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PENSION & HEALTH ALLOCATIONS UNDER THE SAG-AFTRA COMMERCIALS CONTRACT

Considering allocation amounts given when covered services are not primary

This is the fourth in a series of six articles examining recent developments and ongoing issues related to the Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA) Commercials Contract and will focus again on the payment of pension and health contributions arising from compensation payable under multi-service endorsement agreements.

Advertisers and agencies may be allocating too much compensation in certain multi-service endorsement agreements and paying higher amounts in pension and health contributions relating to television services granted by actors, athletes, and other performers than warranted by the perceived value of those services. Where certain "silent" rights under a talent contract — for instance, television rights are granted but not exercised — trigger a pension and health obligation under the Guidelines for Allocations in Overscale Agreements, as appended to the 2009 SAG-AFTRA Commercials Contract, advertisers and agencies may consider strategies for making lower allocations to offset the fact that pension and health contributions are owed. Arguably, the perceived value to the advertiser of the SAG-AFTRA covered services component of such a multi-service agreement is less than had commercial production services been rendered. Athlete and performer endorsement agreements containing merchandizing rights do command lower allocations under the Allocation Guidelines, but there are inconsistencies regarding how those more forgiving provisions are applied.

Section B of the Allocation Guidelines provides that for a multi-service endorsement contract that includes commercial production services and non-covered services, a 50 percent (or 40 percent for talent whose principal source of income in the entertainment industry is modeling) allocation of the compensation is recommended, *even if no commercials are actually produced or used,* thus placing perceived value on the advertiser's right to produce commercials and to hold a performer to exclusivity. It may be worth taking the position that an allocation lower than 50 percent is applicable in such scenarios, since commercial production services, if unexercised, are less valuable to the advertiser relative to the non-covered services.

While SAG-AFTRA would likely place value on the fact that the performer is nonetheless held exclusively to the advertiser and thus cannot perform television services for a competitor, the fact is that absent any exploitation of the television rights, the advertiser is getting less bang for its buck relating to compensation attributable to television services. To highlight the point, SAG-AFTRA could not seriously contend that an endorsement agreement for print services only requires the payment of pension and health contributions where the agreement contains a broad exclusivity clause prohibiting the talent from rendering endorsement services, including television services, for a competitor. The SAG-AFTRA Commercials Contract ties payment of pension and health payments to "compensation attributable to services rendered in television commercials." And while the Allocation Guidelines

provide that "[c]ommercial services include the right to produce and use commercials and to hold the performer to exclusivity, whether or not that right is exercised," when such rights are granted but not, in fact, exercised, signatory advertisers should seek to lower the pension and health allocation, particularly when non-covered services, such as print, personal appearances, interviews, social media services and the like are robust and represent the thrust of the endorsement deal.

The Allocation Guidelines do promote a lower allocation of compensation attributable to television services relative to non-covered services (and hence, lower pension and health payments) in situations involving an athlete's multi-service endorsement contract where the athlete has had an active role in developing a product or product line, and where the product or product line features the athlete's name or image. Thus, under section C of the Allocation Guidelines, the recommended allocation of compensation attributable to television services for the athlete endorsers drops from 50 percent to 20 percent (this also applies to contracts for athlete endorsements of a product or brand with which an athlete is strongly associated or which he or she generally wears). This lower allocation seems appropriate given the inclusion into the contract of an extra "bucket" of non-covered services, insofar as the advertiser is getting additional trademark licensing rights, and thus obtaining relatively less benefit from any SAG-AFTRA covered services as part of the deal. Curiously, however, in like circumstances for a non-athlete performer, the Allocation Guidelines, in Section E, promote a 40 percent allocation on multi-service contracts that include merchandizing rights — *i.e.,* as with the athlete contract, the non-athlete performer has similarly granted an additional "bucket" of merchandizing rights permitting the brand to exploit the performer's name and likeness in connection with the sale of its products.

One rationale may be that athletes who wear the brands they endorse, or brands to which they license their name or image, are constantly showcasing those brands on the playing field or court, while actors and other performers may not have the same opportunities to engage in non-covered endorsement services when they license their names and images to products. On the other hand, a perfume or clothing line bearing the name of a celebrity is recognized equally as broadly by the public, thus arguably commanding for the perfume or apparel brand the same 20 percent allocation afforded advertisers engaging athletes to wear or be closely associated their product. Signatory advertisers and agencies involved with multi-service endorsement agreements with a non-athlete that contain a merchandizing provision, would be well-advised to at least explore with SAG-AFTRA the basis for the wide differential (20 percent versus 40 percent) as between the respective athlete and general performer merchandizing Allocation Guidelines.

This article was written with the help of Davis & Gilbert associate Anne DiGiovanni.

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