

# Sports Litigation Alert

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## The Athlete Endorsement Game

By **Ben Mulcahy and Gina Reif Ilardi**

Successful athlete endorsements can enhance consumer recognition of a brand and increase the relative perceived value of the products being endorsed. But securing a high-profile endorsement often requires lengthy negotiation and certainly comes at a high cost of entry. For example, Nike reportedly paid Tiger Woods over twenty million dollars for his endorsement, and Peyton Manning reportedly raked in over thirteen million dollars from endorsement deals with Sprint, MasterCard, Gatorade and Reebok. With the current state of the global economy and an unprecedented contraction in (and internal and external scrutiny of) marketing and advertising budgets, major brands are becoming even more selective about the quantity and quality of the athletes they engage in endorsement deals. Fundamental supply and demand principles have, in turn, given major brands greater leverage in negotiating contracts that give the brand broader rights and greater protections in the event the endorsing athlete's image suddenly takes a turn for the worse.

"Morals clauses" grant the brand the right to termi-

nate the endorsement agreement in the event the athlete does something that tarnishes his or her image. Brands pay their athlete endorsers significant sums of money to promote and be the "public face" of the brand's products. Once the athlete's endorsement rights are obtained, the brand will almost invariably spend even more to activate that relationship, often building entire advertising and marketing campaigns around the athlete so that the athlete's talents and achievements become uniquely associated with the brand and its products. When an athlete commits an "immoral" or image-tarnishing act, the morals clause is what gives the brand options in deciding how to proceed.

Morals clauses have received a lot of attention in the popular press lately. One of the recent higher-profile discussions revolved around whether major brands would exercise their morals clause termination rights and sever their relationships with Michael Phelps after a photo of him appearing to smoke marijuana quickly spread across the Internet. The dissemination of the photos caused (or at least coincided with) an announcement by Kellogg that it would not be renewing its endorsement agreement with Phelps at the end of the year, and caused Subway, which had created an entire campaign around the unparalleled swimmer, to publicly support the swimmer, but put that campaign on hold.

Not to compare the morality of smoking pot with dog fighting, but when football player Michael Vick was charged, pleaded guilty to and sentenced for his role in an illegal dog fighting operation in 2007, Nike suspended and eventually terminated its endorsement agreement with Vick pursuant to its morals clause and issued a statement that "Nike considers any cruelty to animals inhumane and unacceptable". Many more examples spanning the entire spectrum of actual or alleged misconduct both on, off and adjacent to the field, court or other playing surface can quickly be brought

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to mind with references to BALCO Laboratories Inc., or with just a few names like Plaxico Burress (and his accidental gunshot wound), Zinedine Zidane (and his World Cup head-butt), Ron Artest (and his rush into the stands), Pacman Jones (and his, well – search the Internet), and countless others outside the world of professional sports. This parade is arguably nothing new, but the increased leverage that brands have from the increasing scarcity of lucrative endorsement opportunities has caused brands to take a step back and re-think whether they are willing to negotiate away the protections that a morals clause can offer, both to the image and to the finances of the brand.

When negotiating a morals clause, one of the most important issues is to identify the kind of behavior that will trigger the clause. To ensure maximum protection, the brand will often begin by insisting on a broad morals clause that allows it to determine, in its sole discretion, if the athlete's actions fall within the type of conduct covered by the clause. A broadly worded morals clause might refer to "any act involving moral turpitude or reflecting unfavorably on the athlete or the brand" or to the athlete being involved in "any situation or occurrence that tends to bring the athlete into public disrepute, contempt, scandal or ridicule." Additionally, language is often sought that would allow the brand to terminate the agreement if the athlete makes a public statement that criticizes the brand or acts in a manner that is "antithetical" to the brand or its products.

A broad morals clause provides the brand with wide discretion to assess an athlete's actions and decide whether to invoke the morals clause in situations that are damaging to the athlete's ability to positively connect with the consumer segment being targeted, even if the conduct isn't illegal and even if the allegations thereafter prove not to be true. For example, it's been reported that AT&T Broadband invoked its morals clause when it recently filed a breach of contract claim against NASCAR Busch Series driver Mike Borkowski for on-track altercations that resulted in

crashes. And many years ago, Reebok cancelled its endorsement contract with NBA forward Shaun Kemp, reportedly pursuant to "non-disparagement" language in its morals clause, after Kemp reportedly stated that basketball sneakers are not what they used to be, that the sneakers of the day were "throwaways", and that his all-time favorite sneaker was made by Nike, Reebok's arch-rival.

Beyond the remedy of termination, brands may also seek to expand, or at least preserve, other remedies against the athlete endorser if the morals clause is violated. For example, providing the brand with some form of refund for amounts previously paid if the athlete violates the morals clause is controversial and often distasteful to enforce as a practical matter, but it has impact if the brand is expressly permitted to "set off" the refund amounts against royalties or other payments that are owed but not yet paid to the athlete under the deal. Brands may also seek to include language expressly permitting them to publicly voice their disapproval of the athlete's actions. When the athlete's endorsement is incorporated into product packaging itself, or when the athlete is entitled to royalties or other payments based on the sales performance of the product(s) being endorsed, the brand may also benefit by including language that makes it clear that it is under no obligation to continue using the athlete's endorsement or continue selling the co-branded product, and that the brand is affirmatively permitted to pull any co-branded product from distribution or just not use the athlete's image or likeness, as Subway temporarily opted to do when the Phelps photo was released.

Unsurprisingly, most athletes resist broad morals clauses and seek to impose narrower and more specific language, sometimes consisting of a short list of acts that will trigger remedies under the clause or going so far as to require the actual "conviction" of a "felony" prior to any termination. Athletes may also seek to negotiate for a morals clause that allows the brand to terminate only if the athlete actually committed the act

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being complained about, versus having been charged with the act or accused of having committed the act.

One cut-through compromise a brand can offer is to structure the morals clause so that it gives the brand the right to terminate the agreement if the athlete is suspended or banned from competing by the league or association that governs his or her sport, thereby allowing the brand to piggy-back its termination rights on the decisions made by the governing athletic body. Such a clause would have permitted a brand to terminate Phelps, who was temporarily suspended from competitive swimming by USA Swimming after the incriminating photo of him became public. It also would have permitted a brand to terminate Vick, who was suspended indefinitely by the NFL after his plea agreement.

Regardless of the final language included in a morals clause, brands today are more likely to insist on a far-reaching morals clause that provides wide latitude to terminate the agreement for any potentially damaging incident or act. Yet, while broader morals clauses with multiple remedies are a growing necessity and a smart business move, a brand's primary goal in drafting a morals clause is flexibility. A morals clause that provides the brand with discretion to evaluate the athlete's conduct and decide, on a case-by-case basis, whether to exercise the available remedies, will preserve the brand's ability to respond to the specific situation in the way deemed most appropriate at the time. Depending on the target audience for the endorsed product, the brand may not need to take immediate action or may decide to take no action at all if it believes that "breaking up" with an athlete who barely crosses the line would actually be detrimental to the brand or the endorsed product. And different brands may have very different points of view on whether certain conduct is acceptable.

Phelps provides a recent example. Within days of the incriminating photo surfacing, Kellogg announced that it would not be renewing its agreement with Phelps

at the end of the year, stating, "Michael's most recent behavior is not consistent with the image of Kellogg". The Kellogg deal with Phelps related to its Corn Flakes product, whose target audience is children and parents. But other companies that had deals with Phelps kept them in place. For example, Subway and Visa, who each market primarily to adults, did not terminate their relationships with Phelps for the same conduct that Kellogg deemed to be inconsistent with its image.

Another factor to consider is the potential for the athlete to re-build his or her image or selling power after a damaging event occurs. If the brand anticipates that the athlete may get beyond the damaging event, a suspension without pay or at a reduced "holding fee", rather than an outright termination of the endorsement agreement, might be a more desirable remedy. For example, when Kobe Bryant was charged with sexual assault in 2003, none of his most prominent brands publicly invoked a morals clause to terminate his endorsement deals. While the brands suspended their use of Bryant in their campaigns, brands that kept their deals in place released new campaigns focused on Bryant just two years later after some of the dust had settled.

Morals clauses may help the endorsed brand prevent prolonged embarrassment or an obligation to maintain a valueless asset such as an unmarketable athlete. Today, brands faced with tighter budgets and increased scrutiny of their marketing spends will continue to move toward broader morals clauses with multiple remedies as a means of image and reputation protection.

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