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ATWATER V. NFLPA: CASTING DOUBT ON THE EFFECT OF EXCULPATORY LANGUAGE IN COLLECTIVE BARGAINING AGREEMENTS

I. INTRODUCTION

National Football League (“NFL”) players are notoriously poor at managing their money.¹ The National Football League Players Association (“NFLPA”) realized this, and in doing so, became the first union to recognize the need for career planning and stronger retirement planning for football players.² In response, the NFLPA enacted the Career Planning Program under the 1993 Collective Bargaining Agreement (“CBA”) between the NFLPA and the NFL.³ Collective bargaining agreements create a legal relationship between employers, employees, and labor unions in which each party has certain contractual obligations to the other parties involved in the agreement.⁴ In order to limit the amount of liability a party may incur in the event of a breach of a contractual obligation owed to another party under a collective bargaining agreement, parties often insert exculpatory clauses and language into the agreement.⁵

Exculpatory language was included in the drafting of the Career Planning Program in order to insulate the NFLPA and the NFL from any failed investment decisions made by professional

1. See BROKE (Rakontur 2012) (documenting various poor financial decisions by professional athletes); see also Joe Kristan, *Ex-Linebacker Romanowski Calls an Audible. Bad Call.*, Roth & Company, P.C. (Feb. 21, 2012, 9:54 AM), <http://rothcpa.com/2013/02/ex-linebacker-romanowski-calls-an-audible-bad-call/> (discussing recent poor investment decision by ex-football player Bill Romanowski).

2. See Geoffrey Rapp, *Players Sue NFLPA over Failed Hedge Fund Investment*, SPORTS LAW BLOG (Jun. 18, 2006, 8:55 AM), <http://sports-law.blogspot.com/2006/06/players-sue-nflpa-over-failed-hedge.html> (“The NFLPA was the first union to recognize that many players and retired players were making incredibly poor investment decisions, dooming themselves to a life of post-retirement financial insecurity.”); see also NAT’L FOOTBALL LEAGUE, NFL COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION, art. LV §12 (Jan. 6, 1993) [hereinafter 1993 CBA] (“The parties will use best efforts to establish an in-depth, comprehensive Career Planning Program.”).

3. See Rapp, *supra* note 2 (discussing background of Career Planning Program).

4. See BLACK’S LAW DICTIONARY 280 (8th ed. 2004) (“[A collective bargaining agreement is a] contract between an employer and a labor union regulating employment conditions, wages, benefits, and grievances.”).

5. See *id.* at 608 (“[An exculpatory clause is a] contractual provision relieving a party for liability resulting from a negligent or wrongful act.”).

football players.⁶ However, a recent decision by the Eleventh Circuit Court of Appeals has cast doubt on the effectiveness of the exculpatory language of the 1993 CBA, as well as the exculpatory language in other collective bargaining agreements.⁷

This Casenote will begin by articulating the Eleventh Circuit Court of Appeals' holding in *Atwater v. National Football League Players Association*. Next, this Casenote will provide a background of the statutes and legal precedent that are involved in *Atwater*. Additionally, this Casenote will analyze and discuss the impacts of the *Atwater* litigation. Lastly, this Casenote will analyze the potential impacts of the *Atwater* holding, including whether the court's holding has rendered the use of exculpatory language in collective bargaining agreements invalid. While the *Atwater* litigation was limited to professional athletes, their union, and professional sports leagues, the holding of *Atwater* may have far reaching effects on the use of exculpatory language in any collective bargaining agreement between an employer and a union in any field of employment.

II. FAILED INVESTMENTS LEAD TO LAWSUIT AGAINST NFL AND NFLPA

The 1993 CBA between the NFL and the NFLPA established the Career Planning Program for retired NFL Players.⁸ The proffered goal of the Career Planning Program was "to help players enhance their career in the NFL and make a smooth transition to a second career."⁹ Further, the Career Planning Program also provided "information to players on handling their personal finances, it being understood that players [were] solely responsible for their personal finances."¹⁰

6. See 1993 CBA, *supra* note 2, at art. LV § 12 ("The program will also provide information to players on handling their personal finances, it being understood that players shall be solely responsible for their personal finances.").

7. See *Atwater v. Nat'l Football League Players Ass'n*, 626 F.3d 1170, 1185 (11th Cir. 2010) (holding that plaintiffs' claims were preempted by section 301 of Labor Management Relations Act); see also Michael Lydakis & Andrew Zapata, *Tackling the Issues: The History of the National Football League's 2011 Collective Bargaining Agreement and What it Means for the Future of the Sport*, 10 WILLAMETTE SPORTS L.J. 17, 18 (2012) ("Consequently, the Eleventh Circuit has failed to concretely establish the effect of the exculpatory language in the Career Planning Program and the Financial Advisors Program.").

8. See 1993 CBA, *supra* note 2, at art. LV § 12 ("The parties will use best efforts to establish an in-depth, comprehensive Career Planning Program."); see also Lydakis & Zapata, *supra* note 7, at 25 (discussing implementation of Career Planning Program).

9. 1993 CBA, *supra* note 2, at art. LV § 12 (quoting 1993 CBA).

10. *Id.* (quoting further purposes of Career Planning Program).

In 2002, The NFLPA created the Financial Advisors Program.¹¹ The Financial Advisors Program was formed in an effort to comply with the NFLPA's obligation under the 1993 CBA to create a comprehensive Career Planning Program.¹² The Financial Advisors Program is available to any due-paying member of the NFLPA.¹³ Under the Financial Advisors Program, NFLPA members are provided a list of financial advisors that have been registered with the NFLPA and have undergone a background check by the NFLPA.¹⁴

Before implementing the Financial Advisors Program, the NFLPA worked with and received assistance from the Securities Exchange Commission ("SEC") in order to ensure that the program was exempt from coverage under the Investment Advisors Act of 1940.¹⁵ Based on recommendations from the SEC, the NFLPA chose not to use "highly selective" screening criteria" to make sure that the NFLPA was not required to register as an investment advisor with the SEC.¹⁶

As a result, the NFLPA was required to open its Financial Advisors Program to as many investment advisors as possible.¹⁷ Accordingly, "[the NFLPA] only denied advisor applications if a background check revealed certain enumerated actions against the advisor."¹⁸ In total, the Financial Advisor Program listed about 500

11. See Lydakakis & Zapata, *supra* note 7, at 26 (discussing NFLPA Financial Advisors Program).

12. See *id.* (noting reasons for establishment of Financial Advisors Program).

13. See *id.* (stating qualifications for Financial Advisors Program).

14. See *id.* (discussing how Financial Advisors Program works).

15. See *Atwater v. Nat'l Football League Player's Ass'n*, No. 1:06-CV-1510-JEC, 2009 U.S. Dist. LEXIS 98236, at *45 (N.D. Ga. Mar. 26, 2009) (discussing background of NFLPA's Financial Advisor Program); see also Lydakakis & Zapata, *supra* note 7, at 26 (providing background of Financial Advisor Program). The Investment Advisors Act of 1940 was created in an effort to monitor and regulate individuals that provide investment advice to others by requiring them to register with the SEC. See *Investment Advisors Act of 1940*, REFERENCEFORBUSINESS.COM, <http://www.referenceforbusiness.com/encyclopedia/Int-Jun/Investment-Advisers-Act-of-1940.html#ixzz1dfQ4ZQXJ> (last visited Dec. 26, 2013) ("Generally excluded from coverage under the act are those professionals whose investment advice to clients is incidental to the professional relationship.").

16. See *Atwater*, 2009 U.S. Dist. LEXIS 98236, at *5 (discussing establishment of Financial Advisor Program).

17. See *id.* (noting that in order to comply with SEC Regulations, Financial Advisor Program had to be open to as many investment advisors as possible); see also Lydakakis & Zapata, *supra* note 7, at 26 (providing background information on Financial Advisors Program).

18. *Atwater*, 2009 U.S. Dist. LEXIS 98236, at *5 (citing NFLPA REGULATIONS AND CODE OF CONDUCT GOVERNING REGISTERED PLAYER FINANCIAL ADVISORS ("PROGRAM REGULATIONS") 180, at 198-200).

financial advisors with whom former and current football players could invest.¹⁹

The NFLPA's Financial Advisor Program was subject to litigation in *Atwater v. National Football League Players Association*.²⁰ In *Atwater*, several former NFL players, a player's spouse, and several investment entities and trusts controlled by the former players brought suit against the NFL and the NFLPA.²¹ In 2004 and 2005, the plaintiffs invested approximately \$20 million with financial advisors Kirk Wright and Nelson "Keith" Bond.²² Wright and Bond, as well as other financial advisors, operated an investment company known as International Management Associates ("IMA").²³ While Plaintiffs believed that IMA was investing and managing their money, Wright was actually conducting a Ponzi scheme.²⁴ Through the Ponzi scheme, Wright stole most of the money the plaintiffs invested with him.²⁵ Eventually, IMA sought bankruptcy relief and

19. See *id.* (noting number of financial advisors registered under NFLPA Financial Advisors Program).

20. See *Atwater v. Nat'l Football League Players Ass'n*, 626 F.3d 1170 (11th Cir. 2010) (holding that plaintiffs' claims were preempted by Labor Management Relations Act).

21. See *id.* (providing facts of litigation); see also James Ottavio Castagnera, *NFL Players, Victimized by Ponzi Scheme, Cannot Sue Their Union or the NFL Under State Laws*, 41 NO. 5 LAW. BRIEF 4, 4 (2011) (discussing facts of *Atwater*); see also Lydakakis & Zapata, *supra* note 7, at 26 (providing background information of *Atwater*).

22. See *Atwater*, 626 F.3d at 1174 (providing facts behind plaintiffs' claims); see also *Atwater*, 2009 U.S. Dist. LEXIS 98236, at *5 (noting that Plaintiffs' invested millions of dollars under Financial Advisors Program); see also Castagnera, *supra* note 21, at 4 (detailing facts leading to *Atwater* litigation); see also Lydakakis & Zapata, *supra* note 7, at 26 (discussing facts of *Atwater*).

23. See *Atwater*, 626 F.3d at 1174 (providing background information on financial advisors with which plaintiffs invested money); see also *Atwater*, 2009 U.S. Dist. LEXIS 98236, at *5 (summarizing facts leading up to Ponzi Scheme); Castagnera, *supra* note 21, at 4 (discussing facts leading to *Atwater* litigation); Lydakakis & Zapata, *supra* note 7, at 26 (noting amount of money invested by plaintiffs under Financial Advisors Program).

24. See *Atwater*, 626 F.3d at 1174 (providing facts behind *Atwater*); see also *Atwater*, 2009 U.S. Dist. LEXIS 98236, at *5 (discussing facts of case); Lydakakis & Zapata, *supra* note 7, at 26 (noting facts of *Atwater*). A Ponzi scheme is defined as "[a] fraudulent investing scam promising high rates of return with little risk to investors. The Ponzi scheme generates returns for older investors by acquiring new investors." See *Ponzi Scheme*, INVESTOPEDIA.COM, <http://www.investopedia.com/terms/p/ponzischeme.asp#axzz2NqMFXIBn> (last visited Mar. 17, 2013) (defining Ponzi Scheme).

25. See *Atwater*, 626 F.3d at 1174 (discussing Ponzi Scheme conducted by Wright and Bond); see also *Atwater*, 2009 U.S. Dist. LEXIS 98236, at *5 (noting that plaintiffs' lost most of their investment as result of Ponzi Scheme); see also Lydakakis & Zapata, *supra* note 6, at 26 (discussing *Atwater*).

Wright was convicted on several felony charges.²⁶ Before his sentencing hearing, Wright committed suicide in his jail cell.²⁷

Subsequently, the plaintiffs brought suit against the NFL and the NFLPA alleging that they would not have invested money with Wright, Bond, and IMA had the financial advisors been properly investigated by the NFLPA.²⁸ The plaintiffs further alleged that the NFL provided them with inadequate background checks on Wright, Bond, and IMA.²⁹ In total, the plaintiffs brought three claims against the NFL and the NFLPA.³⁰ The District Court for the Northern District of Georgia held that section 301 of the Labor Management Relations Act (“LMRA”) preempted the plaintiffs’ claims.³¹ Thereafter, the claims were appealed to the Eleventh Circuit.³²

26. See *Atwater*, 626 F.3d at 1174 (discussing facts of case); *Atwater*, 2009 U.S. Dist. LEXIS 98236, at *5 (noting that IMA filed for bankruptcy); see also Lydak & Zapata, *supra* note 7, at 26 (discussing facts of *Atwater*).

27. See *Atwater*, 626 F.3d at 1174 (providing facts behind plaintiffs’ claims); see also Ashley Post, *Labor Contract Blocks NFL Players’ Lawsuit*, INSIDECOUNSEL (Feb. 1, 2011, 9:45 AM), <http://www.insidecounsel.com/2011/02/01/labor-contract-blocks-nfl-players-lawsuit> (noting that Wright hung himself in his jail cell); see also Lydak & Zapata, *supra* note 7, at 26 (acknowledging that Wright committed suicide in jail).

28. See *Atwater*, 626 F.3d at 1174 (discussing plaintiffs’ claims against NFLPA and NFL); see also Castagnera, *supra* note 21, at 4 (noting that plaintiffs’ would not have invested money with Wright and Bond had NFL and NFLPA provided accurate information regarding financial advisors).

29. See *Atwater*, 626 F.3d at 1174 (“As for the NFL, Plaintiffs asserted that several Plaintiffs requested, and the NFL provided, background checks on Wright, Bond, and IMA that were inadequate.”); see also Castagnera, *supra* note 21, at 4 (noting plaintiffs’ complaint against NFL); Lydak & Zapata, *supra* note 7, at 26 (discussing plaintiffs’ complaint).

30. See generally *Atwater*, 626 F.3d at 1179-84 (concluding that all three of plaintiffs’ claims are preempted by section 301 of Labor Management Relations Act); see also Lydak & Zapata, *supra* note 7, at 26 (“The plaintiffs sued the NFL and NFLPA on state law claims of negligence, negligent misrepresentation, and breach of fiduciary duty.”).

31. See *Atwater v. Nat’l Football League Player’s Ass’n*, No. 1:06-CV-1510-JEC, 2009 U.S. Dist. LEXIS 98236, at *4-5 (N.D. Ga. Mar. 26, 2009) (dismissing plaintiffs’ claims); see also Lydak & Zapata, *supra* note 7, at 26 (“The District Court for the Northern District of Georgia held that the Labor-Management Relations Act (‘LMRA’) preempted state law claims as to failed investments under the Career Planning Program. Furthermore, the District Court held that even if the state law claims were not precluded under the LMRA, the exculpatory language of the Financial Advisors Program would have prevented the NFL and NFLPA from incurring liability.”); Labor-Management Relations (Taft-Hartley) Act of 1947 § 301, 29 U.S.C. § 185 (2012) (providing federal courts authority in labor disputes based on collective bargaining agreements).

32. See *Atwater*, 626 F.3d at 1175 (“Plaintiffs appeal from that decision.”); see also Castagnera, *supra* note 21, at 4 (“The federal district court granted summary judgment with regard to the plaintiffs’ causes of action. The U.S. Court of Appeals

First, the plaintiffs brought a negligence claim against the NFLPA.³³ The plaintiffs alleged that the NFLPA was negligent in their investigation of Wright, Bond, and IMA while conducting their background check on the individuals and their investment company.³⁴ Under Georgia law, a plaintiff must show the following elements in order to state a cause of action for negligence:

- (1) A legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty.³⁵

The appellate court concluded that the defendants did owe the plaintiffs a duty because the CBA between the NFL and the NFLPA established a legal duty when it mandated that the NFL and NFLPA use their best efforts to establish a Career Planning Program.³⁶ However, the appellate court held that section 301 of the LMRA preempted the plaintiffs' negligence claim because the legal duties underlying the negligence claim arose directly from the CBA.³⁷

The plaintiffs' second claim against the NFL and the NFLPA was for negligent misrepresentation.³⁸ The plaintiffs alleged that the NFL negligently provided false information about Wright, Bond, and IMA.³⁹ Under Georgia law, a plaintiff must prove three

for the Eleventh Circuit affirmed."); see also Lydakakis & Zapata, *supra* note 7, at 26 (noting that plaintiffs appealed to Eleventh Circuit).

33. See *Atwater*, 626 F.3d at 1179 ("Plaintiffs' first state-law claim alleged that both Defendants negligently investigated Wright, Bond and IMA.").

34. See *id.* (discussing plaintiffs' first complaint); see also Castagnera, *supra* note 21, at 4 (discussing plaintiffs' allegations against NFLPA and NFL).

35. *Atwater*, 626 F.3d at 1179 (quoting *Dixie Grp., Inc. v. Shaw Indus. Grp., Inc.*, 693 S.E.2d 888, 895 (Ga. Ct. App. 2010)); see also *Bradley Ctr., Inc. v. Wessner*, 296 S.E.2d 693, 695 (Ga. 1982) (discussing elements of negligence under Georgia law).

36. *Atwater*, 626 F.3d at 1179 (quoting 1993 CBA). For complete language of art. LV § 12 of the 1993 CBA, see *supra* note 2 and accompanying text.

37. See *Atwater*, 626 F.3d at 1180-81 (holding that district court properly held that section 301 of LMRA preempted plaintiffs' negligence claim); see also Lydakakis & Zapata, *supra* note 7, at 26 (analyzing court's holding in *Atwater*).

38. See *Atwater*, 626 F.3d at 1182 ("Plaintiffs' second claim against both the NFL and the NFLPA was one for negligent misrepresentation; these claims may be considered together.").

39. See *id.* (analyzing plaintiffs' allegations); see also Castagnera, *supra* note 21, at 4 (discussing plaintiffs' allegations against NFLPA and NFL).

elements to establish a claim for negligent misrepresentation.⁴⁰ First, a plaintiff must show that the defendant negligently supplied false information.⁴¹ Second, a plaintiff must demonstrate that he reasonably relied upon the false information.⁴² Third, a plaintiff must show that the economic injury to the plaintiff was proximately caused by the reliance on the false information.⁴³

In response to the negligent misrepresentation claim, the court found that the NFL had a duty to provide the plaintiffs with adequate information regarding financial advisors because the CBA established a legal duty when it mandated that the NFL should use their best efforts to establish the Career Planning Program.⁴⁴ However, the court felt that the second element of negligent misrepresentation, reasonable reliance on the false information element, was not met in the instant case.⁴⁵ The court held that the negligent misrepresentation was preempted by section 301 because the legal duty arose directly from the CBA.⁴⁶

The plaintiffs' final claim brought against the NFL and the NFLPA was for breach of fiduciary duty.⁴⁷ Under Georgia law, establishing a claim for breach of fiduciary duty requires proof of three elements.⁴⁸ First, the plaintiffs must prove that a fiduciary

40. See *Atwater*, 626 F.3d at 1182 (noting elements of cause of action for negligent misrepresentation under Georgia law).

41. See *id.* (quoting *Futch v. Lowndes Cnty.*, 676 S.E.2d 892, 896 (Ga. Ct. App. 2009)); see also *Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc.*, 479 S.E.2d 727, 729 (Ga. 1997) (discussing elements for cause of action for negligent misrepresentation).

42. See *Atwater*, 626 F.3d at 1182 (quoting *Futch v. Lowndes Cnty.*, 676 S.E.2d 892, 896 (Ga. Ct. App. 2009)); see also *Hardaway Co.*, 479 S.E.2d at 729 (noting second element of negligent misrepresentation under Georgia law).

43. See *Atwater*, 626 F.3d at 1182 (quoting *Futch v. Lowndes Cnty.*, 676 S.E.2d 892, 896 (Ga. Ct. App. 2009)); see also *Hardaway Co.*, 479 S.E.2d at 729 (noting third element of negligent misrepresentation under Georgia law).

44. See *Atwater*, 626 F.3d at 1182-83 ("For the same reasons set forth above, each of these duties arose directly from the CBA's mandate that both the NFL and the NFLPA use 'best efforts to establish [the] Career Planning program.'"); see also *Lydakis & Zapata*, *supra* note 7, at 26 (analyzing court's holding).

45. See *Atwater*, 626 F.3d at 1183 ("That is because, under Georgia law, 'the mere presence of [a] disclaimer,' regardless of whether or not the plaintiffs saw it, can 'render [the plaintiffs'] alleged reliance unreasonable.'"); see also *Mitchell v. Ga. Dep't of Cmty. Health*, 593 S.E.2d 903, 907 (Ga. App. 2004) (noting that determining reasonable reliance depends on all circumstances of case).

46. See *Atwater*, 626 F.3d at 1183 (holding plaintiffs' negligent misrepresentation claim preempted by section 301 of LMRA); see also *Castagnera*, *supra* note 21, at 4 (discussing court's holding); see also *Lydakis & Zapata*, *supra* note 7, at 26 (analyzing court's holding).

47. See *Atwater*, 626 F.3d at 1183 ("Plaintiffs' third state-law claim alleged that both Defendants breached fiduciary duties owed to Plaintiffs.").

48. See *id.* (quoting *Paschal v. Fulton DeKalb Hosp. Auth. Emp. Ret. Plan*, 699 S.E.2d 357, 362 (Ga. App. 2010)).

duty exists.⁴⁹ Second, plaintiffs must show that the duty was breached.⁵⁰ Third, plaintiffs must show that the damage resulting to the plaintiff was proximately caused by the breach of the fiduciary duty.⁵¹

The court first analyzed whether a fiduciary duty was created by the CBA.⁵² Plaintiffs alleged that the CBA established a fiduciary duty between the NFL, the NFLPA, and the plaintiffs because the defendants should have known that the plaintiffs had great confidence in the defendants and therefore the defendants were in a position where they could influence the plaintiffs' conduct.⁵³ The appellate court agreed that a fiduciary duty existed.⁵⁴ However, because the resolution of the fiduciary duty claim was substantially dependent on the interpretation of the CBA, section 301 of the LMRA preempted the state law claim.⁵⁵

Lastly, several of the plaintiffs attempted to argue that since they were retired at the time they invested with IMA, section 301 of the LMRA could not preempt their claims because the retired plaintiffs were no longer members of the NFLPA's bargaining unit.⁵⁶ The court disagreed and ultimately granted summary judgment to the NFL and the NFLPA because section 301 of the LMRA preempts their claims of negligence, negligent misrepresentation, and breach of fiduciary duty.⁵⁷

49. *See id.* (quoting *Paschal v. Fulton DeKalb Hosp. Auth. Emp. Ret. Plan*, 699 S.E.2d 357, 362 (Ga. App. 2010)).

50. *See id.* (quoting *Paschal v. Fulton DeKalb Hosp. Auth. Emp. Ret. Plan*, 699 S.E.2d 357, 362 (Ga. App. 2010)).

51. *See id.* (quoting *Paschal v. Fulton DeKalb Hosp. Auth. Emp. Ret. Plan*, 699 S.E.2d 357, 362 (Ga. App. 2010)).

52. *See id.* at 1183-84 (discussing plaintiffs' breach of fiduciary duty claim).

53. *See id.* at 1184 ("In support of this claim, Plaintiffs alleged only that 'Defendants have maintained a close and special relationship with each of the Plaintiffs such that Defendants were in a position to, and did, exercise a controlling influence over the will, conduct, and/or interest of Plaintiffs.'").

54. *See Atwater*, 626 F.3d at 1184 (discussing breach of fiduciary duty complaint).

55. *See id.* (holding breach of fiduciary duty claim was preempted by § 301 of LMRA).

56. *See id.* (addressing plaintiffs' final argument in regards to retired plaintiffs).

57. *See id.* at 1185 (dismissing plaintiffs' argument that § 301 of LMRA should not preempt claims of retired plaintiffs); *see also id.* ("For these reasons, we uphold the district court's determination that § 301 preempts Plaintiffs' state-law claims. We, therefore, affirm the district court's decision granting the NFL and NFLPA summary judgment on those claims."); *see also Lydak & Zapata, supra* note 7, at 26-7 (discussing court's holding).

III. PREEMPTION OF COLLECTIVE BARGAINING DISPUTES UNDER SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT

The National Labor Relations Act (“NLRA”) was passed by Congress in 1935.⁵⁸ The purpose of the NLRA is:

[T]o promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.⁵⁹

The NLRA allows and encourages the use of collective bargaining to protect the rights of employers and employees.⁶⁰ The formation of labor unions and collective bargaining enables employees to negotiate for rights and benefits that they would be unlikely to receive if they were negotiating for themselves.⁶¹ Through the use of collective bargaining agreements, employers and employees represented by unions are able to agree on a number of workplace conditions including, but not limited to, hours worked and benefits.⁶² The first CBA between the NFL and the NFLPA was signed in

58. See John E. Gardner, Editorial Note, *Federal Labor Law Preemption of State Wrongful Discharge Claims*, 58 U. CIN. L. REV. 491, 491 (1989) (introducing American labor law); see also Lydakakis & Zapata, *supra* note 7, at 17 (providing background information on history of labor relations).

59. Labor Management Relations (Taft-Hartley) Act § 1(b), 29 U.S.C. § 141 (2006) (noting purpose of NLRA, as amended by Labor Management Relations Act of 1947).

60. See National Labor Relations (Wagner) Act, 29 U.S.C. § 151 (1935), *available at* <http://www.nlrb.gov/national-labor-relations-act> (“Congress enacted the National Labor Relations Act (“NLRA”) in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.”).

61. See Gardner, *supra* note 58, at 491 (discussing NLRA of 1935).

62. See Rebecca Hanner White, *Section 301’s Preemption of State Law Claims: A Model for Analysis*, 41 ALA. L. REV. 377, 377 (1990) (introducing uses and helpfulness of collective bargaining agreements between employers and employees); see also Gardner, *supra* note 57, at 500 (“The typical collective bargaining agreements contains provisions dealing with pay rate, seniority, benefits, management promises to maintain a safe work place, and ‘just cause’ limitations on reasons for employee dismissal.”).

1968.⁶³ Since then, new collective bargaining agreements have been signed numerous times, with the most recent CBA being signed in the summer of 2011.⁶⁴

Congress amended the NLRA by enacting the Labor Management Relations Act in 1947.⁶⁵ The Labor Management Relations Act (“LMRA”), more popularly known as the Taft-Hartley Act, is a federal law that regulates the actions and collective bargaining of labor unions.⁶⁶ While the NLRA was directed at curbing unfair labor practices of employers, the LMRA largely targets unfair labor practices by employees.⁶⁷ Section 301 of the LMRA states that lawsuits for breach of contract between labor unions and employers may be brought in any federal district court.⁶⁸ Facially, section 301 only grants federal courts the permission to hear claims based on breaches of collective bargaining agreements.⁶⁹ However, the Supreme Court determined that section 301 does more than just allow federal courts to hear breach of collective bargaining agreement claims.⁷⁰

63. See Lydakis & Zapata, *supra* note 7, at 18 (discussing first CBA in NFL history); see also Jarrett Bell, *Timeline of NFL Labor Disputes*, USA TODAY (Mar. 12, 2011, 12:36 AM), http://usatoday30.usatoday.com/sports/football/nfl/2011-03-03-nfl-labor-disputes-timeline_N.htm (providing timeline of NFL labor disputes).

64. See generally Lydakis & Zapata, *supra* note 7, at 18-20 (discussing history of NFL labor relations); see also Bell, *supra* note 63 (giving timeline of NFL labor disputes).

65. See Gardner, *supra* note 58, at 495-96 (“Furthermore, when Congress amended the NLRA by enacting the Labor-Management Relations Act (LMRA) in 1947, it declared its preference for grievance procedures and arbitration dispute resolution to be an express and integral part of the national labor relations policy it was attempting to institute.”).

66. See *Labor-Management Relations Act*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Labor-Management+Relations+Act> (last visited Dec. 26, 2013) (defining Labor-Management Relations Act); see also 51B C.J.S. *Labor Relations* § 994 (2013) (discussing Labor-Management Relations Act).

67. See Gardner, *supra* note 58, at 495-96 (discussing NLRA of 1935).

68. See Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185(a) (2006) (granting federal courts authority to hear disputes for contract violations between employers and labor unions).

69. See *id.* (“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.”); see also Laura W. Stein, *Preserving Unionized Employees’ Individual Employment Rights: An Argument Against Section 301 Preemption*, 17 BERKELEY J. EMP. & LAB. L. 1, 5 (1996) (“On its face, section 301 of the LMRA simply gives the federal courts jurisdiction over suits to enforce collective bargaining agreements.”).

70. See Stein, *supra* note 69, at 5 (“The Supreme Court, however, quickly held that section 301 is more than a bare jurisdictional grant. Instead, the court read it as a mandate for the federal courts to develop a federal common law of labor contracts to apply in suits brought to enforce collective bargaining agreements.”).

In *Textile Workers Union v. Lincoln Mills*, the Supreme Court held that section 301 of the LMRA “authorize[d] federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements”⁷¹ In *Textile Workers Union*, the plaintiff and the defendant were parties to a collective bargaining agreement that contained a grievance and arbitration procedure.⁷² The employer refused to undergo arbitration and the union brought suit against the employer under section 301.⁷³ The Supreme Court sided with the union and held that section 301 authorized federal courts to order specific performance of arbitration clauses in a collective bargaining agreement.⁷⁴

In reaching its holding, the Court focused on the congressional intent behind section 301 of the LMRA.⁷⁵ The Court concluded that the congressional intent of the law was “obtaining industrial peace.”⁷⁶ Consequently, the Court held that the substantive law that is to be applied when section 301 is invoked is “federal law, which the courts must fashion from the policy of our national labor laws.”⁷⁷ As stated by one scholar, “[t]o read section 301 as a grant of jurisdiction only would deprive the federal courts of the

71. *Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957) (holding that LMRA “authorizes federal courts to fashion body of federal common law for enforcement of collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements”); see also Gardner, *supra* note 58, at 496 (discussing *Textile Workers Union*); White, *supra* note 62, at 379-80 (quoting *Textile Workers Union*); Geri J. Yonover, *Preemption of State Tort Remedies in the Aftermath of Lingle v. Norge: Wholly Independent or Inextricably Intertwined?*, 34 S.D. L. REV. 63, 79 (1989) (stating holding of *Textile Workers Union*).

72. See *Textile Workers Union*, 353 U.S. at 449 (introducing facts of case); see also White, *supra* note 62, at 380 (“The employer and union were parties to a collective bargaining agreement that contained a grievance and arbitration procedure.”).

73. See *Textile Workers Union*, 353 U.S. at 449 (discussing facts of case); see also White, *supra* note 62, at 380 (introducing facts behind *Textile Workers Union*).

74. See *Textile Workers Union*, 353 U.S. at 451 (“[The Court’s] construction of [§] 301(a), which means that the agreement to arbitrate grievance disputes, contained in this collective bargaining agreement, should be specifically enforced.”); see also Gardner, *supra* note 58, at 496 (discussing holding of *Textile Workers Union*); White, *supra* note 62, at 380 (stating Supreme Court’s holding in *Textile Workers Union*).

75. See *Textile Workers Union*, 353 U.S. at 452 (“The legislative history of [§] 301 is somewhat cloudy and confusing. But there are a few shafts of light that illuminate our problem.”); see also Gardner, *supra* note 58, at 496 (discussing holding of *Textile Workers Union*); White, *supra* note 62, at 380 (noting Court focused on legislative history of § 301).

76. *Textile Workers Union*, 353 U.S. at 455 (discussing congressional intent of § 301); see also White, *supra* note 61, at 380 (discussing holding of *Textile Workers Union*).

77. *Textile Workers Union*, 353 U.S. at 456 (noting which law is to be applied in § 301 cases).

necessary means to enforce collective bargaining agreements, particularly the arbitration provisions.”⁷⁸

In *Teamsters v. Lucas Flour Co.*, the Court further emphasized the need to apply federal law in adjudicating claims arising from the breach of a collective bargaining agreement.⁷⁹ In *Teamsters*, an employer brought suit against a labor union for breach of contract because the labor union organized a strike which violated the terms of the collective bargaining agreement.⁸⁰ The Court sided with the employer and agreed that the labor union violated the collective bargaining agreement by organizing the strike.⁸¹ In its holding, the Court further emphasized the importance of having uniform federal labor law.⁸² In reaching its conclusion, the Court rejected the opinion of the Supreme Court of Washington, which theorized that state courts are allowed to apply local, state rules when hearing claims arising from the breach of a collective bargaining agreement.⁸³ The Court emphasized the importance of the *Textile Workers* opinion and stated, “[t]he dimensions of [section] 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by statute.”⁸⁴

Furthermore, the Court stated, “[c]omprehensive is inherent in the process by which the law is to be formulated under the mandate of [*Textile Workers*], requiring issues raised in suits of kind covered by [section] 301 to be decided according to the precepts of federal labor policy.”⁸⁵ According to the Court, Congress enacted section 301 of the LMRA in order to ensure that labor law involving

78. White, *supra* note 62, at 380 (discussing outcome of *Textile Workers Union*).

79. See generally Local 174, *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) (holding state law must be preempted in § 301 cases to ensure uniformity in interpretation and enforcement of collective bargaining agreements).

80. See *id.* at 97 (noting facts of case); see also White, *supra* note 62, at 381 (introducing facts of *Teamsters*).

81. See *Teamsters*, 369 U.S. at 106 (“The strike which it called was a violation of that contractual agreement.”).

82. See *id.* (emphasizing importance of uniform federal labor law for future adjudications).

83. See *id.* at 103 (“It was apparently the theory of the Washington court, that although [*Textile Workers Union*] requires the federal courts to fashion, from the policy of our national labor law, a body of federal law for the enforcement of collective bargaining agreements, nonetheless, the courts of the States remain free to apply individualized local rules when called upon to enforce such agreements. This view cannot be accepted.”); see also Stein, *supra* note 69, at 5 (introducing changes in law under § 301); White, *supra* note 62, at 381-82 (discussing Supreme Court’s holding in *Teamsters*).

84. *Teamsters*, 369 U.S. at 103 (emphasizing importance of *Textile Workers Union*).

85. *Id.* (noting importance of having common federal labor law).

collective bargaining agreements was applied uniformly throughout the United States, in order to avoid the unpredictable results that could result from inconsistent local laws.⁸⁶ Therefore, section 301 of the LMRA preempts breach of contract claims brought by any party to a collective bargaining agreement.⁸⁷

In 1962, the same year as the landmark *Teamsters* decision, the Supreme Court broadened the purview of section 301 of the LMRA, holding that it permits individuals, not solely unions and employers, to bring claims for the breach of a collective bargaining agreement.⁸⁸ In *Smith v. Evening News Association*, the plaintiff brought suit in state court against his employer for breaching the collective bargaining agreement between the employer and the plaintiff's union.⁸⁹ The plaintiff alleged that the employer breached a provision in the collective bargaining agreement that stated that the employer would not discriminate against any employees involved in activity with a labor union.⁹⁰ Motivated by a desire to ensure the uniformity of federal labor law, the Supreme Court held that an individual's claim against an employer or his labor union falls under the scope of section 301 in order to ensure the uniformity of federal labor law.⁹¹

While the 1960s and 1970s saw few challenges to section 301 preemption of breach of collective bargaining claims, the 1980s proved to be different.⁹² During the 1960s and 1970s, breach of collective bargaining agreement dispute resolution was quick and inexpensive for two reasons: section 301 preempted many of the

86. See *id.* at 104 ("With due regard to the many factors which bear upon competing state and federal interests in this area [] we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules."); see also Gardner, *supra* note 58, at 502 (discussing congressional intent behind § 301).

87. See White, *supra* note 62, at 381-82 (discussing impact of *Teamsters* holding).

88. See *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962) (holding individual employees may bring cause of action against labor union or employer under § 301); see also White, *supra* note 62, at 382 (discussing development of law surrounding § 301).

89. See *Smith*, 371 U.S. at 195-96 (stating facts of case).

90. See *id.* (noting plaintiff's complaint).

91. See *id.* at 200 ("Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests, and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do.").

92. See White, *supra* note 62, at 390 (discussing evolution of preemption under § 301).

claims; and section 301 showed deference to the use of arbitration to resolve disputes.⁹³ However, by the 1980s, labor relations between employers and employees “were marked by the rapid erosion of the employment-at-will doctrine.”⁹⁴ As such, state courts began to hear claims for wrongful discharge brought by an employee against his or her employer.⁹⁵ Furthermore, rather than pleading a cause of action for the breach of a collective bargaining agreement, plaintiffs began to plead state law tort claims against their employers as a gambit to avoid preemption by section 301.⁹⁶

In the landmark case *Allis-Chalmers Corp. v. Lueck*, the Supreme Court held that a state law tort action that is “inextricably intertwined” with a collective bargaining agreement must be treated as a section 301 suit or be preempted by federal law.⁹⁷ In *Lueck*, the plaintiff suffered an injury that was not related to his work with the employer.⁹⁸ Under the collective bargaining agreement covering the plaintiff’s employment, the plaintiff was entitled to collect disability insurance.⁹⁹ The plaintiff believed that his employer had ordered his payments to be discontinued and repeatedly made him undergo physical examinations.¹⁰⁰ Therefore, the plaintiff brought suit against his employer for the bad faith handling of an insurance claim.¹⁰¹

93. *See id.* (“Employees covered by a collective bargaining agreement had at their disposal a grievance and arbitration procedure for resolving their disputes, which presented a quick and inexpensive method for handling disagreements.”).

94. *Id.* (introducing evolution of labor relations in 1980s).

95. *See id.* at 390-91 (discussing emergence of state law wrongful discharge claims and their impact on labor relations).

96. *See id.* at 391 (“Employees, moreover, began making more liberal use of traditional tort theories for actions arising out of their employment.”).

97. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985) (holding state law actions that are “inextricably intertwined” with collective bargaining agreement must be preempted by federal law or treated as § 301 suit).

98. *See id.* at 202-04 (introducing facts of case); *see also* Gardner, *supra* note 58, at 520 (discussing facts of *Lueck*); White, *supra* note 62, at 394 (stating facts of *Lueck*).

99. *See Lueck*, 471 U.S. at 204 (discussing collective bargaining agreement covering plaintiff’s employment); *see also* Gardner, *supra* note 58, at 520 (noting facts of *Lueck*); White, *supra* note 62, at 394 (stating facts regarding plaintiff’s collective bargaining agreement).

100. *See Lueck*, 471 U.S. at 204 (discussing facts); *see also* Gardner, *supra* note 58, at 520 (noting facts of case).

101. *See Lueck*, 471 U.S. at 220 (noting plaintiff’s allegations); *see also* Gardner, *supra* note 58, at 520 (discussing facts of *Lueck*); White, *supra* note 62, at 394 (“Lueck claimed his employer, Allis-Chalmers, periodically had ordered that his payments be cut off and had insisted he undergo repeated physical examinations, conduct Lueck viewed as harassment.”).

The Court held that the Wisconsin Supreme Court should have dismissed the plaintiff's case because federal labor law preempted the state law tort claim.¹⁰² Justice Blackmon, writing for the majority, held that when the resolution of a state law tort claim substantially relies on the terms of the collective bargaining agreement, the claim must be treated as a section 301 claim or it must be dismissed as preempted by federal law.¹⁰³ Furthermore, the Court in *Lueck* stated that in order for a tort claim to escape preemption by section 301, the plaintiff's right that is being infringed upon in the plaintiff's claim must be a nonnegotiable right.¹⁰⁴ Since the collective bargaining agreement gave rise to the ability for the plaintiff to collect disability insurance payments, the Court quickly determined that the plaintiff's claims were preempted by section 301.¹⁰⁵

In *Lueck*, the Court had little choice but to hold that state law tort claims that do not exist independently of a collective bargaining agreement must be treated as a section 301 suit or be dismissed as preempted by federal labor law.¹⁰⁶ As noted by one scholar, "[a]ny other result would have permitted a party, as the Court recognized, to escape section 301 by relabeling the action as one for tortious breach of contract."¹⁰⁷ Thus, under *Lueck*, "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties to a labor

102. See *Lueck*, 471 U.S. at 220 ("This complaint should have been dismissed . . ."); see also White, *supra* note 62, at 394-95 ("The Wisconsin Supreme Court held *Lueck*'s claim was not preempted by section 301 because the tort claim was 'independent' of the collective bargaining agreement. The Supreme Court reversed.").

103. See *Lueck*, 471 U.S. at 220 ("We do hold that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim [] or dismissed as pre-empted by federal labor-contract law.").

104. See *id.* at 213 ("Therefore, state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements. Our analysis must focus, then, on whether the Wisconsin tort action for breach of the duty of good faith as applied here confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract."); see also Michael C. Harper, *Limiting Section 301 Preemption: Three Cheers for the Trilogy, Only One for Lingle and Lueck*, 66 CHI.-KENT L. REV. 685, 713-14 (analyzing holding of *Lueck*); White, *supra* note 62, at 397-98 (discussing holding of *Lueck*).

105. See *Lueck*, 471 U.S. at 217-18 (analyzing whether collective bargaining agreement gave rise to plaintiff's rights).

106. See White, *supra* note 62, at 396 (analyzing holding of *Lueck*).

107. *Id.* (discussing § 301 litigation).

contract, that claim must be either treated as a [section] 301 claim, or be dismissed as pre-empted by federal labor-contract law.”¹⁰⁸

Two years later, in 1987, the Supreme Court affirmed a decision to preempt tort claims brought by employees against employers and unions in *International Brotherhood of Electrical Workers v. Hechler*.¹⁰⁹ In *Hechler*, the Court determined that a negligence claim brought by a plaintiff against her union must be preempted by section 301 because the claim was not “sufficiently independent of the collective-bargaining-agreement to withstand the pre-emptive force of [section] 301.”¹¹⁰

While *Lueck* initially stood for a “sweeping view of preemption,” the Court later determined that not all state law tort claims are preempted by section 301 whenever a collective bargaining agreement governs an employment relationship.¹¹¹ In *Lingle v. Norge Division of Magic Chef, Inc.*, the Court held that a state law claim for retaliatory discharge was not preempted by section 301 of the LRMA.¹¹² In *Lingle*, the plaintiff was fired by her employer because she allegedly filed a false workers’ compensation claim.¹¹³ The plaintiff brought suit against her employer in Illinois for retaliatory discharge, a common-law cause of action.¹¹⁴ The case was removed to a federal district court based on diversity jurisdiction.¹¹⁵

The district court dismissed the claim because the cause of action filed by the plaintiff was “inextricably intertwined” with the col-

108. *Lueck*, 471 U.S. at 220 (holding plaintiff’s claims preempted by § 301); see also White, *supra* note 62, at 398-99 (restating holding of *Lueck*).

109. See *Int’l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851 (1987) (holding that state law claim of negligence against plaintiff’s union was preempted by § 301); see also White, *supra* note 62, at 400-01 (introducing *Hechler*).

110. *Hechler*, 481 U.S. at 853 (determining whether plaintiff’s claim must be preempted by § 301); see also White, *supra* note 62, at 401 (“Finding the claim was not ‘sufficiently independent of the collective bargaining agreement to withstand the pre-emptive force of § 301,’ the Supreme Court vacated the decision.”).

111. See White, *supra* note 62, at 415 (discussing evolution of law surrounding § 301).

112. See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) (holding state law claim for retaliatory discharge was not preempted by § 301); see also Harper, *supra* note 102, at 700 (discussing § 301 preemption under *Lingle* and *Lueck*); White, *supra* note 62, at 411-12 (discussing *Lingle*).

113. See *Lingle*, 486 U.S. at 401 (introducing facts of case); see also White, *supra* note 62, at 410-11 (stating facts of *Lingle*).

114. See *Lingle*, 486 U.S. at 401 (expanding on facts of case); see also White, *supra* note 62, at 410-11 (stating facts of *Lingle*).

115. See White, *supra* note 62, at 411 (“The case was removed on diversity grounds and dismissed by the district court which concluded the retaliatory discharge action was ‘inextricably intertwined’ with the contract’s just cause provision.”).

lective bargaining agreement.¹¹⁶ The Seventh Circuit Court of Appeals affirmed the district court's decision.¹¹⁷ However, the Supreme Court reversed the decision and found that the retaliatory discharge claim was independent from the collective bargaining agreement because the state law claim did not require analyzing the collective bargaining agreement in order to make a decision.¹¹⁸ Thus, under *Lingle*, in order for a state law claim to be preempted by section 301, the state law claim must "implicate analysis of the [collective bargaining agreement] before preemption will occur."¹¹⁹

Lastly, in *Steelworkers v. Rawson*, the Supreme Court held that section 301 of the LMRA preempts a state law tort claim if the duty underlying the tort claim is created by a collective bargaining agreement.¹²⁰ In *Rawson*, the surviving family members of deceased Idaho mine workers brought a claim against the miners' union for negligently inspecting the mine that the miners were working in before the accident that caused their deaths.¹²¹ The Court found that the collective bargaining agreement created the ability for the miners' union to inspect the mines; therefore, any duty that the union had to inspect the mines arose from the collective bargaining agreement.¹²² Thus, the Court held that section 301 preempted the plaintiffs' claims.¹²³

116. See *id.* (providing procedural history of case).

117. See *Lingle*, 486 U.S. at 402 ("The Court of Appeals agreed that the state-law claim was preempted by § 301."); see also White, *supra* note 62, at 411 (stating procedural history of case).

118. See *Lingle*, 486 U.S. at 413 ("In sum, we hold that an application of state law is pre-empted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement. The judgment of the Court of Appeals is reversed."); see also Gardner, *supra* note 58, at 525-26 (restating Court's holding); see also Harper, *supra* note 104, at 701 (noting holding of *Lingle*); see also White, *supra* note 62, at 412 (discussing impact of holding in *Lingle*).

119. White, *supra* note 62, at 412 (analyzing Supreme Court's holding in *Lingle*).

120. See *United Steelworkers of Am. v. Rawson*, 495 U.S. 362 (1990) (holding § 301 preempts state law tort claims if duty underlying tort claim is created by collective bargaining agreement); see also Harper, *supra* note 104, at 731 (discussing *Rawson*).

121. See *Rawson*, 495 U.S. at 364-65 (stating facts of case); see also Harper, *supra* note 104, at 731 (introducing facts of *Rawson*).

122. See *Rawson*, 495 U.S. at 370 (analyzing collective bargaining agreement covering plaintiff's employment); see also Harper, *supra* note 104, at 731 (analyzing *Rawson*).

123. See *Rawson*, 495 U.S. at 371-72 ("Pre-emption by federal law cannot be avoided by characterizing the Union's negligent performance of what it does on behalf of the members of the bargaining unit pursuant to the terms of the collective-bargaining contract as a state-law tort. Accordingly, this suit, if it is to go for-

IV. ANALYSIS

A. Reasoning and Analysis of the Court's Holding in *Atwater*

In dismissing the retired NFL players' claims, the *Atwater* Court focused almost solely on the language of section 301 of the LMRA and the language of the collective bargaining agreement between the NFL and the NFLPA.¹²⁴ With respect to the plaintiffs' negligence claim against the NFLPA, the court found that the CBA created a legal duty to adequately conduct background checks on any financial advisor listed in the NFLPA Financial Advisor Program.¹²⁵ Therefore, the court, relying on the principles of *Lingle*, held that the claim should be preempted by section 301 since the legal duty underlying the negligence claim arose from the CBA.¹²⁶

Next, the court dismissed the plaintiffs' claim of negligent misrepresentation.¹²⁷ While the court found that a legal duty existed, the court held that the plaintiffs did not reasonably rely on the false information provided by the NFL regarding Wright, Bond, and IMA because the CBA provides that under the Career Planning Program, players alone are solely responsible for their personal finances.¹²⁸ Thus, the court found that the reasonable reliance element of a claim for negligent misrepresentation was not met because under Georgia law, "the mere presence of [a] disclaimer,' regardless of whether or not the plaintiffs saw it, can 'render [the plaintiffs'] alleged reliance unreasonable.'"¹²⁹

More importantly, the court found that the legal duty the NFL owed the plaintiffs was created by the CBA's mandate that the NFLPA and the NFL use their best efforts to create a Career Planning Program for former and present NFL players.¹³⁰ Additionally,

ward at all, must proceed as a case controlled by federal, rather than state, law."); see also Harper, *supra* note 104, at 731 (stating holding of *Rawson*).

124. See generally *Atwater v. Nat'l Football League Players Ass'n*, 626 F.3d 1170, 1176-85 (N.D. Ga. 2010) (holding that plaintiffs' claims were preempted by § 301 of Labor Management Relations Act); see also Lydak & Zapata, *supra* note 6, at 27 (analyzing Eleventh Circuit's holding in *Atwater*).

125. See *Atwater*, 626 F.3d at 1179 ("Those duties arose directly from the CBA's mandate that, [t]he parties will use best efforts to establish an in depth, comprehensive Career Planning Program.").

126. See *id.* at 1177-81 (finding plaintiffs' negligence claim to be preempted by LMRA § 301 because defendant's legal duty arose from CBA).

127. See *id.* at 1183 (declaring negligent misrepresentation claim to be preempted by federal law).

128. See *id.* at 1182-83 (quoting CBA art. 51 § 12).

129. See *id.* at 1183 (citing *Mitchell v. Ga. Dep't of Cmty. Health*, 635 S.E.2d 798, 804 (Ga. App. Ct. 2006)).

130. See *id.* at 1182 ("The NFL acknowledged in its pleadings before the district court that it performed these background checks as part of the CBA-man-

the court found that determining whether the plaintiffs “reasonably relied” on the alleged misrepresentations made by the NFL requires the court to interpret the language of the CBA, specifically the exculpatory language of article 51, section 12.¹³¹ As such, the court held that the plaintiffs’ claim of negligent misrepresentation against the NFL was preempted by section 301 of the LMRA because determination of the claim would require the interpretation of the CBA.¹³²

For the same reasons as set forth above, the court then determined that section 301 preempted the plaintiffs’ breach of fiduciary duties claims against the NFL and the NFLPA.¹³³ In analyzing the plaintiffs’ breach of fiduciary duty claim, the court first needed to determine whether a fiduciary duty existed.¹³⁴ Under Georgia law:

[A] fiduciary or confidential relationship arises where one party is so situated as to exercise a controlling influence over the will, conduct, and interest or another where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal, and agent, etc. The party asserting the existence of a fiduciary or confidential relationship bears the burden of establishing its existence. When a fiduciary or confidential relationship is not created by law or contract, we must examine the facts of a particular case to determine if such a relationship exists.¹³⁵

dated Career Planning Program. Thus, any duty the NFL owed Plaintiffs to conduct these investigations with reasonable care arose directly from the CBA.”). “[E]ach of these duties arose directly from the CBA’s mandate that both the NFL and the NFLPA use ‘best efforts to establish the Career Planning Program.’” *See id.* at 1183.

131. *See Atwater*, 626 F.3d at 1183 (“But here again the determination of whether Plaintiffs reasonably relied on Defendant’s alleged misrepresentations is substantially dependent on the CBA’s language . . .”).

132. *See id.* (“Therefore, because the court would have to address the disclaimer language in the CBA in order to resolve the reasonable reliance element of Plaintiffs’ negligent misrepresentation claims, § [301] preempts these claims for that reason as well.”).

133. *See id.* at 1184 (holding plaintiffs’ breach of fiduciary duty claim to be preempted by § 301).

134. *See id.* at 1183 (analyzing plaintiffs’ breach of fiduciary duty claim).

135. *See id.* at 1183-84 (citing *Savu v. SunTrust Bank*, 668 S.E.2d 276, 282 (Ga. App. Ct. 2008)).

The court found that a fiduciary duty existed between the NFL, the NFLPA, and the plaintiffs.¹³⁶ However, the court found that the fiduciary duty owed to the plaintiffs arose directly from the CBA.¹³⁷ Since the resolution of the plaintiffs' breach of fiduciary duty claim was dependent on interpreting the language of the CBA, the claim was preempted by section 301 of the LMRA.¹³⁸

Lastly, the court rejected the plaintiffs' argument that section 301 of the LMRA did not preempt their claims because some of the plaintiffs were retired at the time of making their investments with IMA.¹³⁹ While some of the plaintiffs were retired at the time and thus not part of the NFLPA's bargaining unit, the court rejected this argument.¹⁴⁰ The court stated that, "[e]ven when retirees are not part of the recognized bargaining unit and thus the union has no continuing obligation to bargain on their behalf, the union and employer can still choose to negotiate benefits for retirees."¹⁴¹ Moreover, the court held that such an argument was invalid because, under section 301, retirees can enforce provisions in collective bargaining agreements that provide them with retirement benefits.¹⁴² Therefore, since retired football players can potentially receive benefits from the Career Planning Program, they were prevented from arguing that section 301 did not preempt their claims.¹⁴³ Thus, the court found that section 301 preempted all of the claims that the plaintiffs brought against the NFL and the NFLPA.¹⁴⁴

B. Casting Doubt on the Effectiveness of Exculpatory Language in Collective Bargaining Agreements

The District Court for the Northern District of Georgia and the Eleventh Circuit Court of Appeals both reached the same conclu-

136. *See id.* at 1184 (determining whether fiduciary duty existed).

137. *See Atwater*, 626 F.3d at 1184 ("The fiduciary-duty claims supported by [plaintiffs'] allegations directly arise from the [CBA] . . .").

138. *See id.* ("Further, resolution of these claims is substantially dependent on the interpretation of the CBA's language . . .").

139. *See id.* at 1184-85 (dismissing plaintiffs' final argument).

140. *See id.* (concluding that plaintiffs' status as retirees did not change § 301 analysis).

141. *Id.* (stating reasons why plaintiffs' status as retirees did not change § 301 analysis).

142. *See id.* (explaining court's reasoning).

143. *See Atwater*, 626 F.3d at 1184-85 (dismissing plaintiffs' argument).

144. *See id.* ("For these reasons we uphold the district court's determination that § 301 preempts Plaintiffs' state-law claim. We, therefore, affirm the district court's decision granting the NFL an NFLPA summary judgment on those claims.").

sion that section 301 of the LMRA preempted the state law claims that the plaintiffs brought against the NFL and the NFLPA.¹⁴⁵ Similarly, both courts granted summary judgment in favor of the defendants and dismissed the plaintiffs' claims.¹⁴⁶ While both courts ultimately reached the same result, the outcome of the case is not nearly as important as the slightly different analyses that the courts underwent in reaching their conclusions.¹⁴⁷

The District Court held that section 301 of the LMRA preempted the state law claims against the NFL and the NFLPA.¹⁴⁸ Furthermore, the District Court also found that even if section 301 did not preempt the plaintiffs' claims, the exculpatory language of article 51, section 12 of the CBA and the exculpatory language contained in the Financial Advisors Program, which both state that players are solely responsible for their personal finances, would have prevented the NFL and the NFLPA from liability.¹⁴⁹ Thus, the district court dismissed the plaintiffs' claims using two different, independent legal theories.¹⁵⁰

On appeal, the Eleventh Circuit Court of Appeals affirmed the conclusion of the district court that summary judgment should be

145. Compare *id.* at 1177-85 (holding plaintiffs' claims preempted by § 301 because duties directly arose from CBA), with *Atwater v. Nat'l Football League Player's Ass'n*, No. 1:06-CV-1510-JEC, 2009 U.S. Dist. LEXIS 98236, at *4-5 (N.D. Ga. Mar. 26, 2009) (dismissing plaintiffs' claims based on two separate legal arguments); see also *Lydakakis & Zapata*, *supra* note 7, at 26-27 ("This is important because the district court provided independent grounds for defeating the plaintiffs' causes of action against the NFL and NFLPA. . . . On appeal, the Eleventh Circuit affirmed the ruling of the district court but with a modified rationale.").

146. See *Atwater*, 626 F.3d at 1185 (granting defendants motion for summary judgment); see also *Atwater*, 2009 U.S. Dist. LEXIS 98236, at *43 (granting motion for summary judgment to defendants); see also *Lydakakis & Zapata*, *supra* note 7, at 26-27 (comparing Eleventh Circuit's decision with district court's decision in *Atwater*).

147. See *Lydakakis & Zapata*, *supra* note 7, at 27-28 (analyzing Eleventh Circuit's decision in *Atwater*).

148. See *Atwater*, 2009 U.S. Dist. LEXIS 98236, at *28 ("Even assuming that plaintiffs' claims did not arise directly from the CBA, they still would be preempted. As discussed above, § 301 preempts state law claims when the resolution of those claims requires the interpretation of the CBA or any of its terms."); see also *Lydakakis & Zapata*, *supra* note 7, at 26 (discussing district court's holding).

149. See *Atwater*, 2009 U.S. Dist. LEXIS 98236, at *29 ("In addition to being preempted under § 301, plaintiffs' claims against the NFLPA are barred by a disclaimer in the Financial Advisors Program Regulations."); see also *Lydakakis & Zapata*, *supra* note 7, at 26 (stating that district court held that exculpatory language of Financial Advisors Program prevented NFL and NFLPA from incurring liability).

150. See *Atwater*, 2009 U.S. Dist. LEXIS 98236, at *28-29 (dismissing plaintiffs' claims based on two separate legal theories); see also *Lydakakis & Zapata*, *supra* note 7, at 26 (noting district court's holding).

granted in favor of the defendants.¹⁵¹ Importantly, however, the Eleventh Circuit provided different reasoning in granting summary judgment to the defendants.¹⁵² In reaching its holding, the Eleventh Circuit focused solely on whether the claims of negligence, negligent misrepresentation, and breach of fiduciary duty were preempted by section 301 of the LMRA.¹⁵³

The analysis of the Eleventh Circuit Court of Appeals appears consistent with the precedent set by the Supreme Court in determining whether a plaintiff's state law claim is partially or completely preempted by section 301 when collective bargaining agreement covers the terms of the plaintiff's employment.¹⁵⁴ The *Atwater* Court first cited *Lingle* in setting up its analysis.¹⁵⁵ As stated above, in *Lingle*, the Supreme Court held that section 301 of the LMRA completely preempts state law claims brought by a plaintiff when the resolution of the claim involves interpreting the collective bargaining agreement governing the plaintiff's employment.¹⁵⁶ The *Atwater* court held that the resolution of the plaintiffs' three claims brought against the defendants implicated the interpretation of the collective bargaining agreement.¹⁵⁷ Relying on *Rawson*, the court found that the duties underlying the plaintiffs' claims in *Atwater*

151. See *Atwater*, 626 F.3d at 1185 (affirming district court's judgment); see also Lydakakis & Zapata, *supra* note 7, at 26 (stating Eleventh Circuit's holding).

152. See generally *Atwater*, 626 F.3d at 1177-1185 (holding that plaintiffs' claims were only preempted by § 301 and not that claims were dismissed based on exculpatory language); see also Lydakakis & Zapata, *supra* note 7, at 27 ("On appeal, the Eleventh Circuit affirmed the ruling of the district court but with a modified rationale.").

153. See generally *Atwater*, 626 F.3d at 1177-85 (dismissing plaintiffs' claims based on § 301); see also Lydakakis & Zapata, *supra* note 7, at 27 ("The appeals court upheld the district court's determination that LMRA preempted plaintiffs' state-law claims; the panel did not reach the issue of whether the disclaimer contained in the Financial Advisors Program regulations should have precluded Plaintiffs' claims against it.").

154. Compare *Atwater*, 626 F.3d at 1177-1185 (holding that § 301 preempted plaintiffs' state-law claims against NFLPA and NFL because legal duties imposed on defendants arose from and required interpretation of CBA), with *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) (holding state law claim for retaliatory discharge not preempted by § 301), and *United Steelworkers of Am. v. Rawson*, 495 U.S. 362 (1990) (holding § 301 preempts state law tort claims if duty underlying tort claim is created by collective bargaining agreement); see also Castagnera, *supra* note 21, at 4 ("In my view, it is highly unlikely that the Eleventh Circuit will grant a rehearing en banc and even less likely that the Supreme Court will want to review the bilked players' case. The preemption analysis simply seems way too solid to require further consideration.").

155. See *Atwater*, 626 F.3d at 1177 (citing *Lingle*).

156. See *Lingle*, 486 U.S. at 413 (holding state law claim for retaliatory discharge not preempted by § 301).

157. See generally *Atwater*, 626 F.3d at 1177-1185 (deciding that legal duties underlying plaintiffs' claims arose from CBA).

arose from the CBA because the court held that the resolution of the plaintiffs' claims required interpretation of the CBA.¹⁵⁸

As stated previously, the Eleventh Circuit Court of Appeals focused solely on whether the claims of negligence, negligent misrepresentation, and breach of fiduciary duty were preempted by section 301 of the LMRA.¹⁵⁹ The Eleventh Circuit did not focus on the exculpatory language of the CBA section creating the Career Planning Program or the exculpatory language of the Financial Advisors Program.¹⁶⁰ This is important because the District Court held that even if section 301 of the LMRA did not preempt the plaintiffs' claims the exculpatory language meant that the claims should be dismissed.¹⁶¹ Thus, the district court rejected the plaintiffs' claims on independent legal grounds.¹⁶²

However, the Appellate Court only referenced the exculpatory language of the Career Planning Program in order to show that the resolution of the claim would require interpretation of that language.¹⁶³ Oddly enough, the court did not once refer to the seemingly more explicit exculpatory language of the Financial Advisors Program regulations.¹⁶⁴ Therefore, by limiting its analysis to the preemptive effect of section 301 of the LMRA, the *Atwater* court cast

158. *See id.* at 1180-81 (citing *Rawson*).

159. *See generally Atwater*, 626 F.3d at 1177-85 (holding that plaintiffs' claims were only preempted by § 301 and not that claims were dismissed based on exculpatory language); *see also Lydakis & Zapata*, *supra* note 7, at 27 ("On appeal, the Eleventh Circuit affirmed the ruling of the district court but with a modified rationale.").

160. *See generally Atwater*, 626 F.3d at 1177-85 (dismissing plaintiffs' claims based on § 301); *see also Lydakis & Zapata*, *supra* note 7, at 27 ("The appeals court upheld the district court's determination that LMRA preempted plaintiffs' state-law claims; the panel did not reach the issue of whether the disclaimer contained in the Financial Advisors Program regulations should have precluded Plaintiffs' claims against it.").

161. *See Atwater v. Nat'l Football League Player's Ass'n*, No. 1:06-CV-1510-JEC, 2009 U.S. Dist. LEXIS 98236, at *28-29 (N.D. Ga. Mar. 26, 2009) (holding that exculpatory language limited NFL and NFLPA from incurring liability even if § 301 did not); *see also Lydakis & Zapata*, *supra* note 7, at 26-27 ("This is important because the district court provided independent grounds for defeating the plaintiffs' causes of action against the NFL and NFLPA . . .").

162. *See Atwater*, 2009 U.S. Dist. LEXIS 98236, at *28-29 (dismissing plaintiffs' claims based on two separate legal arguments); *see also Lydakis & Zapata*, *supra* note 7, at 26-27 (noting that district court dismissed complaints on two separate legal theories).

163. *See generally Atwater*, 626 F.3d at 1177-85 (referencing exculpatory language but not analyzing its impact).

164. *See generally Atwater*, 626 F.3d at 1177-85 (holding § 301 preempted plaintiffs' claims because legal duties underlying claim arose from CBA); *see also Lydakis & Zapata*, *supra* note 7, at 27 ("Therefore, the Eleventh Circuit felt it was unnecessary to reach the issue of whether the exculpatory language of the Financial Advisor's Program . . .").

doubt on the applicability of exculpatory language in collective bargaining agreements between the NFL and the NFLPA.¹⁶⁵ To a lesser extent, the decision also casts doubt on the applicability of exculpatory language in collective bargaining agreements as a whole.¹⁶⁶

By not discussing the effect of the exculpatory language, the Eleventh Circuit missed a chance to clarify the effect of exculpatory language in collective bargaining agreements.¹⁶⁷ Consequently, the Eleventh Circuit has effectively “muddied the water” on the applicability of exculpatory language in collective bargaining agreements.¹⁶⁸ Additionally, the court’s decision to selectively refer to the exculpatory language only in passing fails to take into account the fact that the NFL and the NFLPA “freely assented to the terms of the labor agreement.”¹⁶⁹

V. POTENTIAL IMPACTS OF *ATWATER*

By examining the changes the NFL made to the Financial Advisor’s Program and the results of the 2011 NFL Collective Bargaining Agreement, one can clearly observe the immediate impact of the *Atwater* litigation.¹⁷⁰ Soon after the Eleventh Circuit decided the *Atwater* case, the NFLPA suspended the Financial Advisors Program.¹⁷¹ The Financial Advisors Program remained closed until August 2012 when the NFLPA finally reopened the investment program for former and present football players.¹⁷² Now that the Financial Advisors Program has been reopened, there are a number

165. See Lydakakis & Zapata, *supra* note 7, at 27 (“*Atwater* raises questions about the effects of the CBA’s exculpatory language and the role of the federal courts in adjudicating disputes lodged by players against the NFL and NFLPA.”).

166. See *id.* (discussing impact of *Atwater* on exculpatory language in collective bargaining agreements).

167. See *id.* at 28 (“Consequently, the Eleventh Circuit has failed to concretely establish the effect of the exculpatory language in the Career Planning Program and the Financial Advisors Program.”).

168. See *id.* (noting that effect of exculpatory language in collective bargaining agreements is uncertain).

169. See *id.* (discussing impact of *Atwater*).

170. For a detailed discussion of the impact of the *Atwater* case, see *infra* notes 171-198 and accompanying text.

171. See Liz Mullen, *NFLPA Reopens Adviser Program*, SPORTS BUSINESS DAILY, Aug. 6, 2012, at 7, available at <http://www.sportsbusinessdaily.com/Journal/Issues/2012/08/06/Labor-and-Agents/NFLPA-advisers.aspx> (stating that NFLPA Financial Advisors Program was reopened in 2012).

172. See *id.* (noting reopening of NFLPA Financial Advisors Program).

of new rules and regulations for accepting financial advisors.¹⁷³ For example, the fee that the NFLPA charged prospective financial advisors to become certified under the Financial Advisors Program has increased from \$1,500 to \$2,500 for the initial fee, and \$500 to \$1,000 for the annual renewal fee.¹⁷⁴ Tom DePaso, general counsel for the NFLPA, attributes the increase in fees to the heightened security and background checks that the NFLPA now uses to screen prospective advisors.¹⁷⁵

Other new rules that have been implemented include an increase in the years of licensed experience that advisors and brokers are required to have, ranging from five years to eight years.¹⁷⁶ Additionally, the NFLPA now requires advisors that become certified under the Financial Advisors Program to have at least \$4 million in professional liability insurance; whereas in the past there was no liability insurance requirement for advisors.¹⁷⁷ Financial advisors must also agree to indemnify the NFLPA against any lawsuit that a player brings against them.¹⁷⁸

As of August 2012, there are approximately 350 financial advisors that are certified by the NFLPA and about 750 more advisors that have been placed on the waiting list to be certified under the Financial Advisors Program.¹⁷⁹ However, the new requirements enforced by the NFLPA might have the effect of decreasing the number of financial advisors that want to become NFLPA certified.¹⁸⁰ The new Financial Advisors Program will be more costly to financial advisors and will require advisors to file more paperwork, and at

173. See *id.* (“The NFL Players Association has resumed accepting applications for financial advisors to be certified in its program, under new rules that require more experience and a more stringent background check.”).

174. See *id.* (listing some of new rules and fee increases for NFLPA Financial Advisors Program). For a more detailed list of rules, regulations, qualifications, and fees, see *NFLPA Financial Advisor Registration Program Fact Sheet*, NFLPA, available at <http://images.nflplayers.com/mediaResources/files/NFLPA%20Financial%20Advisor%20-%20Fact%20Sheet.pdf> (last visited Jan. 26, 2014) (noting increase in certification fee for potential financial advisors).

175. See Mullen, *supra* note 171 (quoting NFLPA general counsel Tom DePaso).

176. See *id.* (listing new rules and regulations for Financial Advisors Program). For a more comprehensive list of rules and regulations for the Financial Advisors Program, see *supra* note 171 and accompanying text.

177. See Mullen, *supra* note 171 (reporting on new regulations for NFLPA Financial Advisors Program).

178. See *id.* (discussing Financial Advisors Program).

179. See *id.* (stating interest in being listed on NFLPA Financial Advisors Program).

180. See *id.* (reporting on impacts of new rules and regulations of Financial Advisors Program).

least some advisors are not sure that the costs and the paperwork are worth the hassle of being certified by the NFLPA.¹⁸¹ While the Financial Advisors Program has changed as a result of *Atwater*, it is not believed that the NFL's retirement fund as a whole will be changed.¹⁸²

Another result of the litigation is that in the 2011 CBA between the NFL and the NFLPA the exculpatory language of Article 51, section 12 has been strengthened.¹⁸³ The exculpatory language of the Career Planning Program now states, "Neither the NFL, nor any Club, nor the NFLPA shall be responsible for any investment decisions made by players; players and any advisors who they select will bear sole responsibility for any investment or financial decisions that are made."¹⁸⁴ While the exculpatory language has been emphasized to directly deflect any liability against the NFL and the NFLPA as a result of failed investments under the Financial Advisor Program, this change may have little actual effect on exculpating the NFL or the NFLPA from future liability.¹⁸⁵

The Eleventh Circuit Court of Appeals' decision not to discuss the effect of the exculpatory language of the Career Planning Program, and the court's decision not to mention the more explicit

181. *See id.* ("One financial adviser now in the program, who spoke on condition of anonymity, said he is trying to decide whether to reapply under the new guidelines. 'It's expensive,' he said, 'and it means more paperwork.'").

182. *See* Zennie Abraham, *NFLPA Hedge Fund Scandal*, NFL BUSINESS NEWS BLOG (July 11, 2006, 9:27 AM), <http://nflbiz.blogspot.com/2006/07/nflpa-hedge-fund-scandal.html> ("Will this have impact on the NFL's retirement fund? I don't think so. This was a program that some – not all – players participated in, so it should have no impact at all on the total NFLPA retirement system.").

183. *Compare* NAT'L FOOTBALL LEAGUE, NFL COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION, art. LI § 12 (Aug. 4, 2011) [hereinafter 2011 CBA] ("Neither the NFL, nor any Club, nor the NFLPA shall be responsible for any investment decisions made by players; players and any advisors who they select will bear sole responsibility for any investment or financial decisions that are made."), *with* 1993 CBA, *supra* note 2, at art. LV § 12 ("The program will also provide information to players on handling their personal finances, it being understood that players shall be solely responsible for their personal finances."); *see also* Lydakakis & Zapata, *supra* note 7, at 28 ("The *Atwater* action was initiated under the amended 1993 CBA, several years prior to the adoption of the 2011 CBA. Therefore it is likely no coincidence that while the 1993 CBA merely stated that the parties 'understood that players shall be solely responsible for their personal finances,' the 2011 CBA explicitly exculpates the NFL, Clubs, and NFLPA from any investment decision made by players, and further states that the players and their advisors bear 'sole responsibility for any investment or financial decisions that are made.'").

184. 2011 CBA, *supra* note 183 (quoting art. 51 § 12 of 2011 CBA).

185. *See* Lydakakis & Zapata, *supra* note 7, at 28 ("Unfortunately, the CBA parties' attempt to address a pitfall in the 1993 CBA by bolstering the exculpatory language of the 2011 Career Planning Program has at best been complicated by the court of appeals, but at worst been negated altogether.").

exculpatory language of the Financial Advisors Program, casts doubt on whether parties to a collective bargaining agreement can limit their liability by including exculpatory language in the agreement.¹⁸⁶ According to two scholars, “the CBA parties’ attempts to address a pitfall in the 1993 CBA by bolstering the exculpatory language of the 2011 Career Planning Program has at best been complicated by the court of appeals, but, at worst, has been negated altogether.”¹⁸⁷ This certainly will not be the last litigation involving professional football players, the NFLPA, and the NFL; however, the role that exculpatory language will play in the resolution of any future litigation between the parties remains uncertain.¹⁸⁸

While the litigating parties in *Atwater* included retired sports players, a sport labor union, and a professional sports league, it should be noted that the case is relevant to other professions as well.¹⁸⁹ While discussing what employers should take away from *Atwater*, Jonathan Spitz, a partner at Jackson Lewis stated, “[i]f [you are] an employer and you insert yourself into the situation [by offering a list of financial advisers], you need to expect that people are going to hold you accountable.”¹⁹⁰ Thus, companies that offer a list of financial advisers to their employees need to be especially careful in the wake of *Atwater*.¹⁹¹ While employers are able to recommend any investment options they choose, they should stick to recommending well-known, well-insured, and established investment options such as mutual funds.¹⁹²

Furthermore, companies should be reminded of their fiduciary obligations to their employees when providing a list of recommended investment options to them.¹⁹³ While the breach of fiduci-

186. See *id.* (discussing impact of *Atwater* holding).

187. *Id.* (analyzing impact of *Atwater*).

188. See generally *id.* (discussing effect of exculpatory clauses in collective bargaining agreements).

189. See Post, *supra* note 27 (commenting on *Atwater* litigation).

190. *Id.* (quoting Jonathan Spitz, partner at Jackson Lewis).

191. See *id.* (discussing impact of *Atwater* on employers).

192. See *id.* at 3 (“Employers can provide prudently chosen investment options, such as mutual fund groups, but doling out lists of hundreds of advisers from assorted firms isn’t wise.”); see also *id.* (“Section 404(c) of the Employee Retirement Income Security act outlines duties an employer must fulfill in order to transfer investment-related liability to employees. ‘As part of compliance with 404(c), most employers are providing information and options for places for employees to put their money, but they’re sticking to the larger, well-established mutual fund companies and brokerage firms that are well-known, well-insured and well-financed that may offer some opportunities for individually managing money’ . . .”).

193. See *id.* (“This case is a reminder that plan fiduciaries have a general obligation to provide participants with options and educational tools to make smart decisions’ . . .”).

any claim brought by the plaintiffs in *Atwater* was dismissed as preempted by section 301 of the LMRA, the court never reached the merits on the breach of fiduciary duty claim.¹⁹⁴ Thus, *Atwater* leaves some uncertainty as to whether exculpatory language in a collective bargaining agreement is enough to insulate an employer from breach of fiduciary duty when providing employees with possible investment options.¹⁹⁵

While the aforementioned impacts of the *Atwater* litigation paint a somewhat woeful picture for employers, not all employers who engage in collective bargaining agreements should feel defeated.¹⁹⁶ The *Atwater* court confirmed that any state law claims that depend on the interpretation of a collective bargaining agreement are preempted by section 301 of the LMRA.¹⁹⁷ Therefore, employers can take some comfort in the fact that “disgruntled union members” will not be able to bring state law claims against the employer as long as the claim depends on the interpretation of the collective bargaining agreement between the employer and the labor union.¹⁹⁸

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194. See *Atwater v. Nat’l Football League Players Ass’n*, 626 F.3d 1170, 1184 (N.D. Ga. 2010) (concluding that breach of fiduciary duty claim brought by plaintiffs was preempted by § 301).

195. See *Lydakis & Zapata*, *supra* note 7, at 28 (discussing effect of exculpatory language in collective bargaining agreements); see also *Post*, *supra* note 27 (noting that employers that provide investment options to employees need to be extra careful after *Atwater*).

196. See *Castagnera*, *supra* note 21, at 4 (“Those readers whose firms are in collective bargaining relationships can take some comfort from the *Atwater* decision.”).

197. See *Atwater*, 626 F.3d at 1177-85 (holding plaintiffs’ state-law claims for negligence, negligent misrepresentation, and breach of fiduciary duty preempted by § 301); see also *Castagnera*, *supra* note 21, at 4 (discussing *Atwater*); see also *Lydakis & Zapata*, *supra* note 7, at 27 (noting holding of *Atwater*); see also *Post*, *supra* note 27 (reporting on impacts of *Atwater*).

198. See *Castagnera*, *supra* note 21, at 4 (“Employee benefits enshrined in collectively bargained agreements likely are insulated from state-law/state-court suits brought by disgruntled union members.”).

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