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REESTABLISHING THE ROLE OF ARBITRATION IN LABOR LAW: AVOIDING THE PERILS OF *WILLIAMS* WITH THE RATIONALE OF *PYETT*

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INTRODUCTION

Since the inception of the National Football League Players' Association (NFLPA), collective bargaining in the National Football League (NFL) has had its fair share of ups and downs.[1] Struggles over free agency, player salaries, player benefits, and the draft have resulted in multiple work stoppages.[2] One issue at the forefront of collective bargaining is drug testing, but, unlike free agency and salary caps, the NFL and the NFLPA agree on their stance: ban the use of drugs.[3] The health effects, public relations, and potential effect on the integrity of the game have both sides in accordance that a strict policy is necessary.[4] The same bargaining process that resulted in the NFL's Drug Testing Policy ("the Policy"), also resulted in successful bargaining since 1957.[5] Although work stoppages did occur in the rich history of the league, the league ran successfully without any such stoppage since 1987.[6] Instead, the NFL and NFLPA repeatedly extended their collective bargaining agreements (CBA) and, with increased pressure from Congress,[7] made

1. *See generally* History, NFLPLAYERS.COM, http://nflpa.com/About-us/History/ (on file with author).

2. *See id.* at paras. 4, 6–7, 13–19, 22–29; *see also* Paul D. Staudohar, *The Football Strike of 1987: The Question of Free Agency*, 111 MONTHLY LAB. REV. 26, 26–30 (1988).

3. *See The NFL StarCaps Case: Are Sports' Anti-Doping Programs at a Legal Crossroads?: Hearing Before the H. Subcomm. on Commerce, Trade and Consumer Protection*, 111th Cong. 34, 34–40 (2009) [hereinafter *NFL Hearing*] (testimony of DeMaurice Smith, Executive Director, National Football League Players Association).

4. NFL & NFLPA, NATIONAL FOOTBALL LEAGUE POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES, § 1 (2007) [hereinafter NFL POLICY].

5. *See* History, *supra* note 1, at para. 2.

6. *See* Michael Wilbon, *Possible NFL Lockout in 2011 Is Hot Topic on Eve of Super Bowl*, WASH. POST, Feb. 6, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/05/AR2010020503094.html.

7. In 2005, Congress introduced four bills that would have regulated drug testing policies in sports. *See generally* Office of National Drug Control Reauthorization Act, H.R. 2565, 109th Cong. (1st Sess. 2005); Clean Sports Act of 2005, S. 1114, 109th Cong. (1st Sess. 2005); Professional Sports Integrity Act of 2005, H.R. 2516, 109th Cong. (1st Sess. 2005); Drug Free Sports Act, H.R. 1862, 109th Cong. (1st Sess. 2005). In proposing these bills, Congress did not mean to regulate drug testing, but rather meant to encourage the leagues to have more stringent penalties in their drug testing policies. *See* Hal Bodley, *MLB Strikes Out Fines from Steroid Policies*, USA TODAY, Mar. 21,

changes to the Policy that reflects the increased need to test players.[8]

On September 11, 2009, however, the Eighth Circuit's decision in *Williams v. National Football League* placed the process of collective bargaining at risk.[9] The Eighth Circuit, in affirming the District Court for the District of Minnesota, found that the players' statutory claims were not preempted under section 301 of the Labor Management Relation Act (LMRA).[10] This decision effectively told the NFL and NFLPA that the bargaining process that resulted in over fifty years of successful CBAs and over twenty years of uninterrupted football was tainted. The Eighth Circuit ignored the intent of Congress and the judicial impetus of section 301 preemption, putting the future of collective bargaining in professional sports in jeopardy. On May 13, 2010, the NFL petitioned the Supreme Court for a writ of certiorari looking for a resolution of the issues surrounding interpretation of section 301 of the LMRA.[11] On November 8, 2010, the Supreme Court denied the petition, avoiding resolution of the section 301 circuit split, and allowing the process of collective bargaining to remain at risk.[12] On the heels of the Eighth Circuit's decision, and reflective of the concerns surrounding the Eighth Circuit's decision, the NFL entered its first work stoppage in almost twenty-five years, unable to agree on a new CBA.[13]

This Comment will discuss the effect preemption has on state law claims regarding drug testing policies implemented in professional sports—focusing on section 301 of the LMRA—using *Williams v. National Football League* as a case study. Part I will introduce the federal preemption doctrines as well as the preemption corollaries specific to labor law. Part II will present the background of the Eighth Circuit's decision in

2005, at C1; *Steroid Penalties Much Tougher with Agreement*, ESPN (Nov. 15, 2005, 11:29PM), http://sports.espn.go.com/mlb/news/story?id=2224832.

8. *See* Vinny DiTrani, *NFL Deal Done; Owners Accept NFLPA Offer*, RECORD, Mar. 9, 2006, at S01; see also Mark Maske & Leonard Shapiro, *NFL Strengthens Steroid Policy*, WASH. POST, April 27, 2005 at D08, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/04/26/AR2005042601232.html.

9. 582 F.3d 863 (8th Cir. 2009), *cert. denied*, 131 S. Ct. 566 (2010).

10. *See id.* at 878–80.

11. *See generally* Petition for Writ of Certiorari, Nat'l Football League v. Williams, 131 S. Ct. 566 (2010) (No. 09-1380), 2010 WL 1932622.

12. *See Williams*, 131 S. Ct. 566, *denying cert. to*, 582 F.3d 863.

13. *Judge Backs Injunction to Halt NFL Lockout*, Post to *Yahoo! News*, YAHOO! (Apr. 25, 2011), http://news.yahoo.com/s/nm/20110425/sp_nm/us_nfl_dispute_3.

Williams v. National Football League. Part III will analyze the NFL's drug testing policy as well as the two Minnesota state statutes at issue in the *Williams* case. Part IV will discuss the ways in which the Eighth Circuit erred in its decision and the reasons why the state statutes at issue should have been preempted. Furthermore, Part IV will discuss how the Eighth Circuit's decision effectively removed arbitrators from their role in the resolution of labor disputes. Part V will seek to reestablish the role of arbitrators by arguing that unions should be able to waive the judicial forum in favor of arbitration for state statutory claims, using the 2009 decision of *14 Penn Plaza v. Pyett*[14] as the basis for such a judicial waiver.

I. HISTORICAL OVERVIEW

A. Preemption Doctrines Generally

The Constitution seeks to strike a balance between state and federal interests by granting certain powers and rights to the federal government,[15] limiting the state's power in certain circumstances[16] and reserving the state's power in others.[17] Although states maintain certain powers, federal interests are given an overarching reach, as evidenced by the Supremacy Clause of the Constitution.[18] The Supremacy Clause, which has been the foundation of many doctrinal findings of the judiciary,[19] including preemption, states: "This

14. 129 S. Ct. 1456 (2009).

15. *See generally* U.S. CONST. art. I, § 8. The clauses most pertinent to this discussion are the Commerce Clause, compelling Congress, "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes[,]" *id.* at art. I, § 8, cl. 3, and the Necessary and Proper Clause, allowing Congress, "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." *Id.* at art. I, § 8, cl. 18.

16. *See id.* at art. I, § 10. This section prohibits the states from, among other things, "enter[ing] into any treaty, alliance, or confederation . . . ; without the consent of the Congress, [from] lay[ing] any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection law . . . [; and] keep[ing] troops, or ships of war in time of peace[.]" *Id.* at art. I, § 10, cl. 1–3.

17. *See id.* at amend. X. The Reserve Clause states that, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

18. *See id.* at art. VI, cl. 2.

19. The Dormant Commerce Clause is a doctrine of judicial interpretation, finding

Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."[20]

In turn, courts have recognized three types of preemption: express, field, and conflict.[21] Because Congress has no authority to pass laws outside of its constitutionally vested power, a finding of preemption presupposes that Congress acted within its proper scope.[22] Express preemption occurs when Congress, enacts legislation that—through the legislation's plain language—specifically prohibits states from acting.[23] Field preemption occurs when Congress acts with the intent to occupy an entire field, and state law impermissibly regulates within that field.[24] Lastly, conflict preemption occurs when: (i) it is impossible to comply with both the state and federal law,[25] or (ii) the state law frustrates congressional intent or "stands as an obstacle to [its] accomplishment."[26] Although all three doctrines contain different means for evaluation, the main objective of the preemption doctrine is to determine congressional intent.[27] Ultimately, if a conflict exists between a federal interest or law and a state law, the state law will be "preempted," meaning it cannot be maintained due to the risk of frustrating congressional intent.[28]

B. Labor Law and Preemption

In labor law, the Supreme Court has identified three

state laws that discriminate against out-of-state entities, or significantly burden the flow of interstate commerce, invalid. *See* Amy M. Petragnani, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215, 1216–19 (1994).

20. U.S. CONST. art. VI, cl. 2.

21. Stephen F. Befort & Byran N. Smith, *At the Cutting Edge of Labor Law Preemption: A Critique of* Chamber of Commerce v. Lockyer, 20 LAB. LAW. 107, 109 (2004); Mary J. Davis, *On Preemption, Congressional Intent, and Conflicts of Laws*, 66 U. PITT. L. REV. 181, 198–99 (2004).

22. *See* Davis, *supra* note 21, at 182.

23. Befort & Smith, *supra* note 21, at 109; *see also* Davis, *supra* note 21, at 198–99.

24. *See* Befort & Smith, *supra* note 21, at 109; *see also* Davis, *supra* note 21, at 199.

25. Befort & Smith, *supra* note 21, at 109; Davis, *supra* note 21, at 199.

26. Davis, *supra* note 21, at 199 (citing Hillsborough Cnty v. Automated Med. Labs., Inc., 471 U.S. 707, 712–13 (1985)).

27. *See* Befort & Smith, *supra* note 21, at 109–10; *see also* Davis, *supra* note 21, at 183.

28. *See* Befort & Smith, *supra* note 21, at 109.

strands of preemption, all practical examples of field preemption:[29] *Garmon* preemption,[30] *Machinists* preemption,[31] and section 301 preemption.[32] These doctrines all derive from the National Labor Relations Act (NLRA) and, in inferring congressional intent, seek to preclude state actions where the federal scheme should control.[33]

1. *Garmon* Preemption

In *San Diego Building Trades Council v. Garmon*, the Supreme Court sought to answer the question whether a state court, having no jurisdiction to enjoin peaceful union activity, could award damages arising out of the same activity.[34] After the employer failed to agree to retain only union members, the union in *Garmon* picketed for the purpose of encouraging union participation.[35] The Superior Court for the County of San Diego ("California court") enjoined the picketing and awarded damages.[36] The Supreme Court found that the state court could not enjoin the action, even if the National Labor Relations Board (NLRB) declined jurisdiction.[37] On remand, the California court upheld the damages, while setting aside the injunction.[38] In finding the California court's issuance of damages inappropriate,[39] the Supreme Court held, "[w]hen an activity is arguably subject to [section] 7 or [section] 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted."[40] Thus, the California courts could not award damages arising from activity the court had no jurisdiction to enjoin in the first

29. *See* Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 164 (2009).

30. *See generally* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

31. *See generally* Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n, 427 U.S. 132 (1976).

32. *See* Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185 (2006); *see also* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988).

33. *See* Befort & Smith, *supra* note 21, at 109–10.

34. *Garmon*, 359 U.S. at 239.

35. *Id.* at 237.

36. *Id.* at 237–38.

37. *Id.* at 238.

38. *Id.* at 239.

39. *Id.* at 248.

40. *Garmon*, 359 U.S. at 245 (emphasis added).

place. In holding so, the Court reiterated two important exceptions to this area of preemption: (1) "Where the regulated conduct touch[s] interests [] deeply rooted in local feeling and responsibility,"[41] and (2) "where the activity regulated [is] a merely peripheral concern of the [LMRA]," the state court may act.[42]

2. *Machinists* Preemption

In *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, the court sets forth the second strand of labor law preemption.[43] *Machinists* involved a union's refusal to have employees work overtime after the employer unilaterally imposed longer hours.[44] The employer filed a charge with both the NLRB and the Wisconsin Employment Relations Commission (WERC).[45] The Regional Director of the NLRB dismissed the unfair labor practices charge, finding the union was not in violation of the NLRA.[46] The WERC then tried the case and found the union's action an unfair labor practice and ordered the union to cease and desist.[47] In finding the WERC's decision preempted,[48] the Supreme Court held that preemption depends upon whether Congress wanted the conduct to be unregulated, or, "to be controlled by the free play of economic forces."[49] This inquiry derives from the belief that a certain activity may be "protected" when it is "intended to be 'unrestricted by [*a*]*ny* governmental power to regulate' because it was among the permissible 'economic weapons in reserve . . . .'"[50]

41. *Id.* at 244 (alteration in original).
42. *Id.* at 243 (alteration in original) (citing Int'l Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958)).
43. 427 U.S. 132 (1976).
44. *Id.* at 134.
45. *Id.* at 135.
46. *Id.* at 135–36.
47. *Id.* at 136.
48. *Id.* at 155.
49. *Wis. Emp't Relations Comm'n*, 427 U.S. at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).
50. *Id.* at 141 (emphasis added) (quoting NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 488–89 (1960)).

3. Section 301 Preemption

The third strand of labor preemption derives from section 301 of the LMRA.[51] Section 301 states:

> 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 organizations, 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.[52]

Section 301 compels the use of federal laws to ensure the uniform interpretation of collective bargaining agreements.[53] When negotiating, the fear of state action places an unreasonably high burden on the negotiating parties to formulate an agreement that complies with every possible state law.[54] Although section 301 recognizes the problems associated with conflicting state laws and encourages collective bargaining, Congress intended for parties to freely bargain only within the basic constraints of state law.[55] Thus, subject to section 301 preemption, parties cannot agree to provisions that would be illegal under state law.[56] In balancing the sometimes-conflicting interests of collective bargaining and state rights, the test for section 301 preemption has been developed to consist of two separate prongs.[57] First, a state-law claim is preempted if the claim itself is based on a violation of a specific term of the CBA.[58] As an example, this would encompass breach of contract claims. Second, a state law claim is preempted by section 301 if the claim "is 'dependent upon an analysis' of the relevant

51. *See* Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185(a) (2006); *see also* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988).

52. § 301(a).

53. Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95, 103 (1962).

54. *See id.* at 103–04.

55. *See* Caterpillar Inc. v. Williams, 482 U.S. 386, 395 (1987) (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212 (1985)).

56. *See id.* (citing *Allis-Chalmers Corp.*, 471 U.S. at 212).

57. Williams v. Nat'l Football League, 582 F.3d 863, 874 (8th Cir. 2009) (citing Bogan v. Gen. Motors Corp., 500 F.3d 828, 832 (8th Cir. 2007)), *cert. denied*, 131 S. Ct. 566 (2010).

58. *See id.*

CBA"[59] This second prong ultimately means that, "if the resolution of a state-law claim depends upon the meaning of a [CBA], the application of the state law is preempted and federal labor law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute."[60]

Section 301 has "extraordinary preemptive power."[61] It extends to any claim that finds itself "inextricably intertwined with consideration of the terms of the labor contract,"[62] or "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract."[63] Preemption deriving from section 301 of the LMRA recognizes the unique relationship among bargaining parties and seeks to foster the relationship by mandating the application of federal law in the interpretation and enforcement of any CBA.[64]

Congress also promulgated section 301 with the intention of encouraging parties to agree to terms providing for binding arbitration proceedings.[65] Congress codified this intention in section 203(d) of the LMRA which states: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing [CBA]."[66] Although the decision to agree to arbitration is completely voluntary, the intent of the parties is binding.[67] If the parties decide to include a provision for grievance arbitration, and a court finds that a claim is preempted by section 301, only an agreed upon forum—including the forum of arbitration—should be used to interpret the CBA.[68]

59. *Id.* (quoting *Bogan*, 500 F.3d at 832).

60. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405–06 (1988).

61. Shane v. Greyhound Lines, Inc., 868 F.2d 1057, 1062 (9th Cir. 1989); *see also Caterpillar Inc.*, 482 U.S. at 394 (citing Avco Corp. v. Aero Lodge No. 735, 88 S. Ct. 1235, 1236 (1968)).

62. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985).

63. *Id.* at 220.

64. *See* Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550 (1964)) (finding that claims arising under a collectively bargained for agreement give way to a 'new common law' of the labor agreement).

65. *See* Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95, 104–05 (1962).

66. 29 U.S.C. 173(d) (2006)

67. *See id.*

68. *See id.*

II. *WILLIAMS V. NATIONAL FOOTBALL LEAGUE*

On December 2, 2008, six players were suspended from the NFL for failing a mandatory drug test.[69] In response, two players from the Minnesota Vikings—Pat Williams and Kevin Williams—appealed their suspensions through the Policy-mandated grievance procedure.[70] After their suspensions were sustained, the Williamses sued the NFL in a Minnesota state court, alleging various violations of Minnesota common law.[71] That same day, the court blocked the suspensions and issued a temporary restraining order.[72] The NFL then removed the case to federal court.[73] Once in federal court, the Williamses amended their complaint, alleging two statutory claims: (1) violation of Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA), and (2) violation of Minnesota's Consumable Products Act (CPA).[74] In response, the NFL filed a motion for summary judgment.[75] The district court granted the NFL's summary judgment motion in part—finding the Williamses' common law claims preempted by section 301 of the LMRA—and denied the motion in part—remanding the statutory claims to state court.[76] The Eighth Circuit affirmed the totality of the district court's decision.[77] In doing so, the Eighth Circuit found that adjudication of the statutory claims did not require interpretation of the CBA; instead, the claims were independent of the CBA and thus not preempted by section 301 of the LMRA.[78] The court did hold, however, that the state common law claims were preempted because those claims depended upon interpretation of the CBA.[79]

69. *Saints McAllister, Vikings' Williamses Among Suspended*, ESPN (Dec. 3, 2008, 3:36 PM), http://sports.espn.go.com/nfl/news/story?id=3740122.

70. *See* Williams v. Nat'l Football League, 582 F.3d 863 (8th Cir. 2009), *cert. denied*, 131 S. Ct. 566 (2010).

71. *Id.* at 871–72.

72. *Id.* at 872.

73. *Id.*

74. *Id.*

75. *See id.* at 872.

76. *Williams*, 582 F.3d at 872–73.

77. *Id.* at 886.

78. *See id.* at 878, 880.

79. *See id.* at 881–82.

A. State Statutory Claims

The Eighth Circuit explicitly found that an employee's mere membership in an entity governed by a CBA does not insulate the employer from state statutory claims.[80] Most notably, the court held

> [W]here there is a CBA that is at least as protective of employees as [the] DATWA, the number of possible claims an employee has against his or her employer will be affected. Where the employer complies with [the] DATWA but not with its CBA that provides greater protection, the employee could have [sic] only a claim for breach of contract. Where the employer does not comply either with [the] DATWA or its CBA that provides equivalent or greater protection than [the] DATWA, the employee could potentially have two claims, a claim for breach of contract and a DATWA claim.[81]

The NFL made three arguments regarding Minnesota's DATWA: (1) The claim turns on analysis of the Policy to find out whether it "meets or exceeds" the statutory requirements; (2) the claim requires interpretation of the Policy to find out if the NFL qualifies as an employer; and (3) uniform interpretation of the Policy is necessary to preserve the integrity of the game.[82]

While comparing the *Williams* facts against the facts in *Karnes v. Boeing Co.*,[83] the court held that determining whether the NFL's policy was at least as protective as the DATWA was a factual dispute, which the court believed it could not preempt under section 301.[84] In *Karnes*, an employee brought an action against his employer for firing him in violation of Oklahoma's Standards for Workplace Drug and Alcohol Testing Act (OSWDATA).[85] The court noted that the OSWDATA said that "[n]o disciplinary action, except for a temporary suspension or a temporary transfer to another position, may be taken by an employer against an employee based on a positive test result unless the test result has been confirmed by a second test."[86] In *Williams*, the court noted

80. *See id.* at 875.
81. *Id.*
82. *See Williams*, 582 F.3d at 873.
83. 335 F.3d 1189 (10th Cir. 2003).
84. *See Williams*, 582 F.3d at 876 (citing Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 261, 266 (1994)).
85. *See Karnes*, 335 F.3d at 1192.
86. *See id.* at 1193 (quoting OKLA. STAT. tit. 40, § 562(A) (2010)).

that the plaintiff in *Karnes* merely needed to show that "Boeing (1) discharged him based on his drug test, and (2) failed to confirm the results through a second test."[87] The court determined that both of these findings were merely factual and did not require interpretation of the CBA. As a result, the *Williams* court held that the Williamses'—as the court saw it comparable—claims were not preempted under section 301 of the LMRA.[88]

The *Williams* court also determined that it simply needed to reference the CBA in order to define "employer" instead of actually interpreting or analyzing the agreement.[89] The *Williams* court—consistent with previous case law on section 301—noted that preemption occurs only where interpretation of a CBA is necessary.[90] Therefore, courts have been quick to distinguish cases "which require interpretation or construction of the CBA from those which only require reference to it."[91] The Eighth Circuit asserted that resolution of the DATWA claim merely required reference to the preamble.[92] Specifically, the court noted that the players accept employment by a member club of the NFL, which cannot create a preemptive effect.[93] More importantly, the court also found that the players' contracts, which referenced the NFL's employer status, were not a part of the CBA and thus the issue did not require any interpretation of the CBA.[94] Without interpretation of the CBA itself, section 301 preemption was completely improper.[95]

Finally, the court reasoned that the need for uniform policies in the NFL could not overwhelm valid state laws and that the interest itself could not mandate preemption.[96] By analogizing *Williams* to *Cramer v. Consolidated Freightways, Inc.*,[97] the Eighth Circuit rejected preemption.[98] In *Cramer*,

87. *Williams*, 582 F.3d at 876 (quoting *Karnes*, 335 F.3d at 1193).
88. *See id.*
89. *See id.* (citing Livadas v. Bradshaw, 512 U.S. 107, 124–25 (1994)).
90. *See id.*
91. *Id.* (quoting Trs. of Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc., 450 F.3d 324, 330 (2006)).
92. *See id.* at 877.
93. *See Williams*, 582 F.3d at 877.
94. *See id.*
95. *Id.* at 876–77.
96. *See id.* at 877–78.
97. 255 F.3d 683 (9th Cir. 2001).
98. *See Williams*, 582 F.3d at 877–78.

the employer argued that the CBA should "supersede inconsistent state laws."[99] The court rejected the employer's argument, noting that the "LMRA certainly did not give employers and unions the power to displace any state regulatory law they found inconvenient."[100] Following the rationale of the *Cramer* court, and because the Eighth Circuit found drug testing policies to be a non-negotiable state right, it opined that parties could not negotiate for what was illegal under state laws and held that the DATWA was not preempted.[101]

Aside from the DATWA, the NFL also argued that the CPA claims were preempted under section 301 because: (1) deciding whether to list bumetanide as a banned substance qualifies as a *bona fide* occupational requirement, compelling interpretation of the CBA, and (2) determining whether the use was "off the premises of the employer" and during "non-working hours" requires the state court to analyze the CBA.[102] The court rejected these arguments, and in doing so, took an extremely narrow approach to section 301 preemption.[103] The court opined that it could only look at the claim, and not toward any affirmative defense, to determine whether section 301 should preempt the claim.[104]

B. State Common Law Claims

The Eighth Circuit, in upholding the district court, found that the state common law claims were preempted, unlike the Williamses' statutory claims.[105] The court stated that any claim of duty owed by the NFL depends specifically on "the parties' legal relationship and expectations as established by the CBA and the Policy."[106] In concluding so, the court found that section 301 preempted the claims of breach of fiduciary duty, negligence, and gross negligence.[107] Regarding the fraud claims, the court found that reasonable reliance on a

99. 255 F.3d at 695 n.9.

100. *Id.* (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211–12 (1985)).

101. *See Williams*, 582 F.3d at 874 (citing *Allis-Chalmers Corp.*, 471 U.S. at 211–12) (emphasis added).

102. *See id.*

103. *See id.* at 879 n.13.

104. *See id.*

105. *See id.* at 883.

106. *Id.* at 881.

107. *Williams*, 582 F.3d at 881.

lack of warning, "cannot be ascertained apart from the terms of the Policy."[108] Finally, regarding the intentional infliction of emotional distress claim, the court found that "one can only evaluate the outrageousness of the NFL's conduct . . . in light of what the parties have agreed to in the Policy."[109]

III. THE NFL POLICY AND THE MINNESOTA STATUTES

A. *The NFL's Drug Testing Policy*

In 1989, the NFL and the NFLPA came together and approved the league's first Drug Testing Policy.[110] Although it has changed numerous times,[111] the Policy employs rules, testing procedures, and disciplinary actions, which are executed when players either fail to follow procedures or fail a drug test.[112] The NFL and NFLPA agreed to the Policy due to a concern with the players' use of prohibited substances.[113] There are three factors upon which this concern is founded: (1) the fact that use of performance enhancing drugs "threaten the fairness and integrity of the athletic competition on the playing field[,]"[114] (2) concerns with "the adverse health effects of steroid use[,]"[115] and (3) the overarching concern that "the use of Prohibited Substances by NFL players sends the wrong message to young people who may be tempted to use them."[116] The NFL procedure applies to all players, present and future, who have not formally retired from the NFL.[117] Testing of players may occur during pre-employment, the pre-season, the regular season, or based on reasonable cause for players with prior positive tests or

108. *Id.* at 882 (finding two specific sections—"Masking Agents and Supplements" and "Supplements"—particularly important in determining whether the players reasonably relied on a lack of warning that the product taken contained a banned substance).

109. *Id.*

110. *See* Judy Battista, *How Good Is the 'Best' Drug Policy*, N.Y. TIMES, Oct. 14, 2005, http://www.nytimes.com/2005/10/14/sports/football/14Drugs.html?_r=1.

111. *See id.; see also* Mike Reiss, *NFL Strengthens Drug Policy*, BOSTON GLOBE, Jan. 25, 2007, http://www.boston.com/sports/articles/2007/01/25/nfl_strengthens_drug_policy/.

112. *See generally* NFL POLICY, *supra* note 4.

113. *Id.* § 1.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* § 2(A).

other circumstances.[118] The Policy outlines mandatory testing procedures and sets forth disciplinary procedures for both failure to comply with the procedures and positive test results.[119] The Policy is one of strict liability: players are completely responsible for what goes into their bodies and the league disciplines them accordingly.[120] The Policy also sets forth an arbitration procedure under which any player may challenge a positive test result or disciplinary action.[121] The Commissioner reviews the arbitration result, and the ensuing result is binding upon the player.[122]

B. Minnesota's State Laws

1. Drug and Alcohol Testing in the Workplace Act

The DATWA sets forth drug testing guidelines which are to be adopted by private employers.[123] Minnesota's drug testing policies have long been among the most restrictive, setting up strong protective policies for the state's resident employees.[124] At the very minimum, under the DATWA, a written policy must contain:

> (1) The employees or job applicants subject to testing under the policy;
>
> (2) The circumstances under which drug or alcohol testing may be requested or required;

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118. NFL POLICY, *supra* note 4, § 2(A).

119. A first violation of the Policy results in a minimum suspension of four games without pay. *Id.* § 6. If fewer than four games remain, the suspension is carried over into the next regular season, until the player misses four games. *Id.* A second violation of the Policy results in a minimum suspension of eight games without pay. *Id.* If fewer than eight games remain, the suspension is carried over into the next regular season, until the player misses eight games. *Id.* A third violation of the Policy results in a minimum suspension of twelve months without pay. *Id.* After twelve months a player may petition for reinstatement. *Id.*

120. *Id.* § 3(E).

121. *See id.* § 10.

122. Until the outlined appeals process is completed, any given disciplinary action, including suspension, will not take effect. *Id.*

123. *See generally* MINN. STAT. ANN. §§ 181.950–.957 (2009). Although the statute was amended in 2010, the version analyzed in this Comment is the pre-2010 version.

124. *See* V. John Ella, *What Do They Have in Mind? Minnesota's Drug-Testing Law Turns 20*, BENCH & B. MINN., Sept. 2007, at 22–23. The other areas viewed as "anti-drug testing" are much of the Northeast and Puerto Rico. *Id.* In contrast, the Rockies and the South are generally considered "pro-drug testing." *Id.*

(3) The right of an employee or job applicant to refuse to undergo drug and alcohol testing and the consequences of refusal;

(4) Any disciplinary or other adverse personnel action that may be taken based on a confirmatory test or request and pay for a confirmatory retest; and

(5) Any other appeal procedures available.[125]

The statute also establishes procedural protections, requiring employers to test outside of the workplace, and to have all specimens sent to a licensed, accredited, or certified laboratory.[126] The DATWA places limits on disciplinary action that may be taken based upon a failed test,[127] and makes allowances for retesting,[128] as well as explanations for a failed test.[129] Although the statute outlines minimum guidelines, it also leaves room for private/collectively bargained agreements.[130] As such, the sections of the statute "*shall not be construed to limit* the parties to a collective bargaining agreement from bargaining and agreeing with respect to a drug and alcohol testing *policy that meets or exceeds*, and does not otherwise conflict with, the minimum standards and requirements for employee protection provided in those sections."[131]

2. Consumable Products Act

Minnesota's CPA regulates employer conduct respecting employees' nonworking activities.[132] This act prohibits employers from refusing to hire, or disciplining a current employee, for use of lawful consumable products, *if* the use of said products occurs off the premises and during nonworking hours.[133] This law, however, does contain important exceptions. The CPA explicitly states, in relevant part, that it is *not* a violation of the statute "for an employer to restrict the use of lawful consumable products by employees during

125. § 181.952(1)(1)–(5).
126. § 181.953.
127. § 181.953(10).
128. § 181.953(9).
129. § 181.953(6)(b).
130. § 181.955(1).
131. *Id.* (emphasis added).
132. *See generally Id.* § 181.938.
133. § 181.938(2).

nonworking hours if the employer's restriction: (1) *relates to a bona fide occupational requirement and is reasonably related to employment activities or responsibilities of a particular employee or group of employees* . . . ."[134] The Minnesota legislation specifically left room for employers with particular needs to set greater restrictions regarding testing policies.[135] In doing so, the legislature recognized the differences that exist between different types of employment.[136]

IV. EIGHTH CIRCUIT ERRS IN DISMISSING ARGUMENT OF PREEMPTION[137]

In its holding, the Eighth Circuit erred in two major respects: (1) not extending the reasoning for preemption of the state common law claims to the state statutory claims,[138] and (2) taking the narrow approach to section 301 preemption by ignoring affirmative defenses.[139] Both of these errors are discussed below.

134. § 181.938(3)(a)(1) (emphasis added). In full the CPA notes that it is not a violation:

> (a) [F]or an employer to restrict the use of lawful consumable products by employees during nonworking hours if the employer's restrictions:
>
> (1) relates to a bona fide occupational requirement and is reasonably related to employment activities or responsibilities of a particular employee or group of employees; or
>
> (2) is necessary to avoid a conflict of interest or the appearance of a conflict of interest with any responsibilities owed by the employee to the employer
>
> (b) [F]or an employer to refuse to hire an applicant or discipline or discharge an employee who refuses or fails to comply with the conditions established by a chemical dependency treatment or aftercare program.[…]
>
> (c) [F]or an employer to refuse to hire an applicant or discipline or discharge an employee on the basis of the applicant's or employee's past or present job performance.

§ 181.938(3).

135. *See* § 181.938(3)(a)(1).

136. *See id.*

137. On December 14, 2009, the Eighth Circuit denied the NFL's motion for a rehearing en banc. *See generally See* Williams v. Nat'l Football League, 598 F.3d 932 (8th Cir. 2009). Four judges dissented from the denial, and found fault in the Eighth Circuit's original analysis. *See id.*

138. *See generally* Williams v. Nat'l Football League, 582 F.3d 863 (8th Cir. 2009), *cert. denied*, 131 S. Ct. 566 (2010).

139. *See id.* at 879 n.13.

A. Common Law Application to Statutory Claims

According to *Williams*, section 301 compels preemption of a state claim where: (1) the CBA creates specific duties such that the claims can be considered "based on" the agreement, or (2) resolution of the complaint would necessitate interpretation of the collective bargaining agreement.[140] The state common law claims in *Williams* were preempted because the court found such interpretation of the CBA necessary.[141] The thread that bound the common law claims together—and thus allowed them to be preempted—was the presence of a relationship between the parties and the need to evaluate that relationship to determine the strength of the claims by the player-employees.[142]

The reasoning used to preempt the common law claims can and should carry over to the statutory claims. The actual determination of whether an employer has breached its obligation under the DATWA and CPA is a factual dispute and the Eighth Circuit relied heavily on the factual nature of this dispute in disallowing preemption.[143] The problem, however, is that the common law claims which were preempted, at their essence, are also factual disputes. The outrageousness of conduct, the reasonableness of expectations, and an employer's duty are all factual issues to be resolved by a fact finder.[144] The question of whether the claim should have been preempted does not sit on the nature of the issue, be it factual or legal, but rather on the necessity of interpretation of the CBA, which ultimately existed in this case.

1. Definition of "Employer"

Although the court may have been proper in rejecting the alternative procedures argument[145]—because the court can easily look to what the NFL did, rather than analyze the actual provisions of the CBA—the court should not have so

140. *Id.* at 881 (citing Bogan v. Gen. Motors Corp, 500 F.3d 828, 832 (8th Cir. 2007)).
141. *See id.* at 881–83.
142. *See id.* For a full discussion of the state common law claims, see *supra* Part II.B.
143. *See Williams*, 582 F.3d at 876.
144. *See id.* at 881–83.
145. For a discussion of the NFL's argument, see *supra* Part II.A.

quickly discarded preemption founded upon the NFL's alleged status as employer.[146] In rejecting the possibility of preemption, the Eighth Circuit found that defining the NFL's status as employer merely necessitated reference to the preamble of the CBA, including the term 'employer' and references to 'employment,' as well as individual employment contracts.[147] If the Williamses had alleged violations of the CBA, this rationale would prove viable; for purposes of the agreement, a reference in it would certainly be binding. The claim, however, was not based upon the CBA, but instead based on two state statutes, and the Supreme Court has continuously noted that section 301 preemption is about *resolution* of the actual claim.[148]

In its disposition, the Eighth Circuit seemingly disregarded state substantive law for determining an employment relationship. As set forth by Judge Larson on remand, Minnesota recognizes a five factor test to determine whether an employer-employee relationship exists for purposes of state law: "(1) the right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of materials or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge."[149] Upon remand, the district court, held that the NFL was in fact the employer for purposes of the DATWA because of the NFL's "'sufficient control over the work' of [the] employees[,]" as defined through sections of the CBA.[150] As the most important factor to consider being "the *right* to control the means and manner of performance,"[151] Judge Larson noted not only the control that the NFL had already

146. In his dissent from a denial of a rehearing en banc, Chief Judge Loken also argued that the NFL's employer status depends upon interpretation of the CBA. *See* Williams v. Nat'l Football League, 598 F.3d 932, 932 (8th Cir. 2009) (Loken, C.J., dissenting from denial of rehearing en banc). Chief Judge Loken does not denote a statutory or common law basis for his finding, but does importantly note that "[a] proper answer requires analysis of the [CBA] between the NFL and the NFLPA, the NFL Constitution and Bylaws, and the Standard Player Contract between the players and the Vikings." *Id.*

147. *See Williams*, 582 F.3d at 877.

148. *See* Caterpillar Inc. v. Williams, 482 U.S. 386, 395 (1987).

149. Williams v. Nat'l Football League, No. 27-CV-08-29778, at *17 (Minn. 4th D. May 6, 2010), *available at* http://www.courts.state.mn.us/Documents/4/Public/News/Orders/Williamses_v_NFL_Findings_and_Final_Order.pdf (citing Guhlke v. Roberts Truck Lines, 128 N.W.2d 324, 326 (Minn. 1964)).

150. *Id.* at *16.

151. *Guhlke*, 128 N.W.2d at 326 (emphasis added).

displayed over the players, but also, and more importantly, the control granted to the NFL through the CBA.[152] The district court looked to the many rights granted through the CBA in conjunction with one another to determine the totality of control.[153] The court did not merely reference each individual section of the CBA as it is allowed to do,[154] but actually determined if that section qualifies as indicative of "the right to control the means and manner of performance," or any other factor of control.[155] Such an interpretation as to the nature of the terms of the CBA by a state court judge under state law is strictly prohibited where the parties to the action expressly called for adjudication of the claim by an arbitrator.[156] As such, the NFL's status as employer of the Williamses, for purposes of the DATWA, was and continues to be "inextricably intertwined"[157] with the CBA, and thus should have been preempted under section 301.

2. Bona Fide Occupational Requirements

The CPA, one of the two statutes at issue, says that, although generally an employer may not fire an employee due to the use of legal products, off premises, during non-working hours, such a restriction is allowed if it "relates to a bona fide occupational requirement and is reasonably related to employment activities."[158] A bona fide occupation requirement derives from the relationship between the parties, the factor allowing for preemption of the common law claims. For example, a professional athlete physically competing on the field likely realizes he or she is going to be tested more stringently for performance enhancing drugs than a businessperson, because the integrity of the sport is maintained by making sure that fans are not suspicious of a game or season's outcome. Thus, the NFL's drug testing policy must be interpreted to determine whether a bona fide

152. *See Williams*, No. 27-CV-08-29778, at *17–23.
153. *See id.*
154. *See* Trs. of Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc., 450 F.3d 324, 330 (2006).
155. *Guhlke*, 128 N.W.2d at 326.
156. *See* Lingle v. Norge Div. of Magic Chef Inc., 486 U.S. 399, 404 n.3 (1988) (citing Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95, 103–04 (1962)).
157. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985).
158. MINN. STAT. ANN. § 181.938(2)–(3)(a)(1) (2009).

occupational requirement exists. In the end, the question of preemption depends largely upon the need for interpretation of a CBA to resolve a state common or statutory claim. Although the inquiry about the bona fide occupation requirement is factual, this point alone cannot prevent preemption. Similar to the common law claims, all of which relied on factual determinations correctly preempted by the Eighth Circuit,[159] the statutory claims requiring an analysis of the bona fide occupation requirement should also be preempted when their resolution depends upon interpretation of the CBA, devoid of their factual nature.

B. Section 301 Preemption and Its Effect on Affirmative Defenses

Noting that the statutes at issue require interpretation of the Policy, the importance of these statutory clauses depends greatly upon the role of defenses in issues of preemption. The jurisprudence regarding the breadth of interpretation under section 301 is relatively evenly split within the Eighth Circuit—some cases take a broad approach, while others, a narrow approach.[160] Under the narrow interpretation, a court may look only to the face of the complaint to determine whether the claim should be preempted under section 301.[161] In taking the narrow approach, the court reasons that the plaintiff is the master of the complaint, and thus should be able to plead it in such a manner as to keep the issue in state court.[162] If a very narrow approach to section 301 preemption doctrine is taken by the courts, then the bona fide occupational requirement will be seen as a 'defense' and defenses may not be viewed when determining preemption issues. The Eighth Circuit has also taken a broader approach.[163] That broader view was outlined in *Johnson v.*

159. *See* Williams v. Nat'l Football League, 582 F.3d 863, 881–83 (8th Cir. 2009), *cert. denied*, 131 S. Ct. 566 (2010).

160. *Compare* Bogan v. Gen. Motors Corp., 500 F.3d 828 (8th Cir. 2007) (finding a narrow approach appropriate), *and* Meyer v. Schnucks Markets, Inc., 163 F.3d 1048 (8th Cir. 1998) (finding a narrow approach appropriate), *with* Gore v. TWA, 210 F.3d 944 (8th Cir. 2000) (finding a broad approach appropriate), *and* Johnson v. Anheuser Busch, Inc., 876 F.2d 620 (8th Cir. 1989) (finding a broad approach appropriate).

161. *See Schnucks Markets*, 163 F.3d at 1051.

162. *See id.* at 1050.

163. *See generally Gore*, 210 F.3d 944; *see also generally Anheuser Busch*, 876 F.2d. 620.

Anheuser Busch, Inc.[164] Such an approach requires the court to look beyond the face of the complaint, using anticipated defenses and other means to determine whether the claim should be preempted under section 301.[165]

In finding the narrow approach more appropriate, the *Williams* court held that it more closely parallels Supreme Court precedent.[166] The primary problem with the court's reasoning in accepting the narrow approach is that *Williams* erroneously applies the principles of removal preemption where it should have analyzed the principles of ordinary preemption.[167] In holding that it may not view defenses to determine preemption, the Eighth Circuit relies on *Caterpillar v. Williams*.[168] Although the Supreme Court in *Caterpillar* clearly states that a "*defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated,"[169] this finding speaks only to the principle of removal preemption. Critically, removal preemption speaks not to which court may adjudicate or what law that court may apply, but only to the whether the claim may be, when originally brought in state court, removed to federal court.[170]

Apart from the removal preemption doctrine, there exists a separate ordinary preemption doctrine. Ordinary preemption is a substantive principle that displaces state law with federal substantive law, regardless of the venue.[171] In *Williams*, the NFL did not challenge the venue itself; the argument set forth by the NFL spoke only to ordinary preemption. The Supreme Court has correctly recognized the distinction between the two principles, and allows courts to

164. 876 F.2d at 623.

165. *See id.* (citing Hanks v. Gen. Motors Corp., 859 F.2d 67, 70 (8th Cir. 1988)).

166. *See* Williams v. Nat'l Football League, 582 F.3d 863, 879 n.13 (8th Cir. 2009), *cert. denied*, 131 S. Ct. 566 (2010).

167. *See* Williams v. Nat'l Football League, 598 F.3d 932, 935 (8th Cir. 2009) (Colloton, J., dissenting from denial of rehearing en banc) (designating the alternative forms of preemption as "ordinary" and "complete" preemption).

168. *See Williams*, 582 F.3d at 879 n.13.

169. Caterpillar Inc. v. Williams, 482 U.S. 386, 399 (1987).

170. *See* Michael C. Harper, *Symposium on Labor Arbitration Thirty Years After the Steel Workers Trilogy: Limiting Section 301 Preemption: Three Cheers for the Trilogy, Only One for* Lingle *and* Lueck, 66 CHI.-KENT L. REV. 685, 719 (1990).

171. *See id.*

look past the face of the complaint in determining ordinary preemption issues.[172] In fact, *Caterpillar*, the case from which *Williams* pulls its support, distinguishes between the two doctrines noting that "[t]he fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted under the NLRA does not establish that they are removable to federal court."[173]

Earlier, in *Lingle v. Norge Division of Magic Chef, Inc.*, a case that sets forth the outer barriers of section 301 preemption, the Supreme Court took time to discuss the purpose and construction of the doctrine of section 301.[174] In footnote three the Supreme Court reiterated:

> It was apparently the theory of the Washington court that, although *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 . . . requires the federal courts to fashion, from the policy of our national labor laws, a body of federal law for the enforcement of [CBAs], nonetheless, the courts of the States remain free to apply individualized local rules when called upon to enforce such agreements. This view cannot be accepted. The dimensions of [section] 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute . . . .
>
> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. *Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.*
>
> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling . . . . State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. *With due regard to the many factors which bear upon competing state and federal interests in this area . . . , we cannot but conclude that in enacting [section] 301 Congress intended doctrines of federal*

172. *See Caterpillar*, 482 U.S. at 398.
173. *Id.*
174. *See* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 404 n.3 (1988)

labor law uniformly to prevail over inconsistent local rules.[175]

The Supreme Court in turn mandated preemption where "the resolution of a state-law claim depends upon the meaning of a [CBA] . . . ."[176] Resolution of a claim does not merely depend upon the claim itself, but instead upon potential defenses. As the heart of section 301 preemption is to keep any interpretation of a CBA out of the hands of state judges[177]—not just interpretation which falls on the face of the complaint—allowing state courts to interpret these defenses in applying state substantive law runs counter to the focus of this doctrine.

Indicative of the impropriety of the Eighth Circuit's decision is the subsequent disposition, by the district court, of the substantive claim.[178] Upon remand, the district court summarily dismissed the Williamses' claim against the NFL for allegedly violating the CPA, finding a bona fide occupational requirement existed, the purported defense to the claim.[179] The Williamses should not have been able to avoid the "extraordinary preemptive power"[180] of section 301 by cleverly pleading a complaint; especially where a legitimate defense, necessary to determine the validity of the claim, turned on an interpretation of the CBA. If the Eighth Circuit had properly analyzed the Supreme Court precedent, and focused on Congress's intent through section 301, the defenses would have needed to be examined, and the statutory claims would have *a fortiori* been preempted.

175. *Id.* (emphasis added) (quoting *Lucas Flour Co.*, 369 U.S. at 103–04).

176. *Id.* at 405–06 (emphasis added).

177. *See* Drummonds, *supra* note 29, at 164.

178. *See generally* Williams v. Nat'l Football League, No. 27-CV-08-29778, at *17 (Minn. 4th D. May 6, 2010), *available at* http://www.courts.state.mn.us/Documents/4/Public/News/Orders/Williamses_v_NFL_Findings_and_Final_Order.pdf.

179. *See id.* at *38–39. For a discussion on the interpretation involved in the CPA claim, *see supra* Part IV.A.2.

180. Shane v. Greyhound Lines, Inc., 868 F.2d 1057, 1062 (8th Cir. 1986); *see also* Caterpillar Inc. v. Williams, 482 U.S. 386, 394 (1987) (citing Avco Corp. v. Aero Lodge No. 735, 88 S. Ct. 1235, 1236 (1968)).

V. ARBITRATION AND SECTION 301

The NFL CBA contains a specific grievance procedure for non-injury based claims by players.[181] Article IX of the CBA outlines the non-injury grievance procedures for the NFL and calls for appeals from the NFL's internal grievance procedure to go to binding arbitration.[182] The type of arbitration provision called for in the CBA is exactly what Congress hoped to encourage in promulgating section 301.[183] As noted above, the impetus of section 301 preemption is to create a common body of law as well as a common forum in which to resolve labor claims dependent upon interpretation of the terms of a CBA.[184] Because the Eighth Circuit, as well as the Ninth Circuit,[185] continually misapplies section 301, the courts have slowly eroded the role of arbitrators in labor cases. Instead, federal judges, and even less appropriately, state judges have interpreted terms of the CBA—exactly what section 301 preemption urges against.

Although the NFL did not argue that a valid arbitration clause was in place, the impropriety of the Eighth Circuit's decision brings to light specific issues of forum waiver in labor conflicts. The type of provision contained in the NFL CBA requires binding arbitration only when the claim requires CBA interpretation.[186] Thus, when the Eighth Circuit found that resolution of the statutory claim did not require the court to interpret the CBA, the court did not have to send the claim to arbitration. But, as noted, the statutory claims did in fact require interpretation of the CBA, and the court *should* have sent the claims to arbitration. In order to reestablish the role of arbitration, unions and employers should be able to collectively bargain for binding arbitration of statutory claims.[187] The ability, however, to bargain for such a forum

181. *See* NFL MGMT COUNCIL & NFL PLAYERS ASS'N, NFL COLLECTIVE BARGAINING AGREEMENT 2006–2012, Art. IX, 23–27 (Mar. 8, 2006), http://images.nflplayers.com/mediaResources/files/PDFs/General/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf [hereinafter NFL CBA].

182. *See id.*

183. *See supra* Part I.B.3.

184. *See supra* Part I.B.3 and accompanying text.

185. *See generally* Sprewell v. Golden State Warriors, 266 F.3d 979 (9th Cir. 2001) (finding defenses irrelevant in determining questions of section 301 preemption).

186. *See* NFL CBA, *supra* note 181, at Art. IX, Sec. 1.

187. As noted above, *see supra* notes 65–68, section 203(d) of the LMRA calls for use of the forum decided upon by the parties involved. The problem is section 203(d) only

waiver, depends upon the jurisprudence surrounding arbitration.

A. Enforceability of Arbitration Provisions in Collective Bargaining Agreements

In 1920, the Supreme Court decided three cases (collectively known as "The Steelworker's Trilogy") that established the federal policy in favor of arbitration as the forum for resolution of labor disputes.[188] In deciding the Steelworker's Trilogy, the Court turned a firm stance, and recognized that, unless an arbitrator's award does not draw its essence from the CBA, then a court must uphold the arbitrator's award.[189] These decisions recognized the importance of arbitration and generally called for the enforceability of arbitration clauses.

Even with the federal policy favoring arbitration, until recently, it seemed as though there was little hope for unionized parties seeking to arbitrate statutory claims. While the Supreme Court extended the scope of arbitration clauses, the Court still feared the differing interests of individual employees and their representative unions and disallowed union waiver of an individual employee's judicial forum of statutory claims.[190]

Then, in 2009, the Supreme Court outlined an exception to the general rule of non-waiver. In *14 Penn Plaza v. Pyett*, the Supreme Court recognized that unions could waive the judicial forum in favor of arbitration for federal antidiscrimination claims.[191] *Pyett* involved the Realty Advisory Board on Labor Relations ("RAB") and the Service

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comes into play when a court finds the claims preempted by section 301. *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, 367 n.46 (2010). Allowing parties to collectively bargain for a forum waiver clause will avoid the judicial forum altogether; parties will go directly to arbitration.

188. *See generally* United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigating Co., 363 U.S. 574 (1960); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

189. *See generally Am. Mfg. Co.*, 363 U.S. 564; *Warrior & Gulf Navigating Co.*, 363 U.S. 574; *Enter. Wheel & Car Corp.*, 363 U.S. 593.

190. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (holding that an employee does not lose the judicial forum after a claim goes through an arbitral proceeding).

191. 129 S. Ct. 1456 (2009).

Employees International Union, Local 32BJ ("Union") entering into an industry-wide CBA requiring union members to submit all employment discrimination claims, including those under the Age Discrimination in Employment Act (ADEA), to binding arbitration.[192] 14 Penn Plaza, a member of the RAB, owned the building where respondents worked.[193] Temco Service Industries, Inc., respondents' direct employer, reassigned respondent's jobs after 14 Penn Plaza hired Spartan Security.[194] The Union filed grievances alleging various violations of the CBA.[195] After withdrawing the age-discrimination claims from arbitration, the respondents alleged a violation of the ADEA in the district court.[196] The petitioners sought to compel arbitration based on the Federal Arbitration Act (FAA).[197] The district court denied the motion, and the Second Circuit affirmed.[198]

The Supreme Court then reversed and remanded the decision, holding that "there is no legal basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated by the Union and the RAB, and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue . . . ."[199] In coming to this conclusion, and allowing for waiver of the judicial forum through a CBA, the Court recognized that unions—as exclusive bargaining agents for employees—should be able to negotiate for arbitration, as arbitration clauses are a condition of employment, and thus a mandatory subject of bargaining.[200] In allowing for such a waiver, the Court also noted that individual employees would not lose their discrimination claims in arbitration, but instead just lose the judicial forum itself.[201] The Supreme Court also recognized that bargaining parties must "clearly and unmistakably" waive the statutory claim in the arbitration provision in order to make it enforceable;[202] however, the Court in *Pyett* refused

192. *See id.* at 1461.
193. *See id.*
194. *See id.* at 1461–62.
195. *See id.* at 1462.
196. *See id.*
197. *See 14 Penn Plaza*, 129 S. Ct. at 1462.
198. *See id.* at 1462–63.
199. *Id.* at 1466.
200. *See id.* at 1463–64.
201. *See id.* at 1469.
202. *Id.* at 1473–74.

to analyze what constitutes clear and unmistakable waiver.[203] Thus, lower courts are still free to interpret what "clearly and unmistakably" entails.

B. *Extending the Decision in* Pyett *to the Waiver of State Statutory Claims*

The Supreme Court's decision in *Pyett*—which was limited to waiver of federal ADEA claims—can, and should be extended in order to further effectuate the policies behind section 301. Cases analyzing arbitration clauses have become more accepting of the use of arbitration as a forum for resolution of claims.[204] The *Pyett* decision relies upon a number of cases, which use the FAA,[205] as a statutory basis for waiver of the judicial forum.[206] Although labor arbitration derives from a different source than the FAA, the Supreme Court has acknowledged that the FAA applies to almost all contracts of employment.[207] As such, the FAA can and should

203. *See 14 Penn Plaza*, 129 S. Ct. at 1473–74.

204. Originally, the Supreme Court did not allow waiver of the judicial forum for federal statutory claims. *See* Wilko v. Swan, 346 U.S. 427 (1953) (disallowing waiver of the judicial forum for claims brought under the Securities Act). Despite initial resistance to forum waiver, the Supreme Court later overruled the holding in *Wilko*, and held that courts should presume federal statutory claims are arbitrable. *See generally* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

205. 9 U.S.C. §§ 1–16 (2006)

206. *See generally 14 Penn Plaza*, 129 S. Ct. 1456 (relying upon, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989), and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) to allow for union waiver of the judicial forum).

207. Circuit City v. Adams, 532 U.S. 105 (2001). The FAA, first enacted in 1925, applies to "any maritime transaction or a contract evidencing a transaction involving commerce." § 2. Section 1 of the FAA further defines commerce by stating:

> '[C]ommerce', as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but *nothing herein contained shall apply to contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 1. (emphasis added). Because of the exempting language contained in section 1, courts spent many years trying to determine the limits of the FAA exemption of employment contracts. In 2001 the Supreme Court finally answered that question. The Court in *Circuit City v. Adams*, held that section 1 of the FAA only applies to transportation employment contracts; all other employment contracts are subject to the provisions of the FAA. 532 U.S. 105. This means that most arbitration clauses contained in employment contracts are in fact enforceable under the FAA.

continue to provide a basis for waiver of state statutory claims. The jurisprudence of the FAA currently allows for arbitration of state statutory claims.[208] The Supreme Court has even recognized that the FAA preempts state statutes that discriminate against arbitration clauses.[209] In fact, even if a contract has a state choice of law provision, courts will uphold arbitration provisions unless the parties specifically call for the choice of law provision to apply to arbitration.[210] Allowing for a waiver of state statutory claims is a natural extension of the arbitration jurisprudence already in place.

The Minnesota statutes at issue in *Williams* do not contain any provisions disallowing arbitration of the statutory claim.[211] As such, unions should be able to waive the judicial forum in favor of arbitration for state statutory claims, specifically drug testing statutes. Because the Supreme Court did not specifically define clear and unmistakable waiver, a reasonable interpretation would be one that puts all parties represented on notice of which statutory provisions are waived. The NFL and NFLPA, for example, could state—in the CBA—that "The NFL agrees to comply with all state statutory drug testing provisions, present or hereafter enacted, to the extent it is legally required to do so. Any and all claims arising under those provisions shall be subject to the grievance and arbitration procedures provided herein as the sole and exclusive remedy for violations. Arbitrators shall apply any and all appropriate law in rendering decisions based on these claims." After including such language, the CBA could cross-reference to the Policy, where it could include a non-exhaustive list of such drug testing provisions. Such language would provide appropriate notice to all members of the NFLPA that their representative union waived the judicial forum, favoring instead arbitration of drug testing statutory claims.

208. *See generally* Southland v. Keating, 465 U.S. 1 (1984) (calling for arbitration of all claims agreed to under state law, including a state statutory claim).

209. *See generally* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1995) (holding that a first page notice requirement applicable only to arbitration clauses is inconsistent with the FAA and is therefore displaced).

210. *See generally* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) (finding that the choice of law provision intended to only incorporate "New York's substantive rights and obligations, and not the state's allocation of power between tribunals").

211. *See generally* MINN. STAT. ANN. §§ 181.950–.957 (2009); *see generally also id.* § 181.938.

Such waiver also allows arbitrators to be the ones to apply section 301 in determining the underlying claim. As arbitrators in labor cases are quite familiar with what "interpretation" of a CBA actually entails, these individuals are more likely to properly enforce section 301 preemption and use a broad approach, taking defenses into account. Again, by waiving the statutory forum, individuals will not lose their substantive claim; instead, they simply agree to a specific forum to resolve their claims, a forum that the Supreme Court has affirmatively recognized as an acceptable forum for the resolution of statutory claims.

CONCLUSION

Drug testing has become a topic at the forefront of the sports industry. Concerns with the effects that drug use has on the players, the integrity of the sports leagues, and the potential trickle-down effect on America's youth has caused leagues to institute stringent strict liability standards and respectively strong discipline. The Eighth Circuit in *Williams v. National Football League* did not defer to these collectively bargained for agreements, and instead allowed for players to take state action. By failing to extend the reasoning of the common law claims to the statutory claims and misinterpreting Supreme Court precedent, the Eighth Circuit has placed professional sports leagues in a position of fear of litigation.

Both leagues and players, through their respective player's associations, should be able to reach an agreement regarding drug testing terms, place them in a collectively bargained for agreement, and then subsequently rely on these procedures and discipline. The NFL followed the intent of Congress, strengthened drug testing policies and in return, it was sued. Section 301 is intended to deal with such cases, and in order for the intent of Congress to be fully realized, professional sports leagues must be able to continue collectively bargaining for drug testing policies without fear of potential state litigation.

Although it does not resolve the issue of improper application of section 301 preemption, allowing unions and employers to waive the judicial forum in favor of arbitration can act as a first step towards the fulfillment of congressional intent in labor adjudication. Arbitrators have experience

interpreting CBAs; they know when interpretation of the CBA is necessary to the resolution of a statutory claim, and thus are likely to properly apply section 301. Even in instances in which the arbitrator follows a narrow approach—which is contrary to the substantive law of section 301—having the arbitrator be the one to decide follows the congressional intent regarding *forum* of adjudication. Until the Supreme Court resolves the split among the circuits regarding section 301 preemption, allowing arbitrators to resolve the entire statutory claim, as well as preemption issues, encourages proper adjudication of claims pursuant to section 301 of the LMRA.