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By: Kelli Shope*

I. INTRODUCTION

There's no business like show business. Within this business, talent agents and the Screen Actors Guild (SAG) generally focus on the business, so that actors can focus on the show. For decades, talent agents and SAG have fought to protect rank-and-file actors from Hollywood scams and unfair employment conditions. Yet their roles are distinct; while both represent the professional interests of actors, agents have a direct financial stake in their actors' careers. Because of the nature of the agency relationship, actors sometimes need protection from their own agents. SAG has historically met this need. In the 1930's, SAG worked with talent agents to develop standards that would govern the agency relationship; these standards ultimately took form in a collective bargaining agreement. From 1939 to 2002, actors relied on this collective bargaining agreement between agents and SAG and enjoyed the benefits flowing therefrom, perhaps even taking them for granted. The agreement, called "Rule 16(g)," set forth the contours of the agent/artist relationship, and virtually every actor of this generation was a beneficiary to that agreement. Rule 16(g) set clear guidelines for agents in their dealings with clients; for instance, it capped agency commissions, prohibited agents from owning an interest in productions, required

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arbitration of all claims, and gave actors the right to break agency contracts under various circumstances. In 2002, this longstanding agreement terminated after SAG and talent agents failed to reach new terms. Now in 2006, SAG and agents still have not returned to the table. Consequently, actors are faced with entering into agency-created contracts without SAG approval, without the protections that governed the relationship for over sixty years, and with significantly less favorable terms. An unprecedented issue has emerged: without a collective bargaining agreement in place, what is the broader effect on the contractual rights of rank-and-file actors? A new era of agency relations has emerged; aspiring actors can no longer afford to ignore the business in show business.

SAG and talent agents are not the only parties relevant to a discussion about the current state of agency relations. Many years ago, California lawmakers recognized the vulnerability of struggling actors and drafted legislation to protect these artists from agents. In 1978, lawmakers enacted the Talent Agencies Act[1] (TAA or the Act) to regulate the talent agent profession for the benefit of actors. Today, actors may need to resort to this somewhat obscure legislation as they face entering into agency contracts without the protection of a collective bargaining agreement. Countless articles have been devoted to the TAA's effect on talent managers and agents but curiously few, if any, have been devoted to its impact on those it serves: rank-and-file actors.[2]

The following article will explore the impact each of the above entities – SAG, talent agents, and lawmakers – has on the contractual rights of rank-and-file actors in light of the termination of Rule 16(g). Section II discusses actors' prior contractual rights under the collective bargaining agreement and how failed negotiations with talent agents left actors vulnerable to unfair contracts. Section III explores the new standard agency contract utilized by agents and the

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1. Talent Agencies Act, Cal. Lab. Code §§ 1700 – 1700.47 (West 2004) (hereinafter Cal. Lab. Code).

2. It is important to note at the outset that this discussion is limited to rank-and-file actors. This is because well-known and more established actors presumably have bargaining power and need not rely on the minimum terms set forth in collective bargaining agreements – they can negotiate. The discussion is also limited to Hollywood actors, as the New York branch of SAG negotiates independently of the Hollywood branch.

resulting legal implications for actors. Section IV details and evaluates the substance of the TAA, one of the few remaining legal protections for actors. Section V exposes the shortcomings of the TAA and SAG and poses possible explanations for the current state of affairs in agency relations. Finally, potential solutions will be presented.

II. SAG'S COLLECTIVE BARGAINING ON BEHALF OF ACTORS: AN OVERVIEW

SAG began serving actors in 1933 with one fundamental objective: "to do all things necessary or proper to advance and promote their welfare and interests."[3] To meet this objective, SAG has sought to "establish unity in action"[4] in representing its members' interests.[5] Specifically, the "Screen Actors Guild represents its members through: negotiation and enforcement of collective bargaining agreements which establish equitable levels of compensation, benefits, and working conditions for performers."[6] SAG's role as representative, negotiator, and protector in the actor/agent relationship is detailed below.

A. "Power in Numbers": Collective Bargaining with Agents

One of SAG's primary services to members is collective bargaining.[7] The role of collective bargaining in the entertainment

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3. Screen Actors Guild, Inc. Constitution and By-laws, Art II, § 2H (July 2004).

4. Screen Actors Guild, Inc. Constitution and By-laws, Art II, § 2B (July 2004).

5. In recent years, the threat of strikes and controversial elections created division within the union, evidenced by intense hostility among SAG's two "parties": the "Restore Respect," now called "Campaign for Unity," and "Membership First" factions. The two factions remain divided on issues such as guild membership prerequisites, a merger with the American Federation of Television and Radio Artists (AFTRA), and DVD compensation.

6. Screen Actors Guild, Inc. Constitution and By-laws, Art II, § 2B (July 2004).

7. In a landmark employment law case, the Supreme Court validated the right of collective bargaining and reaffirmed its purpose: "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and

industry is particularly important. As the California legislature has recognized, artists in this industry are generally more susceptible to abuse than employees in more traditional industries, especially in their dealings with agents.[8] Actors with creative dispositions essentially place their dreams in the hands of agents with career objectives of their own. The law governing collective bargaining agreements gives artists an excuse to not give in to oppressive or unfair terms, despite an inherent temptation to acquiesce to the requests of agents. To compensate for their inferior bargaining position, actors can rely on the fact that they are bound by the terms of a collective bargaining agreement and face union sanctions or dismissal for agreeing to less favorable terms. This legal precedent helped actors in agency relations throughout the sixty-three year collective bargaining period with talent agents.

B. The SAG Franchise Agreement: Rule 16(g)

Since 1939, SAG and talent agents worked under some form of collective bargaining agreement which set forth terms and conditions in the agent/artist relationship. Negotiations between SAG and talent agents – represented by the Association of Talent Agents (ATA)[9] – ultimately led to codified agency regulations collectively known as Rule 16(g). With over fifty pages of detailed provisions, the agreement was designed to compensate for the difference in

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bargaining power and serve the welfare of the group." J.I. Case Co. v. Nat'l Labor Relations Bd., 321 U.S. 332, 338 (1944). To protect employees in an inferior bargaining position, the Court prohibited any waiver of minimum terms set forth in collective bargaining agreements. *Id.* Individual contracts undercutting union agreements would not only undermine union efforts but also violate the federal National Labor Relations Act. *Id.*

8. Buchwald v. Superior Court, 254 Cal. App. 2d 347, 350-51 (1967).

9. As the designated bargaining unit for talent agents, the ATA represents over one hundred talent agencies in their negotiations with the various entertainment unions. Roughly one thousand individual agents are represented by the ATA. *See* About ATA, *at* http://www.agentassociation.com/frontdoor/about_ata.cfm (last visited Feb. 16 2006). The ATA offers many benefits to member agents including: full time lobbying; general representation of agents' interests; meetings with the Labor Commissioner and state lawmakers; a full-time political strategist at the state capitol; involvement with relevant legislation; and maintenance of relations with the entertainment guilds. *Id.* ATA agents, in turn, represent approximately 90% of working actors. *Id.*

bargaining power among agents and artists. It also allowed actors to focus on the creative process, instead of concerning themselves with the business side of the industry. Specific protections for actors under Rule 16(g) included the following:

1. General provisions

Under Section III of Rule 16(g), agents were required to obtain a franchise from SAG. Those who applied for and successfully obtained franchises were called "SAG-franchised agents"; acquiring a franchise made the agent bound by all regulations within Rule 16(g).[10] To get a franchise, an agent generally had to comply with the following: (1) the agent could not include any false or misleading statements on the franchise application; (2) the agent was required to post a $10,000 surety bond;[11] and (3) an agent's SAG franchise was conditioned upon the maintenance of a state license.[12] If an agent ceased to maintain a SAG franchise, any contracts with SAG actors were automatically void.[13] Underlying the franchise agreement was the requirement that all SAG members deal exclusively with SAG-franchised agencies.[14]

Once franchised, the agent was free to enter into a SAG-approved agency contract with SAG actors. Within fifteen days of entering into an agency agreement with a SAG actor, the agent was required to submit a copy of the contract to SAG or the contract could be rendered void.[15] As with all collective bargaining agreements, Section IV-B made it clear that SAG actors could not enter into contracts with less favorable terms than those provided for in Rule 16(g).[16] Any changes to the agreed-upon form contract had to be approved by SAG *and* be more favorable to the artist.[17]

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10. *See* SAG Regulations, Application for Screen Actors Guild, Inc. Talent Agent's Franchise, Exhibit A, No. 6.

11. *See* SAG Regulations, § III-J.

12. Further, revocation of a state license would result in revocation of the franchise. *See id.* § III-L.

13. *Id.* § IV-G2. The agent's only rights at that point were the ability to collect commissions "earned prior to the date of such termination." *Id.*

14. *Id.* § II.

15. *Id.* § IV-I.

16. *Id.* § IV-B. *See also id.* § IV-J (stating that "the actor may not waive any of the provisions of these regulations or of the form agency contracts attached

2. Fiduciary Provisions

Under Section H, agents agreed to various covenants regarding agency contracts, each embodying the principle that agents were fiduciaries.[18] Most significantly, the agent agreed to:

a) make "all reasonable efforts to assist the actor in procuring employment for the services of the actor as an actor in the branch or branches of the motion picture industry covered by his agency contract";[19]

b) make truthful statements in discussions with the actor;[20]

c) not intentionally withhold significant facts from the actor;[21]

d) avoid "dishonest and fraudulent practices" in the contract phase and subsequent performance thereof;[22]

e) "be that of a fiduciary";[23]

f) make client lists available to prospective clients;[24]

g) arbitration where a client believed that the agent's representation of other actors with similar characteristics has adversely affected the quality of agent's representation of the client;[25]

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hereto . . . ."). Of course, well-known or higher status actors are free to negotiate more favorable terms.

17. *Id.* § IV-B.

18. The regulations included fourteen specific covenants in addition to the general provisions of Rule 16(g). *See id.* § IV-H6(b).

19. *Id.* § IV –H1.

20. *Id.* § IV –H3.

21. *Id.* § IV –H4.

22. *Id.* § IV –H5.

23. *Id.* § IV –H6(a).

24. *Id.* § IV –H8.

25. Where a client believed this to be the case, an agent had to agree to resolve the issue through arbitration – if a tribunal found that the quality of representation

h) assume a duty to the client to "consider only the interests of the actor in any dealing for the actor, and shall never consider or act upon the interests of the agent when such interests are adverse to the interests of the actor";[26]

i) fully represent the client in the client's career;[27]

j) be available to clients during reasonable business hours, call client back within a reasonable amount of time, and always have someone available to answer phones during business hours;[28] and

k) at the actor's request, give the actor reasonably specific written statements describing recent professional efforts of the agent on behalf of artist.[29]

3. Scope of Rule 16(g)

Section IV-F limited the scope of the agency contract to the field of acting.[30] Accordingly, fields such as writing and directing were beyond the scope of the contract; any concurrent agency representation in those fields had to be reflected in separate contracts.[31] Geographically, agents were generally prohibited from receiving commissions on compensation from work that an actor

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was adversely affected because of concurrent representation of similar clients, then the tribunal could permit the actor to terminate his agency contract upon terms it deemed proper. *Id.* § IV-H8.

26. *Id.* § IV-H.

27. To satisfy this requirement, the agent was required to: (1) "seek out and confer with producers and others who may employ or recommend the employment of the actor," (2) "advise the actor with respect to his career," (3) read scripts proposed to actors and share his or her opinion, (4) continue procurement activities even when actor is engaged on other projects, and (5) at actor's request, provide actor with a summary of commissions that the actor paid to the agent. *Id.* § IV-H10a-c(vi)(e).

28. *Id.* § IV –H12.

29. *Id.* § IV –H13.

30. *Id.* § IV-E.

31. *Id.* § IV.

completed in a territory in which the agent "d[id] not maintain an office capable of servicing the actor . . . ."[32] As for termination, under Section IV-D, contracts were terminable at will if the parties so agreed. Further, where an actor failed to gain ten days of employment during any ninety-one day period, the contract was terminable by the actor or agent upon written notice.[33]

4. Substantive Provisions

The agreement's more substantive provisions primarily dealt with agency commissions. Agency commissions were capped at 10%.[34] Commissions on reruns paid to actors at minimum guild scale were payable only with respect to the first and second reruns.[35] Further, commissions were not payable for employment in motion picture and television jobs which would reduce the actor's compensation to below the SAG minimum scale rate;[36] in these scenarios, agents had to negotiate a plus 10% deal to collect a commission. Commissions on the following were explicitly prohibited:[37] per diem payments; reimbursements for expenditures related to jobs;[38] penalties for violations by the production;[39] and compensation for extra or "background" work.[40]

Other substantive prohibitions involved conflicts of interest and legal misconduct. Agents were subject to fines for engaging in or

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32. *Id.* § VII-B.

33. *See* SAG Regulations, Exhibit E, No. 6, "SAG Motion Picture/Television Agency Contract."

34. SAG Regulations, § XI-A(1) (stating that "no contract of an agent . . . may specify a higher rate of commission than 10% of the compensation or other consideration received by the actor"). This cap on the commission rate was not avoided by additional services provided by the agent. § XI-A(2).

35. *Id.* § XI-C(1).

36. SAG Regulations, Agreed Interpretations, No. I. ("No Commission on Scale" rule).

37. For all non-commissionable payments, see section XI-G (1) – (9) of the SAG Regulations.

38. This would include "damage to or loss of wardrobe, special hairdress, etc." *Id.* § XI-G(2).

39. This includes meal and rest period violations, penalties for late payments, and any other penalties resulting from violations of other SAG collective bargaining agreements. *See id.* § XI-G(3).

40. *Id.*§ XI-G(5).

having an interest in a motion production in violation of the Regulations.[41] Further, agents were subject to fines or revocation of their SAG franchise for engaging in any of the following conduct: fraud, misappropriation of funds, charging in excess of the specified 10% commission, or collecting commissions on minimum SAG scale jobs or on runs beyond the first and second reruns.[42] Again, revocation resulted in the automatic termination of all contracts with SAG members; as such, agents had considerable incentive to comply.[43]

One particular substantive provision is worth noting in its entirety: "It shall never be deemed to be a violation of these Regulations or a breach of any agency contract for an agent to be over-zealous in representing the interests of the client."[44]

Lastly, all disputes arising under the agency contract were submitted to arbitration.[45] Proceedings against agents could be brought by SAG members, SAG itself, or proper state authorities including, in California, the Labor Commissioner.[46]

5. Cooperation Provision

In the spirit of unity between SAG and talent agents, Rule 16(g) established what was known as the SAG-Agents Cooperative Committee.[47] The Committee was intended to meet quarterly to discuss the agent/artist relationship and make contract recommendations for the agency agreement which would "aid in promoting harmonious agent-actor relationships."[48]

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41. *Id.* § VIII-B4. *See also* § XVI-B (stating "an agent or an owner of an interest in an agent shall not be an active motion picture producer" or own "any interest in a motion picture producing or distributing company.").
42. This is not an exhaustive list. *See id.* § VIII A-C.
43. *Id.* § VIII-E.
44. *Id.* § XVII-A.
45. *Id.* § IV.
46. *Id.* § IX, Disciplinary Proceedings.
47. *See id.* § XXIV.
48. *See id.* § XXIV-F, H.

C. A Hollywood Union Ends: SAG and the ATA Call it Quits

In 2002, what was perhaps the longest marriage in Hollywood came to a dramatic end. In happier times, SAG and agents had agreed that the collective bargaining agreement was "entered into for the benefit of the members of SAG, both present and future, and for the benefit of members of ATA and NATR, both present and future . . . ."[49] The ATA had characterized its relationship with the SAG as "symbiotic" and one of "mutual support, basic fairness, and cooperation."[50] The parties presumably took for granted the sixty-three year partnership and assumed the agreement would continue to serve their members for years to come. So where did the love go? And what happened to the spirit of collaboration? No Hollywood ending here. SAG and the ATA were unable to maintain their relationship, leaving one longstanding collective bargaining agreement in the dust and thousands of actors headed for unfamiliar territory.

The failed agency negotiations and termination of Rule 16(g) took place as follows.[51] In early 1999, SAG officers and the ATA agreed to begin a series of meetings to discuss changes in the industry and to explore the possibility of amending Rule 16(g) to reflect such changes.[52] Agents primarily wanted SAG to relax

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49. SAG Regulations,.Basic Contract, Art. III-A.

50. The Agency Regulations Negotiations, *available at* http://www.agentassociation.com/frontdoor/news_deal.cfm?id=103. Further, "over the years ATA has looked to SAG as its partner. The Relationship has been symbiotic: success enhances both and neither profits if the other fails." *Id.*

51. Rule 16(g) set forth procedures and terms for expiration of the collective bargaining agreement. The agreement was set to expire five years after execution, but it would continue beyond the five years until one party submitted six months written notice to the other party. SAG Regulations, Basic Contract, Art. XI-A. Upon receiving notice, the parties would agree to head back to the bargaining table to "negotiate with each other in good faith for a new agreement between them to include regulations governing agents relating to activities of SAG members . . . ." *Id.* Ideally, negotiations would begin immediately to avoid the termination of Rule 16(g). *Id.* In the past, the parties were able to make amendments when necessary and avoided the need for the notice provision.

52. It is no surprise that SAG and the ATA have different accounts of the negotiations. The events as set forth in this article are generally corroborated by all, unless stated otherwise. For a look at each party's detailed versions of the facts, see http://www.sag.org (last visited Feb. 23, 2006) (for SAG's Restore

ownership rules.[53] A series of meetings ensued and, in August of that same year, the ATA provided the SAG national board with a proposal outlining its suggestions for amendments.[54] In January of 2000, SAG offered its own proposal.[55] After more discussions on the major areas of conflict, the parties came to agree on amendments to the agency contract.[56]

SAG's National Executive Committee then decided to initiate a full membership referendum on the new agreement.[57] Upon hearing word of a referendum – something the ATA opposed – ATA membership strongly recommended that the ATA and SAG head to the bargaining table to come up with an entirely new SAG agency contract with more sweeping amendments.[58] The ATA served SAG with the six-month termination notice, and the termination

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Respect party's version); http://www.membershipfirst.com (last visited Feb. 23, 2006) (for the Membership First party's take on the negotiations); and http://www.agentassociation.com/frontdoor/news_detail.cfm?id=26 (last visited Feb. 23, 2006) (for the ATA's version).

53. Talent agents wanted to ease ownership rules and be permitted to own interests in productions, a venture prohibited under Rule 16(g) as a conflict of interest and a breach of agent independence. SAG Regulations, § XVI: Agents To Be Independent. *See also* Koh Siok Tian Wilson, *Talent Agents as Producers: A Historical Perspective of Screen Actors Guild Regulation and the Rising Conflict with Managers*, 21 LOY. L.A. ENT. L. REV. 401, 409 (2001) ("The financial interest rules assure that agents work for their clients. Such an assurance cannot be as effective if agents also become their clients' employers.").

Another reported concern of agents was the non-franchise status of talent managers and the alleged impact on the agent profession. Talent managers were not capped at a 10% commission and were not subject to the restrictions of Rule 16(g). However, under the TAA, managers are not legally permitted to engage in any employment procuring activities. Cal. Lab. Code § 1700.4. Incidentally, entertainment attorneys are subject to the TAA as well and may not procure employment for artist clients. *See* Waisbren v. Peppercorn Prod., 41 Cal. App. 4th 246, 253 (1996) (holding that any individual procuring employment, including incidental procuring activities, must first be licensed by the state of California pursuant to the TAA). *See also* Cal. Lab. Code §§ 1700.4 – 1700.5.

54. SAG: History of Negotiations, *available at* http://www.agentassocation.com/frontdoor/news_detail.cfm?id=43 (last visited Jan. 5, 2005).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* It was clear at the outset that the ATA did not want SAG members to vote on the proposed agreements.

procedures under Rule 16(g) kicked in. Pursuant to SAG regulations, negotiations were required to begin right away and in good faith.

During negotiations, Rule 16(g) technically expired, however SAG asked for and received an extension of the negotiations in light of its concurrent commercial negotiations.[59] On February 22, 2002, under the leadership of newly elected SAG President Melissa Gilbert, a tentative agreement was reached.[60] The proposed contract would have relaxed restrictions on ownership of film and television productions and on agency interests in distribution companies.[61] Agencies would have been permitted to sell up to 20% of the interest in their agencies to film production or distribution companies and advertising companies.[62] Many SAG members viewed these proposed changes as being in conflict with the agent's role as fiduciary and independent representative.

On April 3, 2002, SAG sent out a referendum to members.[63] With a 55% "no vote," SAG members narrowly rejected the new agency contract.[64] The ATA refused to return to the bargaining

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59. *Id.*

60. *Id.*

61. *See* Dave McNary, *Agents Paid AFTRA over Pact*, VARIETY, Aug. 12, 2003.

62. *Id.*

63. According to the Membership First faction of SAG, the guild spent $700,000 to try to make sure members passed the new contract. *See* Membership First, *available at* http://www.membershipfirst.com (last visited Jan. 5, 2005). Public relations experts were allegedly brought in to convince SAG members to vote yes. *Id.*

64. The provision that would have revised SAG rules to allow the change in ownership rules was a "chief reason for the SAG pact's defeat." SAG Fights GSAs, *available at* http://www.wgaeast.org/features/sag-figns-gsas.html (last visited Feb. 10, 2005). Many actors were concerned about such a fundamental change in the nature of the agency relationship - a change that seems to contradict the role of agent as a fiduciary. "SAG's position . . . has always been that relaxing financial restrictions would create a conflict of interest, as the actor's agent would, in effect or in actuality, become the actor's employer." *See* Membership First, *available at* http://www.membershipfirst.org. The idea of agents as equity partners in film and television production did not go over well in membership meetings during the negotiation phase: "time and again, actors said 'I need to know that my agent represents me and only me in all my dealings with management.'" *Id.* The concept of agents as employers is regarded by actors as unnatural and dangerous; the common sentiment is that "the agent works for the actor, not the other way

table.[65]

D. The State of Agency Contracts after Rule 16(g)

Rule 16(g) was officially history once the ATA refused to continue negotiations. As a result of the failed negotiations, the franchise expired for all ATA-affiliated agents, voiding all agency contracts thereunder. While all pre-existing agency contracts were considered null and void, at the same time SAG warned members not to sign any new agency agreements without prior approval from SAG. SAG cited Rule 16(a), which forbade members from contracting with non-franchised agents. SAG actors were in limbo status, as it was not clear with whom they should seek representation. SAG members knew that signing with a non-franchised agent was prohibited under Rule 16(a), was considered "conduct unbecoming of a guild member," and would lead to expulsion from the guild. Yet the SAG franchise arrangement had terminated.

In light of the dissolution of Rule 16(g), the SAG National Board temporarily suspended Rule 16(a), allowing members to sign contracts with non-franchised agents.[66] The temporary suspension

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around." Membership First, *available at* http://www.membershipfirst.com (last visited Jan. 5, 2005).

On another note, while many SAG representatives voted against the agreement, at the same time agents were reportedly giving letters to their actor clients encouraging them to vote yes. *See* Roger Armbrust, ATA and SAG Turning Pact into Volcano, *available at* http://www.backstage.com/backstage/news/article_display.jsp?vnu_content_id=1454493.

Six days prior to SAG's rejection of the contract, SAG's sister union AFTRA approved a similar contract with the ATA. The difference in this case was that AFTRA submitted to ATA's request to not send out a referendum to AFTRA members. In 2003, Variety magazine revealed federal tax records indicating that ATA paid AFTRA $500,000 in December as part of the agreement for AFTRA to ease ownership rules. *See* McNary, *supra* note 61.

65. *See* McNary, *supra* note 61.

66. *See* Member Update on Talent Agents, *at* http://www.sag.org/sagWebApp/Content/Public/memberupdate_talent.htm. The "temporary" suspension remains in effect today. On another note, the effect of the elimination of Rule 16(g) on independent agents remains unclear. On the one hand, independent agents still have their SAG franchise intact and should be subject to SAG agreements. On the other hand, if affiliation with the ATA means reduced restrictions, one wonders why independent agents (the few that remain)

remains in effect today. The Board "suspended its rule against members dealing only with franchised agents, promised a campaign for agents to re-sign the old agreement, and warned members not to sign new agency agreements if terms provide less protection than existing standards."[67] The purpose behind the suspension was apparently to give SAG board members time to explore options to protect SAG actors, while also allowing actors to maintain their agency relationships that would be otherwise terminated because of the end of Rule 16(g). Four years later, Rule 16(a) continues to be suspended with no resolution in sight. Negotiations on the agency contract have not been re-established and chances of resuming negotiations are slim to none - agents have no incentive to return to the table. Actors can no longer rely on the protections granted by collective bargaining; instead they face new contracts created by agents without SAG input or approval. Consequently, agents have unprecedented free reign over agency contracts.

III. AGENTS REDEFINE THE SCOPE AND TERMS OF AGENCY CONTRACTS

For decades, agents accepted the role of fiduciary under Rule 16(g), putting the artists' interests above their own. At the same time, agents clearly have always had a direct financial stake in the artists' careers. This reality is now apparent in the text of agency contracts like never before; post-Rule 16(g), the actors' contractual rights have been subjugated to those of agents.

A. The GSA: Double-Agents Dictate the Terms

With no collective bargaining agreement in place for actors, agents were left to their own devices to come up with a standard agency contract. Subject only to TAA restrictions and general labor and agency law principles, agents created the general services agreement, or

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would not join the ATA and surrender their franchise. After all, Rule 16(a) is not in effect anyway and they could now represent their actors without being subject to SAG regulations!

67. *See* Dave McNary, *SAG Memo Puts Agents on Notice*, VARIETY, Apr. 25, 2002, *available at* http://www.variety.com. By "existing" standards, presumably the article was referring to Rule 16 (g) standards.

GSA. Interestingly, the ATA did not have to rush to devise a new contract when negotiations broke down; the GSA was submitted to the Labor Commissioner for approval *during* the original SAG contract negotiations and well before the SAG referendum. Agents appear to have been ready for the dissolution of the bargaining agreement for some time. Post-Rule 16(g), the GSA has emerged as the industry standard for rank-and-file actors.

1. GSA Terms

The expired SAG contract and the GSA both contain a declaration of approval by the Labor Commissioner.[68] The similarities between the contracts stop there. Suffice it to say that the Labor Commissioner did not have to mull over a lengthy contract in approving the GSA – it is a mere three and a half pages in length, compared to the more than fifty pages of protections comprising Rule 16(g). The GSA terms which currently define the agent/artist relationship include the following:

a) Geographic Scope: the artist agrees that the agent is the sole representative of the artist *throughout the world.*[69]

b) Scope of Representation: artist agrees that agent is the *exclusive* representative of artist in the following entertainment fields – writing, directing, music, editing, directing, producing, and "any other capacity in the entertainment, literary and related fields throughout the world . . ." and that agent shall use all "reasonable efforts" to procure employment.[70]

c) Commission: artist agrees to pay 10% of the *gross* compensation earned or received by actor or actor's corporation, venture, partnership, etc. whether or not procured by the agent. Gross compensation includes, *but is not limited*

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68. The clause "The form of this contract has been approved by the State Labor Commissioner on January 25, 2002" originates from the TAA. *See* Cal. Lab. Code § 1700.23.

69. General Services Agreement, Provision 1 (approved by State Labor Commissioner on Jan. 25, 2002) (hereinafter GSA). To compare to Rule 16(g), see *supra* Section II.2.c.

70. GSA, Provision 2. To compare to Rule 16(g), *see supra* Section II.2.c.

to, the following commissionable payments received by artist - or any entity in which artist has any interest - whether or not procured by agent: all forms of compensation, residuals, royalties, bonuses, gifts,[71] non-monetary consideration, and so on.[72] (Commissionable payments on jobs earned under this contract appear to be commissionable in perpetuity.)

d) Breach by Artist: artist is personally liable, jointly and severally.[73]

e) Breach by Agent: no breach by agent is to be considered a material breach unless artist gives written notice to agent within thirty days of being on notice or constructive notice of the breach and agent does not cure defect within ten days of receiving notice.[74]

f) Right of Termination: either party may terminate the contract where artist does not receive a job offer in any four month period and artist is at all times available and other party receives written notice prior to an offer of employment after the four month period.[75]

g) Resolution of Controversies: controversies are referred to the

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71. An anecdote seems appropriate here. Shortly after the SAG contract expired, an actor - who shall remain nameless - asked for clarification on the commissionability of gifts. The agent, visibly annoyed at the question, replied: "Here's the deal. If you get a Timex, you can keep my 10%. If you get a Rolex, I'll take my 10% - got it?" Practically speaking, this means that if an actor works a scale job and gets a gift, the agent can take 10% of the value of the gift in addition to the 10% commission of gross. By accepting the gift, the actor would actually earn less take-home pay.

72. GSA, Provision 3. Further, jobs paid at the SAG scale rate are commissionable under the GSA, as opposed to Rule 16(g) Essentially, the agent now has no incentive to negotiate a plus-10% contract, meaning less work and more money for the agent. To compare commission rules under Rule 16(g), see *supra* Section II.2.c.

73. *See* GSA, Provision 5.

74. *See* GSA, Provision 6.

75. *See* GSA, Provision 8. To compare to Rule 16(g), see *supra* Section II.2.c.

Labor Commissioner.[76]

h) Amendments to the Contract: there shall be no amendments unless agreed to in writing by both parties. Substantial amendments must be submitted to Labor Commissioner for approval, unless favorable to artist.[77]

i) Death: if artist should decease, the contract is binding on artist's heirs.[78]

2. What Contractual Rights Might Actors have in Light of the GSA?

It is clear that the GSA does not offer much in the way of protections for actors. But regardless of the new unfavorable contract terms, actors theoretically have legal rights beyond the text of the GSA.

a) Rights of a Fiduciary

Absent from the GSA is any mention of the "F" word – *fiduciary*.[79] It could be argued that adopting the GSA was an attempt

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76. *See* GSA, Provision 10. Arbitration is no longer required. To compare to Rule 16(g), *see supra* Section II.2.c. This disadvantages actors in many ways. Currently, the Labor Commissioner, appointed by the state to enforce the TAA, is required to hear any complaints related to the contract of which he or she approved. Presumably, if the Labor Commissioner's office approved this contract, it would be unsympathetic to the artist's complaints thereunder. Actors are also disadvantaged by the fact that the ATA and the Labor Commissioner have a collaborative relationship. Earlier this year, the ATA met with the Labor Commissioner's office "in an effort to form a cooperative effort between the two staffs." *See* Talent Agency Licensing: ATA to Share Duties With California Licensing Branch, http://www.agentassociation.com/frontdoor/agency_licensing (last visited Aug. 1, 2005). A partnership was formed to help with the agency licensing process and to "better service the ATA membership," and the ATA is now authorized to help the Labor Commissioner with talent agent license renewals. *Id.* Another indication of the disadvantage to actors is that cases decided by the Labor Commissioner have historically been decided in favor of protecting agents, albeit typically as opposed to managers.

77. *See* GSA, Provision 11. To compare this provision to Rule 16(g), see *supra* Section II.2.c.

78. GSA, Provision 11. While the agreement is also binding on agent's heirs, the burden is not comparable.

79. Each fiduciary obligation under Rule 16(g) is set forth *supra* Section II.2.b.

to create a shift in the agent/artist relationship.[80] Post Rule 16(g), the agent may have attempted to strip itself of its fiduciary role and incorporate the role of employer/adversary, wherein the interests of the artist can be secondary. However, removing the term "fiduciary" from agency contracts does not concurrently remove an agent's fiduciary duty to clients; the agent has acted as a fiduciary to the actor for over 60 years and that obligation does not end simply because fiduciary language is no longer in agency contracts.

Despite the missing language from the GSA, actor clients are permitted to bring breach of fiduciary duty claims against their agents.[81] The agent relationship with respect to clients is that of a fiduciary; the law requires that fiduciaries act in the best interest of clients.[82] The Second Restatement of Agency classifies agents as fiduciaries and states that agents are not only bound by statutory obligations, but also may be held liable for common law breach of fiduciary duties including the duties of good faith, fair dealing, and loyalty.[83]

Although actors might technically have a claim for breach of fiduciary duty,[84] actors would not likely bring suit against an agent on their own without the backing of SAG or Rule 16(g) protections. The inferiority of rank-and-file actors in the agency relationship coupled

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80. Under Rule 16(g), SAG could and did bring breach of fiduciary duty claims on the behalf of actors; arbitration initiated by SAG made SAG the "bad guy" and took the pressure off non-name actors. In one case, an arbitrator cited 16(g) in ruling against an agent who gave producers a pre-signed check authorization form despite the actor's revocation of the authorization. *See* Newsstand, Aug. 12, 2003, SAG Arbitration, at http://www.agentassociation.com (last visited February 10, 2004). He went on to hold that the agent's breach caused damages to the actor because it destroyed the trust inherent in the relationship, thereby destroying the fiduciary relationship between the agent and actor. *Id.*

81. *See* Lewis v. Katz, No. A100785, 2003 WL 22321469 (Cal. Ct. App. Oct. 10, 2003) (stating that performers brought and Labor Commissioner heard breach of fiduciary claim by agent's client).

82. *See* Detroit Lions, Inc. v. Argovitz, 580 F. Supp. 542 (E.D. Mich. 1984) (holding that non-lawyer agents are equally prohibited from conflicts of interests in dealing with clients and that a sports agent violated this duty when he negotiated on behalf of a player with a team in which the agent was also part owner).

83. W. Edward Sell, AGENCY, (1975); RESTATEMENT (SECOND) OF AGENCY § 424, subd. 1 (1958).

84. For example, breach of fair dealing with regard to the GSA or a GSA provision or a conflict of interest if an agent negotiates a contract for an actor on a production in which the agent has an ownership interest. *See supra* note 82.

with the rare opportunity to have an agency contract make these claims unlikely. As many actors see it, a bad agency contract is better than no agency contract and alienating agents is not an appealing career option. By analogy, this line of thinking makes agents themselves necessary – without them, producers could get actors to work for free because working for free is better than not getting the role. Because of the unique nature of the industry and the complicated relationships therein, breach of fiduciary claims are not a realistic option here.

b) Unconscionability

Rule 16(g) and the GSA are clearly worlds apart when it comes to protecting the actors' interests. Aside from a breach of fiduciary duty claim, an agent's enforcement of the contract itself, or many of its terms, may be unconscionable. Unconscionability claims benefit parties in an inferior bargaining position, such as rank-and-file actors. Actors assume this inferior position because they significantly outnumber agents, often wait years just to get in the door to see agents, need an agent to work in their chosen industry, and because agents typically have a law and or business background which gives them an edge in the area of contracts. If an agent - in a far superior bargaining position - subjects an actor without bargaining power to arguably oppressive terms, the actor can refuse to comply and raise the defense of unconscionability.

The first inquiry in any unconscionability analysis is whether the agreement is a contract of adhesion, or a standardized contract "which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."[85] Here, the initial requirement appears to be met considering that agents have a monopoly on employment procuring activities under the TAA, and actors need agency contracts to pursue their careers.[86] Struggling actors have no power to bargain early in

85. Neal v. State Farm Ins. Co., 10 Cal. Rptr. 780, 784 (App. 1961).

86. It is a violation of the TAA for any person not licensed by the Labor Commissioner to procure employment for actors. *See* Gittleman v. Karolat, Cal. Labor Comm'n Case No. TAC 24-02 (2004). Managers and entertainment lawyers, for example, must be licensed as agents to procure employment. *Id.* Procuring activities include occasional procurement and "incidental activities" including the sending of a resume to a producer or setting up a meeting between an

their careers and actors are considered "a dime a dozen" in Hollywood. Thus, many rank-and-file actors must sign the GSA or they cannot obtain agency representation or pursue their chosen profession. On the other hand, if an actor does not sign the GSA, the agent can simply choose to not represent the actor.

Unconscionability also has a substantive and procedural component, each of which must be met for a party to prevail. In California, unconscionable contracts are those in which there is oppression, due to unequal bargaining power, resulting in one-sided or overly harsh results. Such contracts are characterized primarily by a lack of opportunity to negotiate. They are also characterized by terms which limit the nature of recovery for the weaker party but impose no such restriction upon the party with the upper hand.[87] The party in the superior position can justify such disparities upon a showing that the realities of the employment structure demand the lack of mutuality and that the disparity is not merely to maximize his own position.[88]

Turning to the GSA, there is no clear justification for the lack of mutuality and exclusion of actors' rights other than to bolster the position of agents. It may appear to a court that agents seized the opportunity to enhance their position by forcing an unfair, one-sided agreement on actors in an inferior bargaining position. Further, once artists enter into this agency contract, agents continue to maintain the upper hand; while the artist is actually bound by the terms of the contract, the agent can effectively breach without recourse. For example, if an actor fails to pay the agent her commission, the artist is in breach – the breach is easily ascertainable. Yet, if the agent stops submitting or actively representing the actor under the GSA, the agent may be in breach, but the actor has no way of proving or even getting notice of the breach. The lack of oversight under the GSA enables agents to breach, leaving the actor with little recourse. The actor maintains an inferior

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artist and a casting director. *Id.* at 11. Penalties for employment procuring activities by an unlicensed person include disgorgement of all commissions for the previous year, and the entire contract can be held void. *Id.* at 10.

87. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000). In California, for example, courts have found that mandatory arbitration clauses in employment contracts are presumptively unconscionable. *See* Ingle v. Circuit City, 328 F.3d 1165, 1174 (9th Cir. 2003).

88. *See Armendariz*, 6P.3d at 692.

position throughout the agency relationship – unless the actor lands a few big roles and gets some bargaining power.

Practically speaking, an unconscionability claim by a rank-and-file Hollywood actor is highly unlikely. An actor of this status would probably not want to breach an agency contract that is generally difficult to obtain and then get involved in a legal battle with an agent; why risk losing an agent when agents are essential and so hard to come by? Further, actors have generally relied on the Guild to fight for their contractual rights and are probably not prepared for such an undertaking or even aware that they have such legal rights. While actors could conceivably argue unconscionability, the nature of the industry is not conducive to such a claim.

It appears that the GSA is a reality and is here to stay: agents have no incentive to re-negotiate. Actors are unlikely to bring claims against agents or breach their highly sought after contracts, and SAG has not managed to get agents back to the table or otherwise resolve the issue. The only avenue of recourse may be the Talent Agencies Act. Most actors probably do not even know the legislation exists, even though it was enacted for their protection.

IV. LEGISLATIVE EFFORTS TO PROTECT ASPIRING ACTORS: THE TALENT AGENCIES ACT

Decades ago, California lawmakers recognized that struggling actors are particularly vulnerable to abuse by agents and in need of statutory protections governing the agent/artist relationship. In 1978, lawmakers enacted the Talent Agencies Act,[89] a remedial statute which sought to regulate the talent agent profession and the contracts between agents and their clients. Legislative history indicates that the specific purpose behind the Act was to shield artists from the abuses of shady agents[90] and to ensure their personal, professional, and financial welfare.[91]

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89. Talent agent legislation originated with the 1913 Private Employment Agencies Law, which was codified in the California Labor Code. The law then developed into the Artists' Managers Act, ultimately evolving into the Talent Agencies Act in 1978. Philip R. Green and Beverly Robin Green, *Talent Agents and the New California Act*, 4 ENT. L. REP. 3 (1987).

90. *Gittelman*, Cal. Lab. Comm'r, No. TAC 24-02, at 8.

91. *See Waisbren*, 48 Cal. Rptr. 2d 437.

The Act addresses particular problems inherent in the agent/artist relationship and provides actors with a minimum level of legal protection in their relationship with agents. Until 2002, Rule 16(g) was the primary source of protection for actors, thus the extent to which the TAA offered substantive protections was unknown. Now that Rule 16(g) has terminated, the TAA may be the only remaining source of protection for actors. The essence of the TAA is as follows:

A. TAA Provisions

Under the TAA, the Labor Commissioner is empowered to handle talent agent licensing, approve agency contracts, and set general regulations for the talent agent profession. Relevant TAA provisions include:

1. Licensing[92]

The TAA states that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner."[93] The licensing process is designed to prevent "improper persons from becoming [talent agents] and to regulate such activity for the protection of the public."[94] To secure a license, applicants must complete a detailed application, submit fingerprints, and present affidavits attesting to the moral character and/or reputation for fair dealing of the applicant.[95] The Labor Commissioner reserves the right to investigate applicants to confirm representations made in the application.[96] If approved, the agent must post a $10,000 surety bond to the Commissioner,[97] conditioned on compliance with the Act.[98] Upon issuance, licensees must also pay a $25 filing fee and a standard annual renewal fee of

92. This section includes only pertinent provisions for purposes of this article. To view the Act in its entirety, see Cal. Lab. Code §§ 1700-1700.47.

93. Cal. Lab. Code § 1700.5.

94. *Gittelman*, Cal. Lab. Comm'r, No. TAC 24-02, at 9-10.

95. *Id.* § 1700.6(d).

96. *Id.* § 1700.7.

97. *Id.* § 1700.15.

98. *Id.* § 1700.16.

$250.[99] Licensed agents must then post the license in a "conspicuous place" in the agency's place of business.[100] Licensed agents are subject to revocation, after an opportunity to be heard,[101] upon any of the following occurrences: (1) the licensee fails to comply with any of the Act's provisions; (2) the licensee "cease[s] to be of good moral character"; (3) the conditions, under which the license application was granted, change; or (4) it is discovered that the license application includes false statements or material misrepresentations.[102]

2. Regulation of Agency/Artist Contracts

In addition to licensing, the Labor Commissioner regulates the profession of talent agents by enforcing the Act's provisions related to agency contracts. All agency contracts are subject to review and approval by the Labor Commissioner.[103] The TAA qualifies the review requirement, stating that agency contracts will not be denied *unless* the contract terms are "unfair, unjust and oppressive to the artist."[104] On the face of the contract, agencies must include the statement, "This talent agency is licensed by the Labor Commissioner of the State of California," along with an agreement to refer all controversies involving contract terms to the Labor Commissioner for "adjustment."[105] California lawmakers granted original jurisdiction to the Labor Commissioner concerning all controversies related to violations of the TAA.[106] Finally, a schedule of fees to be assessed under the agency contract must be submitted to the Commissioner for approval and posted in the talent agency

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99. *Id.* § 1700.12.
100. *Id.* § 1700.5.
101. *Id.* § 1700.22.
102. *Id.* § 1700.21.
103. *Id.* § 1700.23 stating: "Every talent agency shall submit to the Labor Commissioner a form or forms of contract to be utilized by such talent agency in entering into written contracts with artists for the employment of the services of such talent agency by such artists, and secure approval of the Labor Commissioner thereof".
104. *Id.*.
105. *Id.* (specifying that the statement of licensure must be prominent).
106. *Id.* § 1700. *See also* Green *supra* note 89, at 3.

office.[107]

3. Ownership Interests

Under section 1700.30, the TAA prohibits the sale or transfer of "any interest in or the right to participate in the profits of the talent agency" without prior approval by the Labor Commissioner.[108] Further, agents are prohibited from referring artists to any entity in which the agency has a "direct or indirect financial interest."[109]

B. Form over Substance: Just Whom Does the Act Protect?[110]

In light of the provisions discussed above - and others not

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107. Cal. Lab. Code § 1700.24.

108. *Id.* § 1700.30. Rule 16(g) expressly prohibited this conduct. Post-Rule 16(g), agents have their first chance to seek approval for ownership arrangements. Early signs indicate that agents are slowly venturing into such arrangements. After the termination of Rule 16(g), William Morris Independent partnered with a financier/producer to form El Camino Pictures. Cathy Dunley and Dana Harris, *WMA Sets Pic Finance Operation*, VARIETY, May 26, 2003, *available at* http://www.variety.com. The agency did not seek approval from the Labor Commissioner, it claims, because El Camino is a financing entity, with plans to produce 10 films. *Id.* William Morris claims that the agency owns no interest in the company but vertically integrated agencies such as this arguably cross over into production, raising concerns over agency independence which the TAA and Rule 16(g) sought to protect against. *Id. See also* Dana Harris, *New Endeavor for Interpublic*, VARIETY, Jan. 16, 2005, *available at* http://www.variety.com (announcing that the advertising agency is set to acquire a minority stake in the Endeavor agency, albeit its marketing arm). The article explains how the deal was approved as a direct result of the termination of Rule 16(g). *Id.* It also suggests that Endeavor's A-list clients may be resentful upon learning of the arrangement. *Id.*

109. Cal. Labor Code § 1700.40(b). Other regulations under the Act include a record-keeping provision - wherein an agency must keep records of fees received from artists and jobs secured by the artists under the agency contract - and prohibitions on the following: collecting registration fees, permitting persons of "bad character" to enter the agency's place of business, and publishing false or misleading advertisements or information. Lastly, the Act contains an anti-discrimination clause.

110. This question has been posed by many authors, usually in reference to the TAA's preference for agents over managers. *See e.g.* Edwin F. McPherson, *The Talent Agencies Act: Time for a Change*, 19 HASTINGS COMM. & ENT. L.J. 899, 917 (1997); Katherine Gaidos, *Hollywood Rewrite*, CALIFORNIA LAW BUSINESS (July 6, 2002).

mentioned -[111] it appears as though actors have some statutory protection in the absence of a collective bargaining agreement. At minimum, the TAA should step in to guarantee basic rights based on its mission to protect actors from agents. Yet since the termination of SAG's collective bargaining agreement, actors have been subjected to one-sided, unfair contract terms despite the existence of these TAA provisions. One problem is that while the conduct of agents is technically regulated and subject to review, the review is not substantive and therefore not meaningful. This is partly because all reviews are conducted by the Labor Commissioner's office: the office that approved the GSA in the first place, that recently partnered with the agents' association in the area of licensing,[112] and whose previous decisions overwhelmingly favor agents.[113] Although the TAA was designed to protect artists from shady agents, it seems that the Act has done more to protect agents - hence the name "Talent Agencies Act." The Act has granted licensed agents a monopoly on employment procuring for actors and, although prospective agents must jump through some hoops to get licensed, once licensed the conduct of agents is not monitored to any significant degree.

It is puzzling why the TAA subjects agency contracts to review at all, if not for a meaningful review. But since a review is required under the Act, then a substantive review is necessary if the Act is to protect artists from agents. Under such a review, certain provisions should have led the Labor Commissioner to reject the GSA, especially considering that the Act is intended be liberally construed.

C. California Courts Support a Broad Interpretation of the TAA

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111. *See* Cal. Labor Code §§ 1700-1700.47.

112. *See* Talent Agency Licensing: ATA to Share Duties with California Licensing Branch, (Aug. 1, 2005), http://www.agentassociation.com/frontdoor/agency_licensing. The ATA now has a partnership with the Labor Commissioner – a "cooperative effort between the two staffs" - wherein agents help to facilitate the licensing process. *See id.*

113. In the Labor Commissioner's enforcement of the TAA, talent agents have been increasingly victorious. Although actors do not often bring claims against agents before the Labor Commissioner, for reasons discussed *infra*, cases involving managers have consistently been held in favor of agents. *See generally* Matthew H. Schwartz, *Beaten to Submission: Talent Agents Score a Victory Over Managers on Submissions of Motion Picture Screenplays,* 22 J.NAALJ 145 (2002); Gaidos, *supra* note 110; McPherson, *supra* note 110.

California courts have held that the TAA is to be interpreted broadly, in order to meet the Act's underlying objectives.[114] If the TAA were actually interpreted broadly, as intended, then the Labor Commissioner could have used certain provisions of the TAA to reject the GSA in its entirety. For example, the "unfairness" provision should have led the Labor Commissioner to reject the GSA; under the TAA, contracts are to be approved unless terms are "unfair, unjust and oppressive to the artist."[115] The GSA terms arguably fit this standard. Already in an unfair bargaining position, actors are effectively forced to sign the GSA if they want to work as actors. Faced with the choice of signing the agreement, or finding a new livelihood, most committed actors would not run the risk of rejecting the agreement. Once artists enter into the agreement, they are bound by unfair, extremely one-sided terms with no real recourse.

Similarly, the TAA could be interpreted broadly to strike down specific GSA terms. For instance, the TAA provision prohibiting an agent from referring actors to companies in which the agent has a financial interest should be interpreted more broadly to prohibit agency ownership in productions.[116] This clause was designed to prevent agents from benefiting from referrals to photographers, managers, coaches, printing services, etc.[117] The statutory language "including, but not limited to"[118] indicates that agents could be banned from referring actors to other services, including employer

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114. Although most of the cases advocating broad interpretation of the TAA dealt with talent agents versus managers, the standard for interpreting the statute should be consistent, especially considering that the beneficiaries to the Act are the same.

115. Cal. Lab. Code § 1700.23.

116. State lawmakers would likely agree with this broad interpretation because it would more closely reflect the purpose of the Act. Incidentally, the federal government has historically disapproved of such ownership arrangements. In 1962, the Justice Department charged MCA with violating the Clayton and Sherman Acts for concurrently owning a production company and talent agency. A settlement resulted - MCA had MCA-Universal handle talent representation under contracts with guaranteed payouts to talent, to avoid conflicts of interest. For a full discussion, *see* Wilson, *supra* note 53, at 407. However, in this era of relaxing media ownership rules, the federal government may not intervene as it felt compelled to do in the 1960s.

117. Cal. Lab. Code § 1700.40(b).

118. *Id.* § 1700.40(b).

production companies in which the agency has a financial interest. The underlying concern with referrals is that an agent will lose independence and breach a fiduciary duty to an actor because of a financial interest – the same concern exists in agency ownership. But preventing agents from sending actors to audition for productions in which they have an interest is nonsensical – instead, the Labor Commissioner could have broadly interpreted the statute to prohibit agents from entering into ownership arrangements entirely, since they create a conflict of interest.

Lastly, the TAA's fair dealing provision could be interpreted more broadly to include a fair dealing requirement throughout the agency relationship. The Labor Commissioner should review the conduct of an agent, and fiduciary, who suddenly subject his clients to a contract like the GSA. The sharp contrast of GSA terms suggests that some agents intended to strip themselves of their fiduciary role. Binding vulnerable clients in an inferior bargaining position to unfair terms could arguably violate the fair dealing provision as conduct unbecoming of an agent licensed by the state. The TAA requires that individuals demonstrate a reputation for fair dealing before becoming licensed talent agents. Once licensed, the requirement of fair dealing in all respects must remain or the purpose behind the statute is ignored.

For good reason, courts have held that the TAA is to be interpreted broadly to achieve its unique purpose.[119] It is, after all, designed to be a remedial statute for actors. However, as interpreted by the Labor Commissioner, the TAA has done little to ensure the personal, professional, and financial welfare of struggling actors – and therefore the legislation has not served its underlying purpose.

V. SAG: WHY IT FAILED TO PROTECT THE LITTLE GUY

Lawmakers and SAG both set forth to fight for the rights of vulnerable actors in their dealings with agents. The TAA falls short in various ways and continues to offer little in the way of substantive protections. SAG let its actors down on this issue as well, and various institutional problems may be to blame.

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119. *Waisbren*, 48 Cal. Rptr. 2d at 441.

A. Prioritization and Structural Problems

As the primary representative of actors' interests, it is curious that four years after the termination of Rule 16(g), the agency issue is still far from resolved. SAG has not announced an affirmative solution and other issues seemed to dominate during Melissa Gilbert's term as SAG President. Last September, SAG elected a new President and new leadership. With new leaders in place, perhaps years of inaction and poor prioritization will transform into action and initiative.

B. Inaction After the Fallout With Agents

From 2002 until the present, SAG took no significant action on the agency issue and no clear resolution is in sight. The inaction parallels the failure in 2002 to take meaningful steps to fight the adoption of the GSA after Rule 16(g) terminated. In September of 2005, three years after the GSA was adopted, the Guild announced that national SAG agency committee members would present detailed information about the status of talent agent contracts and offer proposals.[120] *Variety* reports that SAG "gave no details"[121] – as of February 2006, SAG still has not announced plans related to agency contracts. For years, the primary advice to SAG members was to not sign GSAs, knowing that the average member has no other viable option. Although many issues affect this 120,000 member union, SAG seems to have dropped the ball on one issue that profoundly affects most guild members.

C. Systemic Structural and Prioritization Problems

The inability to renew a collective bargaining agreement that spanned over sixty years is symptomatic of deep-rooted structural and institutional problems at SAG. While a structural analysis is beyond the scope of this article, it is worth mentioning that other failed negotiations have plagued SAG in recent years. The commercial strike of 2000 - the longest strike in SAG history – and

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120. Dave McNary, *Agents: SAG Doing Re-Reg End Run, Org Leaders Accused of Shutting out ATA*, VARIETY, Oct. 19, 2004, *available at* http://www.variety.com.

121. *Id.*

merger talks between AFTRA and SAG[122], in addition to agency and other negotiations, suggest that the actors' union itself is suffering from a lack of bargaining power.

Questionable prioritization plays into this as well; while the talent agent relationship affects every rank-and-file actor's contractual and creative rights, the Guild has yet to shift the issue to the forefront. Instead, the union chose to make a controversial AFTRA-SAG merger a top priority.[123] Perhaps poor prioritization and failed negotiations explain the results of a recent AFL-CIO poll: seventy-five percent of SAG membership has "no confidence at all in the union's ability to solve those problems besetting it."[124]

Other possible explanations for the poll include the hostile division within the union, apparent conflicts of interest of SAG representatives, and SAG's hesitancy to stand up for rank-and-file actors. These institutional problems may also explain why the agency issue is unresolved.

First, as previously mentioned, SAG has been sharply divided into two opposing factions.[125] When SAG enters into contract negotiations as a union that is not united, its bargaining position and the interests of its actors may be compromised.

Second, SAG officers often represent the actors' interests concurrently with their own interests in the industry. For instance, former SAG President Melissa Gilbert and other SAG officers have their own production companies or produce films in addition to acting, which begs the question: how can SAG guarantee to its members that SAG officials have their "actor" hats on while negotiating with fellow producers and agents? While this may not have come into play in prior agency negotiations, it certainly would if agents ever did agree to return to the table – this is because agents are on the road to becoming joint owners with production companies. Because of diversification in the industry today, conflicts of interest must be addressed head on to avoid, at minimum, the appearance of impropriety and, at most, an actual compromised bargaining position.

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122. A merger that the SAG President made a top priority despite serious reservations by SAG members.

123. Claude Brodesser, *To Be Continued? Fluid SAG-Producer Talks Center on Extension*, VARIETY, Feb. 17, 2004.

124. *Id.*

125. *See supra* note 5 and accompanying text.

Finally, SAG must begin to stand up for the "little guy," considering that only a small percentage of actors achieves celebrity status or significant bargaining power. This small percentage of well-known actors has lawyers and bargaining power to protect their interests, unlike the vast majority of SAG members. If SAG puts the interests of name actors first and fails to take on causes for rank-and-file actors, then problems like the GSA will continue to emerge and go unresolved. A good example of SAG ignoring the interests of rank-and-file actors involves the 2001 commercial strike. Actors were clearly prohibited from crossing the picket line to accept non-union employment, but scabs emerged in that strike and were treated differently based on status. SAG expelled non-celebrity actors for crossing the picket line but looked the other way when SAG members including Tiger Woods, Elizabeth Hurley, Shaquille O'Neal, and others accepted non-union work during the strike. One of the expelled actors had even refused to shoot the job upon seeing protestors on set, but the union would not budge and refused to reinstate the actor.[126] The problem is this: if the actors' own union will not stand up for the little guy, who will?

VI. RESTORING FAIRNESS IN AGENCY RELATIONS: PROPOSALS FOR CHANGE

Although the egregious conduct of some agents led to the creation of the TAA and Rule 16(g), agents also have a long tradition of collaboration with SAG and serving the interests of their actors. Unfortunately, agents currently have no incentive to initiate

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126. In a segment called "Screen Actors Guild Bans Little Actors who Crossed the Picket Line but not Stars," ABC's John Stossel exposed the union's double standard and inconsistent punishments for struggling actors versus well-known actors. Upon hearing about SAG's unequal treatment based on celebrity, George Clooney offered to pay penalties for the expelled SAG actors in an attempt to allow them to resume their careers. He did not take issue with SAG's enforcement of the rules – he took issue with enforcement based on status. Again, SAG would not budge. Stossel attempted to interview President Melissa Gilbert, but received no response. Stossel intended to ask Gilbert about a non-union production which she financed and in which she played the lead role. A clear SAG violation, Stossel pointed out that Gilbert was never expelled – in fact, "[s]he became president of SAG, the union that protects the little guy." *See* National Legal and Policy Center, Union Corruption Update, (Mar. 18, 2002).

negotiations or to alter the state of the agent/artist relationship other than for the unpopular purpose of restoring fairness Therefore, it is up to SAG and lawmakers to fulfill their commitment to protect actors by living up to their respective objectives. With proper action by SAG and lawmakers, there is hope for a renewed partnership between SAG and the ATA.

1. Calling in the Big Guns

As demonstrated in other SAG negotiations, the leverage of well-known actors can work to the union's advantage in the resolution of labor disputes. Similar to efforts to undermine runaway production – where some well-known actors have refused to sign on to projects filmed overseas without a legitimate, creative purpose for doing so – the involvement of established actors can make a difference or at least bring attention to a union cause.[127]

Likewise, high-profile actors may be the best chance of making headway with agents. Since agents currently have no reason to re-establish negotiations with SAG, big-name actors are needed for leverage. Name actors yield tremendous bargaining power - agents need "names" to bring in big commissions. To put pressure on agents, high-profile actors could condition renewal of their own highly bargained-for agency contracts on the ATA's commitment to work exclusively under SAG-approved contracts for all clients. Many actors remember the struggles on their way up the ranks and have rallied around union causes to help fellow actors. And, despite the fact that name actors are not subject to GSAs, they actually do have a stake in this area: they may ultimately be impacted by eased ownership rules. If there is one burden that all actors will share, it is the threat of agents as producers.

2. Legislation

SAG should urge lawmakers to amend and expand the TAA to meet its stated objectives. The goals of the Act are not being served

127. For instance, in last year's negotiations on SAG's collective bargaining agreement with television and film producers, countless well-known actors lent their names to the union's cause to increase SAG's bargaining position and to raise awareness among SAG members.

by provisions that fail to offer substantive protections. The ATA actively engages in lobbying efforts,[128] but it does not have a monopoly on Sacramento; the actors' interests should be represented there as well. SAG is in the best position to alert lawmakers that the agency relationship has changed; the TAA, in fairness, was created while a longstanding collective bargaining agreement was in place to offer more substantive protections. The situation has drastically changed, and the law must be changed to reflect these new concerns.

A good starting point would be to get lawmakers to consider amending the TAA provision related to contract approval. As written, the Labor Commissioner may only reject contracts that are unfair, unjust, *and* oppressive to the artist.[129] Instead of the default position of approving agency-created contracts and preferring form over substance, the Labor Commissioner should be granted more discretion to substantively review agency contracts and conduct. Perhaps the "and" should be changed to "or" so as to reach clearly one-sided, unfair agreements. That way, actors would actually have statutory protection from unjust agency contracts.

Further, SAG should consider actively engaging in an ongoing dialogue with the Labor Commissioner. Again, the ATA has taken action and established a relationship with the Labor Commissioner,[130] and so actors' interests should be represented as well. SAG officials should urge the Labor Commissioner to reconsider the validity of the GSA. SAG could start by appealing to the Labor Commissioner to re-examine the sharp contrast between the SAG contract and the GSA. Since the TAA is intended to be construed liberally,[131] the Labor Commissioner should have the

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128. *See* About ATA: Benefits of Membership in ATA, http://www.agentassociation.com/frontdoor/about_ata.cfm (last visited Aug. 1, 2005).

129. Cal. Lab. Code § 1700.23 (West 2003).

130. *See* Talent Agency Licensing: ATA to Share Duties With California Licensing Branch, http://www.agentassociation.com/frontdoor/agency_licensing (last visited Aug. 1, 2005).

131. *Waisbren*, 48 Cal. Rptr. 2d at 441. The court held that the Act "should be liberally construed to promote the general object sought to be accomplished; it should not be construed within the narrow limits of the letter of the law." *Id.* quoting *Henning v. Indust. Welfare Co.*, 762 P.2d 462 (Cal. 1988). Thus, it must be liberally construed to "ensure the personal, professional, and financial welfare of artists." *Id.*

authority to reevaluate the GSA under the "unfair, unjust, and oppressive standard" with an eye toward promoting the underlying purpose of the Act: protecting actors from agents and ensuring their professional welfare.

Next session, SAG must also make talent agent contracts a priority and incorporate TAA reforms into its legislative agenda. SAG actively works on legislation in other areas of importance to guild members and should do so in the area of agency relations as well. Most recently, SAG co-sponsored two film incentive bills and a paparazzi bill, and lent its support to bills dealing with spam, lock-out benefits, and health insurance issues. SAG clearly has the resources and must take initiative in this area.

3. Unification and Rehabilitation of the Union

SAG has become bitterly divided over the years, despite the fact that it exists to protect and represent one cause - the welfare of its actors. For progress on the agency issue and others, the opposing factions need to put aside hostilities and internal battles. With seventy-five percent of the union having no confidence in SAG leadership, reforming the agency issue may first require reforming the union itself.

Perhaps a new set of leaders will bring renewed confidence in SAG or at least begin to heal old wounds. In September 2005, SAG elected new leadership, with Alan Rosenberg replacing Melissa Gilbert as President.[132] Rosenberg recently stated that actors often put their craft ahead of their business interests, which is precisely why SAG needs to be a strong union.[133] And in his first interview as President, he cited "unifying the union" as the top priority of his term."[134] Most significantly, he acknowledged that without solidarity in the union, the idea of getting agents back to the table is unrealistic.[135] This acknowledgement may signal renewed interest in the agency issue on the part of SAG, but it will take swift action to earn the confidence of SAG members.

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132. *Interview with Screen Actors Guild President Alan Rosenberg*, SCREEN ACTOR 37 (Fall 2005).

133. *Id.*

134. *Id.*

135. *Id.*

Although SAG has not adopted a resolution related to agency contracts, SAG has recently held a series of GSA workshops for actors in which SAG representatives urge actors to not sign GSAs, to strike out unfavorable clauses and add more favorable terms, and to get SAG input before signing any agency contract. Further, SAG members are told that the negative implications of signing the GSA are real and detrimental, and that respectable agents will accept changes in the agency contract. One thing is clear: actors can no longer rely on the protections granted by the old collective bargaining agreement and instead must start considering the business side of the industry.

4. Mobilization of Rank-and-File SAG Members

More than ever, SAG members need to acknowledge the business side of the industry and learn how to protect their own interests. In the past, SAG members could ignore agency contract terms and rely on SAG to negotiate and enforce contract provisions. However, until SAG can restore agency relations and regain its role as the actors' protector in this area, actors need to gain awareness of the issues affecting their interests and mobilize. They should actively pressure their union to make this issue a priority and take a stand with agents. If actors were to collectively reject the GSA or demand better terms from agents, eventually the status quo might change. Actors should demand the respect they deserve and accept the reality that not having an agency contract might ultimately be better than having an oppressive one.

VII. CONCLUSION

Actors enjoy the benefits of collective bargaining in all aspects of the business – from commercials and television to voiceovers and film. Almost every actor in the industry today also benefited from the SAG franchise agreement with talent agents. The agreement offered rank-and-file actors protection from agents who did not effectively represent them, capped agency commissions, limited the scope of representation to acting, and strictly regulated the agent/artist relationship in general. When SAG and the ATA failed to reach new terms and the agreement terminated, actors became more vulnerable and less protected than ever before. The new

standard agency contract provides significantly less favorable terms than those provided through the collective bargaining agreement. When put to the test, the TAA failed to protect rank-and-file actors from unjust contracts. SAG has yet to introduce proposals for restoring agency relations. Consequently, the TAA, SAG, and agents have left rank-and-file actors caught between a rock and a hard place: they must either sign the new standard agency contract or try to make it in Hollywood without an agent.[136] If given the choice, most actors would likely sign the contract, knowing that they cannot effectively pursue their careers without one. In light of SAG's negotiation failures and the TAA's shortcomings, it is clear that actors can no longer afford to take the business side of show business for granted. At the same time, newly elected SAG leaders, and ultimately lawmakers, are in the best position to demand the return to a fair, even-handed relationship between actors and their agents. Actors simply want a break in Hollywood; it is time for lawmakers, agents, and SAG to at least give them the legal break they deserve.

136. Of course, actors can request amendments to the form contract. However, with a superior bargaining position, agents have little incentive to adopt changes to a contract they created.