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### Recommended Citation

Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DePaul J. Sports L. & Contemp. Probs. 1 (2005)

Available at: <https://via.library.depaul.edu/jslcp/vol3/iss1/1>

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**MORALS CLAUSES AS CORPORATE PROTECTION  
IN ATHLETE ENDORSEMENT CONTRACTS**

*Daniel Auerbach\**

INTRODUCTION

In the rapidly expanding realm of endorsement agreements, corporations are increasingly exposed to greater financial and other related risks. The increase in quantity and severity of such risks is a product of various factors, namely the evolution of the athlete endorsement industry in terms of size and customer appeal. As a result of these changes, corporations are forced to place greater emphasis on hedging such risks through tougher negotiation and enforcement of long-dormant contractual provisions. Several agreements, including those involving Latrell Sprewell and Kobe Bryant, illustrate the practical roles of corporate protections once an athlete has acted in a manner inapposite to the company's will. The changes occurring in the athlete endorsement arena and the associated risks have led to one inevitable conclusion: tougher contractual provisions, notably a forceful morals clause, may be the supreme safeguard for corporate endorsees.

Endorsement contracts, as defined by California State law, are "any contract or agreement pursuant to which a person is employed or receives remuneration for any value or utility that the person may have because of publicity, reputation, fame, or following obtained because of athletic ability or performance."<sup>1</sup> Athlete endorsement deals typically fall into one of two categories of licensing agreements: (1) the athlete grants the right to use his or her identify

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<sup>1</sup> CAL. BUS. & PROF. CODE § 18895.2(d) (West 1997 & Supp. 1998).

for specific backing of a product or service, or (2) the athlete grants the right to develop products associated with that athlete and his or her sport.<sup>2</sup>

Over the past 20 years, the athlete endorsement industry has experienced unprecedented growth. Nike Inc., the nation's largest employer of endorsers for athletic goods, reached more than \$1.6 billion in long term commitments as of November 2003.<sup>3</sup> Such expenditures are the culmination of 30 years spent elevating the company's brand into a worldwide leader in the sports apparel industry.<sup>4</sup> Even in the aftermath of a severely detrimental scandal surrounding one of its highest-paid endorsers, Kobe Bryant, Nike increased its commitments by nearly \$200 million, or 13 percent.<sup>5</sup> While total athlete endorsement in the four major sports was down approximately 20 to 30 percent at the end of 2003<sup>6</sup>, the industry remains a multi-billion dollar endeavor.

Companies who hire athletes as spokespersons for their products or services face a variety of risks from such agreements. While risks such as injury or death are relatively easy to insure against, either contractually or through a third party, others may present more difficulty. Increasingly, many athletes' images are being tarnished due to factors including steroid-use allegations, criminal conduct and ill-fated on-court or on-field actions.

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<sup>2</sup> Keven Davis, *Marketing the Individual and Endorsement Contracts for the Sports Industries*, ALI-ABA Course of Study Materials, Entertainment, Arts and Sports Law, Vol. 1, Jan. 2003.

<sup>3</sup> Liz Mullen, *Nike Endorser Tab Up \$192M*, SPORTSBUSINESS JOURNAL, Jan. 19, 2004.

<sup>4</sup> Davis, *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> Rick Horrow, *The Athlete Endorsement Business on Trial*, SportsLine.com, Dec. 3, 2003.

## II. MORALS CLAUSES AS ENDORSERS' DEFENSE – CORPORATE PROTECTION

Morals clauses, also called public image, good-conduct or morality clauses, are 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.<sup>7</sup> Due to the changing nature of athletes and the agreements themselves, endorsers are wise to take note of these provisions.

As corporations invest larger sums in the reputable names of athletes to endorse their products and services, they find themselves in a position to be more selective in determining an appropriate endorser to limit their exposure to risks of financial loss and embarrassment. While the proper endorser for a company depends largely on the company's intended image, many believe that sports marketers are increasingly looking for integrity and class in their brand representatives.<sup>8</sup> As important as the selection and negotiation process is for companies, they can never be entirely certain that an endorser's image is bulletproof. To hedge against much of this risk, corporate employers are more often insisting on stricter contractual protections, primarily through the inclusion of so-called "morals clauses."

The emphasis on morals clauses is a relatively recent phenomenon, though the provisions have been in use since the early twentieth century. In the 1920s, when film attendance would dip, the movie stars would be blamed for the garish and scandalous accounts of their lives appearing in the press.<sup>9</sup> During the McCarthy Era of the 1950s such clauses were often used to censor political rather than moral conduct.<sup>10</sup> Since the 1980s, morals clauses have become an

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<sup>7</sup> Steve Carlin, *Forget What (Kobe's) Commercial Says: Image is Everything*, FORT WORTH BUSINESS PRESS, Sept. 5, 2003

<sup>8</sup> Barry Janoff, *The World Not According to Kobe*, BRANDWEEK, Jan. 12, 2004.

<sup>9</sup> 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.

<sup>10</sup> *Id.*

increasingly significant element of various contracts, most notably athlete endorsement and licensing agreements. Even the last eight years has witnessed a dramatic increase. The Sports Media Challenge survey, conducted in 1997, indicated that less than half of all endorsement deals included morals clauses;<sup>11</sup> by 2003, industry estimates start at a minimum 75 percent.<sup>12</sup> The growth of such provisions can largely be attributed to three factors: (1) ages of athletes; (2) fundamental moral character of endorsers; and (3) financial value of endorsement agreements. As one sports marketing consultant stated, “The convergence of extremely youthful, wealthy and therefore powerful athletes has caused a lot of the athlete misbehavior.”<sup>13</sup>

Increasingly, younger athletes and higher salaries are likely to contribute to the behavior of professional players. Athletes are increasingly entering the ranks of most professional sports at a younger age.<sup>14</sup> With younger athletes comes greater immaturity and often a lesser degree of pride in their moral images. The National Basketball Association (“NBA”) has been a trendsetter for welcoming young players into its league. Since the mid-1990s, the stars of the NBA are increasingly players who leave college early or forego such training grounds completely. This trend is likely the result of the lucrative offers of the professional leagues, despite creating thinner developed talent due to league expansion.<sup>15</sup> The NBA has the highest average individual salaries of any sport, though the other leagues have experienced similar growth. From 1983-84 to 1993-94, players’ average salaries increased from \$250,000 to \$1.8

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<sup>11</sup> Eric Fisher, *Sosa Flap to Change Endorsement Deals*, WASH. TIMES, June 8, 2003, at C03.

<sup>12</sup> *Id.*

<sup>13</sup> Kelly Pate, *The Halo Effect: Sports Marketers Tighten Contracts as Athletes Keep Proving They’re No Angels*, DENVER POST, July 23, 2003, at C-01.

<sup>14</sup> For example, in December 2003, Freddy Adu signed a contract with D.C. United of Major League Soccer; Michelle Wie joined the Women’s PGA tour in 2005 prior to turning age 16; in the 2004 NBA draft, 8 of the first 19 picks were straight out of high school. Brendan McGovern, *2004 NBA Draft Review*, June 25, 2004, available at <http://probasketball.about.com/od/nbadrafthistory/a/draftgrades04.htm>.

<sup>15</sup> The number of NBA teams has increased from 17 in 1970-71 to 23 in 1985-86 to 30 for the 2003-04 season. [NBA.com/history/standings/19701971.com](http://NBA.com/history/standings/19701971.com), [NBA.com/history/standings/19851986.com](http://NBA.com/history/standings/19851986.com).

million.<sup>16</sup> From 1993 to 2003, each of the four major leagues experienced average salary growth between 70 and 280 percent<sup>17</sup> compared to a 27 percent increase in the consumer price index for the same period.<sup>18</sup> Despite what is arguably the most stringent salary cap for individual players and the most effective team luxury tax of the four major sports, the NBA has continued to experience tremendous growth in players' salaries. The salary cap growth of the NBA is, in large part, due to the cap being tied or "marked" to a pool of league-wide revenues that has also continued to grow. For the 2003-04 season, the average salary exceeded \$4.9 million per player.<sup>19</sup>

The result of these changes has been greater incentive for young players to enter professional leagues, such as the NBA. The decision is often justified by a simple question: why stay in college or elect to attend in the first place where athletes risk injury while playing for free when he or she can join the professional ranks and make hundreds of thousands or millions of dollars? While athletes are rewarded for attending college by receiving an education, the opportunity costs of electing not to enter the professional leagues are substantial. In the face of these influences, companies are exposed to a far younger endorsee than they were 20 years ago. While there is the option of selecting an older, safer and more proven spokesperson, those athletes typically lack the edge that appeals to young, trendsetting consumers that companies seek to identify themselves with. Due to the age and associated level of maturity, companies are forced to seek greater protection from the athletes' moral turpitude.

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<sup>16</sup> PAUL C. WEILER, *LEVELING THE PLAYING FIELD*, 105-06 (2000).

<sup>17</sup> Charlie Gillis, *Game Over? Without Help from the Players, Canada's NHL Teams Can't Compete*, MACLEAN'S, Nov. 3, 2003 (noting the percentage increase of average salaries in the following amounts: Major League Baseball + 137%; National Basketball Association + 279%; National Football League + 71%; National Hockey League + 213%).

<sup>18</sup> United States Department of Labor, Bureau of Labor Statistics, Feb. 20, 2004 at <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt>

<sup>19</sup> Roscoe Nance, *Good news for players: Salary cap up 9%*, USA TODAY, July 16, 2003, at 11C.

A second factor contributing to the growing necessity of morals clauses in endorsement agreements is the character of those athletes who carry the greatest endorsement weight. Two issues can be identified as signs of the necessity for greater protection. First, due to dynamics such as age, “street cred” (an athlete’s appeal based on his or her toughness and traditionally-urban image), and other characteristics of popular athletes, some of the best and most profitable endorsers are often those individuals with less-than-stellar reputations and potential for morally repugnant conduct. While the most marketable and highest paid endorser, Tiger Woods,<sup>20</sup> is a mature, always-grinning gentleman, others, including Allen Iverson and Shaquille O’Neal, have more questionable reputations. Second, athletes are increasingly under greater scrutiny in their everyday lives. In January 2004, Jeff Garcia, the San Francisco 49ers quarterback with a “pristine” image, was arrested on suspicion of drunken driving.<sup>21</sup> That afternoon, he was before reporters issuing an apology for his actions.<sup>22</sup> The moral of the story is that, no matter how minor the offense, athletes are subject to a substantially higher level of public scrutiny than others. While Mickey Mantle largely avoided ridicule for his drinking habits in the 1960s, today’s players don’t have the same luxury.

Finally, companies often seek greater protections in endorsement agreements due to the financial volume at stake. By 1996, endorsement and licensing agreements by U.S. companies alone, reached one billion dollars, more than 10 times the amount expended in 1986.<sup>23</sup> While more recent figures are unavailable, the growth trend has undoubtedly continued into the twenty-first century. Between the two largest endorsers – Nike and Reebok – athlete endorsements are

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<sup>20</sup> Kurt Badenhausen, *King of the Court*, FORBES, July 5, 2004, available at <http://www.forbes.com/business/global/2004/0705/048.html>.

<sup>21</sup> Ann Tatko, *Image Consultant: Jeff Garcia Will Survive*, CONTRA COSTA TIMES, Jan. 16, 2004.

<sup>22</sup> *Id.*

<sup>23</sup> Randall Lane, *Nice Guys Finish First*, FORBES, Dec. 16 1996, at 236.

contracted to consume more than \$1.2 billion of the companies' combined budgets in the next four years.<sup>24</sup>

Due to the increasing value and emphasis placed on contractual protections, the negotiations process is worthy of consideration.

### III. NEGOTIATING MORALS CLAUSES

Negotiations of any licensing agreement, especially those relating to athlete endorsements, are primarily about one issue – money. That being the case, companies can defend against indirect financial loss through tougher morals clauses. In the past, morals clauses have been “the type of thing you negotiate for about two minutes,” according to a California-based sports agent.<sup>25</sup> Once a point to be glossed over, if included at all, morals clauses are now, or should be, becoming one of the stickiest points of contention in an athlete endorsement agreement. These provisions are increasingly viewed as “where the rubber meets the road in contract negotiations.”<sup>26</sup>

Entering the negotiations, both parties should understand the fundamental concept of the laws of supply and demand in determining their strengths at the bargaining table.<sup>27</sup> The relative demand is both a function of the endorser's strength within a specific product type or athletic realm, and also his or her star power in general.<sup>28</sup> For example, Michael Jordan or Tiger Woods, in spite of their liabilities in the form of admitted infidelities or media outbursts, respectively, command a powerful position because of their ability to sell a product through their image. As a

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<sup>24</sup> *Nike Endorsement Commitments; Reebok Endorsement commitments*, SPORTSBUSINESS JOURNAL, BY THE NUMBERS (2004) at 32.

<sup>25</sup> Brian Steinberg & Maureen Tkacik, *Should Brands Endorsed by Bryant Keep Him On?*, WALL ST. J., July 22, 2003.

<sup>26</sup> Darren Rovell, *No Ringing Endorsement from Corporate Sponsors*, ESPN.com, Aug. 21, 2003 (quoting Peter Land, GM of Edelman's Sports & Entertainment practice who negotiates deals on behalf of companies).

<sup>27</sup> Carlin, *supra* note 8.

<sup>28</sup> Leigh Augustine-Schlossinger, *Endorsement Contracts for Professional Athletes*, 32 COLO. LAW. 43 (Jan. 2003).



result, they can expect, with little objection from a corporate endorsee, a weak or lenient morals clauses – in other words, the clause may require conviction prior to termination. Individuals with athletic prowess, but less star power such as Ray Allen or Vijay Singh could likely expect a more stringent morals clause, with the termination language possibly set at indictment or even arrest.

While typically only a sentence or two, morals clauses often include discussion of several issues. The primary concern for both parties at the negotiation is the specificity of the conduct language.<sup>29</sup> For example, a strict morals clause may refer to “any act involving moral turpitude” or the endorser becoming involved in “any situation or occurrence including, but not limited to, the use of drugs or alcohol, or otherwise tending to bring himself into public disrepute, contempt, scandal, or ridicule.”<sup>30</sup> Such a provision is far more intrusive than the conventional, boilerplate clauses historically requiring full conviction of a felony prior to termination.<sup>31</sup> Clauses referencing “moral turpitude” also tend to allow substantial leeway for the company because of the difficulty in defining the phrase. Companies are prudent to insist on such broad language leaving themselves latitude to terminate the agreement for any potentially damaging incident or act. Corporate attorneys are increasingly trying to include morals clauses expansive enough to allow the company to end the deal at the first “whiff of scandal.”<sup>32</sup> On the other hand, athletes’ agents often negotiate for specific language that limits termination clauses to the athlete’s

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<sup>29</sup> It should be noted that, while generic clauses or the occasional phrase from a specific agreement are publicized, morals clauses from specific athlete endorsement agreements are generally unavailable to the public for various reasons offered by company endorsees.

<sup>30</sup> Robert Freeman, *Morals Clause for Multimedia Products Incorporating Celebrity Likeness*, E-COMMERCE LAW & STRATEGY, Vol. 19; No 8; p. 3, Dec. 2002.

<sup>31</sup> The source of such “conviction” language is likely in the traditional provisions included in the major sports’ collective bargaining agreements. The leagues often have required, and some still do require, conviction of a crime prior to the league or team taking disciplinary action for off-court or off-field conduct. See, e.g., National Basketball Players Association Collective Bargaining Agreement, Article VI, Section 4 (2001), *available at* <http://www.nbpa.com/cba/cba.html>.

<sup>32</sup> Liz Mullen, *Morals Clause Give Companies an Out*, SPORTSBUSINESS JOURNAL, Aug. 11, 2003.

conviction of a crime.<sup>33</sup> The broad conduct provision is important to the company both in terms of its leverage in the event of an endorsee gone awry as well as knowing its boundaries.

The former NBA star Jayson Williams is a classic example of the dangers of failing to know the breadth of the included contractual language. Williams, currently on trial for the killing of a visitor to his home in 2002, was still owed four years on his playing contract after injuries forced him to retire from the New Jersey Nets in 2000.<sup>34</sup> The Nets originally believed they could avoid payment of the final years of his contract if he was convicted of “serious” crime. In fact, the contract’s clause allegedly allowed for termination only if the “moral turpitude is an act of intentional moral impropriety.”<sup>35</sup> Because he is being tried for manslaughter, a crime with no intent requirement, the morals clause would not allow for Williams’ termination and he has continued to receive his multi-million dollar paycheck from the insurance company.<sup>36</sup>

A second and related issue in the morals clause is the standard and procedure for reviewing the player’s conduct. In the boilerplate language of a strict morals clause, the company is granted exclusive authority to determine whether the athlete’s conduct is violative of the clause. While such a determination is challengeable by the athlete – as was the case in Fila’s termination of Chris Webber – such language grants the company tremendous freedom. Players, on the other hand, typically negotiate for an arbitration clause as part of the morals clause. This provision allows them third-party review in determining whether the conduct in question is disreputable or amounts to the termination threshold.<sup>37</sup> The arbitration clause in Chris Webber’s

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<sup>33</sup> Rick Horrow, *The Athlete Endorsement Business on Trial*, SportsLine.com, Dec. 3, 2003.

<sup>34</sup> Tom Canavan, *Williams Will Still Be Paid from Nets deal, Agent Says*, THE RECORD (Bergen Cty, NJ), Feb. 28, 2002 (explaining that Williams is contractually entitled to \$17.9 million for the 2003-04 season while he sits trial).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Jordan Jacobs & Leonard Glickman, *Focus on Sports & Entertainment law: Misbehaving Athletes Faced with Morals Clauses*, THE LAWS. WKLY. 18 n.17, Sept. 11, 1998.

endorsement agreement with Fila allowed him to challenge Fila's decision to terminate him as an endorser. In the ensuing hearing, Webber was awarded \$2.61 million for Fila's wrongful termination despite Webber being caught and charged with marijuana possession while on a Fila promotional campaign.<sup>38</sup>

The parties to an endorsement agreement should also agree upon measures for determining how the company can terminate the athlete. The agreement may include specific language concerning whether violation of a conduct clause of a team, league, or other governing body is sufficient grounds to trigger the company's morals clause and allow for termination. The parties should determine ahead of time whether a unilateral decision on the part of the company is sufficient for termination. If not, a secondary determination, such as third party arbitrator, would likely be necessary.<sup>39</sup>

Endorsement agreements can even contain morals clauses that are specific to the individual athlete. In 1991, following his victory at the PGA Championship, John Daly signed a \$10 million agreement to endorse Wilson's golf products.<sup>40</sup> Six years later his agreement was terminated following various drinking binges and an episode at the Player's Championship where Daly tore apart his hotel room and withdrew from the tournament.<sup>41</sup> Later in 1997, Daly was given a second chance by Callaway who offered an endorsement agreement that would pay off Daly's gambling debt of \$1.7 million and up to an additional \$3 million per year. The agreement contained a provision allowing the company to terminate Daly if he engaged in any gambling or drinking activities.<sup>42</sup> The clause was likely drafted in light of his past struggles with

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<sup>38</sup> Rovell, *supra* note 24.

<sup>39</sup> Jacobs & Glickman, *supra* note 35..

<sup>40</sup> Ron Sirak, *Nice Birthday Gift: Wilson Drops Daly*, CHATTANOOGA FREE PRESS, Apr. 29, 1997, at D3.

<sup>41</sup> *Id.*

<sup>42</sup> Larry Bohanna, *Daly Struggles: Golf's Bad Boy Seeks to Recover His Game – But at What Cost?*, THE DESERT SUN (Palm Springs, CA), Oct. 17, 1999.

both addictions. Unfortunately for both parties, Daly violated this provision in 1999 and was terminated by Calloway preceding his public admission of relapsing.<sup>43</sup>

When approaching the negotiating table, both athletes and the endorsee-company must consider both the specific elements of the morals clause and the marketability of the athlete.

#### IV. ENFORCEABILITY

While enforcing morals clauses as a means of terminating an athlete endorser has not been commonplace in the past, various companies have put their proverbial foot down on endorsers gone awry. The aforementioned Chris Webber won his arbitration hearing against Fila when the three-member panel ruled that Webber “did not violate the terms of his contract” and “Fila prematurely terminated the agreement.”<sup>44</sup> According to Howe Burch, Fila’s senior vice president of marketing, “The contract said that had he been convicted of a crime, we could terminate him, but since he only paid an administrative fine and wasn’t technically convicted, the court ruled in his favor.”<sup>45</sup> In 1997, fellow NBA star Latrell Sprewell was released from his contract with Converse following a physical altercation with his coach. Sprewell was not only suspended by the NBA, but was fired by Converse, costing him an estimated \$300,000 to \$600,000 annually.<sup>46</sup> Unlike Webber, Sprewell was unsuccessful in his legal challenge of the endorsee company’s invocation of the contract’s morals clause.<sup>47</sup> Two years later, Converse

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<sup>43</sup> *Id.*

<sup>44</sup> ‘PREMATURELY TERMINATED’; KINGS’ WEBBER WINS RULING AGAINST FILA, July 8, 1999, CNN/SI at [http://sportsillustrated.cnn.com/basketball/nba/news/1999/07/08/webber\\_fila\\_ap/](http://sportsillustrated.cnn.com/basketball/nba/news/1999/07/08/webber_fila_ap/).

<sup>45</sup> Darren Rovell, *No Ringing Endorsement from Corporate Sponsors*, ESPN.com, Aug. 21, 2003.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

voided the endorsement of another infamous character, Dennis Rodman, though a more flexible morals clause prevented significant legal challenge.<sup>48</sup>

Morals clauses have also been invoked outside of the NBA. In 1997, Kmart dropped endorser Fuzzy Zoeller after he made racially charged statements about fellow golfer Tiger Woods.<sup>49</sup> Zoeller lost the remaining two years of his six-year contract with Kmart, worth more than \$150,000 annually, for arguably minor misconduct – referring to Tiger Woods as “that little boy” and urging him to request chicken and greens at the Masters Tournament Champions Dinner.<sup>50</sup> Presumably, the morals clause in Zoeller’s agreement was quite strict.

Another noteworthy example of the breadth that a morals clause can reach comes from the racing industry. In May 2000, Mike Borkowski, a NASCAR driver for the AT&T Broadband team, clipped two other cars during the Busch 200 causing them to crash. The television station replayed the crash multiple times while referencing the “AT&T car” as the culprit. While such occurrences are commonplace in NASCAR races, AT&T Broadband took action based on a broad morals clause included in its 1999 contract with Borkowski. The provision gave AT&T the right to terminate if Borkowski were to commit “any act or become involved in any situation or occurrence tending to bring AT&T into public disrepute, contempt, scandal or ridicule . . . or reflecting unfavorably on AT&T, or its name, reputation, public image or products.”<sup>51</sup> Not only did AT&T terminate their sponsorship agreement with Borkowski, but in November 2000, AT&T filed suit against the driver demanding reimbursement of \$600,000 in endorsement money he had received.<sup>52</sup> The parties eventually settled the dispute out of court.<sup>53</sup>

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<sup>48</sup> Mark Conrad, *Converse Gets Moral on Rodman*, Mark’s Sportslaw News, Apr. 10, 1999, available at <http://www.sportslawnews.com>.

<sup>49</sup> Fisher, *supra* note 11.

<sup>50</sup> W.D. Murray, *Bad Boy Scandal Fallout: Advertisers Struggle with Sports Superstars’ Foibles*, ROCKY MTN. NEWS (Denver, CO), Nov. 9, 1997.

<sup>51</sup> Eric Dexheimer, *Jocks on the Rocks*, DENVER WESTWORD, Jan. 18, 2001.

<sup>52</sup> *Id.*

Finally, the most recent reported installment of companies considering their morals clauses came in July 2003. Kobe Bryant, star of the Los Angeles Lakers and the third most marketable sports celebrity of 2002<sup>54</sup>, was arrested in Eagle County, Colorado and charged with one count of sexual assault.<sup>55</sup> Conviction of such a Class 3 felony would result in a potential sentence of 4 years to life in prison.<sup>56</sup> While none of Bryant's endorsees have invoked a morals clause, two companies, McDonald's and Ferrero, an Italian marketer of chocolate spread, have declined to extend their agreements that ended in December 2003.<sup>57</sup> Those two deals alone were worth an estimated \$2 million annually.<sup>58</sup> Prior to the events in Colorado, Bryant earned an estimated \$20 million annually from endorsement contracts, including a new \$45 million agreement with Nike for 5 years.<sup>59</sup> Nike, who has offered no definitive word on Bryant's future with the company, is presumed not to have the right to terminate the agreement, regardless of conviction.<sup>60</sup> According to industry experts, Nike's standard morals clause requires only indictment of a crime.<sup>61</sup> While it took more than two years, Nike recently renewed its confidence in the tarnished image of Bryant and included him in a print advertising campaign in July 2005.<sup>62</sup>

Bryant's troubles appear to be three-fold. First, the nature of his crime makes companies especially concerned about their reputation. Rather than being arrested for drunk driving, Bryant is being charged with felony sexual assault. As one expert noted, "McDonald's and Sprite

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<sup>53</sup> Andy Bernstein, *NASCAR Drivers Push A&T Broadband*, SPORTSBUSINESS JOURNAL, Sept. 3, 2001.

<sup>54</sup> Jonathan Shikes, *Selling Kobe*, PRESS ENTERPRISE (Riverside, CA), July 20, 2003, at C01.

<sup>55</sup> Horrow, *supra* note 31.

<sup>56</sup> *Id.*

<sup>57</sup> Mullen, *supra* note 30.

<sup>58</sup> *Kobe Bryant*, Forbes.com, available at

<http://www.forbes.com/celebrities2004/LIROKPF.html?passListId=53&passYear=2004&passListType=Person&uniqueId=OKPF&datatype=Person>

<sup>59</sup> Chris Isidore, *Advertisers Worry: Who's Next?*, CNNMoney.com, July 21, 2003.

<sup>60</sup> *Id.*

<sup>61</sup> Mullen, *supra* note 30.

<sup>62</sup> *Kobe Bryant Resumes Endorsement Career*, USATODAY.com, July 10, 2005.

believe in the family image, and [sexual assault is] not what the family is all about.”<sup>63</sup> Second, because Bryant had such a flawless image before this incident, his actions are that much more shocking. His image was “so sterile, even boring” before this, but now companies are likely to question their faiths in even the mostly highly regarded athletes.<sup>64</sup> Finally, Bryant’s case is more detrimental to his endorsers due to the relatively high profile of the case. His future endorsement value is therefore more speculative. Just as the financial world has broadcast a play-by-play recap of the Martha Stewart trial, the sports industry has never been out of earshot of the Kobe Bryant trial. Due to less tolerance by companies who employ athletes, a decade ago Bryant would likely have been terminated from his agreements and the issue would have been settled. Unfortunately for endorsees such as Nike, the same finality does not hold true today.

While companies endorsed by a star such as Kobe Bryant would normally grant extensive leeway in evaluating his conduct, the nature of his crime, his previous image, and the level of publicity expose those companies to greater potential damage. As of early 2004, Bryant’s remaining endorsee companies have stuck with their star spokesman. Presumably, the remaining companies either have elected to wait out the storm of his trial or are unable to terminate him under their current agreement.

Despite the growing necessity and application of morals clauses, companies must be tactful in dealing with their endorsers. As athletes frequently become public icons, often on an international stage, companies do not want to abandon such a figure in such a way as to draw criticism or injure the company’s goodwill.”<sup>65</sup> Therefore, a company must carefully weigh the relative backlash from deserting a idolized endorser against the damage from being associated with a disreputable figure. Additionally, even if an endorser violates a company’s morals clause,

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<sup>63</sup>,Shikes, *supra* note 51 (quoting Robert Tuchman).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (quoting David Cornwell, an attorney who has negotiated several athlete endorsement contracts.)

the company's decision to invoke the provision often depends on the particular infraction. For example, an endorser who has an affair may still be able to endorse golf clubs or headache medication, but may be less suitable for a product associated with traditional family values. In such a case, the decision to terminate an endorsement agreement can turn on the image the company is trying to portray – Reebok's image is likely different from McDonald's based on its core consumers. In the case of Allen Iverson, his endorsement of Reebok was apparently an appropriate synergy considering the image they wish to portray. When Iverson was arrested and charged with felony assault in 2002, Reebok stood by their star endorser. Iverson's image as a "bad boy" combined with the continued success of his product in the aftermath of his arrest, were the characteristics that Reebok likely had either anticipated or were pleasantly surprised to experience.

#### V. OTHER APPLICATIONS OF MORALS CLAUSES

While morals clauses predominantly arise in the context endorsement agreements and player contracts, such provisions have been applied in a variety of other arrangements. For example, corporate sponsors spent about one billion dollars collectively and averaged more than \$50 million each on the 2000 Summer Olympic Games in Sydney Australia.<sup>66</sup> Due to the alleged improprieties by the International Olympics Committee (IOC) in 1999 concerning bribery and the 2002 site, several sponsors threatened to pull future sponsorship commitments.<sup>67</sup> Only after the IOC agreed to include morals clauses in the Olympic contracts did companies such as John Hancock agree to recommit funds to the 2002 games.<sup>68</sup> The victory for sponsoring companies is noteworthy because it illustrates the growing concern for corporate reputations and

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<sup>66</sup> Gregg Krupa, *Olympic Sponsors to get Morals Clause*, BOSTON GLOBE, Apr. 20, 1999, at C1.

<sup>67</sup> *Id.*

<sup>68</sup> Dexheimer, *supra* note 49.



the expansion of a very powerful protection tool. In the future, if corporate sponsors get wind of scandal or impropriety by the IOC or any other related party, they are no longer committed to four years of a foul association.

In the wake of the introduction of morals clauses to Olympic sponsorship contracts, other sponsorship agreements may follow suit. The late 1990s and early 2000s witnessed immense corporate upheaval in corporate America. Several of the affected companies were tied to sports marketing, most notably Enron. Significant revenue producers for professional sports teams are sponsorship and naming rights agreements. In 2000, about 70 percent of the venues used by the four major leagues are corporately named, with several agreements commanding 6 to 10 million dollars annually.<sup>69</sup> When Enron Corporation, then America's seventh largest company, collapsed in late 2001, it was just two years into its \$100 million 30-year naming rights agreement with the Houston Astros. The Enron name became synonymous with disrepute and shame, leading the Astros to seek an end to the agreement. Per its contractual right, Enron refused to allow its name to be removed from the stadium, resulting in a \$2.1 million buyout by the Astros. While the Astros found a replacement namesake for their home stadium, the Enron debacle left a lasting impression on professional franchises. Had the Astros included a provision in their agreement with Enron, they could have saved not only the \$2.1 million they were forced to pay out, but also they would have had the freedom and flexibility to make their own determination of whether their naming sponsor should remain in place.<sup>70</sup> Such a luxury could save a team significant time and reputational value by allowing them to dissociate themselves from a crooked company.

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<sup>69</sup> DENNIS R. HOWARD & JOHN L. CROMPTON, FINANCING SPORT, 273-75 (2d ed. 2004).

<sup>70</sup> *Id.* at 285.

A final extension of morals clauses is already underway in the licensing industry regarding images or likenesses of celebrities. Developers of video games and other multimedia products may increasingly include strict morals clauses in their agreements with athletes and other celebrities.<sup>71</sup>

Regardless of the purpose or industry, companies who employ athletes and other celebrities are likely going to follow the endorsement industry in placing greater emphasis on morals clauses as a means of image and reputation protection.

## VI. FUTURE OF ENDORSEMENT AGREEMENTS AND CONTRACTUAL DEFENSES

As companies continue to throw millions of dollars at athletes to act as their spokespersons, they will undoubtedly move toward greater contractual protections. In their pursuit of the ideal pitch man or woman, companies (most likely their attorneys) are sure to take more than the occasional glance at such long-ignored provisions as morals clauses.

Alternatively, or in addition to contractual protections, companies may consider more creative approaches to protecting their investments. For example, some companies are more often advertising using multiple athletes in one campaign to hedge some of the individual risk as well as reach a wider audience. Nike, Campbell's Soup, Visa and RadioShack have all employed such advertising efforts. A recent Nike campaign includes LeBron James with retired legends Jerry West, Julius "Dr. J" Erving, Moses Malone and George Gervin. In December 2003, RadioShack developed an advertisement featuring the variety of Cal Ripken Jr., Howie Long, and Shaquille O'Neal, stars or former stars of the three most popular American sports.<sup>72</sup>

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<sup>71</sup> Freeman, *supra* note 28.

<sup>72</sup> Janoff, *supra* note 7.

A second approach for sports marketers is to employ either retired or deceased athletes to promote their products. In 2003, Next, a Tennessee-based company, acquired the rights to use the late Walter Payton's name, image, photograph, and signature for its new line of athletic apparel.<sup>73</sup> IBM has recently employed retired NFL stars Franco Harris, Barry Sanders and Ray Nitschke.<sup>74</sup> The advantages of such athletes are their established star power and maturity, making it unlikely a company would need to invoke its morals clause.

In the future, morals clauses may help to prevent prolonged embarrassment or obligation to maintain a valueless asset such as an immoral, unmarketable athlete. Additionally, companies may select alternate endorsers and determinations of athlete value in their sports marketing campaigns. Regardless of their choice, companies will increasingly need to be aware of the potential detriment an endorsement deal gone bad can have on a brand. As one industry executive notes, "there is a concept of innocent until proven guilty, but that's in the court of law, not in the court of endorsements."<sup>75</sup> Corporate America is now forewarned.

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Richard Alm, *Some Think Bryant Will Lose Endorsements, Regardless of Outcome*, DALLAS MORNING NEWS, July 20, 2003.