"THE RISE AND FALL OF KIRK WRIGHT: THE NFLPA'S FIDUCIARY OBLIGATION AS THIRD-PARTY GUARANTOR OF 'CERTIFIED FINANCIAL ADVISORS'"

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INTRODUCTION

The National Football League Players Association (NFLPA) has a controversial certification program for both would-be agents and financial advisors who hope to represent National Football League (NFL) players.[1] The union (NFLPA) must first certify

[1] *See*, *e.g.*, Poston v. Nat'l Football League Players Ass'n, No. 02CV871, 2002 WL 31190142, at *1 (E.D.Va. Aug. 26, 2002) ("Licensed contract advisors such as Poston represent National Football League ("NFL") players in various types of negotiations,

agents and financial advisors for athletes in the NFL. The NFLPA provides a list (Schindler-like) that identifies those agents and advisors who are "acceptable", but this list does not guarantee in any form their competency and/or a previous, spotless history of no felonies, bankruptcies, etc.[2]

Kirk Wright, hedge fund manager from Atlanta, age 37, an NFLPA certified financial advisor, hung himself from a self-made rope in his jail cell on May 31, 2008.[3] He was previously convicted on May 21, 2008, of 47 counts of fraud and money laundering for taking more than $150 million dollars from former NFL clients.[4] He awaited sentencing at the time of his death; he also faced up to 710 years in prison, $16 million in fines, and the possible repayment of client losses.[5] He "settled" his "debt" the best way he could.

The initial lawsuit was filed by six former NFL players, including Steve Atwater, Blaine Bishop, Roy Crockett, Carlos Emmons, Clyde Simmons, and Al Smith, who accused the union of negligently adding Kirk Wright to an allegedly properly vetted list of prospective financial advisors that was provided to NFL football players, even though Kirk Wright had several financial liens filed

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including negotiations for employment contracts with particular teams and associated marketing opportunities. Pursuant to their agreements with the NFLPA, the conduct of such advisors is governed by regulations established by the NFLPA, and the NFLPA, through its Disciplinary Committee, has the power to discipline contract advisors for noncompliance with these regulations.") (citations omitted).
See also WALTER T. CHAMPION, JR., SPORTS LAW IN A NUTSHELL 35 (4th ed. 2009) ("The purpose of this type of regulation [of contract advisors] is to provide quality control in representation and to limit the fees that agents can charge NFLPA members for contract negotiation. . . . In 2003, the NFLPA established a similar certification program for financial advisors.").

[2] *See, e.g.,* Poston, 2002 WL 31190142, at *1. *See also* WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW § 17.6 (2d ed. Supp. 2013-14).

[3] Mike Tierney, *Lawsuit by Ex-N.F.L. Players Against Union Continues: Death of Hedge Fund Manager Does Not Halt Case*, N.Y. TIMES, June 2, 2008, at D3 [hereinafter Tierney]. *See also* S.E.C. v. Wright, 261 Fed. Appx. 259 (11th Cir. 2008) [hereinafter *S.E.C.*] (Kirk Wright, pro se, sought an appeal of the default judgment of $19,805.90 plus civil penalty of $120,000 to the S.E.C. for violation of federal securities law; the Eleventh Circuit affirmed the default judgment on the basis that the district court did not abuse its discretion); S.A. Reid, *Convicted Fund Manager Hangs Himself in Jail Cell*, ATLANTA J. CONST., May 26, 2008, at B5.

[4] Tierney, supra note 4, at D3.

[5] *Id.*

against him.[6] This should have been a red flag. The union countered by insisting that all certified agents and financial advisors underwent annual background checks, but the list also included a disclaimer that their vetting does not indicate endorsement nor recommendations.[7] But, then, why have a list in the first place?

Kirk Wright had four sports cars, multiple residences, flashy jewelry, and a $500,000 wedding on October 22, 2005. His ponzi scheme took in $150 million, which is chump change for Uncle Bernie Madoff, but still significant, and was a result of poor investments compounded by fabricated financial statements.[8] Federal authorities shut Wright's firm down. Wright fled, but was caught at an elegant Miami Beach hotel in May 2006. As a result, Atwater, *et al*., sued the NFLPA and the NFL for $20 million.[9]

The crux of the lawsuit was that the NFLPA fact-checking corporation that was used to vette background checks on applicants for the list of certified financial advisors was faulty, negligent, and grossly negligent. These checks included the applicant's criminal and credit history. Originally, the applicants must have only three years of relevant experience, but this was changed to five years.[10] The *Atwater* plaintiffs and defendants (NFLPA and the NFL) agreed that the death of Wright, who the union brought in as a third party, should not have any legal effect on the lawsuit. Wright refused to plea bargain under the belief that the proposed settlement would cause financial harm to his four sons.[11] [Probating the estate is another matter, which will be discussed later].

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[6] Atwater v. NFLPA, No. 1:06-CV-1510-JEC, 2007 WL 1020848, at *1 (N.D. Ga. March 29, 2007), *summary judgment granted*, 2009 WL 3254925, at *1 (N.D. Ga. March 27, 2009), *aff'd*. 626 F.3d 1170 (11th Cir. 2010) [hereinafter *Atwater*].

[7] Tierney, *supra* note 4. *See Atwater* 2007 WL 1020848. *See also*, Defendant NLFPA's Answer to Plaintiff's Amended Complaint, Counterclaims and Third-Party Claim, Atwater v. NFLPA, 2007 WL 4714090 (N.D. Ga. April 23, 2007); Memorandum in Support of Motion to Dismiss of the National Football League, Atwater v. NFLPA, 2006 WL 5243750 (N.D. Ga. Aug. 18, 2006).

[8] Tierney, *supra* note 4. *See* Black v. NFLPA, 87 F. Supp. 2d 1 (D.D.C. 2000).

[9] Tierney, *supra* note 4. *See also* Peter Lauria, *Hedge Fiend Had Lavish Lifestyle*," N.Y. POST, Mar. 26, 2006, at 29; *Indicated Fund Chief's Assets Set For Auction*, ROCKY MOUNTAIN NEWS, July 18, 2006, at 2B.

[10] Tierney, *supra* note 4. *See also* Mike Tierney, *Hedge Fund's Manager Found*, ATLANTA J. CONST., May 18, 2006, at C1.

[11] Tierney, *supra* note 4.

Wright was convicted on all four counts of mail fraud, securities fraud, and money laundering. Tragically, his death did not dampen the animosity from his investment victims; e.g., Calvin Paris of Del Ray Beach, Florida, wanted the maximum punishment. The football players continued their suit in an attempt to recover some of their financial losses from both his estate and the union. They alleged that the union was a third-party guarantor of Wright's integrity as a fiduciary.[12] Steve Atwater, for example, just said, "It's a tragic deal all around". Yet, he continued as the named plaintiff.[13] The players eventually lost their suit, at least in the Eleventh Circuit, on November 23, 2010, on rather dubious technical grounds.[14] Thus, the NFLPA escaped accountability again. The Court of Appeals saw this action merely through the eyes of whether the lawsuit should be preempted by the Labor-Management Relations Act (LMRA).[15] The Eleventh Circuit failed to appreciate that the NFLPA's actions were more than mere negligence, but worthy of the designation of "gross misconduct," which should preempt the preemption.[16] Here, the NFLPA voluntarily embraced the responsibility of background checks on those financial advisors who were included in "The List."[17] Once they accepted that responsibility, they had a fiduciary duty to perform this obligation, which is crucial to an NFL player considering his career's short shelf life, in a non-negligent, professional, and complete manner.[18] In short, because there was a fiduciary relationship and because the actions or

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[12] *Id*.

[13] *Id. See also*, Christian Boone & Bill Rankin, *Convicted Swindler Hangs Himself*, ATLANTA J. CONST., May 26, 2008, at A1 [hereinafter *Boone & Rankin*].

[14] Atwater v. NFLPA, No. 1:06-CV-1510-JEC, 2007 WL 1020848 (N.D. Ga. March 29, 2007), *summary judgment granted*, 2009 WL 3254925 (N.D. Ga. March 27, 2009), *aff'd*, 626 F.3d 1170 (11th Cir. 2010).

[15] Labor Management Relations Act § 301, 29 U.S.C. §185 (1947).

[16] *Atwater*, 626 F.3d 1170, 1179-83 (11th Cir. 2010).

[17] *See generally* Plaintiffs Memoranda in Opposition to the NFLPA's Motion for Summary Judgment Based on Causation, Atwater v. NFLPA, 2008 WL 5371720 (N.D.Ga. Aug. 18, 2008) (No. 1:06-CV-1510-JEC),.

[18] *Atwater*, 636 F.3d at 1183-84. *See also* Pablo S. Torre, *How (and Why) Athletes Go Broke*, SPORTS ILLUSTRATED (March 23, 2009*), available at* http://www.si.com/vault/2009/03/23/105789480/how-and-why-athletes-go-broke. (About 80% of all professional athletes are broke in six years. Like with the *Atwater* plaintiffs, a reoccurring theme is "misplaced trust" in dubious financial advisors.).

inactions of the NFLPA exhibited gross misconduct, then their "vetting" process must not be negligent.[19]

I. THE RISE AND FALL OF KIRK WRIGHT

The FBI only found $28,000 in cash from an estimated investment fraud of $185 million.[20] Wright's hedge fund company based in Marietta, Georgia, called International Management Association, L.L.C. (IMA), also faced a fraud lawsuit by the U.S. Securities and Exchange Commission and at least three separate lawsuits from investors and former business partners.[21] Former pro-football player, Steve Atwater, a defensive back for the Broncos and originally the Jets, was so impressed with Wright's alleged investment returns that he joined the firm as a client liaison.[22] In his capacity as client liaison, Atwater brought in six $20 million investments.[23] That money was lost.[24] "In my wildest dreams, I never thought he was stealing the money," said Atwater.[25]

Altogether, about 500 people invested with Wright.[26] He was Harvard-educated and sold his clients on an annual return of 27% by short selling stocks.[27] He dazzled his would-be clients with seminars in Las Vegas, a hospitality suite at Atlanta Falcons football games, and parties at his suburban home, which had a pool and three fountains.[28]

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[19] *Atwater*, 636 F.3d at 1183-84.

[20] *Id. See also* Bill Rankin, *Ex-Fund Manager's Fraud Trial Starts*, ATLANTA J. CONST., May 7, 2008, at D8.

[21] Monée Fields-White, *Kirk Wright's Razzle-Dazzle Play*, BLOOMBERG MARKETS, Oct. 2006, at 125 [hereinafter *Fields-White*].

[22] *Id. See also* Brief of the S.E.C., Appellee, at *5, S.E.C. v. Wright, 261 Fed. Appx. 259 (11th Cir. 2008) (No. 07-11008-GG), 2007 WL 4705017 (noting that Wright claimed that the funds had approximately $185 million in assets, when in fact the funds' assets totaled less than $500,000).

[23] Fields-White, *supra* note 22.

[24] Fields-White, *supra* note 22. *See also* Plaintiffs/Counterclaim Defendants' Reply to NFLPA's Opposition to Plaintiff's Motion for Summary Judgment at *2, Atwater v. NFLPA, 626 F.3d 1170 (11th Cir. 2010) (No. 1:06-CV-1510-JEC), 2008 WL 5371726.

[25] Fields-White, *supra* note 22.

[26] *Id. See also* Plaintiffs/Counterclaim Defendants' Reply to NFLPA's Opposition to Plaintiff's Motion for Summary Judgment, *supra* note 25, at *2.

[27] Fields-White, *supra* note 22.

[28] *Id.*

The SEC alleged that Wright falsified statements about the firm's assets and inflated the return rates for his hedge funds.[29] The NFLPA registered Wright as an acceptable financial advisor, that is, he was placed on their "list".[30] The *Atwater* lawsuit blamed the NFL and the NFLPA for recommending unfit financial advisors.[31] The players sought $20 million in reimbursement for their loss; they also demanded that the union improve its screening of fund managers.[32]

Wright lied to his investors and claimed that his returns on their investments were due to his short selling of a particular stock.[33] But, this, of course, if true, exposed them to extreme risks.[34] These so-called short sales are the selling of borrowed shares that must be eventually repurchased. These short sales are manipulated so as to capitalize on declines in price. Wright had $30.5 million in trading losses.[35] The remainder of the lost investments were likely squandered for personal purchases, including more than six million dollars in real estate, jewelry, and art, all of which was sold at auction.[36]

"Kirk Wright lived fast but died alone in a Union City Jail cell . . ."[37] Wright, who bilked investors out of tens of millions of dollars, hanged himself.[38] He was found dead in a cell while

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[29] Brief of the S.E.C., Appellee, *supra* note 23, at *4-5. *See generally* Jessica Gabel, *Midnight in the Garden of Good Faith: Using Clawback Actions to Harvest the Equitable Roots of Bankrupt Ponzi Schemes*, 62 CASE W. RES. L. REV. 19 (2011).

[30] Counterclaim Defendants' Memorandum in Support of Motion for Summary Judgment Against NFLPA, Atwater v. NFLPA, 626 F.3d 1170 (11th Cir. 2010) (No. 1:06-CV-1510-JEC), 2008 WL 4076744, at *3.

[31] *Id.* at *2-7.

[32] *Id.*

[33] Fields-White, *supra* note 22, at 126.

[34] *Id.* at 126, 128.

[35] *Id*. at 128.

[36] *Id*. *See also* Mike Tierney, *Fraud Suspect's Belongings Sold for $1.9 Million, Auction's Proceeds a Fraction of Amount Lost by His Clients*, ATLANTA J. CONST., July 30, 2006, at C3 [hereinafter *Tierney-Auction*].

[37] Boone & Rankin, *supra* note 14, at A1. *See also* S.A. Reid, *Wright Was 'Normal Self' Before Suicide; Probe Begins: Jailer Recalls Hedge Fund Manager Didn't Appear 'Under Any Particular Duress' After His Conviction Wednesday*, ATLANTA J. CONST., May 27, 2008, at B3 (hereinafter cited as Reid); Drew Jubera, *Investment Manager's High Life Ended in Jail Cell; Acquaintances Shocked by Kirk Wright's Suicide*, ATLANTA J. CONST., June 7, 2008, at A1.

[38] Boone & Rankin, *supra* note 14.

awaiting sentencing. His prison term was expected to be lengthy.[39] Wright was convicted of 47 counts of mail fraud, securities fraud, and money laundering stemming from scams run through IMA.[40]

II. THE NFLPA'S CERTIFICATION PROCESS

The NFLPA established the Registered Financial Advisory Program in 2002.[41] On February 12, 2003, the NFLPA granted Kirk Wright's application for registration as a certified financial advisor with his two companies, IMA and International Management Associates Advisory Group (IMAAG).[42] Prior to granting the application, it was expected that the NFLPA would conduct a thorough background check of Wright and his affiliated corporate entities to ensure that all requirements of the Registered Financial Advisory Program were met.[43] It is the obligation of the NFLPA to make certain that neither Wright nor his affiliated associates had any adverse judgment liens rendered against them.[44] Two *Atwater* plaintiffs, Blaine Bishop and Carlos Emmons, through their certified contract advisors, requested that the NFLPA run background checks on Kirk Wright and his affiliated partners, associates, and corporate entities.[45] "[T]hese background checks . . . [were] reported to plaintiffs . . . that it did not see any red flags that raise any concerns."[46] The plaintiffs relied on the NFL's and the NFLPA's purported clearance of Wright and his subsequent registration in the Financial Advisors Program.[47]

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[39] *Id.*

[40] *Id. See* S.E.C. v. Wright, 261 Fed. Appx. 259 (11th Cir. 2008).

[41] Atwater v. NFLPA, No. 1:06-CV-1510-JEC, 2007 WL 1020848, at *1 (N.D. Ga. March 29, 2007), *summary judgment granted*, 2009 WL 3254925, at *1 (N.D. Ga. March 27, 2009), *aff'd*, 626 F.3d 1170 (11th Cir. 2010).

[42] *Id.*

[43] *Id. See also* Defendant NFLPA's Opposition to Plaintiff's Motion for Summary Judgment at •2-4, Atwater v. NFLPA, 2007 WL 1020848 (N.D. Ga. March 29, 2007) (No. 1:06-CV-1510-JEC), 2008 WL 5371717.

[44] *Atwater*, 2007 WL 1020848, at *5.

[45] *Id.*

[46] *Id.*

[47] *Id.*

The *Atwater* plaintiffs invested approximately $20 million in IMA managed hedge funds.[48] Neither the NFLPA nor the NFL advised plaintiffs that the Wright management groups were not registered as financial advisors anywhere prior to their NFLPA registration.[49] Nor did they advise plaintiffs that Wright had several state and federal judgments and tax liens placed against him.[50] On December 5, 2005, plaintiffs asked Wright to return their investment accounts, but were denied.[51] Plaintiffs sued, seeking monetary damages arising from the NFLPA's negligence, negligent misrepresentation, breach of fiduciary duty, and fraudulent promises that led plaintiffs to invest with Wright.[52]

The Financial Advisors Program was established "to protect former, current, and prospective NFL players from the financial fraudsters and con artists who preyed on the NFL through a variety of investment scams."[53] "The NFLPA represented that individuals not meeting the eligibility requirements would be disqualified from the program."[54] And, that "[t]he NFLPA has represented that advisors background were continuously monitored."[55] Ken Ballen, former Director of the Financial Advisors Program, "testified that with his background Wright would not qualify for registration."[56] However, despite being registered, "it is undisputed that both [Wright and Bond] had numerous state and federal tax liens, judgments and

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[48] *Id. See also* Plaintiff's Memoranda in Opposition to the NFLPA's Motion for Summary Judgment Based on Exhaustion of Internal Remedies at •2-4, Atwater v. NFLPA, 2007 WL 1020848 (N.D. Ga. March 29, 2007) (No. 1:06-CV-1510-JEC), 2008 WL 5371723.

[49] *Atwater*, 2007 WL 1020848, at *6.

[50] *Id.*

[51] *Id.*

[52] *Id. See also* Memorandum in Support of NFLPA's Motion for Summary Judgment, Atwater v. NFLPA at *3-4, 2007 WL 1020848 (N.D. Ga. March 29, 2007) (No. 1:06-CV-1510-JEC), 2008 WL 4076738.

[53] Plaintiff's Memoranda in Opposition to the NFLPA's Motion for Summary Judgment Based on Causation at *4, Atwater v. NFLPA, 2007 WL 1020848 (N.D. Ga. March 29, 2007) (No. 1:06-CV-1510-JEC), 2008 WL 5371720. *See generally*, Richard Karcher, *Fundamental Fairness in Union Regulation of Sports Agents*, 40 CONN. L. REV. 355 (Dec. 2007); Timothy Davis, *Regulating the Athlete-Agent Fiduciary: Intended and Unintended Consequences*, 42 WILLIAMETTE L. REV. 781 (Symposium 2006).

[54] Plaintiff's Memoranda in Opposition to the NFLPA's Motion for Summary Judgment Based on Causation, *supra* note 54, at *8.

[55] *Id.*

[56] *Id.*

garnishments that had been filed against them at various times."[57]

III. LAWSUIT CONTINUES AFTER WRIGHT'S DEATH

Shortly after his conviction, Wright committed suicide while awaiting sentencing. The lawsuit initiated by former NFL players claiming negligence, negligent misrepresentation, and breach of fiduciary duty against the NFLPA continued after his death.[58]

The plaintiffs relied on the NFLPA's performance of a "due diligence background check" including its recommendation and endorsement of Wright through registration in the certification program, and the NFLPA's purported monitoring of his continuing fiscal fitness and qualification to remain in their program.[59] The program was established to protect NFL players from con artists who seek out athletes (like older Americans) since they believe they are more susceptible to investment scams.[60]

Plaintiffs invested a total of $13.6 million in certain Wright funds between 2004 and 2006. However, in late 2005, they demanded the withdrawal of their investment account balances, but were denied.[61]

The crux of the problem is that neither Wright nor IMA were suitable for certification due to Wright's fiscal history littered with liens, judgments, and garnishments. Kirk Wright filed an Application for Admission to the NFLPA Financial Advisors

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[57] *Id.* at 5. *See also* Atwater v. NFLPA, No. 1:06-CV-1510-JEC, 2009 WL 3254925, at *2 (N.D. Ga. Mar. 27, 2009) (Kirk Wright ("Wright") and Nelson Bond ("Bond") were principals of two investment companies: International Management Associates, LLC ("IMA") and International Management Association Advisory Group ("IMAAG"). Although there is some dispute about the exact dates, the parties agree that the NFLPA granted Wright and Bond's application to participate in the Financial Advisor Program at least once in 2005. Wright and Bond were listed as "Registered Advisors" on October 10, 2005. Their names were removed in early 2006).

[58] Memorandum in Support of NFLPA's Motion for Summary Judgment, *supra* note 53, at *3-4.

[59] Plaintiff's Memoranda in Opposition to the NFLPA's Motion for Summary Judgment Based on Exhaustion of Internal Remedies, *supra* note 49, at *3. *See also* Jubera, *supra* note 38; Reid, *supra* note 38.

[60] *See* Plaintiff's Memoranda in Opposition to the NFLPA's Motion for Summary Judgment Based on Exhaustion of Internal Remedies, *supra* note 49, at 4-5 (The program served NFLPA members as a pre-screen to all financial advisors who applied to participate in the certification program.).

[61] *Id.* at *3.

Program in January 2003 and renewal in 2005. The NFLPA failed to properly account for his liens, judgments, garnishments, and other red flags. The NFLPA had actual knowledge of Wright's less than stellar civil records and questionable background prior to registration in the program. If the plaintiffs knew of these civil records, they would not have invested with Wright.[62] Plaintiffs alleged that the NFLPA's failure to properly administer the program was negligent and grossly negligent. Therefore, the NFLPA should be liable for plaintiffs' entire losses, including interest.[63] The NFLPA counterclaimed against Wright as a third-party defendant and continued against Wright's estate, even after his death.[64]

IV. CO-DEFENDANT NFL ARGUES LABOR PREEMPTION

Courts have had trouble interpreting sports cases. Look no further than *Flood v. Kuhn,*[65] or the so-called non-statutory labor exemption memorialized in *Clarrett v. NFL.*[66] This basically allows, for all times, the trumping of labor law over antitrust as a means to right wrongs for athletes.[67] Another form of ignoring the inequalities inherent in professional sports, especially when these inequalities are foisted upon the athletes by a weak union, is the doctrine of labor preemption.[68]

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[62] *Id*. at 3-4.

[63] *Id.* at 4.

[64] *Id.*

[65] Flood v. Kuhn, 407 U.S. 258 (1972).

[66] Clarett v. NFL, 306 F. Supp. 2d 379 (S.D.N.Y. 2004), *stay denied,* 306 F. Supp. 2d 411 (S.D.N.Y. 2004), *rev'd* 369 F.3d 124 (2d Cir. 2004). *See* Walter T. Champion Jr., Clarett v. NFL, *and the Reincarnation of the Non-statutory Labor Exemption in Professional Sports*, 47 S. TEX. L. REV. 587 (2006); Walter T. Champion Jr., *Looking Back to* Mackey v. NFL *to Revive the Non-Statutory Labor Exemption in Professional Sports*, 18 SETON HALL J. SPORTS & ENT. L. 85 (2008); *See* Walter T. Champion Jr., *The Second Circuit Takes a Second Look at the Non-Statutory Labor Exemption in Professional Sports*; Walter T. Champion, Jr., *A Review of* Wood v. NBA, Caldwell v. ABA, NBA v. Williams, *and* Clarett v. NFL, 27 HOFSTRA LAB. & EMP. L. J. 83 (Fall 2009); Walter T. Champion Jr., *Mixed Metaphors; Revisions & History, and Post-Hypnotic Suggestions on the Interpretations of Sports Antitrust Exemptions: The Second Circuit's Use in* Clarett *of a Piazza Like "Innovative Reinterpretation of Supreme Court Dogma*," 20 MARQ. SPORTS L. REV. 55 (Fall 2009).

[67] *Clarett*, 369 F.3d 124.

[68] *See* CHAMPION, *supra* note 3, at 516-23.

The preemption doctrine is mostly a technical procedural shorthand that dismisses state law cases if there are contravening labor law issues that emanate from a collective bargaining agreement (CBA). [69] The problem with professional sports, especially in football, is that the unions are by nature weak and even self-serving. [70] A football career is short-lived, and in the NFL, the CBA is an extremely one-sided agreement that is slanted against the athlete. [71]

If the complaint is labor-based, as it allegedly was in *Atwater v. NFL*, [72] which involves the interpretation of a union-based, mandatory plan to certify financial planners, [73] then both sides may claim that a federal statute preempts the state issue. [74] Usually the federal statute in question is the Labor-Management Relations Act of 1947 (LMRA); [75] however, the National Labor Relations Act (NLRA)[76] or any other federal statute may also come into play.

Preemption is a powerful affirmative defense. A state tort claim to survive LMRA preemption must state a claim that is independent of the CBA.[77] This independence demands that the

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[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] Atwater,v. NFLPA, 626 F. 3d 1170 (11th Cir. 2010).

[73] *Id.*

[74] CHAMPION, *supra* note 3, at 410.

[75] Labor Management Relations Act, § 301, 29 U.S.C. § 185 (1947).

[76] National Labor Relations Act, 29 U.S.C. § 151 (1947).

[77] *See* CHAMPION, *supra* note 3, at 410. *See generally* Ezekiel J.N. Fletcher, *De Facto Judicial Preemption of Tribal Labor and Employment Law*, 2008 MICH. ST. L. REV. 435 (2008); Daniel V. Dorris, Comment, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251 (2009); Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97 (2009); Harry G. Hutchison, *Liberty, Liberalism, and Neutrality: Labor Preemption and First Amendment Values*, 39 SETON HALL L. REV. 779 (2009); Anna Wermuth & Jeremy Glenn, *It's No Revolution: Long Standing Legal Principles Mandate the Preemption of State Laws in Conflict with Section 3(o) of the Fair Labor Standards Act*, 40 U. MEM. L. REV. 839 (2010); Benjamin A. Huffman, Symposium, *Federal Preemption of State Labor Laws in the Context of Workers' Compensation for Undocumented Workers*, 32 HAMLINE J. PUB. L. & POL'Y 83 (2010); Catherine L. Fisk, Symposium, *The Anti-Subordination Principle of Labor and Employment Law Preemption*, 5 HARV. L. & POL'Y REV. 17 (2011); Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011); and William B. Gould IV, *Football, Concussions, and*

claim is "neither [in] a tangential relationship to a [CBA], nor a defendant's assertion of the contract so as to preempt the claim under the LMRA."[78]

The courts use a two-step approach to determine whether a state law tort claim is sufficiently independent of a CBA to survive preemption under the LMRA.[79] The first step in determining whether the claim is sufficiently independent is to examine whether proof of the state claims require interpretation of the CBA.[80] Secondly, the court must ascertain whether the plaintiff's claim is created by state law, or the CBA[81] State law creates a state law tort claim and does not require interpretation of a CBA.[82] If the plaintiff can prove all of the elements of the state claims without CBA interpretation; however, then the claim is independent of the labor agreement and is not preempted under the LMRA. If resolution of the state law claim is substantially dependent on an analysis of the CBA terms or inextricably intertwined with those claims, then the claim is preempted by the LMRA.[83]

The leading case in sports preemption is *Williams v. NFL*,[84] also known as the "StarCaps" litigation.[85] The *Williams* plaintiffs were two Minneapolis Vikings players, Kevin Williams and Pat Williams, who were suspended for violating the NFL's drug testing policy by taking an over-the-counter weight loss supplement called StarCaps.[86] The players were warned that this non-prescription supplement contained the banned substance, bumetanide, an undisclosed ingredient found in StarCaps.[87]

The NFL argued preemption because their drug policy, which forced the players' suspension, was part of the CBA, and,

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Preemption: The Gridiron of National Football League Litigation, 8 FIU L. REV. 55 (2012).

78 CHAMPION, *supra* note 3, at 410.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 Williams v. NFL, 582 F.3d 863 (8th Cir. 2009).

85 *Id. See also* CHAMPION, *supra* note 3 at 411.

86 *Williams*, 582 F.3d 863. *See also* CHAMPION, *supra* note 3 at 411.

87 *Williams*, 582 F.3d 863. *See also* CHAMPION, *supra* note 3 at 411.

therefore, preempted Minnesota state law.[88] The Federal Court of Appeals for the Eighth Circuit rejected the NFL's claim that the CBA preempted state law pursuant to § 301 of the LMRA.[89] The NFL further argued that it feared that state law application would thwart its goal of a uniform drug policy.[90] On remand to the Minnesota state court, the court averred that the players had not been damaged. The court ruled, however, that as their employer, the Vikings were subject to Minnesota's employment laws.[91]

The U.S. Supreme Court denied *certiorari* in *Williams*,[92] and let stand the Eighth Circuit's version of Williams' lawsuit under the Minnesota Drug and Alcohol Testing in the Workplace Acts (DATWA)[93], which was not preempted by the LMRA.[94] The Eighth Circuit held that § 301 of the LMRA only preempted those state law claims that are "substantially dependent" on the applicable CBA.[95] The Eighth Circuit decided that a court considering the players' claims would not have to consult the NFL's policy on banned substances incorporated into the CBA in order to resolve their claim.[96] Furthermore, the Court held that the NFL's DATWA procedures impose minimum standards and requirements for employee protection, and thus are under an employer's drug and alcohol testing policy.[97] The petition for *certiorari* noted that the Seventh and Tenth Circuits are in conflict with the Eighth and Ninth Circuits, and that when principles of ordinary preemption, rather than complete preemption, apply defenses that require an analysis of a CBA would preempt state law claims under § 301.[98]

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88 *Williams*, 582 F.3d 863. *See also* CHAMPION, *supra* note 3 at 411.
89 *Williams*, 582 F.3d 863. *See also* CHAMPION, *supra* note 3 at 411.
90 *Williams*, 582 F.3d 863. *See also* CHAMPION, *supra* note 3 at 411.
91 *Williams*, 582 F.3d 863.
92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.* at 874. *See also* CHAMPION, *supra* note 3 at 411.
96 *Williams*, 582 F. 3d at 876. *See also* CHAMPION, *supra* note 3 at 411.
97 *Williams*, 582 F. 3d at 874. *See also* CHAMPION, *supra* note 3 at 411.
98 CHAMPION, *supra* note 3, at 412.

The Ohio Court of Appeals in *Cleveland Browns Football Co. v. Bentley*[99] declined to follow the Eleventh Circuit Court of Appeals decision in *Atwater*.[100] The *Bentley* court looked at a case that involved the quality of medical care administered to a professional football player.[101] The type of service in *Bentley*[102] appears to be similar to the type of service, namely financial planning, which is the key to the discussion of preemption in the 11th Circuit's version of *Atwater*, which predated *Bentley*.[103]

An injured LeCharles Bentley exercised his CBA right to have a Browns' physician perform his surgery, and elected to undergo postoperative surgery at the Browns training facility. Bentley alleges that he contracted a staphylocus (staph) infection at the facility because the Browns' physicians, trainers, and staff failed to properly clean and maintain the facility.[104] He sued under fraud and negligent misrepresentation "alleging that the Browns' head athletic trainer and general manager misled him about the world-class quality of the Browns' facility and had concealed from him prior staph infections at the facility."[105] The comparison to *Atwater* is obvious because both cases dealt with professional football, and the attempt by at least one member of the CBA to aggressively and fraudulently mislead a football player who by definition, is the least able to check the reliability and accuracy of the facts, figures, and policies asserted by either the league or the union.[106]

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[99] Bentley v. Cleveland Browns Football Co. 958 N.E. 2d 585 (Ohio Ct. App. 2011). *See also* Motion for Leave to File Brief as Amicus Curiae, *Bentley*, 958 N.E. 2d 585 (No. 11-1008), 2012 WL 942960.

[100] Atwater v. NFLPA, 626 F.3d 1170 (11th Cir. 2010).

[101] *Bentley*, 958 N.E. 2d at 585.

[102] *Id.*

[103] *Atwater*, 626 F.3d at 1170.

[104] Motion for Leave to File Brief as Amicus Curiae, *supra* note 101, at *3.

[105] *Id.*

[106] *See Id.* at *23 (The amicus brief of the Ohio Chamber of Commerce, which was against the Interests of LeCharles Bentley, compared *Bentley* to *Atwater*:
The [Atwater] players alleged that the union and the NFL approved a financial adviser who actually ran a Ponzi scheme; the NFL and the union responded that this financial advisers program was a part of a broader 'Career Planning Program' mandated in the CBA. The court held that, because the league's and union's conduct arose out of this CBA-obligated program, the plaintiffs' claims were preempted because 'the duties underlying' them 'arose directly from the CBA' and required reviewing the CBA's terms).

Like *Atwater*, this is not the type of case that should be preempted. This type of skullduggery deserves a day in court.[107] Again, like *Atwater*, LeCharles Bentley argued that his fraud and misrepresentation claims were independent of the CBA's terms.[108] "The court reasoned that 'nothing in the CBA required Bentley to use the Cleveland Browns' facility."[109] "It concluded that Section 301 did not preempt Bentley's claims: 'Given that Bentley's postsurgical rehabilitation would not have contravened the CBA if he had chosen to go elsewhere, it would be unnecessary to analyze the CBA to resolve the claims that arose from his contracting the staph infection.'"[110]

Another case that failed to find preemption and postdated the Eleventh Circuit's opinion in *Atwater*, is the Eastern District of Missouri's opinion in *Marzette v. Anheuser-Busch, Inc.* [111] In *Marzette*, plaintiff's discrimination claims were not preempted by § 301 of the LMRA.[112] The court held that these claims were not dependent upon an interpretation of the CBA. [113] Citing to *Williams v. NFL*, if the complaint raises issues to which federal law applies with preemptive force, the court must look beyond the face of the complaint in determining whether remand is proper.[114] The threshold issue here is whether the *Atwater* complaint triggers preemption.[115] In applying § 301, it does not.[116] The court began with the "claim itself" and then,[117] asked whether the claim

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[107] *See* Robert M. Sagerian, Note, *A Penalty Flag for Preemption: The NFL Concussion Litigation, Tortious Fraud, and the Steel Curtain Defense of Section 301 of the Labor Management Relations Act*, 35 T. JEFFERSON L. REV. 229, 232 (2013) (Attorney Sagerian makes the cogent point that concussion litigation and the tortuous fraud implicit therein "should bar the tortfeasor from asserting a LMRA § 301 preemption defense." Likewise, there was tortuous fraud inherent in *Bentley* and *Atwater*).

[108] Motion for Leave to File Brief as Amicus Curiae, *supra* note 101, at *4.

[109] *Id.*

[110] *Id.*

[111] No. 4:10-CV-539 CEJ, 2011 WL 250996, (E.D. Mo. Jan. 26, 2011).

[112] *Id.* at *4-5.

[113] *Id.* at *6.

[114] *Id.* at *2 (citing 582 F.3d 863, 874 (8th Cir. 2009)).

[115] Atwater v. NFLPA, 626 F.3d 1170 (11th Cir. 2010).

[116] *Marzette*, 2011 WL 250996, at *5 (The *Marzette* court noted that *Atwater* discussed the unsettled state of the law on the issue of whether federal jurisdiction can arise solely based upon a counterclaim).

[117] *Id.* at *2.

was sufficiently "independent" to survive § 301 preemption.[118] There is a substantial split between the circuits as to whether an affirmative defense requiring the interpretation of a CBA can convey federal jurisdiction.[119]

Within the Eighth Circuit there are both broad and narrow applications of § 301 preemption.[120] However, *Williams* declines to consider the defendants' affirmative defense as a basis for federal jurisdiction.[121] *Marzette* is persuaded by *Williams's* reasoning;[122] *Williams* is a more narrow construction of § 301.[123] In both cases, the main question is "whether the claim itself, regardless of probable definition, is necessarily grounded in rights established by the CBA."[124] The court must get to the issue itself: whether the financial advisor program is fraudulent or not.[125]

V. ALLEGED DISCLAIMERS AND THE NFLPA'S GUARANTEES OF WRIGHT'S FIDUCIARY INTEGRITY

The NFLPA regulates the agents and financial advisors that athletes use as a third-party beneficiary to the CBA.[126] The courts have allowed the unions to issue such regulations, at least generally.[127] One of the defendants' arguments in the *Atwater* litigation was that the athletes have signed an exculpatory clause, which the NFL and NFLPA argued, relieves the union from any negligence in the listing of unworthy potential financial advisors.[128] The plaintiffs' counterargument was that the union's failure to spot financial disasters in the resume' of Kirk Wright

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[118] *Id.*

[119] *Id.* at *3.

[120] *Id.*

[121] Williams v. NFLPA, 582 F.3d 863, 877 n.13 (8th Cir. 2009). *See also Marzette*, 2011 WL 250996, at *3.

[122] *Williams*, 582 F. 3d at 877 n.13. *See also Marzette,* 2011 WL 250996, at *3.

[123] *Williams*, 582 F. 3d at 877 n.13. *See also Marzette,* 2011 WL 250996, at *3.

[124] *Marzette*, 2011 WL 250996, at *3 (citing *Williams*, 582 F.3d at 877 n.13).

[125] *See* Plaintiff's Opposition to Defendant NFL's Motion for Summary Judgment as to Negligence, Atwater v. NFLPA, 626 F.3d 1170 (11th Cir. 2010) (No. 1:06-CV-1510-JEC), 2008 WL 5371718 (N.D. Ga.).

[126] *See* Plaintiff's Memoranda in Opposition to the NFLPA's Motion for Summary Judgment Based on Causation *supra* note 54 at *2.

[127] *See* CHAMPION, *supra* note 2, at 34-37.

[128] *See generally* Plaintiff's Opposition to Defendant NFLPA's Motion for Summary Judgment as to the Exculpatory Clause, *Atwater*, 626 F.3d at 1170 (No. 1:06-CV-1510-JEC), 2008 WL 5371722 (N.D. Ga.).

amounts to gross negligence which could not be waived by the perfunctory signing of an exculpatory clause.[129]

Courts do not favor waivers.[130] It is axiomatic that for a waiver to be valid it must be clear, explicit, and unambiguous. It also may not be against public policy, nor may it condone the waiver of gross negligence.[131] In the *Atwater* litigation, plaintiffs sought damages that stemmed from the NFLPA's negligent acts that were related to the administration of the Financial Advisor's programs and not the acts of the registered financial advisors themselves.[132]

Although courts favor warnings,[133] they usually do not favor waivers, unless the present case lacks specificity.[134] The disclaimer used in *Atwater* was based on a fraud, or at least a fraudulent lack of a candor in a fiduciary-like situation.[135] "The main feature of all exculpatory agreements is to relieve one party of all or part of his responsibility to another. A waiver is simply one form of an exculpatory agreement."[136] "Although exculpatory clauses are valid in certain circumstances they are not favored in the law. Any clause which exonerates a party from liability will be strictly construed against the party that benefits."[137]

"The most significant aspect of a release is the particular words that are used . . . The release will be enforceable as long as the release agreement is sufficiently clear to show the party's intent that defendant is to be held harmless for any injury that is caused by his own negligence."[138] Remember, "[al][t]hough the NFLPA disclaims liability . . . inclusion on the list implies

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[129] *Id.* at *3.

[130] *Id.* at *1. *See also* CHAMPION, *supra* note 2, at 240.

[131] CHAMPION, *supra* note 2, at 241-44.

[132] *Atwater*, 626 F.3d at 1179.

[133] CHAMPION, *supra* note 2, at 241-44.

[134] *Id.* Usually, for example, foot races or car races; events that call for skill and preparation. Disclaimers are ambiguous because the disclaimer in *Atwater* is ambiguous because disclaimers are generally limited. *Id. See also* Plaintiff's Opposition to Defendant NFLPA's Motion for Summary Judgment as to the Exculpatory Clause, *supra* note 131.

[135] Plaintiff's Opposition to Defendant NFLPA's Motion for Summary Judgment as to the Exculpatory Clause, *supra* note 131 at 1170.

[136] CHAMPION, *supra* note 2, at 241.

[137] *Id.* at 242.

[138] *Id.*

legitimacy."[139] Joe Leccesse, co-chairman of the Sports Law Group at Proskauer Rose, concluded that "'[n]otwithstanding their disclosure, an argument can be made that the union didn't fully investigate potential advisors.'"[140]

"A waiver will be valid if it does not contravene any policy of law and does not involve a quasi-public entity that supports or supplies essential services, but rather relates to the private affairs of individuals."[141] However, "[i]f there is no ambiguity and the contract is not one of adhesion, the exculpatory clause will not violate public policy."[142] "[I]t is universally held that a waiver will not bar a claim for gross negligence."[143] "Similarly, a disclaimer is against public policy if it is inconspicuous."[144] In short:

> The factors that are essential in a determination of whether a release will violate public policy include the following: whether the agreement concerns the type of business that is generally thought suitable for public regulation; whether the party seeking the waiver is engaged in performing services of great importance to the public; whether the party invoking exculpation possesses the decisive advantage and business strength; whether the party thus invoking confronts the public with a standardized adhesion contract; and whether as a result of this contract the purchaser is placed under the contract of the seller and therefore, subject to the risk of carelessness by the seller.[145]

Remember, the claims of the *Atwater* plaintiffs "are based on an independent duty of care and not some alleged contractual duty related to background checks or some other security services."[146]

In their gross negligence claims, the *Atwater* plaintiffs argue that even if the exculpatory clauses are determined to be

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[139] Peter Lauria, *Union Dues-Y: NFLPA Could Face Lawsuits Over Fraudster*, N.Y. POST (Mar. 29, 2006), *available at* http://nypost.com/2006/03/26/union-dues-y-nflpa-could-face-lawsuits-over-fraudster/.

[140] *Id.*

[141] CHAMPION, *supra* note 2, at 242.

[142] *Id.* at 243.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 244.

[146] Plaintiff's Opposition to Defendant NFL's Motion for Summary Judgment as to Negligence, *supra* note 128.

enforceable, Georgia law,[147] like general tort law,[148] does not recognize the validity of any other attempts within a disclaimer to condone gross negligence.[149] "Parties may not exculpate themselves from liability for gross negligence through the use of a disclaimer, release, or other similar instrument."[150] Gross negligence can be defined as the absence of the slightest care; or care that is determined to be careless and inattentive.[151] The standard is that reasonable people could not differ as to whether gross negligence exists.[152] "Indeed, deposition testimony and documents produced by the NFLPA during discovery demonstrates that a jury reasonably finds that the NFLPA lacked even the slightest care and diligence in administering the NFLPA Financial Advisors Program."[153] The "unscrupulous" Kirk Wright was allowed entrance to a program that allegedly was established so as to screen out persons such as Wright who had "a history of financial delinquencies including tax liens, civil judgments, garnishments, and poor credit."[154] The NFLPA failed in their fiduciary duty to their union members.

The crux of the *Atwater* plaintiffs' gross negligence claims was that in 2002 the NFLPA established the "Financial Advisors Program" to provide their members with counsel and direction on investment decisions.[155] Wright's International Management Fund (IMF) hedge fund allegedly robbed 500 investors of approximately $185 million; it was granted registration in the financial advisor certification program on February 12, 2003, and was reinstated twice thereafter, before the *Atwater* allegations became known.[156] However, Wright's eligibility in the program

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147 Plaintiff's Opposition to Defendant NFLPA's Motion for Summary Judgment as to the Exculpatory Clause, *supra* note 131 at *3.

148 CHAMPION, *supra* note 2, at 242.

149 *Id.*

150 Plaintiff's Opposition to Defendant NFLPA's Motion for Summary Judgment as to the Exculpatory Clause, *supra* note 131 at *3.

151 *Id.* (quoting with approval, McFann v. Sky Warriors, 268 Ga. App. 750, 759 (Ga. App. 2004)).

152 Plaintiff's Opposition to Defendant NFLPA'S Motion for Summary Judgment as to The Exculpatory Clause, *supra* note 131 at *3.

153 *Id.*

154 *Id.*

155 Lauria, *supra* note 142.

156 *Id.*

was terminated on December 31, 2005.[157] Ron George, the certification program's director, explained that its goal was to tell those obligated players to look for financial advice from a group of certified financial advisors that were already vetted by the union.[158] Once IMF was union-approved, the now certified members' contact information and a menu of their services was included on a list that was circulated to all NFLPA athlete-members.[159]

The NFLPA has a fiduciary relationship with its members, which included the *Atwater* plaintiffs.[160] In regard to the NFLPA's financial advisor certification program, the NFLPA's fiduciary duty to the *Atwater* plaintiffs was to accurately vet the would-be certified financial advisors[161] before their placement on the list.[162]

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[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] Memorandum of Law in Opposition to Defendant NFLPA's Motion for Summary Judgment for Failing to Establish the Elements of Their Claims at *3, Atwater v. NFLPA, 626 F.3d 1170 (11th Cir. 2010) (No. 1:06-CV-1510-JEC), 2008 WL 5371721 (N.D. Ga.) ("In the case at bar, there is no contract or law creating a fiduciary duty. However, the particular facts and circumstances surrounding the NFLPA's relationship with the Union membership and Plaintiffs creates a fiduciary relationship.").

[161] *Id.*

Here it can certainly be said that the NFLPA maintained a controlling influence over the conduct and interests of its member. This is especially true as it relates to the FA Program. As noted by the Union, 'we protect by doing the research and thoroughly investigating financial advisors.' The Union also noted that in the operation of the FA Program was a 'helping hand in times of trouble.' Plaintiffs are former professional players who from the start of their usually short-lived careers are exhaustively counseled and encouraged to trust and remain loyal to a union that exists for the purpose of protecting their interests. Because members come to rely on this information and because the Union expects loyalty in return, a certain level of trust develops between union and members. Importantly, this same level of trust does not vanish merely because one changes his status to inactive player. So long as he remains a member, this same level of trust continues to be an expectation of that union-member relationship.

Such is precisely the case here. Plaintiffs are retired players who had the utmost amount of trust in the NFLPA. When it proclaimed that it performed background checks and thoroughly investigated advisors approved for the Financial Advisors Program, Plaintiffs thought they could *trust* that this in fact took place. *Id.* (emphasis in original, footnotes omitted)).

[162] *Id.*

The NFLPA did not perform this task correctly or competently in the case of the felonious Kirk Wright.[163]

The NFLPA's singular most heinous commission was their negligent misrepresentation of Kirk Wright's financial stability.[164] The *New York Post* averred that "[t]he NFL Players Association could be on the hook for millions in damages because it served up alleged hedge fund charlatan Kirk Wright to its members as an approved investment advisor." [165] Remember the "NFLPA's registered Financial Advisors Program was established . . . in order to protect former, current, and prospective NFL players from . . . investment scams." [166] The NFLPA lauded that this program "will give NFL players access to a diverse group of qualified[,] pre-selected financial advisors." [167] However, Ken Ballen, the former director of the program, in his letter of resignation to the NFLPA Executive Director, Gene Upshaw, admitted that in the last analysis the NFLPA failed to protect its members from fraud perpetuated against them by their own unscrupulous agents. [168] "Although Wright and Bond were registered in the Program, it is undisputed that both had numerous state and federal tax liens, judgments [,] and garnishments that had been filed against them at various times."[169] Both Bond and Wright lied on their applications and did not meet the eligibility requirements of having a clean slate concerning a history of "civil judgments and/or fraud."[170] By failing to discover their past fraud, the NFLPA fraudulently misrepresented that Kirk Wright had a clean financial slate with a dearth of felonious red flags.

In *Atwater v. NFLPA*'s "Plaintiffs Memoranda in Opposition to the National Football League Players Association's Motion for Summary Judgment Based on Causation," the plaintiffs asserted

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163 *Id.*

164 *Id.* at *2. *See* Lauria, *supra* note 142. *See also* Plaintiffs Memoranda in Opposition to the NFLPA's Motion for Summary Judgment Based on Causation, *supra* note 54 at *2.

165 Lauria, *supra* note 142.

166 Plaintiff's Memoranda in Opposition to the NFLPA's Motion for Summary Judgment Based on Causation, *supra* note 54 at *3.

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id* at *6.

in its heading that "the NFLPA made a representation as to Wright's and Bond's honesty and integrity by registering them into the program. Plaintiffs relied on this representation and suffered injury proximately resulting from such reliance."[171]

Plaintiffs pled negligent misrepresentation. [172] "Under Georgia law, negligent misrepresentation requires: (1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance." [173] The key to determining the existence of fraudulent misrepresentation is whether the vetted fiduciary authority was continuing to monitor the advisors as part of the advisor's program. [174] "The continued monitoring was important to ensure the Advisor's status had not changed." [175] Here, "the supply of 'negligent false information' occurred from the time Wright and/or Bond were registered as financial advisors until they were banned from the Program for failing to meet the Program's eligibility requirements."[176]

VI. CHIEF JUDGE CARNES MARCH 27, 2009 DECISION

Chief Federal Judge Julie Carnes of the Northern District of Georgia issued an opinion in *Atwater v. NFLPA* on March 27, 2009. Procedurally, Judge Carnes described the case this way:

> This case is presently before the Court on . . . the NFLPA's Motion for Summary Judgment, the NFL's Motion for Summary Judgment as to Plaintiff's Third Course of Action, the NFL's Motion for Summary Judgment on the Pleadings as to the Plaintiff's First and Fourth Causes of Action, and Plaintiff's Motion to Substitute the Estate of Kirk S. Wright as Third-Party Defendant.
>
> The Court has reviewed the record and the arguments of the parties, and concludes that the . . . NFLPA's Motion for Summary Judgment should be GRANTED, the NFL's Motion

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171 *Id.*
172 *Id.* at *8.
173 *Id.*
174 *Id.* at *8-9.
175 *Id.* at *9.
176 *Id.*

> for Summary Judgment should be GRANTED, the NFLPA's Motions to Substitute the Estate of Kirk S. Wright as Third-Party Defendant should be GRANTED as unopposed, Plaintiff's Motion for Summary Judgment as to the NFLPA's Counterclaims should be GRANTED in PART and DENIED in PART, the NFL's Motion for Summary Judgment and Judgment on the Pleadings as to Plaintiffs' First, Third, and Fourth Causes of Action, and should be DENIED as MOOT . . . .[177]

The issue was the plaintiff's allegation that the NFLPA breached its duty by negligently performing background checks on would-be financial advisors that were members of the union's Financial Advisors Program.[178]

The Carnes court agreed with the NFL and NFLPA that § 301 of the LMRA preempted all of plaintiff's state law claims.[179] Additionally, the Court held that plaintiff's claims against the NFLPA are barred by the disclaimer in the Financial Advisors Program regulations.[180]

VII. PROBATING WRIGHT'S ESTATE

Probating Wright's estate had the usual problems associated with an estate that is top-heavy with angry creditors and litigants. An unusual aspect of this case is that Wright fooled everyone for a long time, representing he was a legitimate investor instead of a Ponzi scheme maker. Today, investors are aware of this potential danger because of the failed multi-billion dollar schemes of Madoff and Sanford. In fact, Wright would not negotiate with prosecutors because of fear that he would "disinherit" his four children.[181] This, of course, turned out to be the least of his worries.

Regardless of the status of his will, there was the ongoing *Atwater* litigation and the NFLPA's' counterclaim against Wright's estate to be factored into the probate mix.[182] The fact

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[177] Atwater v. NFLPA, No. 1:06-CV-1510-JEC, 2009 WL 3254925, *1 (N.D. Ga. Mar. 27, 2009).

[178] *Id.*

[179] *Id.* at *5.

[180] *Id.* at *9.

[181] Plaintiff's Memoranda in Opposition to the NFLPA's Motion for Summary Judgment Based on Exhaustion of Internal Remedies, *supra* note 49 at *2.

[182] Tierney, *supra* note 4.

that he committed suicide is also important, as it relates to whether anyone will receive the benefits of his insurance proceeds.[183] But, on the positive side for the would-be probate judge, most of Wright's assets are liquid after the various auctions.[184] The probating of Wright's estate is similar to the more common scenario when the testator dies suddenly after filing for bankruptcy. In that situation, the creditors must prioritize their requests and argue for premier ranking, which will be determined by the reality that the assets are limited and insufficient to satisfy demands.

VIII. NFLPA'S STATUS AS AN ALLEGED THIRD PARTY GUARANTOR

The NFL had a legal duty to act with reasonable care, and the NFLPA breached its duty of care by failing to employ a reasonable level of due diligence in the application and approval of Kirk Wright as a certified investment advisor.[185] The NFLPA certified his status as a fiduciary capable to invest money properly. To state a successful cause of action for breach of fiduciary duty in the state of Georgia, the plaintiff must show: (1) the existence of a fiduciary duty; (2) breach of that duty; (3) damage proximately caused by that breach.[186] The terms "fiduciary relationship" and "confidential relationship" are synonymous under Georgia law.[187]

It appears that the financial advisor program created a fiduciary relationship.[188] The NFLPA maintained a controlling influence over the conduct and interests of its members. "[W]e protect by doing the research and thoroughly investigating

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[183] Atwater, *supra* note 7.

[184] *See* Stanley Kent & Catherine Woelk-Rudisill, *Probate and Non-Probate Distribution Issues in the Case of a Murder/Suicide*, 17 COLO. LAW. 1061 (June 1988). *See generally* Dominic Campisi, *Alternatives to Litigation in Trust and Probate Proceedings*,42 ARB. J. 30 (Sept. 1987); Karen Gerstner, *A Message to Clients…Avoiding Probate Court Litigation*, 22 APR PROB. & PROP. 56, (March-April 2008).

[185] *See* Tierney, *supra* note 37.

[186] Memorandum of Law in Opposition to Defendant NFLPA's Motion for Summary Judgment for Failing to Establish the Elements of Their Claims, *supra* note 163 at *3.

[187] *See* Griffin v. Fowler, 579 S.E.2d 848 (Ga. App. 2003).

[188] *Id.*

financial advisors."[189] NFL players and former players rely on this disseminated information. The Union expects loyalty in return; therefore, a certain level of trust develops between the union and its members.[190] The *Atwater* plaintiffs are retired players who had the utmost trust in the NFLPA. These players believed that the NFLPA had indeed performed background checks and thoroughly investigated advisors approved for the financial advisors program.[191]

Plaintiffs' relationship with the NFLPA's financial advisor program requires the utmost trust and confidence. The NFLPA is in a fiduciary relationship with its members. The NFLPA breached its fiduciary duty because it fell below industry standards in the implementation and administration of the financial advisors program.[192]

The NFLPA represented that the program was "the first of its kind in professional sports", and gave NFL players access to a diverse group of qualified, pre-selected financial advisors.[193] The NFLPA also represented that the program was "a service for our members, . . . [and] will simply pre-screen all financial advisors who apply to participate in the Program . . . as to their character, reputation, and integrity."[194] "The Program is designed to help ensure the integrity of those who handle a player's money . . . . The NFLPA will monitor the compliance of registered advisors with the Program's eligibility requirements and regulations."[195]

IX. THE 11TH CIRCUIT'S VERSION OF *ATWATER V. NFLPA* AND THE "CIRCUIT SPLIT" ON THE PREEMPTION "CRISIS"

The Eleventh Circuit held that the negligence claims against the NFL and the NFLPA were preempted by LMRA and that the

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189 Memorandum of Law in Opposition to Defendant NFLPA's Motion for Summary Judgment for Failing to Establish the Elements of Their Claims, *supra* note 163 at *7.

190 *Id.* at *8.

191 *Id.*

192 *Id.* at *9.

193 *Id.* at *10.

194 Plaintiff's Memoranda in Opposition to the NFLPA's Motion for Summary Judgment Based on Exhaustion of Internal Remedies, *supra* note 49 at *5-6.

195 *Id.*

negligent misrepresentation and breach of a fiduciary duty claims against both defendants were also preempted.[196]

The *Atwater* plaintiffs are retired players, and thus they are not "employees" within the meaning of the National Labor Relations Act.[197] Therefore, the CBA does not apply to retirees and thus, the *Atwater* retirees' claims against the NFLPA cannot be preempted by § 301.[198] In addition, the NFL is not a signatory to the CBA and thus claims against it cannot be preempted by § 301.[199] "Here, the National Football League *is not a signatory to the CBA*. Instead, the Collective Bargaining Agreement was entered into by the National League Management Council and the National Football League Players Association."[200]

In a case with a similar background, namely, dealing with policies associated with the NFL, the Eighth Circuit in *Williams v. NFL*,[201] held the Labor Management Relations Act (LMRA) did not preempt that plaintiff's statutory claims.[202] Conversely, the Eleventh Circuit in the present case of *Atwater v. NFLPA*[203] held that plaintiff's claims of negligent misrepresentation were preempted by the LMRA.[204] The Eleventh Circuit based their opinion on their conclusion that § 301 preemption applies when the court is "required to interpret or apply the CBA to resolve the retirees' claims",[205] and here, the "Plaintiff's state-law claims arise from the CBA, or are substantially dependent upon the court's interpretation of the CBA."[206]

Of course, the key to their determination was that the claims must be substantially dependent upon the court's interpretation of the CBA, which was clearly inapplicable to the scenario of the *Atwater* plaintiffs, since it was a union regulation that was

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196 Atwater v.NFLPA, 626 F.3d 1170, 1185 (11th Cir. 2010).

197 Eller v. NFLPA, 731 F.3d 752, 755 (8th Cir. 2013).

198 Response Brief of Appellants/Cross-Appellees at *15, Atwater v. NFLPA, 626 F.3d 1170 (11th Cir. 2010) (No. 09-12556-B), 2009 WL 7856622.

199 *Id.*

200 *Id.* at *15-16.

201 Williams v. NFL, 582 F.3d 863, 880 (8th Cir. 2009).

202 29 U.S.C. § 185 (2006).

203 Atwater v. NFLPA, 626 F.3d 1170 (11th Cir. 2010).

204 29 U.S.C. § 185 (2006).

205 *Atwater*, 626 F.3d at 1185.

206 *Id.*

vehemently protested to by the non-member retirees.[207] The Eleventh Circuit in the June 11, 2003 decision of *Eller v. NFLPA*,[208] held that retirees are not "employees" under the National Labor Relations Board (NLRB).[209] This, in effect, negates the Eleventh Circuit's own argument in *Atwater* that "[e]ven when retirees are not a part of the recognized bargaining unit, and thus the union has no continuing obligation to bargain on their behalf, the union and employers can still choose to negotiate benefits for retirees,"[210] which they did not choose to do for the *Atwater* plaintiffs. The union's conduct in *Atwater* is at best tangential to the NLRA.[211] As the U.S. Supreme Court stated in *Livadas v. Bradshaw*, it will disallow preemption if the CBA is irrelevant to the dispute.[212]

For preemption to apply, the alleged conduct must be either protected or prohibited by the NLRA.[213] *Eller v. NFL Players Ass'n*,[214] was a lawsuit against the NFLPA, like *Atwater*.[215] Both plaintiffs were retired NFL players but unlike *Atwater*, the *Eller* plaintiffs "filed this class action lawsuit . . . against the NFLPA . . . asserting that defendants wrongfully barred retirees from . . . plaintiffs' settlement negotiations, negotiated on retirees behalf without authority to do so, and ultimately agreed to a CBA with fewer benefits for retired players than they could have obtained for themselves."[216]

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[207] *See* Plaintiff's Opposition to Defendant NFLPA'S Motion for Summary Judgment as to The Exculpatory Clause, *supra* note 131 at *7 ("Plaintiffs here . . . pleaded allegations of recklessness . . . and an absence of careful administration of the Financial Advisors Program . . . .")

[208] Eller v. NFLPA, 731 F.3d 752 (11th Cir. 2013).

[209] 29 U.S.C. § 151 (2012)

[210] *Atwater*, 626 F.3d at 1185.

[211] *See* Memorandum in Support of NFLPA's Motion for Summary Judgment, *supra* note 53, at 8-9. The only connection with the NLRA, is that the financial advisors program is a part of the career planning program which is mandated by the C.B.A. and thus a part of the NFLPA's compliance with the C.B.A.'s requirement that the Union provide information to players on the handling of their personal finances. "[T]he C.B.A. does not require the NFL's approval of the manner in which the NFLPA meets its obligation to provide financial information to players . . . ." *Id.* at 21.

[212] *See* Lividas v. Bradshaw, 512 U.S. 107, 125 (1994).

[213] T & H Bail Bonds, Inc. v. Local 199 Laborers Int'l Union of N. Am., 579 F. Supp. 2d 578, 581 (D. Del. 2008).

[214] Eller v. NFLPA,731 F.3d 752 (8th Cir. 2013).

[215] Atwater v. NFLPA, 626 F.3d 1170 (11th Cir. 2010).

[216] *Eller*, 731 F.3d at 754.

The *Atwater* plaintiffs did not negotiate in any such way, as did the plaintiffs in *Williams v. NFL*,[217] which reiterated that "it is the NFL's burden to establish preemption . . ."[218] Of course, this, the NFLPA did not accomplish in *Atwater*.[219]

CONCLUSION

The *Atwater* plaintiffs provided the first opportunity to investigate the NFLPA's status as a third-party guarantor of the financial advisor's fiduciary integrity. The NFLPA certified and listed their advisors as qualified, and NFL players could only choose from the list. The question is whether the probate court should acknowledge the existence of an obligation on the part of the NFLPA to reimburse plaintiffs for financial losses they suffered as a result of the deceased's fraudulent investment practices.

There appears to be a fundamental difference between the NFLPA's certified contract advisor program and the NFLPA's certified financial advisor program. The NFLPA has reprimanded, punished, and de-certified contract advisors who they have deemed to violate NFLPA regulations.[220] So, at least in that instance it appears that the NFLPA acknowledged the existence of a relationship between a certified advisor and their integrity. The financial advisor program is a fiduciary relationship between the athlete and the financial advisor since it is based entirely on the advisor's handling of the client's money; whereas, there are other responsibilities that accompany the athlete's contract advisor relationship. The NFLPA knew or should have known that membership in the Financial Advisor Program carried with it indices of responsibility and integrity that its members would naturally rely on. At the very least, membership in the Program

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[217] Williams v. NFL, 582 F.3d 863 (8th Cir. 2009).

[218] *Id.* at 880

[219] *See generally* Plaintiffs' Memorandum in Opposition to NFL's Motion for Summary Judgment on Labor Preemption at 4, Atwater v. NFLPA, 2009 WL 3254925 (N.D. Ga 2009) (No. 1:06-CV-1510-JEC), 2008 WL 5371719 ("The NFL cannot point to a simple document that provides a nexus between the Career Planning program and the Financial Advisors Program or that a Career Planning Program was even in existence.").

[220] Plaintiff's Memoranda in Opposition to the NFLPA's Motion for Summary Judgment Based on Exhaustion of Internal Remedies, *supra* note 49 at *6.

should indicate that there were no instances that would suggest that the certified financial advisors were anything else other than well qualified. That is, membership should translate, at a minimum, to the absence of any fraudulent red flags.

The myth of preemption is the only answer that the Eleventh Circuit in *Atwater v. NFLPA*,[221] can conjure up to solve the conundrum of a "mandatory list" that is the heart of the NFLPA's certified financial advisor program. Plaintiff's claims are not preempted by § 301 of the LMRA,[222] since the duties owed to plaintiffs are not "substantially dependent upon" the CBA's terms that govern the relationship between the NFL and the NFLPA's retired plaintiffs.[223]

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[221] Atwater v. NFLPA, 626 F.3d 1170 (11th Cir. 2010).

[222] 29 U.S.C. § 185 (2006).

[223] Plaintiff's Memorandum in Opposition to the NFL's Motion for Summary Judgment on Labor Preemption, *supra* note 222.