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Abstract

The standard analysis of *Parker v. Twentieth Century Fox* follows the court in focusing on whether the substitute employment offered Shirley MacLaine was “different and inferior” from that which she had initially contracted for. That, this paper argues, was the wrong question. The court managed to produce the right outcome, but through convoluted reasoning that failed to recognize the essential feature of the contract. The contract had a “pay-or-play” provision by which the studio, in effect, purchased an option on her time; they would pay her to be ready to make a particular film, but they made no promise to actually use her in making the film. Cancellation did not entail breach, and, therefore, it was unnecessary to ask whether she had failed to mitigate.

The paper traces the case through the courts, showing how the attention paid the pay-or-play feature declined. It then analyzes the economics of the pay-or-play clause. The clause gives the studio an option, giving it the flexibility to adapt or to abandon a project. The pay-or-play clause is a nuanced balancing of the studio's need for flexibility against the artist's reliance.

Bloomer Girl Revisited or How to Frame an Unmade Picture

Victor P. Goldberg

Nearly all contracts casebooks feature the saga of Shirley MacLaine's suit against Twentieth Century Fox arising from the cancellation of the proposed film *Bloomer Girl*.¹ None really get the story right. To be fair, none try. The case is a vehicle for exploring the obligation of the victim of the breach of an employment contract to take alternative employment. If she refused an offer of alternative employment that was not “different and inferior,” her failure to mitigate would mean that the earnings she would have received would be offset against the damages; so, asked the court, was the alternative proposed by Fox “different and inferior?” And for that purpose it can be great fun. Is a western-type movie to be filmed in Australia different and inferior to a musical about Amelia Bloomer to be filmed in Hollywood? If so, what would not be? A musical filmed in England? A western musical? What about a western set in Mexico in which she played a nun with an unsavory past? Could she have possibly settled for that?

Well, actually, she did. Universal released *Two Mules for Sister Sara* about one year before the California Supreme Court released *Parker v. Twentieth Century Fox* with Shirley MacLaine co-starring in both.² Would the court have also found that project different and inferior as a matter of

¹Shirley MacLaine *Parker v. Twentieth Century-Fox Film Corp.*, 3 Cal.3d 176, 474 P.2d 689, 89 Cal.Rptr. 737. It is the opening case in Stewart Macaulay, et al, *Contracts: Law in Action*, at 51. Other casebooks which reprint it as a main case include Steven J. Burton, *Principles of Contract Law*, 1995 at 318; Thomas D. Crandall & Douglas J. Whaley, *Cases, Problems, and Materials on Contracts* (2d ed. 1993) at 48; John P. Dawson, William Burnett Harvey, Stanley D. Henderson, *Cases and Comment on Contracts* (6th ed. 1993) at 44; E. Allan Farnsworth and William F. Young, *Cases and Materials on Contract* (5th ed. 1995) at 508; Lon L. Fuller and Melvin Aron Eisenberg, *Basic Contract Law* (6th ed. 1996) at 266; James F. Hogg and Carter G. Bishop, *Contracts*, 1997 at 496; Amy Kastely, et al, *Contracting Law* at 1016; Ian R. MacNeil, *Contracts: Exchange Transactions and Relations* (2d ed. 1978) at 132; Arthur Rosett, *Contract Law and its Application* (5th ed. 1994) at 375; Robert E. Scott and Douglas L. Leslie, *Contract Law and Theory*, 1988 at 769; Robert S. Summers and Robert A. Hillman, *Contract and Related Obligation* (3d ed 1997) at 262. The following casebooks include a brief excerpt from the decision. Charles L. Knapp & Nathan M. Crystal, *Problems in Contract Law: Cases and Materials* (3d ed. 1993) at 949; Robert W. Hamilton, Alan Scott Rau, and Russell J. Weintraub, *Cases and Materials on Contracts* (2d ed. 1992) at 23; Edward J. Murphy, Richard E. Speidel, and Ian Ayres, *Studies in Contract Law* (5th ed. 1997) at 508. John D. Calamari et al., *Cases and Problems on Contracts* (2d Ed. 1989) at ___ does not cite the case, but it uses a simplified version of the facts as a problem. The case does not appear in Friedrich Kessler et al., *Contracts: Cases and Materials* (3d ed. 1986).

²The film, co-starring Clint Eastwood, was released by Universal. Herein, the plot summary: “Set in Mexico, a nun called Sara is rescued from three cowboys by Hogan, who is on his way to do some reconnaissance, for a future mission to capture a French fort. The French are chasing

law? More importantly, should it matter? Suppose that the alternative film proposed by Fox was also a musical to be filmed in Hollywood, with the same director associated with the *Bloomer Girl* project, and with all contract terms identical. If she had rejected that alternative would she still have been allowed to recover under the original contract? Or suppose that this alternative project had been proposed by a second studio. If she rejected their offer would she still be able to recover from Fox? The hypothesized offer would not be “different and inferior;” regardless of its source, her rejection should take Fox off the hook. At least that appears to be the moral.

In fact, even if the second offer had been equivalent, she probably would have prevailed, perhaps even on a summary judgment motion. Moreover, she should prevail. By posing the problem in terms of the “different or inferior” question, the California Supreme Court deflected attention from the essence of the contract. The contract had a “pay-or-play” provision, common in the motion picture industry. The studio had, in effect, purchased an option on her time; they would pay her to be ready to make a particular film, but they made no promise to actually use her in making the film. When Fox canceled the project, they did not breach; they merely chose not to exercise their option. There was no breach and, therefore, there was no need to mitigate.³ And the Supreme Court knew it. Nonetheless, they chose to ignore it (or nearly so).

By framing the case as it did, the *Parker* court managed to convert an easy case into a harder one. That it gave the right answer is a fortuitous result. The contract language was clear, the function of the contract terms transparent. Had the court framed the issue properly, focusing on the nature of the pay-or-play obligation, the case would have been doctrinally less interesting, but of much greater interest to those concerned with the design of transactions. Why use a pay-or-play clause? If the studio does cancel a project that has been made pay-or-play, what determines whether the studio should encourage the artist to work with another studio during the pay-or-play period? Would the earnings from the project with a second studio be offset against the first studio's obligation? Could the first studio prevent the artist from working for the second studio during the pay-or-play period?

The essay proceeds as follows. The background of the dispute is presented in Part I. Part II tracks the case through the courts showing how the mitigation component of the case waxed while the pay-or-play component waned. Part III discusses the whys and wherefores of pay-or-play clauses, paying particular attention to an issue not explicitly raised by *Parker*, the relationship between the artist and other potential employers.

I. The Rise and Fall of the Bloomer Girl Project

Sara, but not for the reasons she tells Hogan, so he decides to help her in return for information about the fort defenses. Inevitably the two become good friends but Sara has a secret.” Internet Movie Data Base, <http://us.imdb.com>.

³The studio’s option need not entirely lapse when it cancels the project. It might, depending on the contract language, have the right to continued service by the artist.

Bloomer Girl was an adaptation of a stage musical, written by Harold Arlen and Yip Harburg, that had a two year run on Broadway in the mid-1940's.⁴ The play's plot and political themes are summarized by Harburg's son:⁵

Bloomer Girl concerns the political activities of Amelia (renamed Dolly) Bloomer and the effect they have on the pre-Civil War family of her brother-in-law, hoopskirt king Horace Applegate, and his feminist daughter, Evalina. Evalina is the youngest and only remaining unmarried Applegate daughter; her older sisters are all married to company salesmen, and as *Bloomer Girl* begins, Horace is trying to unify business and family by encouraging his chief Southern salesman, Jefferson Calhoun, to court Evalina. On the eve of the Civil War, *Bloomer Girl* centers around Evalina's tutelage of Jeff in matters of gender and racial equality. Evalina, Dolly, and the other feminists of Cicero Falls not only campaign against Applegate's hoopskirts and sexism but also stage their own version of *Uncle Tom's Cabin* and conceal a runaway slave—Jeff's own manservant, Pompey. It was, said Yip, a show about the "the indivisibility of human freedom."

Bloomer Girl interweaves the issues of black and female equality and war and peace with the vicissitudes of courtship and pre-Civil War politics. . . . [I]t was at no point an escapist entertainment. "There were so many new issues coming up with Roosevelt in those years," Yip once said, "and we were trying to deal with the inherent fear of change—to show that whenever a new idea or a new change in society arises, there'll always be a majority that will fight you, that will call you a dirty radical or a red."

When she entered into her contract to make *Bloomer Girl* in August 1965, Shirley MacLaine was one of the biggest female stars in Hollywood, having received three Academy Award nominations for Best Actress in a five year span.⁶ The contract negotiation had taken about seven months. Shooting was to begin the following May and was expected to take fourteen weeks. She would receive ten per cent of the gross profits of the film to be offset against her guaranteed

⁴See Harold Meyerson and Ernie Harburg, *Who Put the Rainbow in the Wizard of Oz?* Yip Harburg, Lyricist. University of Michigan Press, 1993, pp. 183-219. The show ran for 654 performances on Broadway (at 369).

⁵Id at 186-7. Macauley and Whitford, *supra* note 1, speculate on whether the left of center politics of the play might have influenced Shirley MacLaine's decision to choose this project. Mary Jo Frug proposed a political interpretation of the *Parker* decision, emphasizing the feminist politics of Amelia Bloomer; see Mary Jo Frug, "Re-reading Contracts: A Feminist Analysis of a Casebook, 34 *American U. L. Rev.* 1065, ____ (1985). As we shall see below, the politics of both Miss MacLaine and *Bloomer Girl* had nothing to do with the proper disposition of the case.

⁶ *Irma La Douce* (1963), *The Apartment* (1960), and *Some Came Running* (1958).

compensation (\$750,000) and expenses of \$50,000.⁷ She had the right to approve the screen play and the director. In fact, the director, George Cukor, had already been approved. His previous film, *My Fair Lady*, had been both an artistic and commercial success, both the film and Cukor winning the Academy Award in 1964.⁸ If the movie had been produced and if it had been as successful at the box office as *My Fair Lady*, MacLaine would have earned over \$3 million from the domestic box office alone.⁹

Her contract included a standard "pay-or-play" provision: "We shall not be obligated to utilize your services in or in connection with the Photoplay hereunder, our sole obligation, subject to the terms and conditions of this Agreement, being to pay you the guaranteed compensation herein provided for."¹⁰ That is, she would receive the \$750,000 guaranteed compensation so long as she was ready, willing, and able to perform. If Fox decided to replace her or to abandon the project, they remained obligated to pay her the \$750,000.

While waiting for shooting to begin on *Bloomer Girl*, MacLaine turned down a role in *Casino Royale*, for which she would have received guaranteed compensation of \$1,000,000 plus an unspecified percentage.¹¹ She did, however, manage to fit one film in; according to her agent she "consented to perform in the motion picture called 'Gambit' for Universal Pictures only because she knew at the time that the motion picture 'Bloomer Girl' would follow."¹²

⁷None of the court opinions specifically recognize that the initial contract gave her ten per cent of the gross. The fact is noted in a number of the Briefs available to the courts. See, for example, Opening Brief of Appellant in the Court of Appeal, p. 4 and Respondent's Brief in the Court of Appeal, p. 86. For a description and analysis of contingent compensation in the movie business, see Victor P. Goldberg, *The Net Profit Puzzle*, 99 *Columbia Law Review* 524 (1997).

⁸Internet Movie Data Base, <http://us.imdb.com>.

⁹Internet Movie Data Base, <http://us.imdb.com>. The domestic rentals were about \$34 million. Rentals are the studio's share of the box office which typically come to about half the domestic box office; see Goldberg, note 5, above, at 543.

¹⁰Respondent's Answer to Petition for Hearing in the Supreme Court of California, p. 6.

¹¹Respondent's Brief, p. 18. It is not clear whether she was to receive a percentage of the gross receipts, as in *Bloomer Girl*, or of some other amount. The large number of stars associated with *Casino Royale* (and her counsel's silence) suggests that the contingent compensation was less favorable for *Casino Royale*.

¹²Respondent Brief, p. 82. *Gambit*, co-starring Michael Caine, was a crime-caper movie. Internet Movie Data Base, <http://us.imdb.com>.

In March 1966, Fox decided to terminate the *Bloomer Girl* project for reasons unspecified.¹³ They proposed that MacLaine consider taking instead the female lead in a western-type drama set (and to be filmed) in Australia, *Big Country, Big Man*. She had read the screenplay in June 1965 and had expressed interest in doing the film if there were a different director.¹⁴ In the March discussions, her agent informed Fox that she was no longer interested in the alternative project. A few weeks later, Fox sent a letter (characterized by her counsel as artfully drafted)¹⁵ to MacLaine informing her that her services would not be utilized in *Bloomer Girl* and offering her the female lead in *Big Country, Big Man* as a substitute, giving her one week to accept the offer.¹⁶ The terms of the second contract would be the same with a few exceptions. In fact, of the 34 clauses in the *Bloomer Girl* contract, 31 were identical.¹⁷ The second contract eliminated the clause giving her approval rights regarding the dance director (since there would be none) and modified her approval rights of the director and the screenplay.

There are hints in the record that the *BCBM* offer was not entirely sincere. Her agent stated in his declaration that Fox had informed him in December 1965 that *BCBM* was off schedule and if it were to be done at all, it would probably be in 1967.¹⁸ In the March discussion of the termination of the *Bloomer Girl* project, Richard Zanuck (Fox's Executive Vice President in Charge of Production) purportedly told her agent that the script was much better now and could be produced in July or August 1966.¹⁹ Both her lawyer and the judge pointed to Fox's failure to name the

¹³Fox's letter to MacLaine said, in part:

Because of circumstances which have arisen since the date of the Agreement, we have determined not to proceed with the production of the photoplay as originally contemplated. Therefore, we cannot and will not utilize your services as contemplated by the Agreement nor otherwise comply with our obligations to you under that Agreement.

In order to avoid any damage to you, the Corporation hereby offers to employ you to portray the leading feminine role in a photoplay tentatively entitled "Big Country, Big Man," which role you previously expressed interest in performing. (Respondent's Brief in the Court of Appeal, p. 7)

¹⁴Answer, Supreme Court, p. 18. The record is silent on the identity of the director and whether that director was still associated with the project when it was proposed in 1966.

¹⁵cite.

¹⁶Cite.

¹⁷For a listing of the clauses, see Appellant's Opening Brief in Court of Appeals, pp. 29-30.

¹⁸Respondent's Brief, p. 48.

¹⁹Respondent's Brief, p. 77.

proposed director and leading man as evidence that the offer was somewhat questionable.²⁰ Fox's counsel characterized the lower court's response in strong terms: "[t]he lower court apparently believed that defendant's offer, and its affirmative defense, were outrageous and in bad faith and expressed those sentiments in its strangely argumentative language at the conclusion of its Opinion."²¹ In his declaration, Zanuck claimed the offer was "a bonafide good faith offer and the defendant would have complied with the terms of that offer, had plaintiff accepted them."²² Fox's sincerity would have been a fact question and probably would have survived the summary judgment motion.

MacLaine refused the substitute offer and, according to her agent, was unable to find alternative employment in the *Bloomer Girl* shooting period.²³ She brought suit against Fox to recover the \$750,000 guarantee,²⁴ stating two causes of action: money due under a written contract; and damages for breach of a written contract.²⁵ She rejected a settlement offer of \$400,000.²⁶ Fox conceded that it had breached the original agreement and offered as its only defense her failure to mitigate damages by her refusal to accept the *BCBM* offer. Her failure to mitigate, claimed Fox, meant that MacLaine should receive only nominal damages.²⁷ On a very thin record consisting of the *Bloomer Girl* contract, Fox's letter proposing the *BCBM* contract, short declarations by her agent and lawyer, Fox's in-house counsel, and Richard Zanuck, an affidavit by MacLaine that she did not

²⁰Respondent's Brief, p. __; lower court decision at __.

²¹Opening Brief of Appellant, p. 40.

²²Appellant's Opening Brief, p. 52.

²³cite

²⁴Actually, she sued for the \$50,000 expenses as well, but the parties stipulated that since the expenses would not be incurred if the studio exercised its pay-or-play option, she would have no right to recover them. (Answer in Supreme Court, p. 20)

²⁵Supreme Court citation.

²⁶This fact was included in the Declaration of her lawyer and was noted in the dissent in the Supreme Court (3 Cal. 3d 176, 188).

²⁷That is, \$750,000-\$750,000=\$0. Oddly, one of the leading casebooks gets this wrong: If the court had ruled that the refusal of the second film constituted a failure to mitigate, how would Ms. MacLaine have fared on the obstacle to recovery then presented—showing the difference in value in appearing in “Big Country” rather than “Bloomer Girl”? (Students often miss the point that had she lost this case, she is nevertheless entitled to be compensated as if she had accepted the role in “Big Country.”) John P. Dawson, William Burnett Harvey, Stanley D. Henderson, Cases and Comment on Contracts (6th ed. 1993) Teacher's Manual, at 23.

work or receive compensation during the fourteen week shooting period, and a few stipulations, MacLaine asked for and received summary judgment. That result was upheld on appeal.

II. The Opinions

A. Superior Court

The case was first heard by Judge Zack in Superior Court.²⁸ He rejected Fox’s mitigation defense both because the pay-or-play clause meant that no mitigation was necessary and, even if it were, the proposed alternative was “different and inferior.” Judge Zack provided a straightforward characterization of the pay-or-play clause:

The contract ... is one in which the Defendant said, in substance, “We contemplate making a motion picture called ‘Bloomer Girl.’ We desire your services as ‘Evalina’, the star thereof, to be filmed during a certain period, in Los Angeles, California. If the picture is made and if you appear recognizably in the photoplay, as released, and the contract has not otherwise been validly terminated, we will pay you the guaranteed compensation, the expenses, and the percentage of the gross. Also, if the picture is made, you shall have absolute (subject to contingencies) approval of the director (Paragraph 29), reasonable approval of the dance director (Paragraph 31), and absolute approval of the screenplay for the photoplay (Paragraph 32).”

However, Defendant also says: “We do not promise we will ever make the picture or if we do, you will ever appear in it as released. The sole binding promise we make here and now (Paragraph 2) is that we will pay, in exchange for your commitment to perform at our election as provided in the agreement, the guaranteed compensation.”

* * *

Thus defendant is not liable to Plaintiff, under Paragraph 2, for failure to make the picture or for failure to have Plaintiff appear in it. Since Defendant elected not to proceed prior to the time Plaintiff’s performance was to commence, Defendant’s only enforceable promise now is to pay the guaranteed compensation.²⁹

The clause, said the court, amounted to a waiver of any right to have damages mitigated.³⁰ Fox’s admitted breach was not its failure to make the movie—it had never promised that. The breach was

²⁸His opinion is reprinted as an Appendix to Respondent’s Brief in the Court of Appeals.

²⁹Pp. 6-7.

³⁰P. 18. Fox relied on the conclusory Declaration of its Resident counsel, Frank Ferguson: “Nothing in Article 2 is intended to nor does it relate to any advance waiver by the producer of the doctrine of mitigation of damage.” Opening Brief in the Court of Appeal, p. 13.

only the failure to pay the guaranteed compensation at the promised time. Judge Zack had a rather stinging characterization of Fox's position:

To destroy all rights under a contract, to assist a wrongdoer, is unconscionable. To paraphrase: Defendant is saying: "Yes, we admit we signed a contract giving you approval of director and subject matter in a picture if we made it. We also admit that provided you are not in default, the contract requires us, in any event, to pay the guaranteed compensation. But there is another *unwritten* clause in the deal, resulting from the rule of mitigation of damages which allows us to compel you to perform on our terms if you are to recover anything in the "Bloomer Girl" Contract. Under this unwritten clause we either get your performance on our terms, or we get off scot-free. It works like this: We totally breach the contract and make an offer to employ at the same salary, *but this time on terms we dictate*. If you accept the offer and sue us on the original contract, we can demur you out because Paragraph 2 eliminates all covenants other than the one to pay money. You have received the money; we are not liable for failure of the other conditions to occur because we did not promise they would. On the other hand, if you do not accept the later offer to perform on terms which only we decide, and then sue us for breach of the original agreement, we have a complete defense of failure to mitigate damages. Take your choice."³¹

If MacLaine did have to mitigate, under the stipulated facts the only mitigation possible would have been acceptance of Fox's offer to star in *BCBM*. Neither this opinion nor the two appellate opinions had to confront issues arising from an employment offer from a third party (although it comes up indirectly in the discussion of "offset").³² Judge Zack ruled that, as a matter of law, the alternative employment was different and inferior and, therefore, she did not have to accept it. While he noted the differences in the films—a musical to be filmed in Hollywood versus a western to be filmed in Australia—he put no weight on those factors in determining that the substitute was different and inferior. Rather, he emphasized artistic control, her approval of the director and the screenplay. "Failure of Defendant to show . . . any facts at all, as to the comparability of the employment, leaves the Court in a position where there is only one conclusion that can be reasonably drawn from the absence of screenplay and director control in the second employment and that is that these powers were *important*."³³

MacLaine did not have to work; but what if she had done so? Could she keep the income from the other employment or would Fox's liability be reduced? The court emphatically stated that

³¹Pp. 27-28, emphasis in original.

³²See text below at 33.

³³P. 23 (emphasis in original).

she would be required to offset her earnings: “Plaintiff ... would have to deduct ... all earnings, even those as a seamstress, during the contracted period of ‘Bloomer Girl’ employment.”³⁴

B. The Court of Appeal

Writing for a unanimous court, Judge Kingsley upheld the grant of summary judgment but on quite different grounds.³⁵ The difference stems from his interpretation of MacLaine’s position:

Plaintiff’s cause of action, therefore, is not actually for a breach of her employment contract by an unlawful discharge; rather it is for a recovery under the contract according to its terms. The parties also are in agreement that defendant’s alternative obligation to pay plaintiff \$750,000 if it did not utilize her services in “Bloomer Girl” was subject to an implied condition that she mitigate defendant’s obligation by accepting other suitable employment.³⁶

He expands on this in a cryptic footnote:

We have decided the case at bench on the theory stated in the text. Since it was tried below, and was briefed and argued here, on that theory, we assume that the parties have correctly interpreted their mutual intention as to the particular contract herein involved. Our acceptance of the theory of mitigation for the purpose of this opinion, however, is not a determination that, in some other lawsuit, involving other parties to another similar contract, the validity of that theory might not be raised.³⁷

His meaning is not entirely clear. I interpret this to mean that the pay-or-play provision would normally mean that she need not mitigate, but in this particular case and for purposes of summary judgment only, she conceded that she would have to accept an offer of comparable employment in mitigation. How he came to this interpretation I do not know. He does not hold that the trial court erred. Perhaps her lawyer took the position in oral argument, but the written record does not support Kingsley’s characterization. Fox’s counsel, in its opening brief to the Court of Appeal, criticized the lower court’s treatment of the pay-or-play clause “as being vitally significant—so much so, that the Court ruled that its very existence waived the only defense defendant proffered to the Complaint, the alleged failure of plaintiff to mitigate damages.”³⁸ “Plaintiff,” argued Fox, “took the position that as

³⁴P. 19.

³⁵81 Cal.Rptr. 221.

³⁶At 222.

³⁷Id.

³⁸Opening Brief for Appellant, Court of Appeal, p. 12.

a matter of law, employees could sit out their term of employment without mitigating and that if she were wrong about this, defendant's affirmative defense 'would indeed present a triable issue of fact.'"³⁹ That hardly sounds like agreement on an implied condition that she mitigate. Indeed, in its Petition for Rehearing, Fox claimed that the two quoted passages from Judge Kingsley's opinion were inaccurate "because plaintiff never so agreed."⁴⁰

Plaintiff, in fact, did not back off from her claim that she was entitled to the compensation regardless of whether she had attempted to mitigate:

It is that right of Respondent's—to receive the \$750,000 anyway, *even if not used in "Bloomer Girl"*—which Appellant is seeking to take away from Respondent through the "mitigation" device. In other words, an express contractual provision which in effect eliminated mitigation by providing that Respondent was to be paid even if *not* used in "Bloomer Girl" is being threatened by Appellant's "mitigation" theory. If that theory were given effect, it would render meaningless Respondent's express contractual right to be paid under the "Bloomer Girl" contract, *even if her services were not used*.

And, of course, Respondent paid dearly for that contractual right, among other things because she turned down an offer of \$1,000,000 plus royalties from Columbia Pictures because of the necessity to hold herself in readiness for "Bloomer Girl" during the period indicated.

* * *

Her sole present right of action, because of the election reserved to Appellant in the last unnumbered paragraph of Paragraph 2 of the "Bloomer Girl" contract is to have the guaranteed compensation.⁴¹

Having determined that there was an implied condition that she mitigate, Judge Kingsley then had to give it content. There being no law regarding the failure to mitigate the non-breach of a contract, the court turned to the only analogy available, mitigation of damages in unlawful discharge cases. Like Zack, Kingsley concluded that as a matter of law, the tendered employment was different and inferior; unlike Zack, he did not rely solely on the artistic control issues:

It is obvious that the two plays differed widely: One was a musical with opportunities for plaintiff to display her talents as a singer and dancer; the substitute offered no such opportunity. One was to be filmed in Los Angeles; the other in a foreign country. As to one, plaintiff had the right of detailed script approval; as to

³⁹Opening Brief of Appellant in the Court of Appeal, p. 49.

⁴⁰P. 9.

⁴¹Respondent's Brief, Court of Appeal, pp. 37-38 (emphasis in original).

the other, she was required to accept a script already fixed. In one, she was to work under the direction either of a director named in the contract and, thus, approved by her in its execution, or by some other director satisfactory to her; in the substitute, she would work under a different director in whose selection she had had, and would have, no voice at all. Those differences are of a kind that, as a matter of common knowledge, are all significant to a star performer. The question is not whether or not plaintiff would have been wise to have accepted the offered substitute role. Her duty to defendant was not to exercise the wisest professional judgment. It was merely to accept employment that did not differ substantially from that which the original contract contemplated. Plaintiff had been employed in Los Angeles, to appear in a musical, based on a stage play of established reputation, under the direction of a director in whom she had confidence, using a script she had approved. She was offered employment in a foreign country, to appear in a non-musical, under a director whom she did not know or trust, and using a script which (so far as defendant's affidavits show) she had read only once and as to which she had indicated, at the most, only a general approval and not a detailed one. Those differences were substantial within the meaning of the cases in the field. The trial court properly ruled that, as a matter of law, plaintiff had no duty to defendant to accept its substitute role.⁴²

C. The Supreme Court

In the Supreme Court's decision, the one prominently featured in all the casebooks, the existence of the pay-or-play clause was acknowledged in a footnote, but it warranted no discussion from either the majority nor the lone dissenter.⁴³ The entire discussion centered on whether the second offer was different and inferior as a matter of law. "The sole issue," said the court, "is whether plaintiff's refusal of defendant's substitute offer . . . may be used in mitigation."⁴⁴ The majority said that it could not. The nature of the project made it different and the loss of the

⁴²At 225-226.

⁴³The majority opinion concluded by noting that its finding on the "different and inferior" issue made consideration of the pay-or-play provision unnecessary:

In view of the determination that defendant failed to present any facts showing the existence of a factual issue with respect to its sole defense—plaintiff's rejection of its substitute employment offer in mitigation of damages—we need not consider plaintiff's further contention that for various reasons, including the provisions of the original contract, . . . plaintiff was excused from attempting to mitigate damages. (At 184)

⁴⁴3 Cal. 3d 176, 182.

screenplay and director approvals made it inferior.⁴⁵ The dissent observes that the majority's conclusion amounts to proof by repetition and goes on to claim that the relative merits of the second film were not so obvious that they could be determined without more facts.⁴⁶

The court's emphasis on the "different and inferior" question and the scant attention given the pay-or-play provision was only partially dictated by the parties' briefs. The bulk of their arguments was addressed to aspects of the mitigation defense.⁴⁷ And when they did raise the pay-or-play issue, the presentation was less than crystal clear. Nonetheless, the arguments were available to the court which chose simply to ignore them.

⁴⁵ The mere circumstance that 'Bloomer Girl' was to be a musical review calling upon plaintiff's talents as a dancer as well as an actress, and was to be produced in the City of Los Angeles, whereas 'Big Country' was a straight dramatic role in a 'Western Type' story taking place in an opal mine in Australia, demonstrates the difference in kind between the two employments; the female lead as a dramatic actress in a western style motion picture can by no stretch of imagination be considered the equivalent of or substantially similar to the lead in a song-and-dance production.

Additionally, the substitute 'Big Country' offer proposed to eliminate or impair the director and screenplay approvals accorded to plaintiff under the original 'Bloomer Girl' contract, and thus constituted an offer of inferior employment. (At 183-184)

⁴⁶At 187.

⁴⁷So, for example, plaintiff framed the dispute in terms of the mitigation defense: ... the various admissions by Appellant in its pleadings and declarations and the various undenied facts and stipulated facts in this case all narrowed the issues to the mitigation defense. Even as to that one defense it was further limited to the question of whether one particular alternate offer of employment by Appellant to Respondent constituted a mandatory mitigation opportunity for her." (Answer to Petition for Hearing in Supreme Court, p. 4).

Still, plaintiff did argue that the contract did not require mitigation:

Respondent had the right in "Bloomer Girl" to be paid her \$750,000.00 even if the Appellant did not utilize her services in or in connection with the Photoplay. But in the "Big Country, Big Man" proposal, Respondent's right to receive the \$750,000.00 from Appellant *under the 'Bloomer Girl' contract* regardless of whether her services were utilized therein--and even if they were not--was to be expressly eliminated." (p.14, emphasis in original)

Fox presented seven arguments; the first six concerned the mitigation defense. The seventh was most strange. The Court of Appeal, said Fox, erred when it stated that the suit was not for unlawful discharge, but for recovery under the contract according to its terms. It further erred when it said that plaintiff had agreed that it would have to mitigate damages. Fox claimed that it had anticipatorily repudiated and breached its contract and that MacLaine had been discharged; both parties had, Fox noted, stipulated to those facts. “Moreover, not only did plaintiff never agree that defendant’s obligation to pay \$750,000 was subject to an implied condition that she mitigate damages, plaintiff vigorously contended quite the opposite.”⁴⁸ “Thus, when the Court of Appeal declared (1) this was not a case involving an unlawful discharge and (2) plaintiff had agreed that her right to receive \$750,000 was subject to an implied condition to mitigate damages, it was inaccurate in the extreme.”⁴⁹ If the court had been correct in labeling this a contract still in force, Fox contended, the mitigation defense would fail. It cited *Payne v. Pathe Studios, Inc.*,⁵⁰ which concerned a studio’s liability under a pay-or-play clause for failure to make a film (the case will be discussed below):

Here again we must bear in mind that this is not an action for damages for breach of the contract of employment, but an action on the contract itself for agreed compensation. The doctrine of mitigation of damages has no place in such an action.⁵¹

Fox concluded by noting that the “inconsistency” with *Payne* “cannot help but lend confusion and inconsistency in what has been heretofore well settled law.”⁵² This all seems like a pretty powerful argument, but *for the plaintiff*. The law is well settled that in a pay-or-play contract there is no place for mitigation—the plaintiff simply receives the guarantee. Fox’s twist is the one described derisively by Judge Zack. By announcing a breach, Fox breaches the promise to employ (which is subject to the mitigation defense), not the promise to pay (which is not). That argument seems extraordinarily silly. Neither the Court of Appeal nor the Supreme Court overtly recognized it; but it is the implicit core of their analysis.

D. The Precedents

To be fair, the courts’ failure to recognize the nature of the pay-or-play clause was not entirely their fault. While plaintiff did argue that the clause did not require her to mitigate, she did not even

⁴⁸Appellant’s Petition for Hearing in Supreme Court, p. 25.

⁴⁹P. 26.

⁵⁰6 Cal. App. 2d 136 (1935).

⁵¹At 142.

⁵²P. 26.

attempt to relate the case to the few other reported cases involving such a clause. In her lengthy briefs, she mentioned only one and did not bother to note that the case involved a pay-or-play clause. That case, *de la Falaise v. Gaumont-British Picture Corp., Ltd.*,⁵³ was the only case concerning a pay-or-play clause cited by any of the courts. And, like the plaintiff, their invocation of the case ignored the pay-or-play nature of the contract. Fox, however, called three other cases to the court's attention.

The four cases taken together provide a good picture of the role of pay-or-play clauses. They also illustrate how, by forcing their analyses into Procrustean categories, the courts manage to make simple questions difficult. I will consider the four cases in chronological order.

1. *Zazu Pitts (Payne v. Pathe Studios, Inc.)*⁵⁴ She entered into a contract in May 1930 with Pathe Studios to star in "Beyond Victory," to be completed before the end of December of that year. She was to receive a guarantee of \$5,000, to be paid regardless of whether or not the picture was made.⁵⁵ Her salary was to be \$1250 per week for a minimum of four weeks. The film was not made and she (or rather her assignee) sued for the guaranteed amount. The opinion is silent on whether the filming was expected to take longer, but I think it a reasonable inference that it was not. Despite cancellation of the one film, Pitts still managed to appear in thirteen films that year.⁵⁶ She prevailed, with the court finding that this was "not an action for damages for breach of the contract of employment, but an action on the contract itself for the agreed compensation."⁵⁷ Because of this, said the court, there was no occasion to mitigate. Any earnings between May and the end of December would not be offset against the \$5,000 obligation. The court noted that "she was employed and received compensation during a large portion of the period in question,"⁵⁸ but that did not preclude her fully performing the contract.

The court observed: "The question whether this contract was an option in favor of defendant on the services of [Pitts], . . . to be exercised at will, or was an agreement to engage her services for at least four weeks with a guarantee of \$5,000 as a minimum compensation, became a question of

⁵³39 Cal. App. 2d 461; 103 P. 2d 447.

⁵⁴6 Cal. App. 2d 136; 44 P. 2d 598.

⁵⁵"It is understood and agreed that in the event your services are not started on or before December 31, 1930, we hereby agree to pay you the sum of Five Thousand Dollars (\$5000) which represents the four weeks guarantee on this agreement." (At 599)

⁵⁶Data base.

⁵⁷At 142.

⁵⁸At 142.

fact for the trial court to determine."⁵⁹ If the latter, the court would have had to deal with the question of whether the \$5,000 was liquidated damages or a penalty. It is a distinction without a difference. The court managed to convince itself of the former so it did not have to deal with the doctrinal niceties of liquidated damages. Of more interest than the doctrinal smokescreen is the court's characterization of the clause as an option. Pathe paid Pitts \$5,000 to be ready to make a particular film in a seven month period, but Pathe retained the right to cancel the film or to make the film with someone else.

2. *Constance Bennett. (de la Falaise v. Gaumont-British Picture Corp., Ltd.)*⁶⁰ Constance Bennett agreed to make two films in London in 1936, each to be made in eight weeks or less. The first was completed, but the second never made. Her compensation for each picture was ten percent of the American gross receipts to be offset against a guarantee of \$30,000. In addition, she would receive a guaranteed \$5,000 which was not to be recouped from her share of the gross receipts.⁶¹ The start date for the second picture was to be between September 1 and November 14 and the studio promised to give notice of the starting date by August 1. The studio sought to cancel the contract in the spring of 1936, but she refused; the studio failed to give notice of a start date on August 1, whereupon she sued the studio for the \$35,000 minimum guarantee.

In its defense, the studio noted that she had begun working on a picture for Twentieth Century Fox in July ("Ladies in Love") and that this would relieve them of their duty to notify on August 1. However, the court found, she would have been able to complete that film in time to appear in England by September 1, so her behavior did not excuse the studio. The only issue was whether any employment she had taken between September 1 and January 1 should be offset against the \$35,000 guarantee. She received no movie offers during the period, but did perform in two radio programs, receiving \$4,000 for the two.

The court distinguished this case from *Payne* "which instead of being an action for breach of contract, was based upon the failure of respondent to pay the minimum compensation specified in an agreement very similar to the one here involved."⁶² Because *Payne* was not an action for breach of contract, the doctrine of mitigation did not apply. Since this was an action for breach of contract, the

⁵⁹At 140.

⁶⁰39 Cal. App. 2d 461; 103 P. 2d 447. Henri Falaise, Marquis de la Coudraye was the third of her five husbands. According to her mini-biography, "she feuded with the press and enjoyed lawsuits." (Rod Crawford <puffinus@u.washington.edu> at Internet Movie Data Base, <http://us.imdb.com>).

⁶¹So, if the American gross receipts were less than \$300,000, she would receive \$35,000. For every dollar of gross receipts above \$300,000, she would receive an additional ten percent.

⁶²At 469.

doctrine would apply. This is a most peculiar syllogism, given that the action is for precisely the same thing—payment of the guarantee after the studio chose not to go forward.

The court cited the "well settled" rule that the damages for wrongful discharge were the salary less the amount the employee might have earned with reasonable effort from other employment; the employee need not enter into service that was different or inferior to mitigate damages. The rule, the same one at issue in *Parker*, was even less relevant here. She had not *turned down* any alternative employment; she had *accepted* employment on radio. The court conflated two distinct questions: should the defendant's damages be reduced by the revenues the plaintiff should have earned (but didn't) in mitigation; should the plaintiff's actual earnings be offset against the damages. Having so boxed itself in, the court extricated itself with a nonsensical argument. The radio engagement, said the court, "might be denominated different in character from that required of a moving picture actress, [but] it cannot be said to be inferior thereto."⁶³ The radio earnings would, therefore, be offset against the damages so that she recovered only \$31,000.

3. *Pare Lorentz. (Lorentz v. R. K.O. Pictures, Inc.)*⁶⁴ Lorentz agreed to write, direct, and produce a movie for \$50,000 plus ten per cent of the net profits. The picture was over budget and behind schedule and the studio finally stopped production. Lorentz had already received the \$50,000; he sued for a number of items, including the percentage compensation he would have earned and the lost screen credits. The relevant contract clause was written in the form of a waiver.⁶⁵ In granting the studio summary judgment on these claims, the court explained why it made sense for the studio to maintain the option of replacing the director or terminating the project:

the contract makes employment certain and as well the payment of the fixed compensation. Such obligation is fixed, but the work to be done and the results of the work must remain in the sound discretion of the moving picture corporation. The expensive business enterprise may by the turn of events at any time indicate the wisdom of discontinuing the production or the showing of a photoplay. Should events of such portent occur, the corporation is absolved from liability from

⁶³At 469.

⁶⁴155 F. 2d 84.

⁶⁵"The Producer expressly waives and releases the corporation from all claims or causes of action based on the failure of the Corporation actually to utilize the services of the Producer or the results thereof, or on the failure of the Corporation to produce or to release or to continue the distribution of the Pictures; provided, however, that nothing contained in this Article of this agreement shall be deemed to relieve the Corporation of its obligation to pay the Producer the fixed compensation payable to him pursuant to Article 1 of Section 11 of this Agreement." (At 86)

prospective benefits to appellant. Appellee has reserved decision on such question to its own discretion.⁶⁶

4. *Ann Sheridan. (RKO Pictures, Inc. v. Sheridan)*⁶⁷ In April 1949 Sheridan accepted the leading female role in a motion picture entitled *Carriage Entrance*. Her fee was \$50,000 plus an additional \$100,000 which was to be paid out of the gross receipts of the picture. The contract gave her approval of the script, the director, and the leading man. At the time she signed the contract she also signed a letter stating that she approved the script, director, and Robert Young as the leading male actor. Young subsequently rejected the role and the parties could not agree on an adequate replacement. In August, RKO sent her a letter saying that it would not use her in the picture and would not pay her any compensation.

The dispute involved two mechanical issues with respect to the pay-or-play clause. What event would trigger the clause and, if it were triggered, what compensation should be paid? Neither the purpose of a pay-or-play clause nor the mitigation defense were at stake. The clause, which included an awkwardly worded proviso, read as follows:

Producer shall not be required to use Artist's services hereunder or to complete the production of 'Carriage Entrance,' and shall be deemed to have fully performed all its obligations to Artist by paying Artist the minimum compensation payable to Artist hereunder. However, if, because Artist does not approve any one or more of the items specified in paragraph 1 [the director, script, and leading man], Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder.⁶⁸

RKO argued that the last sentence meant that the pay-or-play obligation would not be triggered if she failed to act in good faith by not approving the alternative leading men they had proposed *or* if she did not render any services under the contract. The court held that the contract said "and" and meant "and." Even if she had unreasonably withheld approval of alternative leading men, as long as she had rendered some services the clause would be in effect. Since the jury had found that her consultations regarding costumes and her fittings of gowns were services rendered pursuant to the contract, the clause was triggered.

Sheridan argued that the trial judge erred by ruling as a matter of law that the phrase "minimum compensation" meant \$50,000. The phrase, she argued (and the court agreed), was definitely ambiguous and parol evidence should have been admitted; the case was remanded on this point.

⁶⁶At 86.

⁶⁷195 F. 2d 167.

⁶⁸At 168-169.

I find the first conclusion more compelling than the second. At worst, the second issue involves a one-shot drafting snafu which could easily be rectified by making clear that the minimum compensation and the guaranteed payment are one and the same. The first issue was highlighted by awkward drafting, but the problem can be deeper. The studio's pay-or-play obligation has to be triggered by a specific event; only in some circumstances will that event be the signing of the contract. In the other four contracts considered in this Section (*Parker*, *Payne*, *de la Falaise*, and *Lorentz*), the pay-or-play obligation began the instant the contract had been entered into. But, as *Sheridan* illustrates, that need not be the case.

5. *In sum*. This tour of the precedents suggests that while the raw materials for a sensible analysis of *Parker* were there, they would be easy to miss. The outcomes were not so bad,⁶⁹ and there was some awareness of the function of the pay-or-play clause. But the attempt to pigeonhole the facts into traditional legal categories did more to obscure than to enlighten. The opacity of the precedents is starkly illustrated by the failure of the *Parker* litigants (and courts) to appreciate their implications. Three were raised by Fox's counsel, not MacLaine's, despite the fact that they should support her claim. Fox failed to recognize that by calling these cases to the court's attention, it was really undermining its own case. And the plaintiff returned the favor. Only one of the cases, *de la Falaise*, was cited by the plaintiff and the courts, and that only for the proposition that mitigation does not require the plaintiff to take employment that was different and inferior.

III. Pay-or-Play

The essential features of a pay-or-play clause were spelled out in a decision contemporaneous with *Parker* by none other than Judge Kingsley. The issue arose in the context of a divorce.⁷⁰ Carroll Baker had a seven picture deal with Paramount in which she had agreed to perform in at least one picture a year. Paramount agreed to pay her a fixed fee each year whether or not she worked, the fee being \$200,000 per year in the early years and \$300,000 in the later years. After she starred in *Harlow*, a 1965 release, Paramount did not call on her to make any more pictures. Paramount attempted to renege, prompting her to sue, and the court, in an unpublished opinion, found in her favor. In the divorce proceedings, the issue facing the Court of Appeal was whether the final \$1.2 million of payments under the pay-or-play clause should be treated as property, as the husband contended, or future earnings.⁷¹ The court found the latter. Judge Kingsley spelled out clearly the meaning of the pay-or-play clause:

[The contract] required the wife to hold herself available for service in one picture each 12-month period; without the consent of Paramount she could not accept other

⁶⁹Offsetting Constance Bennett's radio earnings was probably wrong, but defensible as a default rule; the *Sheridan* court's acceptance of parol evidence was almost certainly a stretch.

⁷⁰*Garfein v. Garfein*, 16 Cal. App. 3d 155; 93 Cal. Rptr. 714.

⁷¹The amount was for payments falling due after the date of separation.

potentially conflicting engagements, business or social. [Footnote: Under the contract, plaintiff could perform for another producer, provided she gave Paramount notice of her intent; in that event, Paramount was required either to consent or to schedule her for its own picture at the time or times involved.]

* * *

The husband argues that the several payments were not "earnings" because the wife was entitled to them even though she did not "work"—i.e., appear in any motion pictures. But appearance in a picture was only one alternative of her obligations to her employer under the contract. Under a "play or pay" contract, the employer secures: (1) an option on the performer's services; and (2) the assurance that a performer will not, without its consent, create competition for other pictures of the employer by performing for some other producer. "They also serve who only sit and wait." We hold that the wife "earns" her agreed compensation by refraining from performing for anyone except the employer during the period of the contract, unless with the employer's consent. [Footnote: The effect of the contract, obviously, was to limit plaintiff in bargaining with other producers and subjected her to losing the opportunity to appear in pictures for other producers, which she might regard as important to her career or her bank account] Since the payments made after June 1967, were "earned" after that date, they were separate property. [Footnote: The duty to pay, where no picture was made, did not accrue until the final day of each 12-month period, since the wife was required to hold herself available for the full period. The compensation, thus, was not "earned" until that last day.]⁷²

Judge Kingsley turns *Parker* on its head. A pay-or-play clause does not *require* the talent to seek reasonable employment alternatives to mitigate damages. Rather, he suggests, it gives the studio the power to *prevent* the talent from working with a rival studio for a period of time. It is not clear whether this drastically revised vision reflects rapid learning on the part of Judge Kingsley; perhaps he already knew it and this knowledge was the basis for his cryptic footnote in *Parker*. What is clear is that for the last quarter century this alternative understanding of the pay-or-play clause has been on the books and was put there by the intermediate court judge who helped create *Parker*.

Carroll Baker's Paramount contract differed from the five discussed in the previous section. Those were all for specific films to be made in a reasonably well-defined time slot. The Baker contract was for seven unidentified (and unidentifiable at the time of contract) films to be made over a seven year period. This, along with the *Sheridan* contract's variation on the triggering mechanism, underscores the point that not all pay-or-play clauses are created equal.

The two basic features, however, remain those identified by Judge Kingsley: the studio has paid for the option of using the talent for some time period and the talent has agreed not to work for someone else during that period unless it receives the studio's permission or pays for the privilege. Indeed, these features are memorialized in the union contracts. The Director's Guild agreement, for

⁷²At 158-159.

example, says that if the director is employed by a third party, the employer “shall be entitled to an offset of the compensation arising from such new employment for such remaining portion of the guaranteed period against the compensation remaining unpaid. . . . [However,] the Director shall have no obligation to mitigate damages arising from his or her removal. . . .”⁷³

A. The Studio’s Option

Movie-making is a sequential process. A studio might begin with a concept, hire a screenwriter to draft a screenplay, hire the director and actors and other talent, and, if all goes smoothly, a finished feature film will be the result. But things do not always run smoothly. Most projects do not make it to the screen. Indeed, most die early before the studio has invested a significant amount.⁷⁴ Even if a project does not die, its course can change constantly as circumstances or information change. The screenplay can be revised, another studio might be coming to market with a movie about a similar subject, a particular star might become available, the co-stars might lack chemistry, and so forth.⁷⁵ By maintaining the flexibility to react, the studio can adapt the project to changed circumstances. As the primary claimant on the film’s earnings, the studio has the incentive to make adaptive decisions which enhance the expected value of the project.⁷⁶

However, other participants must make decisions which depend on the likelihood that the project will go forward and they do not want their interests to be totally ignored. Prior to 1950, when much of the talent was under long-term contract to the studios and studios produced a large number of films, the studios internalized these concerns. If Ms. X was dropped from a particular film, the studio still had to pay her salary. The studio held a portfolio of talent. If someone were dropped from one film, or a project canceled, the studio had a large number of other projects in the works so that the studio’s cost of carrying an inventory of contract players was not great. As the number of films produced declined, the long-term contracts disappeared.⁷⁷ Talent was hired largely on a film-

⁷³1990 DGA Basic Agreement §6-105; cited in 2 Thomas D. Selz et al., *Entertainment Law* §27.10.

⁷⁴See Goldberg, note ? supra at 538.

⁷⁵For descriptions of the evolution of various film projects, see Julie Salamon, *The Devil’s Candy*, 1991 (*The Bonfire of the Vanities*); Steven Bach *Final Cut: Dreams and Disaster in the Making of Heaven’s Gate* (1985); Spike Lee, *By Any Means Necessary: The Trials and Tribulations of the Making of Malcolm X* (1992); Sidney Pink, *So You Want to Make Movies* (1989) (independent films, most filmed in Europe); and Thomas Schatz, *The Genius of the System* (1988) (major studio films from 1930-1950).

⁷⁶Cite business text on value of option.

⁷⁷In the 1930’s the major studios turned out nearly 400 films a year; in the 1960’s the number had fallen to less than 200. Mark Weinstein, *Profit Sharing Contracts in Hollywood: Evolution*

by-film basis and the studio had to pay for the talent's readiness on that basis as well. (The per picture contracts of Constance Bennett and Zazu Pitts were exceptions in their era, as was Carroll Baker's in the present era.) In the studio contracts of the 1930's and '40's, the studio determined which roles the actor would play. If the actor refused, the studio could suspend the actor.⁷⁸ The actor would not be compensated while on suspension and the clock would stop running. That is, the suspension time would be tacked on to the end of the contract.⁷⁹ In modern multi-picture agreements, the actor has some discretion as to acceptance of a particular role.

The opportunity cost of accepting a contract for a particular film project is the offers that might come along in the intervening months. In Shirley MacLaine's case, at least one offer, *Casino Royale*, was foreclosed by her acceptance of the *Bloomer Girl* contract. If the studio were free to adjust without taking this opportunity cost (or reliance) into account, the talent would be reluctant to commit to the project in the first place. The pay-or-play clause provides some protection of the artist's reliance. It is analogous to the "take-or-pay"⁸⁰ or "demand charge"⁸¹ often used in long-term

and Analysis, J. of Legal Studies (forthcoming).

⁷⁸The standard contract was described in *De Haviland v. Warner Bros. Pictures, Inc.*, 67 Cal.App.2d 225, 153 P.2d 983 (1944).

The contract gave the Producer, defendant, the right to suspend plaintiff for any period or periods when she should fail, refuse or neglect to perform her services to the full limit of her ability and as instructed by the Producer and for any additional period or periods required to complete the portrayal of a role refused by plaintiff and assigned to another artist. Plaintiff was to receive no compensation while so suspended or thereafter until she offered to resume her work. It was provided that the Producer had the right to extend the term of the contract at its option, for a time equal to the periods of suspension. (At 228)

Olivia DeHavilland (the court is quite free with the spelling of her name) had been suspended for twenty-five weeks over the course of her seven year contract. The court continued:

The several periods of suspension totaled some twenty-five weeks. The facts as to the suspensions are not in dispute; defendant's right to impose them is not questioned. Plaintiff's reason for refusing the several roles was that they were unsuited to her matured ability and that she could not faithfully and conscientiously portray them. Her good faith and motives are not in issue, but according to the contract the Producer was the sole judge in such matters and she had to do as she was told. (At 229)

⁷⁹In *De Haviland* the court voided contract extensions beyond seven years.

⁸⁰Example of some cases.

⁸¹See, for example, *Alcoa v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980).

supply contracts.⁸² The seller (the artist) is promised some compensation even if the buyer (the studio) chooses to take nothing at all. Shirley MacLaine is to receive the \$750,000 even if the movie is not made. By reducing the incremental costs of continuation, these devices provide some protection to the seller's (artist's) reliance, balancing that reliance interest against the buyer's (studio's) need for flexibility. The parties leave the decision to proceed entirely in the hands of the studio with pay-or-play merely altering the prices it faces.⁸³

The assurance is not given lightly. Recall that Shirley MacLaine's contract negotiations took seven months and were not concluded until the parties had agreed on the director. The record is silent on whether Cukor had also signed his contract at the same time, but that is a common practice.⁸⁴ The studio will try to delay triggering its pay-or-play obligations until the project is far along. Until the contract is formed, the studio has no obligation to pay anything. MacLaine might turn down roles which would conflict with this project because she anticipates that the project will go forward, but until the pay-or-play clause is triggered, she bears all the consequences. The parties

⁸²The contracts between oil refineries selling petroleum coke and their aluminum company purchasers used a variety of devices (including "standby" charges and nonlinear pricing) to protect the seller's reliance while granting the buyer some discretion over the quantity. See Victor P. Goldberg and John R. Erickson, "Quantity and Price Adjustment in Long-Term Contracts: A Case Study of Petroleum Coke," 30 *J. of Law & Economics* 369, 378-382.

⁸³The studio should be free to make that decision without second-guessing by the courts. In a recent case, however, the court held that the studio's discretion was limited by an implied covenant of good faith and fair dealing. The facts are somewhat unusual as the disputed contract was apparently part of a settlement following the dissolution of the personal and romantic relationship of Clint Eastwood and Sondra Locke. Immediately following the settlement, Warner (Eastwood's studio) signed a development deal with Locke which included a \$750,000 pay-or-play arrangement to direct some future unspecified project. Warner did not approve any of her projects, paid her the \$750,000 (plus another \$750,000 for an exclusive first look) and argued that it had satisfied its contractual duty. Locke argued that the studio, to please Eastwood, had no intention of making any movie with her and that the deal was a sham. She sued for breach of contract and for fraud; the California Court of Appeals, reversing the trial court, denied Warner summary judgment. *Locke v. Warner Bros, Inc.* 1997 Cal. App. LEXIS 676. In contrast to *Parker's* implication that only the \$750,000 guarantee was at stake, the court noted that "[m]erely because Warner paid Locke the guaranteed compensation under the agreement does not establish Warner fulfilled its contractual obligation. As pointed out by Locke, the value in the subject development deal was not merely the guaranteed payments under the agreement, but also the opportunity to direct and produce films and earn additional sums, and most importantly, the opportunity to promote and enhance a career." (At 12)

⁸⁴Cite.

bargain, in effect, over when, and how, the actor's reliance (forbearance) will be protected.⁸⁵ The subtlety of the triggering mechanism is well illustrated by the contract of a supporting actor who would only be made pay-or-play upon receipt of a bona fide conflicting offer. In effect, the producer's option would be a variation on a right of first refusal.⁸⁶ Upon signing the agreement, the artist commits to being available. The producer can terminate the artist without cost until the start of shooting or until it "matches" an outside offer that includes a pay-or-play provision.

B. Past Performance

Not all pay-or-play clauses are meant to balance the talent's reliance against the studio's flexibility. For some, their contribution to a project is essentially completed by the time the pay-or-play clause is triggered. The "packaging producer" (as opposed to the "line producer" who will be involved during production) will typically have compensation in three pieces. A producer would receive a fairly modest (currently in the \$25,000-\$50,000 range) development fee. Since most projects fail to come to fruition, that is all the producer would receive. If, however, the project advances to a certain point, the producer will receive the fixed component of the compensation which might well be ten times (or more) the development fee. Finally, if the producer continues with the project until completion, the producer would be eligible for contingent compensation, likely as a share of "net profits."⁸⁷ Since the packaging producer is not expected to be involved in the production of the film, a pay-or-play clause is a convenient device for limiting the required compensation to the first two components. Once the packaging producer's contribution is complete, the studio can simply

⁸⁵The contract formula will typically serve as the baseline for renegotiation. When, for example, Alan Arkin's contract was terminated two weeks before principle photography was to begin on *Bonfire of the Vanities*, the studio's only legal obligation was to pay his fixed compensation—\$120,000. However, the co-producer suggested that the studio would do more. "We expressed our apologies to Alan—and we'll have to negotiate something. This is not the first time this sort of thing has happened—nor will it be the last, but we are concerned about his feelings." (Salamon, note 73 at 110).

⁸⁶"In the event that Artist receives a conflicting bona fide 'pay-or-play' offer on another motion picture which Artist would otherwise accept, Artist shall accord Producer the right to pre-empt such other offer by furnishing Artist with a "pay-or-play" guarantee for his guaranteed compensation hereunder within five (5) business days of receipt by Producer of a written request therefor describing the conflicting 'pay-or-play' offer. If producer so exercises said right of preemption, Artist shall render his services hereunder on the Start Date, as defined herein. If Producer does not so furnish Artist with such guarantee, Artist may elect to be released from his obligations hereunder." (Redacted contract excerpt available from the author.) The star of the same movie had a more attractive pay-or-play clause, though, unlike Shirley MacLaine's contract, it was not triggered upon signing.

⁸⁷See Goldberg, *supra* note ?, at 538-539.

invoke the pay-or-play clause providing the producer with the fixed compensation and relieving itself of the legal burden to pay the contingent compensation.⁸⁸ The studio has purchased an option on the producer's time, but, unlike the actor's contract, the presumption is that the studio will choose not to exercise the option.

C. Offset

Judge Kingsley's characterization of the pay-or-play clause as "assurance that a performer will not, without its consent, create competition for other pictures of the employer"⁸⁹ is slightly off on two counts. The primary motivating force is almost certainly not shielding the studio from the actor *creating competition*, although industry people might characterize it this way. It is not plausible that preventing the production of a film with a particular star in a particular narrow window of time (fourteen weeks for Shirley MacLaine) would have much of an impact on the individual studio.⁹⁰

Nor does the actor require the studio's consent.⁹¹ The contract grants the studio a limited right to prevent the actor from working with another studio (and perhaps other potential employers) for a specified period. That right is protected not by a "property rule" but only by a "liability rule."⁹² That is, the studio cannot prevent the actor from working with someone else during the production period; it can only collect damages by setting off payments from the third party against its fixed compensation liability.

It was not always so. When most artists were under long-term contracts in the 1930's and 1940's, the studio did have the right to prevent them from working elsewhere. This did not mean that the artist wouldn't work elsewhere; it simply meant that the third party employer had to bargain with the studio to "rent" the employee. If the artist's market value were greater than the contract price,

⁸⁸The packaging producer's clause has to be triggered by a particular contractually defined event, preferably one that reflects the completion of that phase of the process. One common choice is the date at which some principal (the star and/or the director) is made pay-or-play.

⁸⁹See text at note 69 above.

⁹⁰The studio with the largest box office share has averaged around 20% since 1975. See *Encyclopedia of Exhibition, 1996-97* (Published by National Association of Theatre Owners), p. 194. The adverse effects of another studio's having a big hit are diffused over the remaining producers, so that the rewards to thwarting a project will be spread over the remaining studios; the initial studio would receive only a small share of the returns.

⁹¹Judge Kingsley recognized this; Paramount, as he noted, had something akin to a first refusal right in Carroll Baker's contract. See text at note 69 above.

⁹²Guido Calabresi and Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," 85 *Harvard Law Review* 1089 (1972).

the studio could pocket the difference. Renting talent from other studios was a common occurrence—an industry study found over 2,000 loan-outs of actors, directors, and cinematographers among the seven major studios in 1933-1939.⁹³

So, although the studio in the 1930's had the power to prevent an actor from “creating competition,” it usually chose not to wield that power. Rather, it more typically attempted to allocate its “assets” (artists under contract) to their highest and best use, since the studio would benefit both from the direct payments on this film and, possibly, the enhanced reputation of the artist. That might entail having the artist “sit and wait,”⁹⁴ but the motive for refusing to loan out the artist would be management of the inventory of talent (a better use for that artist might come along), not preventing the creation of competition.

1. One Picture Deals. In the modern era, the studio's right has been protected only by a liability rule, in both one-shot deals (Shirley MacLaine) and in multi-picture deals (Carroll Baker). I will discuss some aspects of the multi-picture deal below, but for now will focus on the one-shot deal. If the studio invokes the pay-or-play clause, the artist is free to contract with someone else in the time slot. However, any earnings must be offset against the original contract. Rather than requiring the artist or third-party employer to negotiate with the original studio, the rule fixes a price in advance. The rule appears to establish a 100% tax on the subsequent transaction which would seem to dampen incentives. Why shouldn't Shirley MacLaine just go to the beach?

Even if the entire fixed compensation had to be set off, there are good reasons why an artist might choose to perform rather than remain idle. First, the fixed compensation is only one element in the compensation package. Shirley MacLaine stood to make millions on her gross participation. Even if the compensation terms of the second contract were identical, the expected value of the contract would be substantially greater than her *Bloomer Girl* fixed compensation. If opportunities for roles of equivalent economic value are few and far between, she might find the potential gains from the contingent compensation attractive despite the fact that the fixed compensation from the second movie would go to Fox, not her. Second, if the period between signing the original contract and the production period is long (over nine months in Shirley MacLaine's case), the artist's market value can change dramatically. If an actor had one box office hit in the interim, fixed compensation might well jump from \$100,000 on the canceled picture to \$1 million on the new one. Third, even if the expected compensation for the second picture just equaled the pay-or-play obligation (so that the expected net compensation was zero), the actor might still be willing to make the second picture because doing so might enhance future earnings.⁹⁵ Fourth, since salaries are paid weekly, the offset

⁹³Thomas Schatz note 73, p. 323.

⁹⁴See text at note 69 above.

⁹⁵On the value of a track record, see Goldberg note 7 *supra*, at 540, and the materials cited therein. Recall that in *Locke* (*supra*, note ?) the court explicitly recognized that production of the film could enhance career prospects.

only applies to the overlapping period. So, for example, had MacLaine started a movie with a different studio in the last week of the pay-or-play period, only one week of her compensation (\$53,571.43) would be offset.

The preceding paragraph presupposes that the initial studio would be willing and able to enforce the entire offset. That is unlikely. The first studio is, in effect, bargaining with the second, and its bargaining position is not terribly strong. Its only chip in the negotiations is the few weeks of the career of a particular artist. The second studio has two dimensions in which it can substitute. It could choose someone else to perform, someone not burdened by the offset "tax." Or it could shift the timing of the project to avoid the pay-or-play period. That flexibility should, in most instances, enable the second studio to bargain away a considerable portion of the offset. If the artist has the right to refuse any offer, no matter how reasonable, the duty to offset is not likely to be onerous.

Still, even though the tax is likely to be much less than 100%, that doesn't explain why there should be any tax at all. Why not simply let the artist take any new offer that comes along unencumbered by the previous arrangement with the studio? The most plausible reason is that the tax (whatever its effective rate) provides some incentive for the studio to terminate in a timely manner. The earlier the exercise of the pay-or-play option, the more likely it is that the artist will find alternative employment and provide some offset to the first studio's contractual obligation.⁹⁶

These arguments suggest that Judge Zack erred in stating that all earnings during the pay-or-play period, even those as a seamstress, must be offset against the studio's obligation. If the artist knew that such earnings—a small fraction of the studio's obligation—would be offset, then there is no reason for the actor to work (the tax is 100%) and no reason for the parties to bargain over it. The only reasons the artist might engage in such non-theatrical work would be ignorance (she didn't know the rule) or an expectation that the studio wouldn't bother to enforce its legal right. That expectation is likely to be correct since in most instances it would not be worth the studio's effort to litigate the matter, although if a case were litigated on other grounds the studio would likely raise this point in its attempt to limit damages (as was the case in Constance Bennett's radio contracts).⁹⁷ So, while application of the offset rule for non-entertainment alternative employment would be silly,⁹⁸ it is unlikely to cause much harm since the parties would not, in most instances, take it seriously.

⁹⁶I am indebted to Saul Levmore and Kenny Jones for raising this issue in workshops. It is, essentially, the argument for encouraging anticipatory repudiation by a party who has determined that it will not perform.

⁹⁷See text at note 59 above.

⁹⁸Constance Bennett's radio performances might be a closer case. These were, in part, an investment in developing a presence in an alternative medium; indeed, in the 1940's she devoted more attention to radio than to film. (Rod Crawford <puffinus@u.washington.edu> at Internet Movie Data Base, <http://us.imdb.com>.)

2. *Multi-Picture Deals.* The modern multi-picture deal differs markedly from the long-term contracts of yesteryear. In the pre-1950 long-term contracts, the artist's ability to reject a proposed role was drastically curtailed. The studio assigned the artist to a film and, if the artist refused, the studio could suspend the artist.⁹⁹ If the artist wanted to make a picture with another studio, she needed permission from the first studio. Now, the studio has the obligation to offer projects, but the artist need not accept. Nor would the studio have the exclusive right to the artist's services. If the artist wanted to make a film with another studio, the first studio would have, in essence, a first refusal right. Technically, a first refusal right allows the holder to buy an asset (here the artist's time) at a price fixed by the third party. In this case, the relevant constraint is not the third party's offer price, but merely the existence of an offer which the artist finds acceptable. As Judge Kingsley noted in a footnote in his discussion of the Carroll Baker contract, "under the contract, plaintiff could perform for another producer, provided she gave Paramount notice of her intent; in that event, Paramount was required either to consent or to schedule her for its own picture at the time or times involved."¹⁰⁰ If the studio fails to offer a role for the time slot, the artist is free to make the film elsewhere. If the artist were the originator of the project, she might have to offer the contract studio a "first look." If the studio fails to pick up the project within a contractually determined time period, the artist would be free to shop it elsewhere.

Carroll Baker's contract made her pay-or-play for at least one film each year. An alternative, and I think more common, arrangement,¹⁰¹ would give the studio an option to use the artist in one film each year for one fee (a guarantee). If the studio desired to use the artist in a particular film, it would offer the artist pay-or-play status for a second fee (at a predetermined rate).¹⁰² Regardless of the precise structure, there remains the same two problems. First, if the studio cannot require the artist to work on a particular film, what consequences might the artist bear by refusing a project? Second, if, say, Fox offers a part to Carroll Baker and Paramount fails to match, should Paramount's "guarantee payment" (the \$200,000) be offset by the earnings from the second studio's project? Or, turning that around, should Fox have to repay some or all of Paramount's guarantee payment as a cost of hiring Carroll Baker?

The artist's discretion is a crucial variable in a multi-picture deal and the outcome will reflect the bargaining power (marketability) of the artist. The more powerful artists will demand considerable freedom in their choice of roles, while relative unknowns would have much less

⁹⁹For a description of Betty Davis's battles with Warner Brothers in the 1930's, see Schatz, note 73 at ___.

¹⁰⁰See text at note 69 above.

¹⁰¹Cite. See the redacted "Term Loanout Agreement" on file with author. Artists typically set up their own corporations which then loan out the artist to the movie studio.

¹⁰²If the artist accepted, then the pay-or-play clause would be triggered; if the artist rejected, then there would still be consequences as described below in the text at note ?.

discretion. The pay-or-play clause can be used to make the artist take the studio's reliance interest seriously, a reversal of the single-picture story.¹⁰³ If the studio offers the artist a role and evidences its seriousness by offering to make the artist pay-or-play, and the artist refuses, the artist can be made to bear the costs in two dimensions. The contract could require that the fixed compensation which would have been triggered by the pay-or-play clause be offset against the guarantee. That would mean that the studio has met its obligation of employing the artist for one of the contracted pictures, but at a relatively modest cost. Additionally, the pay-or-play offer could define a time period during which the artist could not perform for another studio without the studio's consent (or at least a right of offset). By varying (a) the ease with which the studio can trigger the pay-or-play clause and (b) the artist's ability to accept offers from other studios (the length of time, the reasonableness of consent, the magnitude of the offset), the parties can customize to some degree the cost to the artist of rejecting the studio's proposed role.

With the multi-picture deal, the breadth of the studio's option is much greater than the one-shot deal. In the one-shot deal, the artist had committed to a tightly defined time period. The narrowness of that window constrained the first studio's bargaining power; the second studio could wait a few weeks (at a cost) and eliminate the problem. That is not so for the multi-picture deal as a whole (although it is true for each individual project offered to the artist). I would suspect that an artist with considerable bargaining power when entering into a long-term contract (i. e., one that was very marketable) would eliminate the offset. That would allow pursuit of outside offers without penalty and would also enhance the employer's incentive to find attractive roles. The less successful (at the time of contract formation) are more likely to be stuck with a duty to offset.¹⁰⁴

¹⁰³The arrangement described in this paragraph is essentially the one established in the redacted contract referred to in note 99 above.

¹⁰⁴In a related context, the offset issue was at the core of a dispute between John Calipari and the New Jersey Nets. Calipari entered into a five-year contract to coach the Nets. He had been coaching for a few months before the deal had been memorialized in a writing (heaven knows why). At that stage Calipari insisted that there be no offset if he were fired and subsequently hired as a basketball coach during the duration of the contract. Calipari ultimately prevailed. Contemporaneous press accounts suggested that the majority of National Basketball Association coach's (seventeen) were required to offset their earnings from the second coaching job against the unpaid balance of the first contract. More powerful coaches (Pat Riley and Larry Brown were named) did not have offset clauses. See Selena Roberts, "Calipari Resisting A Contract Addition," *The New York Times*, Section B; Page 15, November 20, 1996; and Will McDonough, "Calipari agrees to stay with Nets," *The Boston Globe*, Pg. D5, November 21, 1996.

The offset issue arises in guaranteed player contracts as well. Arbitrations in both the National Basketball Association and National Football League held that where the contract was silent, guaranteed player contracts did not require the player to offset when signing with another team. See *National Football League Players' Association v. National Football League Management Council*, 188 Cal. App. 3d 192; 233 Cal. Rptr. 147 (1986) (Arbitration of Dante

IV. Concluding Remarks

Whether the parties would require offset in a particular contract, one-shot or multi-picture, is a hard question. It should not, however, be confused with the much easier question raised by *Parker*: Must the artist take a reasonable offer to “mitigate” damages? No. Shirley MacLaine granted the studio an option to utilize her services for a specific use and a specific purpose. For good and sensible reasons, the studio was prepared to pay a considerable sum for that option. It then chose not to exercise the option. The studio's breach was not the failure to make the film, but only the failure to pay the contracted for option price. Had the courts framed the question properly, they would have reached the right result for the right reasons.

Instead, the court took a "different and inferior" path (in both senses). The court asked whether the alternate employment was different and inferior as a matter of law and somehow concluded that it was. It is hard to imagine how a rational court could find the second contract "different and inferior" as a matter of law while at the same time citing with approval *de la Falaise*. After all, that court found radio plays (regardless of content) different but not inferior. If a radio play is not inferior to a movie, how could a court find one unmade movie necessarily inferior to another?¹⁰⁵

The fact that there were significant differences between *Bloomer Girl* and *Big Country, Big Man*, I suspect, encouraged the courts to go down the wrong track. Suppose that the second offer was virtually identical—a Hollywood musical with the same director, same approvals, same compensation, same timing, and same politics. Had she refused to make the second picture as "mitigation", then she could not have raised the "different and inferior" objection. Without the "different and inferior" crutch, the parties would have posed the problem properly, and the court, like Judge Kingsley in *Garfein*, would have disposed of it neatly.

Maybe. A less sanguine view would be that the *Parker* analysis is symptomatic of deeper problems. Why did the California Supreme Court ignore the purpose of the relevant contract language in determining whether Shirley MacLaine had to mitigate? Does the disjunction between contract law's analytic boxes and transactional lawyer's practical concerns lead to systematic error in

Pastorini & Oakland Raiders) and Arbitration of Rudy Hackett & Denver Nuggets (1977). The NBA collective bargaining agreement was subsequently revised to provide for offset against guaranteed compensation; see Paul Weiler, ___ at 299.

¹⁰⁵*De la Falaise* could be justified if the court had recognized a distinction between cases in which the plaintiff had been employed (offset) and those in which (like *Parker*) it had not. The court could plausibly argue that a radio play, unlike a seamstress job, is close enough (not inferior) to warrant an offset of the earnings, if earnings there be, while still holding that the law did not require that the plaintiff accept a radio script in mitigation.

contract litigation? In particular, is there a hostility against option arrangements, which could be viewed as a form of "penalty clause?" (The studio agrees, in effect, to pay a penalty if it fails to perform.) Indeed, when I presented an earlier draft of this paper at workshops, the immediate response was to ask if contracting parties could use the option characterization to evade the penalty clause bar.¹⁰⁶ To which the appropriate response should be: Hear, hear. There is no reason for wooden application of the rule barring penalty clauses. Shirley MacLaine is no Shylock. The studios are not being put upon by her or other artists; they include pay-or-play clauses in their contracts (and these are, after all, the studios' contracts) for good reason. The pay-or-play clause is a nuanced balancing of the studio's need for flexibility against the artist's reliance.

Perhaps the most disconcerting aspect of *Parker* is that the court's framing of the issue has seemed so appropriate and non-controversial to legal scholars and courts for over a quarter of a century. The court might have drawn the "different and inferior" boundary in the wrong place, but there has been no questioning the notion that ascertaining this boundary is the relevant inquiry. Even the one attempt to reframe *Parker*, Mary Jo Frug's feminist discussion, stays within the "different and inferior" framework. Contracts casebooks, in general, and Dawson, Harvey, and Henderson, in particular, she claimed,

. . . inexplicably . . . omit material that would confirm readers' intuitions that the social context and political significance of the films might explain the application of the "different and inferior" qualification in *Parker*. Dawson, Harvey, and Henderson thus subtly deter readers who are familiar with nineteenth century feminist activists and their work from utilizing their personal connections with the case to understand *Parker*. . . . Although reader's intuitions about the *Parker* case may in fact explain the otherwise baffling result of this decision, the casebook does not encourage them to draw on these intuitions.¹⁰⁷

It makes no sense to interpret a standardized clause on the basis of the hypothesized idiosyncratic politics of a particular artist. The court, unfortunately, invited argument along these (and other irrelevant) lines and academics, alas, have accepted.

¹⁰⁶Part of the problem, I suspect, is the notion held by many contracts professors that \$750,000 (in 1965 dollars) is too much to pay Shirley MacLaine for "doing nothing." One wonders how they will cope with Sondra Locke's claim that \$1,500,000 for "doing nothing" is too little. Of course, as Judge Kingsley pointed out in *Garfein*, they are not "doing nothing;" they also serve who only sit and wait.

¹⁰⁷Frug, note 7, at _____. The socio-political context receives at least lip service in a few casebooks; see Macaulay and Whitford, note 1 supra, at 63-65; Farnsworth and Young, note 1 supra, at 513; Knapp and Crystal, note 1 supra, at _____, and Kastely, et al, note 1 supra, at 1024.