

HOME FIELD ADVANTAGE: DETERMINING THE
APPROPRIATE “TURF” FOR *WILLIAMS V. NATIONAL
FOOTBALL LEAGUE* AND CLARIFYING
PREEMPTION PRECEDENT

I. INTRODUCTION

In a 2009 survey of former National Football League (“NFL”) players, approximately nine percent of the sample group admitted to steroid use during their professional careers; however, sports writers and bloggers alike acknowledge that the use of steroids in the NFL is far more prevalent.¹ Drug use in professional sports is an issue that has permeated numerous organizations and leagues throughout the past few decades.² Professional sports’ drug policies are generally grounded in three principles: (1) the substances “threaten fairness and integrity of athletic competition on the playing field,” since athletes who take steroids can gain a competitive advantage; (2) steroids threaten athletes’ health; and (3) steroid use by professional athletes “sends the wrong message to young

1. See *Retired NFL Players Admit Steroid Use in Survey*, CBC SPORTS (Feb. 20, 2009, 3:46 AM), <http://www.cbc.ca/sports/football/story/2009/02/19/nflrpa-steroid-survey.html> (reporting findings of 2009 study published in *American Journal of Physical Medicine & Rehabilitation*). The 2009 study focused on the correlation between steroid use and musculoskeletal injuries among NFL players. See *id.* (discussing context of study). See *Haslett Says ‘70 Steelers Made Steroids Popular in NFL*, CBS SPORTS (Mar. 24, 2005), <http://www.cbssports.com/nfl/story/8322840> (commenting on popularization of steroid use during 1970s, when steroid use was legal); Mark Maske & Leonard Shapiro, *NFL’s Steroid Policy Gets Kudos on Capitol Hill*, WASH. POST, Apr. 28, 2005, at D01, available at <http://www.washingtonpost.com/wp-dyn/articles/A21734-2005Apr28.html> (suggesting statistics are not indicative of actual prevalence of performance-enhancing drug use). Representative Henry Waxman said, “[t]he percentage of NFL players who test positive for steroids is very low. . . . Is this because the policy is working, or is this because players have figured out how to avoid detection?” *Id.*

2. See Jeffrey Katz, *Should We Accept Steroid Use in Sports?*, NPR (Jan. 23, 2008), <http://www.npr.org/templates/story/story.php?storyId=18299098> (“A report by former Sen. George Mitchell, released in December, mentioned dozens of baseball players as having used steroids and described their use as ‘widespread.’ Track star Marion Jones pleaded guilty to lying to investigators about steroid use in October [2007]. And last summer [2007], several riders were dismissed from the Tour de France on charges of using banned substances.”); Ethan Lock, *The Legality Under the National Labor Relations Act of Attempts by National Football League Owners to Unilaterally Implement Drug Testing Programs*, 39 U. FLA. L. REV. 1, 3, 7-8 (1987) (summarizing history of drug use in professional sports, in particular, football, and impetus for drug testing in league); Paul Susic, *Substance Abuse Among Athletes*, FOUNDATION OF SPORT AND EXERCISE PSYCHOLOGY, (May 28, 2009) http://www.psychtreatment.com/substance_abuse_among_athletes.htm (providing overview of issues of drug use and abuse among professional athletes and Olympians).

people who may be tempted to use them,” particularly high school and college athletes.³ One commentator hypothesized that fans may more readily accept NFL players’ performance enhancing drug use because of the physicality professional football requires and the entertainment value these players provide to fans.⁴ Regardless of the motivation for consumption of illicit drugs, it is undeniable that drug use damages athletes physically, psychologically, and professionally.⁵

A 2009 case, *Williams v. National Football League*,⁶ brought national attention to some of the inherent issues with collectively bargained drug policies when an organization has employees

3. See *National Football League Policy on Anabolic Steroids and Related Substances*, NFL, 31, 33-34 (Jun. 21, 2007) <http://www.patscap.com/drugpolicy.pdf> [hereinafter “NFL STEROIDS POLICY (2007)"] (explaining rationale behind strict steroid policy, specifically in National Football League). Similar policies govern athletes in the NHL, NBA, MLB, and Olympic Games. See *Drug Testing Program Summary*, NHLPA, <http://www.nhlpa.com/About-Us/Drug-Testing-Program-Summary/> (last visited Sept. 17, 2011) (outlining procedure for drug testing in NHL and possible sanctions for violation); L. Elaine Halchin, *Anti-Doping Policies: The Olympics and Selected Professional Sports*, CRS REPORT FOR CONGRESS (Apr. 29, 2005), at 9-13, <http://www.policyarchive.org/handle/10207/bitstreams/2423.pdf> (comparing policies of Olympics, MLB/MLBPA, NBA/NBPA, and NFL/NFLPA). Recent efforts to employ the WADA to administer NFL drug tests sends a message about how seriously the NFL takes their drug policy. See Katz, *supra* note 2 (“The use of performance-enhancing drugs is not accidental; it is planned and deliberate with the sole objective of getting an unfair advantage. I don’t want my kids, or your kids, or anybody’s kids to have to turn themselves into chemical stockpiles just because there are cheaters out there who don’t care what they promised when they started to participate. I don’t want my kids in the hands of a coach who would encourage, condone, or allow the use of drugs among his or her athletes.”); Lock *supra* note 2, at 3 (emphasizing “infatuation” with professional athletes).

4. See Tim Keown, *NFL and WADA? No Thanks*, ESPN (May 10, 2011), <http://sports.espn.go.com/espn/commentary/news/story?id=6520270> (discussing potentially more lenient standard to which NFL players are held).

[Fans] don’t know the extent of it, but they can guess a little bit, and they’re OK with the idea that a lot of these guys probably have to do something extra to play such a brutal game at such a high level week after week. . . . Maybe because most people never envisioned themselves being able to play in the NFL, everybody is a little more lenient when it comes to whatever substances guys put into their bodies to provide a nation with Sunday entertainment.

Id.

5. See e.g. *A Guide for Understanding Steroids and Related Substances*, U.S. DEPARTMENT OF JUSTICE DRUG ENFORCEMENT ADMINISTRATION OFFICE OF DIVERSION CONTROL (Mar. 2004), <http://www.deadiversion.usdoj.gov/pubs/brochures/steroids/professionals/index.html> (warning about potential ramifications of steroid use); *Anabolic Steroids*, ESPN (Sept. 6, 2007), <http://espn.go.com/special/s/drugsandsports/steroids.html> (detailing dangers of anabolic steroid use and some physical and behavioral side effects).

6. 582 F.3d 863 (8th Cir. 2009).

“working” in more than one state.⁷ The case was hailed as the “Super Bowl of litigation” due to its potential to drastically impact the use of uniform drug policies in the NFL.⁸ Throughout the past few years, commentators have continually noted the importance of the outcome of this case on the future of collective bargaining agreements (“CBAs”) in professional sports.⁹ In fact, one commentator opined that this case is one of the top five cases likely to change the face of sports law.¹⁰ Travis Tygart, chief of U.S. Anti-Doping Agency, agreed, calling *Williams* the “most significant . . . challenge” to collectively bargained drug policies in the United States.¹¹ Confounding precedent and the lack of a uniform stan-

7. See Jaime Koziol, Note, *Touchdown for the Union: Why the NFL Needs an Instant Replay in Williams v. NFL*, 9 DEPAUL BUS. & COM. L.J. 137, 161 (2010) (describing implications of case and scope of issue of collectively bargained agreements when employees are not limited to one state). “The holding will not stay confined to the NFL and the Minnesota Vikings Players; instead, it extends to all employers who have grown accustomed to relying on the power of negotiation to tailor CBAs with large groups of employees spread out over several states.” *Id.*

8. See Roger I. Abrams, *StarCaps Anyone?*, HUFFINGTON POST (Jul. 20, 2009), http://www.huffingtonpost.com/roger-i-abrams/starcaps-anyone_b_241651.html (noting importance of holding in this case for future sports litigation and vast number of areas of law this case tackles). The case has “created full employment for sports and labor lawyers.” *Id.* Over two decades ago, a 1987 article suggested the value of a unilateral, league-wide policy. See Lock, *supra* note 2, at 5 (calling unilateral policies advocated by team owners “a . . . useful solution to a complex problem.”).

9. See Amy Tracy, Note, *Athletic Discipline for Non-Sport Player Misconduct: The Role of College Athletic Department and Professional League Discipline and the Legal System’s Penalties and Remedies*, 9 VA. SPORTS & ENT. L. J. 254, 263 (2010) (“This incident represents the clash between the ultimate authority of the legal system and the self-implemented powers of professional leagues.”); Wayne Coffey, *NFL Commissioner Roger Goodell Finds Congressional Ally in Attempt to Suspend Two Vikings Players*, NY DAILY NEWS (Nov. 3, 2009), http://www.nydailynews.com/sports/football/2009/11/03/2009-11-03_goodell_seeks_congressional_help.html (explaining importance of case and potential implications if Eighth Circuit’s holding stays); Michael S. Schmidt, *Ruling Against NFL Could Affect Other Sports*, HEARST NEWSPAPERS (Sept. 19, 2009), http://articles.sfgate.com/2009-09-19/sports/17206787_1_anti-doping-agency-court-ruling-alcohol-testing (suggesting importance and relevance of case). This case has the potential to impact the efficacy of drug policies in all of the major United States professional sports leagues, including the NFL, MLB, NBA, and NHL. See *id.* (projecting ruling could interfere with efficacy of other leagues’ disciplinary schemes).

10. See Shaun Assael, *Five Lawsuits That Will Change Sports*, ESPN INSIDER (Nov. 8, 2010), http://insider.espn.go.com/insider/blog/_/name/assael_shaun/id/5780468 (predicting important upcoming sports litigation and listing this case as one of top five lawsuits that could change sports law).

11. Schmidt, *supra* note 9. The Eighth Circuit’s holding presents an impediment to collectively-bargained drug policies and the NFL’s ability to punish players for violating the league’s drug policy. See *id.* (describing doubts raised concerning drug-testing programs of professional sports in United States as result of ruling).

dard for the oft-quoted notion of “inextricably intertwined” complicated the analysis of this case.¹²

Williams moved through the Minnesota state judicial system through a number of appeal proceedings in 2009 and 2010.¹³ The NFL even petitioned the Supreme Court of the United States; however, the Court denied certiorari on November 8, 2010.¹⁴ On April 28, 2011, the Minnesota Supreme Court denied a review of the appeals court’s decision, marking the end of the *Williams* litigation.¹⁵ As of the beginning of the 2011-2012 season, Pat and Kevin Williams were required to serve suspensions for their drug policy violations.¹⁶

Although this case was litigated in 2009, and ultimately resolved in 2011, *Williams v. NFL* is still at the forefront of sports litigation debates.¹⁷ This article discusses the influential case of *Williams v. NFL* and the subsequent need for clarification of preemption precedent. Part II of the article provides a detailed discussion of the background of the relevant NFL documents; section 301 of the Labor Management Relations Act (“LMRA”) and previous cases

12. For a further discussion of confusion about preemption doctrine, see *infra* notes 112-116 and accompanying text.

13. See *Williams v. Nat’l Football League*, 598 F.3d 932 (8th Cir. 2009) (denying petition for rehearing en banc). The Minnesota Court of Appeals reaffirmed the NFL’s authority to suspend both Williams from four NFL games on February 8, 2011. See Amy Forliti, *Appeals Court Won’t Block 2 Vikings Suspensions*, WINONA DAILY NEWS (Feb. 8, 2011, 11:51 PM), http://www.winonadailynews.com/sports/article_c16df8c0-3410-11e0-89b4-001cc4c03286.html (reporting Minnesota Court of Appeals will not “permanently block” NFL from issuing suspensions to both Williams). When the Winona Daily News published this article, there was a possibility that the players would appeal the decision to the state Supreme Court. See Jon Krawczynski, *Kevin Williams Hasn’t Heard About Suspension*, NBC SPORTS (Jul. 31, 2011, 5:51 PM), <http://scores.nbcsports.msnbc.com/fb/story.asp?i=20110731192417404385808> (explaining that in April 2011, “the Minnesota Supreme Court declined to hear [the] appeal”).

14. See generally *Nat’l Football League v. Williams*, 131 S.Ct. 566 (2010) (denying petition for writ of certiorari).

15. See Michael David Smith, *NFL Declares Victory in StarCaps Case*, NBC SPORTS (Apr. 28, 2011, 1:01 PM), <http://profootballtalk.nbcsports.com/2011/04/28/nfl-declares-victory-in-starcaps-case/> (discussing conclusion of StarCaps litigation).

16. For a further discussion of punishment imposed, see *infra* note 270 and accompanying text.

17. See e.g., Goodell: *No decision on Williamses Until Case Closes*, MINN. STAR TRIB. (Mar. 22, 2011, 11:02 PM), <http://www.startribune.com/sports/vikings/118475739.html> (proving continued relevance of *Williams* litigation); Christopher Gates, *Could Williams Wall Still Escape Bogus Suspension?*, DAILY NORSEMAN (Jul. 31, 2011, 5:51 PM), <http://www.dailynorseman.com/2011/7/31/2308076/could-williams-wall-still-escape-bogus-suspension> (“Since the suspensions [of Pat Williams and Kevin Williams] will be handed out under the new CBA, it might be possible . . . though not highly likely . . . that the NFL could apply any agreement reached under this CBA retroactively, thereby voiding these suspensions. . . . But, the book isn’t completely closed on this story yet. We’ll have to see what happens.”).

that have addressed preemption; and the relevant Minnesota state laws, the Drug and Alcohol Testing in the Workplace Act (“DATWA”) and the Minnesota Consumable Products Act (“CPA”).¹⁸ Part III analyzes the Court’s rationale and suggests the policy implications of the decision.¹⁹ Part IV discusses the potential impact this case could have on future drug policies and suggestions for drafting effective CBAs, as well as the Supreme Court’s role in potentially elucidating this area of law.²⁰

II. FACTS

Williams presented the issue of whether a state or federal court should evaluate professional football players’ employment claims, focusing on whether section 301 of the LMRA preempted the players’ specific, statutory claims.²¹ During random drug testing in July and August 2008, Minnesota Vikings players Kevin Williams and Pat Williams tested positive for bumetanide.²² The Williamses had taken StarCaps, a banned diuretic and weight-loss supplement that contains bumetanide to meet their weight goals and earn monetary bonuses.²³ Bumetanide can mask the presence of performance-en-

18. For further information about the background issues, see *infra* notes 53-130 and accompanying text.

19. For a further analysis of the court’s reasoning, an evaluation of court’s arguments, and possible policy implications, see *infra* notes 131-250 and accompanying text.

20. For a further discussion of impact of *Williams* litigation, see *infra* notes 251-285 and accompanying text. Though the case at issue was decided in the Eighth Circuit on September 11, 2009, the impact section incorporates post-litigation developments and subsequent legal proceedings.

21. See Benjamin B. Hanson, Comment, *Defend the Williams Wall, Leave Professional Sports Drug Testing Policies in Shambles: The Decision and Consequences of Williams v. NFL*, 33 HAMLINE L. REV. 327, 330 (2010) (reviewing litigation history through state and federal courts and summarizing crux of case); David J. Duddleson & V. John Ella, *NFL Players’ Minnesota Drug Testing Claims Not Preempted by Federal Law, Eighth Circuit Rules*, JACKSON LEWIS LLP (Sept. 23, 2009), <http://www.jacksonlewis.com/resources.php?NewsID=1859> (discussing section 301 preemption as it relates to collectively bargained agreements). Section 301 preemption would send the case to the federal court system. See *id.* (summarizing preemption process and NFL desire to litigate in federal court based on LMRA preemption).

22. See *Williams v. Nat’l Football League*, 582 F.3d 863, 870 (8th Cir. 2009) (providing background of case and why Kevin and Pat Williams were suspended, thus setting off firestorm of litigation). Kevin Williams and Pat Williams (Minnesota Vikings) and Charles Grant, Deuce McAllister, and Will Smith (New Orleans Saints) tested positive; however, the *Williams* case primarily concerns Kevin and Pat Williams based on their state law claims under Minnesota law. See *id.* (listing players who tested positive for bumetanide).

23. See Complaint at *5, *Williams v. Nat’l Football League*, No. 08CV06255, 2008 WL 5110342 (D. Minn. 2008) (discussing Williams’ use of StarCaps and potential financial incentives). The Williams deny ever having taken anabolic steroids, or masking or diluting urine samples. See *id.* (noting neither player has

hancing drugs in an individual's system.²⁴ At the time that the Williamses took StarCaps, bumetanide was not listed as an ingredient on the drug label; however, the Williamses allege that NFL officials knew that StarCaps contained bumetanide years before this litigation commenced.²⁵ In fact, in 2006, laboratory tests confirmed that StarCaps contained bumetanide; this information was shared with Adolpho Birch, NFL Vice President of Labor Law and Labor Policy, and Dr. John Lombardo, independent administrator of the NFL's Policy on Anabolic Steroids and Related Substances ("Policy").²⁶ Birch informed the president, general manager, and head athletic

history of violating Policy). Kevin and Pat Williams assert that they would not have taken StarCaps had they known that the product contained a prohibited substance, particularly since both men have medical conditions that bumetanide could have adversely affected. *See id.* (listing factual allegations). *See also* Findings of Fact, Conclusions of Law, and Order for Judgment at *2, *Williams v. Nat'l Football League*, No. 27-CV-08-29778, 2010 WL 1793130 (D. Minn. 2010) (confirming both Kevin and Pat had weight clauses in their contracts with Minnesota Vikings). The court noted that the Williamses were medically and financially incentivized to take StarCaps because: Kevin had knee surgery and found that he felt better when he was carrying less body weight; Pat has high blood pressure and gout and benefitted from maintaining a lower body weight; and Kevin could receive a \$400,000 bonus for meeting weight requirements, though he was ineligible for this bonus if he used any "last minute weight-reducing tactics" including excessive use of a steam room, diuretics, or fasting. *See id.* at *2-4 (discussing Williamses' medical issues and financial incentives for losing weight); *see also Brad Childress Not Source of Williams Leak*, FOX (Mar. 12, 2010, 10:42 AM), <http://www.myfoxtwincities.com/dpp/news/minnesota/brad-childress-not-source-williams-starcaps-leak-mar-12-2010> (noting Williamses' admitted reason for taking StarCaps to facilitate weight loss and receive bonuses); *Judge Says He'll Stay Suspensions if Vikes Appeal*, SPORTS ILLUSTRATED (May 21, 2010, 2:47 AM), <http://m.si.com/news/2627690> (reporting Williamses' use of StarCaps, a weight-loss supplement containing bumetanide, a diuretic).

24. *See* John Jasper, *NFL Players Pat & Kevin Williams Tested Positive for Banned Substance Bumetanide*, BETTOR, INC., <http://blogs.bettor.com/NFL-Players-Pat-Kevin-Williams-Tested-Positive-for-Banned-Substance-Bumetanide-a13703> (last visited Oct. 11, 2011) (providing information about bumetanide, identifying it as banned under NFL policy).

25. *See Williams*, 582 F.3d at 871 (alleging NFL officials knew about ingredients of StarCaps and intentionally withheld information from players); Abrams, *supra* note 8 ("One problem (actually one of the many problems with the case) is that the label for StarCaps did not list bumetanide as an ingredient."); *Pat and Kevin Williams of Minnesota Vikings Acknowledges Contract Barred Diuretic Use*, ESPN (Mar. 10, 2010, 8:34 PM), <http://sports.espn.go.com/nfl/news/story?id=4982523> (reporting Williamses' denials of having knowledge that StarCaps contained prohibited substance).

26. *See Williams*, 582 F.3d at 869 (confirming Birch's and Lombardo's knowledge of presence of bumetanide in StarCaps). The Williams alleged that NFL representatives intentionally mismanaged this information. *See id.* at 871-72 (describing NFL officials' alleged knowledge that StarCaps contained bumetanide but failure to disclose this to players). Doctors Lombardo and Finkle, as well as Birch, were eventually dismissed from the case. *See* Findings of Fact, Conclusions of Law, and Order for Judgment at *13, *Williams v. Nat'l Football League*, No. 27-CV-08-29778, 2010 WL 1793130 (D. Minn. 2010) (reporting dismissal of parties

trainers of each team that players were not permitted to endorse the company that made StarCaps; however, Birch did not specifically disclose that StarCaps contained a prohibited substance.²⁷ Peter Ginsberg, counsel for the Williamses, claimed that Birch showed disregard for the players' health and safety and alleged that the NFL breached its fiduciary duty to the players by withholding this information.²⁸ Ginsberg also alleged that the punishments inflicted on his clients violated the Americans with Disabilities Act since both of the Williamses are obese and they used StarCaps to facilitate medically necessary weight loss.²⁹ Nonetheless, the NFL has a strict liability drug policy, making the Williamses' taking of StarCaps sufficient to warrant punishment regardless of whether they knew that the diuretic contained a banned substance.³⁰ The players admitted

from suit). Finkle was dismissed on April 14, 2009; Birch and Lombardo on March 8, 2010. *See id.* (providing background of parties to action).

27. *See id.* at 869-70 (saying only that player endorsements of and business relationships with StarCaps were banned); Nat'l Football League Players Ass'n v. Nat'l Football League, 654 F.Supp.2d 960, 964 (D. Minn. 2009) (describing lack of communication about ingredients in StarCaps). The lab urged Birch to report the findings to the Food & Drug Administration ("FDA"); however, Birch chose not to follow this directive. *See id.* (referencing court documents indicating Birch's decision not to report findings to FDA).

28. *See* Complaint at *2, Williams v. Nat'l Football League, No. 08CV06255, 2008 WL 5110342 (D. Minn. 2008) (alleging breach of fiduciary duty by NFL officials including Dr. Lombardo, Dr. Finkle, and Mr. Birch); Sean Jensen, *Vikings Pat and Kevin Williams Sue NFL Over Four-Game Suspension*, TWIN CITIES.COM (Dec. 3, 2008, 5:23 PM), http://www.twincities.com/ci_11121347?source=most_viewed (quoting Ginsberg's allegation that NFL officials purposely kept important information from players regarding ingredients in StarCaps). "[Adolpho Birch] knew about Bumetanide and Starcaps. . . . All he cared about was the commercial aspect of the league. He did not care – and in fact showed a gross disregard – for the health and safety of players." *Id.* The Williamses' attorney noted that withholding this information jeopardized both their health and ability to comply with league policies. *See id.* (suggesting Birch exhibited "gross disregard" for players' health and wellness).

29. *See* Williams v. Nat'l Football League, 582 F.3d 863, 870 (8th Cir. 2009) (explaining Ginsberg's use of American Disabilities Act to bolster claim that NFL policy and testing procedures are "violative of the players' fundamental and guaranteed rights."). "Ginsberg notes that three of his clients have 'clinical weight problems,' two of whom have had to add 'weight clauses into their contracts.' He also identifies 'this [a]s a further complicating factor since a person who has a weight condition falls within a protected class' under the Americans with Disabilities Act." *Id.* Considering obesity as a protected class under the American Disabilities Act is a matter of discretion, and has been contested by some health professionals, however this is not conclusive. *See* Lauren Cox, *Doctors Fight Labeling Obesity a Disability*, ABC News (Jun. 18, 2009), <http://www.abcnews.go.com/Health/WellnessNews/story?id=7865711&page=1> (discussing physician opposition to classification).

30. *See* Williams, 654 F. Supp. 2d at 965 (quoting Pash on strict liability policy). Pash explained, "the Policy has always adhered to the 'fundamental principle' of strict liability that 'puts the burden on players to be responsible and accountable for what is in their bodies.'" *Id.* *See also* Matthew J. Mitten, *Judge Extends Preliminary*

that they knew about the league's drug regulations, supplement hotline, and strict liability policy.³¹

Two months after the drug tests were administered, the NFL sent letters to the Williamses informing them of their violations of the league drug policy and suspending them without pay for four games each, according to NFL protocol.³² Vikings fans became outraged as two of their Pro Bowl defensive tackles were benched during the NFC playoffs.³³ The case attracted national attention almost immediately.³⁴

The Williamses appealed the suspensions.³⁵ The independent arbiter who heard the appeal, Jeffrey Pash,³⁶ learned that StarCaps contained bumetanide in mid-November 2008, approximately a week before the arbitration began.³⁷ Pash upheld the suspensions, holding the players responsible for violating the Policy.³⁸ He maintained that players assume strict liability for taking any drugs or di-

Injunction in NFL Doping Case, MARQUETTE UNIVERSITY LAW SCHOOL FACULTY BLOG (Dec. 18, 2008), <http://law.marquette.edu/facultyblog/2008/12/18/judge-extends-preliminary-injunction-in-nfl-doping-case/> (referencing NFL's strict liability policy on drug use). For a description of NFL strict liability drug policy, see *infra* note 84 and accompanying text.

31. See *Williams*, 582 F.3d at 871 (supporting Williamses' admission of knowledge and awareness of drug policies and NFL resources for information about supplements). For a further discussion of NFL drug regulations, the supplement hotline, and strict liability policies, see *infra* notes 39, 84-86 and accompanying text.

32. See *Williams*, 582 F.3d at 870-72 (summarizing NFL's informing Williamses of punishment for positive test result and reiterating NFL's strict liability policy).

33. See Jensen, *supra* note 28 (describing Vikings fans' reaction to players' suspensions).

34. For a further discussion of the national attention paid to *Williams* case and commentators' predictions of implications of case, see *supra* notes 8-11 and *infra* notes 255, 281 and accompanying text.

35. See *Nat'l Football League Players Ass'n v. Nat'l Football League*, 654 F. Supp. 2d 960, 963 (D. Minn. 2009) (explaining appeals process for NFL suspensions).

36. See *id.* ("The Commissioner designated Defendant Jeffrey Pash, the NFL's chief legal officer, to be the Hearing Officer in the appeals.").

37. See *id.* at 871 (supplying timeframe of arbitration process). Pash learned that StarCaps contained bumetanide between November 10, 2008 and November 13, 2008; the arbitration hearing was on November 20, 2008. See *id.* (providing timeline for relevant events in case).

38. *Williams v. Nat'l Football League*, 582 F.3d 863, 872 (8th Cir. 2009) (summarizing Pash's findings and decision to uphold suspensions). The court stated: Pash rejected the players' argument in light of: (1) the rule of strict liability embodied in the policy, (2) the 20-year history of the application of the policy, and (3) the 'repeated[] warn[ings] that if [players] take supplements, they do so at their own risk,' (4) "knowing that a positive test would result in suspension and would not be excused based on a claim of unintentional or inadvertent use."

Id.

etary supplements and rejected the players' arguments that Dr. Lombardo was obligated to inform players if he had specific knowledge regarding a banned product.³⁹

On December 3, 2008, the Williamses sought legal redress for eleven alleged violations of Minnesota law.⁴⁰ The Williamses then filed a state court action against the NFL appealing their suspensions.⁴¹ Following a temporary restraining order issued by the state court, the NFL removed the case to the federal court system.⁴² The Williamses amended their complaint to include two more counts: alleged violations of DATWA and CPA, two Minnesota state labor statutes.⁴³ On December 4, 2008, the NFL Players Association ("NFLPA") filed suit against the NFL and the NFL Management Council ("NFLMC") under Section 301 of the LMRA, alleging violations of the league's CBA and public policy.⁴⁴ The NFL asserted that federal law preempted these claims; the plaintiffs countered that the claims were "supplemental to any federal law issues, instead of being preempted by them."⁴⁵

The United States District Court of Minnesota held that Section 301 preempted the Williamses' common law claims, but not

39. *See id.* (quoting Pash's findings and dismissing idea that Dr. Lombardo is obligated to disclose knowledge of banned product). The court quoted:

[The players] contend that where specific evidence is available about a particular product, a specific warning is required, and that failure to extend such a warning should excuse any violation of the Policy associated with that product. . . . The Policy does not articulate or impose an obligation to issue specific warnings about specific products, and nothing in the record suggests that the bargaining parties have ever contemplated imposing such a requirement on Dr. Lombardo.

Id.

40. *See id.* at 872 n.7 (listing Williams' claims). The eleven counts were: request for injunctive relief; breach of fiduciary duty by the NFL; aiding and abetting breaches of fiduciary duty; violation of public policy; fraud and constructive fraud; negligent misrepresentation, negligence, gross negligence; intentional infliction of emotional distress; vicarious liability for torts committed by individual defendants. *See id.* (listing causes of action).

41. *See id.* at 872 (summarizing chronology of legal proceedings). In the interim, on December 4, 2008, the Union filed suit alleging breach of contract and seeking the reversal of the arbitration holding. *See id.* (mentioning separate suit filed by Union on behalf of players).

42. *See id.* at 872 (providing procedural background of case).

43. *See id.* (listing Williams' amended complaints). These additional claims were filed in federal court on January 2, 2009. *See id.* (supplying date of filing of amended complaint).

44. *See id.* (describing NFLPA's claims under section 301).

45. Aaron Shepard, Comment, *Football's Stormy Future: Forecasting the Upcoming National Football League Labor Negotiations*, 33 COLUM. J.L. & ARTS 527, 541 (2010). The NFL and the plaintiffs' contention over whether the state claims were preempted remained a central issue in the *Williams* litigation. *See id.* (explaining jurisdictional issues).

their statutory claims under DATWA and CPA.⁴⁶ The district court remanded the statutory claims, DATWA and CPA, to Minnesota state court, noting that they were a “reflection of Minnesota public policy,” thus, Minnesota judges had a more logical and vested interest in the outcome.⁴⁷ The Williamses, the NFLPA, and the NFL appealed the district court decision.⁴⁸ The United States Court of Appeals for the Eighth Circuit affirmed the district court’s decision, holding that the NFL’s drug testing policy does not supersede Minnesota state law, thus finding in favor of the Williamses on the preemption claim.⁴⁹ The Supreme Court rejected the NFL’s writ for certiorari on November 8, 2010, allowing the case to remain in the Minnesota state court system.⁵⁰ On April 28, 2011, the *Williams* litigation concluded when the Minnesota State Supreme Court re-

46. See *Williams*, 582 F.3d at 873 (limiting scope of preemption doctrine in context of case and ruling that Williamses’ statutory claims were independent of analysis of CBA). The district court made a number of other holdings that were unrelated to the preemption issue:

[T]he court concluded that the Union’s argument—that the NFL and Dr. Lombardo violated public policy by failing to disclose that StarCaps contained bumetanide—failed because Dr. Lombardo warned players about weight-loss supplements in general and testified that had a player asked him about StarCaps he would have disclosed that it contained bumetanide. The court determined that Dr. Lombardo’s decision not to provide an ingredient-specific warning was within his discretion. The court further decided that the NFL had no duty to specifically inform players when a supplement is found to contain a banned substance. Finally, the court determined that Pash was not a partial arbitrator and, even if Pash’s involvement could somehow establish bias, the Players and the Union had waived any such claim. Therefore, the court dismissed the Union’s section 301 breach of contract claim and the Players’ common law claims (which the court had already determined were actually § 301 claims).

Id.

The court must afford the arbiter ‘an extraordinary level of deference’ and must confirm the award as long as ‘the arbitrator was even arguably construing or applying the contract and acting within the scope of his authority.’ . . . Further, the court may vacate the decisions ‘only for the reasons enumerated in the FAA.’

Nat’l Football League Players Assoc. v. Nat’l Football League, 654 F. Supp. 2d 960, 967 (D. Minn. 2009) (quoting *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 798 (8th Cir. 2004); *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008) (noting stringency with which court analyzes claims of arbiter bias).

47. See *Williams*, 582 F.3d at 873 (explaining policy rationale for remanding case to state court system).

48. See *id.* (stating parties appealed lower court decision).

49. See *id.* at 873-86 (analyzing players’ statutory and common law claims, eventually affirming district court holding).

50. See Bill Mears, *Supreme Court Stays Out of NFL Drug Violation Dispute*, CNN (Nov. 8, 2010), http://articles.cnn.com/2010-11-08/us/scotus.nfl.drugs_1_players-for-illegal-drugs-drug-policy-appeals-court?_s=PM:US (reporting Supreme Court’s decision and commenting on rationale for decision); *National Football League v. Williams*, SCOTUS BLOG, <http://www.scotusblog.com/case-files/cases/>

jected Pat Williams's appeal, thus upholding the players' suspensions.⁵¹ As of September 2011, this case was resolved and the Williamses served their suspensions at the beginning of the 2011-2012 Vikings season.⁵²

III. BACKGROUND

A. NFL Collective Bargaining Agreements and the NFL Drug Policy

The NFL has been hailed as the most powerful organization in the world, with thirty-two teams in its empire.⁵³ Each member team of the NFL is a separately owned entity; however, all of the teams operate under the governance of the NFL Constitution and By-laws.⁵⁴ Each team is considered an independent employer of its

national-football-league-v-williams/ (last visited Oct. 5, 2011) [hereinafter "SCOTUS BLOG"] (updating status of case).

51. See Christopher Gates, *Minnesota Supreme Court Refuses To Hear Pat Williams' Appeal*, SB NATION MINNESOTA (Apr. 28, 2011, 3:56PM), <http://minnesota.sbnation.com/minnesota-vikings/2011/4/28/2140142/minnesota-supreme-court-refuses-to-hear-pat-williams-appeal> ("With the Minnesota Supreme Court's refusal to hear the appeal, the accused have no more legal remedies, and will likely have to face their suspensions . . .").

52. For updated information on resolution of case, see *supra* note 270 and accompanying text.

53. See B-Dub, *The NFL Is Now the Most Powerful Organization in the World*, PLAYER PRESS (Apr. 20, 2010), <http://playerpress.com/articles/the-nfl-is-now-the-most-powerful-organization-in-the-world> ("The NFL draft draws more viewers annually than the actual games of other sports. And nine of the top ten highest-rated programs in the history of television are Super Bowls."). See *NFL Teams*, CBS SPORTS, <http://www.cbssports.com/nfl/teams> (last visited Sept. 16, 2011) (listing NFL teams by conference). The thirty-two teams are: Buffalo Bills, Miami Dolphins, New England Patriots, New York Jets, Baltimore Ravens, Cincinnati Bengals, Cleveland Browns, Pittsburgh Steelers, Houston Texans, Indianapolis Colts, Jacksonville Jaguars, Tennessee Titans, Denver Broncos, Kansas City Chiefs, Oakland Raiders, San Diego Chargers, Dallas Cowboys, New York Giants, Philadelphia Eagles, Washington Redskins, Chicago Bears, Detroit Lions, Green Bay Packers, Minnesota Vikings, Atlanta Falcons, Carolina Panthers, New Orleans Saints, Tampa Bay Buccaneers, Arizona Cardinals, St. Louis Rams, San Francisco 49ers, and Seattle Seahawks. See *id.* (naming thirty-two NFL member teams).

54. See Findings of Fact, Conclusions of Law, and Order for Judgment at *1, *Williams v. Nat'l Football League*, No. 27-CV-08-29778, 2010 WL 1793130 (D. Minn. 2010) (providing structure of NFL organization); *Am. Needle, Inc. v. Nat'l Football League*, 130 S.Ct. 2201, 2214-15 (2010) (determining that NFL is not single entity, but instead collection of thirty-two separately owned entities); see also *Brown v. Nat'l Football League*, 219 F. Supp. 2d 372, 383 (S.D.N.Y. 2002) ("Brown worked not for the NFL, but for the Cleveland Browns Football Company, a Delaware limited partnership and an entirely separate entity which happens to be a member of the NFL."). See generally Constantine J. Avgiris, Comment, *Huddle Up: Surveying the Playing Field on the Single Entity Status of the National Football League in Anticipation of American Needle v. NFL*, 17 VILL. SPORTS & ENT. L.J. 529 (2010) (analyzing single entity status of NFL).

respective players.⁵⁵ The thirty-two teams compose the NFLMC, which negotiates with the NFLPA.⁵⁶ Additionally, the NFLPA, which was formed in 1956, represents players in labor disputes.⁵⁷ Specifically, the NFLPA works to make players' contracts more lucrative to offset the competitive nature of the game and players' susceptibility to career-ending injuries.⁵⁸ The NFL Commissioner monitors each party's compliance with the negotiated terms.⁵⁹ The NFL Commissioner for the 2008-2009 season was Roger Goodell, a former NFL Chief Operating Officer.⁶⁰

Issues with drugs in the NFL heightened in the 1970s and 1980s, and in 1982, the first drug testing programs were implemented by individual teams.⁶¹ These inaugural policies were aimed at player "health and safety" and preserving "competitive integrity."⁶² These policy rationales remain the backbone of the NFL's drug policy.⁶³ NFL players are randomly tested for prohibited substances at predetermined intervals.⁶⁴ The NFL administers approx-

55. See Hanson, *supra* note 21, at 339 (explaining process of collective bargaining and structure of employee-employer relationship).

56. See *id.* (describing relationship among NFL teams and governing organizations).

57. See *About Us*, NFL PLAYERS, <http://www.nflplayers.com/about-us/> (last visited Sept. 16, 2011) ("The NFL Players Association . . . [r]epresents all players in matters concerning wages, hours, and working conditions and protects their rights as professional football players.").

58. See *Labor in NFL History*, SHMOOP UNIVERSITY, <http://www.shmoop.com/nfl-history/labor.html> (last visited Sept. 16, 2011) (providing background on NFLPA's role in contract drafting).

59. See Joshua A. Reece, Note, *Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement*, 45 VAL. U. L. REV. 359, 360 (2010) (explaining NFL Commissioner's authority to punish players' behavior that deviates from NFL standards).

60. See Mark Maske, *Owners Pick Goodell as NFL Commissioner*, WASHINGTON POST, Aug. 9, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/08/AR200608081043.html> (commenting on Goodell's path to become Commissioner and other contenders for coveted position).

61. See Lock, *supra* note 2, at 7-8 (providing history of exacerbation of drug problem, and NFL Commissioner Pete Rozelle's directive that individual teams institute drug testing programs).

62. See Drew Ruble, *Czar Adolpho*, BUSINESS TN (Jan. 2008), <http://business.tn.com/content/czar-adolpho> (quoting Birch speaking about NFL's instituting drug policies).

63. For a further discussion of policy rationale for drug policies, see *supra* note 3 and accompanying text.

64. See NFL STEROIDS POLICY (2007), *supra* note 3, at 34-36 (detailing process for testing athletes for steroid use). The policy outlines a number of times at which random testing is administered: pre-employment; annual/preseason; regular season; postseason; off-season; and reasonable cause testing for players with prior positive tests or under other circumstances. See *id.* (stating guidelines for prohibited substance testing).

imately 26,000 random drug tests annually.⁶⁵ The league analogizes their testing system to a typical employment setting, noting that individuals who test positive for drugs will face repercussions.⁶⁶ Further, the NFL has a carefully drafted policy assigning authorized collectors to take the specimens while abiding by a strict set of rules regarding collection and anonymity.⁶⁷ The NFL Policy also specifies approved facilities to which specimens are sent for evaluation.⁶⁸ This extensive number of provisions and careful planning reflects the NFL's emphasis on maintaining a drug-free league and upholding the integrity of its testing procedures.⁶⁹

The Policy specifically lays out the ramifications for a positive drug test.⁷⁰ The NFL's Policy assigns exclusive authority to an advisor to make decisions regarding steroid use or possession by players.⁷¹ The Policy outlines, "[p]layers with a confirmed positive test result will be subject to discipline by the Commissioner. . . . The

65. See Alex Marvez, *NFL Drug Testing Could See Big Change*, FOX SPORTS ON MSN (May 24, 2011, 5:14 PM), <http://msn.foxsports.com/nfl/story/NFL-drug-testing-program-could-use-outside-company-WADA-052411> (reporting NFL testing frequency). The NFL conducts approximately 14,000 tests for performance-enhancing drugs, and 12,000 for recreational drugs; approximately 6,000 tests are conducted during the off-season. See *id.* (citing test statistics). Dr. Birch suggests that the NFL administers more drug tests than any other organization. See *id.* (considering possible increase if NFL delegates testing to outside organization). However, players are given notice the night before the administration of a test, which lessens the effectiveness of such testing procedures. See Michael S. Schmidt, *On Twitter, a Key Flaw in N.F.L. Drug Tests*, NEW YORK TIMES, Aug. 21, 2010, at SP1, available at <http://www.nytimes.com/2010/08/22/sports/football/22testing.html> (discussing lack of element of surprise of drug tests and questioning drug testing procedure).

66. See NFL STEROIDS POLICY (2007), *supra* note 3, at 34 ("As is the case in the employment setting, players testing positive in a pre-employment setting will be subjected to medical evaluation and clinical monitoring as set forth in Sections 3A, 4C, and 12, and to the disciplinary steps outlined in Section 6.").

67. See *id.* at 48 (explaining strict testing procedure and guidelines for sample collection and evaluation).

68. See *id.* at 36 (listing accredited facilities for anti-doping testing by ISO and World Anti-Doping Association).

69. See *id.* at 33-34 (outlining introductory policy reasons for implementing drug testing policies).

70. See *generally id.* (specifying punishments for positive drug results).

71. See *id.* at 34 (assigning authority for implementing policy to advisor). This advisor's specific title is "NFL Advisor on Anabolic Steroids and Related Substances." *Id.* The advisor's position grants:

sole discretion to make determinations regarding steroid-related matters, including medical evaluations and testing . . . consultation with players and team physicians; oversee[ing] the development of educational materials; [participating] in research on steroids; confer[ring] with the Consulting Toxicologist; and serv[ing] on the League's Advisory Committee on Anabolic Steroids and Related Substances.

Id.

first time a player violates the Policy by testing positive [for a banned substance] . . . he will be suspended without pay for a minimum of four regular and/or postseason games.”⁷² During the 2008 season, Dr. John Lombardo acted as independent administrator of the Policy.⁷³ Players may petition the Commissioner or a person to whom he designates authority; however, the arbiter’s decision is final and binding.⁷⁴

Each NFL team is governed by the CBA; the agreement under which the StarCaps litigation arose was valid through March 2011.⁷⁵ The CBA stipulates that member teams (clubs) employ individual NFL players, not the NFL.⁷⁶ Players’ contracts are between the players and the member club.⁷⁷ The CBA affords individual teams the sole authority to “hire, fire, negotiate, and sign contracts with players, cut players, and provide special bonuses for players;” however, the NFL retains the right to review and approve every NFL contract for players.⁷⁸ Thus, it would be difficult for the players to

72. *Id.* at 38.

73. *Id.* at 47 (identifying Lombardo’s role as administrator); *MAX Sports Medicine – John A. Lombardo, MD*, MAX SPORTS MEDICINE, <http://www.maxsportscenter.com/Meet-Our-Staff/John-A—Lombardo,-MD.aspx> (last visited Sept. 16, 2011) (identifying Dr. Lombardo as advisor to NFL for performance-enhancing drugs and as Independent Administrator of NFL Policy for Anabolic-Androgenic Steroids and Related Substances).

74. See NFL STEROIDS POLICY (2007), *supra* note 3, at 40 (describing disciplinary appeals process); *Pacman’s 1-Year Suspension Upheld*, ABC NEWS (Nov. 7, 2007), <http://abcnews.go.com/sports/story?id=3832139&page=1> (exemplifying Commissioner Goodell’s authority to accept or reject players’ appeals).

75. See *NFL Collective Bargaining Agreement Explained*, SPORTS ILLUSTRATED (Jan. 20, 2011, 1:57 PM), <http://sportsillustrated.cnn.com/2010/football/nfl/01/20/cba.qa/index.html> (posing questions and answers about current NFL CBA). After the 2006-2012 CBA expired, there was a four-month lockout over labor issues. See *Players, Owners Sign Deal to End NFL Lockout*, CNN (July 25, 2011, 13:24 GMT), <http://edition.cnn.com/2011/SPORT/07/25/nfl.deal/index.html> (reporting on end of four-month lockout). The NFL lockout ended on July 25, 2011 with the signing of a new, ten-year collective bargaining agreement. See *id.* (summarizing term of new CBA).

76. See Findings of Fact, Conclusions of Law, and Order for Judgment at *1, *Williams v. Nat’l Football League*, No. 27-CV-08-29778, 2010 WL 1793130 (D. Minn. 2010) (discussing NFL CBA and specific language regarding employment). For a further discussion of the employee-employer relationship between the NFL and NFL players, see *supra* notes 54-55 and accompanying text.

77. See *CBA, Preamble*, NFL, 3 (2006) <http://static.nfl.com/static/content/public/image/cba/nfl-cba-2006-2012.pdf> [hereinafter referred to as “CBA (2006)”] (providing member clubs of NFL, not NFL itself, employs players). This article is primarily based on the content of the 2006 NFL CBA; at the time of writing, the 2011 CBA negotiations were not complete. For a further discussion of the employee-employer relationship, see *supra* notes 54-55, 76-78 and accompanying text.

78. See Findings of Fact, Conclusions of Law, and Order for Judgment at *3, *18, *Williams v. Nat’l Football League*, No. 27-CV-08-29778, 2010 WL 1793130 (D.

argue that the CBA itself is unconscionable, as players were integrally involved in its creation.⁷⁹

The Policy lists the names of prohibited substances, divided into categories of anabolic/androgenic steroids, masking agents, and certain stimulants.⁸⁰ Bumenatide is listed under the “masking agent” category; the Policy defines masking agents as “[for example] diuretics or water pills” used for weight loss.⁸¹ The Policy warns players about use of diuretics and dietary supplements, a category into which StarCaps logically fits.⁸² Specifically, the Policy reads, “a positive test result will not be excused because it results from the use of a dietary supplement, rather than from intentional use of a Prohibited Substance.”⁸³ Further, there is a caveat that addresses dietary supplements, warning that these supplements are not subject to government regulation and may contain products that are not explicitly listed in the ingredients; thus, players accept responsibility for taking these products and are strongly dissuaded from doing so.⁸⁴ An NFL Dietary Supplement Hotline is also provided as a resource to players.⁸⁵ This hotline provides confidential

Minn. 2010) (describing rights of team owners while reserving final oversight to NFL).

79. See Kevin Seifert, *Here Come the Lawyers*, ESPN (Dec. 2, 2008, 10:37 PM), http://espn.go.com/blog/nflnation/tag/_/name/peter-ginsberg (discussing parties privy to CBA drafting). “After all, the NFL and its Players Association have collectively-bargained the steroids policy. Ginsberg would have to argue that the policy was wrongly administered. Suggesting that the policy itself is unfair or illegal might not help because the players participated in its development.” *Id.*

80. See NFL STEROIDS POLICY (2007), *supra* note 3, at 43-46 (listing banned substances by category). Each substance is listed by generic name and examples of some brand names. See *id.* (listing substances and some products that include substance).

81. See *id.* at 40 (listing masking agents).

82. For a further discussion of StarCaps in NFL context, see *supra* notes 23-24 and accompanying text.

83. NFL STEROIDS POLICY (2007), *supra* note 3, at 40.

84. See NFL STEROIDS POLICY (2007), *supra* note 3, at 52 (stating that players who take these dietary supplements do so “at [their] own risk”). The appendix further states, “several players have been suspended even though their positive test result may have been due to the use of a supplement, [and] . . . if you test positive or otherwise violate the Policy, you *will* be suspended . . . [as y]ou and you alone are responsible for what goes into your body.” *Id.* Appendix G, a memorandum from Dr. Lombardo, explains, “[i]f you take a supplement that contains a substance that violates the policy it will subject you to discipline. More importantly, you run the risk of harmful health effects associated with their use.” *Id.* at 53.

85. See Michael O’Keefe, *NFL Sets Up Supplement Hotline Joins NFLPA in Info Drive*, NY DAILY NEWS (Aug. 10, 2001, 2:22 AM) http://www.nydailynews.com/archives/sports/2001/08/10/2001-08-10_nfl_sets-up_supplement_hotli.html (describing resources and information provided by hotline).

product information; however, use of the Hotline does not absolve players from responsibility for their own actions.⁸⁶

B. Section 301 of the Labor Management Relations Act

The LMRA, or Taft-Hartley Act, was an update of the 1935 Wagner Act (part of the New Deal).⁸⁷ The Wagner Act governed employment relations affecting interstate commerce and stimulated the development of labor unions.⁸⁸ The Wagner Act also created the National Labor Relations Board (NLRB) to oversee union and employee relations.⁸⁹ In 1947, Congress replaced the Wagner Act with the Taft-Hartley Act, which added a number of contested provisions.⁹⁰ Section 301 reads, “[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties”⁹¹

In accordance with the Supremacy Clause of Article VI of the United States Constitution, when federal and state laws are in conflict, federal laws govern.⁹² The rationale behind this rule is to encourage uniform application of collective bargaining agreements.⁹³

86. *Williams v. Nat'l Football League*, 582 F.3d 863, 869 (8th Cir. 2009) (quoting defendants' brief) (providing information about Hotline, anonymity, and other drug prevention and reporting resources); see O'Keefe, *supra* note 85 (reporting creation of hotline).

87. See Steven Wagner, *How Did the Taft-Hartley Act Come About?*, GEORGE MASON UNIVERSITY'S HISTORY NEWS NETWORK (Oct. 14, 2002), <http://hnn.us/articles/1036.html> (summarizing history of Taft-Hartley Act).

88. See *id.* (explaining history of labor unions and collectively bargained labor agreements in United States).

89. See *id.* (summarizing formation of NLRB).

90. See *id.* (“The Taft-Hartley Act retained the features of the earlier Wagner Act but added to it in ways widely interpreted as anti-labor. Labor leaders dubbed it a ‘slave labor’ bill and twenty-eight Democratic members of Congress declared it a ‘new guarantee of industrial slavery.’”).

91. 29 U.S.C. § 185(a). The provision reads in full:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

92. See U.S. CONST. art. VI, cl. 2 (describing preemption theory governing situations in which federal and state law claims conflict); *Gibbons v. Ogden*, 22 U.S. (9 Wheat. 1) (1824) (establishing and applying Supremacy Clause).

93. See Mark L. Adams, *Struggling Through the Thicket: Section 301 and the Washington Supreme Court*, 15 BERKELEY J. EMP. & LAB. L. 106, 118 (1994) (commenting

Section 301 of the LMRA preempts almost all state causes of action concerning collective bargaining agreements.⁹⁴

Section 301, however, generally does not preempt state laws that govern conduct falling outside a collective bargaining or other labor agreement.⁹⁵ Gabriel A. Feldman, a leading sports law expert, summarized, “if the state law creates a right separate and apart from the rights created by the collective bargaining agreement, the state law claim will not be preempted, even if the analysis of the state law claim would overlap with the analysis of a claim brought under the terms of the collective bargaining agreement.”⁹⁶ The exception covers claims that are “tangentially” related to collective bargaining agreements.⁹⁷ If it were not for this exception, all collective bargaining agreements would automatically become federal law.⁹⁸ A noteworthy and relevant consideration is how closely tied the state law at issue is to the CBA.⁹⁹ The most widely used stan-

on “straightforward logic supporting the need for a uniform federal law regarding labor contracts” and subsequent confusion about scope of application).

94. See *Williams v. Nat'l Football League*, 582 F.3d 863, 873-74 (8th Cir. 2009) (referencing section 301 and introducing its application); 29 U.S.C. § 185(a) (outlining use of section 301 for “[s]uits for violation of contracts between an employer and a labor organization.”). See also *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 220 (1985) (analyzing scope of preemption clause); *Oberkramer v. IBEW-NECA Serv. Ctr., Inc.*, 151 F.3d 752, 756 (8th Cir. 1998) (describing preemption clause of National Labor Relations Act and narrowing scope of use). State law claims that are “substantially dependent upon an analysis of the terms or provisions of a collective bargaining agreement or are ‘inextricably intertwined’ with consideration of the terms or provisions of a collective bargaining agreement are also preempted by § 301.” *Id.*

95. See *Allis-Chalmers Corp.*, 471 U.S. at 213 (“State-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are preempted by those agreements.”).

96. *The NFL StarCaps Case: Are Sports' Anti-Doping Programs at a Legal Crossroads? Before the Subcomm. on Commerce, Trade & Consumer Prot. of the H.R. Comm. on Energy & Commerce*, 111th Cong. 1 (2009) (testimony of Gabriel A. Feldman, Associate Professor of Law and Director of Tulane Sports Law Program, Tulane University School of Law), available at http://democrats.energycommerce.house.gov/Press_111/20091103/feldman_testimony.pdf [herein referred to as “Feldman”].

97. See *Hanson*, *supra* note 21, at 346 (qualifying scope of preemption doctrine).

98. See *id.* (discussing implications of application of section 301 to collective bargaining agreements).

99. See *Shepard*, *supra* note 45, at 542 (summarizing consideration of relationship between DATWA and CBA). The Eighth Circuit analyzed whether the DATWA “was intrinsically tied to the CBA The key inquiry was whether the claim was based on a right set forth in the agreement, or otherwise could not go forward without a significant analysis of the relevant CBA section.” *Id.*

dard involves determining whether the claim is “inextricably intertwined” with the terms of the CBA.¹⁰⁰

An important point emphasized in *Allis-Chalmers Corp. v. Lueck*,¹⁰¹ a leading case in the area of preemption, is that section 301 does not allow parties to a collective bargaining agreement to rewrite state law.¹⁰² In that case, the plaintiff was a member of a labor union through his employer, Allis-Chalmers Corporation.¹⁰³ He sued his insurance carrier for breach of fiduciary duty and unfair labor practices when they withheld disability payments following a non-occupational injury to the plaintiff’s back.¹⁰⁴ In its analysis, the Court explained state laws that “proscribe conduct, or establish rights and obligations, independent of a labor contract” are not preempted.¹⁰⁵ The Eighth Circuit has largely followed the rationale of the *Allis-Chalmers* Court.¹⁰⁶ In *Meyer v. Schnucks Markets, Inc.*,¹⁰⁷ the Eighth Circuit proposed a test for determining whether claims are preempted: if the state law claim can be resolved without consulting the CBA, section 301 will not preempt the claim.¹⁰⁸ An-

100. See e.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985) (using terminology “inextricably intertwined with consideration of the terms of the labor contract.”); Adams, *supra* note 93, at 120 (directing focus to whether claim is “inextricably intertwined” and quoting *Allis-Chalmers Corp.*).

101. 471 U.S. 202 (1985).

102. See *id.* at 211 (“Were state laws allowed to determine the meaning intended by the parties in adopting a particular contract phrase or term, all the evils addressed in *Lucas Flour* would recur. The parties would be uncertain as to what they were binding themselves to when they agreed to create a right to collect benefits under certain circumstances. As a result, it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate.”); Hanson, *supra* note 21, at 330 (discussing, generally, when state claims are preempted by section 301).

103. See *Allis-Chalmers Corp.*, 471 U.S. at 207 (describing basis for Mr. Lueck’s claim). Mr. Lueck had suffered a debilitating back injury and his insurance company repeatedly withheld disability payments. See *id.* at 205 (reciting facts of case).

104. See *id.* (explaining plaintiff’s injury and scope of coverage of plan). The plaintiff argued that Aetna Life & Casualty Company, the union’s insurance carrier, “intentionally, contemptuously, and repeatedly failed to make disability payments under the negotiated disability plan, without a reasonable basis for withholding the payments.” *Id.* at 206.

105. See *id.* at 212 (creating court precedent for limiting application of section 301).

106. See Hanson, *supra* note 21, at 348 (discussing Eighth Circuit interpretation of section 301 and use of Supreme Court precedent to guide circuit court decisions).

107. 163 F.3d 1048 (8th Cir. 1998).

108. See *id.* at 1050 (setting forth two factors: whether “state-law claim itself is based on [a collective bargaining agreement] . . . or dependent upon analysis of [the agreement].”). “For there to be complete preemption, we believe that the claim must require the interpretation of some specific provision of a CBA; it is not enough that the events in question took place in the workplace or that a CBA

other important case, *Lingle v. Norge Div. of Magic Chef, Inc.*,¹⁰⁹ reiterated the “depends upon” standard for preemption, and charged:

[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is preempted and federal labor-law principles-necessarily uniform through the Nation-must be employed to resolve the dispute.¹¹⁰

Preemption in the context of labor law is judge-made; thus, this is an area in which courts have relative flexibility.¹¹¹ As the outcomes of preemption cases suggest, the language of section 301 is confusing and vulnerable to disparate application.¹¹² Even cases aimed at clarifying preemption have added to the disorder.¹¹³ One commentator opined that preemption litigation, in particular section 301 claims, “has been one of the most confused areas of federal court litigation.”¹¹⁴ Additionally, while “inextricably intertwined” is perhaps the most common language, courts have used a number of other phrases to suggest the requisite level of connection between a state law and a CBA provision to justify pre-

creates rights and duties similar or identical to those on which the state-law claim is based.” *Id.* at 1051.

109. 486 U.S. 399 (1988).

110. *Id.* at 405-06.

111. See *The NFL StarCaps Case: Are Sports' Anti-Doping Programs at a Legal Crossroads?: Before the Subcomm. on Commerce, Trade, and Consumer Prot. of the H.R. Comm. on Energy & Commerce*, 111th Cong. 1, 11 (2009) (testimony of Jeffrey Standen, Professor of Law, Willamette University) http://democrats.energycommerce.house.gov/Press_111/2009/1103?standen_testimony.pdf (explaining possible motivation for Supreme Court to hear case due to impact and nature of preemption doctrine).

112. See e.g. Adams, *supra* note 93, at 121-22 (comparing two preemption cases, noting holdings were “ambiguous” and “not easily reconciled”); Laura W. Stein, *Preserving Unionized Employees' Individual Employment Rights: An Argument Against Section 301 Preemption*, 17 BERKELEY J. EMP. & LAB. L. 1, 1 (1996) (reflecting on preemption precedent and its impact). “Just within the past decade the Supreme Court has used several tests to determine whether a state law should be preempted.” *Id.* The author suggests, “the problem with the current doctrine of section 301 preemption goes beyond the confusion stirred in the lower courts by erratic Supreme Court holdings.” *Id.*

113. See Stephanie R. Marcus, Note, *The Need for a New Approach to Federal Preemption of Union Members State Law Claims*, 99 YALE L. J. 209, 209 (1989) (positing *Lingle* “attempted to clarify section 301’s preemptive scope, but the decision has actually caused uncertainty in section 301 preemption claims.”).

114. *Id.*

emption.¹¹⁵ This issue is compounded by the variety of organizations and unions that use CBAs; each of these unions has unique needs and goals they seek to accomplish under their agreements.¹¹⁶

C. Minnesota State Laws: The Drug and Alcohol Testing in the Workplace Act and Consumable Product Act

The Williamses alleged that the NFL violated both DATWA and CPA in issuing the players' suspensions resulting from their use of StarCaps.¹¹⁷

The DATWA was enacted in 1987 and provides a framework for drug testing in the workplace in Minnesota.¹¹⁸ Minnesota's procedures are among the most thorough in the nation and provide a number of safeguards for both employees and employers.¹¹⁹ A press release on the policy notes that Minnesota's policy is strict and warns that national companies with employees in Minnesota are particularly susceptible to violating the drug testing rules due to their specificity.¹²⁰

115. See e.g. *Trs. of Twin Cities Bricklayers Fringe Benefit v. Superior Waterproofing*, 450 F.3d 324, 330 (8th Cir. 2006) ("An otherwise independent claim will not be preempted if the CBA need only be consulted during its adjudication."); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988) (providing "if the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law . . . is pre-empted . . .").

116. For a discussion of various unions that were involved in section 301 pre-emption litigation, see *supra* notes 101-110 and accompanying text. Union membership spans both the public and private sectors, as well as a number of professional disciplines including: teaching; law enforcement; transportation; construction; and professional athletics. See *Union Members Summary*, BUREAU OF LABOR STATISTICS (Jan. 21, 2011), <http://www.bls.gov/news.release/union2.nr0.htm> (releasing statistics about union membership rates and demographics); *Sports Unions + Leagues - Labor Relations and the Sports Industry*, RUTGERS UNIVERSITY LIBRARIES (Oct. 4, 2011), <http://libguides.rutgers.edu/content.php?pid=148775&sid=1276918> (providing links for professional sports league unions).

117. See *Williams v. Nat'l Football League*, 582 F.3d 863, 872 (8th Cir. 2009) (describing procedural history of case). The plaintiffs added claims of DATWA and CPA violations in their First Amended Complaint, filed with the Fourth Circuit District Court on January 2, 2009. See *id.* (discussing claims added in amended complaint).

118. See *Drug & Alcohol Testing Background*, MINNESOTA CHAMBER OF COMMERCE, http://mnchamber.com/priorities/drugalcohol_bkgd.pdf (explaining passage of Minnesota workplace drug and alcohol policies); see Dale L. Deitchler, *Minnesota Law Applies to Union-Negotiated Drug Testing Policies*, *Says Eighth Circuit*, LITTLER MENDELSON P.C. (Sept. 22, 2009), <http://www.littler.com/PressPublications/Lists/ASAPs/DispASAPs.aspx?List=edb4a871%2D9e73%2D4eae%2Dbj81%D3d045b6ede6d&ID=1431> (providing background of DAWTA in relation to *Williams* case).

119. See *Drug & Alcohol Testing Background*, *supra* note 118 (listing clauses of current state drug and alcohol policy).

120. See V. John Ella, *What Do They Have in Mind? Minnesota's Drug-Testing Law Turns 20*, BENCH & BAR OF MINNESOTA Vol. 64, No. 8 (2010), available at <http://>

The DATWA laws carefully define an employer as “any person or entity located or doing business in this state and having one or more employees”¹²¹ The statute stipulates a number of acceptable testing procedures and circumstances, including job applicant testing, random testing, and reasonable suspicion testing.¹²² Specifically, DATWA states that employers cannot dismiss first-time offenders; dismissal is only justified following a failure to participate in mandatory treatment or counseling at the employee’s own expense.¹²³ Colloquially referred to as the “One Free Strike” rule, DATWA allows employees one “strike” before their employer may legally dismiss them.¹²⁴ Subdivision two of DATWA notes that the Act applies to all CBAs after 1987, the year in which the Act was passed.¹²⁵ However, employers are permitted to adopt a more stringent drug and alcohol policy, provided it does not conflict with the minimum standards of DATWA.¹²⁶

Under CPA, lawful consumable products are those “whose use or enjoyment is lawful and which are consumed during use or enjoyment”¹²⁷ The examples provided in the statute include food, non-alcoholic beverages, and tobacco.¹²⁸ The CPA permits employers to:

[R]estrict the use of lawful consumable products by employees during non-working hours if the restriction relates to a bona fide occupational requirement, is necessary to avoid a conflict or an apparent conflict of interest with any

www.mnbar.org/benchandbar/2007/sept07/drug_testing.htm (“Minnesota’s DATWA is one of the strictest, most complicated, and employee-friendly drug-testing laws in the country.”).

121. Minn. Stat. § 181.950 subdiv. 7 (2010).

122. See Anita Neumann, *Workplace Drug and Alcohol Testing*, MINNESOTA HOUSE OF REPRESENTATIVES (June 2010), <http://www.house.leg.state.mn.us/hrd/pubs/dgaltest.pdf> (identifying circumstances under which employers can test employees for drug or alcohol use or abuse).

123. See *id.* (outlining ramifications for positive drug test result).

124. See Don Erickson, *Drug and Alcohol Testing: Crafting a Policy for Your Business*, BUSINESS NORTH (Feb. 28, 2007), <http://www.businessnorth.com/viewarticle.asp?articleid=1793> (commenting on leniency of Minnesota policy).

125. See § 181.955 subdiv. 2 (describing scope of application of rule).

126. See *id.* subdiv.1 (explaining employers’ rights to adopt more stringent regulations); see *Williams v. Nat’l Football League*, 582 F.3d 863, 875 (8th Cir. 2009) (quoting § 181.955, “DATWA ‘shall not be construed to limit the parties to a collective bargaining agreement from bargaining and agreeing with respect to a drug or alcohol testing policy that meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection’”).

127. § 181.938, subdiv. 2 (2010).

128. See *id.* (listing permissible products under Consumable Products Act).

of the employee's job responsibilities, or is part of a chemical dependency or treatment program.¹²⁹

The CPA is often cited as a statute that protects employees from sanctions resulting from alcohol or tobacco consumption occurring off-premises during nonworking hours.¹³⁰

IV. ANALYSIS

A. Narrative Analysis

This case consolidated a number of appeals filed by interested parties.¹³¹ The NFL, Dr. John Lombardo, and Adolpho Birch appealed from the district court's holding in favor of the Williamses.¹³² Kevin and Pat Williams cross-appealed, arguing that their state law claims were not preempted by section 301.¹³³ The NFLPA appealed the district court's confirmation of arbitration awards, which upheld the Williamses' suspensions.¹³⁴

As this was a high-profile case, involving public figures and one of the nation's most revered organizations, the district court was careful to devote attention to the details of the Policy, including supplemental memoranda and appendices.¹³⁵ The court first considered the DATWA claim, which the NFL argued was preempted for a number of procedural and policy reasons.¹³⁶ The players'

129. *Workplace Issues*, MINNESOTA DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT, http://www.positivelyminnesota.com/Business/PDFs/Employers_Guide_to_Employment_Law_Issues_in_Minnesota/06_Workplace_Issues.pdf (last visited Sept. 23, 2011).

130. See Michael Wilhelm, *Minnesota's Lawful Consumable Products Statute*, MINNESOTA EMPLOYER (Sept. 14, 2011), <http://minnesotaemployer.com/2011/09/14/minnesota-s-lawful-consumable-products-statute/> (warning employers about protective provisions of statute).

131. See *Williams*, 582 F.3d at 868 (8th Cir. 2009) (describing procedural posture of case, particularly efforts to consolidate claims).

132. See *id.* (discussing parties to appeal and rationale for appealing).

133. See *id.* (clarifying Williamses' role in appeals and central argument).

134. See *id.* (reflecting on NFLPA's appeal).

135. See *High Profile Cases*, MINNESOTA JUDICIAL BRANCH, <http://www.mncourts.gov/district/4/?page=1829> (last visited Sept. 24, 2011) (reporting recent orders in state court, labeling *Williams* case "high profile"); *Williams v. Nat'l Football League*, 582 F.3d 863, 868-69 (8th Cir. 2009) (quoting Policy and highlighting NFL's emphasis on players' responsibility for taking dietary supplements at their own risk).

136. See *Williams*, 582 F.3d at 873 ("The NFL asserts that the DATWA claim is preempted because: (1) the claim turns on analysis of the Policy in order to determine whether it 'meets or exceeds' DATWA's requirements, (2) the claim requires interpretation of the Policy in order to determine whether the NFL qualifies as an employer under DATWA such that the statute's protections extend to the Players, and (3) uniform interpretation of the CBA/Policy is necessary to preserve the integrity of the NFL's business as a national organization.").

claim was broad, alleging that the NFL violated their rights by failing to comply with DATWA.¹³⁷ The NFL countered that, while their policy did deviate from the DATWA model, any discrepancies were “negligible” and did not change the fact that the Williamses tested positive for a banned substance.¹³⁸ Counsel for the NFL further explained that their policy met the requirements of DATWA, since the CBA afforded players the same, if not more, protection than DATWA under the Act’s first subdivision.¹³⁹ The court rejected this rationale, explaining that being bound to a CBA does not preclude an individual from receiving protection under DATWA.¹⁴⁰ Thus, the court reasoned that the plaintiffs’ claim did not necessitate an examination of the Policy, but instead a fact analysis comparing the Policy with the requirements under DATWA.¹⁴¹ This latter approach, a fact analysis, would not require preemption under section 301.¹⁴² The court reiterated that the standard for preemption is consultation of the CBA or Policy; instead, this case involved a purely factual evaluation without consultation of these documents.¹⁴³

Further, the NFL argued that the court needed to evaluate the CBA to determine whether an employer-employee relationship existed; DATWA is an employment statute, so the court needed to determine whether the NFL “qualifie[d] as an employer” under the statute.¹⁴⁴ The court focused on the “depends upon” language in *Lingle* in its analysis.¹⁴⁵ The court also referenced *Trustees*, differentiating between interpreting a CBA and consulting a CBA.¹⁴⁶ Addi-

137. *See id.* at 875 (discussing cause of action under DATWA state claim).

138. *See id.* (“[T]he NFL concedes that its steroid testing procedures do not comply with the letter of Minnesota law, but argues that the differences are negligible and do not require the Court to invalidate the Williamses’ positive tests for bumetanide.”).

139. *See id.* (explaining NFL’s policy and protections for players).

140. *See id.* (dismissing NFL’s rationale for depriving Williamses of DAWTA claim).

141. *See id.* at 875-76 (clarifying court’s opinion of appropriate analysis of DATWA and policy).

142. *See id.* at 875-78 (ruling on section 301 analysis).

143. *See id.* at 876 (citing *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261, 266 (1994)) (supporting notion that factual examination of NFL drug testing policies did not require interpretation of CBA).

144. *See id.* at 876-77 (describing NFL’s employer-employee claim).

145. *See id.* at 876 (evaluating NFL’s second claim); *see also* *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988) (detailing preemption occurs when “resolution . . . depends upon the meaning of a collective-bargaining agreement.”).

146. *See Williams*, 582 F.3d at 876-77 (quoting *Trustees* to support idea that “interpreting” CBA has specific meaning); *see* *Trs. of Twin Cities Bricklayers Fringe Benefit v. Superior Waterproofing*, 450 F.3d 324, 330 (8th Cir. 2006) [“Trustees”]

tionally, it examined the employee-employer relationship between players and the NFL, finding that the CBA defines member clubs of the NFL to be the employers of players, but the NFL itself was not considered the players' employer; the Court determined that these "references" to employment in the NFL CBA required only consultation.¹⁴⁷ Upon this analysis, the court concluded that resolution of the players' claims did not require interpretation of the CBA, but rather "consultation" – consultation would not necessitate preemption of a state law claim.¹⁴⁸ In addition, the court found that individual players' contracts were separate from the league CBA.¹⁴⁹

Lastly, the court rejected the NFL's policy-driven argument that creating different state-by-state standards for the application of a national policy would nullify the effect of uniform enforcement.¹⁵⁰ The court interpreted *Allis-Chalmers Corp.* and *Cramer*, two preemption cases, concluding that national employers' and unions' desire to maintain uniformity in their policies does not outweigh States' rights to enforce their state labor laws.¹⁵¹ The court dismissed the uniformity argument, ignoring policy implications for creating different drug and alcohol leniency among and between states.¹⁵² Despite the NFL's three arguments expounded upon

(providing language for distinguishing between interpretation and consultation of CBA).

147. See *Williams*, 582 F.3d at 877 (quoting portions of CBA that define employment relationship).

148. See *id.* at 876-77 (referencing preemption definitions in *Trustees* and *Livadas v. Bradshaw*, 512 U.S. 107 (1994) and concluding that interpretation was not necessary).

149. See *id.* at 877 (alluding to difference between contracts and CBA); Gabriel A. Feldman, *NFL Labor Negotiations: Are We Headed for the Doomsday Scenario*, HUFFINGTON POST (Feb. 18, 2011), http://www.huffingtonpost.com/gabriel-a-feldman/nfl-lockout_b_824910.html (explaining that, unlike in most other employment situations, NFL players can sign contracts that extend beyond CBA).

150. See *Williams*, 582 F.3d at 877 (dismissing NFL argument that "denying preemption and subjecting the Policy to divergent state regulations would render the uniform enforcement of its drug testing policy, on which it relies as a national organization for the integrity of its business, nearly impossible").

151. See *id.* at 877-78 (comparing conflicting interests of uniformity and enforcement of state labor laws); see generally *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 221 (1985) (holding when "resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a section 301 claim . . . or dismissed as pre-empted by federal labor-contract law" and reversing Wisconsin Supreme Court decision); *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 697 (9th Cir. 2001) (finding plaintiff's state law claims independent of CBA, thus not preempted).

152. See *Williams*, 582 F.3d at 878 (providing minimal rationale for rejecting NFL's national uniformity argument based on idea that CBAs cannot "contract for what is illegal under state law").

herein, the court held that section 301 did not preempt the DATWA claim.¹⁵³

The court subsequently moved to the CPA claim. The NFL argued that the CPA claim required preemption because the CBA and Policy were vital aspects of the CPA analysis.¹⁵⁴ However, the court reasoned that the NFL's bona-fide requirement exception claim and conflict-of-interest exception claim were irrelevant to a section 301 evaluation.¹⁵⁵ The NFL attempted to preempt the CPA claim by emphasizing the "off the premises" and "during nonworking hours" language; however, the court's examination of the CBA and Policy did not find this language in either document.¹⁵⁶ The court rejected the NFL's allusion to league documents, noting that the party requesting preemption has the burden of persuasion.¹⁵⁷ The *Williams* Court disagreed with the NFL, deeming preemption unnecessary, explaining that the "bona fide occupational requirement" clause was merely a defense to liability and finding the defenses insufficient to trigger preemption.¹⁵⁸ Finally, the court considered the NFL's claim that players waive their CPA rights because the Players' Union agreed to the Policy.¹⁵⁹ Here, the court dismissed the NFL's arguments due to a lack of supporting case law and quotations taken out of context.¹⁶⁰

153. *See id.* at 878 (holding DATWA not preempted and describing rationale).

154. *See id.* (summarizing NFL's claim that CPA subject to preemption).

155. *See id.* at 878-79 (dismissing NFL claim, noting that NFL's defenses were irrelevant to section 301 analysis and it would be inappropriate to subject CPA claim to section 301 preemption).

156. *See id.* at 879-80 (reviewing CBA and Policy, finding that neither includes referenced language, thus rendering it unnecessary to consult these documents to resolve CPA issue).

157. *See id.* at 880 (noting NFL was vague about which document that court would need to consult in order to evaluate CPA claim).

158. *See* Feldman, *supra* note 96, at 6 (describing Court's dismissal of "relates to a bona fide occupational requirement" language to justify preemption and consultation of CBA). "Raising a defense under federal law is not among the grounds for removal." Richard S. Meyer & Harris N. Cogan, *It's Federally Preempted – Let's Remove It!*, NEW YORK LAW JOURNAL (Feb. 2007), available at <http://www.blankrome.com/index.cfm?contentID=37&itemID=1229>. The court also said that the Policy's rule on diuretics was an occupational requirement because it acted as a defense to liability, and thus did not require preemption. *See 2009 Annual Survey: Recent Developments in Sports Law*, 20 MARQ. SPORTS L. REV. 497, 618 (2009) (discussing *Williams* case, among others, and explaining court's rationale for dismissing CPA preemption claim).

159. *See Williams*, 582 F.3d at 880 (summarizing NFL's final argument under CPA).

160. *See id.* (comparing NFL's use of quotations from cases to contextual language of same quotations).

The final preemption-related argument the court considered was the players' common law claims.¹⁶¹ The players charged that these alleged violations were independent of analysis of the CBA or the Policy, and thus should not be preempted by section 301.¹⁶² Borrowing the Third Circuit's test in *Bogan v. General Motors Corp.*,¹⁶³ the court considered whether it would be permissible to preempt the alleged state-law tort claims.¹⁶⁴ The players alleged breach of fiduciary duty, negligence, and gross negligence claims, accusing the NFL of withholding information about StarCaps' ingredients.¹⁶⁵ Further, they argued that this duty of disclosure stemmed from their state law duty as fiduciaries.¹⁶⁶ The Court found the evaluation of these claims inseparable from an examination of the Policy, thus the claims were preempted.¹⁶⁷ Similarly, the Court ruled that the players' fraud, constructive fraud, negligent misrepresentation, intentional infliction of emotional distress, and vicarious liability claims were preempted.¹⁶⁸ Determining whether the players were adequately informed and whether their reliance was reasonable requires a court to evaluate the clarity or ambiguity of the governing agreement.¹⁶⁹ The court pointed to provisions of the Policy that specifically addressed masking agents and supple-

161. *See id.* at 880-81 (introducing final argument for consideration). These claims included breach of fiduciary duty; aiding and abetting a breach of fiduciary duty; violations of public policy; fraud; constructive fraud; negligent misrepresentation; negligence; gross negligence; intentional infliction of emotional distress; and vicarious liability. *See id.* (listing causes of action).

162. *See id.* at 881 (describing players' argument that state law claims do not originate from Policy).

163. *Bogan v. Gen. Motors Corp.*, 500 F.3d 828 (8th Cir. 2007).

164. *See Williams*, 582 F.3d at 881 (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985)) ("[E]xamining whether the tort claims: (1) are premised on duties created by the relevant CBA such that they are 'based on' the agreement, or (2) require interpretation of the CBA such that they are 'dependent upon an analysis' of the agreement.").

165. *See id.* (referencing plaintiff's cross-complaints alleging that NFL officials had knowledge that StarCaps contained bumetanide, and failed to disclose this information to players).

166. *See id.* (recapping players' allegations of breach of fiduciary duty).

167. *See id.* (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 221 (1985)) (noting claims "relating to what parties to a labor argument agreed . . . must be resolved by reference to uniform federal law.").

168. *See id.* at 881-83 (recognizing that players' claims were preempted because court could not resolve issues without consulting CBA or Policy).

169. *See id.* at 881-82 (finding plaintiffs' claims of misrepresentation inseparable from evaluation of CBA and Policy); *Trs. of Twin City Bricklayers Benefit Funds v. Superior Waterproofing*, 450 F.3d at 326-31 (describing process by which reliance is proven and necessity to consult and interpret CBA to decide case).

ments that would be integral to a misrepresentation evaluation.¹⁷⁰ The intentional infliction of emotional distress claim was contingent upon the Policy's guidelines on employee-employer relationships and mandatory disclosures.¹⁷¹

The Players' Union sought to vacate the arbitrator's decision affirming the NFL's suspension of the players who violated the Policy, a claim the court warned would be difficult considering the deference afforded arbitration awards.¹⁷² The Union first claimed that Dr. Birch had inappropriately persuaded Dr. Lombardo to refer the players for discipline after they tested positive for bumetanide.¹⁷³ Dr. Lombardo admitted that he would not have referred the players for discipline but for Birch's instruction; the court recognized this as an issue with the enforcement of the Policy guidelines, not the arbitrator's ruling.¹⁷⁴ Information about Birch's instruction was not disclosed until discovery proceedings in the earlier stages of this case.¹⁷⁵ Thus, the court ruled that the arbitrator did not know about Birch's instruction to Dr. Lombardo, and therefore did not ignore Policy guidelines when issuing his ruling.¹⁷⁶ The court also rejected the Union's claim that the arbitration awards violated public policy, alleging that both the NFL's and Dr. Lombardo's failures to disclose that StarCaps contained bumetanide violated the fiduciary duty owed to players, due to a lack of supporting authority.¹⁷⁷

170. *See Williams*, 582 F.3d at 882 (pointing out evaluation of players' misrepresentation claims requires examination of section eight and Appendix G of Policy).

171. *See id.* (noting that players' claims of intentional infliction of emotional distress are inseparable from interpretation of Policy, thus requiring preemption).

172. *See id.* at 883 (describing narrow standards for which arbitration awards can be vacated). Arbitration awards can be vacated under the Federal Arbitration Act for reasons including, but not limited to, corruption, fraud, evident partiality, and misconduct. *See Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788 (8th Cir. 2003) (citing 9 U.S.C. § 10(a)) (discussing relevance of arbitration awards and reasons for vacating such awards).

173. *See Williams*, 582 F.3d at 883 (detailing Union's claim of undue influence).

174. *See id.* at 883-84 (summarizing process by which Birch influenced Dr. Lombardo, resulting in disciplinary action against players).

175. *See id.* at 884 (noting Union did not learn of Birch's inappropriate action until discovery phase of case, impacting its relevance).

176. *See id.* ("[I]t is clear that the arbitrator did not 'ignore' the provisions of either the 2006 or 2008 Policies when he issued the awards. Therefore, Birch's directive is not a reason to vacate the arbitrator's award in the case.").

177. *See id.* at 885 (describing Union's argument, and rejecting claim on basis of inadequate authority).

The Union's last argument was that the arbiter was biased, and the awards were thereby "evident[ly] partial[]"¹⁷⁸ Evident partiality infers that the arbitrator had improper motives; a "mere appearance of bias" is inadequate to satisfy this burden.¹⁷⁹ The court recognized that the arbitrator, Jeffrey Pash, was a prominent NFL figurehead who had met with the Vikings on numerous occasions; however, the court noted that the Union could have presumed Pash would have interaction with the Vikings, given his position as NFL General Counsel.¹⁸⁰ The court rejected the Union's claims that Pash was biased based on his contacts with the Vikings and the Williamses' attorney and ruled that the Union had foregone any argument that Pash was "evidently partial" when it allowed the NFL General Counsel to act as the independent arbitrator for the case.¹⁸¹ The court noted that even if the Union had objected, Pash's alleged partiality did not meet the requisite burden of "improper motives."¹⁸² Thus, the court did not vacate the arbitration awards on the basis of Pash's alleged bias.¹⁸³ The court concluded by reiterating its affirmation of the holdings of the district court on all issues.¹⁸⁴

178. *See id.* (evaluating Union's claim that arbitrators were partial and thus produced unfair rulings). The standard under 9 U.S.C. § 10(a)(2) for vacating an arbitration award is "evident partiality or corruption." 9 U.S.C. § 10(a)(2) (2002).

179. *See* 3 Fed. Proc. § 4:119 (Lawyers ed. 2009) (identifying ways to prove evident partiality).

180. *See Williams*, 582 F.3d at 885-86 (recognizing Pash's position as both arbitrator and NFL General Counsel, and justifying his meetings with Vikings and appointed counsel for both Williamses).

181. *See id.* at 886 ("[T]he Union waived any objection as to Pash's evident partiality by failing to object to the general counsel for the NFL serving as arbitrator.").

182. *See id.* (conceding even if Union had not "waived" issue, Pash's bias did not amount to evident partiality). The *Williams* court referenced *Dow Corning Corp. v. Safety Nat'l Cas. Corp.* for idea of improper motives. *See Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 750 (8th Cir. 2003) (vacating award based on arbitrator's "improper motives").

183. *See Williams*, 582 F.3d 863, 886 ("Therefore, we decline to vacate the award on this basis. In sum, we reject each of the Union's arguments for vacating the awards. Accordingly, we affirm the district court's order confirming the awards.").

184. *See id.* (affirming district court judgment).

B. Critical Analysis

1. Preemption Analysis and Confusing Nature of Existing Precedent

Section 301 preemption is a complex concept that requires a case-by-case analysis and lacks general uniformity.¹⁸⁵ The *Williams* case presented a difficult issue for the NFL, because the league had already conceded that its policy does not comply with Minnesota state law.¹⁸⁶ Further, there was no on-point preemption precedent on which the court could rely, since *Williams* was the first case of its kind.¹⁸⁷

An important distinction the Court failed to acknowledge was that DATWA was enacted prior to the aggravation of drug issues in professional sports; this further illustrates the possibility that DATWA was not intended to apply to professional sports leagues.¹⁸⁸ One commentator recognized that the NFL has a separate policy for recreational drugs, thus the NFL would argue that DATWA should be limited to recreational drug issues and inapplicable to cases involving performance-enhancing drugs.¹⁸⁹ Further, subdivi-

185. See Feldman, *supra* note 96, at 4 (citing *Cramer v. Consolidated Freightways*, 255 F.3d 683, 691 (9th Cir. 2001)) (“Section 301 preemption is a fact-specific inquiry that does not provide courts with a clear, bright-line rule.”).

186. See *Williams v. Nat'l Football League*, 582 F.3d 863, 875 (8th Cir. 2009) (noting NFL's concession of failure to comply with DATWA, but arguing “differences are negligible and do not require the Court to invalidate the Williams' positive tests for bumetanide”).

187. See Gregg Rosenthal, *Latest StarCaps Decision Likely Means Williamses Will be Available All Year*, NBC SPORTS (May 21, 2010, 11:47 AM), <http://profootballtalk.nbcsports.com/2010/05/21/latest-starcaps-decision-likely-means-williamses-will-be-available-all-year/> (acknowledging lack of precedent to guide StarCaps decision). “[Judge Larson explained] that the issues presented in the litigation ‘were a matter of first impression,’ and that Larson had no precedent available to guide him.” *Id.* See also Brian Murphy, *Kevin Williams Faces a Lighter NFL Suspension Under New Labor Deal*, FOX SPORTS (Aug. 25, 2011, 12:29 AM), <http://msn.foxsports.com/nfl/story/Vikings-Kevin-Williams-likely-faces-2game-suspension-62538502> (calling StarCaps litigation a “precedent-setting case”); Brad Biggs, *Kevin Williams Will No Longer Appeal StarCaps Case*, NATIONAL FOOTBALL POST (Mar. 11, 2011, 8:44 AM), <http://www.nationalfootballpost.com/Kevin-Williams-will-no-longer-appeal-StarCaps-case.html> (quoting Pat Williams's agent calling case “unique” and one that “merits further consideration”).

188. See Ella, *supra* note 120 (recognizing twenty year anniversary of DATWA). DATWA was enacted in 1987. See *id.* (referencing year of enactment). See Hanson, *supra* note 21, at 366 (suggesting that DATWA was not enacted to combat performance-enhancing drug use in professional sports leagues, but rather to preclude employers from overzealously punishing cocaine use by employees). This author hypothesized that the NFL could argue that DATWA applies to the NFL's separate policy for recreational drugs, not its performance-enhancing drug policy. See *id.* (describing scope of DATWA).

189. See Hanson, *supra* note 21, at 366 (suggesting court “may deduce that DATWA should not apply”). DATWA was enacted in response to employers testing for recreational drugs, and the NFL has a separate policy to target recreational

sion four of DATWA carves out an exception for professional sports leagues for random drug testing; professional athletes may be randomly tested for recreational drugs if they are subject to a CBA, “but only to the extent consistent with the [CBA].”¹⁹⁰ To combat future preemption claims, the NFL could argue that the state legislature intended for this exception to apply broadly to exempt professional sports leagues from any DATWA provisions that conflicted with league rules.¹⁹¹

As one commentator explained, the Eighth Circuit inappropriately interpreted DATWA, focusing on the differences between NFL policy and state drug policies instead of the actual requirements of DATWA.¹⁹² DATWA was created by the state of Minnesota with no consideration for its application to national sports leagues.¹⁹³ DATWA protects employees from unfair drug testing, whereas the NFL policy seeks to establish and maintain fair competition.¹⁹⁴

drugs; thus, DATWA may not apply. *See id.* (discussing possible limitations to scope of DATWA). However, this argument could prove futile since the Policy does not specify to which drugs or types of drugs it applies. *See id.* (reasoning that argument would fail since Policy does not limit which types of drugs it regulates).

190. *See* Minn. Stat. § 181.951 (1991) (exempting professional sports leagues from random testing requirements).

191. *See* Victor S. Broccoli, *Williams v. NFL: The Eighth Circuit Flags the NFL for Interference with State Drug Testing Laws*, 17 SPORTS LAW. J. 283, 300 (2010) (creating possible defense for NFL). Mr. Broccoli states:

DATWA contains a provision exempting professional sports leagues from DATWA’s prohibition on random drug testing. The NFL would appear to have a plausible argument that the Minnesota legislature intended to exempt the NFL from other DATWA requirements that ‘limit the ability of sports leagues to test and punish for [performance enhancing drugs].’

Id. (quoting *The NFL StarCaps Case: Are Sports’ Anti-Doping Programs at a Legal Crossroads? Before the Subcomm. on Commerce, Trade & Consumer Prot. of the H.R. Comm. on Energy & Commerce*, 111th Cong 18 (2009): Hearing Before the H. Energy and Commerce Subcomm. on Commerce, Trade, and Consumer Protection, 111th Cong. 14 (2009) (statement of Gabriel A. Feldman)).

192. *See* Koziol, *supra* note 7, at 155 (analyzing Eighth Circuit’s use and interpretation of DATWA).

The Eighth Circuit in *Williams* ignored this argument, and instead simply compared DATWA requirements with the procedures that the NFL followed with respect to its drug testing of Players. However, that is not what the DATWA commands; the DATWA requires courts to analyze and interpret the Policy and its requirements so it can meaningfully compare them to the requirements of the DATWA. Thus, the *Williams* court should have preempted the claim, because the DATWA claims are ‘inextricably intertwined with consideration of the terms of the [Policy].’ The Eighth Circuit should have more closely examined the plain language of the DATWA statute and understood it to mean that the court must examine the CBA in its analysis.

Id.

193. *See id.* at 156 (noting original purpose of DATWA).

194. *See id.* at 156 (differentiating purposes of DATWA and NFL Policy).

Thus, the Policy and DATWA have distinguishable objectives; this makes the substitution of DATWA rules for the NFL policy inappropriate.

Irrespective of this argument, the court's interpretation of DATWA inferred a misguided analysis of the NFL's role as an employer and players' roles as employees.¹⁹⁵ The CBA, itself, stipulates that the NFL does not directly employ players.¹⁹⁶ Thus, it is difficult to argue that a determination on the DATWA claim can be made without an examination of the relevant employee-employer contract, which in this case is the NFL CBA.¹⁹⁷ The court made a distinction between "interpreting" and "consulting" a document, explaining that an arbitrator would only need to consult the CBA to understand whether the NFL was the players' employer.¹⁹⁸ The differences between the Minnesota policy, which prohibits suspensions based on a first time drug offense, and the NFL Policy, which institutes four-game suspensions for the same offense are worth noting; there is a sharp contrast between the state's and the NFL's punishments for the same offense.¹⁹⁹ The NFL argued that not requiring preemption would essentially obliterate the value of having a uniform policy.²⁰⁰ This contradicts the emphasis section 301 places on uniform laws, because construing the same terms in different ways depending on state law would irreparably disrupt the interpretation and application of CBAs.²⁰¹

With regard to the CPA claim, one commentator summarized preceding case law and concluded, "whenever there are parties to a

195. See Neumann, *supra* note 122 (describing employee-employer relationship for DATWA purposes). For a further discussion of who employs NFL players, see *supra* note 76 and *infra* note 196 and accompanying text.

196. See CBA (2006), *supra* note 77 (providing member clubs of NFL, not NFL itself, employs players).

197. See *id.* (defining relationship between players and NFL and stipulating contractual terms).

198. For a further discussion of this "interpretation" vs. "consultation" dichotomy, see *supra* note 146 and accompanying text.

199. See Jeffrey Standen, *The Coming Federalization of Anti-Doping Policy*, SPORTS LAW PROFESSOR (Nov. 2009), http://thesportslawprofessor.blogspot.com/2009_11_01_archive.html [hereinafter "*The Coming Federalization*"] (juxtaposing different state and league policies).

200. See *Williams v. Nat'l Football League*, 582 F.3d 863, 877 (8th Cir. 2009) (describing ramifications for not holding DATWA to be preempted). "[T]he NFL argues that denying preemption and subjecting the Policy to divergent state regulations would render the uniform enforcement of its drug testing policy, on which it relies as a national organization for the integrity of its business, nearly impossible." *Id.*

201. See *Local 174, Teamsters, Chaukfeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (emphasizing importance and practicality of uniform law in interpreting collective bargaining agreements).

collective-bargaining agreement, a Consumable Products Act claim will be preempted.”²⁰² This commentator explained that although claims are not preempted if they do not allege that the employer violated the CPA, the employer could argue for preemption in state court.²⁰³ Another commentator noted that the CPA was not drafted with the intention to apply the Act to professional athletes.²⁰⁴ This point is particularly relevant, given the unique employment arrangement in professional athletics where “employees” work in over twenty states and directly compete against each other for national recognition.²⁰⁵ Most industries that boast employee records in more than one state do not facilitate direct competition between and among their employees.²⁰⁶

The “inextricably intertwined” argument applied to the DAWTA claims can similarly be applied to the CPA claim.²⁰⁷ Counsel for the NFL focused on the specific CPA language, “relates to a bona fide occupational requirement,” noting that the court could not determine if the provision applies without specifically consulting the CBA.²⁰⁸ Determining whether the NFL violated the players’

202. Hanson, *supra* note 21, at 364.

203. *See id.* (describing rationale for inevitable preemption in CPA claims involving CBAs).

204. *See* Koziol, *supra* note 7, at 157 (summarizing Minnesota legislature’s intended application of CPA and suggesting its limited application to professional sports leagues).

205. *See NFL Teams*, NFL, <http://www.nfl.com/teams> (last visited Sept. 25, 2011) (listing NFL teams by division). There are multiple states with more than one team, and some states with no professional football team. *See id.* (identifying teams by city and team name). The states with NFL teams include: Arizona, California, Colorado, District of Columbia, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Washington, and Wisconsin. *See id.* (listing names of cities that host NFL teams). *See NFL Schedule: Playoffs*, NFL, <http://www.nfl.com/schedules?seasonType=POST> (last visited Sept. 25, 2011) (providing example of NFL playoff schedule, indicating competition between teams for national recognition as Super Bowl champions).

206. *See* Koziol, *supra* note 7, at 157 (explaining NFL teams’ desires to compete among each other, rather than “drive each other out of business”).

207. For a further discussion of DATWA preemption argument, see *supra* notes 118-126 and accompanying text.

208. *See* Feldman, *supra* note 96, at 6 (“The NFL has a strong argument that a court would need to interpret the terms of the NFL collective bargaining agreement to determine if punishment for use of a particular drug related to a bona fide occupational requirement of the NFL. That is, the NFL has a persuasive claim that an analysis of the CPA’s ‘bona fide occupational requirement’ is inextricably intertwined with the terms of the collective bargaining agreement, and thus should be preempted.”).

CPA rights requires an interpretation of the CBA, the governing employment document.²⁰⁹

The *Williams* case presented a relatively novel issue for the Eighth Circuit, and certainly one that exposed weaknesses in the NFL's current policies.²¹⁰ In its petition for writ of certiorari, the NFL noted that the appeals court's analysis exacerbates conflict among circuit courts, thus necessitating Supreme Court review.²¹¹ The writ further charged that the Eighth Circuit's decision would subject the CBA to "conflicting . . . interpretations and enforcement . . . of a single collective bargaining agreement" which would "render[] uniform interpretation and operation of the collective bargaining agreement impossible."²¹² Thus, the *Williams* decision had the potential to cause far-reaching effects on professional athletics programs and their respective collective bargaining agreements.²¹³

The Eighth Circuit previously ruled on a few cases involving the intersection of section 301 and CBAs; however, the *Williams* decision reflects a deviation from the general trend of the circuit's holdings.²¹⁴ In both *Trustees* and *Gore v. Trans World Airlines*,²¹⁵ the court held that section 301 preempted the plaintiffs' claims due to the relationship between the plaintiff's claims and the CBA; in this genre of cases, the court must analyze whether the resolution of the state law claim depends on the language and meaning of the CBA.²¹⁶ To apply state laws to "evade compliance with [a CBA's]

209. See Koziol, *supra* note 7, at 156 (arguing CPA claim should have been preempted).

210. For a further discussion on lack of precedent for Eighth Circuit to follow in *Williams v. NFL*, see *supra* note 187 and accompanying text.

211. See *Williams v. Nat'l Football League*, 582 F.3d 863, 863 (8th Cir. 2009), *petition for cert. filed*, 2010 WL 1932622 (U.S. May 13, 2010) (No. 09-1380) (urging Supreme Court to hear case to settle inconsistencies in circuit courts).

212. *Id.*

213. For a further discussion of impact on professional sports leagues, see *supra* note 9 and *infra* note 255 and accompanying text.

214. See Broccoli, *supra* note 191, at 288-90 (describing some previous holdings of Eighth Circuit involving similar labor law issues and interpretations of CBAs).

215. 210 F.3d 944 (8th Cir. 2000).

216. See *Trs. of Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 334 (8th Cir. 2006) (holding plaintiff's claims inseparable from analysis of CBA). Superior, a caulking and waterproofing company, was a party to a collective bargaining agreement that required the company to provide monthly fringe benefits to employees. See *id.* at 327 (listing facts). Superior failed to comply with a fringe benefit audit, and Superior's owner claimed that he only wanted the CBA fringe benefits to apply, and thus would only make contributions for Union employees. See *id.* (describing circumstances of case). Superior argued that the action was not preempted under section 301; the Union charged that

terms under federal law” would eviscerate Congress’s goals of uniformity and equitable enforcement.²¹⁷ In *Bogan*, the Eighth Circuit provided an example of a state claim that did not require preemption since the plaintiff’s claim did not stem from the CBA.²¹⁸ Additionally, Supreme Court precedent mandates that state claims that involve interpretation of the relevant CBAs be strictly within federal jurisdiction.²¹⁹ This confusion about the consultation of the CBA

preemption was necessary. *See id.* at 329-30 (evaluating preemption). Ultimately, the Court upheld the district court’s finding that preemption was necessary, finding that the language of the CBA was at issue and the state law claims were “inextricably intertwined.” *See id.* at 334 (upholding district court holding, thus necessitating preemption). *See Gore v. Trans World Airlines*, 210 F.3d 944, 952 (8th Cir. 2000) (explaining plaintiff’s claims were inseparable from language of CBA, thus necessitating interpretation of CBA). This case involved a Trans World Airlines (TWA) employee who made threats about his life and the lives of his co-workers. *See id.* at 947 (describing facts of case). The TWA CBA contained language regarding prohibited conduct and banning firearm possession. *See id.* (expressing provisions of CBA). The employee, Gore, was eventually rehired after undergoing psychological evaluation, and he subsequently filed a state law claim. *See id.* at 948 (providing background on procedural posture). The court found that Gore’s claims were “inextricably intertwined” with the language of the CBA, thus necessitating preemption. *Id.* Gore did not reference the CBA in his complaint; however, his claims were based on his employer’s adherence to the terms of the CBA, thus creating inextricable intertwining with the CBA. *See id.* at 950 (discussing CBA and need for preemption). *See also Broccoli*, *supra* note 191, at 289 (describing holdings in *Trustees of Twin City Bricklayers Fringe Benefit Funds and Gore*).

217. *Trustees*, 450 F.3d at 334.

218. *See Bogan v. Gen. Motors Corp.*, 500 F.3d 828, 832-33 (8th Cir. 2007) (finding plaintiff’s claims not “inextricably intertwined,” and thus not preempted by section 301). A private investigator reported that plaintiff was selling and/or using drugs at General Motors during work hours. *See id.* at 829 (summarizing facts). The court stated that the CBA reflected her employer’s rights to termination; there was no language about employees’ rights upon termination. *See id.* at 833 (analyzing language regarding employee rights). Thus, her claim was not “inextricably intertwined” with the CBA. *See id.* (determining preemption not necessary). *See also Broccoli*, *supra* note 191, at 289 (describing facts of *Bogan* case and discussing lack of preemption).

219. *See Williams v. Nat’l Football League*, 582 F.3d 863, 863 (8th Cir. 2009), *petition for cert. filed*, 2010 WL 1932622 (U.S. May 13, 2010) (No. 09-1380), (referencing Supreme Court labor law cases that have required preemption when state law claims involve language of CBA). *See also e.g.*, *United Steelworkers v. Rawson*, 495 U.S. 362, 363 (1990) (concluding plaintiff’s tort claim pre-empted by section 301 because mine inspection procedure was tied to CBA despite fact that duty stemmed from inspection, not language of CBA); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988) (“[A]n application of state law is pre-empted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement.”); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 221 (1984) (holding when “resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law” and reversing Wisconsin Supreme Court decision); *Textile Workers Union v. Lincoln Mills*, 353

exposes the issues with the current definitions for preemption, and the unclear language of the frequently cited case law.²²⁰

While the court followed the *Allis-Chalmers* “inextricably intertwined” preemption test, its application of this test did not comport with other preemption cases.²²¹ The “inextricably intertwined” test is subjective and variable, as evidenced by disparate holdings and analyses of the meaning of this phrase.²²² The court improperly concluded that the Williamses’ claims were not sufficiently inextricably entangled with the NFL CBA to constitute or justify preemption.²²³

Further, as one legal analyst postured, the *Williams* decision contradicts prior section 301 analyses in NFL cases.²²⁴ This commentator summarized two NFL cases that involved tort allegations; in both cases, the athletes’ efforts to trump state law claims over NFL uniform policies were unsuccessful and the players’ claims were preempted.²²⁵ The *Williams* case was the first of its kind to test the boundaries of the NFL’s CBA when its policies rival state laws.²²⁶ This lack of precedent reiterates the need for Supreme Court evaluation to guide future preemption cases involving professional sports leagues’ CBAs.²²⁷

U.S. 448, 456 (1957) (holding federal law is appropriate legal standard for section 301(a) claims under Labor Management Relations Act).

220. For a further discussion of confusing preemption terminology, see *supra* notes 113-115 and *infra* notes 275-278 and accompanying text.

221. For a further discussion of *Allis-Chalmers Corp. v. Lueck* and other preemption cases, see *supra* notes 101-110 and accompanying text.

222. See Regina Goshern, Comment, *Section 301, Tortious Interference and the Sixth Circuit: Immunization for the Tortfeasor*, 82 U. DET. MERCY L. REV. 253, 261 (2005) (commenting on subjective nature of preemption test). For a further discussion of preemption cases, see *supra* notes 101-110 and accompanying text.

223. For a further discussion of the court’s preemption analysis and findings, see *supra* notes 136-171 and accompanying text.

224. See Koziol, *supra* note 7, at 142-44 (pointing out differences between *Williams* holding and trend of law). Ms. Koziol focused on *Stringer v. Nat’l Football League*, 474 F. Supp.2d 894 (S.D. Ohio 2007) and *Holmes v. Nat’l Football League*, 939 F. Supp. 517 (N.D. Tex. 1996). In both *Stringer* and *Holmes*, the respective courts held that the players’ (or their estates’) claims were preempted by section 301, as their claims were “inextricably intertwined” with the CBA. See *Stringer*, 474 F.Supp.2d at 900-01 (S.D. Ohio 2007) (introducing defendants’ claims and applying preemption test); *Holmes*, 939 F. Supp. at 527 (holding *Holmes*’ claims were inextricably intertwined with NFL CBA, and adjudication of *Holmes*’ allegation required interpretation of CBA). See also *Smith v. Houston Oilers, Inc.*, 87 F.3d 717, 718 (5th Cir. 1996) (holding all claims preempted by 301).

225. See Koziol, *supra* note 7, at 144 (considering trend of unsuccessful preemption claims to challenge court’s holding in *Williams*).

226. For a discussion of lack of precedent, see *supra* note 187 and accompanying text.

227. See e.g., John Krawczynski, *NFL Appealing StarCaps Case to US Supreme Court*, SIGN ON SAN DIEGO (May 13, 2010, 11:20 AM), <http://network.yardbarker>.

The *Williams* case, and the national attention it garnered, exposed weaknesses in the Supreme Court's preemption case law. The *Williams* case presented the novel issue of how to deal with state law claims that were not drafted with the intent of applying to specific employment arenas, as is the case with the Minnesota DATWA and CPA claims.²²⁸ The vague phrase of "inextricably intertwined" also leaves a gap in existing precedent that requires attention; this could be remedied by specifically outlining what is meant by this phrase when comparing state law claims to non-traditional union agreements.²²⁹ The forum decision in *Williams* was directly dependent upon interpretation of the preemption language; in fact, legal expert Professor Gabriel A. Feldman posited that a different court could have arrived at a different holding regarding the preemption questions.²³⁰

An evaluation under federal law would not guarantee a victory for the NFL, but rather a just evaluation of their arguments in the appropriate forum (federal rather than state court).²³¹ The tort claims in *Williams* required preemption, evidencing the relatively inextricable interconnection between many legal claims and the applicable CBA.²³² Given Supreme Court precedent, this was an appropriate conclusion; the tort claims could not be evaluated

com/nfl/article_external/nfl_appealing_starcaps_case_to_us_supreme_court/2587668 ("The NFL wants the case settled on the federal level to overrule the state court proceedings and establish that rules of the CBA are not subject to individual state laws."); Koziol, *supra* note 7, at 164, 167 (recommending that Supreme Court reverse Eighth Circuit's decision and supporting notion that precedent could alleviate confusion).

228. For a further discussion about inapplicability of DATWA and CPA to NFL claims, see *supra* notes 188-194,204 and accompanying text.

229. For a further discussion of unclear language of preemption doctrine, see *infra* notes 275-278 and accompanying text.

230. See Feldman, *supra* note 96, at 6 (discussing whether defenses can "serve as a basis for triggering preemption" and noting potential for inconsistent holdings among different courts in different states, evidencing possible inequities in application and interpretation of similar statutes in different states). "[A] different court within the Eighth Circuit could have reached a different conclusion in this case." *Id.* at 7. Feldman proceeded to state:

I do not believe that there is a clear 'right' answer with respect to the preemption issue, and the resolution of any claim will vary depending on the terms of the specific state statute at issue, but I do believe that a different court — even within the Eighth circuit — could have reached a different conclusion based on the same set of facts presented in the *Williams* case.

Id.

231. For a further discussion on appropriate venue for claims involving CBAs, see *supra* notes 91-110 and accompanying text.

232. For a further discussion of preemption and "inextricable intertwine-ment," see *supra* notes 91-110 and accompanying text.

without consulting the CBA.²³³ This is not to say that preemption should be uniformly instituted for all cases involving the NFL CBA, but the specificity of both the CBA and the Policy, particularly with regard to their drug provisions, necessitated its evaluation for both the DATWA and CPA claims in the *Williams* case.²³⁴

2. Policy Implications

The implications of this case, in addition to the national attention it garnered, are primarily grounded in policy rationale.²³⁵ The NFL has stressed the importance of a uniform policy – with professional football teams in twenty-two states, it would be impractical and inequitable for players in different states to abide by different drug rules.²³⁶ In fact, this idea of uniformity is the hallmark of the preemption doctrine.²³⁷ Enforcing uniform policies is important to the NFL, among other sports leagues, to maintain a fair and competitive playing field.²³⁸ The chief concern is to ensure that members of the NFL are not afforded physical advantages against opponents resulting from a more lenient state drug policy.²³⁹ The

233. For a further discussion of precedent, see *supra* notes 101-110 and accompanying text.

234. For a further discussion of background of NFL CBA and Policy and rationale behind preemption of DATWA and CPA claims, see *supra* notes 53-130 and accompanying text.

235. See Koziol, *supra* note 7, at 157-165 (suggesting larger implications of *Williams* decision, both in the NFL and outside the realm of professional sports, and potential for “disastrous ramifications”).

236. For a list of states with NFL teams, see *supra* note 205 and accompanying text. See *NFL Teams*, *supra* note 53 (listing current NFL team names and affiliated cities); Feldman, *supra* note 96, at 11 (“A professional sports league such as the NFL . . . has a heightened interest in maintaining a uniform performance enhancing drug policy. The reason for the heightened interest becomes clear when one identifies the product created by the NFL and its teams. The NFL is composed of autonomous, separately owned teams that compete with each other on a number of levels. Yet, these teams are also interdependent and cooperate in a number of areas. . . . [T]he NFL and its teams cooperate to create a season of games, including the playoffs and a championship game, involving teams that are relatively evenly matched and operate on a ‘level playing field.’ . . . A non-uniform performance enhancing drug policy might interfere with the ability of the league to maintain competitive balance.”).

237. For a further discussion of policy rationale behind preemption, see *supra* note 93 and *infra* note 277 and accompanying text.

238. See Feldman, *supra* note 96, at 11-12 (recognizing importance of national uniformity); Brief of Major League Baseball, Major League Soccer, L.L.C., The National Basketball Association, and the National Hockey League as Amici Curiae in Support of Petitioner, *Williams v. Nat’l Football League*, No. 09-1380 (Jun. 14, 2010) (describing negative impact *Williams* case could have on uniform drug policies of other national sports leagues with teams in more than one state).

239. See Robert L. Clayton & V. John Ella, *Federal Court Tackles NFL Drug Testing Program*, HACKNEY PUBLICATIONS (Oct. 9, 2009), <http://www.hackneypublica->

NFL is in a unique position because it seeks to promote competition among its associated entities rather than trying to create a monopoly of one entity over another.²⁴⁰ Most other national companies do not physically compete against other branches or teams of their employer.²⁴¹ The NFL argued that denying preemption, and instead deciding this case in state court, created inconsistencies between policies applied to players in Minnesota and players that played in any other state.²⁴² Anything less than a uniform standard could encourage “cherry-picking” among state standards.²⁴³

The purpose of section 301 preemption is to ensure uniform application of CBA provisions; the underlying rationale is that parties would be less motivated to engage in collective bargaining if there was a lack of uniformity in the meanings of the terms of the CBA.²⁴⁴ The *Williams* case illustrates the inherent issues with preempting NFL policies with individual state laws; although the Saints and Vikings players alike took bumetanide, the Saints players would have to serve suspensions for a first-time offense, while the Vikings players would not.²⁴⁵ If the Vikings and Saints had played each other following this case, the Williamses would have played while

tions.com/sla/archive/000925.php (commenting on importance of integrity of league and maintenance of level playing field).

240. See Koziol, *supra* note 7, at 157 (differentiating NFL from most other multi-state businesses). Most businesses that operate in more than one state are not fostering direct competition between the entities. See *id.* (commenting on unique nature of NFL).

241. See Clayton & Ella, *supra* note 239 (recognizing differences between NFL and most other employers, issue that complicates this preemption analysis).

242. See Jon Krawczynski, *NFL Appealing StarCaps Case to US Supreme Court*, HUFFINGTON POST (May 13, 2010), <http://www.huffingtonpost.com/huff-wires/20100513/fbn-nfl-suspensions/> (comparing Minnesota’s with other states’ drug policies). Specifically, the NFL’s brief charged that denying preemption “created one collectively bargained rule for NFL players in Minnesota and a different rule under the same collective bargaining agreement for all other NFL players.” *Id.*

243. See *Vikings, NFL To Face-Off in Court Over Doping Rule*, WFAA-TV (Mar. 8, 2010), <http://www.wfaa.com/sports/football/Vikings-NFL-To-Face-Off-In-Court-Over-Doping-Rule-86942012.html> (advocating for uniform standards rather than state-by-state discretion); see Feldman, *supra* note 96, at 14 (listing states whose policies conflict with NFL drug policy, suggesting broader scope of *Williams* issue). There are five states with drug policies that conflict with the NFL Policy; these states are Arizona, Louisiana, Maryland, Minnesota, and North Carolina. See *id.* (listing states with drug regulations that conflict with NFL Policy).

244. See Feldman, *supra* note 96, at 5 (explaining rationale for section 301 preemption and potential for conflicting interpretations of CBAs in accordance with varying state laws).

245. See James Alder, *StarCaps Ruling Could Give Vikings Unfair Advantage*, ABOUT.COM (Sept. 13, 2009), <http://football.about.com/b/2009/09/13/starcaps-ruling-gives-vikings-unfair-advantage.htm> (highlighting discrepancy in punishment between Saints players and Vikings players based on different state drug policies).

the Saints players, who had committed the same offense, were sidelined.²⁴⁶ A state could potentially change its drug policies to secure the additional money and resources that come with having a championship-winning team.²⁴⁷ Assuming this tactic was successful in the NFL, it could be adopted by other professional sports leagues.²⁴⁸ Thus, the *Williams* decision could create a precedent for changing state laws to reflect a particular team's desire to break the rules of the NFL CBA in a way the NFL could not police.²⁴⁹ Additionally, the integrity of the league is at stake; insinuations that the NFL kept information from players in an effort to trap them tarnishes the image of the league that was organized to monitor one of the nation's favorite pastimes.²⁵⁰

For a further discussion of Minnesota's "One Free Strike" rule, see *supra* notes 123-124 and accompanying text.

246. See Feldman, *supra* note 96, at 12 ("The NFL runs into a problem if the three Saints are suspended for four games, but the Vikings – because of Minnesota state law – cannot be suspended at all. It is 'unfair' to the Saints players that they were treated more harshly than the Vikings players for engaging in the same misconduct. But, perhaps more significantly, the more lenient treatment of the Vikings players gives the Vikings team a competitive advantage . . . on the field.")

247. See Koziol, *supra* note 7, at 157-58 (analyzing implications of *Williams* decision on league fairness and competitive advantage).

Other states can now perhaps manipulate the decision in *Williams* to possibly secure a competitive advantage for their respective home teams.

State legislatures could draft laws similar to Minnesota's CPA in order to ensure that professional sports team within its jurisdiction would be allowed to take performance enhancing drugs without recourse.

Id. at 158. See James Alder, *Super Bowl Player Bonus Shares*, ABOUT.COM, <http://football.about.com/od/histo2/a/SBbonus.htm> (last visited Oct. 12, 2011) (listing bonuses paid to winning and losing Super Bowl competitors).

248. See *Appeals Court Rules For Williamses*, ESPN (Sept. 11, 2009, 9:12 PM, <http://sports.espn.go.com/nfl/news/story?id=4464771>) (quoting Goodell's prediction that *Williams* could affect other leagues). Goodell expressed:

It is putting in jeopardy a drug program that has been in front of the entire world as being one of the highest standards of all sports. . . . It puts in jeopardy that players in Minnesota in any sport – this could affect other sports — are subject to a different standard than in the other 49 states. You recognize it is a fairness question for all athletes.

Id. See Koziol, *supra* note 7, at 158 ("International sports organizations, such as the Major League Baseball ('MLB') and the National Basketball Association ('NBA'), will now likely struggle to enforce a uniform set of rules in various states, since laws in different states can now seemingly outlaw the ability of the league to maintain an equal playing field."). For a further discussion on potential impact on other leagues, see *supra* note 238 and accompanying text.

249. See Koziol, *supra* note 7, at 158 (suggesting other areas of CBA for which states could change laws to accommodate teams' desires to take actions that would otherwise violate NFL policies).

250. For a further discussion of the accusations that NFL officials knew Star-Caps contained bumetanide and intentionally withheld this information, see *supra* notes 25-28 and accompanying text.

V. IMPACT

NFL Spokesman Greg Aiello called this lawsuit a “state law end-around that [could] undermine all anti-doping policies in sports.”²⁵¹ Representative Harry Waxman of California opined that the Eighth Circuit’s ruling makes the drug policy ineffective and inhibits the NFL from enforcing its own policies.²⁵² There is a potential for every state to have a different interpretation and application of the NFL’s CBA that hinges upon the respective state’s drug testing laws.²⁵³ Thus, the publicity and potential to significantly affect the efficacy of the NFL’s CBA and Policy made the resolution of this case an important goal for both the NFL and its players.²⁵⁴

This ruling could create an escape valve for athletes – players could challenge their suspensions under state law rather than complying with the CBA and Policy to which they are contractually committed.²⁵⁵ Going forward, it would be advantageous for employers to write their policies to require interpretation of the CBA or an applicable policy to resolve state law claims.²⁵⁶ A similar suggestion is to make the NFL’s Policy conform with the most stringent state policies; an employment and labor law newsletter opined, “[f]or all employers, and especially unionized employers and those with a

251. See *Vikings, NFL To Face-Off in Court Over Doping Rule*, *supra* note 243 (quoting Greg Aiello); *Williams Suspension Case: NFL Goes to Supreme Court to Overturn Minnesota Ruling*, ESPN (May 13, 2010, 8:46 PM), <http://sports.espn.go.com/nfl/news/story?id=5186165> (“The NFL’s brief said remanding the case to state court ‘created one collectively bargained rule for NFL players in Minnesota and a different rule under the same collective bargaining agreement for all other NFL players.’”).

252. See Wayne Coffey, *NFL Commissioner Roger Goodell finds Congressional Ally in Attempt to Suspend Two Vikings Players*, N.Y. DAILY NEWS (Nov. 3, 2009), http://www.nydailynews.com/sports/football/2009/11/03/2009-11-03_goodell_seeks_congressional_help.html (referencing Representative Waxman’s recommendations for maintaining authority and encouraging enforcement of NFL policies). Waxman predicted, “[i]f these rulings prevail, they could wreak havoc with policies designed to curb performance-enhancing drug use in professional sports . . . [the new] legal interpretations could render . . . drug-testing programs unenforceable, loophole-ridden and unacceptably weak and ineffective.” See *id.* (stating agreement with Goodell); see also Tracy, *supra* note 9, at 263 (discussing suggestions for congressional involvement in drug policies in professional sports leagues).

253. See Feldman, *supra* note 96, at 13 (predicting if Eighth Circuit’s holding becomes general trend, NFL would have to observe every state’s policies).

254. For a discussion of potential impact of *Williams v. NFL*, see *infra* notes 255-285 and accompanying text.

255. See Schmidt, *supra* note 9 (warning that ruling impinge upon league’s right to enforce their own discipline policies). For a further discussion on potential implications for other sports leagues, see *supra* note 248 and accompanying text.

256. See Deitchler, *supra* note 118 (strategizing ways policy writers could ensure preemption of claims).

multi-state presence, there is no substitute for reviewing personnel policies on a state-by-state basis to ensure they are in compliance with employment laws such as DATWA and the CPA.²⁵⁷ If Minnesota became the model state, NFL players could not be suspended for first time drug offenses.²⁵⁸ In some respects, this would eviscerate the value of having an organization draft its own CBA.²⁵⁹ Further, weakening the NFL drug policy to accommodate the states that have more lenient standards seems counterintuitive to the original intent of enacting drug regulations.²⁶⁰ This would also subject NFL drug laws to constant amendments, as state laws rarely remain static.²⁶¹

Some commentators also addressed the possibility of congressional involvement.²⁶² The sports leagues and the U.S. Anti-Doping Agency requested that Congress create a national drug testing standard and preclude players from challenging drug policy punishments in state courts.²⁶³ In November 2009, NFL Commissioner Goodell solicited congressional support, specifically that of the Energy and Commerce Committee and the House Subcommittee on Commerce, Trade and Consumer Protection, to implement such a

257. Deitchler, *supra* note 118. See Jeffrey Standen, *The Starcaps Case and the Impending NFL Labor Fight*, SPORTS LAW PROFESSOR (Sept. 21, 2009), <http://www.thesportslawprofessor.blogspot.com/2009/09/starcaps-case-and-impending-nfl-labor.html> (explaining possibility of creating “lowest common denominator” agreement); Feldman, *supra* note 96, at 13 (discussing possibility of instituting NFL policy that is only as strict as the most “lenient” or “employee-friendly” state policies); Koziol, *supra* note 7, at 165 (posing suggestion to write policy to comply with most stringent state standards).

258. See Minn. Stat. §§ 81.950-181.957 (2010) (outlining procedure for discipline of drug-related offenses in Minnesota under DATWA).

259. See Deitchler, *supra* note 118 (“[A]fter *Williams*, there will be few, if any, affirmative acts an employer may take in policy administration to assure preemption where state law provides so much detail regarding compliance requirements that a reviewing court would need merely to compare employer action to those requirements. CBAs, in other words, would add little in the way of interpretation except, possibly, with respect to mandatory statutory requirements for a written policy’s content.”).

260. For a further discussion of NFL drug policy, see *supra* notes 3, 71-62 and accompanying text. The StarCaps case has already “taken some of the shine off a once-respected NFL drug testing program.” Alex Marvez, *Starcaps Case is a Blow to NFL Drug Policy*, FOX SPORTS (Sept. 16, 2009, 3:51 PM), <http://msn.foxsports.com/nfl/story/Starcaps-case-is-a-blow-to-NFL-drug-policy>.

261. See Koziol, *supra* note 7, at 165 (referencing dynamic nature of state laws).

262. See e.g. Shepard, *supra* note 45, at 545-46 (summarizing NFL’s request to Congress to resolve issue through nationally-run drug testing).

263. See Mears, *supra* note 50 (mentioning suggestions filed by national professional sports leagues and U.S. Anti-Doping Agency); Clayton & Ella, *supra* note 239 (suggesting congressional oversight of drug policy administration).

standard.²⁶⁴ Goodell sought the application of the Policy in all fifty states, noting “a specific and tailored amendment to the Labor Management Relations Act is appropriate and necessary to protect collectively bargained steroid policies from attack under state law.”²⁶⁵

A separate bill, the Clean Sports Protection Act, was introduced in September 2010 in response to the *Williams* litigation; however, this bill never became law, thus leaving the NFL susceptible to future preemption cases.²⁶⁶

In March 2011, Kevin Williams ceased legal action appealing his suspension; Pat Williams continued to appeal to the Minnesota Supreme Court.²⁶⁷ As of April 2011, the *Williams* case was resolved, when a federal judge dismissed the players’ claims and upheld their suspensions.²⁶⁸ On April 28, 2011, the Minnesota Supreme Court issued an order denying review of an appeals court decision favoring the NFL’s suspensions of the players, thus concluding years of

264. See Daniel Hauptman, Comment, *The Need for a Worldwide Draft to Level the Playing Field and Strike Out the National Origin Discrimination in Major League Baseball*, 30 LOY. L.A. ENT. L. REV. 263, 290 (2010) (mentioning Commissioner Goodell’s appeal to Congress). Goodell requested that Congress “change federal labor laws to prevent states from interfering with the league’s efforts to enforce its banned substances policy.” *Id.*

265. *Goodell Wants Law Changed*, BOSTON.COM (Nov. 3, 2009), http://articles.boston.com/2009-11-03/sports/29260785_1_steroid-policies-state-court-roger-goodell; see Coffey, *supra* note 9 (quoting Goodell’s statement before Congress regarding uniform NFL steroid policies).

266. See Clean Sports Protection Act, S. 3851, 111th Cong. § 2 (2010) (proposing legislation to govern preemption between sports league policies and state law policies). This bill was introduced on September 28, 2010 by Senator Byron Dorgan and was a direct response to the *Williams* case. See *Senate Bill Would Strengthen Sports Drug League Problems*, NFL (Sept. 28, 2010), <http://www.nflcommunications.com/2010/09/28/senate-bill-would-strengthen-sports-league-drug-programs/> (summarizing content of proposed legislation and citing NFL support). “The bill is a federal legislative response to the ‘StarCaps’ case in Minnesota and means that, if passed, drug testing programs would pre-empt state laws if these programs are more likely to detect performance enhancing drugs.” *Id.* The bill was introduced and referred to the Senate Committee on Commerce, Science, and Transportation; however, neither the Senate nor House voted on the bill. See S. 3851: *Clean Sports Protection Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s111-3851> (last visited Oct. 10, 2011) (condensing status of bill).

267. See Jeremy Fowler, *Kevin Williams Opts Not to Appeal Latest StarCaps Ruling, Takes One Step Closer to Missing Four Games in 2011*, TWIN CITIES (Mar. 10, 2011, 8:29 PM), <http://blogs.twincities.com/Vikings/2011/03/kevin-williams-opts-not-to-app.html> (addressing Pat Williams’ and Kevin Williams’ respective decisions regarding pursuing StarCaps appeals).

268. See Jason Cole, *NFL Wins StarCaps case*, YAHOO SPORTS (May 23, 2011), <http://www.sports.yahoo.com/nfl/news?slug=jc-nflstarcaps052309> (reporting federal court holding in StarCaps litigation).

litigation for the NFL and the Williamses.²⁶⁹ Ultimately, the Williamses served two game suspensions and paid fines of two game checks at the beginning of the 2011-2012 NFL season.²⁷⁰

The CBA under which the *Williams* case was evaluated was set to expire in March 2011, providing the NFL an opportunity to rewrite their policies to accommodate the suggestions posed by a number of commentators.²⁷¹ The NFL could have drafted language in the new CBA to prevent similar preemption issues from arising in the future.²⁷² Under the newly negotiated CBA, testing positive for diuretics carries a two-game suspension punishment; in fact, Kevin Williams benefitted from this “more nuanced penalty system.”²⁷³ Thus, the NFL made some changes to the CBA to reflect the issues the *Williams* case exposed, but it did not remedy this issue completely.²⁷⁴

269. See Smith, *supra* note 15 (“The Minnesota Supreme Court has just issued this morning an order denying a review of the appeals court decision that went in favor of the league. . . . The result is the case is over and we, the NFL, prevailed in the case. So there is a court in Minnesota that rules in our favor from time to time.”). See generally *Williams v. Nat’l Football League*, 582 F.3d 863, 868, 874-86 (8th Cir. 2009), *rehearing and rehearing en banc denied*, 598 F.3d 932 (affirming district court’s holding, rejecting NFL’s claims for preemption of DATWA and CPA claims, finding players’ state law claims preempted, and denying Union’s claim advocating arbitration awards be vacated.); *Nat’l Football League v. Williams*, 582 F.3d 863, 863 (8th Cir. 2009), *cert. denied*, 131 S.Ct. 566 (2010) (denying petition for writ of certiorari to United States Court of Appeals for Eighth Circuit).

270. See *NFL Suspends Vikes’ Williams, Saints’ Smith in StarCaps Case*, NFL.COM (Sept. 2, 2011, 1:16 PM), <http://www.nfl.com/news/story/09000d5d821ea898/article/nfl-suspends-vikes-williams-saints-smith-in-starcaps-case> (updating punishment imposed on Williamses for drug policy violation). Kevin Williams sat out of the first two Vikings games of the 2011-2012 season; Pat Williams served his suspension while unsigned. See Mike Florio, *StarCaps Suspensions Finally are Finalized*, NBC SPORTS (Sept. 2, 2011, 5:07 PM), <http://profootballtalk.nbcsports.com/2011/09/02/starcaps-suspensions-finally-are-finalized/> (reporting ultimate punishments for players who took StarCaps).

271. See Brian Galliford, *NFL CBA Set To Expire This Evening As Lockout Looms*, SB NATION (Mar. 3, 2011, 8:00 AM), <http://www.buffalorumblings.com/2011/3/3/2026997/nfl-lockout-cba-negotiations-deadline> (reporting anticipated expiration of NFL CBA and expected lockout). For a further discussion of commentators’ suggestions, see *supra* notes 256-266 and accompanying text.

272. For a further discussion of the *Williams* case timeline, see *supra* notes 267-270 and accompanying text.

273. See *NFL Suspends Vikes’ Williams, Saints’ Smith in StarCaps Case*, *supra* note 270 (comparing two game suspension for diuretics with previous CBA’s four game suspension policy).

274. See Kevin Seifert, *Costly Challenge for Vikings’ Kevin Williams*, ESPN (Sept. 2, 2011, 4:46 PM), http://espn.go.com/blog/nfcnorth/post_/id/305561/costly-challenge-for-vikings-kevin-williams (noting change in sanction duration under new CBA). The previous CBA provided for four-game suspensions; the new CBA has a two-tiered system that differentiates between diuretic and drug use. See *id.* (commenting on change in policy). See generally *Collective Bargaining Agreement*,

Furthermore, the language of section 301 is confusing and difficult to apply in a non-traditional union setting.²⁷⁵ As one Berkeley Law professor posited,

Preemption under section 301 of the Labor Management Relations Act has been described as a ‘thicket,’ a ‘tangled and confusing interplay between federal and state law’ and ‘one of the most confusing areas of federal court litigation.’ Despite recent efforts by the United States Supreme Court to eliminate the confusion, lower federal courts and state courts continue to struggle with this issue.²⁷⁶

The preemption doctrine, itself, is grounded in policy rationale.²⁷⁷ Even the landmark phrase “inextricably intertwined” lacks a uniform definition or standard, as evidenced by incongruent holdings by various courts.²⁷⁸ Creating a uniform definition of “inextricably intertwined” could alleviate some existing confusion about the requisite level of “interpretation” vs. “consultation” required to justify preempting a state law claim.²⁷⁹ This solution could benefit not

NFL (2011), <http://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> (lacking provisions to remedy preemption issue).

275. See Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 515 (2010) (calling preemption doctrine “thin and confusing”); David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1146 (1999) (“Supremacy Clause preemption cases turn on questions of statutory interpretation . . . they have proven just as vexing to the courts as have Commerce Clause cases, and have produced an equally conflicted and fractured body of case law.”).

276. Adams, *supra* note 93, at 107.

277. See Stein, *supra* note 112, at 3 (analyzing Supreme Court policy rationale advocating uniformity). Stein notes:

The Supreme Court has interpreted section 301 as authorizing the federal courts to create a body of federal common law governing the enforcement of collective bargaining agreements. The preemption argument, which the Supreme Court has accepted, is that allowing covered employees to bring certain state law claims would conflict with the purposes behind having this federal common law. Specifically, the Supreme Court has argued that permitting such suits could undermine the goal of having a single uniform law to govern their interpretation of collective bargaining agreements, and could undermine the role of the arbitrator as the principal interpreter of such agreements.

Id.

278. For a further discussion of application of “inextricably intertwined” and disparate application of this term, see *supra* notes 220-223 and accompanying text.

279. For a further discussion of this “interpretation” vs. “consultation” dichotomy, see *supra* notes 147-148 and accompanying text.

only professional sports leagues, but also any employer who relies on a CBA.²⁸⁰

Regardless of the upshot of the *Williams* case, it is undeniable that this case has garnered, and will continue to garner, national attention and has the potential to drastically change the process of drafting CBAs.²⁸¹ As preemption law is primarily judge-made, a sound resolution of this case would have been to create Supreme Court precedent for section 301 as it applies to professional sports leagues' CBAs.²⁸² However, on November 8, 2010, the Supreme Court of the United States denied certiorari, thus halting the NFL's efforts to create a national precedent regarding preemption of professional sports leagues' agreements.²⁸³

Only time will tell how greatly this case will impact the realm of professional sports leagues and their collective bargaining agreements. The fact that the Supreme Court of the United States denied certiorari and the new NFL CBA did not account for the *Williams* debacle suggests that the issue of preemption could arise again soon.²⁸⁴ If the *Williams* case becomes the legal trend, professional sports leagues could embark on a slippery slope of pardoning

280. See Koziol, *supra* note 7, at 160-61 (expounding upon wider implications of *Williams* and potential effect on employers who rely on CBAs); *National Football League v. Williams*, ASU SPORTS & ENTERTAINMENT LAW BLOG (Oct. 29, 2010), <http://asusportslaw.wordpress.com/2010/10/29/national-football-league-v-williams/> ("This case should be a very interesting one to keep an eye on. The resolution of these issues will affect more than just the Williams's fate – it will have resonating implications on the rest of the League and its power to regulate and enforce rules in various States.").

281. See Koziol, *supra* note 7, at 160-61 (suggesting potential impact on drafting of future CBAs).

282. See *id.* at 164 (reiterating preemption concept is judge-made). "Some have speculated that because the preemptive scope of labor law is judge-made, it is possible that the Supreme Court will hear the case and expand the scope of Section 301 preemption." *Id.* at 164. For an additional perspective on preemption as judge-made law, see *supra* note 111 and accompanying text.

283. See SCOTUS BLOG, *supra* note 50 (referencing United States Supreme Courts' denial of certiorari); *NFL Wants Supreme Court to Settle the StarCaps Case*, STEROIDSOURCES.COM (May 17, 2010, 8:13 PM), <http://www.steroidsources.com/Steroid-Information/2010/05/nfl-wants-supreme-court-to-settle-starcaps-case/> (discussing NFL's appeal to Supreme Court of the United States to hear case and create precedent).

To avoid a similar StarCaps case in the future, the NFL asks the Supreme Court to make a ruling in favor of their drug policies. They are hoping that the high court will recognize the internal policy of the league as well as other sports organizations despite differing state laws and guidelines. SCOTUS BLOG, *supra* note 50

284. For a further discussion of potential residual effects of lack of Supreme Court precedent for professional sports leagues' CBAs and specific provisions under new CBA, see *supra* notes 273-274, 282-283 and accompanying text.

players for illegal conduct and wreaking havoc on the competitive nature of these leagues.²⁸⁵

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285. See Hanson, *supra* note 21, at 372 (speculating impact of *Williams* case on competition and integrity of professional sports). See generally Brief of Major League Baseball et al., *supra* note 238 (stating goal of fair competition and supporting NFL's position regarding uniform enforcement of drug policies).

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