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AN EXAMINATION OF MORALS CLAUSES
IN TALENT CONTRACTS AND WHAT
TALENT NEEDS TO KNOW! *Fernando M. Pinguelo & Timothy D. Cedrone*

SYMPOSIUM TRANSCRIPT

2008 SETON HALL UNIVERSITY SCHOOL OF LAW SPORTS &
ENTERTAINMENT LAW SYMPOSIUM: FROM THE ARENA TO THE
STREETS – THE PRESSURES PLACED ON ATHLETES, ENTERTAINERS
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COMMENT

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MORALS? WHO CARES ABOUT MORALS? AN EXAMINATION OF MORALS CLAUSES IN TALENT CONTRACTS AND WHAT TALENT NEEDS TO KNOW†

*Fernando M. Pinguelo**

*Timothy D. Cedrone***

I want to apologize to all of the people I have let down because of my behavior, which has reflected badly on my family, friends, co-workers, business associates and others.

– Supermodel Kate Moss apologizing in 2005 after revelations of cocaine use¹

After evaluating the situation, we have decided that a campaign with Kate Moss is not consistent with H&M's clear disassociation from drugs.

– Statement from fashion retailer H&M explaining its dismissal of Kate Moss from an advertising campaign²

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† A version of this article was presented by Fernando M. Pinguelo at the Seton Hall Sports & Entertainment Law Symposium, entitled *From the Arena to the Streets: The Pressures Placed on Athletes, Entertainers, and Management*, held at Seton Hall University School of Law on November 7, 2008.

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1. *Kate Moss: Sorry I Let People Down*, CNN, Sept. 22, 2005, <http://edition.cnn.com/2005/WORLD/europe/09/22/kate.moss/index.html>.

2. *Id.*

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INTRODUCTION

Supermodel Kate Moss admits to using cocaine and fashion retailer H&M dismisses her from an advertising campaign.³ Sports caster Marv Albert pleads guilty to

3. *Id.*

misdemeanor assault and battery and is subsequently terminated by NBC.⁴ Mel Gibson makes anti-Semitic remarks during an arrest for drunk driving and ABC cancels his contract for a proposed miniseries on the Holocaust.⁵ Mary-Kate and Ashley Olsen are eliminated from “Got Milk?” advertisements because of Mary-Kate’s eating disorder.⁶ What gives companies such as H&M, NBC, ABC, and the Milk Processor Education Program the right to do this? In the typical case, these companies are permitted to terminate an agreement with talent based on actions similar to those of Kate Moss, Marv Albert, Mel Gibson, and the Olsen twins by invoking what is commonly known as a morals clause in their contracts with talent.

Morals clauses in “talent”⁷ contracts are nothing new; indeed, Universal Studios began including such clauses in its agreements with actors and actresses as early as 1921.⁸ However, in today’s increasingly public society, where the proliferation of tabloids, celebrity gossip blogs, and news magazines inundate the public with information on talent’s personal lives, a need arises to inform talent of the particularities and consequences of morals clauses in their contracts. This need is particularly acute because, despite the prevalence of morals clauses in talent contracts and the many examples of companies invoking and enforcing such clauses against talent,⁹ there exists a dearth of both scholarly

4. Michael Janofsky, *Marv Albert Pleads Guilty and Is Dismissed by NBC*, N.Y. TIMES, Sept. 26, 1997, at A1.

5. Andy Fixmer, *ABC Cancels Holocaust TV Deal with Gibson’s Company*, BLOOMBERG, Aug. 1, 2006, <http://www.bloomberg.com/apps/news?pid=20601103&sid=absXIIqI3RFg&refer=us>.

6. *Olsen Twins Scrub Milk Mustaches*, USA TODAY, July 7, 2004, http://www.usatoday.com/life/people/2004-07-07-olsens-milk_x.htm.

7. The term “talent,” as used in this article, refers to those individuals possessing creative, artistic, athletic, or other performance aptitudes and whose services are individually unique, non-duplicable, and non-replicable. The term, as used here, does not refer to those individuals who obtain skills through education or training, and whose services are easily replaceable.

8. *Morality Clause for Films*, N.Y. TIMES, Sept. 22, 1921, at 8, available at <http://query.nytimes.com/mem/archive-free/pdf?res=9A02E0DC123EEE3ABC4A51DFBF66838A639EDE>.

9. See Merissa Marr, *When a Star Implodes – Studios Have Few Options When Celebrities Stumble; Return to Morals Clause?*, WALL ST. J., Aug. 4, 2006, at W8 (citing the cases of Mel Gibson, Tom Cruise, Kate Moss, Lindsay Lohan, and Michael Nader as examples of how various companies have dealt with the controversial actions of entertainers with whom they have contracts).

research and case law on the topic.

This Article is designed to serve two purposes, one educational and one practical. First, this Article explores the parameters of morals clauses in talent contracts and the relevant case law interpreting such clauses. Against this backdrop, this Article shifts its focus and explores the specific information (and resulting consequences) of which talent should be aware when agreeing to a contract that includes a morals clause – that is, it explores what talent should know about such clauses. As a general proposition, talent needs to know that a morals clause is powerful enough to impact important aspects of one's career, ranging from one's compensation and continued employment to restrictions upon his or her personal behavior. From a practical perspective, talented individuals who understand this information will be more fully informed about the parameters, effects, and potential consequences of morals clauses in their contracts.

Accordingly, this Article is divided into four sections. Part II provides the reader with foundational information on morals clauses, including a definition of "morals clause," a contextual example of such a clause, and a brief discussion on the concept of morality. Part III presents a historical overview of morals clauses in talent contracts with a broad look at the development of the clauses in the twentieth and twenty-first centuries. This historical overview includes an examination of the relatively few cases in this area that have been actually litigated and not settled. Part IV addresses the various types of morals clauses found in talent contracts, as well as the contexts in which they are typically used. Shifting from the educational to the more practical, Part V explores what talent should know about morals clauses in their contracts. Specifically, this section discusses the role of morals clauses in negotiations, the effect of morals clauses on a client, what happens when the clause is triggered, and potential remedies, defenses, and courses of action available to a client when the other contracting party invokes a morals clause. Part VI concludes the Article.

I. DEFINING A MORALS CLAUSE: A BRIEF INTRODUCTION TO THE CONTOURS OF MORALS CLAUSES IN TALENT CONTRACTS

Before delving into the specifics of morals clauses and what talent needs to know, it is imperative to develop a

working definition of the term "morals clause."¹⁰ "Morals clause," as used in the entertainment industry, has come to reference any number of contractual terms that cite certain behavior of the contracting individual and serve as a basis for termination of the agreement. One commentator has defined the term as a clause that "allows . . . advertisers to terminate a talent agreement when an actor's conduct is detrimental to the [employer's] interests or otherwise devalues the performance due."¹¹ In the context of professional sports, the term can be defined as a clause that "gives the athlete's team, league or the company paying the athlete to endorse its products the right to terminate a contract or otherwise punish a player who engages in criminal or unseemly behavior."¹² Another commentator defines "morals clauses" as "provisions included in an endorsement contract granting the endorsee the right to cancel the agreement in the event the athlete does something to tarnish his or her image and, consequently, the image of the endorsee or its products."¹³ From these definitions, we propose the following definition of "morals clause" in the broader context of talent agreements:

A contractual provision that gives one contracting party (usually a company) the unilateral right to terminate the agreement, or take punitive action against the other party (usually an individual whose endorsement or image is sought) in the event that such other party engages in reprehensible behavior or conduct that may negatively impact his or her public image and, by association, the public image of the contracting company.

10. The term "morals clause" will be used throughout the entirety of this article; however, it should be noted that the term has several alternative formulations. These analogous counterparts include the terms "public image clauses," "good-conduct clauses," and "morality clauses." See Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 3 (2005). Other terms analogous to "morals clauses" include "moral turpitude clauses," "personal conduct clauses," and "behavioral clauses." For purposes of this article, and for the sake of uniformity, the term "morals clause" will be used to reference all these various formulations.

11. Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 235 (2005).

12. Brian R. Socolow, *What Every Player Should Know about Morals Clauses*, MOVES, Aug. 2008, at 186, available at <http://www.loeb.com/files/Publication/0953bcf8-0747-44dc-ab71-70e670d6285d/Presentation/PublicationAttachment/70f3fe3f-a00e-4882-83da-0096ecbab624/Brian%20Socolow%2c%20Moves%20Magazine.pdf>.

13. Auerbach, *supra* note 11, at 3 (citing Steve Carlin, *Forget What (Kobe's) Commercial Says: Image Is Everything*, FORT WORTH BUS. PRESS, Sept. 3, 2005, available at <http://www.fwbusinesspress.com/display.php?id=492>).

To account for the wide-ranging uses of morals clauses,¹⁴ this definition is necessarily expansive in its scope. It is intended to be widely applicable in an attempt to encompass all the various uses of morals clauses under one working definition.

The underlying purpose of a morals clause in an agreement is to protect the contracting company from the immoral behavior of the talent with whom it contracts.¹⁵ But this begs an obvious question: what constitutes moral or immoral behavior? The concept of moral behavior, insofar as it relates to the law, is constantly in a state of flux as it reacts to changes in community standards and incorporating natural evolutionary advancements associated with the growth and development of a society.¹⁶ By their very nature, morals are subjective concepts and are often governed by the prevailing thoughts of the period. That being the case, there is no single definition of “moral” or “immoral” conduct, and when disputes arise between parties, courts are often left to decide what the parties intended the terms of the moral clause to mean. Given the constant state of flux in which “moral” behavior is defined, it is rather difficult to discern a definition for “morality” or “moral behavior” applicable in all circumstances. This is especially true when one considers the factual sensitivity of making such an evaluation. At the very least, moral behavior refers to behavior that comports to an existing code of conduct put forward by a society.¹⁷ Indeed, in the context of talent, there often emerges a blurry divide between what is “immoral behavior” and what is merely eccentric.

A final topic of note in discussing the contours of morals clauses is the interplay between allegations of misconduct versus actual misconduct. In certain instances, an individual

14. The various uses of morals clauses are discussed in more detail in Part IV.

15. See generally Kressler, *supra* note 12, at 240-244 (discussing the value of morality clauses to advertisers, television networks, and motion picture studios and how such companies use morality clauses to hedge against the risk of improper conduct on the part of an entertainer).

16. See generally Calvin Woodward, *Thoughts on the Interplay between Morality and Law in Modern Legal Thought*, 64 NOTRE DAME L. REV. 784 (1989) (examining the circumstances that have contributed to attitudes regarding the relationship between law and morality) and Robert P. Burns, *On the Foundations and Nature of Morality*, 31 HARV. J.L. & PUB. POLY 7 (2008) (discussing historical observations and arguments relevant to contemporary moral debates).

17. Bernard Gert, *The Definition of Morality*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Feb. 11, 2008, <http://plato.stanford.edu/entries/morality-definition/>.

subject to a morals clause in a talent contract may be falsely accused of conduct that would violate the morals clause. For example, actress Kathleen Turner once alleged actor Nicholas Cage had been arrested twice for drunk driving and had stolen a dog.¹⁸ However, the allegations were false and the parties later settled the suit.¹⁹ The conduct of which Cage was accused is potentially the type of conduct which could violate a morals clause. Although there were no reports of employers terminating contracts with Cage due to the false accusations, the situation does highlight the fact that false allegations could trigger a morals clause (depending on the wording of the clause). This is an underlying tension inherent in the application of morals clauses, and an undercurrent running through this article. In short, the potential for both false accusations and actual conduct to trigger a morals clause has a direct impact on application of morals clauses.

II. HISTORY OF MORALS CLAUSES: THE DEVELOPMENT OF MORALS CLAUSES IN THE TWENTIETH CENTURY

A. *Talent Behaving Badly: The Rise of Morals Clauses in America during the Twentieth Century*

Although it may seem as if examples of talent acting “immorally” have occurred only in recent years, the reality is that talent has been the subject of stories of debauchery for more than a century. Similarly, the concept of morals clauses is not a relatively new legal development either, despite the recent uptick in notoriety that the clauses have received.²⁰ Thus, understanding the current legal issues surrounding morals clauses and determining how to inform talent of them is best served by examining the history of morals clauses in the United States. This history serves as the context in which the present-day morals clauses should be viewed.

The 1920s saw a widespread increase in the amount of attention paid by the press to the motion picture industry and

18. *Actors Cage and Turner Settle Suit*, FOXNEWS.COM, Apr. 4, 2008, <http://www.foxnews.com/wires/2008Apr04/0,4670,PeopleCageTurner,00.html> (last viewed May 3, 2009).

19. *Id.*

20. *Sports Law and Entertainment Law – Two Overlapping Practices*, METROPOLITAN CORP. COUNS., Feb. 2008, at 7.

Hollywood in general.²¹ Much of the focus of the press was on the individual movie stars, whose “garish and scandalous” behavior was often blamed for declines in film attendance.²² The scandalous actions of talent in the 1920s directly caused morals clauses to be inserted in talent contracts, as evidenced by the case of Fatty Arbuckle.

In 1921, Paramount Pictures signed comedian Roscoe “Fatty” Arbuckle to a three-year, \$3 million contract.²³ At the time, he was one of the most celebrated and beloved comedians in America.²⁴ Later that year, Arbuckle hosted a Labor Day weekend party in a San Francisco hotel suite, after which a female guest was found near death in a bedroom.²⁵ After the guest’s death, Arbuckle was arrested on charges of rape and murder.²⁶ Arbuckle’s arrest turned public opinion against him and the motion picture industry in general.²⁷ After observing the impact that Arbuckle’s actions had on Paramount Pictures, Universal Studios preemptively instituted a new policy whereby all actors and actresses employed by Universal Studios would be bound by a morals clause in their contracts.²⁸ In fact, the attorneys for Universal Studios at that time issued a statement, saying: “As a direct result of the Arbuckle case in San Francisco, Stanchfield & Levy, attorneys for the Universal Film Manufacturing Company, have drawn up a protective clause . . . to [be] inserted in all existing and future actors’, actresses’, and directors’ contracts with the company.”²⁹ Despite having nothing to do with the Arbuckle case, nor having any clients

21. Kressler, *supra* note 12, at 236-237 (citing SAM STOLOFF, *FATTY ARBUCKLE AND THE BLACK SOX: THE PARANOID STYLE OF AMERICAN POPULAR CULTURE, 1919-1922*, in *HEADLINE HOLLYWOOD: A CENTURY OF FILM SCANDAL* 60 (Adrienne L. McClean & David A. Cook eds., 2001); RAYMOND MOSELEY, *THE HAYS OFFICE* 29 (1945)).

22. Auerbach, *supra* note 11, at 3 (citing David Rabinowitz & Helene Godin, *What to do with a Fallen Star: Voiding Endorsement Deal Can Be Legal Headache*, *ADVERTISING AGE*, Nov. 14, 1994, at 30).

23. Kressler, *supra* note 12, at 236 (citing ROBERT H. STANLEY, *THE CELLULOID EMPIRE: A HISTORY OF THE AMERICAN MOVIE INDUSTRY* 180 (1978)).

24. Dave Kehr, *It's Not Over for the Fat Man*, *N.Y. TIMES*, April 16, 2006, § 2, at 11.

25. Kressler, *supra* note 12, at 236 (citing STOLOFF, *supra* note 22, at 56); *see also* Kehr, *supra* note 25 (reporting that the guest, twenty-eight year old actress Virginia Rappe, died a few days later of peritonitis).

26. Kehr, *supra* note 25 (Arbuckle was eventually cleared of all the charges).

27. Kressler, *supra* note 12, at 236 (citing STANLEY, *supra* note 24, at 180 and STOLOFF, *supra* note 22, at 56).

28. *Morality Clause for Films*, *supra* note 8, at 8.

29. *Id.*

with similar issues at that time, Universal Studios nonetheless saw a need to include the clauses in its talent contracts to “reassure the public” and “protect the company in an investment”³⁰ Thus, thanks to the public outcry towards Fatty Arbuckle’s conduct, morals clauses in talent agreements began to proliferate during the 1920s.

The McCarthy Era saw somewhat of a transformation in the way in which companies utilized morals clauses against talent. During the 1940s and 1950s, the clauses were often used to censor political conduct and expression rather than challenge immoral conduct.³¹ In 1947, the House Committee on Un-American Activities (commonly referred to as “HUAC”) served forty-three subpoenas upon studio chiefs, directors, writers, and actors seeking their appearance for hearings in Los Angeles and Washington.³² In October 1947, HUAC heard testimony from ten witnesses deemed “unfriendly” by HUAC and who soon came to be known as the “Hollywood Ten.”³³ Widespread publicity followed the hearings, and the Hollywood Ten were cited for contempt of Congress by the House of Representatives in November 1947 based on their refusal to answer HUAC’s questions.³⁴ Thereafter, the studios invoked the morals clauses in the talent contracts to terminate their relationships with the Hollywood Ten based on their alleged communist leanings.³⁵ Certain members of the Hollywood Ten responded by filing lawsuits against the

30. *Id.* The text of the 1921 Universal Studios clause read as follows:

The actor (actress) agrees to conduct himself (herself) with due regard to public conventions and morals and agrees that he (she) will not do or commit anything tending to degrade him (her) in society or bring him (her) into public hatred, contempt, scorn or ridicule, or tending to shock, insult or offend the community or outrage public morals or decency, or tending to the prejudice of the Universal Film Manufacturing Company or the motion picture industry. In the event that the actor (actress) violates any term or provision of this paragraph, then the Universal Film Manufacturing Company has the right to cancel and annul this contract by giving five (5) days’ notice to the actor (actress) of its intention to do so.

Id.

31. Auerbach, *supra* note 11, at 3 (citing Rabinowitz, *supra* note 23, at 30).

32. Kressler, *supra* note 12, at 237 (citing STANLEY, *supra* note 24, at 128-131).

33. *Id.* at 237-238 (citing STANLEY, *supra* note 24, at 130-131). Three individuals of the Hollywood Ten later brought suit against their respective employers. Their cases, including an example of one screenwriter’s testimony, are discussed in further detail in Part III.B., *infra*.

34. *Id.* (citing STANLEY, *supra* note 24, at 132).

35. *Id.*

studios.³⁶ The utilization of morals clauses by studios in the 1920s and the 1950s is fundamentally similar in that at both points in time: the studios used the clauses to sever the association between the studio and the disreputable individual. However, the studios' utilization of morals clauses was also strikingly different: the McCarthy Era studios utilized them as a basis for attacking the *alleged political ideologies* of talent,³⁷ whereas the Roaring Twenties studios utilized them as a means to attack *actual immoral actions*.

Following the McCarthy Era, the use of morals clauses swung back from attacking political ideologies, to again curbing immoral behavior and protecting a company's image. Since the 1980s, morals clauses have become increasingly common in talent contracts.³⁸ A 1997 survey conducted by Sports Media Challenge found that less than half of all endorsement contracts included morals clauses.³⁹ By 2003, this number had risen to at least seventy-five percent.⁴⁰ As of 2008, the collective bargaining agreements in the National Football League,⁴¹ National Basketball Association,⁴² National

Hockey League,⁴³ and Major League Baseball⁴⁴ each contained a standard or uniform player agreement that included a morals clause.

In recent years, morals clauses have been employed against Michael Vick,⁴⁵ Kobe Bryant,⁴⁶ Kate Moss,⁴⁷ Rebekah Chantay Revels (Miss North Carolina 2002),⁴⁸ Latrell Sprewell,⁴⁹ and many other talented individuals. Given the rapidity with which information is disseminated to the public today, it is exceedingly unlikely that a company would enter into an agreement with talent without seeking the inclusion of some form of morals clause.⁵⁰ Indeed, morals clauses in contracts have now become the norm in talent agreements. The prevalence of morals clauses has significantly increased the need for talent to develop a meaningful understanding of the clauses and possibly even challenge any attempt to abuse the intended purpose of the clause.

B. Morals Clauses in Talent Agreements and the American Judicial System: An Examination of Seminal Cases and Key Points

As one would suspect, some talented individuals have been

standards of good citizenship, good moral character (defined here to mean not engaging in acts of moral turpitude, where or not such acts would constitute a crime), and good sportsmanship..." *Id.* at 183.

43. National Hockey League Collective Bargaining Agreement, available at <http://www.nhl.com/cba/2005-CBA.pdf> [hereinafter NHL CBA]. Under the NHL Standard Player's Contract, § 2(e), each NHL player agrees "to conduct himself on and off the rink according to the highest standards of honesty, morality, fair play and sportsmanship, and to refrain from conduct detrimental to the best interest of the Club, the League or professional hockey generally." *Id.* at 245.

44. Major League Baseball Collective Bargaining Agreement, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf [hereinafter MLB CBA]. Under § 7(b) of the Major League Baseball Uniform Player's Contract, a baseball club "may terminate [a player contract]...if the Player shall at any time fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship..." *Id.* at 217.

45. Socolow, *supra* note 13, at 187.

46. *Id.*

47. *Kate Moss: Sorry I Let People Down*, *supra* note 1.

48. *Revels v. Miss N.C. Pageant Org., Inc.*, 627 S.E.2d 280 (N.C. Ct. App. 2006).

49. Auerbach, *supra* note 11, at 11 (citing Darren Rovell, *No Ringing Endorsement from Corporate Sponsors*, ESPN, Aug. 21, 2003, <http://espn.go.com/sportsbusiness/s/2003/0718/1582783.html>).

50. One may even wonder if the failure of a company's attorney to include such a clause in an agreement with talent would constitute legal malpractice, but that is an issue that need not be addressed here.

36. See discussion *infra* Part III.B.

37. See Dan Georgakas, *Hollywood Blacklist*, in *ENCYCLOPEDIA OF THE AMERICAN LEFT* (Mari Jo Buhle, Paul Buhle, & Dan Georgakas eds., 1992) available at <http://www.writing.upenn.edu/~afilreis/50s/blacklist.html> (discussing the treatment of politically-charged films from the 1930s and 1940s during the 1950s). Compared to the hysteria it generated in the late 1940s and 1950s, HUAC largely ignored the politically-charged movies of previous decades. *Id.* Moreover, movie studio bosses were often personally involved in the production of movies with a political edge, although sometimes even pro-Russian movies were made at the request of the federal government. *Id.* The Hollywood movie studio system of the 1930s and early 1940s was notably different in comparison to that of the late 1940s and early 1950s in that the studios only began taking adverse action against individuals based on their political ideologies (*i.e.*, blacklisting alleged Communist sympathizers) after Congress and HUAC pressured the studios to take action against such individuals. *Id.*

38. See Auerbach, *supra* note 11, at 3-4.

39. *Id.* at 4 (citing Eric Fisher, *Sosa Flap to Change Endorsement Deals*, WASH. TIMES, June 8, 2003, at C03).

40. *Id.*

41. National Football League Collective Bargaining Agreement, available at <http://www.nflplayers.com/images/fck/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf> [hereinafter NFL CBA]. Under § 11 of the NFL Player Contract, a football club may terminate the player contract "[i]f at any time, in the sole judgment of the Club,...[the] Player has engaged in personal conduct reasonably judged by the Club to adversely affect or reflect on [the] Club..." *Id.* at 252.

42. National Basketball Association Collective Bargaining Agreement, available at <http://www.nbpa.com/downloads/CBA.pdf> [hereinafter NBA CBA]. Under § 16 of the NBA's Uniform Player Contract, a basketball team may terminate a player contract "if the Player shall at any time, fail, refuse, or neglect to conform his personal conduct to

engaging in reprehensible behavior for as long as they have been paid for their talents. Such behavior has resulted in employers terminating talent agreements, and, naturally, the terminated talent has responded by filing lawsuits in some cases. An early example of this is an 1874 case from New York, *Drayton v. Reid*, in which an actress challenged the termination of her contract by her employer.⁵¹ The court upheld the termination, finding that her indecent and immoral conduct was sufficient grounds for her termination.⁵²

During the twentieth century, three cases stemming from the Hollywood Ten hearings and addressing morals clauses in talent agreements were fully litigated between 1947 and 1957 (the "Hollywood Ten Trilogy"): *Loew's, Inc. v. Cole*,⁵³ *Twentieth Century-Fox Film Corp. v. Lardner*,⁵⁴ and *Scott v. RKO Radio Pictures, Inc.*⁵⁵ In 2005, a morals clause in a television actor's contract with ABC was at issue in *Nader v. ABC Television, Inc.*⁵⁶ These cases make up the primary case law examining morals clauses in talent contracts under principles of contract law.⁵⁷ These cases show that, in certain circumstances, courts are willing to find that an employer's termination can be justified on the basis that the individual violated an express morals clause.

The first case in the Hollywood Ten Trilogy is *Loew's, Inc. v. Cole*, in which screenwriter Lester Cole sued Loew's Inc. (whose trade name was Metro-Goldwyn-Mayer) after the company suspended his employment after his testimony

51. Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 *YALE L. J.* 775, 847 n. 382 (1992) (citing *Drayton v. Reid*, 5 *Daly's Rep.* 442 (N.Y.C.P. 1874)).

52. *Id.* The court refused to state her precise immoral acts, only stating that she committed acts "too gross and disgusting to be described." *Id.*

53. 185 F.2d 641 (9th Cir. 1950) (applying California law).

54. 216 F.2d 844 (9th Cir. 1954) (applying California law).

55. 240 F.2d 87 (9th Cir. 1957) (applying California law).

56. 150 Fed. App'x 54 (2d Cir. 2005) (applying New York law).

57. The four above-cited cases do not make up an exclusive list of the litigated cases involving morals clauses. Several other courts have had cases brought before them in which the morals clauses played a role. Three such cases include *Marilyn Manson, Inc. v. New Jersey Sports & Exposition Authority*, 971 F. Supp. 875 (D.N.J. 1997) (case decided primarily on First Amendment grounds), *Vaughn v. American Basketball Association*, 419 F. Supp. 1274 (S.D.N.Y. 1976) (case decided on jurisdictional issues), and *Revels v. Miss N.C. Pageant Org., Inc.*, 627 S.E.2d 280 (N.C. Ct. App. 2006) (case ordered to be resolved in arbitration). The morals clauses involved in these cases were not litigated issues, as these cases were decided on grounds other than the morals clause involved. Thus, they are not further addressed in this section.

before HUAC.⁵⁸ Cole was called before HUAC as an "unfriendly" witness, and was asked whether he was or had ever been a member of the Communist Party.⁵⁹ HUAC interpreted Cole's response⁶⁰ as a refusal to answer, and subsequently indicted Cole for contempt.⁶¹ Following his testimony, Loew's suspended Cole from his employment pursuant to the morals clause in his contract.⁶² In its ruling, the district court affirmed the jury verdict, finding that Cole did not breach his contract in testifying as he did and that Loew's breached its contract with Cole by terminating his employment.⁶³ The Court of Appeals for the Ninth Circuit reversed, holding that the district court erred in excluding evidence submitted by the movie studio that purported to show that Cole's actions had dealt a heavy blow to the public image of the studio.⁶⁴ The Ninth Circuit further stated that, based on Cole's refusal to answer, it would have been reasonable for a jury to conclude that he was a Communist, and that such action could be considered a breach of his contract.⁶⁵ Loew's and Cole eventually settled the case.⁶⁶

58. *Loew's Inc.*, 185 F.2d at 644-645.

59. *Id.* at 644.

60. In response to multiple inquiries of whether he was a member of the Communist Party, Cole answered by saying,

I would like to answer that question as well; I would be very happy to. I believe the reason the question is being asked is that because at the present time there is an election in the Screen Writers Guild in Hollywood. . . . [question was repeated]. . . . Can I answer that in my own way, please? May I, please? Can I have the right? Mr. McGuinness was allowed to answer in his own way.

Cole v. Loew's, Inc., 8 F.R.D. 508, 1948 U.S. Dist. LEXIS 3340, *7-8 (S.D. Cal. 1948).

61. *Loew's Inc.*, 185 F.2d at 644.

62. *Id.* The morals clause in Cole's employment contract with MGM read: The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.

Id.

63. *Id.* at 646. In affirming the jury verdict, the District Court reasoned that Cole did not breach his contract because (1) Loew's led Cole to believe that if he were to testify as he did, he would not become liable to suspension, and (2) by keeping Cole in its employ after the testimony, Loew's elected to keep his contract in force. *Id.*

64. *Id.* at 645-646, 662. The wrongly excluded evidence included evidence regarding the actual effect of Cole's conduct upon public opinion. *Id.* at 662.

65. *Id.* at 649.

66. Burt A. Folkart, *Writer Lester Cole Dies; Blacklisted Guild Founder*, L.A.

The second case of the Hollywood Ten Trilogy is *Twentieth Century-Fox Film Corp. v. Lardner*. The facts in *Lardner* essentially mirror those in *Cole*: Ring Lardner, Jr., was a screenwriter who refused to tell HUAC whether he was a Communist, and, after being cited for contempt by the House of Representatives, he was discharged by Twentieth Century Fox.⁶⁷ Fox justified its termination of Lardner based on the morals clause in their contract.⁶⁸ Fox argued that his conduct before HUAC had breached the morals clause of the contract, thereby excusing Fox from performance.⁶⁹ At trial, the jury awarded damages to Lardner, finding that he had not breached the morals clause in the contract.⁷⁰ The Ninth Circuit reversed, holding that the words "decency and morality" in Lardner's contract required him to refrain from actions such as those at issue in the case (refusing to answer a question during testimony).⁷¹ In the end, the Ninth Circuit ruled in favor of Fox, holding that Fox had the right to terminate the agreement based on Lardner's refusal to testify and subsequent conviction for contempt.⁷²

The final case in the Hollywood Ten Trilogy is *Scott v. RKO Radio Pictures, Inc.* The key facts in *Scott* mirror the first two cases in the trilogy: Adrian Scott was terminated pursuant to a morals clause in his contract after HUAC cited him for contempt.⁷³ The morals clause at issue in *Scott* was also similar in substance to the morals clauses in *Cole* and

TIMES, Aug. 17, 1985, at M1.

67. *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 847 (9th Cir. 1954).

68. *Id.* at 847-848. The morals clause in Lardner's contract read:

That the artist shall perform the services herein contracted for in the manner that shall be conducive to the best interests of the producer, and of the business in which the producer is engaged, and if the artist shall conduct himself, either while rendering such services to the producer, or in his private life in such a manner as to commit an offense involving moral turpitude under Federal, state or local laws or ordinances, or shall conduct himself in a manner that shall offend against decency, morality or shall cause him to be held in public ridicule, scorn or contempt, or that shall cause public scandal, then, and upon the happening of any of the events herein described, the producer may, at its option and upon one week's notice to the artist, terminate this contract and the employment thereby created

Id. at 848.

69. *Id.*

70. *Id.*

71. *Id.* at 850.

72. *Id.*

73. *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 87-88 (9th Cir. 1957).

Lardner.⁷⁴ After a bench trial, the trial judge found that Scott's actions breached his contract and his discharge was justified.⁷⁵ In affirming its decisions in *Cole* and *Lardner*, the Ninth Circuit held that the district court correctly ruled that Scott's termination was justifiable under the terms of the morals clause in his contract and that Scott had breached that clause based on the contempt order HUAC issued.⁷⁶ Thus, these cases show that, under California law, a breach of an express morals clause, as determined under the facts, is just cause for terminating a talent agreement where the conduct at issue is detrimental to the public image of the company.⁷⁷

One wonders whether *Cole*, *Lardner*, and *Scott* were stuck between the proverbial rock and a hard place with regards to their contracts. If the three screenwriters were to testify that they were Communists, the morals clause in their contracts likely would have been invoked against them (for the obvious reason that the studios would not have wanted to be associated with Communists during the Cold War). However, if they refused to testify, which is essentially what they did, then an inference of membership in the Communist Party could have resulted and the morals clauses could have been invoked to terminate their agreements. Their final option was to testify that they were not Communists. However, this could have also resulted in termination of their contracts under the morals clauses if they were found to have perjured themselves or perhaps even been accused of perjury. Thus, it is reasonable to conclude that, regardless of the course of action undertaken by the three screenwriters, each risked

74. *Id.* The morals clause in Scott's agreement read:

At all times commencing on the date hereof and continuing throughout the production or distribution of the pictures, the producer will conduct himself with due regard to the public conventions and morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or public morals or decency or prejudice the corporation or the motion picture industry in general; and he will not wilfully do any act which will not wilfully his capacity fully to comply with this agreement, or which will injure him physically or mentally.

Id.

75. *Id.* at 88.

76. *Id.* at 91-92.

77. *Loew's Inc. v. Cole*, 185 F.2d 641, 648-649 (9th Cir. 1950); *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 847-848 (9th Cir. 1954); *Scott*, 240 F.2d at 87.

termination of his agreement with his respective employer under the morals clause. If nothing else, these cases show the depth of the strength of such clauses, and, more importantly from talent's perspective, the importance of carefully planning one's actions so as to minimize any potential breach of a talent agreement through contravention of the morals clause.

The final reported case addressing morals clauses in talent agreements is *Nader v. ABC Television, Inc.* Michael Nader was an actor on the popular soap opera *All My Children*, which was produced by ABC Television.⁷⁸ ABC terminated Nader's contract "in the wake of his well-publicized arrest for selling cocaine to an undercover police officer."⁷⁹ In 1999, Nader brought suit against ABC under various legal theories, including breach of contract.⁸⁰ In affirming the grant of summary judgment by the district court, the Court of Appeals for the Second Circuit held that Nader's arrest and the resulting media attention brought his conduct "well within any reasonable interpretation of the [morals] clause."⁸¹ Therefore, *Nader* is consistent with the Hollywood Ten Trilogy in that a breach of an express morals clause contract may justify termination of a talent agreement where the conduct at issue is viewed as detrimental to the public image of the company.⁸²

78. *Nader v. ABC Television, Inc.*, 330 F. Supp.2d 345, 346 (S.D.N.Y. 2004).

79. *Nader v. ABC Television, Inc.*, 150 Fed. App'x 54, 55 (2d Cir. 2005).

80. *Id.*

81. *Id.* at 56. The morals clause in Nader's contract read as follows:

8. MISCONDUCT. If, in the opinion of ABC, Artist shall commit any act or do anything which might tend to bring Artist into public disrepute, contempt, scandal, or ridicule, or which might tend to reflect unfavorably on ABC, any sponsor of a program, any such sponsor's advertising agency, any stations broadcasting or scheduled to broadcast a program, or any licensee of ABC, or to injure the success of any use of the Series or any program, ABC may, upon written notice to Artist, immediately terminate the Term and Artist's employment hereunder. In the event ABC terminates Artist's services pursuant to the provisions of this Paragraph, ABC shall be discharged from all obligations hereunder by making any and all payments earned and payable on account of services performed by Artist prior to such date of termination. The guarantee, if any, applicable to the cycle in which such termination is effective shall be automatically reduced to the number of programs produced in such cycle and on which Artist rendered services prior to the effective date of such termination. In addition to whatever other right ABC may have, ABC may also remove Artist's credit, if any, from all such programs on which such credit may have appeared.

Nader, 330 F. Supp.2d at 346.

82. *Id.* at 347-348; *Lardner*, 216 F.2d at 853-854; *Loew's Inc.*, 185 F.2d at 645;

III. MORALS CLAUSES IN GREATER DETAIL: THE CONTEXTS IN WHICH MORALS CLAUSES ARE TYPICALLY USED AND THE REASONS FOR THEM

A. *Who Has Morals Clauses in Their Contracts? The Contexts and Industries in Which Morals Clauses Are Commonly Employed*

As previously stated, a morals clause in the context of talent agreements can be defined as a contractual provision giving the contracting company the unilateral right to terminate the talent agreement, or take other punitive action against the individual, in the event the individual engages in reprehensible behavior or conduct that may negatively impact the public image of the individual and, by association, the public image of the contracting company.⁸³ Morals clauses are used in a variety of industries where a talented individual's behavior may be associated with the contracting company's image in some manner.

In the entertainment industry, a wide variety of companies often include morals clauses in their contracts with talent. These companies include advertisers and endorsees, television networks, and motion picture studios, among others.⁸⁴ Advertisers and endorsees use morals clauses in an attempt to quickly eliminate the celebrity/product association in the mind of the consumer where the celebrity's image has come into disrepute in the public's view.⁸⁵ Similarly, television networks employ morals clauses to protect themselves, their programs, their advertisers, and the relationships among talent, the network, and sponsors from the association of talent's morally reprehensible behavior with those entities.⁸⁶ Morals clauses also have been employed by motion picture studios for more than eighty-five years⁸⁷ to ensure that the value of their films is not compromised by the socially unacceptable conduct of talent associated with the

Scott, 240 F.2d at 87.

83. See discussion *supra* Part II.

84. See generally *Kressler*, *supra* note 12.

85. *Id.* at 241.

86. *Id.* at 243.

87. See *Kressler*, *supra* note 12, at 237 (stating that movie studios implemented morals clauses in actors' and actresses' contracts in 1921).

film.⁸⁸

The professional sports industry also regularly employs morals clauses in both player contracts and endorsement contracts. As of 2008, the collective bargaining agreements in the National Football League,⁸⁹ National Basketball Association,⁹⁰ National Hockey League,⁹¹ and Major League Baseball⁹² each contained a standard player agreement that included a morals clause. The collective bargaining agreements of each league allow for little negotiation between the player and the team on the subject of the morals clause.⁹³ However, in the context of athlete endorsement contracts, the opposite may be true: the clauses can be drafted more narrowly than in the standard player agreement, and the relationship between athlete and company allows for much more negotiation depending on the player's bargaining position.⁹⁴ Therefore, the use of morals clauses in professional athlete endorsement agreements parallels the use of morals clauses in agreements between entertainers and advertisers.

Morals clauses are also commonly employed in agreements between corporations and their most talented executives, such as "C-level" executives. To wit, in one study of 375 chief executive officer ("CEO") employment contracts, it was found that 271 of such contracts allowed the employing company to terminate the employment contract for cause based on acts of "moral turpitude."⁹⁵ Martha Stewart is but one example of a CEO having a morals clause in her employment agreement. Stewart's contract with Martha Stewart Living Omnimedia Inc. contained a morals clause as part of the definition of "cause" for termination, although Stewart could not be sued by the company for breach of contract if she violated the clause.⁹⁶ It is not surprising that corporations would attempt

88. Kressler, *supra* note 12, at 244.

89. NFL CBA, *supra* note 42, at 252.

90. NBA CBA, *supra* note 43, at 183.

91. NHL CBA, *supra* note 44, at 245.

92. MLB CBA, *supra* note 45, at 217.

93. See Socolow, *supra* note 13, at 187.

94. *Id.* at 188.

95. Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executive Bargain For?* 25 (Vanderbilt U. Law Sch. Law & Econ. Research Paper Series, Working Paper No. 04-12, May 2005) available at <http://ssrn.com/abstract=529923>.

96. Jeffrey Sagalewicz, Comment, *The Martha Duty: Protecting Shareholders from the Criminal Behavior of Celebrity Corporate Figures*, 83 OR. L. REV. 331, 336 (2004)

to include morals clauses in executive employment agreements. CEOs are often regarded as the face and primary representative of a company, and in some cases, the welfare of the company can be directly linked to the public image of the CEO.⁹⁷ As such, it is easy to understand why a company would include a morals clause in its executive employment agreements to give itself the flexibility to disassociate the executive with the company in the event of the executive's damaging conduct.

Entertainers, CEOs, and professional athletes are not the only groups subject to morals clauses in their contracts. As seen in the Hollywood Ten Trilogy, screenwriters may have morals clauses in their employment agreements.⁹⁸ Models can have morals clauses included in their contracts, as seen in the cases of Kate Moss⁹⁹ and Isabella Rossellini.¹⁰⁰ In August 2008, reports surfaced in the United Kingdom that longtime publisher Random House was attempting to include a morals

(citing *Form of Employment Agreement*, CORPORATE COUNSEL CENTER, <http://contracts.corporate.findlaw.com/agreements/martha/marthastewartemployagt.htm> 1 (last visited July 7, 2004)). The morals clause in Martha Stewart's employment agreement with Martha Stewart Living Omnimedia, Inc. read as follows:

The Executive's [Martha Stewart's] employment hereunder may be terminated during the Employment Period under the following circumstances:

...

(c) Cause. The Company shall have the right to terminate the Executive's employment for "Cause." For purposes of this Agreement, the Company shall have "Cause" to terminate the Executive's employment only upon the Executive's: (i) conviction of a felony or willful gross misconduct that, in either case, results in material and demonstrable damage to the business or reputation of the company.

Form of Employment Agreement, supra.

97. Leslie Gaines-Ross, *CEO Reputation: The New Factor in Shareholder Value*, DIRECTORSHIP, May 2000, at 4, available at <http://www.allbusiness.com/marketing-advertising/branding-brand-development/1107114-1.html> (citing a Wharton Business School study that correlated a 10% change in CEO reputation to a 24% change in market capitalization).

98. *Loew's Inc. v. Cole*, 185 F.2d 641 (9th Cir. 1950); *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844 (9th Cir. 1954); *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87 (9th Cir. 1957).

99. *Kate Moss: Sorry I Let People Down*, *supra* note 1.

100. Irene Lacher, *Elegant Prose; The Famous Parents, The Lost Lancome Job, Her Love Life. The Sublime Isabella Rossellini Takes a Turn as Author with a New Memoir*, L.A. TIMES, July 10, 1997, at E1. Isabella Rossellini was a model and actress who endorsed cosmetics products for Lancome for fourteen years. *Id.* The morals contract in her contract with Lancome reared its head when she appeared nude in David Lynch's film *Blue Velvet* and her involvement in Madonna's controversial book *Sex*. *Id.*

clause in its contracts with authors of children's books.¹⁰¹ Video game makers and other multimedia product makers are increasingly including morals clauses in their agreements with talent.¹⁰² In short, any talented individual who is or may become associated with a company or organization in the minds of the public is likely to have a morals clause included in his or her contract.

Agreements between companies may also include morals clauses. Before the 2002 Olympic Games, several corporate sponsors threatened to withdraw their sponsorship of the Olympics because of concerns stemming from the Salt Lake City Winter Games bribery scandal.¹⁰³ The International Olympic Committee ("IOC") appeased the concerns of its sponsors by allowing morals clauses to be included in sponsorship agreements.¹⁰⁴ Inclusion of the clauses allowed the corporate sponsors to terminate their sponsorship agreements with the IOC if the IOC engaged in activities (such as bribery) that would harm the image of the Olympics.¹⁰⁵ The adoption of the morals clause by the IOC and its sponsors represented an evolution of the morals clause because it was the first time a major sports organization or league had subjected itself to the dictates of a morals clause.¹⁰⁶ These are just a few of the situations in which morals clauses can be employed, and it is reasonable to surmise that morals clauses will continue to be used in a variety of circumstances by an ever-increasingly diverse group of entities – not just talent and their employers.

B. Why Have a Morals Clause in the First Place? An Explanation for Morals Clauses in Talent Agreements

Companies first began including morals clauses in their talent agreements purely as a form of corporate protection. For example, in 1921, the law firm of Stanchfield & Levy

101. Posting of Sian Pattenden to Books Blog, <http://www.guardian.co.uk/books/booksblog/2008/aug/01/childrenswritersdontmisbeha> (Aug. 1, 2008, 11:30 BST).

102. Auerbach, *supra* note 11, at 17 (citing Leigh Augustine-Schlossinger, *Endorsement Contracts for Professional Athletes*, 32 *COLO. LAW.* 43 (2003)).

103. Gregg Krupa, *Olympic Sponsors to Get Morals Clause*, *BOSTON GLOBE*, Apr. 20, 1999, at C1.

104. *Id.*

105. *Id.*

106. *Id.*

advised its client, Universal Studios, to include morals clauses in its talent agreements as a means of protection against the immoral conduct of Universal Studios' actors and actresses.¹⁰⁷ Universal Studios and its attorneys expressed three specific goals in drafting and including morals clauses in its talent agreements. First, the studio intended for the clauses to have "a restraining influence on some thoughtless or willful actors."¹⁰⁸ Second, the clauses were drafted by Universal Studios' attorneys to "reassure the public, who . . . may be inclined to fear that all their screen idols have feet of clay . . ."¹⁰⁹ Finally, the morals clauses would "protect [Universal Studios] in an investment, often of hundreds of thousands of dollars."¹¹⁰ Thus, the early impetus causing companies to insert morals clauses into their agreements with talent was the desire to be able to quickly disassociate the company from "immoral" talent.¹¹¹

In more recent years, the motivations for the inclusion of morals clauses in talent agreements have become more varied. Due to the proliferation of new forms of media, which has greatly increased the speed with which information is disseminated to the public, talented individuals are now significantly more scrutinized than they have been in the past.¹¹² In the past, minor misdeeds of talent may have gone unnoticed by the public; however, due in large part to the Internet and new media outlets, a rather insignificant indiscretion on the part of talent can be broadcast to millions of people within minutes, or even seconds, of its happening.¹¹³

For example, America largely ignored Mickey Mantle's drinking problem during his playing days (1951-1968);¹¹⁴ but in 2007, when St. Louis Cardinals manager Tony La Russa was arrested for drunken driving, reports of the incident surfaced the same day it happened.¹¹⁵ Due to the increasing

107. *Morality Clauses for Films*, *supra* note 7.

108. *Id.*

109. *Id.*

110. *Id.*

111. See Kressler, *supra* note 12, at 237.

112. See Socolow, *supra* note 13, at 188 (stating that morals clauses are common in sports contracts partly because players and sports professionals are under increased scrutiny by tabloids and the news media).

113. See *id.*

114. Mike McAlary, *Beloved Even When They Falter; Prayers for Mick, Daryl Too*, *N.Y. DAILY NEWS*, June 9, 1995, at 22.

115. *Cardinals Manager Arrested for DUI in Florida*, *ESPN*, March 22, 2007,

rapidity with which companies are required to assess such situations, morals clauses have become one of the primary methods utilized by companies in order to mitigate damage attributable to talent's misdeeds.¹¹⁶ In short, the increased speed that the public learns about the transgressions of talent as a result of technology has caused companies to use morals clauses as a means to quickly sever the connection between the company and the individual.

The changing dynamics and character traits of talent have also given modern companies reason to place more emphasis on morals clauses. One commentator has surmised that, at least in the context of athlete endorsement contracts, two factors have contributed to the growing use of morals clauses: (1) the age and associated maturity level of professional athletes caused by athletes entering professional sports at a younger age; and (2) a desire for more protection in endorsement agreements due to the volatility of the character of athletes and the amount of money at stake.¹¹⁷

Likewise, these reasons for the use of morals clauses in athlete endorsement contracts are largely similar to those of the broader entertainment industry. In situations where talent is used as the representative of a company, the company hedges against the risk of talent transferring unintended negative connotations to the company by including morals clauses in the agreements.¹¹⁸ The morals clause can be used to quickly disconnect the celebrity/company association in the public's mind when the person falls into public disrepute.¹¹⁹ Similarly, television networks and motion picture studios seek to protect the "brand" of their productions by using morals clauses to sever any connection between the company and talent whose immoral conduct is inconsistent with the company's desired image.¹²⁰ Thus, companies today use morals clauses to protect against the significant risk that their brands will become irreparably tarnished if talent engages in immoral conduct.

The final, and perhaps most significant, impetus pushing companies to include morals clauses in talent contracts is the

<http://sports.espn.go.com/mlb/news/story?id=2807935>.

116. See Kressler, *supra* note 12, at 241; Socolow, *supra* note 13, at 188.

117. Auerbach, *supra* note 11, at 5-6.

118. See Kressler, *supra* note 12, at 240-241.

119. See *id.*

120. See *id.* at 241-244.

large amount of money at stake in certain agreements.¹²¹ Consider these numbers from the sports industry alone: as of May 31, 2008, Nike, Inc., owed more than \$3.8 billion in endorsement deals;¹²² Tiger Woods is projected to eclipse \$1 billion in career earnings by 2010, with about 90% of those earnings attributable to endorsements;¹²³ and the aggregate of sponsorship deals for the 2008 Beijing Olympics was approximately \$2.5 billion.¹²⁴ The entertainment industry is no different: vast amounts of money are directly connected to the public images of talent, particularly where the talent's image is connected to that of a product, television show, movie, etc.¹²⁵ Universal Studios recognized the potential for problems in this area as early as in 1921, when it began including morals clauses in its talent agreements for the expressed purpose of protecting its financial investments in talent.¹²⁶ Thus, with such large amounts of money directly linked to the public image of talent, it is no surprise that companies seek to protect themselves in the event of talent's image being tarnished.¹²⁷

IV. WHAT TALENT NEEDS TO KNOW ABOUT MORALS CLAUSES: NEGOTIATION POINTS, EFFECTS ON CAREERS, TRIGGERING THE CLAUSE, AND AVAILABLE REMEDIES

The motivations of professional sports organizations and companies seeking an endorsement must be appreciated in considering what talent needs to know about morals clauses. Similarly, the athlete who is asked to agree to such a clause needs to be adequately informed about the clauses before signing a contract including one. For example, an individual who understands the reasons why a company is attempting to include a morals clause in his or her contract will be better

121. See Auerbach, *supra* note 11, at 6-7. See also Kressler, *supra* note 12, at 240-244; Janofsky, *supra* note 4, at A1; Socolow, *supra* note 13, at 188.

122. Nike, Inc., Annual Report (Form 10-K), at 35 (May 31, 2008).

123. Andrew Farrell & Tom Van Riper, *Billionaire Status Is Tiger Woods' Next Trophy*, MSNBC, July 15, 2008, <http://www.msnbc.msn.com/id/25691350/>.

124. Joe Nocera, *These Games Brought to You by...*, N.Y. TIMES, June 1, 2008, at 44.

125. See generally Kressler, *supra* note 12, at 239-244.

126. Janofsky, *supra* note 4, at A1 (quoting a statement released by Universal Studios' attorneys that inclusion of the morals clauses in the company's talent agreements would "protect the company in an investment, often in the hundreds of thousands of dollars").

127. See Auerbach, *supra* note 11, at 6.

situated to negotiate the parameters of the clause. In any event, talent needs to know that morals clauses are powerful enough to impact important aspects of one's career, ranging from one's compensation and continued employment to his or her personal behavior.

A. Negotiation Points: Goals of the Company versus Goals of the Talent in the Negotiation of a Morals Clause

Perhaps the most important point that talent should understand is that, as a practical matter, companies are almost always going to seek to include a *broad* morals clause in their agreements. By including a broadly-worded morals clause, the company seeks to give itself extensive flexibility to terminate the talent agreement for any potentially damaging conduct of the talent.¹²⁸ Consistent with this, the company will try to include a wide-reaching morals clause that is expansive and subjective in nature, thereby allowing the company broad discretion in its invocation of the clause.¹²⁹

The morals clause in the NFL Collective Bargaining Agreement¹³⁰ and those at issue in *Nader v. ABC Television*¹³¹ and *Scott v. RKO Radio Pictures*¹³² are prime examples of broad morals clauses. Obviously, talent will want to take the opposite approach, seeking narrow and objective morals clauses that give the company minimal discretion to invoke the clause.¹³³ For example, many chief executive officer contracts contain narrow morals clauses that only allow termination for acts of moral turpitude that violate laws.¹³⁴

128. See Auerbach, *supra* note 11, at 8.

129. Kressler, *supra* note 12, at 255.

130. NFL CBA, *supra* note 42, at 252 (allowing a team to unilaterally terminate a player agreement if the player has engaged in conduct deemed by the team to adversely affect or reflect on the team).

131. *Nader v. ABC Television, Inc.*, 150 Fed. App'x 54, 56 (2d Cir. 2005) (citing morals clause in Nader's contract that allowed ABC to terminate the agreement for any conduct that "might tend to reflect unfavorably on ABC" or any of its sponsors, licensees, series, or programs).

132. *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 87-88 (9th Cir. 1957) (citing morals clause in Scott's contract that allowed company to terminate the agreement if Scott did anything to "degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or public morals or decency or prejudice the corporation or the motion picture industry in general").

133. *Id.*

134. Gary T. Pakulski, "Morals Clauses" Usually Limited to Illegal Acts for

The reality of the situation is that the broad or narrow nature of the morals clause will largely be driven by the bargaining position of the talent and the capabilities of his or her representative. Talent should seek to negotiate for reasonable language that protects them from unsubstantiated claims, false arrests, and other wrongful accusations. Thus, the key point for talent to know at the outset of negotiations is that the company will seek to include broad morals clauses, and talent should be ready to counter this with a strategy aimed towards narrowing the terms of the morals clause.

In addition to knowing that companies will attempt to include a broadly-worded morals clause, talent should be aware that companies will similarly try to secure exclusive authority to determine whether the talent's conduct is violative of the morals clause.¹³⁵ While it is unrealistic to expect that a company would agree to a mutual determination of whether conduct violates the morals clause, talent should nonetheless seek to respond to such proposals by negotiating for alternative means of making a determination. One potential solution that both parties may find agreeable is binding arbitration.¹³⁶ Through inclusion of an arbitration clause, talent would be able to secure independent third party review to determine whether the allegedly violative conduct meets the threshold for termination under the morals clause.¹³⁷ Alternatively, talent may also attempt to incorporate other "due process" protections, whereby the person would be given an opportunity to defend himself or herself before termination.¹³⁸ Of course, the ability of talent to secure any type of protective provision in an agreement

Executives, TOLEDO BLADE, Aug. 13, 2008, <http://www.toledoblade.com/apps/pbcs.dll/article?AID=/20080813/BUSINESS07/808130365>.

365. Gary Convis, the CEO of Dana Holding Corp., a supplier of axles and drive shafts to automobile makers, can be fired with cause for "the conviction - or plea of no contest...for any felony or the indictment...for any felony, including without limitation any felony involving fraud, moral turpitude, embezzlement or theft." *Id.* Similarly, the morals clause in the contract of Al Stroucken, the CEO of Owens-Illinois, Inc., the largest manufacturer of glass containers in the world, restricts the ability of the company to fire him to a "conviction - or a plea of...(no contest) - for a felony; or a crime involving fraud, dishonesty, or moral turpitude." *Id.*

135. See Auerbach, *supra* note 11, at 9.

136. See *id.*

137. See *id.* (citing Jordan Jacobs & Leonard Glickman, Focus on Sports & Entertainment Law: Misbehaving Athletes Faced with Morals Clauses, *THE LAWS. WKLY.* 18 n.17, Sept. 11, 1998).

138. See Socolow, *supra* note 13, at 188.

largely depends on his or her bargaining position. In short, talent should be aware of two things during the negotiations process: (1) companies will attempt to secure exclusive authority to terminate the contract pursuant to a broadly worded morals clause, and (2) there are alternatives available to talent to lessen the companies' authority.

B. Career Effects: How Morals Clauses in Contracts Can Potentially Impact the Careers of Talent

A morals clause can have a myriad of effects on an individual's career. First and foremost, the morals clause can result in severe financial consequences if violated, particularly in the area of celebrity endorsements. For example, after disclosure of her cocaine use, H&M dropped Kate Moss from an advertising campaign, undoubtedly costing her a sizable sum of money.¹³⁹ After he was charged with sexual assault in 2003, Kobe Bryant lost \$2 million in endorsement money after McDonald's and Nutella ended their relationships with Bryant.¹⁴⁰ Bryant also reportedly saw his total endorsements decline by \$4 million following the sexual assault incident.¹⁴¹ Pepsi pulled advertisements featuring Ludacris in 2003 after political pundit Bill O'Reilly criticized Pepsi for using the rapper as an endorser.¹⁴²

The financial impact on less famous talent is also notable. Benjamin Curtis, more famously known as the "Dell Dude," was dismissed from computer maker Dell Inc. after he was arrested for marijuana possession in 2003.¹⁴³ The

139. Kate Moss: Sorry I Let People Down, *supra* note 1.

140. David Wharton, He's Back in the Picture: Bryant's First Nike Ad Since Charges Were Dropped Gets High Marks from Experts but Negative Comments from a Women's Advocacy Group, *L.A. TIMES*, July 14, 2005, at D1.

141. *Id.*

142. Pepsi Avoids a Boycott, *CBS News*, Feb. 14, 2003, <http://www.cbsnews.com/stories/2003/02/14/entertainment/main540619.shtml>. Pepsi's actions caused Russell Simmons, founder of the Hip Hop Summit Action Network and BET, to call for a boycott of Pepsi products by those in the music industry. *Id.* A boycott was avoided when Pepsi agreed to donate \$3 million to Ludacris' charitable foundation. *Id.* However, the terms of the settlement reportedly did not include reinstatement of the advertisements Pepsi pulled nor an apology to Ludacris, both of which Russell Simmons had attempted to obtain from Pepsi as part of the deal. Rap Mogul Resolves Pepsi Row, *BBC NEWS*, Feb. 14, 2003, <http://news.bbc.co.uk/1/hi/entertainment/music/2760499.stm>.

143. Anthony Ramirez, "Desperate Housewives" Actor Arrested on Marijuana Charge, *N.Y. TIMES*, May 19, 2005, at B2.

screenwriters and screen directors involved in the Hollywood Ten Trilogy all lost their jobs based on the morals clauses in their contracts.¹⁴⁴ Unlike wealthy talent, less heralded individuals such as Benjamin Curtis, Lester Cole, Ring Lardner, and Adrian Scott¹⁴⁵ may depend on their employment for all of their income. In those situations, the invocation of a morals clause may cause severe financial hardship. Regardless of one's financial position, talent needs to know that morals clauses can devastate one's earnings in a relatively short period of time.

Beyond the financial impact, talent should know that a morals clause can affect how they live their daily lives. Talent can avoid behavior that could potentially violate the provision through awareness of the precise parameters of the morals clause. However, even if talent knows what behavior could be deemed a violation of the morals clause, there is no guarantee the behavior will not occur. For example, the NFL suspended Adam "Pacman" Jones for the entire 2007 season for conduct detrimental to the league after five arrests in less than two years.¹⁴⁶ Despite being reinstated by the NFL with clearly delineated requirements for avoiding subsequent suspensions, Jones became involved in an alcohol-related fight with a member of his security team during the 2008 season.¹⁴⁷ As a result, the NFL again suspended Jones, stating that his behavior was inconsistent with the conditions previously set for continued participation in the NFL.¹⁴⁸ While it is fairly obvious from the Pacman Jones situation that knowing the bounds of permissible behavior may not always save talent from their own immoral conduct, talent should nonetheless know the limitations to which they agreed in their morals clause to avoid any possible repercussions.

144. *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87 (9th Cir. 1957); *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844 (9th Cir. 1954); *Loew's Inc. v. Cole*, 185 F.2d 641 (9th Cir. 1950).

145. Lester Cole, Ring Lardner, and Adrian Scott were the three plaintiffs in the Hollywood Ten Trilogy. See discussion *supra* Part III.B.

146. Mason Levinson, "Pacman" Jones Suspended at Least Four Games by NFL, *BLOOMBERG*, Oct. 14, 2008, <http://www.bloomberg.com/apps/news?pid=20601079&sid=aK7Z5DPPZrHM&refer=home>.

147. *Id.*

148. *Id.*

C. *Triggering the Morals Clause: Conduct and Actions That Can Trigger a Morals Clause in Talent Agreements*

Generally, talent needs to know what behavior or conduct will trigger the morals clause in an agreement. Specifically, talent needs to be cognizant that the morals clause may prohibit a broad range of conduct that may seem otherwise permissible. Whether the morals clause is drafted broadly or narrowly will largely determine what conduct is allowed and what is prohibited. For example, the broad morals clause at issue in *Nader* allowed ABC to terminate the agreement for any conduct that “might tend to reflect unfavorably on ABC” or any of its sponsors, licensees, series, or programs.¹⁴⁹ Similarly, the morals clauses in NFL player contracts allow a team to unilaterally terminate a player agreement if the player has engaged in conduct deemed to adversely affect or reflect on the team.¹⁵⁰ Such clauses are so broad that they could potentially apply to an expansive array of conduct. For instance, one could argue that the rather socially acceptable behavior of obtaining an amicable divorce could violate morals clauses such as these; after all, an actor or actress obtaining an amicable divorce “might tend to reflect unfavorably on ABC”¹⁵¹ if the network is attempting to portray a family-friendly image.

On the other hand, a morals clause may specify the precise conduct that is actionable under the provision. Securing a morals clause that unambiguously delineates the type of behavior prohibited is preferable for talent.¹⁵² Another talent-protective option is a narrow morals clause that only allows for termination based on conviction of a crime of moral turpitude or a felony.¹⁵³ This is the case in many chief executive officer contracts, where the narrow morals clauses allow termination only for acts of moral turpitude that violate laws.¹⁵⁴

In conjunction with seeking narrowly worded morals clauses, talent should be aware that morals clauses may be

149. *Nader v. ABC Television, Inc.*, 150 Fed. App'x 54, 56 (2d Cir. 2005).

150. NFL CBA, *supra* note 42, at 252.

151. *Nader*, 150 Fed. App'x at 56.

152. See Kressler, *supra* note 12, at 255-256. See also Auerbach, *supra* note 11, at 7 and Socolow, *supra* note 13, at 188.

153. See Kressler, *supra* note 12, at 251, 255-256.

154. See Pakulski, *supra* note 135.

vague in the conduct they prohibit. A morals clause stating that acts of moral turpitude are grounds for dismissal requires a determination of what constitutes “moral turpitude.” The term, as used in morals clauses, can be ambiguous and subject to different interpretations by different parties.¹⁵⁵ Thus, talent needs to know what conduct is allowed and what conduct is prohibited by the morals clause; or, in the case of a vague morals clause, talent needs to know when to seek legal advice.

In addition to knowing what conduct triggers a morals clause, talent should be aware of the effects of the clause being triggered. Most importantly, the triggering of a morals clause can be grounds for termination of the entire agreement.¹⁵⁶ Some morals clauses allow for the company to show its disapproval of the talent's conduct by imposing fines and/or recouping payments rather than termination.¹⁵⁷ A morals clause may also give the company the right to discontinue selling a product associated with the individual or otherwise discontinuing the use of the talent's image in advertisements.¹⁵⁸ For example, after former NFL quarterback Michael Vick was indicted for his role in an illegal dog-fighting scheme, but before he was convicted, Nike suspended its multi-million dollar endorsement deal with Vick and halted all sales of Vick merchandise at Nike-owned stores.¹⁵⁹ Reebok also pulled Vick jerseys from its shelves, and trading card company Donruss removed Vick from its 2007 releases.¹⁶⁰ Thus, as the effects of a triggered morals clause can be devastating for talent, it is imperative that talent knows the effects of a clause being triggered so that he/she can plan accordingly and avoid any potential for disaster.

155. Martin J. Greenberg, *College Coaching Contracts Revisited: A Practical Perspective*, 12 MARQ. SPORTS L. REV. 127, 215-216 (2001). See also Auerbach, *supra* note 11, at 8 (stating that the phrase “moral turpitude” is often difficult to define).

156. See Socolow, *supra* note 13, at 188. See also Auerbach, *supra* note 11, at 3 (citing Carlin, *supra* note 1); Kressler, *supra* note 12, at 235.

157. Socolow, *supra* note 13, at 188.

158. *Id.*

159. Brent Hunsberger, *Nike Suspends Vick's Endorsement Deal*, OREGONIAN, July 28, 2007, at C01.

160. Judy Battista, *Without Contact, Vick Takes Hit in Pocket*, N.Y. TIMES, July 28, 2007, available at <http://www.nytimes.com/2007/07/28/sports/football/28vick.html>.

D. Available Remedies: What Talent Can Do When a Morals Clause Is Invoked Against Them

The final key point that talent needs to know is that there are both legal and non-legal remedies available if and when a morals clause is invoked. As seen in the Hollywood Ten Trilogy and *Nader v. ABC Television*, talent terminated pursuant to a morals clause in an agreement can sue the terminating company on a variety of legal theories. For example, the claims Michael Nader brought against ABC Television included various disability discrimination, contract, and tort claims.¹⁶¹ Specifically, Nader asserted six claims against ABC Television: violation of the American with Disabilities Act, breach of contract, fraudulent misrepresentation, fraudulent inducement, unjust enrichment, and breach of the covenant of good faith and fair dealing.¹⁶² Unfortunately for Nader, the court dismissed all his claims.¹⁶³ Despite Nader's failures, legal action may not be a fruitless pursuit in all cases, as seen in cases involving musical performer Marilyn Manson and former professional basketball player Chris Webber.

During the 1997 summer, the OzzFest '97 concert performance had a scheduled tour stop at Giants Stadium, a public outdoor facility owned and operated by the New Jersey Sports & Exposition Authority ("NJSEA") and located in the Meadowlands Sports Complex in East Rutherford, New Jersey.¹⁶⁴ The controversial musical performer Marilyn Manson was scheduled to perform at Giants Stadium; however, the NJSEA sought to exclude Marilyn Manson from performing based on public image concerns about the band's anticipated performance.¹⁶⁵ The primary issue in the case was whether the NJSEA violated the First Amendment to the U.S. Constitution by prohibiting Marilyn Manson from performing.¹⁶⁶ Although the court decided the case primarily on First Amendment grounds, it nonetheless addressed the potential validity of the morals clause in the contract between

161. *Nader v. ABC Television, Inc.*, 150 Fed. App'x 54, 55 (2d Cir. 2005).

162. *Id.* at 55-58.

163. *Id.* at 55.

164. *Marilyn Manson, Inc. v. New Jersey Sports & Exposition Auth.*, 971 F. Supp. 875, 880-881 (D.N.J. 1997).

165. *Id.* at 880.

166. *Id.*

the parties.¹⁶⁷ The clause gave the NJSEA the right to omit any performer from the concert under certain circumstances, including "character offensive to public morals."¹⁶⁸ Without explicitly striking down the morals clause as unconstitutional, the district court stated that the NJSEA's requirement that performers agree to a morals clause was problematic from a constitutional standpoint.¹⁶⁹ The court further stated that without proof of reasonable guidelines for restricting program content, the NJSEA's system of choosing concert performances through application of morals clauses "probably cannot pass constitutional muster."¹⁷⁰ Marilyn Manson was thus able to obtain a preliminary injunction allowing it to perform at OzzFest.¹⁷¹ The *Marilyn Manson* case shows that talent may have recourse against public entities that seek to enforce morals clauses against them if enforcement of the clause places an unconstitutional burden on a fundamental right.

In 1999, former NBA player Chris Webber challenged the termination of a shoe endorsement contract by sporting goods company Fila.¹⁷² Fila terminated the contract pursuant to its morals clause.¹⁷³ Webber brought an arbitration claim against Fila, and eventually won a \$2.61 million judgment for wrongful termination.¹⁷⁴ Webber successfully argued that since the contractual language permitted termination under the clause only if he were convicted of a crime, his payment of

167. *Id.* at 886-887.

168. *Id.* at 883. The clause read:

8. Performance Approval

LICENSOR retains approval right of performance, exhibition, or entertainment to be offered under this Agreement and LICENSEE agrees that no such activity or part thereof shall be given or held if LICENSOR files written objection on the grounds [**12] of character offensive to public morals, failure to uphold event advertising claims or violation of event content restrictions agreed to by both parties at the time of completion of this agreement.

Id.

169. *Id.* at 887.

170. *Marilyn Manson, Inc. v. New Jersey Sports & Exposition Auth.*, 971 F. Supp. at 887.

171. *Id.* at 891.

172. "Prematurely Terminated" – Kings' Webber Wins Ruling Against Fila, CNN/SI, July 8, 1999,

http://sportsillustrated.cnn.com/basketball/nba/news/1999/07/08/webber_fila_ap/.

173. *See id.*

174. *Id.*

an administrative fine and the absence of a conviction were not grounds for termination.¹⁷⁵ As demonstrated in this case, talent may also have recourse under the law when a private actor invokes a morals clause; however, the success of the case will largely depend on the contractual language and facts at issue.

There are also non-legal avenues available to talent to deal with a termination pursuant to a morals clause. First, talent may be able to negate the application of a morals clause without resort to litigation if the individual is properly represented. For example, former NBA star Jayson Williams was owed payment for four years on his playing contract when he retired from the NBA in 2000 due to injuries.¹⁷⁶ In 2002, Williams was indicted on manslaughter charges.¹⁷⁷ According to Williams' agent, the morals clause in his contract required intentional moral impropriety, and since there were no allegations of intentional conduct, the morals clause would not apply.¹⁷⁸ With some skillful representation, talent may be able to avoid having a morals clause terminate an agreement.

Second, if talent is in a strong bargaining position, they may be able to negotiate with the company to prevent the company from terminating the agreement.¹⁷⁹ Of course, the ability of talent to successfully negotiate with the company depends on the value of the individual to the company and the investment the company has made in the individual.¹⁸⁰ An individual whose value to the company is high is better positioned to negotiate this point, while less valuable talent may have a more difficult time.¹⁸¹ In short, talent needs to know that a company's attempt to invoke a morals clause does not necessarily mean that the agreement will be terminated.

175. Rovell, *supra* note 50.

176. Tom Canavan, *Williams Will Still Be Paid from Nets Deal, Agent Says*, THE RECORD (Bergen County, NJ), Feb. 28, 2002, at A4.

177. Jayson Williams retrial delayed over racial slur fallout, USA TODAY, Jan. 3, 2008, http://www.usatoday.com/sports/basketball/2008-01-03-2809430661_x.htm.

178. Canavan, *supra* note 177, at A4. As of November 2008, Williams was being retried on a reckless manslaughter charge, of which he was acquitted in 2004. Jayson Williams retrial delayed over racial slur fallout, *supra* note 178. In the first trial, Williams was convicted on four counts related to covering up the death of the victim. *Id.*

179. See Socolow, *supra* note 13, at 187.

180. *Id.*

181. See Auerbach, *supra* note 11, at 8. See also Socolow, *supra* note 13, at 187.

Rather, with the aid of skillful representation, talent may be able to reach a separate agreement with the company and avoid the full consequences of the morals clause being triggered.

E. Bringing It All Together: Understanding the Extent of the Potential Power of the Morals Clause

Morals clauses can have a far-reaching impact on talent. Accordingly, talent needs to know that morals clauses can place heavy burdens on talent, particularly in their daily conduct. Broadly-worded morals clauses can place heavy restrictions on the activities in which talent can engage; and, in certain cases, can even penalize talent for engaging in legally permissible conduct. Moreover, talent needs to be aware that morals clauses can go so far as to penalize an individual for having a mental health disorder.¹⁸² Thus, morals clauses can place stringent restrictions on talent and their conduct. To protect their livelihood and shield themselves from legal woes, it is imperative that talent know of the potential problems arising from morals clauses, particularly in the context of what conduct is within the scope of the morals clause.

CONCLUSION

This Article has sought to explore the parameters of morals clauses in talent contracts and the relevant case law interpreting such clauses in order to increase the amount of scholarly research in this area and to explore what talent should know about morals clauses. As a general proposition, talent needs to know that morals clauses are powerful enough to impact important aspects of one's career, ranging from one's compensation and continued employment to his or her personal behavior. More specifically, talent needs to be aware of four issues regarding their morals clauses: (1) the goals of the company in negotiating morals clauses and counter-arguments; (2) how morals clauses can impact one's career; (3) the ways in which morals clauses can be triggered; and (4)

182. See, e.g., *Olsen Twins Scrub Milk Mustaches*, *supra* note 6 (discussing actresses Mary-Kate and Ashley Olsen being dropped from the "Got Milk?" campaign based on an eating disorder).

the legal and non-legal remedies available to talent to deal with a morals clause. With the increasing coverage that morals clauses have been given in the media and in the legal industry, it is important for both talent and their representatives to constantly assess and reassess their own morals clauses.