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PIRATE'S BOOTY— JOHNNY DEPP'S LAWYERS WALK THE PLANK: A CAUTIONARY TALE FOR ALL ENTERTAINMENT LAWYERS

Michael P. McNamara

Kirsten Hicks Spira

Brian Adesman

Samuel Goldwyn, one of Hollywood's most iconic film producers, supposedly declared that "'[a]n oral contract isn't worth the paper it's written on.'" *Phillippe v. Shapell Industries,* 43 Cal.3d 1247, 1269 (1987). This prophetic adage, simple as it may be, teaches a lesson that entertainment lawyers cannot afford to learn the hard way.

A recent high-profile case from the Los Angeles Superior Court underscores the importance of obtaining signed engagement letters with clients, particularly clients in the entertainment industry.

On October 30, 2019, actor Johnny Depp settled a lawsuit against his former law firm, just weeks before trial was set to begin. Mr. Depp reportedly received an eight-figure payment. *Depp v. Bloom Hergott Diemer Rosenthal La Viollette Feldman Schenkman & Goldman, LLP,* BC680066, 2018 WL 4344241 (Cal. Super. Aug. 28, 2018) should give pause to all entertainment lawyers who rely on oral commission-based agreements with clients.

The protracted litigation began in 2017, when Depp filed a lawsuit against the law firm alleging—among other claims—that the firm committed legal malpractice by mismanaging and misappropriating his finances and collecting millions of dollars in attorneys' fees without a written, signed engagement agreement, in violation of Business and Professions Code section 6147.

Before moving to the substance of Depp's claims, it is important to understand the basics of that statute:

Business and Professions Code section 6147

Business and Professions Code section 6147 sets forth the requirements for enforceable contingency fee agreements. Among other things, all contingency fee retainer agreements must be *in writing* and the client must be provided with a copy of the signed agreement. *See* Cal. Bus. & Prof. Code § 6147(a). Failure to comply with Section 6147 renders the fee agreement voidable at the client's election. *Id.* at § 6147(b). If the client voids the agreement, however, the attorney is "entitled to collect a reasonable fee" based on the value of his or her service. *Id.* With that in mind, back to the facts . . .

The Litigation

When Depp first hired Bloom Hergott in 1999, he entered into an oral agreement under which the firm would provide entertainment-related legal services and, in return, Depp would pay the firm 5% of his earnings. For almost twenty years, the firm represented Depp on multiple matters and spent thousands of hours working

on his behalf. In return, Depp paid the firm 5% of his earnings as a commission.

When he sued the firm in October 2017, Depp alleged legal malpractice and asked for a declaration that any purported contingency fee agreement with the firm was unenforceable. Depp sought disgorgement and restitution of all fees he previously paid to the firm. In its cross-complaint, the firm sought a declaration that the 1999 oral agreement was valid and claimed that Depp breached the agreement by refusing to pay for legal services.

Depp filed a motion for judgment on the pleadings as to the firm's breach of contract cross-claim on the ground that the claim was barred by Section 6147 because the oral agreement on which the claim was premised was unenforceable. The central issue in the parties' briefing was whether percentage-based engagements, which have been ubiquitous in the entertainment industry for years, constitute contingency fee arrangements that must satisfy Section 6147's requirements.

Typical contingency fee arrangements, like the kind used in the personal injury context, involve the collection of certain fees only if the case is won. Percentage-based commission engagements, on the other hand, are slightly distinguishable in that the attorney's fees are not contingent on any particular outcome, but rather on the existence of client earnings. This distinction formed the primary basis for the firm's opposition to Depp's motion:

> In the entertainment industry, actors such as Mr. Depp build a reputation off their performances and often have long-term career goals and public relation strategies. [The firm] offers clients a holistic approach that incentivizes both a client and an attorney to develop a mutually beneficial relationship that can last an entire career, instead of just a series of "one shot" transactions. . . . [¶] This goal—advancing a client's career through legal services—is not a clearly defined, limited goal. It is broad and open-ended.

Defendant's Opposition to Plaintiff's Motion for Judgment on the Pleadings at 9:15–23. The firm argued that Depp's legal services could not be reduced to a description of "successful" or "unsuccessful." For example, the firm negotiated a wide variety of different deals for Depp including Depp's approval rights, credits, insurance coverage, etc.

Alternatively, the firm argued that Depp ratified the oral agreement by "continuing to accept legal services and by continuing to pay [the Firm] through July 2017." *Depp,* 2018 WL 4344241, at *3.

The Ruling

The court was not persuaded, and it granted Depp's motion. It ruled that the firm could not pursue its claim for breach of oral contract because it failed to comply with Section 6147—the agreement was not in a writing containing the required disclosures. 2018 WL 4344241, at *6. The court analyzed the issue using the following framework.

First, the court determined that Depp's oral agreement with the firm was a contingency fee agreement. The court reasoned that a "contingency fee contract" is conditioned upon—or tied to—some measure of the client's success. The court explained:

> [T]he contract as pled is a contingency fee contract. It is tied entirely to [Depp's] success in the entertainment business. As [Depp] put it, when [he] made money, [the firm] made money . . . . That is the very definition of a performance-based incentive. Even if the court employed [the firm's] proposed test, the success of [Depp] in [his] business endeavors was not guaranteed. This is a contingency fee agreement. There is nothing else it can be.

Id. at *4.

Next, the court noted that Depp could not ratify the oral contingency fee agreement because "in order to establish ratification of a contract which is voidable under Section 6147, [the firm] must [] plead and prove the existence of a writing which complies with Section 6147," which the firm could not. *Id.* at *6.

Quantum Meruit Recovery?

Lastly, the trial court acknowledged that "Section 6147(b) does not leave [the firm] without a remedy, even though its contract is unenforceable. When a contract is voided for violation of Section 6147, the claim is converted to one for quantum meruit." *Id.*; *see also* Cal. Bus. & Prof. Code § 6147(b) ("Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee."); *Arnall v. Superior Court,* 190 Cal.

App. 4th 360, 366 (2010) (same); *Mardirossian & Assocs., Inc. v. Ersoff,* 153 Cal. App. 4th 257, 275-76 (2007) (same).

In other words, while the firm was required to return Depp's fees, it was also entitled to offset the reasonable value of the legal services it provided to Depp. Thus, theoretically, if the firm's legal services were more valuable than the fees Depp paid, Depp would be entitled to nothing.

Only a few cases have discussed how to calculate a "reasonable fee" in the context of Section 6147, and the *Depp* court did not reach this issue. Courts that have considered this issue have stated that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Mardirossian & Assocs.*, 153 Cal. App. 4th at 272 (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983)). Factors such as the difficulty of the legal questions involved and the experience of the attorney must be considered when determining the rate and number of hours to be used in the calculation. *Id.*

One case has suggested that the "reasonable fee" calculation should also take into account factors such as the likelihood that work on the client's matter would preclude other employment; the results obtained; and the informed consent of the client to the fee. Thus in *Fergus v. Songer*, 150 Cal. App. 4th 552, 567-68 (2007) the jury could conclude that the attorney was entitled to an hourly fee in excess of his normal hourly rate because of his extraordinary services and the fact that he was precluded from accepting other employment. However, in *Chodos v. Borman,* 227 Cal. App. 4th 76, 102-04 (2014), the court criticized *Fergus* and appeared to reject the idea that the amount of benefit conferred should be a consideration when calculating the reasonable value of services.

In the end, the "reasonable fee" question is likely to be an expert-driven inquiry, dependent on the exact facts at issue. But attorneys who can prove, through contemporaneous time records, that they devoted substantial time to the plaintiff's matter are likely to be in the best position.

Takeaways

Oral agreements, even if confirmed by a course of dealing where the arrangement is ratified over a twenty-year period, will not necessarily protect a lawyer from a claim under Section 6147. While entertainment lawyers may take solace in the fact that the *Depp* case settled before trial—thus ensuring that the court's ruling on Depp's motion will not become binding precedent—they should assume that handshake deals with clients are ticking timebombs, forever voidable at the client's election. Indeed, since the court's ruling on Depp's motion, other entertainment artists have filed similar suits. E.g., Complaint, *Carter p/k/a/ Lil Wayne v. Sweeney,* No. 151067/2019 (N.Y. Sup. Ct. filed Jan. 30, 2019).

Even if a lawyer has a written contingency fee agreement, it is critical that it comply with Section 6147, which requires that the agreement state (1) the contingency fee rate; (2) how disbursements and costs will be handled; (3) "to what extent, if any, the client could be required to pay any compensation to the attorney" relating to the contingency fee contract; and (4) that the fee is "not set by law but is negotiable between attorney and client." Failure to comply with any single requirement of Section 6147 renders the entire agreement voidable at the option of the client. *Arnall*, 190 Cal. App. 4th at 366 n.6.

Although there may be good arguments that distinguish commission agreements from contingency agreements, Bloom Hergott's experience in the *Depp* case makes clear that entertainment lawyers must understand the serious risk that payment for legal services based on a percentage of a client's earnings will be treated like any other type of contingency fee arrangement and must therefore meet the requirements of Section 6147. As reported by several reputable sources, during oral argument on Depp's Motion, Judge Green echoed this sentiment:

> I don't think there are special rules for show business . . . . I grew up in a show business family. I'm aware that show business people think they live in a separate universe, but they don't. Not a separate legal universe.

Nancy Dillon, *Johnny Depp Wins Major Round in $30 Million Dispute With Entertainment Lawyer that Could Ripple through Hollywood,* The New York Daily News (Aug. 28, 2018), https://www.nydailynews.com/news/ny-news-johnny-depp-wins-round-against-entertainment-lawyer-20180828-story.html; Jenna Greene, *Johnny Depp (and Buckley Sandler) on Top in $30M Malpractice Suit against Hollywood Power Lawyer*, The Recorder (Aug. 29, 2018, 1:12 PM), https://www.law.com/therecorder/sites/therecorder/2018/08/29/daily-dicta-johnny-depp-and-buckley-sandler-on-top-in-30m-malpractice-suit-against-hollywood-

power-lawyer-403-20829/?slreturn=20191104134957.

While Judge Green's comments are not precedential, courts routinely remind entertainment litigants that they are subject to the same rules as any other litigant. For example, in *Effects Associates, Inc. v. Cohen,* a "low-budget horror movie mogul" argued that moviemakers should be exempt from copyright law's statute of frauds, which requires a signed writing to transfer ownership of a copyright. 908 F.2d 555, 555-57 (9th Cir. 1990). While acknowledging that "[m]oviemakers do lunch, not contracts," the Ninth Circuit rejected the idea that "moviemakers are too absorbed in developing joint creative endeavors to focus upon the legal niceties of copyright licenses." Id. at 556-57 (internal quotations omitted). Instead, the Ninth Circuit held moviemakers to the same standards as non-movie makers. *See also Weinstein Co. v. Smokewood Entm't Grp., LLC,* 664 F. Supp. 2d 332, 343 (S.D.N.Y. 2009) ("Congress did not exempt parties in the film industry from the requirements of the Copyright Act. Under § 204(a), a transfer of copyright ownership has not occurred unless and until the copyright owner unambiguously embodies its intention to a signed writing.")

Finally, even if a lawyer has a fully compliant written contingency or commission agreement, the best practice is to continue to maintain accurate contemporaneous time records in support of all legal services. This type of evidence can be crucial if a lawyer must defend his or her work in quantum meruit when the former client challenges the validity of the contingency agreement.

Conclusion

While "handshake agreements" and non-binding "deal memos" are routine in the entertainment industry, if lawyers practicing in this industry do not want to walk the plank like Depp's lawyers, it is critical to have signed written agreements that fully comply with the requirements of Section 6147.

Michael P. McNamara is a partner and ***Kirsten Hicks Spira*** and ***Brian Adesman*** are associates at the Los Angeles office of Jenner & Block LLP.