2010

The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in a New Era of Corporate Crimes and Scandals

Porcher L. Taylor III
University of Richmond, ptaylor@richmond.edu

Fernando M. Pinguelo

Timothy D. Cedrone

THE REVERSE-MORALS CLAUSE: THE UNIQUE WAY TO SAVE TALENT'S REPUTATION AND MONEY IN A NEW ERA OF CORPORATE CRIMES AND SCANDALS♦

PORCHER L. TAYLOR, III.,* FERNANDO M. PINGUELO.** & TIMOTHY D. CEDRONE***

* Porcher L. Taylor III, J.D. is an associate professor at the University of Richmond, where his primary and resident appointment is in the university's School of Continuing Studies, and his joint appointment is in the university's Robins School of Business as an associate professor of management.

** Fernando M. Pinguelo, a trial lawyer and partner of Norris McLaughlin & Marcus, chairs the firm's Entertainment Law Group. Mr. Pinguelo also co-chairs the firm's Electronic Discovery group and handles a variety of cases that implicate electronic documents and their impact on lawsuits and on businesses. He founded the award-winning *eLessons Learned* (www.eLLblog.com), a blog focused on how technology impacts the law.

*** Timothy D. Cedrone, Esq., is a judicial law clerk in the New Jersey Superior Court, Appellate Division. He is a *cum laude* graduate of Seton Hall University School of Law and a *summa cum laude* graduate of Seton Hall University. This article and the opinions expressed within are solely those of the authors. Nothing in this article represents the views of the New Jersey Superior Court or any related entity, and nothing in this article should be attributed to the New Jersey Superior Court or any related entity in any manner.

INTRODUCTION: THE HIGH VALUE OF A REVERSE-MORALS CLAUSE

A close examination of the endorsement relationship between Enron Corporation ("Enron") and the Houston Astros between 1999 and 2001 sheds light on an emerging and vital part of the entertainment contract in the twenty-first century – the reverse-morals clause. We define a reverse-morals clause[1] as a recip-

[1] In the few times that the concept of a reverse-morals clause has appeared in legal literature, we see that concept being interchangeable with the following terms, in some variation or another: reverse-morality clause, bilateral-morals clause, reverse-moral-turpitude clause, bilateral-moral-turpitude clause, ethics clause, and morals clause.

rocal contractual warranty to a traditional morals clause[2] intended to protect the reputation of talent[3] from the negative, unethical, immoral, and/or criminal behavior of the endorsee-company or purchaser of talent's endorsement. Such a clause gives talent the reciprocal right to terminate an endorsement contract based on such defined negative conduct. As an illustration, if pre-scandal[4] Tiger Woods' or New York Yankees shortstop Derek Jeter's contract with Gillette were to have a reverse-morals clause, then Woods or Jeter could sever his endorsement contract and potentially recoup money damages against Gillette if the company failed

---

[2] We define a traditional morals clause as follows:

> 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.

Fernando M. Pinguelo & Tim Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 351 (2009).

[3] The term "talent," as used in this article, refers broadly to those individuals possessing technical, creative, artistic, athletic, and/or other performance aptitudes and to those individuals who obtain superior skills through education or training and encompasses entrepreneurs, executives, and anyone else whose skills and abilities are highly valued and sought after. The term also encompasses organizations whose purpose is to exploit the skills and performance aptitudes of these individuals.

[4] We recognize that no person is immune from allegations of immoral conduct. However, prior to Thanksgiving Day 2009, Tiger Woods had been one individual whose reputation had rarely, if ever, been impeached in the court of public opinion. Lamentably, we must use this pre-scandal prefix in front of Tiger Woods' name throughout this Article because of the abrupt, unexpected, and scandalous events that exposed this acclaimed athlete to public outrage. His Thanksgiving Day 2009 suspicious car crash in front of his Florida home and alleged affairs with women have "captured headlines." Johnny Diaz, *Winning Campaign Becomes Marketing Mess for Gillette*, BOSTON GLOBE, Dec. 11, 2009, *available at* http://www.boston.com/business/articles/2009/12/11/sports_stars_antics_turn_gillettes_winning_ad_campaign_into_a_marketing_mess/. As one sports commentator sums up, "Depending on what pedestal you placed Woods, we have lost a sports icon, a role model, a bigger-than-life presence. So powerful was his reach that even something as trivial as his shirt selection for, say, the U.S. Open would be featured in the tournament merchandise tent." Gene Wojciechowski, *After Tiger, In Whom Shall We Believe?*, ESPN.com, Dec. 17, 2009, http://sports.espn.go.com/espn/commentary/news/story?page=wojciechowski/091217. Wood's recent fall has already come at a steep price in endorsement deal losses. Gillette has not aired a commercial featuring Tiger since November 29, 2009. Diaz, *supra* note 4. Global consulting firm Accenture PLC was the first major sponsor to "cut ties altogether" with Woods. Mark Williams, *Accenture Becomes First Major Sponsor to Cut All its Ties with Tiger Woods*, MERCURY NEWS, Dec. 13, 2009, *available at* http://stats.mercurynews.com/golf/story.asp?tour=EURO&i=20091213192469867813804&ref=hea&tm=&src. AT&T Inc. also severed its sponsorship relationship with Woods; and Swiss watch maker Tag Heuer "downscaled" its use of Woods' image in its advertising campaigns. Associated Press, *AT&T Cuts Connection with Woods*, ESPN.COM, Jan. 1, 2010, http://sports.espn.go.com/golf/news/story?id=4784720. Logically, it follows that Accenture and AT&T have severed their relationships with Woods pursuant to a morals clause.

to uphold its integrity as defined in the contract.[5]

In 2000, Enron, the Houston-based energy company, claimed revenues of more than $101 billion and was named "America's Most Innovative Company" by Fortune magazine for the sixth year in a row.[6] Despite its colossal size and what appeared to be extraordinary success, Enron "was not a household name,"[7] at least from a national sports perspective. Shrewdly, a year earlier, Enron had consummated a marketing and branding initiative to place that reputational zenith within its grasp. Enron pursued a Major League Baseball ("MLB") franchise and in April 1999, Enron signed a thirty-year $100 million deal for naming rights to the Houston Astros' new ballpark, to be named Enron Field. The Astros, like any talent who enters into a stadium naming-rights contract, were placing a bet in the reputation lottery that Enron's integrity would shine for the length of the contract. A year later, in 2000, the Astros played their first game in their new stadium. "Every" fan of MLB then "learned" the name "Enron."[8]

In a national headline-grabbing disintegration two years after the Enron naming-rights deal closed, Enron filed what was then the largest bankruptcy in American history.[9] Since then, the word "Enron" has been embedded in the national psyche and lexicon as being the icon of corporate avarice and the perpetuation of a Ponzi-type scheme[10] on the public. The Astros paid a steep price because of Enron's bankruptcy. The team spent the next two months trying to buy out the balance of the naming-rights contract for $2.1 million to erase Enron's name from the stadium –

---

[5] While a few sports lawyers and bloggers state that reverse-morals clauses are proliferating in endorsement contracts, we can find no publicly available examples of the names of the parties or the language in such contracts. *See* Cardozo Arts & Entertainment Law Journal Annual Spring Symposium, http://cardozoaelj.net/symposium.html (last visited Apr. 12, 2010).

[6] Ric Jensen & Bryan Butler, *Is Sport Becoming Too Commercialised? The Houston Astros Public Relations Crisis*, INT'L J. SPORTS MARKETING & SPONSORSHIP, Oct. 2007, at 23, 27.

[7] Patrick E. Longan, *Lessons from Enron: A Symposium on Corporate Governance: Introduction* 54 MERCER L. REV. 663, 663 (2003).

[8] *Id.*

[9] Jensen & Butler, *supra* note 6, at 27.

[10] The U.S. Securities and Exchange Commission defines "Ponzi schemes" as:

> an investment fraud that involves the payment of purported returns to existing investors from funds contributed by new investors. Ponzi scheme organizers often solicit new investors by promising to invest funds in opportunities claimed to generate high returns with little or no risk. In many Ponzi schemes, the fraudsters focus on attracting new money to make promised payments to earlier-stage investors and to use for personal expenses, instead of engaging in any legitimate investment activity.

Securities and Exchange Commission, Ponzi Schemes – Frequently Asked Questions, http://www.sec.gov/answers/ponzi.htm (last visited Mar. 3, 2010).

doing so just months before the season opener.[11] The team had to do this because thousands of "Astros-loving Houstonians" lost their jobs at Enron,[12] leading to a "public relations nightmare"[13] for the team. One public relations professional commented that the "mud" from Enron would stick to the Astros for at least four or five years and that the Astros would have to save themselves from the "mess they created."[14]

In their motion to compel, which was filed in federal bankruptcy court to force a recalcitrant Enron to remove its name from the stadium, the Astros used these sobering words to describe their unique reputational crisis at the time:

> Given the barrage of telephone calls and media inquiries the Astros receive each day, it is clear that the name "Enron Field" and the Enron logo displayed on the Stadium wrongly suggest to the public that the Astros are associated with the alleged bad business practices of Enron. As it stands, the Houston Astros arguably are viewed as Enron's team.[15]

Astros' President Pam Gardner stated, "The Houston Astros have been materially and adversely affected by the negative public perception and media scrutiny resulting from Enron's alleged bad business practices and bankruptcy."[16] A year after Enron filed for bankruptcy, the Astros announced that Minute Maid would become the new stadium naming sponsor. Since the value of stadium naming rights typically decreases when the rights have to be "rebranded" with a new name,[17] the Astros likely absorbed additional damages because of Enron's financial and image problems.

The Houston Astros were not alone in being damaged by the

[11] *See* Jensen & Butler, *supra* note 6, at 23. For additional information on the matter, see Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L. J. 1, 13 (2007) and Christopher Moraff, *Recession May Change Game on Pricey Stadium-Bank Deals*, PHILA. TRIB., Jan. 4, 2009, at A1.

[12] Blocher, *supra* note 11, at 13.

[13] Jensen & Butler, *supra* note 6, at 29-30 (referencing the *Houston Business Journal*'s quotation of Houston Astros officials in describing their plight with the public over the team's negative disassociation with the Enron scandal).

[14] *Id.* at 30 (quoting Mike Paul of MGP & Associates PR).

[15] Christian M. Voigt, *What's Really in the Package of a Naming Rights Deal? Service Mark Rights and the Naming Rights of Professional Sports Stadiums*, 11 INTELL. PROP. L. 327, 342 (2004) (quoting from the Houston Astros' motion filed in the Enron bankruptcy proceedings); *see also* Notice of Presentment and Hearing on Motion by Houston Astros for Order Compelling Enron Corp. to Assume or Reject License Agreement, In re Enron Corp., 2002 Extra LEXIS 46, at *18 (Bankr. S.D.N.Y. Feb. 5, 2002). Voigt translates this bankruptcy motion language into meaning that the public perceived Enron as being "responsible" for the Astros "performance." Voigt, *supra*, at 342.

[16] Jensen & Butler, *supra* note 6.

[17] *Id.* at 27 (quoting a sports marketing professional from an article by Marie Leone, *Baseball, Apple Pie and Corporate Scandals*, CFO MAGAZINE, Oct. 20, 2002, *available at* http://www.cfo.com/article.cfm/3006938/c_9746131).

bankruptcies of corporate stadia-naming sponsors. The San Francisco Giants baseball team also did not want its fans to think that it supported Enron and therefore asked the bankruptcy court to enjoin Enron to remove its logo from the scoreboard at the Giants' home stadium.[18] And, in less scandalous cases, where companies that bought the rights for the stadia of the Baltimore Ravens (PSI Net), St. Louis Rams (Trans-World Airlines), St. Louis Blues (Savvis), and Carolina Panthers (National Car Rental) went bankrupt or out of business, the teams were compelled to buy back the naming rights, which can be costly, as reflected in the Baltimore Ravens having to pay $5.9 million to the bankrupt PSI Net in 2002.[19]

Tainted sponsors extend beyond the realm of bankruptcy. Recently the New York Jets and New York Giants broke off talks with the German insurance company Allianz after the news media exposed the "company's ties to the Nazis" during World War II, just as the firm was poised to pay $25 to $30 million a year to have its name on the new Meadowlands Stadium.[20] In 2005, Seton Hall University removed the name of former Tyco CEO L. Dennis Kozlowski from an academic building that had borne his name for eight years because the CEO had committed an Enron-stature crime.[21]

The foregoing episodes raise the need for talent to consider and/or seek and obtain reverse morality protections from corporate sponsors and to negotiate such reputation and financial protection into endorsement contracts.[22] In a world that continues to

[18] Jensen & Butler, *supra* note 6, at 29.

[19] The deal with PSINet called for the Ravens to receive $105 million over twenty years. Kevin Cowherd, *Farewell, PSINet Stadium – But What Name Is Next?*, BALT. SUN, Jan. 28, 2002, at 1D, *available at* http://articles.baltimoresun.com/2002-01-28/features/0201280041_1_stadium-purple-nest-i-have-heard.

[20] Moraff, *supra* note 11, at A1; Richard Sandomir, *What's in a Naming Right? Certainly Not Cash*, N.Y. TIMES, Jan. 6, 2010, at B13. The naming-rights deal was expected to be one of the largest, if not the largest, naming-rights deal in the country. *Id.* These ties included Allianz insuring various Nazi concentration camps, including Auschwitz.

[21] *College Strips Off Kozlowski Name*, CNNMoney.com, Aug. 18, 2005, http://money.cnn.com/2005/08/18/news/newsmakers/kozlowski_seton/index.htm. Kozlowski was found guilty of stealing hundreds of millions of dollars from Tyco.

[22] Most strikingly, the Houston Astros had to endure litigating a *de facto* morality issue in bankruptcy court against a corrupt company. One legal commentator submits that the Houston Astros would have saved themselves not only $2.1 million in payout money, but also would have had the contracting leverage to terminate the contract had the Astros simply required Enron to submit to a morals clause. *See* Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 16 (2005) (advocating that such a morals clause would be "a luxury" that could "save a team significant time and reputational value by allowing them to dissociate themselves from a crooked company"). Equally cogent, Auerbach, citing the introduction of morals clauses to Olympic sponsorship contracts, predicts that naming-rights agreements might become ripe terrain for morals clauses. *Id.* at 15-16. In the context of the Houston Astros being "Enron-ed," one sports management-media commentator recommends that professional teams incorporate "ethics clauses into naming rights agreements associated

expose Ponzi schemes and other corporate crimes and scandals, there is an even more persuasive post-Enron[23] reason for reverse-morals clauses to become a standard provision in talent endorsement contracts. Once a public linkage has been established between talent and a corporate brand, negative information about either could result in a "damaged consumer evaluation of both entities."[24]

This Article sails into the largely unchartered waters of reverse-morals clauses because, to our knowledge, there are no law review or law journal articles that substantially address this still nascent area of law.[25] Similarly, our research has not revealed any

with the corporate branding of stadiums, uniforms, merchandise, and a wide array of paraphernalia" in anticipation of naming rights sponsors falling into disrepute. Ric Jensen, *Essay: Public Relations Lessons from How the Houston Astros got "En-roned,"* 2 J. SPORTS MEDIA 104, 107-08 (2007); *see also* Jensen & Butler, *supra* note 6, at 23, 27, 31 (arguing that sports franchises might want to have a morals-type escape clause to terminate a stadium naming-rights deal if another Enron occurs, and to be prepared for contingency planning if a disaster like Enron erupts).

[23] Former Secretary of Labor Robert Reich described the financial services industry's decade-long, pre- and post-Enron malaise that eroded public trust as follows:

> Over the past decade, several U.S. corporations came to symbolize betrayals of public trust-Enron, Adelphia, Global Crossing, Tyco, HealthSouth, Sunbeam, WorldCom, Waste Management, and ImClone, to name a few. *Every* major U.S. accounting firm either admitted negligence or paid substantial fines without admitting guilt. Nearly every major investment bank played a part in defrauding investors, largely by urging them to buy stocks that the banks' own analysts privately described as *junk.*

Robert B. Reich, *Government in Your Business*, HARV. BUS. REV., Aug. 2009, at 94, 96 (emphasis added).

[24] *See* Darin W. White et al., *The Effects of Negative Information Transference in the Celebrity Endorsement Relationship*, 37 INT'L J. RETAIL & DISTRIBUTION MGMT 322, 323 (2009). This source is the seminal empirical study that examined the impact of negative information about the brand on the celebrity endorser. *Id.* at 324.

[25] Only one law journal article devotes a paragraph to the basic concept of a *reverse-morals clause*, although not naming that concept as a "reverse-morals clause" *per se*. *See* Daniel Auerbach, *supra* note 22, at 16. Similarly, only three law journal articles, including the foregoing one by Auerbach, comprehensively address *traditional* morals clauses. *See also* Pinguelo & Cedrone, *supra* note 2, at 347; Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J. L. & ARTS, 235, 236 (2005). Kressler notes that "there is no substantive scholarly research" on the subject of morals clauses and "only a few cases interpreting" that type of contract provision. *Id.* The most comprehensive and explicit coverage of the "reverse-morals clause" is found in a piece in a British legal newsletter. *See* Christopher R. Chase, *Morality, Reverse Morality and Sir Allen Stanford*, 7 WORLD SPORTS L. REP. (Mar. 2009) (analyzing the distinguishable purposes of a morality and reverse-morality clause in the context of the alleged massive fraud committed by Sir Allen Stanford, the sponsor of several matches of the English Cricket Board), *available at* http://www.simkins.co.uk/articles/azbStanford.aspx. This piece is posted on the website of the law firm of Michael Simkins LLP Solicitors. Only a handful of law blogs and law firm web site-type pieces even address the reverse-morals clause, and that coverage is very brief. *See, e.g.*, Christopher R. Chase, *A Moral Dilemma: Morals Clauses in Endorsement Agreements*, Mondaq.com, May 21, 2009, http://www.mondaq.com/article.asp?articleid=79346; Brian R. Socolow & Jill Westmoreland, *What Every Player Should Know About Morals Clauses*, 4 MOVES MAG., AUG. 2008, *available at* http://www.loeb.com/files/Publication/0953bcf8-0747-44dc-ab71-70e670d6285d/Presentation/PublicationAttachment/70f8fe3f-a00e-4882-83da-0096ecbab624/Brian%20Socolow,%20Moves%20Magazine.pdf (devoting one short paragraph to reverse-morals clauses and noting that Enron was the genesis of these clauses);

state or federal cases involving reverse-morals clauses.[26] Nor has an actual talent contract containing such a clause been publicly revealed, either in terms of language or the identification of the parties to such a clause,[27] although reportedly "an increasingly larger number" of talent are now asking for reverse-morals clauses in the wake of the Enron fallout and other high-profile corporate wrongdoings that have left talent "in some cases receiving as much negative press as the companies themselves."[28] These issues merit our attention because the morals clause and the "cutting-edge" reverse-morals clause are fast becoming "the most heavily negotiated aspect of any sports or entertainment contract."[29] Although, paradoxically, there is little information on reverse-morals clauses themselves, "there is no single subject (i.e., the morals clause and reverse-morals clause) of greater import for the sports lawyer or agent in today's brightly lit sports environment."[30] This Article closes that gap in the legal literature.

Foley & Lardner LLP, *Reverse Morality: Learn Insights on One Item that Properties Should Include in Every Sponsorship Contract*, A Q&A with Kirk Sullivan in The Migala Report, Oct. 1, 2004, http://www.foley.com/news/news_detail.aspx?newsid=994 [hereinafter Q&A with Kirk Sullivan] (a short interview with a law firm senior counsel about reverse-morality clauses). As far as law school symposia giving prominent coverage to the reverse-morals clause, apparently two law schools have done so. In March 2010, the Cardozo Arts & Entertainment Law Journal held its Annual Spring Symposium, titled, "The Tiger Woods Effect: The Uncertain and Turbulent Future of Endorsement Deals, Morals Clauses and Reverse Morals Clauses? Cardozo Arts & Entertainment Law Journal Annual Spring Symposium, http://cardozoaelj.net/symposium.html (last visited Apr. 12, 2010). In March 2008, the Second Annual National Sports and Entertainment Law Symposium was held at the University of Virginia School of Law. Breakout Session III was titled "Morals Clauses in Sports Contracts–A 2008 Primer," which solely covered both morals clauses and reverse-morals clauses. Significantly, Associate Professor of Law Michael McCann, "a leading expert in the United States," was the moderator of this breakout session, which had four panelists. For two brief comments about reverse-morals type clauses in the sports marketing literature, see Jensen & Butler, *supra* note 6 at 27,31.

[26] One case of note is Arbor Leasing LLC v. BTMU Capital Corp., 68 A.D.3d 580 (N.Y. App. Div., 1st Dep't 2009), in which the New York Supreme Court, Appellate Division, reversed the lower court's grant of summary judgment. The lower court had found that the defendant wrongfully terminated the consulting agreement between the parties pursuant to the morals clause in the contract. This case is interesting in that it is one example, if not the only example, of a morals clause dispute between two companies (as opposed to a company and an individual) being litigated to the point of resulting in a published court opinion.

[27] A leading authority and scholar in sports law, Associate Professor of Law Michael McCann of Vermont School of Law, opined in 2005 that no athlete had invoked a reverse-morals clause yet, but it was "bound to happen." Robb London, *The Natural: For Peter Carfagna '79, Negotiation is a Professional Sport—and He's Been in the Zone*, HARV. L. BULL., Fall 2005, *available at* http://www.law.harvard.edu/news/bulletin/2005/fall/feature_4.php.

[28] *See* Q&A with Kirk Sullivan, *supra* note 25.

[29] These quotes are from the brochure of the Second Annual National Sports and Entertainment Law Symposium held at the University of Virginia School of Law in March 2008. The quotes describe Breakout Session III, which was titled "Morals Clauses in Sports Contracts–A 2008 Primer," which solely covered both morals clauses and reverse-morals clauses. Sports Law Blog, http://sports-law.blogspot.com/2008/02/second-annual-national-sports-and.html (Feb. 28, 2008, 16:22 EST).

[30] *Id.*

The Article begins in Part I with an examination of how the traditional morals clause[31] begat the reverse-morals clause. We briefly trace the history of morals clauses and how they evolved into the first reverse-morals clause in 1968 with Hollywood celebrity Pat Boone. Next, in Part II the Article analyzes the heightened need for talent brand protection in perilous and uncertain economic times and explores the likelihood that the "Great Recession of 2008-2009"[32] and beyond will bring additional damage to talent reputation in endorsement deals. Indeed, talent has good reason to fear that a future Enron or Bear Stearns [33] might be lurking across the endorsement negotiation table.

Offering a due diligence checklist for talent in prudently vetting endorsement deals with companies, Part III raises a few red flags. Special attention is given to the dubious reputation red flags that celebrity golfer Vijay Singh faced in his recent endorsement

---

[31] The need to address talent's off-the-field conduct with traditional morals clauses has become most acute in the NFL in recent years. *See* Porcher L. Taylor III & David R. Maraghy, *Pro Teams Should Reward Good Off-Field Behavior*, 25 ENT. & SPORTS LAWYER 15(2007) (finding that off-the-field behavior is a "core subset of a team's brand equity," as the NFL has been "overrun" with the arrests of some fifty players between 2006-2007); *see also* Hannah Karp, *Why the NFL Spies on its Players*, WALL ST. J., Nov. 7, 2008, at W1 (noting that at least 57 NFL players had been arrested in the first ten months of 2008 and that about 10% of the league's players on the 2008 rosters had been arrested during their playing careers); Editorial, *The NFL's Bad Actors*, USA TODAY, Aug. 18, 2009, at 6A ("In Cincinnati, the hapless, halfway-house Bengals—nine players were arrested in 17 months in 2006 and 2007—rehired receiver Chris Henry last year despite five arrests."). In the sports world, as in other areas of contract law, a morals clause does not necessarily terminate the talent relationship, as sometimes these clauses "trigger a new round of negotiations." The "decisive factor" may be whether the athlete is "hot right now" in terms of on-the-field performance. London, *supra* note 27 (citing Peter Carfagna, a top sports lawyer).

[32] Prominent academic economist Nouriel Roubini at New York University Stern School of Business uses this term to reflect the gravity and pervasiveness of the current recession in his *New York Times* op-ed. Nouriel Roubini, Op-Ed., *Does Bernanke Deserve Another Term?: The Great Preventer*, N.Y. TIMES, July 26, 2009, at A12, *available at* http://www.nytimes.com/2009/07/26/opinion/26roubini.html. We likewise use this term throughout this Article to describe the current recession with the short-hand term "Recession," or recession with a capital "R." Prominent law and economics scholar and jurist Richard A. Posner hails economist Roubini as being "the most emphatic of the Cassandras" who foresaw the coming of the Recession. RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION, 252 (2009). In memorable prose in the preface of his book, Posner attacks any euphemistic descriptions of this current Recession when he states,

> The world's banking system collapsed last fall [2008], was placed on life support at a cost of some trillions of dollars, and remains comatose. We may be too close to the event to grasp its enormity. A vocabulary rich only in euphemisms calls what has happened to the economy a 'recession.' We are well beyond that. We are in the midst of the biggest economic crisis since the Great Depression of the 1930s.

Id. at vii.

[33] Bear Sterns was arguably "ground zero" for the Great Recession of 2008-2009. In spring 2008, Bear Stearns was America's fifth largest investment bank and the biggest underwriter and trader of risky mortgage-backed bonds. When Bear Stearns imploded in 2008, few could suspect that a "cascading collapse across the entire financial firmament" was soon to follow. POSNER, *supra* note 32, at 252.

deal with Stanford Financial Group and its CEO, Sir Allen Stanford. Examination will also include some intriguing corporate reputation research on whether illegal corporate behavior can actually be predicted in the context of due diligence. Part IV investigates what talent needs to know about reverse-morals clauses – from talent's standing to demand such a clause, to innovative negotiation, draftsmanship, and enforcement tips. These negotiation and draftsmanship suggestions seek to build "equal protection"[34] into the endorsement contract. In creative fashion, Part IV predicts the likely impact Twitter[35] and other similar real-time disseminators of "news" will have on reverse-morals clauses.[36] We examine how Twitter might impact the negotiation of future traditional morals clauses and reverse-morals clauses.

Part V concludes the article, bringing the reader full circle and re-emphasizing the relevance of reverse-morals clauses in today's universe of endorsement contracts and talent agreements. While the reverse-morals clause may seem a bit obscure today, including one in talent agreements may quickly become the prudent course of action for those seeking to secure protection against corporate crimes and misdeeds. Thus, the importance of the clauses should not be underestimated, and it is against this backdrop that we begin our analysis into the origins and characteristics of the reverse-morals clause.

---

[34] One lawyer uses the term the "equal protection" power to cancel the endorsement contract in the context of drafting a reverse-morals clause. *See* Q&A with Kirk Sullivan, *supra* note 25.

[35] Twitter is described as:

> [A] privately funded startup with offices in the SoMA neighborhood of San Francisco, CA. Started as a side project in March of 2006, Twitter has grown into a real-time short messaging service that works over multiple networks and devices. In countries all around the world, people follow the sources most relevant to them and access information via Twitter as it happens—from breaking world news to updates from friends.

Facebook Twitter Description, http://www.facebook.com/group.php?gid=52724239580 (last visited Mar. 13, 2010).

[36] Twitter has rapidly evolved into an uncensored, self-promotion tool for talent to speak directly to talent's fan base and for businesses to speak directly to their customers and consumers. As a result, a minefield of communication errors, retractions, and embarrassments could await both talent and businesses in "Twitter Land."

I. HOW THE TRADITIONAL MORALS CLAUSE BEGAT THE REVERSE-MORALS CLAUSE

A. *The Origins of the Traditional Morals Clause: From Babe Ruth and Hollywood Scandal-Plagued Stars in the 1920s to Athletes and Entertainers in the Twenty-First Century*

Traditional morals clauses in contracts first began appearing during the first part of the twentieth century. During the 1920s, employers began responding to the widespread increase in the amount of attention paid by the press to the motion picture and sports industries – and the scandals of the stars of those industries.[37] More specifically, employers of entertainers and athletes began incorporating morals clauses in employment agreements. The two most prominent examples of this change in these industries are those of George Herman "Babe" Ruth and Roscoe "Fatty" Arbuckle.

Babe Ruth is widely regarded as one of the best players to have ever graceed a MLB field.[38] Ruth's reputation on the field, however, may have only been matched by his reputation off the field.[39] Indeed, Ruth has been described as a glutton, womanizer, spendthrift, heavy drinker, and smoker.[40] Ruth also regularly collected speeding tickets, broke team curfews, and engaged in fist fights with umpires, fans, and teammates.[41] Apparently recognizing the problems that Ruth's off-the-field behavior could cause for a baseball team in an age of increased media coverage, the New York Yankees introduced a clause similar to a morals clause into Ruth's playing contract in 1922.[42] Ruth's clause with the Yankees required him to abstain from drinking alcohol and to be in his bed by 1:00 a.m. during the baseball season.[43] Despite the presence of this provision in Ruth's contract, neither the Yankees nor Ruth apparently followed it seriously.[44] Although this clause in Ruth's contract was not a morals clause in the sense that it did not explicitly allow the team to terminate his playing contract based on "immoral" conduct, it serves as an early progenitor of the more

---

[37] Pinguelo & Cedrone, supra note 2.

[38] *See* Larry Schwartz, *Lovable Ruth Was Everyone's Babe*, ESPN.com, http://espn.go.com/sportscentury/features/00016451.html (last visited Mar. 3, 2010).

[39] *Id.* (stating that Ruth "possessed an insatiable appetite for life").

[40] Robert M. Jarvis, *Babe Ruth as Legal Hero*, 22 FLA. ST. U. L. REV. 885, 886 n.6 (1995).

[41] *Id.* Ruth's collection of speeding tickets is particularly notable considering the timeframe.

[42] *Id.*

[43] *Id.* (citing LAWRENCE S. RITTER & MARK RUCKER, THE BABE: A LIFE IN PICTURES 1-5 (1988)).

[44] *Id.*

traditional morals clause. That is, it was a clause that allowed the Yankees to take legal action against Ruth if he engaged in certain proscribed conduct. Such is the essence of morals clauses today.

A year before the Yankees and Ruth placed this quasi-morals clause in Ruth's playing contract, Universal Studios instituted a new policy whereby all actors and actresses employed by Universal Studios would be bound by a morals clause in their contracts.[45] Universal Studios began including a morals clause in its employment contracts because of a scandal involving one of the most celebrated and beloved comedians in America at the time, Roscoe "Fatty" Arbuckle.[46]

In 1921, Paramount Pictures signed comedian Roscoe "Fatty" Arbuckle to a three-year, $3 million contract.[47] 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.[48] After the guest's death a few days later, Arbuckle was arrested on charges of rape and murder.[49] Arbuckle's arrest turned public opinion against him and the motion picture industry in general.[50] After observing the impact that Arbuckle's actions had on its competitor, Universal Studios preemptively instituted the aforementioned new policy of including morals clauses in contracts.[51] In fact, the attorneys for Universal Studios at the time issued a pointed 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."[52] Despite having little to do with the Arbuckle case, or apparently having any clients with similar issues at that time, Universal Studios nonetheless saw a need to include the clauses in its talent contracts to "re-

---

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

[46] Dave Kehr, *FILM; It's Not Over for the Fat Man*, N.Y. TIMES, Apr. 16, 2006, at 2(11), *available at* http://query.nytimes.com/gst/fullpage.html?res=9804EEDF1F30F935A25757C0A9609C8B63.

[47] Kressler, *supra* note 25, at 236 (citing ROBERT H. STANLEY, THE CELLULOID EMPIRE: A HISTORY OF THE AMERICAN MOVIE INDUSTRY 180 (1978)).

[48] *Id.* (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 56 (Adrienne L. McClean & David A. Cook eds., 2001). The guest, twenty-eight year old actress Virginia Rappé, died a few days later of peritonitis. Kehr, *supra* note 46.

[49] Kehr, *supra* note 46. Arbuckle was eventually cleared of all the charges. *Id.*

[50] Kressler, *supra* note 25, at 236 (citing STANLEY, *supra* note 47, at 180, and Stoloff, *supra* note 48, at 56).

[51] *See Morality Clause for Films*, *supra* note 45, at 8.

[52] *Id.*

assure the public" and "protect the company in an investment . . . ."[53] As seen in the cases of Babe Ruth and Fatty Arbuckle, morals clauses in employment contracts originated in the 1920s as a direct consequence of the immoral actions of certain popular individuals.

The next step in the evolution of morals clauses occurred during the McCarthy Era of the 1940s and 1950s. During that period, morals clauses were often used to censor political conduct and expression rather than challenge immoral conduct.[54] 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, D.C.[55] The forty-three subpoenas yielded ten witnesses in October 1947, when HUAC heard testimony from certain individuals deemed "unfriendly" by HUAC.[56] These ten witnesses soon came to be known as the "Hollywood Ten."[57] Widespread publicity followed the hearings, and the House of Representatives cited the Hollywood Ten for contempt of Congress in November 1947 based on their refusal to answer HUAC's questions.[58] Thereafter, the studios invoked the morals clauses in the individuals' contracts to terminate their relationships with the Hollywood Ten based on their alleged communist leanings.[59] (Incidentally, three members of the Hollywood Ten responded by filing lawsuits against the studios.)[60]

In the decades following the 1950s, the use of morals clauses swung away from attacking political ideologies and towards curb-

---

[53] *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.

[54] Auerbach, *supra* note 22, 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).

[55] Kressler, *supra* note 25, at 238 (citing STANLEY, *supra* note 47, at 128-31).

[56] *Id.* (citing STANLEY, *supra* note 47, at 130-31).

[57] *Id.*

[58] *Id.* (citing STANLEY, *supra* note 47, at 132).

[59] *Id.*

[60] *See* 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).

ing immoral behavior and protecting a company's image.[61] Since the 1980s, morals clauses have become increasingly common.[62] A 1997 survey conducted by Sports Media Challenge found that less than half of all endorsement contracts included morals clauses.[63] By 2003, this number had risen to at least seventy-five percent.[64] As of 2009, the collective bargaining agreements in the National Football League,[65] National Basketball Association,[66] National Hockey League,[67] and Major League Baseball[68] each contained a uniform player agreement that included a morals clause. In recent years, morals clauses have been employed against Michael Vick,[69] Kobe Bryant,[70] Kate Moss,[71] Rebekah Chantay Revels (Miss North Carolina 2002),[72] Latrell Sprewell,[73] Adam "Pacman" Jones,[74]

---

[61] Auerbach, *supra* note 22, at 3-4.
[62] *Id.*
[63] *Id.* at 4 (citing Eric Fisher, *Sosa Flap to Change Endorsement Deals*, WASH. TIMES, June 8, 2003, at C03).
[64] *Id.* (citing Fisher, *supra* note 63, at C03).
[65] Under the NFL Player Contract, § 11, 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 . . . ." NATIONAL FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT, 252 (Mar. 8, 2006), *available at* http://images.nflplayers.com/mediaResources/files/PDFs/General/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf.
[66] Under the NBA's Uniform Player Contract, § 16, a basketball team may terminate a player contract

> if the Player shall:
> (i) at any time, fail, refuse, or neglect to conform his personal conduct to standards of good citizenship, good moral character (defined here to mean not engaging in acts of moral turpitude, whether or not such acts would constitute a crime), and good sportsmanship . . . .

National Basketball Association Collective Bargaining Agreement, National Basketball Players Association Web Site, at 183, http://www.nbpa.org/cba/2005.
[67] 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." National Hockey League Collective Bargaining Agreement, National Hockey League Web Site, at 245, http://www.nhl.com/cba/2005-CBA.pdf.
[68] Under the Major League Baseball Uniform Player's Contract, § 7(b), a baseball club "may terminate [a player contract] . . . if the Player shall: at any time (1) fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship . . . ." *Id.* Major League Baseball Collective Bargaining Agreement, Major League Baseball Players Association Web Site, at 217, http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf.
[69] Socolow & Westmoreland, *supra* note 25, at 187.
[70] *Id.*
[71] *Kate Moss: Sorry I Let People Down*, CNN.com, Sept. 22, 2005, http://www.cnn.com/2005/WORLD/europe/09/22/kate.moss/index.html.
[72] Revels v. Miss N.C. Pageant Org., Inc., 627 S.E.2d 280 (N.C. Ct. App. 2006).
[73] Auerbach, *supra* note 22, at 11 (citing Darren Rovell, *No Ringing Endorsement from Corporate Sponsors*, ESPN.com, Aug. 21, 2003, http://espn.go.com/sportsbusiness/s/2003/0718/1582783.html).
[74] Liz Mullen, *Only in Rare Cases Do Misdeeds Cost Athletes*, STREET AND SMITH'S SPORTS BUS. J., Sept. 17, 2007, *available at* http://www.sportsbusinessjournal.com/article/56411. Jones

and many others. On the whole, traditional morals clauses have now become the norm in all types of talent agreements in the entertainment and sports industries.[75]

B. *The Tipping Point: 1968 – The Birth of the Reverse-Morals Clause*

Morals reciprocity was born in 1968 when celebrity singer and actor Pat Boone's thirteen-year contract with Dot Records expired. Boone, a "genial southerner," was second only to Elvis Presley during the 1950s in rock music popularity and obtained the respected lifestyle-status of "the good Elvis."[76] Dozens of Boone's songs were "hits."[77] At the age of twenty-three, Boone had cut a dozen single records, sold more than thirteen million copies, and signed a $3 million, five-year contract for a weekly TV show, The Pat Boone Chevy Showroom.[78] In a 1957 cover photo story in Newsweek about the singer, the magazine noted Boone's faithful membership in the Church of Christ, where he hewed to "church rules" prohibiting smoking and drinking, even though this spiritual allegiance cost him sponsorship by alcohol and tobacco companies.[79]

Pat Boone's high-profile righteous image and family life paved the way for him to publish a best-selling teenage advice book, followed by a sequel on romance advice. In an ironic twist, Boone's own marriage fell into problems.[80] In his 1970 autobiography, he revealed the hypocrisy in his life when he had, contrary to his religion, gradually acquired the habits of drinking, smoking, dancing, and later, gambling, even though his wife had given up these first three vices at his insistence. Sometime thereafter, Boone, "in an emotional confession" before a church congregation, embarked upon a "born-again" Christian path, and his wife was soon to follow him down that path.[81]

In 1968, Boone faced a "disastrous" financial crisis with his partnership purchase of a professional basketball team.[82] At the time, he also struggled with the direction in which his career was headed. While he was content to let his multi-year contract with Dot Records expire, Boone grappled in his conscience with whether he should instead sign a deal with the record label of co-

was the first athlete against whom apparel company Reebok employed a morals clause to terminate an endorsement contract. *Id.*

[75] *See* Pinguelo & Cedrone, *supra* note 2.

[76] Joseph Reiner, *Pat Boone – Contemporary Musicians*, ENCYCLOPEDIA.COM, 1995, http://www.encyclopedia.com/doc/1G2-3493100014.html.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* Later in the 1970s, Boone, often with his family, recorded gospel albums. *Id.*

[82] *Id.*

median and television star Bill Cosby, who at the time was a significant entertainment industry figure.[83] The following captures the end result of Boone's moral and spiritual crisis:

> [A]t the last minute Boone considered reneging, upset over cover art for the [Bill Cosby] label's other new release: nude pictures of John Lennon and Yoko Ono on the Two Virgins album. After much prayer, Boone, ready to opt out of the deal, met with label executives. They were sympathetic to his religious concerns and agreed to a "reverse morals clause"—Boone's contract would lapse if the record company, not the performer, did something unseemly. Finally, it was agreed that no formal contract would be drawn up. This was fortunate for Boone, as a few months later the label went bust following [Bill] Cosby's departure.[84]

Most significantly, Pat Boone's successful negotiation of an oral agreement for a reverse-morals clause in 1968 is the first reference that we can find to such a clause in any talent agreement.[85] In Boone's case, his novel advocacy of a reverse-morals clause was most likely achievable due to his iconic stature in the entertainment world and his integrity aura in arguably a more conservative era in American history. There was urgency for Boone's entreaty for a reverse-morals clause because the nude photos on the record jacket offended one of his core religious beliefs. The record company had little choice but to acquiesce to Boone's demand for reverse reputation insurance. Presumably, the record company realized that with Boone there would be no compromise on his faith – Boone's faith was deemed non-negotiable.

C. *Corporations Behaving Badly: The Integrity Recession of 2008-2009*

Unsurprisingly, a few legal commentators, mostly in the form of law firm website articles and blogs, submit that the genesis of the reverse-morals clause was the Enron catastrophe.[86] Undoubtedly, the highly-publicized saga of how the Houston Astros got entangled in the Enron mess is the likely source for this school of thought.[87] In stark contrast to its façade of standing firmly on the

[83] *Id.*
[84] *Id.* (emphasis added).
[85] Notably, the quoted encyclopedic reference to the term "reverse morals clause," *supra* note 76, is dated 1995. Presumably, therefore, one can only speculate as to what the parties to Pat Boone's oral agreement in 1968 called that provision in the talent contract, if anything.
[86] *See, e.g.*, Q&A with Kirk Sullivan, *supra* note 25; Chase, *supra* note 25.
[87] These legal commentators do not refer to the Houston Astros episode as being the catalyzing event for the need for reverse-morals clauses. Instead, the commentators just generically refer to the fallout from Enron. The Introduction of this Article specifically ana-

high road of integrity, Enron abruptly and dramatically transformed from poster child to a "bankrupt enterprise" in less than three months in 2001.[88] The need for a reverse-morals clause became something beyond Pat Boone's isolated demand for it in 1968.

By early 2008, the legacy of Enron and its progeny seemed to become dimmer in corporate America's rear-view mirror as corporate crimes and scandals had seemed to be on hiatus. Only a few prescient finance experts and economists were concerned that something more pervasive than Enron was on the corporate reputation horizon – the Wall Street shake-up and the Great Recession of 2008-2009. The post-Enron era was now calling for more pervasive talent reputation insurance, in the form of a reverse-morals clause. Given these considerations, it is imperative to examine several common occurrences of which talent should be aware.

1. Talent: Beware of Corporate Bankruptcy as a Reputation Red Flag

The Great Recession has triggered a flood of business bankruptcies, and many more are expected.[89] Some of these bankruptcies have become a lightning rod in the public limelight.[90] Talent should prudently recognize that bankruptcy is a reverse-morality warning sign and codify such a trigger in the reverse-morals clause, which this Article takes up in Part IV, the draftsmanship section.

2. Talent: Beware of Exorbitant Executive Bonuses

While Wall Street has gained notoriety for paying significant annual bonuses to its top-performing executives and traders, the unique saga of the bonuses paid at American Insurance Group ("AIG") played out before an irate nation wrapped in the throes of

---

lyzes the Astros-Enron encounter as the epicenter for the need to reboot the concept of a reverse-morals clause after celebrity singer Pat Boone first introduced that contract provision in 1968. *See supra* Part I.B.

88 *Id.* For an authoritative and penetrating analysis of why public companies "falsely portray" themselves to the capital markets in SEC filings and through other publicity efforts, see Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms)*, 146 U. PA. L. REV. 101 (1997).

89 On a year-to-year basis, business bankruptcies rocketed up twenty-four percent in October 2009 compared with the same month in 2008. Eric Morath, *Business Bankruptcy Filings Increased 7% in October*, WALL ST. J., Nov. 3, 2009, at B4, *available at* http://online.wsj.com/article/SB10001424052748703932904574511733633191024.html. One likely cause for this increase is that "[t]he margin for success is so thin that any financial hiccup could cause a business to file for bankruptcy . . . ." *Id.* (quotations omitted).

90 *See* Peter J. Wallison, Letter to the Editor, *Too Big to Fail, or Succeed*, WALL ST. J., June 18, 2009, at A17.

the Great Recession of 2008-2009.[91] AIG, the world's largest insurer, had a financial products division that was a veritable "giant hedge fund," making "outsized bets" on risky derivatives.[92] Presciently, legendary investor Warren Buffett had warned that derivatives were "financial weapons of mass destruction."[93] As a result of its risky bets on derivatives, AIG was forced to become a major recipient of federal bailout money.[94]

Against this backdrop, AIG still distributed $165 million in long-planned retention bonuses to executives of its derivatives unit.[95] Striking a major blow to Wall Street's bonus-centric compensation system, Congress swiftly intervened with "punitive tax" legislation solely targeting those AIG executives as well as the tens of thousands of employees at the nation's nine largest institutions that had received at least $5 billion in assistance under Congress' $700 billion rescue package.[96] The legislation provided that those executives who received bonuses of more than $125,000 would "surrender" ninety percent of their payments to a special income tax.[97]

For reverse-morals clause purposes, "exorbitant" executive compensation will most likely continue to be a lightning rod of public and regulatory rancor for companies in the U.S., even in the eventual post-Recession era. By some accounts, the harm done by financial services firms' pay practices could "plague" pub-

---

[91] The scandal "angered the country." Brady Dennis, *AIG Employees to Repay $50 Million in Bonuses*, WASH. POST, Mar. 24, 2009, at D1. In all fairness to Wall Street, "virtually all Wall Street employees receive bonuses," which in many cases make up the majority of compensation. Shahagh Murray et al., *Congress Moves to Slap Heavy Tax on Bonuses: 90% Levy for Biggest Payouts at Bailed-Out Firms*, WASH. POST, March 20, 2009, at A1.

[92] *See* BARRY RITHOLTZ, BAILOUT NATION: HOW GREED AND EASY MONEY CORRUPTED WALL STREET AND SHOOK THE WORLD ECONOMY 204-05 (2009).

[93] Editorial, *If It's Too Big to Fail, It Deserves to be Regulated: Our View: Treasury Plan Marks Logical Starting Point for Curbing Excesses*, USA TODAY, Mar. 27, 2009, at 6A.

[94] See Murray, *supra* note 91.

[95] *Id.*

[96] *Id.*

[97] *Id.* Even President Obama felt obliged to weigh in on the controversy, stating that the legislation "'rightly reflects the outrage that so many feel over the lavish bonuses that AIG provided its employees at the expense of the taxpayers who have kept this failed company afloat.'" *Id.* A co-sponsor of the "even tougher" Senate version of the bill declared that "[bailed out companies like AIG] have to engage in more financially prudent behavior" and that the Senate bill constituted a "dramatic" move toward "dismantling" Wall Street's bonus system that had made banking and investment such highly profitable professions. *Id. See also* Dennis, *supra* note 91. The AIG scandal prompted employee security concerns due to growing public ire. AIG's CEO, in testimony before Congress about the bonuses, alerted Congress to the fact that the company had received "threats," and New York Attorney General Andrew M. Cuomo, who subpoenaed AIG to identify by name the employees who had received the bonuses, acknowledged that AIG had these 'security concerns.' Murray, *supra* note 91. Rancor against the financial services industry extended well beyond bonuses. Northern Trust was "sharply criticized" for sponsoring a golf tournament with "lavish side events." Tomoeh M. Tse, *Bailed-Out Firms Post Expense Rules; $4 In-Flight Movie? You're on Your Own*, WASH. POST, Sept. 12, 2009, at A12.

licly-held companies for "months and years ahead."[98] Given this on-going public and governmental scrutiny of executive pay, talent should consider negotiating such a scandal trigger into a reverse-morals clause. This Article takes up that question and analysis directly in Part III, the draftsmanship section.

3. Talent: Beware of a Recession Exposing a Spate of Ponzi Schemes

In describing a natural benefit of recessions, the economist John Kenneth Galbraith once remarked that "[r]ecessions catch what the auditors miss."[99] Enter Ponzi schemes where initial investors are paid off with the influx of money from new investors.[100] Talent should not idly think that he or she could not fall prey to such an insidious scheme. Likewise, one can consider that the business-sophisticated likes of former Philadelphia Eagles owner Norman Braman and current New York Mets owner Fred Wilpon, both of whom were duped into a Ponzi scheme engineered by an affable Wall Street icon by the name of Bernie Madoff. Braman and Wilpon were part of a veritable who's who list of business and charitable victims who got sucked into the vortex of Madoff's scheme which was exposed in 2008. Others include the foundation of Nobel laureate and Holocaust survivor Elie Wiesel, GMAC chairman J. Ezra Merkin, Yeshiva University, and North Shore-Long Island Jewish Health System, along with numerous banks, hedge funds, and other investment groups.[101]

The "onetime Wall Street legend"[102] Bernie Madoff led Ber-

---

[98] Karen Dillon, *The Coming Battle Over Executive Pay*, HARV. BUS REV., Sept. 2009, at 94, 97. Propitiously, the bailout era apparently came close to an end on December 14, 2009, when Wells Fargo became the last of the largest U.S. banks "to rush though a repayment" to the federal government before the end of the year. Eric Dash & Andrew Martin, *Wells Fargo to Repay U.S., a Coda to the Bailout Era*, N.Y. TIMES, Dec. 15, 2009, at B1.

[99] Carlos Lozada, *Bernie Madoff, Evil Genius? That's Just Half Right*, WASH. POST, Aug. 30, 2009, at B1.

[100] For a short, but excellent, numbers-laden article on how a pyramid scheme, a "popular variation" of a Ponzi scheme, actually works, see Willis H. Riccio, *Ponzi Schemes: A Man Called Charles*, 58 R.I. B.J., July-Aug. 2009, at 8. Charles Ponzi, the Italian immigrant namesake of the Ponzi scheme, defrauded hundreds of investors of ten million dollars in 1919. *See* John Steele Gordon, *Pyramid Schemes Are as American as Apple Pie*, WALL ST. J., Dec. 17, 2008, at A21. Ponzi schemes are not necessarily of short duration. *See* Chad Bray, *SEC Charges Brooklyn Money Manager with Fraud*, WALL ST. J., Sept. 9, 2009, at A6 (reporting that a New York money manager was recently charged with operating a purported $40 million Ponzi scheme that lasted for three decades and evidently helped finance a pornography business).

[101] For a list of the most prominent victims, see Peter Lattman & Aaron Lucchetti, *Losses in Madoff Case Spread-Alleged Ponzi Scheme's Victims Include Lautenberg, Zuckerman, Spielberg's Charity*, WALL ST. J., Dec. 15, 2008, at A1 and Robert Frank & Tom Lauricella, *'Uncle Bernie' and His Angry Clients-Madoff Created Air of Mystery*, WALL ST. J., Dec. 20, 2008, at A1.

[102] David Lieberman et al., *Amazement Lingers at Madoff's Downfall*, USA TODAY, Dec. 15, 2008, at 6B.

nard L. Madoff Investment Securities LLC for decades. Madoff carefully cultivated a golden reputation over the course of forty-eight years as a "pioneer" of electronic trading and the development of the NASDAQ Stock Market, of which he was chairman in the early 1990s.[103] Madoff had a record of seventy-two "winning months in a row" and regular returns of about ten percent for years, which according to one hedge fund expert was "like finding the Holy Grail."[104] Sometimes those "insane returns" reached eighteen to twenty percent.[105] The foundation of Nobel laureate and Holocaust survivor, Elie Wiesel, lost $15 million. In lamenting that loss and betrayal of trust by Madoff, Wiesel said: "We thought he was a god; we trusted everything in his hands."[106] Madoff's decades-long Ponzi scheme came to an abrupt end in December 2008 when investors asked for $7 billion in redemptions.[107]

Bernie Madoff, "the biggest scam artist in Wall Street history"[108] pled guilty to "the world's biggest Ponzi scheme," having bilked investors out of as much as $65 billion.[109] As a consequence, he received a 150-year prison sentence for his "extraordinarily evil"[110] crimes, as cited by the federal judge who imposed the sentence. Auspiciously, Madoff's Ponzi scheme revelation in December 2008 created a silver lining amidst incredibly unfortunate losses. Apparently, the shattering economy along with the major headlines about Madoff combined to expose possibly more Ponzi schemes within just a matter of weeks.[111] The Commodity Futures Trading Commission, which shares with the Securities Exchange Commission ("SEC") the responsibility for pursuing Ponzi scheme leads, experienced a doubling of reported leads to such schemes in 2008, and its enforcement caseload rose in 2009.[112] The head of the enforcement arm remarked that "[t]here is no way for a Ponzi to survive given the large number of redemptions and a lack of

[103] *Id.* Madoff was deemed to be a "statesman" in the industry. *Id.* (quoting Marianne Brown, CEO of Omego, a company that helps to affirm trades).
[104] *Id.*
[105] Lozada, *supra* note 99, at B4.
[106] *Id.*
[107] Lieberman, *supra* note 102.
[108] Lozada, *supra* note 99, at B1.
[109] Frank Ahrens, *U.S. Denies Report of Madoff Cancer*, WASH. POST, Aug. 25, 2009, at A9. However, it should be noted that a federal prosecutor review of most accounts held by Madoff's customers when he was arrested in 2008 reveals that about half of the customers had not lost money because they withdrew more money than they "originally" invested. Associated Press, *Review Says No Net Loss for Some in Scheme*, N.Y. TIMES, Sept. 23, 2009, at B7.
[110] Lozada, *supra* note 99, at B1.
[111] Leslie Wayne, *The Mini-Madoffs: Troubled Times Are Bringing More Ponzi Inquiries to Light*, N.Y. TIMES, Jan. 28, 2009, at B1.
[112] *Id.*

new investors."[113] Indeed, two months later in March, Bart Chilton, commissioner of the Commodity Futures Trading Commission, described the eruption as "rampant Ponzimonium," revealing that his agency had uncovered nineteen Ponzi schemes in 2009, as compared to just thirteen such schemes for all of 2008.[114] The tally for the year 2009 was significant as the recession "unraveled"; and nearly four times as many Ponzi schemes surfaced as compared to 2008.[115] Tens of thousands of investors lost an estimated $16.5 billion, which figure does not even include moneys lost from the Madoff scam.[116]

From a federal regulatory standpoint, a Ponzi scheme should be relatively simple to expose by merely having the SEC demand "proof" that the investment adviser holds the amount of money the adviser claims to hold.[117] However, talent, in shopping for endorsement deals, should not be lured into a false sense of regulatory, financial, or reputation security.[118] In particular, talent cannot always rely on the SEC to preemptively expose and prosecute Ponzi schemes. Tragically for Bernie Madoff's thousands of victims, since Madoff was an advisor to the SEC on electronic trading issues, he was held in high regard by senior regulators at the SEC.[119] In a reputation-damaging "mea culpa"[120] SEC chairman Christopher Cox publicly apologized for the SEC's failure to act upon the "credible and specific allegations" that repeatedly came into the SEC about Madoff's bogus investment returns.[121] In a

[113] *Id.*

[114] Reuters, *Regulator: It's 'Ponzimonium,'* CNNMoney.com, Mar. 20, 2009, http://money.cnn.com/2009/03/20/news/economy/fraud_ponzi.reut/index.htm. BusinessWeek reported that Ponzi schemes and other "investment scams" had tripled in 2009. Roben Farzad, *The Asset Hunters*, BUSINESSWEEK, July 6, 2009, at 38.

[115] Curt Anderson, *Ponzi Collapses More than Tripled in '09 as Investors Lost About $16.5B*, USA Today.com, Dec. 28, 2009, http://www.usatoday.com/money/markets/2009-12-28-ponzi-schemes_N.htm.

[116] *Id.*

[117] Binyahim Appelbaum & David S. Hilzenrath, *SEC Didn't Act on Madoff Tips; Regulator Was Warned About Possible Fraud as Early as 1999*, WASH. POST, Dec. 16, 2008, at D3.

[118] Certainly, celebrities and professional athletes, many of whom are wealthy, may be vulnerable to Ponzi schemes, and are prime targets for them. For example, federal prosecutors recently charged a woman with running a Ponzi scheme in which she stole $3 million from eight victims, including Michael Vick and two other NFL players. See Assocated Press, *Woman is Charged in a Ponzi Scheme Involving Professional Football Players*, N.Y. TIMES, Aug. 25, 2009, at B2.

[119] *Id.*

[120] Alex Berenson & Diana B. Henriques, *S.E.C. Issues Mea Culpa on Madoff*, N.Y. TIMES, Dec. 17, 2008, at B1. *See also* Stephen Labaton, *S.E.C. Image Suffers in a String of Setbacks: Missed Warnings in the Madoff Case*, N.Y. TIMES, Dec. 16, 2008, at B6.

[121] Binyahim Appelbaum & David S. Hilzenrath, *SEC Ignored Credible Tips About Madoff, Chief Says*, WASH. POST, Dec. 17, 2008, at D1. The SEC received at least six "warnings" about Madoff's business over the years, including one that "explicitly" warned that Madoff was probably "running a Ponzi scheme." Zachary A. Goldfarb, *SEC Outlines Madoff Lessons*, Wash. Post, Sept. 11, 2009, at A22.

"scathing" report by the SEC's own Inspector General, Bernie Madoff himself told the internal watchdog that he was "astonished" that the SEC did not verify whether Madoff Investment Securities was carrying out the multi-billion dollars worth of trades Madoff claimed to be making after he supplied the agency with account details.[122] The moral of this vigilance-lacking story is that talent, with the support of lawyers, business advisors, and others who comprise talent's team of trusted advisors, must conduct due diligence probes into the bona fides of potential endorsees.

Other modern-day Ponzi schemes continue to unfold, including those that involve talent endorsement deals. Former world number one golfer Vijay Singh purportedly signed a five-year, $8 million endorsement deal with Houston-based Stanford Financial Group in January 2009.[123] From a superficial due diligence standpoint, Stanford Financial Group appeared to sustain very high-yielding certificates of deposit ("CDs") held in the company's bank in Antigua for about 30,000 wealthy investors, mostly in the U.S., Caribbean, and Latin America.[124] The financial group was run by its Texas-born owner and chairman, Sir Robert Allen Stanford, a billionaire who made Forbes' annual list of the wealthiest people in the U.S. [125] A celebrity of sorts on Wall Street and in Antigua, Sir Allen Stanford seemed to have a King Midas touch in wealth management. As a return for Stanford Financial Group's investor clients, his Antigua-based bank issued CDs that paid interest rates that were more than twice the U.S. market average.[126] Astonishingly, these returns were sustained over the twelve-month period of February 2008 through February 2009, when the U.S. stock market and hedge funds lost astronomical amounts of value.[127]

[122] Zachary A. Goldfarb, *The Madoff Files: A Chronicle of SEC Failure,* WASH. POST, Sept. 3, 2009, at A1. Most significantly, the SEC opened inquiries into Madoff five times in a sixteen-year period. *Id.*

[123] The Associated Press reported that Vijay Singh's endorsement deal with Stanford Financial was worth $8 million. *See* Associated Press, *Singh Offered to Pay Financier's Bond,* ESPN.com, June 26, 2009, http://sports.espn.go.com/golf/news/story?id=4289707. *But see* Kevin Eason, *Fallout from Allen Stanford Affair Leaves Top Sportsmen Confused,* THE TIMES, Feb. 19, 2009, ttp://www.timesonline.co.uk/tol/sport/cricket/article5762814.ece (stating that the five-year deal was for an estimated $5 million a year).

[124] Tim Elfrink, *The Rise and Fall of the Stanford Financial Group; Castles and Corruption Lead to Criminal Charges,* HOUSTON PRESS, Apr. 9, 2009, *available at* http://www.houstonpress.com/2009-04-09/news/the-rise-fall-of-the-stanford-financial-group/.

[125] For the most illuminating and comprehensive coverage of the sordid rise and fall of Stanford Financial Group and its chairman, see *id.*; *see also* Matthew Goldstein & David Polek, *Are These CD Rates Too Good to be True?* BUSINESSWEEK, Feb. 11, 2009, *available at* http://www.businessweek.com/magazine/content/09_08/b4120022131798.htm?chan=magazine+channel_top+stories, Alec Wilkinson, *Not Quite Cricket,* The New Yorker, Mar. 9, 2009, at 24.

[126] Goldstein & Polek, *supra* note 125.

[127] *Id.*

Additionally, despite the then lingering bite of the global recession, Stanford Financial claimed to have increased the assets it oversaw by thirty percent, to more than $50 billion.[128] In fact, the wealth-management company touted that its investments lost a mere 1.3% in 2008 – a year when the Standards & Poor index dropped thirty-nine percent.[129] Sir Allen reported that one mutual fund grew from ten million dollars to more than a billion in about five years.[130] In an apparent attempt to increase Stanford Financial Group's respectability, in recent years, it had recruited former Federal Reserve Governor Lyle Gramley as an economic advisor to its research division.[131]

The SEC initiated its investigation of alleged CD fraud at Stanford Financial Group in 2005, which was triggered by a whistle-blowing former company broker who claimed that the company was "running a Ponzi scheme."[132] About one month after Vijay Singh sealed his lucrative endorsement deal with Stanford Financial in January 2009, the SEC formally charged Sir Allen Stanford, his CFO, and another company deputy with allegedly orchestrating an $8 billion "massive Ponzi scheme."[133] Four months later, in June 2009, the Department of Justice unsealed its indictment against the Texas billionaire and three other executives at Stanford Financial. A federal magistrate originally set bail on Stanford at $500,000, but a federal judge a week later reversed that ruling, declaring Stanford to be "a serious flight risk."[134]

Despite cogent public and discoverable red flags spanning several years, Vijay Singh signed his main endorsement deal with Stanford Financial Group in January 2009. Even after being confronted sporadically by the media about his endorsement deal with Stanford Financial, Singh appeared to continue to honor his five-year contract with Stanford Financial Group and wore a golf shirt and cap with a Stanford logo.

4. Talent: Beware of the Rapid Erosion of Public Trust in

---

[128] *Id.*
[129] Elfrink, *supra* note 124.
[130] Wilkinson, *supra* note 125, at 27.
[131] See Goldstein & Polek, *supra* note 125.
[132] Matthew Goldstein, *SEC Dates Stanford Probe to 2005*, BUSINESSWEEK, Feb. 27, 2009, *available at* http://www.businessweek.com/bwdaily/dnflash/content/feb2009/db20090225_898663.htm.
[133] Elfrink, *supra* note 124. The SEC in its twenty-five page civil complaint asserted that Allen Stanford and the CFO kept ninety percent of the company's purported $8 billion in investments in a 'black box' protected from outside scrutiny. *Id.*
[134] Miguel Bustillo, *The Stanford Affair: Stanford Ruled Flight Risk, Denied Bail*, WALL ST. J., July 1, 2009, at C3.

Corporate America

The Great Recession of 2008-2009, the sudden rash of Ponzi scheme exposures, and the shake-up of Wall Street and the auto industry in Detroit have all combusted to erode public trust in corporate America. Ominously, according to the annual poll taken by the Edelman Trust Barometer, the year ending in 2008 was a record low for the ten-year period from 1998-2008 in America.[135] A mere thirty-eight percent of "self-described" informed adults in the U.S. said that they trust businesses, a decline of twenty percentage points from 2007.[136] This "precipitous decline" in business trust is global, with the Barometer finding that sixty-two percent of adults in twenty countries trusted corporations less in December 2008 than they had in 2007.[137] This descent of trust should concern strategists, as some researchers warn that "a low-trust environment makes everything about doing business more difficult. For an individual company, loss of trust leads to higher transaction costs, lower brand value, and greater difficulty attracting, retaining, and managing talent. Ultimately, it can mean boycotts, negative publicity, and unwanted regulation."[138]

For talent already in an attractive endorsement deal or for talent in the hunt for new or better endorsement deals, the prospect of companies suffering lower brand value, boycotts, and negative

---

[135] Reich, *supra* note 23. A recent and unusually sharp rebuke by a federal judge underscores the descent of trust not only in corporate America but also in federal regulatory bodies. Judge Jed S. Rakoff refused to approve a $33 million deal that would have settled a civil lawsuit filed by the SEC against bailed-out Bank of America – a case that alleged that the bank failed to adequately disclose the bonuses that were paid out by the foundering Merrill Lynch before its merger with Bank of America in 2009. The judge, in his ruling, "accused" the bank of blindsiding its shareholders and the American taxpayers and both the bank and the SEC of "concocting the settlement to effectively absolve themselves of further responsibility." Zachery Kouwe, *Judge Rejects A Settlement Over Merrill Bonuses*, N.Y. TIMES, Sept. 15, 2009, at A1, A23. On the same day of the judge's ruling, across town in New York City, corporate America was on the receiving end of a presidential rebuke, as President Obama made an unprecedented speech on Wall Street. President Obama declared, "Hear my words: We will not go back to the days of reckless behavior and unchecked excess at the heart of this crisis, where too many were motivated only by the appetite for quick kills and bloated bonuses." Elisabeth Williamson & Damian Paletta, *Obama Urges Bankers to Back Financial Overhaul*, WALL ST. J., Sept. 15, 2009, at A4. Although some financial industry officials that were present at Obama's speech concurred with the president's call for reform, "behind the scenes" financial companies have "pushed" to marginalize or delay parts of Obama's reform package in Congress. Alexi Mostrous Neil Irwin, *Obama Gets Stern with Wall Street*, WASH. POST, Sept. 15, 2009, at A12.

[136] Reich, *supra* note 23, at 9. For a cogent commentary on how Bernie Madoff's $65 billion Ponzi scheme might have damaged American capitalism, see Anne Applebaum, Op-Ed., *Madoff's Scheme May Have Truly Damaged Capitalism*, WASH. POST, Dec. 19, 2008, at A17, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/12/15/AR2008121502393.html?nav=emailpage.

[137] Eric Beinhocker et al., *Strategy in The New World: The Ten Trends You Have to Watch*, HARV. BUS. REV., July-Aug. 2009, at 55, 57.

[138] *Id.* (emphasis added).

publicity is not inviting, especially since endorsement opportunities (and therefore the ability to select the most reputable companies) are on the decline.

5. Talent: Beware of the Endorsement Deal Recession

Shopping around for a worthy endorsement deal suitor has suddenly become much more difficult for talent during the Recession, particularly in the financial services, entertainment, auto, and sports industries. State and federal regulators shut down eighty-one banks in 2009, and federal regulators added 111 lenders to their endangered banks list in the third quarter of 2009.[139] Now stadium naming-rights deals involving the nation's largest financial institutions might be in jeopardy due to possible intervention by the federal government. Citigroup, the largest government bailout recipient in November 2008, precipitated a scandal of sorts, when it announced that it would charge ahead with the costliest naming-rights deal in sports history with the New York Mets, even though the financial giant had just laid off 52,000 employees and was treading water with almost $20 billion in losses for 2008.[140]

Several people criticized the Citigroup-Mets deal and other bailed-out companies pursuing naming-rights deals. U.S. Congressman Elijah Cummings (D-MD) railed: "This type of spending is indefensible and unacceptable to Citigroup's new partner and largest investor: the American taxpayer."[141] The legislator called on bailed-out companies to cease such "reckless spending," as America "cannot continue to pour taxpayer dollars in buckets with holes."[142] In a stern rebuttal, Citigroup said that the Mets deal is "an important marketing priority" and that it had no intention of abandoning the contract.[143] The future may still be up in the air for the naming-rights deals for the three stadia in Philadelphia — Wachovia Center, Lincoln Financial Field, and Citizens Bank Park —as they all bear the names of bailed-out financial institutions.[144]

As for Hollywood, "the most escapist of industries" in a recession, the entertainment capital of the world has gone "haywire," as

---

[139] Damian Paletta & David Enrich, *Banks on Sick List Top 400*, WALL ST. J., Aug. 28, 2009, at A1.

[140] Moraff, *supra* note 11, at A5. The deal, signed in 2006, was for $20 million a year over twenty years for Citigroup to place its name on the Mets' new ballpark, Citifield. *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* A more recent report has indicated that Citi attempted to find an escape clause in the naming-rights deal with the Mets, but was unable to do so. Sandomir, *supra* note 20.

[144] *See* Moraff, *supra* note 11, at A5.

the number of deals for actors, musicians, directors, and other talent has dropped precipitously.[145] For instance, movie franchising is down because only about two banks, as compared to about ten in the past, are actively financing independent films.[146] With record sales down, musicians have been hurting, too.[147] The Hollywood mega-stars continue to thrive, but those who might have gotten $10 million on a deal are now being offered closer to $6 million or $8 million.[148]

Tiger Woods will no longer play in the Buick Invitational, an event that he has dominated for years. Due to the court-supervised Chapter 11 restructuring of General Motors, which is Buick's parent, Buick and the PGA Tour announced in August 2009 the cessation of the Invitational.[149] Endorsement deals on the sports merchandise side have also been declining in the Recession, the best example of which might be shoes. Prominent sports business reporter Darren Rovell correctly predicted that the top shoe endorsement deals for NBA draft picks would not be more than $1 million; in fact, the top deal plummeted to $750,000.[150] Surprisingly, neither Nike, Adidas, nor Under Armour had made any announcement about new deals as of June 2009.[151] Rovell saw this novel situation almost like a Hobson's choice, stating, "This leaves agents and players with a choice that top draft picks have never really had. They can sign for any money they can get now or they can have confidence in their ability and sign a deal when they have some stats to add leverage to the game."[152] In a subsequent interview with Rovell, 2009 NBA top draft pick Blake Griffin, then of the Oklahoma Sooners and now of the Los Angeles Clippers, confirmed that the bad economy was causing a downsizing in the dollar amount of endorsement deals.[153]

While talent may be in the midst of an endorsement drought

---

[145] Amanda Bronstad, *Hollywood Goes Haywire: Talent Boutiques Have Proliferated but Deals Are Drying Up*, NAT'L L. J., July 27, 2009, at 1.
[146] *Id.* at 8.
[147] *Id.*
[148] *Id.*
[149] David Biderman, *Heard on the Field . . . : Buick Open Reaches the End of the Line*, WALL ST. J., Aug. 6, 2009, at D8. Buick also announced the termination of the Buick Open. *Id.* Tiger Woods has had a lucrative endorsement contract with Buick since 1999. *See GM Ends 9-year endorsement deal with Tiger Woods*, Nov. 24, 2008, http://www.golf.com/golf/tours_news/article/0,28136,1861539,00.html (last visited Mar. 31, 2009).
[150] Darren Rovell, *Bad Year for NBA Draft Pick Shoe Deals*, Sports Biz with Darren Rovell, CNBC.com, June 24, 2009, http://www.cnbc.com/id/31522493.
[151] *Id.*
[152] *Id.*
[153] See Video Interview by Darren Rovell of Blake Griffin, Likely #1 Draft Pick, CNBC.com, June 25, 2009, http://www.cnbc.com/id/15840232?video=1163694741&play=1. Blake Griffin confirmed the downsizing but hoped that the economy would improve. *Id.*

because of the Recession, consulting firms that cater to the financial services industry appear to be searching for talent who can help tout endorsees' Recession-recovery services. Pre-scandal Tiger Woods was the most prominent talent in this business recovery advertising field. Accenture Ltd., a well known global management consulting company,[154] ran expensive full-page ads in the Wall Street Journal and BusinessWeek, showing a very meditative Tiger Woods stuck in the high grass, for example, looking down confidently at his unseen golf ball. In relevant part, the Recession-themed advertisement's text ran as follows:

> It's rough out there. Economic realities are daunting. And yet, as with every competitive challenge, some businesses will respond proactively and effectively, while others are left behind. The winners will be those who act quickly, make the right decisions and execute them flawlessly. From our work with the world's most successful companies–through up cycles and down–Accenture has developed the unique perspective and broad capabilities to help you come out on top. At a time when it's tougher than ever to be a Tiger, it's even more crucial to know what it takes. Talk to us to see how we can help.[155]

II. THE REVERSE-MORALS CLAUSE: SUGGESTIONS FOR A DUE DILIGENCE CHECKLIST

With all of these new pressures to bear in the endorsement deal arena, we now turn to how talent can best probe the bona fides of endorsee company suitors: A due diligence checklist. By performing all of the items listed on this checklist, the average person of due diligence would likely identify whether the endorsee company posed a risk to talent's reputation.

A. *Simple, No-Cost, Quick, Accurate Due Diligence*

Realistically, in the context of the reverse-morals clause, talent will neither be able nor expected to conduct the type of physical and personal due diligence that, for example, the NFL can now exact upon the 1952 players it has under contract through its aggressive NFL Security investigative unit.[156] In order for it to be

[154] Tiger Woods has been the "centerpiece" of Accenture's advertisements since 2003, at a cost to the firm of more than $65 million per year. Christopher Hosford, *Marketers Playing Through Pain of Losing Tiger*, B TO B, July 14, 2008, at 4.

[155] Accenture Full-Page Advertisement, WALL ST. J., July 17, 2009, at A9 (on file with authors) (emphasis added). At the bottom right-corner of the ad is Accenture's logo with the following statement below it: "*High performance. Delivered.*"

[156] This unit delves into the private lives of players. In a "sweeping" and "unprecedented" effort to protect its brand by cracking down on any player behavior that is harmful to the NFL's "integrity and reputation," NFL teams are hiring a "new breed" of security chiefs –

of use to talent, a due diligence checklist must be both practical and informative. Our research suggests that there is no real checklist or best practices in either the advertising research or legal literature that directly addresses this issue.[157]

As a threshold matter in drafting a due diligence checklist for a reverse-morals clause, we must examine whether unlawful corporate behavior can be predicted. Using data about court convictions of the managers or employees of Fortune 500 companies, management researchers have empirically tested whether such corporate misbehavior is predictable.[158] A study tentatively found that firms with prior violations were more likely to commit additional acts because committing illegal acts "may teach" companies how to further violate the law.[159]

This corporate predictability research leads us to the first item on our due diligence checklist. Talent needs to conduct a decade or beyond corporate history search on any endorsement suitors. The search into the corporate past should look for scandals or civil and/or criminal violations. When public companies are involved, we recommend a careful look at the quarterly (10-Q) and annual (10-K) financial reports that publicly held companies

---

former police officers and FBI agents – and calling up extensive background checks, installing video-surveillance equipment in locker rooms, chasing down "rumors," and occasionally forbidding players from speaking to the press. *See* Karp, *supra* note 31. For a most informative look at how the NFL currently "spies on its players," see *id.* and Kate Thomas, *N.F.L. Role in Burress Incident Scrutinized*, N.Y. TIMES, Dec. 4, 2008, at B14. Although the NFL Security unit has been around since the 1950s and "low-profile," it has been recently thrust into the media spotlight of controversy thanks to former New York Giants wide receiver Plaxico Burress' accidental shooting of himself. *Id.* (noting that the NFL unit initially knew more than the police did about the suspected crime). This super-scrutiny facilitates the NFL's ability to rapidly and "summarily" fine and suspend players under its new controversial personal-conduct policy launched in 2007. *See* Karp, *supra* note 31. This new regime effectively rewrites the playbook on how the NFL can enforce morals clauses against its players. *Id.*

[157] The best analogue that we can find on this point is this paragraph from the retail management literature:

> As a result of our findings, it is crucial that retailers be aware of the risks associated with using celebrities to endorse their stores and products. Given that our results provide tentative support for the commonly held belief that a decline in the celebrity's image can impact the image of the brand, it is important that retailers carefully choose an endorser who currently has a good image and will likely be able to uphold this image in the future. In other words, retailers should closely evaluate a celebrity's overall character before associating their brand name with a celebrity in order to protect their company's image. While it is impossible to predict a celebrity's future moral or ethical actions, companies should be aware of a celebrity's character weaknesses that could lead to future problems.

White, *supra* note 24, at 331.

[158] Melissa Baucus & Janet P. Near, *Can Illegal Corporate Behavior Be Predicted? An Event History Analysis*, 34 ACAD. OF MGMT. J. 9 (1991). Significantly, Baucus's and Near's article integrated theoretical contributions from a number of disciplines into a model of illegal corporate behavior. *Id.* The research focused on cases where the courts ruled that the firm was intentionally guilty of illegal behavior, not corporate wrongdoing. *Id.* at 11.

[159] *Id.* at 34.

must file with the SEC,[160] as well as the firm's own website. Both public and privately held companies can be searched on Google, Twitter, Facebook, and other similar resources.

Cyber-sleuthing of public filings and a company's own website can pay nice dividends to the truly diligent in corporate reputation research. For example, a "low-key" Venezuelan investment analyst, Alex Dalmady, used solely this research tactic in helping a friend determine whether his investment with Stanford Financial Group was safe, after the Madoff scandal hit the headlines in December 2008.[161] Literally, Dalmady took five minutes to conduct his online search of Stanford Financial, whereupon he immediately called his friend back and exhorted to him, "Get your money out. Now."[162] This is Alex Dalmady's account of his five-minute online investigation:

> It wasn't just the balance sheets; there's one fishy thing after another . . . I looked up [Stanford Financial Group's] board of directors, and I see it's Stanford, his dad, and some other old guy in Mexia [a town in Texas]. I looked up his address, and it was on this cattle ranch in the middle of nowhere.[163]

Dalmady's concern was echoed by a business professor at Johns Hopkins University who has studied large-scale frauds and has chided the balance-sheet focused SEC regulators for not being attuned to the "most basic problems" at Stanford Financial Group, such as a board of directors with eighty-five year old Mexia, Texas cattle ranchers "at the top."[164] The professor, Phillip Phan, contended that Stanford Financial might never have "built" such a large Ponzi scheme had the SEC fully comprehended the simple fact that the composition of the board of directors itself was a red flag.[165] Phan concluded that fraud regulation is more akin to CIA all-source intelligence gathering, i.e., well beyond the myopia of merely analyzing corporate balance sheets.[166]

Regarding the Bernie Madoff Ponzi scheme case, there was ample free information on the Internet that could have raised

---

[160] One law professor surmises that some celebrities do proceed in a "cautious manner" in the context of vetting products before signing endorsement deals. *See* Michael Maddow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 230 (1993) (suggesting that some talent probably test the laundry detergent of the endorsee or examine the insurance company's books in an effort to protect talent reputation out of fear of personal liability in a deceptive advertising lawsuit). *Id.* at 230-31.
[161] Elfrink, *supra* note 124
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*

flags in that case, as evidenced by these simple insights of an investment executive:

> Put simply, reputation and referrals are not good enough . . . : Potential investors can check their fund manager's credentials and verify certification with the Financial Industry Regulatory Authority (FINRA), which issues licenses for financial advisers. FINRA also has background information on approximately 680,000 currently registered brokers and 5,100 currently registered securities firms.[167]

Investors should also be on the lookout for potential conflicts of interest.[168] In Madoff's case, he served as treasurer of the board of trustees at Yeshiva University, which lost $110 million in Madoff-advised investments.[169]

B. *Probing for Bankruptcy Red Flags*

Just as any prudent company would conduct a credit and bankruptcy search on an unfamiliar or unknown company with which it sought to do business, talent should direct talent's agents to do the same.[170]

A good place to start that inquiry might be to perform an online Public Access to Court Electronic Records (more commonly know as "PACER") federal court filing search[171] or Google search; or request information from a financial reporting service about the company.[172] Talent should not expect a corporate bankruptcy to always be headline-generating news with the national media, but word-of-mouth dialogue about a company's financial

---

[167] Douglas J. Guth, *Lessons Learned from Madoff Scandal*, CLEVELAND JEWISH NEWS, Dec. 26, 2008, at 1, *available at* http://www.clevelandjewishnews.com/articles/2008/12/26/news/local/doc49515b95453ab345173173.txt (referring to an interview with Kris Putnam-Walkerly, founder and president of Putnam Community Investment Consulting, Inc.).

[168] *Id.*

[169] *Id.*

[170] Although it may seem intuitive, talent should care about the financial viability of a company beyond whether or not the company can make the payments called for in any agreement. Any financial instability or irresponsibility on the part of a company creates the potential for a negative association between the company's financial irresponsibility and the individual's image. For example, if a company files for Chapter 11 bankruptcy protection, society may think that the endorser approves of the company's way of doing business. As such, we include this section with this scenario in mind.

[171] PACER is a service of the United States Judiciary and the PACER Service Center is run by the Administrative Office of the United States Courts. PACER is an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and the U.S. Party/Case Index via the Internet. Links to all courts are provided from PACER's web site. Electronic access is available by registering with the PACER Service Center, the judiciary's centralized registration, billing, and technical support center. *See* http://pacer.psc.uscourts.gov/pacerdesc.html.

[172] Two examples include Dun & Bradstreet (http://www.dnb.com/us/) and Bankruptcy Crawler (http://www.bankruptcycrawler.com/).

health is often captured via blogs, online commentary, and online discussion forums. While headlines are certainly helpful, an online search would be more comprehensive in helping to identify the financial viability of particular companies.

Prudent due diligence is an acute necessity, particularly in stadium naming-rights deals where more and more endorsee companies either go bankrupt or defunct:

> [T]he Baltimore Ravens, the New England Patriots and St. Louis Blues are all in jeopardy of not getting paid for the naming rights on their homes. At best, they're risking major embarrassments because they may have to restructure their deals or even change the names on their stadiums. At worst, they lose out on a substantial sum of money if the companies whose names adorn their facilities default on their agreements.[173]

Ray Schaetzle of the National Basketball Association's New Jersey Nets, as a caveat, states, "At the minimum, chief financial officers have to do credit checks on sponsors to make sure they are worthy from a public relations perspective and financially sound."[174] Amplifying this naming-rights theme, Minnesota Twins president Dave St. Peter states that the Twins only seek good-steward endorsee companies that "mirror" the same values of the team, including "affordable" entertainment, community service, and dedication to the fans.[175]

Talent should think twice about endorsing a company with a failed business plan.[176] Talent may want to demand that questionable endorsement partners sign more rigorous reverse-morals clauses, with explicit terms indicating what constitutes unethical or improper behavior.[177] The goal is to try to avoid buyers that are not only bankrupt in finances but also bankrupt in character. As a corollary to talent protection in this context, talent should search to make sure that a company has not been or is in serial bankruptcy, often called Chapter 22 bankruptcy, which is "courthouse

[173] See Jensen & Butler, *supra* note 6 (quoting D. Radin, *Dot.com Bombs Do Some Damage to Stadium Names*, PITTSBURGH POST-GAZETTE, Apr. 26, 2001, at E-3).

[174] *Id.* (quoting an article by M. Leone in *CFO Magazine*). Marie Leone, *Baseball, Apple Pie and Corporate Scandals*, CFO MAGAZINE, Oct. 20, 2002, *available at* http://www.cfo.com/article.cfm/3006938/c_9746131.

[175] *Id.* (quoting an article by J. Vohmhof in *The Minneapolis/St. Paul Business Journal*). John Vohmhof Jr., *Teams Seek Partners for Naming Rights, Sponsorships*, MINNEAPOLIS/ST. PAUL BUSINESS J., July 7, 2006, *available at* http://milwaukee.bizjournals.com/twincities/stories/2006/07/10/focus2.html.

[176] *See supra* Part II.C.1 of this Article for coverage of the "faux bankruptcies" of General Motors and Chrysler.

[177] *See infra* Part IV of this Article on Draftsmanship as to how the bankruptcy trigger should be drafted into reverse-morals clauses.

slang" for corporate "bankruptcy recidivism."[178] This is "when a Chapter 11 company returns back into bankruptcy because its reorganization failed."[179]

C. *Ask a Bank for its Leverage Ratio*

If talent were to consider an endorsement deal with a bank, talent's due diligence inquiry should include a query into the bank's leverage ratio.[180] Banking prudence should call for the leverage ratio of debt to net capital to be twelve to one, meaning that $12 was the maximum a bank could borrow for every $1 in capital.[181] Hyper-leveraging was the nucleus of the tumbling down of Wall Street and the economy.[182] Talent should tread cautiously with banks who engage in hyper-leveraging.

D. *Endorse a Company that Has High Corporate Reputation Rankings*

Ideally, talent should especially consider endorsement deals with companies that are highly rated in the corporate reputation rankings. Examples abound.[183] Business Ethics Magazine annually ranks the top 100 companies for corporate social responsibility

---

[178] *See Experts Outline US Airways' Bankruptcy Options*, PITTSBURGH POST-GAZETTE, Sept. 12, 2004 (on file with authors).

[179] *Id.* Companies that are in this recidivist gallery are LTV Steel, FAO Schwartz, Continental Airlines, and Greyhound Lines.

[180] Leverage is defined as the ratio of debt to net capital.

[181] *See* RITHOLTZ, *supra* note 92, at 143.

[182] *See* Niall Ferguson, *The Descent of Finance: Managing in the New World*, HARV. BUS. REV., July-Aug. 2009, at 44, 47.

[183] For the most comprehensive compilation of corporate reputation ratings lists, see Charles J. Fombrun, *List of Lists: A Compilation of International Corporate Reputation Ratings*, 10 CORP. REPUTATION REV. 144 (2007). Fombrun notes that the majority of the hundreds of lists that he has compiled were based on either a measure of overall reputation or of the hospitality of the workplace. *Id.* For an excellent analysis of what some of the relevant corporate reputation literature has to say about the interplay of corporate reputation with corporate success, see Juan Manual de la Fuente and Sabate and Esther de Quevedo Puente, *Empirical Analysis of the Relationship Between Corporate Reputation and Financial Performance:* A Survey *of the Literature*, 2 CORP. REPUTATION REV. 161 (2003) (finding empirical support for the reciprocal influence relationship between corporate reputation and financial performance), Muel Kaptein, *The Ethics Thermometer: An Audit-tool for Improving the Corporate Moral Reputation*, 2 CORP. REPUTATION REV. 10 (1998) (contending that a company's success is directly related to the "trustworthiness" of that company and a lack of trust in a corporation can impede its "functioning"), and Rian van der Merwe and Leyland Pitt, *Are Excellent Companies Ethical? Evidence from an Industrial Setting*, 5 CORP. REPUTATION REV. 343 (2003) (containing a study of the relationship between corporate ethics and the concept of excellence). Compellingly, corporate governance agencies exert strong influence over the governance practices of public companies. *See* Thuy-Nga T. Vo, *Rating Management Behavior and Ethics: A Proposal to Upgrade the Corporate Governance Rating Criteria*, 34 IOWA J. CORP. L. 1, 30 (2008). The biggest and most influential corporate governance rating agency is Institutional Shareholder Services ("ISS"), which rates more than 8000 companies in thirty-one nations, using its Corporate Governance Quotient. *Id.* at 4. Talent should note that this rating agency charges a fee of up to $17,000 per year for access to its ratings. ISS accomplishes its ratings by using its Corporate Governance Quotient. *Id.* at 6.

and stakeholder accountability.[184] In similar reputation fashion, Fortune magazine annually publishes its "widely read and respected" list of "Most Admired Corporations," which serves as a standard of the most "financially sound" and civic-minded companies.[185] Another Fortune listing to consider is its annual "The 100 Best Companies to Work For."

We offer a stark caveat here. Enron was named "America's Most Innovative Company" by Fortune magazine for six years in a row.[186] While corporate rankings might be helpful tools for vetting endorsement candidates, they are neither authoritative nor infallible. Moreover, reports indicate that Enron's high rankings might be partially attributable to the fact that Enron co-opted influential members of the business media with money.[187] Notwithstanding these flaws, reading local newspapers and periodicals are important parts of endorsement vigilance. Sir Allen Stanford's own newspaper, the Antigua Sun, ran an article about him being a great and humble benefactor, but the balanced piece included some insights from his "detractors" that Stanford's true self might eventually be exposed. This article was printed seven years before the SEC uncovered Stanford's alleged multi-billion dollar Ponzi scheme.[188]

Returning to Vijay Singh's endorsement deal with Stanford Financial Group, the Wall Street Journal ran an article with a headline that read, "Top Lawyer's Withdrawal from Stanford Case Waves a Flag."[189] Even a layperson realizes that it is not every day that a lawyer withdraws from a high-profile case. Indeed, the lawyer, Thomas Sjoblom, was present at meetings where Stanford Financial employees discussed how they had illegally used money, and he was present when a senior executive denied criminal obstruction-of-justice charges against her.[190] Sjoblom promptly resigned and asked the SEC to disregard his statements on behalf of Stanford Financial.[191] The title of this Wall Street Journal article

---

[184] *See* Vo, *supra* note 183, at 27.

[185] Patrick McLane et al., *Potentially Devastating Events: How Three Companies Managed and Survived a Crisis*, 2 CORP. REPUTATION REV. 268 (1999).

[186] *See* Jensen & Butler, *supra* note 6.

[187] *See* CNN Reliable Sources, *Has Media Reported on Enron Scandal Responsibly?*, CNN.com, Jan. 26, 2002, http://transcripts.cnn.com/TRANSCRIPTS/0201/26/rs.00.html.

[188] *See* Peter Fritsch, *Antigua, Island of Sun, Is Also in the Shadow of R. Allen Stanford*, WALL ST. J., Mar. 2, 2002, at A1, A10.

[189] *See* Kara Scannell, *Top Lawyer's Withdrawal from Stanford Case Waves a Flag*, WALL ST. J., Mar. 6, 2009, at C2.

[190] *Id.*

[191] *Id.* Both Stanford Financial Group's former lawyer, Sjoblom, and his prominent law firm, Proskauer Rose, are in civil litigation hot water with a group of investor clients of Stanford Financial, who have sued them for allegedly aiding a "massive investment fraud scheme." Leigh Jones, *Proskauer Hit with Suit over Stanford Work*, NAT'L L.J., Aug. 31, 2009,

alone should give pause about the level of integrity of the buyer that has hired talent to be an endorser of its product.

Rankings work both ways in that they can go up and down. Talent must be attuned to a rapid drop in corporate reputation rankings:

> A precipitous drop in such rankings can signal a loss of the public's trust in confidence in the company. This can then translate into a detrimental financial impact on a company as reflected in part by its shareholder value, which by definition includes the perception of a company's goodwill and its brands.[192]

While the Sarbanes-Oxley Act, the corporate governance law that was passed primarily because of the Enron implosion, essentially mandates that public companies develop and have ethics codes,[193] talent should search individual corporate web sites for corporate values statements, codes of ethics, and codes of conduct, to see if they and the prospective endorsee speak the same ethical language.[194] To further that pursuit, talent should consider seeking out those companies that have Chief Ethics Officers. This position has become more prevalent at businesses in the wake of the wave of scandals since Enron.[195]

E. *Beware of CEOs Who Make Hyperbolic Statements to the Media*

Sir Allen Stanford, the CEO of Stanford Financial Group, made a character-revealing statement when he bragged to reporters that he was a direct descendant of the founder of Stanford University. His hope was to brand his own name and that of his namesake company with one of the most prestigious academic brands in America. Unfortunately for him, his claim of DNA pedigree was patently false. Stanford University was not happy about this attempt at brand theft, and the university filed a lawsuit against Stanford Financial Group in October 2008, three months before the SEC filed civil fraud charges against the company.[196]

---

at 6.

[192] *See* McLane, *supra* note 185, at 268.

[193] Section 406 of the Sarbanes-Oxley Act only requires public companies to disclose in their SEC filings whether or not they have adopted a code of ethics for senior financial officers. If a company has not adopted such a code, they must provide a reason to the SEC for its failure to adopt a code. 15 U.S.C. § 7264 (2006).

[194] *See* Fritsch, *supra* note 188. The Sarbanes-Oxley Act does not require an ethics code for public companies.

[195] *See* Charles Fombrun & Christopher Foss, *Business Ethics: Corporate Responses to Scandal*, 7 CORP. REPUTATION REV. 284 (2004).

[196] Press Release, Stanford University, Statement from Stanford University Regarding Stanford Financial Group, (Feb. 17, 2009), *available at* http://news.stanford.edu/pr/2008/pr-financialgroup-021809.html.

Stanford University lamented the "confusion and reputational injury" that it suffered due to the charges filed by the SEC[197] against Sir Allen Stanford.

Since about eighty percent of financial statement fraud involves a company's CEO or CFO,[198] it is even more imperative that talent keep a close eye on media statements made by senior leaders in companies with whom talent are considering an endorsement deal. Most notably, on the eve of Enron's collapse in 2001, its senior leaders were visible cheerleaders in front of the media and Enron employees, as they bragged that Enron was performing strongly. The psychology and corporate law and governance literature warn of the pathological dangers of "narcissistic CEOs."[199] CEO narcissism has the "potential to tear a company apart."[200]

III. REVERSE-MORALS CLAUSE DRAFTSMANSHIP

A. *The Tiger Woods Effect: What Caliber of Talent Has Reputational Standing to Extract a Reverse-Morals Clause?*

Intuitively, from a contract negotiating leverage standpoint, not all talent are going to have the high-integrity reputation and high-performance success to be able to extract a reverse-morals clause out of a sponsor company. Sponsors may resist the idea of talent trying to impose upon them morals reciprocity. One entertainment lawyer, speaking from experience, finds that a sponsor will "never" offer up a reverse-morals clause but will concede to such a clause if talent asks and presses for it.[201] This is the threshold test, i.e., whether a company will even agree to be bound by a reverse-morals clause requested by talent. Who has the reputational standing to weigh in on this matter? We consider Pat Boone[202] and pre-scandal Tiger Woods.

---

[197] *Id.*

[198] Marshall A. Geiger & Porcher L. Taylor III, *CEO and CFO Certifications of Financial Information*, 17 ACCT. HORIZONS 357, 358 (2003) (citing Roberto Ceniceros, *Interest in Governance Drives Director Scrutiny*, BUSINESS INS., Jan. 27, 2003, at 10,14). CEO reputation can represent a "staggering" forty-five percent of a company's reputation, and eighty-one percent of respondents in a survey said the CEO's reputation would influence their opinion of a company under media scrutiny. Leslie Gaines-Ross, *CEO Reputation: The New Factor in Shareholder Value*, 26 DIRECTORSHIP 4 (2000). This reinforces the need for talent to hang cautiously on virtually every public word and act of a CEO.

[199] For a cogent article on this phenomenon, see Jayne W. Barnard, *Narcissism, Over-Optimism, Fear, Anger, and Depression: The Interior Lives of Corporate Leaders*, 77 U. CIN. L. REV. 405 (2008).

[200] *Id.* at 422.

[201] Q&A with Kirk Sullivan, *supra* note 25.

[202] See *supra* Part I of this Article for a discussion of Pat Boone. In Part I, we discuss the first reverse-morals clause, made in 1968, which was a byproduct of celebrity singer Pat Boone's desire to keep his Christian faith inviolate in the face of the changing mores in

Pre-scandal Tiger Woods, perhaps "the single most impactful endorser in the history of sports marketing,"[203] was the quintessential candidate for extracting a reverse-morals clause from an endorsee, assuming, of course, that the celebrity golfer did not already have such clauses from his many corporate sponsors. While it is almost axiomatic in the advertising literature that consumers will buy products whose "virtues" are praised by celebrities and others,[204] Tiger had endorsement selling power beyond products. Perhaps unlike any other talent, he literally had shareholder-wealth or stock market-return generating power when he endorsed sports apparel. Researchers have found a positive and substantial impact of Tiger's performance on Nike's excess returns, implying that the market valued the additional publicity that Nike received when Tiger, wearing Nike apparel, was in daily contention to win a golf tournament.[205]

Despite the ability of certain endorsers to influence returns, it would likely be somewhat difficult for most talent to convince a sponsor to reciprocate morality – a scenario made even more difficult with the Tiger Woods scandal. One sports commentator has asked who "will fill the void" left by Tiger Woods' "indefinite self-exile" from golf?[206] He compellingly surmises that the likes of seven integrity-filled pro athletes from basketball, football, and baseball could fill the void.[207] Among the most likely to succeed are Indianapolis Colts quarterback Peyton Manning, New York Yankees shortstop Derek Jeter, and two-time Heisman Trophy winner, Tim Tebow, the quarterback for the Florida Gators.[208]

B. *Needed: A Corporate Rehabilitation or Probation Clause*

As we discuss in the following paragraphs, talent with damaged reputations can make an integrity-filled and successful return

---

the record industry. Boone's mega-stature in the industry forced the hand of the record label to comply with his request.

[203] Rich Thomaselli, *Dream Endorser*, ADVERTISING AGE, Sept. 25, 2006, at 1 (quoting Paul Swangard, managing director for the University of Oregon's Warsaw Sports Marketing Center).

[204] Consuelo Lauda Kertz & Roobina Ohanian, *Recent Trends in the Law of Endorsement Advertising: Infomercials, Celebrity Endorsers and Nontraditional Defendants in Deceptive Advertising Cases*, 19 HOFSTRA L. REV. 603 (1991).

[205] Notably, this stock market-return effect may not apply when sports stars endorse financial service products, like American Express, rather than sports products. *Id.* (citing three research articles); *see also* Stephen K. Koernig & Thomas C. Boyd, *To Catch a Tiger or Let Him Go: The Match-up Effect and Athlete Endorsers for Sport and Non-Sport Brands*, 18 SPORTS MARKETING Q. 25, 35 (2009) (suggesting that the current industry practice of "linking athletes who have no obvious match with the product category" (e.g., when Tiger Woods endorsed the Buick car brand) might not be the most efficacious use of an endorsee company's resources).

[206] Wojciechowski, *supra* note 4.

[207] *Id.*

[208] *Id.*

to the studio, theater, screen, or playing field. In certain cases, fans and endorsers re-embrace these fallen icons. If such reputation restoration is attainable for talent, can reputation-damaged companies make similar comebacks? If the answer is yes, then talent should be convinced of the need to draft a reputation-rehabilitation or probation clause into both a traditional- and reverse-morals clause, with a time limit on the same.

First, to illustrate how talent can undergo a significant reputation rehabilitation, we turn to the example of Los Angeles Lakers guard Kobe Bryant. According to sports business reporter Darren Rovell of CNBC, Bryant completed "the greatest marketing" comeback in the history of sports marketing in less than six years after being criminally charged with sexual assault.[209] Rovell makes the following case: in 2003, in reaction to the national media storm that Bryant's scandal triggered, McDonald's, Coke, Spalding, and Nutella did not renew their endorsement deals with the basketball star.[210] Nike stayed on with Kobe Bryant but put marketing of the player on hold.[211]

Bryant eventually climbed out of the lost reputation graveyard to make his comeback. Rovell asserts that he could list hundreds of comments from pundits who said that it would be "impossible" for Bryant to recover all of his pre-scandal endorsements.[212] Rovell cites as an example a comment made by Michael Levine, the founder of Levine Communications, made shortly after the news broke in 2003 about Bryant's alleged crime:

> No matter what, if [Kobe Bryant's] found utterly and completely innocent, this will have been a September 11th-level of tragedy to his image and reputation. There is no full recovery . . . I cannot imagine companies wanting to be in long-term, expensive relationships with him no matter what happens.[213]

In the intervening years, Bryant won the NBA's Most Valuable Player award, scored eighty-one points in one game, and received more adoration at the Beijing 2008 Summer Olympics than his endorsement rival, Cleveland Cavaliers star LeBron James[214] – all while maintaining sterling conduct off-the-field.[215] In the last two

---

[209] Darren Rovell, *Bryant is NBA's Most Marketable Again*, Sports Biz with Darren Rovell, CNBC.com, June 15, 2009, http://www.cnbc.com/id/31367376 (hereinafter *Brand is NBA's Most Marketable Again*).
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.* (emphasis omitted).
[214] *Id.*
[215] As far as incentivizing off-the-field good deeds, see Taylor & Maraghy, *supra* note 31 (advocating that professional sports teams should consider paying athletes a bonus for

years, Nike re-engaged Bryant by having him roll out its new Hyperdunk shoe. Moreover, Coke's Vitaminwater brand took Bryant back, and Forbes' magazine's Celebrity 100, which ranks financial and media power, placed Bryant No. 10 on its 2009 list, just behind Brad Pitt and ahead of Will Smith, Michael Jordan, and Lebron James.[216] Lastly, Bryant's jersey outsold all other NBA players' jerseys in 2009, the second time this has happened in the last three years.[217]

This is a remarkable quid pro quo that corporate America has lavished recently upon Bryant because Bryant has been successful in making the public, his fans, and endorsee companies "forget" his alleged crime. While Bryant is now literally at the top of his on-court and marketing game, few in the talent world could match the kind of on-court heroics that he has displayed in the past six years as he took his game to an even higher level and rebuilt his off-court reputation. Does this example mean that similarly situated talent must reach a Kobe Bryant-level of performance to generate this kind of recovery and rebound? This begs the question of whether Tiger Woods or former Atlanta Falcons quarterback Michael Vick can replicate the reputation restoration success of Bryant.[218] With Tiger Woods' return to golf in a major holding pattern (as of March 2010), we turn our attention to Michael Vick, the most recent sports figure to actively engage the center stage of the rehabilitation spotlight.

While the "moral implications" of the Philadelphia Eagles signing Michael Vick will be "debated" for a long time, the "football implications" are quite salient in that the Wildcat offense is here to stay in the NFL.[219] The surprise, high-stakes return of Vick to the NFL was a calculated tradeoff that the Eagles made between the "reward" that Vick's "unparalleled improvisational skills" would give the "Super Bowl-caliber" team and the anger that Vick's post-prison debut from a dog-fighting conspiracy sentence generated among some Eagles' fans.[220] In an effort to preemp-

---

extraordinary citizenship off-the-field).

[216] *Bryant is NBA's Most Marketable Again, supra* note 209.

[217] *Id.*

[218] Comparing Michael Vick's potential reputation restoration to Kobe Bryant's successful rehabilitation might be somewhat inapposite because the rape case against Bryant was dropped by the state when the accuser was unwilling to testify. *See* Kirk Johnson, *As Accuser Balks, Prosecutors Drop Bryant Rape Case,* N.Y. TIMES, Sept. 2, 2004, at A1.

[219] Judy Battista, *With Vick, Eagles Up Ante on the Wildcat,* N.Y. TIMES, Aug. 18, 2009, at B9. The Eagles prudently signed Vick to a meager two-year, $1.6 million deal. *Id.*

[220] *Id.* Significantly, Coach Andy Reid is "one of the N.F.L.'s most innovative and aggressive offensive minds." *Id.* One can question, therefore, whether Vick would have been signed at all in the N.F.L. had not one team's need for innovation prevailed over player infamy. *See* Jeff Zillgitt, *Reputation Restoration is No Two-Minute Drill: Off and On Field, Vick Must Pass Many Tests,* USA TODAY, May 29, 2009, at 1C, 6C (asking "Who will take a chance on Vick and be willing to withstand negative publicity and potential protests from animal

tively disarm that fan rancor before Vick actually returned to the playing field, the team sent a letter to its premium seat-holders, in essence, asking them for "patience and understanding."[221]

Michael Vick's "catastrophic and very public fall" from sports stardom[222] is substantially different from that of Kobe Bryant. In fact, it might be unique: "Few pro athletes have faced the daunting confluence of predicaments in Vick's past, present and future. Vick . . . lost his multi-million-dollar job, his freedom and his reputation, and he's millions in debt."[223]

The contrition-filled Vick[224] has to climb a steep hill to repair his tarnished image because of the nature of the felony that he committed. In the judgment of one crisis-management expert: "'From a reputation standpoint, being inhumane is one of the worst things you can commit in terms of being able to bounce back from it.'"[225]

Yet, Vick entered the Eagles stadium for the first time to a "partial standing ovation" in a pre-season game, just three months out of prison and the same day that he appeared in bankruptcy court.[226] The fans "roared" when Vick "zipped" a thirteen-yard completion in the first quarter.[227] In fully reinstating Vick to play for the Eagles in Week 3 of the regular NFL season (instead of the anticipated Week 6 re-instatement), NFL Commissioner Roger Goodell paid Vick a nearly hour-long personal visit and seemed upbeat. He told the media, "'[t]his is a transition to hopefully maximizing [sic] for him [Michael Vick] the opportunity to be successful.'"[228] The Commissioner moved up Vick's reinstatement

rights groups?").

[221] Battista, *infra* note 224.

[222] Zillgitt, *supra* note 220, at 1C. Vick was a Pro Bowl quarterback with a $130 million contract from the Atlanta Falcons. From that high perch he fell to serving eighteen months in federal prison for a felony conviction for a dog-fighting conspiracy, and fell into a $20 million bankruptcy. *Id.* at 1C, 6C.

[223] *Id.* at 6C.

[224] For accounts of Vick's remorse-filled press conference announcing his return to the NFL through the Philadelphia Eagles, see Judy Battista, *Soul Searching: Eagles Gingerly Embrace Vick, Who Quietly Shows Contrition*, N.Y. TIMES, Aug. 15, 2009, at B9, Les Carpenter & Mark Maske, *How Vick Got a Second Chance in NFL*, WASH. POST, Aug. 15, 2009, at A1, and Michael Wilbon, *'I Won't Disappoint*,' WASH. POST, Aug. 15, 2009, at D1.

[225] Zillgitt, *supra* note 220. Notwithstanding this rather dire prediction, Vick's probationary service specifically addressed the dog-killing. He was ordered to perform community outreach activities in Philadelphia with the Humane Society. *See* Jarrett Bell, *Vick Cleared for Third Week*, USA TODAY, Sept. 4, 2009, at C1. Equally fortunate for Vick, his on-going rehabilitation mentor is former Indianapolis Colts Super Bowl-winning coach, Tony Dungy. *See* Matthew Kaminski, *A Coach's Faith: The Weekend Interview with Tony Dungy*, WALL ST. J., Sept. 12-13, 2009, at A13. Sportswriter Michael Wibon hails Dungy as "the quietest but most credible man in football." *Id.*

[226] Gary Mihoces, *On Field, Vick Gets Six Plays, Positive Reception*, USA TODAY, Aug. 28, 2009, at C1. In our view, for any athlete to perform under the dual weight of a prison sentence and huge bankruptcy in a recession is extraordinary.

[227] *Id.*

[228] Judy Battista, *Eligible to Play in Week 3, Vick Gives a Preview*, N.Y. TIMES, Sept. 4, 2009, at

by three weeks because Vick's return to football had gone "so smoothly."[229] The lingering question on Michael Vick's career horizon is whether he will be able to pull off a Kobe Bryant coup in restored endorsement deals. We predict that will largely depend on whether Vick stays out of trouble.

Corporate America has played image rehabilitation from the same crisis management playbook as that of Kobe Bryant and Michael Vick. Johnson & Johnson's rapid and prudent response to the 1982 Tylenol poisonings "remains the gold standard in crisis control."[230] Seven people had died taking Tylenol capsules laced with cyanide.[231] Pharmaceutical industry experts sounded the brand death knell to Tylenol.[232] Johnson & Johnson went on the "offensive" by launching a recall of 31 million bottles of Tylenol and a "massive" public relations campaign to inform the public.[233] As a result of Johnson & Johnson's role model initiative, it restored confidence both in the company and in Tylenol as a product, ultimately bringing Tylenol successfully back to the pharmaceutical market.[234] Johnson & Johnson's reputation-restoration progeny are plentiful. Among them are Exxon (an oil tanker from the world's largest energy company ran aground on an Alaskan reef), Sears Roebuck & Company (California regulators formally accused the company of fraudulently charging customers for unnecessary repairs at its automotive centers), Texaco (publicly contentious and embarrassing settlement of what was then the largest class action racial discrimination lawsuit in history), and Cadbury Schweppes (the world's largest confectionary company had to recall some of its products due to a possible salmonella contamination).[235]

The foregoing establishes the need of talent to draft a reputa-

---

B11.

[229] *Id.* Vick's 2009 season was, by most accounts, mediocre. Frank Fitzpatrick, *Vick Experiment Seems Destined to End*, PHILA. INQUIRER, Jan. 10, 2010, *available at* http://www.philly.com/philly/sports/eagles/81082567.html. At times, Vick showed glimpses of his past brilliance, and other times, he failed to live up to the hype his original signing created. *Id.* What happens next in Michael Vick's professional football career and his ongoing image reconstruction remains to be seen. *Id.*

[230] Jia Lynn Yang, *Getting a Handle on a Scandal*, CNNMoney.com, May 22, 2007, http://money.cnn.com/magazines/fortune/fortune_archive/2007/05/28/100033741/index.htm.

[231] *Id.*

[232] *Id.*

[233] *Id.* Commendably, the company "assumed responsibility" for the safety of consumers even though the firm was not responsible for the poisoning of its own Tylenol product. *See* IAN I. MITROFF, MANAGING CRISES BEFORE THEY HAPPEN: WHAT EVERY EXECUTIVE NEEDS TO KNOW ABOUT CRISIS MANAGEMENT 16 (2001).

[234] *Id.* at 17.

[235] *See* McLane, *supra* note 185, Conor Carroll, *Defying a Reputational Crisis–Cadbury's Salmonella Scare: Why Are Customers Willing to Forgive and Forget?* 12 CORP. REPUTATION REV. 64 (2007).

tion-rehabilitation or probation clause into both a traditional and reverse-morals clause. Given this, and mindful that only certain individuals with high degrees of leverage will likely be able to secure a reverse-morals clause, this Article now turns its attention to the elements of an effective reverse-morals clause and considerations in drafting one.

C. *Reverse-Morals Clause Drafting Considerations*

1. Prohibited Conduct

First and foremost, any effective reverse-morals clause will, depending on the goals of the individual, specify which conduct on the part of the company will trigger the clause. Most individuals will likely seek to secure a broad reverse-morals clause whereby the individual may exercise his/her legal rights based on a wide variety of improper corporate conduct. For example, such broad language could prohibit "any conduct that brings the company into public disrepute, hatred, scorn, or otherwise negatively impacts the reputation of the company in the community."[236] On the other hand, talent, at the behest of the company, could agree to a more narrowly worded reverse-morals clause. Such a clause would identify the specific conduct proscribed by the contract. Such language could prohibit "crimes of moral turpitude" or "violations or convictions of laws." Talent should be cognizant of the troubles that a broadly worded morals clause may pose in the event it is ever triggered. For example, a broad clause may be sufficiently vague to preclude the individual from seeking enforcement in court.[237] Consideration should also be given to whether the clause will cover substantiated actions on the part of the company or merely allegations of immoral conduct.

A final problem talent may face with a poorly drafted reverse-morals clause is that such a clause could permit either party to terminate the agreement if the company engages in the proscribed conduct. Talent will therefore want to draft the clause in such a way that he or she is the sole party who can invoke the clause. Doing so will prevent a company that wants to terminate

---

[236] *See* Kressler, *supra* note 25, at 256 (discussing similar language in the context of traditional-morals clauses)

[237] *See* Kressler, *supra* note 25, at 236. Although vagueness may prevent enforcement of a morals or reverse-morals clause, courts have regularly enforced them. *See, e.g.*, Nader v. ABC Television, Inc., 150 Fed. Appx. 54 (2d Cir. 2005); Scott v. RKO Radio Pictures, Inc., 240 F.2d 87, 87-88 (9th Cir. 1957); Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844, 848 (9th Cir. 1954); Loew's Inc. v. Cole, 185 F.2d 641, 648-49 (9th Cir. 1950). Based on these cases, it is fair to say that morals clauses, and by extension reverse-morals clauses, are generally enforceable, provided that they are drafted with specificity and clarity.

the agreement from purposely engaging in proscribed conduct and then subsequently terminating the agreement pursuant to the reverse-morals clause.

2. Rights After Clause Is Triggered

A reverse-morals clause could specify talent's rights upon the clause being triggered by the company's conduct. Such rights could include talent having the option of terminating the agreement or seeking damages or both. The issue talent would face in seeking damages is quantifying the amount of damages they suffered in dollars. However, this situation could potentially be resolved with a liquidated damages clause.[238]

3. Applicability to Related Entities and Individuals

This term goes to the scope of the reverse-morals clause. Many companies consist of numerous subsidiaries and affiliates. Even though a person may technically be associated with only one company, his or her image could subsequently become associated with all related entities of that company in the event of a corporate scandal. As a result, talent would be wise to draft a clause so that it covers not only the entity with whom he or she is contracting, but also all companies related to or owned by the contracting party in whole or in part. Stated another way, the clause should cover all companies that own an interest in the contracting party and all companies in which the contracting party owns an interest. Similarly, one should also consider the scope of the clause in terms of

[238] The enforceability of such a liquidated damages clause will vary from state to state according to that state's laws on the subject. In the context of employment contracts, liquidated damages may be quantified in advance where the amount specified is proportionate to the probable loss caused by a breach and actual damages are difficult to determine at the time the parties agree to the contract. *See, e.g.*, Bigda v. Fischbach Corp., 849 F. Supp. 895, 902 (S.D.N.Y. 1994); Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633, 641-44 (2001). Notwithstanding various state law differences, courts have generally looked at several factors in determining the enforceability of a liquidated damages clause in employment contracts, including: sophistication of the parties; representation by counsel; arms-length negotiation by the parties; similar damages provisions in other employment contracts; intention of the parties to provide for liquidated damages or a penalty; and the relationship of the damages amount to any actual damages that may be sustained due to breach. *See Bigda*, 849 F. Supp. at 902; DiMatteo, *supra*, at 641; Frederic L. Kirgis, *Fuzzy Logic and the Sliding Scale Theorem*, 53 ALA. L. REV. 421, 428 (2002); Mark A. Conrad, *Mike Keenan's Power Play – A Slap Shot against the Rangers and a Slap on the Wrist by the NHL*, 5 SETON HALL J. SPORT L. 637, 653-54 (1995). Effective negotiation of a liquidated damages clause in this context would necessarily account for these factors. Importantly, one should be aware that estimating damages to one's reputation due to association with an immoral corporate entity may be difficult at best, thereby giving rise to the distinct possibility that such a clause may not be enforceable.

whether it will apply to individual employees of the company. It may be in the individual's interest to draft the clause in such a way that any immoral conduct on the part of company executives may trigger the clause, regardless of whether an executive's actions occurred within the scope of his or her official duties. Companies will likely seek to exclude the actions of individuals outside the scope of their employment from triggering the clause.

4. Term

Talent should take into consideration the reality that reputation-damaging corporate scandals could occur before the contract is signed and then only be discovered after the contract is signed. As such, talent may want to consider seeking a warranty against both past immoral conduct and future immoral conduct when negotiating a reverse-morals clause. Talent may also consider whether to attempt to secure a provision requiring compliance with the clause after the agreement has expired, thereby allowing the individual to potentially bring an action for damages long into the future. Of course, the "term" component of a reverse-morals clause should also specify that compliance with the clause is required for the duration of the agreement.

5. Reservation of Rights

A reverse-morals clause should conclude with language reserving all legal rights and remedies available at law not otherwise specified in the agreement. If a company agrees to a reverse-morals clause at the outset, inclusion of this type of clause would be unlikely to be met with resistance.

6. Future Considerations and Technological Developments

During the drafting process, consideration should also be given to future developments in technology, such as the advent of Twitter. With the increased likelihood of companies demanding that talent relinquish certain social media rights via a morals clause,[239] talent may similarly seek protection against companies' improper use of social media and technology in a reverse-morals clause. Such protection could take the form of a clause addressing the medium through which immoral conduct is conveyed to the public.

---

[239] *See infra* Part IV.

7. Example of a Reverse-morals Clause

Taking the foregoing into consideration, we have formulated an example of a reverse-morals clause meant for illustrative purposes only. The clause below attempts to encompass each of the aforementioned elements. However, it is drafted with reasonableness as the goal, such that a balance is drawn between competing interests.[240]

> If Company should, prior to or during the term of this Agreement, engage in any immoral or financially irresponsible conduct or any other conduct that might tend to bring Company into public disrepute, contempt, scandal, or which might otherwise tend to reflect unfavorably upon Company, its employees, subsidiaries, or affiliated companies, Talent, and only Talent, will have the right to terminate this Agreement for cause. Talent, and only Talent, will further have the right to terminate this Agreement for cause if, prior to or during the term of this Agreement, Company files for protection under any chapter of the United States Bankruptcy Code, 11 U.S.C. § 101 et seq., or commits any felonious act under federal, state, or local law. If the Agreement is terminated pursuant to this clause, Talent will have the right to seek appropriate remedies at law or equity. Talent reserves all legal rights and remedies not otherwise specified in this clause.

IV. TWITTER: VIRAL TROUBLE FOR TALENT AND SPONSOR COMPANIES

The hugely popular micro-blog Twitter is claiming some high-profile talent as social media casualties in the race to personally, directly, and instantly connect with fans and followers in this nascent, uncensored medium. Given the astronomical numbers streaming forth from Twitter, it is understandable why so many talent have found this free service to be irresistible. Twitter is now the third largest social network in the world, behind MySpace and Facebook,[241] with about forty million users who each day produce a "staggering" amount of short messages called tweets.[242] Twitter users spent nearly 300 million minutes on the site in April 2009.[243] The Twitter world orbits around one simple question that challenges its users to answer in 140 characters or less, "What are you

---

[240] Any perceived failure to include a specific element addressed previously in this example is not meant to indicate that a reverse-morals clause should not include such element.
[241] *See* Kelly Phillips Erb, *Microblogging: Is Twitter The New Blog?* 31 PENN. LAWYER 34, 34 (July-Aug. 2009).
[242] Jon Swartz, *More Marketers Sign on to Social Media: They're Going Where Many of Their Customers Hang Out*, USA TODAY, Aug. 28, 2009, at B1.
[243] *Id.*

doing?"[244]

Let us run through a few of the celebrity talent who are already on the Twitter "casualty" list. Shaquille "Shaq" O'Neal, the NBA basketball star, was forced to become a Twitter user because an Internet impostor used his name and was sending messages to "unsuspecting" Shaq fans.[245] In an exponential windfall for O'Neal, more than two million Twitter followers rapidly flocked to his site.[246] Shaq received a fortunate windfall, but it could have just as easily gone the other way. The fans of Pittsburgh Steelers' quarterback Ben Roethlisberger had a false scare when Twitter, Facebook, and MySpace all relayed messages that said that the quarterback had skin cancer.[247] In reality, Roethlisberger, like Shaq, was not a user of these social media sites.[248] Roethlisberger's agent was left with the task of ensuring that the posts be removed from them.[249]

In what might be "the most gracious exit in the raucous, indiscreet, gaffe-ridden history of celebrity Twittering," George Mason basketball coach Jim Larranaga, recently "retired" from Twitter.[250] The coach had made an "oblique" negative reference to an NCAA rule on the amount of snacks coaches can offer players, and commentators abruptly picked up on his tweet to "heap mockery on the NCAA."[251] Best-selling novelist Alice Hoffman had to publicly apologize and shut down her Twitter account after she vented about a critical book review in the Boston Globe by calling a reviewer a "moron."[252] Controversial rock star Courtney Love was sued for libel by a designer who Love called a "drug addict."[253] Dallas Mavericks owner Mark Cuban was recently fined by the

---

[244] Erb, *supra* note 241.

[245] Howard Beck, *The Real O'Neal Puts His Cyber Foot Down*, N.Y. TIMES, Nov. 20, 2008, at B16, *available at* http://www.nytimes.com/2008/11/20/sports/basketball/20shaq.html.

[246] Jonathan Berr, *Sports Biz: Will the NBA Declare War on Twitter?* DailyFinance.com, Sept. 4, 2009, *available at* http://www.dailyfinance.com/2009/09/04/sports-biz-will-the-nba-declare-war-on-twitter/. Kobe Bryant and Ron Artest are among the other top NBA stars who have found Twitter to be a "cheap, easy means of self-promotion." *Id.* Apparently, more than 700 professional athletes from various leagues have Twitter accounts. Interview by Jennifer Ludden of Pablo Torre, Sports Reporter, Why So Many Athletes on Twitter?, National Public Radio, Aug. 27, 2009, *available at* http://www.npr.org/templates/story/story.php?storyId=112286202.

[247] Ed Bouchette, *No Cause for Alarm: Roethlisberger Denies He Has Skin Cancer*, PITTSBURGH POST-GAZETTE, May 21, 2009, at D1, *available at* http://www.post-gazette.com/pg/09141/971734-66.stm.

[248] *Id.*

[249] *Id.*

[250] Amy Argetsinger & Roxanne Roberts, *The Reliable Source: Coach Hangs Up His Twitter Fingers*, WASH. POST, Sept. 2, 2009, at C3. The writers of this piece note that the "social-media craze" has become a "minefield for less cautious public figures." *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

NBA for $25,000 for using Twitter to criticize some referee calls.[254] Lastly, Miami Heat star Michael Beasley "caused alarm" recently with attempted suicide tweets he posted that questioned whether his life was worth living.[255]

Unsurprisingly, some professional sports leagues are fighting back. The NFL and U.S. Tennis Association ("USTA") have recently jumped into the Twitter fray with actual or potential sanctions. The NFL imposed "pretty draconian restrictions" on Twitter and Facebook banning social media posts ninety minutes before a game and until post-game interviews are completed.[256] Surprisingly, those NFL restrictions also apply to the news media.[257] In a move that "angered" star player Andy Roddick, the USTA issued a warning at the 2009 U.S. Open about tweeting confidential information that could be helpful to gamblers in fixing tennis matches, a long-time concern of the USTA.[258] A San Diego Chargers player was fined $2,500 for his tweet that said the training camp food was "nasty."[259] The Green Bay Packers banned its players from using Twitter.[260]

With the Wild West of Twitter, franchises and sponsors are left with no real checks and balances on the content of these instant messages. Since Twitter is less likely to be "filtered" through agents, publicists, or team officials,[261] the "image-obsessed" NFL, which is regularly hit with player off-the-field misconduct, fears that it might not win the control game over Twitter.[262] This fear is a direct threat to both traditional and reverse-morals clauses.

Armed with Twitter, talent are just possibly one tweet away

---

[254] *Id.*
[255] *Id.*
[256] Berr, *supra* note 246. Both the NFL and NBA announced their Twitter policies before the 2009 season began. Joe Librizzi, *Why the NFL and NBA's Twitter and Social Media Policy is Wrong*, BLEACHER REPORT, Dec. 18, 2009, http://bleacherreport.com/articles/311770-why-twitter-and-social-media-policy-in-nfl-and-nba-is-wrong.
[257] Berr, *supra* note 246.
[258] *Id.* On the eve of the 2009 U.S. Open, an upset Roddick, a former Open champion, tweeted that he thought it is "'lame the US Open is trying to regulate our tweeting. I understand the on-court issue but not sure they can tell us if we can't do it on our own time . . . we'll see.'" He added in another tweet, "'I definitely respect the rule about inside info and on the court, but you would seriously have to be a moron to send "inside info" through a tweet.'" Associated Press, *Roddick Calls U.S. Open Twitter Warning 'Lame,'* NBCsports.com, Aug. 28, 2009, http://nbcsports.msnbc.com/id/32603366/ns/sports-tennis/.
[259] Mike Florio, *Chargers Fine Cromartie for Twitter Complaint*, NBCSports.com, Aug. 4, 2009, http://profootballtalk.nbcsports.com/2009/08/04/source-chargers-fine-cromartie-for-twitter-complaint/.
[260] Paul Montgomery, *Green Bay Packers Ban Twitter on the Job*, THE INQUISITR, Aug. 2, 2009, http://www.inquisitr.com/31651/green-bay-packers-ban-twitter-on-the-job/.
[261] Rick Maese, *With Twitter's Arrival, NFL Loses Control of Image Game*, WASH. POST, Aug. 2, 2009, at A1.
[262] *Id.* at A1, A18.

from scandal or a morals clause violation. As demonstrated above, Twitter seems to have the potential to facilitate the proclivity of talent to instantly become victims of fraud and the ability of talent to defame or embarrass others, including their own teams or sponsors. Lawsuits could likely follow. Veiled or explicit criticism about sponsor products could erupt as well. Imagine if a major celebrity endorser impulsively sent a tweet to his fans that said that he or she did not even use the product he or she endorses in TV commercials. Could that possibly result in lost sales for the company? Would that be an actionable breach of a morals clause?

Exacerbating this effect is the technical fact that tweets have a communication ceiling of 140 characters. This limitation is a scandal waiting to happen because brief, informal statements are often subject to interpretation, and consequently, the communication margin of error is greatly amplified by that limitation. Accordingly, it will be quite difficult for talent to retract a tweeted statement or apologize in a coherent way. For instance, how does Miami Heat star Michael Beasley convincingly and effectively convey to his distraught fans that his recent tweet was not an exclamatory declaration that he was going to commit suicide?[263] Teams and sponsors, serving as the Twitter police, are going to find it difficult to handcuff such instantaneous and free social media.

As result of this Twitter talent predicament, we predict that endorsee companies will demand that talent basically sign away all of their Twitter and other social media rights in the form of language to that effect in a morals clause. Reciprocally, talent may demand that endorsee companies subjugate themselves to a similar provision. In rapid response to the Twitter explosion, marketers are scrambling to get on the social media bandwagon. Innovatively, Ford Motor Company has created a social media management position and plans to introduce America to its Fiesta subcompact car, not with a "massive ad blitz on TV," but by taping 100 top bloggers who have been given a Fiesta for six months.[264] The marketing quid pro quo is that once a month the bloggers are required to upload a video on YouTube about the car, and they are exhorted to talk "no holds barred" about the Fiesta on their blogs, Facebook, and Twitter.[265]

The current social media wisdom is that these media can be an "ideal forum for CEOs to offer customers a candid viewpoint"

---

[263] Miami Heat star Michael Beasley's suicidal-sounding tweets included one stating, "Feelin like it's not worth livin!!!!!!! I'm done." *See* Argetsinger & Roberts, *supra* note 250.
[264] Swartz, *supra* note 242, at B1.
[265] *Id.*

without the need for a filter or "middleman."[266] This is precarious thinking. Similar to the waiting trap described above for talent, this type of unfettered dialogue is potentially fraught with embarrassment and lawsuit danger for any company. As a result, talent should ensure that a prudent Twitter policy is in place at a sponsor company not only as a matter of due diligence but also as part of a reverse-morals clause.

Lastly, and maybe counter-intuitively, the ubiquitous use of Twitter might contribute to the current drought in the number and dollar value of endorsement deals. Since nine in ten consumers trust their peer consumers more than marketers,[267] who needs expensive TV commercials or ads anymore, with talent as the centerpiece, to launch a new product? Twitter provides the marketing force, not talent. A growing cadre of marketers simply "can't afford to ignore" millions of prospective customers who are "consuming media" in new venues.[268] An author of a forthcoming book on how businesses can capitalize on Twitter states, "Companies have no choice. This is where their customers are going."[269] In the face of this potential adverse Twitter effect, talent might consider a clause in their endorsement contracts that states that their deal will not be obsolesced or marginalized by current or future, yet undiscovered social media.

V. Conclusion

This Article has served as an invitation to reputable talent to reverse the negotiation tables on endorsee companies and extract from them reciprocal scandal-protection "insurance policies" in the form of reverse-morals clauses. This is an essential and prudent contract strategy in the new era of corporate crimes and scandals in a recession-scarred world. The reverse-morals clause, birthed in 1968 by a celebrity singer caught in the throes of the clash between his orthodox religious faith and the changing mores of the record industry, apparently has lain dormant for three decades. The Enron scandal in 2001 demonstrated the need to "revive" it. Between 2001 and 2008, however, there has apparently been no substantive discussion about these clauses either in the legal literature, sports marketing literature, or the blogosphere. In the post-Great Recession world of endorsement deals (which includes the growing prominence of social media outlets), we

[266] *Id.* at B2.
[267] *Id.* This data are from a recent survey by Nielsen. *Id.*
[268] *Id.*
[269] *Id.*

think endorsers would be wise to put reverse-morals clauses back on the negotiation table. Undoubtedly, both the traditional morals clause and reverse-morals clause are now the center of the endorsement contract universe.

This Article has sailed into the largely unchartered waters of reverse-morals clauses. Armed with the history perspective, caveats, simple due diligence checklist, and contract drafting suggestions outlined in this Article, both talent and their agents should walk with confidence into the negotiation room. Although the very idea of a reverse-morals clause would have been an oxymoron more than forty years ago; today, this clause is vital for protection against the harmful effects of the types of scandalous or criminal behavior by an endorsee company that we have unfortunately and repeatedly experienced since 2001.