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New Remedial Developments in the Enforcement of Personal Service Contracts for the Entertainment and Sports Industries: The Rise of Tortious Bad Faith Breach of Contract and the Fall of the Speculative Damage Defense

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NEW REMEDIAL DEVELOPMENTS IN THE ENFORCEMENT OF PERSONAL SERVICE CONTRACTS FOR THE ENTERTAINMENT AND SPORTS INDUSTRIES: THE RISE OF TORTIOUS BAD FAITH BREACH OF CONTRACT AND THE FALL OF THE SPECULATIVE DAMAGE DEFENSE

*Kevin W. Yeam**

I. THE SCENARIOS

Samantha Starlet walks off the set during principal photography stating she will not perform in this film until she gets better billing and more money. Lionel Backer refuses to play this season unless the team renegotiates his contract. The rock band, Heavy Mentals, delivers only three records out of a promised five during its seven year deal with its record company.

These scenarios apply equally in the areas of television production, theater and book publishing. The talent have all signed personal service contracts with their employers and are in breach thereof for willfully and intentionally withholding their promised services. What are the legal options available against the breaching performer(s)?

II. INTRODUCTION

Personal service contracts are an inherent part of the entertainment and sports industries. Performers and other talent contract to make records, write books, play a sport and/or appear on film, tape or on stage in exchange for compensation. Unfortunately, it is very common for performers to refuse to satisfy the terms and conditions of their contracts. In these situations, there are three principal remedies available to enforce the personal service contracts against the breaching talent. They are:

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(1) an injunction; (2) contract damages; and (3) tortious breach of contract damages.

The purpose of this paper is to provide the entertainment and sports management counsel with a practicum of alternative remedies for enforcement of personal service contracts against performers who willfully refuse to perform all or part of their personal service contracts.

Specifically, the analysis shall discuss the basic contract remedies applicable to personal service contracts including an overview of the area of injunctive relief and the recent trend to allow recovery of damages hereto considered speculative. Additionally, this paper examines the courts' expansion of the theory of tortious bad faith breach of contract and its potential application in the entertainment industry.

A. Background.

Traditionally, courts have held contract damage recoveries against a breaching performer to be too speculative.[1] Further, a personal service contract is not specifically enforceable.[2] Therefore, the only remedy historically available to management is a negative injunction.[3] However, courts have shown some reluctance to award such relief.[4]

Because of the lack of remedies available and the inherent uncertainty involved in entertainment law, management is oftentimes forced to renegotiate a personal service contract with the breaching talent despite having a legal and binding agreement. However, recent developments have expanded the well-settled areas of damages and tortious breach of contract. These new principles should provide management with alternative remedies against the breaching talent and could potentially balance the power between management and the talent.

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1. *See generally* J. B. Lippincott Co. v. Lasher, 430 F. Supp. 993 (S.D.N.Y. 1977); Washington Capitol's Basketball Club v. Barry, 304 F. Supp. 1193 (N.D. Cal. 1969), *aff'd*, 419 F.2d 472 (9th Cir. 1969); Warner Bros. Pictures v. Brodel, 31 Cal. 2d 766, 192 P.2d 949 (1948); Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969); Paramount Pictures Corp. v. Davis, 228 Cal. App. 2d 827, 39 Cal. Rptr. 791 (1964); DeHaviland v. Warner Bros. Pictures, 67 Cal. App. 2d 225, 153 P.2d 983 (1944); Rogers Theatrical v. Comstock, 232 N.Y.S. 1 (1928); Lumley v. Wagner, 42 Eng. Rep. 687 (1852).

2. CAL. CIV. CODE § 3423(5) (Deering 1984); CAL. CIV. PROC. CODE § 526(5) (Deering 1972); 5 A. CORBIN, CORBIN ON CONTRACTS § 1204 (1964); 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, at 2816 (1964). *See supra* note 1 and accompanying text.

3. *See supra* note 1 and accompanying text.

4. *See* Vanguard Recording v. Kineskin, 276 F. Supp. 563 (S.D.N.Y. 1967); Machen v. Johansson, 174 F. Supp. 522 (S.D.N.Y. 1959); Foxx v. Williams, 244 Cal. App. 2d 223, 52 Cal. Rptr. 896 (1966); ABC Broadcasting Co. v. Wolf, 52 N.Y.2d 394, 420 N.E.2d 363, 438 N.Y.S.2d 482 (1981); Rubin, *The Enforcement of Personal Service Contracts*, 3 ENT. & SPTS. LAW, No. 1 at 3 (Spring 1984).

III. REMEDIES

A. Injunctive Relief.

The negative injunction is the most commonly used remedy in the enforcement of personal service contracts.[5] In certain limited circumstances, it can be as effective as a mandatory injunction.[6] Unfortunately, such an injunction is more often of no practical or economic value to the entertainment employer.

There are two limitations which restrict its usefulness. First, courts highly scrutinize requests for negative injunctions because of their reluctance to inhibit the talent's freedom to pursue a livelihood.[7] In California, the negative injunction is even more difficult to obtain because of statutory prerequisites as well as the standard *Lumley* requirements.[8] This results in the courts denying many such injunctions.[9] Second, management's primary concern is an economic return on the personal service contract and not in preventing the talent's performance for others.[10]

B. Damages.

Damages are recoverable against a breaching artist. Such include the management's right to recover liquidated damages,[11] advances[12] and pre-contractual reliance damages.[13] However, courts have generally been reluctant to award damages for lost profits in the area of entertain-

5. For a well argued example of entertainment employee negative injunction, *see* Bonner v. Westbound Records, 76 Ill. App. 3d 736, 394 N.E.2d 1303 (1979); Rogers Theatrical v. Comstock, 232 N.Y.S. 1 (1928) (negative covenant not to compete implied into every personal service contract). *See generally* Lumley v. Wagner, 42 Eng. Rep. 687 (1852).

6. Paramount Pictures Corp. v. Davis, 228 Cal. App. 2d 827, 39 Cal. Rptr. 791 (1964).

7. Machen v. Johansson, 174 F. Supp. 522 (S.D.N.Y. 1959); Vanguard Recording v. Kineskin, 276 F. Supp. 563 (S.D.N.Y. 1967).

8. CAL. LAB. CODE § 2855 (West 1971) (no negative injunction after seven years from date entering into personal service contract); CAL. CIV. CODE § 3423 (Deering 1984) and CAL. CIV. PROC. CODE § 526 (West 1979) ($6,000 yearly minimum guaranteed compensation for personal service contract negative injunction).

9. *See supra* note 4 and accompanying text.

10. Rubin, *The Enforcement of Personal Service Contracts*, 3 ENT. & SPTS. LAW, No. 1 at 3 (Spring 1984).

11. Courts have enforced liquidated damages clauses in entertainment personal service contracts. However, such a clause may show that the artist's breach can be compensated with a monetary award. This can be used by the breaching performer in arguing that plaintiff has an adequate remedy at law, and thus, bar a negative injunction. *See* Madison Square Gardens Corp. v. Braddock, 90 F.2d 924 (3rd Cir. 1937). Commonly, liquidated damages are set at an amount equal to the additional compensation a breaching employee obtains from the new employer, and not at a specific dollar amount. *Rubin*, at page 3.

12. J. B. Lippincott Co. v. Lasher, 430 F. Supp. 993 (S.D.N.Y. 1977).

13. Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542 (1932); Anglia Television v. Rees, 1971 3 All E.R. (C.A.).

ment law.[14] Although, the breach (as well as the proximate/foreseeable injury to plaintiff) may be undisputed, the difficulty lies in the ability to prove the amount of damages with reasonable certainty.[15] The traditional view is that lost profit damages are speculative and non-recoverable because it is impossible to predict the success of a film, play, record, book or team with reasonable accuracy.[16] Recently, however, courts have begun to relax the speculative defense and allow a broader showing of the certainty of injury.[17]

1. Certainty of Damages.

Under the long settled rule of contract remedies, damages for breach of contract must be clearly ascertainable and reasonably certain. Usually, the plaintiff carries this burden of proof.[18] However, to avoid the harshness of this rule, courts will shift the burden when the defendant's wrong creates the difficulty in overcoming the uncertainty.[19]

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14. *See, e.g.*, Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 140 Cal. Rptr. 921 (1977); Zorich v. Petroff, 152 Cal. App. 2d 806, 313 P.2d 118 (1957); Amaducci v. Metropolitan Opera Ass'n, 33 A.D. 2d 542, 304 N.Y.S.2d 322 (1969). *See also* Zimmerman, *Exclusivity of Personal Services: The Viability and Enforcement of Contractual Rights*, 19 BEV. HILLS B. ASS'N J. 73 (1985); 2 SIMENSKY & SELZ, ENTERTAINMENT LAW § 21.04, at 21-14 (1983). *See supra* note 1 and accompanying text. For cases denying lost profit damages of an unestablished business, *see* Fredonis Broadcasting Corp. v. RCA, 569 F.2d 251 (5th Cir. 1978), *cert. denied*, 439 U.S. 859 (1978); Patton v. Royal Indus., 263 Cal. App. 2d 760, 70 Cal. Rptr. 44 (1968); Evergreen Amusement Corp. v. Milstead, 206 Md. 610, 618, 112 A.2d 901, 904-05 (1955); Cramer v. Grand Rapid Showcase Co., 223 N.Y. 63, 119 N.E. 227 (1918).

15. *See supra* notes 1 and 14 and accompanying text.

16. *See supra* note 15. *See generally* Jones v. San Bernardino Real Estate Bd., 168 Cal. App. 2d 661, 336 P.2d 606 (1959) (plaintiff was denied damages for loss of contracts, business associations, and clientele based on a breach of an employment contract and expulsion from a local realty board); Quinn v. Straus Broadcasting Group, 309 F. Supp. 1208 (S.D.N.Y. 1970) (the moderator of a radio talk show was denied damages for loss of publicity for wrongful termination of an employment contract).

17. Welch v. U.S. Bancorp Realty and Mortgage Trust, 286 Or. 673, 596 P.2d 947 (1979). The court in *Welch* stated "the term 'reasonable certainty' as a screening device may not now be as favorable a concept for defendants resisting claims of lost profits as it once was under older decisions of this court." *Id.* at 704-05, 596 P.2d at 963. For cases allowing lost profit damages of a new business venture upon a showing of reasonable certainty, *see* S. Jon Kreedman & Co. v. Meyer Bros. Parking-Western Corp., 58 Cal. App. 3d 173, 130 Cal. Rptr. 41 (1976); Vickers v. Wichita State Univ., 213 Kan. 614, 620-21, 518 P.2d 512, 517 (1979) (breach of contract to televise college basketball games); Ferrell v. Elrod, 63 Tenn. 129, 469 S.W.2d 678 (1971).

18. D.C. Comics v. Filmation Assocs., 486 F. Supp. 1273 (S.D.N.Y. 1980); 5 A. CORBIN, CORBIN ON CONTRACTS § 1020, at 164 (Kaufman Supp. 1980).

19. Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265 (1946); M. & R. Contractors and Builders v. Michael, 215 Md. 340, 348-49, 138 A.2d 350, 355 (1958); R. DUNN, RECOVERY OF DAMAGES FOR LOST PROFITS, § 1.4, at 7 (1981); RESTATEMENT OF CONTRACTS § 331(a), at 10 (1932).

It is undisputed that management may recover damages if such can be proven with reasonable certainty.[20] The problem arises in the instant scenarios when management attempts to prove that the breaching talent's absence led to and resulted in lost profits. There is a two step analysis to recovering such damages. First, the talent's name and performance must have value to the employer. Secondly, such loss must be measurable with reasonable certainty.

It has long been stated that entertainment personal service contracts are different from standard employment contracts.[21] The name of the performer and the attendant publicity related to his performance are valuable.[22] The star uses this value to achieve greater bargaining leverage against the employer. Alternatively, the management employs the performer's name and publicity for its "marquee value" and box office appeal. The loss of the talent's performance is a manifest denial of the employer's benefit due under the personal service contract. Therefore, it is logical to conclude that the loss of the breaching performer's services and name are a substantial detriment to management.

Once the employer establishes the fact of damage with reasonable certainty, the mere difficulty in ascertaining the amount of damage is not fatal.[23] There is no requirement of mathematical precision. Rather, all the plaintiff needs to show, using the best evidence available, is a reasonable method of measuring the lost value of the breaching performer to the employer.[24]

Management counsel should present all the supporting evidence obtainable to demonstrate the talent's value to the employer and the amount of the injury resulting from the talent's refusal to perform the

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20. *See supra* notes 1 and 14-19 and accompanying text.

21. Clemens v. Press Pub. Co., 67 Misc. 183, 122 N.Y.S. 206 (1910).

22. *See, e.g.*, Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 140 Cal. Rptr. 921 (1977); Lloyd v. Cal. Pictures Corp., 136 Cal. App. 2d 638, 289 P.2d 295 (1955) (court sustained a cause of action for breach of contract for denial of screen credit and granted the right to recover for lost publicity and credit); Paramount Prods. v. Smith, 91 F.2d 863 (9th Cir. 1937), *cert. denied*, 302 U.S. 749 (1937) (plaintiffs recovered damages for breach of contract for plaintiff's screen credits for writing script used in a film). This principle has long been recognized in England—*see, e.g.*, Herbert Clayton and Jack Waller, Ltd. v. Oliver, 1930 A.C. 209 (an actor engaged to play one of three principal leads was later cast in an inferior role. Court stated plaintiff was entitled to lost publicity arising from the lesser billing); Marke v. George Edwardes, Ltd., (1928) 1 K.B. 269 (C.A. 1927) (an actress promised credit and lead in a play was awarded damages for lost publicity and denial of opportunity to perform).

23. Larsen v. A.C. Carpenter, Inc., 620 F. Supp. 1084 (E.D.N.Y. 1985); Tull v. Gundersons, Inc., 709 P.2d 940 (Colo. 1985); Borne Chem. Co. v. Dictrow, 85 A.D.2d 646, 445 N.Y.S.2d 406 (1981); *Vickers*, 213 Kan. at 620, 518 P.2d at 517; RESTATEMENT OF CONTRACTS § 336, Comment d (1932); R. DUNN, *supra* note 19, § 1.4 at 7.

24. *See supra* note 23 and accompanying text.

personal service contract. Producers, owners, management executives, marketing/advertising experts and others can provide expert testimony on the performer's public appeal and market value, as well as furnish opinions as to the losses sustained because of the talent's absence from the employer's end-product.[25] Evidence of entertainment custom and industry practice, such as projected advertising and sales revenues, can be offered to establish the performer's value to the employer. Also, the use of statistical data to measure the popularity and public recognition of the star can assist in proving the amount of damages.[26] Evidence should be offered concerning the value of plaintiff's product with and without the breaching performer.[27] The extent of damage can be shown by comparing similarly situated performers.[28] Lastly, the breaching talent's track record of success can be used to predict the likelihood of plaintiff's future lost benefits because of the talent's refusal to perform.[29]

Referring to the scenarios, management counsel can introduce the

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25. *See, e.g., M & R Contractors*, 215 Md. at 349, 138 A.2d at 355 (which held that reasonable certainty "may often be based upon opinion evidence"); Harsha v. Capital Sav. Bank, 346 N.W.2d 791 (Iowa 1984) (court allowed expert opinion regarding plaintiff's projected earnings had defendant not breached); Larsen v. Walton Plywood Co., 65 Wash. 2d 1, 390 P.2d 677 (1964) (court allowed expert testimony regarding the market structure for establishing damages). *But see* Broadway Photoplay Co. v. World Film Corp., 225 N.Y. 104, 121 N.E. 756 (1919).

26. Evidence concerning the scope of distribution of the work, such as television rating surveys, circulation figures for newspapers and magazines, gross earnings for movies, and the number of record albums sold, etc., might be considered a relevant factor in determining the proper measure of damages. 2 SIMENSKY & SELZ, *supra* note 19, § 1.4, at 20-21. *See, e.g.*, Paramount Prods. v. Smith, 91 F.2d 863 (9th Cir. 1937), *cert. denied*, 302 U.S. 749 (1937) (plaintiff was allowed to introduce statistical evidence to show life expectancy and future earning potential); Smithers v. Metro-Goldwyn-Mayer Studios, 139 Cal. App. 3d 643, 189 Cal. Rptr. 20 (1983), *vacated*, __Cal. 3d __, 696 P.2d 82, 211 Cal. Rptr. 690 (1985), *withdrawn on appeal*. In *Smithers*, a 1985 unpublished and uncertified opinion, the Court of Appeal allowed the introduction of the "television recognition quotient" (a publication which evaluates the performer's recognition factor with the public) "to establish the extent of plaintiff's damage." *Ericson*, 73 Cal. App. 3d at 857, 140 Cal. Rptr. at 925-26 (value can be correlated to box office appeal).

27. *See* Paramount Prods. v. Smith, 91 F.2d 863 (9th Cir. 1937), *cert. denied*, 302 U.S. 749 (1937) (plaintiff introduced evidence to show the difference in compensation before and after the breach). Evidence concerning the before and after effect of the performer's breach, such as added revenues, attendance figures and box office gross receipts, might also be considered a relevant factor in determining the proper measure of damages. A marketing device known as "presale" (i.e.: the selling of exploitation licenses to movie before filming to defray production costs) might be used to determine lost profit as the difference between the price paid with the performer and the price without the performer. Meyer & Osman, *Production Company Remedies for Star Breaches*, 1 ENT. L.J. 28 (1981).

28. Unruh v. Smith, 123 Cal. App. 2d 431, 267 P.2d 72 (1954).

29. *See, e.g.*, Paramount Prods. v. Smith, 91 F.2d 863 (9th Cir. 1937), *cert. denied*, 302 U.S. 749 (1937) (support of a claim for damages plaintiff offered evidence of similar personal service contract to contrast the value plaintiff actually received). *Ericson*, 73 Cal. App. 3d at

success record of Heavy Mental's last three albums to show it is reasonably certain that the fourth album would make plaintiff-employer a comparable amount of profit. Sports attorneys could establish the public recognition and support of Mr. Backer by fan surveys and gate attendance. Ms. Starlett's value to management can be proven by asking industry experts the value of the film with and without her performance. All or part of these proposed measurements can be introduced. No one particular piece of evidence is conclusive. Management must compile as much supporting data as possible to be successful in proving the amount of damages.

At least one court has recognized the need to expand the rule of reasonable certainty in the area of entertainment law. In the 1985 uncertified decision of *Smithers v. Metro-Goldwyn-Mayer Studios*,[30] the court held that a performer's name and its attendant publicity are valuable, certain and compensable to the performer.[31] Plaintiff-artist was entitled to $500,000 damages for insufficient star billing. In rejecting the defendant's certainty defense, the court stated "it is clear that one who willfully breaches the contract bears the risk as to the uncertainty or the difficulty in computing the amount of damage."[32] A number of witnesses established that the use of an artist's name has value.[33] The court concluded

857, 140 Cal. Rptr. at 925-26 (damages may be calculated in correlation to an artist's known record of successes).

30. 139 Cal. App. 3d 643, 189 Cal. Rptr. 20 (1983). A hearing was granted by the California Supreme Court vacating this opinion. __ Cal. 3d __, 696 P.2d 82, 211 Cal. Rptr. 690 (1985) (California Supreme Court retransferred the case to the Court of Appeals to be reconsidered in light of the recent decision in Seamen's Direct Buying Serv. v. Standard Oil of Cal., 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984)). In March 1985, the Court of Appeals in an unpublished opinion reaffirmed its original decision adding only a brief discussion of *Seamen's* and finding it inapposite to the instant matter. As of the time of this writing, a petition requesting certification for publication in the official reporter is pending in the California Supreme Court. For a detailed discussion of the *Smithers* decision by plaintiff's attorney, *see*, D. Frank, What's in a Name? Maybe a Fortune! (1986) (unpublished manuscript).

31. 139 Cal. App. 3d 643, 645, 189 Cal. Rptr. 20, 22 (1983) (plaintiffs sued MGM for breach of contract by failing to give plaintiff billing in accordance with plaintiff's personal service contract; the jury awarded plaintiff $500,000 for defendant's breach).

32. 189 Cal. Rptr. at 24 (citing Donahue v. United Artists Corp., 2 Cal. App. 3d 794, 804, 83 Cal. Rptr. 131, 135 (1969)).

33. 189 Cal. Rptr. at 24. Fred Westheimer, of the William Morris Agency, testified the recognition of an artist's name and money go hand-in-hand. Reporter's transcript in *Smithers* trial (hereinafter referred to as "RT") 94:18-22. Chester Migden, former National Executive Secretary of the Screen Actors Guild, stated the association of an actor's name to a particular product is valuable. Further, he remarked the advertising industry pays very heavily for the name of a star. RT: 359:3-18; 361:17-28; 362:1-11, 27-28; 363:1-4. Bert Remson, Casting Director, told the court billing is money. RT: 386:28; 387:1-11, 16-19. John Conwell, former Vice President in charge of talent for Quinn Martin Productions, testified he was unable to estimate the probabilities of greater revenues, but in his opinion plaintiff would have earned

that a jury could reasonably deduce from the evidence that plaintiff-artist would suffer an economic loss because of defendant's breach, even though no witness was able to precisely estimate plaintiff's damages.[34]

Even though *Smithers* and many of the herein cited authority are considered "artist cases," the underlying factual and policy analysis is arguably applicable to the scenarios which are the subject of this paper. It makes no significant difference; plaintiff-artist's damages are lost future earnings and plaintiff-employer's damages are lost product revenues. Both factual situations essentially discuss the absence of the artist's name from the employer's product due to a breach of contract and resulting damages therefrom caused plaintiff. However, the courts have traditionally favored the talent over the entertainment employer. This could ultimately impede the employer's successful application of this new trend.

Smithers, albeit uncertified, is at the cutting edge of the recent trend to relax the certainty rule. It, along with the other authority discussed herein, establishes the courts' growing propensity to exercise their broad discretion and allow more evidence regarding the certainty of damages. There is clearly nothing esoteric about the relationship between a talent's performance and the enhanced value the same has upon the management's product. Management's counsel should focus on the lost benefits of the bargain under the personal service contract by presenting all supporting evidence obtainable to demonstrate the substantial value of the talent's performance to the employer and the resulting injury from the refusal to perform.

2. Avoidable Consequences.

The general rule states that a plaintiff is required to act reasonably to mitigate damages.[35] The defendant has the burden of proving plaintiff's failure to mitigate, or the amount plaintiff derived from

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more money had he received star billing. RT: 427:23-28; 431:13-28; 432:1-7. Thomas Jennings, theatrical agent, when called to testify, stated the greater a performer's name recognition means the more money the employer will pay. RT: 442:8-28; 443:1-22. John Randolph, an actor, stated at trial recognition and income are inseparable, and plaintiff suffers economic loss for not receiving his promised billing. RT: 640:20-23; 647:3-7, 17-18; 650:7-8; 652:12-22.

34. 189 Cal. Rptr. at 24. Plaintiff's experts were unable to state exactly plaintiff's losses. Rather, each explained on cross-examination the impossibility to provide specific and identifiable amounts but there was no doubt the absence of plaintiff's name in star billing detrimentally affected plaintiff's ability to make more money.

35. *See, also,* Hardwick v. Dravo Equipment Co., 279 Or. 619, 569 P.2d 588 (1977); Placid Oil Co. v. Humphrey, 244 F.2d 184 (5th Cir. 1957); Steelduct Co. v. Henger-Seltzer Co., 26 Cal. 2d 634, 160 P.2d 804 (1945); Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 436, 358 A.2d 805 (1976); Davis v. Small Business Inv. Co. of Houston, 535 S.W.2d 740 (Tex. Civ. App. 1976).

mitigation.[36]

There is no case law which discusses an entertainment employer's responsibility for mitigating damages when an entertainer refuses to perform under a personal service contract. Alternatively, the courts have narrowly defined the entertainment artist's duty to mitigate.[37] Practically, management's only mitigation options in the proposed scenarios are (1) to replace the breaching performer; or (2) continue without the talent. Because of the inherent individuality and uniqueness of every performance, there is some question as to whether the employer has any duty to mitigate, or if the artist is replaced, whether the substitute is truly mitigating the plaintiff's losses.

There are cases, although outside the entertainment field, which hold that if no replacement employee is available, there is no duty to mitigate.[38] There is no substitute when the item contracted for is unique.[39] It is undisputed that the entertainment industry is based upon the idea of the unique, extraordinary and special performance.[40] It is equally logical to submit that such performers are not interchangeable.

The entertainment employer has a limited ability to mitigate. A superior performer will cost management more money and still not necessarily be better suited for plaintiff's particular need. Alternatively, an inferior substitute or a continuation without a replacement will not satisfy management's lost contractual benefits. Thus, the employer may sustain damage regardless of its attempt to mitigate.

It seems there is a requirement if a replacement is available. The measure of damages is the comparable difference between the value of the substitute, if any, and the talent-defendant's promised performance value.

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36. *See supra* note 33 and accompanying text.

37. *See, e.g.*, Warner Bros. Pictures v. Bumgarner, 197 Cal. App. 2d 331, 17 Cal. Rptr. 171 (1961) (court stated before the employee had a duty to mitigate, there must be a discharge or repudiation by the employer of the personal service contract); Payne v. Pathe Studios, 6 Cal. App. 2d 136, 44 P.2d 598 (1935) (where the employee is rendering non-exclusive services there is no duty to mitigate); Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970). (The court held the employee's mitigation duty is only to accept employment of a comparable or substantially similar nature.)

38. Unruh v. Smith, 123 Cal. App. 2d 431, 267 P.2d 72 (1954). *But see*, Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969).

39. *See, e.g.*, Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply Co., 98 Idaho 495, 567 P.2d 1246 (1977); Homestake Mining Co. v. Talcott, 161 Cal. App. 2d 566, 327 P.2d 59 (1958) (mineral ore); House Grain Co. v. Finerman & Sons, 116 Cal. App. 2d 485, 253 P.2d 1034 (1953) (barley).

40. *See generally* CAL. CIV. CODE § 3423(5); Wilhelmena Motels v. Abdulmajid, 67 A.D.2d 853, 413 N.Y.S.2d 21.

C. *Tortious Breach of a Personal Service Contract.*

1. Generally.

In every contract, there is an implied covenant of good faith and fair dealing.[41] The recent trend is to find a bad faith breach of contract which would constitute a tort. This new development provides prospective plantiffs with an alternative remedy to standard contract damages and injunctions. The advantages of a tortious breach of contract are that it provides a broader measure of damages,[42] avoids some of the strict uncertainty problems associated with contract damages,[43] and opens the entire cornucopia of tort remedies including punitive damages.[44]

Although there has been an expansion in the area of bad faith breach of contract, courts have been unable to establish a uniform standard for determining when a breach of contract is tortious. However, the courts have recurrently held four types of conduct by breaching defendants to be tortious. They are: (1) oppressive;[45] (2) egregious;[46] (3) will-

41. *See, e.g.*, , De Laurentiis v. Cinemagrafica de las Americas, S.A., 9 N.Y.2d 503, 215 N.Y.S.2d 60 (1961); 3 A. CORBIN, CORBIN ON CONTRACTS § 561 at 228 (1960).

42. To recover tort damages, plaintiff must show defendant's conduct proximately caused his damage. *See generally* CAL. CIV. CODE §§ 3300, 3301 and 3333 (Deering 1984); California Shoppers v. Royal Globe Ins., 175 Cal. App. 3d 1, 221 Cal. Rptr. 171 (1985).

43. In the case of a particularly aggravated breach where the injured party has difficulty in proving damages, the willfulness of the breach may be taken into account in applying the requirement that damages be proven with reasonable certainty. RESTATEMENT (SECOND) OF CONTRACTS § 355 (1977) comment a. *See* Quigley v. Pet, Inc., 162 Cal. App. 3d 877, 888, 208 Cal. Rptr. 394, 400 (1984).

44. The general rule is breach of contract damages are limited to pecuniary loss without recovery for punitive damages. RESTATEMENT (SECOND) OF CONTRACTS § 369 (1977). A party is not automatically entitled to punitive damages for tortious breach of an implied covenant of good faith and fair dealing. "In order to justify an award of exemplary damages, the defendant must be guilty of oppression, fraud or malice." CAL. CIV. CODE § 3294 (Deering 1984). He must act with the intent to vex, injure or annoy, or with conscious disregard of plaintiff's rights. *Id.*

45. *See, e.g.*, Knepper, *Review of Recent Tort Trends*, 30 Def. L.J. 1, 23 (1981), *discussing* Golf West of Ky, Inc. v. Life Investors, Co. No. C 138 745 (Superior Court for the County of Los Angeles, July 10, 1980). In *Golf*, defendant terminated without cause an exclusive distributorship contract after plaintiff spent two and one-half years and a substantial sum of money to establish outlets for defendant's product. The jury awarded 2.5 million dollars as compensatory damages and 6.5 million dollars for tortious breach of an implied covenant of good faith. *See* Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979) (the Seventh Circuit held Indiana's oppressive breach of contract tort statute, which is similar to the tortious breach of implied covenant of good faith, allowed punitive damages against the defendant who tried to ruin plaintiff's business by attempting to force plaintiff to sell his business to defendant at a reduced rate); Boise Dodge, Inc. v. Clark, 92 Idaho 902, 907, 453 P.2d 551, 556 (1969) (the court stated punitive damages for contract or tort can be found if there is fraud, malice, oppression or any other satisfactory reason for awarding such damages); Loom Treasures v. Terry Minke Advertising Design, 635 S.W. 2d 940 (Tex. Civ. App. 1982). (The court allowed

ful;[47] (4) coercive conduct.[48] The courts' stated policy reasons for bad faith breach of contract decisions remain constant. Generally, the courts seek to deter others similarly situated, provide a remedy for damages which otherwise might go uncompensated and protect plaintiffs from serious wrongs, tortious in nature, even though not predetermined torts.[49]

The entertainment scenarios fall into the aforementioned conduct classifications and policy rationale, and thus should be accorded the similar protection of tortious breach of contract. The scenario talent willfully breached their personal service contracts when the employers were most vulnerable. The performers' intent was to exploit the enhanced bargaining position and coerce modification of the valid and legally binding personal service contracts. The plaintiff-employers' reliance upon recovering contract damages is still relatively uncertain and a negative injunction would not solve the economic burden nor compel the contract benefits. Therefore, management has two options: (1) surrender their valid contractual rights under the personal service contracts, or (2) resort to an arguably inadequate choice of remedies. Meanwhile, the breaching performers avoid the performance required under the personal service contracts or they enjoy the success of intentionally extorting additional

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punitive damages when breach of contract is malicious, oppressive or fraudulent absent an independent tort).

46. Kahal v. J.W. Wilson and Assocs., 673 F.2d 547 (D.C. Cir. 1982) (District of Columbia Circuit Court held punitive damages and breach of contract were justified upon a showing that the breach was aggravated by a particularly egregious conduct of the defendant).

47. *See, e.g.*, Morrow v. L.A. Goldschmidt Assocs., 126 Ill. App. 3d 1089, 468 N.E.2d 414 (1984) (willful and wanton misconduct is an independent tort that will support punitive damages based upon the breach of contract); Robison v. Katz, 94 N.M. 314, 610 P.2d 201 (1980) (the court will allow punitive damages in a contract action upon a showing of malice, reckless, or wanton conduct by defendant); Henderson v. U.S. Fidelity and Guaranty Co., 620 F.2d 530 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 608 (1980) (the Fifth Circuit held punitive damages could be awarded when defendant intentionally and willfully breached the contract).

48. *See, e.g.*, Seaman's Direct Buying Serv. v. Standard Oil of Cal., 36 Cal. 3d 752, 769-70, 686 P.2d 1158, 1167, 206 Cal. Rptr. 354, 363 (1984) (the court stated tort remedies are available in a contract action where defendant seeks to avoid all liability under a meritorious contract by adopting a "see you in court" position without probable cause and with no belief in the existence of a defense); *In re* Roy C., 169 Cal. App. 3d 912, 215 Cal. Rptr. 513 (1985) (a party to a contract may be subject to tort liability, including punitive damages, for use of coercion to gain more than is due under the contract); Davis v. Tyee Indus., 58 Or. App. 292, 298, 648 P.2d 388, 392 (1982), *aff'd*, 295 Or. 467, 668 P.2d 1186 (1983) (the court stated defendant's behavior in breaching the contract bordered on extortion and amounted to a tort of coercion); Adams v. Crater Well Drilling, 276 Or. 789, 556 P.2d 679 (1976) (the court held that a party to a contract may be subject to tort liability, including punitive damages if he coerces the other party to pay more than is due under the contract terms.)

49. Vernon Fire and Casualty Ins. Co. v. Sharp, 264 Ind. 599, 608, 349 N.E. 2d 173, 184-85 (1976). *See also* Sassaman, *Punitive Damages in Contract Actions—Are the Exceptions Swallowing the Rule?* 20 WASHBURN L.J. 86 (1980).

contract rights. Whichever, the management needs the alternative of tortious breach of contract to balance the scales in these scenarios.

2. Developments in California.

It is well settled in California that the law implies in every contract a covenant of good faith and fair dealing.[50] The covenant requires that neither party do anything which would deprive the other of the benefit of the agreement.[51]

In the recently decided landmark case of *Seaman's Direct Buying Serv. v. Standard Oil Co. of Cal.*,[52] the California Supreme Court acknowledged, albeit somewhat tentatively, that a non-insurance contract could be breached tortiously if it contained "characteristics similar" to those found in insurance contracts.[53] The court intimated that a party which coerces the other party to pay more money than due under the contract terms, or attempts to avoid all liability on a meritorious contract by stonewalling the validity of the contract without probable cause, offends accepted notions of business ethics and engages in tortious conduct.[54]

In a subsequent decision, the court in *Wallis v. Superior Court*,[55] considered the employee/employer relationship in light of the *Seaman's* case. In *Wallis*, the court stated "the characteristics of the insurance contract which give rise to an action in tort are also present in most employer/employee relationships."[56] The court held:

> for purposes of serving as predicates to tort liability, we find

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50. *See, e.g.*, Gianelli Distrib. Co. v. Beck Co., 172 Cal. App. 3d 1020, 1035, 219 Cal. Rptr. 203, 208 (1985); *Seaman's*, 36 Cal. 3d at 769, 686 P.2d at 1166, 205 Cal. Rptr. at 362; Wallis v. Super. Ct., 160 Cal. App. 3d 1109, 1117, 107 Cal. Rptr. 123, 127 (1984); *Quigley*, 162 Cal. App. 3d at 887, 208 Cal. Rptr. at 399; Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 818, 598 P.2d 452, 456, 157 Cal. Rptr. 482, 486 (1979).

51. *See, e.g., Seaman's*, 36 Cal. 3d at 769, 686 P.2d at 1166, 206 Cal. Rptr. at 362; *Quigley*, 162 Cal. App. 3d at 887, 208 Cal. Rptr. at 399.

52. Seaman's Direct Buying Serv. v. Standard Oil Co. of Cal., 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

53. *Seaman's*, 36 Cal. 3d at 769-71, 686 P.2d at 1166-67, 206 Cal. Rptr. at 362-63 (extending the validity of the tort of bad faith breach of contract). *See* Commercial Cotton Co. v. United Cal. Bank, 163 Cal. App. 3d 511, 516, 209 Cal. Rptr. 551, 554 (1985).

54. *Seaman's*, 36 Cal. 3d at 769-70, 686 P.2d at 1166-67, 206 Cal. Rptr. at 362-63.

55. 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123 (1984).

56. *Wallis*, 160 Cal. App. 3d at 1117 n.2, 207 Cal. Rptr. at 127. This tort has also been discussed in the context of wrongful termination cases. *See* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Pugh v. See's Candies, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). *See also* Koehrer v. Super. Ct., 181 Cal. App. 3d 1155, 226 Cal. Rptr. 820 (1986).

> that the following "similar characteristics" must be present in a contract: (1) the contract must be such that the parties are in an inherently unequal bargaining position; (2) the motivation for entering the contract must be a non-profit motivation, i.e., to secure peace of mind, security, future protection; (3) ordinary contract damages are not adequate because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party "whole"; (4) one party is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and (5) the other party is aware of this vulnerability.
>
> These criteria having been met, the party in the stronger position has a heightened duty not to act unreasonably in breaching the contract, and to consider the interest of the other party as tantamount to his own.[57]

Examining the hypothetical scenarios in light of the five-part test, it is clear that the personal service contract between the entertainment employer and the breaching performer share substantial similarities with an insurance contract.

In addressing the first element of the *Wallis* test, the court focuses on the realities of the economic situation to determine whether the parties are in an equal bargaining position.[58] At the time of the hypothetical breach, management has sunk a huge investment in the product and performer. Further, plaintiff-employer has limited reasonable mitigation alternatives for the breach. This is especially true if plaintiff-employer's production will collapse without defendant's contractual performance. Alternatively, the talent has little risk of legal reprisal from management because of the inadequacy of employer's injunctive and contractual remedies. Therefore, there exists a great disparity in the economic situations and bargaining positions between the entertainment-employer and the breaching performer.

Second, the plaintiff's motivation for the contract must be non-profit.[59] However, this is a legal fiction. All contracts must be supported

57. *Wallis*, 160 Cal. App. 3d at 1118, 207 Cal. Rptr. at 129. *See* Hudson v. Moore Bus. Forms, 609 F. Supp. 467, 478 (N.D. Cal. 1985).

58. *Wallis*, 160 Cal. App. 3d at 1117, 207 Cal. Rptr. at 128.

59. *Id.*, at 1117, 207 Cal. Rptr. at 127. *See Commercial Cotton*, 163 Cal. App. 3d at 516, 209 Cal. Rptr. 559 (while the defendant-bank had a commercial purpose for accepting depositors funds, the plaintiff-depositor had a non-profit motive which was sufficient to justify finding the contract to be non-profit motivated). *See generally Egan*, 24 Cal. 3d at 819, 598 P.2d at 456-57, 157 Cal. Rptr. at 486-87.

by mutual consideration to be enforceable. Whether called benefit, consideration, security or peace of mind, a plaintiff is receiving a profitable advantage under every contract. In *Commercial Cotton*,[60] a depositor received valuable bank services, protection of his funds and convenience of financial transactions in exchange for depositing funds in the defendant-bank.[61] However, the court held this to be a non-profit motive.[62] Similarly, an insured is entitled to the services of an insurance agent, protection against casualty and attorney services under an insurance contract, but again the motive is deemed non-profit.[63] All plaintiffs are thus motivated to enter into the contracts by the valuable and substantial benefits under the contracts. Courts have merely fashioned their arguments to find a non-profit motive when the basic policies of tortious breach are present and the court believes injustice will result if found inapposite.

Assuming the courts will supply a strict construction to the non-profit motive element, the hypothetical personal service contracts have a non-profit motivation. In *Quigley*,[64] the court stated that there is a profit motive when the reason for the contract "can be assured by ordinary contract damages."[65] However, courts have historically been reluctant to award contract damages for breach of the entertainment personal service contract by the artist. Thus, there is no assurance of recovering contract damages.

In *Wallis*, the court stated that the non-profit motive exists when "among considerations [for entering into a contract] is the peace of mind and security it will provide . . . ."[66] An entertainment-employer is not a non-profit venture. However, this is not a requirement. Plaintiff-employer must show some element of non-profit motivation. Management does not make a profit directly from the personal service contract. Rather, plantiff-employer absorbs substantial loss under the contract with the intent to generate a profit from the end-product. Plaintiff-employer could obtain the same performance without a personal service contract. However, the contract is motivated to secure the performance of an essential artist before the employer makes a significant investment into the project in reliance upon the performer's promise. Without this security, the entertainment-employer cannot protect its future. There-

60. 163 Cal. App. 3d 511, 209 Cal. Rptr. 551 (1985).
61. *Id.*
62. *Id.*
63. *Egan*, 24 Cal. 3d at 819, 598 P.2d at 456-57, 157 Cal. Rptr. at 486-87.
64. 162 Cal. App. 3d 877, 208 Cal. Rptr. 394.
65. *Id.* at 893, 208 Cal. Rptr. at 403.
66. *Wallis*, 160 Cal. App. 3d at 1117, 207 Cal. Rptr. at 128 (quoting Crisci v. Security Ins. Co., 66 Cal. 2d 425, 434, 426 P.2d 173, 179, 58 Cal. Rptr. 13, 19 (1967)).

fore, the purpose of the contract itself is to protect the plaintiff-employer and is not solely motivated by profit.

As for the third element, contract damages are not adequate where they offer no motivation whatsoever for the defendant not to breach.[67] Tremendous uncertainty exists in obtaining negative injunctions or contract damages. Further, an entertainment-employer cannot readily turn to the marketplace to replace the talent because of the inherent uniqueness of entertainment performers. As a result, talent commonly breach their personal service contracts knowing that little, if any, legal reprisal is available to plaintiff. Plaintiff's choices are to gamble on the traditional remedies or be coerced into surrendering valid rights. Therefore, entertainment-employers' remedies do not require the artist to account for his actions and are inadequate to make plaintiff whole.

Fourth, there must be a trust between the parties resulting in one party's vulnerability.[68] The law imposes on all employees an implied duty of loyalty to the employer,[69] especially when the employee is essential to the employer.[70] Therefore, a trust relationship exists between the entertainment-employer and the talent-employee.[71] This is especially true in the hypothetical scenarios. Due to the uncertainty of traditional remedies, the entertainment-employer must trust the performer to render the promised services because the talent has little motivation not to breach. In reliance upon this trust, the entertainment-employer invests time, effort and costs in preparation for the use of the performer's services, thereby creating the vulnerability. Performers often will breach at the time when employers expect the benefits of the personal service contract. Thus, employers are extremely vulnerable because of the sunk investment, the lack of alternative remedies and the potential demise of the entire project without defendant's perfomance.

Lastly, the performer must be aware of this vulnerability.[72] The talent not only is aware of the plaintiff-employer's precarious position, but also intentionally breaches the contract at a time which maximizes the exploitation of plaintiff-employer's vulnerability.

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67. *Wallis*, 160 Cal. App. 3d at 1118, 207 Cal. Rptr. at 129.

68. *Id.*

69. *Hudson*, 609 F. Supp. at 479; Diodes, Inc. v. Franzen, 260 Cal. App. 2d 244, 249, 67 Cal. Rptr. 19, 22 (1968).

70. Dana Perfumes, Inc. v. Mullica, 268 F.2d 936, 937 (9th Cir. 1959); *Hudson*, 609 F. Supp. at 479.

71. *See generally*, Commercial Cotton Co. v. United Cal. Bank, 163 Cal. App. 3d 511, 209 Cal. Rptr. 551 (1985) (the bank owed a quasi-fiduciary duty to depositor because of his reliance upon bank's honesty and professionalism; this created a trust relationship).

72. *Wallis*, 160 Cal. App. 3d at 1118, 207 Cal. Rptr. at 129.

Once the court finds the criteria to have been met, the breaching performer's extortion-like intent to manipulate the plaintiff and destroy his enjoyment and benefit of the personal service contract is a breach of the covenant of good faith and fair dealing. Defendant has placed his own interest so far ahead of plaintiff's interest as to offend standard business ethics and one's own sense of justice. In support of the above analysis and in application to the entertainment industry, the court in *Smithers v. Metro-Goldwyn-Mayer Studios*[73] (in an uncertified decision) held that a threat to blacklist an entertainer unless he would forego his contractual rights is a tortious breach of duty of good faith and fair dealing.[74] This case is analogous to the proposed scenarios save the reversal of the employer and talent as plaintiff and defendant. The defendant's threats to blackmail the performer are tantamount to the breaching performer's intentional withholding of his performance. The net result of both is that the defendants are attempting to use their superior positions to force the plaintiffs to surrender rights granted in valid personal service contracts.

IV. CONCLUSION

Historically, the body of entertainment and sports law favors the artist, performer or athlete over the employer, whether the management is a multi-national conglomerate or an independent owner. However, talent in the 1980's has achieved more power and success hereto unparalleled by their predecessors. Because of this new power, star talent can rival the most dominant of entertainment employers. Therefore, the old rule of protecting entertainers is being eroded by recent trends to expand management's remedies against breaching talent, thereby creating mutuality of remedies which reflects the equality of power between employer and talent.

The negative injunction has always had a limited usefulness to the entertainment employer. It has minimal economic value to management

73. 139 Cal. App. 643, 189 Cal. Rptr. 20 (1983), *withdrawn on appeal*, ___ Cal. 3d ___, 696 P.2d 82, 211 Cal. Rptr. 690 (1985) (the jury awarded plaintiff $300,000 on the tortious breach of contract issue). This is an uncertified opinion and cannot be cited as authority as of the time of this writing. A hearing was granted by the California Supreme Court vacating this opinion. ___ Cal. 3d ___, 211 Cal. Rptr. 690, 696 P.2d 82 (1985) (California Supreme Court retransferred the case to the Court of Appeal to be reconsidered in light of the recent decision in Seaman's Direct Buying Serv. v. Standard Oil Co. of Cal., 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984)). In March 1985, the Court of Appeal in an unpublished opinion reaffirmed its original decision adding only a brief discussion of *Seaman's* and finding it inapposite to the instant matter. As of the time of this writing, a petition requesting certification for publication in the official Reporter is pending in the California Supreme Court.

74. Smithers v. Metro-Goldwyn-Mayer Studios, ___ Cal. 3d ___, 696 P.2d 82, 211 Cal. Rptr. 690 (1985).

and is increasingly more difficult to obtain. Therefore, employers must look elsewhere to achieve satisfaction under personal service contracts.

Traditionally, contract damages were too speculative in entertainment and sports industry personal service contracts. However, a recent trend to relax the speculative damages defense has allowed broader showings of the fact and amount of injury. Management counsel should introduce all evidence available in support of management's position and incorporate the duty to mitigate into the damage analysis.

Tortious bad faith breach of contract may also provide management counsel with an additional alternative remedy. Recent decisions have expanded its definition and, as such, it could potentially be applied to the hypothetical scenarios. However, the expansion of the remedy of contract damages would render the necessity for this remedy moot except for recovery of punitive damages.