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Studios adjust after losing profit-sharing cases to talent

Insiders say others may not be able to copy 'perfect plaintiff' wins

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LOS ANGELES — In Hollywood, disputes over profit sharing from hit films and television shows have long pitted artists and studios against each other. But many in the industry say a shock to the system last year in the form of three hefty verdicts favoring the artists may have shifted the scales between Hollywood's Davids and Goliaths.

The closely followed trials shed new light on accounting methods studios have used when calculating, reporting and paying out profits to producers, directors and lead actors. For decades, artists and executives in the close-knit production industry have quietly settled profit participation disputes away from the glare of the courtroom as a way to ease the negative impacts of legal acrimony on future projects.

But three verdicts last year — which favored "Chariots of Fire" producer Alan Ladd, Jr., "Nash Bridges" actor Don Johnson and "Who Wants to be a Millionaire?" producer Paul Smith — revealed a weakness in that practice, observers said. Artists of a certain age, with time and money to spend on litigation and perhaps less concern for their reputations than actors and producers at earlier career stages, could be more willing to go to court. Observers also noted that two of the three trial lawyers for the plaintiffs weren't focused in the entertainment industry, giving them an outsider's perspective that may have bolstered their cases.

These so-called "perfect plaintiffs" have apparently emboldened other artists to examine their own profit statements and encouraged studios to evaluate their accounting procedures. But many in the industry say a flurry of profit participation inquiries this year is only temporary and likely won't lead back to the courtroom.

The first verdict, handed down by a unanimous jury in 2007 and affirmed by a California Court of Appeal last May, was a win for producer Ladd, who argued that Warner Bros. Entertainment Inc. cut him out of profits for the "Police Academy" movies, "Chariots of Fire" and "Blade Runner," among other projects. The court ruled that the studio's practice of licensing collections of films to television stations and equally allocating the fees among the properties didn't fairly account profits for the more popular films in the group, in this case, Ladd's — to the tune of $97 million.

Robert Levins / Daily Journal
From left, attorneys Mark C. Holscher, Roman M. Silberfeld and John M. Gatti.

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>
> — *Elaine P. Douglas*

In the second case, last July, a state court jury awarded actor Don Johnson and his production company $23.2 million in damages for the television show "Nash Bridges," in which Johnson shares 50 percent of the copyrights with studio Rysher Entertainment Inc.

On the same day, British producer Paul Smith and his production company, Celador International Ltd., won $269 million from The Walt Disney Co. when a federal jury determined the studio-owned network ABC Inc. had been unfairly licensing Celador's show "Who Wants to be a Millionaire?" to its own affiliate, Buena Vista Television, for a below-market rate.

Entertainment industry trial lawyer John M. Gatti of Stroock & Stroock & Lavan LLP represented Ladd at trial and on appeal. Business trial lawyer Mark C. Holscher of Kirkland & Ellis LLP led Johnson's legal team at trial, and plaintiffs' trial lawyer Roman M. Silberfeld of Robins, Kaplan, Miller & Ciresi LLP represented Celador.

Profit participation cases, including Ladd's, Johnson's and Smith's, have long followed a standard course. Artists who believe they have a claim commence the process by requesting an audit of the studio's books. They wait in a queue, often for a year or so, hire a professional studio auditing firm to conduct the audit and

Studios try to adjust after big talent verdicts

sit down with studio representatives to go through their concerns.

"That's the point at which most of these matters get resolved," said Harrison J. Dossick, a studio-side litigator with Katten Muchin Rosenman LLP in Century City. "Oftentimes, there just isn't enough at issue to justify the expense and uncertainty of litigation. If the two sides can get to within a couple hundred thousand dollars, then these cases tend to settle."

What set Ladd, Johnson and Smith apart, said Jeffrey S. Weiss, a litigation consultant and former in-house business affairs lawyer at several studios, was that all three had the time and money to endure the litigation. And while younger artists might be deterred by the public exposure and the possibility of earning a bad reputation, these three "perfect plaintiffs," Weiss said, had very little to lose. And there could be more where they came from.

Silberfeld pointed out that contracts "of a certain vintage" don't contain the now-popular arbitration clauses that send most contract disputes over newer films and television shows straight to a private arbitrator. But in last year's three big cases, as in the vast majority of profit participation cases, there were attempts to settle before trial. In the Celador case, Silberfeld said Smith and ABC held their ground, and the matter went before a jury.

"Because there's not a huge track record of these cases having been tried, it was easier for the defendant to say, 'You know what? Let's just go roll the dice,'" Silberfeld said. Now, he added, "I think studios will think twice about taking what I regard as an extreme position on what a contract term means in the profit area."

Studios, perhaps feeling more vulnerable, naturally want to prevent losses like those suffered last year. Gatti, who also advises some studios in profit participation cases, said that after he won Ladd's case, several studio clients asked him to help them evaluate their accounting and licensing procedures.

Warner Bros.' manner of allocating profits equally among films, despite their disparate popularity — a common practice in years past, according to lawyers — is no longer accepted.

"There are guidelines now," Gatti said. "Before having these opinions, you were bound by what the industry was doing … These methods were used and accepted but not tested by the courts."

In the year since the verdicts in the Ladd, Johnson and Celador cases, entertainment lawyers say profit participation cases have gained visibility and that has emboldened plaintiffs. The back-to-back, highly public studio losses got people talking, and Silberfeld, Gatti and Holscher said that in the immediate aftermath of the verdicts, they received a flurry of calls from potential plaintiffs wondering if they, too, might have claims worth pursuing.

Elaine P. Douglas of entertainment audit firm Hacker Douglas & Co. LLP said she has also been busy in the past year.

Of the three verdicts, Douglas said, "We were delighted with all of them, needless to say," adding, "It raises everybody's awareness … For a lot of major [artists], their attorneys and business managers are very savvy about that to start with, but a lot of other people will suddenly go, 'Hmm, I wonder if there's money there I should be going after.'"

Douglas L. Johnson of Beverly Hills-based Johnson & Johnson LLP said his firm has for years brought profit participation cases on behalf of artists, most of which have settled. Since last summer, he's fielded more inquiries about the issue. In the past year, Johnson and his partner, Neville L. Johnson, have filed several complaints over classic hit television shows "Mannix," "Head of the Class," "Knight Rider" and several others in which the artists' contracts didn't contain now-prevalent arbitration clauses.

For parties whose contracts contain arbitration clauses, JAMS launched a practice this year focused specifically on the entertainment industry. Gina Miller, regional vice president of JAMS, said she expects to see more profit cases over time, though it's not a new issue for the company's neutrals.

Meanwhile, many lawyers said it's too early to tell who will come out on the winning end of this year's profit claims. They said the audit process takes time and could now be more likely to result in private settlement after last year's verdicts. The prohibitive costs of litigation may also limit trials.

"It's catch me if you can, good luck finding a lawyer and paying the big fees," Doug Johnson said.

Dossick of Katten Muchin said that a 2003 decision in a profit participation case involving Disney and the film "Who Framed Roger Rabbit" had already been driving disputes to private resolution. In that case, the California Court of Appeals ruled that artists couldn't be awarded punitive damages in profit claims.

"That took a lot of incentive out of these cases," Dossick said. "Now you're just dealing with the difference between what was paid and what [the artists] think they should have gotten. There's just not enough to fight about."

In other words, said participants' lawyer Chad R. Fitzgerald of Kinsella Weitzman Iser Kump & Aldisert LLP, "Even though [studios] got bloody noses, they don't seem to have dropped their defenses or lowered the intensity with which they fight these claims."

The Celador case is currently on appeal in the 9th U.S. Circuit Court of Appeals, and Johnson's case has been appealed to the California Court of Appeal. No dates for oral argument have been set in either. After last May's appellate ruling in the Ladd case, the parties privately resolved the remaining issues.