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A Call to the Bullpen: Alternatives to the Morality Clause as Endorsement Companies' Main Protection Against Athletic Scandal

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A CALL TO THE BULLPEN: ALTERNATIVES TO THE MORALITY CLAUSE AS ENDORSEMENT COMPANIES' MAIN PROTECTION AGAINST ATHLETIC SCANDAL

Abstract: High-profile scandals in the sports world, exemplified by Lance Armstrong and Tiger Woods, expose endorsement companies to financial and reputational risks. Endorsement contracts today rely on morality clauses to mitigate this risk of exposure, which unduly restricts a company's response to an athlete's misconduct. Clawback clauses, on the other hand, provide companies with a mechanism to fully protect their investment in the employee or sponsored athlete. This Note discusses the practicality of introducing clawback clauses into athletic endorsement contracts. Although many factors inhibit endorsement companies from implementing clawback clauses into endorsement contracts, more beneficial alternatives exist that companies can pursue to better protect themselves rather than relying solely on morality clauses. This Note argues that the most practical alternative to the morality clause includes adopting specific contracting techniques in contrast to the untried clawback provision.

INTRODUCTION

During an interview conducted by Oprah Winfrey in January of 2013, Lance Armstrong, a seven-time Tour de France winner, admitted to injecting performance-enhancing drugs throughout his professional cycling career.[1] After years of fiercely denying rumors of his steroid use, Armstrong discussed not only the scandal's toll on his reputation and legacy, but also on his wallet.[2] Months before Armstrong's public admission, on October 10, 2012, the United States

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[1] Liz Clarke, *Lance Armstrong Confession Gets Specific in Oprah Winfrey Interview*, WASH. POST, Jan. 17, 2013, http://www.washingtonpost.com/sports/othersports/lance-armstrong-confession-gets-specific-in-oprah-winfrey-interview/2013/01/17/de4f001c-6120-11e2-9940-6fc488f3fecd_story.html, *archived at* http://perma.cc/E2PJ-CTU2 (admitting to using Erythropoietin (EPO), blood doping, blood transfusions, testosterone injections, and human growth hormones); Juliet Macur, *Confessing, but Continuing to Fight*, N.Y. TIMES, Jan. 18, 2013, at B11 (admitting to doping from the mid-1990s to 2005, when Armstrong won his seventh and last Tour de France race).

[2] Patrick Rishe, *Armstrong Will Lose $150 Million in Future Earnings After Nike and Other Sponsors Dump Him*, FORBES, Oct. 18, 2012, http://www.forbes.com/sites/prishe/2012/10/18/nike-proves-deadlier-than-cancer-as-armstrong-will-lose-150-million-in-future-earnings/, *archived at* http://perma.cc/5JCE-TNPZ (calculating from pulled sponsorships that Armstrong has lost an estimated $150–200 million in potential earnings over the next decade); David Wharton, *Lance Armstrong on Sponsors Leaving: A $75-Million Day in Losses*, L.A. TIMES, Jan. 18, 2013, http://articles.latimes.com/2013/jan/18/sports/la-sp-sn-lance-armstrong-oprah-winfrey-part-2-20130118, *archived at* http://perma.cc/Y8Q4-D5QQ (estimating that the United States Anti-Doping Agency's report banning Armstrong from competition cost him $75 million in sponsorship money that very day).

Anti-Doping Agency ("USADA") banned Armstrong from competitive cycling for life due to evidence of doping.[3] Swiftly thereafter, each and every one of Armstrong's sponsors pulled their support, costing Armstrong millions in sponsorship earnings.[4]

Lost in the aftermath was how much Armstrong's scandal cost his former endorsement companies.[5] To help minimize the damage, his sponsors executed the morality clause written into Armstrong's endorsement contracts to terminate the contracts.[6] Morality clauses like those in Armstrong's contracts prohibit im-

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[3] *See* Press Release, USADA, Statement from USADA CEO Travis T. Tygart Regarding the U.S. Postal Service Pro Cycling Team Doping Conspiracy (Oct. 10, 2012) [hereinafter *Tygart Statement*], *available at* http://cyclinginvestigation.usada.org, *archived at* http://perma.cc/66K2-UMNB. The USADA's report found direct evidence—including financial statements, emails, scientific data, and laboratory results—implicating Armstrong's use of performance-enhancing drugs. *See id.* Specifically, the report accused Armstrong of injecting EPO, corticosteroids, testosterone, and blood transfusions. *See* USADA, REPORT ON PROCEEDINGS UNDER THE WORLD ANTI-DOPING CODE AND THE USADA PROTOCOL 17–19 (2012), *available at* http://d3epuodzu3wuis.cloudfront.net/ReasonedDecision.pdf, *archived at* http://perma.cc/Q5TF-YWR5. Ultimately, the USADA not only banned Armstrong for life, but also stripped him of his Tour de France victories. *See id.* at 164. The problem with performance enhancing drugs is that they can drastically improve athletic performance. *See Effects of PEDs*, USADA (2014), http://www.usada.org/substances/effects-of-performance-enhancing-drugs/, *archived at* http://perma.cc/8NUF-C2ZK. Therefore, the purpose of the USADA's investigation into Armstrong was to continue their effort to rid cycling of steroid use to level the playing field. *See Tygart Statement*, *supra*.

[4] *See* Rishe, *supra* note 2 (estimating that Armstrong lost $150–200 million in potential future endorsement earnings over the next decade); Wharton, *supra* note 2 (estimating that Armstrong lost $75 million from pulled sponsorships on the day the USADA report was publicized). After the USADA report was released, Armstrong lost ten sponsors, which included Nike, Trek, Eaton-Bell Sports, 24 Hour Fitness, Honey Stinger, Anheuser-Busch, RadioShack, Giro, FRS, and Oakley. *See* Cindy Boren, *As Lance Armstrong Loses Sponsors, What's Next for Livestrong?*, WASH. POST, Oct. 18, 2012, http://www.washingtonpost.com/blogs/early-lead/wp/2012/10/18/as-lance-armstrong-loses-sponsors-whats-next-for-livestrong/, *archived at* http://perma.cc/3XUT-GUM4; Tom Rotunno, *Armstrong Loses Eight Sponsors in a Day*, CNBC (Oct. 18, 2012, 10:55 AM), http://www.cnbc.com/id/49462583, *archived at* http://perma.cc/MD2R-XZ5H; Darren Rovell, *Oakley Drops Lance Armstrong*, ESPN (Oct. 22, 2012, 2:24 PM), http://espn.go.com/olympics/cycling/story/_/id/8536558/oakley-drops-lance-armstrong-sponsorship, *archived at* http://perma.cc/HT6Z-8WTE.

[5] *See* Chris Isidore, *Lance Armstrong: How He'll Make Money Now*, CNN MONEY (Jan. 18, 2013, 4:15 PM), http://money.cnn.com/2013/01/16/news/companies/armstrong-endorsements/, *archived at* http://perma.cc/Z4NS-Z3KN (highlighting endorsement companies' difficulty in recouping any sponsorship money due to the structure of endorsement contracts); Chris Smith, *Lance Armstrong and Why Sponsors Need to Rethink Athlete Endorsements*, FORBES, Oct. 18, 2012, http://www.forbes.com/sites/chrissmith/2012/10/18/lance-armstrong-and-why-sponsors-need-to-rethink-athlete-endorsements/, *archived at* http://perma.cc/QDP5-2V2L (describing how athletic sponsorship deals can lead to embarrassment and harsh negative backlash, especially in the age of social media); Rodd Zolkos, *Lance Armstrong Doping Scandal Highlights Endorsement Deal Risk*, BUS. INS. (Oct. 28, 2012, 6:00 AM), https://www.businessinsurance.com/article/20121028/NEWS06/310289985, *archived at* http://perma.cc/Y293-XBGG (explaining that athletic scandals can create reputational and brand risks).

[6] *See* Hayes Hunt & Brian Kint, *Celebrity Endorsements: Your Morals Clause Return Policy*, LEGAL INTELLIGENCER 1 (Nov. 21, 2012, 12:00 AM), *available at* http://www.cozen.com/Templates/media/files/publications/Hunt_Kint_Legal.pdf, *archived at* http://perma.cc/3GXP-WXQ2; Brian Socolow, *Armstrong's Endorsement Contracts and the "Morals Clause,"* SPORTS LITIG. ALERT 1 (Nov. 2, 2012), http://www.loeb.com/articles-articles-20121102-armstrongsendorsementcontractsandthe

moral conduct, including behavior deemed to cause public disrepute, public scandal, or criminal action.[7]

Nevertheless, morality clauses fail to grant companies the option of recouping prior investment in an athlete.[8] For Armstrong's sponsors, executing the morality clauses terminated or suspended their endorsement contracts, which only saved money prospectively.[9] Over his professional career, sponsors like Nike, Oakley, and the United States Postal Service paid Armstrong millions to endorse their products and win Tour de France races.[10] Commentators opine, however, that because these endorsement contracts relied on morality clauses to combat the possibility of negative publicity, former sponsors are unlikely to recoup past payments to Armstrong as a result of his past athletic performances.[11]

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moralsclause, *archived at* http://perma.cc/KZ3X-ZCNR. Morality clauses offer endorsement companies the option of terminating an endorsement contract if the athlete engages in prohibited conduct expressed in the clause. *See* Christopher R. Chase, *A Moral Dilemma: Morals Clauses in Endorsement Contracts*, MONDAQ (Aug. 28, 2009), http://www.mondaq.com/unitedstates/x/79346/Sport/A+Moral+Dilemma+Morals+Clause, *archived at* http://perma.cc/72HG-SSD3.

[7] *See* Chase, *supra* note 6.

[8] *See* Ira Boudway, *Lance Armstrong Unlikely to Face Clawbacks*, BUS. WK. (Oct. 22, 2012), http://www.businessweek.com/articles/2012-10-22/lance-armstrong-unlikely-to-face-clawbacks, *archived at* http://perma.cc/ND9T-6XDR (asserting that Armstrong's sponsors would not be able to recoup their investment); Erik Spanberg, *Promoter Wants Armstrong to Return Bonuses*, SPORTS BUS. J. (May, 6, 2013), http://www.sportsbusinessdaily.com/Journal/Issues/2013/05/06/In-Depth/Lance-Armstrong.aspx, *archived at* http://perma.cc/3W24-7YQB (highlighting the fact that endorsement contracts typically only allow for termination).

[9] *See* Hunt & Kint, *supra* note 6, at 2 (explaining that morality clauses do not provide for recovery of money already paid out); Cyrus Sanati, *Sports Stars Should Be Subject to Clawbacks*, FORTUNE (Sept. 4, 2012, 10:47 AM), http://finance.fortune.cnn.com/2012/09/04/lance-armstrong-sponsors/, *archived at* http://perma.cc/YJ3G-N39G (finding that clawback clauses in endorsement contacts are "extremely rare"). Endorsement companies may add other remedies into morality clauses such as a suspension, a penalty, or a refusal to market the athlete's products in what is called a "pay or play" provision. *See* Chase, *supra* note 6 (listing the possible remedies of a morality clause); Erin Geiger Smith, *Will "Morals" Clauses Impact Tiger's Endorsements?*, BUS. INSIDER (Dec. 8, 2009, 4:01 PM), http://www.businessinsider.com/will-morals-clauses-impact-tigers-endorsements-2009-12, *archived at* http://perma.cc/P76C-N4RS (explaining that morality clauses could allow a company to publically criticize an athlete). These alternative remedies only provide a nominal recovery and are therefore beyond the scope of this Note. *See* Chase, *supra* note 6 (implying that the financial penalties from alternative moralities clause remedies are only a slap on the wrist because the endorsement relationship ultimately prevails).

[10] *See* Boudway, *supra* note 8 (estimating that Armstrong earned $15–18 million from endorsements in 2011). Overall, estimates put Armstrong's net worth around $125 million, with the majority of his wealth coming from sponsors. *See* Isidore, *supra* note 5 (finding that in 2005 alone Armstrong made about $17.5 million from endorsements).

[11] *See* Boudway, *supra* note 8 (concluding that Armstrong is unlikely to be subject to claims concerning his past earnings); Spanberg, *supra* note 8 (generalizing that it is very common for athletes to keep their endorsement money even after a scandal arises). For example, in his contract with Tailwind Sports Corporation, Armstrong's former team's management company, the corporation offered him $9.5 million in bonuses for winning the 2002, 2003, and 2004 Tour de France races. *See* Mason Levinson, *Lance Armstrong Arbitrator to Hear $12 Million Bonus Recoup Case*, BLOOMBERG NEWS (Oct. 31, 2013, 1:01 PM), http://www.bloomberg.com/news/2013-10-31/lance-armstrong-arbitrator-to-hear-12-million-bonus-recoup-case.html, *archived at* http://perma.cc/GQ9D-RNFP (laying out the

Exemplified by Armstrong's high-profile scandal and the subsequent legal battles that continue, many observers have recommended that endorsement companies take steps to better protect themselves.[12] Specifically, some have discussed the use of clawback clauses.[13] Often used in the securities world, claw-

particulars of Tailwind Sports Corporation's contract with Armstrong, which included $4.5 million for the 2002 and 2003 victories and $5 million for the 2004 victory); Michael O'Keeffe, *Lance Armstrong Sued by SCA Promotions for $12.1 Million for 'Cold-Hearted, Elaborate' Lie*, N.Y. DAILY NEWS (Feb. 8, 2013, 1:06 AM), http://www.nydailynews.com/sports/i-team/armstrong-sued-12m-cold-hearted-elaborate-lie-article-1.1258614, *archived at* http://perma.cc/WY9G-TAF2 (describing Tailwind Sports Corporation as managing Armstrong's cycling team, the U.S. Postal Service Team). SCA Promotions, a company that indemnifies athletic bonuses, paid Armstrong the bonuses after his victories. *See* Darren Rovell, *Insurer Seeks $7.5 Million*, ESPN (Oct. 22, 2012, 3:45 PM), http://espn.go.com/olympics/cycling/story/_/id/8537796/texas-insurance-firm-asks-lance-armstrong-repay-75-million-bonuses, *archived at* http://perma.cc/4RCE-J9MS (documenting that by February 2006, SCA had paid Armstrong all of his bonuses set out in the contract with Tailwind Sports). Following Armstrong's public admission, however, SCA sued Armstrong for $12 million on February 7, 2013, demanding repayment of the bonuses. *Lance Armstrong Against SCA Suit*, ESPN (Apr. 6, 2013, 5:32 PM), http://espn.go.com/sports/endurance/story/_/id/9141711/lance-armstrong-asks-court-dismiss-sca-lawsuit, *archived at* http://perma.cc/J2S5-3RAW. SCA is seeking $12 million because on top of the $9.5 million SCA paid Armstrong in bonuses, SCA also had to pay Armstrong $2.5 million in legal fees following an arbitration hearing in 2005 between SCA and Armstrong. *See* Socolow, *supra* note 6, at 2. SCA refused to pay Armstrong $5 million in bonuses following Armstrong's 2004 Tour de France victory due to allegations that Armstrong was doping. *See Lance Armstrong Gets Demand*, ESPN (Oct. 26, 2012, 9:50 PM), http://espn.go.com/dallas/story/_/id/8556747/lance-armstrong-gets-demand-dallas-promoter-refund?src=mobile, *archived at* http://perma.cc/5A6P-WX7Y (reporting that the evidence of doping came from sworn testimony by Betsy Andreu, the wife of a former teammate of Armstrong's). Armstrong faces additional lawsuits from other entities including Acceptance Insurance Company and the U.S. government under the False Claims Act requesting a clawback of the sponsorship money spent by the U.S. Postal Service to Armstrong. *See* Frederic J. Frommer, *Lance Armstrong Urges Judge to Dismiss Lawsuit, Argues U.S. Postal Service Got What It Bargained for*, HUFFINGTON POST (July 24, 2013, 5:12 AM), http://www.huffingtonpost.com/2013/07/25/lance-armstrong-lawsuit-government_n_3641990.html, *archived at* http://perma.cc/W8LT-E6DJ (explaining the U.S Postal Service's lawsuit against Armstrong in detail); Juliet Macur, *Two New Armstrong Suits*, N.Y. TIMES, Mar. 2, 2013, at D3 (describing other lawsuits filed against Armstrong due to his doping admission including one from Acceptance Insurance Company, who paid him $3 million in bonuses).

[12] *See* Daniel Auerbach, *Moral Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 17 (2005) ("As companies continue to throw millions of dollars at athletes to act as their spokespersons, they will undoubtedly move toward greater contractual protections."); Tony R. Bertolino, *High-Profile Athlete Doping Cases Provide Insight for Sports Law Attorneys*, 75 TEX. B. J. 844, 848 (2012) (discussing the fact that sports lawyers should expect endorsement companies to demand recoupment of an athlete's endorsement money if doping is discovered); Daniel Roberts, *The Business Page: The Sea Change in Endorsement Contracts*, SPORTS ILLUSTRATED (May 15, 2013 10:15 AM)), http://www.si.com/more-sports/2013/05/14/fortunate-50-change-sports-endorsements, *archived at* http://perma.cc/77ME-9ZBH (highlighting the major shift in endorsement contracts to providing increased protection to companies because of Armstrong's scandal); Sanati, *supra* note 9 (calling for clawback clauses to be used more often in endorsement contracts); Spanberg, *supra* note 8 (explaining that endorsement companies are going to try and protect themselves better after the fallout with Armstrong).

[13] *See* Sanati, *supra* note 9 ("But an SCA win won't change anything in the long run unless it causes marketers and sports teams to come together and require that clawback provisions be standard in all future contracts with sports stars."); Spanberg, *supra* note 8 ("Whatever happens in Armstrong's

back clauses give companies a mechanism to protect their investment in the employee or agent.[14] Clawback clauses essentially recoup the employee's compensation if the employee engages in prohibited acts listed in the clause.[15]

As endorsement companies continue to increase the use of athletes to sponsor their products, these companies must begin to protect their substantial investment in these athletes.[16] Although clawback clauses provide endorsement companies the best protection, many factors inhibit endorsement companies from adding clawback clauses into endorsement contracts.[17] Nevertheless, endorsement companies can pursue other alternatives to better protect themselves from reputational and financial costs associated with athletic scandals in ways that are more protective than morality clauses.[18]

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cases, the mere topic of what amount to clawback provisions in promotions, sponsorships and endorsements could portend greater scrutiny—and tougher negotiations.").

[14] *See Clawbacks of Executive Compensation—An Update*, AYCO COMPENSATION & BENEFITS DIG. 1 (Oct. 18, 2013) [hereinafter AYCO] http://www.aycofinancialnetwork.com/news/digest/digest_1310.pdf, *archived at* http://perma.cc/7HYV-XHPP (defining clawback clauses as provisions which allow a company to recoup compensation already paid out); *2013 Clawback Policy Report*, EQUILAR 4 (last visited Jan. 14, 2015) http://www.equilar.com/images/pdf/2013/2013-equilar-clawback-policy-exec-summary.pdf, *archived at* http://perma.cc/JB8N-GVSL (outlining the prevalence and the structure of clawback clauses among Fortune 100 companies).

[15] *See* Miriam A. Cherry & Jarrod Wong, *Clawbacks: Prospective Contract Measures in an Era of Excessive Executive Compensation and Ponzi Schemes*, 94 MINN. L. REV. 368, 371–72 (2009) ("We define 'clawback' as a theory for recovering benefits that have been conferred under a claim of right, but that are nonetheless recoverable because unfairness would otherwise result").

[16] *See* Auerbach, *supra* note 12, at 6 (finding that by 1996, endorsement contracts by U.S. companies had reached $1 billion). In fact, endorsement deals from Nike alone were worth $1.7 billion as of August 2, 2004. *See Nike Endorsements up to $1.7B*, CNN MONEY (Aug. 2, 2004, 11:33 AM), http://money.cnn.com/2004/08/02/news/fortune500/nike_endorsements/, *archived at* http://perma.cc/WHB8-QN55. The age and moral character of athletes contribute to endorsement companies' increasing need for protection. *See* Auerbach, *supra* note 12, at 4–6 (arguing that younger athletes and larger salaries have caused more immaturity and misconduct).

[17] *See* Michael C. Macchiarola, *In the Shadow of the Omnipresent Claw: In Response to Professors Cherry & Wong* 95 MINN. L. REV. HEADNOTES 1, 15–16 (2010), http://www.minnesotalawreview.org/wp-content/uploads/2011/06/Macchiarola_PDF1.pdf, *archived at* http://perma.cc/QG7T-FHM5 (focusing on the legal issues associated with clawback clauses); David T. Della Rocca et al., *Clawing Back Incentive Compensation*, LEXOLOGY (June 30, 2010), http://www.lexology.com/library/detail.aspx?g=6deb486d-a7a8-44be-85b9-a8c949693b00, *archived at* http://perma.cc/RYW2-NPEU (addressing administrative and enforceability issues related to clawback provisions); *Clawing Back Bonuses: When Is It Enforceable?*, FOX WILLIAMS (Mar. 7, 2012), http://www.hrlaw.co.uk/site/focus/bonus_payments, *archived at* http://perma.cc/F4AE-FADX (describing the issue of retaining talent once a company adopts clawback clauses).

[18] *See* Patrick E. Fitzsimmons & Lindsey R. Goldstein, *The Tiger Effect: The Future of Morals Clauses in Endorsement Agreements*, SPORTS L. TODAY (Spring 2010), *available at* http://www.fishneave.com/~/media/Files/articles/2010/03/sports-law-today-spring-2010.pdf, *archived at* http://perma.cc/QK8S-G9S9 (explaining how restructuring the contract can be one possible alternative to morality and clawback clauses); *What Are "Liquidated Damages"?*, ROTTENSTEIN L. GRP. (last visited Jan. 14, 2015) [hereinafter ROTTENSTEIN], http://www.rotlaw.com/legal-library/what-are-liquidated-damages/, *archived at* http://perma.cc/SB5S-CJH5 (highlighting liquidated damages as an alternative to morality clauses).

This Note argues that clawback clauses, even though the optimal choice, are not practical to implement, and therefore endorsement companies should consider other methods of recovery.[19] Part I of this Note provides an overview of different types of contractual stipulations including morality clauses, clawback clauses, and liquidated damages provisions.[20] Part II discusses the legal and practical concerns regarding the introduction of clawback clauses into athletic endorsement contracts.[21] Part III examines, in light of the legal and practical concerns raised in Part II, whether clawback clauses are a viable alternative to morality clauses.[22] This Note concludes that clawback clauses are not practicable and proposes other alternatives, such as liquidated damages provisions and contract restructuring, for endorsement companies to better protect their interests.[23]

I. STICKING TO THE FUNDAMENTALS: THE DOCTRINES OF MORALITY, CLAWBACK, AND LIQUIDATED DAMAGES PROVISIONS

This Part outlines the concept, purposes, and enforceability of morality clauses, clawback provisions, and liquidated damages provisions in contracts.[24] All of these provisions help protect the principal's investment in the agent, whose actions and behavior can be detrimental to the principal.[25] Although the rationales behind these clauses are similar, implementing one over the other has advantages and disadvantages.[26] Section A details the doctrine of morality clauses, and explains how they are generally applied in endorsement contracts.[27] Section B examines clawback provisions and their use in the securities and sports contexts.[28] Finally, Section C discusses liquidated damages provisions, which can sometimes be used as an alternative to morality and clawback clauses.[29]

A. Unsportsmanlike Conduct: An Examination of Morality Clauses

A morality clause is a contractual agreement that allows the principal to terminate or punish an agent whose behavior violates one of the prohibited actions expressed in the clause.[30] In addition to terminating the contract, morality

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[19] *See infra* notes 208–292 and accompanying text.
[20] *See infra* notes 24–146 and accompanying text.
[21] *See infra* notes 147–207 and accompanying text.
[22] *See infra* notes 208–251 and accompanying text.
[23] *See infra* notes 252–292 and accompanying text.
[24] *See infra* notes 30–146 and accompanying text.
[25] *See infra* notes 30–146 and accompanying text.
[26] *See infra* notes 30–146 and accompanying text.
[27] *See infra* notes 30–79 and accompanying text.
[28] *See infra* notes 80–132 and accompanying text.
[29] *See infra* notes 133–146 and accompanying text.
[30] *E.g.*, Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 235 (2005) (defining morality clauses); Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals*

clauses allow the employer to suspend the employee, impose a fine on the employee, publically criticize the employee, or adopt "pay or play" measures.[31] Most importantly, the morality clause does not allow the company to recover compensation that has already been paid under the contract.[32] In fact, some morality clauses include a walk-away provision where the employee retains some of the remaining contract as a settlement.[33]

Though limited in their remedial applicability, morality clauses are found in a wide variety of contracts, such as endorsement contracts, professional athletic contracts, and financial executive contracts.[34] In the financial world, morality clauses are referred to as "bad boy" clauses, allowing an investment company to forfeit the contract of an employee who engages in prohibited conduct.[35] Despite widespread application, morality clauses are predominately used in talent agreements for athletes and actors.[36]

Although morality clauses have long been used in talent agreements, the use of morality clauses in athletic endorsement contracts has exploded in the last fifteen years.[37] The increase can be attributed to the younger age of professional

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Clauses in Talent Contracts and What Talent Needs to Know, 19 SETON HALL J. SPORTS & ENT. L. 347, 350–51 (2009) (same); Chase, *supra* note 6 (same).

[31] *See* Chase, *supra* note 6 (detailing the remedies for a morality clause, which can include termination, suspension, penalty, damages, or "pay or play" provisions); Smith, *supra* note 9 (explaining that morality clauses could also allow a company to publically criticize an athlete). "Pay or play" provisions are remedial actions that give the corporation the ultimate discretion to air, publish, or make available an athlete's merchandise. *See* Chase, *supra* note 6. In these instances, the company would still need to pay the athlete, but could publically distance itself from him or her. *See id.*

[32] *See* Pinguelo & Cedrone, *supra* note 30, at 351 (explaining that morality clauses allow a company to terminate the athlete, but not to claw back their compensation); Chase, *supra* note 6 (claiming that inserting a "refund clause" into a morality clause is difficult). This form of recovery is usually referred to as a clawback provision. *See* Hunt & Kint, *supra* note 6, at 3 (finding it very doubtful that Armstrong's endorsement companies included a clawback provision in his contracts); *infra* notes 80–85 and accompanying text (defining clawback provisions).

[33] Dave Carpenter & Emily Fredrix, *'Bad Boy' Clauses Can Sink Tiger Woods, Other Endorsers*, BOSTON.COM (Dec. 17, 2009), http://www.boston.com/business/articles/2009/12/17/bad_boy_clauses_can_sink_woods_other_endorsers/, *archived at* http://perma.cc/R9MJ-6F63 (stating that morality clauses usually prevent future compensation, but some parties can bargain walk-away-provisions that give the athlete additional compensation when the contract is terminated).

[34] *See* Pinguelo & Cedrone, *supra* note 30, at 363–66 (providing examples of where morality clauses are commonly used).

[35] *See* Richard E. Wood, *Bad Boys (and Girls) Get Clawed Back*, 18 BENEFITS L. J. 84, 84 (2005), *available at* http://www.klgates.com/files/Publication/35fa615b-443b-44e9-9916-6b26d9c6642e/Preview/PublicationAttachment/3ecd8ed7-f3b6-4c4f-ab50-87cfa0250f7a/Bad_Boy.pdf, *archived at* http://perma.cc/AB6K-VP43 (outlining the history and design of "bad boy" provisions in the financial world).

[36] *See* Auerbach, *supra* note 12, at 3–4 (underscoring the prevalence of morality clauses in talent agreements).

[37] *See* Kressler, *supra* note 30, at 235–38 (describing the history of morality clauses in talent agreements); John Gibeaut, *Hold That Tiger*, A.B.A. J. (Sept. 1, 2010, 7:50 AM), http://www.abajournal.com/magazine/article/hold_that_tiger/, *archived at* http://perma.cc/RK9V-*2JD7* (detailing recent athletic scandals that have used the morality clause). In 1997, a survey directed by Sports Me-

athletes,[38] the changing moral fiber of athletes,[39] and the increase in money involved in endorsement agreements.[40] Coupled with the millions of dollars paid to athletes in endorsement contracts, recent high-profile scandals, including Lance Armstrong's, highlight the role that morality clauses play in trying to protect the endorsement company's investment.[41]

Not only do morality clauses cut off compensation to athletes, but they also terminate the association between the athlete and the company.[42] Social theorists classify this association as "meaning transference," where society transfers the perceived ideals of the athlete to the product.[43] Similarly, negative perceptions of the athlete also transfer if the athlete engages in reprehensible actions.[44] Therefore, morality clauses allow the company to quickly disassociate themselves with the athlete to sever the relationship in the public's mind.[45] In effect, morali-

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dia Challenge reported that fewer than half of all endorsement deals included a morality clause. *See* Pinguelo & Cedrone, *supra* note 30, at 356–57. In 2003, the number had risen to 75%. *See* Auerbach, *supra* note 12, at 4.

[38] *See* Auerbach, *supra* note 12, at 4–5 (highlighting the fact that more and more athletes are forgoing college in favor of professional sports).

[39] *See* Auerbach, *supra* note 12, at 6 (implying that because athletes are younger, their immaturity leads to more misconduct).

[40] *See* Pinguelo & Cedrone, *supra* note 30, at 368–69 (providing financial statistics from athletic endorsement contracts). As an example, in 2010, NFL Quarterback Peyton Manning earned around $15 million in endorsement deals with Gatorade, MasterCard, Oreo, and Reebok. *See* 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 (2011). Moreover, in 2012, Lance Armstrong retained anywhere from $15–20 million in endorsement deals. *See* Hunt, & Kint, *supra* note 6, at 1.

[41] *See* Pinguelo & Cedrone, *supra* note 30, at 368 (stating generally that morality clauses help protect companies from scandals); Katz, *supra* note 40, at 194 (detailing the amount of money involved in endorsement contracts). Scandals and the use of morality clauses can become national news, as exemplified by Lance Armstrong, Tiger Woods, Michael Vick, Kobe Bryant, and many others. *See* Defne Gunay, *Morals Clauses: Tiger Woods and the Death of His Sponsorships*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (Mar. 04, 2010), *available at* http://iplj.net/blog/archives/1368, *archived at* http://perma.cc/FR24-VQXP (describing where morality clauses have been used, including with Michael Vick, Kobe Bryant, and Kate Moss); Roberts, *supra* note 12 (detailing the morality clause used for Rashard Mendenhall, a former NFL player).

[42] *See* Kressler, *supra* note 30, at 240–41.

[43] *See id.* (explaining that some social theorists argue that a product has no meaning until an individual becomes attached to it); David Jacoby et al., *"Morals Clauses": Protecting the Brand from Celebrities Gone Wild*, IN FASHION 1 (2011), *available at* www.schiffhardin.com/binary/2011-04_in-fashion-spring.pdf, *archived at* http://perma.cc/NQ55-RHNY (defining "meaning transference"). As an example of positive meaning transference, the values of perseverance, hard work, and excellence associated with Lance Armstrong after battling cancer and winning multiple Tour de France races transmits to Armstrong's promoter, the U.S. Postal Service, in the public's perception. *See* Hunt & Kint, *supra* note 6, at 1.

[44] *See* Kressler, *supra* note 30, at 240–41.

[45] *See id.* at 241.

ty clauses help protect the company's brand and public image from the athlete's potential scandals.[46]

Due to the financial and reputational costs at stake for the endorsement company and the athlete, morality clauses are heavily negotiated.[47] The athlete wants objective language included in the contract so that the morality clause only triggers when a specific act occurs.[48] Conversely, endorsement companies prefer broad language so that the company can maximize potential protection.[49] Broad language gives the company more discretion to determine if the athlete's actions fit within the proscribed conduct, and whether to enforce the morality clause.[50] Whether the language in the morality clause is more objective or sub-

[46] *See* Pinguelo & Cedrone, *supra* note 30, at 368 ("[C]ompanies today use morals clauses to protect against the significant risk that their brands will become irreparably tarnished if talent engages in immoral conduct.").

[47] *See*, *e.g.*, Auerbach, *supra* note 12, at 7 ("Due to the increasing value and emphasis placed on contractual protections, the negotiations process is worthy of consideration."); Pinguelo & Cedrone, *supra* note 30, at 367–69 (listing the possible negotiation points concerning morality clauses); Chase, *supra* note 6 ("Morals clauses are one of the most controversial and heavily negotiated provisions in athlete endorsement agreements."). Whether a particular morality clause is more favorable to the endorsement company or the athlete depends on the language included in the clause. *See* Chase, *supra* note 6 (describing the intricacies of negotiating a morality clause and how the company and athlete's interests' conflict); *see also* Pinguelo & Cedrone, *supra* note 30, at 370–71 (same). The athlete will negotiate for objective language, whereas the endorsement company will push for broader and more subjective language. *See* Auerbach, *supra* note 12, at 8–9; Socolow, *supra* note 6, at 1.

[48] *See* Chase, *supra* note 6. As an example, morality clauses that are only triggered by conviction of a criminal offense favor the athlete because the analysis is objective. *See* Auerbach, *supra* note 12, at 7–8. In the case of former NBA player Chris Webber, an arbitration panel found in Webber's favor due to the language in the morality clause. *See* Pinguelo & Cedrone, *supra* note 30, at 377–78. The morality clause in that instance expressly stated that termination of the contract could only occur if Webber were convicted of a crime. *See id.* Webber was never convicted of any crime, but was instead only charged with assaulting a police officer, resisting arrest, and possession of marijuana. *See* Auerbach, *supra* note 12, at 10–11; Pinguelo & Cedrone, *supra* note 30, at 377–78. Therefore, the arbitration panel awarded Webber $2.61 million in compensation for wrongful termination. *See id.* The case shows that negotiations over the language of the morality clause can have huge financial consequences for both the endorser and the athlete. *See* Auerbach, *supra* note 12, at 9 (highlighting the case of NBA star Jayson Williams, whose morality clause included objective language, costing the New Jersey Nets millions); Pinguelo & Cedrone, *supra* note 30, at 377–78 (same).

[49] *See* Chase, *supra* note 6. For example, subjective language includes phrases such as "moral turpitude," "public disrepute," "morals," or "ridicule." *See* Auerbach, *supra* note 12, at 8; Bob Tarantino, *Keep Your Pants on—The Morals Clause in Performer Contracts*, ENT. & MEDIA L. SIGNAL (Jan. 18, 2012), http://www.entertainmentmedialawsignal.com/keep-your-pants-on-the-morals-clause-in-performer-contracts/, *archived at* http://perma.cc/82U4-MAW2 (providing an example of a morality clause that includes broad, subjective language favorable to endorsement companies). The meaning of such language is in constant flux based on society's understanding of what constitutes "morals." *See* Pinguelo & Cedrone, *supra* note 30, at 352.

[50] *See* Auerbach, *supra* note 12, at 8 ("Companies are prudent to insist on such broad language leaving themselves latitude to terminate the agreement for any potentially damaging incident or act."); Chase, *supra* note 6 ("[T]he advertiser will often push for a broad morals clause that provides sufficient discretion to the advertiser to determine whether the endorsing athlete's acts constitute a violation.").

jective depends in large part on the athlete's star power and track record.[51] A more famous, household named athlete will have more leverage than an athlete with less star power or a bad track record.[52]

The results of these negotiations have a long history of being enforced by the courts.[53] In as early as 1918, the New York Supreme Court's Appellate Division found that an employee could be terminated for violating a morality clause.[54] Courts enforced morality clauses through the Hollywood scandals of the 1920s[55] and the 'Hollywood Ten' cases in the 1950s.[56] In the 'Hollywood Ten' scandal, where movie industry employees were found to be in contempt of Congress for refusing to testify about their affiliation with the Communist Party, four of the ten employees sued the studios for wrongful discharge.[57] In all four cases, the courts ultimately upheld the enforceability of the morality clause.[58] The morality clause in each case maintained subjective language calling for ter-

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[51] *See* Auerbach, *supra* note 12, at 7–8 (using the law of supply and demand to conclude that an athlete's star power affects the language included in a morality clause); Fitzsimmons & Goldstein, *supra* note 18, at 2 (indicating that an athlete's talent and popularity has an effect on the negotiations over morality clauses).

[52] *See* Hunt & Kint, *supra* note 6, at 3. For example, NBA star Lebron James will have more competition for his services than Lance Armstrong and therefore more leverage to negotiate a morals clause that contains very objective language, permitting a remedy for the corporation only when a criminal conviction occurs. *See* Auerbach, *supra* note 12, at 7–8 (describing the conflict of interest between endorsement companies and athletes); Jacoby et al., *supra* note 42, at 2 (explaining that an athlete with bargaining leverage will want to limit the morality clauses to situations involving only the conviction of a crime).

[53] *See* Ackerman v. Siegel, 170 N.Y.S. 522, 522–23 (App. Div. 1918); Pinguelo & Cedrone, *supra* note 30, at 358.

[54] *See Ackerman*, 170 N.Y.S. at 523.

[55] Pinguelo & Cedrone, *supra* note 30, at 354–55. The press coverage of Hollywood scandals and the drinking and partying lifestyle created public resentment towards Hollywood. Kressler, *supra* note 30, at 237. Coupled with high-profile scandals involving movie stars such as Mary Pickford and Roscoe "Fatty" Arbuckle, movie studios began to invoke morality clauses in talent agreements to protect themselves from any public association. Pinguelo & Cedrone, *supra* note 29, at 354–55; Gibeaut, *supra* note 37.

[56] Kressler, *supra* note 30, at 238; Pinguelo & Cedrone, *supra* note 30, at 355. In the 1950s, morality clauses were used to protect companies from being associated with the Communist Party. Kressler, *supra* note 30, at 238; Pinguelo & Cedrone, *supra* note 30, at 355. During the McCarthy Era, Congress began to investigate whether communism had infiltrated Hollywood. Kressler, *supra* note 30, at 238. In 1947, the House Committee on Un-American Activities subpoenaed forty-three movie industry employees. *Id.* Out of the forty-three employees to testify, ten witnesses refused to answer whether they were affiliated with the Communist Party. *Id.* Congress therefore charged the "Hollywood Ten," as they were referred to in the public, with contempt of Congress. *Id.* Following public upheaval, the studios employed the morality clause, terminating the Hollywood Ten's employment contracts. Kressler, *supra* note 30at 238; Pinguelo & Cedrone, *supra* note 30, at 355.

[57] *See* Scott v. RKO Radio Pictures, Inc., 240 F.2d 87, 88 (9th Cir. 1957); Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844, 844, 847 (9th Cir. 1954); Loew's, Inc. v. Cole, 185 F.2d 641, 645 (9th Cir. 1950); RKO Radio Pictures, Inc. v. Jarrico, 274 P.2d 928, 929 (Cal. Dist. Ct. App. 1954).

[58] *See Scott*, 240 F.2d at 88; *Lardner*, 216 F.2d at 848; *Cole*, 185 F.2d at 645; *Jarrico*, 274 P.2d at 928–29.

mination if the employee brought to himself and the company public hatred, contempt, scorn, ridicule, or disrepute.[59] The courts all held that the employees' actions were in the purview of the broad morality clause.[60] The remedy was to uphold the termination of the employee by way of the morality clause.[61]

Today, courts uniformly enforce morality clauses.[62] Courts enforce morality clauses based both on the expressed terms within the contract and also under common law doctrine.[63] For example, in 2005, in *Nader v. ABC Television, Inc.*, the U.S. Court of Appeals for the Second Circuit upheld the morality clause stating that morality clauses, "have long been held valid and enforceable."[64] Additionally, the common law employs an implied duty of good conduct, which calls for the employee to conduct himself or herself with decency so as not to injure the employer in his or her business.[65] Combining the morality clause and implied duty of good conduct, courts state that the employer's right to terminate the contract under the morality clause does not restrict the employer's right to terminate the employee under the common law.[66] In other words, morality clauses supplement the common law.[67]

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[59] *See Scott*, 240 F.2d at 88; *Lardner*, 216 F.2d at 848; *Cole*, 185 F.2d at 645; *Jarrico*, 274 P.2d at 928–29.

[60] *See Scott*, 240 F.2d at 88; *Lardner*, 216 F.2d at 848; *Cole*, 185 F.2d at 645; *Jarrico*, 274 P.2d at 928–29.

[61] *See Scott*, 240 F.2d at 88; *Lardner*, 216 F.2d at 848; *Cole*, 185 F.2d at 645; *Jarrico*, 274 P.2d at 928–29.

[62] *See* Nader v. ABC Television, Inc., 150 Fed. App'x 54, 56 (2d Cir. 2005) ("Morals clauses have long been held valid and enforceable. There is no indication that New York departs from the generally applicable law on this point.") (citation omitted); Mendenhall v. Hanesbrands, Inc., 856 F. Supp. 2d 717, 725 (M.D.N.C. 2012) (citing *Nader* for the proposition that morals clauses have long been valid and enforceable); Jacoby et al., *supra* note 43, at 2 (explaining that courts in New York and California have upheld morality clauses, regardless of the language that is included).

[63] *See* 19 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 54:45 (4th ed. 2013) (analyzing the common law doctrine that an employer can terminate an employment contract based on moral turpitude); RESTATEMENT (SECOND) OF AGENCY § 380 (1958) (same); Kressler, *supra* note 30, at 246–47, 250 (demonstrating the confluence of express and implied morals clauses).

[64] *Nader*, 150 Fed. App'x at 56. In *Nader*, the employee sued the employer, who terminated the employee's contract based on the application of the morality clause. *See id.* at 55. ABC Television employed the employee, an actor, under contract dated April 11, 2000. *See* Nader v. ABC Television, Inc., 330 F. Supp. 2d 345, 346 (S.D.N.Y. 2004). On February 24, 2001, Nader was arrested and charged with one count of criminal sale of a controlled substance for selling cocaine and one count for resisting arrest. *See id.* ABC Television consequently terminated the contract under the morality clause. *See id.* at 347.

[65] *See* Kressler, *supra* note 30, at 250 (explaining the employee's obligation of good conduct).

[66] *See Scott*, 240 F.2d at 90–91; *Lardner*, 216 F.2d at 850–51.

[67] *See Scott*, 240 F.2d at 90–91; *Lardner*, 216 F.2d at 850–51. For example, in *Lardner*, the Ninth Circuit used the same supplemental language in one of the "Hollywood Ten" cases. *See Lardner*, 216 F.2d at 850 ("The fact that a contract of employment authorizes the employer to terminate it for certain specified causes does not ordinarily prevent the employer from discharging the employee for a legal cause not specified."). The court found that the employee not only violated the express terms of the morality clause, but also violated the implied duty of good conduct under the common law. *See id.*

Even though morality clauses are enforceable by law, whether courts uphold a termination of employment depends in large part on the language of the clause at issue.[68] Cases hinge on how broad the morality clause is worded and whether the athlete's conduct fits within the explicit prohibited conduct expressed in the clause.[69] For example, in 2012, in *Mendenhall v. Hanesbrands, Inc.*, the U.S. District Court for the Middle District of North Carolina found that although the morality clause was enforceable, the employee's actions did not trigger the clause.[70] In addition, the *Mendenhall* court concluded that the employer had to maintain the common law doctrine of implied covenant of good faith and fair dealing.[71] Notwithstanding the employer's discretion to use the morality clause, the common law requires that the employer not exercise its discretion under the contract arbitrarily or irrationally.[72] The court found that the employee's actions were not in the purview of the expressed terms in the morality clause, and the employer violated the duty of good conduct.[73] Therefore, the court held for the employee because the employer applied his or her discretion arbitrarily in violation of the implied covenant of good faith and fair dealing.[74]

To date, the courts have not given employers the ability to recover past wages from employees through the morality clause.[75] For example, in 2009, in *White v. National Football League*, the U.S. Court of Appeals for the Eight Circuit affirmed the ruling in the U.S. District Court for the District of Minnesota that the Atlanta Falcons could not recoup bonuses paid to their employee due to the anti-forfeiture clause in the contract.[76] Similarly, in 2009, in *Team Gordon, Inc. v. Fruit of the Loom, Inc.*, the U.S. District Court for the Western District of

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[68] *See Mendenhall*, 856 F. Supp. 2d at 727–28; Pinguelo & Cedrone, *supra* note 30, at 377–78 (highlighting examples of when the language in the morality clause is the dispositive factor). The arbitration panel in Chris Webber's case found in favor of Webber due to the objective language used in the clause. *See* Pinguelo & Cedrone, *supra* note 30, at 377–78.

[69] See *Mendenhall*, 856 F. Supp. 2d at 727–28; Pinguelo & Cedrone, *supra* note 30, at 377–78.

[70] *See Mendenhall*, 856 F. Supp. 2d at 725, 727. Plaintiff Mendenhall brought a breach of contract claim against the defendant, Hanesbrands, Inc., claiming the defendant wrongfully terminated his contract under the morals clause. *See id.* at 725. In response, the defendant filed a Motion for Judgment on the Pleadings. *See id.* at 722. It was disputed whether the employee's inflammatory remarks concerning 9/11 actually caused "shock, insult, or offen[se]" to the public. *See id.* at 720, 722, 725.

[71] *See id.* at 725–26.

[72] *See id.*

[73] *See id.* at 727–28. The court ultimately denied the defendant's Motion for Judgment on the Pleadings, finding that a dispute of fact existed between the parties as to whether Mendenhall's comments caused public shock, insult, or offense. *See id.*

[74] *See id.*

[75] *See* White v. National Football League, 585 F.3d 1129, 1135 (8th Cir. 2009); Team Gordon, Inc. v. Fruit of the Loom, Inc., No. 3:06-cv-201-RJC, 2009 WL 426555, at *4 (W.D.N.C. Feb. 19, 2009). There have also been cases where the parties have settled out of court to recover endorsement money. *See* Auerbach, *supra* note 12, at 12. In 2000, AT&T utilized the morality clause to terminate NASCAR driver Mike Borkowski's contract. *See id.* AT&T also sued Borkowski for $60,000 to recover their endorsement money. *See id.* AT&T and Borkowski decided to settle out of court. *See id.*

[76] *See White*, 585 F.3d at 1142–43.

North Carolina held that the employee did not enjoy unjust enrichment from the breach of the contract and therefore was not required to pay back past wages to the employer.[77] The employer terminated the endorsement contract with NASCAR driver Robby Gordon after he fought fellow driver Michael Waltrip and used derogatory language in a post-race interview.[78] The court upheld the termination but did not allow the employer to recoup its investment from the athlete because the morality clause only stipulated for termination of the contract.[79]

B. A Late Flag on the Play: Explaining Clawback Provisions

Since morality clauses have been viewed as failing to adequately safeguard an endorsement company's investment, some commentators have advocated for the addition of clawback provisions in endorsement contracts.[80] In opposition to the morality clause, clawback provisions in contracts allow the employer to recoup compensation already paid to the employee or agent.[81] Clawback provisions are contractual agreements that expressly give employers the ability to recoup incentive-based compensation under specific circumstances.[82] The specific circumstances are either regulated by a statutory act or are voluntarily spelled out in the agreement.[83]

Clawback provisions have become popular in financial executive contracts after the scandals of Enron and WorldCom in the early 2000s and the recent financial crisis.[84] In the sports context, clawback provisions have appeared in mi-

[77] *See Team Gordon*, 2009 WL 426555, at *7.

[78] *See id.* at *3–4.

[79] *See id.* at *6–7.

[80] *See supra* note 12 and accompanying text (advocating for the use of clawback clauses as a defense to higher priced endorsement contracts and athletics scandals). Morality clauses not only fail to claw back investment, but subsequent litigation only tends to further stamp the association between the athlete and the company, undermining the purpose of the morality clause in the first place. *See* Socolow, *supra* note 6, at 2 (indicating that litigation could imply that the company knew about the conduct before the actions were public knowledge).

[81] *See* Cherry & Wong, *supra* note 15, at 371–72 (defining clawback clauses); Pinguelo & Cedrone, *supra* note 30, at 351 (explaining that morality clauses allow a company to terminate the athlete, but are not used to claw back their compensation); Garrett R. Broshuis, Comment, *Deterring Opportunism Through Clawbacks: Lessons for Executive Compensation from Minor League Baseball*, 57 ST. LOUIS U. L.J. 185, 187 (2012) (showing that clawback clauses give companies the ability to claw back compensation already paid out to the athlete); Della Rocca et al., *supra* note 17 (same).

[82] Broshuis, *supra* note 81, at 187; Martin J. Greenberg, *The Use of Clawback Clauses in College Coaches' Contracts*, NAT'L SPORTS L. INST. 3 (2010), https://law.marquette.edu/assets/sports-law/pdf/for-the-record/greenberg-v21no2.pdf, *archived at* https://perma.cc/7EVX-KNXY.

[83] *See* AYCO, *supra* note 14, at 1–2 (describing the statutorily mandated clawback provisions); Amy Goodman & Gillian McPhee, *"Clawbacks" of Executive Compensation*, GIBSON DUNN (July 9, 2008), http://www.gibsondunn.com/publications/Pages/ClawbacksOfExecutiveCompensation.aspx, *archived at* http://perma.cc/4M2F-SZVV (discussing a company's decision to voluntarily implement clawback clauses).

[84] Cherry & Wong, *supra* note 15, at 420 (discussing the recent financial crisis in the fall of 2008 as contributing to the influx of clawback clause provisions in the financial world); Stuart R. Lombardi,

nor league baseball contracts and are slowly being introduced into NCAA college coaches' contracts, but explicit clawback provisions have not yet been utilized for athletic endorsements.[85] Subsection 1 discusses clawback provisions in the financial sector, highlighting the growing prevalence of clawback clauses and the difference between statutory clawbacks and voluntary clawbacks.[86] Subsection 2 explores the existence and application of voluntary clawback provisions in the sports context and their limited use.[87]

1. Financial Sector

Clawback provisions, which are most frequently used in executive financial contracts, have become increasingly popular for a few reasons.[88] Investment firms and securities firms have begun to employ clawback clauses in part because clawback clauses are now statutorily enforced.[89] After the Enron and WorldCom scandals, Congress responded with the Sarbanes-Oxley Act of 2002 ("SOX"), representing the first statutory provision that authorized clawback clauses in executive compensation contracts.[90] SOX did not require investment companies to institute clawback provisions, but did force the Security and Exchange Commission ("SEC") to pursue repayment of incentive compensation from senior executives at investment and securities firms who were involved in

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Note, *Interpreting Dodd-Frank Section 954: A Case for Corporate Discretion in Clawback Policies*, 2011 COLUM. BUS. L. REV. 881, 883, 891 (2011) (explaining that statutory clawback provisions have popped up due to financial scandals and the recent financial crisis).

[85] *See* Broshuis, *supra* note 81, at 186 (exploring clawback clauses in minor league baseball); Greenberg, *supra* note 82, at 4–5 (examining clawback clauses in NCAA college coaches' contracts); Sanati, *supra* note 9 (quoting sports agents who said that they have never heard of clawback provisions in endorsement contracts).

[86] *See infra* notes 88–119 and accompanying text.

[87] *See infra* notes 120–132 and accompanying text.

[88] *See* Terrance Gallogly, Comment, *Enforcing the Clawback Provision: Preventing the Evasion of Liability Under Section 954 of the Dodd-Frank Act*; 42 SETON HALL L. REV. 1229, 1241 (2012) (underscoring the mandatory implementation of clawbacks due to legislation); *2013 Clawback Policy Report*, *supra* note 14, at 4 (showing the prevalence of clawback clauses among Fortune 100 companies); *A Company's Reputation Is What Gets Fried When Its Books Get Cooked*, UNIV. OF WASH. FOSTER SCH. OF BUS. (Nov. 18, 2006) [hereinafter *A Company's Reputation*], http://www.foster.washington.edu/news/Pages/FosterNewsItem.aspx?ArticleId=39115567939815, *archived at* http://perma.cc/9XC9-ZXG7 (calculating that inaccurate SEC reporting can cause financial risks for the corporation).

[89] *See* Gallogly, *supra* note 88, at 1240–41 (highlighting the origins of SOX); *2013 Clawback Policy Report*, *supra* note 14, at 4 (implying that the increase in clawback clauses among Fortune 100 companies is due in part to the Dodd-Frank Act, which mandates clawback clauses).

[90] AYCO, *supra* note 14, at 4 (describing SOX as the "initial statutory authorization" for clawbacks). The clawback provision under SOX was codified in Section 304 of the act. Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7243 (2012).

fraud.[91] Therefore, SOX is very narrow in scope, triggering only against the CEO or CFO and only when misconduct occurred.[92]

The second round of statutory clawback provisions took place as part of a response to the most recent financial crisis in 2008–09.[93] Following the subprime mortgage crisis, President George W. Bush signed the Troubled Asset Relief Program ("TARP") into law on October 3, 2008, which allowed the Treasury Secretary to purchase assets from failing investment firms and banks in order to strengthen the financial sector.[94] Still, the ability to claw back executive compensation under TARP did not exist until Congress enacted the American Recovery and Reinvestment Act of 2009 ("Recovery Act").[95] The Recovery Act expanded the scope of the SOX provisions by allowing clawbacks without the need to prove that misconduct created the incorrect financial filing.[96] Still, the Recovery Act's clawback stipulations only applied to corporations that either received

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[91] *See* Goodman & McPhee, *supra* note 82 (implying that Section 304 of SOX gave the corporation the ability to implement a clawback provision and not a mandate); Patrick T. Smith, *The Dodd-Frank Clawback Provision's Role in Creating a More Secure Corporate Governance Structure*, SETON HALL L. SCH. (Nov. 18, 2013, 7:59PM), at 3, http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1372&context=student_scholarship, *archived at* http://perma.cc/7ZL9-YBSD (stating that even though some corporations voluntary created clawback provisions, it was not mandated by Section 304 of SOX). The purposes of Section 304 were to improve accountability, reduce fraudulent SEC reporting, and send a message to the public that the securities world was committed to deterring fraud. *See* Gallogly, *supra* note 88, at 1241 (explaining that Section 304's objective was to create a more transparent investment practice); Smith, *supra* at 5 (characterizing the purpose of Section 304 as preventing future accounting scandals like Enron).

[92] *See* 15 U.S.C. § 7243. Specifically, Section 304 of SOX states that if an issuer is required to prepare a financial restatement due to the misconduct of the issuer then the issuer can recover the CEO's or CFO's bonuses, incentive based or equity based compensation, and profits received from the sale of the corporate stock. *Id.* The statute limits the time period to twelve months following the first public filing of the document that needed to be restated. *Id.* Therefore, Section 304 is only implicated when the financial restatement resulted from misconduct, although misconduct is not defined. *See* Gallogly, *supra* note 88, at 1242 (clarifying that Section 304 is only triggered when misconduct occurs); Goodman & McPhee, *supra* note 83 (explaining that Section 304 fails to define "misconduct"). When inaccurate accounting occurs, the revision of a company's financial accounts is called a financial restatement. *See SEC Advisory Committee on Improvements to Financial Reporting Subcommittee III*, at 2, *available at* https://www.sec.gov/about/offices/oca/acifr/acifr-sc3-report.pdf, *archived at* https://perma.cc/ZT7E-V8A8. The U.S. Securities and Exchange Commission ("SEC") governs financial restatements. *See id.* Financial restatements cover material inaccuracies such as accounting errors, fraud, and non-compliance with generally accepted accounting principles. *See id.*

[93] Broshuis, *supra* note 81, at 190 (explaining the aftermath of the 2008–09 financial crisis and Congress's response); Lombardi, *supra* note 84, at 893 (describing the clawback clauses mandated under TARP); AYCO, *supra* note 14, at 1 (same).

[94] Jeanne Sahadi, *Bailout Is Law*, CNN MONEY (Oct. 4, 2008, 12:00PM), http://money.cnn.com/2008/10/03/news/economy/house_friday_bailout/, *archived at* http://perma.cc/W735-S8HD.

[95] *See* Lombardi, *supra* note 84, at 893.

[96] *See id.* The Recovery Act specifically provided that companies could claw back incentive compensation paid to the company's five highest senior executive officers and the next twenty highest compensated employees if a financial statement was later found to be materially inaccurate. *See* 31 C.F.R. § 30.8 (2010) (articulating TARP standards for clawing back compensation).

TARP funding or failed to pay back the loan received by TARP.[97] Furthermore, the Recovery Act granted an exception if the employee could show that exercising the clawback provisions would be "unreasonable."[98]

Following TARP, Congress further expanded the ability to claw back employee compensation through the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act").[99] Section 954 of the Dodd-Frank Act amends the Securities Exchange Act of 1934, which forms the basis of securities regulation and enforcement.[100] The amendment expressly forces companies to implement a clawback provision for corporations listed on a national securities exchange.[101] If the corporation fails to implement a clawback provision, the SEC may remove the company from the listed stock exchange.[102] Although Section 954 of the Dodd-Frank Act expands the ability of investment companies to claw back executive compensation in comparison to both SOX and the Recovery Act, the SEC has not yet developed regulations for clawback provisions as delegated by Congress.[103] As of January 14, 2015 the SEC has failed to formulate rules as required under Section 954 of the Dodd-Frank Act.[104] Therefore, until the SEC promulgates such rules, financial compa-

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[97] *See* Lombardi, *supra* note 84, at 893.

[98] *See id.*

[99] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 954, 124 Stat. 1376, 1904 (2010), codified as amended at 15 U.S.C. § 78j-4(b) (2012)); Lombardi, *supra* note 84, at 894–95 (explaining in detail the parameters of Section 954 of the Dodd-Frank Act).

[100] § 954, 124 Stat. at 1904; Gallogly, *supra* note 88, at 1238–39.

[101] *See* § 954, 124 Stat. at 1904; Gallogly, *supra* note 88, at 1238–39; AYCO, *supra* note 14, at 2.

[102] *See* § 954, 124 Stat. at 1904. Specifically, Section 954 of Dodd-Frank stipulates that the company can reclaim incentive-based compensation and stock option gains from executive officers following a financial restatement. *See* Gallogly, *supra* note 88, at 1239–40. The company therefore can recoup compensation that was in excess of what the executive was supposed to receive. *See* AYCO, *supra* note 14, at 2.

[103] *See* § 954, 124 Stat. at 1904; Sarbanes-Oxley Act, § 7243, 116 Stat. at 778; Steven Salky, *Executives: Beware of Dodd-Frank Compensation Clawbacks*, LEXOLOGY (Feb. 28, 2013, 9:14PM), http://www.lexology.com/library/detail.aspx?g=f44fb5fe-1886-47fd-b559-2c4768d4cdbc, *archived at* http://perma.cc/7NTT-VMM7 (highlighting that Congress delegated enforcement and rulemaking power to the SEC). In comparison to Section 304 of SOX, Section 954 of the Dodd-Frank Act is much broader. *See* Gallogly, *supra* note 88, at 1242. Section 954 allows the company to claw back three years worth of incentive-based compensation, whereas Section 304 of SOX only covers one year. *See* Dodd-Frank Act, § 954, 124 Stat. at 1904; Sarbanes-Oxley Act, § 7243, 116 Stat. at 778; Gallogly, *supra* note 88, at 1243. Moreover, Section 954 does not require a showing of misconduct, but rather just a showing that the financial restatement is needed. *See* Dodd-Frank Act, § 954, 124 Stat. at 1904; Sarbanes-Oxley Act, § 7243, 116 Stat. at 778; Gallogly, *supra* note 88, at 1242. Section 954 also covers all "executive officers," where Section 304 only applies to CEOs and CFOs. *See* Dodd-Frank Act, § 954, 124 Stat. at 1904; Sarbanes-Oxley Act, § 7243, 116 Stat. at 778; Lombardi, *supra* note 84, at 895–96.

[104] U.S. Securities and Exchange Commission, *Implementing Dodd-Frank Wall Street Reform and Consumer Protection Act—Pending Action*, U.S. SEC. & EXCH. COMM'N (last visited on Jan. 14, 2015), http://www.sec.gov/spotlight/dodd-frank/dfactivity-upcoming.shtml, *archived at* http://perma.cc/LEN3-KC4H.

nies are not required to implement clawback provisions into their executive contracts.[105]

Despite the lack of guidance from the SEC, financial firms and investment banks have voluntarily established clawback policies.[106] From 2006 to 2013 the use of clawback provisions in Fortune 100 companies increased from 17.6% to 89.4%.[107] These voluntary clawback provisions have come in many different varieties, including differing coverage, triggers, the length of time a company can claw back compensation, and the types of compensation the provisions cover.[108] Some financial companies have gone beyond the Dodd-Frank Act requirements with their clawback provisions.[109]

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[105] *See id.*

[106] *See* Katherine Blostein, *Clawbacks: Trends and Developments in Executive Compensation*, A.B.A. 1 (Mar. 25, 2010), http://apps.americanbar.org/labor/errcomm/mw/Papers/2010/data/papers/014.pdf, *archived at* http://perma.cc/FEE3-FPTR ("[M]any companies, especially public financial institutions are implementing [clawback] provisions in their compensation plans.").

[107] *2013 Clawback Policy Report*, *supra* note 14, at 4.

[108] *See* AYCO, supra note 14, at 4–5 (listing the different issues companies must tackle before implementing clawbacks); *2013 Clawback Policy Report*, *supra* note 14, at 4 (calculating statistically how different Fortune 100 companies structure their clawback provisions). Of the clawback provisions created voluntarily by the Fortune 100 companies, 68% cover key executives and employees, while only 7.8% apply the clawback provision to CEOs or CFOs exclusively. *2013 Clawback Policy Report*, *supra* note 14, at 4. Moreover, for triggers, 85.4% include materially inaccurate financial statements, while 81.6% include ethical misconduct. *Id.* 71.8% of the clawback provisions include both materially inaccurate financial statements and ethical misconduct. *Id.* For example, Dell requires only a financial restatement to trigger the clawback provision, whereas American Express requires fraud or misconduct. *2013 Clawback Policy Report*, *supra* note 14, at 4.

[109] See AYCO, *supra* note 14, at 4 ("In fact, even without regulatory guidance form [sic] the SEC on how [clawback provisions] need to be designed, most large public companies already have established customized compensation recovery policies. Many go well beyond what the law currently requires."). These voluntary clawback provisions could be in response to the anticipated SEC rules for Section 954 of the Dodd-Frank Act. *See 2013 Clawback Policy Report*, *supra* note 14, at 4. *But see* Ed Dehaan et al., *Does Voluntary Adoption of a Clawback Provision Improve Financial Reporting Quality?*, UNIV. OF WASH. FOSTER SCH. OF BUS. 2 (Dec. 27, 2011), http://www.bus.miami.edu/_assets/files/faculty-and-research/conferences-and-seminars/finance-seminars/Shevlin%20Paper.pdf, *archived at* http://perma.cc/6AA5-PKYF (arguing that companies voluntarily implemented clawbacks before they were mandatory under the Dodd-Frank Act). Financial firms and investment banks may also execute clawback provisions to protect against risky investments and excess compensation. *See* Dan Fitzpatrick, *J.P. Morgan: 'Whale' Clawbacks About Two Years of Compensation*, WALL ST. J., July 13, 2012, http://online.wsj.com/news/articles/SB10001424052702303740704577524730994899406, *archived at* http://perma.cc/H7TF-X837 (finding that clawback clauses may trigger when an executive's investment strategy does not yield a profit, deterring risky investments); AYCO, *supra* note 14, at 1 (stating that one reason for implementing a clawback provision is to guard against unjust enrichment). Another purpose could be to prevent employee fraud and minimize inaccurate accounting information that can be detrimental to the company. *See A Company's Reputation*, *supra* note 88 (showing how employee fraud and inaccurate reporting can lead to detrimental results for the company). When the SEC notifies investors of the need for a financial restatement, the company's stock most likely will fall and could cost the company more than the actual cost in fines. *See* Zoe-Vonna Palmrose et al., *Determinants of Market Reactions to Restatement Announcements*, 37 J. ACCT. & ECON. 59, 59–60 (2004) (discussing how inaccurate reporting causes stock prices to fall). The threat of clawing back one's compensation incentivizes executives to report accurately and to avoid fraud. *See* Scott E. Landau &

With the increase of clawback provisions in compensation contracts comes the question of enforcement.[110] Since Congress passed SOX, the SEC has enforced statutory clawbacks under Section 304 of SOX and TARP's clawback stipulations.[111] Courts have held that SOX covers CEOs and CFOs who do not personally contribute to the misconduct, and that personal knowledge of the misconduct is not necessary if the executive received excess compensation due to the inaccurate financial statement.[112]

Clawback provisions have also been enforced in the financial sector privately.[113] Individual corporations, who have voluntarily created clawback policies, self-police and enforce their own clawback provisions.[114] For example, in 2013, J.P. Morgan enforced its voluntary clawback provision that was put in place in 2010.[115] Under their expanded clawback triggers, J.P. Morgan recouped millions in compensation from senior managers under their "maximum permit-

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Bradley A. Benedict, *How Effective Is Your Clawback?*, PILLSBURY WINTHROP SHAW PITTMAN, LLP (Feb. 3, 2010), http://www.pillsburylaw.com/publications/how-effective-is-your-clawback, *archived at* http://perma.cc/H548-YRN7. Studies show that voluntary adoption of clawback provisions improves both financial reporting and the perception of accurate financial reporting. *See* Palmrose et al., *supra* at 59–60; Dehaan et al., *supra* at 4 (showing that clawbacks improve both actual and perceived financial reporting); *A Company's Reputation*, *supra* note 88. Overall, clawback provisions improve corporate compensation packages that mirror actual performance and at the same time deter misconduct and illegal behavior. *See* Landau & Benedict, *supra*.

[110] *See* Gallogly, *supra* note 88, at 1243–46 (outlining how statutory clawback provisions are enforced).

[111] *See e.g.*, .E.C. v. Baker, No. A-12-CA-285-SS, 2012 WL 5499497, at *8–10 (W.D. Tex. Nov. 13, 2012) (showing that the SEC has enforced Section 304 of SOX); S.E.C. v. Mercury Interactive, LLC, No. 5:07-cv-02822-JF/PVT, 2010 WL 3790811, at *4–5, (N.D. Cal. Sept. 27, 2010) (same); S.E.C. v. Jenkins, 718 F. Supp. 2d 1070, 1074 (D. Ariz. 2010); *see also* Goodman & McPhee, *supra* note 83 (stating that Section 304 of SOX can only be enforced by the SEC). As a defense, respondents have argued that Section 304 is unconstitutional, but courts have uniformly found that Section 304 does not offend the Constitution. *See Baker*, 2012 WL 5499497, at *8–10; S.E.C. v. Geswein, No. 5:10CV1235, 2011 WL 4541303, at *3 (N.D. Ohio Sept. 29, 2011). After the 2008–09 financial crisis there has been an uptick in SEC enforcement of SOX's Section 304. *See* Gallogly, *supra* note 88, at 1244. Companies have also enforced clawbacks against executives under TARP's provisions. *See* Ben Protess, *Wilmington Trust C.E.O. Forfeits $2 Million in TARP Clawback*, N.Y. TIMES DEALBOOK (Jan. 4, 2011, 12:32 PM), http://dealbook.nytimes.com/2011/01/04/wilmington-trust-ceo-forfeits-2-million-in-tarp-clawback/?_r=0, *archived at* http://perma.cc/KWB6-5AU2.

[112] *See Jenkins*, 718 F. Supp. 2d at 1074. Until *Jenkins* in 2010, the SEC did not reprimand CEOs or CFOs who were not the direct cause of the misconduct. *See id.* The Court in *Jenkins* found that SOX covered CEOs and CFOs who did not personally contribute to the misconduct. *See id.*

[113] *See*, *e.g.*, Deborah Ball, *A First for UBS: Bonus Clawbacks*, WALL ST. J., Feb. 9, 2012, at C3; Sarah Butcher, *Irate RBS Bankers Could Challenge Bonus Clawbacks*, EFINANCIALCAREERS.COM (Mar. 7, 2013), http://news.efinancialcareers.com/uk-en/136129/irate-rbs-bankers-could-challenge-bonus-clawbacks/, *archived at* http://perma.cc/MP7Z-HXHJ.

[114] *See* Ball, *supra* note 113 (describing the implementation of bonus clawbacks at UBS); Butcher, *supra* note 113 (discussing Royal Bank of Scotland's bonus clawbacks); Fitzpatrick, *supra* note 109 (discussing J.P. Morgan Chase's decision to employ the "maximum permitted clawback").

[115] *See* Fitzpatrick, *supra* note 109. J.P. Morgan expanded its voluntary clawback policy to include behavior that injures the company's reputation and creates financial losses. *See id.*

ted clawback."[116] UBS has also decided to employ their clawback clause to recover 50% of share-based bonuses, which exceeded $2 million due to a trading scandal that cost UBS $2.3 billion.[117] Although not all investment banks have enforced their clawback provisions, many have threatened to do so in case of operational losses or fraud.[118] As of November 8, 2014, no voluntary clawback provision created by a corporation has reached the courts.[119]

2. Sports Sector

Clawback provisions are not only implemented and enforced voluntarily in the executive financial sector, but are also used in the sports world to a more limited degree.[120] For example, Major League Baseball ("MLB") teams began instituting clawback provisions into minor league contracts in 2006.[121] After years of trying to suppress minor league signing bonuses, MLB suggested to each team that implementing a clawback provision would deter opportunistic behavior.[122] Before clawback provisions, there was nothing deterring players from walking away from the contract, nor any protection from injury.[123] Without clawback provisions, a minor league prospect could sign a contract that included a signing bonus, collect millions of dollars, and then quit the next day without any financial repercussions.[124] Now, MLB teams can use the clawback provision to dissuade players from quitting and protect themselves from player injury.[125] These minor league clawback provisions were codified in the 2011 collective bargain-

[116] *Id.*

[117] Ball, *supra* note 113.

[118] *See id.* (explaining that Morgan Stanley and Goldman Sachs have made statements that they would claw back employee compensation where actions put the banks at risk). Over the last few years, other banks have adopted and enforced their voluntary clawback provisions on their employees. Chris Isidore, *Three Big Banks Expand Bonus Clawback Policy*, CNN MONEY (Mar. 14, 2013, 10:16 AM), http://money.cnn.com/2013/03/14/investing/bank-bonus-clawback/, *archived at* http://perma.cc/T5BV-9GS2 (showing that Citigroup, Wells Fargo, and Capital One all expanded their clawback policies); Elena Logutenkova & Hugh Keane, *Credit Suisse to Pay 2012 Cash Bonuses with Clawback*, BLOOMBERG (Jan. 25, 2013, 10:12 AM), http://www.bloomberg.com/news/2013-01-25/credit-suisse-to-pay-2012-cash-bonuses-with-three-year-clawback.html, *archived at* http://perma.cc/NV3M-HPWY (explaining that Credit Suisse was paying bonuses that could ultimately be clawed back); Michael J. Moore, *Morgan Stanley Expands Reasons to Claw Back Executive Pay*, BLOOMBERG (Apr. 5, 2012, 3:10 PM), http://www.bloomberg.com/news/2012-04-05/morgan-stanley-expands-reasons-to-claw-back-executive-pay.html, *archived at* http://perma.cc/M55X-6KCW (reporting that Morgan Stanley expanded its clawback policy).

[119] *See* Broshuis, *supra* note 81, at 209.

[120] *See id.* at 186 (focusing on clawback provisions used in Major League Baseball's ("MLB") minor league system); Greenberg, *supra* note 82, at 4–5 (explaining clawbacks used in NCAA coaches' contracts).

[121] *See* Broshuis, *supra* note 81, at 185.

[122] *See id.* at 196–98, 200.

[123] *See id.* at 198–200.

[124] *See id.*

[125] *See id.* at 200.

ing agreement between MLB and the MLB Players Association, and are currently used by each and every team.[126]

Recently, commentators have promoted the use of clawback clauses in National Collegiate Athletic Association ("NCAA") coaches' contracts in response to recent high-profile NCAA violations.[127] Commentators argue that clawback clauses would deter college coaches from violating NCAA rules and leaving the university before suffering the consequences.[128] In the vast majority of college coaches' contracts, the contract only stipulates that the university can terminate the contract in light of a NCAA violation.[129] Therefore, the coach who caused the violation can leave scot-free while the university is burdened with sanctions that can include financial penalties, recruiting limitations, vacating team wins, and ineligibility for postseason competition.[130] Nonetheless, there are universities, such as the University of Memphis, that have instituted clawback provisions to deter coaches from breaking NCAA rules and then leaving without any repercussions.[131] These clawback clauses work as a deterrent against prohibited conduct and provide the university with financial insurance in the event of potential monetary sanctions.[132]

C. "That Will Come Back to Haunt Them": Analyzing Liquidated Damages

Similar to clawback clauses, a liquidated damages provision is a contract stipulation that outlines damages in case of a breach of contract.[133] In other

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[126] *Id.* at 202–03. The most important factor is the amount of the signing bonus. *See id.* at 203. Any bonus above $1 million will allow teams to recoup their bonus for up to five years. *See id.* For bonuses between $250,000 and $1 million, teams will be able to recoup for up to four years. *See id.* For bonuses below $250,000, teams will only be allowed to recoup three years after the signing bonus. *See id.*

[127] *See* George Dohrmann, *Clawback Clauses in Contracts Could Deter Coaches From Breaking Rules*, SPORTS ILLUSTRATED (Jan. 20, 2010, 1:07PM), http://www.si.com/more-sports/2010/01/20/contracts, *archived at* http://perma.cc/B23K-6FE5; Greenberg, *supra* note 82, at 2–3. The University of South California's head basketball coach, Tim Floyd, resigned after one of his players was accused of receiving money from boosters in violation of NCAA regulations. *See* Dohrmann, *supra*. Current University of Kentucky basketball head coach, John Calipari, has had two of his NCAA Final Four appearances voided due to NCAA violations. *See id.*

[128] *See* Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where It Belongs*, 52 B.C. L. REV. 551, 577 (2011) ("[I]nstitutions may, however, consider such 'clawback' provisions in individual coach employment contracts."); Dohrmann, *supra* note 127 (advocating "[i]nsert[ing] clawback provisions into the contracts for coaches, clauses clearly written that would force a coach to pay back part of his salary should he or his program violate NCAA rules"); Greenberg, *supra* note 82, at 2 (supporting the use of clawback provisions for NCAA coaches).

[129] *See* Dohrmann, *supra* note 127; Greenberg, *supra* note 82, at 3.

[130] *See* Dohrmann, *supra* note 127; Greenberg, *supra* note 82, at 2–3.

[131] *See* Greenberg, *supra* note 82, at 3.

[132] *See* Dohrmann, *supra* note 127; Greenberg, *supra* note 82, at 3.

[133] *See* Cherry & Wong, *supra* note 15, at 417–18 (defining liquidated damages provisions).

words, parties predetermine the sum that must be paid if one party breaches a provision in the contract.[134]

In order for courts to recognize a particular liquidated damages provision, certain requirements must be met.[135] First, the damages that are likely to accrue in a breach must be difficult for the parties to estimate.[136] If the damages can be easily calculated or are based on objective measures, courts conclude that liquidated damages are unnecessary.[137] In certain jurisdictions, if the damages are very uncertain or impossible to calculate, then the court will refer to the provision as an unliquidated damage stipulation and void the provision.[138] Second, liquidated damages must neither be intended to penalize the breaching party nor be so disproportionate from the probable damages that the provision is considered a penalty.[139] If the court finds that the damages served as a penalty then the liquidated damages clause will be void.[140] Like clawback clauses, liquidated damages serve to diminish contracting and litigation costs, and provide each party with financial insurance.[141]

Liquidated damages provisions are found in limited pockets of the sports sector.[142] Generally, liquidated damages provisions used in the sports contracts attempt to assess the financial loss of an invaluable entity.[143] For example, col-

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[134] *See id.*

[135] *See* 24 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 65:1 (4th ed. 2013) (outlining the specific requirements for liquidated damages); ROTTENSTEIN, *supra* note 18 (same).

[136] *See* 24 WILLISTON ON CONTRACTS, *supra* note 135, § 65:1.

[137] *See id.*; ROTTENSTEIN, *supra* note 18.

[138] *See* ROTTENSTEIN, *supra* note 18.

[139] *See* 24 WILLISTON ON CONTRACTS, *supra* note 135, § 65:1; Cherry & Wong, *supra* note 15 at 417. Some courts compare the actual damages suffered to gauge whether the stipulated damages are reasonable in what is known as a "second look." *See* Cherry & Wong, *supra* note 15, at 417–18. Other courts focus on the reasonableness of the damages under the circumstances at the time of negotiating the liquidated damages. *See* DEFENSE AGAINST A PRIMA FACIE CASE § 19:7 (rev. ed. 2014); ROTTENSTEIN, *supra* note 18.

[140] *See* 24 WILLISTON, *supra* note 135, § 65:1. Courts determine the intention of the parties based on the circumstances surrounding the negotiation and the reasonableness of the liquidated damages. *See id.*

[141] *See id.*

[142] *See* Martin J. Greenberg & Bryan M. Ward, *Non-Relocation Agreements in Major League Baseball: Comparison, Analysis, and Best Practice Clauses*, 21 MARQ. SPORTS L. REV. 7, 38–39 (2010) (exploring the use of liquidated damages provisions in non-relocation agreements by MLB teams); Richard T. Karcher, *The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Considerations*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 47–48 (2009) (examining liquidated damages provisions in NCAA coaches' contracts); Joe Meyer, *Paying to Play (Somewhere Else): An Examination of the Enforceability of Athletic Conferences' Liquidated Damages Provisions*, 20 JEFFREY S. MOORAD SPORTS L. J. 107, 113 (2013) (discussing the use of liquidated damages provisions in the area of NCAA conference realignment).

[143] *See* Greenberg & Ward, *supra* note 142, at 38 ("Calculating a total amount of damages to a city and its inhabitants that would be caused by the relocation of a city's MLB team is an impossible task."); Meyer, *supra* note 142, at 126 ("A conference's damages are not easily quantifiable in monetary amounts because each university adds unique qualities to the conference.").

leges and universities structure liquidated damages provisions to trigger when the head coach leaves the school and therefore breaches the contract.[144] The liquidated damages provision tries to guard against the difficulty of valuing the loss of a head coach.[145] Overall, liquidated damages provisions have been found in the sports sector in areas where it is difficult to value damages due to a breach of contract.[146]

II. IN THE HOT SEAT: THE ISSUES ASSOCIATED WITH INTRODUCING VOLUNTARY CLAWBACK PROVISIONS TO ENDORSEMENT CONTRACTS

Today's commentators promote the use of clawback clauses to better protect endorsement companies from athletic scandals.[147] Because no statute requires companies to include clawback clauses in endorsement contracts, any introduction of a clawback policy would be voluntary.[148] This Part examines spe-

[144] *See* Meyer, *supra* note 142, at 117–19 (providing examples of liquidated damages provisions in NCAA head coaches' contracts). Liquidated damages provisions are also found in NCAA assistant coaches' contracts. *See* Division of Intercollegiate Athletics Full-Time Assistant Football Coach Employment Contract (Jan. 31, 2014), *available at* http://records.rutgers.edu/sites/records/files/Fraser,%20Robert%206-30-16.pdf, *archived at* http://perma.cc/ZS4Q-RSYN (exemplifying the fact that universities and colleges implement liquidated damages provisions in assistant coaches' contracts). NCAA head coaches also execute liquidated damages provisions against universities and colleges in the event that the school terminates the contract before the end of the term. *See* Darren Rovell, *The Cost of Changing Schools*, ESPN (Dec. 8, 2003, 10:38 AM), http://sports.espn.go.com/ncf/news/story?id=1676108, *archived at* http://perma.cc/R64E-EJHA (providing examples of contracts that include such liquidated damages provisions).

[145] *See* Richard T. Karcher, *Redress for a No-Win Situation: Using Liquidated Damages in Comparable Coaches' Contracts to Assess a School's Economic Damage from the Loss of a Successful Coach*, 64 S.C. L. REV. 429, 431–33 (2012) (examining how difficult it is for a school to assess the value of a head coach). Liquidated damages provisions in NCAA head coaches' contracts have been upheld as enforceable by the courts. *See* Meyer, *supra* note 142, at 117–19 (discussing the seminal cases concerning liquidated damages provisions in head coaches' contracts).

[146] *See* Greenberg & Ward, *supra* note 142, at 38 (finding that damages incurred by a MLB team leaving a city for another location is very difficult to measure); Meyer, *supra* note 142, at 126 (concluding that a school's value to a sports conference is difficult to assess); Karcher, *supra* note 145, at 431–33 (examining how difficult it is for a school to assess the value of a head coach).

[147] *See* Auerbach, *supra* note 12, at 17 ("As companies continue to throw millions of dollars at athletes to act as their spokespersons, they will undoubtedly move toward greater contractual protections."); Sanati, *supra* note 9 ("But an SCA win won't change anything in the long run unless it causes marketers and sports teams to come together and require that clawback provisions be standard in all future contracts with sports stars."); Spanberg, *supra* note 8 ("Whatever happens in Armstrong's cases, the mere topic of what amount to clawback provisions in promotions, sponsorships and endorsements could portend greater scrutiny—and tougher negotiations.").

[148] *See* Broshuis, *supra* note 81, at 186 (detailing the use of voluntary clawbacks in the sports world); Ball, *supra* note 113 (noting voluntary clawbacks used in the financial world). Congress's delayed response to the accounting scandals of Enron, ImClone, and Global Crossing implies that it would take a major event for Congress to regulate endorsement contracts. *See* Larry Bumgardner, *Reforming Corporate America: How Does the Sarbanes-Oxley Act Impact American Business?*, 6 GRAZIADIO BUS. REV., http://gbr.pepperdine.edu/2010/08/reforming-corporate-america/, *archived at*

cific concerns that endorsement companies must address before deciding to implement a voluntary clawback clause.[149] Section A surveys the legal issues that accompany voluntary clawback clauses.[150] Section B examines practical implementation issues including negotiation, supervision, and administrative considerations.[151]

A. Rules Are Rules: Discussing Legality Concerns

Because no one has challenged the legality of voluntary clawback provisions, it is unclear how courts will analyze voluntary clawbacks.[152] Vital to the enforceability question is the distinction between prospective clawback clauses and retroactive clawbacks.[153] Subsection 1 focuses on prospective clawback provisions and how contracting parties will need to understand the doctrine of unconscionability.[154] Subsection 2 then discusses retroactive clawback provisions and how state wage laws limit possible recovery regardless of which type of clawback is used.[155]

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http://perma.cc/859T-92NZ (explaining how it took a second wave of scandals after Enron for Congress to respond).

[149] *See infra* notes 152–207 and accompanying text.

[150] *See infra* notes 152–194 and accompanying text.

[151] *See infra* notes 195–207 and accompanying text.

[152] *See* Miriam A. Cherry & Jarrod Wong, *Reply: Clawback to the Future*, 95 MINN. L. REV. HEADNOTES 19, 23–24 (2010), http://www.minnesotalawreview.org/wp-content/uploads/2011/06/Wong_Cherry_PDF.pdf, *archived at* http://perma.cc/2BVK-482M ("The clawback is a relatively new phenomenon, or at least, hitherto, it 'has been subject to neither rigorous analytical scrutiny nor definition and exposition.'" (quoting Macchiarola, *supra* note 17, at 2)); Broshuis, *supra* note 81, at 209 (highlighting the fact that no court has handled voluntary clawback clauses).

[153] *See* Cherry & Wong, *supra* note 15, at 414–15 (defining the differences between prospective and retroactive clawback clauses). Depending on which clawback clause has been employed, different legal concerns will arise. *See* 24 WILLISTON, *supra* note 135, § 65:1 (explaining that a contract freely agreed upon should be followed); Wood, *supra* note 35, at 89 (explaining that courts maintain a general duty to enforce the terms of a contract that the parties negotiated). Not addressed in this Note are the legal concerns regarding non-competition restrictions. If an endorsement company implements a non-competition restriction in the clawback clause, restrictive covenants will be at issue, regardless of whether a prospective or retroactive clawback is applied. *See Validity and Enforceability of Restrictive Covenants in Contracts of Employment*, 9 A.L.R. 1456 (1920). There are two types of non-competition agreements that can be used by the endorsement company. *See id.* The first type limits the employee from accepting employment with others during the contract, whereas the second type limits the employee's ability to accept or engage in similar business for a period of time after the termination of the contract. *See id.* The first type is often found in contracts involving actors, singers, or athletes collectively considered talent. *See id.*; *see also* Pinguelo & Cedrone, *supra* note 30, at 349 n.7 ("The term 'talent' as used in this article, refers to those individuals possessing creative, artistic, athletic, or other performance aptitudes and whose services are individually unique, non-duplicable, and non-replicable."). These types of contracts are most often found to be valid. *See* Marchio v. Letterlough, 237 F. Supp. 2d 580, 590 (E.D. Penn. 2003); Keith v. Kellermann, 169 F. 196, 199, 201 (S.D.N.Y. 1909).

[154] *See infra* notes 156–171 and accompanying text.

[155] *See infra* notes 172–194 and accompanying text.

1. Unconscionability

Prospective clawback clauses are written into the compensation contract at the start of the business relationship and before benefits have been conferred.[156] Such negotiated agreements are subject to the doctrine of unconscionability, which is a discretionary judicial remedy.[157] Courts factor in the setting, purpose, and effect of the contract on the athlete to determine whether the contract is unconscionable and therefore void.[158]

In order to be considered unconscionable, courts focus on the concepts of substantive and procedural unconscionability.[159] Substantive unconscionability determines whether the contract is overly harsh or one-sided, whereas procedural unconscionability concentrates on oppression or surprise.[160] For example, in 2006, in *Nagrampa v. MailCoups, Inc.*, the U.S. Court of Appeals for the Ninth Circuit found that the arbitration clause in the franchise contract was substantively unconscionable.[161] The court held that the arbitration clause was substantively unconscionable because the clause was one-sided.[162]

Overall, the doctrine of unconscionability is subjective and courts have failed to provide a uniform test or factors.[163] Therefore, endorsement companies need to address all of the factors articulated previously by courts as strictly as

[156] *See* Cherry & Wong, *supra* note 15, at 414 (defining prospective clawback provisions); Broshuis, *supra* note 81, at 188 (same). In other words, the two parties have negotiated the clawback clause. *See* Cherry & Wong, *supra* note 15, at 414.

[157] *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 illus. 1. (1981) ("In the absence of justification by evidence of commercial setting, purpose, or effect, the court may determine that the contract as a whole was unconscionable when made, and may then deny specific performance."); Paul Bennett Marrow, *Squeezing Subjectivity from the Doctrine of Unconscionability*, 53 CLEV. ST. L. REV. 187, 187 (2005–2006) ("Determinations about unconscionability are subjective. To date no one has been able to articulate an objective standard. Statutes that empower the judiciary to make findings of unconscionability almost uniformly fail to define what qualifies. Judges are left to fashion solutions that they, and they alone, believe address their charge."); Wood, *supra* note 35, at 89 ("If a bad boy provision is included in a compensation contract, then the courts should give full effect to that provision—subject, of course, to the usual defenses to the enforcement of contracts, such as fraud, duress, mistake, and unconscionability.").

[158] RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a.; Broshuis, *supra* note 81, at 209.

[159] Broshuis, *supra* note 81, at 209–10.

[160] *See* Gatton v. T-Mobile USA, Inc., 61 Cal. Rptr. 3d 344, 352, 356 (Ct. App. 2007) (discussing how courts determine substantive unconscionability). Oppression occurs when the parties maintain inequality of bargaining power. *See* Broshuis, *supra* note 81, at 210. Surprise includes terms that are hidden or terms that the party cannot understand. *See id.*

[161] *See* Nagrampa v. Mailcoups, Inc., 469 F.3d 1257, 1284, 1287 (9th Cir. 2006). The court determined that the evidence for procedural unconscionability appeared minimal even though the first-time franchise owner lacked specialized education and the franchisor maintained overwhelming bargaining power. *See id.* at 1283–84.

[162] *See id.* at 1287. The clause allowed the franchisor to sue in court, whereas the franchisee could only sue in an arbitral forum. *See id.*

[163] *See* Marrow, *supra* note 157, at 187 ("Determinations about unconscionability are subjective."); Cherry & Wong, *supra* note 152, at 24 n.26 ("Another instance of a doctrine that is well established, but not entirely predictable, is that of unconscionability.").

possible to ensure that a clawback clause will be enforceable.[164] To avoid procedural unconscionability issues, endorsement companies should negotiate with the athlete's agent to establish equal bargaining power.[165] Procedural unconscionability is unlikely to pose a problem because both endorsement companies and famous athletes are likely to be represented by sophisticated parties.[166] Moreover, to avoid the issue of surprise, the endorsement contract should explicitly explain the consequences of a clawback clause, thereby establishing that each side understands the terms and their expectations under the contract.[167]

Substantive unconscionability, on the other hand, may pose a problem for endorsement companies hoping to enforce clawback provisions in contracts with athletic sponsors.[168] Still, courts are likely to enforce clawback provisions with athletic sponsorship contracts because of the purpose and effect behind the provision.[169] In order to protect the company's investment and their public image, the clawback clause could act as both financial insurance and as a mechanism to quickly disassociate the athlete with the company in the public's collective mind.[170] Therefore, courts are likely to find that the clawback clause in fact creates a more level playing field in terms of risk between the athlete and the endorsement company.[171]

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[164] *See* Wood, *supra* note 35, at 89 (explaining that courts maintain a general duty to enforce the terms of a contract that the parties negotiated); Broshuis, *supra* note 81, at 209–10 (describing the factors of substantive and procedural unconscionability).

[165] *See* Broshuis, *supra* note 81, at 210 (explaining the oppression prong of procedural unconscionability). One student-written work points out that major league baseball teams may violate procedural unconscionability because minor league baseball players may not have representation. *See id.*

[166] *See id.* at 210, 210 n.204 (stating that many top minor league baseball players retain agents); Jason Belzer, *The World's Most Powerful Sports Agents*, FORBES, July 31, 2013, http://www.forbes.com/sites/jasonbelzer/2013/07/31/the-worlds-most-powerful-sports-agents/, *archived at* http://perma.cc/E4A4-XTTC (listing important sports agents and who they represent).

[167] *See Gatton*, 61 Cal. Rptr. 3d at 352 (holding that there was not a finding for surprise because the plaintiffs were given full disclosure of the contract provision at issue).

[168] *See* Broshuis, *supra* note 81, at 209–10 (outlining the particulars of substantive unconscionability). Even if a court finds that an endorsement company violated the substantive unconscionability prong, courts typically require that the contract violate the procedural prong as well. *See id.* at 210.

[169] *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (placing importance on the setting, purpose, and effect of the contract); Broshuis, *supra* note 81, at 209 (underscoring the fact that the purpose of the contract is important to substantive unconscionability analysis).

[170] *See* Kressler, *supra* note 30, at 237 (explaining that a corporation includes a morality clause to quickly disassociate itself from a scandal); AYCO, *supra* note 14, at 1 (stating that a reason for implementing a clawback provision is to guard against unjust enrichment); Dehaan et al., *supra* note 109, at 4 (showing that clawbacks improve both actual and perceived financial reporting, which helps reduce costs associated with inaccurate reporting and fraud).

[171] *See* Broshuis, *supra* note 81, at 211–12 (explaining that the purpose and effect of clawback provisions on minor league policies likely will pass substantive unconscionability review).

2. State Wage Laws

In contrast to prospective clawback clauses, retroactive clawback clauses are created after the contract has been negotiated and compensation has been conferred.[172] The retroactive clawback is imposed on the agent rather than having been openly negotiated and agreed upon.[173] Although these retroactive clawback clauses generally do not have enforceability issues with respect to the doctrine of unconscionability,[174] such clauses do face substantial barriers from state wage laws.[175]

State wage laws restrict the employer's ability to recover compensation from the employee after the employment agreement has been established.[176] In other words, state wage laws will need to be addressed regardless of whether the employer established a prospective or retroactive clawback clause.[177] Whether an endorsement company can claw back compensation depends upon the type of compensation and the language of the state's wage laws.[178]

Concerning the type of compensation, most employers compensate employees with a mix of base salary and incentive compensation.[179] Incentive com-

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[172] *See* Cherry & Wong, *supra* note 15, at 414 (defining retroactive clawback clauses); Broshuis, *supra* note 81, at 188 (same).

[173] *See* Cherry & Wong, *supra* note 15, at 414; Broshuis, *supra* note 81, at 188.

[174] *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 ("If a contract or term thereof is unconscionable *at the time the contract is made* a court may refuse to enforce the contract.") (emphasis added); Broshuis, *supra* note 81, at 209 (implying that unconscionability does not come into play because unconscionability focuses on the fairness of the negotiated contract stipulation).

[175] *See* Doreen E. Lilienfeld & Alicia M. O'Connell, *Executive Compensation Clawbacks: Focus Grows on Recovering Money Already Paid or on the Way*, 243 N.Y. L.J., Mar. 29, 2010, at 1, 1 (explaining the intricacies of clawbacks and state wage laws); Wood, *supra* note 35, at 93 (same).

[176] *See* Lilienfeld & O'Connell, *supra* note 175, at 1 (defining what state wage laws are and how they vary from state to state); Landau & Benedict, *supra* note 109 (discussing state wage laws).

[177] *See* Lilienfeld & O'Connell, *supra* note 175, at 1 (discussing how an employer must consider a state's wage laws when creating a clawback policy); *Clawback Policies Under Section 954 of the Dodd-Frank Act*, GOODWIN PROCTER LLP (2013), http://www.goodwinprocter.com/~/media/Files/Toolkit/2013/Developments%20for%20Public%20Companies/Clawback%20Policies%20Under%20Section%20954%20Of%20The%20DoddFrank%20Act.pdf, *archived at* http://perma.cc/BHT5-44TK (same).

[178] *See* Lilienfeld & O'Connell, *supra* note 175, at 1–2 (highlighting the importance of how states define "wages"); Althea R. Day et al., *Executive Compensation Clawbacks*, MORGAN LEWIS 2 (Apr. 16, 2009, 6:28PM), http://www.morganlewis.com/pubs/EB_ExecCompClawbacks_Webcast_16apr09.pdf, *archived at* http://perma.cc/NUP4-87EP (same).

[179] *See* Lee Ann Obringer, *How Employee Compensation Works*, HOWSTUFFWORKS.COM (last visited Jan. 5, 2015), http://money.howstuffworks.com/benefits1.htm, *archived at* http://perma.cc/9B4Z-N8GQ. A base salary is a fixed amount earned by the employee. *See* Susan M. Heathfield, *Signing Bonus*, ABOUT.COM (last visited Jan. 5, 2015), http://humanresources.about.com/od/glossarys/g/signing_bonus.htm, *archived at* http://perma.cc/2H3R-XE4B. Regarding base salary, every state recognizes that an employer cannot retroactively claw back an employee's base salary because each state defines base salary as wages, which are unrecoverable. Michael S. Melbinger, *More Companies Adopting Clawback Policies*, CCH EXECUTIVE COMPENSATION UPDATE, VOL. 6, NO. 3 (2010), *available at* 2010 WL 9567705 ("We have never seen base salary covered in clawback policy."); Della Rocca et al., *supra* note 17.

pensation can come in a variety of different forms, including annual bonuses, performance-based bonuses, and equity options.[180] Consequently, whether a company may claw back incentive compensation depends upon how each state defines wages.[181]

In a large majority of states, the wage deduction laws consider wages as compensation earned by the employee from performance or services rendered.[182] Divergence among states arises from state courts' interpretation of how to define wages.[183] For example, in New York, compensation that is either deferred, commission-based, a bonus, or otherwise incentive-based is considered wages once earned or vested.[184] Therefore, the employer may not claw back any cash-based incentive compensation, which is based on the performance of the employee.[185] Nevertheless, New York state courts have found that wages do not include equity compensation or discretionary bonuses based on the employer's overall financial performance.[186] Conversely, in New Jersey, courts consider any form of incentives and bonuses that are supplementary and independent from base wages and

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[180] *See* Michael Marz, *Types of Incentive Compensation Plans for Service Businesses*, HOUS. CHRON., http://smallbusiness.chron.com/types-incentive-compensation-plans-service-businesses-67893.html, *archived at* http://perma.cc/Y2B5-UA9Z. Incentive compensation fluctuates based on a number of variables including performance of the employee and performance of the employer. *See id.*

[181] *See* Lilienfeld & O'Connell, *supra* note 175, at 1–2 (discussing the wage deduction laws in New York, California, Texas, Connecticut, and New Jersey); Wood, *supra* note 34, at 93–94 (detailing the state wage laws for Pennsylvania); *Wage Deduction Laws*, SOC. FOR HUMAN RES. MGMT. (last revised Oct. 2013), http://www.shrm.org/LegalIssues/StateandLocalResources/StateandLocalStatutesandRegulations/Documents/deductionlaw.pdf, *archived at* http://perma.cc/AKZ4-NFYX (highlighting the law of each and every state's wage deduction laws).

[182] *See* Lilienfeld & O'Connor, *supra* note 175, at 1–2 (defining wages for New York, California, Texas, Connecticut, and New Jersey); *Wage Deductions Laws*, *supra* note 181 (listing the requirements of each state's wage deductions laws).

[183] *See* Lilienfeld & O'Connell, *supra* note 175, at 1–2 (discussing how case law has interpreted different state wage deduction laws); Wood, *supra* note 34, at 93 (explaining that Pennsylvania case law has interpreted wages differently than New York even though both states maintain identical definitions for wages).

[184] Lilienfeld & O'Connell, *supra* note 175, at 1 ("The New York Labor Law defines 'wages' as 'the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis.'"); *Wage Deduction Laws*, *supra* note 181 (noting that New York state wage laws provide that "[n]o employer shall make any deduction from the wages of an employee, except deductions which: a) are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency . . . ; or b) are expressly authorized in writing by the employee and are for the benefit of the employee").

[185] Lilienfeld & O'Connell, *supra* note 175, at 1.

[186] *See* Truelove v. Northeast Capital & Advisory Inc., 738 N.E.2d 770, 771–72 (N.Y. 2000) ("Courts have construed this statutory definition as excluding certain forms of 'incentive compensation' that are more in the nature of a profit-sharing arrangement and are both contingent and dependent, at least in part, on the financial success of the business enterprise."); Gillian Chapman et al., *Operating Clawback in a Global Context*, LINKLATERS—MUNICH INT'L CONFERENCE 2013, at 17 (2013), http://www.globalequity.org/geo/themes/newswire/Share_files/assets/images/conference/munich2013/cybercafe/8.3-Operating%20Clawbacks%20in%20a%20Globa.pdf, *archived at* http://perma.cc/4M5A-RT3X ("[e]quity-based compensation ≠ 'wages'").

paid in addition to base wages as not included in the definition of wages.[187] Because state wage laws vary so dramatically, endorsement companies must be aware of how different state courts interpret wages and how their interpretation may affect the enforceability of their clawback polices.[188]

Applying state wage laws to endorsement compensation can be especially difficult.[189] Endorsement contracts can include a slew of different compensation techniques such as base salary, performance-based bonuses, annual bonuses, and royalties on the sale of merchandise or other published materials.[190] Although clawing back base salary will be unenforceable in every state, whether performance based bonuses and annual bonuses can be clawed back will depend on the language of the state wage laws and the state court's interpretation of those statutes.[191] In terms of royalties, states like New York will most likely determine that royalties are earned compensation and therefore constitute wages that may not be clawed back by the company.[192] In states that interpret wages similarly to New Jersey, however, royalties will probably be excluded from wages and may be clawed back.[193] Endorsement companies need to consider both the state in which the compensation contract will be imposed and the type of compensation to determine whether clawing back compensation will be enforced.[194]

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[187] N.J. STAT. ANN. § 34:11-4.4 (2010); Lilienfeld & O'Connell, *supra* note 175, at 2

[188] *See* Lilienfeld & O'Connell, *supra* note 175, at 1–2.

[189] *See* Jay Shanker, *When the Stars Align: Negotiating Celebrity Endorsement Deals*, MCAFEE & TAFT (June 2013), http://www.mcafeetaft.com/?t=40&an=20538&format=xml&p=5790, *archived at* http://perma.cc/M2V7-HJ9Q (explaining the nature of endorsement contract compensation); Lilienfeld & O'Connell, *supra* note 175, at 1–2 (conveying how different states define wages).

[190] *See* Shanker, *supra* note 189.

[191] *See* Lilienfeld & O'Connell, *supra* note 175, at 1–2 (discussing state court interpretations of state wage deduction laws); Melbinger, *supra* note 179 (finding that base salary is not included in clawback policies); Della Rocca et al., *supra* note 17 (explaining whether incentive-based compensation will be clawed back is determined by how a state defines wages).

[192] *See* Lilienfeld & O'Connell, *supra* note 175, at 1.

[193] *See id.* at 2.

[194] *See id.* at 1–2 (providing examples of state wage laws); Della Rocca et al., *supra* note 17 (underscoring the importance of carefully considering the applicable state wage law); *Wage Deduction Laws*, *supra* note 181 (detailing state wage laws). Under Delaware state law, wages are defined as "compensation for labor or services rendered by an employee, whether the amount is fixed or determined on a time, task, piece, commission or other basis of calculation." DEL. CODE ANN. tit. 19, § 1101(a)(5) (West 2014); *see also* Lewis S. Black, Jr., *Why Corporations Chose Delaware*, DEL. DEP'T OF STATE DIV. OF CORPS., http://corp.delaware.gov/whycorporations_web.pdf, *archived at* http://perma.cc/2THK-YCW5 (providing statistics on how many corporations and Fortune 500 corporations incorporate in Delaware). Delaware's definition of wages is almost verbatim to New York's. *See* N.Y. LAB. LAW § 190 (McKinney 2014). Yearly bonuses are considered wages under Delaware law. *See* Masterson-Carr v. Anesthesia Services, P.A., C.A. No. N12C-11-107 MJB, 2014 WL 4793498, at *8 n.104 (Del. Super. Ct. Sept. 25, 2014). Whether other forms of incentive compensation will be considered wages will be determined by the Delaware courts. *See* Lilienfeld & O'Connell, *supra* note 175, at 1–2 (discussing state court interpretations of state wage deduction laws).

B. "It's All About Executing": Practical Concerns

Not only must endorsement companies consider the legal issues associated with voluntary clawbacks, but they must also determine whether the company could practically enforce the clawback.[195] Naturally, while negotiating over the endorsement contract, the company and the athlete's interests' conflict, where the endorsement company will want to impose a clawback policy and the athlete will want a morality clause instead.[196]

In these negotiations, the endorsement company, regardless of the athlete's stature or public image, will face an uphill battle.[197] Because companies do not currently implement clawback clauses in endorsement contracts, the athlete will have significant leverage over the endorsement company to keep a clawback clause out of an endorsement contract.[198] Unlike executive compensation and minor league baseball contracts, there is no oversight entity like the SEC or MLB to govern voluntary clawback provisions for endorsement companies.[199] Therefore, unless multiple endorsement companies simultaneously introduce clawback provisions to endorsement contracts, no individual company will do so.[200] Imposing a clawback provision threatens the company's ability to retain

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[195] *See* Macchiarola, *supra* note 17, at 15–16 (discussing practical issues associated with clawback clauses generally); 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, *archived at* http://perma.cc/4GBQ-G3T7 (discussing the practical concerns of voluntary clawback policies established by financial firms).

[196] *See* Pinguelo & Cedrone, *supra* note 30, at 370 (explaining how an athlete and endorsement company's interests conflict); Chase, *supra* note 6 (same); Socolow, *supra* note 6, at 1 (same).

[197] *See* FOX WILLIAMS, *supra* note 17 (conveying how executing clawback clauses could diminish the company's ability to retain talent); Sanati, *supra* note 9 (quoting a sports agent stating that he would take his client out of the room if the company tried to negotiate a clawback clause).

[198] *See* Sanati, *supra* note 9. As one commentator noted:

> Apparently, clawback provisions in sport contracts are extremely rare. Three "super" sports agency interviewed by *Fortune* on this topic, who wished not to be identified given the sensitive nature of this topic, say that they have never heard of a clawback provision ever being asked for or given in any kind of marketing or player contract. One of the agents went so far to say that if a marketer asked for such a provision, he would, "take his client and walk out of the room."

See id.

[199] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 954, 124 Stat. 1376, 1904 (2010), codified as amended at 15 U.S.C. § 78j-4(b) (2012); Broshuis, *supra* note 81, at 202–03 (discussing MLB's policy on minor-league clawback clauses); Salky, *supra* note 103 (highlighting that the SEC has enforcement and rulemaking power over § 954 of the Dodd-Frank Act).

[200] *See* Mai Iskandar-Datta & Yonghong Jia, *Valuation Consequences of Clawback Provisions*, 88 ACCT. REV. 171, 178 (2012), *available at* http://business.wayne.edu/datta-mai/clawback_provisions.pdf, *archived at* http://perma.cc/BB9X-3LC2 (discussing the concern of executives about retaining talent after creating a clawback policy); Matthew A. Melone, *Adding Insult to Injury: The Federal Income Tax Consequence of the Clawback of Executive Compensation*, 25 AKRON TAX J. 55, 61 (2010) (suggesting that corporations need to worry about retaining talent when drafting clawback policies); FOX WILLIAMS,

talent and thereby improves the ability of a competitor to attract that same talent.[201]

Furthermore, not only will companies need to address these negotiation hurdles, they must also execute a mechanism to actually claw back compensation when the clause becomes applicable.[202] This can be difficult, since clawback provisions try to recover compensation that has already been paid and sometimes already spent.[203] Endorsement companies will need to adopt clawback mechanism policies to determine how and under what circumstances they will claw back compensation.[204] For example, many commentators have noted that investment banks, such as Morgan Stanley, have failed to execute clawback provisions that are under the firm's discretion.[205] On the other side of the spectrum, too much administrative discretion could lead to abuse and litigation, which could compound administrative costs.[206] Taken together, these practical and le-

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supra note 17 (focusing on the fact that introducing clawback clauses could harm a company's ability to retain talent); Sanati, *supra* note 9 (discussing how collective action is needed for clawback clauses to become standard within endorsement contracts).

[201] *See supra* note 200 and accompanying text (discussing the potential first mover problem if clawback clauses are introduced into endorsement contracts).

[202] *See* AYCO, *supra* note 14, at 5 (listing the issues that companies should consider before implementing a clawback provision); Goodman & McPhee, *supra* note 83 (same).

[203] *See* Macchiarola, *supra* note 17, at 15 (noting the "practical difficulties of getting employees to return paychecks that they have already cashed [and] spent"); Gandel, *supra* note 195 ("In practice, it is often hard to get employees to return pay."). Employees that have already paid taxes on their incentive compensation add another wrench to the administrative problem. *See* Macchiarola, *supra* note 17, at 15.

[204] *See* Macchiarola, *supra* note 17, at 15–16 (finding that giving ultimate discretion to the employer to execute a clawback policy to be troublesome); Della Rocca et al., *supra* note 17 (addressing administrative concerns related clawback clauses); Goodman & McPhee, *supra* note 83 (same); Melbinger, *supra* note 179 (determining the best practices for implementing clawback clauses). These administrative issues will only increase administrative work hours, time, and costs. *See* Macchiarola; *supra* note 17, at 15–16, 18 (contending that clawback clauses only adds another layer of costs and administrative hassles). As an example, a company's decision of whether to adopt a clawback policy against an indigent employee or whether executing that clawback policy will create undue hardship can create administrative headaches and expose the company to litigation. *See id.* at 16 (finding that waiving the clawback clause for indigent employees would compromise the overall structure of the clawback policy); Landau & Benedict, *supra* note 109 (discussing the legal issues associated with problems of adopting clawback clauses against indigent employees). Issues over subjectivity and how much discretion to give corporate administrations also will need to be explored. *See* Macchiarola, *supra* note 17, at 15–16; Gandel, *supra* note 195 (discussing how company discretion could lead to administrative problems).

[205] *See* Shanthi Bharatwaj, *Bankers Will Still Get Their Billions Despite Clawbacks*, FORBES, Feb. 10, 2012, http://www.forbes.com/sites/thestreet/2012/02/10/bankers-will-still-get-their-billions-despite-clawbacks/, *archived at* http://perma.cc/C3EW-JE9Q (stating that companies may be unwilling to execute their clawback clauses due to legal and practical uncertainties); Isidore, *supra* note 118 (highlighting Morgan Stanley's refusal to execute their clawback policy).

[206] *See* Gandel, *supra* note 195.

gal concerns place the efficacy of voluntary clawback provisions in sports endorsement contracts in a state of uncertainty.[207]

III. Monday Morning Quarterbacking: Analyzing Alternatives to Morality Clauses

Although high profile scandals have put clawback provisions in the spotlight for sports endorsement contracts, practical realities favor alternative mechanisms for endorsement companies to better protect themselves.[208] Section A discusses whether clawback clauses are a viable option for endorsement companies, and concludes that there are too many practical issues for endorsement companies to overcome.[209] Section B presents two possible alternatives that could better shield endorsement companies from athletic scandal, arguing that restructuring endorsement contracts differently is the most feasible alternative to recovery beyond morality clauses.[210]

A. Post-Game Analysis: The Viability of Voluntary Clawbacks

As previously mentioned, commentators argue that adding clawback clauses into endorsement contracts could better protect endorsement companies' investment from athletic scandals as compared to morality clauses.[211] After digging deeper into the practicality of implementing clawback clauses into endorsement contracts, however, significant roadblocks limit their effectiveness and likelihood of being employed.[212] Subsection 1 focuses on the legal and administrative issues that make it difficult for clawback provisions to become a standard contract provision in endorsement contracts.[213] Subsection 2 then argues that practical considerations and the competitive market for endorsement contracts create serious disincentives for companies to be the first to adopt clawback provisions.[214]

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[207] *See* Macchiarola, *supra* note 17, at 15–16.

[208] *See infra* notes 211–292 and accompanying text.

[209] *See infra* notes 211–251 and accompanying text.

[210] *See infra* notes 252–292 and accompanying text.

[211] *See supra* notes 12–13 and accompanying text (suggesting that clawback clauses could protect against higher-priced endorsement contracts and athletic scandals).

[212] *See* Macchiarola, *supra* note 17, at 15–16 (contending that clawbacks are too subjective and therefore cause administrative problems); Gandel, *supra* note 195 (arguing that clawbacks could lead to increasing litigation costs); Sanati, *supra* note 9 (highlighting the possible negotiation issues that clawbacks produce).

[213] *See infra* notes 215–230 and accompanying text.

[214] *See infra* notes 231–251 and accompanying text.

1. Legal and Administrative Issues Associated with Clawback Clauses

Because courts have not yet addressed the legality of voluntary clawback provisions, endorsement companies cannot predict how courts will determine the enforceability of clawbacks.[215] This uncertainty is compounded since judicial decisions related to clawback clauses are likely to be rooted in subjective analyses concerning unconscionability, mistake, duress, fraud, and non-competition restrictions.[216] Such unpredictability may contribute to additional litigation costs and is therefore unlikely to be a popular option for endorsement companies to pursue.[217]

Nevertheless, endorsement companies can skirt many of these legal issues by relying solely on prospective clawback provisions.[218] Because both sides agree upfront in prospective clawback provisions, concerns over enforceability and uncertainty diminish in comparison to retroactive clawbacks.[219] Therefore, under a prospective clawback provision, courts should uphold the consequences of the provision subject to state wage laws.[220]

In addition to overcoming these legal issues, however, endorsement companies will also have to consider administrative concerns, including the specific language of the clause.[221] The best way to achieve this is to negotiate a clawback

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[215] *See* Macchiarola, *supra* note 17, at 7, 16 (discussing the issues associated with subjectivity related to clawback clauses); Broshuis, *supra* note 81, at 209 (underscoring the fact that voluntary clawback clauses had not reached the courts as of 2012).

[216] *See* RESTATEMENT (SECOND) OF CONTRACTS § 151 (2013) (explaining the doctrine of mistake); Cherry & Wong, *supra* note 152, at 24 n.26 (noting that the doctrine of unconscionability can be unpredictable); Macchiarola, *supra* note 17, at 7, 16 (focusing on the problems associated with subjectivity). Additionally, state courts interpret these doctrines as well as state wage laws differently, adopting distinctive tests and relevant factors. *See* Lilienfeld & O'Connell, *supra* note 175, at 1–2 (reviewing the state wage deduction laws of New York, California, Texas, Connecticut, and New Jersey); *Wage Deduction Laws*, *supra* note 181 (listing the state wage deduction laws for every applicable state).

[217] *See* Gandel, *supra* note 195.

[218] *See* Broshuis, *supra* note 81, at 188 (discussing how subjectivity concerns diminish with prospective clawback clauses); Cherry & Wong, *supra* note 152, at 24 (same).

[219] *See* Cherry & Wong, *supra* note 152, at 24–25 ("Having themselves defined the triggers for clawbacks, the parties will not have to contend with the 'troubling' prospect of a lack of 'the predictive value of the rule of law.'") (quoting Macchiarola, *supra* note 17, at 9). Under contract law, courts generally have a duty to enforce the meaning and expectations of the parties to a contract. *See* Wood, *supra* note 35, at 89.

[220] *See* Cherry & Wong, *supra* note 152, at 24 (finding that parties who negotiate a prospective clawback are "literally on the same page"); Wood, *supra* note 35, at 89 (explaining that courts should uphold the expectations and meanings of a contract); *supra* notes 172–194 and accompanying text (discussing state wage laws).

[221] *See* Macchiarola, *supra* note 17, at 15–16 (discussing the administrative issues endorsement companies must consider); Pinguelo & Cedrone, *supra* note 30, at 370 (explaining how an athlete and endorsement company's interests conflict); Goodman & McPhee, *supra* note 83 (same). In other words, the endorsement company needs to mull over the specific language of the clause. *See* AYCO, *supra* note 14, at 5 (determining that endorsement companies need to consider the triggers, the applicable compensation, and how much discretion is to be given to themselves); Day et al., *supra* note

provision prospectively instead of trying to re-negotiate it into an endorsement contract.[222] As discussed earlier, prospective clawback clauses give endorsement companies the best opportunity to legally claw back compensation.[223] Moreover, fashioning clawbacks individually rather than implementing a company-wide policy may increase the enforceability of a clawback provision.[224] Negotiating clawbacks on an athlete-by-athlete basis will overcome many substantive and procedural unconscionability issues.[225]

Concerning the clawback trigger, endorsement companies should strive to maintain broad language, which would grant the company more discretion to enforce the clawback clause.[226] Therefore, endorsement companies should borrow language from morality clauses because precedent is already established, thus diminishing contracting costs.[227] Furthermore, the conduct in morality

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178, at 18–19 (listing issues to consider to maintain best practices); Della Rocca et al., *supra* note 17 (focusing on the mechanisms and administration concerns associated with clawback clauses); Melbinger, *supra* note 179 (identifying issues to consider when determining best practices). Because clawback clauses are usually discretionary, the endorsement company should adopt an administrator to determine when the athlete has violated the clawback clause. *See* Della Rocca et al., *supra* note 17.

[222] *See* Broshuis, *supra* note 81, at 188 (championing the idea of relying solely on prospective clawback clauses); Cherry & Wong, *supra* note 152, at 24 (same); *see also* Melbinger, *supra* note 179 (finding that most companies are taking the prospective concept a step further and applying their clawback policies to only future awards and compensation). When two parties re-negotiate a contract, there is less mutual benefit between the parties. *See Renegotiating Contracts*, COLSON QUINN, (last visited Jan. 5, 2015), http://www.colsonquinn.com/sites/181/pics/Renegotiating%20Contracts.pdf, *archived at* http://perma.cc/HBR2-4K9W; *see also* Macchiarola, *supra* note 17, at 7 (discussing the increased cost of contracting); Pinguelo & Cedrone, *supra* note 30, at 370 (explaining how an athlete and endorsement company's interest conflict during negotiations).

[223] *See* Cherry & Wong, *supra* note 152, at 24 (finding that prospective clawback clauses allow the parties to be on the same page and diminish the unpredictability of litigation).

[224] *See* Della Rocca et al., *supra* note 17 ("While a companywide policy may be appealing because of its relative simplicity in design and administration, the enforceability of a clawback is likely to be strongest where the provisions of the clawback are directly included or expressly incorporated into an agreement to which an employee is a party."); Goodman & McPhee, *supra* note 83 ("Companies that intend to adopt clawback provisions can do so by adopting a clawback policy. However, the adoption of a policy, without more, may raise questions as to the policy's enforceability and could lead to criticism for failing to implement the provisions fully.").

[225] *See* Broshuis, *supra* note 81, at 209–10 (implying that company-wide clawback policies could diminish an individual's bargaining power); *supra* notes 156–171 (discussing procedural and substantive unconscionability).

[226] *See* Auerbach, *supra* note 12, at 8 (explaining that endorsement companies try to include as broad of language as possible to maximize protection); Chase, *supra* note 6 (same); *see also* Della Rocca et al., *supra* note 17 ("The scope of the events or conduct that trigger the recovery of compensation is perhaps the most significant design element of any clawback policy.").

[227] *See* Macchiarola, *supra* note 17, at 7 (asserting that subjectivity creates increased contracting costs); Alan Schwartz & Joel Watson, *The Law and Economics of Costly Contracting*, YALE L. SCH. LEGAL SCHOLARSHIP REGISTRY (Dec. 2001), at 2–3, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1004&context=lepp_papers, *archived at* http://perma.cc/RJ6U-YMNW (discussing the economics of contracting costs); Tarantino, *supra* note 49 (providing an example of a morality clause with broad language favoring the endorsement company).

clauses targets minimizing the risk of future athletic scandals.[228] Nevertheless, companies that adopt morality clause language will need to deal with the same legal issues associated with morality clauses.[229] Therefore, one could argue that by implementing a clawback clause, an endorsement company inherits just another layer of legal complications.[230]

2. The First Mover Problem: Issues over Negotiating the Clawback Clause

Despite the possibility that endorsement companies *could* include clawback provisions in endorsement contracts, endorsement companies may be wary of introducing any clawback clause to the negotiation table.[231] First, in comparison to morality clauses, introducing clawback clauses will increase contracting costs.[232] Similar to morality clauses, however, contracting costs could diminish over time once clawbacks are used more often.[233] Furthermore, the financial and reputational cost of scandals most likely outweighs the contracting costs of introducing clawback clauses.[234]

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[228] *See* Mendenhall v. Hanesbrands, Inc., 856 F. Supp. 2d 717, 720 (M.D.N.C. 2012) (including language such as "public disrepute, contempt, scandal, or ridicule, or tending to shock, insult or offend the majority of the consuming public or any protected class or group thereof" into the morality clause); Auerbach, *supra* note 12, at 8 (showing that morality clause language includes phrases such as "moral turpitude," "public disrepute," and "ridicule"); Pinguelo & Cedrone, *supra* note 30, at 367–68 (explaining that language in morality clauses minimize damages to endorsement companies from athletic scandals); Chase, *supra* note 6 (finding that morality clauses include language such as "public disrepute," "contempt," or "scandal").

[229] *See* Nader v. ABC Television, Inc., 150 Fed. App'x 54, 56 (2d Cir. 2005); *Mendenhall*, 856 F. Supp. 2d at 727–28; Auerbach, *supra* note 12, at 9–10 (explaining the arbitration hearing between NBA star Chris Webber and his sponsor Fila); *see supra* notes 53–79 and accompanying text (discussing the legal issues associated with morality clauses, focusing predominately on how courts interpret morality clause language and whether the athlete's actions fit within the clause).

[230] *See* Macchiarola, *supra* note 17, at 7 (discussing the legal and administrative headaches caused by clawback clauses).

[231] *See* FOX WILLIAMS, *supra* note 17 (discussing the concern of retaining talent due to the introduction of clawback clauses); Goodman & McPhee, *supra* note 83 (same); *supra* note 200 and accompanying text (contending that collective action would be needed in order to overcome the first mover problem).

[232] *See* Macchiarola, *supra* note 17, at 7 (discussing that the subjectivity of clawback clauses will increase contracting costs); Schwartz & Watson, *supra* note 227, at 3–4 (discussing the cost of renegotiation). Morality clauses are a standard contract provision within endorsement contracts and therefore both sides can rely on past examples of negotiations, decreasing contracting costs. *See* Auerbach, *supra* note 12, at 3–4 (underscoring the prevalence of morality clauses in talent agreements); Macchiarola, *supra* note 17, at 7 (discussing contracting costs); Schwartz & Watson, *supra* note 227, at 3–4 (same).

[233] *See* Cherry & Wong, *supra* note 152, at 20 ("[T]he parameters of the [clawback] doctrine can and will only be more precisely delineated with time.").

[234] *See* Kressler, *supra* note 30, at 240–41 (discussing meaning transference); Pinguelo & Cedrone, *supra* note 30, at 376–68 (explaining that morality clauses protect the company from scandal); Ken Belson & Richard Sandomir, *Insuring Endorsements Against Athletes' Scandals*, N.Y. TIMES, Feb. 1, 2010, at D2 (explaining that stock prices for seven publicly held companies lost $12 billion in market value a month after Tiger Woods stated he was taking a leave from golf). These costs

Nevertheless, the risks involved in being the first mover outweigh the benefits of introducing clawback provisions to the negotiation table for endorsement companies.[235] The first company to introduce a clawback policy to its endorsement contracts runs the risk of losing talent to other companies who only have morality clauses.[236] The novelty of clawback clauses would give the athlete added leverage to go to a different competitor who maintains morality clause protection.[237] Therefore, endorsement companies must find a way to push the leverage back in their favor.[238]

Endorsement companies can try and take advantage of recent scandals, such as the one involving Tiger Woods in 2009.[239] Before becoming embroiled in controversy, Mr. Woods was seen as a clean-cut, globally recognized athlete

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include the cost of litigation. *See* White v. National Football League, 585 F.3d 1129, 1135 (8th Cir. 2009); Team Gordon, Inc. v. Fruit of the Loom, Inc., No. 3:06-cv-201-RJC, 2009 WL 426555, at *7 (W.D.N.C. Feb. 19, 2009); Terry Frieden, *Lance Armstrong Sued by U.S. for Post Office Sponsorship Funds*, CNN, Apr. 24, 2013, http://www.cnn.com/2013/04/23/justice/justice-case-armstrong/, *archived at* http://perma.cc/M53V-VVT8 (describing Armstrong's legal battle with the U.S. government); Gandel, *supra* note 195 (finding that clawback clauses could create more litigation for companies).

[235] *See* Iskandar-Datta & Jia, *supra* note 200, at 178 (explaining the concern that executives have about retaining talent); Melone, *supra* note 200, at 61 (same).

[236] *See* FOX WILLIAMS, *supra* note 17 (focusing on the fact that introducing clawback clauses could harm a company's ability to retain talent); Goodman & McPhee, *supra* note 83 (same); *supra* note 200 and accompanying text (contending that collective action can solve the first mover problem). Endorsement companies consistently fight over the same athlete to sponsor their products. *See* Kurt Badenhausen, *Why Nike Should Let Kevin Durant Leave for Under Armour*, FORBES, Aug. 22, 2014, http://www.forbes.com/sites/kurtbadenhausen/2014/08/22/why-nike-should-let-kevin-durant-leave-for-under-armour/, *archived at* http://perma.cc/A4XL-98KK (highlighting other sponsorship battles including NBA star Stephen Curry leaving Nike for Under Armour and NBA star Dwyane Wade signing with Li Ning instead of Nike); Eddie Maisonet, *Why Kevin Durant Chose Nike over Under Armour*, SB NATION (Sept. 3, 2014, at 11:33 AM), http://www.sbnation.com/2014/9/3/6098457/kevin-durant-nike-contract-under-armour, *archived at* http://perma.cc/FRJ3-AC6T (detailing Under Armour's attempt at stealing Kevin Durant from Nike).

[237] *See* Emma Thomasson, *Adidas Marketing Push an Uphill Battle Against 'Cool' Nike*, BUS. INSIDER (Aug. 8, 2014, 11:04 AM), http://www.businessinsider.com/r-adidas-marketing-push-an-uphill-battle-against-cool-nike-2014-08, *archived at* http://perma.cc/BG2Y-F74U (describing the battle between Nike and Adidas and the economic stakes); *supra* notes 200, 236 and accompanying text (highlighting examples of when endorsement companies fight over athletes and the risks that clawback clauses could have on retaining desirable athletes).

[238] *See* Fitzsimmons & Goldstein, *supra* note 18, at 2 (describing how the Tiger Woods scandal may help give endorsement companies leverage).

[239] *See id.* In late 2009, the media and the general public found out that Woods engaged in infidelity with many different women. *See* Russell Goldman, *At Least 9 Women Linked to Tiger Woods in Alleged Affairs*, ABC NEWS, Dec. 7, 2009, http://abcnews.go.com/Entertainment/tiger-woods-women-linked-alleged-affairs/story?id=9270076, *archived at* http://perma.cc/8XJ8-J38B. Accenture, AT&T, Gatorade, General Motors, and Tag Heuer ended their endorsement relationship with Woods. *See AT&T Cuts Connection with Woods*, ESPN (Jan. 1, 2010, 2:30 AM), http://sports.espn.go.com/golf/news/story?id=4784720, *archived at* http://perma.cc/VVP2-PJVB; *GM Ends Car Loans for Tiger Woods*, BBC NEWS (Jan. 13, 2010), http://news.bbc.co.uk/2/hi/business/8458194.stm, *archived at* http://perma.cc/JXK7-7ZJR; *Tiger Woods Dropped by Gatorade*, BBC NEWS (Feb. 27, 2010), http://news.bbc.co.uk/2/hi/business/8540167.stm, *archived at* http://perma.cc/9NKQ-QNKH.

who had significant leverage over endorsement companies.[240] Any company welcomed such an athlete's sponsorship, thereby affording Mr. Woods the opportunity to negotiate for the most lenient of endorsement contracts.[241] In the wake of such a scandal, however, endorsement companies now have leverage against even the most clean-cut of today's athletes.[242] Endorsement companies can argue that added protection in the form of a clawback provision is needed to avoid another scandal.[243] But with each passing year, the impact of Mr. Woods's scandal diminishes and endorsement companies lose leverage.[244] Furthermore, even though Mr. Woods's scandal might provide endorsement companies with added leverage in the short term, this solution fails to solve the problem of being a first mover.[245]

Without competitors simultaneously adopting clawback provisions, an athlete may choose an endorsement company that gives the athlete more freedom.[246] A company providing only the right to terminate the contract under a morality clause has more power to retain talent than a competitor who imposes a clawback provision.[247] Where competition to retain talent exists, the incentive to

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[240] *See* Auerbach, *supra* note 12, at 6 (describing Tiger Woods as "a mature, always-grinning gentleman"); *see also* Hunt & Kint, *supra* note 6, at 3 (explaining that Armstrong's star power gave him the opportunity to walk away to a competitor).

[241] *See* Pinguelo & Cedrone, *supra* note 30, at 371–72 (discussing an athlete's bargaining power); Hunt & Kint, *supra* note 6, at 3 (same); Jacoby et al., *supra* note 43, at 2 (same).

[242] *See* Goldman, *supra* note 239 (explaining the Tiger Woods scandal); Fitzsimmons & Goldstein, *supra* note 18, at 2 (finding that endorsement companies are in a better position after Woods' scandal to include more protective clauses, even for premier athletes).

[243] *See* Fitzsimmons & Goldstein, *supra* note 18, at 2. Woods' story provides endorsement companies even more leverage over less popular and troubled athletes. *See* Auerbach, *supra* note 12, at 7–8.

[244] *See Nike's Tiger Woods Ad Draws Critics*, ESPN (Mar. 29, 2013, 3:17 PM), http://espn.go.com/golf/story/_/id/9100497/nike-winning-takes-care-everything-tiger-woods-ad-draws-critics, *archived at* http://perma.cc/5LA4-DZZQ (exemplifying the public's changing attitude after Tiger Woods scandal); *Tiger Woods' Affair: Has Golfer's Image Finally Recovered from Infidelity Scandal?*, HUFFINGTON POST (June 10, 2013, 7:28 PM) [hereinafter *Tiger Woods' Affair*], http://www.huffingtonpost.com/2013/06/10/tiger-woods-reputation_n_3417137.html, *archived at* http://perma.cc/595A-G6E9 (determining whether Woods' image has improved since the scandal). Nevertheless, the next major athletic scandal will only push the leverage back in the endorsement company's favor. *See* Don Van Natta Jr. & Keith Van Valkenburg, *Ray Case: Purposeful Misdirection by Team, Scant Investigation by NFL*, ESPN (Sept. 19, 2014), http://espn.go.com/espn/otl/story/_/id/11551518/how-ray-rice-scandal-unfolded-baltimore-ravens-roger-goodell-nfl, *archived at* http://perma.cc/ZG2D-EL75 (describing the details surrounding NFL player Ray Rice's scandal).

[245] *See supra* note 200 and accompanying text (explaining the first mover problem).

[246] *See* Melone, *supra* note 200, at 61 (discussing the endorsement company's problem of retaining talent); Pinguelo & Cedrone, *supra* note 30, at 370 (describing how the endorsement company's and the athlete's interests conflict during negotiations); Spanberg, *supra* note 8 (highlighting that morality clauses usually only allow the company to terminate the contract); *supra* note 200 and accompanying text (showing the problem that clawback clauses present when it comes to retaining talent).

[247] *See* Melone, *supra* note 200, at 61 (explaining that athletes want less protection, whereas endorsement contracts want as much protection as possible); Pinguelo & Cedrone, *supra* note 30, at 370

level the playing field is minimal.[248] A recurring problem is that endorsement companies initially want to offer lenient contracts to athletes in order to lure in talent, but once a scandal breaks out that same company cries out for the need to add more protection.[249] This merry-go-round highlights the necessity for collective action.[250] Unfortunately, the large number of varying and distinctive industries makes collective action impracticable, thereby undermining the possibility of implementing clawback provisions in endorsement contracts.[251]

B. Bench Warmers: Alternatives to Voluntary Clawbacks

Even though prospective clawbacks offer endorsement companies the best opportunity to implement clawback clauses, the negotiation concerns are likely too burdensome to overcome.[252] Without clawback clauses, the status quo of

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(describing how the endorsement company and the athlete's interests conflict during negotiations); Socolow, *supra* note 6, at 2 (highlighting the available remedies under a morality clause); *supra* note 200 and accompanying text (highlighting the retention problem).

[248] *See* FOX WILLIAMS, *supra* note 17 (explaining the problem of retaining talent); Goodman & McPhee, *supra* note 83 (same); *supra* note 200 and accompanying text (same).

[249] *See* FOX WILLIAMS, *supra* note 17 (explaining that this outcry usually comes from shareholders, who want more protection in order to protect their investment in the company); *see also* Belson & Sandomir, *supra* note 234 (explaining that stock prices for seven publicly held companies lost $12 billion in market value a month after Tiger Woods stated he was taking a leave from golf).

[250] *See supra* note 200 and accompanying text (finding that the problem of retaining talent deters companies from including more protective contract clauses like clawbacks).

[251] *See* Socolow, *supra* note 6, at 1 (showing that Lance Armstrong was sponsored by the U.S. Postal Service, Nike, Trek, and Oakley). To solve this collective action issue, neither lobbying efforts to expand Dodd-Frank nor collective bargaining with player's unions are viable options. *See id.* Regarding lobbying, there are too many distinct industries that use athletes to sponsor their products, ranging from shoe brands and athletic gear to the U.S. Postal Service. *See id.*; Spanberg, *supra* note 8. For example AT&T, a phone company, Tag Heuer, a watch company, and Gatorade, a sports drink company, all sponsored Tiger Woods. S*ee AT&T Cuts Connection with Woods*, *supra* note 239; *Tiger Woods Dropped by Gatorade*, *supra* note 239. Therefore, it is unrealistic to imagine how these industries would come together as a single-issue lobbyist group, taking on the costs of such an effort, to impose clawback clauses on athletic endorsement contracts. *See* Michael Blanding, *A Few Firms Have Outsized Influence in D.C.*, HARV. BUS. SCH. (Jan. 25, 2012), http://hbswk.hbs.edu/item/6881.html, *archived at* http://perma.cc/KKB9-4MF9 (highlighting the cost of lobbying); Steve Spires, *Ideological/Single-Issue: Background*, OPENSECRETS.ORG (last updated June 2010), http://www.opensecrets.org/lobby/background.php?id=Q&year=2013, *archived at* http://perma.cc/A6YT-EU92 (explaining the concept of single-issue lobbying groups). Concerning collective bargaining, the same practical issues arise. *See* Socolow, *supra* note 6, at 1 (highlighting the wide range of industries involved in athletic endorsements). With such varying types and sizes of potential endorsement companies, there is no commonality of interest to create a multi-employer collective bargaining unit. *See* NLRB v. Am. Printers & Lithographers, 820 F.2d 878, 881–82 (7th Cir. 1987); *AT&T Cuts Connection with Woods*, *supra* note 239; *Tiger Woods Dropped by Gatorade*, *supra* note 239. Moreover, under the National Industrial Recovery Act, the National Labor Board would most likely find that such a unit is inappropriate due to the lack of common interests among the endorsement companies. *See NLRB*, 820 F.2d at 881–82; *AT&T Cuts Connection with Woods*, *supra* note 239; Socolow, *supra* note 6, at 1; *Tiger Woods Dropped by Gatorade*, *supra* note 239.

[252] *See* Cherry & Wong, *supra* note 152, at 24 (preferring the prospective clawback because it minimizes subjectivity); Melone, *supra* note 200, at 61 (discussing the endorsement company's prob-

relying on morality clauses still leaves endorsement companies at risk to athletic scandals.[253] Therefore, endorsement companies must turn to alternatives that may in fact protect endorsement companies in a similar fashion to clawback clauses.[254] Two possible options for endorsement companies are to negotiate for liquidated damages or to structure the endorsement contract differently.[255] Subsection 1 outlines the practicality of liquidated damages provisions, concluding that similar negotiation problems as with clawback clauses make liquidated damages provisions a questionable solution.[256] Subsection 2 describes specific sponsorship and contracting techniques that endorsement companies can employ to protect themselves rather than relying solely on morality clauses.[257]

1. Liquidated Damages Provisions

In order to protect their investment against potential scandal, endorsement companies could try to impose liquidated damages into the contract.[258] In a way, liquidated damages are very similar to prospective clawback clauses.[259] Both contract doctrines explicitly express the amount of damages that will ensue even before the prohibited conduct occurs.[260] Due to their similarity, endorsement companies may fall into the same negotiation issues as with clawback clauses.[261]

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lem of retaining talent); Pinguelo & Cedrone, *supra* note 30, at 370 (describing how the endorsement company and the athlete's interests conflict during negotiations). The legal and administrative issues are moot if endorsement companies cannot initially negotiate the clawback clause into the contract. *See* Broshuis, *supra* note 81, at 188 (highlighting the legal issue of unconscionability); Macchiarola, *supra* note 17, at 15–16 (describing several administration issues); FOX WILLIAMS, *supra* note 17 (highlighting the first mover problem); Goodman & McPhee, *supra* note 83 (discussing legal issues associated with state wage deduction laws).

[253] *See* Sanati, *supra* note 9 (describing the need for clawback clauses due the recent athletic scandals highlighted by Armstrong); Spanberg, *supra* note 8 (finding that athletic scandals could bring about more protective contract provisions like clawback clauses); *Tiger Woods Scandal Cost Shareholders Up to $12 Billion*, U.C. DAVIS (Dec. 28, 2009), http://www.news.ucdavis.edu/search/news_detail.lasso?id=9352, *archived at* http://perma.cc/F87G-3L6N (calculating the financial toll on endorsement companies after Woods' scandal).

[254] *See infra* notes 258–292 and accompanying text.

[255] *See* Fitzsimmons & Goldstein, *supra* note 18, at 2 (describing endorsement contracting techniques); ROTTENSTEIN, *supra* note 18 (outlining the law on liquidated damages provisions).

[256] *See infra* notes 258–273 and accompanying text.

[257] *See infra* notes 274–292 and accompanying text.

[258] *See* Hunt & Kint, *supra* note 6, at 2 (discussing the practicality of introducing liquidated damages provisions into endorsement contracts).

[259] *See* Cherry & Wong, *supra* note 15, at 417–18 (explaining the similarities between clawback clauses and liquidated damages provisions).

[260] *See id.* (exploring the characteristics of liquidated damages).

[261] *See* Auerbach, *supra* note 12, at 3–4 (underscoring the prevalence of morality clauses in talent agreements); *supra* note 9 and accompanying text (discussing the remedies that can be added into a morality clause and the reality that morality clauses usually only allows for termination); *supra* notes 196–200 (exploring the negotiation hurdles associated with clawback clauses).

Nevertheless, clawback and liquidated damages provisions differ in the source and the amount of damage payments.[262] Under liquidated damages, the parties try to estimate the potential damage that will occur if the athlete engages in prohibited conduct.[263] Conversely, with clawback clauses, the parties only need to determine how much incentive compensation to claw back rather than calculating the potential damage to the endorsement company.[264] Therefore, these different computations alter how much the athlete will need to pay back to the company.[265] If the amount is smaller than the level of compensation under a clawback clause, a liquidated damages provision may be easier to include in a contract with an athletic endorsement.[266] Additionally, in order to generate even more leverage, the endorsement company could offer more base salary compensation in exchange for the implementation of a liquidated damages clause.[267]

If the circumstances stated above push the leverage in favor of the corporation, the endorsement company then must meet the legal requirements associated with liquidated damages.[268] Because damages associated with endorsement contracts are difficult to quantify in dollar terms, a liquidated damages provision will likely have no trouble reaching the threshold requirement for the enforceability of such a provision.[269] Other aspects of the enforceability of such provi-

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[262] *See* Cherry & Wong, *supra* note 15, at 417–18 (describing the characteristics of clawback clauses and liquidated damages provisions).

[263] *See* 24 WILLISTON, *supra* note 135, § 65:1.

[264] *See id.* (noting that courts will invalidate liquidated damages provisions when the parties have failed to adequately proximate damages); Della Rocca et al., *supra* note 17 (identifying issues that companies need to confront before implementing clawback clauses, including the type of compensation covered); Melbinger, *supra* note 179 (same).

[265] *See* Cherry & Wong, *supra* note 15, at 417–18.

[266] *See id.* The difference in how damages are paid between liquidated damages and clawback clauses could also push the leverage in favor of endorsement companies. *See* Cherry & Wong, *supra* note 15, at 417–18. With liquidated damages, the athlete who engages in prohibited conduct pays the damages. *See* 24 WILLISTON, *supra* note 135, § 65:1; Cherry & Wong, *supra* note 15, at 417–18. Conversely, under clawback clauses, the company essentially takes compensation from the athlete. *See* Cherry & Wong, *supra* note 15, at 371–72. Therefore, liquidated damages are psychologically easier to accept and negotiate than clawbacks. *See generally id.* (explaining liquidated damages and clawback provisions). Rather than clawing back compensation independent of the athlete, liquidated damages force the athlete to pay the company as a consequence of the prohibited conduct. *See generally id.* (same). This slight difference between paying the endorsement company and the endorsement company independently taking compensation may tip the leverage in favor of the endorsement company, making liquidated damages provisions even more attractive to them. *See generally id.* (same).

[267] *See Clawbacks Make CEOs More Accountable for Firm's Financial Reporting*, UNIV. OF WASH. FOSTER SCH. OF BUS. (Oct. 20, 2011), http://www.foster.washington.edu/centers/facultyresearch/Pages/clawbacks.aspx, *archived at* http://perma.cc/PHB4-SXZ6.

[268] *See supra* notes 135–141 and accompanying text (outlining the legal requirements of liquidated damages).

[269] *See* Chris Smith, *supra* note 5 (describing the reputational risk to endorsement companies); Zolkos, *supra* note 5 (same). It is very difficult to quantify the damage to a company's brand and image. *See* Rob Heidrick, *Collateral Brand Damage: Lessons from Lance*, TEX. ENTER. (Nov. 30, 2012), http://www.texasenterprise.utexas.edu/article/collateral-brand-damage-lessons-lance-armstrong, *archived*

sion, however, would depend on the circumstances surrounding the negotiations.[270] The company would need to show evidence of how a future scandal will affect them economically and the probable amounts of those damages.[271] Therefore, companies that employ liquidated damages must worry about the doctrine of unliquidated damages.[272] In certain jurisdictions, if damages are extremely uncertain or mathematically impossible to calculate, the court will void liquidated damages.[273]

2. Sponsorship and Endorsement Contract Techniques

If endorsement companies cannot overcome the negotiation or legal hurdles associated with liquidated damages, endorsement companies should consider restructuring endorsement contracts.[274] Currently, endorsement companies try to sign the most popular or up-and-coming athlete to endorse their product.[275] In their estimation, such popularity will increase exposure, thereby increasing profits.[276] To maintain such exposure, endorsement companies will attempt to sign the athlete for a long-term contract.[277] Due to the popularity of these athletes along with the long-term commitment, companies tend to only sign a limited

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at http://perma.cc/WUR6-NYJQ (discussing the damage to Armstrong's sponsor's brand). *But cf. Tiger Woods Scandal Cost Shareholders Up to $12 Billion*, *supra* note 253.

[270] *See* 24 WILLISTON, *supra* note 135, § 65:1.

[271] *See* Belson & Sandomir, *supra* note 234.

[272] *See* ROTTENSTEIN, *supra* note 18.

[273] *See id.*

[274] *See* 24 WILLISTON, *supra* note 135, § 65:1 (describing the legal issues associated with liquidated damages); Pinguelo & Cedrone, *supra* note 30, at 370 (outlining the issues inherent in negotiations between endorsement companies and athletes); Fitzsimmons & Goldstein, *supra* note 18, at 2 (explaining one restructuring strategy for endorsement companies).

[275] *See* Badenhausen, *supra* note 236 (explaining Under Armour's and Adidas's strategy of locking in one star NBA athlete to sponsor their products); Sarah Jane Gilbert, *Marketing Maria: Managing the Athlete Endorsement*, HARV. BUS. SCH. (Oct. 29, 2007), http://hbswk.hbs.edu/item/5607.html *archived at* http://perma.cc/VSU5-JETE (discussing how marketers increasingly use athletes to sponsor their products); Maisonet, *supra* note 236, (recalling that commentators have stated that spending a lot of money on one athlete is a waste); Martin Roll, *Celebrity Endorsement Guide*, BRANDING STRATEGY GUIDE (Oct. 2, 2010), http://www.brandingstrategyinsider.com/2010/10/celebrity-endorsement-guide.html#.UucX4fYo7R1, *archived at* http://perma.cc/J966-3SGW (determining that endorsement companies should establish long-term commitments to celebrities).

[276] *See* Badenhausen, *supra* note 236 (showing that Under Armour wanted to sign Kevin Durant because they wanted to increase their revenue from NBA sponsors); Gilbert, *supra* note 275 (discussing the revenue that the sports industry produces).

[277] *See* Badenhausen, sup*ra* note 236 ("Adidas inked Derrick Rose to a 13-year, $185 million deal in 2012 to be the face of the brand in the U.S."); Maisonet, *supra* note 236 ("The folks in Beaverton will reportedly pay Durant approximately $300 million over the next 10 years, keeping the Nike KD signature humming along in the process."); Roll, *supra* note 275 ("[C]ompanies should view celebrity endorsements as long-term strategic decisions affecting the brand.").

number of athletes.[278] Such a technique compounds the association between the product and the athlete.[279]

Unfortunately, this type of contract structuring exposes the endorsement company to the most risk.[280] Accordingly, endorsement companies can adopt certain restructuring techniques that diminish the costs associated with athletic scandals.[281] First, instead of including a large signing bonus, the endorsement company should spread the compensation out over an extended period of time.[282] Moreover, the endorsement company could structure the endorsement contract to compensate the athlete based more on performance rather than base salary.[283] This could allow the company to retroactively clawback compensation subject to state wage laws.[284] Second, the company could sign athletes to shorter-term contracts with clauses of first refusal rights to minimize the time of association between the athlete and the company.[285] This measure incentivizes the

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[278] *See* Kressler, *supra* note 30, at 240–41 (discussing meaning transference); Gilbert, *supra* note 275 (same).

[279] *See* Kressler, *supra* note 30, at 240–41; Jacoby et al., *supra* note 43, at 1.

[280] *See* Auerbach, *supra* note 12, at 2 ("Nike Inc., the nation's largest employer of endorsers for athletic goods, reached more than $1.6 billion in *long term commitments* as of November 2003.") (emphasis added); Heidrick, *supra* note 269 ("I think it's always a mistake when an organization has one representative and thousands of people beholding their careers to one person.") (quoting Terry Hemeyer, Public Relations Professional and Lecturer at the University of Texas at Austin). A long-term contract given to a limited number of athletes ties the endorsement company's brand to the image of only a limited number of athletes. *See* Roll, *supra* note 275.

[281] *See* Auerbach, *supra* note 12, at 17–18 (discussing the strategy of using retired athletes); *Avoiding the Perils of Sport Sponsorship*, BEDFORD GRP. (last visited Jan. 6, 2015), http://bedfordgroupconsulting.com/marketing-insights/avoiding-the-perils-of-sport-sponsorship/, *archived at* http://perma.cc/Y2Y2-AK4L (advocating for the use of multiple athletes in endorsement contracts); Fitzsimmons & Goldstein, *supra* note 18, at 2 (exploring the strategy of negotiating shorter contract terms).

[282] *See* Chase, *supra* note 6 (discussing the tactic of spreading compensation over time); Fitzsimmons & Goldstein, *supra* note 18, at 2 (same).

[283] *See* Della Rocca et al., *supra* note 17 (examining the strategy of compensating an employee based on performance and reassessing the performance every so often); *Avoiding the Perils of Sport Sponsorship*, *supra* note 281 (same).

[284] *See* Lilienfeld & O'Connell, *supra* note 175, at 1–2 (finding that state wage laws allow employers to deduct certain incentive based compensation); *see supra* notes 180–187 (discussing state wage deduction laws and highlighting how states vary on whether certain incentive based compensation can be deducted); *see also* Marz, *supra* note 180 (listing performance based bonuses as incentive-based compensation).

[285] *See* Fitzsimmons & Goldstein, *supra* note 18, at 2 (discussing shorter term contracts for athletic endorsement contracts); *see also* Badenhausen, *supra* note 236 (explaining that Nike had the contractual right to match Under Armour's proposal to Kevin Durant); Marsha L. Collett, *What Is a Right of First Refusal?*, WICKENS, HERZER, PANZA, COOK & BATISTA CO. (Mar. 2, 2011), http://www.wickenslaw.com/firm-newsletter-archive/what-is-a-right-of-first-refusal/, *archived at* http://perma.cc/5E2Y-DE54 (explaining the concept of first refusal rights).

athlete to reign in one's behavior to re-sign with the company, thereby decreasing the likelihood of a scandal occurring.[286]

Furthermore, the company could sign multiple middle of the pack athletes rather than one or two superstars.[287] A scandal from one athlete can be curtailed by the endorsement of the other athletes.[288] Moreover, the company would have an advantage in negotiations over a mid-level athlete in comparison to a superstar.[289] Finally, an endorsement company could seek out popular, retired athletes.[290] Endorsement companies can predict a retired athlete's character better than a young athlete's due to the years of exposure that the retired athlete has already experienced in the media.[291] Even though these are not fool proof measures like prospective clawback clauses or even liquidated damages, structuring the contract with these modifications in mind presents a more feasible alternative and could allow companies to diminish the costs caused by athletic scandals.[292]

CONCLUSION

Morality clauses expose endorsement companies to large reputational and financial risks from potential athletic scandals. Therefore, endorsement companies should adjust how they negotiate and structure endorsement contracts. Prospective clawback clauses offer endorsement companies the best opportunity to protect their investment. Unfortunately, because the risks associated with negotiating these new provisions are too burdensome, endorsement companies should consider alternatives that could protect themselves from future athletic scandals. Consequently, endorsement companies should consider liquidated damages provisions and specific sponsorship and contracting techniques as viable alternatives. Although liquidated damages present endorsement companies with similar protections to clawback clauses, the similarities make liquidated damages most likely unworkable. The negotiation issues associated with liquidated damages

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[286] *Cf.* Broshuis, *supra* note 81, at 194 (arguing that because of clawbacks financial executives "will be constantly 'monitoring the rear view mirror'").

[287] *See* Auerbach, *supra* note 12, at 17; Fitzsimmons & Goldstein, *supra* note 18, at 2.

[288] *See* Auerbach, *supra* note 12, at 17; Fitzsimmons & Goldstein, *supra* note 18, at 2.

[289] *See* Pinguelo & Cedrone, *supra* note 30, at 371 (explaining that the bargaining power of an athlete depends on their star power and track record); Boudway, *supra* note 8 (same); Chase, *supra* note 6 (same). The leverage over a middle of the pack athlete could allow for clawback clauses or liquidated damages provisions. *Cf.* Pinguelo & Cedrone, *supra* note 30, at 371.

[290] *See* Auerbach, *supra* note 12, at 18; Michael Traikos, *The New Sponsor Sluts: How Retired Athletes Became Product Pushers*, DIGITAL J. (Nov. 22, 2006), http://digitaljournal.com/article/59165, *archived at* http://perma.cc/KZF6-22TF.

[291] *See* Auerbach, *supra* note 12, at 18; Traikos, *supra* note 290.

[292] *See* Auerbach, *supra* note 12, at 17 (highlighting the practicality of restructuring the contract by showing examples of how endorsement contracts have used multiple athletes for their endorsements); Traikos, *supra* note 290 (showing the practicality of restructuring the contract because companies have already started employing retired athletes, such as the former boxer George Foreman).

will likely keep endorsement companies from imposing them in endorsement contracts. Therefore, the most practical alternative for endorsement companies is to adopt particular contracting and sponsorship techniques. After all, endorsement companies aren't playing to win—they are playing not to lose.

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