

BEFORE THE UNITED STATES
HOUSE OF REPRESENTATIVES

COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION

STATEMENT OF MICHAEL WEINER
GENERAL COUNSEL, MAJOR LEAGUE
BASEBALL PLAYERS ASSOCIATION

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Mr. Chairman and Members of the Committee:

My name is Michael Weiner, and I serve currently as the General Counsel of the Major League Baseball Players Association (MLBPA). Thank you for the opportunity to testify today about the court's decision in Williams et al. v. NFL et al., Nos. 09-2247/2462 (Sept. 11, 2009 8th Cir.) and its potential impact on current drug testing programs in professional sports.

At the outset, I note that today in baseball, we have an effective, comprehensive, scientifically robust, and administratively fair testing program. It is run by an independent administrator, operates both in and out of season, and has sufficient flexibility to allow us to improve the program in response to developments. The Commissioner has repeatedly said that he believes our program is the best in professional sports, and on this point, we agree. And the program can continue to operate effectively regardless of what happens in the ongoing Williams litigation, the case that is the impetus for today's hearing.

In Williams, the United States Court of Appeals for the Eighth Circuit upheld an arbitrator's decision that, in turn, upheld suspensions of two NFL players under the league's drug program. The court also held claims of violations of certain Minnesota statutes were not preempted by Section 301 of the Labor Management Relations Act, and that those claims should be remanded to state court for further proceedings. Apparently, it has been suggested that to save drug testing in professional sports, Congress must pass legislation that overturns this portion of the Eighth Circuit's ruling.

We do not support this proposition. Nothing we have seen – in this litigation, or in the Minnesota law, or elsewhere – suggests that Congress needs to take such extraordinary action.

As the United States Supreme Court has said, as quoted by the Eighth Circuit in Williams:

[T]here [is not] any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavor. Clearly, § 301 does not grant the parties to a [CBA] the ability to contract for what is illegal under state law. [Slip Op. at 19-20, quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 at 211-12 (1985)(footnote omitted)(emphasis added)].

A bill that would preempt state law would not only overturn this long-standing precedent, it would stand for the unusual proposition that parties to a collective bargaining agreement can contract for that which is illegal under state law.

For decades, Congress and the Supreme Court have struck a well-considered balance between encouraging collective bargaining and, in the interests of federalism, accommodating state legislation regarding the workplace. Indeed, collective bargaining routinely occurs against the backdrop of state laws. Our Basic Agreement, like many collective bargaining agreements, expressly references many subjects governed by state law, including worker's compensation, unemployment compensation, privacy of medical records and licensing of physical therapists.

Today, this Committee is being asked to upset this balance because, apparently, one employer disagrees with one circuit court decision (still subject

to further review) interpreting one state's statutes on one subject matter. That is not sufficient reason to take such a major and potentially consequential step. Further analysis of the *Williams* case reinforces that position.

First, the Williams litigation is ongoing and far from over. The NFL has sought further review of the preemption holding within the 8th Circuit (a petition for rehearing is pending) and, if necessary, can seek review from the United States Supreme Court. And, if those appeals are not successful, the NFL can litigate the state law claims on remand to the state court. The 8th Circuit's ruling (thus far) is only that the players' state law claims are not preempted; the players have not actually prevailed on any of those claims. An interlocutory ruling, with expected additional proceedings at the appellate and trial level, should not provoke Congressional action.

Second, the Minnesota statutes of which the NFL now complains had nothing to do with the court orders that prevented the suspensions from going into effect during 2008. The preliminary injunction issued by the federal District Judge was based on concerns about the fairness of the arbitration, including the fact that the case was not heard by a truly neutral arbitrator, but instead by the General Counsel of the NFL. 598 F. Supp. 2nd 971. It was not until later that the players filed an amended complaint first raising the claims under the Minnesota statutes. See Williams, Slip Op. at 10.

Third, the Williams case does not even involve a claim that the players were taking illegal steroids in order to obtain an unfair advantage. The players tested positive due to traces of a diuretic contained in a legally purchased supplement which did not list on the label the ingredient which caused the players to test positive. According to the opinions, the NFL was aware that the

supplement was tainted but failed to warn the union or the players. The opinions also reflect that the NFL directed the independent program administrator to suspend the players (he had previously not been suspending players who had consumed this product) and did not even tell the union it was doing so. These specifics must be considered by the Committee in weighing this request for legislative intervention in light of the Williams saga.

Importantly, the two Minnesota statutes in question do not threaten the operation of our program.

Under the Drug and Alcohol Testing in the Workplace Act (DATWA), Minn. Stat. §§ 181.950-957, professional athletes covered by collective bargaining agreements can be subjected to drug testing, but that testing must meet certain standards. Employers and unions are free to bargain as long as they comply with the minimum requirements of DATWA, and employee protections in CBAs may exceed those minimum requirements. Finally, before resorting to a claim under DATWA, employees must exhaust their remedies under the CBA.

We do not believe that DATWA presents any threat to our program. For the most part, our program already complies with the statute's requirements. In the instances in which some adjustments may need to be made (e.g., having our laboratory obtain certification under DATWA), we do not think those would be difficult to achieve or that they would interfere with enforcement of the JDA.

The same is true of the Minnesota Consumable Products Act (CPA), Minn. Stat. § 181.938. Under that statute, employers cannot discipline employees for using "lawful consumable products" away from the workplace during nonworking hours. But employers can restrict consumption of such

products if they relate to a bona fide occupational requirement (BFOQ) that is reasonably related to employment activities, or if such a restriction is necessary to avoid a conflict of interest (or its appearance) with any responsibilities owed by the employees to the employer. Williams Slip Op., supra, at 20. No court or arbitrator has considered these questions; put differently, no court or arbitrator has determined whether the CPA's "lawful consumable products" provision even applies to professional sports. It is premature to assess whether Williams warrants any legislative correction until these and other issues are fully litigated.

In short, we do not believe the Minnesota statutes pose any serious threat to our drug program. Nor are we aware of other state or local laws that interfere with administration of our program. For example, a San Francisco ordinance forbids employers from requiring urine tests as a condition of continued employment. Sec. 3300A.5. That same ordinance, however, says that it "does not intend to regulate or affect the rights or authority of an employer to do those things that are required, directed or expressly authorized by ... collective bargaining agreement between an employer and an employer labor organization." Sec. 3300A.10. Our testing in San Francisco, thus, has continued without interruption, despite the local ordinance. Putting aside other arguments against congressional interference with state prerogatives, it is plain that Congress should not preempt state action in response to a potential or hypothetical problem.

Ironically, the supplement at the heart of the Williams case should never have been on the market in the first place. It is difficult to understand how a supplement containing a prescription drug was allowed to be sold over-the-

counter throughout the United States, let alone one that contained such high levels of the drug.

Unfortunately, this particular product, Starcaps, is not the exception. Earlier this year, the Food and Drug Administration published a list of more than 95 supplements containing prescription drugs, steroids or diuretics. This fall, we notified our members that yet another supplement, Armitest, was found to contain extremely high levels of both testosterone and androstenedione.

There is no longer any question that the current federal regulatory scheme for dietary supplements is not working. We hope, as this Committee moves forward, that consideration will be given to either amending the Dietary Supplement Health and Education Act or providing the FDA with sufficient resources to ensure the safety of supplements for all consumers.

Nearly half of all Americans claim to use dietary supplements, many on a daily basis. Those individuals are worthy of the same basic protection promised those who consume traditional food – the assurance that the products regulated by the FDA, that are sold without restriction throughout the country, are safe and that the products' labels can be trusted.

Thank you, Mr. Chairman, and I would be happy to answer any questions you may have.