SENDING AGENTS TO THE PRINCIPAL'S OFFICE:
How Talent Agency Packaging and Producing Breach the Fiduciary Duties Agents Owe Their Artist-Clients

Brian T. Smith

Abstract

Talent agents have always been indispensable to writers, actors, and other creative workers in the entertainment industry, providing independent representation to their artist-clients in dealings with sophisticated corporate employers. But following a historical shift in their revenues from commissioning clients to lucrative television packaging fees, the power and profits of the biggest agencies grew exponentially. Revenues from packaging fees allowed these agencies to diversify into other businesses and attracted outside investment by private equity firms leading to further vertical integration. Now, the largest agencies have turned their eye toward a new revenue stream: producing and owning content through agency-affiliate production companies.

These innovations have come at the cost of the independent representation agents are supposed to provide their clients. Packaging and producing by talent agencies and their affiliates breach the well-established fiduciary duties agents owe their clients under the law by aligning the agency's own interests with the interests of its clients' employers. Outside investment in the agencies only exacerbates these conflicts. These departures from traditional agenting undermine the avowed purpose of the California Talent Agencies Act: to protect vulnerable artists from the conflicted practices of their agents. While these issues are at the heart of the ongoing industry dispute between the Writers Guild of America and the big agencies, their importance should concern all agency clients and their unions. The California Legislature should amend the outdated Talent Agencies Act to enumerate and reaffirm the fiduciary duties

* J.D., UCLA School of Law, 2020; B.A., Tufts University, 2007. The Author is a recipient of the 2013 Tony Award for Best Musical for his work as a producer on *Kinky Boots*. He is the screenwriter and producer of the 2019 independent feature film, *Perception*.
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talent agents owe their clients under common law and prevent the erosion of legal protections for creative workers in one of the state's largest and most important industries.

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Introduction

Talent agents have always played an important role in the entertainment industry: helping artists procure employment and protecting artists' interests in negotiations with sophisticated employers. As might be expected in view of such an arrangement, it is well-established that talent agents are agents in a principal-agent relationship with their artist-clients under common law. This relationship gives rise to traditional fiduciary duties which require the agent to avoid conflicts of interest and act in the client's best interests.

However, as the business of entertainment has drastically expanded and transformed over the last century, so too has the business of agenting. Since the early days of television, talent agents have "packaged" clients together as teams to create new series for employers, shifting agencies' compensation from traditional client commissions to packaging fees paid directly from the clients' employers to the agencies. Revenues from packaging fees led to a period of enormous growth in the wealth, power, and influence of the largest agencies that dominated the television packaging business. In the early twenty-first century, the biggest agencies have diversified their businesses in earnest, and recently several of the largest agencies have taken the next logical step and created affiliate production companies to produce and own creative work themselves. Revenues from packaging and expansion into businesses other than traditional talent representation have also attracted outside investment in the biggest agencies. The result is that the most powerful talent agencies now operate more as divisions of vertically-integrated corporate conglomerates than as independent firms in the business of individual artist representation. These changes threaten to undermine agents' ability to provide independent representation to their clients—the necessary benefit which elevated talent agents to their indispensable position within the Hollywood system.

This Comment explains how packaging and producing by talent agencies and their affiliates aligns an agency's interests with a client's employer. This contravenes the very purpose of talent agents under the law: to represent the best interests of the client in dealings with the employer. These conflicts of interest breach the fiduciary duties agents owe their clients under common law. While the California statute governing talent agency licensure, the Talent Agencies Act (TAA), does not specifically enumerate the fiduciary relationship between agent and client,[1] that relationship was already affirmed in agreements between the talent unions (guilds) and the agencies at the time the legislation was enacted in its modern form. Since those guild agreements have largely fallen away for reasons explained herein, this Comment argues a lack of explicit provisions in the TAA have led talent agencies to expand in directions which benefit the financial interests of the agency at the expense of fulfilling the fiduciary obligations agents owe their clients.

Eliminating agency packaging and producing may seem extreme, but the legislative purpose of enacting the Talent Agencies Act helps shed light on the need for these proposals. If the California legislature intended that the TAA would protect artists from the unscrupulous practices of their representatives,[2] and if prohibiting agency packaging and producing is essential to providing the fair, independent representation that the legislature intended artist-clients to receive from their agents under the law, then neither practice should be permissible. And

1. *See* Talent Agencies Act (TAA), Cal. Lab. Code §§ 1700–1700.44 (West 2011).
2. *See* Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 746 (Cal. 2008).

packaging and producing *do* work against agents' ability to provide the fair, independent representation that the legislature intended artist-clients be given.

While agents traditionally were compensated on a commission basis, taking a fixed percentage of their clients' earnings, in reality, the revenues of the largest agencies have long been more dependent on lucrative packaging fees. Agencies receive these fees from employers of their clients, for whom they bundle several clients of the agency—such as a writer, director, and lead actor—and sell their services as a team to the studio. On series with packaging fees, agents forgo their traditional commissions on a client's compensation and instead receive a fixed percentage of the initial license fee and of the net profits of the series directly from the clients' employing studio. This pegs the agent's financial interest to the employer's financial control of the project, rather than to the client's financial compensation.

Packaging has been around nearly as long as television itself and has always been controversial. However, for most of its history, any conflict created by packaging was waived in agreements between the guilds and the talent agencies. These agreements specifically allowed packaging, perhaps as a compromise for other limitations on agent practices, like limits on outside financial investment in agencies and financial interests in client's work. However, two of the most important of these longstanding agreements, those with the Screen Actors Guild (formerly SAG, now SAG-AFTRA)[3] and the Writers Guild of America (WGA)[4] have since been terminated for reasons described herein, and their contractual limitations on agencies' financial interests have fallen away.

It has long been the conventional wisdom in Hollywood that talent agencies owning their clients' work was impermissible. In fact, the talent agency MCA was forced to choose between its function as a talent agency and its role as a content-creator by the U.S. Department of Justice in the 1960s to avoid antitrust litigation. But no specific provision proscribing the practice is found in the TAA, and the private guild regulation prohibiting the practice outright was lifted with the large agencies' termination of their agreement with SAG in 2002. Even without an explicit statement banning production, allowing agencies to produce a client's work via an affiliate breaches the fiduciary duties agents owe their clients under common law, because, effectively, the agency is negotiating against itself as the constructive employer of the artist-client. Although agencies insist these are arms-length transactions, it is impossible to ignore that in most cases the agency and the affiliate are owned by the same parent corporation, and often there is a fluidity of business between the nominally separate corporations. By

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3. Screen Actors Guild, Codified Agency Regulations Rule 16(g) (1991) [hereinafter SAG Rule 16(g)], https://www.sagaftra.org/files/sag_rule_16_g.pdf [https://perma.cc/6QX2-T9J8].

4. Writers Guild of America, Artists' Manager Basic Agreement of 1976 [hereinafter WGA AMBA], https://www.wga.org/uploadedFiles/who_we_are/departments/amba1976.pdf [https://perma.cc/QL9Z-EWP3].

reducing the agent's role to negotiating with the agent's own affiliate, the risk becomes too great that the agent will do what is best for the agency's interests, rather than acting in the best interests of the client.

Outside investment in the agencies only complicates the matter further, as majority ownership of talent agencies by non-agents can further pressure agents into acting in the best interests of the agency rather than the best interests of the clients when the two conflict. Outside ownership in big agencies is often by private equity firms that demand a focus on increasing agency profits.

Agencies claim packaging and producing via affiliate-studios do not disadvantage artist-clients but benefit them. Their position is that the artist-client receives a better deal as part of a package, since the agency does not take a commission on their compensation. With producing, the agencies believe that by eliminating the studio, they are able to offer artist-clients' more creative control than they would otherwise have, and additionally provide more favorable deal terms for clients from their agency-affiliate studios than they would from outside studios.

Whether talent agencies should be forbidden from vertically integrating and entering production—a path that will eventually set them on a course to compete with the studios—because of their fiduciary duties to their artist-clients is at the heart of concerns over packaging and producing. An ultimate decision on the legality of these issues, whether the result of bargaining between the agencies and the guilds, a decision by the courts, or a mandate of the state legislature, will have a tremendous effect on the future of the agencies in Hollywood. Like MCA in 1962, vertically-integrated talent agencies may be forced in the future to decide which business they actually want to be in: talent representation or content production and distribution.

Part I of this Comment provides background on the history of talent agencies from their origins to the present day and explains the practices of packaging and producing by talent agencies. Part II identifies the fiduciary duties owed by talent agents to their clients under the framework of public and private law which has historically governed artist-agent relationships in California including common law, the Talent Agencies Act, and previously-governing guild regulations. Part III explores the conflicts of interest inherent in agency packaging and producing, the exacerbation of those conflicts by outside investment in the agencies, and how those conflicts may injure artist-clients and the market. Part IV analyzes the potential mitigation of these conflicts offered by the new WGA Code of Conduct and proposes the California State Legislature amend the Talent Agencies Act to bring its protections for artists into the modern era and fulfill its stated purpose of protecting artist-clients from unfair exploitation by their representatives. This Comment only addresses issues and solutions under California law.[5]

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5. Additionally, this Comment only addresses agreements between the talent agencies and

I. Background

Talent agents have been around since before the birth of film and television, although their role has changed as the entertainment industry has transformed its methods of production and distribution due to advances in technology and changing viewer consumption habits. Sociologist Violaine Roussel, who recently "wrote the book" on modern talent agents, described the wide range of clients a modern agency now may represent:

> Agents represent many of the Hollywood professions, from actors, directors, and writers ("above-the-line" creators) to professionals of film and television crews ("below-the-line" personnel, from cinematographers to makeup artists), producers, or "reality world" personalities (in TV and digital media). Beyond individual talent, they may also represent projects and companies, as well as manage "talent" in other areas other than the ones usually associated with Hollywood . . . : athletes, models, video game creators, and so on.[6]

For nearly as long as they have existed, talent agents have been regulated by a public-private framework composed of state law and private regulation by the Hollywood labor unions, known as guilds, to which a talent agency's clients often belong. Under California law, only licensed talent agents are legally empowered to "procure employment" for clients, unlike other artist representatives such as talent managers or lawyers who may not engage in such procurement.[7] As sociologists William and Denise Bielby noted:

> Legally and technically, a talent agency is nothing more than a state licensed employment agency. The agency finds work for a writer, actor, or director on a film or television project, and in exchange it receives a 10 percent commission from the client's earnings. Hundreds of agencies represent artists in the film and television industry, and the majority operate exclusively in this manner . . . . A few agencies, however, operate differently: Instead of seeking out projects for their clients, they initiate projects on their own. They negotiate unique arrangements with the talent guilds and cultivate long-term relationships which those who finance, produce, and distribute new projects. Through strategic moves during times of structural change in the industry and aggressive actions to protect their unique market positions, these "core" agencies have amassed market power in both labor and

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the Screen Actors Guild (formerly SAG, now SAG-AFTRA) and the Writers Guild of America (WGA); it does not consider the effect of agreements between the Association of Talent Agents (ATA) and the Directors Guild of America.

6. Violaine Roussel, Representing Talent: Hollywood Agents and the Making of Movies 23 (2017). Roussel "conducted 122 open-focused interviews with agents in various areas of specialty and types of agencies; former agents and trainees; plus a few of their work counterparts so as to get their perspective on agenting (including studio executives, independent producers, managers, lawyers, publicists, actors, directors, and writers). The interviews were complemented with five in situ observations at agencies and alongside agents." *Id.* at 21.

7. *See* Talent Agencies Act (TAA), Cal. Lab. Code § 1700.4(a) (West 2011).

> product markets. *Their power, in fact, rivals that of major studios at the height of the studio system.*[8]

These "big" agencies practice an entirely different business than their smaller counterparts, and their businesses are largely "invisible" to one another.[9]

This Comment focuses exclusively on practices of these larger agencies operating in what Roussel calls Big Hollywood.[10] Particularly, it discusses the practices of packaging and producing prevalent among the four largest talent agencies (the Big Four[11]): Creative Artists Agency (CAA), WME Entertainment (WME, born of a 2009 merger of agencies William Morris and Endeavor), United Talent Agency (UTA) and International Creative Management Partners (ICM). Agents employed by these companies are the agents in the public imagination, popularized by the depiction of superagent Ari Gold on the television show "Entourage."[12]

Talent agents have always been controversial figures,[13] curiously blending the fiduciary duties owed to an artist-client under a traditional agent-principal relationship with the need to represent a pool of artist-clients who compete with one another for work—a situation in which not all clients' best interests can be served simultaneously.[14] "[A]s the saying goes '20 percent of the clients

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8. William T. Bielby & Denise D. Bielby, *Organizational Mediation of Project-Based Labor Markets: Talent Agencies and the Careers of Screenwriters*, 64 Am. Soc. Rev. (1999), *reprinted in* Brokerage and Production in the American and French Entertainment Industries: Invisible Hands in Cultural Markets 24, 28 (Violaine Roussel & Denise Bielby eds., 2015) (emphasis added); *see also* Roussel, *supra* note 6, at 26 ("Hollywood consists of two interdependent but different occupational spheres, to which the distinction between 'Little Hollywood' and 'Big Hollywood' refers: the many boutique agencies and their specific counterparts on one hand, and the major agencies, the big studios, and the other dominant Hollywood players on the other." (citation omitted)).
9. Roussel, *supra* note 6, at 34; *see also id.* at 29 ("Such sizable agencies represent 'star clients' of various statures and enter into business (alongside the main law firms and the most reputable managers) with the executives and heads of the studios and as well with major players in the independent world. Their transactions concern the most lucrative projects, as well as those that have the greatest chance to earn professional recognition from artistic authorities.").
10. *See id.* at 15.
11. *See generally, e.g.*, Bielby & Bielby, *supra* note 8.
12. Of course, the well-known inspiration for Ari Gold is the real co-CEO of WME Entertainment (WME) and its parent company, Endeavor, Ari Emanuel. Mark Yarm, *The Real-Life Bros of 'Entourage'*, Rolling Stone (June 4, 2015, 3:00 PM), https://www.rollingstone.com/movies/movie-lists/the-real-life-bros-of-entourage-166827 [https://perma.cc/UCZ2-5MVP].
13. *See* Roussel *supra* note 6, at 19–20 ("Like its fictional representations, the social figure of the agent is a questionable one, suspected to be at once superficial and insincere, ruthless and impervious to empathy, indifferent to art and economically self-interested (and manipulative for that purpose) . . . . [A]gents' position in Hollywood . . . 'predisposes them for the role of scapegoat.'").
14. Imagine an agent represents several writers, actors, or directors who may be a good fit for a given job or role. In a perfectly impartial world, the agent would submit all the

pay 80 percent of the bills,' . . . in fact, an even smaller percentage probably really does."[15] At the big agencies, "each agent typically handles a long list of clients, from several dozens to more than 100 or 150. And they do a lot more in practical terms than just negotiating deals."[16] Big Hollywood talent agents have power "to affect which artists we get to know and admire, and which entertainment products get offered to audiences or never see the light of day."[17]

A. *Traditional Agenting and Early Regulation*

Traditionally, agents have taken a percentage-based commission on their clients' earned compensation, capped by state employment law and guild regulation at ten percent. But talent agents have represented artist-clients since even before the creation of the modern film and television industries. The storied talent agency William Morris began representing vaudeville talent in 1898.[18]

Journalist James Andrew Miller eloquently summarized the state of affairs in Hollywood during the early twentieth century, when the modern film industry came into being:

> Movies developed into a huge business in the late 1920s; to consolidate power and maximize profit, smaller production companies began to merge, leading to the creation of eight major corporations—powerful studios that would soon be performing nearly 80 percent of the films released in any given year. Actors were hardly equipped—with information or bargaining skill—to deal with those giant companies, and as a result studios

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parties meeting the qualifications of the job or description of a role, and the employer would decide who to hire without the agent having to advocate for one client over another. However, an agent must pitch clients, often persistently, to potential employers *in competition with other agencies*. And an agent can't realistically try to persuade an employer to hire multiple clients for the same job or role, so concessions must be made in terms of prioritizing individual client interests. Artist-clients acknowledge the seemingly unavoidable nature of these conflicts of interest between clients of the same agency and contractually waive their objection to them as part of the guild agreements and personal representation contracts, if one exists. It is plausible that an agent's decision to prioritize certain clients aligns with the best interests of the agency itself, considering the financial interest of the agency is tied to the project's packaging fee and the agency's relationship with the buyer-employer-studio. *See id.* at 33 (The big talent agencies have daily meetings to discuss "what studios are thinking of making, and which agency clients could be 'packaged' and sold to them, or attached to an existing 'package' if the project has already reached the casting stage of development.").

15. *Id.* at 24.
16. *Id.* at 23.
17. *Id.* at 26, 70 (describing how "the big agencies do a lot more than just training their future agents. They operate like a 'farm system' that produces professionals [who begin in the mailroom or as assistants at talent agencies] who will then populate smaller agencies, management companies," studios, and networks, thus explaining how these agencies "preside over the transmission of professional norms and models" of the entertainment industry).
18. William A. Birdthistle, *A Contested Ascendancy: Problems with Personal Managers Acting as Producers*, 20 Loy. L.A. Ent. L. Rev. 493, 504 (2000).

> were able to develop the famous "star system" that saw many actors controlled, professionally and personally, by the studios that essentially owned them . . . . No wonder the William Morris Agency [WMA], a Broadway institution since the 1890s, but one that had avoided movies' silent era altogether, ventured into 'the movies' in 1928.[19]

The swift expansion of the movie industry came with an increased need in talent representation, to protect employers from abusing the interests of their creative workers, as Roussel explained:

> Delegating talent representation to "independent agents," who remained closely tied to studios since their business depended on such relationships, was not without benefits for the studios. It also protected them against the suspicion—made explicit and debated in the trade papers—that the internalization of talent scouting and management *would lead the studios to serve their own interest over that of the artists* . . . . [Talent agents] were gradually constructing their position as "sellers"—that is, unavoidable counterparts to "buyers" on a free market. Their successful negotiations with talent unions (especially the Screen Actors Guild), leading to the signature of franchise agreements between the guilds and the agencies in the late 1930s, were also decisive in signifying their accreditation as professional players, individually and collectively, in Hollywood.[20]

"Historically, the ban on agent production came about in the late 1930s in response to extensive vertical integration in the entertainment industry."[21] SAG, a union for motion picture actors, and the WGA, a union for writers, were founded in 1933.[22] "In 1939, after one year of negotiations, SAG adopted the Agency Regulations [later known as SAG Rule 16(g)]. The Regulations required agents apply to SAG for a franchise, and forbade them from producing films. This marked the first appearance of the financial interest rules currently in dispute" in guild agreements.[23] "An important aspect of [Rule 16(g)] [were] the rules prohibiting an agency from possessing various kinds of financial interests that would, among other things, transform them into producers and employers of actors."[24]

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19. James Andrew Miller, Powerhouse: The Untold Story of Hollywood's Creative Artists Agency xxxii (2016).
20. Roussel, *supra* note 6, at 12–13 (emphasis added).
21. David Zelenski, Comment, *Talent Agents, Personal Managers, and Their Conflicts in the New Hollywood*, 76 S. Cal. L. Rev. 979, 991 n.90 (2003) (citations omitted).
22. Catherine L. Fisk, *Will Work for Screen Credit: Labour and the Law in Hollywood*, *in* Hollywood and the Law 235, 242 (Paul McDonald et al. eds., Bloomsbury Publ'g 2018) (2015) (noting origins of the WGA); Koh Siok Tian Wilson, *Talent Agents as Producers: A Historical Perspective of Screen Actors Guild Regulation and the Rising Conflict with Managers*, 21 Loy. L.A. Ent. L. Rev. 401, 405 (2001) (discussing founding of SAG).
23. Wilson, *supra* note 22, at 406.
24. *Id.* at 403.

In California, talent agents had originally been subject to the Private Employment Agencies Law of 1913.[25] Lawmakers amended this statute in 1943 "to regulate talent agents and to proscribe outrageous behavior."[26] This change brought talent agencies under the purview of the Labor Commissioner, who continues to have jurisdiction today.

Meanwhile, the major studios were facing antitrust action by the government over vertical integration of production and distribution, culminating in the Department of Justice's Consent Decrees mandating that production and exhibition of motion picture remain separate businesses.[27] Thus, the motion picture studios were initially hesitant to get into the business of television.[28]

By the 1950s, the ground was shifting again in Hollywood. Television viewership exploded across the United States, causing a decline in theatrical attendance and a shift in production budgets. These changes included doing away with exclusive contracts allowing artists to work only for one studio. The death of the star system, and the transformation of creative talent into independent employees able to work for any studio on a given project, "meant that agents were now seen as necessities rather than options or luxuries."[29]

B. *Development of Television Packaging by Agencies, Early Attempts to Enter Production, and Amended State and Guild Regulation*

With the film studios hesitant to dive into the business of television production in the early 1950s due to antitrust concerns after the issuance of the Consent Decrees, the major talent agencies of the era, MCA and the William Morris Agency (WMA), decided to fill the void in supply by providing television networks and advertising agencies with teams of talent to create programming for the new medium.[30] WMA led the way in developing the initial packaging fee structure, as William and Denise Bielby described:

> WMA would develop the premise, format, cast, and the writing and producing team for a new series, and offer it to a network or advertising agency. Instead of earning 10 percent commission on the salaries of its clients, the agency would receive a packaging fee of 10 percent for the entire production budget for the series. By 1960, WMA alone had originated and packaged twenty-six of the series on the network schedule, and . . . a handful of agencies controlled more than 40 percent of prime-time television."[31]

At the same time, the mogul Lew Wasserman transformed his talent agency, MCA, into a packager of television series as well—but Wasserman

25. Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 746 (Cal. 2008); Birdthistle, *supra* note 18, at 511.
26. Birdthistle, *supra* note 18, at 511.
27. *See generally* United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).
28. Bielby & Bielby, *supra* note 8, at 28.
29. Miller, *supra* note 19, at xxxiii.
30. Bielby & Bielby, *supra* note 8, at 28, 46.
31. *Id.* at 28–29 (citations omitted).

went a step further.[32] MCA wanted to enter the business of television production directly, by partnering with its star clients to create dozens of production companies that would produce television content for the networks directly.[33] Wasserman's move took a talent agency from merely packaging into directly producing through an affiliate for the first time.

In order to move into production without violating the strictures against agency producing in SAG Rule 16(g),[34] Wasserman needed a waiver from the guild for his television production activities. Wasserman's client, then-SAG President Ronald Reagan, was happy to grant such a waiver—and to share ownership in his next television venture with Wasserman's MCA-affiliate production company, Revue.[35] "MCA was the only talent agency ever to receive a blanket waiver from the talent guilds, and . . . within two years MCA was earning more from the production and distribution of filmed television programming than from their agency business."[36] The scheme was enormously successful, but also shortlived. As Andrew James Miller recounted:

> In 1962, MCA's dominating presence in Hollywood ran smack into the Department of Justice. Its investigation into the company's "monopolistic practices" resulted in a face-off between Wasserman . . . and Attorney General Robert F. Kennedy Jr. To avoid criminal and civil penalties for alleged antitrust violations, MCA agreed to divest itself of its talent agency at the same time that the company bought struggling Universal Pictures and Decca Records. Just like that, MCA quit the talent business and created the largest entertainment assembly line in Hollywood . . . . When MCA departed the representation business, the move solidified William Morris as *the* agency.[37]

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32. Miller, *supra* note 19, at xxxiii; *see also* Cynthia Littleton, *Talent Agencies Face Conflicts of Interest as Parent Companies Storm into Production Arena*, Variety (Feb. 13, 2018, 6:00 AM), https://variety.com/2018/tv/features/talent-agents-production-conflicts-of-interest-1202695460 [https://perma.cc/N8JL-52UY].
33. Miller, *supra* note 19, at xxxiii.
34. *See* Bielby & Bielby, *supra* note 8, at 48 n.3 (citations omitted).
35. *See* Dennis McDougal, The Last Mogul: Lew Wasserman, MCA, and the Hidden History of Hollywood 191 (1998) ("'Reagan saw no conflict in this arrangement, though others did,' wrote Reagan biographer Lou Cannon. 'He also saw no conflict in giving MCA, represented by his former agent Wasserman, a blanket and secret waiver that violated the long-standing practice of allowing actors to retain agents who were also movie producers—in effect serving as spokesman for both sides.'").
36. Bielby & Bielby, *supra* note 8, at 48 n.3 (citations omitted).
37. Miller, *supra* note 19, at xxxiv. Lee Loevinger, the United States Assistant Attorney General, Antitrust Division, explained the situation and resulting agreement thusly:
    > A suit was filed against MCA, Inc. on July 13, 1962, charging a conspiracy to monopolize and actual monopolization of the talent agency business and other restrictive acts in the production of television network programs and the sale of talent. Ten days after suit was filed the parties agreed upon the entry of an order providing for the dissolution of the talent agency corporation. MCA had previously announced its intention to spin off the talent agency intact, keeping

From that time on until only very recently, talent agencies have only engaged in packaging of film and television, and not production.

Between 1959 and 1982, the California State Legislature continued to tweak the statutes governing talent agents, first by moving the statutes to a new section of the Labor Code as the Artists' Managers Act.[38] As law professor William Birdthistle has noted, "This recodification signaled the entertainment industry's ascendancy in California and the state lawmakers' recognition of its importance."[39] The Act was renamed the Talent Agencies Act in 1978. "In 1982, the legislature revisited the TAA and promulgated a host of regulations affecting its operation . . . . The 1982 provisions remain good law today,"[40] and the TAA has not been revised since.

Similarly, in 1976 the WGA renewed its franchise agreement with the big talent agencies. The agreement, known in its amended form as the Artists' Manager Basic Agreement (WGA AMBA), further regulated the relationship between artists and their representatives, although its text acknowledged the WGA's discomfort regarding the practice of packaging, and the uneasy compromise reached by the agencies and the guild on the matter.[41]

C. *Modern Packaging in Television and Film*

The shift to agency reliance on revenues from television packaging fees rather than from client commissions fundamentally changed the business model of the big agencies. Packaging is different from traditional agenting in two senses. First, it allows agencies to bundle multiple clients—such as a writer, director and star—with a project, such as the writer's original script or a

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> certain of its former officers in control of the talent agency and to retain certain financial ties with it. As a result of the antitrust suit the talent agency was wholly dissolved and the MCA plans for spinoff were abandoned. On October 18 a final decree was entered by consent of the parties which prohibited MCA from reentering the talent agency business or having any affiliation with it, which prohibited the restrictive practices complained of, and which also provided for disposition of the Universal Film Library acquired by MCA through its control of Decca, which in turn controls Universal Pictures. *The final decree also enjoins MCA from acquiring any other major television, movie or record producer, publisher or distributor within seven ensuing years.*

Lee Loevinger, *Antitrust in 1961 and 1962*, 8 ANTITRUST BULL. 349, 369 (1963) (emphasis added).

38. Birdthistle, *supra* note 18, at 511–12.
39. *Id.* at 512.
40. *Id.* See *infra* Subpart II.B for an enumeration of provisions of the Talent Agencies Act.
41. *See* WGA AMBA, *supra* note 4, § 6(c)(A); *see also infra* note 104. The WGA AMBA governed relations between the writers and talent agencies for forty-three years, until its expiration on April 12, 2019, one year and one week after the WGA initiated notice of termination to the ATA over dissatisfaction with the talent agencies' practices of packaging and producing. *See Agency Campaign Timeline*, WRITERS GUILD AM. W., https://www.wga.org/members/membership-information/agency-agreement/wga-agency-campaign-timeline [https://perma.cc/5PKF-PQUR] (last updated Nov. 2019).

novel which the agency represents, and sell it as a package to the studio, rather than advocating for an individual client for a single job with the studio.[42] This means the agency is not just providing the talent to the studio for a project, but instead selling the studio an idea or script for a film or television series with talent already attached.

The second deviation from traditional agenting is how the agency is compensated for the package. "[Packaging] refers to partly different financial arrangements in film and television: unlike in television, agencies do not receive a separate fee for the activity of [studio] film packaging itself (they are remunerated from their individual clients' contracts)."[43] In television, instead of taking a ten percent commission from their artist-clients' earnings, the agency receives a packaging fee directly from the studio, which includes a percentage of the series' production budget and a portion of its net profits after recoupment (the back-end) not exceeding ten percent. This is known as the "3-3-10" packaging fee. The Big Four agencies have universally adopted this packaging fee structure.[44] "By the mid-1990s, CAA alone was responsible for packaging about one-third of all prime-time series on the network schedule, while WMA, [ICM], and a few other agencies had a major presence as well."[45]

"In a review of the 2016–2017 television season, WGA West found that 87% of the more than 300 series produced that year were packaged by the agencies, and that 'packaging is dominated by WME and CAA,' which accounted for 79% of all the packaged series."[46] This number is even higher for series

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42. Roussel, *supra* note 6, at 14 ("'Packaging' is the key activity of putting together the critical elements of a project then sold altogether to a studio or a network.").
43. *Id.* at 200 n.4.
44. *See, e.g.*, Bielby & Bielby, *supra* note 8, at 29–30. ("The agency typically receives half of the packaging fee up front and the remainder when the series becomes profitable. In addition, the agency receives 10 percent of all syndication sales ('backend profits'), if and when the series goes into off-network distribution. Because, for a successful series, syndication sales can reach hundreds of millions of dollars, the agency's potential profit from syndication is many times the fee it earns for initially packaging the series. By earning a share of syndication revenues, the large agencies have, in effect, positioned themselves as profit participants in television production while bearing none of the upfront financial risks.").
45. *Id.* at 30 (citations omitted).
46. David Robb, *WGA Data: 87% of All Scripted TV Shows Are Packaged*, Deadline (Mar. 15, 2018, 2:10 PM), https://deadline.com/2018/03/tv-series-packaging-agency-domination-wme-caa-writers-guild-data-1202338755 [https://perma.cc/HKS6-MBQY]. According a study by the WGA of the 2016–17 television season, of the Big Four, "WME was the solo packager of 84 series and shared packaging on 59 others; [Creative Artists Agency (CAA)] was the solo packager of 64 series and shared packaging on 61 others; [United Talent Agency (UTA)] was the solo packager of 35 series and shared packaging on 53 others; [and International Creative Management Partners (ICM)] was the solo packager of 14 series and shared packaging on 30 others." *Id.* After the Big Four, only Paradigm, a mid-size agency, "was the solo packager of three series and shared packaging on 10 others" while three smaller agencies cumulatively packaged only three series as solo packager or shared packages on five others. *Id.*

packages sold to the broadcast television networks (ABC, CBS, NBC, Fox, the CW), which command higher packaging fees by virtue of their larger production budgets compared to most basic cable series.[47] In 2003, "95 percent of the new fall series on the six broadcast networks ha[d] packaging fees attached to them."[48] When one considers that the number of original scripted series produced in a year for television and subscription video on-demand (SVOD) services has increased from 182 in 2002 to 487 in 2017, an increase of 168 percent,[49] it is clear that the domination of packaging within the industry and the potential revenue it generates for talent agencies is staggering.[50] Splitting package fees on a single series between several Big Four agencies has become increasingly common over the last twenty years.[51]

"[F]ilm packaging . . . is now a central dimension of agenting in Big Hollywood."[52] Although agencies do not take a packaging fee on studio film packages, and instead rely on their commissions, on independent films they

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47. Broadcast shows have more lucrative back-ends, as they may be sold into syndication to basic cable networks if they are popular enough to produce enough episodes needed to sell syndication rights, whereas shows which originate on basic cable are not generally relicensed back to other basic cable channels or broadcast networks. *See also infra* note 175.
48. *Packaging Prime Time*, TV WEEK (July 7, 2003), https://www.tvweek.com/in-depth/2003/07/packaging-prime-time [https://perma.cc/8AFD-APYU].
49. Joe Otterson, *487 Scripted Series Aired in 2017, FX Chief John Landgraf Says*, VARIETY (Jan. 5, 2018, 10:24 AM), https://variety.com/2018/tv/news/2017-scripted-tv-series-fx-john-landgraf-1202653856 [https://perma.cc/4GB9-423V].
50. The Big Four agencies' domination of the market share in broadcast television packaging raises additional questions under federal antitrust and California unfair competition law. *See* Lenhoff Enters., Inc. v. United Talent Agency, Inc., 729 F. App'x 528 (9th Cir. 2018); First Amended Complaint at 31–33, Writers Guild of Am. W., Inc. v. WME Entm't, No. 19SMCV00725 (Cal. Super. Ct. May 20, 2019), https://www.wga.org/uploadedfiles/news_and_events/press_room/2019/wga_complaint_5-19.pdf [https://perma.cc/SUC7-BEQJ].
51. *See, e.g.*, *Packaging Prime Time*, *supra* note 48.
52. ROUSSEL, *supra* note 6, at 200 n.4.

> In feature film, packaging was relatively rare prior to 1980 and was generally viewed as an unacceptable business practice in the industry. That changed when [CAA], under Michael Ovitz's leadership, built a clientele of writers, actors, and directors that allowed the agency to shop studios, offering "take it or leave it" packages for film projects. Ovitz's strategy was emulated by . . . the other core agencies, which began developing film projects around their clients, much like the major studios did in an earlier era when writers, actors, directors, and producers were their salaried employees . . . . In the 1980s, to obtain financing in the face of rising production costs, film producers came to rely even more heavily on projects with proven themes and "blockbuster" potential, making it all the more important to sign the creative talent that only the packaging agencies could deliver.

Bielby & Bielby, *supra* note 8, at 29.

charge their clients a commission *and* take a separate packaging fee.[53] These films are considered independent because they have no studio financing them, and the agency's packaging role grows to include securing outside financing and distribution deals for the film, in addition to attaching talent.

Packaging film and television projects for major studios is only feasible by the Big Hollywood talent agencies, and the Big Four accordingly dominate the market.[54] Packaging is only possible at these big agencies because they overwhelmingly represent the top-tier talent whose attachment can secure a studio's commitment to finance a feature film or series pilot. Additionally, packaging is facilitated by the big agencies' unique style of "team agenting," popularized during Michael Ovitz's leadership of CAA.[55] Smaller agencies have smaller rosters of lower-tier talent that do not carry much weight in a studio's decision to greenlight a new project.[56] Artist-clients overwhelmingly feel they must be represented by a big agency in order to gain access to employment opportunities with the major studios, since so many of these opportunities arise through the agency packages that dominate the studio film and television market.[57] In practice, packaging outsources many of the biggest hiring decisions a studio must make to the talent agency.[58]

D. *Rise of Talent Managers and Their Effect on Talent Agents*

In the years after Ovitz left CAA, and after a very brief and tumultuous stint as the president of Disney,[59] he transitioned into the talent management business, forming Artists Management Group and recruiting former talent agents to become talent managers.[60] Talent managers are by definition not licensed agents under the Talent Agencies Act, and therefore are unable to

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53. *See* Chad Gervich, How to Manage Your Agent: A Writer's Guide to Hollywood Representation 37 (2014) (noting the up-front portion of agency's packaging fee on an independent film is "usually two to four percent" of the film's production budget); *see also* Roussel, *supra* note 6, at 8; First Amended Complaint at 16, Writers Guild of Am., W., Inc. v. WME Entm't, No. 19SMCV00725, (Cal. Super. Ct. May 20, 2019) (alleging double dipping by the Big Four when commissioning clients on independent film packages).
54. *See, e.g.*, Ted Johnson & Jenny Hontz, *Agents Opt for Joint Custody*, Variety (June 12, 1997, 12:00 AM), https://variety.com/1997/scene/news/agents-opt-for-joint-custody-1116680181 [https://perma.cc/65KP-W6SY].
55. *See* Roussel, *supra* note 6, at 4. The early success of team agenting as pioneered by Ovitz, put CAA "in a position to systematize packaging practices, to attract some of their competitors most successful clients, and oftentimes, because the stars that the studios wanted were massively represented by CAA, to impose their conditions to the buyers." *Id.* at 44.
56. *See id.* at 11.
57. *See, e.g.*, Bielby & Bielby, *supra* note 8, at 31.
58. *See* Zelenski, *supra* note 21, at 999.
59. *See generally In re* Walt Disney Co. Derivative Litigation, 906 A.2d 27, 41–46 (Del. 2006).
60. *See* Birdthistle, *supra* note 18, at 496.

"procure employment" for an artist-client, unless working in conjunction with an agent.[61] However, talent managers, unlike talent agents, did not face similar restrictions on producing under guild regulation. Therefore, it is industry custom that talent managers may take a direct financial interest in the work of their artist-client, and additionally may serve as a producer on a client-driven production.[62]

"This regulatory scheme works so long as agents and managers perform only their traditional roles. However, once they start to do more than that, the scheme's ability to remedy conflicts of interest breaks down."[63] As David Zelenski has pointed out:

> [U]nlike yesterday's traditional managers, today's managers represent established, bankable artists . . . . Accordingly, the necessary predicates for an agent-like conflict are present, namely, bankable clients and the ability to procure employment . . . . *In sum, today's managers closely resemble traditional agents.* Notwithstanding the TAA, they often procure employment for their up-and-coming clients, and with [*Chinn v.*] *Tobin* under their belts, they often legally procure employment for their more established clients by hiring them directly. However, because they do not need to obtain TAA licenses and because they do not need to be franchised, their inevitable agent-like conflicts of interest go unremedied.

This is unfortunate, and it has led to a mass exodus of agents out of the agency business and into the management business. This, in turn, has further blurred the black and white distinction between agents and managers. Essentially, the scenario that has emerged is that managers can do everything that agents can do, plus more.[64]

Talent agencies certainly noticed the lucrative revenue streams realized by their former colleagues who became talent managers and produced their clients' work. "Many of today's managers simply do not resemble traditional managers. This creates a problem."[65]

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61. *See* Cal. Lab. Code §§ 1700.4(a), 1700.44(d) (West 2011); *see also* Zelenski, *supra* note 21, at 979 ("[Agents'] job is to get the artists they represent as much work as possible. Managers, on the other hand, shape artists' careers. Their job is to serve their clients in an advisory capacity and to counsel them on the career options that have been made available to them through their agents.").
62. Whether allowing talent managers to have a financial interest in their clients' work similarly violates the fiduciary duties that *managers* owe to clients, is a question for another day.
63. Zelenski, *supra* note 21, at 993.
64. *Id.* at 997 (emphasis added). In *Chinn v. Tobin*, the California Labor Commissioner held that when a talent manager directly employed an artist-client, it was not considered "procuring employment" with a "third-party employer" under the TAA. *See* Chinn v. Tobin, No. TAC 17–96, slip op. at 7 (Cal. Lab. Comm'r Mar. 26, 1997), https://www.dir.ca.gov/dlse/TAC/1996-17%20Kelleth%20Chinn%20&%20Caroline%20Wampole%20v%20George%20Tobin.pdf [https://perma.cc/4842-PVXN].
65. Zelenski, *supra* note 21, at 993.

E. *Loss of Guild Restrictions Spurs Outside Investment in Agencies, Vertical Integration, and Entry into Affiliate Production*

In the twenty-first century, a number of exigencies have shifted the economic realities of film and television production, diminishing the projected growth in revenues from packaging fees compared to the heyday of packaging fees generated by television series in the 1990s.[66] This has made the agencies ever more attuned to the potential revenue streams realized from owning a project outright as the producer-studio.

The boom in packaging fee revenues lasted throughout the 1990s until about 2005, when what had been a booming DVD market took a nosedive as content moved online and cable networks stopped airing reruns and started producing their own original programming. These changes removed syndication and sales opportunities to generate back-end revenue from broadcast network series. Meanwhile, the fees generated from relicensing series to digital streaming platforms and from downloads have not come close to matching the revenues once generated from syndication and DVDs.[67] Further, for series which now have their initial exhibition on digital platforms rather than on traditional TV, there is usually no relicensing to secondary exhibitors; distributors such as Netflix generally retain the worldwide rights for a long duration.

Looking to the future, agencies began searching for new ways to diversify their businesses. CAA led the way among the Big Four in pursuing "an 'embedding strategy,' superimposing new relations on top of constrained relationships by extending their operations into financial consulting, international marketing, telecommunications, and multimedia production."[68]

But as agencies expanded the number of related businesses in which they engaged, they needed outside capital to fund their efforts. However, SAG Rule 16(g) constrained franchise agencies from accepting outside investment,

66. *See* Bielby & Bielby, *supra* note 8, at 48 n.4 (noting that, in 1998, "[f]or a successful situation comedy that has a run of 100 episodes, packaging fees would total around $2.4 million dollars. A hugely successful sitcom like 'Seinfeld' or 'Friends' can command as much as $4 million dollars per episode in syndication" (citations omitted)).

67. *See* Littleton, *supra* note 32. For instance, "Friends" has generated $130 million in [subscription video on demand (SVOD)] relicensing fees to Netflix for its studio to date, which could generate as much as another $13 million for its packaging agency, ICM. Edmund Lee, *Netflix Will Keep 'Friends' Through Next Year in a $100 Million Agreement*, N.Y. Times (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/business/media/netflix-friends.html [https://perma.cc/QD5W-EQNR]. This is only a drop in the bucket compared to the packaging fees ICM has earned on "Friends" from syndication and home video. *See* Gervich, *supra* note 53, at 36 (noting, in 2014, that "Friends" had reaped over $2 billion in profits—over $200 million of which went to its packaging agency ICM). As Littleton noted, "Nor are traditional network series generating the kind of off-network fees that made 'Friends' and 'Seinfeld' billion-dollar properties in the 1990s. 'The Big Bang Theory' and 'Modern Family' are seen as properties that are closing the book on that chapter of the business."). Littleton, *supra* note 32.

68. Bielby & Bielby, *supra* note 8, at 46 (citations omitted).

as well as a provision barring the agencies from producing or taking a financial interest in their client's work.[69] In 2001, the Association of Talent Agents (ATA) served SAG with notice of termination of the agency franchise contract over the restrictions.[70] The major agencies were particularly interested in partnering with advertising agencies that employed their clients for commercials, as well as private equity firms with which they had already made relationships to arrange financing for independent films.[71]

SAG was understandably reticent to lift the restrictions that ensured agencies would represent its members without conflicts of interest.[72] "As a former SAG presidential candidate explain[ed], 'If you do a commercial for Coca-Cola and the ad agency for Coke also owns a piece of your talent agency, whom will your agent be working for?!'"[73] And indeed, FitzCo (Coca-Cola's advertising agency), is now owned by Interpublic, which became the majority stakeholder of Endeavor Marketing (an affiliate of WME) in 2008.[74]

Negotiations between the ATA and SAG eventually produced a compromise proposal, but it failed when SAG leadership put it to a vote of the membership.[75] "The ATA refused to return to the bargaining table" and "Rule 16(g) was officially history once the ATA refused to continue negotiations. As a result . . . SAG actors were in limbo status."[76] However, the actors did not leave their agents; the SAG national board temporarily suspended the

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69. *See* SAG Rule 16(g), *supra* note 3, § XVI; *see also supra* Subpart III.C.
70. Kelli Shope, *The Final Cut: How SAG's Failed Negotiations with Talent Agents Left the Contractual Rights of Rank-and-File Actors on the Cutting Room Floor*, 26 J. Nat. Ass'n Admin. L. Judges 123, 134 (2006).
71. *Id.* at 133 n.53.
72. *Id.* at 134 n.64 ("'SAG's position . . . has always been that relaxing financial restrictions would create a conflict of interest, as the actor's agent would, in effect or in actuality, become the actor's employer.' The idea of agents as equity partners . . . did not go over well in [SAG] membership meetings during the negotiation phase." (citations omitted)).
73. Zelenski, *supra* note 21, at 1001–02 (citation omitted).
74. Nikki Finke, *Interpublic Continues to Buy Up Showbiz; Now Buys Majority of Endeavor Marketing*, Deadline (Aug. 4, 2008, 5:10 PM), https://deadline.com/2008/08/interpublic-continues-to-buy-up-hollywood-takes-majority-stake-in-endeavor-marketing-6590 [https://perma.cc/HE84-9T6M].
75. The proposed concession would have allowed the agencies to:
    > take up to 20% stakes in production and distribution companies, and it allowed advertising firms and independent (nonstudio) producers to take up to 10% and 20% stakes, respectively, in talent agencies. The provisional agreement was submitted for approval to SAG's members in April 2002. Unsurprisingly, they rejected it.

    Zelenski, *supra* note 21, at 1001; *see also* Littleton, *supra* note 32 ("The agency ownership issue became a flash point for many SAG members, who worried about it setting the stage for conflicts of interest. The discord among SAG leadership on the issue was so strong that the franchise agreement was sent out as a referendum for voting by the 120,000 members of the guild in April 2002. It was rejected by a 54% to 45% margin.").
76. Shope, *supra* note 70, at 134–35.

rule-forbidding members from signing with nonfranchised agents, a suspension which remains in effect today.[77]

The shift in the business models of the larger agencies after withdrawing from the SAG agreement was enormous. The agencies could now take on significant outside investment, from private equity and foreign investors. Several agencies came under majority control of outside investors. These parent conglomerates often own many affiliated companies, including advertising agencies and production companies, to which the agencies may sell packages.[78] In the first decade of the 2000s, packaging became "the dominant practice" for agencies and Hollywood's core agencies quickly merged, as midsized agencies "all but disappeared. Corporatization, concentration and diversification of the industry's largest agencies resulted in the emergence and domination of two giants, WME and CAA, [and] greater specialization and compartmentalization within these large agencies."[79]

As the Big Four agencies vertically integrated and diversified with the cash generated from packaging fees and private investment, they continued to expand their reach.[80] In the 2010s, several of the Big Four have entered film and television production directly through the creation of agency affiliate-studios.[81] As industry journalist Cynthia Littleton has observed, "a bustling production business would also be a big selling point to investors" if any of these companies were to proceed with an IPO.[82]

The blurred lines of production and distribution have given way to blurred roles within the Hollywood infrastructure.[83] The boom in production

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77. *Id.* at 135–36.
78. Denise Bielby, *Talent Agencies and the Market for Screenwriters: From the Origins of Packaging to Today's Transformations*, *in* Brokerage and Production in the American and French Entertainment Industries: Invisible Hands in Cultural Markets, *supra* note 8, at 23, 23–24.
79. *Id.*
80. *See* Littleton, *supra* note 32 ("The impetus for agencies to expand is a response to both good and bad times. On the one hand, there are more outlets seeking content and avenues for talent to reach consumers than ever. On the other, the traditional sources of big paydays for agencies—TV and film packaging fees—have been severely squeezed by structural changes in the industry.").
81. *See id.* ("CAA and its parent company, TPG, have been seeding investments in TV and film production, if not as forcefully or publicly as Endeavor [parent company of WME]. These are growth strategies for companies with grand ambitions coupled with the need to deliver for private investors that have poured hundreds of millions of dollars into both firms.").
82. *Id.*
83. *See* Roussel, *supra* note 6, at 22–23 ("Being immersed in agents' everyday life through fieldwork led me to see beyond the legal definition of the activity and the official divisions supposedly drawing clear-cut lines in the industry, such as those separating representation from production and 'commercial' from 'creative' activities, distinguishing managers from agents, or dividing the making of a movie into successive phases of preproduction, production, and postproduction. *These lines are more blurry in practice:*

of content, the move to premiering new works on direct to consumer SVOD platforms, and the desire to *own* content which can populate those platforms in perpetuity have led to increased vertical integration within production and distribution entities, talent agencies, and across the entertainment media landscape more broadly.[84] With the termination of SAG Rule 16(g), talent agencies were allowed to participate in those broader trends. But talent agencies are uniquely businesses of representation, and with increased vertical integration comes the potential for increased conflicts of interest affecting a talent agency's artist-clients. It is on this front that a war has erupted over packaging and producing between the WGA and the ATA.

As the agencies now push further into producing via newly formed affiliate companies—a path which will inevitably lead them into competition with the studios—the Writers Guild of America is finally pushing back. The WGA has grown increasingly wary of production by agency-affiliated studios,[85] and in 2018 the WGA triggered a one-year termination provision in the WGA AMBA to compel good faith negotiations with the ATA on the first update to the agreement since 1976. The WGA proposed eliminating agency packaging and affiliate producing and returning to a traditional commission model. The agencies contend this would reduce compensation of their artist-clients, but it would also decimate the agencies' bottom lines and disrupt years of strategic investment. The WGA enshrined their proposals unilaterally in a new agency Code of Conduct in April 2019, passed by a membership vote with 95 percent supporting and less than 5 percent opposing the new Code. Many ATA agencies, including the Big Four, argue packaging and producing are crucial to their future business growth—and thus refused to sign the Code of Conduct.[86] By

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they are moved and crossed, and overall collectively drawn by the participants."); Zelenski, *supra* note 21, at 997.

84. *See generally* Elizabeth Schéré, *The Trouble with Mergers Is . . .* , 25 UCLA Ent. L. Rev. 133 (2018).

85. However, top WGA leaders have muddied the waters by engaging in such practices with affiliate-studios of agencies, although at other agencies than where they are represented. *See* Nellie Andreeva, *WGA Negotiator Chris Keyser Shopping Drama Series Produced by Endeavor Content*, Deadline (May 30, 2019, 10:50 AM), https://deadline.com/2019/05/chris-keyser-drama-series-pitch-writers-agencies-fight-the-state-of-affairs-1202624099 [https://perma.cc/LY2T-YRLR] (discussing former WGA West President and WGA Negotiating Committee co-chair David Keyser's deal for a series produced by WME-affiliate studio Endeavor Content, although noting Keyser was a client of CAA); Rebecca Sun & Jonathan Handel, *As Agencies Push to Own Content, Some Creators Cry Foul*, Hollywood Rep. (Sept. 12, 2018, 6:40 AM), https://www.hollywoodreporter.com/features/talent-agencies-push-production-rankles-wga-some-clients-1142009 [https://perma.cc/GTR2-URR5] (discussing WGA East President Beau Willimon's deal for a series produced by Endeavor Content, although noting Willimon was a client of CAA).

86. David Ng, *WGA Sues Four Main Talent Agencies over Packaging Fee Dispute*, L.A. Times (Apr. 17, 2019, 10:46 AM), https://www.latimes.com/entertainment/tv/

April 22, 2019, over seven thousand WGA writers had terminated their representation with agents at ATA-agencies, including the Big Four.[87]

The next week, the WGA brought a lawsuit against the Big Four agencies along with several top-tier television writers as coplaintiffs, alleging that packaging breaches the fiduciary duties owed by agents to their writer-clients. Over the next year, smaller agencies began to sign the new agency Code of Conduct, and a broadcast network television staffing season continued without the large agencies representing their WGA writer-clients. In the midst of this conflict, WME's parent company Endeavor announced its forthcoming, long-rumored IPO on May 23, 2019.[88] However, the company later put its IPO plans on hold for a number of reasons, including a failure to come to an agreement with the WGA.[89] The ATA filed claims against the WGA that changed the venue of the dispute to federal court, and the parties have proposed beginning the trial in March 2021.[90] On April 27, 2020, as this Comment went to publication, the district court hearing the case dismissed some of the WGA's claims against the agencies, but allowed the individual writer-plaintiffs' claims of breach of fiduciary duty caused by packaging to move forward.[91]

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la-fi-ct-wga-agencies-lawsuit-20190417-story.html [https://perma.cc/7WPH-MB5Y] ("The WGA's [C]ode of [C]onduct is a threat to agency business operations." (statement of ATA Executive Director Karen Stuart)).

87. Matt Donnelly, *Writers Guild Says over 7,000 Members Have Fired Agents*, Variety (Apr. 22, 2019, 4:43 PM), https://variety.com/2019/film/news/writers-guild-7000-members-fired-agents-1203194928 [https://perma.cc/MHY3-L7L9].

88. Dade Hayes, *Endeavor Enters New Era, Filing for Long-Expected Public Stock Offering*, Deadline (May 23, 2019, 10:50 AM), https://deadline.com/2019/05/endeavor-enters-new-era-filing-for-long-expected-public-stock-offering-1202621424 [https://perma.cc/YY5U-VLWF].

89. Dade Hayes & Patrick Hipes, *Endeavor Officially Withdraws IPO but Leaves Door Open*, Deadline (Oct. 16, 2019, 3:16 PM), https://deadline.com/2019/10/endeavor-withdraws-ipo-sec-filing-1202762044 [https://perma.cc/FT44-R75G]; *see also* Richard Rushfield, *Ari Emanuel, WME, and the Great Hollywood IPO That Wasn't*, Vanity Fair (Jan. 27, 2020), https://www.vanityfair.com/hollywood/2020/01/ari-emanuel-wme-and-the-great-hollywood-ipo-that-wasn't [https://perma.cc/872V-LPMT].

90. Patrick Hipes, *WGA and Big 3 Agencies Aiming at March 2021 Trial Start*, Deadline (Dec. 27, 2019, 4:32 PM), https://deadline.com/2019/12/wga-agencies-march-2021-trial-start-offered-1202817895 [https://perma.cc/6T2G-ZQ32].

91. Order Granting in Part and Denying in Part Plaintiffs and Counterclaim Defendants' Motion to Dismiss, William Morris Endeavor Entm't, LLC v. Writers Guild of Am. W., Inc., No. 2:19-cv-05465-AB (AFMx), slip op. at 14–15, 15 n.5 (C.D. Cal. Apr. 27, 2020), ECF No. 104, https://pmcdeadline2.files.wordpress.com/2020/04/wme-filing.pdf [https://perma.cc/DLW7-K2B2]. For a continuously updating compendium of the most recent updates in the dispute, see *Story Arc: WGA-ATA Showdown*, Deadline, https://deadline.com/story-arc/wga-ata-showdown [https://perma.cc/MK5D-7SJQ] (last visited May 5, 2020).

II. Fiduciary Duties Owed by Talent Agents to Artist-Clients

Under common law, talent agents and their clients are engaged in an agent-principal relationship.[92] "Accordingly, fiduciary responsibilities attach to the relationship, encompassing the duty to act loyally for the principal's benefit in all matters related to that relationship."[93] California courts assume this relationship in disputes between agents and artists.[94] Surprisingly, the Talent Agencies Act does not directly mention the fiduciary relationship, although the Act's purpose is to protect artists from being taken advantage of by their agents. The oversight in express language may be attributed to the robust agreements in place between the guilds and the agencies at the time of the modern Act's enactment, which included language acknowledging the fiduciary relationship.[95] But even in the absence of an express statutory or contractual provision, under California common law it is clear that agents and their clients are in agent-principal relationship and that agents are fiduciaries of their clients.

A. *Fiduciary Duties Under Common Law*

In the agency law relationship between talent agent and artist-client, the artist-client is the principal and the agent is naturally the agent.[96] A talent agent and performer are specifically used as examples of an agent-principal relationship in the *Restatement (Third) of Agency*.97 An agent owes a fiduciary duty to the principal as a matter of law. This requires that the agent act loyally, in the best interest of the client, and on the client's behalf.[98] Quoting the *Restatement*, courts have noted, "[i]t is undisputed that an agent owes its principal 'a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.'"[99] And that "[t]he duty of loyalty embraces several subsidiary obligations, including . . . the duty 'not to acquire a

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92. Michael P. Zweig & Tal E. Dickstein, *Agent's Breach of Fiduciary Duty and Conflicts of Interest*, *in* 14 Am. Bar Ass'n, Business and Commercial Litigation in Federal Courts § 149:49 (Robert L. Haig ed., 4th ed. 2018).
93. *Id.* (citations omitted).
94. *See, e.g.*, cases cited *infra* note 103.
95. *See* Zweig & Dickstein, *supra* note 92, § 148:49 (noting agreements between the artists' guilds and the talent agencies have acknowledged that "the agent-artist relationship is that of a 'fiduciary'").
96. *See* Restatement (Third) of Agency § 1.01 (Am. Law Inst. 2006); Restatement (Second) of Agency § 1 (Am. Law Inst. 1958).
97. *See* Restatement (Third) of Agency § 1.01; *id.* § 1.01 cmt. c ("Authors, performers, and athletes often retain specialized agents to represent their interests in dealing with third parties."); *see also id.* § 8.08 cmt. c, illus. 2 (using the example of a relationship between a "talent agent" and a performer as an example of an agent-principal relationship).
98. *Id.* § 1.01 cmt. e. "To establish that a relationship is one of agency, it is not necessary to prove its fiduciary character as an element." *Id.*
99. Monterey Bay Military Housing, LLC v. Pinnacle Monterey LLC, 116 F. Supp. 3d 1010, 1025 (N.D. Cal. 2015) (quoting Restatement (Third) of Agency § 8.01).

material benefit from a third party in connection with'" the relationship.[100] The Ninth Circuit has confirmed the *Restatement*'s view that, "Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency."[101] Such a duty could perhaps be waived by contract, such as a guild agreement or personal services agreement between an individual client and the agency. However, many agencies—even the Big Four—often operate without written contracts with their clients.[102] Even for those agencies that do use written agreements, it is not necessarily the case that a waiver of fiduciary rights by an unsophisticated client, for instance, would be enforceable under contract law.

In cases involving talent agents and their clients, courts assume the existence of a fiduciary duty owed to a client by his or her agent. Available judicial opinions focus only whether the duty was breached, without ever questioning whether such a fiduciary duty exists; the existence of the duty is undisputed.[103]

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100. Huong Que, Inc. v. Luu, 150 Cal. App. 4th 400, 416 (2007) (quoting Restatement (Third) of Agency § 8.02). The California Court of Appeals also noted an agent's duty "not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party." *Id.* (quoting Restatement (Third) of Agency § 8.05(2)). Indeed, the California Legislature recently enacted a new law that prohibits agencies from offering their client's "quote" (an industry term indicating an amount of money that the client has in the past accepted for similar work) to prospective employers of their clients, thus indicating the legislature's commitment to upholding fiduciary duties, like confidentiality. *See* Cal. Lab. Code § 432.3(b) (2018) (effective Jan. 1, 2019) ("An employer shall not, orally or in writing, personally or *through an agent*, seek salary history information, including compensation and benefits, about an applicant for employment." (emphasis added)). The law's enactment was intended by the legislature to help lower the gender pay gap across the state, not just in Hollywood, but it nonetheless has had a big effect on the way agents operate when negotiating employment for clients. *See* Mike Fleming Jr., *It Will Soon Be Illegal for Studios to Verify Salary Quotes: Hollywood Dealmakers Brace for California Labor Code 432.3*, Deadline (Dec. 13, 2017, 7:32 AM), https://deadline.com/2017/12/hollywood-dealmaking-california-labor-code-432-3-salary-quotes-1202225985 [https://perma.cc/77YX-LF4P] ("Agents are no longer allowed to tell studios what their client has made, unless they have received written consent from that client. In that case, agents can volunteer the information, but studio execs putting together projects are prohibited from asking for it or using other methods to verify.").

101. United States v. Betts, 511 F.3d 872, 874 n.2 (9th Cir. 2007) (quoting Restatement (Second) of Agency § 387).

102. *See* Jonathan M. Barnett, *Hollywood Deals: Soft Contracts for Hard Markets*, 64 Duke L.J. 605, 622 (2015).

103. *See, e.g.*, Seven Summits Pictures & Mgmt., LLC v. Deschanel, No. BC604072, 2018 WL 1453445, at *2 (Cal. Super. Ct. Feb. 15, 2018) ("The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damages proximately caused by the breach. The duty of loyalty is a fiduciary duty. A fiduciary breaches this duty when engaging in self-interested behavior." (citations omitted)); Jones v. William Morris Agency, No. TAC 16396, 2012 WL 5359503, at *11 (Cal. Labor Comm'r Oct. 10, 2012) ("The sole issue is whether the alleged acts and omissions by WME and argued by [agency client Tommy Lee] Jones constitute a

The issues of whether accepting packaging fees or producing a client's work via affiliate companies constitute material breaches of an agent's duty of loyalty to his client are novel questions for the courts, although they have long been contentiously debated by the guilds and the talent agencies.[104]

B. *Fiduciary Duties Under the California Talent Agencies Act*

The Talent Agencies Act is the specific statutory provision governing the licensing and operation of talent agencies under California law.[105] Although the Act makes no explicit mention of fiduciary duties owed by agents to their artist-clients, the California Supreme Court has made clear that "[e]xploitation of artists by representatives has remained the Act's central concern through subsequent incarnations to the present day."[106] Under the TAA, a talent agency is any "person or corporation who engages in the occupation of procuring . . . or attempting to procure employment or engagements for an artist."[107] The scope of the TAA is limited by definition to "artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises."[108]

As the California Supreme Court has noted, "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.'"[109] These interests are still represented by provisions in the currently governing 1982 Act stating that no talent agency "shall divide fees with an employer, an agent or other employee of an employer,"[110] nor "send or cause to be sent, any artist to any place where the health, safety, or welfare of the artist could be adversely affected, the character of which place the talent agency could have ascertained upon reasonable inquiry."[111]

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material breach of the implied covenant of good faith and fair dealing in an agency relationship . . . . An alternative although similar way to describe the issue is whether WME engaged in acts [materially breaching its duty and nullifying the contract].").

104. The 1976 WGA agreement even acknowledged in its text the distance between the writers' and the talent agents' positions when it came to packaging, alluding to tension between the groups over the issue. *See* WGA AMBA, *supra* note 4, § 6(c)(A).

105. *See* Talent Agencies Act, CAL. LAB. CODE §§ 1700–1700.47 (West 2011).

106. Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 746 (Cal. 2008).

107. CAL. LAB. CODE § 1700.4(a). This exempts talent *managers* from the regulatory scheme, although managers acting as unlicensed agents by procuring employment are most frequently the target of the Act's enforcement. *See infra* notes 126–127 and accompanying text.

108. CAL. LAB. CODE § 1700.4(b).

109. *Blasi*, 174 P.3d at 746 (citations omitted).

110. CAL. LAB. CODE § 1700.39.

111. *Id.* § 1700.33. This Comment does not address whether talent agencies may be in violation of section 1700.33 in light of the many revelations brought forth during the #metoo

In the absence of an explicit fiduciary duty provision, the main protection against conflicts of interest offered artist-clients by the TAA is the provision against fee-splitting with employers.[112] A definition of fee-splitting is not provided by the Act and has not been litigated by the courts.[113] During hearings before the California Legislature, fee-splitting was described as a practice where an agent agrees to pay employers in exchange for the employer's promise not to hire any other artists except those represented by the agency.[114] For a simple example of what this would look like, imagine an employing studio agrees to only hire talent employees represented by a single agency in exchange for payments from that agency to the studio.[115] The employer pays the employee wages, the employee's agent receives a commission on the wages, and the agent

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movement, but many have publicly questioned whether agents were at fault for sending artist-clients to employers about whom agents were aware sexual harassment and assault allegations had been made in the past by other clients, and for abandoning clients to appease retaliating powerful employers. *See, e.g.*, Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, New Yorker (July 27, 2018), https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct [https://perma.cc/NR7B-TJE8]; David Ng & Josh Rottenberg, *As Harvey Weinstein Scandal Spreads, Talent Agencies and Guilds Face Tough Questions*, L.A. Times (Oct. 27, 2017, 6:00 AM), https://www.latimes.com/business/hollywood/la-fi-ct-weinstein-agents-unions-20171027-story.html [https://perma.cc/JZ8K-AC4C]; Megan Twohey et al., *Weinstein's Complicity Machine*, N.Y. Times (Dec. 5, 2017), https://www.nytimes.com/interactive/2017/12/05/us/harvey-weinstein-complicity.html [https://perma.cc/QM6Q-8PKK] ("It is impossible to say how many women might have been spared Mr. Weinstein's alleged sexual aggression had more agents responded with the impulse to act. At C.A.A., at least eight agents had heard about Mr. Weinstein's behavior . . . . Failure to take action in the face of misconduct accusations was hardly limited to cases involving Mr. Weinstein.'"). Similarly, the Act also includes a provision forbidding talent agencies from "knowingly permit[ting] any persons of bad character . . . to . . . be employed in . . . the talent agency." Cal Lab. Code § 1700.35. The #metoo movement also brought allegations of agents sexually assaulting agency clients. *See* Mike Fleming Jr., *Adam Venit Retiring from WME as Terry Crews Suit Settled*, Deadline (Sept. 6, 2018, 11:06 AM), https://deadline.com/2018/09/adam-venit-retiring-from-wme-1202458341 [https://perma.cc/X96D-WEUS]; Patrick Hipes & Dominic Patten, *Ex-APA Agent Tyler Grasham Escapes Criminal Charges in L.A.*, Deadline (May 24, 2018, 1:33 PM), https://deadline.com/2018/05/tyler-grasham-no-charges-sexual-assault-hollywood-agent-1202397643 [https://perma.cc/CAQ8-ZE82].

112. *See* Cal. Lab. Code § 1700.39.

113. *See* James M. O'Brien III, *Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists*, 80 Calif. L. Rev. 471, 480 n.47 (1992).

114. *Id.* (citing *The Licensing and Regulation of Artists Managers, Personal Managers, and Musicians Booking Agencies: Hearings Before the S. Comm. on Industrial Relations* A-6 (Cal. 1975) (statement of entertainment and labor attorney Walter L.M. Lorimer)).

115. This arrangement would be a classic kickback scheme. *See* Alexandra Addison Wrage, Bribery and Extortion: Undermining Business, Governments, and Security 14 (2007).

pays part of the commission back to the employer. Such a scheme would constitute such an impermissible fee-splitting arrangement under the Act.[116]

The Act does include a section regarding "conflicts of interest" but it only applies to mysterious "other services." The clause prevents a talent agency from "refer[ring] an artist to any person, firm, or corporation in which the talent agency has a direct or indirect financial interest for *other services to be rendered to the artist*"—such as talent management, classes or coaching, or audition reel production—and prohibits agencies from accepting "any referral fee or similar" kickbacks from such services.[117] Labor law experts say this clause is open to interpretation in a way that could pose problems for agency-affiliated productions: "That language is broad enough to arguably say to a talent agent that you can't direct your clients into [employment] in which you have an ownership or other financial interest."[118]

The weakness of the TAA's language in delineating the fiduciary duties of agents and failing to address packaging and producing directly can be attributed to several factors. By industry custom, producing by the talent agencies has been considered verboten since the U.S. Department of Justice intervened to break up MCA in 1962, demanding its talent agency business and its production business be split into separate, unrelated corporations.[119] Legislators may not have felt it necessary to spell out this industry custom in statute. It also reflects the perceived strength of the existing guild regulations at the time the TAA was last amended in 1982. Those guild regulations more explicitly restricted conflicts of interest by conditioning agencies' ability to represent union talent on a promise to prevent conflicts of interest that would align the agent's interests with that of his client's employer, and were thus seen as robust enough to not require additional government regulation on the issue.[120] Finally, the enormous influence of the large talent agencies on state and national politicians and public officials—many of whom are themselves historically and/or currently represented by big agencies—may help explain the initial vagueness of the statute and why it has not been amended since.[121]

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116. However, this clause would not seem to cover packaging, which involves payments made *to* the agency *from* the artist-client's employer, the studio. *See infra* Subpart III.A.
117. Cal. Lab. Code § 1700.40(b)–(c) (emphasis added).
118. Littleton, *supra* note 32 (quoting a "veteran" Hollywood labor attorney).
119. *See* Dave McNary, *Writers Guild, Hollywood Agents Negotiate with Deadline Looming*, Variety (Mar. 21, 2019, 6:47 PM), https://variety.com/2019/film/news/writers-guild-hollywood-agents-negotiations-1203169747 [https://perma.cc/AM2B-34EY]; *supra* notes 32–37 and accompanying text.
120. *See infra* Subpart II.C.
121. *See* David Ng, *Talent Agencies Are Reshaping Their Roles in Hollywood. Not Everyone Is Happy About That*, L.A. Times (Apr. 6, 2018, 4:45 PM), https://www.latimes.com/business/hollywood/la-fi-ct-talent-agencies-20180406-story.html [https://perma.cc/6QQ3-LSS7] (noting President Trump's former talent agent was Endeavor CEO Ari Emanuel); Lucas Shaw, *Hollywood Talent Giant Buys Speaking Agency of Obamas,*

Big agencies are not only powerful entities in their own right; they also represent very powerful people.

The Act contains several other provisions requiring the Labor Commissioner's approval for sales of interest in a talent agency and for annual renewal of an agency's license, applications for which must identify all persons "financially interested either as partners, associates or profit sharers" in the agency.[122] The Labor Commissioner must expressly approve any "[sale], transfer, or [give-away] to any person other than a director, officer, manager, employee, or shareholder of the talent agency" of "any interest in or the right to participate in the profits of the talent agency."[123] We can thus assume that the many recent purchases of interest in talent agencies by outside investors must have been expressly approved by the Labor Commissioner,[124] such as the purchase of a majority stake in CAA by private equity firm TPG Capital in 2014.[125]

In sum, then, the meager protections offered by the Talent Agencies Act do little to protect artist-clients from the increasing conflicts of interest that have arisen in the modern, vertically integrated entertainment media landscape. Perhaps this would explain why most claims brought under the Act have not been brought against talent agents, but instead against talent managers—who are not licensed under the Act and thus prohibited from procuring employment for their clients.[126] Claims have most frequently focused on whether a talent manager illegally acted as an unlicensed talent agent by

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Clintons, Bloomberg (Nov. 8, 2019, 5:00 AM), https://www.bloomberg.com/news/articles/2019-11-08/hollywood-talent-giant-buys-speaking-agency-of-obamas-clintons [https://perma.cc/SW4B-DSSY] (noting WME parent Endeavor's acquisition of the Harry Walker Agency, the speaking agency representing former Presidents Barack Obama and Bill Clinton); Sun & Handel, *supra* note 85 ("Endeavor has formed a PAC, and all the major firms regularly interface with politicians."); CAA *Speakers*, CAA, https://www.caa.com/caaspeakers [https://perma.cc/T4KJ-RAE2] (last visited Apr. 28, 2019) (noting CAA's representation of many highly placed former public officials). Former California Governor Arnold Schwarzenegger is a longtime client of CAA, and remained close with them during his time in the governor's mansion. *See* Arnold Schwarzenegger (@schwarzenegger), Twitter (Feb. 10, 2011, 4:15 PM), https://twitter.com/Schwarzenegger/status/35854389998518272 [https://perma.cc/5TNJ-XCCS] ("Exciting news. My friends at CAA have been asking me for 7 years when they can take offers seriously. Gave them the green light today.").

122. Cal. Lab. Code § 1700.11.

123. *Id.* § 1700.30.

124. *See infra* Subpart III.C.

125. *See* Mike Fleming Jr., *TPG Spends $225 Million in Deal That Ups Stake in CAA to 53%*, Deadline (Oct. 20, 2014, 10:57 AM), https://deadline.com/2014/10/caa-sells-majority-stake-to-tpg-225-million-855694 [https://perma.cc/QZB5-XVDN].

126. *See, e.g.*, Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 750 (Cal. 2008). Notably, the California Supreme Court declined to decide "what precisely constitutes 'procurement' under the Act. The 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 into procurement." *Id.*

procuring employment.[127] Ironically, the Act has rarely been used to enforce its protections against the talent agents it purports to regulate.

Why artist-clients do not often bring claims against their talent agents under the TAA may be attributed to a valid fear of retribution by the powerful large agencies,[128] a lack of legal precedent and widespread industry confusion regarding the duties of talent agents to artist-clients under the law, and the enormous influence of the large talent agencies on both public officials and guild leaders—many of whom are themselves represented by the big agencies.[129]

C. *Fiduciary Duties Under Previously Governing Guild Regulations*

The fiduciary relationship between artists and their agents were historically acknowledged by two major agreements between the guilds and the major agencies already firmly in place at the time the modern TAA was enacted[130]: the WGA Artists' Manager Basic Agreement of 1976 (WGA AMBA) and SAG Rule 16(g).[131] Although the provisions of these agreements bound the agencies for many decades, today they no longer constrain the Big Four since the ATA withdrew from the SAG agreement in 2002 and the WGA terminated the AMBA in 2019. Discussion of these agreements' provisions is included in this Comment to illuminate the contractual scheme under which the parties operated for most of their existence.

SAG Rule 16(g)—the important yet unremarkably named eighty-nine-page document of codified SAG-agency regulations—stated clearly that "[t]he agent's relationship to the actor shall be that of a fiduciary."[132] The agent also

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127. *See generally* Zelenski, *supra* note 21. For most of the Act's existence this could result in extreme consequences for talent managers: the rescission of *all* commissions rendered to the manager by the client under a voided contract in the past year. Birdthistle, *supra* note 18, at 516–17; Zelenski, *supra* note 21, at 985. However, that remedy was defanged by the California Supreme Court in *Marathon Entertainment, Inc. v. Blasi*, where the court held severability applied to the representation contracts and so the Labor Commissioner could choose to limit rescission to only fees generated from the single illegally-procured employment gig rather than rescinding all fees paid under the contract. *See Blasi*, 174 P.3d at 743–44.

128. *See, e.g.*, Ng, *supra* note 121 ("Everyone on the talent side is afraid to challenge the agencies for fear of being blackballed." (statement of entertainment attorney)).

129. *See supra* notes 85, 121.

130. *See* Zelenski, *supra* note 21, at 989 ("Performing in the entertainment industry is one of the most highly unionized occupations in American industry, so it is unsurprising that in addition to the TAA, a large body of private law has developed to regulate artists' representatives." (citation omitted)).

131. This Comment only focuses on WGA and SAG regulation, although "[a]ll of the[] guilds have sought to establish appropriate standards for agents who represent guild members in individual negotiations." *Id.*

132. SAG Rule 16(g), *supra* note 3, § IV(H)(6)(a). It goes on to provide that in his or her role as fiduciary, the agent "shall have all the obligations of a trustee as set forth in Sections 2228 to 2239, inclusive, of the Civil Code of the State of California as each existed on June 30, 1987." *Id.* These obligations included the obligation to act in good faith, to

owed "the duty to the actor to consider only the interests of the actor in any dealings for the actor, and shall never consider or act upon the interests of the agent when such interests are adverse to the interests of the actor."[133]

SAG Rule 16(g) also placed important restrictions upon talent agencies to prevent their temptation to engage in self-dealing. One provision barred SAG-franchised agencies from allowing outside investment in the agencies, ensuring that employers of talent could not gain a financial stake in the agencies.[134] A complementary provision forbade agencies from acquiring financial interests in the work of their clients (and from being an "active motion picture producer") and prohibited ownership of interest in client content, subject to small percentage exceptions or waiver by SAG.[135] Perhaps most significantly,

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not use client property for an agent or agency's own profit and a provision forbidding agents from "taking part in any transaction . . . in which he or anyone [else] for whom he acts as agent has an interest . . . adverse to that of his" client, unless the client permits it with "full knowledge of the motives of the [agent] and of all other facts which might affect his own decision, and without the use of any influence on the part of the [agent]." CAL. CIV. CODE § 2228–2231 (Deering 1986) (operative until July 1, 1987). It also included fiduciary duties of the agent to not assume an interest adverse to the interest of a client without client consent, to "immediately" disclose any adverse interest to a client, and mandated a legal presumption against the agent with the clear statement that a violation of the foregoing would make the agent "guilty of fraud" against the client. *Id.* § 2233–2235.

133. SAG RULE 16(G), *supra* note 3, § IV(H)(9); *see also id.* § XVII(A) ("It shall never be deemed to be a violation of these Regulations or a breach of any agency contract for an agent to be over-zealous in representing the interests of the client."). However, Rule 16(g) also expressly provides that "[t]he agent may represent actors of the same general qualifications and eligible for the same parts or roles. Such representations shall not constitute a violation of the fiduciary obligation." *Id.* § IV(H)(8). This provision thus eliminates the agent's obligation to act only on behalf of one client at a time, allowing agents to represent two or more clients who may be in competition for the same role.

134. *Id.* § XVI(A) ("[N]o person, firm or corporation engaged or employed in the production or distribution of motion pictures or owning any interest in any company so producing or distributing, shall own any interest in an agent, directly or indirectly, nor shall any such person, firm or corporation own or control any indebtedness of the agent or of any of its owners, nor shall any such person, firm or corporation share in the profits of the agent.").

135. *Id.* § XVI(B) ("An agent or an owner of an interest in an agent shall not be an active motion picture producer . . . . [A]n agent or an owner of an interest in an agent shall not engage in the production or distribution of motion pictures or own or control, directly or indirectly, any interest in a motion picture producing or distributing company."). *But see id.* § XVI(C)(1)–(2) ("An agent or the owners of an interest in an agent may acquire or receive from one or more clients of such agent or as the nominee of such client or clients an interest in a motion picture producing or distributing company (herein designated as 'an interested company') but in no event may such interest exceed in the aggregate ten percent (10%) of the total amount owned by such client or clients of the agent in such company . . . . [T]he guaranteed compensation payable to the client by an interested company shall not be less than the customary guaranteed compensation theretofore received by such client for such services."); *id.* § XVI(D) ("An agent or the

because the rules applied to the agency at-large, not just representatives of SAG members, *all artist-clients of a SAG-franchised talent agency benefited from SAG Rule 16(g)*.

These barriers between agents and clients' employers went directly to the guild's "requirement of agent independence. Essentially the rule prohibit[ed] agents from producing or owning pieces of their clients' work."[136] This is important because "by prohibiting agents from acting as producers, the guilds eliminate[d] the possibility of agents' acting simultaneously as their clients' representatives and as their clients' employers."[137] Before its suspension in 2002,[138] the restrictions found in SAG Rule 16(g) bound agents with a specificity not found in the WGA AMBA or the TAA.

The WGA AMBA outlined the minimum terms for WGA members' representation by franchised agents.[139] In a section on agents' "Fiduciary Obligations to Writers" the contract required that "[t]he [Agent] shall act with reasonable diligence, care, and skill at all times in the interest of his Writer-Client and shall not act against his Writer-Client's interest."[140] The WGA AMBA was silent as to direct producing by talent agencies, the mention of which may have been seen as unnecessary since WGA members benefitted from SAG restrictions on agency behavior. Both the WGA and the SAG agreements specifically allowed for packaging.[141]

Although ATA-member agencies, including the Big Four, are not currently bound by either the SAG Rule 16(g) or the WGA AMBA, many smaller

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owners of an agent may own not to exceed in the aggregate five percent (5%) of the stock, bonds, or other securities of a motion picture producing company listed on any recognized stock exchange.").

136. Zelenski, *supra* note 21, at 990 (citations omitted).

137. *Id.* at 980.

138. *See generally* Shope, *supra* note 70, and text accompanying notes 69–79.

139. *See* WGA AMBA, *supra* note 4, § 6(c). The term "Artists' Manager" is used for "Agent" throughout the contract, which is confusing in light of the important modern distinctions between agents and managers. In 1976, the Association of Talent Agents was still known as the Artists' Managers Guild. The organization dates back to 1937. *About ATA*, Ass'n Talent Agents, http://www.agentassociation.com/index.php?submenu=about_ata&src=gendocs&ref=AboutATA&category=AboutATA [https://perma.cc/V5SD-W39V] (last visited Mar. 10, 2019) ("The birth of ATA . . . is tied substantially to the proliferation of talent unions and guilds that formed after the Supreme Court upheld the Wagner Act also known as the National Labor Relations Act (1935).").

140. WGA AMBA, *supra* note 4, § 8(e). Like SAG Rule 16(g), the WGA AMBA also stated that agents owe a duty of disclosure to clients of the names of other clients of the agency whom the agent believes to be competitive to the writer. *Compare id.* § 8(d), *with* SAG Rule 16(g), *supra* note 3, § IV(H)(8), *and* discussion *supra* note 133; *see also* discussion *supra* note 14. Choosing among clients to promote for the same writing job may also create a conflict of interest between two clients for an agent, but this is different from conflicts of interest that might arise between a client and the agency itself, such as those created by packaging and producing.

141. *See* SAG Rule 16(g), *supra* note 3, § V(A)(7); WGA AMBA, *supra* note 4, § 6(c).

talent agencies *do* continue to abide by these agreements. Additionally, many small, non-ATA agencies continue to be franchised by SAG-AFTRA and abide by the strictures of Rule 16(g).[142] More recently, some small and midsize agencies, including some ATA members (although none of the Big Four) have even signed the WGA's new Code of Conduct, as discussed in Part IV of this Comment, and continue to represent WGA-member writer-clients.[143]

III. Conflicts of Interest Inherent in Agency Packaging and Producing

The practices of packaging and producing by talent agencies create the potential for serious conflicts that may leave artist-clients questioning whose interests their agents are serving: the client's or the agency's. Agents represent artist-clients in selling their creative services or intellectual property. When agents take a financial stake in the production budget and net profits of a television show by charging their client's employer a packaging fee, rather than taking commissions on their clients' earnings as under the traditional agent model, they gain a financial stake in the work of their clients directly from the clients' employers. When talent agencies engage their clients' services or purchase their clients' intellectual property to produce content directly through agency-affiliated studios, they effectively enter into an employment relationship with their own clients. Packaging and producing therefore tie the talent agency's financial interests to the *employer's interests* at the very moment that the agent's primary function is supposed to be representing the best interests of their artist-client, the *employee*, in dealings with a client's prospective or current employer. The entertainment industry's acquiescence to packaging and producing does not mean that those practices are legally permissible. These practices violate agents' common law fiduciary obligations to their clients, and they are no longer plausibly waived as they were under now-terminated guild agreements.[144]

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142. However, by and large these are Roussel's "Little Hollywood" talent agencies which continue to operate on traditional commission models, and whose businesses are wholly different than those of big agencies. *See* Roussel, *supra* note 6, at 31 ("[W]e could go as far as to say that they practice different professions.").

143. As of March 23, 2020, Paradigm, APA, Gersh, and Verve, among other agencies, have signed new agreements with the WGA that include additional modifiers to the new Code of Conduct, including phasing out packaging over time and allowing minor interests only in affiliate production. *See* Mike Fleming Jr., *Paradigm Signs 5-Year WGA Franchise Agreement*, Deadline (Mar. 23, 2020, 12:00 PM), https://deadline.com/2020/03/paradigm-signs-5-year-wga-franchise-agreement-1202890444 [https://perma.cc/TM7E-M5NH]; Nellie Andreeva & David Robb, *Gersh Agency Signs Deal with the WGA; New Franchise Agreement Extends Sunset Date—Update*, Deadline (Jan. 17, 2020, 4:52 PM), https://deadline.com/2020/01/gersh-deal-with-the-wga-1202834120 [https://perma.cc/G4VN-HR36].

144. *See* sources cited *supra* note 141. However, these obligations could conceivably be

The financial interest gained by an agency in a client's work through a packaging fee might be described as indirect, since the agency does not exercise direct control over the employment relationship with the client. But as the agency negotiates its own separate arrangement with its clients' employer for its own benefit—the packaging fee—the agent becomes a principal party to the deal itself, and is no longer merely acting in a representative capacity for the client.[145] Additionally, the packaging agency often gains a significant measure of influence over the production, which can become a problem when the agent's interest is tied to the studio instead of the client.[146]

The financial benefits of packaging to the agencies are significant, and the revenues from longrunning broadcast television shows which have enjoyed extensive subsequent syndication and other relicensing has been crucial to the agencies' growth and attraction of outside investors.[147] However, packaging revenues are on the decline,[148] and the battle the WGA is waging over the longstanding practice is merely leverage to win the war of the future: whether agencies should be allowed to produce their clients' work through affiliate entities.

With extraordinary access to top talent and intellectual property, agency-affiliate studios have the potential to be a major revenue-generator for agencies' parent companies, but they also threaten to undermine the principal-agent relationship between client and agent by turning it into one of employee and constructive employer. The conflict created when an agency uses an agency-affiliate studio to *produce* a client's work is therefore more direct than the conflict in packaging, because it places the agency in the position of employing the agency's own client through an affiliate production company or studio. This means the agent is negotiating on behalf of the client with a company that shares ownership with the agency. Since the agency and the production company owe duties to the mutual parent company, there is the risk the duties of the agent become aligned with the production company rather than the client, who is relying on the agent to obtain the best possible terms for the client's employment.

Employment by agency-affiliate company was not specifically contemplated by the WGA AMBA, but it was proscribed by SAG Rule 16(g).[149] Perhaps more importantly, any business combining a talent agency and a

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waived by individual personal service contracts. *See supra* text accompanying note 102.

145. Bielby & Bielby, *supra* note 8, at 45 ("These agencies operate as principals, not just as agents.").

146. Zelenski, *supra* note 21, at 999; *see infra* text accompanying notes 167–168.

147. *See supra* text accompanying notes 54–58, 78–82.

148. *See infra* text accompanying notes 173–175.

149. SAG Rule 16(g), *supra* note 3, § XVI(B); Littleton, *supra* note 32 ("The practice, known in industry jargon as double-dipping, was expressly banned by the Screen Actors Guild for nearly 60 years.").

content studio was presumed illegal by industry custom after the Department of Justice demanded that MCA, upon its acquisition of Universal Pictures and Decca Records in addition to its booming television production business, dissolve its talent agency in exchange for the dropping of federal antitrust charges in 1962.[150]

These conflicts of interest are further aggravated by the vertical integration of other businesses into the agencies and outside ownership. An explosion in outside investment has resulted in an increased focus on agency profit margins, and indeed some big agencies are now majority-owned by outside investors. This significant outside investment was only made possible by the termination of the ATA agreement with SAG mandating compliance with Rule 16(g). The talent agency now has a duty to its shareholders—often private equity firms—to maximize shareholder profits. At the same time, a parent company's other affiliated companies may be employing an agency's artist-clients for films, television, or advertising work—work that the agency-affiliated studio will own outright and from which it will be able to profit, as well as work on which the agency will earn a package fee. The agency affiliate may undercut traditional studio buyers by offering artists more favorable compensation than the deal they know a traditional studio will offer.[151]

Can an individual agent truly put a client's best interests ahead of the interests of the agent's employer—the agency—*and* the agencies' parent and affiliated companies? In other words: Can an agent in today's entertainment industry actually discharge their duties as a fiduciary of their artist-clients in such circumstances? Artist-clients rely on their agents to represent their concerns to their employer—the studio—when conflicts arise over creative decisions and employment terms.[152] These are the moments when agents are expected to intervene, to negotiate with the studio regarding a disagreement with a client, and advocate in their artist-client's best interests. However, when the studio and the agency's interests are financially-tied, whether through a packaging fee paid by the studio to the agency or when an agency-affiliated company produces and owns a client's work outright, the agency's own corporate interests become aligned with those of the client's employer. These conflicts negate the value of independent representation that talent agents are supposed to provide, subvert the legislative intent of the Talent Agencies Act, and breach the fiduciary duties agents owe their clients under agency law.

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150. *See* McDougal, *supra* note 35, at 297–301; Ng, *supra* note 121.

151. Littleton, *supra* note 32 (explaining how WME offered client Steve Harvey "a larger ownership stake, lower overhead costs, more creative control and a big salary boost" to turn down the renewal offer from the studio for Harvey's hit syndicated talk show and to partner with a WME-affiliated studio instead on future seasons).

152. Catherine L. Fisk, *Hollywood Writers and the Gig Economy*, 2017 U. Chi. Legal F. 177, 201.

A. *Packaging*

It was often said that "'packaging fees' are two dirty words nobody wants to talk about in the TV industry."[153] Packaging is a longstanding practice surviving since the early years of scripted television and was previously permitted under SAG Rule 16(g) and the WGA AMBA for their effective history.[154] However, since the termination of those agreements, and in the absence of other valid written agreements constituting a waiver on behalf on behalf of clients, packaging arguably breaches the fiduciary duties agents owe their clients under common law and the purpose of the Talent Agencies Act. These breaches are caused by the alignment of the agent's financial interests with the interests of the client's employer in a packaging arrangement, thus resulting in reduced contingent compensation for successful clients in comparison to what they might receive under a traditional commission scheme. Because package fees ultimately cut into production budgets, they also reduce the financial resources available to hiring additional actors or writers or increase the compensation of existing employees. The billing structure of packaging fees, which are deducted on the back-end "off the top" of net profits *before* the client's share of profits is calculated, further exacerbates the breach of duty.

As explained by David Zelenski in his excellent comment, cited at length by the California Supreme Court in their seminal ruling on the TAA, *Marathon Entertainment, Inc. v. Blasi*[155]:

> [a]gents function as packagers when they put together teams of clients—for example, writers, directors, and actors—and sell those teams to employers for percentage fees instead of commissioning each separate client's deal individually. Typically, the package fee is 10% of the production's entire budget, rather than 10% of each client's individual salary. Agents can charge such high amounts because . . . franchise agreements only restrict amounts that *clients* can be charged, not amounts that *employers* can be charged.

This process resembles producing in two ways. First, it enables agents to earn producer-sized fees. Ten percent of an entire budget, after all, is much more than 10 percent of each client's salary. Second, it enables agents to exercise control over production development. So long as they represent bankable artists whom employers want to hire, they can force those employers to hire less-bankable artists as part of the package deal. Packaging agents, in other words, come to the negotiations table with substantial bargaining power, and they can leverage that bargaining power into a final say over which artists get

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153. *Packaging Prime Time*, *supra* note 48; *see also* Gavin Polone, *Gavin Polone on TV's Dirty Secret: Your Agent Gets Money for Nothing (Guest Column)*, Hollywood Rep. (Mar. 26, 2015, 8:00 AM), https://www.hollywoodreporter.com/news/gavin-polone-tvs-dirty-secret-783941 [https://perma.cc/A9RG-S9FB].

154. *See* SAG Rule 16(g), *supra* note 3, § V(A)(7); WGA AMBA, *supra* note 4, § 6(c).

155. Marathon Entm't, Inc. v. Blasi, 174 P.3d 741 *passim* (Cal. 2008).

hired. Essentially, agents get to make the decisions that traditionally have been made by employers.[156]

Packaging, however, is limited to big agencies representing star talent that "are in a position to package a star in a project and can therefore be in charge of 'pitching a project,' as opposed to 'pitching a client' for a given role . . . being cast" in a project that has already been greenlighted or a television series already in production.[157]

Today, a standard television package fee follows what is knowns as a "3-3-10" structure. The agency receives a payment of three percent of the base license fee of the show up front and another three percent deferred until the studio has recouped its production costs. Once the studio has recouped and the series has entered net profits, the agency receives up to ten percent of the net profits (the back-end) off the top, taken before other the profit participants—the agency's artist-clients—receive their shares of net proceeds.[158]

When packaging, instead of making ten percent of *their clients' earnings* on a project as under a traditional agent-client model, agencies collect percentages of the entire production budget. The agencies then receive their portion of the back-end off the top *before* an artist-client receives their pro rata share of the profits, rather than *pari passu* with the artist-client and other participants. For this reason, on a successful series, the packaging agency may end up far out-earning a writer merely for setting up the packaged project with the studio—and this could be so even if the agency no longer represents the artist-client after the creation of the series.[159]

Entertainment lawyer Jonathan Handel explained the appeal of packaging fees to agencies succinctly:

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156. Zelenski, *supra* note 21, at 999 (citations omitted).

157. Roussel, *supra* note 6, at 32. "[U]nlike Big Hollywood agents—who can act as project architects through packaging and handling star talent—smaller agencies enter the fray only later on, when a film has been green-lighted and the casting phase begins, struggling then to get a job for the (lesser known or unknown) clients they have sometimes personally 'discovered' and brought into professionality." *Id.* at 33.

158. Polone, *supra* note 153. The base license fee is itself a large share (or more) of the production budget paid by the initial exhibitor of the series. *See* Michelle Castillo, *Netflix Tries a Different Model for TV Shows, Paying More Up Front but Keeping More Later on Big Hits, Insiders Say*, CNBC (Aug. 15, 2018, 4:59 PM), https://www.cnbc.com/2018/08/15/netflix-cost-plus-model-tv-shows-revenue-upside.html [https://perma.cc/5FE9-XSCH].

159. *See* Roussel, *supra* note 6, at 6 ("Orchestrating preproduction, from a central position in a highly collective game, is the domain of the motion picture literary agent. When production starts, his role comes to an end."). Former talent agent Gavin Polone offered a detailed hypothetical for how an agency's packaging fees may easily outearn a client's compensation on a television show created by the client, and by how much. *See* Polone, *supra* note 153 ("[Packaging] sometimes . . . just means negotiating a client's deal (and maybe not even that, as lawyers often do the negotiating) . . . . In many cases, the total payments to the agency are more than what the agency's client—on whose back it leveraged the package—makes on the show.").

> Why do the top agencies love packaging fees? Because successful shows can be highly profitable, even if few and far between. Plus, package fees are a durable asset that pays in perpetuity even if the client leaves the show or the agency. That pleases agency owners and investors (who also especially love affiliate production . . .). And agents say that many clients are happier because they like not having to pay commissions.[160]

The potential breaches of fiduciary duty inherent to packaging were recently enumerated by attorneys for the WGA and individual writer-client plaintiffs in a lawsuit filed after the expiration of the WGA's franchise agreement with the ATA-agencies. In their suit against the Big Four agencies, the WGA alleged that packaging causes agents to willfully breach their fiduciary duties to their clients in three ways: (1) by placing the agency's "own interests above that of its clients," (2) by "increasing its own profits at the expense of" its clients, and (3) "by proceeding with the representation under numerous conflicts of interest without obtaining valid, informed consent to those conflicts of interest" from its clients.[161] The WGA asked the court to enjoin the Big Four from receiving packaging fees and to declare the practice unlawful.[162]

The WGA believes packaging violates not only California law because it breaches fiduciary duties to clients, but also "[s]ection 302 of the federal Labor-Management Relations Act ("LMRA"), the so-called 'anti-kickback' provision of the Taft-Hartley Act."[163]

Section 302(a) of the LMRA makes it illegal for an employer to pay or give anything of value to "any representative of any of his employees" while section 302(b) makes it unlawful for a representative to request any such money or property under subsection (a).[164] Under the WGA's view, employers agreeing to pay a package fee would be in violation of section 302(a) and an agency requesting, receiving, or agreeing to receive a package fee would be in violation of section 302(b).

The issues of whether packaging fees, a longstanding industry custom, breach fiduciary duties or are illegal kickbacks under the Taft-Hartley Act are seemingly novel ones for the courts. Packaging fees were, of course, specifically provided for under the WGA AMBA and SAG Rule 16(g), but the inclusion of these provisions reflects the long history of agencies' contentious relationship

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160. Jonathan Handel, *Television Packaging Deals: All the Confusing Questions Answered*, Hollywood Rep. (Apr. 3, 2019, 6:00 AM), https://www.hollywoodreporter.com/news/what-exactly-are-packaging-fees-a-writers-agents-explainer-1198974 [https://perma.cc/6CR2-QGG4].

161. First Amended Complaint at 20–22, Writers Guild of Am. W., Inc. v. WME Entm't, No. 19SMCV00725 (Cal. Super. Ct. May 20, 2019), https://www.wga.org/uploadedfiles/news_and_events/press_room/2019/wga_complaint_5-19.pdf [https://perma.cc/S9MC-JJCQ].

162. *See id.* at 4.

163. *Id.* at 31 (citing 29 U.S.C. § 186 (West 2018)).

164. 29 U.S.C. § 186(a)–(b).

with the guilds over the issue to begin with. Indeed, "packaging was a major issue in 1976 when the WGA renegotiated the [AMBA] with the [ATA]."[165]

However, things have changed since 1976. When the WGA AMBA was negotiated, cable channels were just coming on the market and joining broadcast networks. Home video had not yet been invented, and the myriad licensing opportunities of digital media were still far from creation. In 1976, a film made money at the box office, and perhaps additional fees with subsequent licensing to television. Scripted television shows were aired only on domestic broadcast networks in their initial broadcast, then perhaps later relicensed to foreign networks.

In later decades, by contrast, film and television content was monetized across a number of revenue generating sequential windows after an initial theatrical release or television broadcast.[166] This means that for hit programs, the period of time in which a project generates revenue can continue long after the initial form of distribution. Talent is generally paid wages or a fee to cover initial distribution, and then guild residuals for subsequent uses of a motion picture or television episode. Top tier individual clients, whom an agency may package together to entice a studio buyer, may also receive back-end compensation after studio recoupment as part of their deals.

Tying the agency's interests to those of the employer-producer can result in agents not acting in their client's best interests when they are at odds with the best interests of the agency. In the classic example, it is in the employer's best interests to keep production costs down, to ensure production will be able to eventually recoup its costs. For instance, a studio or network will pressure a television writer-producer to cut costs, and the writer will want her agent to push back against the studio so the she can have the most resources possible to execute her vision in production. However, when the agency's own

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165. *Packaging Prime Time*, *supra* note 48; *see* WGA AMBA, *supra* note 4, § 6(c)(A). "The position of WGA negotiator was created as part of the renegotiated AMBA in 1976 expressly to address the multiple allegiance issue . . . . Any writer who is represented by an agency that is packaging his or her show can use the WGA negotiator to negotiate the contract." *Packaging Prime Time*, *supra* note 48. The WGA Negotiator has never been used. Lecture by Lise Anderson, Assistant Exec. Dir., WGA West at UCLA School of Law (Mar. 4, 2019) (notes on file with author); *see also* Arlin Miller, *How the WGA-ATA Tug of War Is Flipping the Script in Hollywood and What's Next*, SAG Watchdog (Apr. 3, 2019), https://www.sagwatchdog.com/wp/2019/04/03/how-the-wga-ata-tug-of-war-is-flipping-the-script-in-hollywood-and-whats-next [https://perma.cc/HE75-RDKR].

166. *See, e.g.*, Castillo, *supra* note 158; Melanie D. Miller, *Attention Filmmakers: Here's Everything You Need to Know About Release Windows*, IndieWire (Jan. 14, 2015, 1:04 PM), https://www.indiewire.com/2015/01/attention-filmmakers-heres-everything-you-need-to-know-about-release-windows-66295 [https://perma.cc/37R5-NWGU]; *see also* Ken Ziffren, *How Talent Paydays Are Evolving as Studios Become Streamers (Guest Column)*, Hollywood Rep. (Feb. 6, 2020, 6:30 AM), https://www.hollywoodreporter.com/news/ken-ziffren-how-talent-deals-are-evolving-as-studios-become-streamers-guest-column-1274871 [https://perma.cc/UN6X-HJPA].

financial interest is tied to the cost of the entire production, the agency may want to keep production costs down: to increase the chances the show will recoup and that the agency will receive their large share of net profits which is part of the package fee. Thus, the agency's interests become aligned with the studio's—the employer of the artist-client—at the very moment the artist-client is relying on the agent to advocate for her interests to her employer. In other words, in order to discharge its duty to the artist-client, the agency must directly advocate against its own financial interests.

When it comes to cutting production costs however, the three percent of the budget which goes to the upfront part of the packaging fee is sacrosanct. Law professor Catherine Fisk detailed a typical situation in which one writer was placed:

> [A] writer described the experience of a showrunner who was pressured by a network and studio to cut production costs because of declining ratings. The network and studio demanded that the showrunner cut $600,000 from the budget, even if it meant cutting "$50 a week from the assistants," but they refused even to consider cutting the $75,000 per episode package fee paid to the talent agency even though the agency had done nothing to earn it except introduce the showrunner to a big-name producer several years before.[167]

This issue of valuable production resources being diverted to the agency packaging fee instead of being spent on employees and production costs comes up again and again. A network executive may call up to say, "'You can't have as many characters . . . you're getting too expensive. You're going to have to fire some actors [or tell the actors they're going to make less money].'"[168] And yet, networks are unwilling to fight the agencies on the packaging fee, despite the fact that this fee is invisible on the screen—unlike the very real value added by employing more actors or writers, or adding additional locations, props, or effects—and is thus of no value to the eventual consumer in whether they will turn into a particular show on that network. Studios and networks are hesitant to take a stand against packaging fees, for fear of losing access to agency packages to their competitors.[169] Among themselves, studio executives have long accepted packaging fees as a fact of life; and industry insiders frequently describe the practice as akin to "paying money to the mob for protection."[170]

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167. Fisk, *supra* note 152, at 198.
168. *Id.* (quoting the words of a network executive to a television writer/showrunner).
169. Ng, *supra* note 121 ("The fear is pervasive. 'The studios are afraid of not getting pitches and opportunities if they take a hard line against [packaging fees].'" (quoting an entertainment attorney)).
170. *See, e.g.*, Chris Lindahl, *WGA Ratchets Up Legal Fight, Claims Agencies Use Mob Tactics*, IndieWire (Aug. 19, 2019, 9:44 PM), https://www.indiewire.com/2019/08/writers-guild-of-america-wga-agency-fight-packaging-lawsuit-1202167125 [https://perma.cc/PDK9-BENQ]. For a discussion of the statistics illustrating the extent to which the Big Four dominate the packaging market, see *supra* notes 46–50 and accompanying text.

Finally the extent to which agencies now share packaging fees calls into doubt whether the agencies are doing anything to earn them. "[W]hen TV packaging first evolved from the radio industry, agencies never split packages. Now it's common to have two or even three agencies split a package fee."[171] If different agencies are providing the different components of a package (writer, director, lead cast)—are agents doing anything more to earn a generous packaging fee than they when they procure employment for a client at a ten percent commission?[172] In the case of a split package, probably not, and thus the hefty packaging fee becomes even harder for agents to justify.

However, as the television market (including internet streaming services which provide original content) continues to rapidly diversify, and audience viewership grows increasingly fragmented, packaging fees are unlikely to continue to be the huge drivers of revenue for agencies that they once were.[173] Large packaging fees were dependent on the subsequent resale of popular series with many seasons of episodes to exhibitors other than the initial airing network (over twenty years, "Friends" premiered on NBC, then aired in syndication on TBS, then was made available on Netflix) whereas a new series now may likely premiere on a streaming platform and stay on that platform's library forever, eliminating the ability to generate additional revenue over time through subsequent sales of rights. Without subsequent monetization of rights by secondary distributors for many shows, the value of packaging fees is likely to be less as the entertainment industry moves towards a streaming model. Further, syndication opportunities on cable for shows premiering on broadcast networks have diminished as basic cable networks have opted to produce and air original content of their own rather than licensing secondhand programming, reducing the potential revenues from the most lucrative part of packaging fee: the back-end.[174]

The loss of the DVD market and the shift to series premiering on SVOD platforms (and subsequent loss of later relicensing opportunities) have made series less profitable on the back-end, and thus have diminished the biggest potential payout to the agency from the package fee: their net profits. The ability to relicense hit shows on syndication has made studios less likely to recoup

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171. *Packaging Prime Time*, *supra* note 48; *see also* Johnson & Hontz, *supra* note 54.
172. Polone, *supra* note 153.
173. *See, e.g.*, Littleton, *supra* note 32; Ng, *supra* note 121.
174. Noam Scheiber, *To TV Writers, Pay Fight with Agents Has Another Villain: Wall Street*, N.Y. Times (Apr. 23, 2019), https://www.nytimes.com/2019/04/23/business/media/agents-hollywood-private-equity.html [https://perma.cc/F3EA-PGS5]. With the overall increase in the number of series being made, agencies may be relying more heavily on revenues accumulated from the front part of packaging fees—their percentages of series' production budgets—rather than the back-end. A potential change from reliance on revenues from a larger percentage of the back-end of a few successful shows to a smaller percentage of the production budget for a wide range of shows can be seen shifting the metric of agency packaging revenues from quality to quantity.

their costs, and thus less likely to generate any income to the agency on the back-end of the package fee.[175] For these reasons, the battle over packaging is likely to be less important to the future the industry than the battle over the less-established practice of agency producing.

B. *Producing*

The conventional Hollywood understanding is that "studios 'traffic in content' whereas agencies 'traffic in artists.'"[176] This understanding was born of the legacy of various regulations and decisions mandating that production and distribution remain separate spheres,[177] including the U.S. Department of Justice's antitrust investigation and intervention into MCA, which had been engaging in both the production and distribution of television in addition to its talent agency business.[178] Further, SAG Rule 16(g) specifically proscribed an agent from owning a financial interest in a client's work.

The landscape has changed considerably since the MCA investigation. The FCC's Financial Interest and Syndication Rules (Fin-Syn) were repealed in 1993, paving the way for increased vertical integration in television production and distribution between the studios and networks.[179] ATA agencies, including the Big Four, have operated outside the strictures of SAG Rule 16(g) since the termination of the ATA's SAG franchise contract in 2002. In 2018, President Trump's Department of Justice announced that it would review the Paramount Consent Decrees "to determine whether the decrees should be modified or terminated."[180] Enormous mergers between telecommunications conglomerates and production and television distribution companies have become commonplace with little opposition from the Department of Justice.[181] Similarly, the talent agency business has seen enormous consolidation through mergers and acquisitions with little opposition from the California

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175. Unlike television made for traditional broadcast or cable networks which then may be relicensed for television syndication and/or relicensed to SVOD services, like Netflix or Hulu, episodes made originally for SVOD services have not to-date been relicensed to traditional broadcast or cable television. Lecture by Sandra Stern, President, Lionsgate Television Grp. at UCLA School of Law (Apr. 12, 2019) (notes on file with author).

176. Roussel, *supra* note 6, at 37.

177. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); *see generally* Kenneth Ziffren, *The Need to Rethink the Fin-Syn Reforms*, L.A. Law., May 2005, at 60, https://www.lacba.org/docs/default-source/lal-back-issues/2005-issues/may-2005.pdf [https://perma.cc/Y7S6-C357]; Christopher J. Pepe, Comment, *The Rise and Fall of the FCC's Financial Interest and Syndication Rules*, 1 Vill. Sports & Ent. L.F. 68 (1994).

178. *See* notes 32–37 and accompanying text.

179. *See* Elizabeth Kolbert, *The Media Business: Television*, N.Y. Times, Apr. 12, 1993, at D6, https://www.nytimes.com/1993/04/12/business/the-media-business-television.html [https://perma.cc/4JKK-Q29V].

180. *The Paramount Decrees*, U.S. Dep't Just., https://www.justice.gov/atr/paramount-decree-review [https://perma.cc/6XWC-VD32] (last updated Feb. 20, 2020).

181. *See generally* Schéré, *supra* note 84.

Labor Commissioner (who is required to approve such deals under the TAA), and the Big Four have become affiliates of larger conglomerates, some with aspirations of going public, while smaller agencies have merged to have any chance to compete.[182] Much like in other industries with increased vertical integration and the American economy as a whole,[183] the entertainment business has stratified. The top four studios accounted for over ninety percent box office in 2019, mainly on the backs of franchise films,[184] and mid-budget original features are now an endangered species.[185]

Although producing by talent agencies was historically believed to be off-limits,[186] in the merger-friendly, vertically integrated business climate of the early twenty-first century, the agencies are challenging that conventional wisdom. Producing by talent agencies puts the agency, via its affiliate, in the position of employing the artist-client. But such producing by agencies' affiliates of a client's work likely violates the fiduciary duties the agent owes the client.

From a conflict of interest standpoint, the argument against producing by agencies is stronger than the argument against packaging fees because of the direct nature of the conflict. Although affiliate studios claim to be walled off from their agencies, in practice the level of personnel separation varies widely among agencies.[187] This direct connection puts the agent in the position of having to represent the seller—his artist-client—in a transaction where the buyer is an affiliate of the agent. Is the agent's duty then to secure the most favorable terms for his artist-client or the most favorable terms for his

182. *See* Roussel, *supra* note 6, at 36.

183. *See generally* Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age (2018).

184. *See* Nancy Tartaglione, *2019 Worldwide Box Office Hits $42.5B Record*, Deadline (Jan. 10, 2020, 1:34 PM), https://deadline.com/2020/01/highest-grossing-movie-studios-2019-record-international-global-box-office-market-share-chart-analysis-2020-forecast-1202823471 [https://perma.cc/B38Y-6UNJ] (showing Disney/Fox, Warner Bros., Universal, and Sony together accounted for 92.47 percent of worldwide box office in 2019).

185. *See* Jason Bailey, *How the Death of Mid-Budget Cinema Left a Generation of Iconic Filmmakers MIA*, Flavorwire (Dec. 9, 2014), http://flavorwire.com/492985/how-the-death-of-mid-budget-cinema-left-a-generation-of-iconic-filmmakers-mia [https://perma.cc/EK8X-CBVM] ("[C]ounter-intuitive though it might seem, a studio would rather make a $60 million movie than, say, a $10 million one. Studios are no longer interested in small investments with small return, which aren't worth the time or the money. They want the big enchilada.").

186. *See e.g.*, Roussel, *supra* note 6, at 43 ("While, by law, agents are not supposed to produce and therefore cannot officially be credited in this capacity, interviewees repeatedly claimed such a producing role, expressing the pride they take in these production-like dimensions of agenting."); Zelenski, *supra* note 21, at 1000 ("So long as [agents] package rather than outright produce, they can circumvent the law, which leaves their corresponding conflicts of interest unremedied.").

187. *See* Ng, *supra* note 121.

employer, which itself has a duty to maximize profits for its shareholders? The two duties are in direct conflict. Examples of this structural injustice between buyer and seller can be found in analogous case law. As one California federal judge observed:

> Simply put, if one was buying a car from a salesperson, would one expect to ask and receive worthwhile advice from that salesperson on how to bargain with him to reduce the price of the car? Of course not. The seller and the buyer are on opposite sides of the transaction.[188]

"Some agency executives believe concerns about conflicts of interest are exaggerated since agencies deal with potential conflicts all the time."[189] Most agencies recommend or require an artist-client retain outside counsel in such negotiations.[190] But artist-clients often rely on their agents as their primary source for advice on which deal is best and *why*, and to guide them through the negotiating process, even when a client's lawyer reviews or negotiates the final deal. Agents have a big advantage in having access to and influence over their artist-clients in making professional decisions because of the unusual personal-professional nature of the agent-artist-client relationship and the trust it has historically engendered.[191]

One agent memorably phrased the problem of having an agent-affiliated studio employ a client: "On every show and every movie, there's always a problem where the producer has to call and yell at somebody's agent. What are you going to do in this case—call and yell at yourself?"[192] Even if the client also retains a separate lawyer and talent manager, the lawyer's involvement is usually limited to finalizing the initial contract, and the talent manager may also have a producing role and a financial interest in the client-created work.

Agents argue that the ability of an agency to produce its clients' work benefits the clients in ways that make working with an agency affiliate-studio preferable for an artist-client compared to employment by a traditional third-party studio. They claim this new structure "enable[es] [clients] to pursue projects without having to navigate through the traditional studio system. Instead, clients are theoretically able to conceive, pitch and execute projects entirely within the walls of the agency. 'The idea is to let clients become the studio. That's been the function of it—wrapping services around these clients to allow them to be the studio,' said one talent agency insider."[193] This reflects a sincerely held, longstanding belief within studios and agencies that *clients just*

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188. Yellow Pages Cost Consultants v. GTE Directories Corp., 716 F. Supp. 1306, 1309 n.2 (N.D. Cal. 1989), *vacated by* 951 F.2d 1158 (9th Cir. 1991).
189. Ng, *supra* note 121.
190. See *id.* ("Endeavor's WME frequently encourages clients to have outside counsel working on their behalf and in some cases requires it."); Littleton, *supra* note 32.
191. *See generally* Roussel, *supra* note 6, at 102–22.
192. Littleton, *supra* note 32.
193. Ng, *supra* note 121.

don't care about conflicts of interest—as long as they're making money.[194] The agencies have relied on this core tenet as they have blurred the line between *representing* their clients and *employing* their clients.

According to talent agency logic, where employment by an affiliate-studio of a client's agency *benefits the client*, agencies are able to offer greater compensation and control to their clients to produce their work for an agency-affiliated studio rather than a traditional studio outside the agency.[195] Indeed, the close relationships with artist-clients enjoyed by most agents can be leveraged successfully to persuade a client to make a project with the agency-affiliate studio instead of a traditional studio.[196] Artists rely upon their agents to make informed employment decisions, and agents know what the comparable terms offered by the traditional studio are or will be and can maneuver to craft a more favorable deal from an agency-affiliate studio. This may give agency-affiliate studios an advantage over traditional employers in securing a production deal with talent.

Agencies' interest in producing and owning content themselves can be traced to two major developments in the Hollywood landscape: the market shift among the major studios toward reliance on recognizable intellectual property to build franchises and the rise of the manager-producer. "Owning the material that is at the foundation of any movie—be it a book, a script, a real-life story—gives studios more control over the filmmaking process and diminishes their dependence on writers or stars, and on agencies who represent and sell them."[197] Agencies responded to the major studios' newfound focus

194. *See* Bielby & Bielby, *supra* note 8, at 31 ("Commenting in 1992 on the merger trends among agencies, Joe Roth, then chairman of Twentieth Century Fox . . . observed: 'This indicates what agents are finding out all around—the talent doesn't care about a lack of conflict of interest. The stars don't give a shit about conflict of interest . . . . They're looking for the biggest gorilla that will help them hold a line against the studio." (quoting *The Players*, New Yorker, Oct. 26, 1992, at 36–37)).

195. Littleton, *supra* note 32 ("The level of conflicts can range from questions about how compensation and commission terms are set to how inevitable creative troubles will be handled. Then there's the issue of which clients get offered the hottest properties—although that's nothing new for agencies the size of WME and CAA.").

196. When WME offered Steve Harvey more favorable deal terms to move production of his hit talk show to agency-affiliate IMG Content away from NBCUniversal, which had produced it for the first five seasons, "Inside NBC, there was disbelief bordering on outrage . . . . There was shock that an affiliate of a talent agency would make such a play against NBCUniversal, a huge source of employment for WME clients." *Id.*

197. Roussel, *supra* note 6, at 39. As Roussel keenly observed, in Hollywood:

> [T]he long writers' strike of 2007/08 appeared to the participants as a 'game changer.' At a time when studios were heavily relying on writers to create and develop [original] material, this intense power struggle was a war of nerves challenging the logics of the [studios]. The strike paralyzed their activity for a while . . . . But it also forced them to define another modus operandi that would make them less dependent on cooperative writers. When the strike finally ended, the studios had started successfully experimenting with new manners

on franchise films and decline in the ability of actor's star power to get midsize budget, star-vehicle films made by taking a more active role in the producing and development of midsize, formerly-studio generated but now more "independent" films."[198] For agents, packaging is "a form of meta-creative work. Packaging independent films with domestic and foreign artists, financiers, producers, and distributors is opposed to pure sales activity by the agent."[199]

As packaging of independent films began to look more and more like producing, the shift to fully producing client-driven content was a natural one for talent agencies. Similarly, as revenues from individual packaging fees have declined, so too have syndication and relicensing opportunities (even as the number of packages sold by agencies has significantly increased with the diversification of distribution platforms); the shift from packaging to producing is thus seen as integral to continued growth of revenue streams for the agency or its parent corporation.[200]

Agencies recognize that the right to own content, and then build franchises around it, is a valuable commodity for longterm revenue generation. An agency-affiliated studio can own content it produces in perpetuity and continue to profit from it regardless of whether the agency continues to represent the client who created it. In this view, why should *the studios* be the exclusive entities with the right to profit from produced content and the derivative works it may generate, when the agencies—with their close relationships to talent—are best poised to compete? As several of the Big Four agencies presently are majority-owned by outside shareholders—mostly private equity firms—there is enormous pressure to take advantage of all potential revenue streams and maximize shareholder profits.[201] In this

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> of operating . . . . Studio moguls felt free to state publicly that the vocation of their company was to make film franchises that are internationally lucrative, preferably using studio owned material rather than external material brought in by writers. In a context of rapid decline of domestic film revenue and, conversely, of increased reliance on foreign markets, betting on world-famous superheroes rather than on stars whose international numbers weren't high, or on films genres that don't travel well, appeared as a profitable choice.

Id. at 40–41 (footnote omitted).

198. *See id.* at 43 ("The decline of star power [in response to the rising power of recognizable intellectual property] from which the large agencies used to draw their own leverage affects the balance of power relations between studios and agencies, but it also gives rise to new agenting strategies.").

199. *Id.*

200. *See* Scheiber, *supra* note 174 ("The agencies say one revenue stream from hit shows has declined in recent years, partly because streaming services like Netflix, Amazon and Hulu don't syndicate shows and sell other rights—generating so-called back-end profits—the way traditional studios do. That can reduce the packaging fees that agencies take in from such shows.").

201. *Id.* ("'This agency business is a nice little business, but it's not going to make everyone's dreams come true. If we want to grow, we need to move our model from pure agency

environment, it's hard to imagine a client's interests being prioritized over those of the agency or its affiliate-studio when those interests conflict. "A bustling production business would also be a big selling point to investors if" an agency were to issue an IPO.[202]

Meanwhile, talent managers, long restricted under the Talent Agencies Act from "procuring employment" for artist-clients like licensed talent agents, have had a different advantage: by industry custom, talent managers are permitted to produce.[203] The guilds have consistently supported the managers' right to produce while insisting agents may not produce under the regulatory scheme. This reflects the view among guild membership that talent managers, who often serve far fewer clients than agents and with much more personal attention, are viewed as having a fundamentally different role than agents at big agencies that may individually represent dozens of clients.[204]

Additionally, it reflects the reality that since talent managers are prohibited from procuring employment under the TAA, an agent or lawyer will have to negotiate any opportunity generated for an artist-client by a talent manager, and therefore the conflict is minimized compared to the potential conflict of agents, who are legally permitted to participate in the negotiation of the employment agreement.[205] Whether there is a conflict-of-interest in allowing talent managers, who likely also have fiduciary duties to their clients under common law and guild regulations, to produce their clients' work is an interesting question that deserves more research, but is ultimately not the focus of this Comment.[206]

Talent management companies like 3 Arts Entertainment (3 Arts) are both talent management companies and major producers of film and television. 3 Arts produces projects, including successful television series created by or starring their artist-clients, such as "Parks & Recreation" for actress and writer Amy Poehler, or "Silicon Valley" for writer Mike Judge.[207] Agencies

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commissions and towards ownership.' WME and Creative Artists would later use their cash stockpiles [from private equity investment] to invest in the production of movies and scripted series." (quoting statement of a former CAA agent)).

202. Littleton, *supra* note 32; *see also supra* notes 88–90 and accompanying text (discussing Endeavor's proposed IPO).

203. *See e.g.*, Wilson, *supra* note 22, at 402 ("For the star . . . the personal manager has become by and large a personal producer.").

204. *See* Zelenski, *supra* note 21, at 990–91.

205. *But see id.* at 998 ("To put it simply, many of today's managers are agents-in-managers'-clothing—and they are agents-in-managers'-clothing who easily escape traditional regulations. So long as these 'agents' go unlicensed, their conflicts of interest go unremedied.").

206. *See also* David Robb, *WGA Blasts "Bad Behaviors" of Unfranchised Agents, Lawyers and Managers on Package Fees & Commissions*, Deadline (May 31, 2019 5:53 PM), https://deadline.com/2019/05/wga-blasts-bad-behaviors-unfranchised-agents-lawyers-managers-1202625363 [https://perma.cc/LB6N-5ZAN].

207. Curiously, the motion picture and television studio Lionsgate purchased a majority

have keenly observed the lucrative opportunities available to managers when it comes to producing.[208] In fact, the modern talent management business was jumpstarted by former agents, many of whom wished to be able to also produce, a role foreclosed to licensed agents.[209] The transformation of many former agents into managers helped blur the line between the traditional boundaries of the professions.[210]

Allowing the agencies to produce their clients' work ties the agency's profitability to that of the artist-client's employer, the agency-affiliate studio, and thus places the agency's interests in conflict with those of the client, in whose best interests the agency has a fiduciary duty to act. As production and distribution continue to diversify with the proliferation of new media platforms, and in the absence of revised state regulation, the lines are likely to continue to blur between agent, manager, and producer and between representation and employment, further complicating the situation from a legal perspective.

C. *Exacerbation of Conflicts Caused by Outside Investment in Agencies*

While it is not clear that ownership stakes in the agencies by private equity groups and other outside investors are breaches of fiduciary duty in their own right, there is no doubt that they have complicated and exacerbated the potential for conflicts of interest in the agent-client relationship.[211] Several of the Big Four agencies are now majority-owned by private equity or foreign

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stake in 3 Arts Entertainment (3 Arts) which would further complicate conflict of interest issues for artist-clients relying on 3 Arts managers to represent their best interests in all matters in connection with a production company or studio, regardless of whether the management company is negotiating the terms of employment. *See* Cynthia Littleton, *Lionsgate Buys Majority Stake in 3 Arts Entertainment*, Variety (May 30, 2018, 6:35 AM), https://variety.com/2018/biz/news/lionsgate-buys-majority-stake-3-arts-entertainment-1202825107 [https://perma.cc/7SVA-A7U5]. It is possible to imagine the transaction drawing the scrutiny of the California Labor Commissioner, to whom it would be subject to approval, had Lionsgate tried to acquire a talent agency, instead of a management company. *See supra* notes 123–125 and accompanying text.

208. *See* Wilson, *supra* note 22, at 402–03 ("Certain personal managers have built substantial movie and television production businesses by using the enormous clout of the star talent to which they have unique access. As a result, conflicts with agents have arisen."); *see also* Birdthistle, *supra* note 18, at 509 ("While managers, unlike agents, have always been able to acquire an ownership interest in their clients' product, this ability to produce has only recently been recognized as a major asset to the profession.").

209. *See id.* at 496; discussion *supra* Subpart I.E.

210. *See* Zelenski, *supra* note 21, at 997.

211. Cynthia Littleton, *The State of the Agency Biz*, Variety (May 8, 2013, 3:00 PM), https://variety.com/2013/biz/news/talent-agencies-adjust-demanding-landscape-1200472558 [https://perma.cc/9SJ4-VH4H] ("Skeptics of the [talent agencies'] diversification push warn about the increasing possibility of conflicts of interest for talent reps. Are the new ventures designed to assist clients, or are the clients being leveraged to spur new ventures?").

investors. These investors buy-in in the hopes of making the agency profitable enough to justify an IPO, which has the means to deliver a healthy payout to the investors.[212] As journalist Noam Scheiber has reported:

> The powerful outside investors to whom the agencies now answer often resemble the activist investors that dominate more workaday industries. Rather than upgrade their operations, supermarkets and retailers owned by private-equity firms have diverted profits to their owners and made interest payments on the debt these owners piled onto their balance sheets. Many have succumbed to bankruptcy, erasing thousands of jobs along the way.[213]

The focus on the bottom line is more prevalent than ever before in agenting, and the pressure to generate profits imposed by parent corporations trickles down to individual agents, who may be compelled to put the agency's interests ahead of an individual artist-client's best interests or those of the agency's artist-clientele as a whole.[214]

The outsize revenues earned by agencies through packaging fees were crucial to attracting private equity investment.[215] The ability to diversify into other businesses[216] and to produce and own content are now seen as crucial by

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212. Scheiber, *supra* note 174 ("The relationship between private-equity firms and the major talent agencies dates back at least to the last decade but escalated in 2010, when TPG Capital made an initial investment in Creative Artists Agency. That investment grew to $500 million and a majority stake. Within a few years, the parent company of WME, the other industry leader, sold a stake worth $200 million to Silver Lake, another private-equity firm.").
213. *Id.* (citations omitted).
214. *Id.* ("Still, the outside investors didn't simply hand the agencies sacks of cash for empire-building. In some cases, they also prompted changes in the way the agencies ran their business. There was, for instance, cost-cutting—including restrictions on who could dine in fancy restaurants and stay in high-end hotels, long considered a divine right of agents."); *see* Littleton, *supra* note 211 ("Private equity players traditionally have very specific expectations for return on investments in a timeframe that rarely exceeds seven to 10 years.").
215. *See* Scheiber, *supra* note 174 ("'We benefit from package fees from the shows when they get resold and resyndicated over and over again,' a Silver Lake managing partner, Egon Durban, told *The Financial Times* in 2014." (citation omitted)). *But see id.* ("In interviews, current and former agents at large agencies conceded that some in their industry had been too aggressive in seeking packaging fees. But they denied that private-equity investments had fueled these practices, pointing out that some large agencies have ruthlessly hunted packaging fees even without outside investors.").
216. Littleton, *supra* note 211 ("Brand management and consulting services for companies well outside the entertainment realm are a target growth areas for agencies ranging from CAA to [Agency for the Performing Arts (APA)]. 'If somebody had told me five years ago we'd be representing brands like Bombardier and Lamborghini, I wouldn't have believed it,' said [ATA President and APA President-CEO] Jim Gosnell. 'We used to talk about working under the "umbrella" of the entertainment business. Now it's a circus tent.'"). "TPG, meanwhile sought a pipeline into the entertainment deal flow that comes CAA's way; CAA started its own inhouse investment bank, Evolution Media

the agencies and their parent corporations to the agency's longterm profitability. The capital from private equity has also funded an influx of acquisitions by the agencies, notably the 2009 merger of the talent agency Endeavor with the William Morris Agency to create WME, and WME's subsequent merger with International Management Group (IMG) a global sport management company, to create WME-IMG. The parent company was later renamed, again, Endeavor, under which WME and IMG each continue to operate.[217] The company's enormous reach allows it to attract ever more investment for acquisitions.[218] Some of these decisions have been ill-advised.[219] CAA has sold large stakes to Asian investment funds, in addition to a majority stake owned by the private equity firm TPG.[220]

Some agencies have determined their ways of doing business are incompatible with the demands of private equity. As Cynthia Littleton reported:

> ICM was a forerunner in this area in its 2005 deal with Rizvi Traverse, which ultimately led to battles between the [agents] and the money mavens

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Capital, in 2008." *Id.*

217. *See* Nellie Andreeva & Dade Hayes, *WME at 10: The Merger That Made Endeavor a Power Player*, Deadline (May 31, 2019, 5:45 PM), https://deadline.com/2019/05/wme-turns-10-william-morris-endeavor-merger-hollywood-power-player-1202625324 [https://perma.cc/8G3Z-RKGK].

218. Gene Maddaus, *WME-IMG to Receive $1.1 Billion Cash Infusion (Exclusive)*, Variety (Aug. 2, 2017, 6:00 AM), https://variety.com/2017/biz/news/silver-lake-wme-img-1-1-billion-investment-1202513182 [https://perma.cc/86GB-LR5M] ("WME-IMG is about to receive a $1.1 billion investment led by a Canadian pension fund and a Singaporean sovereign wealth fund, *Variety* has learned. The investment round values the agency at $6.3 billion, an increase from its $5.5 billion valuation in 2016 . . . . Silver Lake has invested $750 million in WME-IMG in two rounds, first into WME in 2012, and again in 2014 upon the merger with IMG, giving it a majority stake in the combined company. With subsequent investments, Silver Lake now holds a sizable minority of the firm. Softbank invested $250 million in 2016 at the $5.5 billion valuation.").

219. In 2018, Endeavor planned to sell a $400 million minority stake to the sovereign wealth fund of Saudi Arabia, after courting Saudi Crown Prince Mohammed bin Salman. The company later terminated the nascent deal after reports of the Saudi involvement in the assassination of Washington Post columnist Jamal Khashoggi. *See* Kim Masters & Tatiana Siegel, *Endeavor Pulling Out of $400 Million Saudi Arabia Deal (Exclusive)*, Hollywood Rep. (Oct. 15, 2018, 11:35 AM), https://www.hollywoodreporter.com/news/endeavor-pulling-400-million-saudi-arabia-deal-1152404 [https://perma.cc/P7SY-7F2B].

220. *See* Fleming, *supra* note 125; Cynthia Littleton, *Singapore's Temasek Acquires Stake in CAA*, Variety (Sept. 26, 2017, 4:49 AM), https://variety.com/2017/biz/news/caa-singapore-temasek-buys-stake-1202573102 [https://perma.cc/SQ38-D9KG]; Cynthia Littleton, *CMC Capital Partners Invests in CAA, Launches China Media and Entertainment Venture*, Variety (Apr. 17, 2017, 11:00 AM), https://variety.com/2017/tv/news/cmc-capital-partners-caa-china-investment-1202032272 [https://perma.cc/39CA-YT3D] (detailing how CMC has "joined with the agency to launch CAA China, a broad-based media and entertainment venture. CAA China aims to greatly expand the agency's activity in the areas of talent representation, film finance, TV and digital content production, and dealmaking involving sports, music, live events, and endorsements.").

> until a management buyout was orchestrated [in 2012]. The divorce from Rivzi cost ICM most of its portfolio of profit participation stakes in TV shows, movies, books, stage shows and other ventures assembled since it was formed in 1975.[221]

But as reporter David Ng has noted, other large agencies, including CAA and WME, have doubled down on outside investment:

> In recent years, private equity firms have increased their stakes in Endeavor [WME] and CAA, exerting pressure on the agencies to find new sources of revenue beyond packaging and traditional talent representation. The result has been a further diversification of their portfolios to include production and other media ventures.[222]

The scope of agency-affiliated ventures may include companies that not only produce or finance films and television series, but advertising agencies and corporations that also will employ agency clients for commercial work or sponsorships. Although often the agency and an artist-client's interests may align in pursuing these employment opportunities, sometimes they may be at odds. For instance, if an advertising agency owned by Interpublic, the majority stakeholder in Endeavor Content (an affiliate of WME), were to hire WME clients for an commercial to be produced by Endeavor Content, it is in the producer and advertiser's best interests to keep production costs down. Importantly, that includes the major expense of fees for a star for the ad, who is, of course, a client of WME. The best interests of the client are to receive the highest fee he or she can command for his or her work. The affiliates want to minimize expense. How hard can an agent reasonably be expected to fight for a client's best interests when those interests are directly in conflict with the interests of the agent's employer, the agency, and its stakeholders? The complex interplay of interests makes it too likely the agent will infringe on the fiduciary duties owed to the client under the law.

IV. Proposed Solutions to Mitigate Conflicts of Interest

In the absence of explicit statements of fiduciary obligation in the Talent Agencies Act, and with the expiration of prior guild regulations as applied to ATA-member agencies, artist-clients at big agencies are currently unprotected from the potential conflicts of interest raised by packaging and producing, other than by bringing claims against their agents under common law. But for all but the most established artists, suing the big agencies individually is too risky if one wants to keep working in the industry.[223] Several potential routes may be

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221. Littleton, *supra* note 211.
222. Ng, *supra* note 121.
223. *See, e.g.*, *id.* (noting talent's concern that bringing a suit could result in being blackballed by agents).

taken to remedy this situation and effectuate the intent of Talent Agencies Act to protect artist-clients from their agents' inclination to ignore these conflicts.

The new WGA Code of Conduct, effected after the termination of the WGA AMBA in 2019, is one such solution. Although the Code only applies to agents of writers, it includes important strictures that prevent conflicts of interest within an agency at-large by eliminating package fees and agency or agency-affiliate ownership of client work. Like the provisions of SAG Rule 16(g), the provisions in the Code would therefore benefit all clients of an agency, not just writers. The difficulty, of course, will be getting biggest agencies to agree to operate under the terms, which would significantly alter their ability to generate revenue and create a need to fundamentally change their business models.

The WGA Code of Conduct, or other future guild regulations in the same spirit, would be strengthened by cooperation between the guilds to insist upon similar protections for members of all the several guilds represented by the talent agencies. However, resistance will remain among the agencies, and the guilds and the ATA may never be able to reach an agreement that adequately protects artist-clients through private negotiation. For that reason, the California Legislature should amend the outdated Talent Agencies Act and enact expanded protections for all clients represented by talent agencies operating in the state. If other actions are not taken by the agencies or the legislature, artist-clients may be forced to sue the agencies to vindicate the rights they are owed—just as the WGA is attempting to do on behalf of its members.

A. *WGA Code of Conduct*

The WGA's new Code of Conduct details the scope of a talent agent's duties to a writer-client in the representation relationship.[224] It also provides a standard representation agreement, Rider W, the terms of which "shall be deemed to be incorporated into any representation agreement, written or oral, between Agent and Writer."[225]

The Code of Conduct makes explicit the fiduciary relationship between the agent and the writer, and specifically proscribes agencies from (1) having ownership or financial interest in work created by a client or an affiliation with an entity which owns work created by WGA members (notably broader than only prohibiting an agency from taking a financial interest in work created by its own artist-clients), or being owned or affiliated by any entity that does; (2) having ownership or a financial interest in "any business venture that would create an actual or apparent conflict of interest with Agent's representation of a Writer," or being owned or affiliated with any entity that does; (3) deriving

224. Writers Guild of Am., WGA Code of Conduct (as of April 13, 2019) § 3 (2019), https://www.wga.org/uploadedfiles/employers_agents/agencies/wga_code_of_conduct_4-13-19.pdf [https://perma.cc/G58X-CWCM].

225. *Id.* § 4.

"any revenue or other benefit" from a writer's creation of a work, other than a percentage commission (capped at ten percent) of the writer's compensation; and (4) accepting "any money or thing of value" from the employer of a writer.[226]

Packaging is implicitly prohibited, with the exception that the agency "shall be permitted to receive compensation for feature film financing and sales services" but subject to limitations, including requiring WGA approval for agency fees on films with production budgets of over $20 million.[227]

To date, many small agencies not represented by the ATA—which do not engage in producing or packaging practices anyway—have signed the Code of Conduct, and therefore may continue to represent WGA writers. Initially, as a group, the ATA refused to sign the Code, which was drafted unilaterally by the WGA. Shortly after the WGA membership passed the Code by a majority vote of membership, most WGA writers terminated their representation by ATA agencies, including the Big Four.[228] Now, several of the largest ATA-agencies outside the Big Four have come to agreements with the WGA to implement the Code with certain modifications.[229] These agreements include favored nations provisions to allow each agency to take advantage of future concessions the WGA may grant to other agencies. As modified, these compromise agreements include sunset provisions to phase out packaging and limited carveouts for ownership of small percentage interests in client work.[230] Whether the Big Four agencies will also reach an agreement with the WGA, or the parties will press forward with their lawsuit, now in federal court, remains to be seen.

Whether the ATA agencies will sign the Code of Conduct and resume their relationships with WGA-member writer-clients depends on a number of factors. A network television staffing season has now come and gone without WGA writers being represented by their agents. Many writers have resorted to contacting studios directly, and the WGA has created a website to allow writers to post samples and studios to contact them directly to submit themselves for staffing opportunities.[231] A successful staffing season without the participation of the major agencies could be seen as diminishing the leverage of the agents.

Another factor is how many ATA-agencies will defect and sign the Code, creating an opportunity to sign new writer-clients and undercut their competitors who refuse to sign the Code. If individual agents at Big Four agencies began to defect for smaller agencies that have signed the Code or start their

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226. *Id.* § 3(B).
227. *Id.* § 3(C).
228. *See, e.g.*, Donnelly, *supra* note 87.
229. *See supra* note 143.
230. *See* Andreeva & Robb, *supra* note 143; Fleming, *supra* note 143.
231. *Staffing Submission System Showrunner Registration*, Writers Guild Am. W., https://apps.wga.org/forms/staffingsubmissionregistration.aspx [https://perma.cc/VT8L-5GPJ].

own agencies, the Big Four would risk permanently losing relationships with many of their clients whom they hope to return to the agency roster at the end of this dispute. A decision in the WGA litigation enjoining packaging or finding that it breaches a fiduciary duty owed to clients would further damage the agents' cause, although any decision is a long way off if one ever comes; the case is largely viewed within the industry as a bargaining tactic in WGA-ATA negotiations and as setting the table for the WGA's upcoming negotiation with the Association Motion Picture and Television Producers over the writers' minimum basic agreement for employment.

There is also the remote possibility that some of the Big Four make the same surprising choice Lew Wasserman of MCA did in 1962 and sever or dissolve their agencies in favor of entering the content production business. However, this is unlikely to happen in the absence of other government intervention, such as amending the TAA. There is no doubt that losing revenue from packaging fees and cutting off the potential future revenue from affiliate studios (not to mention prohibiting the same conduct from companies which hold stakes in the agencies), would severely handicap the talent agencies' financial projections and alter the structure of their businesses substantially. For these reasons, the Big Four and their owners have every incentive to fight tooth and nail against the WGA Code of Conduct.

B. *Guild Cooperation and a Universal Agency Franchise Contract*

The risk for the WGA when it terminated its agreement with the ATA without putting a new one in place was that union writers would not fire their agents and would continue to be represented by the big agencies, merely without the protection of a franchise agreement with their guild—just as SAG members had in 2002.[232] But by holding a membership vote in 2019 to approve the new Code of Conduct and empower the guild to force writers to terminate their representation with unfranchised agencies, the WGA was able to maintain its leverage in negotiations with the ATA in a way SAG was not in 2002.

SAG-AFTRA has announced that they stand in solidarity with the WGA in their negotiations with the ATA.[233] This makes sense since the SAG negotiations stalled in 2002 over similar issues relating to agency interest in client work and outside investment in agencies. Whether the other major Hollywood labor unions, including the Directors Guild of America, will take a stand is less certain. What is certain is that all artist-clients, most of whom are union-members in the highly unionized entertainment production industry, stand to

232. *See supra* notes 76–77 and accompanying text.

233. David Robb, *SAG-AFTRA Stands with WGA in Its "Struggle" with Talent Agents*, Deadline (Mar. 31, 2019, 6:09 PM), https://deadline.com/2019/03/sag-aftra-wga-ata-talent-agents-writers-guild-of-america-1202586006 [https://perma.cc/7S5U-FYAW].

benefit from provisions prohibiting agencies from engaging in practices that create conflicts of interest with their artist-clients.

As such, the several guilds should follow the WGA's lead and sever their representation contracts with talent agencies over the practices of packaging, producing, and outside investment in the agencies. Together, the guilds could devise a universal agency franchise contract, with similar provisions to the WGA Code of Conduct, which would protect all their members from the conflicted practices of their representatives. The leverage created by the guilds working in concert to protect their members would be substantial.

C. *Amend the Talent Agencies Act*

Finally, the California Legislature should amend the Talent Agencies Act to better protect not only the many artists who must engage talent agents to legally procure employment under the Act, but also the many clients of talent agencies who are not also guild members. The entertainment industry is one of the largest employers in California and produces a large percentage of the state's exports. Protecting its workers should be a paramount concern of the state legislature. The TAA has not been revised since 1982 and is long overdue for amendments to bring it up to speed with the realities of the modern entertainment industry and the practices of the big talent agencies.

Even if the several guilds were to act together to protect their members, the legislature should still act to amend the TAA. Many workers who are non-unionized are now represented by these expansive agencies, including athletes, models, reality television stars, and other public figures. These workers deserve the same protection as guild members from their agents, and the state legislature should assure they receive it. The legislature can no longer abdicate its responsibility to protect workers in one of the state's largest industries that generates enormous revenue for the state by relying on private regulation. The legislature should consider incorporating rules for agents similar to the California Rules of Professional Conduct governing attorneys into the Talent Agencies Act, and must spell out in the Act the fiduciary duties agents already owe clients under common law.

Conclusion

The unchecked growth of big Hollywood talent agencies due to the removal of guild regulation and the feebleness of the Talent Agencies Act has infringed the protections of independent representation that artist-clients are owed by their agents under California common law. Packaging, producing, and outside investment create numerous conflicts of interest that may disadvantage the artist-clients of talent agencies. These practices are so ingrained in the business models of big agencies that they are unlikely to end without a difficult fight. Whether or not the WGA is successful in mitigating these practices as they relate to writers will not be known until the WGA

and the Big Four reach a resolution on the new Code of Conduct or their litigation plays out in the courts. In the meantime, the several guilds and the California Legislature should act to protect artists from the conflicted practices of the representatives they legally require to procure employment and preserve the integrity of the agent-principal relationship for workers in one of the state's largest and most important industries.