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An agent's fiduciary duties to clients

By Thomas Vidal

The stories so compellingly told through film and television simply would not exist without first being birthed on the page. As vital as words are to stories, one might imagine that the artists who craft them would be aggressively protected by the talent agents who undertake their representation. But they are not.

Talent agents and the agencies that employ them have done a grave disservice to the writers they represent. One glaring conflict of interest is the move that many agencies have been making into content ownership and content creation. Another is the agency packaging fee.

A packaging fee is one paid to the agency by a studio or network, in lieu of a commission from the writer, on projects where the agency represents a combination of the writers, director and actors who will be employed on the project. The packaging fee is generally comprised of two distinct categories: a flat fee paid directly out of the budget of the project; and a share of the backend revenues of the project — often for life.

By aggressively pursuing packaging fees, agencies and agents have elevated their own interests above those of their writers. This the law does not and should not countenance.

WGA and its members now find themselves in a pitched battle with their agents to put a stop to this practice, which is causing much harm to professional writers, and restore the right to have agents who “act with the utmost good faith in the best interests” of their writers.

On April 17, WGA and several writers filed a lawsuit against the Big Four talent agencies alleging two causes of action: breach of fiduciary duties and violation of California’s Unfair Practices Act. WGA argues that, in the past, agents’ compensation, as a percentage of the writer’s compensation, aligned the interests of agent and client. The packaging-fee model, however, has de-coupled the agent’s compensation from that of their client. Consequently, WGA argues that packaging fees are adverse to the writer-client’s interests and in violation of the duties owed to the writer by the agent.

WGA alleges in its complaint, and many commentators who have written on the subject concur, that agents are fiduciaries and the packaging fee is a breach



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of the agents’ duties to their clients. But what is the basis for them to say so?

While talent agents are governed by the Talent Agencies Act and (at least until recently) under guild agreements such as the 43-yearold WGA-Agency franchise agreement, they are also bound by the California Civil Code’s regulations of agents. Under California law, an agent is one who represents another in dealings with third persons. Civ Code Section 2295. Certainly, this is the *raison d’être* of a talent agent. A talent agent is, thus, not some special category under the law but an ordinary agent.

The California courts have held that “an agency relationship is a fiduciary one, obliging the agent to act in the interest of the principal.” *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 977 (1997).

It is no small thing to be a fiduciary to another. Many forms of conduct permissible in a workaday world for those acting at arm’s length are forbidden to those bound by fiduciary ties. In California, a fiduciary is held to something stricter than the morals of the market place: “Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior,” courts have held. *Wolf*

v. Superior Court, 107 Cal. App. 4th 25, 30 (2003) (internal citations omitted).

As a fiduciary, the talent agent has broad authority to act on behalf of a writer, but cannot violate four express duties owed to the writer: loyalty; the avoidance of conflicts of interest; not to undertake actions adverse to the writer; and not to commingle property of the writer’s. *See* Civ. Code Section 2322.

The payment of packaging fees implicates several of those duties.

When an agency seeks a packaging fee, its interests are in conflict with those of the writer. First, because one component of the packaging fee is paid from the project’s budget, the fee decreases the compensation that could be paid to the writer. It also decreases the amount of money available in the budget to make the project. From that perspective, it is clear that the packaging fee is particularly harmful to other writers or talent on the project who are not clients of the agency because they are still paying a regular agency commission (if they are represented), the amount of the budget available to pay for their services is less than it would otherwise be, and the amount of the budget available to incorporate elements that could improve the

film or show is less.

Second, the backend-revenue component of the packaging fee results in writers receiving less backend than they might otherwise, while the agency’s backend may greatly exceed the amount their clients earn. Moreover, the backend participation may last in perpetuity — even if the client is no longer rendering services on the project.

The packaging fee also potentially implicates the duty of loyalty because the agency’s interests in the packaging fee are adverse to the client’s interest. For example, agencies have an incentive not close a deal if no package fee or inadequate packaging fee is available.

Finally, the packaging fee implicates the talent agent’s duty of confidentiality because the agency has an incentive to share information on projects in development with other agents or talent in the interests of maximizing the agency’s ultimate package fee.

While WGA has been negotiating with the talent agencies, a public trial may be the only means of actually resolving the packaging-fee problem. This is because studios, networks, managers and even other entertainment attorneys are not able, or perhaps not willing, to challenge the practice.

Should WGA prevail in its lawsuit, it could conceivably end outright the ability of agencies to obtain packaging fees if the court imposes an order enjoining the practice.

On the other hand, the talent agencies argue that writers and WGA have allowed, if not consented to, packaging fees for some time and it is somehow inappropriate to complain about it now. While that argument could suffice to foreclose any claims for disgorgement or damages stemming from past packaging fees, it does not create an effective defense against the practice of seeking packaging fees prospectively.

Writers — as well as other talent — are entitled to have representation that is free of conflicts of interest. It is time to put an end to one of the greatest sources of agents’ conflicting interests — as another writer might have described it, the packaging fee is an idea whose time has come.

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