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Football, Concussions, and Preemption: The Gridiron of National Football League Litigation

*William B. Gould IV**

“I’m a big football fan, but I have to tell you, if I had a son, I’d have to think long and hard before I let him play football. And I think that those of us who love the sport are going to have to wrestle with the fact that it will probably change gradually to try to reduce some of the violence. In some cases, that may make it a little bit less exciting, but it will be a whole lot better for the players, and those of us who are fans maybe won’t have to examine our consciences quite as much.” – President Barack Obama, quoted in Franklin Foer & Chris Hughes, *O*², *NEW REPUBLIC*, Feb. 11, 2013, at 22, 29.

I. INTRODUCTION

Since its inception in the nineteenth century in the United States, football has been seen as a brutal game, sometimes with such “excess brutality” that President Theodore Roosevelt was induced to convene a White House meeting designed to form rules.¹ This meeting took place two decades prior to the advent of the National Football League (“NFL”) and organized professional football. As early as the 1950s, however, it was possible to witness the public’s rising and sometimes insatiable hunger for violent cataclysmic hits which saw players colliding at full speed with one another coming from considerable distances

* Charles A. Beardsley Professor of Law, Emeritus, at Stanford Law School; Chairman of the National Labor Relations Board, 1994-98. The author served as an expert witness in a recent case involving retired football players. See *Eller v. Nat’l Football League Players Ass’n*, 872 F. Supp. 2d 823 (D. Minn. 2012). The author wishes to express his gratitude for the considerable research assistance provided by Eric Weitz, Stanford Law School 14, as well as Chris Hu, Stanford Law School 13. I have also benefited in preparing this article from my Sports Law seminar, particularly the remarks of Steve Fainaru and Mark Fainaru-Wada of ESPN delivered at Stanford Law School on February 25, 2013.

¹ See *Football Conference at the White House*, *N.Y. TIMES*, Dec. 5, 1905; see also Bob Greene, *The President Who Saved Football*, *CNN* (Feb. 5, 2012), <http://www.cnn.com/2012/02/05/opinion/greene-super-bowl>.

across the field.² The rise in this kind of play, it is thought, had something to do with the change in equipment, particularly the helmet (designed to protect against skull fractures rather than concussions) as well as the public's demand for short-attention-span excitement and titillation. As Alan Schwarz has written:

In the N.F.L., leather helmets of the 1920s evolved into plastic models by the 1950s, after which single face bars evolved into cages through the 1980s. Most experts believe that these advances, while heading off catastrophic injury, have led to greater use of the head while tackling and more daring play over all. This leads to more concussions and subconcussive blows, for which the helmets were not truly designed and that can cumulatively cause later-life cognitive problems. Only in the 21st century have helmet manufacturers begun to focus on directly protecting against concussions.³

The NFL was clearly slow to publicly recognize the relationship between football, head trauma, and subsequent cognitive impairment. In 1994, New York Jets team doctor Elliot Pellman said, "Concussions are part of the profession, an occupational risk," and further that a football player is "like a steelworker who goes up 100 stories, or a soldier."⁴ In 1997, the American Academy of Neurology established guidelines for concussed athletes returning to play, but three years later, the NFL rejected them.⁵ Again, in 2006, an NFL committee rejected the Academy's guidelines, stating that "current attempts to link prospective grading of concussion symptoms to arbitrary, rigid management decisions are not consistent with scientific data," and advocating the case-by-case treatment of players who had received concussions.⁶ Commissioner Roger Goodell, as late as 2007, has said, in announcing an off-season "concussion summit": "We're protecting the players against the players"⁷ — notwithstanding the subsequent alarm raised by a series of articles demonstrating a link in some athletes be-

² See generally Michael Sokolove, *Should You Watch?*, N.Y. TIMES, Oct. 24, 2010, at 1, 7.

³ Alan Schwarz, *Before Reaching N.F.L., Players Also Face the Risk of Head Injuries*, N.Y. TIMES, Oct. 2, 2009, at B13.

⁴ Michael Farber, *The Worst Case: Doctors Warn That Repeated Concussions Can Lead to Permanent Brain Dysfunction*, SPORTS ILLUSTRATED, Dec. 19, 1994.

⁵ Ta-Nehisi Coates, *The NFL's Response to Brain Trauma: A Brief History*, ATLANTIC (Jan. 25, 2013), <http://www.theatlantic.com/entertainment/archive/2013/01/the-nfls-response-to-brain-trauma-a-brief-history/272520>.

⁶ *Id.*

⁷ *Id.* In 2007, an NFL safety pamphlet notified players by stating, "Current research with professional athletes has not shown that having more than one or two concussions leads to permanent problems if each injury is managed properly." *Id.*

tween head trauma and chronic traumatic encephalopathy (CTE) or general cognitive impairment.⁸

But in 2009, matters began to change. As Alan Schwarz noted, the NFL had commissioned a survey which had indicated “that dementia or similar memory-related diseases had been diagnosed in its retired players vastly more often than in the national population, [but] the League [had] claimed the study was unreliable.”⁹ However, Schwarz wrote, “confidential data from the N.F.L.’s dementia assistance plan strongly corroborate[d] claims of a link between football and later-life cognitive impairment.”¹⁰ The turning point occurred in 2009 in the form of hearings before the House Judiciary Committee, which saw the NFL and Commissioner Goodell excoriated for their failure to recognize the link. Congresswoman Linda Sanchez stated that this reminded her of the position of the tobacco companies in the pre-1990s period when they kept saying, “[N]o, there is no link between smoking and damage to your health.”¹¹ Now the NFL Players’ Association, which at some points in the past had said that it had no representation obligation for retirees¹² and that football did not cause

⁸ See, e.g., Alan Schwarz, *Expert Ties Ex-Player’s Suicide to Brain Damage*, N.Y. TIMES, Jan. 18, 2007, at A1; John Branch & Alan Schwarz, *N.F.L. Culture Makes Issue of Head Injuries Even Murkier*, N.Y. TIMES, Feb. 3, 2007; Alan Schwarz, *N.F.L. Doctor Quits Amid Research Doubt*, N.Y. TIMES, Mar. 1, 2007, at D1; Alan Schwarz, *Football: Wives Also Suffer as Dementia Sets In*, N.Y. TIMES, Mar. 14, 2007; Alan Schwarz, *NFL: Survey Links Concussions to Depression*, N.Y. TIMES, May 31, 2007; Alan Schwarz, *Lineman, Dead at 36, Exposes Brain Injuries*, N.Y. TIMES, June 15, 2007, at D1; Alan Schwarz, *Player Silence on Concussions May Block N.F.L. Guidelines*, N.Y. TIMES, June 20, 2007, at D1; Alan Schwarz, *Silence on Concussions Raises Risks of Injury*, N.Y. TIMES, Sept. 15, 2007, at A1.

⁹ Alan Schwarz, *N.F.L. Data Reinforces Dementia Links*, N.Y. TIMES, Oct. 23, 2009, at D1.

¹⁰ *Id.*

¹¹ *Legal Issues Relating to Football Head Injuries (Part I & II), Hearings Before the H. Comm. on the Judiciary*, 111th Cong. 116 (2010); Alan Schwarz, *N.F.L. Scolded Over Injuries to Its Players*, N.Y. TIMES, Oct. 29, 2009, at B12.

¹² *Cf. Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (holding that retirees are not employees within the meaning of the Act and that therefore employers are not obliged to bargain about their conditions). In football, however, the matter is a bit more complex because the NFLPA has bargained on behalf of retirees, though sometimes reluctantly. *Cf. Nedd v. United Mine Workers*, 556 F.2d 190, 200 (3d Cir. 1977) (“When a Union elects to undertake [bargaining over retiree benefits], the union’s duty of fair representation must apply.”); *Toensing v. Brown*, 528 F.2d 69, 72 (9th Cir. 1975) (similar holding). *But see United Auto Workers v. Yard-Man*, 716 F.2d 1476, 1486 n.16 (1983) (suggesting that the duty of fair representation should not extend to retirees, even when the union acts in ways that affect retiree interests); *Anderson v. Alpha Portland Indus., Inc.*, 727 F.2d 177, 183 (8th Cir. 1984) (holding that the duty of fair representation does not apply to contract *administration* on behalf of retirees); *Eller v. Nat’l Football League Players Ass’n*, 872 F. Supp. 2d 823 (D. Minn. 2012) (dismissing retirees’ claims against NFLPA due to the lack of a fiduciary duty). Conditions involving retirees as they related to active incumbent employees are a mandatory subject of bargaining. See *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350 (D.C. Cir. 2008); *Inland Steel Co. v. NLRB*, 170 F.2d 247, 250-51 (7th Cir. 1948).

dementia, stated that it shared the blame for head injuries.¹³ A few weeks later, in a moment reminiscent of baseball's recognition that its steroid problem was serious in the wake of the 2005 House hearings,¹⁴ the NFL promised to have independent experts provide an "uncompromised approach to handling players with concussions" for the first time.¹⁵ Schwarz noted:

This continued a pattern of the league requesting credit for improving conditions without accepting its role in preserving the conditions that required improvement. For example, when the N.F.L. decided in 2007 that players who were knocked unconscious during games could no longer return the same day, the league did not address how published research by its own committee doctors had declared the practice safe. And on the day that Goodell held a leaguewide concussion summit in June 2007 to show how serious the league was on the issue, he fought the suggestion that a player found with brain damage . . . had developed it through football. Goodell insisted that the player "may have had a concussion swimming," adding, "[a] concussion happens in a variety of different activities."¹⁶

Then, a month later, the NFL finally "conceded publicly for the first time that concussions can have lasting consequences."¹⁷

Meanwhile, more than 200 concussion-related lawsuits have been filed involving more than 4,000 retired players alleging tort liability on the grounds of negligence, fraud, and misrepresentation, with many of the allegations arising out of the NFL's tardy response. It is said that the NFL awarded disability benefits to at least three former players in the late 1990s and early 2000s, after it concluded that football caused them crippling brain injuries at the same time the NFL was asserting that its "players were different than boxers, whose susceptibility to brain injuries caused by the sport has been documented since the

¹³ Alan Schwarz, *N.F.L. Players and Union Say They Share Blame on Head Injuries*, N.Y. TIMES, Nov. 1, 2009, at SP1.

¹⁴ *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use, Hearings Before the H. Comm. on Gov't Reform*, 108th Cong. (2005); see also WILLIAM B. GOULD IV, *BARGAINING WITH BASEBALL: LABOR RELATIONS IN AN AGE OF PROSPEROUS TURMOIL* 194-234 (2011).

¹⁵ Alan Schwarz, *N.F.L.'s Moves Signal a Truce on Concussions*, N.Y. TIMES, Nov. 26, 2009, at B10.

¹⁶ *Id.*; see also Alan Schwarz, *N.F.L. Head Injury Study Leaders Quit*, N.Y. TIMES, Nov. 25, 2009, at B11; Alan Schwarz, *N.F.L. to Shift Its Handling of Concussions*, N.Y. TIMES, Nov. 23, 2009, at A1.

¹⁷ Alan Schwarz, *N.F.L. Acknowledges Long-Term Concussion Effects*, N.Y. TIMES, Dec. 21, 2009, at D1.

1920s.”¹⁸ Despite the recognition that the helmet is a major component in the concussion problem, to this day, the NFL has refused to mandate or officially recommend helmet models “protecting against collisions believed to be linked to concussions.”¹⁹ The NFL defends itself in the court of public opinion, as well as in the concussion litigation procedural skirmishing relating to preemption, discussed below, on the basis of the role of medical doctors under the collective bargaining agreement. The primary thrust of this preemption relates to the disability procedures providing for claims by retirees predicated upon injuries that they have suffered while playing the game. Preemption, based upon the argument that an interpretation of the collective bargaining agreement is present, also focuses upon the fact that doctors are involved in making an assessment about whether the player can return after suffering an injury, including a concussion or semi-concussion. But the outstanding problem of conflict of interest between doctor loyalty to the club versus the player has been discussed with renewed vigor:

Privacy, confidentiality, speed of recuperation, treatment regimens — all of them stand to suffer when players see a doctor employed by an organization that prefers they return to work ASAP. Then imagine this added conflict: The doctor who just cleared you for duty was so thrilled to have the gig that she paid your employer for the privilege. Now you’re getting closer to the situation many pro athletes face. Put yourself in their cleats for a moment. Would you want to be treated by a doctor who had your employer’s profitability anywhere on her list of concerns? And further, would you be forthcoming about your health problems to someone with a direct pipeline to managers with the power to effectively fire you for poor health?²⁰

The conflict of interest exists whether physicians are paid by the club or whether they are paying the club — but it is clearly exacerbated in the latter instance. Meanwhile, research continues regarding the

¹⁸ Steve Fainaru & Mark Fainaru-Wada, *Mixed Messages on Brain Injuries*, ESPN: OUTSIDE THE LINES, Nov. 14, 2012.

¹⁹ Sam Borden, *Despite Risks, N.F.L. Leaves Helmet Choices in Players’ Hands*, N.Y. TIMES, Sept. 21, 2012, at A1.

²⁰ Sam Eifling, *Why NFL Team Doctors Are Ethically Compromised*, SLATE, Jan. 30, 2013; see also Tom Junod, *This NFL Season Has Been Defined by People Talking About The Injury Issue*, ESQUIRE, Feb. 2013, at 77, 81-82 (“The team doctor works for the team and so does the trainer. They are paid to get you on the field – or, as Dr. Yates says, to help you fulfill your career’ – and you are paid to play. They are not paid to protect you. You have to protect yourself. This is why the players’ union has fought for the right to get a second medical opinion and the right to see your medical records.”).

question of how to “identify protein deposits in the brains of living players” so as to measure the risk of developing chronic traumatic encephalopathy (“CTE”).²¹ It has received professional football recognition only recently, unaddressed by doctors and trainers for years (these individuals were concerned simply with whether a player could return to the game after examining how many fingers the physician or trainer held up in the air),²² a problem compounded by the NFL’s apparent failure to investigate properly and perhaps disclose as well. Inevitably, there will be questions about the issue of causation and whether CTE is attributable to other factors beyond head trauma or whether head trauma has been experienced prior to playing for the NFL in college or high school. These will pose difficult issues not present, for instance, in the smoking cases where the science was already more developed than it is in the concussion cases at the time of litigation.

II. THE PREEMPTION ISSUE

The first area of argument in the substantial number of tort actions filed against the National Football League by former NFL players relates to jurisdiction and involves the issue of preemption and the role of the labor arbitration process. Gaining a substantial impetus during World War II²³ and in the immediate postwar period when grievance-arbitration machinery flourished as a means to peaceably resolve disputes rather than through self-help weaponry in the form of strikes or slowdowns. Section 301 of the Taft-Hartley amendments²⁴ provided the framework for the fashioning of national labor law policy promoting the arbitration process, a policy recognized and implemented through a body of law designed for the enforcement of collective bargaining agreements and rooted in national labor law.²⁵ In the

²¹ *New Scan May Enable Better Diagnosis, Treatment for Athletes’ Brain Damage*, PBS NEWSHOUR, Jan. 22, 2013; see also Drew Joseph, *Stanford Analyzes Athletes’ Concussions*, SF GATE (Nov. 20, 2012), <http://www.sfgate.com/collegesports/article/Stanford-analyzes-athletes-concussions-4055088.php>.

²² The approach has now become far more sophisticated. See Judy Batista, *NFL to Expand Concussion Efforts*, N.Y. TIMES, Feb. 27, 2013, at B11.

²³ See generally Jesse Freidin & Francis J. Ulman, *Arbitration and the National War Labor Board*, 58 HARV. L. REV. 309 (1945); JAMES B. ATLESON, *LABOR AND THE WARTIME STATE: LABOR RELATIONS DURING WORLD WAR II* (1998).

²⁴ “Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.” Section 301(a), 29 U.S.C. § 185(a).

²⁵ *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957) (“We conclude that the substantive law to apply in suits under s 301(a) is federal law, which the courts must

wake of *Lincoln Mills*, the Court, through the landmark *Steelworkers Trilogy* rulings,²⁶ fostered arbitration.²⁷

The first and most pressing issue in the wake of the *Steelworkers Trilogy* related to the question of the impact of the broad preemption doctrine involving the unfair labor practice²⁸ and the representation machinery jurisdiction of the National Labor Relations Board. The Court held that federal courts and the consequent arbitration process retained jurisdiction, notwithstanding NLRA preemption,²⁹ that state courts retained jurisdiction notwithstanding the dominance of federal labor law as articulated in *Lincoln Mills*,³⁰ and that the state courts' function within a section 301 environment "require[s] the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute . . . requiring issues raised in suits of a

fashion from the policy of our national labor laws." Justice Frankfurter dissented, in part, because of his view that arbitration was recognized through the Federal Arbitration Act of 1925, itself, in his view, limited in its relationship to certain employment contracts and collective bargaining agreements. *Id.* at 466-67 (Frankfurter, J., dissenting). *But see* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). For a discussion of the rise of the Federal Arbitration Act in the collective bargaining agreement arena, see William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609 (2006); William B. Gould IV, *A Half Century of the Steelworkers Trilogy: Fifty Years of Ironies Squared*, ARBITRATION 2010: THE STEELWORKERS TRILOGY AT 50, PROCEEDINGS OF THE SIXTY-THIRD ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 35 (Paul D. Staudohar & Mark I. Lurie, eds.)

²⁶ *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Am. Mfg. Co.* (1960). These cases and the policies inherent in them are discussed in ARCHIBALD COX, *LAW AND THE NATIONAL LABOR POLICY* 64-85 (1960).

²⁷ *Arbitrator Rule Upheld by Court*, N.Y. TIMES, June 21, 1960, at A19.

²⁸ *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959). See generally Archibald Cox & Marshall J. Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950); Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972); William B. Gould IV, *The Garmon Case: Decline and Threshold of "Litigation Elucidation,"* 39 U. DET. L.J. 539 (1962); cf. Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990). Though preemption here related to that which "arguably" constituted an unfair labor practice, the preemption doctrine was subsequently promoted for subject matter admittedly not within the unfair labor practice prohibitions and consequent protections. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132 (1976).

²⁹ *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962); see also *Colo. Anti-Discrimination Comm'n v. Cont'l Air Lines*, 372 U.S. 714 (1963) (finding that state prohibition on employment discrimination did not conflict with federal Railway Labor Act and thus was not preempted); *Humble v. Boeing Co.*, 305 F.3d 1004 (9th Cir. 2002) (state disability law not preempted); *Detabali v. St. Luke's Hospital*, 482 F.3d 1199 (9th Cir. 2007) (state disability law not preempted). *But see* *Reece v. Houston Lighting & Power Co.*, 79 F.3d 485 (5th Cir. 1996); *Oberkramer v. IBEW-NECA Serv. Ctr.*, 151 F.3d 752 (8th Cir. 1998).

³⁰ *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

kind covered by § 301 to be decided according the precepts of federal labor policy.”³¹

Initially and appropriately, the arbitration process took a backseat to anti-discrimination law,³² but some measure of retreat from this position was sounded four years ago.³³ In the interim, new cases involving tension between the preemptive scope of section 301, first heard in the 1960s, emerged in connection with employment tort and contract actions instituted in a judicial forum.

The first case was *Allis-Chalmers Corp. v. Lueck*,³⁴ where the Court considered whether a Wisconsin tort remedy for the bad faith handling of an insurance claim instituted in court was authorized through a collective bargaining agreement procedure for the processing of disability benefit claims. According to the Court, the manner in which a benefit claim was processed, whether it was dilatory or not, inevitably depended upon an interpretation of the collective bargaining agreement, and therefore, it was preempted because of the interest in national uniformity.³⁵ The Court visited this issue again in *Lingle v. Norge Division of Magic Chef, Inc.*,³⁶ where an Illinois employee covered by a collective bargaining agreement was discharged for filing a workers’ compensation claim and sued to recover compensatory and punitive damages in state court. The Court, in an opinion authored by Justice Stevens, rejected the proposition that a state court remedy was preempted by section 301. Here, the Court stressed the fact that the state law remedy was “independent” of the collective bargaining agreement, even though as in *Lueck*, “state-law analysis might well involve attention to the same factual considerations as the contractual determination of whether Lingle was fired for just cause.”³⁷

³¹ *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). *Lucas Flour* itself was a damage action for violation of a no-strike clause, which the Court upheld because of an implied obligation to proceed to arbitration under the collective bargaining agreement. *Id.* at 104-05. This policy was further implemented through provisions providing for injunctive relief. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970); William B. Gould IV, *On Labor Injunctions, Unions, and the Judges: The Boys Markets Case*, 1970 SUP. CT. REV. 215. *But see Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976); cf. William B. Gould IV, *On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge*, 30 STAN. L. REV. 533 (1978).

³² *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); William B. Gould IV, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969).

³³ *Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); GOULD, *Fifty Years of Ironies Squared*, *supra* note 25, at 56-79; David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment*: 14 *Penn Plaza v. Pyett*, 19 CORNELL J.L. & PUB. POL’Y 429 (2010).

³⁴ 471 U.S. 202 (1985).

³⁵ *Id.* at 220.

³⁶ 486 U.S. 399 (1988).

³⁷ *Id.* at 408.

Conceding that there might be preemption where the subject matter of the law in question is in the collective bargaining agreement, not all such disputes involve “interpretation,” said the Court. “In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is ‘independent’ of the agreement for § 301 pre-emption purposes.”³⁸

On the other hand, a unanimous Court also held that an employee’s state tort claim was preempted where she alleged the union was negligent in providing her with safety at the workplace inasmuch as this constituted a breach of the union’s federal duty of fair representation.³⁹ The Court, by a 6-3 vote, held that a wrongful death action brought against the miners’ union by the survivors of those killed in an underground fire was preempted by section 301,⁴⁰ inasmuch as the Court reasoned that the union’s duty was thrust upon it by the collective bargaining agreement itself. The principles are fairly easy to state in the abstract. They remind one of Justice Frankfurter’s words, delivered in other contexts, as a “bog of lagomachy”⁴¹ requiring the answers to be fashioned in many instances by “the process of litigating elucidation” before a “Delphic” oracle.⁴²

A union official’s state court defamation and tortious interference claims against his employer and several employees who had allegedly made and discussed false sexual harassment claims regarding the plaintiff were held to be preempted.⁴³ A claim that emotional distress was inflicted by the allegedly retaliatory reassignment of an employee was deemed preempted because it would involve the interpretation of a management rights clause.⁴⁴ Similarly preempted was an

³⁸ *Id.* at 409-10. Here, the Court stressed its holding in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) that preemption was “not lightly to be inferred” when establishment of labor standards were traditionally within the police power of the state. *Id.* at 21; *see also* *Metro. Life Ins. Co. v. Mass. Travelers Ins. Co.*, 471 U.S. 724 (1985). *But see* *Haw. Pac. Health v. Takamine*, 2012 WL 6738548 (D. Haw. Dec. 31, 2012) (involving regulation of collective bargaining agreements).

³⁹ *Int’l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851 (1987). This is rooted in *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944), *Vaca v. Sipes*, 386 U.S. 171 (1967), and *Humphrey v. Moore*, 375 U.S. 355 (1964). *See also* *BIW Deceived v. Local S6, Indus. Union of Marine & Shipbuilding Workers*, 132 F.3d 824 (1st Cir. 1997).

⁴⁰ *United Steelworkers v. Rawson*, 495 U.S. 362 (1990).

⁴¹ *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 348 (1953).

⁴² *San Diego Bldg. Trades Council, Millmen’s Union, Local 2020 v. Garmon*, 359 U.S. 236, 241 (1959).

⁴³ *DeCoe v. General Motors Corp.*, 32 F.3d 212 (6th Cir. 1994).

⁴⁴ *Baker v. Farmers Elec. Coop.*, 34 F.3d 274 (5th Cir. 1994).

intentional infliction of emotional distress claim arising out of an altercation because it would involve the just cause and management rights clauses of the contract.⁴⁵ But the mere consultation⁴⁶ of the collective bargaining agreement, as opposed to its interpretation, will not suffice for preemption.⁴⁷

III. THE FOOTBALL CASES

The seminal appellate decision which establishes some of the framework for the football preemption cases is *Williams v. National Football League*,⁴⁸ involving professional football players suspended after testing positive for a banned substance, who brought an action to claim violations of the Minnesota Drug and Alcohol Testing in the Workplace Act (“DATWA”) and the Minnesota Consumable Products Act (“CPA”). With regard to DATWA, the court, through Judge Shepherd, noted that no provision of the collective bargaining agreement or the drug policy needed interpretation and that therefore an otherwise independent state law claim was not preempted where “only mere consultation” was required.⁴⁹ Accordingly, the court held that the players’ DATWA claim, predicated upon Minnesota law and not the collective bargaining agreement or policy, constituted a “claim [which] . . . is not dependent upon an interpretation of the CBA or the Policy.”⁵⁰ Second, with regard to the CPA, which focuses on the consumption of products off the employer’s premises or during nonwork-

⁴⁵ Foy v. Giant Food, Inc., 298 F.3d 284 (4th Cir. 2002).

⁴⁶ *Livadas v. Bradshaw*, 512 U.S. 107 (1994); *Associated Builders & Contractors v. Local 302, IBEW*, 109 F.3d 1353 (9th Cir. 1997) (involving a union targeting a program involving aid to union signatory contractors in targeted projects and its lawfulness under state prevailing wage laws); *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053 (9th Cir. 2007) (employees’ overtime pay claims are not preempted).

⁴⁷ *Carlson v. Arrowhead Concrete Works, Inc.*, 445 F.3d 1046 (8th Cir. 2006); *Alongi v. Ford Motor Co.*, 386 F.3d 716 (6th Cir. 2004); *Kline v. Sec. Guards, Inc.*, 386 F.3d 246 (3d Cir. 2004); *Karnes v. Boeing Co.*, 335 F.3d 1189 (10th Cir. 2003); *Wynn v. AC Rochester*, 273 F.3d 153 (2d Cir. 2001). The same result is obtained in contract disputes. *Loewen Grp. Int’l v. Haberichter*, 65 F.3d 1417 (7th Cir. 1995); *Beals v. Kiewit Pac. Co.*, 114 F.3d 892 (9th Cir. 1997); *cf. Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987). Conduct separate from the content of a collective bargaining agreement such as, for instance, pre-contractual conduct is not preempted. *Textron Lycoming Reciprocating Div., Avco Corp. v. UAW*, 523 U.S. 653, 657 (1998); *CNH America, LLC v. UAW*, 645 F.3d 785 (6th Cir. 2011).

⁴⁸ 582 F.3d 863 (8th Cir. 2009).

⁴⁹ *Id.* at 877. Here, the court relied upon a Tenth Circuit opinion in “an analogous fact situation,” *id.* at 876 (citing *Karnes v. Boeing Co.*, 335 F.3d 1189 (10th Cir. 2003)), where that Circuit similarly held that an action under the Oklahoma Standards for Workplace Drug and Alcohol Testing Act did not require interpretation of the collective bargaining agreement.

⁵⁰ *Id.* at 878.

ing hours, the court again found that no provision of the Agreement of Policy was involved and thus preemption was not warranted.⁵¹

But, the court held that common law claims rooted in a breach of fiduciary duty, negligence, and gross negligence, as well as misrepresentation, were “inextricably intertwined” since the duty owed to players could not be determined without examining the “parties’ legal relationship and expectations as established by the CBA and the Policy.”⁵² The court focused upon appendices and supplements to the Policy which addressed masking agents and supplements, the players having contended that they “reasonably relied on the lack of a warning” that the supplement in question contained the forbidden element.⁵³ The same conclusion was reached with regard to the players’ intentional infliction of emotional distress claims based upon the same lack of warning.

Prior to *Williams*, another case raising some of the same considerations arose out of a wrongful death action commenced by the widow of a professional football player who suffered heat exhaustion during summer training camp.⁵⁴ Here, the contention was that the deceased had been “forced to participate in practices conducted in extreme heat and humidity while wearing unsafe, heat-retaining, league-mandated equipment and without proper acclimatization, supervision, or medical care.”⁵⁵ Preliminarily, the court in this case held, in an issue that has been raised in the concussion litigation, that the fact that the NFL itself is not a party to the collective bargaining agreement but rather functions as its bargaining arm, the NFL Management Council, does not bar the NFL from raising the preemption issue. The court noted that the collective bargaining agreement imposed “no independent duty on the NFL to consider health risks arising from adverse playing conditions, or to make recommendations for rules, regulations or guidelines for the clubs to follow.”⁵⁶ While several provisions relating to medical care and treatment imposed specific duties on the individual clubs and players and certain player rights, nothing in the CBA obliged the NFL to “provide medical information and guidance to the individual clubs concerning how to prevent or treat illness or injury among the clubs’ employees.”⁵⁷ The court then found that the agreement imposed no duty to protect players from illness or injury during

⁵¹ *Id.* at 880.

⁵² *Id.* at 881.

⁵³ *Id.* at 882.

⁵⁴ *Stringer v. Nat'l Football League*, 474 F. Supp. 2d 894 (S.D. Ohio 2007).

⁵⁵ *Id.* at 898.

⁵⁶ *Id.* at 906.

⁵⁷ *Id.*

the training camp. Concluding that the “relevant inquiry for preemption purposes” was not the question of to whom the duty to provide safety was owed but rather how it came into being, the court concluded that it did not arise under the CBA. Nonetheless, the court was of the view that the degree of care owed by the NFL in republishing its Hot Weather Guidelines could not be undertaken without examining the significance of the CBA provision relating to the requirement that athletic trainers be certified. According to the court:

If, by virtue of the certification process, the trainers are fully prepared to handle heat-related illnesses, the degree of care owed by the NFL in publishing the Hot Weather Guidelines is diminished. On the other hand, if, as part of the certification process, the trainers receive no instruction on how to prevent, recognize, and treat heat-related illnesses, the NFL’s Hot Weather Guidelines obviously take on much greater significance, and the degree of care owed by the NFL increases considerably. Resolution of Plaintiff’s claim is therefore inextricably intertwined with this CBA provision.⁵⁸

On the other hand, with regard to the negligence claim, the court noted that the collective bargaining agreement did not impose a duty to adequately protect the NFL players from risk of injury or illness and that the NFL was not required to accept recommendations of the Player Safety and Welfare Committee. Accordingly, the negligence count was held as not being preempted. And as a general proposition, a major difference between this case and the concussion litigation lies in the fact that in the latter, the defendants are alleged to have suppressed information which would otherwise have safeguarded player safety.

In a case more easily distinguishable from the concussion litigation, the Eleventh Circuit Court of Appeals held that the players who lost money by virtue of financial advisor investments and alleged negligent representation and breach of fiduciary duty could not sue because of preemption where the investors were listed in the NFL Players’ Association Financial Advisors Program, which in turn stemmed from the collective bargaining agreement that contained the promises and limitations of the Program.⁵⁹ The court concluded that the litigation was preempted given the fact that the collective bargaining agreement provided for the investor concept.

⁵⁸ *Id.* at 910.

⁵⁹ *Atwater v. Nat’l Football League*, 626 F.3d 1170 (11th Cir. 2010).

The cases addressing concussions themselves thus far provide little in the way of persuasive reasoning. *Maxwell v. National Football League*⁶⁰ held that the claims were “inextricably intertwined” and substantially dependent upon an analysis of certain CBA provisions imposing duties on the clubs with respect to the medical care and treatment of NFL players. The court stated that the primary responsibility was placed by the collective bargaining agreement upon the team physicians, as well as athletic trainers,⁶¹ as the provision must be taken into account in determining the degree of care owed. In a two-page opinion containing little reasoning, the court concluded that preemption existed.

In *Duerson v. National Football League*, the plaintiff alleged negligence, fraudulent concealment of the linkage between brain trauma and permanent brain damage, conspiracy to publish false information, and negligent failure to warn.⁶² The complaint also contained counts against the companies that manufactured the helmets that the plaintiff wore while playing professional football, and alleged strict liability and negligence for failure to warn of the defect in helmet design. In a more extensive opinion, the court noted that the CBA imposed an obligation upon the club physician to advise the player in writing if the condition could be “significantly aggravated by continued performance.”⁶³ The court also alluded to other provisions which “address” player health and safety and concluded that they “may be interpreted to impose a general duty on the NFL clubs to diagnose and treat ongoing conditions like the concussive trauma that led to Duerson’s CTE.”⁶⁴ The contractual provisions addressing this subject matter meant that the “necessity of interpreting the CBAs to determine the standard of care still leads to preemption.”⁶⁵

My own judgment is that the defendants ought not to be able to carry the day on the preemption issue in the NFL concussion litigation. Belatedly, after years of denying the relationship between head trauma suffered through football impact and dementia and other brain abnormalities, the League, as noted above, switched course in the wake of the House Judiciary Committee 2009 hearings. As the litigation on behalf of more than 4000 retired players has made its way to multi-district status, confronted with the issue of expanding liabil-

⁶⁰ Case No. CV 11-08394 R(MANx) (C.D. Cal. Dec. 8, 2011).

⁶¹ *Id.* at. *2 (“The Court reaches a similar conclusion when examining the CBA provisions relating to the teams’ athletic trainers.”).

⁶² Case No. 12-C-2513, 2012 WL 1658353 (N.D. Ill. May 11, 2012).

⁶³ *Id.* at *4.

⁶⁴ *Id.*

⁶⁵ *Id.*

ity,⁶⁶ it has made changes and engaged in new efforts.⁶⁷ The union, relatively passive in the past, has developed new interest in the subject.⁶⁸ Because both head trauma and cognitive disabilities are perceived to be caused by both subconcussions as well as concussions, regular season padded practices have been diminished in the collective bargaining agreement to one per week.⁶⁹ However, to the contrary, the NFL has continued to push through the collective bargaining process, with apparent success, its objective of extending the season to eighteen games, a result which will undoubtedly diminish player safety as the wear and tear of the season as well as additional games take their toll.⁷⁰

There are parallels with the tobacco lawsuits though, as noted above, it appears causation will be more difficult to establish in the concussion cases. On the preemption issue itself, what is particularly relevant is the essence of the players' position -- i.e., that the NFL spread misinformation, at least prior to 2009, and withheld information about the result of concussions in the game.⁷¹ This does not seem to be related to the collective bargaining agreement although it possible, particularly with regard to the negligence counts, that the obligations of the disability committee, trainers, and doctors under the collective bargaining agreement could be implicated, as the NFL argues. If these provisions can be read to provide for a duty of care, it would seem that the collective bargaining agreement could be intertwined insofar as the negligence count is concerned — but seemingly not on the issues of fraud and failure to disclose. In these respects, the *Stringer* decision may possess some measure of persuasiveness.⁷²

Again, the fundamental claim by plaintiffs on the latter count relates to fraud, concealment, and failure to disclose. Given these allegations it is difficult to see how the obligations of trainers under the collective bargaining agreement are at issue, as they were in *Stringer*. It is hard to imagine how the question of whether doctors made determi-

⁶⁶ Ken Belson, *Concussion Liability Issues Could Stretch Beyond N.F.L.*, N.Y. TIMES, Dec. 11, 2012, at B11.

⁶⁷ Ken Belson, *N.F.L. Hopes to Make Move to Help Identify Concussions*, N.Y. TIMES, Feb. 1, 2013, at B14; Judy Battista, *N.F.L. Joins with G.E. in Effort to Detect Concussions*, N.Y. TIMES, Feb. 3, 2013, at 6.

⁶⁸ Ron Winslow, *NFL Union Funds Study of Injury Risk*, WALL ST. J., Jan. 29, 2013, at A2.

⁶⁹ NATIONAL FOOTBALL LEAGUE-NATIONAL FOOTBALL LEAGUE PLAYERS' ASSOCIATION COLLECTIVE BARGAINING AGREEMENT 143, art. 24, sec. 1(a) (Aug. 4, 2011), available at <https://www.nflplayers.com/about-us/CBA-Download>.

⁷⁰ See, e.g., *Roger Goodell: Owners Want 18 Games*, ESPN, Aug. 26, 2010; Jarrett Bell, *Players Concerned About Pay, Calendar in an Expanded Season*, USA TODAY, Aug. 25, 2010.

⁷¹ Bob Egelko, *Lawsuits on Health Could Hit NFL Hard*, S.F. CHRONICLE, Jan. 19, 2013, at A1.

⁷² *Stringer v. Nat'l Football League*, 474 F. Supp. 2d 894 (S.D. Ohio 2007).

nations about recovery time and the advice that they provided would be directly relevant to the question of whether the NFL withheld the relevant information altogether. Moreover, at least until recent months and years, there did not appear to be a written policy, as such, with regard to head injuries. Thus both the disability committee and the role of physicians does not seem to be bound up with at least the fraud and failure to disclose counts given that they involve subject matter unrelated to the content of the CBA itself. And thus it is hard to see how the uniform development of federal labor policy as it relates to collective bargaining agreements is implicated or frustrated.

IV. CONCLUSION

Preemption is thus then the major issue that the courts must resolve prior to a hearing on the merits. If plaintiffs' position survives at this stage, it is likely that the drama will unfold, which could prove to be both a distraction and harmful publicity for the NFL, thus paving the way toward settlement discussions. This, like the steroids issue for baseball (it awaits further examination in football itself),⁷³ is the drama that now unfolds. It is the most critical issue confronting the game.⁷⁴ Already, some of the rules have begun to change and greater scrutiny and condemnation is being given to head-to-head collisions. It seems clear that many will follow the view expressed by President Obama and keep their boys away from playing the game. Yet as a spectator sport football, for better or worse, is the national pastime with annual revenues exceeding baseball by at least \$2 billion. Leather helmets and a style of tackling more akin to rugby might diminish injury and head trauma. Those developments and other changes similar to them seem unlikely to occur given the public's love for excitement engendered by hard hits and violence. After all, boxing, where cognitive disability has been well known for almost a full century, continues to thrive – indeed the sport is threatened by the emergence of more brutal nontraditional competition. That part of the game will not change, and players who want to share in the ever-expanding bounty produced by it will continue to come forward to endure the game's peril as well as its profits.

⁷³ Judy Battista, *Official Shows Frustration with Union over Delay to Start of H.G.H. Testing*, N.Y. TIMES, Feb. 22, 2013, at B11. Ironically, given the amount of attention that has justifiably been given to baseball in the steroids arena, now the Major League Baseball Players' Association has apparently demonstrated interest in expanding sanctions beyond those contained in the current collective bargaining agreement. *Baseball Eyeing New P.E.D. Rules*, S.F. CHRONICLE, Feb. 26, 2013, at B6.

⁷⁴ See generally CHRIS NOWINSKI, HEAD GAMES (2012); LINDA CARROLL & DAVID ROSNER, THE CONCUSSION CRISIS: ANATOMY OF A SILENT EPIDEMIC (2011).