WRITER-AGENT CLASH
Over Packaging & Producing Cash

by

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[*] For full disclosure, Sally's husband is a member of the WGA. He went on strike against her production company in 2007.

I. The Nature of the Dispute

The dispute between the Writers Guild of America ("**WGA**")[1] and the big Hollywood agencies is more complicated than media reports imply. The system for agent compensation, while arguably static on its face, has grown over the past half century to a place that writers contend is unfair and sets up insurmountable conflicts of interest. Agencies, for their part, suggest that their business models have evolved based on changes in how films and television series are developed and monetized.

The two broad areas of disagreement relate to packaging fees and agents acting as producers.

a. **Packaging Fees**

Packaging fees are amounts that agencies take for putting together several elements of a particular creative project. More common in television than in film, packaging occurs when an agency presents a studio or production company with a "bundle" of creative elements – such as a series concept (often with a bible, pilot episode, and story arcs), director(s), and selected actors. Packaging fees are not tied to the compensation paid to writers and other talent; rather, they are *direct* payments to agencies from the production companies or studios.

b. **Agents as Producers**

The second broad dispute revolves around agencies setting up affiliated production companies that then employ the agencies' own clients. Essentially, the agencies represent both sides of a given production deal. The agencies claim this affords writers more opportunities. Writers, on the other hand, contend that agencies should choose one side or the other.

II. The Intertwining Contracts

There are several contracts at play in this dispute. In other words, this is not "just" about the new Code of Conduct.

The Minimum Basic Agreement is the collectively-bargained agreement ("**CBA**") between the WGA and hundreds of studios and production companies. The CBA establishes minimum levels of compensation, work conditions, and other benefits. Agents can and do negotiate higher rates and perks for their clients from the signatory production companies. The CBA is re-negotiated every three years. It next comes up for renewal in May 2020. The current version can be found at www.wga.org/contracts.

[1] For purposes of this paper, "WGA" shall refer to both the Writers Guild of America, West, Inc. and the Writers Guild of America, East, Inc., which together negotiate a collective bargaining agreement for their members that applies to hundreds of studios and production companies.

The WGA Member Agreement ("**WGA Member Agreement**") is a contract between the WGA and each of its members. Among other things, it prohibits members from working for production companies that have not signed the CBA.

The Artists' Manager Basic Agreement ("**AMBA**" or **Franchise Agreement**") is a contract between the WGA and signatory agents. It sets forth standards that agencies must abide by in order to represent WGA members, including the maximum amount of commissions that can be charged. As set forth in more detail *infra*, the Franchise Agreement, last amended in 1976, was terminated by the WGA in April of 2019. A copy of the Franchise Agreement is attached to this paper as **Exhibit "A."**

The American Talent Agencies Agreement ("**ATA Agreement**") is a contract between signatory agents and their trade organization, which is governed by a 16-member board of directors.

The WGA's new Code of Conduct ("**Code of Conduct**") was implemented in April of 2019 (i.e., shortly after the Franchise Agreement was terminated). The Code of Conduct prohibits most packaging fees (with a phase-out period) and limits agencies' interests in production companies. This is a key document in the current dispute. A copy of the original Code of Conduct (*i.e.,* without some amendments that have been granted after negotiations with certain agencies) is attached hereto as **Exhibit "B."**

The ATA unilaterally proposed a new Agency Standards for Client Representation document ("**ATA proposed standards**") that has not been accepted by the WGA. The ATA proposed standards (attached hereto as **Exhibit "C"**) would allow packaging fees and agency-affiliated production companies, but sets forth certain notice requirements to their writer clients.

III. The General Law of Agency

The term "agency" refers to the legal relationship between a principal and an agent, with the agent having authority to be the legal representative of the principal. There is generally no requirement that the agency relationship be memorialized in writing; however, the principal must have capacity to contract (*e.g.*., sane and of legal age) and both the agent and the principal must consent to the agency relationship.

The premise of agency law is that agents work for their principals and must act in their principal's best interests rather than their own. This "duty of loyalty" necessarily means that agents must avoid conflicts of interest and secretive back alley deals. Agents also generally owe their principals duties of obedience and reasonable care, meaning the agent will adhere to the principal's instructions and act rationally under the circumstances.

Within the entertainment industry, the principals are the talent (writers, actors, musicians, directors, etc.) and they hire talent agents or agencies to procure employment or engagements for them. In California, as in some other jurisdictions, talent agents are subject to state-level regulations in addition to their common law duties. *See*, *e.g.*, California Labor Code and California Code of Regulations. California, the epicenter of the current

dispute, expressly considers talent agents to be fiduciaries who cannot violate duties of, *inter alia,* loyalty, the duty to avoid conflicts of interest, and the duty not to take actions that are adverse to their principals. *See, e.g.,* Cal. Civ. Code § 2322. The WGA contends that these fiduciary duties are inherently breached by the current level of packaging fees and the use by agents of affiliated production companies.

Moreover, similar to the ethical rule prohibiting lawyers from sharing profits with non-lawyers, §1700.30 of the California Labor Code provides that "No talent agency shall sell, transfer, or give away to any person other than a director, officer, manager, employee, or shareholder of the talent agency any interest in or the right to participate in the profits of the talent agency without the written consent of the Labor Commissioner." Likewise, §1700.39 states that "No talent agency shall divide fees with an employer, an agent or other employee of an employer. "

In light of the common law requirements and the California statutes, what happens when an agency represents a combination of the talent that is employed for a project? After all, it is not uncommon for large agencies to represent writers, directors, actors, etc., all of whom may be engaged on a single project. Who is owed the duty of loyalty if the principals' interests are not aligned? In the case of the WGA-Agent clash, do the agents owe a duty to the writers they represent (as the WGA claims), or do they owe a duty to the studios and networks they "sell" packages to? How do showrunners who don't provide writing services fit in?[2]

This paper will focus on the duty that talent agents owe to the writers (principals)[3] they represent, including how those duties are implicated by the current level of packaging and the use of affiliated production companies.

IV. The Historical Origins of Packaging

As noted *supra*, the Franchise Agreement was last amended in 1976. It was terminated in March of 2019 after the WGA gave the ATA the required notice. The new Code of Conduct, enacted in April 2019 with overwhelming support from the WGA membership, is serving as a replacement. Consequently, only talent agents that have signed the Code of Conduct are lawfully permitted to represent WGA writers at this time.

The agencies accurately note that packaging was authorized under the Franchise Agreement, highlighting that the package fee model has been around for at least fifty years. Section 6.C. of the now-terminated Franchise Agreement acknowledged the existence of "packaging representation," but emphasized that the parties did not agree on the legality of same. Accordingly, the parties agreed to disagree, recognizing that "nothing in [the Franchise Agreement] shall be deemed to affect or prejudice the respective positions of [the parties] as to said difference of position." The Franchise Agreement goes on to say that nothing within it "shall limit or affect" the amount of a "package commission." Exhibits N and W further discuss the parameters and processes to be followed relating to potential conflicts that arise from packaging.

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[2] Most showrunners also provide writing services, especially during the first season of a series.

[3] Some of these points also are applicable to other "above the line" talent. To date, however, only the writers have taken up the charge.

As the amount of packaging fees rose (reportedly without the awareness of the writers), and as the biggest talent agencies accepted investments from private equity firms, some agencies added affiliated production companies to their portfolios (e.g., WME/Endeavor Content, CAA/Wiip, and UTA/Civic Center Media). The presence of these outside investors in what previously had been a relationship business no doubt changed the profit motivation for some agencies.

V. The Basis of the Clash

Rather than agents being paid a set percentage (10%) of the amounts they are able to negotiate for their clients – thus aligning their interests – agents now negotiate their own (big) packaging fees to be paid directly by the studios/networks/production companies. Typically, the writers and other talent have no idea how large these payments are (personally, we've not been able to get our own clients' agents to disclose!). However, it has been reported that, in the modern television industry, agencies are paid by studios according to a 3/3/10 formula, which is calculated as 3% of the base license fee per episode upfront, 3% of the base license fee per episode deferred and paid out of 50% of net profits, and up to 10% of Modified Adjusted Gross Revenue (MAGR). While admittedly MAGR and net profits are zero for most shows, the front-end fees alone can still result in lucrative income streams that the writers do not participate in. According to *The Hollywood Reporter*, as of April 2019, these front-end fees ranged from $15,000 to $75,000 per episode (i.e., $300,000 to $750,000 per season).

The WGA argues that the agencies are more interested in getting big fees than in the personal interests of their clients, in some cases allowing agencies to out-earn their clients.

Packaging fees are paid directly as part of a project's budget. Agents also get per episode fees for as long as a television show plays, even if the agent's particular client stops working on the show after the first year. For a show like "*Friends*," that is literally hundreds of millions of dollars. Some writers have said these growing fees impact (i.e., reduce) production budgets in later years, thus negatively affecting the quality of the shows.

Agencies like packaging fees for many reasons, including that they constitute an ongoing income stream to the agency that is not contingent on continuing to represent a particular writer or make an additional deal. Similarly, investors in the agencies want to see assets (an income stream is an asset) beyond personnel (the agents). As the old saying goes, a business doesn't want its biggest assets to go home every night.

Agencies reportedly have "required" that a studio accept certain packaged elements (people that the particular agency represents) even if it's not in the show's best interest. Writers have said that agencies have harmed or even blown deals because they don't want to split the lucrative packaging fees and thus won't accept a creative element represented by a competitor agency.

Studios and production companies generally like packaging. It's much easier to greenlight a project for financing when an agency presents the key pieces on a silver platter. There's no need to coordinate schedules, deal with many agents, etc.

The bottom line, in our view, that seems to get lost in the arguments, is that it's not necessarily the *fact* of packaging that is the big problem, but the *amount* and *type* of the packaging fees. In other words, if an agency represents a writer with a screenplay and it can interest key talent in some of the principal roles, and maybe a director, then it can present that "package" to a studio for financing – but it should then take as its fee only 10% of the compensation it negotiates for each person represented. This aligns the interest of the agent with the interest of the principal, as mandated by basic principal-agent law. To paraphrase one writer: if an agent is only capable of negotiating a big packaging fee for himself but can't negotiate a decent writing fee for me, then he's not a very good agent.

With respect to the production company issue, the agencies shouldn't be allowed to represent both sides to a contract. Period. Either they act on behalf of the producer (management) or they act on behalf of the talent (employees). This applies not only to compensation, but to other issues important to writers, such as script revisions.

The agencies have been shouting about "choice," which has become a code word in many circles. They say that writers should be given a "choice" about whether or not they want to be part of a package. They say that they will start to provide more transparency (it's never full) about their packaging fees. But, realistically, no writer will say "no" to a proposal by his/her agent that s/he join a project being pitched to a studio because s/he wants to work and it's a fickle business.

VI. The Lawsuits

When talks between the WGA and the ATA broke down after the termination of the Franchise Agreement, the WGA and several individual members filed a lawsuit in California state court, alleging breaches of fiduciary duties and unfair competition. Three of the so-called "Big 4" Agencies (*i.e.*, WME, CAA and ICM)[4] then filed a lawsuit against the WGA in Federal Court, asserting anti-trust causes of action. A copy of the Agencies' Consolidated First Amended Complaint is attached hereto as **Exhibit "D."** The WGA responded by dismissing its state court lawsuit and filing counterclaims in the Federal Court case for the state law causes of action, along with claims based on anti-trust and violations of the federal Labor-Management Relations Act and the Racketeer Influenced and Corrupt Organizations Act. A copy of the WGA's Answer and Counterclaims is attached hereto as **Exhibit "E."**[5]

Both sides moved for judgment on the pleadings. Judge Birotte has denied the WGA's motion (noting that the elements of the Agencies' causes of action were sufficiently pled) and has taken the Agencies' similar motion under advisement. The parties have agreed on a neutral mediator to discuss a possible settlement[6] and trial has been set for March of 2021.

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[4] ICM is the fourth of the "Big 4" and the only one without outside investors.

[5] The Counterclaim includes at least one individual WGA member who alleges direct harm.

[6] The court rules require that litigants engage in at least one form of alternative dispute resolution prior to any trial. The parties here agreed on mediation, which must occur prior to December 25, 2020 under the court's scheduling order.

VII. The Walls Start to Crumble

When the Code of Conduct was enacted, it was quickly signed by the literary-only agencies (*i.e.*, those that only represent writers and thus do not engage in packaging). Agencies that also represented actors, directors, and/or individual producers originally stood united, allowing the Association of Talent Agents (the trade group) to negotiate on their collective behalf. At one point, the ATA offered a small percentage of its packaging fees to the writers. The WGA didn't budge from its position, eventually deciding that it wouldn't negotiate with a trade group but only with individual agencies. Before too long, mid-sized agencies, such as Innovative, and Gersh, signed the Code of Conduct, albeit with a few edits from the original version (which will be applied on an MFN basis to all subsequent signatories). Specifically, there is now a runway for the elimination of packaging fees. The WGA also agreed to allow agencies to have up to a 5% stake in an affiliated production or distribution entity.

VIII. The Pending Deadline for the WGA Minimum Basic Agreement

The CBA expires in May 2020. The WGA may try to push its anti-packaging and no-affiliated production company positions as part of negotiations for a new agreement. If the Alliance of Motion Picture and Television Producers ("**AMPTP**"), which represents the production side of the CBA, agrees, it could be a game changer. But certain studio executives previously have expressed concern about being seen as colluding with the WGA. And in many cases, they are dependent on the Big 4 for quality content packages.

As noted *supra*, there are many intertwining contracts that will affect events. To this point, there has not been a work stoppage. Despite the fears of some in Hollywood last spring, the usual TV staffing period went along without a hitch. Shows stayed on the air. Movies got produced. People continued to work. Writers continued to write scripts and the agents who have signed the Code of Conduct continued to pitch and sell them.

IX. The Ending Has Not Yet Been Written

At the time this paper was submitted, much was (and still may be) up in the air. Some of the ATA members have broken ranks and signed the Code of Conduct. Some agents have left their agencies and started new ones. But many agencies, including the Big 4 (where the majority of packaging emanates), have not backed down from their lucrative packaging fees and production affiliates. And the WGA members largely stand in solidarity with their union.

It's important to note that the pending litigation will not solve the two sides' positions on packaging fees and affiliated production entities. The lawsuits are focused on alleged violations of particular statutes and common law principles. A decision on the legality or illegality of any particular practice will impact final contracts, but will not of itself resolve the dispute. In the meantime, perhaps because of the pending expiration of the CBA, the sides are trying to battle it out in the court of public opinion.