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## ARTICLE

### WOLF AND WILHELMINA: GIVING ENTERTAINERS A LICENSE TO BREACH THEIR CONTRACTS

Mark Conrad\*

In recent years, high-priced entertainers and personalities have been the object of intense demand, resulting in lucrative personal services contracts. Such individuals — who have become “hot property” in their various fields — have been in the enviable position of being courted and enticed by many prospective employers or managers. Sometimes, these entertainers will be lured by rivals and will breach their existing contracts to sign a more lucrative agreement.<sup>1</sup>

Two New York cases, *Wolf v. American Broadcasting Companies*<sup>2</sup> and *Wilhelmina Models v. Abdulmajid*,<sup>3</sup> point out the problems that employers or managers face when their prize employees breach contractual obligations, and demonstrate the failure of conventional contract remedies to make these employers or managers “whole.” Both cases involve well-known employees of major entertainment organizations, who breached their contracts and jumped to competitor organizations, and both deci-

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1. See *Motown Files \$1 Million Law Suit Against Teena Marie*, JET MAGAZINE, Aug. 30, 1983, at 53; *Gaff Sues Rod Stewart, Claiming Management Puberty Parts are Valid*, Variety, May 19, 1982, at 111; *Eddie Murphy Asks Court to Void Old Contract*, JET MAGAZINE, June 3, 1985, at 38.

2. 52 N.Y.2d 394, 420 N.E.2d 363, 438 N.Y.S.2d 482 (1981).

3. 67 A.D.2d 853, 413 N.Y.S.2d 21 (1st Dept. 1979).

sions fail to grant effective breach of contract remedies against the employees.

Parts I and II of this article will discuss the *Wolf* and *Wilhelmina* cases. Part III will describe the equitable contract remedies of specific performance and injunctions for breach of a personal services contract. Part IV will discuss a proposed new standard to permit the award of special damages that may provide a more effective remedy for future breaches of contract.

### I. *WOLF v. AMERICAN BROADCASTING COMPANIES*

Since coming to New York in 1976, Warner Wolf has become something of a fixture in local television news. Described as a "sports personality,"<sup>4</sup> Wolf's colorful delivery of the day's sports events with glib, cliched phrases<sup>5</sup> has made him a very popular television personality.

Wolf was employed by WABC-TV from 1976 to 1980, when he joined WCBS-TV, a competitor station and a co-defendant in the case. Wolf's contract with WABC contained a "first negotiations/first refusal" clause that required Wolf to enter into good-faith negotiations and prohibited the sportscaster from negotiating "with any other person or company other than WABC-TV or ABC"<sup>6</sup> for a period of 45 days of a 90-day "renegotiation" period preceding the contract's expiration date of March 5, 1980. Also, the clause provided that if Wolf and ABC could not reach agreement for an extension of the contract, Wolf was obligated not to accept employment as a sportscaster without first giving ABC an opportunity to employ him on substantially similar terms.<sup>7</sup> Only if ABC failed to offer him a similar contract, was Wolf free to accept the other offer.

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4. See N.Y. Times, Schwartz, June 12, 1980, § III, at 19, col. 1.

5. Wolf frequently cries "Let's go to the videotape" before narrating the highlights of a particular match. Also, he uses the term "swish" to describe a deft basketball shot and "boom" to describe a home run in a baseball game.

6. See *American Broadcasting Companies v. Wolf*, 76 A.D.2d 162, 163-64, 430 N.Y.S.2d 275, 277 (1st. Dept. 1980). WABC-TV is owned and operated by the American Broadcasting Companies (ABC) now a division of Capital Cities Broadcasting and WCBS-TV is owned and operated stations by CBS.

7. 76 A.D.2d at 164, 430 N.Y.S.2d at 277.

Although Wolf was obligated by the terms of the contract not to negotiate with a rival employer during the first part of the renegotiation period, the sportscaster did just that. Unbeknownst to ABC, Wolf met with representatives of WCBS-TV on several occasions, some of the meetings taking place even before the 45-day exclusive period began.<sup>8</sup> Those meetings ultimately resulted in Wolf's decision to resign from WABC and accept an offer at the rival station.

During that time, Wolf met with ABC officials, who on February 1, 1980 reluctantly accepted the sportscaster's demand for a three year contract at an annual compensation of \$400,000, \$450,000, \$500,000.<sup>9</sup> Yet, Wolf refused to accept the offer because of ABC's delays in getting back to him and told ABC that his lawyer advised Wolf to "see what the other options are."<sup>10</sup> On February 4th, Wolf agreed to the terms offered by CBS, which provided a two year contract at \$400,000 and \$450,000 per year.<sup>11</sup> and which had an exclusivity clause that barred him from offering any renewal of the contract with ABC.<sup>12</sup> Wolf did not tell ABC about his contractual arrangements with WCBS-TV. In fact, the arrangements were not disclosed until the action had

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8. According to the decision, Wolf met with WCBS-TV representatives on at least four occasions: October 4, 1979, October 16, 1979, February 1, 1980, and February 4, 1980. During those meetings, employment possibilities with WCBS-TV were discussed and by the final meeting, contracts were presented. Also on February 4th, CBS and Wolf agreed to an irrevocable option letter providing that in return for \$100 paid by Wolf "WCBS-TV agrees to hold open its offer of employment under the terms and conditions set forth in the attached draft agreement until June 4, 1980 and WCBS-TV shall not withdraw such offer prior to that date." *Id.* at 166, 430 N.Y.S.2d at 278-279.

9. *Id.* at 165, 430 N.Y.S.2d at 278.

10. *Id.*

11. Wolf actually agreed to two separate contracts, the first an 18-page sportscaster's agreement, and the second, an contract to produce sports specials (known as a "producer's agreement") consisting primarily of sixteen half-hour football specials for an initial pay period of thirteen weeks followed by a two-year term. The salary of \$400,000 for the first year and \$450,000 for the second year, was to be divided equally between the two agreements. *Id.* at 162, 430 N.Y.S. at 278.

12. The clause, which was in the producer's agreement, stated:

"Artist's services shall be completely exclusive to CBS during the term of this Agreement, and during such term Artist will not perform services of any nature for, or permit the use of Artist's name, likeness, voice or endorsement by, *any person, firm or corporation, or on Artist's own account, without Station's prior approval, which approval shall not be unreasonably withheld.*"

*Id.* at 165, 430 N.Y.S.2d at 279 (emphasis added).

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been commenced.<sup>13</sup> Wolf accepted WCBS-TV's offer with one month still left in the 90-day renegotiation period.

In subsequent meetings with ABC representatives, Wolf did not mention his commitment with WCBS-TV but advised his employer that he would not stay at the station, and that on June 4, 1980, he was free to commence employment elsewhere.<sup>14</sup> Although suspicious that Wolf might have made a deal in violation of the right of first negotiations/refusal clause, ABC, did not commence action until May 6th, by which time, Wolf's switch to WCBS-TV was a matter of public knowledge.<sup>15</sup>

ABC sought injunctive relief barring Wolf from working at WCBS-TV and specific performance of the contract with ABC by a direction that Wolf submit CBS's offer of employment to ABC to be matched.<sup>16</sup> ABC alleged that Wolf, induced by CBS, breached both the good-faith negotiation and first refusal provisions of the contract. Strangely, ABC's claim failed to state any claim for damages, relying solely on equitable relief.

The supreme court issued a preliminary injunction, prohibiting Wolf from work for WCBS-TV, but dismissed the action six days later.<sup>17</sup> An expedited appeal to the Appellate Division ensued.

In a 4-1 ruling, the Appellate Division concluded that although Wolf breached the aforementioned provisions, equitable intervention was unwarranted. Although castigating Wolf for deliberately breaching his obligations to ABC<sup>18</sup> and CBS for induc-

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13. *Id.*

14. June 4th was the day after the first-refusal period ended. On February 22nd, Wolf and ABC made an agreement covering Wolf's employment for the 90-day first-refusal period which ran until May 28th. *Id.* at 166, 430 N.Y.S. at 280.

15. *Id.*

16. *Id.*

17. The preliminary injunction was issued on June 3, by Justice Burton Sherman. The complaint was dismissed on June 9.

18. The court stated:

At the time the February 4th agreements were executed, 30 days remained in the 90-day good faith negotiation period provided in the 1978 ABC contract. By virtue of the all-inclusive exclusivity provision contained in the CBS producer's contract, Wolf was contractually precluded from accepting any ABC offer, no matter how attractive. Thus, by entering into the producer's contract, Wolf had deprived ABC of its right

ing the breach<sup>19</sup>, the court nevertheless ruled that ABC was not entitled to equitable relief.

Citing the general rule that equity will not enforce specific performance for personal services contracts, the opinion noted that specific enforcement of ABC's right to match CBS's offer under the first refusal clause and ultimate award of the contract to ABC is "all the more impractical as a remedy in light of Wolf's stated reluctance to continue working for ABC."<sup>20</sup> Unconvinced that ABC did not have an adequate remedy at law for any damages suffered because of the breach,<sup>21</sup> the court also rejected the request for injunctive relief, despite the fact that precedent existed for granting such relief if the personal services are unique.<sup>22</sup>

The opinion took pains to point out that the restrictive covenant not to negotiate "was an integral part of the first refusal provision and is limited to a term of three months following expiration of the contract. . . Thus, even were restraint appropriate,

under the 1978 contract to his good faith negotiations for the extension of that contract.

76 A.D.2d at 169-70, 430 N.Y.S. at 282.

19. The court stated:

This record makes apparent that the producer's agreement was, in fact, one-half of a contrived bifurcation of the sportscaster's agreement, already orally reached on February 1st, and that its all-inclusive exclusivity provision was the mechanism utilized by CBS to obtain, prior to the expiration of ABC's right of first refusal and in avoidance of it, Wolf's commitment to become the CBS sportscaster on June 4, 1980. Thus, CBS accomplished its goal of securing Wolf's sportscasting services on February 4th without the necessity of having Wolf actually sign a sportscaster's agreement until ABC's right of first refusal had expired. By so arranging the February 4, 1980 agreements, with knowledge of ABC's right of first refusal, CBS induced Wolf's breach of his 1978 contract with ABC. (citations omitted).

76 A.D.2d at 169, 430 N.Y.S.2d at 281.

20. *Id.* at 171, 430 N.Y.S.2d at 283.

21. The court stated that "no cogent reason is shown to break with precedent and to order an unwilling party to perform services of a personal nature, especially since we remain unconvinced that ABC does not have an adequate remedy at law for any damages suffered as a result of Wolf's breach." *Id.* at 172, 430 N.Y.S. at 284.

22. See *King Records, Inc. v. Brown*, 21 A.D.2d 593, 252 N.Y.S.2d 988 (1964); *Harry Rogers Theatrical Enters., Inc. v. Comstock*, 225 A.D. 34, 232 N.Y.S. 1 (1928); *Shubert Theatrical Co. v. Gallagher*, 206 A.D. 514, 201 N.Y.S. 577 (1923); *Long Island Am. Ass'n. Football Club v. Manrodt*, 23 N.Y.S.2d 858 (1940).

three months, and not the term of the CBS contract, would be the measure of the length of any restriction against Wolf working for a competitor."<sup>23</sup> It further narrowed the importance of the clause by holding that "the first refusal clause was not a restrictive covenant in the true sense. Rather, it was a three month moratorium on Wolf's employment as a sportscaster. . .and obviously intended as a bargaining tool by which to force Wolf into extending his contract with ABC."<sup>24</sup>

The court also denied ABC's motion to remit claims for damages to the lower court for a hearing, since ABC failed to submit any proof on the issue.<sup>25</sup>

The dissenting opinion<sup>26</sup> argued that ABC should have been granted equitable relief. Since a clause in the agreement with CBS stated that Wolf's services were unique, the opinion concluded that CBS could not seriously contest that Wolf's services were unique and ABC's monetary damages were difficult to prove. Addressing the issue of the scope of the negative covenant prohibiting Wolf from working for other television stations, the dissent held that the covenant "must be read into that contract if ABC's rights thereunder are to be effectively protected."<sup>27</sup> Ruling that the fact that Wolf accepted an offer prior to the expiration of the contract effectively negated ABC's right to match the offer CBS made to Wolf, the dissent concluded that Wolf breached the contract and should be enjoined from competing against ABC for the two year period of the contractual offer.<sup>28</sup>

The case was appealed to the Court of Appeals,<sup>29</sup> which affirmed the Appellate Division's ruling in a even more sympathetic light. Although it agreed that Wolf breached his obliga-

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23. 76 A.D.2d at 171, 430 N.Y.S.2d at 285.

24. *Id.*

25. Since "the action was commenced before Wolf had ever performed a single sportscast for WCBS, and even before the expiration of the three-month first-refusal period, during which ABC would have been without his service had he elected to remain 'on the breach,'" the opinion stated that it "seems fairly obvious that no thought was given to damages." *Id.*

26. *Id.* at 172, 430 N.Y.S.2d at 286 (Murphy, J., dissenting).

27. Paragraph 6. (a) stated: "Artist acknowledges that his services and the rights and privileges granted to CBS hereunder are unique; and CBS shall be entitled to injunctive and other equitable relief to prevent any breach of this Agreement by Artist." *Id.*

28. *Id.*

29. 52 N.Y.2d 394, 420 N.E.2d 363, 438 N.Y.S.2d 482 (1981).

tion to negotiate in good faith with ABC from December, 1979 through March, 1980, the opinion stated that “there was no basis in the record for the Appellate Division’s conclusion that Wolf violated the first refusal provision by entering into an oral contract with CBS on February 4th,” since the breach occurred during the actual contract period<sup>30</sup> and therefore his conduct “only violated the good-faith negotiation clause of the contract” [emphasis added].

After reiterating the prohibition against specific performance as a remedy for breaches of personal service contracts, the Court of Appeals discussed the claim for injunctive relief in some detail. Despite precedent permitting injunctive relief where “an employee either expressly or by clear implication agreed not to work elsewhere for the period of his contract,”<sup>31</sup> the court distinguished this case because the contract period already terminated, stating that public policy favors “robust and uninhibited competition.”<sup>32</sup> It added that “once the employment contract has terminated, equitable relief is potentially available only to prevent injury from unfair competition or similar tortious behavior. . . In the absence of such circumstances, the gen-

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30. *Id.* at 397, 438 N.Y.S.2d at 484-85. In explaining its conclusion, the Court of Appeals stated:

The first-refusal provision required Wolf, for a period of 90 days after termination of the ABC agreement, either to refrain from accepting an offer of employment or to first submit the offer to ABC for its consideration. By its own terms, the right of first refusal did not apply to offers accepted by Wolf prior to the March 5 termination of the ABC employment contract. It is apparent, therefore, that Wolf could not have breached the right of first refusal by accepting an offer during the term of his employment with ABC.

*Id.* at 400-01, 438 N.Y.S.2d at 485.

31. *Id.* at 398, 438 N.Y.S.2d at 486.

32. The court explained its rationale by stating:

Underlying the strict approach to enforcement of [anticompetitive] covenants is the notion that, once the term of an employment agreement has expired, the general public policy favoring robust and uninhibited competition should not give way merely because a particular employer wishes to insulate himself from competition (citations omitted) . . . Important, too, are the “powerful considerations of public policy which militate against sanctioning the loss of a man’s livelihood” (citations omitted).

52 N.Y.2d at 399, 438 N.Y.S.2d at 487.



eral policy of unfettered competition should prevail.”<sup>33</sup>

In near-apocalyptic terms, the court stated that if equitable relief were granted for “a simple, albeit serious, breach of a general contract negotiation clause,” it would serve as the basis “for an open-ended restraint upon the employee’s ability to earn a living should he ultimately choose not extend his employment.”<sup>34</sup>

The dissenting opinion<sup>35</sup> focused on the importance of the first refusal provision, interpreting it as an express conditional covenant under which Wolf could be restricted from appearing on the air other than for ABC for the 90-day post-termination period.<sup>36</sup> Due to Wolf’s breach, the opinion added, ABC was effectively denied the opportunity to exercise its rights.

In rejecting the majority conclusion — that Wolf could not have breached the first refusal clause when he accepted the agreement with WCBS since the acceptance occurred during the term of the contract — the dissent called that approach “a classical exaltation of form over substance [which] is hardly countenanced by equity.”<sup>37</sup> Applying the first refusal clause backwards to the period of the ABC contract, the dissent concluded that a modification of the Appellate Division’s order to include a 90-day injunction would be warranted.<sup>38</sup>

The failure of both the Appellate Division and the Court of Appeals to grant any equitable remedy against Wolf’s breach of contract effectively left ABC without any remedy and gave a license for Wolf and other popular broadcasters to violate their obligations. Although ABC probably made a tactical mistake in not claiming damages, it is unlikely that traditional contract damage formulas would have made ABC “whole,” since any damages, such as lost ratings, shown at the time ABC brought the action would be speculative.

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33. *Id.*

34. *Id.*

35. *Id.* at 400, 438 N.Y.S.2d at 488 (Fuchsberg, J., dissenting).

36. *Id.*

37. *Id.* at 401, 438 N.Y.S.2d at 489.

38. *Id.*

## II. *WILHELMINA MODELS v. IMAN ABDULMAJID*

The case of *Wilhelmina Models v. Abdulmajid*<sup>39</sup> involves an even more flagrant breach by the employee. Iman Abdulmajid<sup>40</sup> is a well-known fashion model who has frequently graced the covers of many magazines. In 1975, she was "discovered" in her native Kenya by a professional photographer who sent pictures of Iman to plaintiff Wilhelmina Cooper, the president of the plaintiff modeling company. Iman, at Wilhelmina's urging, came to New York and signed a personal services contract on October 27, 1975 designating Wilhelmina as the sole and exclusive personal and business manager for Iman for a period of three years. The contract had a clause acknowledging that Iman's services were "extraordinary and unique and there was no adequate remedy at law for a breach of this agreement" and equitable remedies would be proper in a breach or attempted breach.<sup>41</sup>

Iman became a successful model, with earnings increasing threefold from 1976-1978.<sup>42</sup> With ten months left in her contract, Iman informed Wilhelmina that she was leaving the agency to go to Elite, a rival firm. Shortly thereafter, Iman appeared in the listing of models represented by Elite.

Wilhelmina brought an action seeking to enjoin Iman from working for Elite or any other agency. The lower court granted the requested relief, relying heavily on an earlier decision, *King Records, Inc. v. Brown*,<sup>43</sup> in which a musical performer was enjoined from recording for anyone other than the plaintiff, in part because he had signed a "uniqueness" clause similar to the one in Iman's agreement.<sup>44</sup>

However, the Appellate Division unanimously reversed in a

39. 67 A.D.2d 853, 413 N.Y.S.2d 21 (1st Dept. 1979).

40. Known professionally as and hereinafter referred to as "Iman."

41. See Rudell, *The Case of Iman and a Model's Agency*, *New York Law Journal*, June 18, 1979, at 1, col. 1.

42. She earned \$32,000 in 1976, \$72,000 in 1977 and over \$100,000 in 1978.

43. 21 A.D.2d 593, 252 N.Y.S.2d 988 (1st Dept. 1964). This opinion will be discussed in greater detail in section III, *infra*.

44. "The 1960 contract expressly provides Brown's services are unique and extraordinary. The nature and extent of the recordings made by Brown under plaintiff's contract and the large quantity thereof publicly sold substantiate the contract characterization of Brown's services as unique and extraordinary." *Id.* at 595, 252 N.Y.S.2d at 990.

memorandum decision, concluding that the plaintiff had not shown irreparable injury, and strongly questioning whether Iman's services were unique. Stating that "the uniqueness of [Iman's] services would seem to be somewhat diluted by the fact that [Wilhelmina] required all models it manages to sign contracts with such recitations,"<sup>45</sup> the opinion concluded by noting that:

Insofar as defendant model's services are 'unique' in the sense that she looks like herself and not somebody else and is very popular, that uniqueness is not vis-a-vis the plaintiff but vis-a-vis the photographers and commercial organizations who hire the model. Vis-a-vis [Wilhelmina], [Iman] is simply one of a number of models whom plaintiff manages, some of whom are in the same price category. . . .<sup>46</sup>

Distinguishing the case from *King Records, Inc. v. Brown*, the appellate division stated that Iman did not render services nor receive payment from Wilhelmina, but rather paid Wilhelmina as her agent.<sup>47</sup> The court concluded irreparable harm could not be shown and that damages would appear to be an adequate remedy.

The court in *Wilhelmina* sidestepped the question of whether the model's services were unique by stating that the uniqueness clause was in every contract made by the agency and that any notoriety and uniqueness was in large part due to the efforts of the photographers rather than the intrinsic beauty of the model. The decision also didn't address the circumstances that caused the apparently willful breach and the speculative nature of any damages. The court's lack of notice of Iman's talents — calling her one a number of models managed by Wilhelmina — would have made proving damages very difficult.

In failing to grant equitable relief, *Wolf* and *Wilhelmina* serve to undermine the rights of aggrieved employers and managers of entertainers and serve as a substantial attack on the sanctity of contracts. With little likelihood of equitable relief

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45. 67 A.D.2d at 853-54, 413 N.Y.S.2d at 23.

46. *Id.*

47. *Id.*

and the difficulty of proving damages, a license to breach such personal service contracts has been made.

### III. RECENT DECISIONS

Since the aforementioned cases have been decided, more recent opinions have tended to apply *Wolf* and *Wilhelmina* to general business contract problems, rather than in the entertainment sphere.<sup>48</sup> The only recent New York decision that tangentially deals with the unique type of employee like *Wolf* and *Wilhelmina* is *Victor Temporary Services v. Slattery*,<sup>49</sup> a ruling that sidestepped the issue as to whether a high ranking employee of a "temporary employment agency" was unique and extraordinary.

The defendant-employee in *Slattery* was the branch manager of the agency's Rochester office for nine years. While so employed, the defendant had signed an agreement which prevented her from competing with her employer for a period of one year after she left her employment with the plaintiff. Four months after she ended her employment with the plaintiff employment agency, the defendant opened her own temporary employment

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48. See, e.g. *Quandt's Wholesale Distribs. v. Giardino*, 87 A.D.2d 684, 448 N.Y.S.2d 809 (3d Dept. 1982), *aff'd*, 56 N.Y.2d 85, 452 N.Y.S.2d 329 (1982) (food salesman's restrictive covenant not to compete for a period of six months after termination in sales area held invalid since there was no evidence that employee's services were unique and extraordinary and no evidence that employee had access to trade secrets); *McKay v. Communispond, Inc.*, 581 F. Supp. 801 (S.D.N.Y. 1983) (former employee's three-year restrictive covenant not to pursue his career as an instructor in the business communications field held invalid, due to New York's antipathy towards such anticompetitive clauses; the decision also noted that the employee never signed any employment contract); *Scott Paper Co. v. Finnegan*, 101 A.D.2d 787, 476 N.Y.S.2d 316 (1st Dept. 1984) (former employer failed to demonstrate that employee-manager in paper company was unique or extraordinary or privy to trade secrets and injunction preventing him from assuming comparable position with rival firm was improper); *Alexander & Alexander Services v. Maloff*, 105 A.D.2d 1066, 482 N.Y.S.2d 386 (4th Dept. 1984) ("[A] covenant not to compete must meet not only the foregoing criteria, but will be specifically enforceable only to the extent that it is necessary to protect the employer's legitimate interests, is not harmful to the general public, and is not unreasonably burdensome to the employee" (citation omitted).); *Kraft Agency, Inc. v. Delmonico*, 110 A.D.2d 177, 494 N.Y.S.2d 77 (4th Dept. 1985) (part of covenant not to compete against insurance agency within 50 miles for five-year period after sale of company held invalid as too broad); *Wolff v. Wolff*, 67 N.Y.2d 638, 490 N.E.2d 532, 499 N.Y.S.2d 665 (1986) (lower court abused its discretion in enjoining, with no limitation in time or geography, a shareholder in a close corporation from engaging in legitimate competition with that corporation).

49. 105 A.D.2d 1115, 482 N.Y.S.2d 623 (4th Dept. 1984).

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agency three blocks from the plaintiff and solicited business from those she previously dealt with while working for plaintiff.<sup>50</sup> After failing to comply with the plaintiff's notices to stop her activity, the plaintiff commenced an action for injunction relief.

Citing *Wolf*, the Appellate Division ruled in a memorandum opinion that such covenants are disfavored by the court and modified a lower court ruling granting the relief. The appellate court ruled that questions of fact existed as to whether the employee was in fact "unique and extraordinary" and whether she had access to trade secrets.<sup>51</sup>

A recent California decision, *Motown Record Corp. v. Brockert*,<sup>52</sup> involved a fact situation not unlike that in *Wilhelmina*, but the bulk of the opinion dealt with the interpretation and legislative history of a state statute that limits injunctive relief. The case involved the singer Tina Marie Brockert,<sup>53</sup> who signed exclusive personal services contracts with the plaintiff record company and music publisher. Each contract had a duration of one year, but granted the companies six options to renew for one year periods. During the contract period, "Teena Marie" became a very popular singer, achieving "Gold Record" status.<sup>54</sup>

During the last option, Teena Marie informed the plaintiffs that she would no longer perform under the contracts and gave a written notice of rescission. Upon learning of her intention to perform for another company, the plaintiffs sought a preliminary injunction to prevent Teena Marie from performing such services until the expiration of her contract in 1983.<sup>55</sup>

California statutory law provides that a personal services contracts must pay a minimum compensation of \$6,000 per year before a court can even consider imposing injunctive relief for a

50. *Id.* at 1116, 482 N.Y.S.2d at 624.

51. *Id.*

52. 160 Cal. App. 3d 123, 207 Cal. Rptr. 574 (1984).

53. Professionally known as "Teena Marie."

54. She attained that position after her fourth and last album for Motown, "It Must Be Magic." The album sold over 400,000 copies.

55. 160 Cal. App. 3d at 128, 207 Cal. Rptr. at 577.

breach.<sup>56</sup> Each of the options agreed to by Teena Marie and the record company would pay the singer a minimum of \$6,000 if exercised. The lower court, citing § 3423 of the California Civil Code, granted the requested relief.

The appellate court ruled otherwise. In a unanimous opinion, the court ruled that based on legislative history and statutory interpretation, § 3423 only applied to contracts which guarantee the performance of a minimum of \$6,000 per year, and not to an option of \$6,000, which was merely “a potential” compensation, rather than a guaranteed compensation.<sup>57</sup> The decision also noted that applying the statutory provision to an option clause would defeat the legislative intent to “limit injunctive relief to contracts where not only the services are special or unique but the performer herself is a person of distinction in her field at the time of entering the contract.”<sup>58</sup>

The court concluded by noting that the record company did not make a contract with a “star,” but with a “virtual unknown.” Due to that qualitative distinction, the court determined that damages would be the appropriate remedy.<sup>59</sup>

Due to the courts’ increasing reluctance to grant injunctions, some new or expanded traditional remedies may be necessary to rectify this problem. Some of these expanded remedies are: a greater use of restrictions on specific performance, the expanded use of injunctions, or the more liberal use of special or punitive damages.

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56. See CAL. CIV. CODE § 3423, which states:

An injunction cannot be granted: . . . [t]o prevent the breach of a contract, other than a contract in writing for the rendition or furnishing of personal services from one to another where the minimum compensation for such services is at the rate of not less than \$6,000 per annum and where the promised services is of a special, unique, unusual extraordinary or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, the performance of which would not be specifically enforced. . . .

57. 160 Cal. App. 3d at 135, 207 Cal. Rptr. at 582.

58. *Id.* at 136, 207 Cal. Rptr. at 582.

59. *Id.* at 138, 207 Cal. Rptr. at 584.

## IV. PROPOSED REMEDIES

## A. EXPANSION OF SPECIFIC PERFORMANCE

Specific performance, the forced performance of a contractual obligation,<sup>60</sup> is granted by a court of equity when damages awards are impractical or inadequate.<sup>61</sup> Specific performance is clearly an exceptional remedy.<sup>62</sup> Although courts have displayed willingness to grant specific performance in contracts involving the sale of land,<sup>63</sup> sale of antiques,<sup>64</sup> patent rights,<sup>65</sup> and long-term output and requirements contracts,<sup>66</sup> they are clearly unwilling to impose this remedy for personal services contracts on the ground that specific performance would create an objectionable form of slavery or personal servitude.<sup>67</sup>

An element of uniqueness must be present in every contract involved in a specific performance case. Yet, in *Wolf* and

60. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 16-2 (2d ed. 1977).

61. *Id.* at § 16-1.

62. 11 S. WILLISTON, *WILLISTON ON CONTRACTS* § 1338 (3d ed. 1968); 5 A. CORBIN, *CORBIN ON CONTRACTS* § 993 (1964).

63. Real property contracts, covenants running with the land and options to purchase land have traditionally been enforced by grants of specific performance. *See Mobil Oil Corp. v. Brennan*, 385 F.2d 951 (5th Cir. 1967) (covenant running with the land); *Abdallah v. Abdallah*, 359 F.2d 170 (3rd Cir. 1966) (option to purchase real property); *McCullough v. Newton*, 348 S.W.2d 138 (Mo. 1961) (sale of land). *See also Kronman, Specific Performance*, 45 U. CHI L. REV. 351 (1978).

64. Such contracts are specifically enforceable on the ground that the item has attained a sentimental significance or value over and above its monetary value. *See Pusey v. Pusey*, 23 Eng. Rep. 465 (1684) (transfer of an ancient horn); *Burr v. Bloomsburg*, 101 N.J. Eq. 615, 33 A. 962 (1927) (sale of a diamond ring); *Falcke v. Gray*, 62 Eng. Rep. 250 (1859) (sale of two china jars). *See Kronman, supra* note 63, at 356, n.21.

65. *Patent & Licensing Corp. v. Olsen*, 188 F.2d 522 (2d Cir. 1951) (employee ordered to assign patents on process developed while in the course of employment to employer).

66. *See Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33 (8th Cir. 1975) (supply of gas to residential subdivisions); *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3rd Cir. 1948) (sale of carrots); *Eastern Rolling Mill Co. v. Michlovitz*, 157 Md. 51, 145 A. 378 (1929) (scrap iron). *See also Kronman, supra* note 63, at 356, n.25.

67. The policy that equity will not award specific performance for contracts for personal services is said to be based on the difficulty of gauging proper performance, the American commitment to personal liberty, and the undesirability of forcing cooperation between the parties if confidence and loyalty have already been destroyed. *See* 5A A. CORBIN, *CORBIN ON CONTRACTS* § 1204 at 400-01 (1964). The Thirteenth Amendment to the U.S. Constitution states: "Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." *See also Sanquirino v. Benedetti*, 1 Barb. 315 (Sup. Ct. 1st Dept. 1847); *De Rivafinoli v. Corsetti*, 4 Paige Ch. 264 (N.Y. Ch. 1833).

*Wilhelmina*, the respective courts were reluctant to call the defendants “unique” to warrant specific performance and to acknowledge that money damages would not be adequate.

Some legal scholars have advocated the more liberal use of specific performance on the ground that it would be more efficient economically than damage awards.<sup>68</sup> Professor Linzer had advocated the adoption of a two-step test for determining whether specific performance should be decreed. First, a comparison of the efficiency of money damages with that of specific performance. If money damages is less efficacious than specific performance, the second tier would be applied, that is, whether specific performance would cause unusual hardships by enslavement or by costs for society.<sup>69</sup>

This test could possibly lead to the use of specific performance as a remedy for breaches of personal service contracts in at least a few, if not all situations. Looking at *Wolf* and *Wilhelmina*, the loss of Wolf by ABC and Iman by Wilhelmina produced damages that would be difficult to determine or speculative under today’s standards, such as lost ratings and lost bookings. Thus, the first leg of Professor Linzer’s test would be met. As to the second tier, it may be possible that the society’s interest in the sanctity of contract may outweigh the hardships caused by the employees who must perform.

Still, it would be difficult and impractical even under this proposed standard to award specific performance against Wolf and Iman. Wolf claimed that he was dissatisfied with executives at ABC and refused to work there even after ABC accepted his salary demands. However, in *Wilhelmina* such relief may be somewhat more likely, since there was no evidence that Iman disliked her manager, but rather went to a rival for a more lucrative contract. This Linzer formula could apply to other entertainers who may decide to breach their obligations for more money, and not because they felt ill will towards their

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68. See Kronman, *supra* note 63; Linzer, *On the Amoralism of Contract Remedies — Efficiency, Equity and the Second Restatement*, 81 COLUM. L. REV. 111 (1981).

69. Linzer, *supra* note 68, at 131. Also, another reason why the courts are reluctant to impose specific performance to personal services and even most non-personal services contracts is the difficulty of supervision. See J. CALAMARI & J. PERILLO, *supra* note 60, at § 16-10.



employers. The moral justification to keep and adhere to promises made also forms an important consideration for the expansion of the remedy of specific performance.<sup>70</sup> If, as in *Wolf* and *Wilhelmina*, individuals can breach contracts with little or no punishment, what incentive is there for others in our society to honor contractual obligations? In fact, the altering or renegotiating of contracts has become more prevalent in the last two decades.<sup>71</sup>

Although it is admittedly unlikely that specific performance will become more suitable for personal services contracts, the arguments of professor Linzer could apply:

The general use of specific performance could produce truer economic efficiency than the present system, that counts the money cost of performance to the promisor and not the emotional and other costs of nonperformance to the promisee. Money damages lend themselves to the selection valuation so often based by economists, discounting things that are important to some people but that do not easily translate into money. By holding the parties to their bargain, but permitting them to negotiate out, specific performance lets no outsiders substitute their values for those of the parties.<sup>72</sup>

With the prevailing attitudes in favor of individual rights<sup>73</sup>

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70. See Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 278 n.26 (1979)(citing J. MACKIE, ETHICS 110-11, 116-18, 184-85 (1977)).

71. This has been especially true in the area of sports. See N.Y. Times, Jan. 20, 1984, § 1, at 18, col. 5 (football player renegotiates contract with team after buying himself out of option held by New Jersey Generals football team of the United States Football League); N.Y. Times, Feb. 10, 1985, § 1, at 42, col. 5 (baseball player wins ruling in breach of contract action against the Kansas City Royals. Blue to receive between \$1 million and \$1.5 million); N.Y. Times, Mar. 10, 1985, § 5, at 1, col. 3 (Yankees fail to appease player Don Mattingly with two-year \$1 million contract. Old contract renewed at \$320,000 as Mattingly reacts bitterly).

72. Linzer, *supra* note 68, at 138.

73. U.S. CONST. amends. XIII and XIV. See 42 U.S.C. § 1983, which states that:

Every person, who, under color of any statute, regulation, ordinance, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be lia-

and the generally limited use of specific performance, it does not seem likely that the doctrine of specific performance will be expanded to be an effective remedy for entertainers' breach of personal service contracts. Also, due to the higher costs in terms of time and commitment, such a remedy would not be the best way to prevent wholesale breaches of such agreements.

## B. INJUNCTIVE RELIEF

Due to the traditional dislike of the use of specific performance for personal services contracts, the courts came up with the concept of a "negative injunction" to take effect during the contract period, preventing the breaching party from performing the same contractual duties for anyone other than the plaintiff for the remainder of the contract period.<sup>74</sup> The negative injunction has traditionally been an effective remedy to prevent employees who have had access to trade secrets,<sup>75</sup> customer lists,<sup>76</sup> and those who are "unique"<sup>77</sup> from breaching their contracts.

Injunctive relief against breaches by unique entertainers was first granted in the 19th Century English case of *Lumley v. Wagner*.<sup>78</sup> *Lumley* involved a fact situation not unlike that in *Wilhelmina*. Johanna Wagner, a famous opera singer,<sup>79</sup> contracted to perform a specified number of times in a theater that the plaintiff had rented. The contract contained a promise not to perform for anyone else during the contract period, but the singer broke the promise and made a contract to perform for

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ble to the party injured in an action at law, suit in equity or other proceeding for redress.

74. J. CALAMARI & J. PERILLO, *supra* note 60, at § 16-19; J. WEISHART & C. LOWELL, *THE LAW OF SPORTS* § 4.03 (1979).

75. J. CALAMARI & J. PERILLO, *supra* note 60, at § 16-19.

76. *Id.* See also *Quandt's Wholesale Distribs. v. Giardino*, 87 A.D.2d 684, 448 N.Y.S.2d 809 (3d Dept. 1982), *aff'd*, 56 N.Y.2d 85, 452 N.Y.S.2d 329 (1982); *Mixing Equip. Co. v. Philadelphia Gear, Inc.*, 436 F.2d 1308 (3d Cir. 1971); *Town & Country House & Home Serv. v. Newbery*, 3 N.Y.2d 554, 147 N.E.2d 724, 170 N.Y.S.2d 328 (1958).

77. *Victor Temporary Servs. v. Slattery*, 105 A.D.2d 1115, 482 N.Y.S.2d 623 (4th Dept. 1984); *McKay v. Communispond, Inc.*, 581 F. Supp. 801 (S.D.N.Y. 1983); *Purchasing Assocs., Inc. v. Weitz*, 13 N.Y.2d 267, 196 N.E.2d 245, 246 N.Y.S.2d 600 (1963).

78. 42 Eng. Rep. 687 (Ch. 1852).

79. Johanna Wagner was the niece of the composer Richard Wagner and "was not an unknown member of a chorus line. She was one of Europe's best-known opera singers," called "the cantatrice of the Court of His Majesty the King of Prussia." See *Motown Record Corp. v. Brockert*, 207 Cal. Rptr. at 583.

another theater manager. The English court granted the requested injunctive relief.

The *Lumley* rationale was accepted by American courts resulting in the enjoining of newspaper columnists, athletes, actors, singers and other performers from working for new employers.<sup>80</sup> In order for an injunction to be issued against a former employee, the plaintiff must establish that: (1) such relief is necessary to avoid irreparable injury; (2) that no adequate remedy of law (damages) exists; and (3) a likelihood of success on the merits.<sup>81</sup> The mere existence of competition by a former employee will not, in itself, support the issuance of an injunction.<sup>82</sup>

New York's most important rationale of *Lumley* comes in the case of *King Records Inc. v. Brown*.<sup>83</sup> *King Records*, cited and distinguished in *Wolf*,<sup>84</sup> involved James Brown, a vocalist, musician and orchestra leader who breached an exclusive recording and distribution agreement with plaintiff's record company when Brown signed a similar agreement with a record company

80. See *Harry Rogers Theatrical Enters. v. Comstock*, 225 A.D. 34, 232 N.Y.S. 1 (1928); *Shubert Theatrical Co. v. Gallagher*, 206 A.D. 514, 201 N.Y.S. 577 (1923); *Long Island Am. Assoc'n. Football Club, Inc. v. Manrodt*, 23 N.Y.S.2d 858 (Sup. Queens, 1940); *Harry Hastings Attractions v. Howard*, 119 Misc. 326, 196 N.Y.S. 228 (1922); *Associated Newspapers v. Phillips*, 294 F. 845 (2d Cir. 1923); *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 51 A. 973 (1902); *Skyland Broadcasting Corp. v. Hamby*, 141 N.E.2d 783 (Ct. Comm. Pleas, Ohio, 1957); *Clooney v. WCPO TV Div. of Scripps-Howard B.C.*, 35 Ohio App. 2d 124, 300 N.E.2d 256 (1973); *Cullman Broadcasting Co. v. Bosley*, 373 So.2d 830 (Ala. 1979); *Evening News Ass'n. v. Peterson*, 477 F. Supp. 77 (D.D.C. 1979).

81. 43 C.J.S. *Injunctions* § 17 et. seq. See also *Beacon Theatres v. Westover*, 359 U.S. 500 (1959); *Quandt's Wholesale Distribs. Inc. v. Giardino*, 87 A.D.2d 684, 444 N.Y.S.2d 809 (3d Dept. 1982); *Chicago Research and Trading v. New York Futures Exch.* 84 A.D.2d 413, 446 N.Y.S.2d 280 (1st Dept. 1982). Some courts have adopted a somewhat more flexible standard to determine if injunctive relief is warranted. See *Wainwright Sec. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1971) (a plaintiff must establish: "irreparable injury, combined with either a probability of success on the merits, or a fair ground for litigation and a balance of the hardships in his favor.").

82. Although many restrictive covenants contain clauses stating that the former employee admits that a breach of contract will produce "irreparable harm," no case has been found in which a court held such harm existed solely on such a clause. See *Liddle & Gray, Proof of Damages for Breach of a Restrictive Covenant or Noncompetition Agreement*, 9 EMP. REL. L.J. 455, 471 n.2 (1983).

83. 21 A.D.2d 593, 252 N.Y.S.2d 988 (1st Dept. 1964).

84. On June 23, 1960, plaintiff and Brown entered into a written agreement whereby his "exclusive personal services in connection with the production of phonograph records" were engaged by King Records for the period of five years commencing July 1, 1960. Brown covenanted during the contract period not to make recordings for any other person. 252 N.Y.S.2d at 990.

organized by him and his manager about eighteen months before the expiration of the first contract. After concluding that the corporate defendants had knowledge of the earlier contract, the court granted an injunction restraining Brown from recording and restraining the other defendants from manufacturing, distributing or selling any recordings of Brown.<sup>85</sup>

In comparing the rationale of the court in *King Records* to that in *Wolf* and *Wilhelmina*, it is apparent how times have changed. In *King Records*, the court stated that “the nature and extent of the recordings made by Brown substantiate the characterization of Brown’s services as unique and extraordinary.”<sup>86</sup> It added that the fact that the defendant (Mercury Records) paid \$27,000 to Brown’s company to distribute the records “confirmed Mercury’s appraisal of Brown’s services as unique and extraordinary.”<sup>87</sup> In *Wolf* and *Wilhelmina*, the contracts also had clauses classifying the parties’ services as unique and extraordinary. Also, the facts clearly showed that competitors were willing to pay top dollar to those individuals in the hope of convincing *Wolf* and *Wilhelmina* to sign new agreements. Yet, the respective courts gave little time or effort to ABC’s claims that *Wolf*’s services were unique and the court in *Wilhelmina* concluded that her services were not unique at all.

Another analogous case, *Long Island American Association Football Club v. Manrodt*,<sup>88</sup> also demonstrates the differing approach as to what constitutes unique services. In *Manrodt*, the plaintiff football club sought an injunction to restrain the defendants from playing for any other club. The defendants signed a contract to play with the plaintiff, but shortly afterward signed to play with a team in a rival league. In holding that the services were indeed unique, the court stated:

Once a team is organized and the football season begins, it may be extremely difficult to find adequate replacements for players about whom plays have been planned . . . by reason of the fact that

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85. *Id.* at 992.

86. *Id.* at 990.

87. *Id.*

88. 23 N.Y.S.2d 858 (Sup. Queens, 1940).

after the start of the season, most of the desirable players have already been hired by other clubs.<sup>89</sup>

Although the players in question did not claim to be “stars” or team leaders, the court ruled that their selection to the team in itself made their service unique. In *Wilhelmina*, the court stated that despite the fact that she was chosen by a prestigious model agency, she was still “one of a number of models whom plaintiff managed, some of whom are in the same price category as the defendant.”<sup>90</sup>

California courts have also been very reluctant to impose injunctive relief, despite the fact that injunctions on personal services contracts are governed by statute.<sup>91</sup> This has held true even in cases involving such well-known entertainers as Redd Foxx.<sup>92</sup> The only major exception to this trend is *MCA Records v. Newton-John*,<sup>93</sup> where the popular singer Olivia Newton-John made an agreement where she was obligated to produce for the record company two albums a year with an option for additional albums in return for the payment of substantial royalties.<sup>94</sup> Relying on the California Civil Code’s injunction provision, the court upheld the injunction since Ms. Newton-John was an established star with “unique and extraordinary” talents and had guaranteed compensation over \$6,000 no matter if the record succeeded in the marketplace or not.<sup>95</sup>

89. *Id.* at 860.

90. 67 A.D. 2d at 854, 413 N.Y.S.2d at 22-23.

91. See *KGB v. Giannaoulas*, 104 Cal. App. 3d 844; 164 Cal. Rptr. 571 (1980). A radio station sued an ex-employee/mascot for breach of an employment contract, unfair competition and injunctive relief to stop a former employee from appearing in a chicken suit, the costume he had worn while appearing as the station’s mascot. The defendant, popularly known as the “KGB Chicken,” made post-employment appearances in a modified chicken costume. The court denied injunctive relief, claiming that such a restraint would impair the defendant’s right to be engaged in gainful employment and would be fundamentally unfair.

92. See *Foxx v. Williams*, 244 Cal. App. 2d 223, 52 Cal. Rptr. 896 (1966). Comedian Redd Foxx brought an action for an accounting against a recording company which was distributing his albums. The company sought an injunction to prevent Foxx from breaching the exclusivity clause of his contracts. The lower court granted the injunctive relief, but the appellate court reversed, ruling that since Foxx was not *guaranteed* at least \$6,000, injunctive relief is barred under California Civil Code § 3423.

93. 90 Cal. App. 3d 18, 153 Cal. Rptr. 153 (1979).

94. MCA agreed to pay royalties and nonreturnable advance of \$250,000 for each album recorded in the initial two-year period and \$100,000 for each album recorded in the option years. *Id.* at 21.

95. 90 Cal. App. 3d at 22, 153 Cal. Rptr. at 157.

The rationales of *Wolf* and *Wilhelmina* serve to make injunctive relief an even more limited, remedy than in the past. Since these cases were decided it would seem that proving “uniqueness” would pose a greater burden for an employer or manager and would effectively leave them without a remedy if an injunction would be denied.

## V. NEW FORMS OF DAMAGES — THE MOST EFFECTIVE REMEDY

Damages, the most common form of relief for aggrieved parties, seeks to place that party in the same economic position he would have had if the contract had been performed.<sup>96</sup> That basic premise derives from a philosophy, first espoused in the seminal case of *Hadley v. Baxendale*<sup>97</sup> that a promisor is only liable for damages which “arise naturally” from a breach or that were in the contemplation of the parties at the time they made the contract.<sup>98</sup> The first prong is known as “general” damages and the second as “special” damages.

The rule in *Hadley* focuses on the certainty or definiteness of damages, a concept that must be expanded in cases of the breach of high-powered personal services contracts. To prove certainty, a “higher caliber” of evidence must be required than is needed in other factual issues.<sup>99</sup> The most practical kind of damages, lost profits, usually cannot be proven under this standard. Therefore, it has usually been held that lost profits caused by a breach of an entertainment contract are too speculative.<sup>100</sup>

With “star” entertainers, a relaxation of this rule would be most beneficial. An employer or manager may prefer to obtain such damages rather than an injunction, since, under injunctive

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96. J. CALAMARI & J. PERILLO, *supra* note 60, at § 14-4. See also U.C.C. § 1-106; 5 A. CORBIN, *supra* note 62, at § 992; 11 S. WILLISTON, *supra* note 62, at § 1338.

97. 156 Eng. Rep. 145 (1854).

98. *Id.* at 151. The rationale for this standard is to control large damage verdicts by juries, keeping the jury from placing too high a value on the promisee’s “subjective” loss. See Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365, 1391-92 n.134 (1982)(citing G. GILMORE, *THE DEATH OF CONTRACT* 126 n.122 (1974)).

99. J. CALAMARI & J. PERILLO, *supra* note 60, at § 14-8.

100. See *Narragansett Amusement Co. v. Riverside Park Amusement Co.*, 260 Mass. 265, 157 N.E. 532 (1927); *Bernstein v. Meech*, 130 N.Y. 354, 29 N.E. 255 (1891).

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relief, no compensation is received for the loss and the organization loses the services of the entertainer. A calculation of "lost ratings" or "lost bookings" would be easy to ascertain and an effective means of calculating damages.

Though rare, some courts have granted such relief in the past. In *Orbach v. Paramount Pictures Corp.*,<sup>101</sup> the court decided that a theater was able to recover on the basis of proof of net profits prior and subsequent to the period of breach and of the profits of another theater in the same city. Yet other courts, on the same facts, ruled the other way.<sup>102</sup> A relaxation of the "certainty" rule by the adoption and expansion of *Orbach* would bring "lost ratings" and "bookings" into the realm of lost profits.

## A. EXPANSION OF LOST PROFITS

In the last fifteen years, several cases in the sports law field have discussed novel and intelligent ways to expand the notion of lost profits. *Lemat Corp. v. Barry*,<sup>103</sup> the San Francisco Warriors basketball team sought to recover lost ticket revenues as damages for the loss of star player Rick Barry.<sup>104</sup> A lower court ruled that the team had been injured in the amount of \$365,000, the difference between the gross receipts and a projected amount that would have been received had he participated.<sup>105</sup> Although the appellate court denied the request, since injunctive relief was already granted, it did not specifically reject this method of calculating damages.<sup>106</sup>

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101. 233 Mass. 281, 123 N.E. 669 (1919).

102. *But cf.* *Broadway Photoplay Co. v. World Film Corp.*, 225 N.Y. 104, 121 N.E. 756 (1919) which held that similar proof of damages were held to be too uncertain. *See J. CALAMARI & J. PERILLO, supra* note 60, at § 14-8.

103. 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969).

104. 275 Cal. App. 2d at 265, 80 Cal. Rptr. at 243. Barry was sitting out a season after an injunction was granted to prevent him from going to another team. *See also* Whitehill, *Enforceability of Professional Sports Contracts — What's the Harm in it?*, 35 Sw. L.J. 803 (1981).

105. *Id.* The amount of the projected receipts was calculated by multiplying the immediately preceding year's gross receipts by the average percentage growth rate of receipts for the entire National Basketball Association during the year in question, less additional costs that would have been incurred had Barry played. The result was a \$365,000 decline in revenues. *See* Whitehill, *supra* note 104, at 814-15.

106. *But* the decision stated in dictum that damages were speculative and too uncertain. 275 Cal. App. 2d at 678, 80 Cal. Rptr. at 246.

Other calculations of damages have also been argued,<sup>107</sup> such as loss of playoff participation rewards.<sup>108</sup> The inability to increase the price of tickets in the subsequent year has also been as a basis for determination of damages.<sup>109</sup>

A related concept is the question of whether "lost future royalties" can be recovered when a publishing or licensing agreement is breached. Although such damages are generally regarded as too speculative because "the whim and fancy of the public determines sales upon which royalties are based,"<sup>110</sup> the courts have accepted the possibility that such awards can be granted.<sup>111</sup> The United States Court of Appeals for the Second Circuit, in upholding a damage award, recognized that in some cases a jury's damage estimate cannot be achieved with scientific precision, and concluded that only a reasonable approximation of damages is necessary.<sup>112</sup>

A great receptiveness to lost profits would serve as an effective remedy to cases like *Wolf* and *Wilhelmina*. Evidence such as a drop in ratings by WABC or a gain in ratings by WCBS-TV after *Wolf* switched employers could be a standard of reference

107. See *Tomjanovich v. California Sports, Inc.*, No. 78-243 (S.D. Texas, Oct. 10, 1979). The Houston Rockets sought to recover business losses from the player's absence during one season and for losses incurred in the immediately succeeding year. The current year's loss was calculated by subtracting the average per game walk-up sales receipts for games in which Tomjanovich did not play from the average per game receipts for games he did play and subtracting additional expense that would have been incurred if the attendance had been at the higher level. The resulting figure was the loss in net walk-up sales receipts. Whitehill claims that these calculations focused on the specific negative impact on the club and "approaches actual damages more closely" than in *Lemat*. Whitehill, *supra* note 104, at 816.

108. *Id.* at 817. The team in *Tomjanovich* calculated lost playoff revenues by first determining that Tomjanovich's net scoring contribution was slightly more than five points per game and 15 games in the current season were lost by five points or less after the player's injury. If those games had been won, the Rockets would have qualified for the first round of the playoffs.

109. Whitehill, *supra* note 104, at 817 n.131.

110. See *Freund v. Washington Square Press, Inc.*, 34 N.Y.2d 379, 314 N.E.2d 419, 357 N.Y.S.2d 857 (1974).

111. In *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918 (2d Cir. 1977), the defendant, a producer and distributor of records withdrew a record by the plaintiff after it had achieved a modest amount of success. The court upheld a jury determination awarding the plaintiff damages.

112. *Id.* See also House, *Good Faith Rejection and Specific Performance in Publishing Contracts: Safeguarding the Author's Reasonable Expectations*, 51 BROOKLYN L. REV. 95 (1984).



as could lost bookings by Wilhelmina and increased bookings by Elite after Iman changed agencies.<sup>113</sup>

## B. THE GRANTING OF PUNITIVE DAMAGES

Punitive damages are granted to punish malicious or willful conduct.<sup>114</sup> Used primarily in the tort field, the purpose of punitive damages is to prevent the wrongdoer from similar conduct in the future and to deter others from engaging in the same conduct. In the area of contract law, punitive damages are not awarded except in cases where the breach is accompanied by an independent tort,<sup>115</sup> and where the breach involves the malicious or wanton violation of a fiduciary duty.<sup>116</sup>

The use of punitive damages in cases of egregious conduct by a breaching party would be effective in deterring such willful breaches as in both *Wolf* and *Wilhelmina*. Expansion of puni-

113. In fact, a strong case can be made for such damages. Wolf's departure from WABC and arrival at WCBS may have resulted in a significant change in ratings between the two stations. In February 1980, before Wolf's departure, WABC's 6 p.m. broadcast averaged a 12 rating and a 21 share (a rating signifies the percentage of all people watching and a share signifies the percentage of people watching who are watching television at that moment) and its 11 p.m. broadcast averaged a 14 rating and a 27 share, leading all stations in both time slots. WCBS had a 9 rating and a 16 share at 6 p.m. and a 10 rating and a 20 share at 11 p.m. WNBC (a third station surveyed) had a 7 rating and a 13 share at 6 p.m. and a 9 rating and a 17 share at 11 p.m. By May, WABC had a 9 rating and a 20 share at 6 p.m. and a 13 rating and a 25 share at 11 p.m., still leading over WCBS, which had an 8 rating and an 18 share at 6 p.m. and a 10 rating and a 25 share at 11 p.m., and WNBC with a 7 rating and a 15 share at 6 p.m. and a 10 rating and a 20 share at 11 p.m. By July, one month after Wolf joined WCBS, WABC's lead narrowed, with an 8 rating and a 19 share at 6 p.m. and a 10 rating and a 21 share at 11 p.m. over WCBS's 7 rating and 17 share at 6 p.m. and 10 rating and 20 share at 11 p.m. WNBC had a 7 rating and 17 share at 6 p.m. and a 9 rating and a 19 share at 11 p.m. By November 1980, almost six months after Wolf switched stations, the ratings showed WCBS a decisive leader with an 11 rating and a 19 share at 6 p.m. and a 13 rating and a 25 share at 11 p.m. over WABC's 10 rating and 17 share at 6 p.m. and 9 rating and 18 share. WNBC had a 9 rating and a 16 share at 6 p.m. and a 12 rating and a 24 share at 11 p.m. WABC lost a significant portion of its audience to WCBS and, to some extent WNBC during this period. Arbitron Ratings Service reports, 1980.

114. J. CALAMARI & J. PERILLO, *supra* note 60, at § 14-3.

115. See 11 S. WILLISTON, *supra* note 62, at § 1340; Comment, *Exemplary Damages in Contract Cases*, 7 WILLAMETTE L.J. 137 (1971); *Klingbiel v. Commercial Credit Corp.*, 439 F.2d 1303 (10th Cir. 1971) (breach of contract constitutes conversion); *I.H.P. Corp. v. 210 Central Park South Corp.*, 12 N.Y.2d 329, 189 N.E.2d 812, 239 N.Y.S.2d 547 (1963) (breach of lease constituted tort of forcible entry).

116. J. CALAMARI & J. PERILLO, *supra* note 60, at § 14-3. See also *Brown v. Coates*, 253 F.2d 36 (D.C. Cir. 1958); *International Bhd. of Boilermakers, etc. v. Brasswell*, 388 F.2d 193 (5th Cir. 1968), *cert. denied*, 391 U.S. 935 (1968); *Hoche Prods., S.A. v. Jayark Films Corp.*, 256 F.Supp. 291 (S.D.N.Y. 1966).

tive damages has been advocated<sup>117</sup> and a three-pronged test has been proposed to determine if punitive damages are recoverable. A party must show that: (1) a valid contract was made; (2) there is an implied duty arising from the contract but distinct from the contractual obligations; and (3) the defendant committed a malicious or willful breach of the implied duty.<sup>118</sup>

In employment agreements, some courts have recognized an independent duty of good faith and fair dealing.<sup>119</sup> Wolf's actions in negotiating an agreement behind ABC's back during an exclusive period constituted at the very least, a violation of any duty of good faith and honest bargaining, concepts that are integral to society's preservation of the sanctity of agreements. The same could be said for Iman, who left Wilhelmina with ten months left in her contract with the agency, though not enough detail is known as to what precipitated her move to Elite.

An explicit recognition by New York courts of good faith and fair dealing as implied duties would satisfy the second prong of the three-prong test. All that the aggrieved employer would have to show is whether the defendant committed a malicious or willful breach of the duty.

### C. LIQUIDATED DAMAGES

Liquidated, or agreed, damages, is an attempt by the parties to a contract to provide their own damage remedies in case of a breach. Courts will uphold these damages when: (1) actual damages are difficult to calculate; and (2) where the amount stated is reasonable.<sup>120</sup> Usually, liquidated damages will be used as dam-

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117. See P. Coleman, *Punitive Damages for Breach of Contract: A New Approach*, 11 STETSON L. REV. 251 (1982).

118. *Id.* at 260-261.

119. *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) involved the termination of an employment contract. The court held that bad faith termination was a breach of an implied covenant of good faith and fair dealing. As the court stated "parties in contracts and commercial transactions must act in good faith toward one another. Good faith and fair dealing between parties are pervasive requirements in our law; it can be said fairly, that parties to contracts or commercial transactions are bound by this standard." 364 N.E.2d at 1256.

120. J. CALAMARI & J. PERILLO, *supra* note 60, at § 14-31. See also RESTATEMENT (SECOND) OF CONTRACTS § 356(1), which states:

Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the

ages in a breach of restrictive covenant,<sup>121</sup> but may be applicable in cases of breach of personal service contracts by well-known entertainers.

As was earlier stated, actual damages in the traditional sense are hard to calculate for both *Wolf* and *Wilhelmina* and a liquidated damages clause pinpointing an amount of damages for breach may be a simple and direct method for determining damages. However, on a practical level, there is no guarantee that high-powered individuals will accept such clauses in their contracts and the amount of such damages may be more difficult for the parties to negotiate than for the courts to impose.

Also, the intention of the parties is not dispositive if the courts interpret such liquidated damage clauses as penalties,<sup>122</sup> or if the amount stipulated is out of proportion to the probable damage.<sup>123</sup> Due to the difficulties in getting entertainers to accept such a clause and the presumption that courts often use to strike liquidated damage clauses as penalties, such a remedy may be impractical and ineffective.

#### D. TORTIOUS INTERFERENCE WITH CONTRACT

In recent years, New York and California courts have held that a breach of contract can be actionable in tort, permitting the injured party relief that would not be available in an action founded in contract.<sup>124</sup> New York courts have applied this concept narrowly, ruling that the interference with the contract must be independently tortious or that the relationship disrupted was legally binding.<sup>125</sup> California has expanded the con-

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light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

See *United States v. Bethlehem Steel Co.*, 205 U.S. 105 (1907) (upholding a liquidated damages clause in a contract for the manufacture of gun carriages to the government for use in the Spanish-American war). See also *Wise v. United States*, 249 U.S.361 (1919); *Sun Printing and Publishing v. Moore*, 183 U.S. 642 (1902).

121. See *Jaquith v. Hudson*, 5 Mich. 123 (1858).

122. J. CALAMARI & J. PERILLO, *supra* note 60, at § 14-31.

123. *Id.* See also 5 A. CORBIN, *supra* note 62, at § 1058.

124. See Diamond, *The Tort of Bad Faith Breach of Contract: When, If at All, Should it Be Extended Beyond Insurance Transactions?*, 64 MARQ. L. REV. 425 (1981).

125. *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 406 N.E.2d

cept to apply to "all advantageous relations, not merely those that have attained the dignity of an legally enforceable agreement."<sup>126</sup> More recently, California further expanded the concept to protecting all areas of foreseeable harm.<sup>127</sup>

As in the case of injunctive relief, the source of this doctrine comes from English law. The case of *Lumley v. Gye*,<sup>128</sup> a companion case to *Lumley v. Wagner*, concluded that interference with a commercial relationship can give rise to an action in tort.<sup>129</sup> California adopted the *Lumley* approach in 1941, later than New York, but gave it a more liberal reading.<sup>130</sup>

Tort protection against interference with contracts would be a strong deterrent against third parties, such as WCBS who seek to induce breaches of existing contractual obligations. Damage recovery would be expanded by the inclusion of punitive damages,<sup>131</sup> or mental suffering,<sup>132</sup> and parties like WCBS with even deeper pockets than the high-priced employee or entertainer

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445, 428 N.Y.S.2d 628 (1980). In *Guard-Life*, the plaintiff entered into a five-year contract with a manufacturer, providing that plaintiff would be the manufacturer's exclusive distributor in the United States and Canada. Later that year, the defendant, plaintiff's competitor, entered into negotiations with the manufacturer and ultimately, the manufacturer ended its relations with the plaintiff to make a formal agreement with the defendant to supply defendant with the same materials it supplied plaintiff. After receiving lost profits from the manufacturer, the plaintiff brought an action against the defendant for tortious interference with contract. The Court of Appeals ruled that a business competitor is excused from liability for interfering with a contract when the interference is intended at least in part to advance its competing interests and the means employed are not wrongful. Also, the court ruled that the tort will not apply to a contract that is voidable or lacks mutuality.

126. Danforth, *Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 COLUM. L. REV. 1491 (1981).

127. *Id.*

128. 118 Eng. Rep. 749 (Q.B.1853).

129. The court held that since the inducement by Gye to breach the contract was used for the indirect purpose of injuring the plaintiff or benefiting the defendant, it was a malicious act and therefore actionable in tort. Danforth, *supra* note 126, at 1493.

130. *Id.* at 1507.

131. See *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 598 P.2d 452, 157 Cal. Rptr. 482 (1979); *United States Fidelity & Guar. Co. v. Peterson*, 91 Nev. 617, 540 P.2d 1070 (1975); *Travelers Ins. Co v. Montoya*, 90 N.M. 556, 566 P.2d 105 (Ct. App. 1977); See also *Diamond*, *supra* note 124, at n.7 (citing *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978)).

132. See *Gruenberg v. Aetna Ins. Co.* 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973); *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967); *Christian v. American Home Assurance Co.*, 577 P.2d 899 (Okla. 1978).

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could learn that negotiating with someone like Wolf during a “first negotiations/first refusal” period could do more harm than benefit. Also, managers like Elite, who may induce another manager’s client to break his contractual obligations would be liable for expanded damage liability.

## VI. CONCLUSION

Contractual relations are the backbone of a free market society. Personal services contracts involving well-known and high-powered employees have become more important in recent years as these individuals have gained influence and prestige in their respective trades. It is imperative to preserve the sanctity of these agreements, except in cases of fraud, duress or unconscionability.

Unfortunately, the decisions in *Wolf* and *Wilhelmina*, in failing to grant injunctive relief, do just the opposite as the two courts permitted breaches of contractual obligations without any punishment. To rectify this problem, new approaches to expand damage remedies may be the best solution — not only for the aggrieved employers, but for society as well.