

**United States House of Representatives Committee on Energy and Commerce  
Subcommittee on Commerce, Trade, and Consumer Protection  
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**The NFL StarCaps Case:  
Are Sports' Anti-Doping Programs at a Legal Crossroads?**

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I would like to thank Chairman Rush, the House Subcommittee on Commerce, Trade, and Consumer Protection and their staffs for inviting me to participate in this hearing to discuss the implications of the United States Court of Appeals for the Eighth Circuit's recent decision in *Williams v. NFL*.<sup>1</sup> My name is Gabriel Feldman and I am a law professor at the Tulane University School of Law and the Director of the Tulane Sports Law Program. My research and teaching focuses on sports law and the sports industry and its intersection with a number of areas of substantive law, including antitrust, labor, and intellectual property. Prior to joining the Tulane faculty in 2005, I served as an associate for five years at Williams & Connolly LLP, where I represented a number of clients in the sports industry.

*Williams v. NFL* raises a potentially significant issue regarding the interplay between state statutory drug testing laws and the performance enhancing drug ("PED") testing policies contained in the collective bargaining agreements of professional sports leagues. In *Williams*, two players for the Minnesota Vikings (the "Williamses") and three players for the New Orleans Saints were suspended for violating the NFL Policy on Anabolic Steroids and Related Substances (the "NFL PED Policy"). The Williamses argued, among other things, that the suspensions violated their rights under Minnesota's statutory workplace drug laws—the Drug

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<sup>1</sup> 582 F.3d 863 (8th Cir. 2009).

and Alcohol Testing in the Workplace Act (“DATWA”) and the Consumable Products Act (“CPA”) (collectively, the “Minnesota Laws”). The NFL argued that the DATWA and CPA claims were preempted by the terms of the collectively bargained NFL PED Policy. The Eighth Circuit disagreed with the NFL, concluding that the Williamses can challenge their suspensions under the Minnesota Laws.

It is important to emphasize that the Eighth Circuit did not hold that the NFL PED Policy violates Minnesota state law. Instead, the court only held that the Williamses may challenge their suspensions in Minnesota state court under state law.<sup>2</sup> A Minnesota state court will thus determine if the NFL is able to suspend two of its players for violating their collectively bargained performance enhancing drug policy. A determination by the Minnesota state court that the NFL PED Policy violates Minnesota state law may present a problem for the NFL for two reasons: First, the Minnesota Laws are intended to provide uniform regulations for recreational drug testing of employees working for businesses located in Minnesota. In contrast, the NFL PED Policy is designed to provide uniform regulations for PED testing of NFL football players throughout the country. In other words, the Minnesota Laws were never intended to apply to the testing of PEDs in professional sports leagues; the Minnesota Laws and the NFL PED Policy were designed to protect very different interests. Second, application of the Minnesota Laws in this case could threaten the ability of the NFL to maintain a strict, uniform performance enhancing drug testing policy.

Yet, because the state court has yet to determine whether the NFL suspensions violate Minnesota state laws, this is still only a *potential* problem. It is also only a narrow potential problem—even if the state court rules that the suspensions must be lifted because they violate

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<sup>2</sup> The Eighth Circuit has not yet ruled on the NFL’s request for an *en banc* rehearing. Pending the Eighth Circuit’s decision on rehearing, the Minnesota state court is scheduled to hear the case next year.

Minnesota law, this case only means that the NFL PED Policy conflicts with one state's law.

That is, this case only involves one federal court of appeal's interpretation of the application of one state's law to the NFL PED Policy.

This narrow potential problem warrants a very narrow solution, and many steps should be taken before Congress intervenes. The most appropriate—and simple—solution is for the NFL to litigate the case in state court and convince the court that the Minnesota Laws were not intended to apply to the NFL PED Policy and that the suspensions do not violate the Minnesota Laws. If that suit is unsuccessful, the NFL should seek an exemption from the state legislature that makes it clear that the Minnesota Laws do not apply to the NFL PED Policy. If that fails, the NFL and the players association should try to bargain around the Minnesota Laws. If that fails, then, only as a last resort, Congress should consider passing a narrow federal law that will protect the NFL PED Policy and similar policies in other leagues from interference from state drug testing statutes such as the Minnesota Laws. At this point, since we are only dealing with a potential problem, it would be premature for Congress to take any action.

My testimony will thus focus on three areas. First, I will briefly discuss the Eighth Circuit's decision and address whether the court reached the correct result, or, more specifically, whether a different court could reach a different result if faced with the same set of facts in the future. Second, I will discuss how the Eighth Circuit's ruling—and the imposition of state drug testing laws on the NFL— might impact the ability of the NFL and other similarly situated leagues to effectively maintain and enforce performance enhancing drug policies. Third, I will discuss possible solutions to remedy the potential problem created by the Eighth Circuit's decision.

## **I. Did the Eighth Circuit Reach the Correct Result?**

To be clear, as I previously discussed, the Eighth Circuit did not rule that the suspension of the Williamses violated Minnesota state law. The court only determined that a Minnesota state court gets to decide if the suspensions violated Minnesota state law. Although, as I discuss later, this creates a potential problem for the NFL, I do not believe that the Eighth Circuit decided *Williams v. NFL* incorrectly. In other words, I do not believe that Congress needs to act to fix the Eighth Circuit's mistake, because the court did not make a mistake. While a different court could have reached a different conclusion, I do not believe there is a clear "right" or "wrong" answer here. I will discuss the two primary legal arguments in turn.

### **A. Section 301 Preemption**

The Eighth Circuit held that the Minnesota Laws were not preempted by Section 301 of the Labor Management Relations Act (the "LMRA"), and thus the Williamses could challenge their suspensions under the state laws. Did the Eighth Circuit correctly decide the preemption issue? The short answer is—perhaps. Section 301 preemption is a fact-specific inquiry that does not provide courts with a clear, bright-line rule.<sup>3</sup>

Under Section 301, the terms of a collective bargaining agreement preempt state law claims that are either "inextricably intertwined" with an examination of the terms of the collective bargaining agreement or that are "substantially dependent upon analysis of the terms

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<sup>3</sup> See, e.g., *Cramer v. Consolidated Freightways*, 255 F.3d 683, 691 (9th Cir. 2001) ("The demarcation between preempted claims and those that survive § 301's reach is not, however, a line that lends itself to analytical precision.").

of an agreement made between the parties in a labor contract.”<sup>4</sup> In other words, Section 301 preempts any state claim “whose outcome depends on analysis of the terms of the agreement.”<sup>5</sup>

The primary rationale for Section 301 preemption is to ensure the “uniform interpretation of collective bargaining agreements” and to “promote the peaceable consistent resolution of labor-management disputes.”<sup>6</sup> The basic theory is that parties would have a reduced incentive to reach agreement through collective bargaining if the terms of the collective bargaining agreement might be subject to different meanings depending on a particular state law. Section 301 preemption thus allows for a more consistent application and interpretation of the terms of the collective bargaining agreement and is integral for promoting, encouraging, and protecting collective bargaining and collective bargaining agreements.

Nevertheless, there are limitations to Section 301 preemption. The terms of a collective bargaining agreement will not preempt state law where the state law claim confers substantive rights on the party that exist independently of the collective bargaining agreement.<sup>7</sup> That is, 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.

In *Williams v. NFL*, the Eighth Circuit held that the Minnesota Laws were not preempted because those laws created substantive rights that existed independently of the NFL PED Policy. In other words, determination of the Williamses’ claims under the Minnesota Laws did not

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<sup>4</sup> *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 220 (1985).

<sup>5</sup> *IBEW v. Hechler*, 481 U.S. 851, 854 (1987).

<sup>6</sup> *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 404 (1988).

<sup>7</sup> *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988).

require a court to interpret any terms of the NFL collective bargaining agreement or the NFL PED Policy. Rather, in order to resolve the claims brought under the Minnesota Laws, a judge would need only to refer to the facts of the case and to the state statutes—not the league rules.

While there is support for the Eighth Circuit’s holding, a different court in a different jurisdiction could certainly reach a different conclusion and determine that the state law claims were inextricably intertwined with the terms of the collective bargaining agreement. This conclusion is perhaps strongest with respect to a possible claim under the CPA. Under the CPA, an employer may only discipline employees for using lawful products<sup>8</sup> if the prohibition of the use of such product “relates to a bona fide occupational requirement.” 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.

The Eighth Circuit disagreed, however, concluding that the bona fide occupational requirement clause did not trigger preemption because the clause provided only a defense to liability under the CPA, and defenses cannot serve as a basis for triggering preemption. In other words, the Eighth Circuit held that an employer’s defenses are irrelevant for the Section 301 preemption issue. Instead, only the underlying claims of the employee can trigger preemption. Significantly, however, the Eighth Circuit noted that there was a conflict within the circuit regarding that rule. That is, some courts within the Eighth Circuit (as well as courts in other

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<sup>8</sup> Some lawful products are included in the list of banned substances in the NFL PED Policy.

circuits)<sup>9</sup> have held that an employer's defenses *should* be considered as part of the preemption analysis. Thus, a different court within the Eighth Circuit could have reached a different conclusion in this case.<sup>10</sup>

I do not believe 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.

#### B. Dormant Commerce Clause

Interestingly, the NFL may have a stronger argument than preemption. The league can also argue<sup>11</sup> that the Dormant Commerce Clause prevents the application of the Minnesota State Laws to the NFL PED Policy.

The Commerce Clause provides the federal government with the power to regulate interstate commerce, and also restricts the ability of states to regulate commerce among the states.<sup>12</sup> The restriction on the states, known as the Dormant Commerce Clause, invalidates state legislation if it discriminates against or unduly burdens interstate commerce. In determining if the state statute is unduly burdensome, a court will balance the state's interest with the impact of the statute on interstate commerce. Here, the NFL could argue that any interest Minnesota has in regulating the use of PEDs by professional athletes playing for its home teams is outweighed by

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<sup>9</sup> See *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142, 1146 (9th Cir. 1988).

<sup>10</sup> The preemption claim regarding the DATWA claim is not as strong as the claim regarding the CPA claim, but there is at least an argument that the DATWA claims are also inextricably intertwined with the NFL collective bargaining agreement.

<sup>11</sup> Although the Eighth Circuit did not address the dormant commerce clause argument in its opinion, the NFL may in fact have raised the dormant commerce clause argument.

<sup>12</sup> U.S. CONST. art. I, § 8, cl. 3.

the negative impact its state drug laws will have on the ability of the NFL to maintain a uniform PED policy.

Notably, courts have used the Dormant Commerce Clause to strike down state statutes that interfered with the uniform, interstate operation of sports leagues and associations in other contexts. For example, Curt Flood's state antitrust attack against baseball's reserve clause was rejected because the burden on the interstate operation of baseball outweighed the state's interest in regulating baseball's reserve system.<sup>13</sup> In rejecting Flood's state antitrust claim, the Second Circuit highlighted the problem with applying individual state laws to an interdependent, interstate industry like Major League Baseball:

[W]here the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extra-territorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce.<sup>14</sup>

Similarly, a California state court relied on the Dormant Commerce Clause to reject the city of Oakland's attempt to use a state eminent domain statute to prevent the Raiders from relocating

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<sup>13</sup> *Flood v. Kuhn*, 443 F.2d 264, 267-68 (2d Cir. 1971). The Supreme Court affirmed the Second Circuit's decision. See *Flood v. Kuhn*, 407 U.S. 258 (1972).

<sup>14</sup> A California court reached the same conclusion in rejecting a state antitrust challenge to a term of the NFL collective bargaining agreement. See *Partee v. San Diego Chargers Football Co.*, 688 P.2d 684, 677-79 (Cal. 1983). The court noted:

Professional football is a nationwide business structured essentially the same as baseball. Professional football's teams are dependent upon the league playing schedule for competitive play, just as in baseball. The necessity of a nationwide league structure for the benefit of both teams and players for effective competition is evident as is the need for a nationally uniform set of rules governing the league structure. Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business enterprise, and differing state antitrust decisions if applied to the enterprise would likely compel all member teams to comply with the laws of the strictest state.

*Id.*

out of Oakland, noting that the exercise of eminent domain would have been unduly burdensome on the interstate operation of the NFL.<sup>15</sup>

The Ninth Circuit has also invalidated a Nevada statute that granted certain procedural rights to students under investigation by National Collegiate Athletic Association (“NCAA”) institutions.<sup>16</sup> The court recognized that the NCAA schools were interdependent—they agreed on certain rules governing the game, athlete eligibility, etc.— and that the uniform application of rules regarding student-athlete eligibility was important for maintaining a level playing field. The court thus found that the Nevada statute was invalid because it would force the NCAA “to regulate the integrity of its product in every state according to Nevada’s procedural rules.”<sup>17</sup>

These are precisely the types of arguments the NFL could make in challenging the application of the Minnesota Laws to its PED policy. Granted, courts have recognized that states have a greater interest in regulating and protecting the health of its citizens than in regulating areas such as antitrust law. Thus, the NFL may have a more difficult argument when the state regulation involves drug testing, because the state can argue that the regulations are necessary to protect the health and privacy of its citizens. But, that claim is weakened in the *Williams* case by the fact that Minnesota’s laws are designed to regulate recreational—not performance enhancing—drug use. That is, the NFL can argue that Minnesota has no real interest in regulating the testing of performance enhancing drugs, so the Minnesota Laws should not be used to interfere with the NFL’s interest in maintaining a national performance enhancing drug testing policy.

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<sup>15</sup> *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414 (Cal. Ct. App. 1985). The court noted that “relocation of the Raiders would implicate the welfare not only of the individual team franchise, but of the entire League. The specter of such local action throughout the state or across the country demonstrates the need for uniform, national regulation.”

<sup>16</sup> *Nat’l Collegiate Athletic Ass’n v. Miller*, 10 F.3d 633 (9th Cir. 1993).

<sup>17</sup> *Id.* at 639.

Thus, the NFL and other leagues might be able to prevail on a dormant commerce clause argument if another case arises (or, if the Eighth Circuit agrees to rehear the *Williams* case) where a state law claim is brought against discipline imposed by a league performance enhancing drug policy. Nevertheless, there are no clear “right” answers to the Section 301 or dormant commerce clause questions—the appropriate answer will vary from case to case and statute to statute.

## **II. Does the Eighth Circuit’s Decision Present a Problem for the NFL and Other Similarly Situated Sports Leagues?**

The Eighth Circuit’s decision does not pose a problem yet for the NFL because the court only held that the Minnesota state court gets to determine if the suspensions violate Minnesota state law. If the state court concludes that the suspensions must be lifted because they violate state law, then the state court’s ruling poses a problem for the NFL and other similarly situated sports leagues because that ruling may jeopardize the ability of the leagues to enforce a strict and uniform performance enhancing drug policy. To be clear, there are two different issues here: First, imposition of the Minnesota Laws interferes with the uniformity of the NFL PED Policy. Second, as I will discuss later, the Minnesota Laws were never intended to apply to the performance enhancing drug testing policy of a professional sports league.

### **A. The Importance of Maintaining a Uniform Performance Enhancing Drug Policy**

As a general matter, it is advisable for any company in any industry—sports or not—to uniformly apply its drug policies. Uniformity ensures fairness—all persons who engage in a particular type of misconduct will receive the same punishment. The need for uniformity is

heightened, however, in professional team sports. A (non-sports league) business that has offices in multiple states throughout the country would prefer to have a uniform drug testing policy for its employees. For example, consider a corporation that has offices in 10 different states. A uniform drug policy not only allows for equal treatment of all the corporation's employees, but is also more efficient for the corporation—it allows it to create a single policy that applies to all employees. The uniform policy is therefore easier to create and also to enforce, as the corporation only needs to refer to one set of rules that are consistently applied throughout the corporation.

A professional sports league such as the NFL, however, 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. For example, on the most basic level, the teams must cooperate to agree on a time and place to play the game and on a set of rules that will define the game itself.<sup>18</sup> The NFL, however, does not merely create an unrelated series of football games. Rather, the 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.” That is, the NFL and

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<sup>18</sup> For example: How long is each game? How does a team score points? What constitutes a penalty or foul within the game? How many timeouts does each team get? Where will the teams play? When will the teams play?

the other leagues seek to achieve a level of competitive balance among its teams that will help ensure fan interest in the sport.<sup>19</sup>

A non-uniform performance enhancing drug policy might interfere with the ability of the league to maintain competitive balance. The *Williams* saga is a perfect example of how non-uniformity might have an impact on the competitive balance of the league. The two players on the Vikings used the same banned substance, under the same general circumstances, as the three players from the Saints. 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 (or puts the Saints at a competitive disadvantage) on the field. In other words, non-uniform treatment of the players has the potential to inhibit the NFL’s ability to create its product—competitively balanced football games.

Maintaining a uniform policy is also a key factor for ensuring that the NFL PED Policy is effective. There is little question at this point regarding the importance of a strict and effective policy for policing, preventing, and deterring the use of PEDS by athletes.<sup>20</sup>

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<sup>19</sup> In other contexts, courts have long recognized that professional sports leagues have a legitimate interest in maintaining the competitive balance of their teams. *See, e.g.,* *Salvino v. MLB*, 542 F.3d 290, 332 (2d Cir. 2008); *Mackey v. National Football League*, 543 F.2d 606, 610 (8th Cir. 1976).

<sup>20</sup> The California Supreme Court summed up well the importance of a strict drug testing policy for the NCAA:

[T]he practical realities of NCAA-sponsored athletic competition cannot be ignored. Intercollegiate sports is, at least in part, a business founded upon offering for public entertainment athletic contests conducted under a rule of fair and rigorous competition....A well announced and vigorously pursued drug testing program serves to:

B. How the Eighth Circuit's Ruling Could Jeopardize the Uniformity of League Performance Enhancing Drug Policies

The NFL and other major professional sports leagues have achieved a uniform performance enhancing drug testing policy through the collective bargaining process. The Eighth Circuit's ruling, however, may permit a Minnesota state court to threaten the ability of the NFL to maintain this uniform policy. According to the Eighth Circuit, the collectively bargained PED Policy of the NFL does not override Minnesota's state statutes governing the drug testing of employees in the workplace. According to the Eighth Circuit's reasoning, the NFL must comply with the various protections and provisions provided for by the relevant Minnesota statutes. If courts in other jurisdictions agree with the Eighth Circuit's ruling, then the NFL will also have to comply with the various protections and provisions provided for by every other applicable state employee drug testing statute.

The implications of such a ruling—for the NFL and other professional sports leagues—are fairly clear. In order to have a uniform Policy, the NFL must ensure that every provision of its NFL PED Policy complies with every provision of every applicable state statute. In other words, the NFL PED Policy can only be as strict as the most lenient, or “employee-friendly,” policy. And, in a sense, the states would be able to dictate how the NFL performs its performance enhancing drug tests. For example, if Minnesota state law does not allow an employer to discipline an employee for a positive drug test without first allowing the employee

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(1) provide a significant deterrent to would-be violators, thereby reducing the probability of damaging public disclosure of athlete drug use; and (2) assure student athletes, their schools, and the public that fair competition remains the overriding principle in athletic events. Of course, these outcomes also serve the NCAA's overall interest in safeguarding the integrity of intercollegiate athletic competition.

Hill v. National Collegiate Athletic Assn. 7 Cal.4th 1, 46 (Cal. 1994).

to provide an explanation for the positive test, the NFL must also allow all of its players to provide an explanation for the positive test. If the NFL's Policy did not allow the players to provide an explanation, the Minnesota players would be subject to a different set of rules than the other players, and thus the uniformity of the policy would be destroyed. Similarly, assume, for the sake of argument, that Florida enacted a state workplace drug testing law that did not permit an employee to be suspended from his job for more than one day for a first offense. The NFL would have to adopt the same provision for all of its players—otherwise players on the Jaguars, Dolphins and Buccaneers would be subject to a different set of rules. Thus, uniformity can only be achieved by examining every state or local drug testing law and ensuring that the NFL's policy complies with every facet of every one of these laws. As I discuss later, this result would be particularly problematic because the league would be forced to comply with state statutes that were not intended or designed to govern PED testing for professional athletes.

### C. Number of States with Potentially Conflicting Drug Testing Laws

The obvious question then becomes—how many states have drug testing laws that might conflict with the NFL PED Policy? Of the 23 states that are home to an NFL team, only 5 (Arizona, Louisiana, Maryland, Minnesota, and North Carolina) have any form of mandatory statutory workplace drug regulations, and only 3 of those (Maryland, Minnesota, and North Carolina) have possible conflicts with the NFL PED Policy.<sup>21</sup> Thus, other than Minnesota, only Maryland and North Carolina present potential conflicts for the NFL. And, even those potential conflicts are relatively small: 1) All three state statutes require that employers use state-certified testing facilities and give the employee the right to seek independent confirmation of a positive

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<sup>21</sup> Four other states provide voluntary state regulations. The attached appendix contains a brief discussion and analysis of all of the applicable state laws.

test result; 2) The Minnesota and Maryland statutes do not explicitly allow testing for masking agents; and 3) The Minnesota statutes give the employee the right to explain a positive test result and only permit an employer to restrict an employee's use of a legal substance during nonworking hours if the restriction relates to a bona fide occupational requirement. Of course, the risk remains that a state might enact a new statute or modify an existing statute such that the statute would conflict with the NFL PED Policy. But, at this point, the NFL only has to be concerned with the drug testing statutes in 3 different states.

### **III. What Can be Done to Resolve the Potential Problem Created by the Eighth Circuit's Decision?**

There are two related approaches that can serve as a simple solution to the potential problem created by the Eighth Circuit's decision. First, the NFL can litigate the case in state court and get a judicial determination from a Minnesota court that the Minnesota Laws do not apply to the NFL PED Policy. Second, the NFL and the other professional sports leagues can ask the Minnesota state legislature to add a provision to the Minnesota Laws that makes it clear that the laws do not apply to performance enhancing drug policies contained in the collective bargaining agreements of professional sports leagues. If those approaches are not successful, then the league and players should try to bargain around the problem. If all of those approaches fail, then Congress should consider creating a narrow exemption that will protect the performance enhancing drug policies from attack under state drug testing laws. I will discuss each of these solutions in turn.

#### **A. Litigate the Case in Minnesota State Court**

As I discussed earlier, the *Williams* case presents us with a very narrow problem—a Minnesota state court may determine that the suspension of the Williamses violates the Minnesota Laws. This determination, in turn, would interfere with the ability of the NFL to maintain a uniform performance enhancing drug policy. The narrowest solution to this problem, therefore, is simply to convince the Minnesota state court that the suspension of the Williamses does not violate the Minnesota Laws.

### 1. DATWA Claims

It is difficult to analyze the merits of the DATWA claims, because it is not clear what claims the Williamses are bringing under DATWA. Nevertheless, the NFL's strongest argument may be that DATWA was not intended to apply to the NFL PED Policy. Rather, DATWA was designed to regulate testing for recreational drug use and abuse by employees in Minnesota. Thus, even if the suspensions of the Williamses were technical or literal violations of DATWA—as the NFL appeared to concede during the litigation—the suspensions did not violate the spirit of the law. A brief look at the origin and purpose of workplace drug laws in United States is instructive.

In the 1980's, the U.S. waged a "war" against recreational drug use, as the rate of drug abuse among Americans climbed and the awareness of the harmful effects of drug use increased. With respect to the workplace, there was a general consensus that recreational drug use by employees had the potential for causing significant problems, including the following: 1) Loss of productivity on the job; 2) Absenteeism of the employees; 3) Accidents on the job; and 4)

Addiction and health issues for the employees. Thus, many private employers began instituting strict drug testing of their employees.<sup>22</sup>

As a result of the rapid growth of drug testing by these private employers, several states, including Minnesota, enacted workplace drug regulations to protect employees. These state legislatures recognized that employers had a legitimate interest in detecting and preventing drug use by their employees, but also recognized that employees had basic privacy rights that warranted protection. State regulations, such as Minnesota's DATWA, thus helped protect employees by accomplishing two broad goals: 1) Mandating strict procedures to ensure that the drug testing was not unnecessarily invasive, unfair, or unreliable; and 2) Requiring that proper treatment, counseling, and rehabilitation—as opposed to discipline and punishment—was provided for the employees.<sup>23</sup>

This focus on implementing fair and reliable procedures and providing for the treatment and rehabilitation of recreational drug users is a central part of the NFL's *recreational drug testing policy* (the NFL Policy and Program for Substances of Abuse). The use of PEDs by NFL players, however, raises very different issues and warrants a very different type of testing policy. The four primary concerns associated with the use of PEDs by professional athletes are that it:

- 1) Threatens the integrity of the game;
- 2) Provides the PED users with a competitive advantage, which in turn may have a coercive impact on other athletes and “force” them to use PEDs;
- 3)

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<sup>22</sup> In 1986, President Reagan issued an Executive Order that permitted drug testing of federal employees, and the President's Commission on Organized Crime asked all companies in the U.S. to test employees for drug use. See Deborah F. Crown & Joseph G. Rosse, “A Critical Review of the Assumptions Underlying Drug Testing,” 3 *Journal of Business and Psychology* 22 (1988).

<sup>23</sup> Florida's workplace drug laws are representative of laws in this area, and state that the purpose of their regulations is to afford employers “the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees.” *Fla. Stat. § 440.101, et seq.*

Poses health risks to the PED users; and 4) Contributes to the use of PEDs by college, high school, and youth athletes.

There is simply no indication—nor any reason to believe—that DATWA was intended to limit the ability of professional sports leagues to test for the use of PEDs.<sup>24</sup> The Minnesota legislature was concerned about the use and abuse of performance-*detracting* and addictive drugs by its employees. The legislature was not concerned about the use of performance-*enhancing* drugs—cheating—by professional athletes in an interdependent sports league. In fact, when the DATWA was passed in 1987, PEDS were not a particularly great concern of professional sports leagues, much less of the Minnesota state legislature.

Interestingly, in 2005, the DATWA was amended to allow random drug testing for professional athletes subject to a collectively bargained drug testing policy.<sup>25</sup> Thus, with this amendment, the legislature recognized that the DATWA conflicted with sports leagues’ recreational drug testing policies, and were willing to make an exception for Minnesota sports teams. But, there is no indication that this was meant to limit the ability of sports leagues to test and punish for PEDs.

## 2. CPA Claims

The NFL’s argument with respect to the CPA is even more powerful. The CPA was enacted to prevent employers from disciplining employees who used legal substances—in particular,

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<sup>24</sup> Several of the state regulations do not even permit private employers to test their employees for performance enhancing drugs.

<sup>25</sup> According to the amendment, “An employer may request or require employees to undergo drug and alcohol testing on a random selection basis only if (1) they are employed in safety-sensitive positions, or (2) they are employed as professional athletes if the professional athlete is subject to a collective bargaining agreement permitting random testing but only to the extent consistent with the collective bargaining agreement.” See *M.S.A.* §181.951, subd. 4.

alcohol or tobacco— off of company property and during nonworking hours.<sup>26</sup> Again, it seems fairly clear that the Minnesota legislature did not intend for the CPA to limit the ability of professional sports leagues to test for the use of PEDs.

Even if the CPA were applied to the NFL PED Policy, the NFL has a strong argument that the suspensions of the Williamses did not violate the CPA. The CPA makes clear that employers may restrict the use of legal substances during nonworking hours if the restriction relates to a “bona fide occupational requirement” and is “reasonably related to employment activities ... of a particular employee or group of employees.” The NFL can certainly make a strong case that banning legal PEDs or related substances relates to a bona fide occupational requirement.

#### B. Seek a Statutory Exception from the State Legislature

If the Minnesota state court concludes that the suspensions violate the Minnesota Laws, then the NFL’s next step should be to seek an exemption from the Minnesota state legislature. The appeal to the state legislature would be the same as the appeal to the state court—the Minnesota Laws were not intended to apply to the testing of PED use by professional athletes, and the laws are interfering with the ability of the NFL to maintain a strict, uniform PED policy. Thus, the Minnesota legislature should carve out an exception in the Minnesota Laws that make clear that the laws do not apply to the collectively bargained performance enhancing drug testing policies of professional sports leagues. Such an exception would obviously not be unprecedented—Minnesota already provides an exception in DATWA that permits professional sports leagues to conduct random drug testing of its athletes. More broadly, though, Louisiana’s workplace drug testing statute contains a provision that explicitly excludes NFL and NCAA

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<sup>26</sup> Minn. Stat. §181.938. *See* V. John Ella, “What do They Have I Mind? Minnesota’s Drug-Testing Law Turns 20,” 64-Sep. Bench & B. Minn. 22, 23 n.4 (2007).

athletes entirely from its regulations.<sup>27</sup> Several other state statutes have an even broader exemption that excludes all collectively bargained drug policies from its coverage.

### C. Bargain Around the State Laws

If the state litigation and the appeal to the state legislature are unsuccessful, then the league and the players should be given the opportunity to collectively bargain a solution to the problem posed by interference from the Minnesota Laws. These parties have bargained around other state laws that interfere with the operation of the league, so they should be given the opportunity to bargain around this particular set of state laws and achieve a voluntary, contractual solution.

### D. Narrow Federal Statutory Exemption

If all of the other potential solutions fail and the Minnesota Laws have interfered with the NFL PED Policy, then Congress should consider passing narrow federal legislation that will protect the collectively bargained performance enhancing drug policies of professional sports leagues. I want to focus this last section on why federal legislation should be a last resort. And, I think we need to start by asking a very basic question—why is a federal law necessary? In other words, why should the league PED policies take precedence over state law? I do not believe it is because sports leagues should be entitled to special protection or deference under the law. Rather, I believe it is because we want a particular result—we want this particular NFL PED Policy (because it is uniform and strict) to trump this particular state law. It is a drastic step to enact a federal law insulating the term of a collective bargaining agreement from state law

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<sup>27</sup> The Louisiana statute states that the provided drug testing standards “shall not apply to drug testing conducted by the National Collegiate Athletic Association (NCAA) or the National Football League (NFL).” *See La. Rev. Stat. § 49:1001 et seq.*

simply because Congress favors that particular term. Thus, any federal exemption must be narrowly tailored to solve the specific problem at issue here and to avoid any unintended consequences.

A quick hypothetical may be instructive as to why federal legislation might not be the appropriate solution here and how it might lead to unintended consequences. Assume that Congress passes a narrow law that provides that collectively bargained league PED testing policies trump conflicting state drug testing statutes. That law would obviously protect the NFL PED Policy from a challenge under the Minnesota Laws and allow the NFL to maintain a uniform testing policy. But, what happens if, in the next round of collective bargaining negotiations, the parties agree to a different policy? And, what happens if this new policy permits the NFL to suspend a player for a positive PED test without a confirmatory test, and without providing a hearing for that player? Or, what if the new policy allows the commissioner to unilaterally determine the discipline for any positive test? In other words, what if the policy does not provide sufficient rights for the players? What if it does not provide for uniformity? Then, do we want state law to apply or do we still want to protect the league policy?

If Congress chooses to pass legislation that would protect league PED testing policies from interference by state workplace drug laws, the legislation must be narrowly and carefully tailored to achieve the intended result. In order to do that, of course, we must identify the intended result. Is the federal legislation designed to protect all PED policies contained in the NFL collective bargaining agreement, or only the ones that Congress believes are sufficiently strict, or sufficiently uniform? If Congress is only concerned with making sure that the leagues have strict, uniform PED testing policies, then we need to understand that a broad exemption will not necessarily accomplish that goal. Rather, a broad exemption will give the leagues free reign

to change the policy to be more lenient, more restrictive, less uniform, or whatever the owners and players choose. Moreover, an overly broad exemption might open up the possibility of leagues arguing that the terms of their collective bargaining agreements should trump state laws in other areas.

Thus, if a federal exemption is necessary as a last resort, and the goal of the exemption is to protect the current NFL PED Policy, then the law must be narrowly drafted. One method for achieving this result, while still permitting the NFL and the players to modify the policy, is to pass legislation that prevents states from interfering with the collectively bargained PED policies of professional sports leagues, so long as the policies have certain minimum protections (and punishments) in place. For example, the federal law could state something to the effect of: “No state shall have a law that interferes with a professional sports league’s ability to test and discipline players for the use of PEDs or masking agents, provided that the league has a uniform policy in place that provides certain minimum protections, punishments, and standards.” These “minimum protections, punishments, and standards” could then be defined in the law. Of course, the problem with this type of legislation is that it permits Congress—as opposed to the parties—to determine the necessary minimum standards for league PED policies.

Any federal legislation in this area presents risks. Thus, Congressional intervention should only be used as a last resort and then must be carefully and narrowly tailored to avoid any unintended consequences.

#### IV. **Conclusion**

At this stage, any action by Congress would be premature. The *Williams* case only presents a potential problem. An actual problem will arise only if the Minnesota state court

concludes that the suspensions of the Williamses violate the Minnesota Laws. If that occurs, the NFL should request that the Minnesota state legislature carve out an exception for the PED testing policies of professional sports leagues. If that fails, and if the parties are unable to bargain around the Minnesota state laws, then Congress should consider drafting a narrow statute to protect the PED testing policies of professional sports league.

I would be happy to answer any questions from members of the Subcommittee or provide you with additional information.