

NOTES

“That’s a Wrap! (Or Is It?)”: The Unanswered Question of Severability Under California’s Talent Agencies Act After *Marathon Entertainment, Inc. v. Blasi*

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TABLE OF CONTENTS

INTRODUCTION	1334
I. AGENTS VS. MANAGERS—THE WAR WAGES ON	1337
A. TRADITIONAL ROLES OF AGENTS AND MANAGERS	1337
B. THE MAKING OF THE TALENT AGENCIES ACT	1338
II. “SEVERA”-WHAT?: COURT OF APPEAL CASE LAW INTERPRETING THE TAA	1344
III. <i>MARATHON ENTERTAINMENT, INC. V. BLASI</i> : DEPARTURE FROM PRECEDENT—OR SIMPLY (AND FINALLY) AN APPLICATION OF IT?	1349
A. THE FACTS AND HOLDINGS OF <i>BLASI</i>	1349
B. ANALYSIS OF THE CASE AND OF SELECTED RECOMMENDATIONS FOR IMPROVING THE TAA	1352
IV. LOOKING AHEAD: A SUGGESTED SEVERABILITY STANDARD	1356
CONCLUSION	1363

* Georgetown Law, J.D. expected 2009; Stanford University, M.A. 2005; Stanford University, B.A. 2005. © 2009, Erick Flores. I wish to thank Professor Julie Ross for her helpful insight into the eccentric world of entertainment, for inspiring me to rekindle my interest in the industry, and for her tireless revisions of this piece; the editors and staff of *The Georgetown Law Journal* for whipping this Note into shape; and lastly, my family for making and supporting the entertainment junkie I am today. I dedicate this Note to all of those who find Los Angeles to be the bane of human existence—the city might be plastic, but damn, does it look good.

INTRODUCTION

Money. Success. Fame. Glamour.¹ In Hollywood, everyone wants to bask in the luxurious shroud of those four words. Perhaps in part because of the public's desire to indulge vicariously in that unattainable showbiz dream, or because the media frenzies surrounding salacious celebrity scandals have simply weaved the entertainment industry into the public's perception of realism, the average American consumer arguably knows more about Britney's bedroom behavior than Bush's budget balancing. What the public does not know is that the well-oiled machine we call Hollywood is more than illicit sex tapes, celebuntante rehab stints, and red-carpet disasters. The glossies like *Us* and *People* ordinarily fail to report the controversial business battles being waged among the entertainment industry's elite Svengalis—the managers, agents, and lawyers propelling, or even controlling, artists' careers—who, like their artist-clients, are just as interested in having a slice of the money-success-fame-glamour brioche. But the legal landscape in “La-La Land” recently changed for these Hollywood power brokers. In *Marathon Entertainment, Inc. v. Blasi*,² the California Supreme Court announced a hotly anticipated decision that is likely to alter the business of show business and the lives of the artists we avidly follow.

Blasi considered the operation of California's Talent Agencies Act³ (“TAA” or “the Act”) as applied to personal managers in the entertainment industry. The TAA, enacted primarily to curb the exploitation of artists by their representatives,⁴ mandates licensing requirements for any individual or entity functioning as a talent agency and regulates the activities of those licensed as talent agents.⁵ What has developed in the years since the Act's passage is a turf war between agents and managers, the latter of whom seek to remain unregulated by the legislature and the guilds, but who frequently engage in work that is typically reserved for licensed agents.⁶

At the most basic level, the difference between agents and managers is that, under the Act, only licensed agents are allowed to procure employment for artists.⁷ Historically, the California Labor Commissioner and the state courts have enforced this distinction between managers and agents by voiding *ab initio* any managerial contracts in which the manager engaged in the illegal act of procuring employment without first obtaining an agent's license as required by

1. FELIX DA HOUSECAT VS. POP TARTS FEAT. MACAULAY CULKIN, SETH GREEN, & CHLOË SEVIGNY, *Money, Success, Fame, Glamour, on PARTY MONSTER: ORIGINAL MOTION PICTURE SOUNDTRACK* (TVT Records 2003).

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

3. CAL. LAB. CODE §§ 1700–1700.47 (Deering 2006).

4. *Blasi*, 174 P.3d at 746.

5. See generally CAL. LAB. CODE §§ 1700–1700.47.

6. For a discussion of this turf war and relevant authorities commenting on the roles of and relationships between agents and managers, see *infra* Part I.

7. CAL. LAB. CODE §§ 1700.4–1700.5.

the Act.⁸ A hypothetical example helps illustrate the situation. Suppose Serena Waldorf moves to Los Angeles to pursue a career in modeling and acting. While waiting tables at the local New York Pizza Kitchen, she meets Nate Bass—a Hollywood party promoter who only about three years ago decided he would use his star-studded Rolodex to start a career in management. He works with a couple of actors, but Serena would be his first client also interested in pursuing a modeling career.

Bass and Waldorf enter into a one-year contract, under which Bass agrees to manage Serena's career and pay for her modeling and acting lessons and her travel to auditions in Los Angeles and New York in exchange for ten percent of Serena's eventual earnings. Bass realizes Serena only has a dated set of headshots and a résumé that includes the starring role in her high school's rendition of *Little Shop of Horrors*. But seeing her potential, he calls his best friend, a casting agent, who offers to book her on an audition for a small role in a low-budget independent film; he sends her updated publicity stills to local modeling agencies; and he distributes her business cards to industry insiders at the parties he attends. Serena chooses to renew her contract, happy with the direction in which Bass is moving her career, and the following year she eventually scores a supporting role on *Lawlessness and Disorder*—the newest television legal drama. With one year still remaining on the second contract Waldorf and Bass signed, Serena gets signed by her agent, "Little J," at the Billy Morris Agency, after landing a starring role in the theatrical biopic of *Tori Spelling*. Serena gets persuaded that Bass is only cutting into her profits and that "Little J" can manage her *and* get her cutting-edge work. Serena decides to fire Bass, and when he tries to recover the money she owes him under the contract, she brings an action against him under the TAA, claiming he unlawfully procured employment for her in violation of the Act, and that she therefore no longer owes him a dime.

Before 2008, the California Labor Commissioner would almost certainly have voided the contract *ab initio* between Waldorf and Bass and ordered the disgorgement of any fees Waldorf had paid Bass if the Commissioner determined that Bass's acts constituted "procurement of employment." And given the existing case law, one or more of Bass's acts would likely have been found to be illegal. *Blasi* marks a departure from this type of precedent by applying the doctrine of severability to managerial contracts and holding that, while the Labor Commissioner *may* void such contracts in their entirety, he may also

8. *E.g.*, *Smith v. Harris*, TAC 53-05, at 16 (Cal. Labor Comm'n (2007)), <http://www.dir.ca.gov/dlse/TAC/53-05.pdf> ("[O]ur long standing position, which is supported by case law and legislative history, is that a contract under which an unlicensed party procures or attempts to procure employment for an artist is void *ab initio* and the party procuring the employment is barred from recovering payments for any activities under the contract, including activities for which a talent agency license is not required.") (citing *Styne v. Stevens*, 26 P.3d 343, 343 (Cal. 2001); *Yoo v. Robi*, 24 Cal. Rptr. 3d 740, 749–50 (Ct. App. 2005); *Park v. Deftones*, 84 Cal. Rptr. 2d 616, 619 (Ct. App. 1999); *Waisbren v. Peppercorn Prods., Inc.*, 48 Cal. Rptr. 2d 437, 447 (Ct. App. 1995)).

sever the lawful parts of the contract from the unlawful and award compensation to managers for work legally undertaken for an artist.⁹ While some have praised the decision as taking into account the realities of an industry in which managers frequently have to procure employment for young artists who do not have an adequate résumé to acquire an agent,¹⁰ others have blasted the decision for effectively eliminating the strongest tool used by the Labor Commissioner to enforce the Act.¹¹

This Note will examine *Blasi*'s effect on the administration of the TAA and its implications for managers, agents, and artists. In Part I, I will examine the evolution of and the policies underlying the Act and the tension that exists between managers and agents and the services they provide—and are *legally* able to provide—to artists, in order to furnish a contextual framework by which to analyze the effect of the decision. Part II will review the decisions of the California appellate courts to determine whether there was, in fact, precedent supporting *Blasi*'s holding. Next, in Part III, I will analyze *Blasi* and the recommendations other commentators have made to improve the TAA. Here, I will examine the case's impact on the ongoing enforcement of the TAA. Finally, Part IV will make a recommendation that focuses less on improving or redefining the Act, but rather on proposing a workable, entertainment-specific standard of severability that the courts and Labor Commissioner can use in the wake of

9. See *Blasi*, 174 P.3d at 751. The California Supreme Court did not consider its holding a departure from precedent; rather, the court was careful to point out that while “more recent Labor Commissioner decisions appear to take a more stringent view toward the availability of severance,” a string of Labor Commissioner cases pre-2005 had taken the view that severability was available and that “until two years ago, Court of Appeal decisions under the Act had neither accepted nor repudiated the general applicability of the severability doctrine.” *Id.* at 751 & n.10. Despite the court's pronouncement, several commentators would characterize the decision as inconsistent with the precedent established in the appellate courts and the Labor Commissioner's decisions. See, e.g., Tracie Parry-Bowers, Note, *The Talent Agencies Act: A Call for Reform*, 27 LOY. L.A. ENT. L. REV. 431, 431 (2007) (“[The California appellate court's decision in *Blasi*] was a radical departure from twenty-eight years of jurisprudence in this field.”); Dave McNary, *Court Favors Managers*, DAILY VARIETY, June 26, 2006, at 14. But see Edwin F. McPherson, *Double Agent: Is the Penalty of Declaring a Contract Void Ab Initio Too Harsh for Managers Who Procure Employment?*, L.A. LAW., May 2007, at 44 (arguing that although the Labor Commissioner has voided the majority of past contracts violating the TAA in their entirety, “that is certainly not true in all cases. In fact, there is precedent for the *Marathon* opinion.”).

10. Gerald Margolis and Benjamin Shatz, of Los Angeles law firm Manatt, Phelps & Phillips, filed an amicus curiae brief for the National Association of Artists' Managers in support of *Marathon Entertainment*. See Request for Leave to File an Amicus Curiae Brief by the National Association of Artists' Managers in Support of Appellant *Marathon Entertainment, Inc.* at 3, *Marathon Entm't, Inc. v. Blasi*, 174 P.3d 741 (Cal. 2007) (No. S145428) (arguing that the TAA was now “being used as a sword [by artists against managers] rather than as a shield”). Margolis and Shatz said they were “thrilled and delighted” by the court's ruling. Lauren Horwich, *Longtime Suit Ends in Manager's Favor*, BACK STAGE, Jan. 28, 2008, http://www.backstage.com/bso/search/article_display.jsp?vnu_content_id=1003703117.

11. In the aftermath of the *Blasi* ruling, the American Federation of Television and Radio Artists (AFTRA), in support of Rosa Blasi and in disagreement with the court, said, “AFTRA is disappointed that the California Supreme Court did not strongly affirm the contractual rights of performers and other talent and their relationships with talent agents.” Janet Shprintz, *Verdict In on Talent Agency Act: No Clear Victory for Either Side*, VARIETY, Jan. 28, 2008, <http://www.variety.com/article/VR1117979748.html?categoryid=18&cs=1&query=Blasi>.

Blasi to determine which contract terms to enforce and which to declare void.

I. AGENTS VS. MANAGERS—THE WAR WAGES ON

Managers and agents have been fighting a turf war¹² for the greater part of the last century, as the entertainment industry has tried—albeit unsuccessfully—to carve out the groups' respective roles in relation to their artist-clients. Before a discussion of the TAA's enactment and development in section I.B below, a summary of the traditional roles agents and managers undertake in the business in section I.A will provide a useful springboard for discussing the conflicts between these two Hollywood players. Surveying the history of the conflicts between managers and agents places into perspective the impact that the court's decision in *Blasi* will have on the future relationship of these two groups.

A. TRADITIONAL ROLES OF AGENTS AND MANAGERS

Although the primary distinction between managers and agents is circumscribed by the Act's mandate that only licensed agents can lawfully procure employment for artists, the duties managers and agents perform are also largely a product of the practical workings and needs of artists and the industry. Agents are essentially middlemen in the marketplace of talent.¹³ They focus on negotiating deals for short-term, project-specific engagements between an artist and any entity that seeks to employ that artist's services.¹⁴ Agents' activities might include soliciting film and television engagements or live appearances, soliciting and licensing rights to creative works, and exploiting any other opportunities that would either create income for an artist or advance the artist's career.¹⁵ Because agents are compensated on a commission basis, they are both averse to signing unknown clients with no preceding body of work and inclined to cultivating talent to which the market responds favorably.¹⁶ By soliciting employ-

12. Commentators have used various degrees of intensity in describing the acrimonious relationship between agents and managers in the industry, from the more technical "fiscal war," see Gary E. Devlin, Comment, *The Talent Agencies Act: Reconciling the Controversies Surrounding Lawyers, Managers, and Agents Participating in California's Entertainment Industry*, 28 PEPP. L. REV. 381, 381 (2001), to the more severe, if hyperbolic, "long-feared unholy war," see William A. Birdthistle, *A Contested Ascendancy: Problems with Personal Managers Acting as Producers*, 20 LOY. L.A. ENT. L. REV. 493, 495 (2000).

13. See, e.g., *Blasi*, 174 P.3d at 745 ("[T]alent agents act as intermediaries between the buyers and sellers of talent."); David Zelenski, *Talent Agents, Personal Managers, and Their Conflicts in the New Hollywood*, 76 S. CAL. L. REV. 979, 981–82 (2001) ("[Talent agents'] job is to negotiate deals between talent-sellers and talent-buyers on behalf of the talent-sellers.").

14. *Blasi*, 174 P.3d at 745.

15. Devlin, *supra* note 12, at 384.

16. See Birdthistle, *supra* note 12, at 503; Heath B. Zarin, *The California Controversy over Procuring Employment: A Case for the Personal Managers Act*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 927, 935–37 ("Talent agents engage in an extremely risky practice: they provide services to an artist, and are rewarded only when the artist achieves some degree of success."); Zelenski, *supra* note 13, at 981–82 (arguing that the commission-payment scheme between agents and artists is a problem

ment opportunities, an agent plays a significant role in directing the career of an artist—a role typically viewed as reserved for the personal manager—by virtue of factors such as the agent’s personal industry relationships, the way the agent allocates work among clients, or the agent’s incentive to promote and methods of marketing the artist-client.¹⁷

Rather than being recognized for the business acumen attributed to their agent counterparts, personal managers have historically been viewed as assuming an advisory role for their artist-clients.¹⁸ They oversee the artist’s day-to-day activities as well as develop long-term strategies for the artist’s career growth,¹⁹ counseling in the selections of job material, other personnel to be employed by the artist, and the proper vehicles for showcasing or promoting the artist’s talent.²⁰ But in addition to this consultative role, managers assume the risk of investing their financial resources in the up-and-coming artist, often loaning him money until the artist can begin making money on his own.²¹ As a result of this risk and the strains of handling all of the daily aspects of the artist’s career, managers frequently take on fewer clients and charge higher commissions than agents to compensate for their limited client base.²² In turn, this persistent close contact and interdependent relationship between artist and manager—while dichotomously casting the manager as employee of and investor in the artist²³—frequently develops into one of friendship, where the artist often trusts the manager with acting as his alter ego in third-party transactions.²⁴ While it might appear easy to draw a neat line between the jobs of managers and agents, the realities inherent in the business and the development of the TAA have spurred tensions between these two key figures in an artist’s life.

B. THE MAKING OF THE TALENT AGENCIES ACT

Although the TAA establishes that the essential difference between agents

because it discourages agents from engaging “fledgling performers or industry newcomers who have unproven track records”).

17. See Devlin, *supra* note 12, at 384–85.

18. See Blasi, 174 P.3d at 746 (citing *Park v. Deftones*, 84 Cal. Rptr. 2d 616, 618–19 (Ct. App. 1999)). This is not to diminish the business savvy that most managers have—indeed, must have—in order to be successful. Although managers are known primarily for their counseling role, an experienced manager will often have an extensive knowledge of the industry, legal sophistication, a lengthy rolodex of contacts, and a creative knack for masterminding an artist’s career. See, e.g., Birdthistle, *supra* note 12, at 507; James O’Brien, Comment, *Regulation of Attorneys Under California’s Talent Agencies Act: A Tautological Approach to Protecting Artists*, 80 CAL. L. REV. 471, 481 (1992).

19. Zarin, *supra* note 16, at 937.

20. For a thorough description of these and other job functions often served by a personal manager, see Howard Siegel, *Personal Management and Agency Contracts*, in PRACTISING LAW INST., PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 251, 262–64 (2007).

21. *Id.* at 264; Zarin, *supra* note 16, at 937–38.

22. E.g., Zelenski, *supra* note 13, at 983.

23. Erik B. Atzbach, *Drawing the Line Between Personal Managers and Talent Agents: Waisbren v. Peppercorn*, 4 UCLA ENT. L. REV. 81, 82–83 (1996).

24. See Birdthistle, *supra* note 12, at 507; Devlin, *supra* note 12, at 384; O’Brien, *supra* note 18, at 482–83.

and managers is the former group's sole capacity to legally procure employment, the distinction between these Hollywood mainstays was recognized in legislation dating as far back as 1937, when California incorporated the Artist Manager Law into its regulations of theatrical and motion picture agencies.²⁵ The legislature initially categorized "artist managers" as a brand of agency, but the state labor code defined these individuals by many of the duties that we commonly attribute to modern-day managers.²⁶ The artist manager was defined as "someone 'who engages in the occupation of advising, counseling, or directing artists in the development or advancement of their professional careers' in addition to procuring employment or engagement for their clients."²⁷

The quick development of the entertainment industry throughout the 1950s and 1960s sparked a dramatic, multifaceted expansion of the talent agency structure,²⁸ and it gave rise to new employment relationships that blurred the distinctions among the various representative entities the legislature had delineated in the state labor code.²⁹ Eventually, the size and complexity of the new talent agencies led to an increasingly depersonalized relationship between the agent and the artist, with agencies focusing more on procurement of employment than on the artist's day-to-day activities.³⁰ This provided an impetus for the personal manager to fill this newly formed gap,³¹ although the ambiguity about what precisely would constitute "day-to-day" activities as opposed to procurement of employment would lay the foundation for the current conflict between managers and agents.

In 1978, the state legislature introduced the Talent Agencies Act to produce a workable standard for regulating artists' representatives in light of the agencies' new focus on obtaining employment for artists.³² In particular, the legislature sought to alleviate concerns that agents, licensed and unlicensed, were taking advantage of fledgling artists by dispatching female artists to prostitution houses or minors to tend bars to advance their careers and surreptitiously splitting fees with venues at which they had booked their clients.³³ With this goal of curtailing harm to new artists as the underlying remedial policy of the Act,³⁴ the Act expressly sought "to regulate only those whose *primary purpose* and function

25. See Parry-Bowers, *supra* note 9, at 432–33.

26. See *id.* at 433.

27. See *id.* (quoting CAL. ENTM'T COMM'N, REPORT TO LEGISLATURE AND GOVERNOR ON THE TALENT AGENCIES ACT 36 (1985)).

28. Birdthistle, *supra* note 12, at 505.

29. Chip Robertson, Note, *Don't Bite the Hand that Feeds: A Call for a Return to an Equitable Talent Agencies Act Standard*, 20 HASTINGS COMM. & ENT. L.J. 223, 229–31 (1997).

30. *Id.* at 230–31.

31. *Id.*

32. See Parry-Bowers, *supra* note 9, at 433–34.

33. See, e.g., *Marathon Entm't, Inc. v. Blasi*, 174 P.3d 741, 746 (Cal. 2008); Devlin, *supra* note 12, at 386–87; O'Brien, *supra* note 18, at 493.

34. *Blasi*, 174 P.3d at 746.

[was] the securing of employment for artists.”³⁵

But this vague standard created much confusion as to which activities fell within the purview of the Act, particularly among managers losing commissions on contracts for violating the Act for incidental procurement activities.³⁶ Responding to this lack of satisfaction with the Act, lawmakers considered enacting an “incidental exemption” for managers, which would have mitigated the harsher remedies of fee forfeiture and contract rescission for violations of the Act, but ultimately they decided against it.³⁷ Instead, the legislature amended the Act in 1982 to allow managers to procure employment if they worked in conjunction with licensed talent agents and to secure recording agreements without a license.³⁸ Additionally, these new amendments provided for an Entertainment Commission composed of artists, managers, and agents, who would assess the Act’s effectiveness and recommend improvements.³⁹

The Commission’s report—implemented and codified in 1986—was the last time lawmakers studied the effectiveness of the Act, and the report provided the dictates of the Act as it stands today.⁴⁰ In its current incarnation, the TAA requires that any “talent agency”—defined as “a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to

35. Neville L. Johnson & Daniel Webb Lang, *The Personal Manager in the California Entertainment Industry*, 52 S. CAL. L. REV. 375, 388 (1979).

36. *Id.* at 389.

37. *Id.* at 388. New York has a statute similar to California’s TAA, but New York’s statute recognizes an “incidental procurement” exception to the agency licensing requirements. *See* N.Y. GEN. BUS. LAW § 171 (Consol. 2006). Those entities whose “business only incidentally involves the seeking of employment” for artists need not obtain licenses. *Id.* Although a comparison to the New York statute is beyond the scope of this Note, in Part III I will point out the various frameworks the California appellate courts have used to interpret “procurement of employment.” One case, *Wachs v. Curry*, 16 Cal. Rptr. 2d 496 (Ct. App. 1993)—which has now been overruled—adopted a standard that analyzed the extent to which a manager’s business was devoted to procuring employment, *see id.* at 503, which I argue was a de facto “incidental procurement” exemption.

38. Devlin, *supra* note 12, at 389. In 1993, a state appellate court reviewed the purpose of the recording agreement exception. *See Wachs*, 16 Cal. Rptr. 2d at 501–02. After a manager challenged the constitutionality of the recording agreement exception on equal protection grounds, the court rejected the argument that there was no rational basis for allowing managers to procure recording contracts but not other kinds of contracts, responding that the distinction took into account the realities of the music industry. *Id.* Specifically,

“the purpose of [a recording] contract is to produce a permanent and repayable showcase of the talents of the artist. In the recording industry, many successful artists retain personal managers to act as their intermediaries, and negotiations for a recording contract are commonly conducted by a personal manager, not a talent agent.”

Id. at 501 (quoting CAL. ENTM’T COMM’N, REPORT TO LEGISLATURE AND GOVERNOR ON THE TALENT AGENCIES ACT 13–14 (1985)).

39. *See* Robertson, *supra* note 29, at 236. In particular, the Commission was charged with evaluating six issues: (1) when a manager may procure employment; (2) whether any changes should be made to the recording agreements exception; (3) whether criminal sanctions should be reinstated for violations of the Act; (4) whether the sunset provisions should be deleted; (5) whether the Act should be repealed and/or a licensing scheme enacted for personal managers; and (6) whether any additional changes should be made to the Act. *Id.*

40. *Marathon Entm’t, Inc. v. Blasi*, 174 P.3d 741, 746–47 (Cal. 2008).

procure employment or engagements for an artist or artists⁴¹—be licensed.⁴² Compliance with the Act's licensing and regulatory scheme⁴³ requires, among other things, that agents have their form of contract pre-approved by the Labor Commissioner;⁴⁴ submit fingerprints and affidavits vouching for their moral character and/or fair dealing;⁴⁵ post a surety bond of \$50,000;⁴⁶ maintain their clients' funds in a trust fund account;⁴⁷ and keep detailed records of each client to be made available for auditing by the Commissioner at any time.⁴⁸ The Act also grants talent agents the express authority to counsel or direct artists in the development of their careers.⁴⁹

Personal managers, on the other hand, were expressly left out of the regulatory regime of the TAA, insofar as purely managerial activities were concerned. The Entertainment Commission concluded that artists were sufficiently protected by allowing only licensed individuals to procure employment, and it recommended against a separate licensing scheme for managers.⁵⁰ The Commission also decided definitively that an "incidental procurement" exception was not workable, but it suggested retaining the provision allowing managers to undertake acts of procurement at the direction of a licensed agent.⁵¹ As a result of the Act's express intention to regulate only those individuals who engaged in procuring employment for artists, managers are only policed by the Act to the extent they seek out employment for their clients without a valid agency license.⁵²

The conflicts between managers and agents are largely rooted in the interpre-

41. CAL. LAB. CODE § 1700.5 (Deering 2006).

42. *Id.* § 1700.12.

43. In addition to complying with the TAA, agents must also abide by the mandates of the triumvirate of Hollywood guilds representing actors, directors, and writers (i.e., the Screen Actors Guild, the Directors Guild of America, and the Writers Guild of America, respectively). *See, e.g., Zelenski, supra* note 13, at 989–91. Among other guidelines, these franchise agreements dictate the maximum commissions agents can charge their clients and set a ceiling on the length of potential contract terms. *See id.* While highly relevant to the distinction between managers and agents—since managers are not regulated by the guilds—and perhaps another reason why there has been turmoil between the two groups, an extensive discussion of these franchise agreements is beyond the scope of this Note. For a more extensive discussion on the guilds' regulation of agents, see Birdthistle, *supra* note 12, at 520–24, and Zelenski, *supra* note 13, at 989–91. For a critical perspective of the franchise agreements, see 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'L ASS'N ADMIN. L. JUDGES 123 (2006), and for a brief discussion of other conflicts between managers and agents, see *infra* note 53.

44. CAL. LAB. CODE § 1700.23.

45. *Id.* § 1700.6.

46. *Id.* § 1700.15.

47. *Id.* § 1700.25.

48. *Id.* §§ 1700.26–1700.27.

49. *Id.* § 1700.4.

50. Robertson, *supra* note 29, at 236.

51. *Id.* at 236–37.

52. Aside from being unregulated by any state law (other than those laws that govern all individuals entering into contracts), managers are also free from guild regulations, unlike their agent counterparts. *Marathon Entm't, Inc. v. Blasi*, 174 P.3d 741, 745 (Cal. 2008).

tation and enforcement of the ambiguous definition of “procurement of employment” in the TAA,⁵³ which arguably does not take into account the realities of the entertainment industry.⁵⁴ This failure to define what it means to “procure employment” has created a gray area that makes it ripe for managers to undertake activities—such as submitting motion picture screenplays⁵⁵ or arranging meetings for their clients⁵⁶—which may not at first blush seem so akin to procuring employment as, for example, negotiating an agreement would, but which have been grounds for violating the Act. Aside from this indeterminate definition of “procurement of employment,” the conflict between managers and agents also stems from each group’s respectively desired enforcement of the Act. Managers are likely to demand a narrow reading of the Act that would account for the realities of the business, in which new artists—who have neither the experience to elicit the attention of an agent nor the financial resources to afford one—often have to rely on managers to lay the groundwork for the artist’s career.⁵⁷ The Act, they would argue, should only serve to invalidate the most egregious cases of procuring employment because creating an agent-worthy résumé would require a manager to incidentally procure employment for

53. See, e.g., *id.* at 750 (declaring that the court is not asked to define “procurement” of employment and that “[t]he Act contains no definition, and the Labor Commissioner has struggled over time to better delineate which actions involve mere general assistance to an artist’s career and which stray across the line to illicit procurement”); Zarin, *supra* note 16, at 954. Because *Blasi* is based on the California Supreme Court’s most recent interpretation of the TAA, the Act is the focal point of the conflict between managers and agents for purposes of this Note. However, other significant conflicts—which are not directly relevant to my analysis—exist between these two sets of individuals. For example, another increasing source of conflict is managers’ ability to produce projects for their clients, which frequently entitles managers to higher commissions than agents receive. Under the guild franchise agreements, agents are barred from acting as producers, although many would argue that today’s agents’ propensity for “deal packaging” makes them producers by default. There are also conflict of interest issues when managers act as producers that many argue are outside the regulatory scope of the TAA, and dangerously so. For more discussion on the regulatory issues involved in managers and agents acting as producers and how the coveted role of producer is creating an even wider-spanning overlap between managers and agents, see Birdthistle, *supra* note 12, at 526–59, and Zelenski, *supra* note 13, at 994–1002.

54. See, e.g., Robertson, *supra* note 29, at 237–38 (arguing that while the TAA “provides a tidy framework for talent agents,” by “envisio[n]g the talent agent as the most significant player in the entertainment industry” the Act “fails to fully consider the realities of the entertainment industry and the prominent role that personal managers play”).

55. See generally Matthew H. Schwartz, *Beaten to “Submissions”: Talent Agents Score a Victory over Managers on Submissions of Motion Picture Screenplays*, 22 J. NAT’L ASS’N ADMIN. L. JUDGES 145 (2002) (analyzing *Strouse v. Corner of the Sky, Inc.*, TAC 13-00 (Cal. Labor Comm’n (2001)), a case where the Labor Commissioner held that the submission of screenplays is a regulated activity under the TAA).

56. Setting up meetings was one of the allegedly illegal acts raised in the *Blasi* case that the Labor Commissioner ultimately determined was attempted procurement of employment. See *Blasi v. Marathon Entm’t, Inc.*, TAC 15-03, at 3 (Cal. Labor Comm’n (2004)); see also Schwartz, *supra* note 55, at 148 (“Hollywood neophytes are generally aware that conducting negotiations on behalf of qualified artists for the procurement of employment is a protected activity. However, even seasoned Hollywood professionals may be surprised to learn that a one-minute telephone call to arrange a simple social meeting between a qualified artist and a potential employer may implicate the [TAA].”).

57. See, e.g., Atzbach, *supra* note 23, at 84; Robertson, *supra* note 29, at 261.

artists, at least during the first stages of the artist's foray into entertainment.⁵⁸ On the other hand, talent agents, who might understandably want to erect barriers of entry into their business territory, might more generally lobby for an Act with an iron fist, arguing that managers frequently procure employment without having to comply with the rigorous licensing requirements of the Act.⁵⁹ They would advocate a broad reading of the Act so as to invalidate management agreements with even the most trivial of attempts to procure employment.

Of course, artists would also favor a strict reading of the Act. However, as many commentators point out, the majority of artists do not "employ the TAA as a shield to ensure the range of protections originally envisioned by the legislature when the various artist protection Acts were first drafted. Rather, artists use the TAA as a sword—to regain fees paid to their personal managers and/or to cancel representation agreements."⁶⁰ The National Conference of Personal Managers estimates that over the past forty years the California Labor Commissioner has voided approximately \$250 million in personal management commissions.⁶¹ Thus, until *Blasi* was decided in 2008, it was no wonder the Labor Commissioner was frequently viewed as being "strongly biased towards agents,"⁶² most often construing the Act harshly against managers and ordering the remedy of contract rescission and disgorgement of fees paid, despite having the authority to award a manager "some amount of compensation based on quantum meruit."⁶³ As the next Part shows, before *Blasi*, the state appellate courts almost always deferred to the Labor Commissioner's remedy for viola-

58. See, e.g., Devlin, *supra* note 12, at 385–86; Zelenski, *supra* note 13, at 993.

59. See Devlin, *supra* note 12, at 385; cf. Zarin, *supra* note 16, at 985 ("[T]alent agents oppose [an incidental booking] exception, claiming that it would harm their business.").

60. Devlin, *supra* note 12, at 392; see also Parry-Bowers, *supra* note 9, at 447 (arguing that "the *Marathon* decision was . . . a commendable move by the court to uphold the spirit of the TAA" because "[t]he Act was meant to protect artists from abuses at the hands of agencies and unlicensed agents," not to "allow artists to receive gratis services from managers who undertook to develop their careers"); Zelenski, *supra* note 13, at 994 (arguing that the rescission of management contracts and disgorgement of commissions as a remedy for violations of the TAA is "doubly troubling because many artists use this situation to their advantage: They retain managers in their early years to procure employment, and then they get the Labor Commissioner to rescind their contracts once they establish their reputations").

61. Leslie Simmons, *Dispute Between Patti Davis, Manager Thickens*, HOLLYWOOD RPTR., Nov. 6, 2008, http://www.hollywoodreporter.com/hr/content_display/news/e3i7e776b2746cf1559ddcf8c0d0378a035.

62. Parry-Bowers, *supra* note 9, at 449. After the California Court of Appeal handed down its decision in *Blasi*, then-Labor Commissioner Robert Jones wrote to the California Supreme Court expressing his opposition to the court's potential application of the severability doctrine to the TAA. See *id.* at 448. Soon after, the National Conference of Personal Managers voiced its complaints to Governor Schwarzenegger, calling the Commissioner's actions "biased," "improper," and "illegal" because he would still be adjudicating the decision after the supreme court handed down its decision. See *id.* at 449–50. *Marathon* Entertainment owner Rick Siegel filed a federal suit alleging that it is unconstitutional to enforce the TAA on managers and that "[California's] courts and labor commission have enforced 'tortuous, speculative interpretation of legislative intention, disturbing property without the required notice of either the forbidden conduct or of what penalties can be extracted when violations are found.'" Leslie Simmons, *TAA Suit Is a Federal Case*, HOLLYWOOD RPTR., Apr. 15, 2008, http://www.hollywoodreporter.com/hr/content_display/news/e3i325055d85133e396d34b76f6db4181da.

63. Devlin, *supra* note 12, at 392.

tions of the TAA, either rejecting or even failing to consider the doctrine of severability that the California Supreme Court eventually endorsed in *Blasi*.

II. "SEVERA"—WHAT?: COURT OF APPEAL CASE LAW INTERPRETING THE TAA

The TAA is silent on the issue of remedies and sanctions for illegally procuring employment in violation of the Act.⁶⁴ Historically, the Labor Commissioner has retained latitudinous discretion in fashioning a remedy appropriate for the circumstances in each case,⁶⁵ but for the most part has mandated contract rescission and disgorgement of past commissions for even incidental instances of procurement,⁶⁶ regardless of whether the manager charged a commission for the illegal activity.⁶⁷ The Labor Commissioner and the courts have typically taken the position that, in the absence of criminal penalties for TAA violations, voiding contracts *ab initio* is the only way to ensure full compliance with the Act.⁶⁸ Therefore, although the California Supreme Court stated in its *Blasi* opinion that severability was not a novel concept as applied to the TAA,⁶⁹ the precedent established by the state appeals courts and Labor Commissioner suggests that while severability may always have been a viable option as a remedy, it was seldom what the doctor ordered.⁷⁰

A series of decisions have demonstrated the California courts' opposition to severability as a solution for disputes under or violations of the TAA.⁷¹ In *Waisbren v. Peppercorn*, the court of appeal declared the fundamental proposition that even incidental procurement of employment was a violation of the TAA and justified declaring a contract between the manager and artist unenforceable.⁷² The manager in that case sued his client—a puppeteer and television producer—for recovery of commissions owed on a contract that had spanned their six-year relationship, under which the manager, among other things, assisted in project development, managed the artist's business affairs, advised

64. *Marathon Entm't, Inc. v. Blasi*, 174 P.3d 741, 991 (Cal. 2008).

65. *E.g.*, O'Brien, *supra* note 18, at 491–92.

66. *See, e.g.*, Zelenski, *supra* note 13, at 985–89 (analyzing *Waisbren v. Peppercorn Prods., Inc.*, 48 Cal. Rptr. 2d 437 (Ct. App. 1995), where the court of appeal held that even incidental acts of procurement were a violation of the TAA and required voiding the management contract).

67. *See* Schwartz, *supra* note 55, at 147.

68. *See, e.g.*, *Chiba v. Greenwald*, 67 Cal. Rptr. 3d 86, 91 (Ct. App. 2007); *Yoo v. Robi*, 24 Cal. Rptr. 3d 740, 750 (Ct. App. 2005); *Waisbren*, 48 Cal. Rptr. 2d at 446–47; *Smith v. Harris*, TAC 53-05, at 15 (Cal. Labor Comm'n (2007)), <http://www.dir.ca.gov/dlse/TAC/53-05.pdf>; *Cham v. Spencer/Cowings Entm't, LLC*, TAC 19-05, at 17 (Cal. Labor Comm'n (2007)), <http://www.dir.ca.gov/dlse/TAC/19-05.pdf>.

69. *Blasi*, 174 P.3d at 751.

70. While all of the court of appeal decisions discussed in this section refused to apply, or sometimes even mention, the doctrine of severability, there have been some cases decided by the Labor Commissioner that did apply the doctrine. *See, e.g.*, *infra* note 128. The California Supreme Court relied on a few of these decisions to support its holding in *Blasi*. *See Blasi*, 174 P.3d at 751 & n.10.

71. *See Styne v. Stevens*, 26 P.3d 343, 343 (Cal. 2001); *Yoo*, 24 Cal. Rptr. 3d at 750; *Park v. Deftones*, 84 Cal. Rptr. 2d 616, 616 (Ct. App. 1999); *Waisbren*, 48 Cal. Rptr. 2d at 437.

72. *Waisbren*, 48 Cal. Rptr. 2d at 446–47.

the client regarding selection of artistic talent, and supervised client relations and publicity.⁷³ After the artist defended on grounds that the manager had illegally procured employment by negotiating television commercial deals and other project terms, the manager admitted as much, but declared that his procurement activities were only a fraction of the work he performed for his client and were therefore legal.⁷⁴

The *Waisbren* manager had relied on the court's earlier decision in *Wachs v. Curry*,⁷⁵ arguably one of the only pro-manager decisions to date. Although *Wachs* focused on striking down a constitutional challenge to the TAA,⁷⁶ the case was also significant because it adopted a standard that evaluated the manager or agent's procurement activities in relation to his entire business to determine whether a license was necessary.⁷⁷ The court's decision essentially created a de facto incidental procurement exception because it allowed managers to procure employment provided such activities did not constitute a significant part of the manager's business.⁷⁸ However, in *Waisbren*, the court dismissed the *Wachs* standard as dicta, finding that the standard did not sufficiently or workably define "significant part" so as to have any clear applicability to the case at hand and that the *Wachs* court's proposed standard was not supported by the Act's language or legislative history.⁷⁹ After reviewing the Act's plain meaning, its remedial purpose, its legislative history, and its prior interpretation by the Labor Commissioner and the courts,⁸⁰ the *Waisbren* court determined that declaring void those contracts under which a manager had illegally procured employment was the "most effective weapon for assuring compliance with the Act."⁸¹

Later, the court in *Park v. Deftones*⁸² reaffirmed the remedial policy underlying the TAA while further contouring its interpretation of two key provisions of the Act. There, a manager once again sought to recover unpaid commissions from a music band for which he had successfully obtained a recording agreement.⁸³ After the band presented evidence that the manager had secured performance engagements for the band several times over the course of the three-year management contract, the manager argued both that the band's defense was untimely filed and that his booking activities were lawfully conducted to

73. *Id.* at 438–39.

74. *Id.*

75. *Id.* at 445–46.

76. The manager in *Wachs* challenged the Act's constitutionality both on equal protection grounds, claiming there was no rational basis for allowing managers to procure recording agreements but not other types of agreements, and on grounds that the undefined "procurement of employment" term was void for vagueness. See *Wachs v. Curry*, 16 Cal. Rptr. 2d 496, 498 (Ct. App. 1993).

77. See *id.* at 503.

78. See *id.*

79. *Waisbren*, 48 Cal. Rptr. 2d at 445–46.

80. *Id.* at 440–46.

81. *Id.* at 447–48 (quoting REPORT, *supra* note 27, at 17).

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

83. *Id.* at 617.

procure a recording agreement, as allowed by the Act.⁸⁴ The court first held that the band's TAA violation defense was timely. In giving due deference to the Labor Commissioner's interpretation of the statute of limitations, the court established that the defense need only be brought within one year after a manager brings an action to recover commissions, not within one year after the illegal acts occur.⁸⁵ The *Park* court then rejected the manager's argument that his performance bookings were only incidental to his lawful attempt to secure a recording agreement. Relying on *Waisbren*, the court determined that even incidental acts of procurement were within the scope of the Act's regulatory reach, and moreover, that the Act's long-standing policy of curbing abuses against artists compelled the voiding of an illegal contract, even where no commissions were expected.⁸⁶

*Styne v. Stevens*⁸⁷ was one of the first times the California Supreme Court had intervened to interpret the TAA since its enactment, although the case was more significant for its holdings on important procedural aspects of the Act than for any substantive interpretation about illegal activities or remedies for violations. In *Styne*, a manager representing the prominent entertainer Connie Stevens sued to recover commissions pursuant to an oral management contract from a deal between Stevens and a television network, under which she would sell beauty products from her own line and serve as a celebrity spokeswoman.⁸⁸ The trial court initially denied Stevens's motion for summary judgment, which raised defenses based on violations of the TAA, after the court accepted the manager's theory that because Stevens was deriving income based on product sales rather than through direct employment as an artist, the TAA was inapposite.⁸⁹ After a jury found for the manager, the trial court granted Stevens's motion for new trial, finding that it had erred in failing to instruct the jury about the Act's requirements and potential implications for the case.⁹⁰

The manager's appeal on the motion for a new trial eventually made its way to the state supreme court, which granted review on two formalities that had been matters of confusion under the Act. The court ultimately held that the one-year statute of limitations does not apply to raising the TAA as a defense—which may be done indefinitely—but rather only applies to bringing affirmative

84. *Id.* at 618.

85. *Id.*

86. *Id.* at 618–20. The court reasoned that “[t]he abuses at which [the licensing] requirements are aimed apply equally where the personal manager procures work for the artist without a commission, but rather for the deferred benefits from obtaining a recording contract.” *Id.* at 620. The Act's language makes no distinction with respect to whether a manager was compensated or not for an act of procurement, and the Entertainment Commission has previously reviewed and rejected a proposal to exempt from the Act anyone who did not charge a fee or commission for procurement of employment. *See id.* at 619–20.

87. *Styne v. Stevens*, 26 P.3d 343 (Cal. 2001).

88. *Id.* at 347.

89. *Id.* at 348.

90. *Id.* at 349.

claims for violations of the Act.⁹¹ Second, the court went on to define the authority of the Labor Commissioner, who has original and exclusive jurisdiction to hear all controversies under the Act, and held that all claims must first be submitted to and decided by the Labor Commissioner before proceeding to the courts.⁹² Moreover, the court reaffirmed that the Labor Commissioner's interpretation of the Act was entitled to "substantial weight"⁹³ and that the Commissioner had authority to declare contracts void and unenforceable for the unlicensed procurement of employment.⁹⁴

Finally, the more recent decisions in *Yoo v. Robi*⁹⁵ and *Chiba v. Greenwald*⁹⁶ demonstrate the extent to which the courts have been unwilling to apply severability to any contracts that violated the Act. In *Yoo*, a manager was unable to recover commissions from a recording agreement he obtained for his client after evidence showed he had negotiated terms for the artist's live appearances and had sent out promotional packages to solicit employment for his client.⁹⁷ Notably, the court refused to recognize that purely promotional activities, such as sending out an artist's press packages, fell outside the scope of the Act⁹⁸ and that the manager could not shield himself from the remedy of contract rescission by simply warning his client in their written agreement that he was not licensed to procure employment.⁹⁹ The court summed up its own precedent by saying that "[t]he courts have also *unanimously* denied all recovery to personal managers even when the majority of the managers' activities did not require a talent agency license and the activities which did require a license were minimal and incidental."¹⁰⁰

The 2007 court of appeal decision in *Chiba* was an even stronger showing for the courts' marked resistance to severability of contracts than *Yoo* was. At issue were two different contracts between a deceased musician and his cohabitating partner: (1) a contract under which the partner agreed to be the musician's homemaker, secretary, and bookkeeper in exchange for the musician's promise to care for his partner financially for the rest of her life; and (2) a management contract under which the partner would book musical performances and produce albums for the musician in exchange for fifteen percent of the proceeds.¹⁰¹

91. *Id.* at 351.

92. *Id.* at 352.

93. *Id.* at 350.

94. *Id.* at 352.

95. *Yoo v. Robi*, 24 Cal. Rptr. 3d 740 (Ct. App. 2005).

96. *Chiba v. Greenwald*, 67 Cal. Rptr. 3d 86 (Ct. App. 2007).

97. *Yoo*, 24 Cal. Rptr. 3d at 742, 747-48.

98. The court considered but did not decide whether publicists or advertising agencies might engage in illegal procurement activities when they promote an artist, drawing what the court called "a rational distinction" between promoting an artist to the public generally and marketing the client to buyers within the entertainment industry. *See id.* at 748. However, because the court did not expand on its analysis, its conclusion is not clear on this point.

99. *Id.* at 750.

100. *Id.* (emphasis added).

101. *Chiba*, 67 Cal. Rptr. 3d at 89.

Unlike other cases in which a manager sought to recover unpaid commissions under a management contract, here the plaintiff voluntarily conceded that she had illegally procured employment in violation of the TAA and that she was willing to forego any owed commissions under the unenforceable contract.¹⁰² Instead, she only sought compensation from the deceased musician's estate for the first lawful cohabitation agreement.¹⁰³ The court denied the partner relief and refused to apply severability to the transactions despite the substantive differences in the contracts and despite the court of appeal decision in *Blasi*, which had applied the doctrine of severability and which was then pending review in the state supreme court.¹⁰⁴ The *Chiba* court reasoned that equity did not compel enforcement of the lawful parts of the contracts due to the "overriding public policy of deterring unlicensed activities."¹⁰⁵

Combined, the above cases provide a paradigm by which to evaluate the California Supreme Court's decision in *Blasi*. As evinced, the courts were historically opposed to severing the lawful and unlawful parts of contracts where unlicensed employment procurement was involved, even though the common thread running through most of the cases was a manager who had successfully developed the careers of his or her artist-clients and sought unpaid commissions owed under an otherwise lawful management contract. However, rather than using the TAA as a shield to curb the abuses imagined by the legislature when it put the Act into effect, the artists in these and other cases decided by the Labor Commissioner instead used the Act to sever ties with managers and recover all past paid commissions despite gains made in their careers under the guidance of their managers.¹⁰⁶ Perhaps it was this perceived inequity that led the *Blasi* court to part with precedent shaped by the Labor

102. *Id.*

103. *Id.* In California, the agreement between the two cohabitating partners in *Chiba* is known as a *Marvin* agreement, based on *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), which held that contracts dictating the allocation of earnings and property rights between two adults who live together and engage in sexual relations are valid and enforceable unless "expressly and inseparably based upon an illicit consideration of sexual services." *Id.* at 114.

104. *Chiba*, 67 Cal. Rptr. 3d at 89–90.

105. *Id.* at 93. The court's ruling also appeared to be based on what it called "inconsistencies in the pleadings," which made it difficult to determine whether the primary purpose of the parties was the personal relationship or the illegal activities of procuring employment. *See id.* However, dissenting Judge Johnson took the majority to task, calling the "purported 'inconsistencies' among [the] . . . pleadings . . . little more than a tempest in a teapot" and arguing that "[o]n the issue of severability, it makes no difference whether these were two contracts or two clauses of a single contract." *See id.* at 93–94 (Johnson, J., dissenting).

106. *E.g.*, *Tyler v. Laugh Factory Mgmt.*, TAC 31-01, at 14 (Cal. Labor Comm'n (2006)), <http://www.dir.ca.gov/dlse/TAC/31-01.pdf> (voiding *ab initio* a four-year contract between prominent comedian Aisha Tyler and her personal manager and ordering disgorgement of fees in the amount of \$25,000 after the manager combined management and unlicensed booking agent activities); *Kilcher v. Vainstein*, TAC 02-99, at 28 (Cal. Labor Comm'n (2001)), <http://www.dir.ca.gov/dlse/TAC/02-99.pdf> (voiding *ab initio* a six-year contract between acclaimed singer-songwriter Jewel and her personal manager after the manager combined management and unlicensed agency activities); *see also* Birdthistle, *supra* note 12, at 517 ("The multimillionaire celebrities—those artists who arguably need the least protection from the Act—may be quick to wield the Act as a powerful sword against representatives.").

Commissioner and the courts over the past twenty-five years.

III. *MARATHON ENTERTAINMENT, INC. V. BLASI*: DEPARTURE FROM PRECEDENT—OR
SIMPLY (AND FINALLY) AN APPLICATION OF IT?

Although the discussion in Part II shows that the state appellate courts were opposed to, or at least did not consider, severability as an avenue in resolving disputes under the TAA, the California Supreme Court framed its decision in *Blasi* as anything but a landmark. Indeed, as part of its analysis, it reviewed cases decided by the Labor Commissioner that had severed the legal from the illegal parts of the contract as an equitable remedy,¹⁰⁷ and it characterized past courts of appeal decisions as simply refraining altogether from discussing the applicability of the severability doctrine to violations of the TAA.¹⁰⁸ The court's analysis, then, is perhaps unique not for announcing a novel standard, but for finally sanctioning a standard that was always timidly lurking in the shadows of the Labor Commissioner's tool shed of remedies. Below, section III.A summarizes the facts and holdings in *Blasi*, while section III.B is a close analysis of the court's decision and a review of some of the recommendations that have already been made to improve the TAA. What remains unclear after the court's decision is how severability should be applied to contracts violating the TAA and whether the Labor Commissioner would even consider it as a remedy.¹⁰⁹

A. THE FACTS AND HOLDINGS OF *BLASI*

Blasi concerned a dispute between management company Marathon Entertainment and its client Rosa Blasi, a film and television actress who was most recently recognized for her starring role on the television show *Strong Medicine*.¹¹⁰ Marathon and Blasi had entered into an oral agreement under which Marathon would "counsel Blasi and promote her career" in exchange for fifteen percent of her employment earnings during the duration of the contract.¹¹¹ After three years, during which she had obtained employment on multiple films and her lead television role, Blasi unilaterally reduced her manager's commission to ten percent and eventually decided to terminate the management contract upon deciding that her agent would continue to manage her career.¹¹²

107. *Marathon Entm't, Inc. v. Blasi*, 174 P.3d 741, 751 & n.10 (Cal. 2008); see also *infra* note 128 (reviewing the Labor Commissioner decisions that the state supreme court relied on as precedent for the availability of severability for disputes arising under the TAA).

108. See *id.* at 751. The court characterized the *Yoo* and *Chiba* decisions, discussed *supra* notes 95–106 and accompanying text, as supporting the proposition that severability is available as a remedy, even though the courts in those two cases refused to apply the doctrine. See *Blasi*, 174 P.3d at 751–52.

109. See *Parry-Bowers*, *supra* note 9, at 449 ("Given the Labor Commission's history of construing the Act harshly against personal managers, it seems likely that the Commissioner would have little difficulty deciding that any procurement activity in violation of the Act taints the entire contract so as to make it un-severable.").

110. *Blasi*, 174 P.3d at 744.

111. *Id.*

112. *Id.*

Marathon then sued Blasi to recover commissions arising out of Blasi's employment on *Strong Medicine*, alleging that the management company had paid the down payment on her home, paid her business manager's salary, provided business and professional advice, and funded her travel costs—all of which were lawful management services.¹¹³ Blasi obtained a stay on the action so that the Labor Commissioner could rule on her defense that Marathon had violated the TAA by illegally procuring employment during the term of their contract.¹¹⁴ Subsequently, the Labor Commissioner voided the management contract *ab initio* after finding that Marathon had unlawfully procured or attempted to procure employment for Blasi by sending out demo reels promoting Blasi, negotiating various engagements and deals, setting up meetings with casting directors and producers, and seeking out promotional activities on talk shows.¹¹⁵

Marathon subsequently appealed the Labor Commissioner's ruling to the superior court and obtained a trial *de novo*, where Marathon challenged the constitutionality of the Act, claiming the Act violated the due process, equal protection, and free speech rights of managers.¹¹⁶ The court rejected Marathon's constitutional arguments and entered summary judgment for Blasi upon a finding that Marathon had acted as an unlicensed talent agent.¹¹⁷ The court of appeal later affirmed the trial court's conclusion that the TAA applied to managers, but it reversed the lower court's finding with respect to the proper remedy for Marathon's violation after finding that the law of severability of contracts may have permitted the court to separate the lawful and unlawful parts of the contract and apportion a proper remedy in that fashion.¹¹⁸

The California Supreme Court granted review on two issues: (1) whether the TAA applied to managers, and (2) whether the doctrine of severability could be applied to contracts under which a manager had illegally procured employment.¹¹⁹ The court's first holding—that the Act applies to personal managers—was not a surprise. In rejecting Marathon's arguments that the Act's failure to mention managers and the legislature's express refusal to include separate licensing requirements for managers in the Act excluded managers from regulation under the TAA,¹²⁰ the court essentially condoned the way the Act had been operating since its inception. As the court clarified, managers "remain exempt from regulation insofar as they do those things that personal managers do, but they are regulated under the Act to the extent they stray into doing the things

113. *Id.*

114. *Id.*

115. *See* Blasi v. Marathon Entm't, Inc., TAC 15-03, at 4–6 (Cal. Labor Comm'n (2004)).

116. *Blasi*, 174 P.3d at 744.

117. *Id.* at 745.

118. *Id.*

119. *Id.*

120. *See id.* at 748–50.

that make one a talent agency under the Act.”¹²¹

But it was the court's ruling on the second issue that the industry was anxiously awaiting.¹²² The court assumed for argument's sake that Marathon had undertaken illegal procurement activities, and after explicitly denying that it was defining what “procurement” meant,¹²³ it went on to hold that the doctrine of severability could be applied to talent management agreements in fashioning a remedy for violations of the Act.¹²⁴ Like full voiding of a contract, severance was not mandatory but simply another avenue the Labor Commissioner or the courts could pursue.¹²⁵

The court's analysis in applying the doctrine of severability to the TAA proceeded in four neat steps. First, it found the language of the Act was silent as to the question of remedies for violations of the TAA, making it possible to reconcile the Act with California Civil Code section 1599, which had codified the doctrine of severability.¹²⁶ In essence, that provision (and the doctrine, generally) allows, where possible, a contract to be broken into its lawful and unlawful component parts so that the lawful parts are enforceable and the unlawful parts are void.¹²⁷ Second, the court cited a series of Labor Commissioner decisions that appeared to apply severability principles in deciding an equitable remedy, pursuant to—or at least consistent with—Civil Code section 1599.¹²⁸ In its third move, the court tried to ground its holding in precedent set

121. *Id.* at 750. Unsatisfied with the supreme court's holding that the Act does apply to managers as well as agents, Rick Siegel—the founder of Marathon Entertainment, Inc.—filed a federal lawsuit against the California Labor Commissioner, claiming that the TAA was unconstitutional. *See Siegel v. Bradstreet*, No. CV 08-2480 CAS (SSx), 2008 WL 4195949, at *1–2 (C.D. Cal. Sept. 8, 2008). Siegel argued that the Act violated the Due Process Clause, the Contracts Clause, the Equal Protection Clause, and the Takings Clause of the United States Constitution, but the district court ultimately rejected all of Siegel's claims. *Siegel*, 2008 WL 4195949, at *2–5. After filing an appeal in the Ninth Circuit, Siegel petitioned California Governor Arnold Schwarzenegger to intervene on his behalf, and on behalf of all managers, by asking the Labor Commissioner to stop adjudicating disputes relating to the unlicensed procurement of employment until the state legislature better defined who was to be regulated, what activities were to be regulated, and what penalties were to be imposed for violations of the Act. FishbowlLA, Siegel Goes to Terminator for Closure, http://www.mediabistro.com/fishbowlLA/lets_make_a_deal/siegel_goes_to_terminator_for_closure_96398.asp (last visited Nov. 13, 2008). As this Note was going to publication, it was unclear whether Governor Schwarzenegger had intervened, and the Ninth Circuit had yet to issue a ruling on Siegel's appeal.

122. *E.g.*, Shprintz, *supra* note 11 (describing *Blasi* as a “much-anticipated decision on the Talent Agencies Act”).

123. *See Blasi*, 174 P.3d at 750. The court acknowledged that the term “procurement” is not defined in the Act and that the Labor Commissioner “has struggled over time to better delineate which actions involve mere general assistance to an artist's career and which stray across the line to illicit procurement.” *Id.*

124. *See id.* at 754.

125. *Id.*

126. *See id.* at 750.

127. *See id.* at 750–51 (citing CAL. CIV. CODE § 1599).

128. *See id.* at 751 & n.10 (citing *Danielewski v. Agon Inv. Co.*, TAC 41-03, at 24–27 (Cal. Labor Comm'n (2005)), <http://www.dir.ca.gov/dlse/TAC/41-03.pdf>; *Gittelman v. Karolat*, TAC 24-02, at 14–16 (Cal. Labor Comm'n (2004)), <http://www.dir.ca.gov/dlse/TAC/24-02.pdf>; *Cuomo v. Atlas/Third Rail Mgmt., Inc.*, TAC 21-01, at 13–14 (Cal. Labor Comm'n (2003)), <http://www.dir.ca.gov/dlse/TAC/>

by the courts of appeal, claiming that most past cases had been silent on the issue of severability or had mentioned it as a potential remedy, regardless of whether those courts actually used it as one.¹²⁹ Finally, the court buttressed its position by looking to decisions outside the entertainment context where severance was used to partially enforce contracts under which at least one party had engaged in providing unlicensed services.¹³⁰

The ultimate position of the *Blasi* court was to reject a categorical rule that would allow—in instances where severability applied—managers to recover only for rendered artist advice and counseling services and not for other commissions due under the agreement.¹³¹ Analyzing the Act's legislative history and Labor Commissioner and appeals court decisions, the court read into the Labor Commissioner's role the power to void illegal contracts, but not the duty to do so.¹³² The *Blasi* opinion concluded by remanding for a determination of whether severability was appropriate in the case, but not before the court recommended that the legislature revisit the TAA to address "uniform dissatisfaction with the Act's application" to managers, who are often punished by losing commissions despite avid advocacy for their clients.¹³³

B. ANALYSIS OF THE CASE AND OF SELECTED RECOMMENDATIONS FOR IMPROVING THE TAA

Although *Blasi* appears to be inconsistent with the Labor Commissioner's and the courts' past interpretations of the TAA, the truth is that there was no

21-01.pdf; *Anderson v. D'Avola*, TAC 63-93, at 11–12 (Cal. Labor Comm'n (1995)), <http://www.dir.ca.gov/dlse/TAC/63-93.pdf>; *Bank of Am. Nat'l Trust & Sav. Ass'n v. Fleming*, 1098 ASC MP-432, at 16 (Cal. Labor Comm'n (1982)). For its primary analysis of Labor Commissioner decisions, the court specifically discussed *Almendarez v. Unico Talent Management, Inc.*, TAC 55-97, at 2, 14 (Cal. Labor Comm'n (1999)), <http://www.dir.ca.gov/dlse/TAC/55-97.pdf>, in which the Labor Commissioner severed an agreement between a radio personality and his talent manager and allowed the manager to recover payment for personal expenses the manager had fronted for his client, but in which the Commissioner did not enforce payment for unlawful procurement activities. *See Blasi*, 174 P.3d at 751. The court eventually went on to acknowledge that several of the Labor Commissioner's recent decisions stood for the proposition that "severance is never available to permit partial recovery of commissions for managerial services that required no talent agency license," but it dismissed the Labor Commissioner's interpretation of the Act's legislative history and subsequent case law as "mistaken." *Id.* at 754.

129. *See id.* at 751–54.

130. *See id.* at 752. The court relied primarily on two other cases applying severability for the partial enforcement of contracts involving unlicensed services. In *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, the California Supreme Court sanctioned the partial payment to a law firm for legal services provided in both New York and California despite the fact that the firm was only licensed in New York. 949 P.2d 1, 13 (Cal. 1998). And in *Lindenstadt v. Staff Builders, Inc.*, the California Court of Appeal found that an individual who assisted a company in finding businesses to acquire was still entitled to recover for services lawfully performed as a finder despite the fact that the individual may have undertaken activities typically reserved for a licensed broker. 64 Cal. Rptr. 2d 484, 491 (Ct. App. 1997).

131. *See Blasi*, 174 P.3d at 753.

132. *See id.*

133. *See id.* at 755–56.

consistency prior to *Blasi*. As the court pointed out and as commentators have attested, before *Blasi* there were instances in which the courts either refused to even discuss severability or deferred to the Labor Commissioner's strict contract voidance policy. But there were also cases in which the Labor Commissioner had previously applied severability to certain management contracts.¹³⁴ With the Labor Commissioner given wide discretion to fashion an appropriate remedy, the prevalence of severability seemed to be contingent on the Commissioner's personal views.¹³⁵ The court's holding in *Blasi* finally established clear-cut precedent for the acceptability of severability for violations of the TAA, and it may have signaled the Commissioner to undertake at least some basic analysis for determining whether severability would be appropriate.

But before the Supreme Court of California announced its decision in *Blasi*, many commentators were skeptical that it would affirm the appellate court's holding with respect to the issue of severability. Some suggested that the court would succumb to pressure by powerful groups like the guilds representing actors, directors, and writers, or the Association of Talent Agents, which all wrote amicus briefs in support of *Blasi*'s position.¹³⁶ It was also plausible that the court would reject severability given past court pronouncements on the necessity of giving deference to the Labor Commissioner on questions of the TAA's interpretation and the Labor Commissioner's history of construing the Act in a more artist- and agent-friendly manner.¹³⁷ And, of course, there have always been questions as to whether the Act would continue to have any teeth in the absence of criminal penalties or complete contract voidance for illegally

134. See *id.* at 751–54; McPherson, *supra* note 9, at 44–45.

135. One commentator argues that even the court's embracement of severability in *Blasi* gives the Commissioner an "out" that would continue to allow interpreting the Act favorably towards artists and agents by simply finding that the taint of illegality permeates the entire agreement in such a way that severance is not possible. See Parry-Bowers, *supra* note 9, at 448–49. Since *Blasi* was decided, the Labor Commissioner has only published one of its decisions with respect to an artist-manager dispute arising under the TAA. See Welcome to the California Department of Industrial Relations, <http://www.dir.ca.gov/dlse/DLSE-TACs.htm> (last visited Feb. 20, 2009). In *Blanks v. Riccio*, the Labor Commissioner voided *ab initio* an oral agreement between two aerobics instructors, who were seeking careers as musicians, and their long-time friend, who had agreed to manage them. TAC 7163, at 2, 6 (Cal. Labor Comm'n (2009)), <http://www.dir.ca.gov/dlse/TAC/7163.pdf>. The Commissioner found that the manager had negotiated two employment opportunities, had scheduled a publicity appearance on a national talk show, and had scheduled meetings with infomercial producers for the aerobics instructors-come-musicians. *Id.* at 4–6. Although the decision briefly discussed the remedy of severability as sanctioned in *Blasi*, the Commissioner ultimately decided, without much explanation, that the central purpose of the contract was non-managerial in nature and therefore unenforceable. *Id.* at 10–11. Because the statute of limitations had run, the artists were no longer entitled to disgorgement of commissions paid. *Id.* at 11. However, the case suggests that despite the holding in *Blasi*, the Labor Commissioner may still be against using severability as a remedy and may be empowered by discretion to decide against using it.

136. Parry-Bowers, *supra* note 9, at 447–50.

137. See *id.* at 448–49. But see McPherson, *supra* note 9, at 44–45 (arguing that there was precedent for the *Blasi* decision even though the majority of cases showed the Labor Commissioner or the courts voiding *ab initio* most contracts under which illegal procurement occurred).

procuring employment in violation of the Act.¹³⁸

Notwithstanding that *Blasi* has left open the question of how to determine when severability is appropriate as applied to management contracts—a question which I take up more closely in Part IV—the decision advanced the equitable considerations that many argue had been lacking in the enforcement of the Act. Although the court refused to recognize that it was adopting any sort of exemption for incidental procurement,¹³⁹ the application of severability sounds much like a de facto or quasi-incidental procurement exemption. Although a true incidental procurement exception would likely entitle a manager to payment for all activities performed under the contract—including for isolated acts of procuring employment—the court’s decision suggests that managers would face milder penalties for illegal, unlicensed acts of procurement. Because the Labor Commissioner and the courts would now have discretion to limit the use of disgorgement and voidability to those acts constituting procurement of employment while still enforcing payment for lawful management services, managers would only risk foregoing payment strictly for those acts reserved to agents under the TAA.

But the savvy manager ordinarily understands from the get-go that he is not entitled to commissions for illegal acts of procurement of employment and seldom seeks to recover on that basis. This presumption has led commentators who defend severability to suggest that the Act would still be enforceable without the harsh penalty of voiding contracts *ab initio* for isolated procurement violations. Unlicensed managers would have no incentive to solicit employment for their clients as their primary business knowing they would not be paid for that work and being aware of the impracticality of “double-dipping” in both agency and managerial responsibilities.¹⁴⁰ Instead, the reality is that managers who are truly in the business of managing would only undertake isolated acts of procurement to jumpstart or advance the careers of their artist-clients.

As I previously mentioned, the California Supreme Court aptly pointed out that there have been multiple attacks on the efficacy and relevance of the Act, as well as on the inequities in the Act’s enforcement, that have emerged in the over twenty-six years since the Act was first passed. In trying to change the tide and modernize the underlying policies of the TAA to account for the evolution of the entertainment industry, there have been multiple suggested improvements for the Act. Some advocate the reinstatement of criminal penalties in combina-

138. See, e.g., Parry-Bowers, *supra* note 9, at 451–52.

139. See *Blasi*, 174 P.3d at 748.

140. See *Marathon Entm’t, Inc. v. Blasi*, 45 Cal. Rptr. 3d 158, 165 (Ct. App. 2006) (arguing that forfeiture of any commissions directly related to the unlawful procurement of employment should be sufficient to discourage blatant violations of the TAA); cf. Robertson, *supra* note 29, at 264 (“On a practical level, it is not feasible for a personal manager to attend to both the creative and employment needs of an artist who has obtained a ‘modicum of success.’”); Zarin, *supra* note 16, at 985–86 (stating that proponents of an incidental booking exception to the TAA argue that personal managers would be constrained by time-management issues, such that they would not be able to perform both management and agency duties, thereby only engaging in isolated acts of procuring employment).

tion with an incidental procurement exemption, which would supposedly provide managers sufficient leeway to properly serve their clients while providing a strong disincentive to managers to flagrantly violate the Act.¹⁴¹ Of course, the problem with reinstating criminal penalties is that the legislature has avoided doing so due to its and the Labor Commissioner's inability to more lucidly define "procurement of employment" and so as to avoid rendering criminal penalties unconstitutional for the vagueness of the procurement standard.¹⁴² In responding to arguments that an incidental procurement exemption would also be void for vagueness, commentators have suggested looking to New York's related talent agencies statute as a guide.¹⁴³

Other commentators and legislators have advocated the enactment of a Personal Managers Act to regulate the activities of managers in very much the same way that agents are currently regulated under the TAA. Previous suggestions included incorporating inexpensive dispute resolution mechanisms, defining fiduciary obligations owed by managers, articulating particular activities that could or should be properly undertaken by a manager, and providing an incidental booking exception.¹⁴⁴ In 1999, California Assemblywoman Sheila Kuehl proposed an amendment that would require things like the posting of bonds and a license before an individual could be employed as a manager, but both agents and managers who feared heightened government regulation immediately voiced their opposition to the proposed legislation, and ultimately managers ended up once again avoiding a licensing scheme or any similar sort of regulation.¹⁴⁵

Some think such a statute would not be the answer to the dilemmas arising under the Act. One commentator has instead advocated the implementation of a uniform act based on fiduciary law that would regulate all of an artist's representatives.¹⁴⁶ He suggests that a Personal Managers Act would create more conflicts between agents and managers, with each group arguing over the unfair and more lax regulation of the other group, or that it would simply aggravate the situation by mirroring the vagueness of the TAA that has long been the source of contention.¹⁴⁷ Among the novel aspects that would characterize the proposed act would be the use of fiduciary duty law's good faith standard as the primary regulatory vehicle, an inclusion of a non-exhaustive list of prohibited abuses or violations, and the coverage of all artistic representatives, which the commentator suggests would create an overlap in the work representatives undertake,

141. See, e.g., Parry-Bowers, *supra* note 9, at 458.

142. See *id.* at 458–59.

143. See *id.* at 459.

144. See Zarin, *supra* note 16, at 997–1003 (arguing that a Personal Managers Act with an incidental booking exception would protect the interests of both artists and managers).

145. See Birdthistle, *supra* note 12, at 543–46.

146. See Devlin, *supra* note 12, at 405–06, 408–13.

147. *Id.* at 406–08.

while simultaneously mitigating conflicts between them.¹⁴⁸ However, one problem that emerges is that while the proposed act would be highly protective of artists, it would ignore the economic externalities that would be imposed on the various representatives who have specialized in providing a particular service for years. For example, talent agencies would have to expand their operations to provide management services, and their years of paying expensive licensing fees will have been in vain. Personal managers, who may be as new to the business as their artist-clients, would not have the financial means to engage in the often expensive networking opportunities it takes to establish industry relationships and land lucrative deals.

Until the legislature decides to revisit and restructure the Act so that it takes into account the competing considerations of Hollywood's key players, the *Blasi* decision immediately begs the question of how the Labor Commissioner will know when severability is appropriate in each case. I now turn to that question by introducing potential guidelines for the Labor Commissioner and the courts to consider when a controversy arises for a violation of the Act.

IV. LOOKING AHEAD: A SUGGESTED SEVERABILITY STANDARD

In holding that severability could be applied to the facts of *Blasi*, the California Supreme Court stated: "In deciding whether severance is available . . . [t]he overarching inquiry is whether the interests of justice . . . would be furthered by severance."¹⁴⁹ One of the central problems after the court's decision is how to determine the situations in which severability would be an appropriate remedy—that is, to determine precisely when the "interests of justice" would be advanced. The *Blasi* court highlighted a primary concern in applying severability, namely that it is a fact-specific question that will vary from case to case.¹⁵⁰ Because the court provided little guidance to the Labor Commissioner and lower courts on how to approach the doctrine, other than suggesting that they look to the contract's central purpose to evaluate whether illegality permeates the entire agreement,¹⁵¹ my aim is to outline a list of non-exhaustive factors that take into account the nature of the entertainment industry and that should be considered in determining whether severability would be appropriate.¹⁵² As the doctrine is an equitable one, I argue that the

148. *Id.* at 408–13.

149. *Marathon Entm't, Inc. v. Blasi*, 174 P.3d 741, 754 (Cal. 2008) (internal quotation marks omitted) (citing *Armendariz v. Found. Health Psychare Servs., Inc.*, 6 P.3d 669, 775 (Cal. 2000)).

150. *See id.* at 755.

151. *See id.*

152. The Restatement (Second) of Contracts articulates a balancing test for determining when the terms of a partially illegal agreement should be enforced. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981). While the Restatement provides a helpful starting point, it is much too general to be applied on its own to disputes arising under the TAA. At the core of the test is whether the interest in enforcing a particular contractual term of a partially illegal contract outweighs the public policy underlying the legislation or principles that led the legislature to outlaw a particular contractual term in the first place and the deterrent effect that voiding such a term might have. *See id.* The Restatement

Commissioner and the courts should not only look at a manager's potentially illegal conduct, they should also analyze the entire relationship and history between the manager and artist to determine whether the interests of justice would be served by granting the remedy of severability. In particular, the Labor Commissioner and courts should consider: (1) the number of years the artist and manager have been in the industry; (2) the developing definition of "procurement of employment" under the TAA; (3) whether refusing enforcement of the contract would further the purpose of the TAA; (4) the reasons for dissolving the contract; (5) the frequency and nature of the manager's procurement of employment activities; (6) the ease of severing the contract's legal and illegal parts; and (7) the distinct contracts or renewals that exist between the artist and manager.

1. Number of years in the industry.

First, the Labor Commissioner or court should consider the number of years that the manager and artist have been in the entertainment industry, which would inform the parties' expectations arising out of the contract.¹⁵³ Because the underlying policy of the Act is to protect *fledgling* artists from potential abuses by their representatives, accounting for the number of years that the artist has worked in the business would eliminate the sometimes faulty assumption that artists are perpetually too naïve to protect their own business interests. This presumption does not account for the reality that artists pick up a series of handlers along the development of their careers—from lawyers to publicists to business managers—who frequently serve an unspoken checking function on each other's business dealings, not to mention that artists acquire their own business instincts by virtue of their time in the industry. The number of years that an artist has been in the industry also informs the extent to which a manager must engage in incidental procurement activities, such as arranging meetings, sending promotional kits, or booking small performances, in order to develop an artist's portfolio to the point where she is finally bankable enough to be signed by an agent. Thus, the more time an artist spends or the more an artist excels in the industry, the more the Labor Commissioner or court should consider severability as a remedy.

Of course, on the manager's side, the number of years a manager has been in the business would inform the extent to which he knows the industry and is able

suggests three factors to consider in weighing the interest in term enforcement: (1) the parties' justified expectations; (2) any resulting forfeiture if enforcement is denied; and (3) any special public interest in enforcement of the particular term. *Id.* On the other hand, when evaluating the public policy against enforcement of the term, one should consider four factors: (1) the strength of the policy as manifested by legislation or judicial decisions; (2) the likelihood that refusal to enforce the term will further the policy; (3) the seriousness of any misconduct involved and the extent to which it was deliberate; and (4) the directness of the connection between the misconduct and the term. *Id.* Some of the factors I suggest try to build on the model proposed by the Restatement.

153. The Restatement also suggests looking to the parties' expectations in analyzing whether severability would be an appropriate remedy. *See id.*

to navigate the gray area that straddles the fine line between promoting an artist's career and procuring employment. At first glance, this seems to be in conflict with my suggestion that the greater the number of years an artist has been in the industry, the more likely severability should be, since I am now advocating that the Commissioner and courts be more watchful of long-time managers who would be more familiar with the industry. But what I am suggesting is a balancing of these competing realities: an artist who has flourished in the industry would not likely need as strong a protection as complete contract rescission or disgorgement for a manager's violation of the TAA, while a manager who has worked in entertainment for twenty years should not always be able to claim that he was unaware certain acts constituted illegal procurement of employment. The extent to which "procurement of employment" is defined in a particular entertainment context—the next factor on the list—would be read closely in tandem with this first factor.

2. The developing definition of "procurement of employment."

The Labor Commissioner and the courts should be cognizant of the difficulties in clearly defining "procurement of employment" and factor this incoherence into the severability calculus. This factor—which would strike a balance between informing the parties' justified expectations and preserving, if not furthering, the policies and precedent enunciated by the legislature and the case law—does not call for establishing severability as a baseline or rebuttable presumption. Rather, it suggests that as the legislature, Labor Commissioner, and courts work over time to more cogently interpret "procurement of employment," due consideration should be given to whether a particular act has historically been or can, in an everyday sense, be perceived as constituting an act of procuring employment. For example, actively lobbying a studio to get a movie role for an actor-client would squarely fall within almost any definition of procuring employment. But more passively screening emails to arrange a model-client's photo shoots might not so obviously be procurement of employment. And where a particular activity arises that is more indeterminate or that only recently has been interpreted as constituting procurement, the Commissioner and the courts should favor a finding of severability because it is more probable that a manager would not have known that the particular act would result in a violation of the TAA. As such, the Act would remain sustainable and adapt to the ongoing changes in the entertainment industry.

3. Refused enforcement's furtherance of public policy.

Third, the Labor Commissioner and the courts should evaluate the degree to which refusing enforcement of a managerial contract advances the TAA's underlying policy of protecting artists—and, more generally, the public—from abuses. This factor addresses whether there is a special interest or public policy in enforcing or refusing to enforce a particular term and the likelihood that enforcing or voiding a term would advance that special interest or public

policy.¹⁵⁴ Voiding contracts *ab initio* for even minor instances of procuring employment creates the perverse consequence of discouraging managers from investing in the cultivation of new talent for fear that they will be forced to give up all commissions, even for lawfully rendered work. At the same time, the Commissioner and courts should look to whether an actual abuse has taken place to justify complete invalidation of the contract. Where voiding a contract would actually protect an artist who has been taken advantage of by a personal manager, this factor weighs against adopting severability as a remedy. The idea here is not to sanction the illegal behavior of a manager, but rather to ensure that artists do not have license to use the Act as a sword and unjustly renege on commissions despite the advances they have made in their career in part because of their managers' guidance and investment.

4. Reasons for dissolving the contract.

As described in the context of the previous factor, much of the inequity inherent in voiding management contracts *ab initio* for incidental procurement activities stems from the fact that managers frequently spend much of their time and resources in building the career of the new artist. The artist then refuses to pay the manager any commissions due to him and tries to obtain full restitution of fees already paid for lawful management services once a better opportunity comes along for the artist. Although past complaints based on unjust enrichment have often been unsuccessful,¹⁵⁵ it is necessary for effectuating the purpose of the Act to determine whether an artist is seeking to renege on payments based on a perceived abuse or simply to avoid making payments for work legally undertaken by the manager. This is tied to the idea that courts should consider how enforcement of a term would further or hamper the policy underlying a particular piece of legislation and any forfeitures that would result if a particular term were not enforced. I propose that the Labor Commissioner and courts favor severability where a manager's procurement activities are not fraudulent or maligning, such that they do not fall within the purview of the acts the TAA was intended to protect against.¹⁵⁶ Again, the idea is not to sanction a manager's blatant violation of the law, but neither should it be to allow successful artists an escape strategy to the detriment of the managers who helped jumpstart their careers.

5. Frequency and nature of procurement activities.

Under this fifth factor, the Labor Commissioner and the courts would look at

154. Considering the policy underlying the legislation in question is one of the recommendations of the Restatement. *See id.*

155. *See, e.g.,* Schwartz, *supra* note 55, at 147–48 (discussing that quantum meruit-type relief is ordinarily not available to managers because their illegal activities render the managers “in pari delicto, and consequently deprives them of opportunities to invoke a court’s equitable powers”).

156. *See supra* section I.B for a discussion of some of the perceived abuses the state legislature sought to remedy by passing the TAA.

the number of procurement activities that a manager undertook as well as the character of the procurement acts.¹⁵⁷ The most important feature of this factor is that the Labor Commissioner and courts should analyze the acts in the context of the industry in which the artist works to account for the varying levels of severity for the acts of obtaining employment. For example, booking one or two coffee-shop performances for an emerging singer-songwriter is much different than negotiating the terms of a nation-wide mall tour, just as setting up a meeting for a new actor with the heads of a studio is not the same as negotiating the complete terms of a television employment contract.

The Labor Commissioner and the courts might also analyze this factor in conjunction with the number of years an artist has been in the business because the necessity of certain activities would change as the artist flourishes in her career. A singer with an employment agreement, for example, may not need a manager to arrange performances anymore, while someone just starting out would. Also, the Commissioner and courts should more closely consider the remedy of severability when the activities a manager undertakes are purely promotional in nature—such as arranging publicity appearances, sending out press materials, or arranging meetings. This is particularly true at the earliest stages of an artist's career because these types of activities would be more justified as a means of developing an artist's portfolio to the point where she would be bankable enough to be signed by an agent. Finally, the Commissioner and courts should consider a manager's past instances of procurement, including with other clients, to assess the manager's propensity for ongoing and arrant violations of the Act. Where a manager has a proclivity for unnecessary violations of the TAA (for example, booking a well-established artist who should be represented by a licensed agent), severability should not be used as an equitable remedy.

6. Ease of severability.

This factor hews closely to the *Blasi* court's mandate that the Labor Commissioner and the courts evaluate the central purposes of the contract, except that there is a need in the entertainment context to look at the subsequent execution, rather than the form, of the contract. Most managers do not say upfront that they will procure employment, and as a matter of fact, many often include disclosures in their written agreements that the manager will explicitly refrain from procuring employment.¹⁵⁸ So in deciding whether to sever a management agreement, the Commissioner or court should look at the manager's intentions—that is, the extent to which the manager's activities were more akin to those of

157. This factor is similar to the Restatement's suggestion that courts look at the seriousness of the misconduct involved when determining whether to grant the remedy of severability. See RESTATEMENT (SECOND) OF CONTRACTS § 178.

158. For sample personal management contracts, including samples that contain provisions disclaiming the manager's ability to procure employment as an agent, see Siegel, *supra* note 20, at 279–352.

an agent and were explicitly geared towards procuring employment, versus the extent to which the manager's primary role was to advise or guide the artist's career path in a fashion more typical of managers. Analysis of the conversations between the artist and manager when entering into the contract would be relevant here for determining what each party expected to receive from the contract, as would a review of the manager's actions during the contract.

7. Viewing successive contracts or renewals in isolation.

In fashioning a proper remedy, the Labor Commissioner and courts should view each contract or contract renewal between a manager and artist in isolation rather than viewing them as a composite transaction. This issue commonly arises when managers and artists decide to renew their initial agreements but where unlawful procurement activities occur either only during the first contract or only during subsequent renewals. Although viewing contracts in isolation is relevant to deciding whether severability is appropriate, it also addresses whether disgorgement of past commissions paid should occur. For example, where incidental procurement activities occur during a renewal term of a two-year contract, an artist should not be entitled to restitution of fees paid for lawfully rendered services under the first contract. Conversely, where the illegality occurs during a first-term contract, the manager should be entitled to commissions for legal management services rendered during the second contract, unless the illegality under the first agreement is so pervasive as to taint the entire second contract or renewal as well.

* * *

To briefly demonstrate how the severability factors I propose above might work in practice, I return to the hypothetical I described in the Introduction of this Note.¹⁵⁹ As you recall, model-actress Serena Waldorf is seeking to void the contract between her and her manager, Nate Bass, after she is cast to bring the accomplished life of actress Tori Spelling to the big screen and realizes her new agent can represent her in both the capacity of agent and of manager. In a case before the Labor Commissioner, the Commissioner should first look to the number of years each party has spent in the industry. Here, Waldorf was a complete newcomer to the industry when she met Bass, while we know that Bass had represented actors, but never models, for at least three years before he met Waldorf. Although both parties seem relatively new to the industry, this factor would more likely cut in favor of the artist, given the manager's more extensive time in the industry and his familiarity with the entertainment world. But the Labor Commissioner might also choose to bifurcate the manager's

159. *See supra* Introduction. This hypothetical is simplified to show the severability standard I propose in practice. Of course, most dealings in the industry are much more complex and would require the Labor Commissioner or a court to engage in a more plenary analysis of the contract between the artist and her manager, as well as activities conducted before, during, and after the execution of the contract.

activities. Bass had represented actors, but the hypothetical states that he has never worked with models. The extent to which the contested activities were specific to one industry over another might be relevant to this decision.

The second factor—the developing definition of “procurement of employment”—could cut both ways in this situation, depending on whether the Labor Commissioner’s and the courts’ prior decisions had addressed Bass’s disputed employment-procurement activities, as well as whether his activities could be commonly characterized as procuring employment. He accepted his friend’s offer to audition Waldorf for a small part, he mailed publicity stills to modeling agencies, and he distributed business cards at parties. Business card distribution has not been found to serve a procurement function—*yet*—and it is not likely that many would define this ordinary currency of networking as seeking employment for an artist. Still, given that in the past even casual party conversations have been found to be proxies for soliciting employment, Bass’s business card distribution is at least questionable. Moreover, his first two acts here—mailing publicity stills and accepting his friend’s audition offer—would almost certainly be considered illegal under the Act.

The Labor Commissioner should find that the third and fourth factors, read in tandem, weigh in favor of severability because the reasons for voiding the contract would not further the policies underlying the TAA. Under this hypothetical, Waldorf has no complaints of her manager’s work nor any proof that he has taken advantage of her. He invested in her career from the beginning by funding her travel expenses and acting lessons, and Waldorf now seeks disgorgement of fees paid simply because she seeks to improve her bottom line by consolidating the functions of manager and agent. Therefore, the function of the Act, which is to protect fledgling artists, would not be served by voiding the contract *ab initio* for incidental procurement activities.

Similarly, I would argue that the fifth factor I have proposed, which evaluates the frequency and nature of the alleged procurement activities, weighs in favor of severability. Sending headshots to various modeling agencies and distributing business cards at industry functions are arguably more promotional in nature and are essential for building the career of a new artist. Unless and until Bass has engaged in a more active solicitation or bargaining role on behalf of Waldorf, he should not be penalized for publicity activities that raised awareness of his client’s profile so that she could begin building a résumé. On the other hand, sending Waldorf to an audition, even one offered informally by Bass’s friend, is undoubtedly an unlicensed attempt to procure employment. But if there are only incidental acts of this type, particularly early on in the artist’s career, severability should also be favored.

Finally, the sixth factor could cut either way in this scenario, while the seventh factor should push the Labor Commissioner to consider severability. The sixth factor, ease of severability, would depend on the central purpose of the contract and its subsequent execution. The Commissioner would have to analyze Bass’s actions under the contract to determine whether his role was

more akin to advising Waldorf in her career or whether his intentions and her understanding were that he would obtain employment for her. If his function was primarily an advisory one, then the Commissioner should sever the legal parts of the contract and award Bass his due compensation accordingly. And with respect to the seventh factor—viewing each of the contracts or renewals in isolation—the Labor Commissioner should evaluate Bass's activities under the first contract separately from his activities under the subsequent renewal to which Bass and Waldorf agreed. In this hypothetical, Bass's allegedly illegal activities occurred during the first one-year contract. If these acts do not substantially affect any employment Waldorf obtained under subsequent contract renewals, then Bass should be able to recover, at minimum, any fees lawfully owed to him under the second contract.

CONCLUSION

The California Supreme Court's decision in *Blasi* to sanction severability as an appropriate remedy for violations of the TAA is an improvement on the current tenuous status of the Act because it accounts for the practical realities of the entertainment industry. Managers who were zealous representatives for their artist-clients were frequently denied just compensation for lawful services they rendered because they incidentally crossed into the realm of agency to procure employment in an attempt to launch the careers of doe-eyed artists. And unfortunately, few, if any, cases decided by the Labor Commissioner or the courts indicate a furtherance of the purpose the TAA was originally supposed to serve. Most cases are not about new artists being taken advantage of; rather, they are about artists unilaterally renegeing on commissions contractually owed to their managers after the artists have become successful, often due to the work of their managers.

However, while severability may be a stride towards equity, it remains to be seen whether and how the Labor Commissioner and the lower courts will implement the standard without much direction from the state supreme court. The aim of this Note ultimately has been to propose a workable framework that the Labor Commissioner and courts can use to determine when severability is appropriate until the legislature decides to seriously assess the flaws that persist in the application of the TAA. Although an overhaul of the Act might be in order, my recommended solution is one that will address the immediate impact of the *Blasi* decision. With any luck, Hollywood will soon be able to yell, "That's a wrap!" on the conflicts that have persisted between agents, managers, and artists under the TAA.