CONSEQUENTIAL DAMAGES AND ENTERTAINERS' CONTRACTS—THE BUCK STOPS WHERE?*

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I. INTRODUCTION

Entertainers[1] are entitled to compensatory damages when employers breach their contracts.[2] Such damages are calculated

[1] The term "entertainer" as used in this Article shall mean any person who appears, acts, dances, sings, or otherwise performs in a professional artistic capacity for the purpose of providing amusement and entertainment to audiences.

[2] This statement and all other examples used in this Article assume that employers have breached their contracts with entertainers by wrongfully discharging them. *See, e.g.*, Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189 (D. Mass. 1985); Quinn v. Straus Broadcasting Group, 309 F. Supp. 1208, 1209 (S.D.N.Y. 1970); Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970); Amaducci v. Metropolitan Opera Ass'n, 33 A.D.2d 542, 304 N.Y.S.2d 322 (1st Dep't 1969). *But cf.* Williams v. Hardy, 468 So. 2d 429 (Fla. Dist. Ct. App. 1985) (entertainer breaches contract to perform at concert); Yeam, *Tortious Breach of Personal Service Contracts: A New Remedy Against Breaching Performers?*, 5 ENT. & SPORTS LAW. 7, 7 (1986) (employer's remedies are contract damages, an injunction, or tortious breach of contract damages); Note, *Loss of Publicity as an Element of Damages*, 17 VA. L. REV. 65, 66-67 (1930) (citations omitted) [hereinafter Note, *Loss of Publicity*]:

> Where an employer has contracted for the exclusive services of another which are peculiar and rare in nature, and such person later refuses to perform, a restrictive injunction is granted the employer in order to prevent the employee from acting elsewhere. Equity, for obvious reasons, cannot compel specific performance, but it does give the employer this injunction and all

by subtracting from the unpaid contract price monies received from mitigating employment[3] and unpaid expenses.[4] Theoretically, this compensation should also include actual damages[5] for

> the relief possible under it. The basis upon which such decisions rest is that damages for the breach of such contracts cannot be estimated with any certainty, and even if they could, the employer could not purchase the same services elsewhere.

[3] De La Falaise v. Gaumont-British Picture Corp., 39 Cal. App. 2d 461, 103 P.2d 447 (1940) (actress earned $4,000 for two radio appearances which was deducted from judgment awarded for producer's breach of contract for that actress to appear in two films, because such work was different but not inferior to that employment under the contract); Sutherland v. Wyer, 67 Me. 64 (1877) (wrongfully discharged actor who terminated subsequent employment to attend trial had duty to maintain the subsequent employment for the duration of the original contract term); De Loraz v. McDowell, 68 Hun. 170, 22 N.Y.S. 606 (Sup. Ct. N.Y. Cty. 1893), *aff'd mem.*, 142 N.Y. 664, 37 N.E. 570 (1894) (employer could have pleaded that actress failed to accept similar employment in order to mitigate damages had the case gone to trial).

The issue of what is comparable employment is beyond the scope of this Article. *But see, e.g.*, Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d. 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970) (actress' rejection of substitute movie contract with same remuneration did not justify reduction in damages award, because the substitute contract eliminated other important rights under the original agreement, and the nature of the substitute role was different and inferior), *aff'g* 276 Cal. App. 2d 270, 81 Cal. Rptr. 221 (1969); Briscoe v. Litt, 19 Misc. 5, 42 N.Y.S. 908 (Sup. Ct. N.Y. Cty. 1896) (former chorus girl was not obligated to seek work in such capacity, because it was not equal to dramatic role as singer and actress); Evesson v. Ziegfeld, 22 Pa. Super. 79 (1903) (actress not obligated to find work at greater distance from place of original performances and greater labor commitment not required according to court's dictum); Harger v. Jenkins, 17 Pa. Super. 615 (1901) (wrongfully discharged actor did not have to accept employment as store clerk); Buffalo Bayou Co. v. Lorentz, 177 S.W. 1183, 1185 (Tex. Civ. App. 1915) (dictum approving uncited case of dancer who did not have to accept a position placing her in the rear rank of ballet); *see also* Howard v. Daly, 61 N.Y. 362, 371 (1875) (actress' reasonable effort to secure similar employment merely required mitigation of damages, and the defendant had the burden of proof to show evidence to the contrary that such effort was not made); Roserie v. Kiralfy Bros., 12 Pa. 209 (1877) (performers not obliged to seek work outside of their line of professions); *see generally* Annotation, *Nature of Alternative Employment which Employee must accept to Minimize Damages for Wrongful Discharge*, 44 A.L.R.3d 629, § 22, at 663-66 (1972).

[4] *See, e.g.*, Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189, 1195 (D. Mass. 1985).

[5] Actual damages used in this context means consequential damages which the plaintiff can establish as a matter of fact. Consequential damages, for the purposes of this Article, are pecuniary injuries to an entertainer's career flowing from an employer's breach of contract. Redgrave v. Boston Symphony Orchestra, Inc., 557 F. Supp. 230, 234 (D. Mass. 1983) (subsequent history omitted):

> [I]f plaintiffs proved other employers refused to hire Redgrave after termination of the . . . contract because of that termination (that loss of other employment 'followed as a natural consequence' from the termination of the contract), that this loss of other employment would reasonably have been foreseen by the parties at the time of contracting and at the time of termination, and that damages are rationally calculable, then plaintiffs may be entitled to damages that include monies for loss of the other employment.

See also Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977) (recovery of lost royalties flowing from breach of contract to promote records); Smithers v. Metro-Goldwyn-Mayer Studios, 139 Cal. App. 3d 643, — (not certified for publication in official reports), 189 Cal. Rptr. 20, 24 (1983) (the "jury could reasonably conclude from the evidence that Smithers suffered an economic loss . . . ." regarding future negotiations for compensation); *see also* R. Dunn, Recovery of Damages For Lost Profits §§ 4.1-.2, at 185-96, §§ 5.1-.11, at 215-42 (2d ed. 1981 & Supp. 1986).

loss of publicity[6] arising from employers' wrongful termination of contracts.[7] Arguably, the publicity generated from entertainers' performances is part of the compensation package, and entertainers will accept less remuneration for more prominent

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[6] Publicity is a remarkably elastic concept which defies precise definition, but all entertainers depend on the recognition that it provides when seeking subsequent employment. 1 T. SELZ & M. SIMENSKY, ENTERTAINMENT LAW § 9.03 (1985). Loss of publicity, as used in this Article, refers to the value of exposure, billing, or credit that the entertainer would have received if the contract had been fully performed. *See* Berman & Rosenthal, *Screen Credit and the Law*, 9 UCLA L. REV. 156, 156 (1962); Comment, *The Loss of Publicity as an Element of Damages for Breach of Contract to Employ an Entertainer*, 27 U. MIAMI L. REV. 465 (1973) [hereinafter Comment, *Loss of Publicity*]; Note, *Loss of Publicity*, *supra* note 2, at 66; Annotation, *Recovery by Writer, Artist, or Entertainer for loss of Publicity or Reputation Resulting from Breach of Contract*, 96 A.L.R.3d 437 (1979); Moskin, *Proving Damages: Publicity Denied Can Be Valuable*, Entertainment Law & Finance 5 (June 1986); Soocher, *Name Protection: Establishing Implied Rights to Credit*, Entertainment Law & Finance 3 (April 1986):

> A claim for consequential damages for breach of an implied contract should be based on diminished ability to further one's career and reduced future earnings. The same claim based on a loss of publicity and contacts may be deemed too speculative by a court, although the same argument termed as "loss of benefit of the bargain" may prevail. Courts have held, however, that the value of a credit may be determined by the financial success or failure of a particular project.

See also Note, *Giving the Devil Its Due: Actors' and Performers' Right to Receive Attribution for Cinematic Roles*, 4 CARDOZO ARTS & ENT. L.J. 299, 299-300 (1985) [hereinafter Note, *Attribution Right*].

No action has been reported where an entertainer sought to recover for loss of publicity itself, except for Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 140 Cal. Rptr. 921 (1977) (no cause of action stated for loss of general publicity unrelated to career). However, a discussion of the value of publicity itself is, for all intents and purposes, subsumed in the issue of the value of lost opportunities, because the ultimate measure of publicity's worth will be determined by how much additional employment it generates, together with the nature of that subsequent work. Yet, for those entertainers who are unable to prove loss of opportunity flowing from employers' breach of contracts, a measure of damages based on the fair market value of the loss of publicity foregone might protect entertainers' expectation interests. *Cf. Ericson*, 73 Cal. App. 3d at 859 (award of damages based on value of portion of magazine cover reversed for failure to prove proximate cause of alleged harm). Implicit in this analysis is the assumption that if entertainers are compensated for loss of publicity they will be made whole. They will receive the benefit of the bargain, and if they so desire, will spend the proceeds to promote themselves. It is also assumed that this expenditure will have roughly equivalent effects on entertainers' careers as publicity from the employment from which they were wrongfully discharged. Some cases have:

> held [that actors] in part contracted for the purpose of obtaining publicity and increasing their reputation. *See, e.g.*, *Withers v. General Theatre Corp.*, [1933] 2 K.B. 536 [C.A. 1933]. These cases, however, are entirely different from the one at bar; the actors had bargained for the benefit of an opportunity to increase their reputation as part of the consideration for their agreement. The cases do not stand for any expanded award of damages where an increase in reputation is not part of the consideration for the contract.

Skagway City Sch. Bd. v. Davis, 543 P.2d 218, 227 n.19 (Alaska Sup. Ct. 1975).

[7] *See, e.g.*, Colvig v. RKO Gen., Inc., 232 Cal. App. 2d 56, 66-67, 42 Cal. Rptr. 473, 480 (1965) (employers as a general rule do not have to provide work for employees as long as their agreed salaries are paid, except where the employees' reputations will be harmed if they are not allowed to practice their professions); Comment, *Loss of Publicity*, *supra* note 6, at 467-75 (collecting and analyzing English cases).

billing.[8] Therefore, anytime that entertainers are not allowed to perform due to wrongful discharge, they are denied the opportunity to make their art known. This harm is not alleviated by mere payment of the agreed upon unpaid contract price.[9]

Although entertainers are often pecuniarily harmed by the loss of publicity flowing from the inability to practice their art,[10] contract law doctrine requires proof of specific harm.[11] Deter-

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[8] *See, e.g.*, Smithers v. Metro-Goldwyn-Mayer Studios, 139 Cal. App. 3d 643, — (not certified for publication in official reports), 189 Cal. Rptr. 20, 22 (1983); *see also* Berman & Rosenthal, *supra* note 6, at 156-57.

[9] Beyond this point, the value of publicity *qua* publicity, is the fact that loss of publicity may lead to loss of opportunity. Note, *Attribution Right*, *supra* note 6, at 300. Failure to compensate for lost opportunities caused by lost publicity will not be adequately reflected in the balance of the unpaid salary or performance fee, *i.e.*, the entertainer's expectation of profit is not merely limited to the compensation to be paid as remuneration for services rendered.

[10] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (recognition of entertainer's right to control publicity of performance to protect its economic value); Colvig v. RKO Gen., Inc., 232 Cal. App. 2d 56, 66-67, 42 Cal. Rptr. 473, 480 (1965) (practice of profession necessary to protect employee's reputation).

Lost opportunities often mean lost profits. "Profit is computed as the amount the plaintiff would have realized under the contract if it had been faithfully carried out, less the necessary expense of performance on its part." R & I Elecs. v. Neuman, 66 A.D.2d 836, 838, 411 N.Y.S.2d 401, 404 (2d Dep't 1978), *quoted in* Whitmier & Ferris Co. v. Buffalo Structural Steel Corp., 104 A.D.2d 277, 286, 482 N.Y.S.2d 927, 934 (4th Dep't 1984) (Moule, J., dissenting) (subsequent history omitted); *see also* Redgrave v. Boston Symphony Orchestra, 602 F. Supp. 1189, 1195-96 (D. Mass. 1985); R. DUNN, *supra* note 5, §§ 6.1-.2, at 243-47 (lost profits usually means lost net profits).

[11] Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926-28 (2d Cir. 1977); Paramount Prods., Inc. v. Smith, 91 F.2d 863, 866-67 (9th Cir.), *cert. denied*, 302 U.S. 749 (1937); Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189, 1196-97 (D. Mass. 1985); Quinn v. Straus Broadcasting Group, 309 F. Supp. 1208, 1209 (S.D.N.Y. 1970); Westwater v. Rector of Grace Church, 140 Cal. 339, 73 P. 1055 (1903); Tamarind Lithography Workshop, Inc. v. Sanders, 143 Cal. App. 3d 571, 576, 193 Cal. Rptr. 409, 412 (1983); Smithers v. Metro-Goldwyn-Mayer Studios, 139 Cal. App. 3d 643, — (not certified for publication in official reports), 189 Cal. Rptr. 20, 24 (1983); Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 140 Cal. Rptr. 921 (1977); Freund v. Washington Square Press, 34 N.Y.2d 379, 384-85, 314 N.E.2d 419, 420-21, 357 N.Y.S.2d 857, 861 (1974); Hewlett v. Caplin, 275 A.D. 797, 88 N.Y.S.2d 428 (1st Dep't 1949), *aff'd*, 301 N.Y. 591, 93 N.E.2d 492 (1950); *see also* R. DUNN, *supra* note 5, §§ 1.2-.3, at 4-7 (proof necessary for fact of damages, not amount of them):

> Courts have modified the "certainty" rule into a more flexible one of "reasonable certainty." In such instances, recovery may often be based on opinion evidence . . . from which liberal inferences may be drawn. Generally, proof of actual or even estimated costs is all that is required with certainty.
>
> Some of the modifications which have been aimed at avoiding the harsh requirements of the "certainty" rule include: (a) if the fact of damage is proven with certainty, the extent or the amount thereof may be left to reasonable inference; (b) where a defendant's wrong has caused the difficulty of proving damage, he cannot complain of the resulting uncertainty; (c) mere difficulty in ascertaining the amount of damage is not fatal; (d) mathematical precision in fixing the exact amount is not required; (e) it is sufficient if the best evidence of the damage which is available is produced; and (f) the plaintiff is entitled to recover the value of his contract as measured by the value of his profits.

R. DUNN, *supra* note 5, § 1.3, at 8 (citing M & R Contractors & Builders v. Michael, 215 Md. 340, 348-49, 138 A.2d 350, 355 (1958)). *But cf.* Skagway City Sch. Bd. v. Davis, 543

mining the value the contracting parties may have placed on publicity flowing from the entertainer's performance is equally problematic as against the actual harm the entertainer suffered from being unable to procure subsequent employment or successfully bargain for more prominent billing or increased remuneration.[12] First, it is not always clear that the parties thought about the value of the publicity to the entertainer in the event of a default.[13] Second, a causal chain may not exist between the loss of publicity caused by the employer's breach and the entertainer's inability to obtain subsequent work.[14] Many courts have not awarded consequential damages[15] because of these theoretical problems.[16] In fact, most courts address this issue by dismissing causes of action for loss of publicity damages, because they could not reasonably ascertain that harm was suffered[17] or have been daunted from calculating its extent.[18] Other reasons for denying relief have included invocations of proximate cause[19] and noncompensability.[20] In short, another way to consider judicial reluctance to grant relief is to assume that entertainers bear the burden of risk that their prospects will be harmed by employers' breach of contracts. This broad assertion is subject to two exceptions: first, where the parties to the contract agree otherwise; and second, where courts allow the introduction of evidence to establish consequential harm flowing from the breach of

P.2d 218, 225-27 (Alaska Sup. Ct. 1975); Kenford Co. v. County of Erie, 67 N.Y.2d 257, 261-62, 493 N.E.2d 234, 235-36, 502 N.Y.S.2d 131, 132-33 (1986) (specific proof of damages required).

12 Note, *Attribution Right*, *supra* note 6, at 316-17.

13 Spang Indus. v. Aetna Casualty & Sur. Co., 512 F.2d 365, 369 (2d Cir. 1975) ("It is commonplace that parties to a contract normally address themselves to its performance and not to its breach or the consequences that will ensue if there is a default.") (citations omitted); Kenford Co. v. County of Erie, 67 N.Y.2d 257, 262, 493 N.E.2d 234, 236, 502 N.Y.S.2d 131, 133 (1986) (liability for loss of profits not proved to be within parties' contemplation at time of contract or breach).

14 *See, e.g.*, Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 140 Cal. Rptr. 921 (1977).

15 Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 927-28 (2d Cir. 1977); Quinn v. Straus Broadcasting Group, 309 F. Supp. 1208, 1209 (S.D.N.Y. 1970); Westwater v. Rector of Grace Church, 140 Cal. 339, 73 P. 1055 (1903); Tamarind Lithography Workshop, Inc. v. Sanders, 143 Cal App. 3d 571, 577-78, 193 Cal. Rptr. 409, 412-13 (1983); Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 140 Cal. Rptr. 921 (1977); Zorich v. Petroff, 152 Cal. App. 2d 806, 811, 313 P.2d 118, 122 (1957); Freund v. Washington Square Press, 34 N.Y.2d 379, 383-85, 314 N.E.2d 419, 421, 357 N.Y.S.2d 857, 860-61 (1974); Hewlett v. Caplin, 275 A.D. 797, 88 N.Y.S.2d 428 (1st Dep't 1949), *aff'd*, 301 N.Y. 591, 93 N.E.2d 492 (1950).

16 *See infra* text accompanying notes 44-49.

17 *See infra* text accompanying notes 44, 66, 70, & 79.

18 *See infra* text accompanying note 59.

19 *See infra* notes 79-80.

20 *Id.*; *see also infra* notes 47, 87.

contract.[21]

Even where courts have allowed recovery for loss of publicity, there has been no principled basis on which to calculate the actual harm suffered.[22] As a result of the application of traditional contract law doctrine, entertainers are subject to an all or nothing policy.[23] In other words, entertainers are vulnerable to pecuniary harm arising from inadequate computation of damages. However, when they are granted relief, they may be overcompensated. Since the law governing loss of publicity lacks an objective standard for measuring these damages, there is an undue risk of forfeiture leavened by occasional windfalls.[24]

This Article will attempt to remedy this deficiency. First, it will explore the economic justifications for denying recovery as a

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[21] Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189, 1196-97 (D. Mass. 1985); Smithers v. Metro-Goldwyn-Mayer Studios, 139 Cal. App. 3d 643, — (not certified for publication in official reports), 189 Cal. Rptr. 20, 24 (1983); Cummins v. Brodie, 667 S.W.2d 759, 765-66 (Tenn. Ct. App. 1983) (entertainers with prior experience could estimate lost profits, despite lack of mathematical certainty); R. DUNN, *supra* note 5, § 4.2, at 188-96; Comment, *Contracts-Damages—Actual Damages Recoverable For Loss of Credit or Injury to Credit Reputation If Proven Natural, Probable, and Foreseeable Consequence of Breach*, 13 ST. MARY'S L.J. 381, 389 (1981) (analyzing Mead v. Johnson Group, Inc., 615 S.W.2d 685 (Tex. 1981), which focused on sufficiency of evidence to demonstrate consequential damages for new businesses).

[22] Once entertainers have been able to prove that they were harmed, juries have been allowed to determine the amount of harm based on the evidence presented. This method's imprecision prompted critical commentary from one English court which decided entertainers' actions for lost opportunity. Marbe v. George Edwardes (Daly's Theatre), Ltd., [1928] 1 K.B. 269, 281-82 (C.A. 1927):

> The next matter to be considered is the amount awarded by the jury [which] is a large sum. I have felt some doubt whether it does not include something in the way of punitive damages . . . . Was there before the jury material on which they could properly arrive at that large sum as the measure of that loss? Eliminating all matters of prejudice and indignation at the conduct of the defendants, it is to be observed that this plaintiff, who had established a reputation in America, had failed to obtain a suitable engagement within three months after the play had ceased to run . . . . The jury might properly estimate how much longer the effects of the defendants' conduct were likely to last, and might decide that the mere salary was not adequate compensation; and taking into consideration the large salary the plaintiff was earning I cannot say that the amount they have awarded was so large as to show that it must include matters which ought not to have been taken into account.

See also Comment, *Loss of Publicity*, *supra* note 6, at 471. This method also has prompted review in American cases. *See, e.g.*, Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189, 1196-97 (D. Mass. 1985); Smithers v. Metro-Goldwyn-Mayer Studios, 139 Cal. App. 3d 643, — (not certified for publication in official reports), 189 Cal. Rptr. 20, 24 (1983); *see also* Skagway City Sch. Bd. v. Davis, 543 P.2d 218 (Alaska Sup. Ct. 1975); *see generally* R. DUNN, *supra* note 5, § 5.1, at 215-16.

[23] Note, *Lost Profits and* Hadley v. Baxendale, 19 WASHBURN L.J. 488, 508 (1980) [hereinafter Note, *Lost Profits*] (citing Comment, *Remedies—Lost Profits as Contract Damages for Unestablished Business: The New Business Rule Becomes Outdated*, 56 N.C.L. REV. 693, 705 (1978) [hereinafter Comment, *Unestablished Business*]).

[24] *See supra* note 22.

matter of contract.[25] Second, this Article will demonstrate the erosion of the theoretical limitations which constrain traditional measures of apportioning risk.[26] Third, the importation of defamation law defenses will be analyzed, insofar as they introduce tort and constitutional considerations into private agreements.[27] Fourth, this Article will argue that parties to performance-related contracts could agree to shift the risk of liability flowing from breaches by stipulated damages clauses.[28] The inherent advantage of this proposal is that it avoids the doctrinal problems of courts rewriting contracts.[29] Moreover, constitutional privilege[30] and fault[31] considerations are obviated, which will maintain the distinction between the fields of tort and contract.[32]

This Article will conclude that incorporation of stipulated damages clauses in entertainers' contracts will yield equitable risk shifting as a matter of fair contractual bargaining.

II. Contract Law

A. *Protection of the Freedom Interest in Contract*

Once a party enters into a contract, a measure of freedom to act is surrendered in that breaching the contract entails liability for damages:

> The suggested freedom to break a contract and suffer liability only for the legally recognized damages is within the scope of the idea often referred to as Holmes' bad man theory of contract law—that one who is willing to pay the penalty of such damages as the law assesses is free to break the contract and pay.[33]

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25 *See infra* text accompanying notes 44-49.
26 *See infra* text accompanying notes 51-59.
27 *See infra* text accompanying notes 114-62.
28 *See infra* text accompanying notes 163-80.
29 Wassenaar v. Panos, 111 Wis. 2d 518, 528, 331 N.W.2d 357, 362 (1983).
30 *See infra* notes 117, 157.
31 *See infra* text accompanying notes 114-62.
32 Note, *Extending the Bad Faith Tort Doctrine to General Commercial Contracts*, 65 B.U.L. Rev. 355, 378-85 (1982) [hereinafter Note, *Extending the Bad Faith Tort Doctrine*]. *But cf.* G. Gilmore, The Death of Contract 94 (1974).
33 Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189, 1194 (1985) (citing O.W. Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 461-62 (1897)). Aside from judicial recognition of parties' need to deviate from norms of social conduct, contract law permits allocation of opportunities and resources for the greatest possible efficiency. Framed in this economic light, contract breaches are rational choices between goals with greater or lesser economic values. Therefore, the cause of breach is irrelevant, because the breaching party is presumed to have chosen a course of action which is more profitable and questions of morality play no part in classic contract law doctrine. Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903).

The presumption of greater economic benefit accruing from the breach of contract,

This conception of contractual obligations emphasizes that at all times the parties have the choice of either performing or paying for the failure to perform.[34] However, the right to breach contracts is also constrained by economic principles, because the breaching party must derive a greater profit from non-performance than performance in order to cover the costs of non-performance.[35] Thus, the efficient breach of contract theory posits that parties should breach when it is to their advantage to do so, provided that the injured party receives damages limited to loss of expected profit.[36]

B. *Protection of the Expectation Interest in Contract*

The expectation interest is that amount the injured party

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as viewed from the free market perspective, also contains implicit notions as to which course of action is more beneficial to society. Since resources are scarce, society benefits from the highest value placed on them and should reward the most efficient allocation of limited resources by contracting parties. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 278 (1970). Accepting this view that breach of contract is a morally neutral activity in which the personal motivations of the actors are irrelevant, courts have only awarded those damages that will make the injured party whole again. Fuller & Perdue, *The Reliance Interest in Contract Damages* (Parts I and II), 46 YALE L.J. 52, 373 (1936-37); *see* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 4-14, at 521-22 (2d ed. 1977).

Recently, the notion of efficient breach of contract has been attacked on the grounds that "the traditional measure of contract damages [i]s generally inadequate to compensate fully an injured plaintiff." Note, *Extending the Bad Faith Tort Doctrine, supra* note 32, at 371 (citing Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443, 1450-51 (1980); Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Code and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 558 n.19 (1977); Leffe, *Injury, Ignorance and Spite, the Dynamics of Coercive Collection*, 80 YALE L.J. 1, 5 (1970); Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 111 (1981); Schiro, *Prospecting for Lost Profits in the Uniform Commercial Code: The Buyer's Dilemma*, 52 S. CAL. L. REV. 1727, 1734 (1979)). Contract law enforcement transaction costs, such as foregone opportunities and attorney's fees, are not recoverable as part of the successful plaintiff's award, so that no plaintiff ever receives compensatory damages that equal what was bargained for under the contract. Marschall, *Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract*, 24 ARIZ. L. REV. 733, 737 (1982) (efficient breach concept is a myth).

The efficient breach principle has also been attacked in situations where the contract has been fully executed and the only obligation left is to pay money. In these situations, there are no resources to allocate which could prove more economically beneficial to society. Riley, *Disciplining the Recalcitrant Insurer: Punitive Damages for Breach of Contract*, N.Y. ST. B.J., Feb. 1985, at 30, 31-32.

Efficiency as a justification for resource allocation has also been challenged on other grounds, which attempt to identify and isolate hidden value judgments in all decision-making processes. For a recent discussion, see Hanks, *On a Just Measure of the Efficiency of Law and Governmental Policies*, 8 CARDOZO L. REV. 1 (1986), as well as the spirited responses to Professor Hanks' position. Carlson, *Reforming the Efficiency Criterion: Comments on Some Recent Suggestions*, 8 CARDOZO L. REV. 39 (1986); Markovits, *Cost-Benefit Analysis and the Determination of Legal Entitlements: A Reply to Professor Carlson*, 8 CARDOZO L. REV. 75 (1986); *see also* Hanks, *Comments on Carlson's Comments*, 8 CARDOZO L. REV. 85 (1986).

[34] R. POSNER, ECONOMIC ANALYSIS OF THE LAW 55 (1972).

[35] *Id.* at 89; *see supra* note 33 and accompanying text.

[36] Note, *Extending the Bad Faith Tort Doctrine, supra* note 32, at 368-69; *see supra* note 33.

would have received if the contract had been performed,[37] or that amount equivalent to expected profits. Accordingly, a wrongfully discharged entertainer who proves the loss of expected profits is entitled to compensation for lost publicity and opportunities,[38] together with other losses sustained:

> [O]ne must determine the critical question as to the measure of damages under the law. The measure of damages clearly includes the performance fee less any expenses that would have been incurred to perform the contract. Does it also include compensation for harm to [an entertainer's] professional career in the circumstances of this case?[39]

C. Hadley v. Baxendale *as the English Rule*

English courts have long recognized that employers have an obligation to provide entertainers with opportunities to perform.[40] Thus, an employer's breach of contract, under the *Hadley v. Baxendale*[41] rule will give rise to consequential damages flowing therefrom that were a natural result of the breach, or which were

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[37] Cooter & Eisenberg, *Damages for Breach of Contract*, 73 CALIF. L. REV. 1432, 1468 (1985); *see also* Redgrave v. Boston Symphony Orchestra, Inc., 557 F. Supp. 230, 234 (D. Mass. 1983) (quoting John Hetherington & Sons, Ltd. v. William Firth Co., 210 Mass. 8, 21, 95 N.E. 961, 964 (1911)):

> The fundamental principle of law . . . for breach of contract . . . is that the injured party shall be placed in the same position he would have been in, if the contract had been performed, so far as loss can be ascertained to have followed as a natural consequence and to have been within the contemplation of reasonable men as a probable result of the breach, and so far as compensation therefor in money can be computed by rational methods upon a firm basis of facts.

[38] *Redgrave*, 557 F. Supp. at 234; Note, *Lost Profits*, *supra* note 23, at 489 (citations omitted):

> Courts must confront the long standing goals expectancy damages generate while simultaneously wrestling with problems of proof. Undoubtedly, plaintiff's expectancy damages may extend beyond the scope of the contract. However, the law proves less elastic. An intuitive plaintiff gazes ahead and forecasts untold damages.

See also Wassenaar v. Panos, 111 Wis. 2d 518, 535 n.19, 331 N.W.2d 357, 365 n.19 (1983) (citing Annotation, *Recovery by Writer, Artist, or Entertainer for Loss of Publicity or Reputation Resulting from Breach of Contract*, 96 A.L.R.3d 437 (1979)).

[39] Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189, 1194 (D. Mass. 1985).

[40] Comment, *Loss of Publicity*, *supra* note 6, at 467-70 (discussing Marbe v. George Edwardes (Daly's Theatre), Ltd., [1928] 1 K.B. 269 (C.A. 1927); Bunning v. The Lyric Theatre Ltd., 71 L.T.R. 396 (Ch. 1894); Fechter v. Montgomery, 55 Eng. Rep. 274 (M.R. 1863)). The House of Lords approved of *Marbe* and *Fechter* in Herbert Clayton & Jack Waller, Ltd. v. Oliver, [1930] A.C. 209. Comment, *Loss of Publicity*, *supra* note 6 at 471.

[41] 9 Exch. 341, 156 Eng. Rep. 145 (1854). In *Hadley*, a mill owner shipped by common carrier a broken mill shaft so that it could be measured for replacement. The common carrier due to its unreasonable delay in delivering the shaft caused the mill to remain inoperative during that period. Even though the mill owner lost profits, those

or deemed to be within the parties' contemplation at the time of

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profits were held not to be recoverable because they were not within the parties' contemplation.

The rule of *Hadley v. Baxendale* was stated by the court as follows:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

9 Exch. at 354-55. One commentator has noted three inconsistent principles in the first two sentences quoted above. In the first sentence, foreseeability is not required for damages "such as may fairly and reasonably be considered . . . arising naturally . . . ." 9 Exch. at 354, *construed in* R. DUNN, *supra* note 5, § 1.6, at 15. Likewise, the first sentence also posits a rule that allows courts to determine whether damages "may reasonably be supposed to have been in the contemplation of both parties . . . ." 9 Exch. at 354, *construed in* R. DUNN, *supra* note 5, § 1.6, at 15-16. However, this second rule sets forth an objective standard of foreseeability as opposed to a presumptive one stated in the first part of the sentence. The third principle requires that the "special circumstances" were actually made known by the plaintiff to the defendant and is, therefore, a subjective test of foreseeability. R. DUNN, *supra* note 5, § 1.6, at 16. Inconsistencies arise from the confusing manner in which *Hadley*'s rule is presented by courts and commentators alike. The *Hadley v. Baxendale* rule only requires foreseeability when the damages are not proximately caused by the breach of contract. Only where damages are not proximately caused by the breach of contract does an inquiry into what the parties knew or should have known become necessary. R. DUNN, *supra* note 5, § 1.18, at 47-50.

Leaving aside the situations where an entertainer specifically informs an employer that she will suffer consequential harm upon the employer's breach, or where such an employer knew or should have known that loss of opportunity would flow from the breach, the very nature of the contractual relationship may be enough to presumptively put the breaching party on notice. Courts have held that "it would be presumed that lost profits were contemplated by the parties when the object of the contract is profits." R. DUNN, *supra* note 5, § 1.10, at 27 (emphasis omitted) (citing in part, Palmer v. Connecticut Ry. & Lighting Co., 311 U.S. 544 (1941); James v. Herbert, 149 Cal. App. 2d 741, 309 P.2d 91 (1957); Wakeman v. Wheeler & Wilson Mfg., 101 N.Y. 205, 4 N.E. 264 (1886)).

However, just as *Hadley v. Baxendale* involved an action for lost profits, it is hard to imagine many commercial contracts in which the object is not profits. Although this statement swallows the rule of *Hadley v. Baxendale* in lost profits damages actions, "[t]he courts are really saying that a party will be presumed to have contemplated the damages which are proximately caused by his breach of contract." R. DUNN, *supra* note 5, § 1.13, at 33. *But cf.* Skagway City Sch. Bd. v. Davis, 543 P.2d 218, 226-27 (Alaska Sup. Ct. 1975) (specific subjective notice required for unsophisticated parties); Kenford Co. v. County of Erie, 67 N.Y.2d 257, 261, 493 N.E.2d 234, 234-35, 502 N.Y.S.2d 131, 132 (1986) (specific knowledge required). *Skagway* also posited a different rule for entertainers. 543 P.2d at 227 n.19; *see also supra* note 6.

A standard of presumptive foreseeability requires that plaintiff establish proximate causation, that the consequential harm—loss of opportunity—flows directly and naturally as a probable result of the breach of contract:

contracting. These damages include the pecuniary harm suffered by the entertainer's loss of opportunity to perform, together with the attendant loss of publicity.[42] However, despite the application of the *Hadley v. Baxendale* rule, several judges deciding these matters have questioned whether there was sufficient evidence for juries to rationally award relief.[43]

> One who violates his contract with another is liable for all the direct and proximate damages which result from the violation. The damages must be not merely speculative, possible, and imaginary, but they must be reasonably certain and such only as actually follow or may follow from the breach of the contract. They may be so remote as not to be directly traceable to the breach, or they may be the result of other intervening causes, and then they cannot be allowed. They are nearly always involved in some uncertainty and contingency. Usually they are to be worked out in the future, and they can be determined only approximately, upon reasonable conjectures and probable estimates. They may be so uncertain, contingent, and imaginary as to be incapable of adequate proof, and then they cannot be recovered because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damage which he has caused is uncertain. It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with the view to future profits, and such profits are in the contemplation of the parties; and, so far as they can be properly proved, they may form the measure of damage. As they are prospective, they must, to some extent, be uncertain and problematical; and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it; and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach. When a contract is repudiated, the compensation of the party complaining of its repudiation should be the value of the contract.

Wakeman, 101 N.Y. at 209-10 (emphasis omitted) (breach of exclusive agency agreement to sell machines in designated territory), *quoted in* R. DUNN, *supra* note 5, § 1.12, at 30-31.

[42] *See* Comment, *Loss of Publicity*, *supra* note 6, at 479; Annotation, *Recovery by Writer, Artist, or Entertainer for Loss of Publicity or Reputation Resulting from Breach of Contract*, 96 A.L.R.3d 437 (1979). *But see* Wassenaar v. Panos, 111 Wis. 2d 518, 535 n.19, 331 N.W.2d 357, 365 n.19 (1983) (citing O'Leary v. Sterling Extruder Corp., 533 F. Supp. 1205, 1209-10 (E.D. Wis. 1982); Smith v. Beloit Corp., 40 Wis. 2d 550, 559, 162 N.W.2d 585, 589 (1968); J. CALAMARI & J. PERILLO, *supra* note 33, § 1418, at 546; C. MCCORMICK, DAMAGES § 163, at 635 (1935); D. DOBBS, LAW OF REMEDIES § 12.25, at 927 (1973)):

> In addition to the damages reflected in the black-letter formulation, an employee may suffer consequential damages, including permanent injury to professional reputation, loss of career development opportunities, and emotional stress. When calculating damages for wrongful discharge courts strictly apply the rules of foreseeability, mitigation, and certainty and rarely award consequential damages. Damages for injury to the employee's reputation, for example, are generally considered too remote and not in the parties' contemplation.

[43] Comment, *Loss of Publicity*, *supra* note 6, at 471 n.44 (citing Marbe v. George Edwardes (Daly's Theatre), Ltd., [1928] 1 K.B. 269, 281-82, 288, 290 (C.A. 1927)).

D. *American Courts and the English Rule*

American courts generally have denied causes of action based on loss of publicity stemming from performance-related contracts.[44] Likewise, claims for consequential damages have also failed.[45] The grounds for those decisions include: one, the relief sought is not available for performance-related contracts;[46] two, the entertainer did not plead pecuniary harm;[47] three, the loss of publicity and opportunity was not proximately caused by the breach;[48] and four, the damages cannot be reasonably ascertained.[49] Accordingly, these courts are only willing to grant entertainers specific damages within the narrow construction of the

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[44] *Id.* at 475 ("The few American courts that have had the opportunity to deal with this question have, for the most part, failed to recognize that the ultimate financial interests of an entertainer suffer from his being excluded from the work he contracted to perform."); *see also supra* note 42.

[45] *See, e.g.*, Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 140 Cal. Rptr. 921 (1977).

[46] Quinn v. Straus Broadcasting Group, 309 F. Supp. 1208, 1209 (S.D.N.Y. 1970) (citing Cornell v. T.V. Dev. Corp., 17 N.Y.2d 69, 215 N.E.2d 349, 268 N.Y.S.2d 29 (1966); Amaducci v. Metropolitan Opera Ass'n., 33 A.D.2d 542, 304 N.Y.S.2d 322 (1st Dep't 1969)); Skagway City Sch. Bd. v. Davis, 543 P.2d 218, 225 (Alaska Sup. Ct. 1975) (citations omitted); Westwater v. Rector of Grace Church, 140 Cal. 339, 342-43, 73 P. 1055, 1056 (1903); Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 856, 140 Cal. Rptr. 921, 925 (1977).

[47] Carmen v. Fox Film Corp., 258 F. 703, 707 (S.D.N.Y. 1919); Westwater v. Rector of Grace Church, 140 Cal. 339, 340-41, 73 P. 1055, 1055 (1903); Tamarind Lithography Workshop, Inc. v. Sanders, 143 Cal. App. 3d 571, 193 Cal. Rptr. 409 (1983); Zorich v. Petroff, 152 Cal. App. 2d 806, 811, 313 P.2d 118, 122 (1957); Freund v. Washington Square Press, 34 N.Y.2d 379, 384, 314 N.E.2d 419, 421, 357 N.Y.S.2d 857, 861 (1974).

[48] Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 927 (2d Cir. 1977); Paramount Prods. v. Smith, 91 F.2d 863, 870-72 (9th Cir.) (Wilbur, J., dissenting), *cert. denied*, 302 U.S. 749 (1937); Skagway City Sch. Bd. v. Davis, 543 P.2d 218, 225 (Alaska Sup. Ct. 1975); Westwater v. Rector of Grace Church, 140 Cal. 339, 342-43, 73 P. 1055, 1056 (1903); Tamarind Lithography Workshop, Inc. v. Sanders, 143 Cal. App. 3d 571, 577, 193 Cal. Rptr. 409, 412 (1983); Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 140 Cal. Rptr. 921 (1977); Zorich v. Petroff, 152 Cal. App. 2d 806, 811, 313 P.2d 118, 122 (1957); Hewlett v. Caplin, 275 A.D. 797, 88 N.Y.S.2d 428 (1st Dep't 1949), *aff'd*, 301 N.Y. 591, 93 N.E.2d 492 (1950).

[49] Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 927 (2d Cir. 1977); Paramount Prods., Inc. v. Smith, 91 F.2d 863, 870-72 (9th Cir.) (Wilbur, J., dissenting), *cert. denied*, 302 U.S. 749 (1937); Poe v. Michael Todd Co., 151 F. Supp. 801, 803 (S.D.N.Y. 1957); Skagway City Sch. Bd. v. Davis, 543 P.2d 218, 225 (Alaska Sup. Ct. 1975); Westwater v. Rector of Grace Church, 140 Cal. 339, 342-43, 73 P. 1055, 1056 (1903):

> What the reputation was, what it is now, how much and in what way it has been impaired by defendant, or has it been impaired by other persons or other causes, or by failure of the powers and ability of plaintiff, leads us into questions too abstruse and complicated for the human mind. Certainly, such damages are not clearly ascertainable.

See also Tamarind Lithography Workshop, Inc. v. Sanders, 143 Cal. App. 3d 571, 577, 193 Cal. Rptr. 409, 412 (1983); Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 857, 140 Cal. Rptr. 921, 926 (1977); Zorich v. Petroff, 152 Cal. App. 2d 806, 811, 313 P.2d 118, 122 (1957); Freund v. Washington Square Press, 34 N.Y.2d 379, 384-85, 314 N.E.2d 419, 422, 357 N.Y.S.2d 857, 862 (1974); Hewlett v. Caplin, 275 A.D. 797, 88 N.Y.S.2d 428 (1st Dep't 1949) (subsequent history omitted).

bargains struck by the parties because the harm arising from loss of publicity seemed too speculative as a matter of law.

Even when American courts follow the English rule,[50] directing their inquiries to the issue of foreseeability,[51] the problem of calculating damages is left to the discretion of juries once a reasonable certainty of harm is established.[52] One justification for this result is that once a plaintiff has carried the burden of proof by a preponderance of the evidence to establish harm, it would be unfair to deny recovery because the exact amount of

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[50] Spang Indus. v. Aetna Casualty & Sur. Co., 512 F.2d 365, 368 (2d Cir. 1975) ("There can be no question but that Hadley v. Baxendale represents the law in New York and in the United States generally.") (citations omitted); *see also* Mead v. Johnson Group, Inc., 615 S.W.2d 685, 687 (Tex. 1981) (*Hadley v. Baxendale* "is the rule in the majority of American jurisdictions and is recognized by the Restatement (Second) of Contracts."):

> (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
>
> (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
>
> (a) in the ordinary course of events, or
>
> (b) as a result of special circumstances beyond the ordinary course of events, that the party in breach had reason to know.
>
> (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981); *see also* Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903); Abrams v. Reynolds Metals Co., 340 Mass. 704, 166 N.E.2d 204 (1960) (*Hadley v. Baxendale* decision is current law).

[51] Foreseeability is referred to here in order to encompass subjective, objective, and presumptive foreseeability. *See supra* note 41. Since courts do not tend to differentiate among the three principles enunciated in *Hadley v. Baxendale*, the presumptive formulation of foreseeability has been relied on in this Article. *See, e.g.*, Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189, 1195 (D. Mass. 1985); Redgrave v. Boston Symphony Orchestra, Inc., 557 F. Supp. 230, 234 (D. Mass. 1983) (quoting John Hetherington & Sons, Ltd. v. William Firth Co., 210 Mass. 8, 21, 95 N.E. 961, 964 (1911):

> The fundamental principle of law . . . for breach of contract . . . is that the injured party shall be placed in the same position he would have been in, if the contract had been performed, so far as loss can be ascertained to have followed as a natural consequence and to have been within the contemplation of the parties . . . .

[52] Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189, 1195 (D. Mass. 1985); Smithers v. Metro-Goldwyn-Mayer Studios, 139 Cal. App. 3d 643, — (not certified for publication in official reports), 189 Cal. Rptr. 20, 24 (1983). The rule of reasonable certainty applies to the fact of damages and not to their amount. Cummins v. Brodie, 667 S.W.2d 759, 765 (Tenn. Ct. App. 1983). As Dunn notes:

> [O]nce this level of causation has been established for the *fact* of damages, less certainty (perhaps none at all) is required in proof of the *amount* of damages. While the proof of the *fact* of damages must be certain, proof of the *amount* can be uncertain, inexact, or even speculative.

R. DUNN, *supra* note 5, § 1.4, at 10 (emphasis in original) (citing in part, Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); Wakeman v. Wheeler & Wilson Mfg., 101 N.Y. 205, 4 N.E. 264 (1886)).

harm cannot be ascertained with mathematical precision.[53] Other rationales include that: where the breaching party's conduct makes ascertainment of damages difficult or impossible, that party is estopped from preventing the injured party's recovery where harm is shown;[54] and the jury heard enough evidence to rationally award relief in an appropriate amount to compensate for pecuniary harm.[55] Thus, under a modern interpretation of the *Hadley v. Baxendale* doctrine, entertainers may be able to introduce sufficient evidence[56] to demonstrate consequential harm

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53 Stott v. Johnston, 36 Cal. 2d 864, 875, 229 P.2d 348, 355 (1951); Rombola v. Cosindas, 351 Mass. 382, 385, 220 N.E.2d 919, 922 (1966); Cummins v. Brodie, 667 S.W.2d 759, 765 (Tenn. Ct. App. 1983); *see also* Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977) (citing in part, Lee v. Joseph E. Seagram & Sons, Inc., 552 F.2d 447, 456 (2d Cir. 1977); W.L. Hailey & Co. v. County of Niagara, 388 F.2d 746, 753 (2d Cir. 1967) (collecting New York cases)).

54 Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977) (citing Entis v. Atlantic Wire & Cable Corp., 335 F.2d 759, 763 (2d Cir. 1964)); Smith v. Onyx Oil & Chem. Co., 218 F.2d 104, 110 (3d Cir. 1955); Smithers v. Metro-Goldwyn-Mayer Studios, 139 Cal. App. 3d 643, — (not certified for publication in official reports), 189 Cal. Rptr. 20, 24 (1983) (citing Donahue v. United Artists Corp., 2 Cal. App. 3d 794, 804, 83 Cal. Rptr. 131, 135 (1969)).

A variation of this theme is that wrongdoers will be unjustly enriched, unless they are made to bear the risks of their culpable conduct. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946); Zinn v. Ex-Cell-O Corp., 24 Cal. 2d 290, 297-98, 149 P.2d 177, 181 (1944) (cited in R. DUNN, *supra* note 5, § 5.2, at 219).

55 Palmer v. Connecticut Ry. & Lighting Co., 311 U.S. 544, 561 (1941); Hawkins v. Jamrog, 277 Mass. 540, 179 N.E. 224 (1931); Frenchman & Sweet, Inc. v. Philco Discount Corp., 21 A.D.2d 180, 249 N.Y.S.2d 611 (4th Dep't 1964) (cited in R. DUNN, *supra* note 5, § 5.4, at 221-22); *see also* Smithers v. Metro-Goldwyn-Mayer Studios, 139 Cal. App. 3d 643, — (not certified for publication in official reports), 189 Cal. Rptr. 20, 24 (1983) (citing Distribu-Dor, Inc. v. Karadanis, 11 Cal. App. 3d 463, 470, 90 Cal. Rptr. 231, 236 (1970)). For a discussion of *Smithers*, see Note, *Attribution Right, supra* note 6, at 318-19.

56 R. DUNN, *supra* note 5, §§ 5.5-.11, at 223-42; *see also* Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189, 1194-95 (D. Mass 1985); Redgrave v. Boston Symphony Orchestra, Inc., 557 F. Supp. 230, 234 (D. Mass. 1983); Cummins v. Brodie, 667 S.W.2d 759 (Tenn. Ct. App. 1983); Smithers v. Metro-Goldwyn-Mayer Studios, 139 Cal. App. 3d 643, — (not certified for publication in official reports), 189 Cal. Rptr. 20, 23 (1983):

> The testimony was considerable on the importance of billing to an actor. Several witnesses testified that billing reflects the actor's stature in the industry, and affects his negotiations for roles, since it reflects what his status and compensation has been in the past. Billing reflects recognition by the producer and the public of the actor's importance or "star quality," and in turn affects the actor's compensation in present and future roles.

See also Note, *Attribution Right, supra* note 6, *passim* (discussion of the importance of billing or accreditation to entertainers). "Credit—also called billing—is the listing of a person's or company's name next to the function which that person or company performs with respect to an entertainment venture." 1 T. SELZ & M. SIMENSKY, *supra* note 6, § 8.01, at 8-1. Arguably, loss of publicity and opportunity flows directly and positively from entertainers' wrongful discharges. *See supra* notes 5-6. *But cf.* Tamarind Lithography Workshop, Inc. v. Sanders, 143 Cal. App. 3d 571, 577, 193 Cal. Rptr. 409, 412 (1983) (citing Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 140 Cal. Rptr. 921 (1977)) (footnote omitted):

> By its very nature, public acclaim is unique and very difficult, if not sometimes impossible, to quantify in monetary terms. Indeed, courts con-

to their careers. When entertainers can prove actual harm with reasonable certainty, they are not required to demonstrate the exact quantum of harm suffered. Not only does this present a conflict between the requirement that plaintiffs submit evidence of specific damages and jurors' subjective impressions of equities refracted through potentially ambiguous evidentiary information,[57] the very status of the injured entertainer may determine whether she can prove that she was financially harmed.[58]

Moreover, the variables affecting an entertainer's potential earnings are numerous and are rarely explicitly considered in their entirety.[59] However, these factors are essential for a clear understanding of the conflicting circumstances and events that shape an entertainer's career and likelihood of success, despite their ambiguous and intangible nature. In this Article, they are designated as formats[60] and roles.[61]

1. Format

In determining the type of format,[62] the inquiry does not

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fronted with the dilemma of estimating damages in this area have been less than uniform in their disposition of same. Nevertheless, it is clear that any award of damages for the loss of publicity is contingent upon those damages being reasonably certain, specific, and unspeculative.

57 *See* R. DUNN, *supra* note 5, § 5.3, at 220; *see also infra* notes 62-112 and accompanying text.

58 Note, *Attribution Right, supra* note 6, at 301 n.17, 323-24 n.171.

59 Although the evidentiary rules discussed *supra* permit juries to fashion awards based on the plaintiffs' submitted evidence, the proof of harm is not equivalent to its exact specification. However laudable it may be for courts to provide relief, it is not enough to circumvent traditional burdens of proof without more. This result ends in a judge upholding a jury's rewriting of the party's contract; in effect, the risk of the entertainer's harmed prospects is reapportioned after-the-fact according to societal notions of fair play and fault. The conflict posed is between the facts that in most situations wrongful discharge of entertainers will consequentially damage their prospects due to loss of publicity and opportunity, and that the harm suffered is incredibly hard to quantify. *See, e.g.*, Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 928 n.17 (2d Cir. 1977) ("The determination, under *Freund* [*v. Washington Square Press*], of whether the *existence* of damage is certain or speculative, will always be influenced to some extent by the nature of the plaintiff's proof as to the *amount* of damage.") (emphasis in original); Tamarind Lithography Workshop, Inc. v. Sanders, 143 Cal. App. 3d 571, 577, 193 Cal. Rptr. 409, 412 (1983):

> There is no doubt that the exhibition of a film, which is favorably received by its critics and the public at large, can result in valuable advertising or publicity for the artists responsible for that film's making. Likewise, it is unquestionable that the nonappearance of an artist's name or likeness in the form of screen credit on a successful film can result in a loss of that valuable publicity. However, whether that loss of publicity is measurable dollar wise is quite another matter.

60 *See infra* text accompanying notes 62-65.

61 *See infra* text accompanying notes 66-92.

62 Whereas format considerations attempt to place a numerical cap on the number of persons who may have been able to see or hear an entertainer, geographical sensitivity to various kinds of performances are also a factor. This inquiry would overlap with that

concern the geographical location of the foregone performance, but the nature of that area. First, it will indicate the potential size of the audience, thus placing a ceiling on the number of persons who could have seen or heard the entertainer. For example, a cancellation of a contract for a nightclub performance may not have the same potential impact as a foregone television broadcast. The latter format would have greater viewership, assuming that the broadcast has popular appeal, especially if the program is scheduled during prime-time. Thus, while an entertainer may have a select clientele that frequents a particular nightclub, the audience is unlikely to increase due to insularity and lack of advertising. A television broadcast may draw new audiences through the medium's potential for wider exposure.

Nevertheless, a very successful nightclub act may attract new audiences who learn of the entertainer by word of mouth, in contrast with a television broadcast on an obscure station at a very late hour.[63]

Second, the type of audience may be relevant in determining whether the entertainer could establish a base of popular support. For example, if the entertainer were to have performed a particular and specialized form of entertainment, such as firebreathing, would the potential audience have constituted a sufficient market presence to influence others to see the act? Moreover, although a format may dictate the type of persons likely to attend or view a performance, a nationwide broadcast would render this inquiry unnecessary.

2. Sub-format

Finders of fact also have rarely dealt with subsidiary rights flowing from the original contract.[64] These rights might include

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of format, but places more stress on any given geographical area's predilection for artistic matters. *Cf.* Cummins v. Brodie, 667 S.W.2d 759 (Tenn. Ct. App. 1983). While nationwide coverage afforded by certain media, such as film or television, may obviate this consideration, a dramatic role in a local summer stock company may not. Likewise, a particular concert hall may be known for its classical music performances, so that a consistent audience will be generated by those advertisements featuring that particular venue. Nationwide media, although causing venue questions to be subsumed in those pertaining to format ones, may still involve issues relating to the nature and timing of performances. However, to the extent that local broadcasting more closely resembles a live performance, venue considerations should not be entirely disregarded. *See* Kenford Co. v. County of Erie, 67 N.Y.2d 257, 262, 493 N.E.2d 234, 234-36, 502 N.Y.S.2d 131, 133 (1986) (comparison of entertainment facilities not analogous). *But cf.* Comment, *Loss of Publicity*, *supra* note 6, at 479 (suggested jury consideration).

[63] *But compare* Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542 (1932) *and* Carnera v. Schmeling, 236 A.D. 460, 260 N.Y.S. 82 (1st Dep't 1932) *with* Orbach v. Paramount Pictures Corp., 233 Mass. 281, 123 N.E. 669 (1919).

[64] Apparently the issue has been raised infrequently. *Cf.* Parker v. Twentieth Cen-

an option to act in a movie based on a play, or a video recording of a theatrical performance. These sub-formats would have disseminated the entertainer's work to a potentially greater audience. Countervailing factors may include the entertainer's ability to successfully transform a performance from one medium into another. Thus, the intimacy of a live poetry reading may be lost on videotape, or a cameo appearance in a film may generate a recording contract.[65]

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tury-Fox Film Corp., 81 Cal. Rptr. 221, 222 n.2 (1969) (subsequent history omitted) (plaintiff's contract gave rights to receive royalties on any phonograph albums, but that contract which was breached provided that cancellation entitled plaintiff only to the guaranteed salary).

Assuming that no guaranteed return was specified for the subsidiary rights flowing from the original contract, it is possible that a court will find a "domino theory" of prospective damages unconvincingly speculative. Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 927 (2d Cir. 1977) (failure to promote recording gave rise to lost profits for royalties but not bookings for a nationwide concert tour). The *Contemporary Mission* court held "that these additional benefits are too dependent upon taste or fancy to be considered anything other than speculative and uncertain, and therefore, proof of damage in the form of such lost benefits was properly excluded . . . ." 557 F.2d at 927 (citations omitted); *see also* Hewlett v. Caplin, 275 A.D. 797, 88 N.Y.S.2d 428 (1st Dep't 1949) (no damages recovery for share of royalties from proposed book's prospective sales and sales proceeds of other rights in the work), *aff'd*, 301 N.Y. 591, 93 N.E.2d 492 (1950).

[65] When an entertainer has successfully negotiated a subsidiary arrangement which provides for certain guaranteed returns or rights, evidence should be admissible to establish the potential that the project might enjoy. However, a subtle distinction between the *loss of profits* that the secondary project would have generated and the *value of publicity* flowing from this performance is necessary. If the loss of publicity itself is compensable, above and beyond the loss of opportunity, then the value of that publicity should be awarded on both arrangements. It is conceivable that an entertainer might not be able to demonstrate harm arising from the breach of a subsidiary agreement, yet the value of the publicity itself can be calculated with greater precision.

In related situations, courts have not allowed recovery of lost profits damages from a second contract made in reliance on the first one which was breached. R. DUNN, *supra* note 5, § 1.16, at 40-42 (collecting cases). Although the justification for this result is premised on lack of foreseeability, some courts have insisted on the defendant's knowledge of the specific contents of the collateral agreement when the main contract was entered into. *Id.* at 43-44 (citations omitted). Dunn has criticized:

> [t]hese cases [as] not well-reasoned. It ought to be enough for the plaintiff to show that the defendant knew or should have known in substance that the plaintiff was about to enter into a second contract in reliance on his contract with the defendant. While a later contract might not be foreseen in its precise terms, the likelihood of a later contract could well be contemplated . . . .

Id.

However, where the collateral contract is made with the employer at the same time as the main one, foreseeability problems should not pose a barrier to an entertainer's recovery. This fact pattern closely resembles the one in *Parker* in that royalty rights for phonorecords were created simultaneously with the main contract for the underlying film itself. 81 Cal. Rptr. 221, 222 n.2 (1969) (subsequent history omitted). In contrast to *Parker*, *Contemporary Mission* involved an allegation of lost profits from unrelated concert tours, which the plaintiffs claimed would have flowed from the underlying record album's success. 557 F.2d at 927.

It is foreseeable that a successful phonorecord will lead to concert tour opportunities. The issue is really one of proximate cause, and it is difficult to believe that a breaching promotor, cognizant of market realities, would not foresee this future oppor-

3. Roles

a. *Whether the performance was commercial.* Courts have distinguished between actions to recover the balance of unpaid salary and damages for future pecuniary harm[66] and claims for harm to

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tunity. *Cf.* R. DUNN, *supra* note 5, § 1.16, at 46 (liability for contract breach must be finite).

Depending on the facts of a given situation, *i.e.*, the defendant's conduct, entertainers may be able to bring an action for tortious interference with contractual relations. A discussion of this avenue of recovery is beyond the scope of this Article. *See* R. DUNN, *supra* note 5, § 3.9, at 167-73; *see also* RESTATEMENT (SECOND) OF TORTS § 774A (1979):

> (1) One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for
> (a) the pecuniary loss of the benefits of the contract or the prospective relation;
> (b) consequential losses for which the interference is a legal cause; and
> (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference.
> (2) In an action for interference with a contract by inducing or causing a third person to break the contract with the other, the fact that the third person is liable for the breach does not affect the amount of damages awardable against the actor; but any damages in fact paid by the third person will reduce the damages actually recoverable on the judgment.

[66] Quinn v. Straus Broadcasting Group, 309 F. Supp. 1208, 1209 (S.D.N.Y. 1970). *Quinn* was a diversity action brought by a wrongfully discharged moderator of a radio "talk show." The contract provided for a salary of $50,000 for the first year with successive options to renew in the employer's favor in the amounts of $57,000 and $65,000 for the second and third years respectively. Although the employer offered to pay the balance due under the first year, the entertainer claimed $500,000 in damages in his first cause of action.

The second cause of action claimed an additional $500,000 in damages, "alleg[ing] the unique nature of Quinn's services and his need to appear before the public to advance his professional reputation, that defendant knew that plaintiff's reputation would be damaged by cancellation of his show, and that defendant's cancellation deprived him of the opportunity to appear before the public." *Id.* at 1209.

The third cause of action alleged, *inter alia*, that the cancellation of the contract "held the plaintiff up to public ridicule and caused his reputation as a performer to be seriously and permanently impaired." *Id.*

Applying the substantive law of New York, the court first held that the damages alleged in the first cause of action were excessive. Clearly, damages were limited to the unpaid salary under the contract subject to any amounts which should have been mitigated. *Id.* (citing Amaducci v. Metropolitan Opera Ass'n, 33 A.D.2d 542, 304 N.Y.S.2d 322 (1st Dep't 1969)). *Amaducci* involved a wrongfully discharged conductor who sought damages in the amount of $1,000,000 on a contract which provided for a total payment of $10,000. To support these additional damages, the conductor alleged that the breach caused " 'mental anguish, humiliation, grief and distress' and caused, and will in the future result in, 'great and irreparable harm and damage to his name, career and reputation as an orchestra conductor.' " 33 A.D.2d at 542-43. The *Amaducci* court held that:

> it is well settled that the optimum measure of damages for wrongful discharge under a contract of employment is the salary fixed by the contract for the unexpired period of employment, and that damages to the good name, character and reputation of the plaintiff are not recoverable in an action for wrongful discharge.

33 A.D.2d at 543 (citation omitted), *cited in* Quinn v. Straus Broadcasting Group, 309 F. Supp. 1208, 1209 (S.D.N.Y. 1970).

The problem with *Amaducci*'s holding, which *Quinn* indirectly addressed, was that the former court did not respond to Amaducci's pleading. Amaducci alleged, *inter alia*, that the wrongful discharge would injure his "career" in addition to his "name" and "reputation." 33 A.D.2d at 542-43. The court's response is that damages to "good name, char-

reputation alone.[67] The leading case in this country, *Westwater v. Rector of Grace Church*,[68] involved a choir singer who brought suit for wrongful discharge without alleging loss of wages or opportunity.[69] A motion to dismiss was sustained on the ground that the plaintiff had failed to state specific damages, so that her harm was not ascertainable.[70] While it is correct, as a matter of law, not to award breach of contract damages for non-pecuniary losses, *i.e.*, hurt feelings,[71] a non-commercial performance which was terminated could give rise to loss of publicity and opportunity, because an entertainer could experience difficulty obtaining a subsequent paying position.[72]

When future harm flows from the breach of a non-commer-

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acter and reputation . . . are not recoverable." 33 A.D.2d at 543. Despite the fact that Amaducci's complaint is strongly colored by mental anquish and defamation language, it states a claim for consequential damages to his career.

In *Quinn*, decided a year after *Amaducci*, the wrongfully discharged entertainer did not fare any better, although his loss of opportunity claim is more prominently presented. That court noted "[w]hile *Amaducci* does not directly answer plaintiff's contention that he is entitled to damages for the loss of opportunity to practice his profession before the public, there is no reason to believe that the State courts would adopt a different rule in this context." 309 F. Supp. at 1209. The *Quinn* court noted that Herbert Clayton & Jack Waller, Ltd. v. Oliver, [1930] A.C. 209, and Colvig v. RKO Gen., Inc., 232 Cal. App. 2d 56, 42 Cal. Rptr. 473 (1965) were not persuasive authority, because the former had never been followed by New York courts and the latter merely involved enforcement of an arbitration award.

Accordingly, the defendant's motion to dismiss for failure to state a claim upon which relief may be granted on the second two causes of action was granted. 309 F. Supp. at 1210. Since there was no authority to support Quinn's claim that a separate cause of action lies for impairment of reputation as a performer or that loss of opportunity entitles entertainers to relief, the court considered these allegations reiterations of the breach of contract allegation itself. 309 F. Supp. at 1210. This is an interesting result in connection with the court's observation that Quinn had not lost his opportunity to practice his profession, because he was able to obtain a contract with a Philadelphia radio station for $30,000. 309 F. Supp. at 1209. The fact that the plaintiff could only obtain work in another city at almost half the original contract price indicates a loss of opportunity insofar as an injurious setback to a career is concerned. *Cf.* Note, *Attribution Right*, *supra* note 6, at 316-17 (complete loss of career required).

[67] *Cf.* Amaducci v. Metropolitan Opera Ass'n, 33 A.D.2d 542, 304 N.Y.S.2d 322 (1st Dep't 1969); Annotation, *Recovery By Writer, Artist, or Entertainer for Loss of Publicity or Reputation Resulting from Breach of Contract*, 96 A.L.R.3d 437 (1979).

[68] 140 Cal. 339, 73 P. 1055 (1903).

[69] 140 Cal. at 341-42.

[70] "Damages to health, reputation or feelings are not clearly ascertainable either in their nature or origin. Who can say how much in dollars and cents the injured feelings should be compensated, how much money shall be received for the injured reputation? . . . ." *Id.* at 342.

[71] Quinn v. Straus Broadcasting Group, 309 F. Supp. 1208 (S.D.N.Y. 1970); Amaducci v. Metropolitan Opera Ass'n, 33 A.D.2d 542, 304 N.Y.S.2d 322 (1st Dep't 1969); Westwater v. Rector of Grace Church, 140 Cal. 339, 73 P. 1055 (1903).

[72] The *Westwater* court had quite a different view of the matter. "The complaint may be true, and yet the plaintiff may have been much benefited by the dismissal. She may have been getting $5 per month. After she was dismissed, she may have secured similar employment at $250 per month." 140 Cal. at 341. This court did note that had the plaintiff made out a case upon which relief could be granted, then she would have been entitled to compensation. *Id.* at 343. However, this rule should apply only to entertain-

cial contract, special emphasis must be placed on the likelihood of that entertainer seeking commercial employment. This may be established by the entertainer's past experience, as well as by objective indications that attempts were made to seek paid positions.[73] These inquiries are necessary because damage to entertainers' reputations and loss of publicity and opportunity are inextricably connected.[74] Therefore, it is not enough to conclude that since harm to reputation is not compensable, no relief should be granted at all.

b. *Whether the entertainer would have received billing.* If the entertainer were to have received billing[75] for the performance, the case for loss of publicity and opportunity is strengthened because a method of association would have been established between the performance and the performer. The next inquiry then must determine how prominent the billing would have been. A soloist who is a featured performer will derive more credit than a supporting actress in a film if equal dissemination value is assumed for both media. A related consideration is whether the entertainer's part or role would have been advertised in addition to being listed in the production's crawl or statement of credits. Thus, the nature of the advertising and the extent to which promotion for the entertainer was promised are relevant determinants in this calculation.[76] If the contract is breached prior to the marketing of the production, it may be easier to calculate the value of billing by gauging consumer response to the advertising. Post-marketing breaches may be more difficult to assess if the entertainer derived some benefit from the initial promotion.

However, the lack of billing or advertising may not preclude an entertainer's claim for damages. As long as the audience could have formed an association between the entertainer and the performance, then there has been loss of publicity and opportunity. However, this association may depend on how popular the entertainer already is. A newcomer to any given profession, unless possessed of exceptional talent, may not have an immedi-

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ers who are professionally established and should preclude dilettantes. *See infra* notes 87, 90.

[73] Grayson v. Irvmar Realty Corp., 7 A.D.2d 436, 184 N.Y.S.2d 33 (1st Dep't 1959); *see infra* note 90 for a discussion of this point in greater detail.

[74] *See supra* note 6.

[75] *See supra* note 56.

[76] *See* Comment, *Loss of Publicity*, *supra* note 6, at 479; *see also* Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 927-28 (2d Cir. 1977) (failure to promote records gave rise to consequential damages suffered from lost royalty profits).

ate following and may be unable to secure subsequent employment.

c. *Whether the entertainer had a lead or supporting role.* Whether the entertainer would have made a solo appearance or would have performed together with others is another factor to be considered.[77] Arguably, solo acts may be more significant, such as a nightclub act when compared with a supporting role in a play. However, questions pertaining to format and venue may provide competing considerations as to the weight assigned to different roles in different media. Likewise, accreditation arrangements may indicate the degree to which an entertainer was to have been featured, so that conclusions cannot be made regarding solo and group performances until the method of presentation is fully assessed.

Assuming that the entertainer was to have performed in a group, it is necessary to consider the entire relationship between all the performers and the work itself. Whether that entertainer was to be one of a few protagonists in a play or to make a cameo appearance in a film with many such parts is a relevant consideration. Of secondary importance analytically is the nature of the role in terms of the entire production. Thus, one might ask whether the audience is paying to see the production or the entertainer, or if the entertainer's part is such that the rest of the production is built around it.

d. *Whether the entertainer was recognizable.* Whether an entertainer would have been presented in an unrecognizable way requires thought. While this inquiry may be irrelevant for major performers, such as soloists and leading actors, those persons who perform special effects in films, or who are otherwise presented obliquely, may lack sufficient presence to engage the audience's attention. However, it also may be true that such a performance has sufficiently important characteristics which create curiosity as to that entertainer's identity.[78]

e. *Whether the entertainer would have had an opportunity to display her talent.* An action for loss of general publicity may not be upheld

[77] Comment, *Loss of Publicity*, *supra* note 6, at 479.

[78] Two recent examples of this phenomenon occurred in the films, *The Exorcist* and *Flashdance*. For a discussion of this problem, see *Film Credits Stir Debate*, N.Y. Times, Dec. 28, 1983, at C17, col. 1; Chase, *No Screen Credit But Lots of Attention*, N.Y. Times, June 10, 1983, at C17, col. 2 (concerning *Flashdance*); Higham, *Will the Real Devil Speak Up? Yes!*, N.Y. Times, Jan. 27, 1974, at D13, col. 5 (concerning *The Exorcist*).

because courts may refuse to consider publicity cross-elastic.[79]

> For publicity to be of value and result in custom it must relate to the specific aspect of the human activity that is involved. General publicity bears little relation to the repute that leads to custom and trade, for it is specific reputation that brings about gain or loss of business . . . . It follows that damages for loss of publicity in breach of contract must be tied to loss of publicity for some particular event [or] some continuing activity . . . or the practice of a particular skill or art. Consequently, damages from loss of general publicity alone will almost always be wholly speculative and conjectural.[80]

In rejecting the argument that all publicity is valuable to entertainers, and that they are in a category different from that of other purveyors of personal services, the *Ericson* court limited recovery to that publicity generated in service of the performer's art. The court con-

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79 Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 140 Cal. Rptr. 921 (1977). *Ericson* involved a would-be actor who posed nude for Playgirl without compensation in order to promote his career as an actor. When Playgirl sought to reuse the photographs for an annual edition, *Best of Playgirl*, Ericson consented provided that they were cropped to eliminate full frontal nudity and that one photograph would appear on one-quarter of the cover. Ericson's photograph did not appear on the cover of *Best of Playgirl* and he sued for the loss of publicity that he would have received had Playgirl performed as agreed. 73 Cal. App. 3d at 852-53 & n.1.

At trial it was established that Ericson's career was not immediately benefited from the initial publication of the photographs, although "the front cover of a national magazine can provide valuable publicity for an actor or entertainer, but that it is difficult to put a price on this publicity." 73 Cal. App. 3d at 853. The trial court awarded Ericson damages in the amount of $12,500, which represented one-quarter of the value that exposure on the cover of a national magazine is worth to an entertainer, based on the analogous advertising space cost. 73 Cal. App. 3d at 853.

Although the appellate court recognized that the plaintiff had proved that advertising is expensive to buy and has publicity value, it failed to find that the loss of publicity damaged Ericson "in any substantial way or any specific amount." 73 Cal. App. 3d at 854-55. For this reason, breach of contract damages were not reasonably foreseeable and lacked certainty, according to the court, despite Ericson's argument that any loss of publicity was injurious to his career and therefore compensable in damages. 73 Cal. App. 3d at 854.

80 73 Cal. App. 3d at 856 (citations omitted). The court observed that those who offer personal services to the general public could reasonably be assumed to attract more attention the better known they are. *Id.* at 855-56. However, the court immediately qualified that assumption as follows:

> We must ask the question—better known for what? A lawyer who is a famous yachtsman may not necessarily attract legal business; a dentist world-renowned as a mountain climber may not necessarily improve his practice of dentistry as a consequence of his renown; a hairdresser who swims the Catalina Channel in record time may not necessarily increase the patronage of her beauty salon.

Id. at 856. Yet that statement proves too much. Where an entertainer possesses more than one talent, loss of publicity might negatively affect opportunities in more than one field of endeavor. Ericson's inability to recover poses a conundrum, because the fact that his career was inchoate bars him from demonstrating harm to it. *Cf.* Sutherland v. Auch Inter-Borough Transit Co., 366 F. Supp. 127 (E.D. Pa. 1973); Grayson v. Irvmar Realty Corp., 7 A.D.2d 436, 184 N.Y.S.2d 33 (1st Dep't 1959).

cluded its rationale on proximate cause grounds. "Loss of publicity of this type . . . is compensable . . . because [it] is directly connected with the performance of [the entertainer's] art, grows out of his profession, and directly affects his earning power."[81]

The logic behind this argument is that publicity has measurable value only when it relates to a certain function, *i.e.*, the entertainer's merits as a performer in the specified art practiced. To allow damages for loss of publicity in fields in which that entertainer has not excelled or demonstrated any aptitude creates a problem of defining liability. For if the contrary were true, loss of publicity could have no ascertainable value, and thus damages could not be foreseeable at the time of contracting.[82]

The inquiry must be whether the entertainer would have performed that art she professionally practices. Another way of phrasing this point is to ask whether the entertainer's appearance would have demonstrated developed talents which would have allowed for sufficient judgment of those abilities.[83] In *Redgrave v. Boston Sym-*

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[81] 73 Cal. App. 3d at 856. Since Ericson had not as yet established a reputation, the court did not perceive the loss of publicity as bearing any relation to a specialized preexisting practice. The nature of Ericson's claim to the lost publicity is equivocal as demonstrated by the court's hypothetical response:

> It is possible . . . that a television programmer might have seen his photograph on the cover of *Best of Playgirl*, might have scheduled plaintiff for a talk show, and that a motion picture producer viewing the talk show might recall plaintiff's past performances, and decide to offer him a role in his next production. But it is equally plausible to speculate that plaintiff might have been hurt professionally rather than helped by having his picture appear on the cover of *Best of Playgirl*, that a motion picture producer . . . might dismiss plaintiff from serious consideration for a role in his next production.

Id. at 858. However, it is one matter to treat an entertainer who has no established reputation as having lost nothing and quite another to say that an established entertainer is not harmed from the loss of general publicity. This distinction is especially true where an entertainer is multi-talented and has performed in a number of different fields.

Even assuming that loss of general publicity is too speculative, perhaps the value of the advertising itself is not an unequitable remedy. *Cf. id.* at 853. In *Ericson*, the plaintiff had posed for no compensation, which, according to testimony, was worth $1,000. *Id.* at 854-55 n.2. However, exposure on the cover itself was worth considerably more. *Id.* at 854. Arguably, Ericson waived remuneration because he expected to receive the value of exposure from appearing on the magazine's cover. The appellate court's award of statutory nominal damages in the amount of $300 "for knowing commercial use of a person's name or likeness without his consent" seems inadequate in light of the above analysis. *Id.* at 859 (construing CAL. CIV. CODE § 3344 (1971) (subsequent history omitted)). Ericson either should have received approximately $1,000 which could have constituted a restitutionary measure for the benefit conferred on *Playgirl*, or should have recovered approximately $12,500, which could have constituted an expectation interest, if the advertising analogy was sufficiently precise.

[82] It is more accurate to use a proximate cause line drawing test, because it is clearly foreseeable that loss of general publicity may cause harm through lack of bargained for exposure. Resolving certainty of harm questions negatively is a more convincing way to deny recovery in this area.

[83] Comment, *Loss of Publicity*, *supra* note 6, at 479.

phony Orchestra, Inc.,[84] an actress of repute was wrongfully discharged from a contract to narrate an orchestral production.[85] Under the foregoing analysis, it is questionable whether Redgrave would be entitled to recover.[86] Her skills as an actress would not have been used in the orchestral narration if a strict interpretation of those media defines entertainers' capacities. Yet, many of the same techniques, training, and much of the same experience that Redgrave has accrued as an actress would have been reflected in her narrative role. In some instances, an entertainer who is multi-talented, or whose discipline is sufficiently broad to encompass other artforms, may be able to meet this requirement of displaying talent in a given field. However, another test might be whether the entertainer, all things being equal, would seek similar employment in the discipline from which she was wrongfully discharged.[87] In reconsidering *Redgrave* under this alternative test, a slightly different analysis devolves from the facts. The likelihood of Redgrave seeking further employment as a narrator in other orchestral productions is probably low, given her track record as an actress. Yet, it is not enough to conclude that Redgrave was not harmed with respect to obtaining subsequent employment as a narrator. One must also ask whether Redgrave was harmed in areas where she had already established herself; *i.e.*, did she lose opportunities to perform in other films or plays as a result of her employer's contractual breach?[88]

The question that ultimately arises from this inquiry is whether it is foreseeable that a versatile and multi-talented entertainer will experience loss of opportunity in areas of previously demonstrated

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84 602 F. Supp. 1189 (D. Mass. 1985).

85 *See infra* notes 114-62 and accompanying text.

86 It is worth noting that Redgrave did not recover consequential damages, but that the grounds chosen to deny recovery were constitutional in nature. 602 F. Supp. at 1200; *see infra* notes 144-58 and accompanying text for a fuller discussion of the issues raised.

87 Not only would this test weed out dilettantes, *cf.* Grayson v. Irvmar Realty Corp., 7 A.D.2d 436, 440, 184 N.Y.S.2d 33, 37 (1st Dep't 1959) (no consideration of compensation for tortious loss of ability to pursue artistic self-enjoyment) (citing Freeland v. Brooklyn Heights R.R. Co., 54 A.D. 90, 94, 66 N.Y.S. 321, 323 (2d Dep't 1900); Nossokoff v. City of Pittsburgh, 380 Pa. 422, 110 A.2d 246 (1955); Hogan v. Santa Fe Trail Transp. Co., 148 Kan. 720, 85 P.2d 28 (1938)), but it would also address the issue of mitigation. *See supra* note 3.

88 *See* O'Connor, *CBS's 'Second Serve,'* N.Y. Times, May 13, 1986, at C18, col. 5; Billington, *Vanessa Redgrave's New Role Makes a Man of Her*, N.Y. Times, May 11, 1986, at B1, col. 3 (Redgrave's subsequent portrayal of a transexual in television film). However, the fact that Redgrave obtained subsequent employment as an actress is not dispositive of whether she suffered harm. Aside from the fact of breach itself, there may have been other opportunities which she could have availed herself of but for the loss of publicity. Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189, 1198 (D. Mass. 1985) (only one loss of opportunity specifically identified at trial which was a theatrical role in New York); *see also infra* note 131.

expertise.[89]

f. *The nature of the entertainer's role or performance.* While it is important to avoid placing a subjectively hierarchical value on various entertainment forms, some of them are harder to achieve than others. Such a system of values would not attempt to equate a concert pianist with a juggler on aesthetic grounds, but would examine the inherent talent and training of the respective entertainers.

At least one court has distinguished between those entertainers who possess "native talents" and those who train intensively:[90]

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[89] Theoretically, this is a wider scope of activity in which to prove loss. However, Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 140 Cal. Rptr. 921 (1977), stands squarely for the proposition that publicity is not cross-elastic. Likewise, Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 927 (2d Cir. 1977), denies recovery for loss of unestablished or collateral profits flowing from lost opportunities themselves.

[90] Grayson v. Irvmar Realty Corp., 7 A.D.2d 436, 440, 184 N.Y.S.2d 33, 37 (1st Dep't 1959). *Grayson* involved a serious student of opera who fractured her leg and allegedly sustained hearing impairment through defendant's negligence. Since the student's inchoate career was frustrated, the only issue before the court was whether the jury's award of $50,000 was excessive, because the probability of harm was not based on prior engagements in connection with earning income. 7 A.D.2d at 437:

> The situation . . . is a little different . . . from that of young persons training for occupations, especially professions, where the probability of completion of training is high, and the resultant earning of at least a modest income is equally highly probable. The reason for this last difference is that in the case of persons of rare and special talents many are called but few are chosen. For those who are not chosen, the probabilities of exploiting their talents financially are minimal or totally negative. In this class would fall the musical artist, the professional athlete, and the actor.

7 A.D.2d at 437-38. Grayson had studied music from childhood and had been professionally coached in voice and operatic performance. She had learned foreign languages necessary to perform classical opera and had given many free concerts in workshops, benefits, and on the radio. Testimony was admitted that Grayson was preparing for a European debut and that she had a "superior voice" and a "bright future" in the opera. 7 A.D.2d at 438.

The court noted that assessment of damages based on future earning potential for occupations requiring much formal training have been made even though the training period was incomplete. 7 A.D.2d at 439 (citing in part Halloran v. New York, N.H. & H.R. Co., 211 Mass. 132, 97 N.E. 631 (1912); Rhinesmith v. Erie R. Co., 76 N.J.L. 783, 72 A. 15 (1909); *cf.* Weddle v. Phelan, 177 So. 407, 412 (La. App. 1937)) (collecting cases where entertainers have been awarded damages based on future earning potential despite inchoate careers). However, the *Grayson* court modified the award that the jury assessed as being too excessive:

> The would-be operatic singer, or the would-be violin virtuoso, or the would-be actor, are not assured of achieving their objectives merely because they have some gifts and complete the customary periods of training. Their future is a highly speculative one, namely, whether they will ever receive recognition or the financial perquisites that result from such recognition. Nevertheless, the opportunities exist and those opportunities have an economic value which can be assessed, although, obviously, without any precision.

7 A.D.2d at 440. Although the plaintiff had seriously pursued her operatic career, Judge Breitel found that she had not achieved extraordinary recognition for her talents and reduced the verdict to $20,000. 7 A.D.2d at 441.

> It is notable that those who exploit rare and special talents may achieve exceedingly high financial rewards, but that the probability of selection for the great rewards is relatively low. On the other hand, those who, provided they have the intelligence and opportunities, train for the more skilled occupations and professions, not so heavily dependent upon unusual native gifts, will more likely achieve their objectives.[91]

Evidence as to whether an entertainer is a prodigy, exceptionally diligent, or both talented and hard working is relevant.[92] This information would be useful in determining the entertainer's prospects in the field, as well as establishing what other performers of similar caliber could earn over a lifetime career.[93] Such a calcula-

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91 7 A.D.2d at 439.

92 Comment, *Loss of Publicity*, *supra* note 6, at 479; see *Grayson*'s formulation of this test:

> [T]he jury may consider the gifts attributed to plaintiff; the training she has received; the training she is likely to receive; the opportunities and the recognition she already has had; the opportunities she is likely to have in the future; the fact that even though the opportunities may be many, that the full realization of those opportunities is limited to the very few; the fact that there are many other risks and contingencies, other than accidents, which may divert a would-be vocal artist from her career; and, finally, that it is assessing directly not so much future earning capacity as the opportunities for a practical chance at such future earning capacity.

7 A.D.2d at 440.

93 *Cf.* R. DUNN, *supra* note 5, § 5.8, at 231-34. Although entertainers are or may be considered unique for some purposes, it is arguable that evidence of a similar entertainer's experience should be admissible to prove lost opportunities damages. *Id.* § 5.8, at 234. Aside from comparable earnings evidence, Dunn states that "the best evidence of loss of profits is a comparison of the experience of plaintiff's own business before and after the interruption of its progress by the wrongful act of the defendant." *Id.* § 5.5, at 223-24 (citations omitted). However, in order for the evidence to be admissible, the prior and subsequent experience must be comparable. *Id.* at 224 (citing Broadway Photoplay Co. v. World Film Corp., 225 N.Y. 104, 121 N.E. 756 (1919)); *cf.* Cummins v. Brodie, 667 S.W.2d 759, 761, 765 (Tenn. Ct. App. 1983) (even though entertainer's billing rates varied and were not comparable, court awarded average as lost profits damages). Where plaintiffs do not have prior experience, some courts will allow admission of evidence of subsequent experience. R. DUNN, *supra* note 5, § 5.6, at 227-29. Once again, comparability of experiences is necessary in order to be awarded relief. R. DUNN, *supra* note 5, § 5.6, at 228.

It is difficult to analogize entertainers with commercial businesses, because regular business activity is subject to a greater degree of day-to-day similarity than that of an entertainer's career. Nonetheless expert testimony may be useful to establish the likely economic value of entertainers' careers. Whether prior, subsequent, or comparable earnings tests are used depends on the type of entertainer and whether that entertainer's career is inchoate or established. *But cf.* Kenford Co. v. County of Erie, 67 N.Y.2d 257, 261, 493 N.E.2d 234, 235, 502 N.Y.S.2d 131, 132 (1986) (citing Cramer v. Grand Rapids Show Case Co., 223 N.Y. 63, 119 N.E. 227 (1918), for the proposition that a stricter standard of proof is required to prove lost profits for new business, because "there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty."). In *Kenford*, the plaintiff sought to recover lost profits damages for 20 years of operating a domed stadium. However, despite the plaintiff's substantial and sophisticated evidence, the court denied recovery because the economic model was not analogous. The plaintiff's stadium was

tion "must reflect substantial development"[94] in the entertainer's career, although well-known performers are in a different position from ones with inchoate careers. Thus, when determining loss of opportunity, only serious artistic intent, as evidenced by pursuit of the muse, should be compensable.[95]

g. *Whether the entertainer would have sought employment in areas in which talent was demonstrated.* A corollary issue derived from the last section hinges on the professional status of the entertainer. Dilettantes and amateurs should not be allowed to bring nuisance suits, because their interest is not pecuniary but personal.[96] A clear indication of professional stature may be evidenced by professional affiliations, past employment, and attempts to gain subsequent employment.[97]

h. *The possibility of whether the entertainer would have been reviewed.* Although it is impossible to predict whether an entertainer would have been reviewed, some of the uncertainty may be lessened by considering several of the factors already detailed.[98] Large scale productions featuring well-known entertainers are more likely to be reviewed than obscure ones with unknown performers. Likewise, a review is less likely to mention minor characters or players, unless they are particularly outstanding.

Moreover, one must take into account the medium in which the review would appear, and therefore, how many people will be exposed to the criticism. It may also be necessary to consider the impact of trade publications on industry insiders as against more consumer-oriented reviews.[99]

However, it is equally impossible to predict any reviewer's response.[100] Arguably, an entertainer with a substantial track rec-

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incomplete and the facility to which it was compared was operational and located in different part of the country:

> The economic facts of life, the whim of the general public and the fickle nature of popular support for professional athletic endeavors must be given great weight in attempting to ascertain damages 20 years in the future. New York has long recognized the inherent uncertainties of predicting profits in the entertainment field in general . . . .

67 N.Y.2d at 262-63 (citing Broadway Photoplay Co. v. World Film Corp., 225 N.Y. 104, 121 N.E. 756 (1919)).

[94] Grayson v. Irvmar Realty Corp., 7 A.D.2d 436, 440, 184 N.Y.S.2d 33, 37 (1st Dep't 1959).

[95] 7 A.D.2d at 440.

[96] *See supra* note 87.

[97] *Cf.* Westwater v. Rector of Grace Church, 140 Cal. 339, 73 P. 1055 (1903).

[98] *See supra* notes 66-97 and accompanying text.

[99] *Cf.* Comment, *Loss of Publicity*, *supra* note 6, at 479.

[100] *See* 1 T. SELZ & M. SIMENSKY, *supra* note 6, § 9.05, at 9-10. *But cf.* Zorich v. Petroff,

ord of successes has a greater claim to potentially favorable reviews than one who has consistently failed to win popular and critical acclaim.[101] Yet, there are no absolutes which govern these matters, and most entertainers do not perform consistently enough to fall into these categories. An unfavorable review could negatively affect an entertainer's career just as strongly as a positive one could foster it. Therefore, given the equivocal nature of this factor, the safest determinant to be gleaned from the reviewing process is that an entertainer is sufficiently important to merit media attention for performances given. This in and of itself may be useful when calculating loss of publicity, but should never be a deciding factor for the actual computation of damages.[102]

i. *Whether the entertainer secured subsequent employment*. This inquiry follows from the requirement that the plaintiff has the burden to prove loss of opportunity.[103] If the entertainer has immediately gained subsequent employment of a similar or better nature, the cause of action should fail for lack of actual pecuniary harm,[104] except that a court may award statutory nominal breach of contract damages.[105] Whether the entertainer has an obligation to seek employment of a similar or better kind in mitigation of the harm suffered is an open question in at least one jurisdiction.[106] Although the better rule would require the entertainer to actively seek other employment, the nature of the harm suffered is such that the employment search itself is more difficult due to the breaching party's misfeasance.

Even though an entertainer may find employment after a prolonged search, it is possible that some opportunities were foregone. However, due to market vagaries, even had there been no breach, the entertainer's services might not have been in de-

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152 Cal. App. 2d 806, 811, 313 P.2d 118, 122 (1957) (picture's lack of financial success rendered lost publicity value inquiry moot).

101 *See* 1 T. SELZ & M. SIMENSKY, *supra* note 6, § 9.05, at 9-10 to 11.

102 *See id.*

103 *See supra* note 41.

104 This assertion presupposes that no negative publicity or consequences are engendered by the wrongful discharge, and more importantly, that there is a virtually seamless transition from one position to the next. It is also assumed that the positions are equal and both generate equal publicity for the entertainer. If these conditions are met, the entertainer has not experienced difficulty obtaining subsequent employment due to loss of publicity or opportunity.

105 *See, e.g.*, Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 859, 140 Cal. Rptr. 921, 927 (1977).

106 Parker v. Twentieth Century-Fox Film Corp., 3 Cal. 3d 176, 181-82, 474 P.2d 689, 692, 89 Cal. Rptr. 737, 740 (1970).

mand. Furthermore, the question of how to calculate mitigation, if any, is extremely difficult once several months have elapsed from the time of the breach.[107]

Assuming that an entertainer is incapable of obtaining subsequent employment for an extended period of time, despite a thorough search, she should be able to show a loss of opportunity. The foregoing statement assumes that this entertainer was passed over in favor in others and that the market for that type of entertainer is not in a general decline. Otherwise, the loss of opportunity does not flow from the breach and no consequential damages should be considered.[108]

j. *The number of performances to be given in a career.* It is necessary to determine the number of performances that the entertainer could have achieved during her professional career. This evidentiary information may be provided by experts in the field, and will cap the number of opportunities of which the entertainer could have availed herself.[109] Accordingly, the age of the entertainer as measured against the expected number of years left for professional activity must be noted together with the type of art practiced. An established entertainer may have fewer opportunities left despite her experience because there may not be a market for performers of a certain age group. Likewise, a certain art, such as opera singing or ballet, may in and of itself preclude longevity.[110]

An entertainer with little or no experience may be more harmed by loss of publicity and opportunity, because the breach affects her at a critical point when every bit of exposure to poten-

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[107] Note, *Attribution Right*, *supra* note 6, at 316. Generally, mitigation of damages requires that the injured party accept similar work that is not inferior. Different and inferior positions are theoretically not within the type of employment which must be used to offset any harm suffered. However, the case law reflects divergent opinions as to what is "different" and "inferior." *See supra* note 3 for collected cases.

It is arguable that it is not subsequent employment which must be similar and not inferior, but the publicity generated from that subsequent employment. Thus, if an entertainer secures another position which creates similar publicity, *i.e.*, virtually identical advertising and accreditation, this should mitigate damages. Comparing publicity values between an entertainer's employment before and after the breach may be considerably more ascertainable than attempting to decide what is comparable employment for an entertainer. *Cf.* Cher v. Forum Int'l Ltd., 213 U.S.P.Q. (BNA) 96, 102 (C.D. Cal.), *modified on other grounds*, 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983).

[108] *See supra* note 41 for the proposition that recovery for consequential harm requires showing of proximate cause between the breach and harm suffered.

[109] Sutherland v. Auch Inter-Borough Transit Co., 366 F. Supp. 127, 132 (E.D. Pa. 1973) (court accepted plaintiff's experts' proof as to the duration and quality of her career).

[110] *Id.* at 132 (plaintiff's career as an opera singer was viable until age fifty-five). In comparison, some actors are still performing well into their eighties.

tial audiences and potential employers is crucial to establish a reputation. Conversely, it may well be true that the entertainer's obscurity would not be disturbed by momentary exposure, unless the performance or role were such that it constituted the "big break." Arguably, experienced entertainers in demand will be able to recoup their position in the public's eye within a very short period of time.[111] Of course, seasoned entertainers who are not being actively sought for new projects may be harmed if they are unable to keep their names and images before the public and potential employers.[112] In short, entertainers' track records and present employment prospects are also necessary for computing the potential span of careers. However, as with all the calculations in this Article, this one is tentative since illness, accidents, career changes, and death may terminate entertainers' abilities to perform.

For this reason, it may be advisable to factor in the attrition rate for each type of entertainer, discounted by a specified fraction, the likelihood of risk that the entertainer would not be able to practice her art for her full career span. This table would need to be adjusted by the number of years that the entertainer had been performing to more accurately assess the risk to be shifted.

Assuming that entertainers are capable of proving harm to their careers, either through less restrictive burdens of proof than that set out above, or through other means, a recent decision, *Redgrave v. Boston Symphony Orchestra, Inc.*,[113] poses other potential roadblocks to recovery.

III. Defamation Law and Consequential Damages

A. *Redgrave v. Boston Symphony Orchestra, Inc.*

1. The Facts

Vanessa Redgrave, a well-known actress,[114] entered into a contract with the Boston Symphony Orchestra, Inc.[115] to narrate six performances of Igor Stravinsky's *Oedipus Rex*. The performance fee was $31,000 but Redgrave was responsible for all travel expenses incurred.[116] Redgrave's cause of action arose from BSO's cancellation of her contract, which spawned a variety of

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[111] 1 T. Selz & M. Simensky, *supra* note 6, § 9.11, at 9-21.
[112] *See id.* § 9.06, at 9-11 to 12.
[113] 602 F. Supp. 1189 (D. Mass. 1985).
[114] O'Connor, *supra* note 88, at C18, col. 5; Billington, *supra* note 88, at B1, col. 3.
[115] Hereinafter "BSO".
[116] Redgrave v. Boston Symphony Orchestra, 602 F. Supp. 1189, 1195 (D. Mass. 1985).

claims that were disposed of early in the litigation.[117]

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[117] Redgrave, in addition to seeking compensatory and consequential damages for breach of the contract, alleged that no adequate remedy at law existed in either contract or tort, and requested the court to direct the BSO to reschedule the performances agreed to under the contract. Redgrave v. Boston Symphony Orchestra, Inc., 557 F. Supp. 230, 234-35 (D. Mass. 1983). Citing Loeb v. Textron, Inc., 600 F.2d 1003, 1023 n.34 (1st Cir. 1979) ("Under traditional principles of contract law, courts normally do not enforce employment contracts with orders for specific performance."), together with MASS. GEN. LAWS ANN. ch. 214, § 1A (West 1986) ("A remedy in damages shall not bar an action for specific performance of a contract, other than one for purely personal services . . . ."), Judge Keeton found that Redgrave's complaint did not support her assertion that no adequate remedy at law existed. 557 F. Supp. at 234-35. Furthermore, Redgrave's inability to cite apposite cases granting the type of relief requested resulted in Judge Keeton's conclusion "that there is no set of facts within the scope of the complaint that, if proved, would entitle [Redgrave] to specific performance . . . ." 557 F. Supp. at 235.

Redgrave also alleged that BSO's breach of contract was tortious in light of her well-publicized views of Middle Eastern politics. 557 F. Supp. at 235. However, aside from claiming the commission of a common law tort, the complaint did not specify what it was. This omission left Judge Keeton to resort to Redgrave's supporting memorandum which advanced two alternative theories. The first posited that BSO's conduct constituted an intentional infliction of emotional distress as defined by Agis v. Howard Johnson Co., 371 Mass. 140, 145, 355 N.E.2d 315, 318-19 (1976). This case requires plaintiffs to show that: (1) the actor intended to inflict emotional distress, knew, or should have known that he was inflicting emotional distress; (2) the conduct was extreme and outrageous, beyond the bounds of decency, and intolerable; (3) the actor's conduct caused the distress suffered; and (4) such distress was severe and one that a reasonable person could not be expected to endure. 557 F. Supp. at 235-36 (citation omitted). As Judge Keeton noted, Redgrave failed to establish these elements in the complaint because she did not plead them. Yet even ignoring the deficient pleading, Judge Keeton did not find that repudiation of the contract on account of Redgrave's exercise of first amendment rights fell within the *Agis* test set forth in the last paragraph. BSO's conduct was distinguished as "neither the kind of systematic harassment nor the single but dramatically cruel incident [necessary] to sustain a claim of infliction of emotional distress." 557 F. Supp. at 236.

The second theory claimed that Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977), and its progeny were controlling in the present matter. 557 F. Supp. at 235. Judge Keeton rejected this contention, because the facts in *Redgrave* were dissimilar to the cited cases. 557 F. Supp. at 236-37 (citations omitted). First, *Fortune* and its progeny involved long-term employees, whereas *Redgrave* concerned a short-term contract that was repudiated before either party had performed. Second, Judge Keeton held that *Fortune* and its progeny dealt with contract, as opposed to tort, remedies. "In *Fortune*, the court held that a bad faith termination can constitute a breach of the employment-at-will contract. The court refused to consider whether plaintiff might have a tort remedy precisely because, as in this case, a contract remedy was available." 557 F. Supp. at 237.

Judge Keeton also refused to accept Redgrave's characterization of *Fortune* and its progeny as creating substantive tort rights, because Massachusetts precedents did not support this analysis. Moreover, "[t]o permit such a contention to succeed would be to obscure significant substantive issues bearing upon the availability of contract and tort remedies." 557 F. Supp. at 237. Although the court acknowledged that a contract for services creates a legally binding obligation to exercise reasonable care and that breach of that duty gives rise to an action in tort, mere failure to perform is not tortious. 557 F. Supp. at 237 (citing Abrams v. Factory Mut. Liab. Ins. Co., 298 Mass. 141, 143-44, 10 N.E.2d 82, 83-84 (1937) (no support for argument that repudiation of a contract is a tort)). However, Judge Keeton also noted that:

> [r]ights are not to be determined by playing a game of labels. If the relationship of the parties is such as to support a cause of action in tort, that cause of action is not to be denied because the parties happened also to have made a contract. Conversely, a breach of the contract is not, standing alone, a tort as

Redgrave contended that BSO cancelled the performances

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well. And it cannot be converted into a tort merely by attaching to the contract, or to the breach, new labels that sound in tort. Calling a "breach of contract" a "tortious repudiation of contract" is no more helpful in identifying a ground of tort liability than would be an argument that every breach of contract—or perhaps every willful breach—is a tort. No precedent has been advanced by plaintiff that supports such a proposition.

557 F. Supp. at 238.

Redgrave also unsuccessfully claimed that unknown defendants had conspired to unconstitutionally deprive her of her "right to express her political views and her right to equal protection of the laws and equal privileges and immunities under the laws." 557 F. Supp. at 238. This claim failed because Redgrave failed to allege state action as required by Griffin v. Breckenridge, 403 U.S. 88 (1971) (construing 42 U.S.C. § 1985(3) (1982)). Section 1985(3) provides in pertinent part:

[i]f two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities . . . the party so injured or deprived may have an action for the recovery of damages . . . against any one or more of the conspirators.

Likewise, Redgrave failed to establish BSO's liability under 42 U.S.C. § 1986 (1982), because the § 1986 claim was predicated on the existence of state action in the § 1985(3) claim. 557 F. Supp. at 241 (construing 42 U.S.C. § 1986). This statute provides in pertinent part:

[e]very person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured . . . for all damages caused by such wrongful act . . . .

Moreover, Judge Keeton in *Redgrave* expressed doubts concerning the scope of § 1985(3) as a general federal tort law in the present matter. 557 F. Supp. at 241 n.16 (quoting 403 U.S. at 102 & n.9). The court stated that there is no remedy for private impairment of first amendment freedoms, because "[t]he language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 557 F. Supp. at 241 (quoting 403 U.S. at 102 & n.9) (emphasis in original).

The tort and constitutional dimensions of this case, which were successfully constrained by the defendants, for the most part still persisted, insofar as Redgrave's allegation of a violation of the Massachusetts Civil Rights Act survived BSO's initial motion to dismiss for failure to state a cause of action. The Massachusetts Civil Rights Act provides for a private right of action against:

any person or persons, whether or not acting under color of law, [who] interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth.

MASS. GEN. LAWS ANN. ch. 12, §§ 11H-11I (West 1984), *quoted in* 602 F. Supp. at 1192; *see also* 557 F. Supp. at 242-43 (discussion of the rights guaranteed under the Massachusetts state constitution).

Although BSO argued that Redgrave failed to allege its requisite interference or attempted interference with her rights through "threats, intimidation or coercion," and that Redgrave "should not be allowed to bootstrap a breach of contract claim into a civil rights action[,]" the court was unwilling to dismiss Redgrave's claim due to her allegations of constitutionally protected speech. 557 F. Supp. at 243.

At trial two years later, the state civil rights claim was decided in BSO's favor. First, the jury did not find that BSO cancelled the performances to chill her free speech rights and to retaliate for her expressions of support for the Palestine Liberation Organization. Second, Judge Keeton held, as a matter of law, that even though BSO did not terminate the contract to express its disagreement with Redgrave's political views, it could not be

in which she was scheduled to appear to retaliate against her public expressions on political issues.[118] BSO countered that the performances were cancelled for security concerns and because the risk of disruptions "would impair the artistic integrity of the performances."[119] Redgrave also alleged that she was entitled to consequential damages for "loss of future professional opportunities caused by the breach of contract."[120] This harm, according to Redgrave, occurred due to the publicity from BSO's repudiation, which caused other producers and theater operators not to hire her for subsequent engagements.[121]

2. Analysis

After a sixteen-day trial during which both parties presented evidence to the jury on the breach of contract claim, a verdict was returned in Redgrave's favor.[122] The jury awarded damages in the amount of $27,500 together with consequential damages in the amount of $100,000.[123] On appeal, BSO attacked the sufficiency of the plaintiff's evidence proving that consequential damages were within the parties' contemplation,[124] demonstrating ascertainable damages to her career,[125] and establishing that cancellation of the contract caused the alleged harm.[126]

a. *The contemplation of the parties with respect to consequential damages.* Judge Keeton, construing Massachusetts law, held on appeal that "the legal standard as to what is within the contemplation of the parties includes consequences that were foreseeable to a person of reasonable prudence in the position of the party charged with

held liable under the Massachussetts Civil Rights Act because its cancellation acquiesced in others' expressions of disapproval. 602 F. Supp. at 1192.

Despite Redgrave's unsuccessful constitutional and tort claims, the discourse in these matters still persisted. However, it was BSO who successfully countered Redgrave's consequential damages claim with a defamation law analogy defense. *See infra* text accompanying notes 143-62. Thus, it may well be that Redgrave's insistence on stressing rights in addition to her contractual ones created an atmosphere conducive to the consideration of fields other than contract law.

118 602 F. Supp. at 1191-92; *see also* 557 F. Supp. at 233.

119 602 F. Supp. at 1191; *see also id.* at 1198 for concerns which included "fundraising, ticket sales, and physical disturbance of the performances."

120 *Id.* at 1195.

121 *Id.* at 1195, 1198 & n.1.

122 *Id.* at 1191.

123 "Under the contract, [Redgrave was] to receive a performance fee of $31,000, but [was] responsible for paying all travel expenses incidental to the engagement. The parties have stipulated that the net amount after expenses would have been $27,500." *Id.* at 1195.

124 *Id.* at 1195-96.

125 *Id.* at 1196.

126 *Id.*

the breach . . . at the time the contract was made."[127] Applying this objective standard of foreseeability, Judge Keeton went on to find that:

> [t]he evidence in this case was sufficient to support a finding that a reasonable person, having the knowledge of Redgrave's public expressions of political views that BSO had or should have had in the exercise of reasonable care at the time of contracting, would have foreseen harm to her professional career as a consequence of a cancellation by BSO.[128]

It is hard to contemplate a situation in which it is not foreseeable that an employer's breach will harm an entertainer consequentially, especially where that employer is in the regular business of hiring entertainers.[129] This holds true regardless of an entertainer's utterances, and BSO's awareness of Redgrave's expression of political views is irrelevant. In fact, Judge Keeton's formulation of foreseeability places an unfortunate emphasis on the causative effect of BSO's cancellation of the contract, because his later finding, as a matter of law,[130] contradicts what BSO was held to have known at the time of contracting. That is, it is inconsistent to find that BSO knew that its breach would harm Redgrave consequentially because others would draw inferences with respect to reactions to her statements, and at the same time hold that consequential harm was proximately caused by Redgrave's own expressions.[131]

Thus, a test of presumptive foreseeability[132] is preferable, because it is reasonable to expect that all entertainers will be consequentially harmed, provided that they are capable of demonstrating viable professional careers.[133] This standard may be less fair to em-

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127 *Id.* (citation omitted).

128 *Id.*

129 R. DUNN, *supra* note 5, § 1.13, at 33, § 1.18, at 47; *see supra* note 41.

130 *See infra* text accompanying notes 143-58.

131 The effect of this reading is that one has the right to free speech so long as one does not actually try to use it:

> The Boston Symphony Orchestra had canceled, terminated Ms. Redgrave's contract. This . . . is the premier or one of the premier arts organizations in America who [sic], like ourselves, seeks support from foundations, corporations, individuals; have subscribers, sell individual tickets.
>
> I was afraid that and those in my organization were afraid that this termination would have a negative effect on us if we hired her . . . .
>
> . . . And it was finally decided . . . that we would not hire her because of all of the events that had happened, the cancellation by the Boston Symphony and the effects that we felt it would have on us by hiring her.

602 F. Supp. at 1198 n.1 (quoting T. Mann, 9 Transcript 24-25 (Oct. 31, 1984), explaining why he did not risk offering Redgrave a role in *Heartbreak House*, which played at the Circle in the Square Theater in New York City).

132 *See supra* note 41.

133 *See, e.g.*, Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 140 Cal. Rptr. 921 (1977); *cf.*

ployers not in the regular business of hiring entertainers, so that the subjective[134] or objective[135] tests of foreseeability may be better indicators of what the parties may have intended in those circumstances.

b. *The evidence supporting ascertainable consequential damages.* BSO also alleged that Redgrave's evidence at trial was insufficient to establish the exact amount of harm to her professional career. The court correctly noted that "[t]his issue involves the need to separate the effect of the harm caused by Redgrave's political expressions from any added harm caused by BSO's cancellation."[136] The court thus invoked the rule that wrongdoers are liable for all harm resulting from aggravation of a pre-existing condition.[137] Accordingly, the jury's finding that Redgrave's expressions on political issues would not have affected her professional opportunities but for the breach, or that the harm would have been more limited, was upheld. Although noting that "the issue presented as to the sufficiency of the evidence in this case is a close and debatable one, [Judge Keeton found] that the BSO cancellation was a but-for cause of substantial harm to Redgrave's professional career and that $100,000 in damages is reasonable compensation for that harm."[138]

Once Redgrave proved harm to her future opportunities, her inability to demonstrate its exact measure was not fatal to her claim.[139] In fact, the jury was instructed to disregard the impact of Redgrave's statements and to focus solely on the effect of the breach itself.[140] Once again, Judge Keeton's final finding[141] dis-

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Hogan v. Santa Fe Trail Transp. Co., 148 Kan. 720, 85 P.2d 28, 31-32 (1938) (retired violinist not allowed to recover in tort for mere loss of enjoyment due to injury to finger); *see also supra* note 90.

134 *See supra* note 41.

135 *Id.*

136 602 F. Supp. at 1196.

137 *Id.*

138 *Id.*

139 *Id.* at 1196-97 (citing Computer Sys. Eng'g, Inc. v. Qantel Corp., 740 F.2d 59, 67 (1st Cir. 1984); National Merchandising Corp. v. Leyden, 370 Mass. 425, 430, 348 N.E.2d 771, 774 (1976); Rombola v. Cosindas, 351 Mass. 382, 385, 220 N.E.2d 919, 922 (1966)); *see also* R. DUNN, *supra* note 5, § 1.4, at 9-13.

140 602 F. Supp. at 1195 (citing in part Appendix 2 (instructions on interrogatories 4A-4B)), *reprinted in* Redgrave v. Boston Symphony Orchestra, 602 F. Supp. 1189, 1211-12 (D. Mass. 1985):

> You will find that BSO's cancellation was a proximate cause of harm to Vanessa Redgrave's professional career if you find, from a preponderance of the evidence in the case, that the harm would not have occurred but for the cancellation and that the harm was a natural and probable consequence of the cancellation.
>
> The plaintiffs have the burden of proving by a preponderance of the

regards the two separate causes of harm to Redgrave's career that are transparently demonstrated at this stage of the court's analysis.[142]

c. *Loss of opportunity and defamation.* Whereas loss of opportunity arises from the breach itself in that publicity generated from the performances has the value of increasing bargaining power in subsequent engagements,[143] Judge Keeton added a new requirement:

> In the circumstances of this case, . . . plaintiffs must prove that in some way information about BSO's action was communicated to others, that they thereafter acted differently because of the communicated message, and that BSO is legally responsible for harm caused by that communication and its consequences. These requirements . . . . emanate, by necessary implication, from a requirement of proof of causal connection between breach and harm; that is, in the context of this case, causal connection cannot be proved in any other way.[144]

Judge Keeton did not ground these requirements in contract, but instead chose to find them "closely analogous to recognized elements of the law of defamation . . . independent of theories of legal

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> evidence the claimed causal relationship between the BSO's cancellation and the plaintiff's claimed harm. You are not allowed to speculate on the question of causal relationship.

Appendix 2 (instructions on interrogatories 4A-4B), *reprinted in* 602 F. Supp. at 1211. However, the jury was instructed that although the exact amount of damages might be hard to ascertain, Redgrave would still be entitled to recover based upon the evidence submitted. Part of this assessment included weighing the extent to which Redgrave's own conduct contributed to her loss of opportunity. Thus, BSO would only be liable for its share of the harm that it caused to Redgrave's career, as though comparative fault principles were applicable to this matter:

> If [Redgrave's] professional opportunities would have been reduced to some extent by reason of her public expression of political views and they were reduced still further by the influence of the BSO cancellation, plaintiffs are entitled to compensation for this additional harm (the difference between what her opportunities would have been if the cancellation had not occurred, and what they were as a result of the combined effect of her public expressions and the cancellation) . . . .

Appendix 2 (instructions on interrogatory 5), *reprinted in* 602 F. Supp. at 1213.

The point being emphasized here is that the jury was made aware of two distinct causes of harm to Redgrave's career originating from BSO's termination of the contract and Redgrave's public expressions. Moreover, the jury was instructed that it could adjust the amount of compensation to be awarded based on its analysis of the evidence indicating which party was responsible for that loss of opportunities Redgrave suffered. Therefore, the consequential damages award of $100,000 reflected the jury's balancing of these factors, and nowhere in the opinion is there a statement that the jury incorrectly applied the judge's instructions to the evidence presented.

[141] *See infra* notes 143-58.

[142] *See supra* text accompanying notes 136-38.

[143] *See supra* note 6.

[144] 602 F. Supp. at 1197.

cause."[145]

In short, BSO contended that the only harm to Redgrave's professional career, as demonstrated by the evidence, accrued from a statement of fact or opinion implied in BSO's cancellation, or expressed or implied in its press release. However, in agreeing with BSO, Judge Keeton overlooked his own observation that BSO's cancellation was one of several causes of harm to Redgrave's career.[146] Thus, Judge Keeton's language "that this factual premise is an inescapable element of the claimed causal connection between BSO's cancellation and consequential harm to Redgrave's professional career . . . ."[147] ignores another aspect of loss of opportunity. This aspect is a positive one in that entertainers can exploit their performances.[148] The *Redgrave* court focused only on the negative aspect of loss of opportunity, because no evidence was presented as to how BSO's cancellation could have otherwise affected Redgrave's future opportunities other than through inferences drawn from the cancellation and press release.[149] Moreover, the court insisted on a strict chain of causation between persons who would have offered Redgrave engagements and their inferences drawn from BSO's cancellation and the subsequent press coverage.[150] However, there was also a chain of causation stemming from Redgrave's inability to make her name known to the public and potential employers, because the loss of publicity created a loss of opportunity.[151]

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[145] *Id.*

[146] *Id.* at 1196, 1211.

[147] *Id.* at 1197.

[148] *See supra* note 6.

[149]
> The evidence does support the jury's finding . . . . But it does so only because a factfinder may reasonably infer that others, upon receiving the news of BSO's cancellation, interpreted the cancellation as conveying a message about Redgrave. No evidence was presented as to any means by which BSO's cancellation could cause others to deny her performance opportunities unless they first learned about the cancellation and derived some message from it.

602 F. Supp. at 1197-98.

[150] "[P]laintiffs must prove that in some way information about BSO's action was communicated to others, that they thereafter acted differently because of the communicated message, and that BSO is legally responsible for harm caused by that communication and its consequences." *Id.* at 1197.

[151] If one were to focus on the mere fact that Redgrave suffered an opportunity cost insofar as she could not place her name before the public, the emphasis on foregone future prospects dwarfs concern over the cancellation itself. That is, the fact of cancellation necessitates a fault inquiry to determine who was responsible. This is irrelevant as a matter of contract law. All that matters is that Redgrave did not receive the benefit of her bargain, which included the value of publicity flowing from her performances.

By divining meaning from the fact of cancellation it is possible to allocate blame for various underlying causes that led to the termination of Redgrave's contract. However, even Judge Keeton noted that contract law doctrine is free of moral assessments and that one pays for the right to breach. 602 F. Supp. at 1194 (discussing Holmes' theory of liability for contract breaching); *see also supra* note 33.

Referring to the absolute malice standard,[152] the *Redgrave* court then stated that "the law of defamation . . . as applied to media defendants [prevents] a public figure plaintiff [from recovering] damages unless . . . she can establish clearly and convincingly that the defendant had knowledge of the falsity or acted in reckless disregard of the truth of the defamatory matter published."[153] Whether BSO was a "media defendant" was irrelevant to the *Redgrave* court because it had no desire to fathom BSO's intent. Judge Keeton's decision is grounded in state law, which protects against liability for harm flowing from truthful statements of fact.[154]

This application of defamation law imposes substantial legal constraints on plaintiffs seeking consequential damages when courts equate loss of opportunity with alleged wrongful acts of defendants via communicative activity. The substantial constraints arise from the impossibly high burden of proof that plaintiffs will carry to show some unprivileged statement of fact:[155]

> Absent such a showing, the causal connection between wrong and harm is broken because an essential link of the chain is itself legally protected expression. Thus, a plaintiff who seeks to use a communicative link as a part of the chain of causation must disentangle actionable expression from protected expression in that communicative link.[156]

In *Redgrave*, the actress was unable to prove a false statement of fact implied in BSO's cancellation and press release with respect to herself or her public expression on political issues.[157] Even assuming

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[152] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). For a recent discussion of the absolute malice doctrine, see Franklin, *Public Officials and Libel: In Defense of New York Times Co. v. Sullivan*, 5 CARDOZO ARTS & ENT. L.J. 51 (1986).

[153] 602 F. Supp. at 1198 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)). This inquiry, even if one avoids the cynicism of supposing that the *Redgrave* court had no other plausible means of defeating the jury's verdict, still introduces a defamation analysis where none was required. The act of terminating the employment relationship bears no resemblance to a deliberate or reckless misstatement of fact about the employee. To claim that an analogy to defamation follows from the flow of information regarding BSO's cancellation is compellingly creative jurisprudence. However, it is straw jurisprudence because the breach of contract action for consequential damages could have equally rested on the fact that BSO's cancellation cut off the flow of information. Arguably, the consequential damages were more likely due to Redgrave's being unable to make her name even better known.

[154] 602 F. Supp. at 1199 (citing RESTATEMENT (SECOND) OF TORTS § 581A (1977) ("One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.")).

[155] Franklin, *supra* note 152, at 74 n.114 (citing Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 231 (1985); *see also* 602 F. Supp. at 1201-02.

[156] 602 F. Supp. at 1200 (citation omitted).

[157] *Id.* at 1201-02. Redgrave also failed to persuade the court that the defamation law

that Redgrave had been able to "disentangle" opinion from a false fact statement, she probably also would have been required to prove that BSO made these statements with knowledge of their falsity, or with reckless disregard for their truth or falsity.[158]

The import of this final holding is that an entertainer's speech or conduct[159] may bar a claim for consequential damages in most breach of contract actions.[160] In *Redgrave*, potential employers were construed to be reacting to what Redgrave said or its effect as inferred from BSO's conduct. This view of consequential harm squarely places the blame on Redgrave for espousing political opinions. In looking past the fact of breach, the court essentially questioned why BSO cancelled the contract, even as it asked what others

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analogy did not control or that, in the alternative, such interests were subordinated to her first amendment freedom of expression right. More precisely, the right asserted by Redgrave was her right to be free from retaliatory action for expression of her political views. However, the first amendment as incorporated by the fourteenth amendment to the Constitution protects solely against intrusions by governments. *Id.* at 1199 (citing Blum v. Yaretsky, 457 U.S. 991, 1002 (1982); Hudgens v. NLRB, 424 U.S. 507, 513 (1976); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 114 (1973); Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).

Since BSO is a private entity instead of a governmental one and the rights asserted by Redgrave could not be easily categorized within existing precedents, the court was left wandering in the thicket of balancing tests posed by constitutional inquiries:

> It is debatable whether interests in free expression generally would be more effectively protected and promoted if the legal system awarded damages in the circumstances presented here, to vindicate compelling interests in free expression (represented by the plaintiffs in this instance), even though doing so would to some extent impair interests in free expression, or interests in freedom of action with communicative implications (represented by defendant in this instance). . . .

602 F. Supp. at 1199-200.

[158] 602 F. Supp. at 1202.

[159] Defamation law recognizes that communication includes speech and conduct. RESTATEMENT (SECOND) OF TORTS § 559 & comment a (1977); *see also* Morrison v. NBC, 19 N.Y.2d 453, 458-59, 227 N.E.2d 572, 574, 280 N.Y.S.2d 641, 644 (1967). "[U]nlike most torts, defamation is defined in terms of the injury, damage to reputation, and not in terms of the manner in which the injury is accomplished." 19 N.Y.2d at 458 (citation omitted). Thus, it follows from the *Redgrave* court's analysis that the speech or conduct engaged in by an entertainer may be used as a defense against that entertainer's claim for consequential damages. 602 F.Supp. at 1213 (Judge Keeton instructed the jury that if it found that prior to BSO's cancellation Redgrave's expression of political views reduced employment opportunities, then she would not be entitled to recover consequential damages flowing from those expressions).

[160] In those situations where the entertainer has said or done something controversial, that speech or activity will probably prevent recovery of consequential damages. In those situations where the entertainer said or did something which was not controversial, but not within the socially acceptable parameters of the employer-employee relationship, the question of what can be inferred from the employer's termination will lead to a fault-based analysis. Potential employers may be held to have inferred that the prior employer had a valid reason for terminating the entertainer's employment—that the entertainer deserved to get fired.

The only way that a wrongfully discharged entertainer can recover consequential damages under this scenario is to prove that there was nothing that she ever said or did that potential employers could associate with the prior employer's breach of the contract.

could have inferred from BSO's conduct. This method of inquiry poses a virtually insuperable obstacle to a plaintiff's recovery because the unrelated conduct of that plaintiff then becomes a defense against consequential damages.

The *Redgrave* court's decision extends past entertainers who exercise their first amendment right of free expression.[161] The holding will encourage employers to engage in "mudslinging" contests to justify entertainers' discharges to preclude liability for consequential damages.[162] Thus, any fault on a wrongfully discharged entertainer's part may overshadow the basic fact that the wrongful discharge involves loss of publicity, and therefore, a potential loss of opportunity. An alternative consequence of the *Redgrave* decision is to consider that potential employers, after the breach, may legitimately assume that implied in the wrongful discharge is an underlying statement of fact about the injured entertainer; that she did or said something which may be inferred to have a more lasting impact on her career than the fact that she was wrongfully discharged.

IV. Risk Shifting Between Employers and Entertainers

Another factor to consider is the expense of litigation.[163] Competent counsel, witnesses, and incidental costs arising from bringing or defending a lawsuit—which includes opportunities foregone to initiate or defend against a claim—are a substantially inefficient means of rectifying an oversight. That is, instead of gambling on the equities, more persuasive lawyers, and witnesses, it is safer, more efficient, and perhaps, more equitable to allow the parties to negotiate who is to bear the risk at the outset of contracting.[164] Of course, the problem of ascertaining or quantifying the risk of consequential harm from a breach to an entertainer remains unabated,[165] but the transaction costs associated with litigation could be minimized or eliminated.[166]

The negotiation process introduces a new set of transaction costs, so that its practicability depends on two tests. The first is whether negotiating on a contract-by-contract basis is cheaper than litigating the occasional problem that arises.[167] The second

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161 *Id.*

162 *See, e.g.*, Meding v. Hurd, 607 F. Supp. 1088, 1095 (D. Del. 1985).

163 *See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093-94 (1972); *see also* G. CALABRESI, THE COSTS OF ACCIDENTS 135-97 (1970).

164 Calabresi & Melamed, *supra* note 163, at 1106.

165 *See infra* text accompanying notes 169, 179-81, 188-91.

166 *See* G. CALABRESI, *supra* note 163, at 24-33.

167 *See* Calabresi & Melamed, *supra* note 163, at 1106-10.

test is whether it is possible to quantify the risk to be shifted over a wide range of contractual settings.[168]

A. *Stipulated Damages Clauses*

A stipulated damages clause would shift some or all of the risk from the entertainer to the employer with respect to consequential harm.[169] Stipulated damages clauses are relatively easy to enforce because the parties to the contract have chosen an amount which fairly represents the risk of harm flowing from a potential breach of their contract.[170] This amount will be upheld by a court, if necessary, so long as that figure was not intended as a penalty or security for performance, the exact quantum of harm was not ascertainable at the time of contracting, and the stipulated damages are not disproportionate to the actual harm

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[168] Although it is possible to identify the limits which affect an analysis of the risks involved, no exact quantification of the risks are possible. At best the employer and entertainer will be able to factor in certain variables. *See supra* text accompanying notes 62-113.

[169] RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1979) states:

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

It is well established law that parties to a contract may stipulate in advance a fixed amount as compensation in the event of a contractual breach. M. Viaggio & Sons, Inc. v. City of New York, 114 A.D.2d 939, 939, 495 N.Y.S.2d 680, 681 (2d Dep't 1985). "The general rule is that liquidated damages provide compensation for loss. There must be some reasonable relation between the stipulated amount and the anticipated injury. If the stipulated amount is plainly disproportionate to the injury, the provision will not be enforced." 114 A.D.2d at 939.

[170] Furthermore, it will be presumed as a matter of law that the stipulated damages clause was the result of fair bargaining. Employers who attempt to set aside a stipulated damages clause will have the burden of proving why that bargained for provision should not be enforced:

> Placing the burden of proof on the challenger is consistent with giving the nonbreaching party the advantage inherent in stipulated damages clauses of eliminating the need to prove damages, and with the general principle that the law assumes that bargains are enforceable and that the party asking the court to intervene to invalidate a bargain should demonstrate the justice of his or her position.

Wassenaar v. Panos, 111 Wis. 2d 518, 528, 331 N.W.2d 357, 361 (1983) (citing in part MCCORMICK, *supra* note 42, § 157, at 623; Note, *Liquidated Damages as Prima Facie Evidence*, 51 IND. L. J. 189, 205 (1975)).

However, the stipulated amount of damages must represent a reasonable estimate of the probable loss to be suffered by the non-breaching party. J. CALAMARI & J. PERILLO, *supra* note 33, § 14-31, at 565; *see also* Marvel v. Lilli Ann Corp., 28 Misc. 2d 979, 215 N.Y.S.2d 432 (Sup. Ct. King's Cty.) (in order to ascertain whether parties intended to provide for contemplated damages, the court must determine the difficulty of calculating actual damages and the reasonableness of stipulated damages), *aff'd*, 15 A.D.2d 565, 223 N.Y.S.2d 122 (2d Dep't 1961), *aff'd*, 11 N.Y.2d 938, 183 N.E.2d 227, 228 N.Y.S.2d 826 (1962).

suffered.[171]

Thus, a stipulated damages clause satisfies the first test, because very little of a lawyer's time will be necessary to structure the rights of the parties.[172] However, the parties to the contract may experience some difficulty determining the amount of the risk to be shifted.[173]

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[171] "The overall single test of validity is whether the clause is reasonable under the totality of circumstances." Wassenaar v. Panos, 111 Wis. 2d 518, 526-27, 331 N.W.2d 357, 361 (1983) (citing in part, McCORMICK, *supra* note 42, § 149, at 606; J. CALAMARI & J. PERILLO, *supra* note 33, § 14-31, at 565; RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1979); Clarkson, Miller, & Muris, *Liquidated Damages v. Penalties: Sense or Nonsense?*, 1978 WIS. L. REV. 351, 356; Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977); Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L. Q. 495, 503 (1962). Three factors are used to establish the validity of stipulated damages clauses: first, was the clause intended by the parties as a penalty or security for performance, or as damages in the event of one party's breach?; second, at the time of contracting, was it possible to accurately estimate the harm caused by the breach?; and third, were the stipulated damages disproportionate to the harm suffered? 111 Wis. 2d at 529-30 (citations omitted); *see also* J. CALAMARI & J. PERILLO, *supra* note 33, § 14-31, at 565-66.

The first factor currently has little relevance because courts objectively determine reasonableness, regardless of the parties' subjective intent or labeling of the clause. 111 Wis. 2d at 530 (citations omitted).

The second factor measures reasonableness in terms of the difficulty of ascertaining damages:

> The greater the difficulty of estimating or proving damages, the more likely the stipulated damages will appear reasonable. If damages are readily ascertainable, a significant deviation between the stipulated amount and the ascertainable amount will appear unreasonable. [This test, depending on whether it is viewed from the time of contracting or trial has several facets.] These facets include the difficulty of producing proof of damages at trial; the difficulty of determining what damages the breach caused; the difficulty of ascertaining what damages the parties contemplated when they contracted; the absence of a standardized measure of damages for the breach; and the difficulty of forecasting, when the contract is made, all the possible damages which may be caused or occasioned by the various possible breaches.

111 Wis. 2d at 530-31 (citations and footnote omitted).

The third factor is also measured both at the time of contracting and breach, regardless of courts' attempts to limit their analyses to the parties' knowledge at the time of contract formation. J. CALAMARI & J. PERILLO, *supra* note 33, § 14-31, at 566. When a court is contronted with a stipulated damages clause far in excess of the actual injury, it may conclude that the parties' estimate was unreasonable and strike that clause as void. 111 Wis. 2d at 532 (citations omitted).

However, no one factor predominates and "[c]ourts may give different interpretations to or importance to the various factors in particular cases." 111 Wis. 2d at 533 (citing in part Sweet, *Liquidated Damages in California*, 60 CALIF. L. REV. 84, 131-36 (1972). *But cf.* J. CALAMARI & J. PERILLO, *supra* note 33, § 14-31, at 565 (courts place the most weight on the third factor as a matter of fair and equitable dealing).

[172] *See* Calabresi & Melamed, *supra* note 163, at 1118-19.

[173]
> When the parties to an employment contract estimate the harm which might result from the employer's breach, they do not know when a breach might occur, whether the employee will find a comparable job, and if he or she does, where the job will be or what hardship the employee will suffer.

Wassenaar v. Panos, 111 Wis. 2d 518, 534, 331 N.W.2d 357, 365 (1983). The *Wassenaar* court went on to state that the standard measure of damages to which wrongfully discharged employees are entitled is "the salary the employee would have received during

The more time spent negotiating a reasonable figure, the greater the cost of hiring that entertainer.[174] For lesser known entertainers, it may be harder to predict consequential damages for a variety of reasons.[175] Yet, these entertainers lack the bargaining power to compel extensive negotiations and may have to settle for a nominal sum or waive such rights altogether.[176] Established entertainers may be able to more objectively quantify the considerations affecting a calculation of consequential damages flowing from a contractual breach, and also may be better able to negotiate to protect themselves.[177]

A stipulated damages clause, which is freely bargained for by the parties, represents an objective[178] measure of the risk to be shifted. The measure is objective as between the parties, assuming no imbalance of bargaining strength. However, that does not mean that the parties have employed a principled means to assess the risk to be shifted. The clause will be no more principled than

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the unexpired term of the contract plus the expenses of securing other employment reduced by the income which he or she has earned, will earn, or could . . . earn, during the unexpired term" 111 Wis. 2d at 534. Yet, stipulated damages clauses can circumvent the narrowness of this formula, which ignores consequential damages such as permanent injury to "professional reputation, loss of career development opportunities, and emotional stress." 111 Wis. 2d at 534; *see* 111 Wis. 2d at 535; *see also supra* note 42.

Although a stipulated damages clause, if drafted properly, will avoid the problems of proving foreseeability, it still must surmount the reasonableness test. The difficulty in estimating an entertainer's exact harm in the event of wrongful discharge satisfies this factor. *See* text accompanying notes 63-110 for a discussion of the variables affecting an entertainer's earning potential.

[174] *See supra* note 172.

[175] *See supra* text accompanying notes 81-88.

[176] "For the unknown, commercially-untested artist having little or no bargaining power, insistence on contractual . . . rights may result in the loss of the contract and a prolonged stay in obscurity." Krigsman, *Section 43(a) of the Lanham Act as a Defender of Artists' "Moral Rights"*, 73 TRADEMARK REP. 251, 259 (1983).

Even if entertainers lack sufficient bargaining strength to provide for stipulated damages clauses, they may still have remedies at law. This fact may induce employers to choose to negotiate rather than litigate.

[177] Note, *Attribution Right, supra* note 6, at 299-300; *see also* Paramount Prods., Inc. v. Smith, 91 F.2d 863, 866-67 (9th Cir.), *cert denied*, 302 U.S. 749 (1937):

> We do not believe the evidence is subject to the charge of uncertainty. Appellee testified that he and another writer collaborated in writing a story and sold it without screen credit for $10,000, which the two writers divided. Appellee's story was sold for $2,500, but under a contract that required that he be given screen credit. From these figures, the jury might easily compute the advertising value of the screen credit. He also testified that he received screen credit for a play; that prior thereto his salary was $250 per week; and that afterward he received $350 per week at one time, and $500 per week for a period of two weeks, due to the screen credit he had received. That evidence is, if believed, likewise sufficient as a gauge for the measure of the damages.

[178] R. FISHER & W. URY, GETTING TO YES; NEGOTIATING AGREEMENTS WITHOUT GIVING IN 84-96 (1983). Assuming that the parties to the contract have used some external system of valuation, their assent to its terms places their arrangement outside of their subjective preferences.

a jury's award in terms of providing relief, if it is not the result of a deliberate assessment of the fair market value of the potential loss of publicity and opportunity. Therefore, the second test is dependent on the parties' awareness of factors which transcend the relative positions of the contractual arrangement itself.[179] Stipulated damages clauses are a step in the right direction because they more efficiently reduce the transaction and administrative costs of litigation.[180]

B. *Incorporating by Reference Compensation Provisions in Guild Agreements*

The most efficient solution would be to incorporate by reference specific guild agreements[181] to compensate entertainers whose performances were terminated due to wrongful discharge. Since guild agreements tend to provide for arbitration in the event of dispute,[182] litigation costs would be eliminated or reduced, and the need for custom drafting and extended negotiations would be obviated at the level of individual contracting. Thus, a uniform reference to the applicable guild agreement might provide as follows:

> In the event that this contract is terminated on account of employer's wrongful breach of contract of any or all of the covenants herein, employer will compensate entertainer for loss of publicity and opportunity to perform resulting therefrom, in accordance with all of the terms of the Guild Agreement governing this contract, provided that a fair and reasonable stipulated damages clause has not been herein included.

C. *Unresolved Analytical Problems in the Proposed Solution*

1. Proximate Cause

Despite the application of the English rule,[183] there are many

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[179] *Id.* at 90-91:

> Letting someone else play a key role in a joint decision is a well-established procedure with almost infinite variations. The parties can agree to submit a particular question to an expert for advice or decision. They can ask a mediator to help them reach a decision. Or they can submit the matter to an arbitrator for an authoritative and binding decision.

[180] Wassenaar v. Panos, 111 Wis. 2d 518, 528, 331 N.W.2d 357, 362 (1983) (Stipulated damages clauses "avoid the uncertainty, delay, and expense of using the judicial process to determine actual damages.").

[181] *See* 1 T. SELZ & M. SIMENSKY, *supra* note 6, § 9.13.

[182] *Id.* at § 9.32.

[183] *See supra* text accompanying notes 40-43.

variables that affect the success or failure of entertainers' careers.[184] Even if the risk of possible harm is shifted in a voluntary and negotiated manner, it is not necessarily clear that a contractual breach is being compensated instead of a penalty being levied.[185] Assuming that in some cases harm is in fact caused by an inability to generate publicity,[186] other intervening factors may be the proximate cause of loss of opportunity.[187] Mediocrity combined with an inability to effectively promote oneself as an entertainer may prove fatal to one's career.[188] In contrast, those persons possessed with attributes to qualify for success may eventually triumph as entertainers because their merit will become apparent to those who see or hear them.[189]

Although an entertainer's lack of stamina, talent, and luck may constitute a proximate cause of harm suffered, it is not the entertainer who is at fault for breaching the contract. As a matter of law, the employer has voluntarily assumed the risk that the entertainer might be harmed consequentially by the breach in exchange for the freedom not to allow the entertainer to per-

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[184] *See supra* text accompanying notes 62-113.

[185] It is generally agreed that reasonableness must be judged as of the time of contracting rather than as of the time of the breach and ensuing damage. Nevertheless, this general agreement breaks down when the extreme case is reached; that is, where no actual loss results although at the time of contracting a loss was foreseeable and reasonably estimated.

J. CALAMARI & J. PERILLO, *supra* note 33, § 14-31, at 566; *see also supra* note 171. Under these circumstances, a stipulated damages clause is not mere compensation—because there is no injury to compensate—only a forfeiture for failure to perform as agreed. "Stipulated damages substantially in excess of injury may justify an inference of unfairness in bargaining or an objectionable *in terrorem* agreement to deter a party from breaching the contract, to secure performance, and to punish the breaching party if the deterrent is ineffective." Wassenaar v. Panos, 111 Wis. 2d 518, 528-29, 331 N.W.2d 357, 362 (1983). However, in the case of unknown or unestablished entertainers, the disparity in bargaining strength with their employers may obviate this concern, because stipulated damages clauses will not become part of their contracts. For those entertainers who are represented by guilds, or who are established, careful drafting may be necessary to surmount the reasonableness test. Emphasis must be placed on the fact that harm flows from all loss of publicity. Entertainers who are wrongfully discharged before they can perform lose an intangible benefit, even if they are unable to demonstrate a specific loss of opportunity. *But cf.* Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 856, 140 Cal. Rptr. 921, 925 (1977), which noted that "damages from loss of general publicity alone will almost always be wholly speculative . . . ."

[186] *See* 1 T. SELZ & M. SIMENSKY, *supra* note 6, § 9.04.

[187] Grayson v. Irvmar Realty Corp., 7 A.D.2d 436, 184 N.Y.S.2d 33 (1st Dep't 1959). *But cf.* Sutherland v. Auch Inter-Borough Transit Co., 366 F. Supp. 127 (E.D. Pa. 1973) (sufficient evidence introduced to demonstrate opera singer's potential career success); *see also supra* note 90.

[188] *Compare* Grayson v. Irvmar Realty Corp., 7 A.D.2d 436, 440, 184 N.Y.S.2d, 33, 35-37 (1st Dep't 1959) *with* Note, *Attribution Right*, *supra* note 6, at 300.

[189] In addition to raw talent and training, one would also expect to find the will to achieve and the ability to successfully hype one's efforts. Any person who doubts the importance of hype should evaluate the animation with which entertainers discuss their upcoming performances.

form.[190] Under this analysis, whether or not the risk of possible harm to an entertainer's career is proximately caused by every breach of an employment contract is not solved by denying the fact of harm. The very purpose of a stipulated damages clause is to internalize the risk of harm flowing from the parties' conduct. For this reason a more appropriate measure to assess the risk would be to uphold the parties' agreement to shift some or all of the risk in the first place.[191]

2. Ascertainability

Although a comprehensive analysis purporting to state all the computational factors has been set out above,[192] damages for loss of publicity and opportunity remain no more concrete than the success of the entertainer's next work. In the face of such uncertainty, it is difficult to place a principled figure on the harm suffered over a lifetime career of professional employment.

However, the parties may agree to shift the risk according to an artificial and arbitrary method of assigning weight to the expected earnings of the entertainer, multiplied by some factor which discounts the variables affecting any actuarial analysis. This approach skirts two greater problems. First, submission of these questions to juries not properly informed of all relevant considerations may result in damage awards in excess of the contract or insufficient to compensate the harm suffered.[193] Second, failure to address this valuation because it is "unascertainable" may work a greater injustice for entertainers, because no damages will be awarded at all.[194] In attempting to structure a coherent framework from which to negotiate relief for entertainers, the primary benefit, aside from a clearer evaluation of all the factors, is cost efficiency. Although administrative expenses are involved in order to calculate the harm to entertainers, they may be at the level of guild agreement negotiations and applicable for all contracts in that field. Thus, limited judicial resources may be spared.

An additional advantage to a fully negotiated agreement is that it would allow potential contract breachers to more completely assess their full liability should they decide not to honor

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190 *See supra* text accompanying notes 33-36.

191 Independent experts or arbitrators could examine the factors such as those the juries did in *Smith, Smithers, Sutherland,* or *Grayson,* or they could rely on the variables discussed *supra* in text accompanying notes 62-113.

192 *See supra* text accompanying notes 62-113.

193 *See supra* text accompanying note 43.

194 *See supra* text accompanying notes 44-49.

their bargains.[195]

3. Diminishing Harm

The longer ago that the breach of contract occurred, the less significant the harm will be until other intervening factors determine the entertainer's popularity and subsequent employment.[196] For this reason, it may not be fair to consider the entire career of the entertainer for purposes of calculating damages, otherwise entertainers who have an affirmative obligation to go out and prove themselves will be overcompensated.[197] The public's and employers' memories are often geared to short-term successes, so that a string of realized opportunities will eradicate an initial setback. Likewise, it is important to distinguish whether the entertainer is being compensated for the loss of opportunity or for the loss of ability to enhance a reputation measured over a lifetime.[198] This distinction is crucial, since courts have uniformly held that the latter is not recoverable.[199] If it is loss of opportunity that is being compensated, although to some degree there is conceptual overlap with reputation enhancement, then perhaps it is the difficulty in obtaining subsequent employment that is to be addressed. This subsequent employment means that employment directly following from the last engagement and

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[195] *See supra* note 33.

[196] The attempt to calculate damages for injury to reputation, stemming from wrongful dismissal, is indeed fraught with many difficulties. The estimate must rest upon a number of imprecise variables such as the causal connection between the dismissal and injury to reputation, the likelihood that the employee's reputation would have persisted for the remainder of his working life, and the amount by which his future earnings will be decreased because of the dismissal, as opposed to other causes.

Skagway City Sch. Bd. v. Davis, 543 P.2d 218, 225 (Alaska Sup. Ct. 1975). Since entertainers must prove themselves anew with each undertaking, one could argue that an entertainer's career evolves over a lifetime of developing her art. Of course, the contrary may be true if the "big break" leads to fame and fortune. *See, e.g.*, Bishop, *Whoopi Goldberg Role: From Sidekick to Star*, N.Y. Times, Aug. 26, 1986, at C14, col. 5:

> It was in one of those little clubs in San Francisco that the Author Alice Walker saw one of Ms. Goldberg's performances, which led her to recommend Ms. Goldberg for the character of Celie in the film version of . . . "The Color Purple."
>
> Ms. Goldberg's performance in the film, for which she was nominated for an Oscar, along with her one-woman show on Broadway have brought her fame 10 years after she left her native New York to work in repertory theater on the West Coast.

[197] *See supra* note 3.

[198] *Compare* Grayson v. Irvmar Realty Corp., 7 A.D.2d 436, 184 N.Y.S.2d 33 (1st Dep't 1959) *with* Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 140 Cal. Rptr. 921 (1977).

[199] Westwater v. Rector of Grace Church, 140 Cal. 339, 73 P. 1055 (1903); Ericson v. Playgirl, Inc., 73 Cal. App. 3d 850, 140 Cal. Rptr. 921 (1977); Amaducci v. The Metropolitan Opera Ass'n, 33 A.D.2d 542, 304 N.Y.S.2d 322 (1st Dep't 1969).

cannot include employment many years after an employer's misfeasance.

4. Publicity Concerning the Breach of the Entertainer's Contract

In discussing whether subsequent employment would mitigate damages,[200] the analysis was in terms of substitution of one position for another of roughly equal quality. The emphasis, therefore, was on the relative equality of the positions and not the publicity that might be generated from them. If it is the equality of the publicity that is in question instead of the equality of employment,[201] then perhaps it is futile to ask what possible opportunities were foregone. The question is whether the publicity generated from the foregone employment would have been equal to that of the substituted employment.

Should litigation arise from a breach of contract, or if the media should learn of the employment's termination, the resulting attention might increase the entertainer's exposure. However, it is not clear how this publicity should mitigate that entertainer's harm because it is not of the same quality as that derived from the practice of the art.[202] Although the entertainer is receiving attention, the publicity is not favorable. In short, there is a difference between notoriety and publicity, and there are no clear indications of the impact on an entertainer's ability to secure subsequent employment.[203]

V. Conclusion

Damages for loss of publicity and opportunity due to employers' breaches of entertainment contracts have usually been held non-recoverable. The grounds have been that such damages were not compensable, not the natural consequence of the

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200 *See supra* text accompanying notes 196-97.

201 By this I mean the publicity that the entertainer would have received from the production from which she was wrongfully discharged as against the value of the publicity that she might receive from the next production that she can obtain.

202 *But cf.* Cher v. Forum Int'l Ltd., 213 U.S.P.Q. (BNA) 96, 102 (C.D. Cal.) (court awarded a sum equal to 25% of defendants' wrongful initial advertising costs to conduct corrective advertising), *modified on other grounds*, 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983).

203 Arguably the publicity derived from a lawsuit is not as favorable as that from entertainment activities because contention is involved. Potential employers may be concerned that they are buying into a lawsuit if they hire someone who they perceive to be litigious; the public may react negatively to a controversy surrounding that entertainer. *See, e.g.*, Redgrave v. Boston Symphony Orchestra, 602 F. Supp 1189, 1198 n.1 (D. Mass 1985).

breaches, and not ascertainable. This Article has argued that even when courts have followed the English rule allowing juries to award damages, the results have been unprincipled. While it is better and fairer to award some damages than none at all where harm is suffered, fairness also dictates that relief must be premised on factors that were foreseeable to the breaching party at the time the bargain was made. Thus, while it is an established doctrine of law that willful contract breachers bear the risk of exact computational uncertainty, it is inefficient to allow juries to reach decisions without having considered all of the relevant factors. The inefficiency is twofold. First, administrative costs arising from litigation are unnecessary, because the contracting parties could employ a fair market standard of calculating the risk to be shifted between them. Two, entertainers may be overcompensated on a random basis if the transaction costs do not reflect careful weighing of what publicity and opportunity are worth.

This Article has also argued that failure to adequately compensate entertainers for loss of publicity and opportunity works a forfeiture of valuable rights, because it is likely to affect their standing and earning powers in subsequent dealings. To the extent that the English rule is adopted, the only real issue is ascertainability. It is not enough to address this issue in a way that does not violate a court's disinclination to ponder intangibles. This step, if necessary, is last in a chain that logically should begin with the contracting parties agreeing to apportion the risk as accurately as possible. By arranging to negotiate the value of lost future opportunities, the contracting parties can also minimize transaction costs. Stipulated damages clauses are a cost effective and fair method of achieving this goal, because the parties will negotiate the expected value of the publicity to the performer and will set a reasonable value on its worth.

Provisions that objectively employ a fair market standard for evaluating loss of opportunity are not only fairer to the contracting parties, but are also more likely to be upheld by arbitrators and courts, should review become necessary. The heavy emphasis on format and entertainer-specific facts provides useful guidelines for calculating damages or leading to settlements, even if the parties initially disagree on several points of fact. This method of resolution would still be preferable to protracted and unnecessary litigation. Eventually, such industry-wide standards might prove more accurate and efficient, after much data had been collected, because these classifications could be tested against the actual track records of entertainers.

In conclusion, the recognition of entertainers' rights to be protected against harm flowing from breaches of contract also carries with it an obligation to structure a practicable framework in which to provide relief. The best protection for both parties is to negotiate directly through the guild agreements. In this way, an industry standard is equitably promulgated with the lowest transaction and administrative costs, and which attempts to fairly compensate entertainers for consequential harm flowing from loss of publicity and opportunity.