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Morals Clauses—Beware Of The Tiger... Or Gilbert Or ...

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What do Tiger Woods, Peyton Manning, Gilbert Arenas, Mark Martin, Kyle Busch and Derek Jeter all have in common? Even with the variety of public images these athletes project, they each likely have a "morals clause" in their endorsement or sponsorship agreements. The purpose of this article is to highlight a few key practical issues that arise out of morals clauses, with a special emphasis on morals clauses in NASCAR, an area with which RBH has considerable experience.

What are Morals Clauses?

The reason that companies such as Nike, Gatorade, Lowe's and Gillette pay professional athletes millions of dollars is to link their brands to well-known sports stars, with the goal of enhancing their brands and presumably, sales. The morals clause is designed to protect the company's brand in these situations. Thus, the typical morals clause permits the company to terminate the relationship—thereby severing the link between the brand and the sports star--if the athlete "commits any act" that "tends to bring him [or her] into public disrepute, contempt, scandal or ridicule," or "tends to shock, insult or offend any class or group of people." Morals clauses also prohibit conduct that "reflects unfavorably upon the Sponsor's reputation or its products." Although the details are not public, morals clauses surely have been implicated in the recent high-profile travails of Tiger Woods and Gilbert Arenas.

The Realities of Morals Clauses

First, in dealing with morals clauses, clients should be aware that they are working on a virtually barren legal landscape. Understandably, athletes and sponsors prefer to resolve morals clause disputes privately. Moreover, athletes have a disincentive to sue sponsors—who wants to sign an athlete with a track record of suing former sponsors? The result is that reported morals clause cases are few and far between, which means that morals clause litigation is even more unpredictable than other types of litigation.

Second, when negotiating a morals clause, the parties need to understand the implications of the use of certain terms. For example, during negotiations it is common for a sponsor to agree to the insertion of "reasonably" before "tends to shock, insult or offend" or before "reflects unfavorably." In fact, there can be legitimate business reasons for athletes to request such language as protection against arbitrary or capricious sponsor decisions. The impact of using "reasonably," however, is that it creates a

classic jury issue. What this means is that the use of "reasonable" or "reasonably" normally will preclude a judge from deciding a morals clause case at summary judgment or some other pre-trial stage. Thus, unless the case is settled, a sponsor who agrees to a "reasonable" morals clause stands an excellent chance of being in front of a jury opposite a star athlete. The flip side is that athletes should try to exclude terms that vest "sole discretion" in the sponsor to construe the morals clause, thereby making it likely that a judge would take the issue away from the jury.

Third, an athlete faced with a morals clause termination might contend that his or her sponsor has more duties than simply providing cash to the athlete. "Activation" is an industry term used to describe the process by which a sponsor endeavors to maximize the value of its sponsorship. In the NASCAR context, activation could include developing a new advertising campaign to go along with preexisting commercials, creating promotions such as contests and special displays for retail stores, or organizing client entertainment events at races. Of course, all of these efforts cost the sponsor money over and above the sponsorship fee. If, however, a company uses the morals clause to terminate a sponsorship deal without taking significant steps to "activate," the athlete may contend that the sponsor terminated in bad faith. In other words, the driver may argue that the sponsor's reliance on the morals clause is merely a pretext for trying to get out of a sponsorship deal that it never supported in the first place. Sponsors can help themselves on this issue by specifically defining in their agreement what, if any, activation commitments they are willing to make, including any additional dollars they are willing to spend.

Last, NASCAR sponsors should be prepared to face the argument that some "immoral" conduct is to be expected. As the argument goes, the history and nature of NASCAR are such that "swappin' paint" between cars and hand-to-hand battles between drivers are to be tolerated, even encouraged. For example, many people believe that Cale Yarborough's fistfight with Donnie Allison at the 1979 Daytona 500 catapulted NASCAR onto the national sports stage. Accordingly, drivers may contend that the morals clause should be read in a special NASCAR context, with the sponsor assuming the risk of some shenanigans, especially on the track. After all, as NASCAR people are wont to say, "that's racin'."

The first lesson here is that NASCAR sponsors should be especially careful in doing their due diligence on drivers. Sponsoring a driver with a wholesome image is a different proposition from sponsoring one with a bad boy reputation. Potential sponsors should do sufficient background work to be comfortable both with their knowledge of the sport and the individual driver. The second lesson is that both sides should communicate their contractual expectations concerning on-track and off-track conduct. For example, drivers and sponsors might reasonably disagree about whether "aggressive driving" on track is a morals clause violation. Disputes also might arise about the importance of a "clean" reputation on the track versus away from the competition.

Conclusion

Sponsorship and endorsement deals long have held appeal for advertisers, and they will continue to do so, even in this challenging economy. Morals clauses facilitate these relationships by giving the sponsor a way to protect its brand if the athlete misbehaves. These clauses, however, may not serve their intended purpose unless the parties give them the pre-contract attention they deserve.