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# Drawing the Line Between Personal Managers and Talent Agents: *Waisbren v. Peppercorn*

Erik B. Atzbach\*

## I. INTRODUCTION

In California, talent agents are regulated by the Talent Agency Act (“the Act”). Under the Act, those who engage in the “occupation of procuring employment” for artists are considered to be talent agents and must comply with the provisions of the Act, including a licensing requirement.<sup>1</sup> There has been much debate about the extent to which personal managers may procure employment without violating the Act. In *Waisbren v. Peppercorn*, the court drew a very bright line between personal managers and talent agents by holding that the Act requires a license to engage in *any* employment procurement activities.<sup>2</sup> Because it is a bright line rule, in many respects *Waisbren* is a significant deviation from the case law that preceded it.

This comment explores the current state of the law in regard to employment procurement by artists’ representatives in California. Part II of this comment provides some background as to the role of talent agents and personal managers in the entertainment industry. Part III reviews two recent and important cases that preceded *Waisbren*. Part IV examines the *Waisbren* decision. Part V sets forth some recommendations as to the direction personal managers should take as an industry in light of the *Waisbren* decision.

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<sup>1</sup> See generally CAL. LAB. CODE §§ 1700-1700.44 (West 1989).

<sup>2</sup> See generally *Waisbren v. Peppercorn Prods., Inc.*, 41 Cal. App. 4th 246 (1995).

## II. PERSONAL REPRESENTATIVES IN CALIFORNIA'S ENTERTAINMENT INDUSTRY

To appreciate the *Waisbren* decision, some background is needed as to the functions of talent agents and personal managers, as well as to the governing law on artist representation in California.

### A. Talent Agents and Personal Managers

Talent agents<sup>3</sup> are those who actively seek employment for artists,<sup>4</sup> such as live performances and movie parts. Talent agents normally receive a ten percent commission for their services.<sup>5</sup> The role of the talent agent is usually limited to seeking out employment opportunities for the artist. In California, talent agents are regulated by the Act.

Personal managers,<sup>6</sup> on the other hand, are involved with both the day-to-day business and the long-term development of an artist's career.<sup>7</sup> Managers may handle an artist's finances, organize meetings, counsel the artist in his personal relationships, provide artistic coaching to the artist, and engage in other similar activities.<sup>8</sup> Managers are also a source of funds for fledgling artists and provide the resources necessary for the development of human capital. The manager should be viewed as both an investor and an employee of the

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<sup>3</sup> Talent agents are also referred to as agents, booking agents, and artists' managers. James M. O'Brien III, Comment, *Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists*, 80 CAL. L. REV. 471, 478 n.34 (1992); Philip R. Green & Beverly Robin Green, *Talent Agents and the New California Act*, ENT. L. REP., Sept. 1987, at 3-4, reprinted in 1988 ENTERTAINMENT PUBLISHING AND THE ARTS HANDBOOK 357, at 357-58.

<sup>4</sup> DONALD E. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 197-201 (2d ed. 1992).

<sup>5</sup> See Bradley W. Hertz, *The Regulation of Artist Representation in the Entertainment Industry*, 8 LOY. ENT. L. J. 55, at 55-56 (1988).

<sup>6</sup> Green, *supra* note 3, at 358 (explaining that personal managers are also known as managers and artists' managers).

<sup>7</sup> Michael I. Yanover and Harvey G. Kotler, *Artist/Management Agreements and the English Music Trilogy: Another British Invasion?*, 9 LOY. ENT. L. J. 211, 212 (1989).

<sup>8</sup> O'Brien, *supra* note 3, at 482-83.

artist.<sup>9</sup> Because their duties are so far-reaching, personal managers usually charge a commission of fifteen to twenty-five percent.<sup>10</sup> Unlike talent agents, personal managers are not currently regulated by any state government.<sup>11</sup>

### B. *The Talent Agencies Act*

In California, the Talent Agencies Act is the body of law that governs artist representation.<sup>12</sup> The Act is the product of years of refinement of legislation regarding artists' representatives, which began in California in 1913.<sup>13</sup> The Act requires anyone who engages in the "occupation of procuring employment" for artists in the state of California to be licensed. The California Labor Commissioner is responsible for enforcing the Act.

In order to be licensed as a talent agent in California, the applicant must meet certain requirements.<sup>14</sup> First, the applicant is required to submit two affidavits that attest to the applicant's moral character.<sup>15</sup> The Labor Commissioner may investigate the character and responsibility of the applicant.<sup>16</sup> The applicant must also deposit a \$10,000 bond with the Labor Commissioner.<sup>17</sup> This bond serves as a test of the financial credibility of the applicant and provides protection to the artist who may need recourse to the bond.<sup>18</sup>

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<sup>9</sup> Gary A. Greenberg, *The Plight of the Personal Manager in California: A Legislative Solution*, in COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 1993, at 490 (PLI Patents, Copyrights, Trademarks and Literary Property Course Handbook Series No. 359).

<sup>10</sup> Hertz, *supra* note 5, at 56.

<sup>11</sup> Hal I. Gilenson, *Badlands: Artist-Personal Manager Conflicts of Interest in the Music Industry*, 9 CARDOZO ARTS & ENT. L. J. 501, 503 (1991); See Yanover, *supra* note 7, at 211.

<sup>12</sup> Hertz, *supra* note 5, at 57. (explaining that the Talent Agencies Act has been held to be a remedial statute enacted to protect those seeking employment and a constitutional exercise of the state's police power).

<sup>13</sup> Green, *supra* note 3, at 357.

<sup>14</sup> See generally CAL. LAB. CODE §§ 1700-1700.44 (West 1989).

<sup>15</sup> CAL. LAB. CODE § 1700.6 (West 1989).

<sup>16</sup> CAL. LAB. CODE § 1700.7 (West 1989).

<sup>17</sup> CAL. LAB. CODE § 1700.15 (West 1989).

<sup>18</sup> Hertz, *supra* note 5, at 71.

### C. *Issues in the Regulation of Artists' Representatives*

It is important for fledgling artists to develop public recognition through employment in the entertainment industry, such as live performances and movie parts. In order to obtain such employment, an artist must usually rely on the services of someone with significant monetary resources and a network of industry contacts. Unfortunately, many artists can neither attract nor afford the services of a licensed talent agent.<sup>19</sup> For this reason, there has historically been a tendency for most personal managers to participate in some form of employment procurement.<sup>20</sup> The problem is that most personal managers are not licensed as talent agents, so there has been some question as to whether their employment procurement activities are legal.<sup>21</sup>

In California, a finding that a personal manager unlawfully procured employment can have particularly draconian consequences for the manager, including rescission of the management contract and restitution of all commissions earned by the manager.<sup>22</sup> Many artists have used this situation to their advantage, using a personal manager for a few years to procure employment, then getting all the commissions back because the manager illegally procured employment.<sup>23</sup>

Personal managers have unsuccessfully tried to use the common law contract theory of quantum meruit in such situations. The Labor Commissioner has recently held that since quantum meruit is an

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<sup>19</sup> Greenberg, *supra* note 9, at 490 ("According to Roger Davis, Vice President of the William Morris Agency, 'with respect to recording artists, for example, or musical groups . . . we very often do not sign [them] until they have a record because our overhead is so high.'").

<sup>20</sup> O'Brien, *supra* note 3, at 482-83.

<sup>21</sup> Neville L. Johnson & Daniel Webb Lang, *The Personal Manager in the California Entertainment Industry*, 52 S. CAL. L. REV. 375, 418 (1979).

<sup>22</sup> Gilenson, *supra* note 11, at 512; *See generally* Hall v. X Management, TAC No. 19-90 (Cal. Lab. Comm'r 1992).

<sup>23</sup> Nimoy, *Personal Managers and the California Talent Agencies Act: For Whom the Bill Toils*, 2 LOY. ENT. L. J. 145, 163-64 (1982).

equitable remedy, it cannot be applied where there is a statutory mandate such as the Talent Agencies Act.<sup>24</sup>

The precarious situation of personal managers in regard to employment procurement is somewhat ameliorated by two exceptions in the Act. The first exception allows managers to work in conjunction with an agent.<sup>25</sup> In practice, however, this doesn't really help personal managers because talent agents seldom work cooperatively when procuring employment for an artist.<sup>26</sup> The second exception allows personal managers to help an artist negotiate and procure a recording contract.<sup>27</sup>

In 1982, a one year statute of limitations was appended to the Talent Agencies Act in order to provide some measure of protection for managers.<sup>28</sup> Because of the statute of limitations, an illegal contract for employment procurement may only be voided if violations of the Act occurred within one year before the filing of the petition.<sup>29</sup>

### III. RECENT DEVELOPMENT OF THE LAW REGARDING EMPLOYMENT PROCUREMENT

Although *Waisbren* is, in many respects, a major deviation from the development of the case law that preceded it, an understanding of the recent development of the law in this area is nevertheless important for two reasons: (1) the impact of *Waisbren* can only be fully appreciated when one understands how the *Waisbren* decision differs from the legal regime which preceded it; and (2) important constitutional issues in the area of employment procurement were adjudicated immediately prior to *Waisbren*, and these holdings were not affected by the *Waisbren* decision. This section of the comment will examine the ramifications of two recent and important cases

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<sup>24</sup> Hall v. X Management, TAC No. 19-90, at 49-52 (Cal. Lab. Comm'r 1992).

<sup>25</sup> CAL. LAB. CODE § 1700.4 (West 1989).

<sup>26</sup> Fred Jelin, *The Personal Manager Controversy: Carving the Turf*, in COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 1993, at 481 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 359).

<sup>27</sup> CAL. LAB. CODE § 1700.4 (West 1989).

<sup>28</sup> Hertz, *supra* note 5, at 65.

<sup>29</sup> Hall v. X Management, TAC No. 19-90, at 37 (Cal. Lab. Comm'r 1992).

involving employment procurement issues; these cases are *Hall v. X Management* and *Wachs v. Curry*.

#### A. *The Case of Hall v. X Management*

*Hall v. X Management* is an important case that has received much attention from commentators. The Labor Commissioner's findings in *Hall* laid the groundwork for the *Waisbren* decision.

##### 1. History of the Case

Wachs and X Management, Inc., provide personal management services to artists and entertainers. Wachs and X Management entered into a written contract to provide personal management services to entertainer Arsenio Hall in return for fifteen percent of Hall's earnings from his employment in the entertainment industry during the contract term. Hall filed a petition to determine controversy under section 1700.44 of the Act, alleging Wachs had acted as an unlicensed talent agent in procuring and attempting to procure employment for Hall. Hall requested that the Labor Commissioner order Wachs to return all fees stemming from Hall's employment in the entertainment industry. Wachs generally denied Hall's allegations.<sup>30</sup>

##### 2. Reasoning of the Court

X Management's first argument was that it did not "procure"<sup>31</sup> employment because it did not solicit employment. The Labor Commissioner rejected this argument, stating that X Management's narrow definition would frustrate the purpose of the Act and would lead to "mischief and absurdity." The Labor Commissioner also resorted to various dictionary definitions to find that the word "procure" means to arrange or negotiate. Thus the Labor Commissioner concluded that to "procure employment" means to

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<sup>30</sup> *Id.* at 1-2.

<sup>31</sup> CAL. LAB. CODE § 1700.4(a) (West 1989).

negotiate or arrange for employment, even when the employer makes the initial contact.<sup>32</sup>

X Management's second argument was that it did not act in the "occupation"<sup>33</sup> of procuring employment, as defined by the Act, because procuring employment was not its principle or sole occupation. The Labor Commissioner also rejected this argument, finding that a narrow definition of the word "occupation" would frustrate the legislative purpose of the Act because the licensing requirements of the Act could be evaded by working as a talent agent part-time. The Labor Commissioner also cited the principle that remedial statutes should be liberally construed in order to accomplish their purpose—to prevent improper persons from becoming talent agents and to prevent abuses by talent agents.<sup>34</sup>

In justification of its broad construction of the term "procure employment," the Labor Commissioner also cited the findings of the California Entertainment Commission ("CEC"). The CEC was created by the State Legislature in 1982 to study the Act and report its recommendations for any amendments to the Act.<sup>35</sup> One of the major focuses of the CEC was the issue of personal managers who incidentally procure employment. In 1985, when its report was submitted, the CEC concluded that the licensing requirement of the Act applied to personal managers who incidentally procure employment, and that the Act should not be amended to exclude them. The CEC categorically rejected the notion of exceptions for incidental, occasional, or infrequent activities relating in any way to procuring employment for an artist.<sup>36</sup> The Labor Commissioner reasoned that the Legislature's acceptance and endorsement of the CEC's report reflected the Legislature's view that the Act requires a license for any and all employment procurement activities.<sup>37</sup> It should be noted that the *Waisbren* court also placed great weight on the CEC's findings.

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<sup>32</sup> TAC No. 19-90, at 29-31 (Cal. Lab. Comm'r 1992).

<sup>33</sup> CAL. LAB. CODE § 1700.4(a) (West 1989).

<sup>34</sup> TAC No. 19-90, at 31-33 (Cal. Lab. Comm'r 1992).

<sup>35</sup> *Id.* at 33 n.6, 34.

<sup>36</sup> *Id.* at 34.

<sup>37</sup> *Id.*



As a result of its finding that X Management procured employment in violation of the Act, the Labor Commissioner voided the personal management agreement and awarded Mr. Hall a substantial portion of the commissions earned under the agreement.<sup>38</sup>

## B. *The Case of Wachs v. Curry*

*Wachs v. Curry* is important because the court addressed constitutional aspects of the employment procurement issue that had not been addressed before. Also, the analysis used by the *Wachs* court in regard to the incidental employment issue was fundamentally different than the approach taken by the Labor Commissioner in *Hall*, and thus overruled the Labor Commissioner's analysis on this issue.

### 1. History of the Case

While Arsenio Hall's petition to determine controversy against X Management was pending before the Labor Commissioner, Wachs and X Management filed an action against the Labor Commissioner (James Curry) and other state officials charged with enforcing the Act. Wachs's complaint alleged that the licensing provisions of the Act were unconstitutional because no rational basis exists for providing an exemption from the licensing requirement to those who procure recording contracts but not for those who procure other contracts in the entertainment industry, and because it cannot be determined from the language of the Act which activities require licensing as a talent agent. Wachs sought a judgment declaring the licensing provisions of the Act unconstitutional and enjoining defendants from enforcing the Act.<sup>39</sup>

The trial court granted Curry's motion for summary judgment, holding that there were no triable issues of material fact and that the licensing provisions were constitutional. Wachs appealed the trial court's decision. While the appeal was pending, the Labor

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<sup>38</sup> *Id.* at 36, 49.

<sup>39</sup> *Wachs v. Curry*, 13 Cal. App. 4th 616, 620 (1993).

Commissioner decided in favor of Hall in the matter of *Hall v. X Management*.<sup>40</sup>

## 2. Reasoning of the Court

The appellate court proceeded to adjudicate the facial constitutionality of the Act. The court did not address the issue of whether the particular application of the statute to Wachs and X Management was constitutional because no facts regarding a particular application were before the court (a *de novo* trial of *Hall v. X Management* was still pending).<sup>41</sup>

### a. *A rational basis exists for the exemption of those who procure recording contracts*

The court held that a rational basis exists for exempting those who procure recording contracts from the licensing requirement of the Act. The court based its decision on the findings of the CEC, which recommended that the Legislature preserve the exemption. The Legislature deferred to industry norms in accepting the CEC's recommendation to retain the exception, as the CEC's findings were largely based on common practices in the industry.<sup>42</sup> The court noted that there is abundant case law to support the proposition that persons in the same general type of business may be classified differently where their methods of operation are not identical.<sup>43</sup>

### b. *The licensing requirements of the Act are not void for vagueness*

The court held that the term "occupation of procuring [employment]"<sup>44</sup> is not so vague as to render the Act void for

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<sup>40</sup> *Id.* at 621.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 625-626.

<sup>43</sup> *Id.* at 626.

<sup>44</sup> CAL. LAB. CODE § 1700.4 (West 1989).

vagueness.<sup>45</sup> The court used the test set forth in *Hall v. Bureau of Employment Agencies* to determine if the Act was void for vagueness.<sup>46</sup> Under *Bureau of Employment Agencies*, a statute is not void for vagueness if the meaning of the statute may be determined with reasonable certainty, *i.e.*, if any reasonable and practical construction can be given its language.<sup>47</sup> The court focused its analysis on the terms "occupation" and "procure."

The court relied heavily on the legislative history of the Act to determine the meaning of the term "occupation." Although the regulation of artists' representatives began in 1913,<sup>48</sup> they were not singled out for major regulation until the enactment of the Artists' Managers Act of 1943.<sup>49</sup> The Artists' Managers Act regulated the functions that are performed by both talent agents and personal managers today. The Artists' Managers Act emphasized the counseling and directing functions that are performed by personal managers.<sup>50</sup> The Artists' Managers Act defined an "artist's manager" as:

[A] person, who engages in the occupation of advising, counseling, or directing artists in the development or advancement of their professional careers and who procures, offers, promises or attempts to procure employment or engagements for an artist only in connection with and as a part of the duties and obligations of such person under a contract with such artist by which such person contracts to render services of the nature above mentioned to such artist.<sup>51</sup>

The regulation of artists' representatives was updated with the adoption of the Act in 1978. The Act regulates "talent agencies," which it defines as a "person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure

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<sup>45</sup> 13 Cal. App. 4th at 629.

<sup>46</sup> See generally *Hall v. Bureau of Employment Agencies*, 64 Cal. App. 3d 482 (1976), cert. denied, 431 U.S. 920 (1977).

<sup>47</sup> 13 Cal. App. 4th at 629.

<sup>48</sup> Green, *supra* note 3, at 357.

<sup>49</sup> *Id.*

<sup>50</sup> 13 Cal. App. 4th at 628.

<sup>51</sup> *Id.* at 627.

employment or engagements for an artist or artists. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers."<sup>52</sup>

The court found that the Act reflected a change of emphasis from the counseling function to the employment procurement function. While the Artists' Managers Act emphasized the function of advising artists in the development of their careers, the Act emphasizes the procurement of employment for the artist. Based on the Act's legislative history, and its purpose of protecting artists seeking employment, the court concluded that those engaged in the "occupation" of procuring employment are those for whom a significant part of their business involves employment procurement, and that the Act does not apply to those for whom a significant part of their business involves counseling and directing artists. The court stated that:

[T]he "occupation" of procuring employment was intended to be determined according to a standard that measures the significance of the agent's employment procurement function compared to the agent's counseling function taken as a whole. If the agent's employment procurement function constitutes a significant part of the agent's business as a whole then he or she is subject to the licensing requirement of the Act even if, with respect to a particular client, procurement of employment was only an incidental part of the agent's overall duties. On the other hand, if counseling and directing the clients' careers constitutes the significant part of the agent's business then he or she is not subject to the licensing requirement of the Act, even if, with respect to a particular client, counseling and directing the client's career was only an incidental part of the agent's overall duties. What constitutes a "significant part" of the agent's business is an element of degree we need not decide in this case.<sup>53</sup>

In analyzing the meaning of the term "occupation," the *Wachs* court took a very different approach than that used by the Labor Commissioner in *Hall*. In *Hall*, the Labor Commissioner resorted to the dictionary definition of "occupation," the remedial purpose of the Act, and the findings of the CEC, and found that the term should be

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 628.

broadly construed.<sup>54</sup> In *Wachs*, the court established a much narrower definition of the term "occupation" by examining the legislative history of the Act.

The court then focused on the meaning of the term "procure." The court held that the meaning of "procure" is fairly well understood, based on its dictionary definition and the fact that it is used in several other California statutes that have never been challenged on vagueness grounds. The court recognized that many commentators have criticized the Legislature's failure to define the term "procure" as used in the Act. However, the court also noted that none of these critics had claimed that the term was so vague as to render the Act facially unconstitutional.<sup>55</sup>

Based on its finding that the terms "occupation" and "procure" were sufficiently well defined, the court held that the term "occupation of procuring [employment]" was not vague enough to render the Act void for vagueness.

### 3. Effect of the *Wachs* Decision

When distinguishing between personal managers and talent agents, the *Wachs* decision emphasized the representative's involvement in counseling and directing the client's career.

The *Wachs* case was good news for personal managers concerned about the possible effects of the Act on their business. Under *Wachs*, a personal manager would not be subject to the licensing requirement of the Act if counseling and directing the clients' careers constituted the significant part of the personal manager's business.<sup>56</sup> Because the Labor Commissioner is an inferior tribunal, it is bound to follow the decisions of courts exercising superior jurisdiction, such as the *Wachs* court.<sup>57</sup> The *Wachs* court overruled the Labor Commissioner's findings on the scope of the Act in *Hall v. X Management* and set a new standard for determining whether a person was in the occupation of procuring employment. The court purposely

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<sup>54</sup> See *supra* part III.A.

<sup>55</sup> 13 Cal. App. 4th at 629.

<sup>56</sup> *Id.* at 628.

<sup>57</sup> See generally *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450 (1962).

did not address the issue of what is meant by “significant part.” By so doing, the *Wachs* court left considerable room for future debate as to how the nature of the “significant part” of a representative’s business should be determined.

### C. *The Meaning of “Significant Part”*

In *Church v. Brown*,<sup>58</sup> the Labor Commissioner set forth a definition for the term “significant part” as used by the court in *Wachs*. The Labor Commissioner found that employment procurement constitutes a “significant part” of the representative’s business if the employment procurement activities are not due to inadvertence or mistake and if the activities constitute more than a *de minimis* aspect of the representative’s overall duties.<sup>59</sup>

### D. *The Case of Waisbren v. Peppercorn*

The *Waisbren* decision leaves little room for future debate on the issue of the scope of the Act in regard to employment procurement. *Waisbren* is likely to have a significant impact on how personal managers operate in California.

#### 1. History of the Case

Peppercorn Productions, Inc., is a California corporation that specializes in the design and creation of puppets for use in entertainment and advertising. In 1982, Brad Waisbren agreed to promote Peppercorn. From 1982 to 1988 Waisbren performed various administrative and managerial tasks for Peppercorn. Waisbren also procured employment for Peppercorn, but Waisbren’s activities in this regard were incidental to his other duties. Peppercorn terminated its relationship with Waisbren in 1988, and in 1990 Waisbren filed suit against Peppercorn alleging that he had not been paid in accordance with the parties’ agreement. In 1991, Waisbren filed an amended

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<sup>58</sup> TAC No. 52-92 (Cal. Lab. Comm’r 1994).

<sup>59</sup> *Id.* at 12.

complaint in which he alleged several causes of action and sought relief for breach of contract. In 1994, Peppercorn moved for summary judgment on the ground that the parties' agreement was void because Waisbren procured employment in violation of the Act. In opposing the summary judgment, Waisbren argued that he did not violate the Act because his employment procurement activities were minimal and were only incidental to his other activities. In 1994, the trial court granted Peppercorn's motion for summary judgment and Waisbren appealed the judgment.<sup>60</sup>

## 2. Reasoning of the Court

The court held that the Act requires a license for *any* procurement activities, and that the parties' agreement may be voided due to its illegal nature. The court considered several factors in making its decision.

Relying on the dictionary definition of the word "occupation"<sup>61</sup> as the "principal business of one's life," Waisbren argued that one need not be licensed under the Act unless one's principle duties involve the procurement of employment. The court rejected this argument, reasoning that Waisbren's definition ignores the possibility that a person can have more than one job, and that under other definitions of "occupation," one can hold a particular "occupation" even though it is not her principle line of work.<sup>62</sup>

As was done in *Hall*, due to the Act's remedial nature, the court found it appropriate to liberally construe the language of the Act in order to accomplish the purpose of the Act, which is to protect artists from abuses by their talent agents.<sup>63</sup> The court held that the goal of protecting artists would be defeated if the Act did not apply to those who incidentally procure employment. The court also held that the standard advocated by Waisbren, where only those whose principal activities involve employment procurement would be subject to the

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<sup>60</sup> Waisbren, 41 Cal. App. 4th at 251.

<sup>61</sup> CAL. LAB. CODE § 1700.4(a) (West 1989).

<sup>62</sup> 41 Cal. App. 4th at 253-254.

<sup>63</sup> See *supra* part III.A.

licensing requirement of the Act, would be so vague as to be unworkable.<sup>64</sup>

The court placed great weight upon the Labor Commissioner's interpretation of the Act. The Labor Commissioner has long taken the position that a license is required for any employment procurement activity—that the Act applies to those who incidentally procure employment. Citing the principle that the construction of a statute by an agency charged with its enforcement should be given great weight, and the principle that a court should defer to such an agency's interpretation of the statute if it is reasonable, the court agreed with the Labor Commissioner's analysis of the licensing requirement.

The court also placed great weight on the findings of the CEC and the Legislature's acceptance of the CEC's findings, as was done by the Labor Commissioner in *Hall*.<sup>65</sup> The court held that by accepting the CEC's report, the Legislature approved the CEC's view that the Act requires a license for any procurement activities, and that there should be no exceptions for those who incidentally procure employment.<sup>66</sup>

Another factor considered by the court was the Act's limited exception to the licensing requirement for those working in conjunction with a talent agent.<sup>67</sup> The court reasoned that this exception would not be necessary if incidental procurement activities were allowable under the Act, and the Act should not be read in a way which makes this exception superfluous.<sup>68</sup>

The court then addressed prior judicial construction of the Act, focusing on the *Wachs* case. The court criticized the *Wachs* court's analysis of the meaning of the term "occupation" because the *Wachs* court declined to define what it meant by "significant part." The *Waisbren* court held that the focus of *Wachs* was the alleged vagueness of the term "procure," not the definition of the term "occupation," so that *Wachs*' discussion on the meaning of "occupation" is dicta. The court declined to follow the *Wachs* dicta because it is contrary to the

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<sup>64</sup> 41 Cal. App. 4th at 255.

<sup>65</sup> See *supra* part III.A.

<sup>66</sup> 41 Cal. App. 4th at 258-259.

<sup>67</sup> See *supra* part II.C.

<sup>68</sup> 41 Cal. App. 4th at 259.



Act's language, and because *Wachs* did not consider the remedial purpose of the Act, the view of the Labor Commissioner, or the Legislature's adoption of the CEC's report. The court concluded that the *Wachs* dicta is incorrect to the extent it indicates that a license is only required where a person's procurement efforts are "significant."<sup>69</sup>

Finally, Waisbren contended that declaring the parties' agreement to be void is too harsh a penalty. The court disagreed, noting that the CEC recommended that criminal penalties not be imposed for violations of the Act because the Act already contained the most effective deterrent to violations—the power to declare any contract void from its inception. The court found that through its acceptance of the CEC's recommendations, the Legislature had approved the remedy of declaring contracts void from their inception if they violate the Act.<sup>70</sup>

### 3. Effect of the *Waisbren* Decision

The *Waisbren* decision is important because it puts to rest the debate over the scope of the Act, and also because it goes against both the gist of the *Wachs* decision and widespread industry practices. Like the Labor Commissioner in *Hall v. X Management*, the court seemed to place a premium on the remedial purpose of the Act and the Legislature's acceptance of the CEC's findings. The *Waisbren* court based its finding that the Act requires a license for any procurement activities on four main factors: (1) the "plain meaning" of the Act using dictionary definitions; (2) the remedial purpose of the Act; (3) the Labor Commissioner's interpretation of the Act; and (4) the Legislature's acceptance of the recommendations of the CEC. The court found that each of these factors weighed in favor of a very broad construction of the Act's language as it applies to employment procurement.

Overall, the inherent risk of an artist obtaining representation may be reduced because a larger share of artist's representation will be

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<sup>69</sup> *Id.* at 261.

<sup>70</sup> *Id.* at 262.

done by licensed agents who are regulated by the Act, since managers can no longer legally procure employment. Although the *Waisbren* decision will further the Act's purpose of protecting artists from talent agents, this does not necessarily mean that, taken as a whole, artists are more protected from their representatives as a result of *Waisbren*. Post *Waisbren* artist/representative relationships can generally be classified into three types: (1) the artist has one representative who acts as both a manager and an agent; (2) the artist has both a manager and an agent, and deals directly with both; and (3) the artist has both a manager and an agent, but the artist deals almost exclusively with the manager, and the manager obtains employment for the artist through the agent. The *Waisbren* decision will increase the legal protection for artists in type 1 and type 2 relationships, but will probably not be much help for artists in type 3 relationships.

Ironically, artists in type 3 relationships are generally those who are most vulnerable to overreaching representatives. Artists in type 3 relationships tend to be artists who are young in their careers and have not been able to attract or afford the services of an agent. These are the artists who are most in need of a manager because of the crucial investment role performed by managers.<sup>71</sup> A large percentage of artists find themselves in a type 3 relationship early in their career. In regard to artists in type 3 relationships, the *Waisbren* decision may in fact be a double-edged sword in that it will be less likely that artists will be able to seek relief under the Act because it is now less likely that a manager will illegally procure employment. Before *Waisbren*, the Labor Commissioner had the flexibility of using the illegal employment procurement attack as a way to establish jurisdiction and thereby redress an abusive artist/manager relationship. The Labor Commissioner has now effectively locked itself out of such situations, because it is now much less likely that a manager will illegally procure employment. Hopefully the benefit of greater protection for artists in type 1 and type 2 relationships will outweigh the disadvantage of the Labor Commissioner's inability to intervene

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<sup>71</sup> See *supra* part II.A.

on behalf of artists in type 3 relationships. As Bob Marley said, "time will tell."<sup>72</sup>

#### IV. RECOMMENDATIONS

Now that the regulatory boundary between personal managers and talent agents has been clearly drawn, it may be a good time for personal managers to take action in order to obviate the need for future legislation aimed at the regulation of personal managers. One way to do this is for personal managers to become self-regulating by establishing a higher industry standard of fairness in dealings between personal managers and artists. Such heightened industry standards should place greater emphasis on artists' obtaining independent counsel when negotiating the management contract, and should also emphasize managers' observance of fiduciary duties, especially the disclosure of conflicts of interest.

An ideal mechanism for establishing such a standard would be the American Bar Association's forum on the Entertainment and Sports Industries ("forum"). The forum could organize a division concerned with issues regarding personal managers, and could take a leadership role in the establishment of higher industry standards for personal managers. Due to the paucity of management-related organizations, such an organization would be the most viable and effective management-related organization by default. It's no secret that attorneys play a very influential role in the entertainment industry. The American Bar Association should seize the opportunity to provide positive leadership for personal managers.

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<sup>72</sup> BOB MARLEY, *Time Will Tell*, on KAYA (Island Records 1978).