D&G Legal Development Alert: Advertising, Marketing & Promotions

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ARBITRATOR LEVELS PLAYING FIELD FOR SAG P&H ALLOCATION DISPUTES

On June 11, 2008, an arbitrator issued his decision in an arbitration filed by the ANA-AAAA Joint Policy Committee on Broadcast Talent Relations (JPC), a committee made up of advertising agencies and advertisers, against SAG, determining that the SAG Pension & Health Funds Trustees (the Trustees) cannot unilaterally set pension and health allocations. Additionally, the arbitrator ruled that SAG, on a case-by-case basis, must bargain with the individual advertising agencies and advertisers over pension and health allocation disputes. According to the arbitrator, it is the function of the Trustees to collect the pension and health contributions, but not to determine the amount payable. Moreover, in the event of a dispute between SAG and an agency or advertiser, the arbitrator held that the matter cannot be resolved in a court, but must be arbitrated.

By way of background, the SAG Commercials Contract (the Contract) currently requires that signatory advertising agencies and advertisers contribute to the SAG Pension & Health Funds (the Funds) 14.8% of gross compensation paid to performers for so-called "covered services," i.e., the performer's services in television commercials. When an advertising agency or advertiser that is signatory to the Contract engages a celebrity spokesperson to perform not only covered services, but also other types of "non-covered" services, such as making personal appearances or appearing in print advertisements, which are not subject to pension and health contributions, the Contract requires that the spokesperson agreement contain a separate provision covering only covered services. The Contract further requires that Funds contributions be paid on the amount of the performer's total compensation allocable to the covered services.

For over 30 years the Trustees have unilaterally set and adhered to "informal" guidelines concerning Funds allocations, maintaining, by way of example, that a multi-service celebrity spokesperson agreement allocate no less than 50% of the performer's overall compensation to covered services, and up to 90% in some instances. When audited by the Trustees, agencies and advertisers who allocated less than the minimum benchmarks were often threatened by the Trustees with an ERISA action in federal court for underpayment to the Funds. As a result, many of these claims settled, with the agency or advertiser agreeing to pay the additional amounts

sought, rather than face the cost of a protracted litigation, as well as the payment of attorney's fees, fines and liquidated damages under ERISA.

Pursuant to this decision, the Trustees will no longer set the allocations. Instead, allocations will be set according to individual circumstances. Furthermore, future guidelines or minimums must be collectively bargained for and determined by SAG and the JPC, not the Trustees. It is also SAG, not the Trustees, who must now deal with allocation disputes and who must bargain with individual agencies and advertisers over pension and health allocations. Moreover, in the event the parties cannot come to an agreement, the matter must be arbitrated, not litigated in court.

What does the decision mean for the advertising agency or advertiser who is subject to Funds contributions arising from their multi-service spokesperson agreements? First and foremost, fair and reasonable allocations are still required by the Contract and contributions are still payable on the amount allocated. However, the Trustees can no longer mandate a proper allocation under any given contract. Nor can the Trustees hold over the heads of the agencies and advertisers the threat of federal litigation under ERISA, with its draconian penalties in the event the Trustees would prevail. Instead, when allocating a portion of compensation to covered services for the purpose of Funds allocations, agencies and advertisers are to be guided by past practices and applicable language of the Contract, i.e., the "principal performer's 'customary' salary shall be given substantial consideration in resolving [allocation] disputes."

As a result, we will continue to have disputes as to whether enough of a performer's total compensation was allocated to covered services. But the playing field has now been leveled -- the advertising agencies and SAG can hash out whether a particular performer's contract contains a fair allocation to covered services and, if the parties cannot reach an agreement, the matter can simply go to arbitration. No set minimums. No guidelines. No threat of litigation under ERISA in federal court. As for the Trustees, the arbitrator made clear that its role is to collect whatever pension and health contributions are ultimately required to be paid.

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