager; (2) the sophistication of the manager at the time of procurement; (3) the number of times the manager procured; (4) the commission to be received by the manager from his procurement activities; (5) the manager's candor with the agent about the procurement transaction; and (6) any contract clause explicitly forbidding the manager to procure. Suitable, statutory, factor-based approaches to assessing penalties indeed exist in California.²¹⁵ Importantly, and consistent with California case law, determinations arising from these factors can serve both mitigating and aggravating functions.

i. Affirmative Solicitation by the Manager

When procurement arises out of an affirmative solicitation by the manager, there is a heightened probability that the manager acted willfully. Principally, satisfying this factor defeats any argument by managers that the opportunity to procure unexpectedly and unavoidably presented itself. Courts should discern who initiated the transaction. Where the manager initiated (for example, by inquiring into an employment opportunity or proposing an offer), the manager is undoubtedly more culpable for procuring than is another manager who, in his or her representative capacity, was sought out by an employer. The question of who initiated the transaction should come down to deciding which party presented the business opportunity first. A manager who initiates only a casual conversation, which unexpectedly leads to a business proposal, for example, cannot be said to have made an affirmative solicitation. On the other hand, a manager who sends out a client's headshots to a casting director and asks for the director to allow his client to audition is engaging in a higher degree of affirmative conduct.

²¹⁵ CAL BUS. & PROF. CODE § 17206 & § 17356 (West 2013) (listing "willfulness" as one of six factors to be considered when assessing the amount of a civil penalty).

ii. The Professional Sophistication of the Manager at the Time of Procurement

Measuring a manager's professional sophistication at the time of procurement is informative as to the manager's culpability because it approximates the manager's knowledge of wrongfulness. Firstly, the more sophisticated a manager is, the more likely the manager understands the professional and functional distinctions between managers and agents. The presumption, in other words, is that sophisticated managers are aware that they cannot procure employment without a license. This issue has been a heated subject of debate for managers for nearly one hundred years, and it follows that a sophisticated manager would likely have implied knowledge of the restriction on procurement. A manager's professional sophistication can most assuredly be determined by assessing the manager's number of years in the entertainment business, but may also be estimated by secondary considerations. For example, the manager's professional training and education, number of clients, and relationships with other managers and agents may be informative.

iii. The Number of Times the Manager Procured

The number of times a manager procured indicates the manager's willfulness. The more repeated a manager's acts of procurement have been, the more likely it is that the manager actively pursued procurement. For example, in the well-known *Park v. Deftones* case,²¹⁶ the Labor Commissioner determined that Dave Park had procured performance engagements for The Deftones, a famous rock and roll band, on eighty-four occasions without a license.²¹⁷ In such a situation, it is highly unlikely that Park was unaware of the wrongfulness of his conduct. It follows that habitually procuring managers, such as Dave Park, likely assumed an agency relationship with their artist-client altogether and did not concentrate their practice on managerial functions. Further, a large number of procurement acts lends credence to the manager's professional sophistication as well.

iv. The Commission to be Received by the Manager

In theory, how much money the manager stood to gain as a result of the procurement can be indicative of the manager's intent. Percepti-

²¹⁶ *Park v. Deftones*, 84 Cal. Rptr. 2d 616 (Ct. App. 1999).

²¹⁷ *Id.* at 617.

bly, the higher the commission the manager was to receive resulting from the procurement, the more likely it is that the manager acted willfully. The most circumstantial of all the factors, a showing of high commissions in this regard will work best corroboratively, and will likely never be sufficient on its own to demonstrate willfulness.

v. The Manager's Candor with the Agent About the Act of Procurement

If a manager represents an artist who has an agent, the degree of the manager's candor following the procurement chiefly demonstrates whether the manager acted in good or bad faith. Certainly, a manager failing to reveal the transaction to the artist's agent can be presumed to have done so intentionally. The level of a manager's personal relationship with the agent and the manager's amount of correspondence with the agent following the procurement transaction will be informative. For instance, if a manager personally corresponded with the agent several times following the act of procurement and failed to inform the agent of the transaction, the manager likely felt he or she had something to hide, either because the manager knew the act was wrong or because he or she did not want the agent to intervene. The timeliness and substance of the manager's candor will be useful.

vi. Any Contract Clause Explicitly Forbidding the Manager to Procure

If the manager is a party to a contract proscribing the manager from procuring, the manager's breach of that provision is indicative of willfulness. A provision disallowing the manager's procurement specifically informs the manager that he or she cannot procure, and breaching that contractual obligation is facially wrongful. In *Bixby v. Capomazza*, for example, the contract between the parties contained a provision stating that Capomazza "is prohibited from procuring, offering, promising or attempting to procure engagements for [Bixby]," and that Capomazza "is not licensed to practice as an agent under any statute."²¹⁸ Such deliberate clauses would be sufficient to put the manager on notice that acts of procurement are illegal and that managers should not be engaging in such acts.

²¹⁸ *Bixby v. Capomazza*, TAC 37-03 (Cal. Lab. Comm'n 2005), <http://www.dir.ca.gov/dlse/dlse-tacs.htm>.

Again, these factors, used to determine whether to assess a statutory penalty for constructive acts of procurement, are not dispositive. They should be given weight according to the specific circumstances of the individual case. For example, a court may find that the manager engaged in a high number of procurement acts, but his sophistication in the industry was not high enough to warrant a finding of willfulness. Conversely, a court may find that a manager was extremely sophisticated in the field, yet only engaged in a limited amount of procurement for which a finding of willfulness is not warranted.

Overall, statutory penalties provide the ideal remedy for willful violations of the TAA. Managers will likely agree that this remedy, especially when combined with the shift in the burden of production, will deter them from engaging in acts of procurement. Further, artists remain protected, as the legislature originally intended in formulating the Act, because the assessment of these statutory penalties will deter managers from acting as talent agents and potentially taking advantage of their inexperienced clientele. Finally, agents will again be protected as the only individuals who can procure employment, and the deterrent force of statutory fines for willful violators will ensure that their market is not trespassed upon by unlicensed managers.

V. CONCLUSION

Since its foundation, the Talent Agency Act has sought to alleviate concerns regarding agents taking advantage of fledgling artists by procuring any possible employment, without concern for the artist's well-being.²¹⁹ The license requirement mandated by the TAA seems to have accomplished the legislature's goals on the agent side, because licensed agents are no longer able to engage in such reckless and destructive actions without losing their license. On the other hand, the remedies for violations of the license requirement have had an unintended effect on the profession of the personal manager. The Labor Commissioner has consistently voided the contracts of personal managers and allowed artists to use the TAA as a "sword" to strike down these contracts and avoid paying the managers large sums of money owed.

Unfortunately, the courts have been unable to come up with a workable solution to correct the TAA's dilemma concerning remedies. Because many decisions indicate that the remedies under the TAA have been incorrectly applied, and that the Labor Commissioner has

²¹⁹ See, e.g., *Marathon Entm't, Inc. v. Blasi*, 42 Cal. 4th 974, 984-85 (Cal. 2008).

misinterpreted the intent of the legislature in formulating those remedies,²²⁰ the authors of this Comment conclude that the combination of remedies asserted herein provides a workable balance for violations of the TAA. Under our assertion, incidental acts of procurement will no longer cause the manager to lose his rights under a managerial contract unless the artist can prove that severability is not applicable. Further, the assessment of statutory penalties for those managers willfully violating the statute will maintain the deterrent force behind the formulation of the TAA without unjustly enriching artists. Overall, the authors feel that the California legislature should consider applying this approach because it is not only easily adaptable, but also in line with the true purpose of the Act.

²²⁰ *Id.* at 996 (declaring, in regards to the Labor Commissioner's recent decisions, "[w]ith due respect, the Labor Commissioner's assessment of the legislative history and case law is mistaken; as we have explained, neither requires the rule she proposes").