

Conflicting Anti-Doping Laws in Professional Sports: Collective Bargaining Agreements v. State Law

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Each February, millions of football fans gather to watch the most prestigious competition of the sport. With more than 100 million viewers,¹ more Americans watch the Super Bowl than any other television broadcast.² The event itself represents the culmination of a sixteen-week season, with the two best teams competing in the event.³ The winning team, considered the best in all of football, receives the coveted Vince Lombardi Trophy,⁴ bragging rights, and sizeable bonus money.⁵ The

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1. Press Release, The Nielsen Co., Nielsen Issues Annual Report on Super Bowl Advertising and Overall Viewing (Feb. 5, 2009) (on file with author). Approximately 100 million viewers watch the Super Bowl in its entirety, although an estimated 150 million watch at least six minutes of the broadcast. *Id.*

2. Press Release, The Nielsen Co., Super Bowl XLV Most Viewed Telecast in U.S. Broadcast History (Feb. 7, 2011), available at http://blog.nielsen.com/nielsenwire/media_entertainment/super-bowl-xliv-most-viewed-telecast-in-broadcast-history. Super Bowl XLV, played February 6, 2011, between the Green Bay Packers and the Pittsburgh Steelers drew a record 111 million American viewers, making the event the most watched event in television history. *Id.*

3. The regular season for the NFL spans seventeen weeks; each team, however, receives one bye week when it does not play. Preseason games generally last an additional four weeks but do not affect a team's overall season record. Playoff contenders must either win their division by collecting the most regular season wins or obtain a Wild Card slot based on winning percentage. The playoffs themselves consist of three rounds of single-elimination play; winners then compete in the Super Bowl for the overall prize. See NFL, <http://www.nfl.com> (last visited April 9, 2011).

4. Vince Lombardi (June 11, 1913–Sept. 3, 1970), former head coach of the Green Bay Packers, is widely regarded as the greatest football coach of all time. Upon his death, the trophy was renamed in his honor. The Packers won the first two Super Bowls under his direction. *History, Hall of Famers*, PACKERS, <http://www.packers.com/history/hall-of-famers/lombardi-vince.html> (last visited Mar. 31, 2010).

5. NAT'L FOOTBALL LEAGUE MGMT. COUNCIL & NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, NFL COLLECTIVE BARGAINING AGREEMENT 2006–2012 art. XLII (2006) available at <http://static.nfl.com/static/content/public/image/cba/nfl-cba-2006-2012.pdf>. [hereinafter NFL CBA]. Players receive post-season bonuses for each game played. In 2011, post-season play paid \$22,000 for divisional playoffs, \$40,000 for conference championship play, and \$88,000 for a Super Bowl

event also recognizes an individual from the winning team as its Most Valuable Player,⁶ a man considered the epitome of football and the very best of the best of the game.

Imagine watching the awards presentation ceremony, as event sponsors congratulate the winning team and present trophies to the cheers of thousands of screaming fans. Imagine the players shattering dozens of long-held records, all but guaranteeing them spots in the Pro Football Hall of Fame.⁷

Now imagine that each winning player tested positive for performance-enhancing drugs, and the League openly allowed them to play without suspensions, fines, or penalties of any kind.

Such a scenario may seem far-fetched but could actually result after the Eighth Circuit's recent decision in *Williams v. National Football League* on steroid testing in professional sports.⁸ The circuit upheld a lower-court ruling that allows professional athletes in the National Football League (NFL), Major League Baseball (MLB), National Hockey League (NHL), and National Basketball Association (NBA) to challenge their doping⁹ suspensions in state courts and apply favorable state employment law instead of the bargained-for terms specified in their contracts.¹⁰ The ruling effectively prevents the owners of professional sports teams operating under collective bargaining agreements (CBAs) from enforcing the provisions therein for drug testing.¹¹ For example, the NFL's CBA specifies that an athlete's first positive doping test will re-

win. *Id.* The losing team received identical division and conference bonuses, plus \$44,000 for a Super Bowl loss. *Id.* Teams competing in the Wild Card round receive additional bonus money: \$22,000 for division winners and \$20,000 for the two Wild Card teams. *Id.*

6. *News, Super Bowl, MVP Ballot*, NFL, <http://www.nfl.com/superbowl/45/mvp-ballot/landing> (last visited Feb. 26, 2011). Fans and media members determine the winner of the Super Bowl Most Valuable Player (MVP) Pete Rozelle Trophy (named after a former NFL commissioner). Media votes comprise eighty percent of the vote tally; fan votes account for the remaining twenty percent. *Id.*

7. *Selection Process*, PRO FOOTBALL HALL OF FAME, <http://www.profootballhof.com/hof/selectionprocess.aspx> (last visited Feb. 26, 2011). Selection to the Hall of Fame requires an eighty percent approval vote on behalf of the forty-four-member selection committee. The Committee uses few set criteria; however, induction requires a minimum five-year retirement from play and enshrinees must have made "outstanding contributions to professional football." *Id.* The Hall inducts a maximum of seven players each year. *Id.*

8. *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009).

9. Throughout this Note, the author sometimes uses colloquial terms such as "doping" or "juicing" as synonyms for unlawful steroid use.

10. *See Williams*, 582 F.3d at 868.

11. *See Michael S. Schmidt, Ruling May Weaken Doping Plans in Pro Sports*, N.Y. TIMES, Sept. 18, 2009, at A1, available at <http://www.nytimes.com/2009/09/19/sports/football/19doping.html>.

sult in an automatic four-game suspension without pay.¹² But now, because the Eighth Circuit ruled that the terms of the NFL's CBA conflict with applicable Minnesota state law and that state law controls, the court effectively voided the terms of the CBA, rendering the CBA's sanctions unlawful.¹³ Furthermore, similar state laws exist in approximately half of all states,¹⁴ forbidding adverse action against an employee as a result of a positive drug test unless: (1) the employee first receives written notice of his right to explain the result; (2) the employee receives notice of his right to a second, confirmatory test; and (3) the employee receives notice of his opportunity to undergo drug treatment and fails or refuses to participate.¹⁵

The Eighth Circuit's ruling in *Williams* could render efforts to deter steroid usage in professional sports completely ineffective for two reasons. First, compliance with applicable state law requires the "employer," or team owner, to offer the offending player a second, confirmatory test, as well as the opportunity to complete drug treatment.¹⁶ Adherence to these requirements could easily span an entire playing season or longer,¹⁷ allowing offenders to continue to play indefinitely without penalty. Second, the circuit's decision hinders enforcement of the NFL's CBA agreement in all states where franchise teams play—in and out of the Eighth Circuit—because it prevents uniform application of punishment.¹⁸

12. NAT'L FOOTBALL LEAGUE & NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES § 6 (2009) [hereinafter NFL POLICY ON ANABOLIC STEROIDS] (on file with author).

13. *Williams*, 582 F.3d at 868.

14. *Williams* involves Minnesota state law, but approximately half of all states have similar protections for employees who fail a drug test. Michael S. Schmidt, *In Blow to Antidoping Efforts, Athletes Gain Leeway in Court*, N.Y. TIMES, Sept. 29, 2009, at A1.

15. Drug and Alcohol Testing in the Workplace Act, MINN. STAT. ANN. § 181.953(10)(b)(1)–(2) (West 2009); *Williams*, 582 F.3d at 875.

16. MINN. STAT. ANN. § 181.953(10)(a), (b)(1)–(2).

17. NFL preseason begins in August, regular-season games span from September to December, and post-season play lasts throughout January. The Super Bowl generally occurs in early February. NFL, <http://www.nfl.com/schedules> (last visited Feb. 26, 2011). The lengths of drug treatment programs vary. For example, in-patient treatment at the Betty Ford Center, an alcohol and drug rehabilitation program, spans anywhere from one to six months, depending on individual patient needs. *Treatment Programs*, BETTY FORD CENTER, <http://www.bettyfordcenter.org/programs/index.php> (last visited Feb. 26, 2011).

18. The Eighth Circuit includes Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. The decision affects three NFL teams (Minnesota Vikings, Kansas City Chiefs, St. Louis Rams), one NBA team (Minnesota Timberwolves), three MLB teams (Minnesota Twins, Kansas City Royals, St. Louis Cardinals), and two NHL teams (Minnesota Wild and St. Louis Blues). The states, however, also host arena league football, minor league basketball, baseball, and hockey, and one professional women's basketball team. Although the ruling did not address minor league or women's professional sports, the reasoning behind the decision suggests its applicability to any employee working under a CBA in an Eighth Circuit state. Although legally the NFL

This Note addresses the challenges and potential solutions for effective steroid testing in sports created by the ruling in *Williams v. NFL*.¹⁹ Part I focuses on the history and background of drug testing in sports. Part II discusses the current state of the law, problems that arise from the Eighth Circuit's decision, and potential far-reaching effects as a result of the ruling. Part III offers some possible solutions for resolving the circuit split, along with the shortcomings of such solutions. Part IV concludes that the most likely solution for steroid deterrence must come from sports owners themselves, despite tremendous financial costs, to preserve the integrity of the game, protect players' health, and deter drug usage by youth athletes.²⁰ However, such a solution assumes that the owners truly want to rid steroids from sports—which in and of itself is hotly debated.

I. HISTORY AND BACKGROUND OF STEROIDS AND DRUG TESTING

Discovered more than seventy years ago, steroids rapidly made their way into the training regimens of athletes.²¹ This Part addresses the history of steroids, their introduction into individual and group sports, the rampant misuse that led to their classification as a controlled substance, and Congress's continuing efforts to curb steroid abuse by athletes.

Although initially used for legitimate medical purposes, steroids quickly became a remedy for nonmedical situations requiring a physical edge.²² Scientists discovered the anabolic effects of testosterone by 1935; soon after, physicians administered the hormone in drug form to help patients build strength and speed recovery.²³ Some historians allege that German athletes took testosterone as early as 1936 to boost their performances in front of Hitler at the Berlin Olympics.²⁴ Others suggest that German soldiers ingested steroids to increase their aggression on the battlefield during World War II.²⁵ Although these claims remain unconfirmed, the first documented case of steroid usage in sports occurred in the early 1940s, when an aging racehorse began winning races after re-

need not mete out punishment uniformly, Commissioner Goodell has cited the need to do so for morale and fairness reasons. See Schmidt, *supra* note 11.

19. *Williams*, 582 F.3d at 868.

20. NFL POLICY ON ANABOLIC STEROIDS, *supra* note 12, at 1–2. The NFL cites three concerns as its basis for steroid testing: fairness of competition, adverse health effects of athletes, and steroid usage by youths mimicking professional athletes as their role models. *Id.*

21. Charles E. Yesalis, Stephen P. Courson & James Wright, *History of Anabolic Steroid Use in Sport and Exercise*, DRUG ABUSE AND THE LAW SOURCEBOOK § 2.32 (1993).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

ceiving injections of testosterone during training sessions.²⁶ By the mid-1940s, scientists developed synthetic anabolic steroids and wrote essays on the hormones' potential to increase size and strength.²⁷ Experimental usage of the drugs began in the bodybuilding community by the late 1940s or early 1950s.²⁸

Reportedly, steroids became a weapon of U.S. team sports in the mid-1950s, when the team physician for the U.S. weight-lifting team learned that the team's Soviet rivals credited steroids with their success.²⁹ The U.S. team immediately began experimenting with several different steroids—when users began winning championships, word of the effectiveness of steroids spread to other strength-based sports, such as football.³⁰ In fact, the San Diego Chargers hired a former assistant coach for the U.S. weight-lifting team, making him the first strength coach in professional football.³¹ At least three professional football teams used anabolic steroids by the 1960s, with many more following course in the '70s and '80s.³²

In an effort to deter this increased misuse of steroids by professional athletes, Congress passed the Anabolic Steroids Control Act of 1990,³³ which classified steroids as controlled substances and limited steroids' lawful use to treatment of disease or other recognized medical illness.³⁴ Unfortunately, the Act's passage failed to impact steroid usage in sports, with the NFL, MLB, NHL, and NBA testing few players and sanctioning even fewer for possible drug violations.³⁵ Congress escalated its in-

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Anabolic Steroids Control Act of 1990, Pub. L. No. 101-647, § 1901, 104 Stat. 4851 (1990). Congress later amended the Act in 2004 to include as controlled substances a number of new steroids developed since 1990. Anabolic Steroids Control Act of 2004, Pub. L. No. 108-358, § 1, 118 Stat. 1661 (2004).

34. Jeffrey Hedges, *The Anabolic Steroids Act: Bad Medicine for the Elderly*, 5 *ELDER L.J.* 293, 295-97 (1997).

35. NFL drug testing began in 1987; however, the League did not sanction players for violations until 1989. Ed Bouchette, *Steelers' Washington: Baseball Should Ban Steroids*, *PITTSBURGH POST-GAZETTE*, June 3, 2002, <http://www.post-gazette.com/Steelers/20020603steele0603p3.asp>. Similarly, prior to 2005, an infraction in the MLB required only counseling. John Jeansonne, *MLB Flexes Some Muscle*, *NEWSDAY*, Jan. 14, 2005, at A90. Until 2006, the NHL conducted no testing whatsoever. Scott Bordow, *NHL Moving to Put Steroids Question on Ice*, *MYRTLE BEACH SUN NEWS (S.C.)*, Jan. 23, 2006, at B5. The NBA tested players once per year during training camp but utilized no additional random testing after an athlete's rookie year of play. *Steroid Use in Sports Part III: Examining the National Basketball Association's Steroid Testing Program: Hearing Before the H. Comm. on Government Reform*, 109th Cong. 11 (2005) [hereinafter *Steroid Use in Sports Part III*] (statement of Rep. Henry A. Waxman, Member, H. Comm. on Gov't Reform).

volvement beginning in 2004,³⁶ when it initiated a series of hearings with team management, union leaders, professional athletes, sports commissioners, athletic trainers, sports physicians, and parents of youth in professional, collegiate, and high-school organizations, with the goal of curbing steroid usage more successfully.³⁷ Compelled in part by a report on youth steroid use,³⁸ congressional members specifically asked MLB Commissioner³⁹ Bud Selig⁴⁰ to investigate the prevalence of perfor-

36. Congress directed some attention to the misuse of steroids prior to 2004, but the bulk of the hearings occurred in 2004–05. *See infra* note 37.

37. *See Myths and Facts About Human Growth Hormone, B-12, and Other Substances: Hearing Before the Comm. on Oversight & Gov't Reform*, 110th Cong. (2008); *The Mitchell Report: The Illegal Use of Steroids in Major League Baseball, Day 2: Hearing Before the Comm. on Oversight & Gov't Reform*, 110th Cong. (2008) [hereinafter *The Mitchell Report: The Illegal Use of Steroids in Major League Baseball, Day 2*]; *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the Comm. on Gov't Reform*, 109th Cong. (2005); *Steroids in Sports: Cheating the System and Gambling Your Health: J. Hearing Before the Subcomm. on Commerce, Trade, & Consumer Prot. and the Subcomm. on Health of the Comm. on Energy & Commerce*, 109th Cong. (2005); *Steroid Use in Sports, Part II: Examining the National Football League's Policy on Anabolic Steroids and Related Substances: Hearing Before the Comm. on Gov't Reform*, 109th Cong. (2005); *Steroid Use in Sports Part III: Examining the National Basketball Association's Steroid Testing Program: Hearing Before the Comm. on Gov't Reform*, 109th Cong. (2005); *Eradicating Steroid Use, Part IV: Examining the Use of Steroids by Young Women to Enhance Athletic Performance and Body Image: Hearing Before the Comm. on Gov't Reform*, 109th Cong. (2005); *S. 1114, The Clean Sports Act of 2005, and S. 1334, the Professional Sports Integrity and Accountability Act: Hearing Before the Comm. on Commerce, Sci., & Transp.*, 109th Cong. (2005); *Abuse of Anabolic Steroids and Their Precursors by Adolescent Amateur Athletes: Hearing Before the S. Caucus on Int'l Narcotics Control*, 108th Cong. (2004); *Anabolic Steroid Control Act of 2004: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the Comm. on the Judiciary*, 108th Cong. (2004); *Steroid Use in Professional Baseball and Anti-Doping Issues in Amateur Sports: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce & Tourism*, 107th Cong. (2002); *Effects of Performance Enhancing Drugs on the Health of Athletes and Athletic Competition: Hearing Before the Comm. on Commerce, Sci., & Transp.*, 106th Cong. (1999).

38. *Steroids in Sports: Cheating the System and Gambling Your Health: J. Hearing Before the Subcomm. on Commerce, Trade, & Consumer Prot. and the Subcomm. on Health of the Comm. on Energy & Comm.*, 109th Cong. 4 (2005) [hereinafter *Steroids in Sports: Cheating the System and Gambling Your Health*] (statement of Hon. Clifford Stearns, Chairman, Subcomm. on Commerce, Trade, & Consumer Prot.). Stearns cites a survey funded by the National Institute on Drug Abuse (NIDA), which estimated steroid usage among high school seniors at three and a half percent, with similar percentages for teenagers as young as the eighth grade. *Id.*

39. The Commissioner is the chief executive of the MLB, responsible for negotiating labor, television, and other contracts.

40. *Official Info, MLB Executives*, MLB.COM, http://mlb.mlb.com/mlb/official_info/about_mlb/executives.jsp?bio=selig_bud (last visited Feb. 26, 2011). Serving as Commissioner since July 9, 1998, Allan H. "Bud" Selig announced he would not seek another term once his contract expires in 2012. Phil Rogers, *Commissioner Plans to Step Down after 2012*, CHI. TRIB., Nov. 29, 2009, at 10, available at http://articles.chicagotribune.com/2009-11-29/sports/0911280287_1_commissioner-final-official-act-plans.

mance-enhancing drugs in professional baseball.⁴¹ Additional congressional uproar ensued when the Commissioner appointed Senator George Mitchell to lead the inquiry, which resulted in a 409-page report⁴² that alleged extensive steroid usage among players, as well as widespread knowledge of the problem among the players' union, owners, team physicians, trainers, and even the Commissioner himself.⁴³

Congress and sports team owners cite three reasons for clamping down on the use of performance-enhancing drugs: first, to protect the integrity of the game; second, to protect players' health; and third, to protect the health of children who admire professional athletes and often imitate their behaviors.⁴⁴ During the 2005 hearings, members of Congress repeatedly referred to steroid users as "cheaters"⁴⁵ who unfairly skew the playing field by taking illegal substances that increase their size, strength, and speed, while decreasing recovery time.⁴⁶ Congressional members also voiced concerns about the effect of steroid usage on players' health, citing the documented link of steroids with cancer, liver and heart disease, and hormonal problems.⁴⁷ Congress's greatest concern pertained to the safety of teenagers, who emulate professional sports figures and put their own health at risk by doing so. According to one report, one in every sixteen high-school students tries illegal steroids to

41. *The Mitchell Report: The Illegal Use of Steroids in Major League Baseball, Day 2*, *supra* note 37 (statements of Reps. Tom Davis and Henry A. Waxman, Members of the Comm. on Oversight & Gov't Reform).

42. GEORGE J. MITCHELL, DLA PIPER U.S. LLP, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL (2007), *available at* <http://files.mlb.com/mitchrpt.pdf>. The document became widely known as "The Mitchell Report."

43. *Steroid Use in Sports Part III*, *supra* note 35, at 2 (testimony of Rep. Waxman).

44. *Id.* at 41; NFL POLICY ON ANABOLIC STEROIDS, *supra* note 12, § 1. The NBA and NHL cite player safety as their primary goal. NBA-PLAYERS ASS'N, 2005 COLLECTIVE BARGAINING AGREEMENT art. XXXIII § 15(b) [hereinafter NBA CBA], *available at* <http://www.nbpa.org/cba/2005>; NAT'L HOCKEY LEAGUE & NAT'L HOCKEY LEAGUE PLAYERS' ASS'N, COLLECTIVE BARGAINING AGREEMENT 2005–2011 art. 47 § 47.1, *available at* <http://www.nhl.com/cba/2005-CBA.pdf> [hereinafter NHL CBA].

45. *Steroids in Sports: Cheating the System and Gambling Your Health*, *supra* note 38, at 2–4 (testimony of Rep. Stearns); 12 (testimony of Rep. Upton); 98, 100, 108–09 (testimony of Francis Connelly, Senior V.P. and Gen. Counsel–Labor, MLB); 123 (testimony of Sandra Worth, Nat'l Athletic Trainers Ass'n).

46. *Id.* at 2, 4 (testimony of Rep. Stearns).

47. *Id.* at 2, 4 (testimony of Rep. Stearns), 5 (testimony of Rep. Waxman), 6–7 (testimony of Rep. Deal), 8 (testimony of Rep. Brown), 11 (testimony of Rep. Schakowsky), 15 (testimony of Rep. Norwood), 18–19 (testimony of Rep. Ryun), 31–32 (testimony of Linn Goldberg, Prof. of Medicine, Div. of Health Promotion & Sports Medicine, Or. Health & Science Univ.), 37 (testimony of Robert Kanaby, Exec. Dir., Nat'l Fed'n of State High Sch. Ass'ns), 67–68 (testimony of Ralph Hale, Chair. of the Board, U.S. Anti-Doping Agency).

improve physical performance.⁴⁸ But unlike professional athletes, youths tend to ingest steroids without oversight from a physician or trainer, further heightening their level of risk.⁴⁹ Indeed, youths typically consume steroids at ten, twenty, or even fifty times⁵⁰ the intended dosage, which can cause stunted bone development, premature heart disease, liver problems, psychiatric diseases, and even death.⁵¹ Because of the many safety concerns related to steroids, combined with Americans' love of sports, Congress sought to pressure professional sports teams to increase their drug testing and deter steroid usage.

II. THE CURRENT STATE OF PREEMPTION LAW

Until the *Williams* decision, sports owners and unions generally assumed that CBAs preempted state law in the area of drug testing. This Part addresses the presumption of preemption, the *Williams* case, contrary state law employee protections, and the effect of *Williams* on other sports governed by similar CBA provisions.

A. General Assumption Pre-Williams: CBAs Control

Initially, players' unions began negotiating CBAs to ensure that athletes received uniform pay, privileges, and protections from their respective leagues or associations.⁵² In the NFL, the union created the League's first CBA in 1968, which provided minimum salary requirements, pension guidelines, and grievance procedures.⁵³ Similar CBAs took effect for the MLB, NHL, and NBA in 1968, 1967, and 1964, respectively.⁵⁴ With regard to steroids, CBAs also ensured that all players would comply with uniform testing, resulting in fair and honest athletic competition.⁵⁵

Until the Eighth Circuit's decision, team owners and players assumed that their respective CBAs dictated the testing and penalties for use of banned substances in professional sports. For example, the NFL's testing procedure requires each player to receive at least one test per

48. *Id.* at 5 (testimony of Rep. Waxman).

49. *Id.* at 24–29 (testimony of Donald Hooten).

50. *Id.*

51. *Id.*

52. NFL PLAYERS ASS'N, <http://www.nflplayers.com/About-us/History> (last visited Feb. 26, 2011).

53. *Id.*

54. *MLBPA Info*, MLBPLAYERS.COM, <http://mlbplayers.mlb.com/pa/info/faq.jsp#cba> (last visited Feb. 26, 2011); *About Us*, NHLPA.COM, <http://www.nhlpa.com/About-Us> (last visited Feb. 26, 2011); *Official Media Kit*, NBA PLAYERS UNITED, <http://www.nbpa.org/sites/default/files/users/sean.brandveen/Media%20Kit.pdf>.

55. NFL POLICY ON ANABOLIC STEROIDS, *supra* note 12, § 3.

year, generally during pre-season training camp.⁵⁶ During the regular season,⁵⁷ the NFL randomly selects⁵⁸ ten players per team per week for drug testing.⁵⁹ Players receive notification on the day of testing; each must provide a urine sample under the observation of an “authorized specimen collector” so as to dissuade the use of evasive techniques.⁶⁰ The collector splits each sample into two separate bottles, which allows for re-testing, if necessary.⁶¹ The collector then fastens the bottles with tamper-resistant seals, labels each with a confidential identification number, and ships the samples to an approved laboratory for testing.⁶² If the lab confirms a positive test result, a designated Independent Administrator contacts the player to discuss the result.⁶³ The player may request a re-test from the split sample to confirm the finding.⁶⁴ If the re-test corroborates a positive test result, the NFL imposes a minimum penalty of a four-game, unpaid suspension on the player.⁶⁵

The NFL’s steroid policy holds players strictly liable for positive tests.⁶⁶ The NFL even advises players to refrain from ingesting any dietary supplements because the ingredients of such supplements may include banned substances unknown to the athlete.⁶⁷ Although the NFL provides a confidential “Supplement Hotline” so that players may verify the ingredients of supplements to ensure compliance, approval by a Hotline consultant provides no defense for a positive test result.⁶⁸

56. *Id.* § 3(A).

57. The season includes pre-, regular-, and post-season play. *Id.* During the off-season, players may be randomly tested up to six times; reasonable-cause testing may occur more frequently. *Id.*

58. Random selection occurs via computer-generated selection program. *Id.* Reasonable-cause testing may occur if the team physician and the Independent Administrator of the Program acquire reliable information regarding a player’s steroid usage, or if the player has previously failed steroid tests. *Id.* §§ 3(A), 12.

59. *Id.* § 3(A).

60. *Id.* § 3(B), app. C. “Evasive techniques” generally consist of a player’s attempt to covertly exchange a vial of drug-free urine either previously produced by the player himself or acquired from a third person. The presence of an administrator during the collection prevents the unlawful substitution.

61. *Id.*

62. *Id.* at app. C.

63. *Id.* § 4(A).

64. *Id.* § 4(B).

65. *Id.* § 6.

66. *Id.* at app. F.

67. *Id.*

68. *Id.* § 3(E).

B. The Williams Case and Minnesota's Drug and Alcohol Testing in the Workplace Act

Although the NFL intended such a strict-liability sanction for drug test violators, the five NFL players involved in the *Williams* case⁶⁹ challenged the CBA's validity in state court. All five players had tested positive for bumetanide, a banned substance⁷⁰ typically used as a diuretic⁷¹ and masking agent.⁷² The case involved two athletes who played for the Minnesota Vikings, whose franchise resided within the jurisdiction of the Eighth Circuit, and three players for the New Orleans Saints, whose franchise fell under the jurisdiction of the Fifth Circuit. All five appealed their suspensions in accordance with Policy guidelines,⁷³ and the League consolidated the appeals.⁷⁴ When the arbitrator upheld the suspensions, the players filed suit,⁷⁵ alleging violations of Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA).⁷⁶

Created in 1987, Minnesota's DATWA governs employee drug testing in Minnesota and imposes minimum requirements that protect employees from adverse action due to a failed test.⁷⁷ Specifically, DATWA requires that an affected employee receive written notice of his

69. *Williams v. Nat'l Football League*, 582 F.3d 863, 870 (8th Cir. 2009). The players included Kevin Williams and Pat Williams of the Minnesota Vikings and Charles Grant, Deuce McAllister, and Will Smith of the New Orleans Saints. *Id.*

70. NFL POLICY ON ANABOLIC STEROIDS, *supra* note 12, at apps. A, F; *Williams*, 582 F.3d at 869. The NFL publishes a list of banned substances as well as common dietary supplements known to contain prohibited ingredients. See NFL POLICY ON ANABOLIC STEROIDS, *supra* note 12, at app. A. The CBA agreement, however, specifies that strict liability applies: The Policy need not list all banned drugs nor does the League take responsibility for notifying players of which substances are prohibited. See *id.* at app. F. The Policy advises players to take no supplements whatsoever or to do so at their own risk. *Id.*

71. NFL POLICY ON ANABOLIC STEROIDS, *supra* note 12, §§ 1, 3(D), 8, app. A-II. Bumetanide, a diuretic, further complicates the *Williams* case because it is typically used for weight loss. Three of the players in *Williams* were described as having "clinical weight problems," two of whom required weight clauses in their contracts to incent them to maintain their weight. *Williams*, 582 F.3d at 870. Players' counsel suggested that the athletes' weight conditions constituted physical impairment protected under the Americans with Disability Act ("ADA"), 42 U.S.C. § 12101 *et seq.* *Williams*, 582 F.3d at 870. Although obesity is not generally a protected disability under federal case law (see *E.E.O.C. v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 443 (6th Cir. 2006)), and the Act itself does not specify obese persons as a protected class (42 U.S.C. § 12101), the claim could further obscure drug testing efforts by arguing for greater protections for overweight players who fail drug tests.

72. NFL POLICY ON ANABOLIC STEROIDS, *supra* note 12, at app. A-II. Masking agents function to camouflage evidence of anabolic steroids in an athlete's body with the goal of evading a positive drug test. *Id.*

73. *Williams*, 582 F.3d at 875.

74. *Id.* at 870.

75. See *id.* at 868. The players alleged eleven violations in all, most of which were unsuccessful. *Id.* at 872 n.7. Except for the DATWA claim, the other holdings fall outside the scope of this Note.

76. *Id.* at 872.

77. *Id.* at 874–75; MINN. STAT. ANN. § 181.953 (10)(b)(1)–(2) (West 2009).

right to explain the failed test, written notice of his right to a re-test of the original sample, and the opportunity to complete a drug treatment program.⁷⁸ Minnesota employers cannot reprimand an employee for failing a drug test prior to completion of the above procedures unless the employee either fails or refuses to attend drug treatment.⁷⁹ Furthermore, DATWA expressly addresses CBAs, mandating that the Act applies to all CBAs created after its passage.⁸⁰ DATWA clarifies, however, that parties to a CBA may agree on a testing policy that “meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection” set forth in the Act.⁸¹

C. The Preemption Test

As the *Williams* court ruled, CBAs do not automatically preempt state law claims.⁸² Suits for breaches of CBAs are governed by Section 301 of the Labor Management Relations Act (LMRA), a federal law that governs suits for contractual disputes between an employer and a labor organization. Section 301 requires the application of a two-part test to determine if a claim is sufficiently “independent” to survive preemption.⁸³ First, a CBA controls a state law claim if the claim itself is “based on” a provision within the CBA, “meaning that the CBA provision at issue actually sets forth the right upon which the claim is based.”⁸⁴ Second, Section 301 preemption applies when a state law claim “is dependent upon an analysis of the relevant CBA, meaning that the plaintiff’s state law claim requires interpretation of a provision of the CBA.”⁸⁵

The NFL claimed that the provisions of its CBA preempted the Minnesota statute for three reasons.⁸⁶ First, the NFL argued that the players’ claim required an analysis of whether the CBA “meets or exceeds” DATWA provisions because the drug tests administered by the NFL resulted from a collectively-bargained-for drug policy.⁸⁷ Because

78. MINN. STAT. ANN. § 181.953(10)(b)(1)–(2); *Williams*, 582 F.3d at 874.

79. MINN. STAT. ANN. § 181.953(10)(b)(1)–(2).

80. *Williams*, 582 F.3d at 875.

81. *Id.*

82. *Id.* at 874. DATWA specifically addresses CBAs, stating that its provisions apply to all CBAs created after 1987, unless the CBA’s drug testing policy “meets or exceeds, and does not otherwise conflict with, the minimum requirements for employee protection” created under DATWA. *Id.*

83. *Id.*; Labor Management Relations Act of 1947 § 301, 29 U.S.C. § 185(a). Section 301 governs suits for contractual disputes between an employer and a labor organization. *Williams*, 582 F.3d at 873.

84. *Williams*, 582 F.3d at 874.

85. *Id.*

86. *Id.* at 873.

87. *Id.* at 875.

the drug testing policy was based on a provision within the CBA, and because the court's decision would require an analysis of the CBA to determine whether the CBA afforded protections equal or greater to those mandated under DATWA, the NFL argued that the claim passed both prongs of the preemption test.⁸⁸ Second, the NFL argued that the claim required interpretation of the CBA to determine whether the NFL qualified as a covered employer under DATWA, again passing both prongs of the test.⁸⁹ Third, the NFL asserted that the court must rule in favor of the CBA preemption for policy reasons because otherwise, the League would be powerless to uniformly punish players who use banned substances, thereby threatening the integrity of the organization itself.⁹⁰

Despite the NFL's arguments, the *Williams* court ruled against the NFL on all three grounds.⁹¹ First, the court deemed unnecessary any analysis of the NFL's CBA in order to resolve the players' claim, choosing instead to review the procedure followed by the NFL to determine if it adhered to the requirements set forth under the DATWA.⁹² The court found that the question of whether the CBA met or exceeded DATWA provisions posed only a factual determination that required no interpretation of CBA provisions.⁹³ Second, the court stated that it need not interpret the CBA to determine whether the NFL was a qualified employer.⁹⁴ The court clarified that although it may "consult" the CBA's provisions pertaining to the NFL as an employer, case law differentiates between "consultation" and "interpretation," rendering the former insufficient to substantiate a claim for preemption.⁹⁵ Finally, the court was not persuaded by the NFL's third, policy-based claim of its inability to administer uniform enforcement of punishment.⁹⁶ Instead, the court quoted the Ninth Circuit in an analogous case, stating, "[T]he [Labor Management Relations Act] certainly did not give employers and unions the power to displace any state regulatory law they found inconvenient."⁹⁷ The court further stated that Congress's intent in adopting the provisions of Section 301 "[c]learly . . . does not grant the parties to a [CBA] the ability to contract for what is illegal under state law."⁹⁸

88. *Id.*

89. *Id.* at 876.

90. *Id.* at 877.

91. *Id.* at 878.

92. *Id.* at 876.

93. *Id.*

94. *Id.* at 876-77.

95. *Id.* at 877.

96. *Id.* at 878.

97. *Id.* at 877-78 (citing *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 695 n.9 (9th Cir. 2001) (en banc)).

98. *Id.* at 878 (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211-12 (1985)).

D. The Potential Far-Reaching Effect of Williams

Although *Williams* only directly affected two players on the Minnesota Vikings roster, the decision may reach far beyond the Minnesota franchise or even the jurisdiction of the Eighth Circuit. NFL Commissioner Roger Goodell meted out no punishment to either the Vikings players or the three New Orleans Saints players, citing the need to impose uniform discipline or none at all.⁹⁹ Therefore, all five players involved in the *Williams* case played the remainder of the season without penalty.¹⁰⁰ Because no player with a franchise “employer” within the Eighth Circuit¹⁰¹ can be reprimanded for a drug test failure if applicable state law first requires that he either fail or refuse offered drug treatment, the Commissioner could decide to refrain from imposing penalties on any player in the entire League because he can no longer enforce the applicable CBA terms consistently.¹⁰²

Indeed, the implications of the Eighth Circuit’s decision may reach far beyond the five named appellants in the *Williams* case. At a minimum, the decision impacts the nine professional sports teams that reside in the states comprising the Eighth Circuit.¹⁰³ But in light of Commissioner Goodell’s decision to refrain from sanctioning offending players because of the resulting inconsistencies, *Williams* could easily affect all NFL franchise teams. Furthermore, if the respective commissioners for each of the four named professional sports entities discontinued en-

99. Schmidt, *supra* note 11.

100. *Id.*

101. In the Eighth Circuit, Arkansas, Iowa, Minnesota, and Missouri require confirmatory drug testing and treatment prior to termination from employment. ARK. DEPT. OF LABOR, ARKANSAS LAWS RELATING TO LABOR § 11-14-107 (2008), available at http://www.state.ar.us/labor/pdf/laws_relating_labor.pdf; GOVERNOR’S OFFICE OF DRUG POLICY, A GUIDE TO WORKPLACE DRUG TESTING IN IOWA 2, 4–6 (2004), available at http://www.iowa.gov/odcp/images/pdf/workplace_guide_update_Oct_2004.pdf; MINN. STAT. ANN. § 181.953 (10)(b)(1)–(2) (West 2009); MO. REV. STAT. § 105.1105 (2010). Nebraska requires a confirmatory test, but no drug treatment, prior to termination of employment. NEB. REV. STAT. § 48-1903 (2000). North Dakota labor laws are generally silent on both confirmatory drug testing and drug treatment prior to termination. See NORTH DAKOTA DEPT. OF LABOR, <http://www.nd.gov/labor/laws> (last visited Apr. 9, 2011). Confirmatory drug testing, however, is required for employees working in transit, with commercial motor vehicles, firearms, and a few other select positions. See NORTH DAKOTA DEPT. OF TRANSPORTATION DRUG AND ALCOHOL POLICY REQUIREMENTS CHECKLIST (Aug. 2010), www.dot.nd.gov/divisions/localgov/docs/Drug_and_Alcohol_Checklist.doc. Even these workers are tested only for alcohol, cocaine, opiates, and a few other drugs, none of which are steroids. *Id.* South Dakota requires confirmatory testing or drug treatment prior to termination. *Coverage of Laws*, SOUTH DAKOTA DEPT. OF LABOR, <http://dol.sd.gov/humanrights/coverage.aspx> (last visited Feb. 26, 2011).

102. Further complicating the concern of uniformity of punishment, eight professional teams reside in Canada (NBA: Toronto Raptors; MLB: Toronto Blue Jays; NHL: Calgary Flames, Edmonton Oilers, Montreal Canadiens, Ottawa Senators, and Vancouver Canucks), each presumably requiring application of Canadian employment law.

103. For a list of states within the Eighth Circuit, see *supra* note 18.

forcement of their drug programs as a result of *Williams*, the ruling could literally impact thousands of players. For example, in a given season, the NFL employs nearly 1,700 players; similarly, the MLB, NHL, and NBA involve approximately 750, 690, and 420 athletes, respectively, for a total of more than 3,550 “employees” overall.¹⁰⁴

Because *Williams* affects all sports entities that operate under the auspices of a CBA,¹⁰⁵ its potential impact actually extends even further than the four major sports entities. For example, the Arena Football League (AFL),¹⁰⁶ Women’s National Basketball Association (WNBA),¹⁰⁷ Major League Soccer (MLS),¹⁰⁸ and Minor League Baseball (MiLB)¹⁰⁹ all operate under CBAs.¹¹⁰ The AFL employs approximately 450 players,¹¹¹ the WNBA, another 159 athletes,¹¹² and the MLS roughly 380.¹¹³

104. Within the NFL, there are thirty-two teams, each with a maximum of fifty-three players. *NFL Teams*, NFL, <http://www.nfl.com/teams> (last visited Apr. 26, 2011). Similarly, the MLB consists of thirty teams of twenty-five players each, *Official Site of Major League Baseball*, MLB.COM, <http://mlb.mlb.com/index.jsp> (last visited Apr. 26, 2011); the NBA, thirty teams with fourteen players each, *Team Index*, NBA.COM, <http://www.nba.com> (last visited Apr. 26, 2011); and in the NHL, thirty teams with twenty-three players each, *Rosters, Arena Information, and Aerial Maps*, NHL.COM, <http://www.nhl.com/ice/teams.htm#?nav-tms-main> (last visited Apr. 26, 2011). The total number of athletes potentially affected within the four Leagues alone is 3,556. These numbers exclude additional players previously released from training camp or spring training.

105. *Williams v. Nat’l Football League*, 582 F.3d 863, 873–74 (8th Cir. 2009).

106. The Arena Football League suspended operations in 2009 while in Chapter 11 bankruptcy. The League was purchased by Arena Football One, its parent corporation, upon restructuring, and operations resumed on April 2, 2010. Press Release, Arena Football League, AFL Suspends 2009 Season (Dec. 15, 2008) (on file with author); *Arena Football 1 to Launch in 2010*, ESPN (Dec. 10, 2009, 6:19 PM), <http://sports.espn.go.com/extra/afl/news/story?id=4512394>.

107. WOMEN’S NAT’L BASKETBALL ASS’N, COLLECTIVE BARGAINING AGREEMENT (2008), available at <http://www.womensbasketballonline.com/wnba/wnbacba08.pdf> [hereinafter WNBA CBA].

108. The CBA for MLS expired on January 31, 2010. MAJOR LEAGUE SOCCER & MAJOR LEAGUE SOCCER PLAYERS UNION, COLLECTIVE BARGAINING AGREEMENT (2004–2010), available at http://www.mlssoccer.com/files/collective_bargaining_agreement_final.pdf. However, the League and the players union announced a new Agreement in principle, extending through 2014. Press Release, Major League Soccer, League and Players Union Reach Agreement on CBA (Mar. 20, 2010), available at <http://www.mlslatest.com/mls-news/435-major-league-soccer-league-and-players-union-reach-agreement-on-cba>.

109. MLB’s suspension policies include its affiliated Minor Leagues; therefore, *Williams* applies. MLB DRUG PREVENTION PROGRAM, *infra* note 157, § 8(H)(1).

110. It is unclear whether the AFL’s CBA survived its corporate restructure; however, the previous CBA did not expire until 2015. ARENA FOOTBALL LEAGUE & ARENA FOOTBALL LEAGUE PLAYERS ASS’N, AFL-AFLPA CBA REVISION TERM SHEET (2007–2015), available at http://www.aflplayers.org/documents/CBA/AFL_CBA_extension_web_version.pdf.

111. The AFL consists of eighteen teams, with approximately thirty players each. *Teams*, ARENAFOOTBALL.COM, <http://www.arenafootball.com> (last visited Feb. 26, 2011).

112. The WNBA consists of twelve teams with a minimum of eleven players each. WNBA CBA, *supra* note 107, art. XXXIII § 4; WNBA.COM, <http://www.wnba.com/players> (last visited Feb. 26, 2011).

113. MLS comprises sixteen teams with approximately twenty-four players each. *Players*, MLS, <http://www.mlssoccer.com/players> (last visited Feb. 26, 2011).

The MiLB, however, adds the most significant numbers of potentially affected athletes. The League operates a complex “farm” system for players with Major League potential, operating 242 teams among six different “class” levels and nineteen individual leagues.¹¹⁴ Each team roster includes between fifteen and thirty-two players, for a total of about 5,600 athletes.¹¹⁵ Therefore, among the aforementioned sports, the *Williams* decision could potentially affect more than 10,000 athletes.

E. The Limits of Williams

The *Williams* decision does not affect all athletes, but only those governed by CBAs. For example, athletes competing in the Olympic Games remain largely unaffected, because the United States Olympic Team neither operates under a CBA nor “employs” competing athletes.¹¹⁶ Competitors sign a contract directly with the International Olympic Committee¹¹⁷ (IOC), agreeing to abide by its terms for substance abuse testing.¹¹⁸ Conflicts do arise, however, when crossover athletes from the NHL, NBA, and WNBA vie for positions on United States Olympic hockey and basketball teams,¹¹⁹ respectively. For example, under the NHL’s CBA, the League may randomly test players twice per season or less, neither of which may occur on a game day.¹²⁰ The IOC, however, may randomly test those same players—anytime and anywhere.¹²¹ Under these conditions, Bryan Berard, a professional hockey player eligible for the 2006 Olympic team, tested positive for steroids, resulting in a two-year ban from international competition.¹²² Interestingly, after learning of Berard’s drug test failure, the NHL reiterated its be-

114. MiLB.COM, <http://web.minorleaguebaseball.com/index.jsp> (last visited Feb. 26, 2011).

115. *Id.*

116. *The Organisation*, OLYMPIC.ORG, <http://www.olympic.org/en/content/The-IOC/The-IOC-Institution1> (last visited Feb. 26, 2011). The IOC oversees all aspects of the Olympic Games. *Id.*

117. *Id.*

118. The World Anti-Doping Agency (WADA), which manages drug testing for the Olympics, conducts both random and reasonable-suspicion tests. An athlete’s first positive test warrants a two-year ban from international competition; a second positive test results in a permanent ban. *See infra* note 121.

119. *Past Olympic Sports*, OLYMPIC.ORG, <http://www.olympic.org/en/content/The-IOC/Commissions/Olympic-Programme/Past-Olympic-Sports> (last visited Feb. 26, 2011). The Olympics discontinued baseball as a sport after the 2008 Olympics in Beijing. Vicki Michaelis, *IOC: Baseball and Softball Out for ‘12*, USA TODAY, July 8, 2005, at C1. However, even as an active sport, major leaguers generally did not play because the timing of the Games interfered with regular season play.

120. NHL CBA, *supra* note 44, § 47.6.

121. WORLD ANTI-DOPING AGENCY (WADA), WORLD ANTI-DOPING CODE: INTERNATIONAL STANDARD FOR TESTING § 5.1 (2009), available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-Testing/WADA_Int.Standard_Testing_2009_EN.pdf.

122. Bordow, *supra* note 35. Columbus defenseman Bryan Berard failed a drug test, preventing his participation in the 2006 Olympic Games in Torino, Italy. *Id.*

lief that steroids do not pose a problem in professional hockey.¹²³ Furthermore, the League took no action against Berard because it did not conduct the drug tests.¹²⁴

III. POSSIBLE SOLUTIONS AND THEIR SHORTCOMINGS

The current state of drug testing in professional sports does not alleviate the concerns about sports integrity, player health, and youth safety. This Part addresses some possible solutions, as well as their shortcomings, in addressing steroid usage in professional sports.

A. Supreme Court Intervention

Because the *Williams* decision effectively preempts CBAs by applying applicable state employment law, one possible solution to implementing a consistent drug testing policy involves a reversal of *Williams* by the United States Supreme Court. The Court could hold that parties may contract around state law in the form of CBAs and use the Agreements as their sole reference for procedures and disputes. However, that conclusion would require two highly unlikely events: namely, a reversal of well-established labor law and a finding that the Labor Management Relations Act is unconstitutional.

First, the Court would have to determine that Minnesota's DATWA, as well as similar provisions found in other states' drug testing statutes, cannot preempt CBA provisions, thereby contradicting nearly fifty years of relevant case law.¹²⁵ The Court has never made such a determination; in fact, the Court ruled in favor of applying state law in one of the very first cases involving CBA preemption.¹²⁶ Originating in Washington State, *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.*, involved a union strike intended to force the rehire of a terminated employee.¹²⁷ The employer filed suit to recover damages, reasoning that under principles of state law, the strike violated the CBA's arbitration clause.¹²⁸ The union argued that the CBA did not include an express, no-strike clause; therefore, the union could not violate a term that did not exist.¹²⁹ Furthermore, the un-

123. *Id.* (quoting Deputy Commissioner Bill Daly).

124. *Berard Still Eligible to Play in NHL*, ESPN (Jan. 21, 2006, 11:43 AM), <http://sports.espn.go.com/nhl/news/story?id=2299474>.

125. Jaime Koziol, Note, *Touchdown for the Union: Why the NFL Needs an Instant Replay in Williams v. NFL*, 9 DEPAUL BUS. & COM. L.J. 137, 139 (2010).

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

127. *Id.* at 97.

128. *Id.*

129. *Id.* at 104-05.

ion reasoned that federal law preempted state law when scrutinizing CBAs; therefore, because federal law permitted strikes, the union's action could not violate the terms of the CBA.¹³⁰ The Court ruled in favor of the employer, finding that although *inconsistent* doctrines of local law must acquiesce to principles of federal labor law, the *Lucas* case did not involve a conflict between state and federal laws; the CBA's express arbitration provision rendered the union's strike a breach of contract, and therefore, the employer prevailed.¹³¹

Similar to the statutes at issue in *Lucas*, Minnesota's DATWA and Section 301 of the LMRA do not conflict. On the contrary, the Eighth Circuit interpreted the DATWA provisions through the scope of Section 301 to ensure consistency between the relevant state and federal laws that the *Lucas* Court discussed.¹³² Although the *Williams* decision may result in inconsistent drug testing policies for the NFL and other affected teams, the court correctly applied the preemption test and found the NFL's CBA provision to be unlawful. Because the Eighth Circuit correctly applied the preemption test and because the Supreme Court will not likely reverse its prior case rulings allowing for state preemption, the Court will not provide relief in the *Williams* case.

Second, if the Court did determine that state law could not preempt CBAs, the ruling would require a finding that the two-fold preemption test under the LMRA was unconstitutional and therefore must be repealed. Because the LMRA allows state preemption if the CBA provision fails the two-prong test to show its "sufficient independence" from the agreement, the Court would have to find that the test, by virtue of the fact that it allows preemption, is constitutionally invalid. But such a conclusion seems unlikely—the Court has faithfully applied the preemption test since Congress passed the Act in 1947.¹³³ Indeed, the Court has repeatedly articulated the necessity of Section 301, the absence of which would result in an inconsistent and unstable application of labor law.¹³⁴ For example, in *Allis-Chalmers Corp. v. Lueck*, a now twenty-five-year-old case that questioned whether the bad faith handling of an insurance claim should be construed as a tort under state law or as a violation of the employee's CBA under federal law, the Court stated, "Congressional power to legislate in the area of labor relations . . . is long established."¹³⁵

130. *Id.* at 102.

131. *Id.* at 104–06.

132. *Williams v. Nat'l Football League*, 582 F.3d 863, 874–78 (8th Cir. 2009).

133. *See supra* note 83.

134. *Williams*, 582 F.3d at 874; *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406 (1988); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985); *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95 (1962).

135. *Allis-Chalmers Corp.*, 471 U.S. at 208.

Because Congress retains the power to regulate labor law and chose to enact the LMRA to determine whether state or federal law applies in labor claims, the Court will most likely not now conclude that Congress exceeded its constitutional authority sixty-four years ago when it created the preemption test. Therefore, the Court will likely not grant the relief sought by the NFL and other affected sports teams.

Finally, if the Court did conclude that Section 301 was an unconstitutional labor law provision (effectively ruling that state law can never preempt federal law), the decision would render impotent any state law that contradicted the terms of a CBA. The Court, however, has already stated that “whether a certain state action is preempted by federal law is one of congressional intent.”¹³⁶ Furthermore, congressional intent “does not grant the parties to a [CBA] the ability to contract for what is illegal under state law.”¹³⁷ Because labor law falls under the purview of congressional regulation, and because congressional intent reveals a level of deference to state law, a finding by the Court that CBAs *always* preempt state law creates a result that necessarily contradicts congressional intent. Because congressional intent does not support a finding that state laws cannot preempt CBAs, and because the Court’s own precedent in applying federal labor law supports that intent, the Court cannot offer the desired relief to affect the result of the *Williams* decision.¹³⁸

B. Congressional Intervention

Rather than rely on the Supreme Court to reinterpret existing law, a second option could involve legislative intervention, wherein Congress creates new law specifically to address drug testing in professional sports. Sports owners could petition Congress to pass a law defining the scope of CBAs for professional sports and clarify its intent that drug testing, as characterized within the CBAs, shall be administered accordingly. Congress could create an exception to existing, applicable, state law drug testing guidelines, such as Minnesota’s DATWA, thus federally preempting state jurisdiction in the drug testing of professional athletes.

Although congressional intervention would provide the necessary relief, such interference is unlikely for three reasons. First, despite Congress’s past efforts to intervene in the drug testing efforts of professional

136. *Id.*

137. *Id.* at 212.

138. The NFL petitioned for writ of certiorari on May 13, 2010 (after the Court granted it several filing extensions); the Court, however, denied the NFL’s petition on November 5, 2010. *Williams*, 131 S. Ct. 566 (2010); SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/09-1380.htm> (last visited Feb. 26, 2011).

sports,¹³⁹ it may now view the problem as largely the creation—and therefore the problem—of sports owners and players unions. In the past, owners and unions largely dismissed Congress’s concerns, refusing to acknowledge, let alone address, the problem of steroids in sports.¹⁴⁰ For example, during the 2005 congressional hearings, NFL Commissioner Paul Tagliabue¹⁴¹ scoffed at Congress’s intention to legislate drug testing reform, calling such efforts a transgression. “When it comes to process and other considerations, including discipline, we can deal with our own sport better than a uniform standard, which in many cases can become the lowest common denominator We don’t feel there is rampant cheating in our sport.”¹⁴² Similarly, Commissioner Selig¹⁴³ and representatives from the National Collegiate Athletic Association¹⁴⁴ (NCAA) initially rebuffed invitations to attend hearings on steroid usage in sports—their absences and apparent nonchalance left members of Congress “bitterly disappointed.”¹⁴⁵ In fact, when Selig later acquiesced and attended the hearings, he and other League officials repeatedly described their testing efforts as satisfactory and did not share Congress’s concerns.¹⁴⁶ Because team owners and representatives repeatedly spurned Congress’s attempts to assist in the drug testing efforts in the past, lawmakers may now choose to reject requests for help from this same group.

139. See notes 37, 149.

140. See *infra* notes 145–46.

141. Paul Tagliabue served as NFL Commissioner from 1989 until 2006, when Roger Goodell replaced him. *NFL Commissioner Goodell Receives New Contract Until March 2015*, NFL, <http://www.nfl.com/news/story?id=09000d5d8165d4e6&template=with-video-with-comments&confirm=true> (last visited Feb. 26, 2011).

142. News Services, *Tagliabue Against Drug-Testing Laws by Congress*, *READING EAGLE*, Apr. 28, 2005, at C5.

143. See *supra* note 40.

144. The NCAA organizes and governs the majority of collegiate athletic programs in the United States. *About the NCAA*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa> (last visited Feb. 26, 2011).

145. *Steroids in Sports: Cheating the System and Gambling Your Health*, *supra* note 38, at 61 (testimony of Rep. Upton).

146. See Justin Gest, *Baseball and Steroids: Hardball on Capitol Hill*, *HOUSTON CHRON.*, Mar. 18, 2005, at A1. According to Selig, “Baseball’s policy on performance-enhancing drugs is as good as any in professional sports.” *Id.* Similarly, the NHL and NBA continue to stand by their current drug testing efforts. NHL Deputy Commissioner Bill Daly called the League’s testing “effective . . . especially given the fact that we have no history or experience suggesting any problem with performance enhancing drugs in the NHL.” Paul Friesen, *NHL Needs to Step Up Drug Testing: WADA*, *TORONTO SUN*, Feb. 11, 2010, <http://www.torontosun.com/sports/hockey/2010/02/11/12844511-qmi.html>. Additionally, NBA Commissioner David Stern remarked, “There’s a little too much holier-than-thou stuff going on,” commenting on pressures of the Association to embrace increased testing efforts. Mark Woods, *Who Are the Real Dopes in the NBA—the Players or the Policy Makers?*, *THE SPORTBLOG* (Feb. 25, 2009, 3:39 PM), <http://www.guardian.co.uk/sport/blog/2009/feb/25/mark-woods-nba-basketball-drugs>. “[A]lthough we’ll continue to work . . . to improve [drug testing], we are not on some kind of a witch-hunt.” *Id.*

Second, Congress may determine that its other priorities simply outweigh concerns of steroid use in professional sports. Although congressional members have repeatedly voiced their apprehensions about steroid abuse and its effects on sports' integrity and player safety,¹⁴⁷ in the current political climate, lawmakers may decide that other responsibilities prevail. Congress may choose to focus on other pressing, current topics, such as the wars in Afghanistan and Iraq, health care reform, economic recovery, and foreign relations with China, Israel, Iran, North Korea, Russia, and others. Furthermore, Congress's previous intervention in 2005 suffered intense criticism, with pundits and constituents chastising members for diverting their attention from more traditional issues. For example, one columnist ranted,

[L]et's concede that there are only about 1,500 ways we can think of off the top of our heads that the committee's time could be better spent. They could be asking why the Bush Administration is so keen on bugging our phones, why it grants no-bid contracts to Dick Cheney's pals or why they're underfunding the Veterans Administration. Hell, they could be holding hearings on how it is Bush got that weird black eye a few years back. Anything but this.¹⁴⁸

Considering the other issues competing for congressional attention, lawmakers may decide that they cannot address concerns of steroid abuse in the wake of *Williams*.

Last, if Congress did choose to intervene due to the *Williams* decision, it may not provide the results that sports owners anticipate. NFL Commissioner Goodell recently testified before a House subcommittee, imploring lawmakers to consider altering legislation in the aftermath of the *Williams* case.¹⁴⁹ Goodell pleaded for a change in law that would allow CBAs to preempt contrary state law, stating that a change would "protect[] the health of our athletes, ensur[e] confidence in the integrity of the game . . . [and] set[] a positive example for young people."¹⁵⁰ House representatives, however, offered mixed responses to Goodell's requests.¹⁵¹ One House member suggested that the NFL pull up the stakes of all franchises in the Eighth Circuit, stating: "Maybe Minnesota

147. See *supra* notes 33, 37, 38, 41, 43, 45–48.

148. Dave Zirin, *Steroid Circus on Capital Hill*, THE NATION, Feb. 14, 2008, <http://www.the.nation.com/article/steroid-circus-capital-hill>.

149. *The NFL StarCaps Case: Are Sports' Anti-Doping Programs at a Legal Crossroads?: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection*, 111th Cong. (2009) (testimony of Roger Goodell, NFL Commissioner); John R. Parkinson, *NFL Commish Asks Congress for Help Enforcing Drug Testing Policies*, ABC NEWS, Nov. 3, 2009, <http://abcnews.go.com/Politics/nfl-commissioner-roger-goodell-asks-congress-enforcing-drug/story?id=8986110&page=1>.

150. Parkinson, *supra* note 149.

151. *Id.*

without the Vikings is the appropriate remedy.”¹⁵² Another representative offered an equally grim response, saying, “You don’t want us to get involved with this. You don’t know what Congress will do once you open up Pandora’s Box.”¹⁵³

Due to the long-standing tension between Congress and professional sports, as well as lawmakers’ underwhelming reassurance that they would provide the requested relief, congressional intervention after *Williams* provides an unreliable and improbable solution.

C. League Intervention

Because the Eighth Circuit’s decision only protects employees from adverse action resulting from *initial* drug test failures,¹⁵⁴ the final, most probable, and most appropriate solution requires sports owners to increase their own drug testing efforts. Continued, regular testing would penalize repeat offenders and deter would-be steroid users for fear of failing ongoing drug tests. Despite these positive outcomes, increased testing could incur significant expense, both direct and indirect, due to administrative costs, increased defense litigation, and ultimately, lost revenue.

1. Administrative Costs

Perhaps the most obvious solution involves an increase in testing efforts, where professional teams simply test more players more often. Currently, only a small fraction of players are drug tested during any given week. For example, the NFL currently tests only ten players per team per week.¹⁵⁵ With approximately 2,200 players spanning thirty-two teams,¹⁵⁶ current testing covers roughly 320 athletes, or about fourteen and a half percent of players per week. The MLB tests each player once during spring training and once more during the 162-game regular season, for an average of thirteen and a half of players per regular-season game.¹⁵⁷ Increasing weekly testing would identify repeat offenders more

152. *Id.*

153. *Id.* Goodell received some support from Rep. Waxman, who condemned the *Williams* decision stating, “We should not allow the drug policies that the NFL, Major League Baseball and other sports leagues have put in place to be rendered null and void. That is an invitation to steroid abuse in professional sports. And it will inevitably lead to more steroid use.” *Id.*

154. *Williams v. Nat’l Football League*, 582 F.3d 863, 875 (8th Cir. 2009) (“DATWA provides that an employee may not be disciplined on the basis of an initial positive test . . .”).

155. NFL POLICY ON ANABOLIC STEROIDS, *supra* note 12, § 3(A).

156. See NFL TEAMS AND ROSTERS, <http://www.nfl.com/teams> (last visited Apr. 9, 2011).

157. OFFICE OF THE COMM’R & THE MAJOR LEAGUE BASEBALL PLAYERS ASS’N, MAJOR LEAGUE BASEBALL’S JOINT DRUG PREVENTION AND TREATMENT PROGRAM § 3(A)(1)(a)–(b) (2002) [hereinafter MLB DRUG PREVENTION PROGRAM], available at <http://mlbplayers.mlb.com/pdf/jda.pdf>.

quickly, effectively stripping away the protections given by statutes like DATWA that extend only to first time drug test violators.¹⁵⁸

However, increased testing may not be administratively feasible: per the terms of the NFL's CBA, only two suitable laboratories exist for analyzing tests.¹⁵⁹ Similarly, the MLB specifies only one acceptable lab for drug testing.¹⁶⁰ These same three labs also service the NBA, World Anti-Doping Association (WADA), and NCAA for all of their testing needs.¹⁶¹ Furthermore, increased testing efforts via the current testing procedures used by the NFL and MLB may expose more offending athletes but certainly not all. Both Leagues rely solely on urinalysis,¹⁶² which fails to detect the use of Human Growth Hormone (HGH),¹⁶³ blood oxygenation,¹⁶⁴ or designer steroids,¹⁶⁵ all suspected to be widely

158. MINN. STAT. ANN. § 181.953 (10)(b)(1)–(2) (West 2009).

159. NFL POLICY ON ANABOLIC STEROIDS, *supra* note 12, § 3(D). The two labs, the UCLA Olympic Analytical Laboratory in Los Angeles, California, and the Sports Medicine Research and Testing Laboratory in Salt Lake City, Utah, also serve the WADA and NCAA for their testing needs. It is unknown whether additional labs exist in the United States that could alleviate any administrative burden. WADA certifies thirty-five labs worldwide, but only three labs are in North America. Even if additional labs do exist, their use requires approval by each league's respective union. *See infra* Part III.C.2.b for more on contract renewal dates.

160. The MLB permits only one lab to conduct its tests, the Laboratoire de Contrôle du Dopage, in Montreal, Quebec, Canada. MLB DRUG PREVENTION PROGRAM, *supra* note 157, § 1(D). This lab, along with the two previously mentioned, *supra* note 159, comprise the only labs in North America certified under WADA. *Anti-Doping Laboratories*, WORLD ANTI-DOPING AGENCY (WADA), <http://www.wada-ama.org/en/Science-Medicine/Anti-Doping-Laboratories> (last visited Feb. 26, 2011).

161. NBA CBA, *supra* note 44, art. XXXIII § 4(b); *see also* WADA, *supra* note 160; *Keeping Ahead of the Cheaters*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Student-Athlete+Experience/A+complete+guide+to+drug+testing> (last visited Mar. 23, 2011).

162. The NFL recently announced plans to incorporate HGH testing into its drug prevention program due to advances in the accuracy of the test. Representatives for the players union do not support HGH testing. *NFL, Union at Odds Over HGH Test*, ESPN (Feb. 24, 2010, 11:46 PM), <http://sports.espn.go.com/nfl/news/story?id=4940922>.

163. Human Growth Hormone, or HGH, is a protein hormone that is secreted by the pituitary gland and stimulates growth in most tissues. Holli N. Heiles, *Baseball's "Growth" Problem: Can Congress Require Major League Baseball to Test Its Athletes for Human Growth Hormone? A Proposal*, 62 ARK. L. REV. 315, 319–21 (2009). HGH is difficult to detect because it occurs naturally in the body and synthetic versions are chemically identical to the naturally occurring hormone. *Id.* The hormone is believed to be a widely used steroid in professional sports. *Id.* HGH is detected through blood testing, but none of the four professional sports entities test for the drug. *Id.*

164. Blood oxygenation can occur in two ways. First, a portion of the athlete's blood is removed and spun in a centrifuge. The process increases the body's production of oxygen-carrying red blood cells, which can improve performance by fifteen percent. Alternatively, the athlete can ingest a drug called erythropoietin (EPO), which produces the same effect. Sharon Begley, *The Drug Charade*, NEWSWEEK, Sept. 11, 2000, <http://www.newsweek.com/id/86079>.

165. There are a number of so-called "designer steroids," created specifically to evade detection. The most widely known designer drug is tetrahydrogestrinone (THG), which chemists designed to disintegrate when tested through urinalysis (earning it its street name "the clear"). John T. Wendt, *WADA, Doping and THG*, 21 ENT. & SPORTS LAW. 1, 27, 30 (2004); *see also* Jeff Passan, *BALCO Case Takes Another Twist*, YAHOO! SPORTS, Dec. 28, 2006, <http://sports.yahoo.com/mlb/news?slug>

used in professional sports.¹⁶⁶ Therefore, in its current form, increased testing as a solution to combat steroid usage may be impossible at worst and inadequate at best.

If sports' owners did increase their testing efforts, the predicted increase in suspensions could potentially bankrupt teams. Estimated steroid usage in the NFL and MLB may be as high as four-out-of-five players, or eighty percent.¹⁶⁷ The WADA, which oversees drug testing for the Olympics and other world games, estimates a one-in-three user rate in the NHL.¹⁶⁸ Assuming the accuracy of these estimates, mass suspensions resulting from increased positive testing could cause teams to play without fully staffed rosters, if not forfeit games altogether, risking playoff opportunities, player endorsements, broadcast revenue, ticket sales, and ultimately, their own fan bases. If testing efforts are ultimately successful, however, teams could perhaps levy heavy fines on offending players to cover testing costs, then replenish their membership by signing on non-juicing players. Although costly, increased testing would protect players' health, ensure game integrity, and provide a positive example for youth athletes by advancing a no-tolerance steroid policy in professional sports.

¹⁶⁶jp-court122806. An anonymous tip from a coach led the U.S. Anti-Doping Agency to adapt its urinalysis test so that it could detect the new drug. James Douglas, *Athletics: U.S. Makes Biggest Drug Bust*, THE MIRROR (U.K.), Oct. 17, 2003, at 67. The Agency then retested hundreds of past urine samples from athletes, discovering wide-spread usage of the drug. *Id.* U.S. Olympic Gold Medalist Marion Jones admitted using THG; she was stripped of her five Olympic medals and sentenced to six months in prison for perjury. James Murray & Paul Thompson, *Race is on to Beat the Olympic Drug Cheats*, EXPRESS ON SUNDAY (London), June 8, 2008. Similarly, THG is the steroid at the center of Barry Bonds's related charges of perjury, obstruction, and tax fraud. *United States v. Bonds*, 580 F. Supp. 2d 925 (N.D. Cal. 2008); Jeff Passan, *BALCO Case Takes Another Twist*, YAHOO! SPORTS, Dec. 28, 2006, <http://sports.yahoo.com/mlb/news?slug=jp-court122806>. As of this writing, Bonds holds records for most home runs hit in a season, with seventy-three, and most career home runs, with 762; however, the authenticity of the records are hotly contested due to rumors of steroid usage. *Bonds to Make Appearance at Ballpark*, ESPN, Mar. 31, 2010, <http://sports.espn.go.com/mlb/news/story?id=5044807>.

¹⁶⁶ Gest, *supra* note 146.

¹⁶⁷ In response, baseball representatives cite statistics of only one to two percent in 2004, a substantial decrease from the estimated five to seven percent reported the previous year. *See id.* These statistics, however, represent the percentage of failed tests of those athletes actually tested, not necessarily an estimate of overall usage among players. Players Union representative Gene Orza calls reports of wide steroid usage "wildly inflated," while union representative Rob Manfred says that even a five percent positive rate is "hardly the sign that you have rampant use of anything." John Powers, *Pound Blasts New MLB Steroid Policy*, BOSTON GLOBE, Nov. 15, 2003, at E3.

¹⁶⁸ Bordow, *supra* note 35.

2. Increased Litigation

a. Litigation between Players and Owners

Increased testing of athletes could result in increased litigation, effectively clogging the court system and stifling reform efforts. For example, some affected players could allege violations under the Americans with Disabilities Act (ADA).¹⁶⁹ Consider the players in the *Williams* case who tested positive for bumetanide,¹⁷⁰ a diuretic sometimes used by overweight players¹⁷¹ as a dietary aid.¹⁷² If increased testing focused on obese players and resulted in suspensions in higher numbers within that group, lawsuits could result because obesity, in some contexts,¹⁷³ is a protected disability for which an employer may not discriminate.¹⁷⁴ In addition, other players could allege discrimination based on drug addiction because the ADA prevents adverse action by employers against drug addicts.¹⁷⁵ Although the latter claim would likely fail because ADA protections do not extend to allow continued use of drugs, even unsuccessful claims would bog down efforts at suspension and load the courts with additional litigation.

Another possible claim could occur if players challenged their suspensions to allege that their respective league or association uses discrimi-

169. The Americans with Disabilities Act of 1990 protects individuals with either physical or mental disabilities from discrimination in employment, housing, public accommodations, education, transportation, health services, voting, and other areas. 42 U.S.C. § 12101 *et. seq.* (2009).

170. *See supra* Part II.A.

171. Due to concerns of obesity, some players—particularly offensive and defensive linemen—are subject to contractual weight clauses, wherein players agree to maintain their weight under a specified maximum allowance. Failure to comply constitutes breach, relieving the team of its contractual obligation to the player. *See Williams v. Nat'l Football League*, 582 F.3d 863, 870 (8th Cir. 2009).

172. *See supra* note 70.

173. This argument is likely a stretch because obesity is considered a protected disability only if the affected individual can show the weight gain is caused by physiological reasons. *E.E.O.C. v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 443 (6th Cir. 2006). However, players' counsel in the *Williams* case considered the argument as a possible claim at trial. *Williams*, 582 F.3d at 870. For the purposes of this Note, the argument illustrates potential concerns of increased litigation as a result of increased drug testing, resulting in higher implementation costs for owners.

174. Some performance-enhancing drugs, such as bumetanide (the drug at issue in *Williams*), act as both a diuretic and a masking agent. As mentioned *supra* in notes 71 and 72 respectively, overweight players frequently use diuretics to lose excess weight (and subsequently adhere to any contractual weight clauses); masking agents serve the more sinister purpose of camouflaging steroid use to evade a positive drug test. Because bumetanide could be potentially used for an innocent purpose (weight loss), a player could argue that the League unfairly discriminates against overweight players under the pretext of drug testing.

175. *See infra* note 177; 42 U.S.C. § 12210(a)–(b)(3).

minatory practices couched in a pretext of drug testing.¹⁷⁶ For example, suspended players may consider filing employer discrimination claims, alleging that reasonable-suspicion testing creates an adverse impact effect.¹⁷⁷ If, for example, suspended players could show that team management drug tested a particular subsection of the team more frequently than others, and that the increased testing resulted in a disparate proportion of suspensions of a particular protected class of minorities, a claim of adverse impact could result. For this hypothesis, consider the increased testing of players in scrimmage positions (past players estimate that steroid usage occurs in these positions at a rate of fifty to ninety percent).¹⁷⁸ If the majority of those positions are filled by, for example, men of Hawaiian or Samoan descent, and increased testing effectively suspends the majority of players from that racial class, suspended players may be able to file a discrimination claim.¹⁷⁹

b. Litigation between Players and Third Parties

The lawsuits described above focus on disputes between offending players and team owners. But additional, corollary suits could also include third parties, such as supplement companies and non-juicing athletes injured by doping teammates.

Athletes suspended under a strict-liability CBA provision have already begun filing lawsuits against dietary supplement companies who mislabel their products and neglect to list the presence of steroids or steroid precursors among the ingredients.¹⁸⁰ For example, former Olympic silver medalist and alpine skier Hans Knauss tested positive for banned substances after taking a supplement called Super Complete, despite reading literature and receiving a certificate of analysis from the manu-

176. NFL POLICY ON ANABOLIC STEROIDS, *supra* note 12, § 10; MLB DRUG PREVENTION PROGRAM, *supra* note 157, at § 9; NHL CBA, *supra* note 44, § 47.8; NBA CBA, *supra* note 44, art. XXXI.

177. Adverse impact is a practice that, although fairly applied across a group of employees, disparately affects a protected group, resulting in unlawful discrimination. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003).

178. *Transcripts, American Morning*, CNN.COM (Apr. 27, 2005, 8:00 AM), <http://premium2.nascar.com/TRANSCRIPTS/0504/27/ltn.06.html>. Former player Steve Courson estimated steroid usage for NFL players who filled positions as offensive or defense lineman between sixty-five and ninety-five percent. *Id.* Numerous other well-known players such as Pat Donovan, Howie Long, Joe Klecko, and the late Lyle Alzado estimated similar percentages. Yesalis, Courson & Wright, *supra* note 21, at 60–61.

179. Admittedly, a discrimination claim would likely fail because players who commit unlawful conduct, such as steroid usage, cannot seek protection through a discrimination claim. The purpose of this hypothetical, however, is to show the potential increase in lawsuits (successful or not) that could result from increased testing efforts.

180. Howard Jacobs, *Taking Matters Into Their Own Hands: Athlete Lawsuits Against Supplement Companies Following Positive Drug Tests*, 25 ENT. & SPORTS LAW. 1, 35 (2008).

facturer assuring him the product did not contain steroids.¹⁸¹ After Knauss tested positive for a prohibited substance, the WADA suspended him from skiing competition for eighteen months.¹⁸² Knauss claims he sent a sample of the supplement for lab analysis and the results confirmed the presence of steroids, despite the fact that the label did not disclose their presence.¹⁸³ Knauss filed suit against the supplement manufacturer, asking for damages resulting from his suspension, and the court allowed the claims to continue.¹⁸⁴

Similar claims could arise due to the strict-liability clauses present in the CBAs of the NFL, MLB, NHL, and NBA. The *Knauss* case shows that even the unwitting consumption of steroids can result in “humiliating losses of endorsements, sponsorships, and income, and a permanently tarnished reputation.”¹⁸⁵ Indeed, even former WADA Chairman Dick Pound acknowledged that accidental ingestion “can and does happen.”¹⁸⁶ For example, another alpine skier failed a drug test after using a Vicks Vapor Inhaler.¹⁸⁷ A skeleton-sled racer also failed his test because of an ingredient in his anti-baldness medication.¹⁸⁸ Increased testing efforts may result in an increased number of accidental violations; because some companies may use banned substances without adequately labeling their products, offending athletes may take legal action against those companies in an attempt to recoup costs and rebuild their reputations.

Second, athletes who violate their team’s anti-drug policy could possibly subject themselves to suits by their non-juicing teammates. For example, when world-champion track athlete Marion Jones tested positive for THG,¹⁸⁹ the IOC demanded not only the return of her Olympic medals but also those of her relay team members.¹⁹⁰ A spokesperson commented, “[W]hen an athlete makes the choice to cheat, others end up paying the price, including teammates”¹⁹¹ One of Jones’s teammates

181. *Knauss v. Ultimate Nutrition*, 514 F. Supp. 2d 241, 244 (D. Conn. 2007).

182. *Id.*

183. *Id.* The manufacturer of Super Complete made the supplements by mixing ingredients purchased by multiple suppliers. *Id.* Allegedly, the manufacturer admitted that some of its suppliers produced steroids. *Id.*

184. *Id.* at 243, 250.

185. *Id.* at 243.

186. Michael A. Hiltzik, *Anti-Doping Group to Show Some Leniency*, L.A. TIMES, Jan. 25, 2007, at D1, available at <http://articles.latimes.com/2007/jan/25/sports/sp-wada25>.

187. *Id.*

188. *Id.*

189. See *supra* note 165.

190. Jolyn R. Huen, *Passing the Baton: Track Superstar Marion Jones’ Duty and Liability to Her Olympic Relay Teammates*, 5 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 39, 41 (2008). Jones participated on the 4 x 100- and 4 x 400-meter relay teams, earning bronze and gold medals, respectively. *Id.* Her positive drug test disqualified her relay teammates—eight in total. *Id.*

191. *Id.* at 40.

stated: “[B]ecause of the decision [Jones] chose to make, [she] took that decision and choice away from the rest of us The rest of us, our characters will be questioned.”¹⁹²

Although Jones’s teammates sought no legal redress, they perhaps could have sued Jones for tort liability under the theories of either recklessness or negligence.¹⁹³ Historically, tort cases involving an athlete’s liability pertained solely to physical harm; these standards, however, could extend to other injuries incurred in the line of play.¹⁹⁴ Under the higher standard of care, a showing of recklessness generally requires the conscious disregard of an unjustifiable risk that results in harm to another to whom the actor owes a duty of care.¹⁹⁵ Indeed, some courts have already ruled that teammates owe one another a duty of care to refrain from unsafe conduct.¹⁹⁶ Additionally, Jones knew that as a member of a relay team, she owed her teammates a duty to adhere to the rules of conduct that governed her sport.¹⁹⁷ Assuming that Jones’s unlawful ingestion of banned substances caused her teammates injury—by stripping them of their medals, endorsements, and reputations¹⁹⁸—the teammates theoretically might prevail in a tort claim to recover damages.

While courts often apply the recklessness standard, the negligence standard may be more appropriate to ensure that athletes do not escape liability for their actions. In the sporting context, most courts apply the recklessness standard for three reasons: (1) to foster vigorous participation, (2) to inhibit the threat of litigation, and (3) to reduce the athlete’s motivation to seek retaliation in future games.¹⁹⁹ The courts recognize that sports injuries can happen inadvertently, so fairness suggests that the higher-liability standard prevail.²⁰⁰ In the context of doping, however, the lower standard of negligence may provide the more appropriate measure for liability. Its application would not hamper the aforementioned policy goals because those objectives protect athletes who injure another accidentally or inadvertently.²⁰¹ Although this lower threshold may be the more appropriate standard in steroid cases, it would probably result in increased litigation and many more successful claims.

192. *Id.* (quoting LaTasha Collander-Richardson, Jones’s teammate on the gold-medal-winning 4 x 400-meter relay team).

193. *Id.*

194. *Id.* at 46.

195. *Id.* at 45.

196. *Id.* at 51.

197. *Id.*

198. *Id.* at 52–53.

199. *Id.* at 47.

200. *Id.*

201. *Id.* at 48.

Torts claims under the negligence standard could also result if the four professional sports entities increased their drug testing efforts. Similar to Jones's relay team, who could file suit for injuries incurred as a result of Jones's drug use, so too could an NFL team sue a juicing teammate if his drug use resulted in the revocation of a Super Bowl title, bonus money, or endorsements. If the courts adopted the lower negligence standard for steroid cases, many successful claims could result, because an injured player need only show that the offending player breached his duty and inflicted damages. In this context, however, increased litigation may serve a positive purpose by deterring drug use through the threat of litigation.

3. Cease Testing Efforts

Players, unions, and agents will likely resist any efforts to clamp down on drug usage; therefore, sports owners could simply give up and cease drug testing efforts altogether. In fact, this solution may not be significantly different from current testing programs since efforts seem cursory at best.²⁰² Although the various leagues claim that they value player health, game integrity, and youth safety,²⁰³ their meager practical efforts at enforcement and deterrence suggest otherwise. Interestingly, when the United States Anti-Doping Agency asked the four major sports entities to fortify their testing efforts by signing onto the more stringent code of an automatic two-year ban for a first violation (the same sanction faced by Olympic competitors), all four organizations declined.²⁰⁴ By way of contrast, the chart below shows the various suspension guidelines currently imposed by the four major sports entities.

202. As previously mentioned, the NFL tests each player once during training camp, randomly tests ten players from each team per week during the season, and does not test for HGH or THG. NFL POLICY ON ANABOLIC STEROIDS, *supra* note 12, § 3(A); *NFL Drug Testing Program Inadequate, Expert Says*, BALTIMORE SUN, Aug. 29, 2006, at 4E. *See also supra* Parts II.A, III.C.1. Similarly, the MLB (although operating under revised, harsher guidelines that impose a fifty-game suspension for a first offense), tests players only twice each season. MLB DRUG PREVENTION PROGRAM, *supra* note 157, § 3(A). The first test occurs during spring training; because players know they must submit a urine sample within five days of reporting for camp, they can easily cease drug use beforehand to avoid a positive result. *Id.* The second test, although unannounced, does not screen for HGH, THG, or other designer drugs, so players can continue to ingest these popular performance enhancers without fear of discovery. Gest, *supra* note 146. Likewise, the NHL tests "up to" twice per season per player, but both tests must occur during a scheduled practice at the team's facilities. NHL CBA, *supra* note 44, § 47.6. An athlete therefore can deduce that he will not be tested on any game day or during any span when his team travels out of town. Furthermore, NHL testing occurs only during the regular season, so post-season play ensues without any regulation. *Id.* Lastly, the NBA randomly tests "no more than" four times per season and requires no minimum number of tests. NBA CBA, *supra* note 44, art. XXXIII § 6(a).

203. *See supra* note 44.

204. Powers, *supra* note 167.

Current CBA Suspension Guidelines for Positive Drug Tests by Respective Leagues

	1st offense	2nd offense	3rd offense	4th offense
NFL ²⁰⁵	4 games	6 games	1 year	
MLB ²⁰⁶	50 games	100 games	Lifetime ban ²⁰⁷	
NBA ²⁰⁸	10 games	25 games	1 year	Lifetime ban ²⁰⁹
NHL ²¹⁰	20 games	60 games	Lifetime ban ²¹¹	

Ironically, inaction could produce as much litigation as increased action. For example, consider an antitrust suit alleging anticompetitive practices in Major League Baseball.²¹² If team owners continued to allow steroid usage among their players, those players would gain an unfair advantage over natural athletes playing in the MiLB.²¹³ If those natural athletes otherwise would have had a legitimate chance at playing in the MLB, owners' passivity in enforcing drug testing could wrongly deprive natural athletes of the opportunity to work in the MLB.²¹⁴ The MiLB could then allege that the MLB restrained trade by failing to stop steroid abuse and allowing juicing players to obtain a competitive advantage over natural players.²¹⁵ Although a successful class action alleging antitrust violations would require nimble navigation of several exemptions,²¹⁶ a suit could prevail if the MiLB could show that the MLB, explicitly or tacitly, agreed to allow the anticompetitive, steroid-taking behavior to occur.²¹⁷ Similar lawsuits could occur in any sport with a minor league team affiliation that is governed by a CBA.²¹⁸

Complete inaction by owners is unlikely because an interest remains in protecting youth athletes, if nothing else. If team owners do not

205. NFL POLICY ON ANABOLIC STEROIDS, *supra* note 12, § 6. Players in violation of the policy cannot receive honors or awards or participate in the Pro Bowl.

206. MLB DRUG PREVENTION PROGRAM, *supra* note 157, § 8(B)(1)–(3).

207. A player may apply for reinstatement after two years. *Id.* § 8(B)(3).

208. NBA CBA, *supra* note 44, art. XXXIII § 9(c)(A)–(D).

209. A player may apply for reinstatement after a two-year absence. *Id.* § 12.

210. NHL CBA, *supra* note 44, § 47.7(a)–(c).

211. Although subject to a permanent ban, a player may apply for reinstatement after two years. *Id.* § 47.7(c).

212. See Patrick S. Baldwin, Note, *Keeping Them Down on the Farm: The Possibility of a Class Action by Former Minor League Baseball Players Against Major League Baseball for Allowing Steroid Abuse*, 43 GA. L. REV. 1195 (2009).

213. *Id.* at 1200.

214. *Id.*

215. *Id.* at 1201.

216. See *id.* at 1202. Currently, Congress's only antitrust exemptions apply to professional baseball; therefore, a class-action suit brought by another professional sport may have a greater chance of success.

217. *Id.* at 1201–03.

218. *Id.*

increase drug testing as a result of *Williams*, parents may worry that teen steroid usage will continue because youth athletes tend to emulate their sports heroes.²¹⁹ For example, when former MLB player Mark McGwire broke Roger Maris's season home run record in 1998, sales of androstenedione²²⁰ and creatine²²¹ soared. McGwire admitted using both for training.²²² High-school athlete Efrain Marrero began using both "andro" and creatine after McGwire's admission, then ventured into other steroids.²²³ When Marrero later committed suicide, one leading researcher and endocrinologist thought steroid usage could be to blame, because the resulting changes in testosterone levels can affect chemicals in the brain, which in turn affect mood and tendencies toward depression and suicide.²²⁴ If no changes in drug testing occur in the wake of *Williams*, youth injuries and deaths may continue.

If changes in drug testing policy do occur, they will not happen quickly. The current CBA for the NFL concludes at the end of 2012,²²⁵ with the MLB, NBA, and NHL contracts due for renewal at the close of 2011.²²⁶ But the question remains: Will team owners increase their testing efforts in light of the *Williams* decision? Our society rewards speed, strength, size, aggression, and, most of all, winning.²²⁷ Owners may not take action unless fans demand it by ceasing to purchase tickets and

219. Timothy Egan, *Body-Conscious Boys Adopt Athletes' Taste for Steroids*, N.Y. TIMES, Nov. 22, 2002 <http://www.nytimes.com/2002/11/22/us/body-conscious-boys-adopt-athletes-taste-for-steroids.html?pagewanted=1>; Heiles, *supra* note 163, at 322–23; Yesalis, Courson & Wright, *supra* note 21.

220. Androstenedione or "andro" is a steroid precursor, meaning it can be converted in the body into testosterone. Steroid precursors can be either natural or synthetic and are a regulated substance available only through a medical prescription. Lisa Fish, M.D., et al., *Supplements, Steroid Precursors and Adolescent Health*, 90 J. CLINICAL ENDOCRINOLOGY & METABOLISM (2005).

221. Although a naturally occurring chemical in the body, creatine can also be recreated in a laboratory. According to the U.S. National Library of Medicine, "[T]here is some science supporting the use of creatine in improving the athletic performance of young, healthy people. . . . The four major sports entities allow the use of creatine, as do the IOC and NCAA, but the NCAA does not permit the purchase of creatine with school funds. *Medline Plus*, U.S. NAT'L LIBRARY OF MED., NAT'L INSTS. OF HEALTH, <http://www.nlm.nih.gov/medlineplus/druginfo/natural/873.html> (last visited Feb. 26, 2011).

222. *McGwire Uses Nutritional Supplement Banned in NFL*, CNN SPORTS ILLUSTRATED (Aug. 22, 1998, 11:37 AM), http://sportsillustrated.cnn.com/baseball/mlb/news/1998/08/22/mcgwire_supplement.

223. Duff Wilson, *After a Youth Athlete's Suicide, Steroids are Called the Culprit*, N.Y. TIMES, Mar. 10, 2005, at A1, D8, available at <http://query.nytimes.com/gst/fullpage.html?res=9C06E7DE173CF933A25750C0A9639C8B63>.

224. *Id.*

225. NFL CBA, *supra* note 5, art. LVIII § 2.

226. MLB Drug Prevention Program, *supra* note 157, at 27. NBA CBA, *supra* note 44, art. XXXIX § 1; NHL CBA, *supra* note 44, art. III § 3.1.

227. Yesalis, Courson & Wright, *supra* note 21.

sports memorabilia until teams undertake serious testing efforts.²²⁸ But fans' concern about players' health, sports integrity, and youths' health simply might not exist. As one expert stated, "The large majority of fans don't care. They just want to be entertained."²²⁹

IV. CONCLUSION

Increased, accurate, and effective testing will be costly, potentially litigious, and time-consuming but is likely the only way to ensure player safety and preserve the credibility of professional sports. Proponents of increased testing cite the medical statistics and testimony of professionals who believe steroids cause a number of serious health illnesses.²³⁰ Others speculate that the drugs played a suspicious role in the deaths of a number of successful athletes.²³¹ Still more suspicions arise when youth athletes ingest steroids and fatalities result.²³²

In addition to health safety, steroids jeopardize the integrity of professional sports. "There's a cloud over the game that I love," commented Congressman Tom Davis during the 2005 hearings.²³³ When members of Congress repeatedly asked McGwire if he took steroids during his play-

228. Paul Elias, *Testing Called into Question*, DULUTH NEWS TRIBUNE (Minn.), Nov. 26, 2003; Wendt, *supra* note 165, at 31.

229. Elias, *supra* note 228 (quoting Charles Yesalis, a professor at Penn State University and expert on steroid use).

230. *See supra* note 37.

231. For example, former All-Pro defensive end Lyle Alzado believed his steroid usage caused a rare form of brain cancer which took his life at age forty-three. Lyle Alzado, "I'm Sick and I'm Scared," SPORTS ILLUSTRATED, July 8, 1991, at 21–29, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1139729/index.htm>. Former MLB National League MVP Ken Caminiti, who openly admitted his steroid use, died of a heart attack at the age of forty-one. Heiles, *supra* note 163, at 323; "96 MVP Admitted Steroid Use, Fought Drug Problem," ESPN, Nov. 3, 2004, <http://espn.go.com/classic/obit/s/2004/1010/1899091.html>. Beloved Olympic sprinter Florence Griffith Joyner died in her sleep at age thirty-eight after suffering a seizure. Gwen Knapp, *Dreams of Clean Team for Olympic Games are Beyond Our Reach*, S.F. CHRON., Aug. 15, 2004, at E1, available at http://articles.sfgate.com/2004-08-15/opinion/17438113_1_steve-courson-doping-athletes. From 2003 to 2004, a string of professional cyclists—seven in total—died in their sleep from unexplained heart failure. *Id.* (In cycling, blood oxygenation is of particular concern because it boosts endurance. It increases the number of red blood cells which carry oxygen; unfortunately, blood doping also thickens the blood, which can result in slowing of the heart). *Id.* All were between sixteen and thirty-five years of age. *Id.*

232. Some parents believe that in addition to causing physical effects, steroids cause psychological damage, such as uncharacteristic mood swings and violent behavior. *Steroids and Our Youth: An Interview with Don Hooton*, U.S. DRUG ENFORCEMENT ADMIN., http://www.justice.gov/dea/pubs/pressrel/hooton_interview.html (last visited Feb. 26, 2011). For example, Donald Hooton believes that steroids caused his son's depression, which led him to hang himself. *Id.* Similarly, Harry Gordon noted his son's extreme mood swings and quick temper that preceded his fatal heart attack. Ray Duckler, *Harry Gordon, III: Steroids Helped Him Bulk Up, then Killed*, TAYLOR HOOTON FOUND., Jan. 2, 2006, http://www.taylorhooton.org/_webapp_1659513/Harry_Gordon_III.

233. McGwire Mum on Steroids in Hearing, CNN.COM, Mar. 17, 2005, <http://www.cnn.com/2005/ALLPOLITICS/03/17/steroids.baseball>.

ing days, he tearfully replied that he “[didn’t] want to talk about the past.”²³⁴ After nine years in retirement and four years of rejection from admission into the Baseball Hall of Fame,²³⁵ McGwire finally admitted that he used steroids.²³⁶ He and other offending players will likely never reach the Hall, with the election committee mentally asterisking such records. As one sports writer explained,

As a voter I must ask, ‘Do I believe this player likely violated federal law and the minimum standard of sportsmanship, by using illegal performance-enhancing drugs?’ . . . [A vote] should signify more than a belief that a player had an excellent career worthy of enshrinement; it should indicate a sincere belief that it was accomplished legally and ethically . . . Shouldn’t the Hall of Fame be synonymous with the highest standards?²³⁷

Regardless of McGwire’s admission, the MLB still acknowledges his accomplishment of breaking the record for the most homeruns in a season. Without changes in testing, the Hall cannot guarantee that its best players accomplished their feats without unlawful assistance, thereby jeopardizing the integrity of the game.

Therefore, despite the risks of greater costs and litigation, improved testing by the teams is the most effective and practical way to achieve the results desired under the current *Williams* framework. Increased testing will punish offenders, protect player and youth health, and help restore the integrity of competition.

234. Gest, *supra* note 146.

235. *BBWAA Election Rules*, NATIONAL BASEBALL HALL OF FAME AND MUSEUM, <http://baseballhall.org/hall-famers/rules-election/bbwaa> (last visited Feb. 26, 2011). Located in Cooperstown, N.Y., election to the Hall occurs for the game’s best all-time players. Ten or fewer candidates are considered each year, with voting based on a player’s record, ability, integrity, sportsmanship, character, and contributions to the game. *Id.* Successful electees must receive seventy-five percent of available votes from the election committee. *Id.* Sports journalists comprise the election committee.

236. *Mark McGwire Admits Using Steroids*, FOXNEWS.COM, Jan. 11, 2010, <http://www.foxnews.com/us/2010/01/11/mark-mcgwire-admits-using-steroids>.

237. Tom Verducci, *Going, Going, Gone*, SPORTS ILLUSTRATED VAULT, Dec. 11, 2006, <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1114563/index.htm>.