
TREATING PROFESSIONAL ATHLETES LIKE WALL STREET EXECUTIVES: THE POTENTIAL FOR CLAWBACK PROVISIONS IN SPORTS CONTRACTS*

I have let my family down and I regret those transgressions with all of my heart. I have not been true to my values and the behavior my family deserves. I am not without faults and I am far short of perfect. . . . Although I am a well-known person and have made my career as a professional athlete, I have been dismayed to realize the full extent of what tabloid scrutiny really means.¹

– Statement of Tiger Woods after his adultery became public.

I. INTRODUCTION

Anyone who pays even casual attention to sports or entertainment media is aware that athletes frequently find themselves in scandal.² Many of these athletes possess lucrative endorsement deals from which they may be dropped as a result of their disreputable actions.³ But what remedies are there for the companies that invested substantial amounts of money in these athletes' likable images, only to have the athletes squander that goodwill? By virtue of morals clauses⁴ that are a standard portion of endorsement contracts for athletes, the companies often exercise the option to drop the athlete from the deal.⁵ Beyond that, these companies are left with brands associated with a publicly disfavored athlete.⁶ Analogous immoral (or even illegal) behavior committed by Wall Street

* Bradley R. Smith, J.D. Candidate, Temple University Beasley School of Law, 2015. I want to thank the *Temple Law Review* editors and staff for their tireless work in improving this Comment. I would also like to thank Professor Kenneth Jacobsen for his guidance and insight throughout the process of writing this Comment. As with any of my accomplishments, this Comment would not have been possible without the continuing support of my parents.

1. *Tiger Woods Regrets "Transgressions,"* CBSNEWS (Dec. 2, 2009, 8:16 PM), <http://www.cbsnews.com/2100-500290-5863227.html> (discussing Tiger Woods's public response after his adulterous behavior came to light in 2009).

2. See *infra* Part II.A.3 for a discussion of several high-profile athletes who have recently been publicly disgraced by scandal.

3. See *infra* Part II.A.2 for a discussion of the high stakes of endorsement deals, and Part II.A.3 for a discussion of particular athletes who have been dropped from their deals for illicit behavior.

4. "Morals clause" is the term used in this Comment for the type of clause that is sometimes referred to as a "morality clause," "public image clause," "good-conduct clause," "moral turpitude clause," "personal-conduct clause," and "behavior clause." See Fernando M. Pinguelo & Timothy D. 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 n.10 (2009).

5. See *infra* Part II.A.1 for a discussion of the history of, and justifications for, morals clauses.

6. See, e.g., Sarah D. Katz, Note, "Reputations . . . A Lifetime to Build, Seconds to Destroy": *Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements*, 20 CARDOZO J. INT'L & COMP. L. 185, 190–91 (2011) (recognizing that "incidental transfers of unfavorable meanings from [an athlete] to a product or project may occur based on the [athlete's] personal conduct").

executives in the course of business is often dealt with contractually through “clawback” provisions.⁷ Clawback provisions generally provide stipulated damages when executives profit off of trades that they made by virtue of illegal or unethical trading practices.⁸ This Comment explores the potential for similar clawback provisions to be implemented into the morals clauses of athletic endorsement deals and college coaching contracts.⁹

Part II.A discusses the history of morals clauses as well as the current state of morals clauses in athletic endorsement contracts. The public downfalls of Lance Armstrong, Ryan Braun, and Tiger Woods are used as case studies to show how morals clauses have been invoked in recent years. Part II.B introduces clawback provisions, which are common in Wall Street executives’ employment agreements—especially since the financial crisis of 2008. Part II.C examines existing proposals for clawback provisions to be used in sports contracts. Some commentators have suggested the potential for clawback provisions to be used in college coaching contracts.¹⁰ This Comment explores both of these potential uses for clawback provisions in the sports world.

Section III addresses the viability of clawback provisions to be combined with morals clauses in sports contracts, particularly athletic endorsement deals. Clawback provisions in this context would allow companies to recoup some of the money they already paid the athlete-endorser whose immoral acts brought negative attention to the company. Part III.A discusses how clawback provisions can be infused into morals clauses. Further, Part III.A examines how the respective parties will view clawback provisions. Finally, Part III.B discusses how to construct an effective clawback provision that will be agreeable to both parties while sufficiently guarding the corporate sponsor¹¹ party against the repercussions resulting from an athlete’s transgressions. This Comment concludes by envisioning what would have happened to Lance Armstrong had

7. See *infra* Part II.B for a discussion of clawback provisions in employment agreements for executives at financial institutions and corporations.

8. See, e.g., Miriam A. Cherry & Jarrod Wong, *Clawbacks: Prospective Contract Measures in an Era of Excessive Executive Compensation and Ponzi Schemes*, 94 MINN. L. REV. 368, 417–18 (2009) (explaining that in the case of executive misconduct, “the misconduct creates a breach and requires activation of the clawback provision to recover the bonus that had been paid. . . . [T]he stipulated damages amount is the amount of the bonus.”); see also Martin J. Greenberg, *The Use of Clawback Clauses in College Coaches’ Contracts*, FOR THE RECORD (Nat’l Sports L. Inst., Milwaukee, Wis.) Apr.–June 2010, at 3, 3, available at <https://law.marquette.edu/assets/sports-law/pdf/for-the-record/v21i2.pdf> (defining a clawback provision as “a contractual covenant in an employment agreement that requires an employee who has received compensation or something of value to return that compensation upon the occurrence of a specifically stated condition subsequent”).

9. The scope of this Comment is limited to the world of sports, although a very similar concept of clawback provisions could be implemented into the morals clauses in other areas, such as endorsement deals for entertainers.

10. See *infra* note 162 for various proposals to incorporate clawback provisions into college coaching contracts.

11. Throughout this Comment, the term “corporate sponsor” is used to describe the corporate party to an endorsement contract that is seeking to promote its brand by signing an athlete to publicly endorse its product or services.

his endorsement deals included clawback provisions when he was unceremoniously released from several sponsorships.

II. OVERVIEW

A. *Current State of Morals Clauses in Athletic Endorsement Contracts*

Morals clauses in talent agreements have existed since 1921, but have become increasingly prevalent over the last two decades.¹² Prior to 1997, less than half of all athletic endorsement deals were estimated to include a morals clause, but by 2003 that number had risen to over seventy-five percent.¹³ Morals clauses allow a business or employer contracting with an individual to terminate the agreement if that individual behaves in a way that is detrimental to the employer's brand or image.¹⁴ Numerous corporations have made headlines recently after dropping prominent athletes from lucrative endorsement deals due to those athletes' transgressions that led to public shame.¹⁵

1. History and Evolution of Morals Clauses

The popularity of morals clauses in talent agreements has soared in recent years, but the first use can be traced to the Universal Film Manufacturing Company (Universal Films)—now known as Universal Studios—in 1921.¹⁶ The morals clause was created as a response to public outrage at the moral improprieties of Hollywood, particularly the case of Roscoe “Fatty” Arbuckle.¹⁷ In 1921, Arbuckle signed a three-year, \$3 million contract¹⁸ with Paramount

12. 2008 *Seton Hall University School of Law Sports & Entertainment Law Symposium: From the Arena to the Streets – The Pressures Placed on Athletes, Entertainers, and Management*, 19 SETON HALL J. SPORTS & ENT. L. 381, 483–85 (2009) [hereinafter *Seton Hall Symposium*] (statement of Fernando Pinguelo).

13. Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 4 (2005).

14. *Seton Hall Symposium*, *supra* note 12, at 482 (statement of Fernando Pinguelo).

15. See, e.g., Patrick Rische, *Armstrong Will Lose \$150 Million in Future Earnings After Nike and Other Sponsors Dump Him*, FORBES (Oct. 18, 2012, 9:23 AM), <http://www.forbes.com/sites/prishe/2012/10/18/nike-proves-deadlier-than-cancer-as-armstrong-will-lose-150-million-in-future-earnings/> [hereinafter Rische, *Armstrong*] (explaining the financial impact on Lance Armstrong, including Nike dropping him as a product endorser, after he admitted to using illegal performance-enhancing drugs (PEDs)); Patrick Rische, *Cytosport, Aaron Hernandez, and Ryan Braun: Bad Luck or Sour Judgment in Selecting Athlete Endorsers for Muscle Milk*, FORBES (June 23, 2013, 2:24 AM), <http://www.forbes.com/sites/prishe/2013/06/23/cytosport-aaron-hernandez-and-ryan-braun-bad-luck-or-sour-judgment-in-selecting-athlete-endorsers-for-muscle-milk/> [hereinafter Rische, *Cytosport*] (discussing CytoSport cutting ties with Ryan Braun after he tested positive for PEDs and dropping Aaron Hernandez after he was investigated for murder); Will Wei, *Tiger Woods Lost \$22 Million in Endorsements in 2010*, BUS. INSIDER (July 21, 2010, 1:19 PM), <http://www.businessinsider.com/tiger-woods-lost-22-million-in-2010-endorsements-2010-7> (detailing Tiger Woods's lost endorsement revenue after his extramarital affairs were revealed).

16. Pinguelo & Cedrone, *supra* note 4, at 369.

17. Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 236–37 (2005).

18. This amount would be the equivalent of \$28 million in 2005. *Id.* at 236 n.7.

Pictures.¹⁹ Not long after, Arbuckle was involved in a public scandal when a woman was found dead in a hotel room where Arbuckle hosted a party.²⁰ Noticing that Hollywood was increasingly attracting attention for the lavish and morally void lifestyles of some of its biggest celebrities, Universal Films took action to ensure it would not have to continue to pay an actor or actress after a scandal landed the artist in disfavor with the public.²¹ The Universal Films morals clause was sweeping, but not unlike the morals clauses of today in terms of its broad language and all-encompassing scope.²² The clause permitted Universal Films to cancel a contract for any action committed by an artist that brought him or her into “public hatred, contempt, scorn or ridicule, or tend[ed] to shock, insult or offend the community or outrage public morals or decency.”²³ Following Universal’s lead, morals clauses began to take root in talent agreements during the 1920s.²⁴

Hollywood filmmakers shifted their use of morals clauses in the mid-twentieth century to undermine unpopular political ideologies.²⁵ Unlike the 1920s, when morals clauses were concocted to target debauchery in Hollywood, morals clauses were used in the 1950s as a means to attack Hollywood elites who were accused of having Communist ties.²⁶ A few members of the film industry were questioned by the House Un-American Activities Committee.²⁷ When they refused to answer whether they were Communists, their employment contracts were terminated because they had violated the morals clauses in their agreements.²⁸ Several screenwriters challenged their dismissals, and, for the first time, the courts had an opportunity to weigh in on the legality of morals clauses.²⁹

19. *Id.* at 236.

20. *Id.* at 236–37.

21. *Id.* at 237; see also *Morality Clause for Films: Universal Will Cancel Engagements of Actors Who Forfeit Respect*, N.Y. TIMES, Sept. 22, 1921, available at <http://query.nytimes.com/mem/archive-free/pdf?%20res=9A02E0DC123EEE3ABC4A51DFBF66838A639EDE> (reporting that as a result of the Arbuckle scandal, artists employed by Universal would be bound by a “morality clause” allowing the company to discontinue an actor’s salary if he or she were to lose the favor of the public).

22. See Pinguelo & Cedrone, *supra* note 4, at 370.

23. *Morality Clause for Films*, *supra* note 21.

24. Pinguelo & Cedrone, *supra* note 4, at 355.

25. See, e.g., Kressler, *supra* note 17, at 238 (recounting studios utilizing morals clauses to dissociate with suspected communists).

26. Pinguelo & Cedrone, *supra* note 4, at 356.

27. Kressler, *supra* note 17, at 238.

28. *Id.*

29. *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 91 (9th Cir. 1957) (upholding the lower court’s finding that a film director had violated his morals clause for refusing to answer questions at a hearing held by the House Un-American Activities Committee); *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 849–51 (9th Cir. 1954) (affirming that the morals clause in a screenwriter’s contract could be enforced and determining that violation of such was proper grounds for termination); *Loew’s, Inc. v. Cole*, 185 F.2d 641, 658–59 (9th Cir. 1950) (ruling that a jury could take notice that the public held Communism in contempt when considering whether a morals clause had been violated).

Morals clauses withstood these legal challenges, thus establishing precedent for film studios to invoke a morals clause breach as a legitimate ground for termination. In these early cases, the Ninth Circuit upheld the legality of morals clauses in several challenges arising from Hollywood talent agreements.³⁰ In one case, the court reversed a lower court decision and held that the jury could take judicial notice that the “public generally looked with scorn and contempt on persons believed to be Communists.”³¹ The Ninth Circuit stated that the jury, which was properly instructed, could have inferred that the screenwriter was a Communist based on his refusal to answer questions concerning his Communist ties and his subsequent indictment for contempt of Congress, both of which violated the morals clause that required him to act “with due regard to public conventions.”³²

The factual circumstances of the Hollywood screenwriters’ cases were nearly identical, and the Ninth Circuit consistently found morals clauses to be enforceable.³³ The public paid a great deal of attention when Hollywood elites were called before Congress, and accusations of Communist ties bolstered the studios’ arguments that their reputations could be negatively affected by their employees’ actions.³⁴ As such, the Ninth Circuit established that, under California law, a breach of a morals clause³⁵ could be grounds for termination if the talent’s actions damaged the public image of the company.³⁶

2. Why Morals Clauses Matter

Morals clauses allow sponsors to distance themselves from a spokesperson if that individual has publicly disgraced himself or herself.³⁷ Because professional

30. See *supra* note 29 for Ninth Circuit cases addressing morals clauses that were challenged by Hollywood screenwriters.

31. *Cole*, 185 F.2d at 659.

32. *Id.* at 649. The parties would eventually settle the case after the Ninth Circuit’s decision. Pinguelo & Cedrone, *supra* note 4, at 359 (internal quotation marks omitted).

33. *Lardner*, 216 F.2d 844; *Cole*, 185 F.2d 641.

34. See Kressler, *supra* note 17, at 238 (describing front-page editorials on the proliferation of Communists throughout the movie industry and calls for boycotts of theaters showing films by alleged Communists).

35. For purposes of showing what a 1940s morals clause looked like, the clause at issue in *Cole* read:

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

185 F.2d at 645 (internal quotation marks omitted). The morals clause in *Lardner* was similar but was perhaps even more broad by including any conduct “that shall cause public scandal.” 216 F.2d at 848 (internal quotation marks omitted).

36. Pinguelo & Cedrone, *supra* note 4, at 361.

37. Katz, *supra* note 6, at 191 (discussing the role of morals clauses in protecting corporate interests).

sports in America operate as enormous, lucrative businesses,³⁸ many companies seek to protect their investment in an athlete's image through moral clauses in athletic endorsement contracts.³⁹ When an athlete is revealed to have engaged in disgraceful behavior, the companies that are endorsed by that athlete suffer a negative reaction in the market.⁴⁰ Athletes often cash in on their notoriety with endorsement deals; some actually make more money from these sponsorships than they do from their salaries.⁴¹ When companies invest huge sums of money in these athletes,⁴² they want to ensure that any decline in an athlete's reputation does not result in the sponsor falling into public disfavor as well.⁴³ Morals clauses allow the sponsor to end the contractual relationship if the athlete commits a public transgression.⁴⁴ The rationale behind granting corporate sponsors the power to sever the relationship if an athlete breaches a morals clause is that the sponsor has entered the relationship to benefit from the public's favorable image of the athlete.⁴⁵ When an athlete has fallen into disrepute due to some actions of questionable morality, the benefit of the athlete's endorsement to the company's image diminishes considerably.⁴⁶

Morals clauses are considered standard in today's endorsement contracts and often include very broad language.⁴⁷ Companies signing an athlete to an endorsement deal favor broad language while athletes prefer the morals clause

38. In 2012, the National Football League (NFL) amassed over \$9 billion in revenue and its commissioner, Roger Goodell, stated his goal is to increase that number to \$25 billion by 2027. Monte Burke, *How the National Football League Can Reach \$25 Billion in Annual Revenues*, FORBES (Aug. 17, 2013, 6:30 AM), <http://www.forbes.com/sites/monteburke/2013/08/17/how-the-national-football-league-can-reach-25-billion-in-annual-revenues/>.

39. Auerbach, *supra* note 13, at 4 (stating that, as of 2003, approximately seventy-five percent of athlete endorsement contracts include a moral clause).

40. Sherry Bartz, Alexander Molchanov & Philip A. Stork, *When a Celebrity Endorser is Disgraced: A Twenty-Five-Year Event Study*, 24 *MARKETING LETTERS* 131, 134–35 (2013) (indicating that the results of their study reveal that “abnormal returns around celebrity misbehavior dates are consistent with conventional wisdom . . . that celebrity endorsements are value-enhancing events, and damage to celebrity's image has detrimental effects on company's value”).

41. Corey Nachman, 7 “Athletes” Who Made More Money Endorsing Products than Playing Sports in the Past Year, *BUS. INSIDER* (July 7, 2011, 5:27 PM), <http://www.businessinsider.com/athlete-endorsements-2011-2011-7?op=1>.

42. See Pinguelo & Cedrone, *supra* note 4, at 369 (citing Nike, Inc., Annual Report (Form 10-K), at 35 (May 31, 2008)) (revealing that “as of May 31, 2008, Nike owed more than \$3.8 billion in endorsement deals”).

43. See Katz, *supra* note 6, at 191–92 (explaining that companies use morals clauses to protect themselves from “incidental transfers of unfavorable meanings from talent to a product or project [that] may occur based on the talent's personal conduct”).

44. Pinguelo & Cedrone, *supra* note 4, at 349.

45. Katz, *supra* note 6 at 190–91.

46. *Id.* at 191 (explaining the risk of negative publicity that is inherent in any association between talent and a company, product, or project); see also Sherry Bartz et al., *supra* note 40, at 131–40 (2013) (analyzing the market impact on companies that are endorsed by a celebrity engulfed in scandal).

47. See *Seton Hall Symposium*, *supra* note 12, at 486–87 (statement of Fernando Pinguelo) (observing that morals clauses often include language that condemns anything that could bring the individual into public ridicule or hatred).

to specifically define the type of actions that could trigger the sponsor's right to terminate.⁴⁸ Typically, conduct that violates morals clauses extends far beyond criminal activity.⁴⁹ Anything that may tarnish an individual's reputation—and by extension the reputation of the sponsor—may fall under the expansive language of many morals clauses.⁵⁰ An athlete may violate a morals clause by having an extramarital affair, using steroids, engaging in public fights, or committing a variety of other transgressions.⁵¹ An arrest, even if there is no conviction, may end a sponsor's professional relationship with an athlete.⁵² In negotiating endorsement contracts, athletes will therefore try as much as possible to limit the type of conduct for which they can have their contracts terminated.⁵³

While the language in morals clauses is often considered boilerplate, some modern morals clauses are highly specific and may be tailored to a certain athlete's sport.⁵⁴ For instance, the United States Postal Service's (USPS) contract with Lance Armstrong and his professional cycling team included language in its morals clause that targeted the use of performance-enhancing drugs (PEDs).⁵⁵ In general, though, just like the morals clauses of the 1920s, today's morals clauses in athletic endorsement contracts encompass a broad range of behavior.⁵⁶ Morals clauses were briefly used to punish political minorities, but in recent years morals clauses have been invoked only for the

48. See, e.g., Pinguelo & Cedrone, *supra* note 4, at 370 (explaining that broadly worded morals clauses give companies "extensive flexibility to terminate the talent agreement for any potentially damaging conduct of the talent").

49. Brian R. Socolow, *What Every Player Should Know About Morals Clauses*, 4 MOVES MAG. 186, 187 (2008), <http://www.loeb.com/articles-articles-20080903-whateveryplayershouldknowaboutmoralsclauses>.

50. *Id.* at 188 (explaining that broadly worded morals clauses can permit a sponsor to terminate an endorsement deal for something as minor as an endorser's criticism of the company's product or management).

51. *Id.*

52. *Id.*

53. See Auerbach, *supra* note 13, at 7–8 (noting that morals clauses are often a point of contention in negotiating athlete endorsement deals and that an athlete should bargain based on the relative strengths of his or her public image). During the negotiation process, some athletes have requested a "reverse" morals clause that allows the athlete to opt out of the contract if the corporate sponsor is revealed to have been engaged in a corporate scandal. Porcher L. Taylor, III, 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*, 28 CARDOZO ARTS & ENT. L.J. 65, 99–100 (2010).

54. Socolow, *supra* note 49, at 187.

55. *U.S. Joins Lawsuit Against Armstrong*, DENV. POST, Feb. 23, 2013, at B2 (discussing the Justice Department's lawsuit against Lance Armstrong for "knowingly violat[ing] [his] postal service agreement[] by regularly using banned substances and methods to enhance [his] performance"); see also Shaun Assael, *Details of Lance Armstrong Sponsorship*, ESPN (Jan. 14, 2011, 5:03 PM), <http://sports.espn.go.com/oly/cycling/news/story?id=6019436>. See *infra* notes 90–100 and accompanying text for further discussion of the Lance Armstrong scandal.

56. See Pinguelo & Cedrone, *supra* note 4, at 374 (describing various modern morals clauses that are written broadly like those originally implemented in 1920s Hollywood); Socolow, *supra* note 49 at 187 (explaining that many athletes have contracts terminated as the result of broadly worded morals clauses that are viewed as "boilerplate" provisions).

types of immoral actions they were originally intended to target.⁵⁷ However, the standard by which morality is judged has changed with the times.⁵⁸

When a morals clause is invoked by a corporate sponsor to terminate an endorsement contract, the sponsor's decision is rarely challenged in court.⁵⁹ Depending on how valuable an athlete is to the company's brand, an athlete may also be able to convince the sponsor that retaining the athlete despite his or her transgressions is in the sponsor's best interest.⁶⁰ Morals clauses may not require that the endorsement deal be terminated, but instead may feature other penalties that the sponsor can impose.⁶¹ An athlete's star power and market demand can contribute to a morals clause being written narrowly.⁶² With morals clauses being invoked for a wide variety of offenses and because millions of dollars are potentially at stake, it is important that athletes and their attorneys attempt to negotiate detailed morals clauses.⁶³

An egregious violation of a morals clause that an athlete was secretly engaged in at the time he or she signed the endorsement deal may provide a basis for the sponsor to make a fraudulent inducement claim.⁶⁴ For instance, at the time the deal was signed, an athlete may have been using PEDs in violation of the morals clause in their endorsement deal, unbeknownst to the corporate sponsor.⁶⁵ In such a scenario, the sponsor may argue that it would not have extended the endorsement offer had it been aware of the athlete's conduct.⁶⁶ In a sense, the athlete induced the sponsor to buy into a fabricated image of the

57. *Id.*

58. See Katz, *supra* note 6, at 202–03 (observing that legitimate grounds for termination under morals clauses once included miscegenation and suspicion of Communist beliefs).

59. *Id.* at 194–95.

60. Pinguelo & Cedrone, *supra* note 4, at 378–79; Socolow, *supra* note 49, at 187. Tiger Woods was dropped by AT&T, Accenture, and TAG Heuer following his marital scandal in 2009, but he was retained by Nike with which he had a more substantial relationship. Michael Buteau, *Tiger Woods Is Dropped by TAG Heuer from Watch-Endorsement Deal as Rank Falls*, BLOOMBERG (Aug. 8, 2011, 11:02 AM), <http://www.bloomberg.com/news/2011-08-08/tiger-woods-dropped-by-tag-heuer-from-watch-endorsement-deal-as-rank-falls.html> [hereinafter Buteau, *Tiger Woods Is Dropped by Tag Heuer*]. Nike stood by Woods's side and then extended his endorsement deal in 2013. Michael Buteau, *Tiger Woods Signs Fourth Golf Endorsement Contract with Nike*, BLOOMBERG (July 18, 2013, 12:00 AM), <http://www.bloomberg.com/news/2013-07-17/tiger-woods-signs-fourth-golf-endorsement-contract-with-nike.html> [hereinafter Buteau, *Tiger Woods Signs Fourth Golf Endorsement Contract*].

61. Pinguelo & Cedrone, *supra* note 4, at 378–79.

62. See Auerbach, *supra* note 13, at 7–8 (discussing the direct relationship between an athlete's star power and ability to negotiate a narrowly defined morals clause).

63. Pinguelo & Cedrone, *supra* note 4, at 378–79.

64. See, e.g., Hayes Hunt & Brian Kint, *Celebrity Endorsements: Your Morals Clause Return Policy*, LEGAL INTELLIGENCER 1 (Nov. 21, 2012), available at http://www.cozen.com/Templates/media/files/publications/Hunt_Kint_Legal.pdf (discussing the possibility that Lance Armstrong's conduct constituted fraudulent inducement because he conveyed an image of himself that was false to sponsors).

65. *Id.*

66. See, e.g., *id.* at 2 (explaining that companies choose celebrity endorsers based on the image the celebrity projects and the values the company wants consumers to associate with their products or services).

athlete to represent its brand.⁶⁷ However, this argument would be a difficult one for the company to win, as most endorsement deals do not specify that the contract is dependent upon the ideals that the athlete embodies.⁶⁸ A fraudulent inducement lawsuit would also be expensive and require the sponsor to reveal publicly the terms of the sponsorship deal—something most companies are hesitant to do.⁶⁹

3. Invocations of Morals Clauses in the World of Sports

Many athletes have tarnished their images through actions that would not have come to light a few decades ago but are now revealed due to increased media scrutiny of professional athletes.⁷⁰ This is making morals clauses more important than ever before.⁷¹ The combination of an increasing number of young professional athletes and the enormous wealth they are accumulating very quickly has resulted in plenty of examples of misbehavior by athletes.⁷² While there seems to be countless instances of athletes' transgressions that resulted in lost endorsement deals, this Part focuses on the recent cases of Ryan Braun, Tiger Woods, and Lance Armstrong.

Ryan Braun, a professional baseball player, won the 2011 National League Most Valuable Player award, which led to lucrative endorsement deals with Nike, AirTran Airways, and Remington.⁷³ Not long after, however, he tested positive for PEDs, but his reputation was temporarily saved when he appealed the positive test and won.⁷⁴ Sports marketers estimated that this successful appeal could have increased Braun's endorsement revenue from \$2 million to \$5 million in one year's time.⁷⁵ That goodwill was short-lived, however, as a year later Braun was discovered to have in fact used PEDs.⁷⁶ Public opinion of Braun

67. *Id.*

68. *Id.* at 1 (noting the reasons why companies that had signed Lance Armstrong to endorsement deals were likely reluctant to undertake litigation against him for fraudulent inducement). *But see*, Glenn D. West & W. Benton Lewis, Jr., *Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be the “Entire” Deal?*, 64 *BUS. LAW.* 999, 1014 (2009) (explaining some courts allow fraudulent inducement claims regardless of whether the misrepresentation was explicitly stated in the contract).

69. Hunt & Kint, *supra* note 64, at 1.

70. Socolow, *supra* note 49, at 188. To further illustrate this point, one need only look at the example of Mickey Mantle. Mantle, a professional baseball player for the New York Yankees from 1951 to 1968, was known to have been a heavy drinker in his playing days but he received very little ridicule for this habit. Auerbach, *supra* note 13, at 6.

71. Socolow, *supra* note 49, at 188 (stating that due to the power of media today companies immediately turn to the morals clause of their endorsement contracts with disgraced athletes).

72. Auerbach, *supra* note 13, at 4.

73. Mike Ozanian, *Baseball MVP Ryan Braun's \$5 Million Drug Verdict*, *FORBES* (Feb. 24, 2012, 9:08 AM), <http://www.forbes.com/sites/mikeozanian/2012/02/24/ryan-brauns-5-million-verdict/>.

74. *Id.*

75. *Id.*

76. Steve Eder, *Doping Tarnishes Baseball Again as Star Slugger Is Suspended*, *N.Y. TIMES*, July 23, 2013, at A1; Patrick Rishe, *Ryan Braun's Diminished E-Score Reflects Tangible Evidence of Lost*

plummeted.⁷⁷ Not only was Braun exposed as a cheater, he was denigrated by fans and the media for having indignantly maintained his innocence in the face of a positive test a year earlier.⁷⁸ This ruse was arguably considered to be as damaging as the PED use itself.⁷⁹ Nike subsequently dropped Ryan Braun from an endorsement deal reportedly worth almost \$2 million.⁸⁰ The post-suspension endorsement deals that Braun received were far less lucrative.⁸¹

Nike, however, is not always so quick to turn its back on athletes with whom it has endorsement deals, and Tiger Woods is a prime example.⁸² Tiger Woods was beloved and had numerous high-paying endorsement deals when his public image was sullied by the revelation that he had engaged in numerous extramarital affairs and was not the man the public believed him to be.⁸³ Nike continued to back Woods throughout the ordeal and even signed a new deal with him in 2013.⁸⁴ However, other sponsors such as Gatorade,⁸⁵ AT&T, Accenture, and Tag Heuer terminated their endorsement deals with Woods.⁸⁶ The fact that Woods was not dropped by all of his sponsors—and in fact was retained by the sponsor with whom he had the closest relationship—speaks to the weight of his star power.⁸⁷ Yet even the “most marketable and highest paid endorser”⁸⁸ can

Star Power, FORBES (Aug. 21, 2013, 10:46 AM), <http://www.forbes.com/sites/prishe/2013/08/21/ryan-brauns-diminished-e-score-reflects-tangible-evidence-of-lost-star-power/>.

77. Rische, *supra* note 76 (noting that Braun lost a large amount of star power and credibility after his sixty-five game suspension for his involvement in the Biogenesis scandal).

78. See Darren Rovell, *Ryan Braun's Reputation Suffering*, ESPN (July 31, 2013, 4:58 PM), http://espn.go.com/mlb/story/_id/9525399/ryan-braun-milwaukee-brewers-least-trustworthy-athletes-poll-shows (discussing that the impact on Braun's reputation was compounded due to his lies about steroid usage). A public opinion poll indicated that only eight athletes (Lance Armstrong among them) were considered less trustworthy than Ryan Braun. *Id.*

79. *Id.*

80. Robert Passikoff, *Nike Nixes Ryan Braun Sponsorship*, FORBES (Aug. 7, 2013, 10:52 AM), <http://www.forbes.com/sites/robertpassikoff/2013/08/07/nike-nixes-ryan-braun-sponsorship/>; see also Rische, *Cytosport*, *supra* note 15 (observing that Ryan Braun was also dropped by CytoSport).

81. Darren Rovell, *Ryan Braun, Cleat Company 3N2 Agree*, ESPN (Mar. 12, 2014, 12:49 PM), http://espn.go.com/mlb/story/_id/10593719/ryan-braun-milwaukee-brewers-signs-first-post-ban-endorsement-deal-3n2-cleat-company (indicating that Braun received his first post-suspension endorsement deal with 3N2 cleats, which “will pay Braun a fraction of the price he was getting from Nike” before it terminated his deal).

82. See Chris Smith, *Lance Armstrong and Why Sponsors Need to Rethink Athlete Endorsements*, FORBES (Oct. 18, 2012, 12:27 PM), <http://www.forbes.com/sites/chris-smith/2012/10/18/lance-armstrong-and-why-sponsors-need-to-rethink-athlete-endorsements/> (noting that Nike stood behind Tiger Woods, Kobe Bryant, and Ben Roethlisberger amid their respective scandals).

83. *Tiger Woods Regrets “Transgressions”*, *supra* note 1. To further illustrate how pure Woods's image was prior to his public fall from grace, one legal commentator referred to Woods as “a mature, always-grinning gentleman” and held him as the standard against which other athletes are judged. Auerbach, *supra* note 13, at 6.

84. Buteau, *Tiger Woods Signs Fourth Gold Endorsement Contract*, *supra* note 60.

85. Wei, *supra* note 15; *Gatorade Latest to Drop Woods*, GRAND RAPIDS PRESS, Feb. 27, 2010, at D1.

86. Buteau, *Tiger Woods Signs Fourth Gold Endorsement Contract*, *supra* note 60.

87. See Auerbach, *supra* note 13, at 7–8 (suggesting that Woods, prescandal, had such substantial clout because of his marketability that his morals clause was more likely to be tailored

suffer the financial consequences associated with violating the morals clause of an endorsement deal.⁸⁹

Lance Armstrong, another one of the world's most marketable athletes, experienced a similar besmirching of his reputation.⁹⁰ In 2012, it was revealed that Lance Armstrong had engaged in doping⁹¹ throughout his cycling career.⁹² He eventually admitted to doping in a widely viewed interview with Oprah Winfrey.⁹³ Even though Armstrong faced a slew of legal issues when his PED usage was revealed, the largest financial consequence came from lost endorsement deals.⁹⁴ Because the public believed Lance Armstrong had cheated and lied about it for over a decade, he lost lucrative endorsement deals with Nike, Anheuser-Busch, Trek Bicycle Corporation, and Honey Stinger.⁹⁵

USPS, however, was able to go a step further.⁹⁶ USPS is in a unique position as an agency of the federal government and is therefore able to recover

favorably to him); *see also* Bob Harig, *Tiger Woods Signs New Nike Deal*, ESPN (July 17, 2013, 1:41 PM), http://espn.go.com/golf/story/_/id/9485529/tiger-woods-signs-new-endorsement-contract-nike-agent-confirms (noting that Tiger Woods “has been with Nike since turning pro in 1996, when he signed a five-year deal for a reported \$40 million”).

88. *See* Auerbach, *supra* note 13, at 6.

89. Wei, *supra* note 15 (recounting that Tiger Woods's scandal resulted in a \$22 million decrease in endorsement revenue).

90. *See* Smith, *supra* note 82 (highlighting the extreme contrast in the public's views of Lance Armstrong, with some considering him a “[t]ireless hero who battled cancer and won,” while others believe he is a “soulless jerk who used drugs to make millions”).

91. “Doping” or “blood doping” is defined as “the misuse of certain techniques and/or substances to increase one's red blood cell mass, which allows the body to transport more oxygen to muscles and therefore increase stamina and performance.” *Blood Doping*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/questions-answers/blood-doping> (last visited Mar. 6, 2015).

92. Michael McCann, *Armstrong's Confession to Have Stark, Wide-Reaching Impact*, SPORTS ILLUSTRATED (Jan. 17, 2013), <http://www.si.com/more-sports/2013/01/17/lance-armstrong-legal-implications>.

93. *Id.*

94. *See id.* (detailing the many possible legal ramifications of Armstrong's scandal, varying from criminal charges to civil suits); Rische, *Armstrong*, *supra* note 15 (chronicling Armstrong's lost revenue from several lost sponsorships). Armstrong may face further financial consequences after an arbitration panel's decision that he must repay a \$10 million bonus he earned through his contract with his former team owner. Vanessa O'Connell, *Lance Armstrong Must Pay \$10 Million to SCA Promotions*, WALL ST. J. (Feb. 16, 2015, 9:04 PM), <http://www.wsj.com/articles/lance-armstrong-must-pay-10-million-to-sca-promotions-1424109980>.

95. Rische, *Armstrong*, *supra* note 15; *see also*, Rische, *supra* note 76 (noting that Lance Armstrong's E-Score—a means of measuring an athlete's marketability—dropped to a twelve out of one hundred).

96. Ann E. Marimow, *Lance Armstrong Wants DOJ's False-Claims Lawsuit Dismissed*, WASH. POST, Jul. 25, 2013, at A7 (analyzing false claims lawsuit against Armstrong and emphasizing that because USPS is struggling to stay solvent, it is looking to recoup millions in sponsorship deals); *see also* Bill Carey, *Lance Armstrong: U.S. Postal Service Got 'Exactly What It Bargained For*, SPORTS ILLUSTRATED (July 24, 2013), <http://tracking.si.com/2013/07/24/lance-armstrong-postal-service-government-lawsuit/> (observing that Lance Armstrong's legal team argued that USPS “should have known that he was doping”).

payments made to Armstrong by virtue of the False Claims Act.⁹⁷ After Armstrong admitted to using PEDs, USPS filed a lawsuit under the Act, asserting that Armstrong's PED use constitutes a breach of the parties' \$40 million contract, and therefore amounts to a false claim for payment brought against the federal government.⁹⁸ USPS sought treble damages under the False Claims Act.⁹⁹ While the morals clause in Armstrong's contract with USPS specifically identified failing a drug test as grounds for termination, it had no stipulation for returning money already paid out.¹⁰⁰ Other companies that seek to recoup losses suffered under such failed endorsements would need to rely on the contractual provisions of their endorsement agreements.¹⁰¹ The False Claims Act is not available to most sponsors, thereby making the language of those agreements—particularly repayment provisions—critically important.¹⁰²

B. Clawback Provisions on Wall Street

On Wall Street, many stockbrokers' and executives' employment contracts contain clauses that deal with misconduct that goes beyond the misconduct prohibited by the simple morals clauses in athletic endorsement deals.¹⁰³ These clauses are known as clawback provisions and provide an employer with a remedy for an employee's misconduct other than simply severing the employment relationship.¹⁰⁴ Specifically, clawback provisions allow the employer to recover money that it paid to an employee after it discovers that the employee engaged in fraud or other misconduct.¹⁰⁵

Since the 2008 financial crisis, clawback provisions have increasingly been used on Wall Street to require employees to return bonuses and deferred

97. False Claims Act, 31 U.S.C. §§ 3729–3733 (2012); see Press Release, U.S. Dep't of Justice, U.S. Joins Lawsuit Alleging Lance Armstrong and Others Caused the Submission of False Claims to the U.S. Postal Service (Feb. 22, 2013), <http://www.justice.gov/opa/pr/2013/February/13-civ-224.html> (explaining that USPS, as a federal government entity, is entitled to make a claim under the False Claims Act, which only imposes liability on those who make false claims for government funds).

98. Carey, *supra* note 96.

99. See 31 U.S.C. § 3729(a) (providing that an individual who violates the Act "is liable to the United States Government for a civil penalty . . . plus 3 times the amount of damages which the Government sustains because of the act of that person"). However, the result of this legal dispute with the United States government is still pending, with a district court recently having denied in part and granted in part Armstrong's motion to dismiss the case. *United States v. Tailwind Sports Corp.*, No. 10-cv-00976 (RLW), 2014 WL 2772907, at *38 (D.D.C. June 19, 2014).

100. Assael, *supra* note 55.

101. See Hunt & Kint, *supra* note 64, at 2 (explaining potential remedies for companies whose endorsers violate their morals clause).

102. See Press Release, U.S. Dep't of Justice, *supra* note 97 (explaining that the False Claims Act applies only to contracts involving government funds); Hunt & Kint, *supra* note 64, at 2 (emphasizing the importance of repayment provisions).

103. See Stephen Gandel, *Can Financial Firms Get Executives to Give Back Pay?*, TIME (Jan. 27, 2010), <http://content.time.com/time/business/article/0,8599,1956081,00.html> (explaining the ramifications of invoking a clawback provision).

104. See *id.* (stating that clawback provisions are expanding and Wall Street is beginning to use them to police both illegal gains and poor investment decisions).

105. *Id.*

compensation when employees engage in misconduct in the course of business.¹⁰⁶ Many of these clawback provisions in employment agreements mirror a section of the Sarbanes-Oxley Act of 2002.¹⁰⁷

1. Sarbanes-Oxley Act

Section 304 of the Sarbanes-Oxley Act (SOX) mandates the forfeiture of certain bonuses and profits that were received as a result of corporate misconduct, and, in some ways, functions like a government-enforced clawback policy.¹⁰⁸ Many corporate clawback policies roughly emulate the provision.¹⁰⁹ The purpose of section 304 of SOX is to penalize, and thereby deter, executives of public companies from engaging in misconduct.¹¹⁰ It does so by forcing those executives to repay bonuses and profits from securities sales in the year following the violation.¹¹¹ SOX was passed in the wake of a wave of corporate scandals that occurred in the early years of the twenty-first century as a reactionary measure designed to rein in corporate wrongdoers.¹¹² Section 304 provides that the CEO and CFO of public companies must repay any bonuses and certain other revenue that they received during the time the company was engaged in misconduct.¹¹³ Section 304 operates similarly to the contractual clawback provisions of executives at companies like JPMorgan Chase,¹¹⁴ but is triggered only after noncompliance with Securities and Exchange Commission (SEC) financial reporting requirements.¹¹⁵ While it may not be identical to the internal clawback provisions implemented in employment agreements at

106. *Id.*

107. Sarbanes-Oxley Act of 2002 § 304, 15 U.S.C. § 7243 (2012) (mandating that the CEO or CFO of a company reimburse “any bonus or other incentive-based or equity-based compensation . . . [and] any profits realized from the sale of securities” if the company had to “prepare an accounting restatement . . . as a result of misconduct”); *see also* Gretchen Morgenson, *Clawbacks in Word, Not Deed*, N.Y. TIMES, Aug. 4, 2013, at BU1 (explaining that shareholders agitated corporations to include provisions in employment contracts that paralleled section 304 of SOX).

108. 15 U.S.C. § 7243.

109. *See* Morgenson, *supra* note 107 (discussing the impact SOX has had on corporate clawback policies and explaining that SOX allows companies “to retrieve compensation paid to executives who were later found to have grievously mismanaged or misbehaved”).

110. *See* Isaac U. Kimes, Note, *Unfettered Clawbacks—Why Section 304 of the Sarbanes-Oxley Act Requires a Personal Misconduct Standard*, 42 U. MEM. L. REV. 797, 803–07 (2012) (detailing the legislative history of SOX).

111. 15 U.S.C. § 7243(a); *see also* Kimes, *supra* note 110, at 804.

112. Spencer C. Barasch & Sara J. Chesnut, *Controversial Uses of the “Clawback” Remedy in the Current Financial Crisis*, 72 TEX. B.J. 922, 922 (2009) (stating that SOX exemplifies the typical manner that politicians, regulators, and government enforcers respond to a major financial crisis—quickly and with a regulatory response); Kimes, *supra* note 110, at 805–06 (discussing the impact the WorldCom and Tyco scandals had on Congress’s passage of SOX).

113. 15 U.S.C. § 7243(a); *see also* Barasch & Chesnut, *supra* note 112, at 923 (describing the SEC’s power under SOX).

114. *See infra* Part II.B.2 for a discussion of clawback provisions used at particular companies.

115. *See* 15 U.S.C. § 7243(a). Section 304 is only invoked when there is noncompliance with governmental reporting requirements, whereas the corporate policies that mirror section 304 can be invoked internally without government intervention.

financial firms, SOX is credited in part for making clawback provisions popular.¹¹⁶

Because SOX was a government response to corporate scandals, section 304 is tougher than many clawback provisions adopted by corporations.¹¹⁷ Section 304 targets incentive- and equity-based compensation and securities sales because those types of gains are tied directly to the company's accounting practices.¹¹⁸ If a company's accounting statements fail to comply with securities laws due to misconduct by someone within the company, then section 304 is triggered.¹¹⁹ The provision does not require the chief executive to have personally done anything wrong to be penalized.¹²⁰ Rather, it is sufficient that the company, which includes its agents and employees, engaged in misconduct, regardless of the CEO or CFO's knowledge.¹²¹ The mere fact that the executive profited from corporate misconduct is sufficient reason for bonuses and certain profits to be returned to the company as a whole.¹²² For that reason, among others, some groups of shareholders would like to see corporate clawback policies more closely mirror section 304.¹²³

2. Clawback Provisions After the Financial Crisis of 2008

After 2008, clawback provisions became a popular means of reform to prevent Wall Street executives from engaging in risky behavior that had contributed to the financial meltdown.¹²⁴ In 2006, only eighteen percent of Fortune 100 companies had clawback provisions in their executive pay packages, but by 2010 that number had risen to nearly seventy-three percent.¹²⁵ While the clawback policies of major securities firms are not exactly transparent, the

116. Michael S. Melbinger, *More Companies Adopting Clawback Policies*, EXEC. COMPENSATION UPDATE 1 (CCH, Executive Compensation Expert Library), June 16, 2010, 2010 WL 9048481 (noting that while clawback provisions have been around for a while, some argue that they "burst on the scene with Section 304").

117. See Kimes, *supra* note 110, at 798 (explaining that scandals such as Enron, WorldCom, and Tyco, created "public anger" that led to the Congress's decision to pass SOX).

118. *Id.* at 804.

119. 15 U.S.C. § 7243(a); see also Kimes, *supra* note 110, at 803-04 (describing the conduct necessary to trigger section 304).

120. See, e.g., SEC v. Jenkins, 718 F. Supp. 2d 1070, 1074-75 (D. Ariz. 2010) (holding that the misconduct of lower-level officials could still trigger section 304 penalties for the CEO who had evidently no part in the misconduct).

121. *Id.* at 1075; see also Kimes, *supra* note 110, at 818 (discussing the court's view in *Jenkins* that section 304 does not contain a knowledge or scienter requirement on the part of the CEO or CFO).

122. *Jenkins*, 718 F. Supp. 2d at 1075.

123. See Morgenson, *supra* note 107 (recounting the views of the LongView Large Cap 500 index fund, a group of investors that was among the first to push for clawback provisions).

124. See Gandel *supra* note 103 (explaining that financial firms implemented clawback provisions to combat misconduct and employees taking excessive risks on stocks that did not seem likely to pay off for investors).

125. *Id.*; see also Gretchen Morgenson, *Pay It Back If You Didn't Earn It*, N.Y. TIMES, June 8, 2008, at BU1 (observing that, in 2008, almost three hundred companies had adopted clawback provisions, whereas four years earlier only fourteen companies had such policies).

adoption of some sort of policy sends a clear message that misconduct will not be tolerated.¹²⁶ Investors generally like clawback provisions because they help hold executives accountable for their actions,¹²⁷ but compensation consultants complain that clawback provisions are very difficult to enforce.¹²⁸ Clawback provisions are controversial, with some commentators arguing they may in fact encourage the risky behavior they were designed to combat.¹²⁹ Others, however, argue they should be utilized more frequently.¹³⁰

One of the most prominent examples of a company invoking a clawback provision was in the case of Ina Drew, the former chief investment officer of JPMorgan Chase.¹³¹ After \$5.8 billion trading losses in 2012, JPMorgan discovered that “employees may have intentionally hid souring bets.”¹³² Drew was the head of the unit responsible for those losses and subsequently had to return two years’ worth of pay due to JPMorgan’s clawback policy.¹³³ The structure of each company’s clawback policies may differ greatly,¹³⁴ but at JPMorgan the board of directors makes all final decisions regarding compensation clawbacks.¹³⁵ Such a set-up, however, may allow executives to get away with behavior that would ordinarily trigger the clawback provisions.¹³⁶

The pressure for clawback provisions to be included in executive compensation packages extends beyond Wall Street.¹³⁷ American Express adopted an executive compensation clawback policy that exemplifies its effort to combat fraud and misconduct among its senior staff.¹³⁸ Its policy reads as follows:

126. Cherry & Wong, *supra* note 8, at 389–90.

127. Morgenson, *supra* note 107.

128. Gandel, *supra* note 103.

129. *Id.*

130. Morgenson, *supra* note 107 (suggesting that companies should cease talking about implementing clawbacks and begin to take action by actually using them).

131. Steve Schaefer, *JPMorgan to Claw Back Millions From Ina Drew, London Whale*, FORBES (Jul. 11, 2012, 8:41 AM), <http://www.forbes.com/sites/steveschaefer/2012/07/11/jpmorgan-to-claw-back-millions-from-ina-drew-london-whale/>.

132. Dawn Kopecki, *JPMorgan’s Drew Forfeits 2 Years’ Pay as Managers Ousted*, BLOOMBERG (July 13, 2012, 10:50 AM), <http://www.bloomberg.com/news/articles/2012-07-13/dimon-says-ina-drew-offered-to-return-2-years-of-compensation>.

133. *Id.*

134. Gandel, *supra* note 103 (noting that some clawback policies apply only to the most senior executives while other policies do not apply to executives at all); Morgenson, *supra* note 125 (providing brief details on several companies’ clawback provisions).

135. *Examining Bank Supervision and Risk Management in Light of JPMorgan Chase’s Trading Loss: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 45 (2012) (statement of Jamie Dimon, Chairman & CEO, JPMorgan Chase & Co.) (maintaining that compensation decisions are left to the board of directors).

136. See Morgenson, *supra* note 107 (discussing the difficulties in getting companies to enact clawback provisions that are applied rigidly and contain fewer loopholes).

137. *Id.* (discussing a pharmaceutical company’s clawback policy); Cherry & Wong, *supra* note 8, app. at 424–27 (providing details of the clawback provisions of several non-Wall Street companies).

138. Cherry & Wong, *supra* note 8, app. at 425.

Policy Regarding Recoupment of Incentive Compensation. To protect the shareholders' interests, we have a policy pursuant to which we will, to the extent practicable, seek to recover performance-based compensation from any executive officer and certain other members of senior management in those circumstances where (i) the payment of such compensation was based on the achievement of financial results that were subsequently the subject of a restatement, (ii) in the Board's view the employee engaged in fraud or misconduct that caused or partially caused the need for the restatement, and (iii) a smaller or no payment would have been made to the employee based upon the restated financial results.¹³⁹

The American Express policy goes on to explain that all of its approximately five hundred forty executives were required to sign an agreement that detailed the precise compensation that would be forfeited in the event of "detrimental conduct."¹⁴⁰

In preparing a clawback policy, corporations must consider a number of issues—most importantly, the types of compensation that should be subject to recovery and the types of actions that can trigger the employer's right to recover.¹⁴¹ The type of conduct that can trigger an executive's clawback provision varies widely, ranging from no actual misconduct on the part of the executive to only material violations.¹⁴² There are generally three types of conduct that can trigger a clawback provision: bad faith, fraud or misconduct, and restatement of the financial results.¹⁴³ The Citigroup clawback policy applies

139. *Id.* (citing Am. Express Co., Definitive Proxy Statement (Schedule DEF 14A), at 32 (Mar. 14, 2008)).

140. *Id.* app. at 425–26.

141. Melbinger, *supra* note 116, at 3–4.

142. Compare Sarbanes-Oxley Act of 2002 § 304, 15 U.S.C. § 7243 (2012) (requiring misconduct but not specifying who must have committed the misconduct for an executive to be subjected to the clawback), and Jesse Fried & Nitzan Shilon, *Excess-Pay Clawbacks*, 36 J. CORP. L. 721, 740 (2011) (observing that almost seventy percent of S & P 500 firms have policies that preclude reimbursement of payments absent a finding of executive misconduct), with Morgenson, *supra* note 107 (revealing that one company's policy states that it will invoke a clawback provision only in the event of intentional misconduct, "a material negative revision of a financial operating measure," or other misconduct that results in "material detriment of the company's financial results").

143. Cherry & Wong, *supra* note 8, app. at 424. Clawback provisions with bad faith requirements allow a board of directors to recoup financial gains—at any time—from any employee of the company who engages in bad faith conduct that damages the company. *See id.* (listing two examples of bad faith clawback provisions from McKesson Corp. and Ford Motor Corp.). Clawback provisions with fraud or misconduct requirements allow a board of directors to recover performance-based compensation from high-ranking executives if the board believes that the executive(s) engaged in fraud or misconduct. *See id.* app. at 425 (listing two examples of fraud or misconduct clawback provisions from General Motors and American Express). In addition, fraud or misconduct policies necessarily require that the compensation being clawed back must have been achieved by way of an inaccurate or misleading statement of financial results. *Id.* The final category of clawback provisions would allow a board of directors to recoup any incentive-based compensation paid to executives following a restatement of financial results if it was determined that the compensation would not have been awarded but for the initial, inaccurate statement of financial results. *See id.* app. at 426–27 (listing three examples of restatement of financial results clawback provisions from Cisco Systems, Dell, and Exxon Mobile).

only to the company's top executives and can be invoked only when either the law or firm policies have been violated.¹⁴⁴ Morgan Stanley's clawback policy, on the other hand, can be invoked even when misconduct was absent, but a trade ultimately turned out to be especially financially detrimental.¹⁴⁵ McKesson Corporation, a large pharmaceutical company, has a clawback policy with a broader trigger¹⁴⁶ than that required by Citigroup,¹⁴⁷ yet some of McKesson's shareholders still find it inadequate.¹⁴⁸ The board at McKesson can go after senior executive pay in instances of fraud, intentional misconduct of financial reporting, or if the pay was "based on a financial or operating measure that later requires material negative revision."¹⁴⁹ Critics note, however, that "intentional" and "material" are not defined in this policy—perhaps leaving too much opportunity for misconduct to go unpunished by covering only a small subset of undefined, punishable misconduct.¹⁵⁰ However, as one Harvard professor observes, "Firms have not provided sufficient information for outsiders to be able to assess whether the adopted clawbacks are meaningful or merely cosmetic."¹⁵¹

Generally, base salary is not subject to corporate clawback policies.¹⁵² However, performance-based compensation for both short-term and long-term performance goals, such as commissions and bonuses, is generally subject to recovery if misconduct is discovered.¹⁵³ Citigroup's clawback provision applies to all types of pay, including cash and vested stock, but only narrowly defined

144. Gandel, *supra* note 103.

145. *Id.*; see Morgan Stanley, Definitive Proxy Statement (Schedule DEF 14A), at 25 (Apr. 14, 2011) (explaining the terms and conditions of Morgan Stanley's clawback policy).

146. McKesson Corp., Definitive Proxy Statement (Schedule DEF 14A), at 38 (June 21, 2013) (providing for the return of an incentive award by any employee who "(i) engages in intentional misconduct pertaining to a financial reporting requirement . . . which requires the Company to file an accounting restatement with the SEC . . . ; (ii) receives incentive compensation based on a financial or operating measure that later requires material negative revision; or (iii) engages in fraud, theft, misappropriation, embezzlement or dishonesty to the material detriment of the Company's financial results as filed with the SEC").

147. Citigroup Inc., Definitive Proxy Statement (Schedule DEF 14A), at 49 (Mar. 20, 2009) (requiring executives to reimburse bonuses or incentive-based compensation "if such bonus or incentive compensation is based on statements of earnings, gains or other criteria that are later shown to be materially inaccurate").

148. See Morgenson, *supra* note 107 (noting that at the 2013 annual meeting, fifty-three percent of shareholders voted to toughen up McKesson's clawback policy).

149. McKesson 2013 Definitive Proxy Statement, *supra* note 146, at 38.

150. Morgenson, *supra* note 107; see also Donal Griffin, *Tougher Wall Street Clawbacks Are Needed, New York City Comptroller Says*, BLOOMBERG (Dec. 21, 2011, 10:43 AM), <http://www.bloomberg.com/news/2011-12-21/tougher-wall-street-compensation-clawbacks-necessary-nyc-comptroller-says.html> (recounting the arguments posed by New York City Comptroller, John C. Liu, that banks such as Goldman Sachs and JPMorgan should implement stronger clawback policies to recover more money and deter improper conduct).

151. Gandel, *supra* note 103 (internal quotation marks omitted).

152. Melbinger, *supra* note 116, at 3 (declaring that most clawback policies apply to performance-based compensation and that the author has never seen base salary subject to a clawback policy).

153. *Id.*

conduct triggers the provision.¹⁵⁴ Unlike Citigroup's clawback, most clawback policies govern only certain types of employee compensation, like bonuses.¹⁵⁵ If misconduct allowed an executive to achieve certain performance-based benchmarks that resulted in a bonus, it would be unfair to the shareholders for that executive to retain the bonus.¹⁵⁶

C. *Proposals for Clawback Provisions in College Coaching Contracts*

When clawback provisions and sports have been discussed together, it has usually been to suggest adding clawback provisions in college coaching contracts.¹⁵⁷ College sports are governed by a strict set of National Collegiate Athletic Association (NCAA) rules that dictate the bounds of interactions between coaches and players during the recruiting process and after student-athletes matriculate.¹⁵⁸ When a coach commits an infraction, the NCAA often punishes the athletic program, but rarely punishes the coach individually.¹⁵⁹ In response, the school often fires the offending coach.¹⁶⁰ While the school is left to deal with the penalties resulting from the coach's actions, the coach is then free to seek employment at another school or at another level of play—sometimes even upgrading to the professional level.¹⁶¹

154. Citigroup, Inc., 2009 Definitive Proxy Statement, *supra* note 147, at 49 (summarizing Citigroup's clawback policy regarding compensation for senior leadership); Gandel, *supra* note 103. See *supra* notes 141–51 and accompanying text for a discussion on conduct that triggers clawback provisions.

155. See Melbinger, *supra* note 116, at 3–4 (noting that most companies focus their clawback provisions on performance-based compensation and provide more discretion regarding compensation that is not directly attributable to wrongdoing).

156. Amy Goodman & Gillian McPhee, "Clawbacks" of Executive Compensation, GIBSON DUNN (July 9, 2008), <http://www.gibsondunn.com/publications/Pages/ClawbacksOfExecutiveCompensation.aspx>; see also Cherry & Wong, *supra* note 8, at 413 ("[I]t seems unfair that an executive at AIG could walk away with a bonus when the company he had a responsibility to assist is failing.").

157. See, e.g., Greenberg, *supra* note 8, at 11 (concluding that it would not be surprising if clawback provisions became more prevalent in coaching contracts within the next five years); George Dohrmann, *Clawback Clauses in Contracts Could Deter Coaches from Breaking Rules*, SPORTS ILLUSTRATED (Jan. 20, 2010), <http://www.si.com/more-sports/2010/01/20/contracts> (arguing that college athletics programs should put clawback provisions into their coaching contracts); Arne Duncan & Tom McMillen, *Want to Change College Athletics? Financially Punish Coaches*, USA TODAY (Mar. 22, 2013, 12:04 AM), <http://www.usatoday.com/story/sports/ncaab/2013/03/20/arne-duncan-tom-mcmillen-march-madness-education-coach-salaries/2004835/> (commenting that the authors would "like to see" clawback policies implemented in new coaching contracts).

158. See Greenberg, *supra* note 8, at 6–7 (explaining major NCAA violations by coaches and players, such as impermissible recruiting inducements, providing benefits to student-athletes, and academic fraud).

159. Dohrmann, *supra* note 157.

160. *Id.*

161. See *id.* (highlighting the example of college basketball coach Tim Floyd, who resigned from USC amid allegations that he arranged to pay a player, faced no penalties, and was quickly hired as an assistant coach with the New Orleans Hornets).

To remedy this problem, several commentators have proposed including clawback provisions in college coaching contracts.¹⁶² These advocates argue that clawback provisions will allow the school to recover some of the compensation that the delinquent coach was paid while violating NCAA rules.¹⁶³ At least one college athletic program, University of Memphis football, has already incorporated a clawback provision in its coach's contract.¹⁶⁴ The University of Memphis¹⁶⁵ requires its football coach to return any bonuses received for winning post-season games in the event that major violations occur that result in vacated records or fines imposed on the university.¹⁶⁶ However, the University of Memphis is seemingly in the minority, as most colleges do not include such agreements.¹⁶⁷ Clawback provisions for college coaches would be implemented to hold coaches who committed the infractions accountable for their actions.¹⁶⁸ A university's motivation to resort to clawback provisions would be to incentivize the coach to abide by the school's mission of running a clean, rule-abiding program. Corporate sponsors have a similar motivation to incentivize the athletes who endorse their products to maintain a positive public image, so that they remain respectable and admired spokespeople for the company.

III. DISCUSSION

Athletes today are receiving more money through endorsement deals than ever before, but are also the subjects of increased media scrutiny.¹⁶⁹ This scrutiny has brought to light more scandals involving athletes and has endangered the marketability of athletes that find themselves embroiled in scandal.¹⁷⁰ As a

162. Greenberg, *supra* note 8, at 9 (articulating how clawback agreements should be utilized in the world of college athletics); Dohrmann, *supra* note 157 (advocating for clawback provisions to deter coaches from violating NCAA rules); Duncan & McMillen, *supra* note 157 (arguing that college coaches must be punished financially in order to incentivize NCAA rule compliance).

163. See, e.g., Dohrmann, *supra* note 157 (advocating for clawback provisions that "would force a coach to pay back part of his salary should he or his program violate NCAA rules").

164. Greenberg, *supra* note 8, at 5.

165. Interestingly, the University of Memphis's basketball program was recently marred by a scandal that resulted in vacating all the victories of its 2007–08 season and the return of some money to the NCAA. *Id.* There are no reports that Memphis basketball coach John Calipari was forced to repay any of his bonuses. *Id.* Calipari, a renowned coach, immediately became the head coach at the University of Kentucky after leaving Memphis. *John Calipari*, UNIVERSITY OF KENTUCKY ATHLETICS, http://www.ukathletics.com/sports/m-baskbl/mtt/calipari_john00.html (last visited Mar. 6, 2015).

166. Greenberg, *supra* note 8, at 5.

167. See *id.* (describing the author's 2010 survey of some major college athletic programs, which found that no other school that had instituted clawback provisions).

168. Dohrmann, *supra* note 157.

169. See Socolow, *supra* note 49, at 187 (describing how athletes today are the focus of increased media attention); Nachman, *supra* note 41 (highlighting certain athletes who earn more money from endorsement deals than from their team contracts).

170. See *supra* Part II.A.3 for a discussion of certain athletes whose marketability was marred by scandal. See also Pinguelo & Cedrone, *supra* note 4, at 367–68 (comparing how the public ignored Mickey Mantle's excessive drinking during his playing career in the 1950 and 1960s with the media's same-day reporting of manager Tony La Russa's drunk-driving arrest in 2007).

result, the morals clauses in athletic contracts must evolve.¹⁷¹ Greater use of clawback provisions would provide a remedy to the corporate sponsor in an endorsement deal by allowing it to recover from an athlete who falls short of the standards the company paid the athlete to embody.¹⁷² While the misbehavior of Wall Street executives is markedly different from that of athletes, the contractual remedy could be similar. Just as clawback provisions in the contracts of Wall Street executives deter fraud, inserting morals clauses that trigger clawback provisions into athletic endorsement contracts can deter misconduct by athletes.¹⁷³ A clawback provision triggered by the violation of a morals clause would allow a corporate sponsor contracting with an athlete to recoup money if the athlete engages in certain specified misconduct that damages the athlete's reputation, and by extension, the company's brand. Currently, a corporate sponsor's only option when an athlete brings himself or herself into public disfavor is to sever the endorsement deal and attempt to repair the damage to the company's image.¹⁷⁴ By inserting a clawback provision into the morals clause of an endorsement deal, the company will be compensated for any resulting damage to its brand. In the same way, clawback provisions in college coaching contracts will correct the culture of rampant NCAA violations and provide colleges with some financial relief after a rogue coach has committed costly infractions.¹⁷⁵

This Comment proposes that clawback provisions should be inserted into the morals clauses of athletic endorsement deals.¹⁷⁶ Doing so will change the structure and impact of morals clauses. Use of these clauses will provide corporate sponsors with greater economic security in the continued value of their endorsement contracts. Conversely, under this proposal, athletes will face new

171. See *supra* Part II.A.1 for a discussion of the evolution of morals clauses.

172. See *infra* Part III.A.2 for a discussion of how companies should view clawback provisions as a means to protect their brands.

173. See *supra* Part II.B for an analysis of how clawback provisions function to deter misconduct on Wall Street.

174. See Hunt & Kint, *supra* note 64, at 2 (explaining that companies have no viable contractual remedy to claw back funds paid to an athlete unless the contract includes a clawback provision).

175. See *supra* Part II.C for a discussion of proposals to implement morals clauses into college athletic coaching contracts. Research for this Comment has not revealed any instances in which clawback provisions are currently being used in athletic endorsement deals.

176. Nearly concurrent with the publication of this Comment, another student-author, Andrew Zarriello, published a Note addressing the possibility of drafting athletic endorsement deals to include clawback provisions triggered by morals clause violations. See Andrew Zarriello, *A Call to the Bullpen: Alternatives to the Morality Clause as Endorsement Companies' Main Protection Against Athletic Scandal*, 56 B.C. L. REV. 389, 428–31 (2015). Zarriello offers a thought-provoking examination of the viability of clawbacks and argues against the use of clawback provisions in athletic endorsement contracts. Due to the various reputational and financial harms that befall corporate sponsors associated with high-profile athletic scandal, this Comment instead argues that clawback provisions are in fact the most viable option for corporate sponsors looking to protect their image. As explained, clawback provisions in athletic endorsement contracts present novel variables to contract negotiations. This Comment accordingly seeks to explain how the respective parties to athletic endorsement contracts should view these negotiations and how each side can benefit as a result of implementing a well-negotiated clawback provision.

challenges—and opportunities—in negotiating endorsement deals. This Comment intends to demonstrate how athletes can bargain for certain benefits by agreeing to sign an endorsement deal with a clawback provision. One such benefit would be increased clarity for athletes as to the types of conduct that can violate their morals clauses. If clawback provisions are embraced by the sporting world, as they have been on Wall Street, college athletic coaches could also be particularly affected. This Comment concludes by demonstrating an effective clawback provision and how it would have applied to an athlete whose transgressions cost him millions of dollars in endorsements.

A. *Introducing Clawback Provisions to Sports Contracts*

1. Incorporating Clawback Provisions into Morals Clauses

A clawback provision that is triggered by a morals clause violation provides companies with enhanced protection in endorsement deals with athletes.¹⁷⁷ Currently, a company that hires an athlete to endorse its brand is left with essentially no legal remedy in the event the athlete violates his or her morals clause and thereby fails to live up to the ideals he or she was paid to embody.¹⁷⁸ In some cases—such as that of Lance Armstrong and Ryan Braun, who both used PEDs¹⁷⁹—the company may have a cause of action for fraudulent inducement.¹⁸⁰ If an athlete was secretly engaged in some sort of damning behavior at the time the deal was signed, then under a fraudulent inducement theory, he or she wrongfully induced the company to sponsor an image of the athlete that the athlete knew was false.¹⁸¹ To successfully bring such an action, a company would have to argue that using PEDs directly contradicts the values Armstrong and Braun were paid to represent¹⁸²—namely, hard work, dedication, and honesty. However, a fraudulent inducement action has serious drawbacks for a company.¹⁸³

By contrast, a clawback provision would assess stipulated damages against an athlete whose transgressions are severe enough to result in diminished public appeal, without requiring litigation. Morals clauses usually provide a company with only the option to terminate an endorsement agreement, but not to recover prior payments.¹⁸⁴ A typical morals clause may even lead to litigation if an

177. See Hunt & Kint, *supra* note 64, at 2 (discussing the prospect for clawback provisions to be used in athletic endorsement deals).

178. See *id.* (explaining that morals clauses provide only for contract termination, not for repayment of some compensation).

179. See *supra* Part II.A.3 for a discussion of the impact that confessed PED use had on Lance Armstrong's and Ryan Braun's endorsement deals.

180. Hunt & Kint, *supra* note 64, at 1.

181. *Id.*

182. See *id.* (explaining that use of PEDs is “the polar opposite” of the image companies wanted consumers to associate with products endorsed by Armstrong).

183. See *supra* Part II.A.2 for a discussion of the reasons fraudulent inducement actions are unfavorable to corporate sponsors.

184. Hunt & Kint, *supra* note 64, at 2.

athlete challenges the company's determination that his or her conduct actually violated the characteristically broad language of the clause.¹⁸⁵ A morals clause combined with a clawback provision will provide greater clarity for the athlete.¹⁸⁶ At the same time, the company will be compensated in the event the athlete's transgressions harm the company's image—and simultaneously, its profits.¹⁸⁷

Corporate sponsors that hire athletes as endorsers should look to the clawback provisions in employment agreements for Wall Street executives as inspiration for greater protection when improving their morals clauses.¹⁸⁸ Morals clauses emerged in the 1920s when the film industry wanted to protect itself from being associated with actors whose moral turpitude sparked public outrage.¹⁸⁹ The breadth of morals clauses used in today's endorsement deals is relatively unchanged from these early configurations of morals clauses.¹⁹⁰ But as more athletes are exposed engaging in misconduct that damages the value of their endorsement, companies should take further steps to protect the image they have worked to cultivate.¹⁹¹ In response to rampant misconduct in the financial world, finance firms—and the government through the section 304 of SOX—began using clawback to deter further delinquency and to ensure the company would be compensated if one of its executives benefited from wrongdoing.¹⁹² Similarly, corporate sponsors in endorsement deals can better protect themselves by taking the clawback provision so commonly used on Wall Street and applying it to the morals clauses in athletic endorsement deals, thereby creating a contractual obligation for the athlete to pay back some of his or her compensation if the athlete engages in some specified misconduct that violates the morals clause.¹⁹³

185. See *id.* (discussing professional football player Rashard Mendenhall's lawsuit against a clothing company that dropped Mendenhall from his endorsement deal because of comments he made on Twitter); see also Pinguelo & Cedrone, *supra* note 4, at 370 (discussing the flexibility that broad morals clauses provide companies). See *supra* note 29 for cases involving screenwriters who challenged the termination of their contracts for a morals clause violation.

186. See Hunt & Kint, *supra* note 64, at 2–3 (explaining the need for more specific morals).

187. *Id.*; Sherry Bartz, et al., *supra* note 40, at 131–40 (examining the various factors that affect “stock market reactions to celebrity disgraces”).

188. See *supra* Part II.B for a discussion of Wall Street executive clawback provisions that allow an employer to recover certain payments for employee misconduct.

189. Kressler, *supra* note 17, at 236–37.

190. Cf. Pinguelo & Cedrone, *supra* note 4, at 356 (explaining that despite differences in terms of conduct that triggered 1920s and 1950s morals clauses, both were “fundamentally similar” in that “the studios used the clauses to sever the association between the studio and the disreputable individual”).

191. See *supra* Part II.A.3 for examples of athletes who have tarnished their images through off-the-field misconduct.

192. See *supra* Part II.B for a discussion of section 304 of SOX and the use of clawback provisions in Wall Street executive compensation agreements.

193. See Part II.B for a discussion on clawback provisions on Wall Street. See Part II.A.2 for a discussion of morals clauses in athletic endorsement deals.

Whereas morals clauses are often considered to be boilerplate material that is merely glossed over in the negotiating process,¹⁹⁴ a morals clause that triggers a clawback provision will become a much more central feature of endorsement deals because the clawback provision will require some money to be returned as a result of misbehavior.¹⁹⁵ Clawback provisions used on Wall Street are not normally subject to the same sort of negotiations as would be clawback provisions in athletic endorsement deals. Section 304 of SOX, as a piece of legislation, is clearly nonnegotiable, and the corporate clawback provisions for finance executives are not negotiated on an individual basis.¹⁹⁶ The terms of clawback provisions for athletic endorsement deals, however, would vary widely and depend on factors such as the athlete's star power, the length of the contract, and the value of the contract.¹⁹⁷ Therefore, under this proposal, morals clauses will no longer be glossed over during the negotiation process but rather they will become the subject of significant negotiation.¹⁹⁸

2. How Companies Should View Clawbacks

A company that pays out millions of dollars in endorsements will often be the party that benefits most from a morals clause that triggers a clawback provision.¹⁹⁹ Clawback provisions that are tied to morals clauses will serve primarily to offer greater corporate protection.²⁰⁰ Instead of a corporate sponsor terminating its relationship with a disgraced athlete and attempting to repair its image alone, the company will receive some security in the form of the disgraced athlete returning a portion of his or her pay. But the greater benefit of clawback provisions may be the deterrent effect it will have on athletes contemplating questionable behavior.²⁰¹ An athlete at risk of having to pay back money, rather

194. Auerbach, *supra* note 13, at 7. Though morals clauses often use boilerplate language, they can have a huge economic impact, and athletes should accordingly understand what conduct triggers the morals clauses in their endorsement contracts. See Socolow, *supra* note 49, at 187 (discussing athletes who have been suspended, fired, or lost endorsement contracts because of violation of morals clause in their contracts).

195. See Hunt & Kint, *supra* note 64, at 2–3 (noting an inequality in bargaining power that may frustrate negotiations for clawback provisions between athletes and companies seeking endorsers).

196. 15 U.S.C. § 7243 (2012); see Gandel, *supra* note 103 (discussing financial firms setting broad clawback policies that apply to all executives and are not negotiated on an individual basis); Morgenson, *supra* note 107 (describing shareholders voting on suggested clawback provisions).

197. See *supra* notes 60–63 and accompanying text for an explanation of how an athlete's star power can affect the negotiating process.

198. See Hunt & Kint, *supra* note 64, at 2–3 (discussing potential sticking points in negotiations between companies and talent).

199. See *supra* Part II.A.3 for a discussion of athletes whose missteps brought them—and arguably, by extension, the brands they endorsed—into disrepute. Had clawback provisions been in place in those instances, the athletes would likely have been liable to their corporate sponsors for stipulated damages.

200. Hunt & Kint, *supra* note 64, at 2 (emphasizing that clawback provisions allow a company to recoup prior payments to an athlete-endorser instead of being “left to cut its losses when a personality violates any morals clause”).

201. Cf. Dohrmann, *supra* note 157 (explaining that clawback provisions would deter college coaches from committing NCAA rules violations).

than merely being dropped from an endorsement deal without further consequence, is more likely to think twice before engaging in prohibited conduct.²⁰² After all, for certain athletes, these endorsement deals are more lucrative than their player contracts.²⁰³

The corporate sponsor should consider the qualities the athlete possesses that it most wants to convey through the endorsement.²⁰⁴ For example, an athletic-equipment company may not consider an athlete's arrest for driving under the influence or an extramarital affair to be particularly damaging to its brand. If that same athlete was exposed as using PEDs or a corked bat in baseball, however, an athletic-equipment company may find the transgression to be far more destructive to the message it intended to convey by signing the athlete.²⁰⁵ By narrowing down the traits the athlete possesses that make him or her most marketable to the brand, the sponsor can construct a morals clause to which a clawback provision can be attached that is narrowly tailored to its needs.²⁰⁶

The negotiation process can also reveal to the corporate sponsor whether the athlete is the right fit to promote its brand. For instance, if a sponsor attempts to insert a clawback provision for any positive tests for PEDs and the athlete balks during negotiations, the company may want to rethink whether this is the athlete it wants marketing its product.²⁰⁷ Presumably, an athlete who is "clean" will not be scared off by such a provision.²⁰⁸ The use of clawback provisions in the bargaining process can prevent deals with suspect athletes from ever coming to fruition, thus potentially saving the company from later humiliation and reputational harm.

To gain the increased security that a clawback provision provides, the company will likely have to make some sacrifices to appease the athlete.²⁰⁹ Generally, a corporate sponsor possesses greater bargaining power than an athlete when negotiating endorsement deals because of the enormous amount of

202. *Cf. id.* (quoting an athletic director's belief that clawback provisions "would surely cause some more thought for a coach whether to go down the road [of breaking NCAA rules]") (alteration in original).

203. *See* Nachman, *supra* note 41 (listing athletes who made more money from their endorsement deals than their salaries).

204. Hunt & Kint, *supra* note 64, at 1-2.

205. *See id.* (suggesting that Lance Armstrong's doping scandal eroded his image of "hard work, perseverance and overcoming the odds" more than another moral transgression, such as an extramarital affair, would have).

206. *Id.*

207. *See id.* at 3 (observing that it may be unwise for a corporate sponsor to entrust its image or brand to a celebrity-endorser who is unwilling to commit to a morals clause that forbids particular immoral or illegal conduct).

208. *See id.* (suggesting that it would have been foolish for Lance Armstrong, who knew he was using PEDs, to sign an agreement that would make him liable for substantial sums of money if he tested positive for PEDs).

209. *See id.* at 2-3 (suggesting that clawback provisions increase the bargaining power of influential athletes and celebrities since the provisions require they refrain from certain activities).

money it is are prepared to pay an athlete-endorser.²¹⁰ That leverage allows companies to insert broad morals clauses in endorsement deals that athletes are generally powerless to oppose without rejecting the deal outright.²¹¹ In asking an athlete to sign an endorsement deal that includes a clawback provision, most athletes will likely make some counter-demands, such as narrower morals clauses or more money in exchange for their endorsement.²¹² If the corporate sponsor highly values protecting its image, these requests will be a small price to pay for the greater financial protection provided by the use of clawback provisions.

3. How Athletes Should View Clawbacks

Most athletes will be hesitant to sign an endorsement deal with a clawback provision.²¹³ However, the negotiation process can allow some athletes to actually see benefits from the inclusion of clawback provisions. For athletes who feel certain they will not commit any sort of morals clause violation, a clawback provision has little risk and brings the reward of improved bargaining power.²¹⁴ However, such angelic athletes seem to be the minority among today's athletes.²¹⁵ Given the money at stake, athletes typically have little choice but to agree to broad, boilerplate morals clauses that give corporate sponsors considerable freedom to decide whether to terminate an endorsement deal.²¹⁶ But, because no athlete would sign a contract that attempts to claw back payment for any transgression deemed unacceptable by the company, the athlete has increased bargaining power in negotiations with a corporate sponsor that insists on including a clawback provision.²¹⁷

With this bargaining power, the athlete can narrow the type of conduct that is considered a violation or seek more money.²¹⁸ Athletes typically try to include

210. See *Seton Hall Symposium*, *supra* note 12, at 487 (statement of Fernando Pinguelo) (indicating that endorsers have significant negotiating leverage—especially with morals clauses—because they are willing to pay “top dollar” to athlete-endorsers).

211. *Id.*

212. *Cf.* Greenberg, *supra* note 8, at 5 (noting that adding clawback provisions to college coaching contracts may “open the door to the university having to pay more money”).

213. Hunt & Kint, *supra* note 64, at 2.

214. See Greenberg, *supra* note 8, at 5 (arguing that college coaches who agree to clawback provisions would need to be compensated in some way—such as a bonus—for assenting to such a potentially costly provision).

215. See *supra* Part II.A.3 for a discussion of athletes misbehaving and losing endorsement deals.

216. See *Seton Hall Symposium*, *supra* note 12, at 487 (statement of Fernando Pinguelo) (reasoning that, due to the amount of money at stake, athletes often agree to broad morals clauses in their contracts).

217. See Hunt & Kint, *supra* note 64, at 3 (proposing that “[m]id-level athletes and entertainers may be willing to accept morals clauses with clawback provisions” if the provisions only require abstaining from “specifically defined conduct”).

218. *Id.* at 2 (arguing that in order to be acceptable to both sides, clawback provisions “would likely need to decrease over time,” which would permit “certain payments under the contract to vest while simultaneously shifting a portion of the risk of prohibited conduct from the company to the celebrity”); *cf.* Greenberg, *supra* note 8, at 5 (explaining that college coaches will likely ask for more

a stipulation to arbitrate any disputes over a violation of a morals clause.²¹⁹ Doing so takes away a company's unilateral power to decide whether certain conduct did in fact violate the morals clause.²²⁰ Having a third party review the conduct is undoubtedly beneficial to the athlete.²²¹ An athlete may demand in negotiations that he or she will only agree to a clawback provision if the decision as to whether a violation occurred is submitted to arbitration and not merely decided at the corporate sponsor's discretion.²²² With millions of dollars potentially at stake through the invocation of a clawback agreement, athletes will want to ensure that the decision regarding whether a breach occurred is not solely left up to the company that stands to benefit from that decision.

4. Applying Clawback Provisions to College Coaches

College athletic programs can also protect themselves with clawback provisions that are triggered by a violation of the morals clauses in coaching contracts.²²³ Without a clawback provision, the institution that employs a delinquent coach is left with few options, just like the company whose endorser fell into disrepute.²²⁴ In sports, athletes are not the only ones who misbehave—college athletic coaches frequently engage in NCAA rule violations and then leave the school before punishment is served.²²⁵ The coach avoids punishment altogether while the institution suffers sanctions.²²⁶ A recurring story in college

money when faced with a clawback provision); Dohrmann *supra* note 157 (recounting that one agent for several college coaches stated he would request more money for his client in order to agree to a clawback provision).

219. Auerbach, *supra* note 13, at 9.

220. *See id.* (explaining that, without an arbitration clause, companies are usually granted unfettered discretion to determine whether an athlete's conduct violated a morals clause).

221. *Id.*

222. Establishing a protocol for how to deal with violations is beneficial to the company as well. Having a system in place will cut down on litigation and hopefully speed up the process of resolving the dispute. Hunt & Kint, *supra* note 64, at 2 (arguing that arbitration combined with specifically defined conduct proscribed by the contract may increase the likelihood an athlete would agree to an endorsement deal with a clawback provision); *see also* Auerbach, *supra* note 13 at 10 (discussing Chris Webber's endorsement contract with Fila, which resulted in him being awarded \$2.61 million after the arbitrator determined that Fila wrongfully terminated his contract for possessing marijuana).

223. *See supra* Part II.C for a discussion of proposals for clawback provisions in college coaching contracts.

224. *See* Dohrmann, *supra* note 157 (noting that by the time sanctions are decided, the brunt of the punishment often falls on the program and its new coach).

225. *Id.*

226. Examples of coaches taking a new job when NCAA sanctions are imminent are plentiful. Pete Carroll was the football coach at the University of Southern California and took a job with the Seattle Seahawks when the NCAA was planning to impose punishment for numerous violations that took place during his reign. *See* Mike Florio, *Pete Carroll Denies He Took Seahawks Job to Flee USC Sanctions*, NBC SPORTS (June 15, 2010, 7:14 PM), <http://profootballtalk.nbcsports.com/2010/06/15/pete-carroll-denies-he-took-seahawks-job-to-flee-usc-sanctions/>. John Calipari, a college basketball coach, has a reputation for engaging in such behavior. Calipari, now the coach at the University of Kentucky, left coaching positions at the University of Massachusetts and the University of Memphis just as those schools received sanctions for violations during Calipari's respective tenures. Dohrmann, *supra* note 157.

sports is top athletes being discretely paid, often with the coach's knowledge.²²⁷ Such a violation is committed to unduly induce students into competing for a particular university, thus gaining that school an unfair advantage.²²⁸ By implementing clawback provisions, colleges take away the guarantee of substantial bonuses for winning at all costs.²²⁹ Rather than pairing a clawback provision with a typical morals clause in a coach's contract, universities would use clawback provisions to target misconduct that violates NCAA rules.²³⁰

College coaches typically receive bonuses for good performance, thus incentivizing coaches to break some rules to win in the short term while collecting their substantial paychecks.²³¹ The contract for the University of Memphis's football coach includes the following clawback provision that targets these bonuses:

Return of Bonuses:

If there is a final NCAA decision that major violations have occurred in the Program which require the vacation of records and/or return of monies received by the University and/or other penalties, any and all bonuses pursuant to this Paragraph 6 and all of its subparagraphs shall be forfeited and if already paid returned to the University.²³²

This provision appears simple, yet it includes two essential features of clawback provisions—the specific payments that may be recouped (certain bonuses), and the conduct that triggers the provision (major NCAA rules violations).²³³ Tying coaches' financial interests to NCAA rule compliance will provide new incentives for college coaches to recruit and manage their teams in accordance with the rules.²³⁴

B. Applying Clawback Provisions to Athletic Endorsement Deals

1. Constructing an Effective Clawback Provision

The introduction of clawback provisions that are triggered by morals clause violations into athletic endorsement deals will put an end to the belief that

227. Dohrmann, *supra* note 157.

228. See Greenberg, *supra* note 8, at 7 (discussing a pay-for-play scenario involving the University of Southern California basketball team).

229. *Id.* at 8–10.

230. See *id.* at 5 (describing that the clawback provision the University of Memphis uses for its football coach is triggered only for NCAA rules violations, not personal misconduct).

231. See *id.* (discussing a bonus received by a college coach who was subsequently caught violating NCAA rules).

232. *Id.* (citing Email from Sheri Lipman, University Counsel, University of Memphis, to Martin J. Greenberg, Law Offices of Martin J. Greenberg, LLC (Apr. 21, 2010, 16:29 CST) (on file with author)).

233. See Hunt & Kint, *supra* note 64, at 2 (explaining the importance of specificity in clawback provisions).

234. See *supra* Part II.C for a discussion of several commentators' proposals for the use of clawback provisions in college coaching contracts.

morals clauses are boilerplate material.²³⁵ The primary considerations in constructing a clawback provision infused in a morals clause will be the same as the most important factors in Wall Street clawback provisions: the compensation subject to the clause and the behavior that triggers it.²³⁶ Whereas current morals clauses are often broad and ignored until there is a trigger-event, morals clauses that trigger clawback provisions will feature prominently in the negotiating process.²³⁷ Given the abundance of recent examples of sponsors and athletes parting ways after violations of morals clauses, the extra attention paid to these clauses is warranted.²³⁸ The keys to constructing an effective morals clause infused with a clawback provision are specificity and balance. The clawback provision must be balanced in that it must claw back enough money for it to be worth litigating the matter if the athlete refuses to pay, yet not claw back so much that the athlete refuses to sign the deal.²³⁹ The clawback provision must also be specific in that it must state with particularity what type of misbehavior will result in the athlete having to repay past compensation.²⁴⁰

While sponsors clearly benefit from the inclusion of a clawback provision, they also suffer by losing the vast discretion that broad morals clauses provide.²⁴¹ To combat this, a sponsor may attempt to include a two-pronged morals clause.²⁴² The first prong resembles a traditional morals clause in that it is fairly broad and allows the corporate sponsor only to terminate the agreement. The second prong targets specific behaviors that are more damaging to the company's brand; if the athlete commits one of these specified transgressions, money can be clawed back in addition to the agreement being terminated. Broad morals clauses—like those currently in use—allow a sponsor to drop an athlete for virtually anything, even an extramarital affair.²⁴³ An extramarital affair,

235. See Socolow, *supra* note 49, at 187 (lamenting that morals clauses are currently overlooked as merely boilerplate provisions).

236. See *supra* notes 139–56 and accompanying text for a discussion of the different approaches financial firms take regarding the compensation at issue and the behavior that triggers their clawback policies.

237. See Greenberg, *supra* note 8, at 5 (explaining that there are numerous challenges in negotiating college coaching contracts and clawback provisions would only “further complicate the process”); Socolow, *supra* note 49, at 187–188 (discussing negotiations over morals clauses in athletic endorsement contracts).

238. See *supra* Part II.A.3 for examples of athletes having endorsement deals terminated due to morals clause violations.

239. See Greenberg, *supra* note 8, at 5 (discussing the difficulty of striking a balanced agreement that satisfies both parties).

240. See Hunt & Kint, *supra* note 64, at 2.

241. See *supra* Part II.A.2 for a discussion of how current morals clauses afford corporate sponsors substantial latitude and often sole decision-making authority to terminate an endorsement contract.

242. See *supra* notes 47–53 and accompanying text for a discussion on how broad morals clauses help corporations and Hunt & Kint, *supra* note 64 for a discussion on how specificity in morals clauses benefits athletes. See *infra* notes 249–53 and accompanying text for an example of how a two-pronged morals clause targets different transgressions with different levels of repercussions.

243. See *supra* notes 82–89 and accompanying text for a discussion of Tiger Woods, whose marital infidelity led to certain sponsors ending their relationship with him.

while likely bringing disfavor upon an athlete, generally does not damage the specific image of hard work or perseverance for which the athlete was chosen as an endorser.²⁴⁴ Using PEDs, however, does tarnish the values that an athlete represents and therefore may be a more serious violation to the sponsor.²⁴⁵ If the sponsor wants to retain the ability to sever ties with an athlete who engages in general misconduct—like an extramarital affair—it could do so by including broad language in the morals clause, but not subjecting such a violation to the clawback provision. Under a two-pronged morals clause, general misconduct that does not tarnish the values the athlete was specifically targeted to embody would not be subject to the clawback provision, while a second level of more serious offenses that are more damaging to the company's brand would trigger it.

2. What if Lance Armstrong's Endorsement Deals Included Clawback Provisions?

When it was revealed that Lance Armstrong had used PEDs over an extended period of time, he suffered financially by losing \$150 million in future earnings from endorsements.²⁴⁶ Had Armstrong's endorsement contracts included clawback provisions triggered by morals clauses, he would have been liable to those brands for stipulated amounts they had already paid him. Of course, given Armstrong's enormous bargaining power as one of the world's most marketable athletes, he may have been able to walk away from any deal that included stipulated damages for PED usage.²⁴⁷ However, for pedagogical purposes, the following is offered as a simple hypothetical draft of what Lance Armstrong's moral clause may have looked like in a five-year contract with Nike, had it included a clawback provision:²⁴⁸

If Armstrong is arrested for and charged with, or indicted for or convicted of, any felony or crime involving moral turpitude or which may bring him into public disfavor, then Nike shall have the right to immediately terminate this Agreement. In the event Armstrong is suspended from professional competition in cycling or any other athletic endeavor as a result of a positive test for performance-

244. See Hunt & Kint, *supra* note 64, at 2 (indicating that celebrities are hired as endorsers because they represent a particular image and any misconduct that disproves that image has an adverse effect on the sponsor).

245. See *id.* (suggesting that Lance Armstrong's PED use tarnished his image of hard work and perseverance to the detriment of his sponsors).

246. See Rishe, *Armstrong*, *supra* note 15 (listing brands that terminated their relationship with Armstrong and estimating that those lost endorsements cost him \$15 to \$20 million annually in future earnings over the course of a decade).

247. See Hunt & Kint, *supra* note 64, at 3 (observing that at the height of his marketability, brands were clamoring to partner with Armstrong and he would likely have had the power to dictate the terms of any endorsement deal to be heavily in his favor).

248. For purposes of simplicity and understanding, this provision imagines that Armstrong had signed a five-year contract with Nike to endorse its products for which he received \$2 million per year. The dollar amounts and percentage to be clawed back are selected for ease, not an accurate representation of the specific terms of any potential athletic endorsement. These terms would certainly be subjected to substantial negotiation and would vary widely.

enhancing drugs or any other unfair competitive advantage, as determined by the International Cycling Union or other internationally recognized athletic governing body of a sport in which Armstrong competed, then he will be required to pay the following liquidated damages:

Upon the revelation of such improper conduct resulting in an unfair competitive advantage, Armstrong will be required to pay Nike fifty (50) percent of any money the company has paid him pursuant to this Agreement at that date. Any money owed by Armstrong to Nike shall be due one year from the date Nike puts Armstrong on notice of his breach. Any disputes under this section shall be subject to arbitration.²⁴⁹

This example is narrower and more specific than most morals clauses in endorsement contracts.²⁵⁰ The clause retains a semblance of the traditional morals clause in that it still allows Nike to terminate the agreement in the event of an arrest.²⁵¹ However, it does not provide Nike with the same broad power to terminate for non-criminal activity that brings the athlete into disrepute. The clawback provision targets only PED use or other unfair competitive advantage because Nike, as an athletic-equipment company, will primarily want Armstrong's endorsement to associate his image of hard work and perseverance with its brand.²⁵² That image is destroyed and irreparably tainted by cheating, but less so by a drunk-driving arrest. Therefore, Nike would want to attach the clawback penalties to conduct that is most detrimental to its brand.²⁵³ Stipulating arbitration is likely something on which both parties can agree, as it dispenses with the company's sole decision-making authority and does not require expensive and revealing litigation that companies prefer to avoid.²⁵⁴

Because Lance Armstrong ultimately did test positive for PEDs and admitted as much, his conduct would have triggered this clawback provision.²⁵⁵

249. The language of the clause regarding a potential arrest is adopted largely from Rashard Mendenhall's morals clause with Hanesbrands. *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717, 719. This hypothetical clause incorporates several suggestions for clawback provisions by Hayes Hunt and Brian Kint. Hunt & Kint, *supra* note 64, at 1–3. An alternative method to drafting a clawback provision would be to compensate the athlete through bonuses for his on-field performance and subject only those bonus amounts to the clawback provision. Such a method is more akin to the Wall Street clawback provisions discussed in *supra* Part II.B. See Greenberg, *supra* note 8, at 5, for a description of the clawback provision in the contract of the University of Memphis football coach, which was limited to repayment of bonuses.

250. See *supra* Part II.A.2 for a discussion of current morals clauses.

251. See *supra* notes 47–53 and accompanying text for a discussion of broad language in morals clauses.

252. See Hunt & Kint, *supra* note 64, at 2 (noting that companies choose particular endorsers because they embody certain ideals that the company wants to associate with its products).

253. See *id.* (explaining that moral clauses should be tailored to primarily address specific conduct that tarnishes one's individual image, not all immoral acts).

254. See *id.* at 1 (explaining that companies are hesitant to reveal exact terms of endorsement deals through public exposure in the courts).

255. See *supra* notes 90–100 and accompanying text for a discussion of Lance Armstrong's PEDs scandal.

Whereas, in reality, Nike simply terminated its relationship with Armstrong, in this hypothetical, Nike likely would have received millions of dollars in returned compensation.²⁵⁶ What seemed like a bad situation for Lance Armstrong would have been worse as a result of this clawback provision. Had Armstrong not been caught cheating in competition, however, and instead been found to be a womanizing drunk, Nike would have had no remedy under this morals clause with a clawback provision.²⁵⁷ The clawback provision thus raises the risk of a violation for an athlete, but provides the athlete with more freedom as a result of the narrowly tailored morals clause.

IV. CONCLUSION

Clawback provisions are a viable contractual option for corporate sponsors that want to secure their investment in an athlete's image. The public's perception of athletes is often influenced by the frequent reports and publicity surrounding athletes' misbehavior. Because in the endorsement context the company has contracted with the athlete to benefit from the athlete's positive image, any blemish on that reputation may reflect poorly on the company. Rather than merely severing the relationship, a clawback provision allows a corporate sponsor to recoup money from an athlete as a remedy for any damage done to the company's image for having been associated with the disgraced athlete. Morals clauses were created as a result of a period of raucous Hollywood actors garnering negative publicity. Clawback provisions as a component of morals clauses may now be the next step in the wake of frequent incidents in which high-profile athletes behave in a manner that damages their public goodwill and renders them unmarketable.

Clawback provisions would greatly alter the negotiation process of athletic endorsement contracts. As a component of morals clauses, clawback provisions would put an end to the broad boilerplate language of morals clauses in today's endorsement contracts. Because so much money is at stake with endorsement deals, it makes sense for both parties to be clear on the misbehavior that can lead to a termination of the contract or a recovery of prior payments. Morals clauses have serious repercussions but have long been overlooked. With the consequences of breaching a morals clause raised by incorporating a clawback provision, athletes will need to carefully review morals clauses. Perhaps the potential to lose so much money will even rein in the scandalous off-the-field conduct that is commonplace among today's athletes.

256. See Rishe, *Armstrong*, *supra* note 15 (chronicling Armstrong's loss of future earnings from several lost endorsement deals).

257. Compare this result with the information in *supra* notes 47-53 and accompanying text describing broad morals clauses.

