

# **Boxing Basinger: Oral Contracts and the Manager’s Privilege on the Ropes in Hollywood\***

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## TABLE OF CONTENTS

I. INTRODUCTION.....	286
II. KIM BASINGER AND <i>BOXING HELENA</i> .....	287
III. PROMISES AND OBLIGATIONS.....	291
IV. ORAL CONTRACTS IN HOLLYWOOD.....	293
A. <i>Reasons to Abandon Oral Agreements?</i> .....	294
1. California Law Favors Written Contracts.....	294
2. Oral Agreements Complicate Dealmaking.....	296
B. <i>Balancing Money and Power</i> .....	299
V. THE AGENT’S PRIVILEGE TO INDUCE BREACH OF CONTRACT.....	301
A. <i>Origins of the Tort of Interference</i> .....	302
1. Modern Interpretations of the Tort.....	303
2. The Tort in California Courts.....	304
B. <i>The Manager’s Privilege</i> .....	305
1. The Mixed Motive Rule.....	306
2. The Predominant Motive Rule.....	309
C. <i>The Agent-Client Relationship</i> .....	310
VI. BREACHES AND FINANCIAL DAMAGES.....	311
A. <i>Minimizing Induced Breaches</i> .....	311
B. <i>Levying Damages Against Talent Agencies</i> .....	312
VII. CONCLUSION.....	313

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## I. INTRODUCTION

It was not an uncommon story in Hollywood. An independent production company approached a high-profile actress about starring in a film. The actress showed signs that she was interested in the project and, by virtually all accounts, agreed to star in the film. Based on this apparent commitment, the production company arranged financing for the project.

The actress in this particular story was Kim Basinger, the independent production company Main Line Pictures, and the film *Boxing Helena*. But before Basinger signed a contract, she hired a new agent who advised her not to do the film. Basinger followed her agent's advice and, citing that she had not signed a written contract, formally advised Main Line that she would not be appearing in *Boxing Helena*.

What is uncommon about this story, however, is the lawsuit filed by Main Line, alleging a bad faith breach of contract on the part of Basinger and her new agency. The resulting California case, *Main Line v. Basinger*,<sup>1</sup> revisited two complex questions that should interest dealmakers both in Hollywood and elsewhere. First, should Hollywood continue its reliance on oral contracts, and if so, how can we ensure that handshake deals are treated as formal agreements? Second, what is the proper interpretation of the manager's privilege as it relates to talent agents,<sup>2</sup> and how should agents be treated when they induce a breach of contract that is not protected by this privilege?

Entertainment observers and legal scholars have occasionally explored *either* Hollywood's reliance on oral contracts *or* the agent's privilege to induce breach of contract, but nobody has elucidated what might be an important connection between the two. The purpose of this paper is to articulate and explore this connection and to show that it compels us to limit the agent's privilege to maintain an atmosphere in which oral contracts can be taken seriously. I will argue that we should decide to rely on oral contracts in the absence of written agreements and that, by virtue of this reliance, we have numerous practical and principled reasons to limit the scope of the agent's privilege. Using *Main Line v. Basinger* as a backdrop, I will attempt to show that limiting the agent's privilege is necessary, both to maintain fairness in dealings and to reestablish some balance of power in a fast-paced industry

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<sup>1</sup> Los Angeles Superior Court Case No. BC031180. ICM and Kim Basinger's loan-out company, Mighty Wind Productions, were also named as defendants in the lawsuit.

<sup>2</sup> I will hereinafter employ the term "agent's privilege" to refer to the manager's privilege as it relates to a talent agent's relationship with his clients.

that must (and should want to) accept the binding nature of oral agreements.

Parts II and III will simply lay some groundwork for my argument. Part II will outline the events that ensued when Kim Basinger chose not to star in *Boxing Helena*, and Part III will briefly examine Professor Charles Fried's argument that we have a moral obligation to keep our promises, whether or not they be in writing.

Part IV will examine Hollywood's practice of relying on handshake deals and will explain why the institution of relying on oral agreements in Hollywood is as necessary as it is desirable. I will show that, despite the seemingly good reasons why Hollywood should abandon its reliance on oral contracts, oral agreements are valuable, both intrinsically and instrumentally, as they help to ensure the fairest dealings in the fast-paced movie business.

Part V will examine the agent's privilege to induce breach of contract and will explain why the agent's privilege must be limited to prevent agents from abusing this privilege. I will show that qualifying this privilege—thereby allowing a fact-finder to determine an agent's motivations in inducing a breach—ensures that agents fulfill their obligation to make decisions in their clients' best interests.

Part VI will show how Parts IV and V interrelate by further articulating the relationship between oral agreements and the agent's privilege. I will also explore an alternative way to levy financial damages when an agent is found responsible for inducing an inappropriate breach of an oral contract.

## II. KIM BASINGER AND *BOXING HELENA*

According to attorney Patty Glaser, it all "started with a phone call on May 7, 1991, between Guy McElwaine and Julie Philips."<sup>3</sup> McElwaine, a senior agent at International Creative Management (ICM), had just signed actress Kim Basinger for representation. Philips, the star's longtime personal attorney, had not expected McElwaine's urgent call. "We have a problem," the agent said.<sup>4</sup>

McElwaine had just finished reading the script for *Boxing Helena*. Clearly disenchanted with the screenplay,<sup>5</sup> he wanted to prevent Basinger from starring in the upcoming film. Understandably, McElwaine deserved to have his opinion taken seriously, for he was a successful

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<sup>3</sup> Kathleen O'Steen, *Judge Drops ICM from "Helena" Suit*, DAILY VARIETY, Mar. 23, 1993, at 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

agent at one of the three big agencies of the day.<sup>6</sup> Indeed, despite agents' infamous reputations as ten-percent-takers that grow fat on the blood of their clients, their efforts have become "indispensable to the business."<sup>7</sup> Furthermore, unlike actors, whose so-called star power tends to fluctuate considerably with box office returns and public awareness, agents have the potential to remain at the top of Hollywood's power structure for decades.<sup>8</sup>

It was likely, then, that McElwaine's opinion would have a great deal of sway with Basinger. But in the opening weeks of 1991 when Basinger first read the script for *Boxing Helena*, she was not yet represented by McElwaine and ICM. And unlike McElwaine, Basinger loved the screenplay, referring to it as "beautiful and magical."<sup>9</sup> Beautiful or not, this case began with a rather twisted concept for a movie:

The *Boxing Helena* story concerns a fictional woman whose legs are mangled in a car accident. A surgeon rescues Helena and amputates her legs. He becomes so obsessed with Helena that to keep control over her he also amputates her arms. Afterwards he holds her captive in a box.<sup>10</sup>

Not only did Basinger take an interest in the project, but she also repeatedly assured Jennifer Lynch, the writer and director of *Boxing Helena*, that she would appear in the film. Basinger's agent at the time, Bill Block of InterTalent Agency, confirmed the star's oral agreement to do the film in a deal memo in late February.<sup>11</sup> Less than two months later, Basinger moved to ICM where McElwaine, "one of the most well known agents in Hollywood," became her new and exclusive agent.<sup>12</sup> Upon reading the script that his new high-profile client wanted to help bring to life on the screen, McElwaine put in the now-infamous phone call to Julie Philips, Basinger's attorney. Philips then sent a letter to

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<sup>6</sup> The William Morris Agency (WMA), the world's oldest and largest talent agency, and Creative Artists Agency (CAA), launched in the 1975 by five former WMA agents, rounded out the "Big Three" agencies in terms of revenue in the early 1990s. They continue to be the most dominant agencies to this day, although United Talent Agency (UTA) and the Endeavor Agency have given them a run for their money in recent years.

<sup>7</sup> FRANK ROSE, *THE AGENCY 5* (1995).

<sup>8</sup> Such was the case with many WMA agents throughout the years. More recently, CAA's Michael Ovitz was called the most powerful person in Hollywood for the latter part of the 1980s and the first half of the 1990s. See ROBERT SLATER, *OVITZ: THE INSIDE STORY OF HOLLYWOOD'S MOST CONTROVERSIAL POWER BROKER* (1997).

<sup>9</sup> Stephen P. Clark, *Main Line v. Basinger and the Mixed Motive Manager: Reexamining the Agent's Privilege to Induce Breach of Contract*, 46 HASTINGS L.J. 609, 622 (1995).

<sup>10</sup> Douglas Kari, *Basinger in a Box: Verbal Contracts in the Film Industry*, ENT. L. REP., July, 1993 at 1.

<sup>11</sup> Clark, *supra* note 9, at 610.

<sup>12</sup> McElwaine had previously been the Chairman of Columbia Pictures. See DONALD E. BIEDERMAN ET AL., *LAW AND THE BUSINESS OF THE ENTERTAINMENT INDUSTRIES*, (3d ed. 1996).

Main Line on June 10, 1991. According to Main Line's attorney, Philips "expressly reneged on their contractual obligations and wrongfully refused to abide by the parties' agreement."<sup>13</sup>

While the agent's intention to keep Basinger from doing the picture was quite clear, his motives were less so. Main Line alleged in its trial brief that McElwaine had "actively counseled Basinger to pull out of the project and orchestrated her denial of the contract's existence" because his agency was not going to receive a commission on her appearing in *Boxing Helena*.<sup>14</sup> Because it was Block, not McElwaine, who had signed the deal memo, Block's agency would be the only one to receive the ten-percent commission on Basinger's participation in the project. Additionally, appearing in the film would force Basinger to turn down all other projects that would shoot concurrently with *Boxing Helena*, projects that could have afforded ICM a hefty commission. Main Line's assertion, then—that McElwaine knew Basinger was obligated to appear in the film and "induced her to breach the contract by convincing her that the film would be bad for her image"<sup>15</sup>—is indeed a believable one.

Attorney Howard Weitzman, who represented both Kim Basinger and ICM in the suit filed by Main Line, offered an alternative explanation: "What we really have here is a failure to communicate. That's what this case is about. I believe Carl Mazzocone [of Main Line] believed he had a deal with Kim Basinger, maybe because he wanted to believe that or needed to believe that."<sup>16</sup> But Mazzocone's decision to proceed as if he had a deal, Weitzman contended, in no way proved that a deal actually existed. Indeed, on the strength of Basinger's apparent interest in the title role, Main Line arranged financing to meet a proposed budget of \$7.2 million.<sup>17</sup> But Weitzman pointed out that it would be highly unusual for Basinger to have agreed to do the film so quickly: "[I]t just doesn't make any sense that a star like Basinger, with all her experience in this industry, would meet with Jennifer Lynch for a total of two-and-a-half hours and suddenly come up with a deal. It's just not logical."<sup>18</sup> Unlikely, perhaps, but not unbelievable.

Much was at stake in *Main Line v. Basinger*. First and foremost, "many Hollywood dealmakers felt that this traditional way of doing business [on a handshake] was itself on trial," for the jury would be

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<sup>13</sup> Michael I. Rudell, *Liability Under Verbal Agreements*, N.Y. L.J., May 28, 1993, at 2.

<sup>14</sup> Clark, *supra* note 9, at 610.

<sup>15</sup> *Id.*

<sup>16</sup> O'Steen, *supra* note 3, at 2.

<sup>17</sup> Kari, *supra* note 10, at 2.

<sup>18</sup> O'Steen, *supra* note 3, at 2.

asked to decide whether an oral contract existed and, if so, the extent to which Basinger could be held liable for its breach.<sup>19</sup> The jury seemed to settle this issue when, on March 24, 1993, it ruled for Main Line on the contract claim and ordered Basinger to pay \$8.92 million in damages.<sup>20</sup> Despite the apparent vindication of the enforceability of oral contracts, perhaps Hollywood dealmakers on both sides of the table still had reason to shy away from handshake deals:

The Boxing Helena case illustrates the difficulties in enforcing oral contracts, and provides a stark contrast to the favoritism afforded written contracts under California law. Although Main Line won the battle, victory came only after arduous discovery and a month-long trial. . . The true message of the case is that in Hollywood, business as usual should give way to business in writing.<sup>21</sup>

The jury presumably accepted Main Line's contention that Basinger had made a verbal commitment to appear in the film and was therefore responsible for the monetary damage precipitated by her decision not to do so. The jury did not, however, buy Basinger's argument that "she made no binding deal because she never agreed to the final script and disapproved scenes that she said called for 'gratuitous nudity.'"<sup>22</sup>

While the jury's verdict and subsequent determination of damages seemed to leave little undecided, another important aspect of *Main Line v. Basinger* lies in what the jury was not even allowed to consider. The original inducement claim was filed against Basinger and ICM, her agency at the time of her contract breach. In a surprise move just two days before the jury would render damages against the defendants, Judge Judith Chirlin granted ICM's motion to have the agency removed from the suit, leaving Basinger and her loan-out company as the sole defendants.<sup>23</sup> ICM had based its motion for nonsuit on the "manager's privilege." California courts have defined this privilege as follows: "[A] manager or agent may, with impersonal or disinterested motive, properly endeavor to protect the interests of his principal by counseling the breach of a contract with a third party which he reasonably believes to be harmful to his employer's best interests."<sup>24</sup>

Understandably then, the agent's motive "would appear to be a critical factor in determining whether he was privileged to induce the breach."<sup>25</sup> After all, if a court does not consider an agent's motiva-

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<sup>19</sup> Kari, *supra* note 10, at 1-2.

<sup>20</sup> Clark, *supra* note 9, at 610.

<sup>21</sup> Kari, *supra* note 10, at 1.

<sup>22</sup> *Id.* at 2.

<sup>23</sup> O'Steen, *supra* note 3, at 1.

<sup>24</sup> Olivet v. Frischling, 104 Cal. App. 3d 831, 841 (1980).

<sup>25</sup> Clark, *supra* note 9, at 610-11.

tions, the court cannot easily determine whether or not he was truly servicing his client's interests by inducing the breach. But if the privilege is absolute, the fact-finder cannot generally examine the agent's motive in exercising his privilege. In this case, for instance, Basinger's agent got off scot-free after giving advice with potentially self-interested motives. Perhaps the court would have reached a different decision if it had favored a qualified view of the manager's privilege, thereby allowing the jury to examine more closely the agent's motives.

### III. PROMISES AND OBLIGATIONS

More than twenty years ago, Harvard Law School Professor Charles Fried asked a question reminiscent of those with which Aristotle and Thomas Aquinas wrestled centuries ago: why exactly is it wrong for me to break my promise? Fried explains that the institution of promising allows us to bind ourselves to others so that we may expect future performances, something that we may indeed want to do.<sup>26</sup> But this alone "does not show that I am morally obligated to perform my promise at a later time if to do so proves inconvenient or costly."<sup>27</sup> Even invoking the convention of promising, claiming that it would cease to function in the long run if people did not keep promises, is not a compelling way to explain why I should keep a promise in a particular situation. Individual self-interest is equally insufficient to sustain the convention, as it is sometimes in the promisor's best interest (or in the best interest of others) for him *not* to follow through when it is his turn to perform.

According to Fried, the "obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and in trust."<sup>28</sup> An individual becomes morally bound to keep his promises if and when he intentionally invokes the convention of promising. This is so because the primary function of this convention is to give moral grounds for another person to expect the promised performance.<sup>29</sup> By making a promise, the promisor intentionally invites the promised person to be confident that the promised performance will happen. To abuse that confidence now "is like (but only *like*) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust."<sup>30</sup> Not unlike a liar, a promise breaker uses another person by inviting

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<sup>26</sup> CHARLES FRIED, *CONTRACT AS PROMISE* 14 (1981).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 16.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

that person to trust—and make himself vulnerable—and then abusing that trust.<sup>31</sup>

So, the obligation to keep a promise is similar to the obligation to tell the truth. Telling the truth, however, only binds the person in the present, whereas a promise is binding in the future.<sup>32</sup> A society full of people who trust one another is a society that exhibits great social utility, allowing people to accomplish what they could not without confidence in promises and truthfulness. In order to firmly establish this advantage, “there must exist a ground of mutual confidence deeper than and independent of the social utility it permits.”<sup>33</sup> A contract is first of all a promise. As such, it must be kept for the same reasons that a promise must be kept.

Whether or not one chooses to accept Fried’s argument, promises clearly differ from written contracts in some significant ways. People are legally bound to follow through on their contractual obligations, for instance, while the obligation to follow through on a promise is at best a moral one. Also, the institutions serve fundamentally different purposes. When two parties sign a contract, each agrees explicitly to fulfill its respective obligation, and both expect that the other will follow suit. More importantly, each tacitly agrees to allow a third party (*i.e.*, a court of law) to coerce any reticent party into fulfilling its obligation. But promises are distinctly different. They are one-sided in the sense that only one party expects the other party to perform, and there is no understanding that an outside party has the authority to coerce the promisor into fulfilling his or her promise.

Interestingly, oral contracts seem to fall somewhere in-between written contracts and promises. As is true with written contracts, oral agreements are two-sided in that both parties are expected to perform. But the basis for oral contracts, at least at first glance, seems more moral than legal, for they seem to lack the “proof” that would make them more easily enforceable in a court of law. In the sense that each party involved in an oral contract must trust that the other will fulfill its obligations, oral contracts are not too far removed from the institution of promise-keeping. As with promise-keeping, oral agreements can be successful bargaining tools only in an environment of mutual confidence, respect, and integrity.

As I will attempt to illustrate in Part IV, the nature of oral contracts is such that their usage brings with it more advantages than disad-

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 17.

<sup>33</sup> *Id.*

vantages. One could argue that their placement somewhere between traditional written contracts and two-way promises means that oral contracts lack both the legal enforceability of the former and the moral weight of the latter. But I believe something resembling the opposite to be true. This unique position of oral contracts affords them many of the advantages enjoyed separately by written contracts and promises, as oral contracts carry substantial moral weight and can be enforced legally.

#### IV. ORAL CONTRACTS IN HOLLYWOOD

A jury found Kim Basinger guilty not only of breaching her contract but also of denying in bad faith that she had made an agreement in the first place. She was ordered to pay nearly \$9 million in damages to Main Line Productions.<sup>34</sup> The reason for the dispute in the first place? The two parties disagreed about the extent to which their oral agreement constituted a binding contract. In fact, Basinger claimed that she ultimately refused to participate in the project solely because she “was concerned about the amount of unnecessary and gratuitous nudity in the picture.”<sup>35</sup> Basinger was no stranger to nudity, however, so Main Line’s attorney countered that the actual reason she pulled out of the project involved her salary: “In order to bridge the gap between the \$600,000 amount which Main Line offered and the \$3 million which Basinger customarily received, the parties constructed a contingent arrangement in which Basinger would be paid \$3 million if the picture proved profitable.”<sup>36</sup> Once it had been established to the court’s satisfaction that Basinger had intended to make the picture and made her intention known, the fundamental debate hinged on whether the court would accept an oral agreement, supported by several short deal memos, in lieu of a signed contract.

When the jury weighed in against Basinger, “Hollywood dealmakers proclaimed that the verdict vindicated their practice of doing business on a handshake.”<sup>37</sup> Many dealmakers breathed a collec-

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<sup>34</sup> In fact, the damages were subsequently reduced, and the decision was overturned on what both sides agreed was a “technicality.” Judge Chirlin had asked the jury to determine whether Basinger “and/or” her loan-out company had been responsible for a bad faith breach of contract. When the jury returned with an affirmative answer to the judge’s question, the term “and/or” was shown to be problematic, as the jury was unable to specify whether the responsibility belonged to Kim Basinger, to her loan-out company, or to both defendants. Notwithstanding this odd conclusion to the trial, the case illustrates several of the problems inherent in Hollywood’s extensive reliance on oral agreements.

<sup>35</sup> Rudell, *supra* note 13, at 2.

<sup>36</sup> *Id.* at 3.

<sup>37</sup> Kari, *supra* note 10, at 1.

tive sigh of relief “when the jury found an enforceable oral contract and held Basinger liable.”<sup>38</sup> Perhaps the sigh of relief was an appropriate response. But perhaps it was appropriate for reasons other than its apparent affirmation of “business as usual.”

### A. *Reasons to Abandon Oral Agreements?*

Admittedly, there exist a lot of seemingly good reasons for Hollywood to abandon its practice of relying on oral contracts. For one, a look at California law implies that it offers a sort of favoritism for written contracts. Second, the difficulties inherent in proving the existence of oral agreements often cannot be overcome, and it is not worth the time or money required to resolve the disagreements that arise when oral contracts are disputed. After presenting and responding individually to each of these arguments, I will argue that they do not provide solid ground for rejecting oral contracts when one recognizes the value—both intrinsic and instrumental—in maintaining so-called handshake deals.

But there exists a third, potentially more powerful objection to relying on oral agreements. Enforcing oral agreements exacerbates the power differential problem (for lack of a better term) that already exists in the entertainment industry. I will contend that this argument misunderstands the politics and business of the entertainment industry and fails to recognize that relying on oral agreements actually helps to safeguard the rights of those involved in negotiations. Furthermore, using oral contracts fosters an atmosphere of integrity, one in which all participants can be trusted, which is desirable from both legal and moral standpoints. The power differential problem can also be ameliorated by compelling agents to take responsibility for their part in contract breaches.

#### 1. California Law Favors Written Contracts

One of the reasons cited most often by entertainment insiders that Hollywood should abandon its reliance on oral contracts is that California law shows preference for written contracts, thereby giving entertainment professionals good reason to do the same. In fact, it was movie mogul Samuel Goldwyn who coined the malapropism, “An oral agreement isn’t worth the paper it’s written on.”<sup>39</sup> Despite what one might be inclined to conclude from *Main Line v. Basinger*, the law seems to support this view.

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 4.

According to entertainment litigator Douglas Kari, the law is slanted in favor of written contracts because they serve “such important functions.”<sup>40</sup> The primary piece of evidence cited by Kari is the fact that the Statute of Frauds dictates that certain contracts must be expressed in writing to be enforceable, implying that “the law views some agreements as too weighty for a mere handshake deal.”<sup>41</sup> Indeed, the Screen Actors Guild (SAG) provides further support for Kari’s claim by stipulating that any actor who agrees to be nude on film must agree to the project in writing.

Kari cites his primary evidence with a brief discussion of copyright law, which plays an integral role in the entertainment industry. Federal law governing the transfer of a copyright or an exclusive license in a copyright “must be in writing.”<sup>42</sup> The parole evidence rule also favors written agreements, as “an integrated written agreement will take precedence over any prior or contemporaneous oral agreement.”<sup>43</sup> Finally, even the statute of limitations favors written agreements. While California allows a party four years to file suit on breach of a written contract,<sup>44</sup> the state allows only two years if the contract is oral.<sup>45</sup> Kari concludes that, despite the result in the *Boxing Helena* trial, a better practice is for Hollywood to insist on written agreements.

My criticism of Kari’s argument is that he fails to draw any direct link between the fact that California often favors written contracts and his conclusion that Hollywood should rely solely on a system of written contracts. Admittedly, we can infer that the state has *good reason*—namely, the difficulties brought to light in the Basinger case—to prefer written contracts, and Hollywood should at least give consideration to the reasons for this preference. Nonetheless, Kari must prove that this connection exists, for his assertion is less than compelling.

In fact, much of the research I completed in preparation for this paper has hinted that Kari’s connection might not exist. If he were correct that Hollywood should prefer written agreements, one would expect to find evidence that the entertainment industry has run into difficulties with oral agreements in the past. Perhaps court cases involving disputes over oral agreements would be abundant, or industry insiders would bemoan the numerous problems inherent in relying on

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> CAL. CIV. PROC. CODE § 337(1) (West 2002).

<sup>45</sup> *Id.* at § 339(1).

handshake agreements. But one finds neither of these.<sup>46</sup> On the contrary, actor-director Charlton Heston wrote a spirited column in the *Los Angeles Times* in which he admits that, in the more than 60 films he has made, he has “never signed a complete contract on any of them before production began. . . usually it’s sometime after the film’s finished.”<sup>47</sup> He also states that condemning the judgment against Basinger by repeating that she never signed anything “grossly misrepresents the way films are put together.”<sup>48</sup> Heston’s comments, with which few in Hollywood seem to disagree, shows that Kari’s connection is not nearly as clear as he would lead us to believe. Perhaps Hollywood has reason not to bow down to the preferences implied by California’s laws.

## 2. Oral Agreements Complicate Dealmaking

Opponents of the industry’s reliance on oral agreements also point out that oral agreements should be avoided if only because, in the rare event that they do go awry, the financial burdens and time commitments associated with making things right again are exorbitant. Once again, the dispute between Main Line and Kim Basinger provides fuel for this argument. Although *Boxing Helena* was released in the end without Kim Basinger, Main Line spent “nearly two years and \$750,000 on intensive litigation simply to uphold one deal in a dubious victory.”<sup>49</sup> But the long-term professional costs of enforcing oral contracts go well beyond the immediate financial cost of a court battle.<sup>50</sup> Actors are likely to exercise extreme caution in any discussions with producers for fear of getting roped into a project in which they are only mildly interested. In the extreme case, producers “may find it increasingly difficult to make contact with key players,”<sup>51</sup> as artists will be reluctant even to meet with producers who garner a reputation for playing hardball in the way that Main Line has done. Perhaps, opponents to oral

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<sup>46</sup> In preparation for this paper, I came across far fewer than a dozen cases related directly to the film industry in which one or more parties disputed the validity of an oral contract. In addition, sources published before the Basinger case often take it as given that Hollywood runs on handshake deals, just as employers and employees in most industries take it as given that their labor agreements are terminable at will.

<sup>47</sup> Charlton Heston, *Counterpunch: Of Trust, Manners and How Hollywood Works*, L.A. TIMES, Apr. 12, 1993, at F3.

<sup>48</sup> *Id.*

<sup>49</sup> Kari, *supra* note 10, at 3.

<sup>50</sup> Main Line was forced to replace Basinger, and they did so with Sherilyn Fenn, a much younger and far less experienced actress who lacked Basinger’s widespread name recognition. One can only imagine how much more money the picture could have made with Basinger in the title role.

<sup>51</sup> *Id.*

contracts argue, Hollywood would be better served if everybody took the time to draft written agreements before such difficulties have the chance to fester.

One problem with this argument, I believe, is that it assumes without justification that all the costs associated with creating written documents would not exceed those of enforcing the few oral agreements that require enforcement. As mentioned previously, oral agreements have become so commonplace in Hollywood that few players ever even consider walking out on one.

But more importantly, the moviemaking business is set up in such a way that oral agreements have an instrumental value, helping to minimize drag time in an especially fast-paced industry. Producers commonly find their projects under tight deadlines, as they often need to accommodate a particular director's schedule or a studio's insistence on a summer release date. The practice of relying on oral agreements seems to have developed because filmmaking is a unique creative venture that requires participation from so many disparate players: producers, directors, actors, writers, financiers, cinematographers, editors, wardrobe personnel, and production designers.<sup>52</sup> The widespread belief is that stopping to haggle and document the details of every relationship will cause a project to lose steam.<sup>53</sup>

Manager-turned-producer Larry Brezner, whose client list includes Billy Crystal, articulated that a creative industry will fail if it focuses too closely on its necessary business transactions: "If everything had to be done purely on written contracts, nothing would get done in this town. If we depended strictly on business affairs and lawyers, we'd all be staring at blank movie screens."<sup>54</sup> As such, the dictates of the creative process<sup>55</sup> often compel filmmakers to begin productions before the details of all pertinent deals have been hammered out. Because finalizing minute details can sometimes take more time than the actual creation of a film, it is not difficult to understand why studios feel pressured to work the creative and business sides of a project concurrently. Hollywood needs to be able to rely on handshake deals to maintain the fast-paced

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<sup>52</sup> Kari, *supra* note 10, at 3, 5.

<sup>53</sup> This is not meant to imply that nothing is put into writing. In fact, it is common for entertainment lawyers and business affairs executives to draft deal memos and brief letters that set forth the most important deal points and stipulate the terms of what would otherwise be a simple oral agreement.

<sup>54</sup> Kari, *supra* note 10, at 3-4.

<sup>55</sup> Admittedly, this refers more specifically to the marketing process. But it also affects the creative process, as studios would not allow production to proceed in the absence of a pre-approved marketing campaign.

filmmaking that has become the ticket to profitability for most major studios.

If the size of most Hollywood endeavors assures that oral contracts have an instrumental value, the myriad relationships that make up the Hollywood network help to show that oral agreements have an intrinsic value as well. Professor Fried explained that trust provides the foundation for the moral obligation to keep promises. When a person makes a contractual agreement, he or she is essentially making a promise that, *ceribus paribus*, he or she will do what was agreed upon. One of the most notable advantages that a written contract has over an oral one is that both parties have proof that an agreement exists and that, assuming the agreement meets certain legal requirements, both parties are obligated to maintain their respective ends of the bargain. Hollywood does not lack lawyers, and they no doubt push for written contracts whenever they would be to the overall advantage of their clients.

But the fact that top-notch actors commonly agree to start working before signing a contract—even on projects where there exist few obstacles to executing a written agreement—suggests that there is some other reason why the industry favors oral agreements. Despite all the puns that portray many in the entertainment business as deceitful, these jokes recognize that the industry runs on relationships and that people place a high value on what it means to *not* feel forced to rely on written contracts. An environment fueled by a widespread reliance on oral agreements is one in which people are encouraged—even compelled—to trust that others are going to be honest people who follow through with their contractual obligations. Not only does this mentality foster a healthier and more productive work environment, but its prevalence in an industry that runs on “who you know” also provides many of the same protections that written contracts would. Just as one could destroy another’s career by taking her to court for breaching a contract, one could destroy another’s professional reputation by spreading word that he is unreliable and dishonest. The dishonest person would face an uphill battle in securing another deal, and the next deal can be everything to Hollywood heavyweights. Fear of these real consequences is likely to give parties an incentive to make good on their oral agreements in all but the most dire circumstances. Admittedly, parties to an oral agreement would not necessarily *be* any more virtuous than they would have been as parties to a written agreement, but a system that relies on oral agreements could compel people to *act* more virtuous. Perhaps appropriately, this should suffice in an industry built on appearances.

## B. *Balancing Money and Power*

It has also been said that written contracts help to maintain a balance of power in an industry that already places too much power in the hands of large, vertically integrated studios. Indeed, one component of contract law is that it is based on the premise of bilateral voluntary exchange: "In a market economy, such exchanges involve a process in which the parties bargain voluntarily, each striving to maximize his own economic advantage on terms that are acceptable to the other party."<sup>56</sup> Oral contracts allow studios to gain an unfair advantage because so little is spelled out. Oral agreements, in essence, take for granted what the existence of a written contract often does not: that pay-or-play<sup>57</sup> actors will be compensated and that the movie in question is likely to be made. Proponents of this argument contend that a studio is more likely to follow through with its obligations to a project if the studio is forced to execute written agreements with all of its players. Whether the agreement is oral or written, however, actors are roped into the project if and when it gets made. Yet they have virtually no say in whether the film will be made or marketed,<sup>58</sup> and even when they have an oral guarantee that the project will happen, all but the most successful actors will have no say when a project's parameters change between the date of agreement and the completion of the film. So, oral agreements exacerbate a power differential problem that would exist even if the entertainment industry demanded the implementation of written contracts across the board.

While I agree that studios seem to wield a great deal of power in contract negotiations, this argument is deficient because it fails to take into account that the studios put up large sums of money—and therefore take great risks—to develop and produce projects. Even so, studios do not have nearly so great an advantage as opponents of written contracts would lead us to believe.<sup>59</sup> But because it is the corporations

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<sup>56</sup> Daniel A. Graham & Ellen R. Pierce, *Contract Modification: An Economic Analysis of the Hold-Up Game*, LAW & CONTEMP. PROBS., Winter 1989, at 9, 9.

<sup>57</sup> Commonly negotiated by those who represent "A List" actors, so-called pay-or-play deals guarantee the actor compensation (though sometimes reduced) even if a studio decides not to complete the film in question. Even so, the money is of little concern to the most successful of actors, as they are far more concerned about their ability to showcase their art in quality motion pictures. In such instances, the real advantage of written agreements is even more difficult to ascertain.

<sup>58</sup> This is one result of the unpredictable, ever-evolving nature of filmmaking. Specifically, studios often address the clash between "art" and "commerce" by altering a project after most actors and writers have been roped into it. See BIEDERMAN ET AL., *supra* note 12, at 265.

<sup>59</sup> They cannot, for instance, legitimately reassign a contracted actor's part to another actor. This remains true even in the case of a less successful actor, who could just as easily

that finance the projects and pay the actors' often-exorbitant salaries, it is reasonable to allow them the leeway to decide whether a project will be brought to fruition. Should a studio develop a project that it decides not to produce, this decision most likely reflects the studio's informed opinion that it cannot make a profit by following through on its intentions.<sup>60</sup> Requiring a studio to commit to a project is not analogous to requiring an actor to do the same, for actors generally do not have vested economic interests in the success of the project in question.<sup>61</sup> Actors simply lack the downside risk that studios cannot avoid. Actors get paid whether or not a project succeeds or is even released, and they can begin a new project with the time they would have been wasting on the doomed project. Studios, however, are in the hole, as they have to finance everything that has taken place up to the point at which a project is discontinued.

Finally, it is an incomplete understanding of industry politics that allows one to argue that the industry's reliance on oral contracts inequitably limits the rights of artists by locking them into a contract that large companies can get out of simply by scrapping production. Any inequality that might exist is balanced by a company's access to imperfect information and must exist to maintain equity among all artists who contract with the company. Studios have no reliable gauge by which to forecast "the ability of a talent whose future success (or lack thereof) cannot be anticipated at the time of execution."<sup>62</sup> In this sense, employers are in a less desirable bargaining position relative to actors, as actors who know exactly how much money they will receive while studios can only estimate their revenue potential. When viewed in this light, studios do not appear to be in as powerful a position with respect to contract negotiations.

Despite the numerous reasons why the film industry should continue its practice of relying on oral contracts, one cannot deny that actors are at both a professional and a financial disadvantage when a relationship based on an oral agreement goes sour. As Kim Basinger's

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wound a company's reputation by crying foul to their agents, their managers, and other actors.

<sup>60</sup> This claim is supported by basic microeconomics. A firm will continue to produce in the short run so long as it can cover its fixed costs (that is, the money that it cannot get back regardless of its future success or failure).

<sup>61</sup> The vast majority of actors receive the same compensation no matter how poorly a film performs at the box office. For all the but the biggest of stars, their future success in the industry depends on the quality of their acting and other variables, not the revenue generated by the films in which they play bit parts. And while Tom Cruise's future income might depend on the success of his current project, I doubt that he is harmed financially when he is asked to commit to projects that might not ultimately be made.

<sup>62</sup> BIEDERMAN ET AL., *supra* note 12, at 267.

struggle indicates, the fact that her agent counseled her to back out of her oral agreement did little to ease the financial and professional ramifications of her legal loss. A reexamination of the agent's privilege to induce breach of contract will shed light on one way to alleviate the effects of this disadvantage while affirming Hollywood's history of handshake deals.

## V. THE AGENT'S PRIVILEGE TO INDUCE BREACH OF CONTRACT

On March 22, 1993, one day before the *Boxing Helena* case would be given to the jury, Judge Judith Chirlin surprised many in the courtroom by dropping ICM from the suit, leaving Basinger holding the bag.<sup>63</sup> Hollywood insiders, however, were not surprised. Howard Weitzman, the attorney who represented both Basinger and ICM, was nonetheless happy with the judge's decision: "We. . . feel it is consistent with the theory we had in our written motions."<sup>64</sup> Even Main Line's Carl Mazzocone admitted that their case against the agency was tough from the beginning. Not unlike lawyers, agents "are protected by law when they give advice to their clients."<sup>65</sup>

But perhaps Mazzocone's comment is not entirely accurate. In fact, agents are privileged to interfere with contracts only under certain circumstances, the boundaries of which have been manipulated by the courts throughout the last 150 years in both England and the United States. But all that was decided in the courtroom on March 22—a scant two days before the jury would slap Basinger with a nearly \$9 million judgement for a fraudulent breach of contract—was that Basinger and her loan-out company would be forced to shoulder any and all damages.

Much ado has been made about Main Line's win against Kim Basinger, upholding Hollywood's reliance on handshake deals.<sup>66</sup> But Main Line's inducement claim against ICM and the reasons for its failure have received far less attention.<sup>67</sup> Perhaps the judge's dismissal of the claim against ICM should have been the focal point for proponents of fairness, for it is the proper interpretation of the "manager's privilege"—not the aforementioned enforcement of oral contracts—that the court seems to have decided incorrectly. I intend to show that, al-

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<sup>63</sup> Kathleen O'Steen, "*Helena*" Costs Kim Arm and Leg, DAILY VARIETY, Mar. 25, 1993, at 1.

<sup>64</sup> O'Steen, *supra* note 3, at 1.

<sup>65</sup> O'Steen, *supra* note 63, at 3.

<sup>66</sup> As explained in Part IV, Main Line's win was at best a weak affirmation of Hollywood's reliance on oral agreements.

<sup>67</sup> Clark, *supra* note 9, at 609.

though the agent's privilege is a necessary tool for an agent to be able to fulfill his obligation to his clients,<sup>68</sup> it must be limited to ensure that every decision is made in the clients' best interests. Furthermore, adopting a qualified view of this privilege—one that allows fact-finders to examine an agent's intentions and motivations when deciding the extent to which a breach was legitimate—helps to strengthen the bond that should exist between agents and clients.

First I will review the development of the tort of interference with contract, with a brief discussion of antecedents to the tort and a focus on the ways in which courts have interpreted the privilege to interfere. Then I will discuss the manager's privilege (also known as the agent's privilege) and the various entertainment industry players to which it applies, paying particular attention to the relationships that do and should exist between agents and their clients. After presenting the mixed motive rule often used by courts to determine whether an inducement was legitimate, I will critique it using the facts of the *Boxing Helena* case. Finally, I will propose that courts should instead use the predominant motive rule, and I will justify my proposal by citing the agent's obligations that accrue as a result of his unique relationship with his client.

### A. *Origins of the Tort of Interference*

Law students have been taught traditionally that the tort of interference with contractual relations began with the landmark case of *Lumley v. Gye* in 1853.<sup>69</sup> Although courts did not recognize a formal tort of interference with contracts in the first half of the nineteenth century, this had little effect on employment agreements because they were generally thought of as status relations, not contracts.<sup>70</sup> These status relations "included not only the employment relations between masters and their domestic servants, apprentices, and journeymen, but also the legally analogous familial ties between husband and wife. . . ."<sup>71</sup>

Each relationship was governed by an extensive set of legal rules. A servant, for instance, was obliged to provide personal services so

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<sup>68</sup> For the purposes of readability and to maintain hypotheticals that are consistent with *Main Line v. Basinger*, I will hereinafter refer to a single agent as "he" and a single actor as "she." I will avoid the term "actress."

<sup>69</sup> Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510 (1980) [hereinafter *Tortious*].

<sup>70</sup> *Id.* at 1513.

<sup>71</sup> *Id.*

long as he received food, shelter and security from his master.<sup>72</sup> The law explicitly prevented other parties from interfering with this relationship during the servant's term of service. Complainants could log an action for enticement or an action for harboring should an outside party attempt to interfere with the relationship, strengthening a master's control over his servants.<sup>73</sup> The action of enticement differed in three ways from our understanding of tortious third-party interference:

First, there was no requirement that the master, as plaintiff, prove the existence of a contract between himself and his servant. . . . Second, the master received protection from enticement only after the service had actually begun. . . . Third, though masters could sue third parties for enticing their servants away, servants could not sue third parties for procuring their dismissal.<sup>74</sup>

Thus, relationships that we would today describe as contractual used to be guarded from most third-party interference, despite the absence of a formal interference tort prior to 1853. Interestingly, though, "personal service contracts not of a master-servant nature. . . were generally left unprotected from outside interference."<sup>75</sup>

### 1. Modern Interpretations of the Tort

The modern tort of interference with contract "originated in the English case of *Lumley v. Gye*, a case that, like *Main Line v. Basinger*, involved the breach of an executory personal services contract by an entertainer."<sup>76</sup> In 1852, noted opera singer Joanna Wagner agreed to sing exclusively at the plaintiff's theater for a complete season. Before the performance of the contract "had even begun, Gye, a rival theater operator, persuaded the singer to break her contract and sing for him."<sup>77</sup> Although the court admitted that Wagner was not a servant, "the Queen's Bench broadened an existing cause of action for enticing another master's servant to any case 'where the defendant maliciously procures a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse such services.'"<sup>78</sup> Since the decision repeatedly emphasized the defendant's "malicious" motives, "motive was a critical factor to determine liability

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<sup>72</sup> *Id.* at 1514.

<sup>73</sup> *Id.* at 1514-15.

<sup>74</sup> *Id.* at 1515.

<sup>75</sup> *Id.* at 1518.

<sup>76</sup> Clark, *supra* note 9, at 612.

<sup>77</sup> *Tortious*, *supra* note 69, at 1522.

<sup>78</sup> Clark, *supra* note 9, at 612.

for inducement”<sup>79</sup> since the tort’s inception. The *Lumley* doctrine was well accepted in most of the United States, presumably because the tort complemented the popular belief at the time that the right to performance was essentially a property right, one that ought to be protected against theft.<sup>80</sup>

Not unlike many laws from the nineteenth century, the interference tort has gone through several restatements. In 1939, the *Restatement (First) of Torts* provided a list of factors to be balanced in determining whether there exists a privilege to induce a contract breach. Courts were expected to consider the following:

- (a) the nature of the actor’s conduct, (b) the nature of the expectancy with which his conduct interferes, (c) the relations between parties, (d) the interest sought to be advanced by the actor and (e) the social interests in protecting the expectancy on the one hand and the actor’s freedom of action on the other hand.<sup>81</sup>

In other words, an inducer could escape liability if his “purpose coincided with the societal purpose behind a given privilege.”<sup>82</sup> The *Second Restatement* takes a somewhat different approach. It instead “bases liability on whether the interference at issue was ‘improper.’”<sup>83</sup> This restatement implies that an improper interference is subject to liability only if it was intentional.

## 2. The Tort in California Courts

While initially reluctant to implement the inducement tort, California courts have offered numerous ways to determine whether an induced breach is legitimate. In *Boyson v. Thorn* (1893), the California Supreme Court explicitly rejected the rule of *Lumley v. Gye*, holding that an “act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.”<sup>84</sup> In other words, the Court decided that the law protected *all* induced contract breaches. In 1941, the Court adopted what is known as the majority rule, which imposes liability for inducing a contract breach unless the inducement was justified by “an interest that has greater social value than insuring the stability of the contract.”<sup>85</sup> In addition, the court found that the contractual property right generally trumps the right to competition:

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 612-13.

<sup>81</sup> *Id.* at 614.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 615.

<sup>84</sup> *Boyson v. Thorn*, 98 Cal. 578, 583-84 (1893).

<sup>85</sup> *Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 35 (1941).

“Contractual stability is generally accepted as of greater importance than competitive freedom.”<sup>86</sup>

California transformed the tort drastically over the next half-century, and the tort at one point even covered conduct that did not actually induce a breach.<sup>87</sup> But California was willing to insure contractual integrity against a bad faith denial of the contract’s existence. In *Seaman’s Direct Buying Serv. v. Standard Oil Co.* (1984), the California Supreme Court recognized “that a party to a contract may incur tort remedies when, in addition to breaching the contract, it seeks to shield itself from liability in denying, in bad faith and without probable cause, that the contract exists.”<sup>88</sup> Since denying the existence of a contract is essential to the defense in many contract suits, the Court articulated that it is justiciable when it is undertaken from improper motives.

### B. *The Manager’s Privilege*

In recent years, however, California courts have been uneasy about inquiries into motive and have provided a makeshift license for the sort of self-interested inducement at issue in *Lumley v. Gye*.<sup>89</sup> This license has come to be known as the “manager’s privilege,” which is actually a misnomer because it “refers to several distinct privileges applied for different reasons to various types of business relationships.”<sup>90</sup> Courts have long granted corporate employees the privilege to cause their employers to breach contracts with a third party, often emphasizing the confidential relationship between employees and employers.<sup>91</sup> Attorneys who advise their clients to breach a contract have been accorded similar privileges. While this privilege is absolute in California, the rule respects the confidential nature of the attorney-client relationship, which is considered in balancing the interests at stake in each individual case.<sup>92</sup> But neither attorneys nor corporate employees stand to benefit from most contract breaches by their respective clients or employers.

*Olivet v. Frischling* addressed the impact of a potential profit motive on the part of a manager. The court held that “when a manager induces a breach in the hopes that he himself might fill the resultant economic void, he acts not as a servant, i.e., as one upholding his

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<sup>86</sup> *Id.*

<sup>87</sup> Clark, *supra* note 9, at 616-17.

<sup>88</sup> *Seaman’s Direct Buying Serv. v. Standard Oil Co.*, 36 Cal. 3d 752, 769 (1984).

<sup>89</sup> Clark, *supra* note 9, at 617.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 617-18.

<sup>92</sup> *Id.* at 622.

master's best interests, but rather as a naked competitor, devoid of the protection accorded those who labor under standards of . . . responsibility."<sup>93</sup> Because motive is a question of fact, "it would follow that, in cases. . . in which the evidence strongly suggests a defendant may have acted primarily in self-interest, the finder of fact should decide whether the privilege applies."<sup>94</sup> Fact-finders probably would have continued to be allowed to weigh managers' self-interest in the absence of the mixed motive rule.

### 1. The Mixed Motive Rule

The Ninth Circuit Court raised the possibility of "mixed motives" in *Los Angeles v. Davis*:

We conclude that where. . . an advisor is motivated in part by a desire to benefit his principal, his conduct in inducing a breach of contract should be privileged. The privilege is designed to further certain societal interests by fostering uninhibited advice by agents to their principals. The goal of the privilege is promoted by protecting advice that is motivated, even in part, by a good faith intent to benefit the principal's interest.<sup>95</sup>

The privilege is not really qualified, however, because an agent can easily raise a plausible inference that he acted in his client's best interest. The privilege "is absolute in effect, if not in theory."<sup>96</sup>

Not surprisingly, ICM cited *Los Angeles v. Davis* in its trial brief. ICM's attorney, who also represented Basinger, argued that McElwaine believed it would be harmful to her career to perform in *Boxing Helena*. Not only did he dislike the script, but he also was confident that it would not make a good movie.<sup>97</sup> Understandably, he did not want his star to act in a bad film, and his attorney contended that "he was absolutely privileged to advise his clients not to act in what he believes to be a bad motion picture."<sup>98</sup> This reasoning is clearly consistent with the mixed motive rule. But McElwaine's advice also set him up to reap great financial rewards from Basinger's contract breach, as his agency would be able to commission her in other projects, ones in which she could not participate if she chose to continue with *Boxing*

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<sup>93</sup> *Id.* at 620.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 621.

<sup>96</sup> *Id.* at 622.

<sup>97</sup> Indeed, the version of *Boxing Helena* that was ultimately released did poorly at the box office and did little for the career of Sherilyn Fenn in the starring role that would have been portrayed by Basinger.

<sup>98</sup> Clark, *supra* note 9, at 622.

*Helena*.<sup>99</sup> Because of the mixed motive rule, “the jury was never given the opportunity to weigh the evidence.”<sup>100</sup>

I would like to critique the mixed motive rule’s application in *Main Line v. Basinger* on two points, the first one only briefly. First, the protections available to individuals under bankruptcy laws make it difficult for a prevailing plaintiff to receive full compensation for the contract breach. Although the judgment against Basinger was reduced to \$7.4 million, she filed for Chapter 11 protection one day before she would have had to post a bond securing the judgment, pending appeal.<sup>101</sup> As early as *Lumley v. Gye*, “it was suggested that because the breaching party cannot cover the damages, the inducer should be held liable to cover the shortfall.”<sup>102</sup> The mixed motive rule prevents talent agencies<sup>103</sup> from being held accountable for predominantly self-serving inducements, which is unfortunate because these agencies are in a position to pay appropriate damages with little or no interruption to their business operations. Instead, the mixed motive rule forces actors to struggle to pay all damages that result from what is essentially an agent’s questionable advice, and production companies are left undercompensated.

But more importantly, the mixed motive rule provides complete immunity for self-serving<sup>104</sup> agents. This “frustrates the function of the inducement tort as a deterrent against such behavior.”<sup>105</sup> Furthermore, it is particularly inappropriate for talent agencies to benefit from this absolute privilege, considering the extent of their influence over their clients and the resulting opportunities for self-dealing. An examination of the agent’s role in clients’ lives illustrates that the breaching actor should often be viewed as something less than an autonomous person making her own decision.

Unlike the record and music publishing industries, in which entertainment attorneys are the primary dealmakers,<sup>106</sup> talent agents run the show in Hollywood by virtue of their unique niche in the movie

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<sup>99</sup> As mentioned previously, Basinger did not sign with ICM for representation until after she had allegedly agreed to perform in the film. As such, her previous agency would have received all commissions on that project.

<sup>100</sup> Clark, *supra* note 9, at 624.

<sup>101</sup> Kathleen O’Steen, *Basinger Levy is Lowered*, DAILY VARIETY, May 20, 1993, at 16.

<sup>102</sup> Clark, *supra* note 9, at 626.

<sup>103</sup> If an agent is held responsible for inducing a breach of contract, the agency that employs him is also on the hook.

<sup>104</sup> By “self-serving” and “self-dealing” agents, I am referring to their propensity to make decisions that maximize their own income and power, regardless of whether they believe such decisions to be in the best interest of their clients.

<sup>105</sup> Clark, *supra* note 9, at 627.

<sup>106</sup> BIEDERMAN ET AL., *supra* note 12, at 215.

business. Officially, licensed agents are those who actually seek and procure employment for artists, while managers attend to more long-term career matters, as they are not legally allowed to procure employment for their clients. This line has been blurred, however, and it is often hard to define “where one function ends and the other begins.”<sup>107</sup> Ever since Michael Ovitz<sup>108</sup> left the William Morris Agency, for instance, to found the “mothership” of all talent concerns, CAA, talent agencies have enjoyed their position as the most powerful brokers in Hollywood.<sup>109</sup>

The makeup of talent agencies does not allow a single agent to act in the best interests of every client at all times. After all, a top agent might handle more than a dozen clients—many of whom are household names—and it is occasionally the case that two of his clients are being considered for the same starring role. This creates a conflict of interest, but one that is generally regarded as acceptable in Hollywood. Primarily because there is no undue concealment of material information, each client is well aware of the other actors to whom her agent is also responsible. But in a contract negotiation involving only one client, an agent has an obligation to perform in his client’s best interest, in part because the actor has reason to expect such treatment from her agent. Despite employing her brother as her manager, for instance, Basinger likely relied primarily on her agent’s advice because, as he readily admitted, he had been hired to re-invent her image.<sup>110</sup>

As the “entertainment agent’s roles multiply and influence expands, the potential for self-dealing increases.”<sup>111</sup> The mixed motive rule fails to take this into account. Instead, it allows agents virtual immunity, even when their advice is meant primarily to benefit their own personal agenda (which does not always coincide with the best interest of their clients). This results in a dangerous combination that could lead to abuse: agents exercise maximum power with minimal accountability. For this reason, it is imperative that courts abandon the mixed motive rule in favor of an alternative rule that allows the fact-finder to balance the issues at stake in each inducement case. This will solve accountability problems relating to the agent’s decision to induce a

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<sup>107</sup> *Id.* at 227.

<sup>108</sup> Ovitz is a good case in point. Although he is no longer an agent (he has since launched and left Artists Management Group [AMG]), he continues to use his industry connections to procure work for his clients, so much so that his former agency (CAA) has refused to share clients with AMG.

<sup>109</sup> William A. Birdthistle, *A Contested Ascendancy: Problems with Personal Managers Acting as Producers*, 20 LOY. L.A. ENT. L. REV. 493, 496 (2000).

<sup>110</sup> Kathleen O’Steen, “*Helena*” *Some Mean Role*, DAILY VARIETY, Mar. 3, 1993, at 3.

<sup>111</sup> Clark, *supra* note 9, at 628.

breach of contract. As I will show in Part VI, limiting the scope of the agent's privilege should also help to minimize the power differential that is exacerbated by the widespread use of oral contracts in Hollywood.

## 2. The Predominant Motive Rule

The predominant motive rule allows the court to look at "the predominant purpose underlying the defendant's conduct."<sup>112</sup> While this rule has not been applied in California inducement cases, it has been suggested in several California cases and has been openly embraced in at least one other state.<sup>113</sup> In defamation cases, for instance, the California Supreme Court has held that "the question of malice is an independent one—of fact purely—and altogether for the consideration of the jury, and not at all for the judge."<sup>114</sup> In other words, the jury is entrusted with determining the defendant's predominant motive after it has considered the defendant's intent.<sup>115</sup>

Indeed, even in an interference with contract case in which the court ultimately adopted the mixed motive approach, the court seemed to support the predominant motive rule. In *Shapoff v. Scull*, the court described the privilege of a person with a financial interest in another's business as "at most a qualified one dependent for its existence upon the circumstances of the case. . . . The resolution of the issue turns on the defendants' predominant purpose in inducing the breach of contract."<sup>116</sup> Courts are willing to admit, therefore, that certain defendants should be required to show 51% proper motive for legitimate use of the privilege, as opposed to the mere morsel of proper motive required by the mixed motive rule. The nature of a talent agent's job allows him to act often on his own behalf, so it seems reasonable to suggest that courts should consider applying a more strict rule to govern the dealings of talent agencies.

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<sup>112</sup> *Id.* at 629.

<sup>113</sup> The rule has been embraced in New York. *See id.*

<sup>114</sup> *Id.* at 631.

<sup>115</sup> Admittedly, there are numerous practical and philosophical difficulties with this proposal. For one thing, we cannot ever be sure about another person's motives (or even our own, for that matter), which poses a problem for a court that is expected to meet a certain burden of proof. But for the purpose of this paper, I am relying on a more simplistic understanding of motive. I am not proposing that juries be asked or expected to determine specific reasons why an agent acts as he does; rather, I am proposing that juries be allowed to hear testimony that will help them to determine whether an agent, in a broad sense, had intended to act in a manner that is consistent with his responsibilities to his profession and his obligations to his client.

<sup>116</sup> *Shapoff v. Scull*, 272 Cal. Rptr. 480, 485 (Cal. Ct. App. 1990).

### C. *The Agent-Client Relationship*

Talent agents, who no doubt have clear and substantial financial interests in their clients' business, should be held to the higher standard. Consideration of the agent-client relationship and the obligations that flow from that relationship help to elucidate this point. As one of the many representatives in an actor's stable—which, for an accomplished screen actor, might also include an attorney, a business manager, a personal manager, and a publicist—an agent agrees tacitly to do his best work for his client. Not unlike lawyers, agents are often in a position of having to give advice that, while minimizing or eliminating their own financial gain, would clearly be in the employer's best interest. Lawyers, of course, are bound by a strict code regulating their behavior and therefore must do for clients, essentially, what the lawyers truly believe to be in their clients' best interests. While talent agents are regulated nowhere near as strictly as lawyers are, I believe that they face a moral obligation, the same one that lawyers face above and beyond the more obvious legal regulations.

By taking on the representation of an actor, an agent agrees to do so with one primary motive (or, if you will, a set of similar motives) to guide his actions. A full explication of the motive is unnecessary; suffice it to say that the agent must consciously intend that his decisions will maximize the advantages and minimize the disadvantages for the actor's career.<sup>117</sup> Charles Stern, president of the Stern Agency and a former member of the board of directors of the Association of Talent Agencies, believes that agents should not take advantage of their positions because doing so "knocks all the things we stand for, namely integrity and relationships with people."<sup>118</sup> Indeed, the predominant motive rule helps to maintain these standards because, by ensuring that agents take financial responsibility for their interference with actors' contracts, it deters them from inducing contract breaches unless they believe the breach really is in the actors' best interest. Not only does this help to safeguard what should be a tight bond between an agent and his clients, but it also minimizes the virtual immunity that agents enjoy under the mixed motive rule, thereby compelling every agent to strongly consider his clients' best interest in every decision that he makes.

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<sup>117</sup> Admittedly, one could argue that the agent and actor will sometimes disagree about what is good for her career. In practice, however, either the two will come to agreement, or the actor will find a different agent whose ideas and expectations are more in line with her own.

<sup>118</sup> Cleveland Horton, *Coke/CAA Draws Flak: Agent Charges Conflict of Interest, Unfair Business*, *ADVERTISING AGE*, Sept. 30, 1991, at 1.

## VI. BREACHES AND FINANCIAL DAMAGES

In Part IV, I showed that oral contracts possess both instrumental and intrinsic value within the entertainment industry. For this reason and others, I argued that Hollywood should continue to rely on and enforce the oral contracts agreed upon by artists and production companies. I pointed out the downside of relying upon written agreements alone, and I concluded that the value of the convention of using oral contracts more than made up for the potential loss of stability and accountability in the absence of written agreements. I contended that people are inclined to exaggerate what I deemed the power differential problem in the industry and argued that, contrary to popular belief, it is not affected significantly by the industry's reliance on oral agreements. But there is one industry reality that agreements alone—oral or otherwise—seem unable to deal with: the discrepancy between the financial resources available to artists and those available to corporate players in Hollywood. In fact, as *Main Line v. Basinger* illustrated, oral agreements can even exacerbate the discrepancy with staggering results for the artists involved.

But as I hinted at in Part V, I believe that limiting the scope of the agent's privilege (*i.e.*, employing the predominant motive rule) can help to ease the financial disadvantages faced by artists when oral agreements go sour. This is so for at least two reasons. First, limiting the agent's privilege will drastically reduce the number of breaches of oral contracts like the one that could have cost Kim Basinger millions of dollars. And second, when breaches are induced, the predominant motive rule allows for damages to be levied potentially against agencies as well as actors, reducing the financial burden that may be pinned on an actress who is merely following her agent's advice.

### A. *Minimizing Induced Breaches*

By holding agents more accountable for their actions in connection with contract breaches, the predominant motive rule strongly discourages agents from inducing breaches unless they are confident that they can show that their advice is in the client's best interest. This in turn will minimize the number of induced breaches and, therefore, the frequency with which artists are left financially devastated for following their agents' advice. As mentioned previously, the predominant motive rule discourages an agent from acting in his own self-interest because it allows courts to hold him accountable whenever he cannot show that he was acting primarily on his client's behalf. An agent is therefore compelled to seriously consider whether the potential advantages of induc-

ing a breach (freeing a client from doing a project that would hurt her career) actually do outweigh the disadvantages (the potential for the agent and his agency to be held financially accountable for the client's breach). Basinger's agent faced no real disadvantages under the mixed motive interpretation of the agent's privilege, and he thus had no clear disincentive for inducing a breach. Given the circumstances, it is very unlikely that Basinger's agent would have induced the breach if the predominant motive rule had been in effect, for he would have been hard-pressed at the time to prove that his advice was clearly in Basinger's best interest.<sup>119</sup>

An important point is that the predominant motive rule forces agents to *consider* their own long-term self-interest (as they want to try to avoid financial responsibility and a poor reputation) in an attempt to keep them from *acting* in their own short-term self-interest (by inducing an improper breach). This will minimize the number of contract breaches that are induced as well as the number of times agents choose to act in their own self interest at their clients' expense, both good things for the entertainment industry.

### B. *Levying Damages Against Talent Agencies*

Even if limiting the agent's privilege proves successful in minimizing the number of induced contract breaches, it cannot eliminate induced breaches across the board. But limiting this privilege provides a second safeguard for an actor when she is sued for breaching a contract at the suggestion of her agent. When an actor is found guilty of a breach that had been induced by her agent, damages could be levied against the agency<sup>120</sup> as well as the actor if the agent had not been motivated primarily by his client's best interest. This will reduce the financial burden on actors who are merely doing what their agents advise, putting the burden on often-wealthy agencies to pick up the rest of the tab when agents induce improper breaches.

As we saw earlier, agents are obligated to have their clients' best interests in clear view because of the implicit promises they make when they agree to be retained by certain actors. Any agent who fulfills this

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<sup>119</sup> Note that this differs in a significant manner from supporting the claim that breaching the contract had been in Basinger's best interest. Indeed, *Boxing Helena* ultimately bombed at the box office, and while one could argue that it would have performed far better with Basinger's star power, an equally strong case could be made that Basinger was lucky to have avoided the film. But this does not imply that Basinger's agent's primary motivation for inducing the breach was his stated belief that the film would not be in her best interest.

<sup>120</sup> Since each talent agent is also an agent for his employer, it seems reasonable (at least initially) to at least consider holding agencies (as opposed to or in addition to individual agents) responsible for the improper professional actions of their employees.

obligation will be (and deserves to be) protected by the agent's privilege and should not be forced to pay extensive damages for inducing a contract breach. As such, it seems particularly appropriate that an agency whose agent is held accountable for an improper inducement under the predominant motive rule—meaning an agent who failed to meet his obligation to his client—be forced to pay financial damages. After all, the reason why the actor is being sued in the first place is that she followed her agent's advice to renege on the obligation that she made for herself when she promised to fulfill a contractual agreement. More generally, all parties that fail to fulfill their obligations should share in the financial responsibility so that the burden does not fall unfairly on the shoulders of any single entity.

## VII. CONCLUSION

Allow me be the first to point out that I have merely scratched the surface in my discussion of oral contracts and the agent's privilege. Each topic is huge in and of itself, and the overlapping areas are not as clearly defined as I had anticipated they would be. I am even unsure whether the questions I raise are poignant enough to be taken seriously, and the answers I propose are nowhere near as precise as I had hoped they would be. Furthermore, my relatively limited experience in the industry—coupled with the fact that I have not yet been to law school—has made it difficult for me to determine whether my answers provide any practical insight into dealmaking, entertainment or otherwise. I nonetheless hope that I have at least sparked some interest in what I believe to be a worthwhile topic so that others might decide to expand and improve upon what I have written.

Although this paper discusses the desirability of enforcing oral contracts and the proper limitations on the agent's privilege, at its core it is concerned primarily with regulating relationships and guiding behavior to encourage parties to trust one another to do the right thing. The unfortunate reality, however, is that people often renege on promises and ignore obligations. This is a weighty consideration in any relationship, and it is the reason why I have tried to define ways for us to hold people accountable for their choices. The steps I suggest we take toward limiting the scope of the agent's privilege, for instance, will have the immediate effect of reducing the number of induced breaches by holding agents more accountable for their actions.

Perhaps the more important and lasting effect of my attempts to regulate behavior is that they compel agents, clients, and other industry players—all of whom must interact closely with one another on personal and professional levels—to form close, trusting relationships with

everybody in their lives. My hope is that this close interaction will promote more in the way of mutual respect and an underlying sense of integrity. With any luck, dealmakers will learn to overcome their self-interested motives in the future just as they learned to accept the binding nature of oral agreements in the past. But as insiders already know, Hollywood is built on appearances, and it does not appear that this reality is in Hollywood's foreseeable future.