

**TESTIMONY OF ROGER GOODELL**  
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**BEFORE THE**  
**SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION**  
**OF THE**  
**COMMITTEE ON ENERGY AND COMMERCE**  
**UNITED STATES HOUSE OF REPRESENTATIVES**  
**NOVEMBER 3, 2009**

Chairman Rush and Members of the Committee:

We appreciate this invitation to appear before your Committee to discuss the impact of state laws on collectively bargained substance abuse policies in professional sports.

We – and we also believe Congress – have always understood that the negotiation, administration and enforcement of the collectively-bargained steroid policies in professional sports are governed exclusively by federal labor law. Yet, during the past year, the courts have permitted NFL players – regrettably, with the acquiescence of the NFL Players Association (NFLPA) – to use state laws to avoid the agreed-upon consequences for the players' admitted violation of our collectively-bargained anti-steroid policy. These court decisions call into question the continued viability of the steroid policies of the NFL and other national sports organizations.

We believe that 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. Our view is supported by the other major professional sports leagues, as well as the United States Anti-Doping Agency. A narrow and targeted amendment would preserve the rights of sports leagues and their player associations to negotiate and administer effective anti-drug and steroid programs.

We have always believed that collective bargaining is the best approach to developing and implementing effective anti-drug and steroid policies. I have testified to that effect in the past, as have my predecessors. That belief had always been shared by the NFL Players Association, which until last December, had been our partner in developing, improving, administering and enforcing these policies. We still believe that collective bargaining is and

should remain the preferred approach, and that a uniform policy that applies to all teams and all players throughout the league is the best way to preserve the integrity of the sport, protect the health and safety of athletes, and ensure that young people understand that the use of performance-enhancing drugs is dangerous and wrong.

But where successful collective bargaining is frustrated by the unintended application of state law, we believe that specific and tailored Congressional action is appropriate. That is particularly true on an issue, such as use of steroids and related substances, that Congress has addressed on numerous occasions, and in respect of which Congress has praised the leadership and strong programs of the NFL.

### **Summary of NFL Policy**

As you know, the NFL has appeared before this Committee in the past, and we have provided testimony detailing the League's collectively-bargained steroid policy with the NFLPA. To summarize: more than 25 years ago, in 1983, Commissioner Pete Rozelle notified all NFL players that anabolic steroids fell squarely within the League's prohibition against drug abuse and that steroids had serious adverse health effects. The NFL's steroid testing program was implemented a few years later, in 1987, and was intended to advance three important goals:

- to preserve the health of athletes who use these substances;
- to preserve public confidence in the integrity of professional sports, including competitive equality and maintaining competition free of performance-enhancing substances; and
- to ensure that young people know that using steroids and other performance enhancing substances is dangerous and wrong.

**Although the policy has changed over the past 25 years, these remain its fundamental goals.**

Prior to the 1989 season, Commissioner Rozelle publicly announced the suspension of active players who had tested positive for steroids during the preseason.

In 1990, Commissioner Paul Tagliabue took a number of steps to enhance the program. He initiated random, unannounced testing for all players throughout the year, retained Dr. John Lombardo as the League's independent Advisor on Anabolic Steroids (a position Dr. Lombardo continues to hold today under the title of Independent Administrator), recruited other prominent scientists to advise the League in developing its program, and directed that all testing for steroids be conducted only at laboratories certified by the International Olympic Committee.

Since 1993, the NFL and the NFL Players Association have jointly administered the program through the collective bargaining process. The parties meet regularly to discuss changes to the Policy, and they update and revise the Policy yearly. A copy of the 2009 Policy is attached to this testimony.

Our steroid policy has uniformly been recognized as strong and effective, including by Congress. As a former House Committee Chairman said:

Drug-testing experts have long hailed football's testing program as the top of the heap in professional sports. It's a policy that the league and players association review quarterly and improve upon annually. It's a policy that has evolved along with advancements in science and technology. It's a policy with tough penalties, and it's getting tougher all the time.

*Hearing on NFL Steroid Policy Before the House Comm. on Government Reform, 109th Cong., 1st Sess. 2 (2005) (Rep. Davis).*

The effectiveness of the Policy is based on a wide range of factors, including a comprehensive list of banned substances; year-round random testing; education of players and

club personnel; prompt and fair resolution of appeals; confidentiality; and mandatory penalties. Each of these elements is spelled out in detail in the Policy itself.

For many years, the NFL was the only professional sports league to test players for steroids (and related substances such as masking agents) and to impose significant discipline on players who tested positive for these prohibited substances. Today, all of the major professional team sports organizations maintain collectively-bargained steroid testing programs, including Major League Baseball, the National Hockey League, and the National Basketball Association.

As with all effective anti-steroid programs, the Policy embodies what is referred to as a “strict liability” approach – the athlete is responsible for what is in his body. Claims of inadvertent or unintentional use of a tainted supplement or other product will not excuse a positive test. This has been a core element of the Policy since its inception and repeatedly endorsed by the NFLPA in collective bargaining and by the NFLPA’s previous Executive Director in testimony before Congress.

The Policy itself includes clear and explicit warnings to players about the risks of supplement use. They are advised of the health dangers of dietary supplements, and of the very real risk that those supplements may lead players to test positive. Players are further advised that if they do test positive, they will be disciplined under the terms of the Policy. The Policy makes clear that players who use supplements do so at their own risk.

This is not simply a concern for NFL players. As recently documented in several media reports, high school athletes are increasingly using dietary supplements, many of which are tainted with illegal steroids and other controlled substances. *See* Michael S. Schmidt and Natasha Singer, *Two Dietary Supplements Said To Contain Steroids*, N.Y. Times, July 23, 2009. Use of these products by young people in particular can have serious health repercussions.

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The need for narrow legislation results from a specific lawsuit brought against the NFL in 2008 involving the use of bumetanide, a diuretic the use of which has been prohibited by the Policy for at least two decades. Bumetanide has been identified as a masking agent – a substance that athletes use to cover up their use of a steroid. All anti-steroid programs ban the use of masking agents, including diuretics such as bumetanide.

Before the start of the 2008 season, two players on the Minnesota Vikings football team and three players on the New Orleans Saints football team tested positive for this masking agent. Each was notified of his positive test and of a resulting suspension under the terms of the policy. The players appealed, claiming that they took the banned substance inadvertently by using a supplement that did not identify Bumetanide on the label. The players did not challenge the accuracy of the test results or identify any other defect in the testing procedures. The NFL hearing officer (whom the players specifically requested handle their appeals) held lengthy hearings and upheld their suspensions in a decision that – under the collectively-bargained policy – is to be “final and binding.”

Immediately following the decision, the two Vikings players challenged their suspensions in Minnesota state court. The state court judge immediately enjoined the suspensions. The next day, on behalf of all five players the NFLPA filed a separate lawsuit against the NFL in federal court – the first time that the Players Association had ever challenged the policy in court and a clear violation of the CBA. The two cases were consolidated before the federal judge.

After more than five months of litigation, the federal court earlier this year upheld the hearing officer’s decision and rejected all of the NFLPA’s challenges. However, the judge allowed the two Vikings players to pursue their Minnesota state law claims in Minnesota state court. Because Louisiana statutes did not provide any basis for a state law claim, there was no

longer any barrier to enforcing suspensions against the three New Orleans players, but the two Minnesota players remained free to litigate their claims and their suspensions were enjoined.

The federal district court's decision was appealed to the U.S. Court of Appeals for the Eighth Circuit, which unanimously agreed that all of the NFLPA's claims were without merit but also permitted the Vikings players to pursue their state law claims in Minnesota state court. We have sought rehearing in the Eighth Circuit, and that request remains under consideration.

### **The Impact of the Minnesota Court's Ruling and the Need for Narrow Legislation**

The use of state law—with no objection from the NFLPA-- to enjoin the suspensions under the two Minnesota state statutes illustrates with compelling force the need for legislation here.

First, these state law attacks on the collectively-bargained Policy jeopardize public confidence in the integrity and competitive equality of the game, which is critical to the success of the NFL, as it would be to every other professional sports league. *See* Amicus Brief of Major League Baseball, the National Basketball Association, and the National Hockey League, dated July 13, 2009. The practical result of the lawsuits makes this point clear: because the Minnesota players have been able to allege violations of Minnesota statutes while Louisiana does not have comparable statutes under which the Saints players could sue, the three players from the Saints are subject to suspension, while the Vikings players – who admittedly engaged in precisely the same conduct in violation of the Policy – have been permitted to avoid any discipline. The Vikings players are thus able to work under terms and conditions that differ from those governing every NFL player outside Minnesota.

Professional athletes and their collective bargaining representatives should not be permitted to manipulate state statutes as a means to gain a competitive advantage. More

importantly, the professional sports leagues cannot operate properly and maintain even competition on the field if players in one state are subject to rules in this area that vary from state to state.

Second, the success of the players and the NFLPA in delaying – and possibly even avoiding – their mandatory discipline under the Policy has significantly undermined one of the key elements of the Policy: timely resolution of appeals by means of collectively-bargained arbitration procedures. With the help of the NFLPA, the Vikings players have been able to prolong their litigation for almost one year now. And this delay has succeeded even though we strongly believe that the players’ state law claims have no merit.

Third, several key elements underlying the Policy will be significantly undermined – if not eviscerated – in the event the players succeed in their state law challenges. For instance:

- **Strict Liability and Personal Responsibility For Use Of Dietary Supplements.** The players claim that under the Minnesota drug testing statute, they have a “right to explain” their positive test results, and that the NFL must accept their “innocent explanation” (that they unintentionally used a banned substance found in a dietary supplement). Such a requirement would eliminate the strict liability rule underlying the Policy and upon which the Policy’s success critically depends. This result would also be completely at odds with our many warnings to players to avoid the use of supplements and would undermine the positive example we aim to set for young people.
- **Adherence To Strict Collection And Analytical Standards.** The players claim that the Program is unlawful because testing is not done at a laboratory certified under the Minnesota drug testing statute. But, to our knowledge, there is no laboratory that is capable of testing for steroids (as opposed to the workplace drug testing for which the

state's certification requirements are designed) certified in Minnesota. The Minnesota statute thus does not permit testing in the only two laboratories in the United States with the ability to test for steroids and masking agents, both of which are certified by WADA and the International Organization for Standardization, and both of which have been approved for testing by the NFL and the Players Association in our collectively bargained Policy.

- **Comprehensive List of Banned Substances and Year-Round Testing.** The players claim that the Minnesota Lawful Consumable Products Act permits them to take any legal product as long as they consume it off of their employer's premises and not during working hours. Under this rationale, any substance listed on the Policy's banned substances list must be permitted as long as the players take it at home. This would include any lawfully obtained supplement that may contain an unlawful steroid or masking agent. As a result, enforcement of the state statute would undermine both the banned substances list as well as the strict liability policy. In addition, the use of such state "consumable product" laws to avoid responsibility flies in the face of the repeated warnings given to players that supplements are *not regulated* by the FDA and should be avoided.
- **Administrative Independence.** According to the players, Minnesota's law requires the NFL to receive notice of a positive confirmatory test result from the laboratory within three days of the test. But under our Policy only Dr. Lombardo – and not the NFL, the player's team, or the NFL Players Association – is notified of a player's positive result. In fact, notice is often not provided to the NFL for more than three days after Dr. Lombardo's receipt from the laboratory. This is because a test is confirmed under the

Policy only after both Dr. Lombardo and the Program’s expert toxicologist, Dr. Bryan Finkle, have had the chance to examine the underlying data to ensure the accuracy of the test and to discuss any relevant medical information with the player to determine whether a therapeutic use exemption would apply. Only after these checks are performed do the NFL and the player’s team become aware of a positive test result. A requirement that the lab immediately notify the NFL of players’ test results would undermine this bargained-for protection for the players.

- **Mandatory penalties.** The players argue that the NFL’s lack of “compliance” with the Minnesota statute’s procedural requirements should excuse their admitted violation of the Policy. They even argue that it should excuse their breach of their Player Contracts, which had individually negotiated provisions separately prohibiting the players from taking such substances in the first instance. But the mandatory penalty provisions of the Policy are clear: if a player tests positive for a prohibited substance, he will not avoid a suspension on the basis of inadvertent or unintentional use. Permitting players to escape discipline by arguing that the NFL failed to comply with certain state procedural rules – rules not even required by the Policy, some of which vary from state to state – would undermine the bargained-for mandatory discipline agreed to by the parties.

Finally, the potential impact of the actions of the players and their representatives is not confined to Minnesota and is not limited to the National Football League. Other professional sports organizations have teams located in dozens of locations throughout the country. Because NFL players are tested year-round, in the off-season wherever they may be, the laws of all 50 states could apply. A requirement that professional sports leagues comply with a patchwork of

up to 50 varying state laws would destroy the uniform application of their steroid policies, providing certain players with individualized defenses to a steroid policy's application.

Furthermore, application of these laws to professional athletes threatens to undermine the collective bargaining process. How can a professional sports league and a union negotiate an effective steroid policy when neither party can be sure exactly what agreement it is striking? Although some state legislatures seemingly account for collectively bargained programs in the text of their statutes, this does not prevent players from raising challenges and convincing elected judges to grant them relief. In Minnesota, for example, the statute specifically permits parties to agree in a collective bargaining agreement to policies that "meet or exceed" its statute's requirements, and the legislature has indicated that the statute was not meant to "interfere with the labor agreements between athletes and their employers." Nonetheless, the Vikings players have been able to prolong their litigation -- and to avoid their suspensions for admitted violations of the Policy -- for almost one year.

On the other hand, some states arguably prohibit parties to a collective bargaining agreement from negotiating policies that differ from their statutes. For example, a provision of Connecticut's workplace drug testing statute states that "[n]o provision of any collective bargaining agreement may contravene or supersede any provision of" the statute "so as to infringe the privacy rights of any employee," arguably providing a basis for athletes caught violating a steroid policy to file lawsuits seeking to enjoin or overturn their suspensions. Conn. Gen. Stat. Ann. § 31-51aa.

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In summary, Mr. Chairman, we support narrow and specific legislation that would confirm the primacy of federal labor law and respect agreements on this important subject. We

are committed to maintaining a level playing field in the NFL, protecting the health of our athletes, ensuring public confidence in the integrity of the game of professional football, setting a positive example for young people, and working together with the NFL Players Association to continue to refine our steroid policy. We believe such focused legislation will aid us in these goals.

Thank you for inviting us to appear today. We will be pleased to answer any questions.